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BRIEF OVERVIEW OF THE AMERICAN LAW INSTITUTE’S REVISIONS TO THE MODEL PENAL CODE: Sexual Assault and Related Offenses

Everyone on a Sex Offender Registry (SOR) and their families should be intensely interested in the Model Penal Code (MPC) recently published by the American Law Institute (ALI). This highly respected collection of attorneys, judges, and scholars have proposed dramatic changes to how we deal with SORs and those on them.

The stated reason for conducting the MPC Draft revision, repeated several times in the report, is ALI’s recognition that SORs and the collateral consequences that flow from them make no one safer and cause great harm.

The Draft writers understood that SORs are expensive to administer, enflame baseless panic, and hinder the rehabilitation and reintegration of ex-offenders into society. That requires stable housing and employment, emotional support of family and friends, and opportunities to participate fully in the life of the community.

ALI and MPC

A quick note about the Model Penal Code and the American Law Institute. The ALI was formed in 1923 to clarify, modernize, and improve the law to promote the better administration of justice. This revision of the MPC supersedes the original published in 1962.

The American Law Institute is an independent, non-governmental, non-profit organization. Their reports are strictly advisory and carry no legal authority. The Institute drafts, discusses, revises, and publishes restatements of the law, model statutes, and principles of legal practice that are quite influential in courts and legislatures.

ALI’s understanding of current research and best practices led them to believe that SORs and housing restrictions contribute nothing to public safety, and their collateral consequences undermine efforts to rehabilitate Registrants. Such laws, passed by legislators whose good intentions far exceed their knowledge of the problem, are ineffective at best and counterproductive at worst. The revised MPC aims to correct the worst aspects of registration to conform to the overwhelming body of research.

Reforming the SOR

That most experts call for the total elimination of the registries, notwithstanding, this draft of the MPC does not take that view. The drafters reasoned that legislators would have no appetite for abolishing registries in one fell stroke because public support for registration rests on intense emotions and faulty intuitions too strong to overcome at once. Better, they said, to remove from

registry statutes provisions that are senseless, draconian, and punitive. Furthermore, they recommend not using leg monitors or barring internet use.

The MPC would provide clear criteria of who is required to register. Juveniles would be barred from registration. Only sexual assault offenses would warrant adult registration:

- (1) Sexual assault by aggravated force or restraint.
- (2) Simple sexual assault by force, but only after the person has been convicted of a previous, separate, felony sex offense.
- (3) Sexual assault of an incapacitated person after having been convicted of a previous felony sex offense.
- (4) Sexual assault of a minor younger than 12 when the offender is 21 or older.
- (5) Incestuous sexual assault of a minor younger than 16.

The limit for all convictions would be set at 15 years, after which, registration would automatically stop. If, during the first ten years, the Registrant has completed supervision, satisfied any financial obligation arising from the conviction, successfully completed a required treatment program, and has not been convicted of another sex offense; registration would end, and the former Registrant would not be subject to any other duties associated with registration. The police must notify all other jurisdictions where the person is registered and provide the former Registrant a certificate showing that all requirements concerning registration are terminated.

This revision would limit registry information to being used by governmental agencies and police only: general publication of identities or other details about Registrants would be prohibited. Proactive notification, such as post cards and newspaper listings, would be forbidden.

Knowingly failing to report for registration as required would be a misdemeanor. It would be an affirmative defense that uncontrollable circumstances prevented one from reporting and the Registrant complied as soon as reasonably possible.

Collateral consequences

The US Supreme Court has ruled that registration is not punitive because it is intended as a civil regulation: not a criminal punishment. However, several state supreme courts have held that SORs *are* punitive (Alaska, Michigan, Maine, Kentucky, New Jersey, and Pennsylvania) or punitive “as applied” (Kansas, New Hampshire, and Oklahoma). These decisions raise the question of whether collateral consequences (public shaming, employment limitations, housing, and travel restrictions, etc.) function as punishments as severe as a prison sentence. For this reason, ALI insists that any comprehensive understanding of penal codes must factor in those consequences.

The Draft’s proposed changes are dramatic, but on reflection, they do not appear to be radical. The lynchpin of the plan to limit collateral consequences is the restricting of SOR information to police eyes only. The results of the Draft’s proposed changes look very much like a return to the Jacob Wetterling Act registry of the early 1990’s, when the SOR was just for police use, only certain crimes led to registration, and the duty to report ended after 10 years.

<https://www.ali.org/publications/show/sexual-assault-and-related-offenses/#drafts>