Model Penal Code: Sexual Assault and Related Offenses

Tentative Draft No. 6

Motion to Amend Section 213.11, Registration for Law-Enforcement Purposes.

Motion by Ira Ellman, Seconded by Wayne Logan

Add a new paragraph (5) to Section 213.11, and renumber current paragraph (5) to paragraph (6), as follows:

(5) *Application to Other Sexual Offenses.* Notwithstanding any contrary provision of law, where the duty to register arises from a conviction for a sexual offense that is not established under this Article, but under another law of this state:

(a) Notification of the person's obligation to register and associated duties is governed by Section 213.11B.

(b) The time and method of registration is governed by Sections 213.11A(1)((a) and (b), and Section 213.11C.

(c) The information required upon registration is as specified in Section 213.11D.

(d) The duty to keep registration current is as specified in Section 213.11E.

(e) The duration of the registration requirements is as specified in Section 213.11F.

(f) Penalties for failure to register are governed by Section 213.11G.

(g) Access to registry information is governed by Sections 213.11F(3) and 213.11H.

(h) availability of discretionary relief from sentencing consequences and collateral consequences is governed by Section 213.11J.

For the purpose of this paragraph, a "sexual offense" is any offense which can trigger a requirement to register as a sexual offender under any law of this state.

~~(5)~~ (6). Retroactive Effect. …

Explanation.

Under T.D. 5 as approved at the 2021 annual meeting, only a handful of Article 213 offenses were registerable, and no sexual offenses outside of Article 213 were registerable.

T.D. 6 expands the number of Article 213 registerable offenses, but more importantly for the purpose of this motion, it leaves sexual offenses not in Article 213 entirely excluded from the M.P.C. registration provisions. Many (but not all) of the sexual offenses outside of Article 213 are non-contact offenses that are typically regarded as less serious than the sexual assault offenses addressed in Article 213. Examples include exhibitionism or viewing nude or sexualized internet images of persons under 18. But because some non-213 registerable offenses are more serious (e.g., kidnapping or production of child pornography), the Council chose to leave unaffected *any* registration requirements that other laws impose on non-213 sexual offenses. The problem is that the change, as implemented, needlessly goes much further than simply preserving existing requirements that those convicted of non-213 sexual offenses must register. By striking these offenses entirely from the reach of Article's 213 registration provisions, it also excludes these registrants alone from all of Article 213's other important reforms to registration system. Those required to register for a non-213 sexual offense would still be subject to community notification and exposure on a public website, and there would be no limit on the duration of their registration obligation. There is no basis for treating registration triggered by non-213 sexual offenses differently and more harshly than registration required under Article 213. That is especially true given that many of them are less serious, and have lower re-offense rates, than is true for Article 213 offenses. This amendment corrects this presumably unintended consequence of the changes made in T.D. 6.

On a more practical level, the effect of T.D. 6's approach is to leave states adopting the M.P.C. with two parallel registration systems, one for offenses made registerable under Article 213, and another for offenses made registerable under other portions of the criminal code. There is no rationale for such a confusing, administratively complex, and presumably unintended registration system.

This amendment fixes these problems without altering the Council's decision to leave intact any registration requirements arising outside of Article 213. It simply applies the Article 213 registration system, including limitations on public disclosure and the duration of the registration obligation, to all registrations required for a sexual offense, whether arising from Article 213 or elsewhere.

Model Penal Code: Sexual Assault and Related Offenses

Tentative Draft No. 6

Motion to Amend Sections 213.11A and 213.11D

Motion by Ira Ellman, Seconded by Wayne Logan

Add a new subsection (4) to Section 213.11A, as follows:

(4) *No additional registration.* The registering authority designated by law must not register persons who are not required to register on the basis of conviction of an offense under this Article, an offense under the law of another jurisdiction that is comparable to an offense under this Article, or an offense not defined by this Article that is designated as a registrable offense under another law of this state.

