

SEX OFFENDER REGISTRATION AND NOTIFICATION STUDY -
BACKGROUND MEMORANDUM

House Concurrent Resolution No. 3016 (attached as an appendix) directs the Legislative Council to study the feasibility and desirability of providing a community notification process by which communities would be informed of the release of a convicted sexual offender and of persons charged with or convicted of sexual offenses.

North Dakota Century Code (NDCC) Section 12.1-32-15 relates to registration of sex offenders and those who commit crimes against children. In 1995 the Legislative Assembly amended this section to provide that law enforcement may notify a community of the presence of a sex offender if notification is "necessary for public protection."

DEVELOPMENT OF NORTH DAKOTA'S SEX OFFENDER
REGISTRATION AND NOTIFICATION LAW

During the 1991-92 interim, the Legislative Council's interim Judiciary Committee reviewed this state's sex offender registration law. Testimony received by the committee indicated that the sex offender and crimes against children offender registration statutes were causing confusion and problems. Under the sex offender registration procedures all offenders must register, while offenders committing certain crimes against a child register only if required to do so by a court.

In the course of reviewing inconsistencies and conflicts in the registration statutes, the committee considered two bill drafts as vehicles for improving the offender registration statutes. One bill draft would have made mandatory the registration requirement for an individual who has been convicted of certain crimes against a child. Testimony received regarding this bill draft indicated that mandatory registration may be too harsh a penalty in some instances and other alternatives may achieve better results. The other bill draft, presented by a representative of the Parole and Probation Department, consolidated both registration statutes into one statute. It was explained that combining the two statutes would make enforcement of the registration requirements easier by the department.

While reviewing the offender registration requirement, committee members expressed concern that the statements, fingerprints, and photographs of an offender were not public record. It was suggested that as a matter of good public policy these materials should be open records. No testimony was presented on the question

of why the statements, fingerprints, and photographs of offenders should not be available to the public.

The Legislative Council introduced the committee's recommendation, Senate Bill No. 2042 (1993), which was enacted. Senate Bill No. 2042 provided for consolidation of the sex offender and crimes against children registration statutes into NDCC Section 12.1-32-15. The bill also provided that when the registered person changed a name that person had to notify law enforcement within 10 days. The bill also made the statements, photographs, and fingerprints required for registration open to inspection by the public.

The 1995 Legislative Assembly passed House Bill No. 1152, which amended NDCC Section 12.1-32-15. The amendments required a court to impose a registration requirement on any person who has plead guilty or been found guilty of a crime against a child. The amendments also required a person to register if that person is incarcerated or is on probation or parole on August 1, 1995, for a crime against a child or as a sexual offender, if the person has plead guilty or nolo contendere to, or been found guilty of, an offense in a court of another state or the federal government equivalent to those offenses for which registration is required in this state, or if the person has plead guilty to or been found guilty of a crime against a child or as a sexual offender within 10 years before August 1, 1995. The amendments provided that a person who fails to register who has previously plead guilty or been found guilty of violating the registration requirement is guilty of a Class C felony. The amendments also provided that law enforcement agencies may release certain information to the public regarding a person required to register and who is about to be released into the community if the agency determines the person is a public risk and disclosures of the information are necessary for public protection.

North Dakota Century Code Section 12.1-32-15, in its present form, provides a 10-day period for compliance, a 10-year period of registration, and allows a large amount of information to be actively, publicly disclosed. Section 12.1-32-15 provides for two classes of information--registration and nonregistration.

Registration information consists of a registration statement, fingerprints, and a photograph. The registration statement is a written statement made and signed by the offender giving information that is required by the attorney general. The attorney general requires this information: name, date of birth, social security number, and state identification number of offender; offense; date of conviction; date of release; court of record; prosecuting attorney; originating agency; originating officer; address of offender and date of occupancy; place of employment; and number of years required to register. Under NDCC Section 12.1-32-15(10), law enforcement may only disclose registration information to the public if necessary, and the Attorney General is

required to provide nonregistration information to the public at no cost. Under Section 12.1-32-15(8), registration information must be open to inspection by the public.

Nonregistration information (information that identifies anyone not required to register at the disposition of the crime) is gained through the criminal history record or from other public records. This information could include the name of person required to register, the offense as defined in NDCC Section 12.1-32-15(1)(a) or (c), the date of judgment or order imposing a sentence or probation, the name of the court entering the judgment or order imposing a sentence or probation, the sentence or probation imposed upon the offender, and the disposition, if known, of a sentence or probation.

NOTIFICATION LAWS OF SELECTED STATES

Forty states have sex offender registration statutes. They include all states except Hawaii, Iowa, Maryland, Massachusetts, Nebraska, New Mexico, New York, North Carolina, Pennsylvania, and Vermont. At least four other states allow for public notification of released sex offenders. These states include Alaska, Louisiana, New Jersey, and Washington.

