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Lori Conroy

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LETTING IN THE LIGHT:
THE NEED FOR INDEPENDENT REVIEW
OF SEX OFFENDER ASSESSMENTS
IN NORTH DAKOTA

I. INTRODUCTION

Legislatures created sex offender registration laws to facilitate law enforcement efforts to monitor the locations of sex offenders and to increase community awareness of offenders.¹ These laws were also an effort to fill in the gaps left by other legislative endeavors enacted in response to twentieth century panic over sex offenses.² While legislatures focused on sex offenses and the resulting prison terms at first, lawmakers quickly realized the need to monitor sex offenders who already completed their sentences and were living in communities throughout the United States.³

States were slowly passing piecemeal legislation to address this need until they received a federal push in 1994 with the passage of the Jacob Wetterling Act and again in 1996 with the passage of Megan's Law.⁴ Both laws threatened to withhold federal funding from states that failed to pass sex offender registration laws.⁵ States that failed to previously enact sex offender registration laws did so in response to the threat of losing federal funding.⁶

North Dakota enacted its sex offender registration statute in 1991.⁷ Legislators intended the statute to aid law enforcement's investigation and apprehension of sex offenders, and to protect the community.⁸ The statute has undergone significant evolution, with changes made in each of the bi-

1. Wayne A. Logan, *Jacob's Legacy: Sex Offender Registration and Community Notification Laws, Practice, and Procedure in Minnesota*, 29 WM. MITCHELL L. REV. 1287, 1289 (2003).

2. *Id.*

3. *Id.* at 1288-89.

4. Jacob Wetterling Crimes Against Children and Sexually Violent Offender Registration Act, Pub. L. No. 103-322, 108 Stat. 1796, 2038 (1994) (codified as amended at 42 U.S.C. § 14071(g)(2)(A) (2006)); Megan's Law, Pub. L. No. 104-145, 110 Stat. 1345 (1996) (amending 42 U.S.C. § 14071(d) (1994)); Suzanna Hartzell-Baird, *When Sex Doesn't Sell: Mitigating the Damaging Effect of Megan's Law on Property Values*, 35 REAL EST. L.J. 353, 356 (2006); Logan, *supra* note 1, at 1289. Prior to the passage of the Jacob Wetterling Act, five states required sex offender registration. Logan, *supra* note 1, at 1293.

5. Logan, *supra* note 1, at 1289.

6. *Id.*

7. 1991 N.D. Sess. Laws ch. 136.

8. *State v. Rubey*, 2000 ND 119, ¶ 17, 611 N.W.2d 888, 892 (quoting *Hearing on H.B. 1152 Before the H. Judiciary Comm.*, 54th N.D. Legis. Sess. (Jan. 9, 1995)).

annual sessions following its passage.⁹ Until 2001, the process of assessing sex offender recidivism was delegated to local law enforcement agencies.¹⁰ A 2001 Senate bill shifted that responsibility to a committee appointed by the North Dakota Attorney General.¹¹

This article demonstrates that the current sex offender risk assessment procedures should be amended to allow for independent review of sex offender risk determinations.¹² Part II of this article defines “sex offender” under North Dakota law and examines the current procedure for assigning and reviewing sex offender risk assessments in the state.¹³ This discussion includes a look at the consequences of the sex offender registration requirement.¹⁴ Part III of this article surveys sex offender risk assessments in other states and analyzes the legislative and judicial action leading to the development of these procedures.¹⁵ Part IV describes changes to the system of sex offender risk assessment modeled after other jurisdictions which will raise the integrity of North Dakota’s current system, and describes why the North Dakota Legislature should take action to change the current system.¹⁶

North Dakota’s current registration requirement is triggered in a number of ways.¹⁷ The following section will examine the offenses that trigger the registration requirement and will divide North Dakota sex offenders into

9. 2007 N.D. Sess. Laws ch. 136 § 1; 2007 N.D. Sess. Laws ch. 124 § 4; 2005 N.D. Sess. Laws ch. 121 § 1; 2003 N.D. Sess. Laws ch. 113 § 1; 2001 N.D. Sp. Sess. Laws ch. 690 § 1; 2001 N.D. Sess. Laws ch. 140 § 1; 2001 N.D. Sess. Laws ch. 134 § 8; 1999 N.D. Sess. Laws ch. 131 § 1; 1999 N.D. Sess. Laws ch. 123 § 3; 1999 N.D. Sess. Laws ch. 50 § 33; 1997 N.D. Sess. Laws ch. 137 § 1; 1997 N.D. Sess. Laws ch. 136 § 1; 1997 N.D. Sess. Laws ch. 128 § 2; 1997 N.D. Sess. Laws ch. 124 § 5; 1995 N.D. Sess. Laws ch. 139 § 1; 1993 N.D. Sess. Laws ch. 129 § 3; 1991 N.D. Sess. Laws ch. 136 § 1.

10. *Hearing on S.B. 2446 Before the H. Judiciary Comm.*, 57th N.D. Legis. Sess. (March 12, 2001) (testimony of Jonathan Byers, Assistant Attorney General) [hereinafter *Hearing on S.B. 2446*].

11. *Id.*

12. *See* discussion *infra* Part III.A (identifying the burdens and inherent risks that could be lessened through independent review of sex offender risk assessments).

13. *See infra* Part II.A-B (describing the categories of offenses or attempted offenses that will lead to a label of sex offender and identifying the current process for determining sex offender risk levels in North Dakota).

14. *See infra* Part II.C (discussing the time periods and methods of notification required for the three categories of sex offenders in North Dakota).

15. *See infra* Part III.B.1-4 (evaluating the sex offender risk assessment processes in New York, New Jersey, Massachusetts, and Minnesota).

16. *See infra* Part IV.A-B (suggesting changes to North Dakota’s system of sex offender risk assessment based on the processes used in New York, New Jersey, Massachusetts, and Minnesota).

17. *See infra* notes 26-103 and accompanying text (examining the offenses that trigger the sex offender registration requirement in North Dakota).

four categories.¹⁸ Part II concludes with a review of the current procedures for assigning risk levels in North Dakota.¹⁹

II. THE CURRENT LANDSCAPE OF SEX OFFENDER STATUS AND RISK ASSESSMENT IN NORTH DAKOTA

This section summarizes the current status of sex offender registration requirements and procedures in North Dakota.²⁰ The section begins with a discussion of the broad categories of offenders who must register and the offenses that trigger registration requirements.²¹ Subsection A.5 is a brief aside on sexually dangerous individuals, the category of offenders who may be civilly committed due to the danger they pose to society.²² Part B of this section is a detailed description of the current system of risk assessment in the state of North Dakota.²³

A. SEX OFFENDERS: ACQUIRING THE LABEL IN NORTH DAKOTA

North Dakota requires registration for four broad categories of offenders: (1) sexual offenders; (2) certain juveniles found to be delinquent; (3) offenders against children; and (4) those who demonstrate “mental abnormality or sexual predatory conduct” in committing a crime.²⁴ If an individual falls into any of the four categories, courts require registration, in addition to the penalties imposed for the crime.²⁵ This section explores these four broad categories and the crimes encompassed within each.²⁶

18. *See infra* Part II.A.1-4 (dividing offenders into the categories of sexual offenders, juvenile delinquent, child victimizers, and those who demonstrate mental abnormality or sexual predatory conduct).

19. *See* N.D. CENT. CODE § 12.1-32-15(2) (2007) (prescribing the process for assessing sex offender risk in North Dakota).

20. *See infra* Part II.A-B (examining those criminals who must register as sex offenders in North Dakota, the requirements of registration, and the time periods required for registration).

21. *See infra* Part II.A.1-4 (analyzing sexual offenses, offenses committed by juveniles, offenses committed against children, and offenses committed with mental abnormality or sexual predatory conduct).

22. *See* N.D. CENT. CODE § 25-03.3-01 (2007) (defining the term sexually dangerous individual).

23. *See infra* Part II.B (describing the committee in charge of assessing, assigning, and reviewing sex offender risk levels in North Dakota).

24. N.D. CENT. CODE § 12.1-32-15(2) (2007).

25. *Id.* Registration is also required in certain instances even where it is not ordered by the court. *See, e.g., id.* § 12.1-32-15(3)(c) (requiring registration where an individual has pled guilty, nolo contendere or has been found guilty after July 31, 1985, of an offense against a child or a sex offense).

26. *See infra* text accompanying notes 27-103 (describing those sexual offenses, offenses committed by juveniles, offenses committed against children and offenses involving mental abnormality or sexual predatory conduct that will result in a sex offender registration requirement in North Dakota).

1. *Sexual Offenses*

North Dakota defines sex offenders as those who plead guilty, are found guilty, or who plead *nolo contendere* to either attempting or committing a sex offense.²⁷ Not all sexual offenses are felonies in North Dakota.²⁸ Consequently, an individual may be required to register as a sex offender when he or she pleads or is found guilty of a misdemeanor or attempted misdemeanor.²⁹ However, judges have more discretion in deciding whether to order registration in the case of a misdemeanor or attempted misdemeanor sex offense.³⁰

With few exceptions, those crimes considered sexual offenses are all found in North Dakota Century Code chapter 12.1-20.³¹ The crimes are those commonly considered sexual offenses such as forced touching or intercourse, child molestation, and child pornography.³² All of the crimes falling under the category of sexual offenses are either sexual contacts or sexual acts.³³ Sexual contact is touching, either to the skin or through clothing, of the “sexual” or “intimate parts” of a person.³⁴ Sexual acts consist not only of contact between penis and vulva, penis and anus, mouth and anus, and mouth and vulva, but also include contact between other parts of the human body or an object with the victim’s penis, anus, or vulva.³⁵

One of the most severe sex offenses is gross sexual imposition.³⁶ Gross sexual imposition is committed by either engaging, or causing an-

27. N.D. CENT. CODE § 12.1-32-15(1)(e). *Nolo contendere* is Latin for “I do not wish to contend” and means no contest. BLACK’S LAW DICTIONARY 1074 (8th ed. 2004).

28. *See, e.g.*, § 12.1-20-12.1(1)(a)-(b) (defining conduct that will result in a class A misdemeanor charge for indecent exposure).

29. *Id.* § 12.1-32-15(2)(b).

30. *Compare id.* § 12.1-32-15(2)(a) (stating that the court shall require registration where the individual has pled guilty, *nolo contendere* or has been found guilty of committing or attempting to commit a felony sex offense), *with id.* § 12.1-32-15(2)(b) (stating that the court may not require registration where the offender is no more than three years older than a minor victim, where the individual has never been convicted of a sex offense or a crime against a child, and where the offender did not exhibit “mental abnormality or predatory conduct” in committing the crime).

31. *Id.* § 12.1-32-15(1)(e). The North Dakota Century Code states that a person who commits a crime under section 12.1-22-03.1(2), which was repealed in 2001, is considered a sex offender. *Id.* § 12.1-32-15(1)(e); 2001 N.D. Sess. Laws, ch. 134, § 11. That provision intends to clarify that sex offenders convicted under the previous statutory regime are still considered sex offenders under North Dakota Law. *See id.*

32. *Id.* § 12.1-32-15(1)(e).

33. *See id.* (listing the crimes which fall under the category of sexual offenses).

34. *Id.* § 12.1-20-02(4). Sexual contact also includes ejaculation and emission of feces or urine onto another person when it is done “for the purpose of arousing or satisfying sexual or aggressive desires.” *Id.*

35. *Id.* § 12.1-20-02(3). Penetration by the penis or another part of the human body or an object, however slight, of the anus and vulva results in a sexual act. *Id.* Emission is not required for a sexual contact to be committed. *Id.*

36. *Id.* § 12.1-20-03.

other person to engage, in a sexual act or sexual contact.³⁷ To commit the sexual act aspect of gross sexual imposition, one of five circumstances must be present.³⁸ The offender must either: (1) compel the victim through the use of force or threat of force of imminent death, serious bodily injury, or kidnapping; (2) impair substantially or know that another has substantially impaired the victim's power and control by giving the victim intoxicants, a controlled substance, or preventing resistance through another means; (3) know that the victim does not know the offender is committing a sexual act; (4) engage in a sexual act with a victim less than fifteen years old; or (5) know or have reasonable cause to believe that the victim suffers from a mental disease or defect which makes the victim incapable of understanding what the offender is doing.³⁹

Sexual imposition, a less serious form of gross sexual imposition, is also considered a sex offense in North Dakota.⁴⁰ Sexual imposition is defined as engaging or causing another to engage in a sexual act or sexual contact by using a threat that would cause a reasonable person to submit.⁴¹ Sexual imposition also includes sexual acts or sexual contacts required to become a member of a gang.⁴²

Sexual assault is also a sex offense under North Dakota law.⁴³ Those who are convicted of, or plead guilty to, sexual assault are required to register as sex offenders in North Dakota, with one exception.⁴⁴ Offenders who

37. *Id.* §§ 12.1-20-03(1)-(2).

38. *Id.* §§ 12.1-20-03(1)(a)-(e).

39. *Id.*

40. *Id.* § 12.1-32-15(1)(e).

41. *Id.* § 12.1-20-04(1).

42. *Id.* § 12.1-20-04(2).

43. *Id.* § 12.1-20-07.