Add a new subsection (5) to Section 213.11D, as follows:

(5) The registering authority designated by law shall accept all information that this section requires a person subject to registration to provide, but it must not accept or record information from the registrant that this Section does not require the registrant to provide.

Redesignate subsections (5) & (6) as (6) & (7).

Explanation:

These amendments are necessary to preserve the policies adopted elsewhere in this Article of the MPC, as well as by any other state laws addressing registration, with respect to both who must register, and the information that must be submitted to complete registration. It does not change the substance of this Article, or any other state law, on these matters. It rather ensures that the state's rules are not effectively overridden by federal rules that require the registration of persons or information that state law does not require.

The federal Sex Offender Registration and Notification Act, known as "SORNA",[1] sets standards for state registration provisions that states must satisfy to maintain eligibility to receive certain federal funds. As elsewhere explained in T.D. 6 (see page 45), 32 states have chosen to risk loss of federal funds by declining to comply with SORNA's requirements. But a separate set of SORNA provisions place a registration obligation on the individual that arises independently of any state law. The federal requirements apply not only to those with federal convictions, but also to anyone with a state conviction for an offense considerable registerable under federal law—a broad list.[2] Federal criminal jurisdiction for this purpose is asserted over individuals convicted solely of a state offense if they ever engaged in interstate travel following the conviction and after SORNA' enactment in 2006. The preamble in the recently issued regulations state that no "nexus" is required between the interstate travel and the charged SORNA violation "beyond the temporal sequencing implied by [18 U.S.C. § 2250(a)'s] language and structure", citing *Carr v. United States*, 560 U.S. 438, 446 (2010).[3]

Recently issued federal regulations emphasize the responsibility of individuals with prior sex offense convictions to ensure compliance with Federal SORNA without regard to whether their registration is required by relevant state registration, or whether the content or frequency of the federally required reporting is also required by relevant state laws.[4] The knowing failure to register as required by federal law is a federal felony punishable by up to ten years in prison, 18 U.S. Code § 2250(a). It is not a defense that the individual was fully compliant with all applicable state laws. *Willman v. Att'y Gen.*, 972 F.3d 819 (6th Cir. 2020) (holding that federal SORNA imposes independent registration obligations on Plaintiff irrespective of state law).

The individuals thus potentially liable for federal criminal prosecution, despite their full compliance with all applicable state laws, would include juveniles required to register under federal but not state law, or individuals not required to register under state law because their offense predated the state's adoption of a registration requirement.[5] And

---

[1] Enacted as Title I of the Adam Walsh Child Protection and Safety Act of 2006, Public Law 109-248, 34 U.S.C. § 20901 et seq., July 27, 2006.

[2] The broad federal list of registerable offenses is defined by 34 U.S.C. §§ 20911 (5) and (7) to include offenses that have an element involving a sexual act or sexual contact with another as well as a long list of specified offenses against minors.

[3] 86 Fed. Reg. at 69859.

[4] The final Rule was published December 8, 2021 in the Federal Register. https://www.federalregister.gov/documents/2021/12/08/2021-26420/registration-requirements-under-the-sex-offender-registration-and-notification-act.

[5] Some but not all states forbit such retroactive application of the registration requirement, but federal law has historically allowed it. Compare, e.g., Doe v. State, 189 P.3d 999 (Alaska 2008) (holding that Alaska's Sex Offender Registration Act (ASORA) was punitive and its retroactive application thus barred by *ex post facto*

most importantly, federal law imposes a registration obligation on individuals who would not be required to register under the revised MPC, not only because their offense is not registerable under the MPC, but also because the duration of the federal registration requirement exceeds the duration of the registration requirement under the MPC—as will often be the case. (34 USC § 20915 imposes a federal registration requirement of 15 years for Tier One offenses, 25 years for Tier II offenses, and life for Tier III offenses.)