Alaska Statutes Section 18.65.087(b) states:

Information about a sex offender that is contained in the central registry, including sets of fingerprints, is confidential and not subject to public disclosure except as to the sex offender's name, address, photograph, place of employment, date of birth, crime for which convicted, date of conviction, place and court of conviction, and length of sentence.

The Department of Public Safety is given rulemaking authority over Alaska's registry system. The system of public disclosure is left to the department.

In Louisiana, a paroled offender whose victim was younger than 18 years must notify neighbors within one mile in a rural area or three blocks in a city or suburb. The offender must also notify the local schools of the offender's name, address, and nature of the crime. The information must also be printed in a local publication.

The requirements for notification in New Jersey are based on the prosecutorial rating of the likelihood a released offender will commit another sex crime. Risk determines the extent to which notification is given, ranging from alerting police of low-risk offenders to alerting neighbors of high-risk offenders.

In Washington, local law enforcement agencies may notify the community where any released offender moves. The Washington statute is similar to North Dakota law in that information is released when necessary for public protection.

CONSTITUTIONALITY OF REGISTRATION AND NOTIFICATION LAWS

Legal Challenges

In five states, legal challenges to registration laws have resulted in decisions that upheld their constitutionality. In four of these states (Arizona, Illinois, New Hampshire, and Washington) the courts found that registration is not a form of punishment, and therefore not subject to the Eighth Amendment prohibition against cruel and unusual punishment or the prohibition against ex post facto laws. California courts have found registration requirements not to be cruel and unusual punishment. However, a Louisiana appeals court, without analysis, concluded that the public dissemination portions of that state's notification statute were punishment and violated the ex post facto prohibition.

Two federal district court judges have reviewed two states' (Alaska and New Jersey) registration with notification laws and have determined them to be or likely to be considered punishment, hence unconstitutional. In Rowe v. Burton, 1994 WL 792277 (D. Alaska) (July 27, 1994), a United States district court judge for the District of Alaska granted a preliminary injunction on the dissemination of information under the Alaska registration statute. The court examined, inter alia, two grounds by which the Alaska registration statute could be held unconstitutional--the ex post facto clause and the right to privacy. The court granted the injunction on ex post facto grounds.

In State v. Artway, C.A. 94-6287, D.N.J. 2/18/95, a United States district court judge for the District of New Jersey concluded that the public notification portions of "Megan's Law," New Jersey's sex registration statute, were unconstitutional. The court held so on ex post facto grounds. In addition, the court examined the law under the Eighth Amendment's prohibition on cruel and unusual punishment, the right to privacy, the bill of attainder clause, and the double jeopardy clause.

Ex Post Facto Analysis

The ex post facto clause of the United States Constitution (Article I, Section 10) prohibits states from passing laws that punish previous actions. Article I, Section 18, of the Constitution of North Dakota also prohibits enactment of any ex post facto law. The question under the ex post facto clause is whether the sex offender registration law changes the punishment, and increases the punishment more than the law provided when the crime was

committed. Hence, the analysis focuses on whether registration is punishment or whether it is regulatory in nature.

The test used to determine if something is punishment is a multi-factor balancing test. In Kennedy v. Mendoza-Martinez, 372 U.S. 144 (1963), the United States Supreme Court stated:

The punitive nature of the sanction here is evident under the tests traditionally applied to determine whether an Act of Congress is penal or regulatory in character, even though in other cases this problem has been extremely difficult and elusive of solution. Whether the sanction involves an affirmative disability or restraint, whether it has historically been regarded as a punishment, whether it comes into play only on a finding of scienter, whether its operation will promote the traditional aims of punishment--retribution and deterrence, whether the behavior to which it applies is already a crime, whether an alternative purpose to which it may rationally be connected is assignable for it, and whether it appears excessive in relation to the alternative purpose assigned are all relevant to the inquiry, and may often point in differing directions. (citations omitted)

This is a nonexclusive list. Therefore, this test could be labeled a "totality of the circumstances" test.

As to the first factor, whether the registration constitutes an affirmative disability or restraint, in Rowe the court said that the weight is on the side of punishment. The court differentiated other courts' decisions because the statute at issue provided for a central registry and wider dissemination of information than the other previously considered statutes. As such, the court stated that the Alaska "Registration Act may subject . . . registrants to public stigma and ostracism that would affect their personal and private lives." In Artway the court, noting that the public notification provisions of Megan's Law provided more than traditional access by vigilant members of the public, but public dissemination, also held this factor to weigh on the side of punishment.