44. *Id.* §§ 12.1-20-07, 12.1-32-15(1)(e). The following offenders are guilty of sexual assault in North Dakota:

1. A person who knowingly has sexual contact with another person, or who causes another person to have sexual contact with that person, is guilty of an offense if: a. That person knows or has reasonable cause to believe that the contact is offensive to the other person; b. That person knows or has reasonable cause to believe that the other person suffers from a mental disease or defect which renders that other person incapable of understanding the nature of that other person's conduct; c. That person or someone with that person's knowledge has substantially impaired the victim's power to appraise or control the victim's conduct, by administering or employing without the victim's knowledge intoxicants, a controlled substance as defined in chapter 19-03.1, or other means for the purpose of preventing resistance; d. The other person is in official custody or detained in a hospital, prison, or other institution and the actor has supervisory or disciplinary authority over that other person; e. The other person is a minor, fifteen years of age or older, and the actor is the other person's parent, guardian, or is otherwise responsible for general supervision of the other person's welfare; or f. The other person is a minor, fifteen years of age or older, and the actor is an adult.

plead guilty to or are found guilty of having offensive sexual contact with a person, knowing, or having reasonable cause to know, that the person finds the contact offensive, are not required to register as sex offenders.⁴⁵ The elements of sexual assault are similar to the crimes of gross sexual imposition and sexual imposition, with two primary differences.⁴⁶ Despite its name, and unlike the crimes of gross sexual imposition and sexual imposition, sexual assault does not involve the use or threat of force.⁴⁷ Sexual assault is limited to sexual contact, while sexual imposition crimes may involve either sexual acts or sexual contacts.⁴⁸ Sexual contact occurs when an offender touches another person's sexual parts, though not with the offender's own private parts.⁴⁹ In very limited circumstances, sexual contact gives rise to the more serious crime of gross sexual imposition.⁵⁰

Sexual crimes committed against children, minors, and other vulnerable individuals are also considered sex offenses in North Dakota.⁵¹ Three or more sexual acts or sexual contacts in a three-month period with a child under the age of fifteen qualify as continuous sexual abuse of a child.⁵² An offender is guilty of the sexual offense of corruption or solicitation of a minor where he or she engages in a sexual act with a minor or where the offender causes another person to engage in a sexual act with a minor.⁵³ Luring minors by computers or other electronic means, sexual abuse of wards, and incest are also sex offenses in North Dakota.⁵⁴ The crime of incest is

Id. § 12.1-20-07.

45. *Id.* § 12.1-32-15(1)(e).

46. Compare *id.* §§ 12.1-20-07(1)(b)-(f) (listing the elements of sexual assault), with *id.* §§ 12.1-20-03(1)-(2) (describing the elements of gross sexual imposition), and *id.* § 12.1-20-04 (listing the elements of sexual imposition).

47. *Id.* § 12.1-20-07.

48. *Id.* §§ 12.1-20-07(1)(b)-(f). Compare *id.* §§ 12.1-20-03(1)-(2) (describing the elements of gross sexual imposition), with *id.* § 12.1-20-04 (describing the elements of sexual imposition).

49. *Id.* § 12.1-20-02(4).

50. *Id.* §§ 12.1-20-03(2)(a)-(c). Sexual contact rises to the level of gross sexual imposition where either: (1) the victim is under the age of fifteen; (2) the perpetrator forces the victim to submit by threatening serious bodily injury or kidnapping, either to the victim or to any other person; or (3) the perpetrator knows that the victim is unaware of the sexual contact. *Id.* §§ 12.1-20-03(2)(a)-(c), 12.1-20-04.

51. *Id.* §§ 12.1-20-03.1(1) (defining continuous sexual abuse of a child), 12.1-20-05.1(1)(a)-(b) (luring of minors by computer or other electronic means), 12.1-20-06 (outlining the elements of sexual abuse of ward), 12.1-20-11 (defining incest), 12.1-27.2-02 to -06 (governing sexual performances by children); see 12.1-27.2-01(2), (4)-(5) (defining the terms "performance," "sexual conduct," and "sexual performance").

52. *Id.* § 12.1-20-03.1(1).

53. *Id.* § 12.1-20-05. A defendant is guilty of corrupting or soliciting a minor if he or she "engages in or causes another to engage in a sexual act with a minor." *Id.*

54. *Id.* §§ 12.1-20-05.1(1), 12.1-20-06, 12.1-20-11. Luring occurs where a defendant uses a computer or electronic device to communicate with someone the adult believes to be a minor. *Id.* §§ 12.1-20-05.1(1)(a)-(b). The communication, either in whole or in part, must expressly or impliedly discuss or depict "actual or simulated nudity, sexual acts, sexual contact, sadomasochistic

not limited to sexual acts but also includes marrying or co-habiting with a person the offender knows is within a degree of consanguinity.⁵⁵

Several North Dakota sex offenses deal with sexual performances by minors.⁵⁶ Sexual performances include plays, movies, photographs, dances, or other visual representations that include “actual or simulated sexual intercourse, sodomy, sexual bestiality, masturbation, sadomasochistic abuse, or lewd exhibition of the genitals.”⁵⁷ Sex offenses related to sexual performances by a minor include: use of a minor in a sexual performance, promoting or directing an obscene sexual performance by a minor, and promoting a sexual performance by a minor.⁵⁸

The difference between promoting a sexual performance by a minor and the crime of promoting or directing an obscene sexual performance by a minor is in both the type of performance and the level of felony assigned to the offense.⁵⁹ Promoting a sexual performance by a minor includes “any performance which includes sexual conduct by a minor.”⁶⁰ Such conduct could be “actual or simulated sexual intercourse, sodomy, sexual bestiality,

abuse, or other sexual performances.” *Id.* § 12.1-20-05.1(1)(a). The communication must propose that the minor engage in sexual acts, sexual contact, sexual performance, obscene sexual performance, or sexual conduct for satisfaction of the adult’s lust, passions, or desires. *Id.* § 12.1-20-05.1(1)(b). A ward is a person who is in a hospital, prison, or another place where the perpetrator has supervisory or disciplinary authority. *Id.* § 12.1-20-06. Sexual abuse of wards is committed by either engaging in a sexual act or causing another to engage in a sexual act. *Id.*

55. *Id.* § 12.1-20-11. Consanguinity is not defined within Title 14 of the North Dakota Century Code, which is entitled “Domestic Relations and Persons.” See *id.* § 14-01 to -20. Black’s Law Dictionary defines consanguinity as “[t]he relationship of persons of the same blood or origin.” BLACK’S LAW DICTIONARY 322 (8th ed. 2004). The following marriages are incestuous in North Dakota: (1) marriage of children and parents, including grandchildren and grandparents; (2) marriage of half and whole blooded nieces and uncles; (3) marriage between half and whole blooded nephews and aunts; and (4) marriages between half and whole blooded first cousins. §§ 14-03-03(1)-(5). North Dakota has defined unlawful cohabitation as living open and notoriously with a person of the opposite sex as a married couple without actually being married. § 12.1-20-10, repealed by 2007 N.D. Sess. Laws ch. 131 § 4.

56. §§ 12.1-27.2-02 to -06.

57. *Id.* §§ 12.1-27.2-01(2), (4)-(5).

58. *Id.* §§ 12.1-27.2-02 (using a minor in a sexual performance), 12.1-27.2-03 (promoting or directing an obscene sexual performance by a minor), 12.1-27.2-04 (promoting a sexual performance by a minor). A person is guilty of using a minor in a sexual performance where he or she knows that the performance is sexual and “employs, authorizes, or induces a minor to engage in sexual conduct during a performance or, if being a parent, legal guardian or custodian of a minor, that person consents to the participation by the minor in sexual conduct during a performance.” *Id.* § 12.1-27.2-02. In order to be guilty of promoting or directing an obscene sexual performance by a minor, the perpetrator must first know the character and content of the performance and must further produce, direct, or promote the obscene performance by a minor. *Id.* § 12.1-27.2-03. Promotion includes the acts of procuring, manufacturing, issuing, selling, giving, providing, lending, mailing, delivering, transferring, transmitting, publishing, distributing, circulating, presenting, disseminating, exhibiting, and advertising. *Id.* § 12.1-27.2-01(3).

59. Compare *id.* § 12.1-27.2-01(5) (describing the crime of promoting a sexual performance by a minor), with *id.* § 12.1-27.2-01(1) (describing the crime of promoting or directing an obscene sexual performance by a minor).

60. *Id.* § 12.1-27.2-01(5).

masturbation, sadomasochistic abuse, or lewd exhibition of the genitals.”⁶¹ Promoting or directing an obscene sexual performance by a minor also includes sexual conduct but the crime is limited to obscene materials or obscene performances.⁶² Promoting a sexual performance by a minor is considered a class C felony while promoting or directing an obscene sexual performance by a minor is a class B felony.⁶³

It is also a crime to possess materials depicting sexual performances by minors.⁶⁴ Illegal materials include videos, photographs, or other visual representations of sexual conduct by minors.⁶⁵ Possession of prohibited materials is considered a sexual offense.⁶⁶

Indecent exposure is also considered a sex offense in North Dakota.⁶⁷ Indecent exposure is defined as masturbating in public or in front of a minor with intent to arouse, appeal to, or gratify sexual desires.⁶⁸ Indecent exposure can also be the act of exposing “one’s penis, vulva, or anus” in a public place or to a minor anywhere.⁶⁹

“Peeping toms” are also considered sexual offenders in North Dakota.⁷⁰ The formal charge for a “peeping Tom” is surreptitious intrusion.⁷¹ To be convicted, an individual must intend to “arouse, appeal to, or gratify [his or her] lust, passions or sexual desires” by entering, looking at, or recording another person in either the victim’s home or another place where

61. *Id.* § 12.1-27.2-01(4).

62. *Id.* § 12.1-27.2-03. North Dakota uses a three-part definition for obscene material and performances. *Id.* § 12.1-27.1-01(5)(a)-(c). First, the average person must find that the material or performance “predominantly appeals to a prurient interest,” applying “contemporary North Dakota standards.” *Id.* § 12.1-27.1-01(5)(a). Prurient interest is further defined as “a voyeuristic, lascivious, degrading, shameful, or morbid interest in nudity, sex, or excretion that goes substantially beyond customary limits of candor in description or representation of those matters.” *Id.* § 12.1-27.1-01(10). The second prong of North Dakota’s definition requires a depiction or description of either normal or perverted sexual conduct in a “patently offensive manner.” *Id.* § 12.1-27.1-01(5)(b). Patently offensive material, on its face, “affront[s] the contemporary North Dakota standards of decency.” *Id.* § 12.1-27.1-01(8). Finally, the obscenity test requires a determination that a reasonable person would find the material or performance, as a whole, lacking in serious value. *Id.* § 12.1-27.1-01(5)(c). “Reasonable person” generally refers to ordinary adults, unless the material targets minors or another susceptible audience. *Id.* § 12.1-27.1-01(5).

63. *Id.* §§ 12.1-27.2-04 (promoting a sexual performance by a minor), 12.1-27.2-03 (promoting or directing an obscene sexual performance by a minor). Class C felonies are punishable by a maximum of five years in prison and a \$5,000 fine. *Id.* § 12.1-32-01(4). Class B felonies are more severe and punishable by a maximum of ten years in prison and a \$10,000 fine. *Id.* § 12.1-32-01(3).

64. *Id.* § 12.1-27.2-04.1.

65. *Id.*

66. *Id.* § 12.1-32-15(e).

67. *Id.* § 12.1-32-15(1)(e).

68. *Id.* §§ 12.1-20-12.1(1)(a)-(b).

69. *Id.* § 12.1-20-12.1(1)(b).

70. *Id.* § 12.1-32-15(1)(e).

71. *Id.* § 12.1-20-12.2.

the person has a reasonable expectation of privacy.⁷² An offender may be found guilty if he or she looks through a window of a home, or if he or she makes a video or audio recording of that home.⁷³

First offense surreptitious intrusion is a class A misdemeanor.⁷⁴ The charge is converted to a class C felony if the offender has a prior conviction for either surreptitious intrusion or indecent exposure.⁷⁵ Those required to register as sex offenders who are accused of surreptitious intrusion also face class C felony punishment.⁷⁶

The offenses described in this subsection do not constitute an exhaustive list of the crimes that may result in sex offender registration in North Dakota.⁷⁷ An individual who has pleaded guilty or has been found guilty of an offense or attempted offense equivalent to those listed above in a juvenile adjudication, another U.S. court, tribal court, or foreign court is also considered a sex offender for purposes of North Dakota's registration laws.⁷⁸ Even those who are residing in the state temporarily are required to register as sex offenders in North Dakota.⁷⁹

In addition to sexual offenses, three more categories of offenses result in the sexual offender registration requirement in North Dakota.⁸⁰ Offenders who are considered "sexually dangerous" also fall into this category.⁸¹ The following section describes the instances when juvenile offenders are subject to sex offender registration requirements.⁸²

72. *Id.* § 12.1-20-12.2(1).

73. *Id.* §§ 12.1-20-12.2(1)(a)-(b).

74. *Id.* § 12.1-20-12.2(1).

75. *Id.* § 12.1-20-12.2(2).

76. *Id.*

77. *See id.* § 12.1-32-15(1)(e) (defining the term "sexual offender" in North Dakota).

78. *Id.*

79. *Id.* § 12.1-32-15(3). This provision applies if an individual is:

- a. Is incarcerated or is on probation or parole after July 31, 1995, for a crime against a child described in section 12.1-29-02, or section 12.1-18-01 or 12.1-18-02 if the individual was not the parent of the victim, or as a sexual offender;
- b. Has pled guilty or nolo contendere to, or been found guilty of, an offense in a court of this state for which registration is mandatory under this section or an offense from another court in the United States, a tribal court, or court of another country equivalent to those offenses set forth in this section; or
- c. Has pled guilty or nolo contendere to, or has been found guilty of, a crime against a child or as a sexual offender for which registration is mandatory under this section if the conviction occurred after July 31, 1985.

Id.

80. *See infra* Part II.A.2-4 (describing juvenile offenses, crimes against children and crimes committed by a person who displays a mental abnormality or sexual predatory conduct in committing a crime).

81. *See* N.D. CENT. CODE § 25-03.3-01(8) (defining a sexually dangerous individual as an offender who commits a crime involving mental abnormality or predatory sexual conduct and who is a danger to others).