Because the federal government does not maintain its own registration system, individuals cannot comply with these federal registration requirements except by registering with their local or state agencies. Individuals subject to federal requirements that go beyond their state's sometimes find local authorities resistant to accepting registration information not required by state law.[6] It is hardly surprising that registration agencies may not welcome administering registration requirements their state law has declined to impose. Federal law therefore recognizes an "impossibility" defense to a federal failure to register charge, for individuals unable to register because local authorities would not accept the registration. But this is an affirmative defense, 18 U.S.C. § 2250(c), and the individual asserting it does not establish an impossibility defense by showing only that the state does not require the registration, whether at all or in the time and manner under which federal law requires it. 28 CFR 72.7(g). The individual must further show that local authorities do not in fact accept submission of the federally required information or registration, as they sometimes may—if state law does not affirmatively forbid them from accepting registration information the state law does not require.[7]

Effective implementation of the registration rules adopted by the MPC thus requires inclusion in state law of a clear rule barring registration agencies from accepting registration information that state law does not require an individual to provide. The suggested amendment supplies that rule. It does not alter any individual's registration obligations under state law; it only shields state-law compliant individuals from federal liabilities where federal law imposes requirements that the MPC, or other state law, rejects.

---

clause of state constitution, with Smith v. Doe, 538 U.S. 84 (2003) (finding retroactive application of the same Alaska sexual registration act did not violate the federal *ex post facto* clause.)

[6] E.g., Dep't of Pub. & Corr. Servs. v. Doe, 439 Md. 201, 94 A.3d 791 (2014) (ordering removal from state registry of individual required to register under SORNA but not under state law).

[7] As stated in the preamble to the governing regulations, "If the state registration authorities are willing to register the sex offender, he is not relieved of the duty to register merely because state law does not track the Federal law registration requirement." 86 Fed. Reg. at 69868.

Model Penal Code: Sexual Assault and Related Offenses

Tentative Draft No. 6

Motion to Amend Section 213.11D

Motion by Ira Ellman, second by Wayne Logan

Delete Section 213.11D (1) (g).

~~(g) all telephone numbers and email addresses used by the person, and all designations that the person uses for self-identification in internet and telephonic communications and postings;~~

Renumber Section 213.11D (1) (h) as 213.11D (1) (g).

Explanation.

T.D. 6 adds a Paragraph (g) to Section 213.11D (1) that requires the registrant to provide the registering authority with "all telephone numbers and email addresses used by the person, and all designations that the person uses for self-identification in internet and telephonic communications and postings". In an April 26, 2022 decision, the Second Circuit Court of Appeal recently reversed the district court's dismissal of a First Amendment challenge to a Connecticut law that requires registrants to notify Connecticut authorities whenever they create "a new email address, instant messenger address, or other internet communication identifier." *Cornelio v. Connecticut*, 2022 U.S. App. LEXIS 11208, 2022 WL 1217394. That decision, and an earlier one by the ninth circuit which it cites, casts considerable doubt on the constitutionality of the provision this amendment deletes from T.D. 6.

The Court did not consider at this point whether strict scrutiny applied to the statute because it found it likely it would fail even an intermediate scrutiny test. Among the reasons the Court gave for its holding was the law's application to registrants in general, with no effort to focus the requirement on particular individuals for whom a more plausible factual justification might be mounted. That is, of course, also true of this provision. (Other portions of T.D. 6, not affected by this amendment, do allow the imposition of additional collateral consequences not otherwise imposed on persons convicted of a sexual offense when they are narrowly tailored to and explained by circumstances particular to the affected individual,

and their imposition is subject to various procedural safeguards. See Section 213.11I.) The general rule contained in the language stricken by the Amendment is unnecessary and overbroad. Note also that Court rejected the State's contention that the rule was saved by the fact that the required information was not released publicly.

It's also worth noting that Connecticut prosecuted the plaintiff in this case even though there was absolutely no evidence that he had ever used internet communication for an illegal purpose. Indeed, his "violation" was discovered because he used the "unregistered" email address repeatedly—to communicate with the state's sex offender registration unit. It's a good example of the common use of such requirements to harass registrants who are not in fact engaged in any behavior that would be unlawful or even improper for anyone not on the registry..