As to the second factor, whether public dissemination of malfeasance, after the debt to society is paid, has historically been considered punishment, the court in Rowe determined that under this factor the weight is against punishment. The court came to this conclusion by comparing registration with parole or supervised release. The court stated that registration is different because it "entails no obligation to accept continuing supervision, submit to searches, perform community service, live in a particular place or otherwise comply with any of the myriad and often intrusive conditions of parole or supervised release." In Artway the court

determined that this factor weighed on the side of punishment, after reviewing the history of branding.

As to the third factor, scienter, the court in Rowe concluded that this factor was of little aid, but weighed on the side of punishment. The court in Artway said this factor weighed on the side of the regulatory nature of the law. This conclusion was based on deference to the New Jersey Legislature in determining that registration guarded against recidivism. The court also found it unusual to tie the evil mind of the criminal act to the much later occurring registration.

As the fourth factor, whether the law promotes the traditional aims of punishment--retribution and deterrence--the courts in Rowe and Artway determined that this factor weighed on the side of punishment. In Rowe the court said the law obviously was meant to deter crime, but the method by which deterrence was effectuated was different than the ordinary mechanisms of deterrence. Generally, the aim of punishment is to deter future conduct by inflicting some significantly unpleasant consequence upon a criminal. The court said the Alaska registration law is different because the only meaningful deterrence flowing directly from registration comes from modifying the conduct of police and the public. But, the court went on to say there is an indirect consequence of public notification that serves the goal of deterrence as to the sex offender. The court concluded that the public's attention on sex offenders could have a classic punitive effect if the public's reaction resulted in embarrassment, harassment, ostracism, or worse. In Artway the court said that Megan's Law satisfied a traditional aim of punishment--deterrence--because the law contemplated public involvement in the state's police function. That is, the court stated that Megan's Law would deputize every member of the registrant's community and thus achieve the ultimate deterrent against reoffense by the sex offender.

The fifth factor, whether the behavior to which a registration law applies is already a crime, the courts in Rowe and Artway concluded that there is no doubt that registration follows a crime. Both courts also agreed that the weight given this punitive factor should not be great.

As to factor number six, whether there is an alternative purpose assignable to the registration law to which it may be rationally connected, the courts in Rowe and Artway determined that this factor weighs to the side of a punitive character. In Rowe the court stated that "here the act of registration and the associated burdens on the criminal are insignificant in comparison to the goal of reducing the public's exposure to serious criminal behavior. However, the same cannot be said so confidently with respect to the consequences attendant upon the public dissemination of information in the central registry" In Artway the court said that Megan's Law goes beyond the traditional justifiable objectives of

law enforcement to facilitate the effective operation of a law enforcement authority.

Cruel and Unusual Punishment Issue

There are other constitutional questions that arise as a result of sex offender registration laws. The Eighth Amendment of the United States Constitution prohibits the infliction of cruel and unusual punishment. The first step in analysis under the Eighth Amendment is to determine if something is punishment. This analysis is the same as determining punishment for purposes of the ex post facto clause. There is a three-prong test to determine whether the punishment is cruel and unusual. A court will compare the punishment to the crime, to the punishments in other jurisdictions for the same crime, and to other punishments. Generally, for a punishment to be cruel and unusual it must be so severe as to have no rational relation to the gravity of the underlying offense. No case was found which finds sex offender registration cruel and unusual.

Right to Privacy Issue

The constitutional right to privacy comes from the penumbra created by the first nine amendments to the Constitution. The right protects the individual from disclosure of personal matters and from interference with important intimate decisions. The contours of the federal right to privacy are amorphous. In Artway the court stated:

The cases interpreting and delineating the constitutional right to privacy provide no clear answer to the effect of that liberty on the instant determination. Indeed, it appears from the relevant precedent that if plaintiff's challenge rested on privacy concerns alone, it would founder on the rocks created by the modern constitutional ebb resultant from the Supreme Court's retreat from the expansions of Rowe v. Wade.

The United States Constitution, Article I, contains the constitutional prohibition against bills of attainder. Black's Law Dictionary defines the term as "legislative acts, no matter what their form, that apply either to named individuals or to easily ascertainable members of a group in such a way as to inflict punishment on them without a judicial trial." In United States v. Brown, 381 U.S. 437 (1965) the United States Supreme Court stated:

[A] major concern that prompted the bill of attainder prohibition [was] the fear that the legislature, in seeking to pander to the inflamed popular constituency, will find it expedient openly to assume the mantle of judge-or, worse still, lynch mob.

As the court in Artway suggests, although Megan's Law resulted from a specific public concern, the law does provide for general applicability, thereby it seems to fall outside the prohibition against bills of attainder. But, if registration with notification were provided for individuals upon being charged with an offense (rather than convicted), the prohibition against bill of attainder would seem to become more relevant.

Double Jeopardy Issue

The Fifth Amendment of the United States Constitution prohibits double jeopardy. The double jeopardy clause protects against multiple punishments. The test for multiple punishments is if a person is subject to two or more punishments for the same offense in different proceedings. The threshold issue is whether sex offender registration is punishment. Double jeopardy and ex post facto analysis is similar to the analyses by the courts in Rowe and Artway.