82. *See infra* Part II.A.2 (describing the juvenile offenses that, if committed, require sex offender registration)

2. *Juvenile Offenders*

Juveniles may be required to register as sex offenders when there is a plea or a conviction for any of the types of crimes which would trigger the registration requirement for an adult.⁸³ This includes actual or attempted sex offenses, offenses against a child, or any other crime where the court finds that the juvenile demonstrated a mental abnormality or sexual predatory conduct.⁸⁴ The North Dakota Century Code provides courts with some discretion in the case of a juvenile who is found delinquent.⁸⁵ Registration is not required where the court finds that the juvenile has never been convicted as a sex offender or for a crime against a child, and where the juvenile exhibited no mental abnormality or predatory conduct in committing the crime which led to the finding of delinquency.⁸⁶

This discretion also exists in some cases where an offender commits an offense against a child.⁸⁷ Crimes against children are more general crimes that can result in sex offender status.⁸⁸ These crimes are discussed in the following section.⁸⁹

3. *Offenses Against Children*

Offenders who commit crimes against children are also considered sex offenders in North Dakota.⁹⁰ Generally, children are those who fall under the age of majority.⁹¹ Particular crimes in the North Dakota Century Code have specific age provisions.⁹² Crimes against a child include assault, where the victim is under the age of twelve, aggravated assault, and terrorizing.⁹³ Stalking, kidnapping and felonious restraint are also considered

83. § 12.1-32-15(1)(e).

84. *Id.* §§ 12.1-32-15(2)(a)-(e).

85. *Id.* § 12.1-32-15(2)(c).

86. *Id.*

87. *Id.* § 12.1-32-15(2)(d). A court is required to order registration where an offender commits a crime or an attempted crime against a child, except in cases where the offense is felonious restraint, kidnapping, or facilitating prostitution and where the person is not the parent of the victim. *Id.* §§ 12.1-32-15(2)(d), 12.1-29-02, 12.1-18-01 to -02. The court may only deviate from the registration requirement where an individual has never been convicted as a sex offender, or for a crime against a child, and where the individual exhibited no mental abnormality or predatory conduct in committing the offense. *Id.* § 12.1-32-15(2)(d).

88. *Id.* § 12.1-32-15(1)(a).

89. *See infra* Part II.A.3 (examining crimes against children under North Dakota law).

90. N.D. CENT. CODE § 12.1-32-15(1)(a) (2007).

91. *Id.* Chapter 12.1-32 does not offer a definition of the term “minor” within the definition section of the statute, but a section within the Chapter states that a minor is an individual who is under the age of eighteen. *Id.* § 12.1-32-02(1)(c)(4).

92. *See id.*

93. *Id.* § 12.1-32-15(1)(a). Assault is defined as either willfully causing substantial bodily injury to another person or negligently causing substantial bodily injury by using a “firearm, destructive device, or other weapon, the use of which against a human being is likely to cause death

crimes against children.⁹⁴ Intentionally removing a child in violation of a custody agreement and abuse or neglect of a child are also included among these crimes.⁹⁵ Finally, offenses against children include all of the crimes within the homicide and prostitution chapters of the North Dakota Century Code.⁹⁶ Attempted crimes against children and similar crimes from other jurisdictions are also considered crimes against children for purposes of sex offender registration requirements.⁹⁷

In addition to crimes against children, crimes committed by juvenile offenders, and sex offenses, one final, broad category of crimes can lead to sex offender status in North Dakota.⁹⁸ This category of crimes involves any crime in which the offender demonstrates “mental abnormality or sexual predatory conduct.”⁹⁹ Those crimes are discussed in section four.¹⁰⁰

or serious bodily injury.” *Id.* § 12.1-17-01.1. Aggravated assault includes: (1) willfully causing serious bodily injury; (2) knowingly causing bodily injury or substantial bodily injury “with a dangerous weapon or other weapon, the possession of which under the circumstances indicates an intent or readiness to inflict serious bodily injury;” (3) causing bodily injury or substantial bodily injury while attempting to inflict serious bodily injury; or (4) firing a firearm or hurling a destructive device at another person. *Id.* § 12.1-17-02. Terrorizing requires the victim to fear for their own or another’s safety or requires the perpetrator to intend to cause an evacuation or to recklessly disregard the risk of causing “terror, disruption, or inconvenience.” *Id.* § 12.1-17-04.

94. *Id.* § 12.1-32-15(1)(a). Stalking qualifies as an offense against the child when: (1) the perpetrator has already been convicted of a crime such as assault in another state and is now stalking the victim in North Dakota; (2) the perpetrator violates a court order protecting the victim; or, (3) the perpetrator had previously been convicted of stalking. *Id.* §§ 12.1-32-15(1)(a), 12.1-17-07.1(6)(a)(1)-(3). Kidnapping involves abducting or restraining another for ransom or reward. *Id.* § 12.1-18-01(1)(a). Kidnapping also includes using another as a shield or hostage, for involuntary servitude, for terrorizing purposes, to commit or attempt to commit a felony, or to interfere with a “governmental or political function.” *Id.* § 12.1-18-01(1)(b)-(f). Felonious restraint involves knowingly abducting another and restraining that person under circumstances amounting to terrorizing or exposing the person to the risk of serious bodily injury. *Id.* §§ 12.1-18-02(1)-(2). Felonious restraint may also involve restraint with the intent to hold a person for involuntary servitude. *Id.* § 12.1-18-02(3).

95. *Id.* §§ 12.1-18-05, 14-09-22. Sex offender registration is only required for abuse or neglect of a child where an adult family member or household member, guardian or custodian inflicts or allows another to inflict bodily injury, substantial bodily injury, serious bodily injury, or mental injury on a child. *Id.* §§ 12.1-32-15(1)(a), 14-09-22(1)(a). Paid daycare providers who commit the crime of abuse or neglect are also required to register as sex offenders. *Id.* §§ 12.1-32-15(1)(a), 14-09-22(2).

96. *Id.* §§ 12.1-32-15(1)(a), 12.1-16, 12.1-29.

97. *Id.* § 12.1-32-15(1)(a).

98. *Id.* § 12.1-32-15(2)(e).

99. *Id.*

100. *See infra* Part II.A.4 (stating that an offender is required to register as a sex offender where there is a finding that the individual demonstrated mental abnormality or sexual predatory conduct while committing or attempting to commit an offense).

4. *Crimes Involving Mental Abnormality or Sexual Predatory Conduct*

North Dakota courts are required to order registration where there is a finding that the individual demonstrated mental abnormality or sexual predatory conduct while committing or attempting to commit an offense.¹⁰¹ Offenders with mental abnormalities have either congenital or acquired conditions that predispose them to committing criminal sexual acts and therefore make them dangerous to others.¹⁰² Offenders are considered predatory when they establish a relationship with an individual primarily to turn the individual into a victim.¹⁰³ Although they may have overlapping characteristics, sex offenders should not be confused with those adjudged “sexually dangerous individuals” under North Dakota law.¹⁰⁴

5. *Sexually Dangerous Individuals*

The civil commitment of sexually dangerous individuals is beyond the scope of this article.¹⁰⁵ However, this section distinguishes the discrete group, sexually dangerous individuals, from sexual offenders in general.¹⁰⁶ A sexually dangerous individual not only commits a crime which demonstrates mental abnormality or predatory sexual conduct, but has also been adjudged as constituting a danger to the physical safety or health of others in a civil commitment proceeding under North Dakota law.¹⁰⁷

A state’s attorney may start the civil commitment process by filing a petition with the court, or the Department of Corrections and Rehabilitation may refer an incarcerated offender to the state’s attorney.¹⁰⁸ The next step is a preliminary hearing by the court to determine if there is probable cause to believe that the individual is a sexually dangerous individual.¹⁰⁹ Both the petition and the probable cause hearing are confidential.¹¹⁰ If probable cause exists, the offender is referred to a treatment facility for a determination of whether he or she is likely to engage in further sexually predatory

101. N.D. CENT. CODE § 12.1-32-15(2)(e) (2007).

102. *Id.* § 12.1-32-15(1)(c).

103. *Id.* § 12.1-32-15(1)(d); *see also id.* § 25-03.3-01(9) (defining sexually predatory conduct).

104. *Id.* § 25-03.3-01(8).

105. *See supra* text accompanying notes 12-16 (outlining the scope of this article).

106. *Compare* § 25-03.3-01(8) (providing the definition of a sexually dangerous individual), *with id.* § 12.1-32-15(1)(e) (listing those offenses that lead to the label of sex offender).

107. *Id.* §§ 25-03.3-01(8), 25.03.3-13.

108. *Id.* §§ 25-03.3-03(1), 25-03.3-03.1(1).

109. *Id.* § 25-03.3-11.

110. *Id.* § 25-03.3-03(2).

acts.¹¹¹ The determination by a treatment facility is used in a civil commitment proceeding before the court, during which the state has the burden of proving that the offender is a sexually dangerous individual by clear and convincing evidence.¹¹² If the state meets its burden, the individual is placed in a treatment facility or hospital that has the capacity to provide treatment for sexually dangerous individuals.¹¹³ Sexually dangerous individuals remain in custody indefinitely, until a court finds the offender is no longer a danger to the community and issues an order for discharge.¹¹⁴

The civil commitment process alleviates the necessity of registration as long as the court continues to find that the individual is a danger to the community.¹¹⁵ For sexual offenders, juvenile offenders, offenders against children, and those who demonstrate “mental abnormality or sexual predatory conduct” in committing a crime, registration is required following conviction or a guilty plea to any of the crimes in the four broad categories of offenses previously discussed.¹¹⁶ The following section shifts the emphasis from defining who is a sexual offender under North Dakota law to discussing what is required once an offender acquires that label.¹¹⁷

B. THE POWER OF NINE: NORTH DAKOTA’S CURRENT SYSTEM OF ASSESSING SEX OFFENDER RISK LEVELS

This section discusses the 2001 statute that led to the creation of North Dakota’s current procedures for assessing sex offender risk levels.¹¹⁸ The primary responsibility for assigning sex offender risk levels in North Dakota falls on a committee appointed by the Attorney General.¹¹⁹ This section provides a background on this committee and discusses the procedures used by the committee to assign sex offender risk levels.¹²⁰

111. *Id.* § 25-03.3-11.

112. *Id.* § 25-03.3-13.

113. *Id.*; *see also id.* § 25-03.3-01(12) (defining “treatment facility”).

114. *Id.* § 25-03.3-17(1). A sexually dangerous individual must undergo an examination of his or her mental condition at least once a year. *Id.* § 25-03.3-17(2). A report of the yearly mental examination is forwarded to the court that ordered commitment of the individual. *Id.*

115. *Id.* § 25-03.3-13.

116. *Id.* § 12.1-32-15(2).

117. *See infra* Part II.B (describing North Dakota’s Sex Offender Risk Assessment Committee and the process the committee uses to assign sex offender risk levels).

118. 2001 N.D. Sess. Laws ch. 140 § 1(12).

119. § 12.1-32-15(12); North Dakota Office of the Attorney General Wayne Stenehjem, <http://www.ag.state.nd.us/BCI/OR/SORAC.htm> (last visited September 13, 2009) [hereinafter Attorney General Web Site].

120. *See infra* text accompanying notes 126-71 (describing the creation of, the make-up, and the duties of SORAC).

In 2001, the North Dakota Legislature enacted a new provision in the state's criminal code.¹²¹ The subsection charges the attorney general, with assistance from the Department of Corrections and Rehabilitation and the juvenile courts, with developing "guidelines for the risk assessment of sexual offenders who are required to register, with a low-risk, moderate-risk, or high-risk level."¹²² The statute divides the responsibilities of evaluating sex offenders and assigning risk levels among the Department of Corrections and Rehabilitation, the attorney general, and the juvenile courts.¹²³ The Department of Corrections and Rehabilitation assesses and assigns risk levels to those sexual offenders incarcerated under the department's control or those sexual offenders who are on supervised release.¹²⁴ The attorney general assesses and assigns risk levels to those sexual offenders who are not incarcerated or on supervised release.¹²⁵ Juvenile courts, or other agencies with legal custody over juveniles, assess and assign a risk level to juveniles.¹²⁶

As required by the 2001 statute, North Dakota Attorney General, Wayne Stenehjem, formed the state's Sex Offender Risk Assessment Committee (SORAC) and developed the Risk Assessment and Community Notification Guidelines (Guidelines).¹²⁷ The Attorney General appoints nine individuals to SORAC.¹²⁸ The SORAC began assessing sex offenders in November of 2001.¹²⁹ The SORAC currently consists of representatives of the Attorney General's office, the Department of Corrections and Rehabilitation, the Department of Corrections and Rehabilitation Field Services, a victim advocate, a mental health professional, two members of law enforcement, and a North Dakota citizen.¹³⁰

121. See 2001 N.D. Sess. Laws ch. 140 § 1(12).

122. N.D. CENT. CODE § 12.1-32-15(12) (2007).

123. *Id.* §§ 12.1-32-15(12)(a)-(c).

124. *Id.* § 12.1-32-15(12)(a).

125. *Id.* § 12.1-32-15(12)(b).

126. *Id.* § 12.1-32-15(12)(c).

127. Attorney General Web Site, *supra* note 119.

128. RISK ASSESSMENT AND COMMUNITY NOTIFICATION GUIDELINES 5 (2005), available at <http://www.ag.state.nd.us/BCI/OR/RiskAssessmentGuidelines.pdf> [hereinafter GUIDELINES]. This group is referred to as both the Sex Offender Risk Assessment Committee (SORAC) and the Risk Level Committee in materials provided on the North Dakota Attorney General website. Compare Attorney General Web Site, *supra* note 119 (describing the background of North Dakota's sex offender risk assessment laws and regulations), with GUIDELINES, *supra* note 128, at 5 (enumerating the procedures used to determine sex offender risk levels in North Dakota). For simplicity, this article will refer to the committee as SORAC.