I cannot improve upon the Court's explanation of the constitutional issue. For convenience of others, I provide selected excerpts here:

> The government argues that the disclosure requirement advances important governmental interests in deterring registrants from using the internet (1) to "recruit, groom, entice, or otherwise engage in communications with potential or actual sex abuse victims" and (2) to "engage in the distribution or exchange of prohibited sexual images." Appellees' Br. 33. Assuming that these interests in deterrence are important and legitimate as well as genuine, nothing in the record demonstrates that the disclosure requirement advances these interests in a "direct and material way," Turner I, 512 U.S. at 664, or provides more than "ineffective or remote support" for these objectives, Edenfield, 507 U.S. at 770.
>
> With no evidence demonstrating that the disclosure requirement materially provides deterrence, the government relies on two speculative propositions. First, a registered sex offender is less likely to engage in sex-based crimes on the internet if he knows that law enforcement possesses his email address and other internet communication identifiers. Second, the disclosure requirement provides law enforcement with a database that can be used to determine the identity of someone engaged in online sex offenses. The government, however, has not substantiated the deterrent effect and has not indicated whether the database has ever even been used. Perhaps the government's speculation may turn out to be justified, but at this stage we cannot say that the government "has drawn reasonable inferences based on substantial evidence," Turner I, 512 U.S. at 666.… A developed record may undermine the government's assertions. For example, in reviewing Michigan's sex offender registration law, the Sixth Circuit observed that "evidence in the record" supported "a finding that offense-based public registration has, at best, no impact on recidivism." Does #1-5 v. Snyder, 834 F.3d 696, 704 (6th Cir. 2016).… The government also may not be able to show that the database of internet identifiers has actually assisted law enforcement efforts to arrest online predators. There would be a "dramatic mismatch" between the asserted interest and "the

disclosure regime that [the government] has implemented in service of that end" if "there was not a single, concrete instance" in which the database "did anything to advance the [government's] investigative, regulatory or enforcement efforts." Ams. for Prosperity, 141 S. Ct. at 2386.

[E]ven assuming that the disclosure requirement materially advances those interests, the disclosure requirement plausibly imposes an extra burden that unnecessarily chills protected speech. The government cannot normally justify a speech restriction by reference to its interest in deterring crime. "The normal method of deterring unlawful conduct is to impose an appropriate punishment on the person who engages in it" rather than by regulating speech.… To show that the disclosure requirement is narrowly tailored, the government must explain why criminal sanctions that do not implicate the First Amendment would not provide adequate deterrence…

The disclosure requirement also plausibly appears to be overbroad because it applies to all persons subject to the sex offender registration law, including registrants who have never engaged in the sort of illicit online activity that the government seeks to deter. See Conn. Gen. Stat. §§ 54-251 to -252. If the disclosure requirement applies to a broad class beyond those who are likely to engage in the conduct the government seeks to deter, it would be "significantly overinclusive" rather than narrowly tailored. Simon & Schuster, 502 U.S. at 121. The government has not explained why the disclosure requirement cannot be more narrowly targeted. As other courts have noted, "[a] regulatory scheme designed to further the state's legitimate interest in protecting children from communication enticing them into illegal sexual activity should consider how and where on the internet such communication occurs." White, 696 F. Supp. 2d at 1309. To show narrow tailoring, the government must demonstrate that a less burdensome alternative—requiring disclosure only for those online platforms that facilitate solicitation or the exchange of illicit material, for example, or only for those persons likely to engage in such conduct—would not advance the asserted governmental interests.…

….To the extent the government argues that a required disclosure to the government rather than to the public will necessarily survive intermediate scrutiny, it is mistaken. A disclosure requirement may violate the First Amendment "even if there is no disclosure to the general public." Ams. for Prosperity, 141 S. Ct. at 2388 (alterations omitted) (quoting Shelton v. Tucker, 364 U.S. 479, 486 (1960)). "[A]ssurances of confidentiality may reduce the burden of disclosure" but "do not eliminate it." Id.