Due Process Issue

If a statute provides for public notification of persons charged with offenses, there may be a 14th Amendment (Due Process) issue. The 14th Amendment to the United States Constitution states, in part, that "[n]o state shall deprive any person of life, liberty, or property, without due process of law" For this amendment to prohibit action, it must be state action, not private action. A newspaper is not prohibited from collecting and printing information about individuals charged with sex offenses, but if the state becomes too involved, then the analysis turns to whether the charged sex offender has been deprived of a liberty or property interest. This is where the analysis becomes difficult. Although reputation alone is not a protected liberty interest, coupled with another interest, it is protected. That is, if disclosure would result in a loss of a significant freedom of action, including engaging in gainful employment, or a freedom provided by the Constitution or statute, then some process would be required before community notification of those charged with a sexual offense.

FEDERAL LAW

In 1994 Congress passed the Violent Crime Control and Law Enforcement Act. Title XVII of this Act, the "Jacob Wetterling Crimes Against Children and Sexually Violent Offender Registration Act," mandates that states have a sex offender registry under threat of withholding 10 percent of Byrne memorial funds. The Act requires the Attorney General to make guidelines for the states.

One portion of the Act requires information collected under a state registration system to be private; except for law enforcement government agencies and for the public if necessary to protect the

public from a specific individual; but that person's identity may not be released. What this exactly means in regards to this state's notification law is not clear because the Attorney General has not issued the guidelines, but it is a point of interest.

SUGGESTED STUDY APPROACH

Any change to NDCC Section 12.1-32-15 must be carefully considered. Section 12.1-32-15, as amended, may be subject to constitutional challenges. For example, Section 12.1-32-15 will require the registration of those who have plead guilty to or been found guilty of a crime against a child or as a sexual offender within 10 years before August 1, 1995. If registration with notification is found to be punishment, this provision may violate the ex post facto clause.

House Concurrent Resolution No. 3016 suggests a study of a community notification system for those charged with sexual offenses. North Dakota Century Code Section 12.1-34-02(2) and (3) provide for the notification of victims and witnesses of the criminal charges and pretrial release. Community notification provided through state action before an accused person is provided due process may raise due process, double jeopardy, and bill of attainder concerns. Thus any change would necessitate careful review of possible constitutional issues.

The committee may wish to receive information on the operation of the current law by the agency that maintains the registration system--the Bureau of Criminal Investigation. The bureau could offer insight into the internal logistics of operating a registration system. Depending on which aspect of the registration law is addressed by the committee, other agencies and groups could offer information. These include the Department of Corrections and Rehabilitation (Parole and Probation), the Attorney General, courts, state's attorneys, the newspaper and broadcast associations, and protection and advocacy groups.

Sexual offender registration and notification statutes have been challenged in other states--some successfully. The committee needs to be aware of any challenge proceeding through North Dakota courts or of any challenge to provisions similar to North Dakota's provisions. Any change to North Dakota's law, or expansion of the registration or notification requirement needs to be carefully reviewed in light of constitutional issues. The committee may wish to ascertain the effectiveness and workability of North Dakota's law.

ATTACH: 1

Fifty-fourth Legislative Assembly, State of North Dakota, begun in the Capitol in the City of Bismarck, on Tuesday, the third day of January, one thousand nine hundred and ninety-five

HOUSE CONCURRENT RESOLUTION NO. 3016
(Representatives Brown, Carlisle, Aarsvold, Kretschmar, Olson)
(Senators Malewaja, Andrist)

A concurrent resolution directing the Legislative Council to study the feasibility and desirability of providing a community notification process by which communities would be informed of the release of a convicted sexual offender and of persons charged with or convicted of sexual offenses.

WHEREAS, the safety of children is increasingly threatened by sexual predators and other violent offenders; and

WHEREAS, communities across the United States are devising ways to notify their citizens as to the whereabouts of persons charged with or convicted of sexual offenses; and

WHEREAS, before implementing such a notification process, there should be thorough consideration of all the implications of such an effort, including constitutional issues, the impact on victims, and the unique nature of North Dakota communities;

NOW, THEREFORE, BE IT RESOLVED BY THE HOUSE OF REPRESENTATIVES OF NORTH DAKOTA, THE SENATE CONCURRING THEREIN:

That the Legislative Council study the feasibility and desirability of providing a community notification process by which communities would be informed of the release of a convicted sexual offender and of persons charged with or convicted of sexual offenses; and

BE IT FURTHER RESOLVED, that the Legislative Council report its findings and recommendations, together with any legislation required to implement the recommendations, to the Fifty-fifth Legislative Assembly.

Filed April 3, 1995