129. Attorney General Web Site, *supra* note 119.

130. GUIDELINES, *supra* note 128, at 5.

The SORAC meets monthly or more often if necessary.¹³¹ During meetings, the members review records and risk assessment scores, assign risk levels, and hear risk level appeals and requests for reconsideration from sex offenders.¹³² Attendance of five members creates a quorum and a majority vote of the attending members is necessary to take action.¹³³ The SORAC uses the following information to facilitate its tasks: drug and alcohol treatment records; pre-sentence investigations or sentencing reports; criminal records; police reports; psychological evaluations; detention facility discipline reports; and other records.¹³⁴

The starting point for assigning a sex offender risk level is the Minnesota Sex Offender Screening Tool Revised (MnSOST-R).¹³⁵ This actuarial tool has been validated through a predictive validity study.¹³⁶ A predictive validity study examines the relationship between MnSOST-R scores and future recidivism.¹³⁷

MnSOST-R is used to determine a score for the offender by evaluating sixteen risk factors, including age of the offender, criminal history, sex offense history, and characteristics of the victim.¹³⁸ Each risk factor is weighted.¹³⁹ For example, if an offender has only one sex-related conviction, he or she receives a zero score on the risk factor.¹⁴⁰ If an offender has two or more convictions, he or she receives a score of plus two.¹⁴¹ The total number of points for all sixteen risk factors is added up to determine a final score.¹⁴² In North Dakota, an offender who receives an MnSOST-R score of three is recommended to be considered low risk.¹⁴³ A MnSOST-R score between four and seven results in the offender being assigned a moderate

131. *Id.*

132. *Id.*

133. *Id.*

134. *Id.* The Guidelines do not define “other records” for purposes of risk assessment. *See id.*

135. *Id.* at 3.

136. *See generally* Philip H. Witt & Natalie Barone, *Assessing Sex Offender Risk: New Jersey's Methods*, 16 FED. SENT'G REP. 170, 173-74 (2004) (describing a predictive validity study). MnSOST-R has only been statistically validated for assessing risk for adult male offenders in prison and probation populations. GUIDELINES, *supra* note 128, at 3. The Guidelines still provide for the use of MnSOST-R in creating scores for females, intrafamilial, and probationary offenders. *Id.*

137. Witt & Barone, *supra* note 136, at 173.

138. George G. Woodworth & Joseph B. Kadane, *Expert Testimony Supporting Post-Sentence Civil Incarceration of Violent Sexual Offenders*, 3 LAW, PROB. & RISK 221, 228-29 (2004).

139. *Id.*

140. *Id.* at 229.

141. *Id.*

142. *Id.* at 228.

143. GUIDELINES, *supra* note 128, at 6.

risk level.¹⁴⁴ If an offender scores eight or more, he or she is considered high-risk.¹⁴⁵ The SORAC may have to adjust scores for those offenders who were never incarcerated following conviction, because the last four questions of the MnSOST-R relate only to incarcerated offenders.¹⁴⁶

The initial scores generated by the MnSOST-R tool may be adjusted based on a series of factors considered by SORAC.¹⁴⁷ The first factor considered is the likely seriousness of any future offense should the offender recidivate.¹⁴⁸ This factor considers the likely degree of force or harm, degree of likely physical contact, and age of the likely victim.¹⁴⁹ The second factor which may affect the initial score is the offender's history of offenses.¹⁵⁰ The SORAC also takes into account the characteristics of the offender, including prior response to treatment and any history of substance abuse.¹⁵¹ Another consideration is the availability of community supports such as community treatment.¹⁵² Here, SORAC determines the likelihood that the offender will participate in such treatment.¹⁵³ Community support is also an evaluation of the availability of stable and supervised living arrangements and the availability of familial and social relationships.¹⁵⁴ Finally, community support includes the offender's education level and employment stability.¹⁵⁵ The final two factors used in making a risk level decision are whether the offender has indicated he or she will re-offend and whether there is a physical condition that minimizes the risk of recidivism.¹⁵⁶

The offender does not have a right to be present when SORAC determines the offender's risk level.¹⁵⁷ Instead, the offender is notified of the

144. *Id.*

145. *Id.*

146. *Id.*

147. *Id.*

148. *Id.*

149. *Id.*

150. *Id.* at 7. When considering the offender's prior history of offenses, the SORAC considers the relationship of the offender and prior victims, the number of prior offenses or victims, the duration and frequency of the offender's prior offenses, the period of time elapsed since the offender's last offense, and the prior history of antisocial acts. *Id.*

151. *Id.*

152. *Id.*

153. *Id.*

154. *Id.*

155. *Id.*

156. *Id.*

157. *Id.* at 8. SORAC sessions are closed executive sessions. SORAC December 2008 Meeting Notice/Agenda, <http://www.ag.state.nd.us/BCI/OR/SORCAAgenda/2008/12-08.pdf> [hereinafter SORAC Meeting Notice]. The SORAC meeting agendas state that executive sessions are held because some or all of the information discussed during SORAC meetings is classified as confidential under state or federal law. *Id.* Executive sessions are recorded on audiotape or video-

decision in writing.¹⁵⁸ The notice includes the basis for the assigned risk level, community notification requirements, and how to request review of the decision.¹⁵⁹

Although an offender can request an immediate review of his or her risk level assessment, the initial assessment will be changed only under limited circumstances.¹⁶⁰ Testimony given by Attorney General Wayne Stenehjem during a 2001 hearing on the Senate bill which provided for the development of the Guidelines gives insight into these limited circumstances.¹⁶¹ The Attorney General stated, “[t]he risk level may be changed in the event there is a change in circumstances – like completion of sex offender treatment.”¹⁶²

The procedures established by the Attorney General do not provide for judicial or administrative review of a sex offender risk assessment determination.¹⁶³ Instead, an offender has fourteen days to request that SORAC review the risk level determination.¹⁶⁴ The offender has the right to present written information in support of the review and may appear via telephone or in person.¹⁶⁵ However, the Guidelines point out that incarcerated and confined offenders may not have the option of appearing in person.¹⁶⁶ The Guidelines do not provide for the appointment of counsel.¹⁶⁷

The offender’s request for review is considered by SORAC, the same committee which made the initial determination.¹⁶⁸ An offender, or his or her counsel, has ten minutes to present arguments at the review meeting.¹⁶⁹ Where the offender or his counsel is not present, arguments presented in writing or via telephone are considered.¹⁷⁰ Risk levels are changed only if a

tape and the recording must be retained for at least six months. N.D. CENT. CODE §§ 44-04-19.2(2)(c), 44-04-19.2(5) (2007). The Guidelines do not provide for the offender to receive the recording prior to requesting review of a risk level assignment. GUIDELINES, *supra* note 128, at 8-9.

158. GUIDELINES, *supra* note 128, at 8.

159. *Id.*

160. *Id.*

161. *Hearing on S.B. 2446, supra* note 10 (testimony of Wayne Stenehjem, Attorney General).

162. *Id.*

163. *See* GUIDELINES, *supra* note 128, at 8. The Attorney General is not bound by the North Dakota Administrative Agencies Practice Act when assessing, reviewing, or disclosing sex offender risk levels. N.D. CENT. CODE § 28-32-01(2)(v) (2007).

164. GUIDELINES, *supra* note 128, at 8.

165. *Id.*

166. *Id.*

167. *Id.*

168. *Id.*

169. *Id.*

170. *Id.*

majority of SORAC finds the change “warranted.”¹⁷¹ If the risk level is not reduced, the offender must wait two years before requesting SORAC reconsider its earlier determination.¹⁷²

Sex offender risk assessment review procedures may be quite limited, but the consequences of sex offender registration are not.¹⁷³ Registration requires that the offender provide information and DNA to law enforcement agencies, which then disseminate the information to the community.¹⁷⁴ The following section elaborates on North Dakota’s registration requirements.¹⁷⁵

C. THE CONSEQUENCES OF NORTH DAKOTA’S REGISTRATION REQUIREMENTS

Once SORAC has applied the MnSOST-R, considered other relevant factors, assigned a risk level, and decided any request for review of risk level status by an offender, North Dakota’s registration requirements become effective.¹⁷⁶ This section outlines the requirements and the time periods required for registration.¹⁷⁷ It also discusses the type of information that is provided through the sex offender community notification.¹⁷⁸

When an individual is required to register as a sex offender, he or she must provide law enforcement with information about themselves, including his or her place of residence, work location, and school location, if applicable.¹⁷⁹ Sex offenders must also submit to fingerprint testing and must provide law enforcement with samples of blood and bodily fluids.¹⁸⁰ The samples are included in a centralized DNA database.¹⁸¹

Sex offenders are required to register their residences with the chief of police or sheriff’s department within three days of moving to a new county.¹⁸² Even if a sex offender does not move and there is no change to his or her personal information, the offender is required to periodically confirm

171. *Id.*

172. *Id.* at 9.

173. Compare *supra* notes 165-71 and accompanying text (outlining the procedures available for a sex offender who wishes to challenge his or her risk level assessment), with *infra* Part II.C (outlining North Dakota’s sex offender registration requirements).

174. N.D. CENT. CODE § 12.1-32-15(7) (2007).

175. See *infra* Part II.C (outlining the requirements and time periods for registration).

176. See GUIDELINES, *supra* note 128, at 8 (noting the absence of judicial or administrative review).

177. See *infra* text accompanying notes 178-88 (describing the time periods of registration required for low, moderate, and high risk sex offenders).

178. See *infra* text accompanying notes 178-84 (describing the information that sex offenders must provide through the registration process).

179. N.D. CENT. CODE § 12.1-32-15(7) (2007).

180. *Id.*

181. *Id.*

182. *Id.* § 12.1-32-15(2).

the accuracy of the information.¹⁸³ Making a change requires several steps by the offender.¹⁸⁴ A sex offender must give ten days notice to law enforcement before moving, changing schools, or changing his or her name.¹⁸⁵

The decision made by SORAC affects the length of time an offender is required to register and to provide detailed residential and personal information to law enforcement.¹⁸⁶ Those who are assigned high risk levels are bound by lifetime registration requirements.¹⁸⁷ Those assigned moderate risk levels must register for a period of twenty-five years.¹⁸⁸ A fifteen-year registration requirement is imposed on all other sex offenders.¹⁸⁹

The SORAC decision also affects the method and type of information that law enforcement distributes regarding the offender.¹⁹⁰ The North Dakota Century Code requires that registration information on moderate or high-risk sex offenders be disclosed to the public where SORAC, or another agency responsible for risk assessment, finds that the disclosure is necessary for public protection.¹⁹¹ In addition to the mandatory disclosures in the North Dakota Century Code, the Guidelines provide suggestions about who should receive sex offender registration information and the method in which notification should be given.¹⁹²

The Guidelines suggest that information regarding low-risk offenders be distributed to the victims and witnesses of the offense, other law enforcement agencies, and to the public upon request.¹⁹³ Information about moderate risk sex offenders should be distributed to schools, daycares, shopping malls and other community groups.¹⁹⁴ These organizations would also receive information about high-risk sex offenders.¹⁹⁵

There is a difference in the community notification methods suggested for moderate-risk sex offenders and those methods suggested for community notification about high-risk offenders.¹⁹⁶ The Guidelines suggest that information about high-risk offenders be distributed via the internet, post-

183. *Id.* § 12.1-32-15(7).

184. *Id.*

185. *Id.*

186. *See id.* §§ 12.1-32-15(8)(a)-(c) (providing the time periods required for sex offender registration).

187. *Id.* § 12.1-32-15(8)(c)(3).

188. *Id.* § 12.1-32-15(8)(b).

189. *Id.* § 12.1-32-15(8)(a).

190. GUIDELINES, *supra* note 128, at 9.

191. N.D. CENT. CODE § 12.1-32-15(13) (2007).

192. GUIDELINES, *supra* note 128, at 10.

193. *Id.*

194. *Id.*

195. *Id.*

196. *Id.*

ers, community meetings, and through media outlets.¹⁹⁷ Information about moderate-risk sex offenders should be distributed via flyers, personal contact, telephone contact, and on demand to citizens.¹⁹⁸

The Guidelines and North Dakota law regarding registration and community notification are, in some ways, more detailed than those parts of the Guidelines and law which deal with the determination of a sex offender's risk level.¹⁹⁹ With the background of those risk level procedures, this article discusses the impact that a change in sex offender risk assessment review procedures would have on the state.²⁰⁰ Part III not only discusses the impact that a change would have on the state but also provides information on sex offender risk assessment procedures in other jurisdictions which could be implemented in North Dakota.²⁰¹

III. IN SEARCH OF A MORE THOROUGH APPROACH TO SEX OFFENDER RISK ASSESSMENT REVIEW

California law serves as the model for the current North Dakota registration statute.²⁰² Therefore, it would not be unusual for North Dakota to follow other states in amending and evolving the law regarding sex offender risk assessment.²⁰³ The following section explores the impact a legislative change would have on North Dakota by exploring the reasons that support changing the process of sex offender risk assessment review.²⁰⁴ The subsequent section examines four different statutory schemes in the states of New York, New Jersey, Massachusetts and Minnesota.²⁰⁵

197. *Id.*

198. *Id.*

199. *Compare* N.D. CENT. CODE § 12.1-32-15(7)-(11) (2007) (outlining the requirements and the time periods required for sex offender registration), *and id.* § 12.1-32-15(13) (stating that public notification is required for moderate-risk and high-risk sex offenders), *and* GUIDELINES, *supra* note 128, at 9-10 (suggesting who and how law enforcement should notify about sex offenders), *with* GUIDELINES, *supra* note 128, at 3-8 (outlining the procedures for determining sex offender risk levels).

200. *See infra* Part III.A (analyzing how a change in North Dakota's sex offender risk assessment system would affect the burdens and consequences of sex offender registration).

201. *See infra* Part III.B (outlining sex offender risk assessment procedures in New York, New Jersey, Massachusetts, and Minnesota).

202. *See* State v. Rubey, 2000 ND 119, ¶ 15, 611 N.W.2d 888, 891 (stating that N.D. CENT. CODE § 12.1-32-15, North Dakota's sex offender registration statute, was modeled after California law).

203. *See id.*

204. *See infra* Part III.A (exploring how sex offender risk assessments burden both the offender and the community).

205. *See infra* Part III.B (examining the judicial and administrative review of sex offender risk assessments in other jurisdictions).

