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How statutes' reach expands beyond what the original intent was

I have been writing this column for almost 25 years. But this will be the first one in which I will discuss a case and not provide the defendant's name. The case is 2018 IL App (3d) 160599 decided by the 3rd District on April 3.

The story begins in 2008 when the defendant was a 17-year-old high school student. At that time, he pleaded guilty to criminal sexual abuse, a Class A misdemeanor. His crime was having sex with his 15-year-old girlfriend. As a result of this, the defendant was required to register as a sex offender under the Sex Offender Registration Act known as SORA. 730 ILCS 150/3 (West 2014).

Flash forward to 2015. Defendant is now a 24-year-old man. The defendant is accompanying his cousin and her three children on a field trip sponsored by the Easter Seals' Jump Start program. The program is intended to strengthen parent-child relationships and to teach parents how to manage the stress of parenting.

The field trip involved a bus trip to an indoor play facility. A parent on the bus recognized the defendant as a registered sex offender. In response to the parent's complaint, an Easter Seals employee asked the defendant to exit the bus. Defendant immediately obliged.

Unfortunately, the story does not end there. In 2016, this incident was used to charge the defendant with unlawful presence at a facility providing services directed toward children. His status as a sex offender made this action a crime. 720 ILCS 5/11-9.3(c) (West 2014). Following a bench trial, defendant was convicted and sentenced to 24 months of probation, plus fines and costs.

The 3rd District reversed his conviction. The legal issue is fairly mundane. Under the statute, the state had the burden of proving that the facility in question provided programs or services "exclusively directed toward persons under the age of 18."

The court held that neither Easter Seals nor the Jump Start program was directed exclusively toward children. The statute has no bearing on venues where parents and children congregate together. Finding that the state "did not come close" to proving the offense, the court reversed.

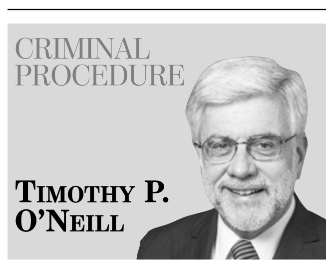
However, the court went on to discuss a larger issue: Does the defendant really fit anyone's description of what a "sex offender" is? In the words of the court, "Perhaps it is time to rethink lumping high school sweethearts together with dangerous child predators."

The court noted that under current Illinois law a person under 17 is guilty of "criminal sexual abuse" if he or she performs an act of sexual penetration or sexual conduct with a person under 17. "Sexual conduct" is defined in part as touching or fondling either directly or through clothing for the purpose of sexual gratification.

"Two 16-year-old high school kids involved in even a moderately heavy petting session most likely both violate the statute and are both guilty of criminal sexual abuse ..."

The upshot, according to the 3rd District, is this: "Two 16-year-old high school kids involved in even a moderately heavy petting session most likely both violate the statute and are both guilty of criminal sexual abuse, a Class A misdemeanor. That seems contrary to anything that even resembles common sense. But, that is not the worst of it. As exhibited by this case, these kids are now not just criminals but 'child sex offenders' under the law and can be hounded for years at the whim of prosecutors, a la Victor Hugo.

"The sex offender registration is mandatory. Who thinks this is a good idea? .... Under the current registration, two underage adolescents who fail to resist the mutual call of their hormones are lumped together as 'child sex offenders' with those who violently rape children .... We suggest that a one-size-fits-all approach to dealing with those who have sexual contact with minors is oppressive and contrary to accepted notions of crime and punishment."



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The 3rd District goes on to recommend that either misdemeanants should not be included under SORA or that the SORA classification should be made discretionary rather than mandatory.

You can now understand why I refused to include the defendant's name in the article. Not all "child sex offenders" are equal. There is a huge difference between his actions and those of a child rapist. The defendant's contact with the legal system should have ended years ago.

But there is an even larger issue here: The tendency of criminal law categories to expand beyond rational limits. For as malleable as "child sex offender" is, "death eligible murderer" is worse.

Case in point, the headline of the May 15 Chicago Tribune screamed that Gov. Bruce Rauner wants to bring the death penalty back to Illinois. But, hey, no worries. This time it will just be for the absolute worst murderers guilty under the highest burden of proof.

Sound familiar?

Let's get this straight. The death penalty can NEVER be confined to just the worst cases. This is less a question of law than of hydraulics. For once you announce that the death penalty is reserved for only the worst crimes, a legislator will want to fit "just one more kind of murder" under that definition. And it will probably reflect an actual murder that occurred in his district.

You want proof? The last death penalty statute enacted in Illinois in 1977 had only seven eligibility factors. By the time it was repealed in 2011, the number of eligibility factors had tripled to 21. That meant that the legislature, on average, added one new death eligibility factor during every 2½ years the statute was in effect.

If I say "death penalty murderer," you picture John Wayne Gacy. But the Report of the Governor's Commission on Capital Punishment in 2002 found that almost every first-degree murder could be death-eligible under one statutory theory or another.

If I say "child sex offender," you picture a child rapist. But, as the 3rd District shows, the term also could cover two willing 16-year-olds on junior prom night.

Invoking "common sense" and "balance" may not cause pulses to race. But they are more than ever necessary in designing a rational system of criminal law.

"Sex offender" is a term that needs to be narrowed. And "death eligible murderer" needs to remain in the graveyard of repealed criminal laws.

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