A. WHY NOT LEAVE WELL ENOUGH ALONE? ANALYZING THE
BROADER CONSEQUENCES OF SEX OFFENDER REGISTRATION

Sex offender risk assessments place an obvious burden on the offender.²⁰⁶ The consequences of risk assessments extend beyond the offender and affect the community.²⁰⁷ This section analyzes those burdens and consequences in the context of the potential impact a legislative change would have on North Dakota sex offenders and its citizenry.²⁰⁸

The requirement of registration and the dissemination of information to the community through the process of notification place a “tangible burden” on sex offenders.²⁰⁹ This burden is one which could exist for the rest of an offender’s life.²¹⁰ There are emotional, financial, and physical aspects of the burden.²¹¹ Registration and notification may result in the offender feeling disgrace, dishonor, and exclusion.²¹² Information about the individual’s prior offenses may cause loss of employment and loss of opportunities for housing, employment, or education.²¹³ At worst, the information may result in physical violence against the offender.²¹⁴ An offender may also turn to physical violence or further deviance out of frustration with the registration

206. See *infra* notes 208-15 and accompanying text (detailing the emotional, financial, and physical burdens caused by sex offender registration).

207. See *infra* notes 230-39 and accompanying text (describing the threats, violence, and ostracism faced by family and friends of sex offenders).

208. See *infra* Part III.A (analyzing the broader consequences of sex offender registration).

209. See *Doe v. Pataki*, 3 F. Supp. 2d 456, 468 (S.D.N.Y. 1998) (analyzing whether plaintiffs had a due process claim in response to the argument that the New York Sex Offender Registration Act places a “tangible burden” on sex offenders).

210. See, e.g., N.Y. CORRECT. LAW § 168-h(2) (McKinney 2008) (requiring level two and level three offenders to register annually for life); N.D. CENT. CODE § 12.1-32-15(8)(c) (2007) (stating that high-risk sex offenders register for life).

211. See *Pataki*, 3 F. Supp. 2d at 467-68 (stating that information provided to the community through the New York Sex Offender Registration Act carries with it “shame, humiliation, ostracism, loss of employment and decreased opportunities for employment, perhaps even physical violence”).

212. See Bruce J. Winick, *Sex Offender Law in the 1990s: A Therapeutic Jurisprudence Analysis*, 4 PSYCHOL. PUB. POL’Y & L. 505, 556 (1998) (concluding that an offender may be characterized and ostracized).

213. See *Pataki*, 3 F. Supp. 2d at 468-69 (outlining the burdens placed on an offender by the New York Sex Offender Registration Act); Patricia A. Powers, *Making a Spectacle of Panopticism: A Theoretical Evaluation of Sex Offender Registration and Notification*, 38 NEW ENG. L. REV. 1049, 1078 (2004) (reporting that a convicted rapist was evicted shortly after police sent fliers to his apartment complex); Winick, *supra* note 212, at 556 (opining that being labeled a sex offender may prevent a person from starting a new life by denying him or her “employment, social, and educational opportunities”).

214. See *Pataki*, 3 F. Supp. 2d at 468-69 (stating that sex offender registration information may lead to physical violence); see, e.g., Powers, *supra* note 213, at 1077 (describing two New Jersey incidents, one in which two men broke into a home and beat a man whom they wrongly thought was a sex offender and another in which shots were fired into the home of a sex offender who was recently the subject of a community notification by police).

requirement.²¹⁵ North Dakota's risk assessment process should seek to ensure that the burdens and risks of registration are sustained by only the most deserving offenders.²¹⁶

Changing North Dakota law to allow for independent review of sex offender risk assessments would eliminate some of the risks inherent in the current system.²¹⁷ The Risk Assessment and Community Notification Guidelines promulgated by the North Dakota Attorney General specifically state that "[r]isk assessment is not an exact science."²¹⁸ The inexactness can be attributed to the ability of SORAC members to consider factors, outside of MnSOST-R, in order to estimate future conduct.²¹⁹

In *Doe v. Pataki*,²²⁰ the Southern District of New York reasoned that the goals of sex offender registration are still satisfied where an offender's dangerousness is underestimated.²²¹ The court reasoned that where an offender's dangerousness is underestimated, law enforcement still has the necessary registration information to help them monitor an offender with an underestimated risk level.²²² On the other hand, the court stated that overestimating an offender's risk level "will lead to immediate and irreparable harm to the offender: his conviction becomes public, he is officially recorded as being a danger to the community, and the veil of relative anonymity behind which he might have existed disappears."²²³

Review of sex offender risk assessments is not only necessary to eliminate and reduce errors in calculation, but is also necessary to ensure that the underlying information and those preparing the information are credible.²²⁴ For example, uncharged conduct can be used to assess risk levels; often, this information is unreliable.²²⁵ The case of former North Dakota psy-

215. See Winick, *supra* note 212, at 556.

216. See *Pataki*, 3 F. Supp. 2d at 470 (opining that the consequences of notification under New York's sex offender registry law "are sufficiently serious to warrant more than mere summary process").

217. See, e.g., *id.* at 469 (stating that the nature of a classification proceeding produces a high risk of error); Winick, *supra* note 212, at 566-67 (opining that hearings should be used in sex offender proceedings, because they will increase the accuracy of the process).

218. GUIDELINES, *supra* note 128, at 1.

219. *Id.* at 6-7.

220. 3 F. Supp. 2d 456 (S.D.N.Y. 1998).

221. *Pataki*, 3 F. Supp. 2d at 469-70.

222. *Id.*

223. *Id.* at 470 (quoting *E.B. v. Verniero*, 119 F.3d 1077, 1110 (3d Cir. 1997)).

224. See *infra* note 224 (pointing out a New York case in which a sex offender's risk level was reduced after the discovery that information from the pre-sentence investigation was speculative).

225. See, e.g., *People v. Jimenez*, 679 N.Y.S.2d 510, 516-17 (1998) (reducing a sex offender's risk level to low-risk after finding that information from a pre-sentence investigation, which indicated there were two victims of the offender's crime, was speculation); Wayne A. Logan, *A Study in "Actuarial Justice": Sex Offender Classification Practice and Procedure*, 3

chologist Joseph Belanger provides further reasoning for allowing independent review of sex offender risk assessment determinations.²²⁶ Belanger's defense attorney described him as the "go-to guy" in the state of North Dakota when it came to evaluating and testifying about the dangers posed by convicted sex offenders.²²⁷ Belanger worked at the North Dakota State Hospital for more than twenty years.²²⁸ A federal grand jury indicted Belanger on charges of possession of child pornography in the summer of 2008.²²⁹ As a consequence of Belanger's criminal charges, his opinions on the likelihood that particular sex offenders will recidivate are now in question.²³⁰

Sex offender risk assessments affect not only the offender, but also the offender's family and friends.²³¹ Friends and family are often affected by the threats, violence, ostracism, and stigmatization, which affect offenders.²³² For example, a woman who allowed her cousin, a sex offender, to live with her, had her tires slashed and molotov cocktails thrown into her yard.²³³

North Dakotans in general are also affected by the process of sex offender risk assessment.²³⁴ When a resident learns that a sex offender has moved into their neighborhood, the knowledge can cause anxiety, fear or even hysteria.²³⁵ In reaction people, especially the elderly, may be afraid to leave their homes, and children may not be allowed to go outside.²³⁶ This could lead to a community breakdown.²³⁷ Over-saturation of information also carries risk.²³⁸ The public may either become desensitized to sex of-

BUFF. CRIM. L. REV. 593, 632 (2000) [hereinafter *Logan Study*] (stating that New Jersey appellate courts have reduced risk classification levels reached by lower courts).

226. FOXNews.com, *North Dakota Sex Offender Expert Pleads Not Guilty to Child Porn Charges*, available at <http://www.foxnews.com/story/0,2933,388042,00.html> (last visited August 15, 2009) [hereinafter *Child Porn Charges*].

227. *Id.*

228. *Id.* Belanger resigned from the state hospital and admitted that he had an addiction to child pornography which he blamed on childhood sexual abuse. *Id.*

229. *Id.*; Brittany Lawonn, *Belanger Pleads Guilty in Porn Case*, FARGO FORUM, Oct. 4, 2008, at A6. Belanger pled guilty to two counts of receiving materials involving the sexual exploitation of minors in the fall of 2008. *Id.*

230. *Child Porn Charges*, supra note 226.

231. Powers, supra note 213, at 1077.

232. *Id.* at 1077.

233. *Id.* at 1077 n.206.

234. See Winick, supra note 211, at 554 (describing the negative psychological affects sex offender registration laws can have on the community).

235. *Id.*

236. *Id.*

237. *Id.*

238. See Powers, supra note 212, at 1066 (discussing the shortcomings of the registration and notification system and arguing that sex offender registration can lead to presumptive knowledge and a false sense of security).

fenders living in their midst or may develop a false sense of security by simply being aware of the location of sex offenders.²³⁹ Because sex offender risk assessments lead to serious consequences for the offender, citizens, and communities, risk level determinations deserve careful consideration which necessarily includes careful review to ensure that sex offender registration carries out the legislative intent of protecting the community.²⁴⁰

Sex offender notification also has a broader economic impact which could be mitigated by careful review of sex offender risk assessments.²⁴¹ Increasingly, internet tools and government registries allow homebuyers to learn whether sex offenders live in a particular area.²⁴² The increased availability of information on sex offenders may have a negative impact on homeowners in the form of reduced property values if an offender resides in their neighborhood.²⁴³ Some governmental entities have already reduced home valuations.²⁴⁴ For example, the Board of Equalization (Board) lowered three Vancouver, Washington, homeowners' property taxes by ten percent because they lived near sex offenders.²⁴⁵ The Board took action despite a lack of market evidence to show that the homes had lost value, concluding that in assessing the value of the citizens' homes, the Board's assessor did not account for proximity to a home where four sex offenders lived.²⁴⁶

The constitutionality of North Dakota's current process of sex offender risk assessment is questionable.²⁴⁷ Under the current system, sex offenders cannot challenge the risk level assigned to them in an independent review process, and they cannot raise constitutional claims about the process of assessing risk levels.²⁴⁸ The absence of judicial review of sex offender risk

239. *Id.*

240. *State v. Rubey*, 2000 ND 119, ¶ 17, 611 N.W.2d 888, 892 (quoting *Hearing on H.B. 1152 Before the H. Judiciary Comm.*, 54th N.D. Legis. Sess. (Jan. 9, 1995)); see *supra* notes 209-14, 230-38 and accompanying text (detailing the burdens sex offender registration places on offenders, citizens, and communities).

241. See generally Hartzell-Baird, *supra* note 4, at 369-70 (discussing the impact sex offender registries have on property values).

242. *Id.* at 366; see, e.g., State of North Dakota, Office of Attorney General, *Sex Offender Website*, <http://www.sexoffender.ng.gov> (last visited August 15, 2009).

243. *Id.* at 369-70.

244. *Id.* at 370.

245. *Id.*

246. *Id.*; *contra id.* at 371 n.107 and accompanying text (pointing out that a King County, Washington, resident was unsuccessful in challenging his property tax assessment by arguing that his home value was lower because a sex offender lived across the street).

247. See *Doe v. Pataki*, 3 F. Supp. 2d 456, 479 (S.D.N.Y. 1998) (holding that sex offenders are entitled to minimum procedures prior to being assigned a risk level or being subject to community notification); *Doe v. Poritz*, 662 A.2d 367, 421-23 (N.J. 1995) (finding the failure to provide for judicial review of risk level determination violated due process).

248. GUIDELINES, *supra* note 128, at 8-9.

assessments “effectively forecloses” the ability of an offender to raise constitutional challenges, which “offends the very notion of fundamental fairness embodied in the concept of procedural due process.”²⁴⁹ Changing North Dakota’s sex offender risk assessment review procedures could help prevent successful federal constitutional challenges to the sex offender registration law and Guidelines.²⁵⁰

The following section analyzes adjudicated cases involving due process challenges to sex offender risk assessment and community notification laws in other states.²⁵¹ The section begins with a broad overview of the differing methods of sex offender classification currently used throughout the United States.²⁵² The section then provides a closer analysis of the historical background and development of sex offender risk assessment procedures in four particular states.²⁵³

B. SURVEYING SEX OFFENDER RISK ASSESSMENT PROCEDURES IN OTHER STATES

In the United States, sex offenders are classified into risk level categories either automatically, without individual assessment, or by the discretion of a reviewing body.²⁵⁴ Nineteen states use the automatic or compulsory method requiring all offenders, convicted of certain child or sex offenses, to register and provide information for community notification.²⁵⁵ The remaining states and the District of Columbia employ the discretionary method.²⁵⁶ Those states employing the discretionary method vest the authority to classify sex offenders either with the courts, law enforcement, non-law-enforcement groups, or a hybrid of these groups.²⁵⁷ In jurisdictions where sex offender risk assessment is discretionary, the right to appeal and the

249. See *Pataki*, 3 F. Supp. 2d. at 477 (stating that New York law’s failure to provide a mechanism with which to raise constitutional claims and the failure to provide procedures to ensure due process caused the plaintiff irreparable harm).

250. See *E.B. v. Verniero*, 119 F.3d 1077, 1107-11 (3d Cir. 1997); *Pataki*, 3 F. Supp. 2d. at 470-71 (quoting *Doe v. Poritz*, 662 A.2d 367, 382-83 (N.J. 1995)).

251. See *infra* text accompanying notes 281-84 and 342-62 (describing judicial decisions in New York and New Jersey).

252. See *infra* Part III.B (describing the process of assigning risk level categories either automatically when an offender is convicted or through an individual review process).

253. See *infra* Part III.B.1-4 (analyzing sex offender risk assessment procedures in New York, New Jersey, Massachusetts, and Minnesota).

254. Logan *Study*, *supra* note 225, at 602-03.

255. *Id.* at 603. The following states employ the compulsory method of sex offender risk classification: Alabama, Alaska, California, Connecticut, Delaware, Illinois, Indiana, Kansas, Michigan, Mississippi, Missouri, New Hampshire, New Mexico, Oklahoma, South Carolina, South Dakota, Tennessee, Utah, and Virginia. *Id.* at 603 n.39.

256. *Id.* at 606.

257. *Id.* at 606-20.

level of appeal varies from jurisdiction to jurisdiction.²⁵⁸ A majority of state statutes are silent on the subject of the right to appeal an initial sex offender risk assessment.²⁵⁹

Section B explores the statutory and regulatory appeal provisions of several jurisdictions that allow the right to appeal an initial sex offender risk assessment.²⁶⁰ The section begins with a look at New Jersey's Megan's Law.²⁶¹ New Jersey was not the first state to pass a registration and community notification statute.²⁶² However, the New Jersey legislation is credited with being the most comprehensive in the nation.²⁶³

This section also analyzes New York's sex offender registration procedures.²⁶⁴ Until the late 1990s, New York failed to provide for appellate review of sex offender risk assessments.²⁶⁵ A 1998 Southern District of New York decision, *Doe v. Pataki*, prompted the legislature to provide for appeal "as of right" any judicial order regarding risk level and notification.²⁶⁶

The third state analyzed in this section is Minnesota.²⁶⁷ Unlike New Jersey and New York, which provide judicial review for sex offender risk assessments, Minnesota provides for administrative review of risk level decisions.²⁶⁸ In Minnesota, initial sex offender risk assessments are conducted by a committee much like North Dakota's SORAC.²⁶⁹

Massachusetts is the final state analyzed in this section.²⁷⁰ Like North Dakota, Massachusetts law and regulations provide that the Sex Offender Registry Board (Board) makes the initial sex offender risk level determination.²⁷¹ However, once the Board's determination is final, the offender may petition for a de novo evidentiary hearing.²⁷²

258. *Id.* at 606.

259. *Id.* at 628.

260. *See infra* Part III.B.1-4 (describing the sex offender risk assessment and review procedures in New York, New Jersey, Massachusetts, and Minnesota).

261. N.J. STAT. ANN. § 2C:7-20 (West 2009).

262. Winick, *supra* note 212, at 509.

263. § 2C:7-20.

264. *See infra* Part III.B.2 (analyzing New York's sex offender registration procedures and court decisions that have led to changes in those procedures since the 1990s).

265. *See infra* text accompanying notes 342-48 (describing a New York Court of Appeals decision which held that an offender had no discrete right to appeal a risk level determination).

266. *Doe v. Pataki*, 3 F. Supp. 2d 456, 472 (S.D.N.Y. 1998).

267. *See infra* Part III.B.3 (discussing the Minnesota Predatory Offender Registration Act and the Minnesota Community Notification Act).

268. MINN. STAT. ANN. § 244.052(6)(a) (West 2009).

269. *Id.* § 244.052(3).

270. *See infra* Part III.B.4 (analyzing the Massachusetts sex offender registration law and sex offender risk assessment guidelines).

271. MASS. GEN. LAWS ANN. ch. 6 § 178K(1) (West 2009).

272. 803 MASS. CODE REGS. 1.01 (2008).

1. *New Jersey*

New Jersey was not the first state to adopt a sex offender registration and community notification requirement, but the state was the first to popularize the requirement of registration and notification.²⁷³ Legislative findings and declarations state that the 1994 provisions were groundbreaking and the most comprehensive in the nation.²⁷⁴ The statute is known and cited as “Megan’s Law.”²⁷⁵ The namesake of the law, a seven-year old girl named Megan Kanka, was raped and murdered by a neighbor who had two prior sexual assault convictions.²⁷⁶ Kanka’s rape and murder sparked a movement throughout the United States to enact legislation to protect children from child molesters.²⁷⁷ The New Jersey Sex Offender Internet Registry Law states that the general purpose of registration is to provide information to help the public protect itself.²⁷⁸

New Jersey places the initial burden of sex offender risk assessment and tier placement on county prosecutors.²⁷⁹ As originally enacted, the New Jersey risk assessment scheme did not provide for judicial review of the initial prosecutorial assessment.²⁸⁰ The New Jersey Supreme Court found this procedure inadequate in *Doe v. Poritz*²⁸¹ and outlined six requirements necessary for sex offender risk assessments to comply with due process.²⁸² The requirements outlined in the case are: (1) judicial review before a state court judge; (2) written notice to the offender; (3) the right to be represented by retained, or appointed counsel if retained counsel cannot be afforded; (4) pre-hearing discovery; (5) the prima facie burden of persuasion on the State to present evidence justifying the risk assessment and type of notification; and (6) the right to stay the notification while seeking

273. N.J. STAT. ANN. § 2C:7-20 (West 2009); Winick, *supra* note 212, at 509. A Washington community is said to have started the first sex offender registration campaign after the 1989 rape and murder of a young boy. Powers, *supra* note 213, at 1062.

274. N.J. STAT. ANN. § 2C:7-20.

275. *Id.* § 2C:7-19. Adult and juvenile offenders, both male and female convicted of specified sex offenses or offenses with a sexual intent, must register under the law. See MEGAN’S LAW GUIDELINES, 6-7, available at <http://www.nj.gov/oag/dcj/megan/meganguidelines-2-07.pdf> [hereinafter MEGAN’S LAW GUIDELINES] (listing the offenders who are covered by Megan’s Law).

276. Powers, *supra* note 213, at 1062.

277. *Id.*

278. *Id.* at 1063.

279. MEGAN’S LAW GUIDELINES, *supra* note 275, at 1.

280. See *Doe v. Poritz*, 662 A.2d 367, 421 (N.J. 1995) (finding that the judicial review of sex offender risk assessments was necessary in order to comply with due process).

281. 662 A.2d 367 (N.J. 1995).

282. *Poritz*, 662 A.2d at 382-83. The New Jersey Supreme Court generally upheld Megan’s Law but found that fundamental due process and fairness, under both the state and federal constitutions, required an offender be notified, heard, and have the opportunity for judicial review. *Id.* at 421-22.

appellate review.²⁸³ Two years later, the Third Circuit Court of Appeals added to the list by requiring that the state prove the risk assessment and type of notification necessary by clear and convincing evidence.²⁸⁴

Under current New Jersey procedures, the prosecutor makes an initial individual assessment on recidivism and the necessary scope of community notification.²⁸⁵ The risk of re-offense is calculated pursuant to the Registrant Risk Assessment Scale (Scale).²⁸⁶ This tool looks at four broad categories: (1) seriousness of the offense; (2) offense history; (3) characteristics of the offender; and (4) community support.²⁸⁷ A numerical value is assigned to each category based on the specifics of the case.²⁸⁸ The values are weighted by importance, with seriousness of the offense being the most important and therefore multiplied by five and community support being the lowest and thus multiplied by one.²⁸⁹

Those with a low-range final score are assigned a low risk level.²⁹⁰ Those with mid-range scores are considered moderate risk, and those with high-range scores are considered high risk.²⁹¹ This information is translated into the tier system.²⁹² Tier One offenders are at low risk of re-offense while Tier Two offenders are a moderate risk of re-offense; and Tier Three offenders are those considered high risk.²⁹³

Prosecutors also determine the level of notification necessary for offenders who fall into Tier Two and Tier Three.²⁹⁴ Only those law enforcement agencies “likely to encounter” the individual are notified about a Tier One offender.²⁹⁵ This determination is based on the facts of the case and geography.²⁹⁶ While law enforcement is always notified, community members and groups who have a fair chance of encountering the offender are also notified under the standard.²⁹⁷ The Megan’s Law Guidelines also pro-

283. *Id.* at 382-83.

284. *E.B. v. Verniero*, 119 F.3d 1077, 1111 (3d Cir. 1997), *cert. denied*, 522 U.S. 1109 (1998).

285. MEGAN’S LAW GUIDELINES, *supra* note 275, at 4.

286. *Id.* at exhibit E, F.

287. *Id.* at exhibit F.

288. *Id.*

289. *Id.*

290. *Id.* at exhibit E p.4.

291. *Id.*

292. *Id.* at 17.

293. *Id.*

294. *Id.* at 22-23.

295. *Id.* at 22.

296. *Id.* at 17.

297. *Id.* at 14.

vide that likely victims should be identified by reviewing the relationship between the offender and past victims.²⁹⁸

Once the county prosecutor determines the risk of re-offense and the level of notification necessary for a Tier Two or Tier Three offender, the prosecutor provides written notice to the offender.²⁹⁹ A copy of the Scale and the underlying reasons for the decision are included with the notice.³⁰⁰ Community notification automatically takes place unless the offender applies for judicial review.³⁰¹

The offender has at least two weeks from the date of the risk assessment notice to file an application for judicial review.³⁰² The offender can apply for judicial review using a form provided by the Attorney General and sent with the risk assessment notification.³⁰³ The completed form must provide the court with the reasons for the offender's objection to the classification and of the need for counsel.³⁰⁴ The offender has the right to retained or appointed counsel in the judicial appeal.³⁰⁵

When the prosecutor receives notice of an application for judicial review, he or she must provide the offender or the offender's counsel with a copy of the individual's Megan's Law file.³⁰⁶ The file contains the documentation relied upon when making the tier determination.³⁰⁷ A judge must review confidential documents contained in the file prior to disclosure.³⁰⁸ In reviewing the documents, the judge may order the materials turned over to the offender, redacted and turned over to the offender, or withheld.³⁰⁹

An offender is entitled to a pre-hearing in which he or she may obtain and give additional information and raise additional questions about the basis for the risk-assessment score.³¹⁰ The trial judge has broad discretion in conducting the pre-hearing and may, if no reason for delay, proceed directly

298. *In re Registrant R.F.*, 722 A.2d 538, 542 (N.J. Super. Ct. App. Div. 1998) (quoting MEGAN'S LAW GUIDELINES, *supra* note 275, at 18).

299. MEGAN'S LAW GUIDELINES, *supra* note 275, at 24. Notice may be waived where the prosecutor cannot provide timely notice to the offender. *Id.* at 24-25. According to the Megan's Law Guidelines, this may happen where the prosecutor receives late notice of the release of a tier-three offender from prison. *Id.* In order to protect the public, notice is waived and the community is notified prior to the opportunity for judicial review. *Id.* at 25.

300. *Id.* at 24.

301. *Id.*

302. *Id.*

303. *Id.*

304. *Id.*

305. *Id.*

306. *Id.* at 19.

307. *Id.*

308. *Id.*

309. *Id.*

310. *Id.* at 27.

to a final hearing at the time of the pre-hearing.³¹¹ At the final hearing, the state bears the burden of proving the appropriateness of the risk level and the community notification assigned by clear and convincing evidence.³¹²

The reviewing judge must make a final determination, which must include express findings of fact that support the judge's decision as to whether the state has met its burden by clear and convincing evidence.³¹³ The Scale is afforded substantial weight in the determination but the court still has discretion to make a value judgment in reaching its final decision.³¹⁴ Courts have recognized that the Scale is not a scientific device and does not need to be followed in every case.³¹⁵ Judge's did not commonly overturn a prosecutor's tier assignment following the *Doe* decision.³¹⁶ However, judges have changed the level of notification necessary for an offender.³¹⁷

Courts serve more than a reviewing role in New York, the state discussed in the following section.³¹⁸ New York's legislature passed a sex offender registration act just two years after New Jersey enacted Megan's Law.³¹⁹ Megan's Law provided the model for the statute.³²⁰

2. *New York's Sex Offender Registration Act*

New York's Sex Offender Registration Act (Act) took effect on January 21, 1996.³²¹ The Act is modeled after New Jersey's "Megan's Law."³²² The New York legislature passed the Act in order to comply with two federal laws, the Violent Crime Control and Law Enforcement Act of 1994 and the Jacob Wetterling Crimes Against Children and Sexually Violent Of-

311. *Id.*

312. *Id.*

313. *In re Registrant R.F.*, 722 A.2d 538, 543 (N.J. Super. Ct. App. Div. 1998).

314. *See In re Registrant M.F.*, 776 A.2d 780, 788 (N.J. 2001) (quoting *In re Registrant C.A.*, 679 A.2d 1153, 1171 (N.J. 1996)) (stating that the Scale is presumptively accurate and binding unless the offender presents subjective criteria indicating that the court should not rely on the classification recommended by the Scale).

315. *See In re Registrant E.I.*, 693 A.2d 505, 508-09 (N.J. Super. Ct. App. Div. 1997) (pointing out that the Scale is a useful tool to help prosecutors and courts determine an offender's risk of recidivism, but does not need to be rigidly followed in all cases).

316. *See Winick*, *supra* note 212, at 552 (explaining that the likelihood of the court overruling the prosecutor on a sex offender risk level determination is small).

317. *See, e.g., R.F.*, 722 A.2d at 543 (concluding that the scope of community notification ordered by the prosecutor was not supported by clear and convincing evidence).

318. *See infra* Part III.B.2 (outlining New York's Sex Offender Registration Act).

319. N.Y. CORRECT. LAW § 168 (McKinney 2008).

320. *People v. Jimenez*, 679 N.Y.S.2d 510, 512 (Sup. Ct. 1998).

321. N.Y. CORRECT. LAW § 168.

322. *Jimenez*, 679 N.Y.S.2d at 512.

fender Registration Program.³²³ The purpose of the Act is to protect the public from sex offenders who are considered inherently recidivistic.³²⁴

A Board of Examiners of Sex Offenders (Board) is responsible for creating guidelines and procedures to be used to assign a sex offender one of three risk levels.³²⁵ Level-one offenders pose a low risk to the community, level-two offenders pose a moderate risk to the community, and level-three offenders pose a high risk to the community.³²⁶ The Board makes a recommendation on the likelihood of recidivism based upon Risk Assessment Guidelines (Guidelines).³²⁷ Although the Board is charged with the responsibility of developing the Guidelines, the New York legislature has provided statutory guidance.³²⁸ The Guidelines are to take into consideration an offender's criminal history, physical conditions, response to treatment, recent behavior, and recent threats.³²⁹ In addition, the Guidelines must provide for a review of victim impact statements.³³⁰

Prior to the Board's recommendation, an offender is notified and has the opportunity to submit information relevant to the determination of his or her risk level.³³¹ The offender also has the opportunity to obtain any sealed information on file with the Board.³³² A district attorney may make a risk level recommendation which differs from that of the Board's at the final determination hearing before the sentencing court.³³³

The sentencing court has the responsibility of making the final decision regarding an incarcerated sex offender's risk level and the court must make its decision thirty days prior to the offender's release.³³⁴ Before making its decision on the offender's risk level, the court must provide the offender

323. *Id.*

324. *Id.*

325. N.Y. CORRECT. LAW § 168-l(1).

326. *Id.* § 168-l(6)(a)-(c).

327. *Jimenez*, 679 N.Y.S.2d at 512. Initially, one Board member reviews the offender's file and assigns points, based on the Guidelines for each factor relevant to the particular offender. *Doe v. Pataki*, 3 F. Supp. 2d 456, 462 (S.D.N.Y. 1998). A second reviewer independently evaluates the first reviewer's assessment for accuracy and agreement. *Id.* The file is then assigned to a third reviewer, who again has an opportunity to agree or disagree with the recommendation. *Id.* Three of the five members of the Board must agree on the recommendation before it is forwarded to the sentencing court. *Id.*

328. N.Y. CORRECT. LAW § 168-l(5).

329. *Id.*

330. *Id.*

331. *Id.* § 168-n(3).

332. *Id.* § 168-m.

333. *Id.* § 168-n(3).

334. *Doe v. Pataki*, 3 F. Supp. 2d 456, 462 (S.D.N.Y. 1998). The risk assessment process was different for those convicted offenders who were on probation or parole when the Act was passed. *Id.* at 463. The Department of Probation and Correctional Alternatives or the Division of Parole, with assistance from the Board, assigned risk level classifications for those individuals. *Id.*

with a copy of the Board's recommendation and reasons for the recommendation.³³⁵ The notice also informs the offender that he or she has a right to a hearing prior to the court's determination and has a right to be represented by counsel at the hearing.³³⁶ The State bears the burden of proving the facts supporting its determinations by clear and convincing evidence at the judicial hearing.³³⁷ Facts proven at trial or given by the offender at the time of a guilty plea are deemed to fulfill the state's burden.³³⁸

New York courts disagree regarding the amount of deference that the sentencing court must give the Board's recommendation.³³⁹ While some courts have interpreted the Act to follow the Board's determination unless it is arbitrary or capricious, at least one court has found that the sentencing court makes a de novo determination of the sex offender's risk assessment.³⁴⁰ The distinction in deference was especially important prior to the New York Legislature's decision to provide the express right to appellate review.³⁴¹

The legislature's decision to provide for an express right of appeal came about after a series of 1998 court decisions.³⁴² In *People v. Ste-*

335. § 168-n(3). New York law states that the notice must include the following statement or one substantially similar:

This proceeding is being held to determine whether you will be classified as a level 3 offender (risk of repeat offense is high), a level 2 offender (risk of repeat offense is moderate), or a level 1 offender (risk of repeat offense is low), or whether you will be designated as a sexual predator, a sexually violent offender or a predicate sex offender, which will determine how long you must register as a sex offender and how much information can be provided to the public concerning your registration. If you fail to appear at this proceeding, without sufficient excuse, it shall be held in your absence. Failure to appear may result in a longer period of registration or a higher level of community notification because you are not present to offer evidence or contest evidence offered by the district attorney.

Id.

336. *Id.*

337. *Id.*

338. *Id.*

339. *See infra* note 340 and accompanying text (listing the various standards of review New York courts found applicable when a sentencing court is reviewing the Board's recommendation).

340. *Compare* *People v. Brasier*, 646 N.Y.S.2d 442, 444 (Sup. Ct. 1996) (holding that the Board's sex offender risk level determination should be upheld unless it is arbitrary or capricious), *and* *People v. Ross*, 646 N.Y.S.2d 249, 252 (Sup. Ct. 1996) (finding that sex offender risk assessment reviews are an administrative function of the court and therefore the arbitrary and capricious standard applies), *and* *People v. Ayten*, 658 N.Y.S.2d 175, 178 (Sup. Ct. 1997) (stating that an upward risk level enhancement made by the Board was unjustified and therefore arbitrary and capricious), *with* *People v. Jimenez*, 679 N.Y.S.2d 510, 513 (Sup. Ct. 1998) (finding that the court makes a de novo determination of a sex offender's risk level).

341. N.Y. CORRECT. LAW § 168-n(3) (McKinney 2008); *see* Logan, *supra* note 224, at 629 (pointing out that the legislature's decision to provide for "appeal as of right" was prompted by federal judicial intervention).

342. *People v. Stevens*, 692 N.E.2d 985 (N.Y. 1998); *Doe v. Pataki*, 3 F. Supp. 2d 456 (S.D.N.Y. 1998).

vens,³⁴³ the New York Court of Appeals held that a sex offender had no discrete right to appeal a risk level determination.³⁴⁴ The offenders, in these consolidated cases, were convicted and sentenced on rape and sexual abuse charges prior to the passage of the 1996 Act, but were subsequently assigned risk assessments by their sentencing courts.³⁴⁵ Both men attempted to appeal under New York criminal procedural law.³⁴⁶ The New York Court of Appeals affirmed the appellate division's dismissal of the appeals.³⁴⁷ The New York Court of Appeals found that the right to appeal exists in criminal proceedings only by express statutory authorization and "discrete risk level determinations are a consequence of convictions for sex offenses, but are not a part of the criminal action or its final adjudication."³⁴⁸

The Court of Appeals indicated that there may have been an argument that the right to judicial review found within "Megan's Law" also provides the right to appellate review of risk level determination.³⁴⁹ However, the court highlighted that the Sex Offender Registration Act is "extremely detailed," yet the Act failed to provide for appellate review.³⁵⁰ The Court of Appeals reiterated that it would "'not resort to interpretative contrivances to broaden the scope and application' of unambiguous statutes to 'create a right to appeal out of thin air' in order to 'fill the . . . void.'"³⁵¹

Also in 1998, in *Doe v. Pataki*, United States District Court for the Southern District of New York held that sex offenders were entitled to minimal procedural protections prior to being assigned a risk level or being subject to community notification provisions.³⁵² Specifically, the district court required New York to follow the procedures prescribed by the New Jersey Supreme Court in *Doe v. Poritz*³⁵³ and the *E.B. v. Verniero*³⁵⁴ decision by the Third Circuit Court of Appeals.³⁵⁵ The procedures not only provided the right to appeal, but also the right to a notice hearing, the right

343. 692 N.E.2d 985 (N.Y. 1998).

344. *Stevens*, 692 N.E.2d at 985.

345. *Id.* at 985-86.

346. *Id.* at 986.

347. *Id.* at 988-89.

348. *Id.*

349. *Id.* at 989.

350. *Id.*

351. *Id.* (quoting *People v. Laing*, 589 N.E.2d 372, 374-75 (N.Y. 1992)).

352. *Doe v. Pataki*, 3 F. Supp. 2d 456, 471 (S.D.N.Y. 1998).

353. 662 A.2d 367 (N.J. 1995).

354. 119 F.3d 1077 (3d Cir. 1997), *cert. denied* 522 U.S. 1109 (1998).

355. *Pataki*, 3 F. Supp. 2d at 471.

to retained or appointed counsel, the right to discovery, and the right to have the burden of proof placed on the State.³⁵⁶

New York law now complies with the *Doe v. Pataki* provisions.³⁵⁷ Under current law, either party may appeal “as of right” from the judicial order regarding risk level and notification.³⁵⁸ Judicial review and appeal is also available where either the state or the offender petitions for a modification of the risk level or level of notification.³⁵⁹

The following section provides a different perspective on the independent review of sex offender risk assessments.³⁶⁰ Minnesota’s sex offender registry law provides for a committee to review an offender’s likelihood of recidivism and to assign a risk level.³⁶¹ This determination can then be reviewed by an administrative law judge.³⁶²

3. *Minnesota*

On June 1, 1991, Minnesota Governor Arne Carlson signed the Predatory Offender Registration Act (Registration Act) into law, making Minnesota the fifteenth state to enact a law requiring sex offender registration.³⁶³ Under the Act, a ten-year registration period applied unilaterally to those convicted of particular offenses enumerated by statute.³⁶⁴ In 1996, the Minnesota legislature passed the Community Notification Act (Notification Act).³⁶⁵ The 1996 Act created end-of-confinement review committees (ECRCs) at each of the state’s prisons and treatment facilities.³⁶⁶

ECRCs consist of the head of the treatment facility or prison, a law enforcement officer, a sex offender treatment professional, a caseworker with experience in treating sex offenders, and a Department of Corrections victim’s services specialist.³⁶⁷ ECRCs assess an offender’s risk of recidivism based upon a series of factors including the seriousness of an offender’s

356. *Id.* at 471-72.

357. Logan, *supra* note 1, at 1293.

358. N.Y. CORRECT. LAW § 168-n(3) (McKinney 2009).

359. *Id.* § 168-o.

360. *See infra* Part III.B.3 (describing Minnesota’s sex offender risk assessment procedures).

361. MINN. STAT. ANN. § 244.052(3) (West 2009).

362. *Id.* § 244.052(6)(b).

363. Logan, *supra* note 1, at 1293.

364. MINN. STAT. ANN. § 243.166(1b)(b).

365. 1996 Minn. Laws 659 (chapter 408, Art. 5).

366. MINN. STAT. ANN. § 244.052(3).

367. *Id.* § 244.052(3)(b). Committee members other than the head of the treatment facility or prison serve two-year terms. *Id.* The official legislative intent of the Community Notification Act indicates that ECRCs are to be established at each state prison and treatment facility where sex offenders are held. Logan, *supra* note 1, at 1304.

possible repeat offense, prior offenses, and response to treatment.³⁶⁸ Using these factors, the ECRC divides offenders soon to be released from prison or treatment into three categories: low risk, moderate risk, and high risk.³⁶⁹

The offender has both the right to notice and the right to be heard at the committee meeting where the risk assessment is made.³⁷⁰ Offenders who are assigned moderate and high risk levels can appeal that determination to an administrative law judge by notifying the chair of the ECRC within fourteen days of the risk assessment determination.³⁷¹ The request does not delay the notification process, unless the administrative law judge finds good cause to suspend the process.³⁷²

Review hearings are held either at the correctional facility where the offender is imprisoned or at a location designated by the administrative law judge.³⁷³ The proceeding is held on the record.³⁷⁴ The offender has the right to be represented by counsel, to present evidence, and to call and cross-examine witnesses.³⁷⁵ In doing so, the offender bears the burden of proving that the ECRC's initial decision was erroneous.³⁷⁶ The administrative law judge makes a written, reasoned determination whether the ECRC's risk assessment was erroneous.³⁷⁷ The decision of the administrative law judge is final.³⁷⁸

From 1996, the year of the Community Notification Act's passage, to mid-November 2002, 217 registrants requested administrative review of their risk level determinations.³⁷⁹ One-hundred-forty-four of those cases were resolved without a hearing, thirty-five risk levels were affirmed, and twelve risk levels were reduced.³⁸⁰ The Minnesota Bureau of Apprehension numbers state that 10,986 sex offenders were registered with the state in November 2002.³⁸¹

Minnesota's sex offender risk level assessment procedures provide an example of an approach which combines an initial risk assessment made by

368. MINN. STAT. ANN. § 244.052(3)(g).

369. *Id.* § 244.052(3)(e).

370. *Id.* § 244.052(3)(d)(i).

371. *Id.* § 244.052(6)(a).

372. *Id.*

373. *Id.* § 244.052(6)(b).

374. *Id.*

375. *Id.*

376. *Id.*

377. *Id.* § 244.052(6)(c).

378. *Id.*

379. Logan, *supra* note 1, at 1322.

380. *Id.*

381. *Id.* at 1321.

a committee with a review process by a body other than a court.³⁸² The Massachusetts sex offender risk assessment procedures are similar.³⁸³ Once an offender receives an initial risk level determination, the offender is provided the opportunity to petition for an evidentiary proceeding before a hearing officer.³⁸⁴

4. *Massachusetts*

Massachusetts sex offender risk level guidelines are developed and applied by a seven-member Sex Offender Registry Board (Registry Board) appointed by the governor.³⁸⁵ The risk levels assigned in Massachusetts correspond with those in New Jersey, New York, Minnesota, and North Dakota.³⁸⁶ The Registry Board's sex offender assessment process consists of two stages.³⁸⁷

In the first stage, the Registry Board is required to notify the offender before making a determination and to allow the offender to submit documentary evidence to the Registry Board.³⁸⁸ The Registry Board then prepares a recommended classification following the general guidelines contained in the Code of Massachusetts Regulations.³⁸⁹ This notice also informs the offender of his or her right to an evidentiary hearing and right to counsel.³⁹⁰ A sex offender must petition for an evidentiary hearing within twenty days of receiving the notice.³⁹¹ The same procedures used for petitioning for an evidentiary hearing on a new risk level assessment are employed when an offender petitions for re-classification of their risk level.³⁹²

A petition by an offender triggers an evidentiary hearing, the second stage in the process of sex offender risk assessment.³⁹³ Requested evidentiary hearings are de novo hearings before a hearing officer where the offender has the right to appointed counsel if he or she is indigent.³⁹⁴ The

382. *See supra* Part III.B.3 (describing Minnesota's sex offender risk assessment procedures).

383. *See infra* Part III.B.4 (outlining the Massachusetts sex offender risk assessment process).

384. MASS. GEN. LAWS ANN. ch. 6, § 178L(1)(a) (West 2009).

385. *Id.* § 178K(1).

386. *See id.* § 178K(2)(a)-(c) (describing the correlation between the risk of re-offense and the risk level designation assigned to offenders).

387. 803 MASS. CODE REGS. 1.01 (2008).

388. MASS. GEN. LAWS ANN. ch. 6, § 178L(1)(a).

389. *Id.* § 178L(1)(a); 803 MASS. CODE REGS. 1.38-.40.

390. MASS. GEN. LAWS ANN. ch. 6, § 178L(1)(a).

391. *Id.*

392. 803 MASS. CODE REGS. 1.37C(3)(c).

393. *Id.* at 1.01.

394. MASS. GEN. LAWS ANN. ch. 6, § 178L(2); 803 MASS. CODE REGS. 1.08. The offender does not have to be represented by an attorney and may instead have non-attorney representative

hearing officer may be a single member of the Registry Board, a hearing panel appointed by the chair, or an individual contracted or employed by the Registry Board.³⁹⁵ Offenders have expressed concern about the practice of Registry Board members serving as hearing officers, arguing that a conflict of interest is created because the same agency prosecutes and adjudicates the claim.³⁹⁶ The Supreme Judicial Court of Massachusetts rejected these concerns in *Doe v. Sex Offender Registry Board*,³⁹⁷ finding that the Board can comply with due process by establishing internal procedures to ensure the offenders receive fair and impartial hearings.³⁹⁸

The Code of Massachusetts Regulations details instructions for carrying out the hearing, including the order of presentation, the right to subpoena witnesses and documents, the right to discovery, the applicability of the rules of evidence, and the duties and powers of the hearing officer.³⁹⁹ The hearing officer makes his or her decision based upon a determination of whether the Registry Board met its burden of proving the necessity of the risk level assigned by a preponderance of the evidence standard.⁴⁰⁰ The hearing officer is not bound by the Board's recommendation, but rather bases a decision on the totality of all the relevant evidence.⁴⁰¹

The decision by the hearing officer must be written and contain a statement of the issues, evidence, rulings of law, and conclusions.⁴⁰² The hearing officer may then decide that the offender has no obligation to register or may maintain, increase, or decrease the Board's initial classification.⁴⁰³ The decision must also outline the degree of community notification required.⁴⁰⁴ The hearing examiner's classification is a final decision and is therefore subject to judicial review, a choice that does not stay the community notification process.⁴⁰⁵

Prior to *Doe v. Att'y Gen.*,⁴⁰⁶ a 1997 decision by the Supreme Judicial Court of Massachusetts, the proceedings described above did not apply to

as long as the offender signs a statement indicating that he or she is aware of the right to counsel and he or she has waived that right. 803 MASS. CODE REGS. 1.14. The offender may also be entitled to an expert evaluation at the Board's expense. *Id.* at 1.09.

395. 803 MASS. CODE REGS. 1.03

396. *Doe v. Sex Offender Registry Bd.*, 697 N.E.2d 512, 518 (Mass. 1998).

397. 697 N.E.2d 512 (Mass. 1998).

398. *Sex Offender Registry Bd.*, 697 N.E.2d at 518.

399. 803 MASS. CODE REGS. 1.16-.19, .21.

400. MASS. GEN. LAWS ANN. ch. 6, § 178L(2); 803 MASS. CODE REGS. 1.03.

401. 803 MASS. CODE REGS. 1.01.

402. *Id.* at 1.22.

403. *Id.*

404. *Id.*

405. *Id.* at 1.23; MASS. GEN. LAWS ANN. ch. 6 § 178M.

406. 686 N.E.2d 1007 (Mass. 1997).

level one sex offenders.⁴⁰⁷ In 1990, Doe pleaded guilty to indecent assault and battery after grabbing and caressing the groin of an undercover police officer on duty in an area reputed to be a hangout for “consensual sexual activity between males.”⁴⁰⁸ Doe challenged the sex offender registry law because it required that a level-one offender, like himself, register and have his convictions made public without a hearing to determine whether he was likely to harm others in the future.⁴⁰⁹

The Supreme Judicial Court of Massachusetts agreed with Doe, finding that Doe had a constitutionally protected due process interest under both the Massachusetts constitution and the Fourteenth Amendment to the United States Constitution.⁴¹⁰ The three-justice concurrence found that registration was a “continuing, intrusive, and humiliating regulation of the person himself,” which could be useful only if narrowly tailored.⁴¹¹ The Court found Massachusetts General Laws Chapter 6 sections 178I-178O unconstitutional as applied.⁴¹²

The Massachusetts regulations provide a final example of the differing ways state legislatures have provided for independent review of sex offender risk assessments.⁴¹³ While New York and New Jersey provide for independent review by the court, Minnesota and Massachusetts grant the reviewing power to an administrative law judge or hearing officer.⁴¹⁴ The following section outlines the reasons why North Dakota should use the risk

407. *Att’y Gen.*, 686 N.E.2d at 1013.

408. *Id.* at 1009.

409. *Id.* at 1010.

410. *Id.* at 1013-14 (Fried, J., concurring).

411. *Id.* at 1016 (Fried, J., concurring). The concurring opinion concluded:

Registration and notification may be useful, and in any event are constitutionally permissible means for protecting the public, but only if they are narrowly tailored to a grave danger. Indiscriminate extensions such as appear in this case will only provoke continuous and often successful litigation. This will burden the courts and the relevant administrative agency to such a point that the purposes of the scheme will be delayed and perhaps defeated even in the carefully limited class of cases to which it properly applies.

Id. at 1017 (Fried, J., concurring).

412. *Id.* at 1014 (citing MASS. GEN. LAWS ANN. ch. 6 §§ 178I-O). The court found the statutes unconstitutional as applied because the statutes provided no procedure through which a level one offender could challenge the registration requirement. *Id.* at 1013. Moderate and high risk offenders were provided such procedures under the Act. *Id.* at 1010.

413. *See supra* Part III.B.4 (outlining the state of Massachusetts’ sex offender risk assessment regulations).

414. *See supra* Part III.B.1-4 (discussing the sex offender risk assessment procedures in New York, New Jersey, Massachusetts and Minnesota).

assessment procedures discussed in sections one through four as models for change in the state's own risk assessment process.⁴¹⁵

IV. RAISING THE BAR IN NORTH DAKOTA

North Dakota legislators and the State Attorney General have the ability to ensure the integrity of the sex offender risk assessment process by amending the North Dakota Century Code and the procedures for assessing sex offender risk levels.⁴¹⁶ This section explores possible methods for amending North Dakota's current law and Guidelines.⁴¹⁷ In addition to analyzing the possible methods of changing the state's sex offender risk assessment procedures, this section analyzes the reasons why such a change is necessary.⁴¹⁸ This analysis focuses particularly on why the current review procedure is inadequate.⁴¹⁹

A. ENSURING INTEGRITY THROUGH REVIEW OF RISK ASSESSMENTS

Amending the current sex offender risk assessment system would require revising the Guidelines promulgated by the Attorney General.⁴²⁰ North Dakota could follow the Massachusetts approach, which begins with a recommendation by the Board, includes an opportunity for a *de novo* hearing before a hearing officer and the opportunity for judicial review.⁴²¹ If North Dakota prefers that the hearing not be conducted *de novo*, it has the opportunity to follow the State of Minnesota's procedures that place the burden on the offender to show that the initial risk assessment determination is erroneous.⁴²² The statutes and regulations from New Jersey and New York also provide guidance.⁴²³ The guidance includes options for the bur-

415. *See infra* Part IV.A-B (explaining how North Dakota can raise the integrity of the state's sex offender risk assessment procedures by providing for independent review of SORAC decisions).

416. *See infra* Part IV.A (discussing how independent review will help ensure the integrity of North's Dakota's sex offender risk assessment process).

417. *See infra* Part IV.A (offering suggestions for changing North Dakota's sex offender risk assessment procedures).

418. *See infra* Part IV.A-B (discussing why North Dakota's current sex offender risk assessment procedures are inadequate).

419. *See infra* Part IV.B (discussing how independent review of SORAC risk assessments could increase the number of sex offenders who comply with registration requirements).

420. N.D. CENT. CODE § 12.1-32-15(12)(b) (2007).

421. *See* MASS. GEN. LAWS ANN. ch. 6, §§ 178L(1)(a), 178M (West 2009) (detailing the Board's considerations in making initial sex offender risk assessments and the hearing officer's requirements in reviewing that decision); 803 MASS. CODE REGS. 1.01, .23, .38-.40 (2008) (providing further instructions on the procedures to be followed by the Board and the hearing officer).

422. MINN. STAT. ANN. § 244.052(6)(a)-(b) (West 2009).

423. *See* MEGAN'S LAW GUIDELINES, *supra* note 275, at 22-23; *In re* Registrant R.F., 722 A.2d 538, 542 (N.J. Super. Ct. App. Div. 1998).

dens of proof and standards of review that could be implemented in North Dakota.⁴²⁴

North Dakota has the opportunity to utilize an existing mechanism, the Office of Administrative Hearings, in order to provide independent hearing officers the opportunity to review the initial sex offender risk assessment determinations made by SORAC.⁴²⁵ Upon request, the Office of Administrative Hearings may provide hearing officers to government entities that are not subject to the Administrative Agencies Practice Act (AAPA).⁴²⁶ The only caveat is that the AAPA procedural provisions do not apply when an independent hearing officer conducts a hearing for an entity not covered by the AAPA.⁴²⁷ As discussed previously, SORAC is not subject to the AAPA.⁴²⁸

North Dakota can minimize the risk of error in sex offender risk assessment by providing the opportunity for an evidentiary hearing where evidence is presented and witnesses are examined and cross-examined.⁴²⁹ Judicial decisions from New Jersey, New York, and Massachusetts indicate that these procedures are not only helpful in reducing error, but that they are also required by the Fourteenth Amendment to the United States Constitution.⁴³⁰

North Dakota could also benefit from changing from a three-tier system to a multi-tier system that has many more than three levels of sex offender risk.⁴³¹ A multi-tier system allows more opportunities for positive reinforcement during the reassessment process.⁴³² For example where there are more than three risk categories, those sex offenders who are able to control their behavior and who respond effectively to treatment can be re-

424. See N.Y. CORRECT. LAW § 168-n(3) (McKinney 2008) (placing the burden of proof on the state by clear and convincing evidence); *Doe v. Pataki*, 3 F. Supp. 2d 456, 470-71 (S.D.N.Y. 1998) (quoting *E.B. v. Verniero*, 119 F.3d 1077, 1111 (3d Cir. 1997)) (requiring New Jersey to prove the risk assessment level by clear and convincing evidence).

425. See N.D. ADMIN. CODE § 98-01-01-01 (2008) (detailing the history of the Office of Administrative Hearings and stating that the Office may provide hearing officers to requesting agencies).

426. *Id.*

427. *Id.* § 98-01-01-02.

428. N.D. CENT. CODE § 28-32-01(2)(v) (2007).

429. See *Doe v. Sex Offender Registry Bd.*, 697 N.E.2d 512, 519 (Mass. 1998) (stating that the risk that the Board will apply general factors to an offender and will incorrectly predict the likelihood of recidivism is minimized where both parties have an opportunity to present evidence, to examine and to cross-examine witnesses).

430. See *Doe v. Pataki*, 3 F. Supp. 2d 456, 471-73 (S.D.N.Y. 1998) (outlining the procedures necessary for sex offender risk assessments in New York to comply with federal due process); *Doe v. Att'y Gen.*, 686 N.E.2d 1007, 1012 (Mass. 1997) (stating that an offender is entitled to procedural due process before being required to register as a sex offender).

431. See Winick, *supra* note 212, at 562.

432. *Id.*

warded by a decrease in risk level.⁴³³ Such an incentive may help sex offenders to be rehabilitated.⁴³⁴

Whatever initial steps North Dakota chooses to take, the Guidelines should be amended to provide for judicial review.⁴³⁵ In addition to the requirements necessary to comport with due process, scholars suggest that sex offenders may be less willing to comply with the current unilateral decision made by SORAC than offenders would be if given an opportunity to participate in the initial assessment and an opportunity for independent review.⁴³⁶ The following section further analyzes this notion of independent review.⁴³⁷

B. WHY A SECOND LOOK IS NOT ENOUGH

Scholars suggest that a second look by SORAC is not an adequate review of a sex offender's risk assessment.⁴³⁸ Wayne A. Logan, Associate Professor at the William Mitchell College of Law, has written extensively about sex offender registration and risk assessment laws.⁴³⁹ Logan opines that allowing sex offender input into classification decisions possibly enhances their willingness to abide by the consequences of those decisions.⁴⁴⁰ In addition, an offender who participates in the risk assessment process may experience positive therapeutic effects.⁴⁴¹

The procedural justice and the relational model of justice provide that individuals do not evaluate the fairness of a procedure by its outcome.⁴⁴² Rather, these models suggest that individuals accept decisions because of the manner in which the decisions are made.⁴⁴³ Those who are treated with dignity and respect are likely to feel that they have been treated fairly by the

433. *Id.*

434. *See id.* (reasoning that offenders will be more willing to complete treatment when they are rewarded for doing so).

435. *See supra* Part IV.A (outlining the reasons why independent review of SORAC decisions is necessary).

436. *See, e.g.,* Winick, *supra* note 212, at 566 (arguing that sex offenders who are given a right to participate in what they deem a fair hearing will be more willing to accept and comply with the results of the hearing).

437. *See infra* Part IV.B (discussing the reasons why North Dakota needs to implement independent review of SORAC decisions).

438. *See, e.g.,* Tom R. Tyler, *Multiculturalism and the Willingness of Citizens to Defer to Law and to Legal Authorities*, 25 LAW & SOC. INQUIRY 983, 985 (2000) (stating that people are more willing to accept decisions if they believe the legal authorities making them are legitimate).

439. *See, e.g.,* Logan *Study, supra* note 225 (discussing the variety of systems of risk assessment classifications currently used); Logan, *supra* note 1 (outlining Minnesota's sex offender risk assessment system).

440. Logan, *supra* note 1, at 1327.

441. *Id.*

442. Tyler, *supra* note 438, at 989.

443. *Id.*

court, or, in this case, by the State of North Dakota.⁴⁴⁴ Fair procedures matter because being treated with dignity and respect is a reassurance that a person is a valuable member of society and is a person worth recognizing.⁴⁴⁵

The relational model suggests that individuals react to neutrality, trustworthiness, and status recognition.⁴⁴⁶ Neutrality includes the characteristics of evenhandedness, lack of bias, and a willingness to make objective decisions.⁴⁴⁷ Trustworthiness is insight into the decision maker's motives, that is, "whether they believe that the authority is benevolent and caring."⁴⁴⁸ Treating a person with politeness and respect invokes status recognition.⁴⁴⁹

Rather than leaving offenders and their attorneys feeling that the decision made by SORAC is unilateral and an appeal is futile, the process should be amended to provide an opportunity to participate in and to appeal the determination.⁴⁵⁰ Scholars believe this amended process will increase compliance.⁴⁵¹ The possibility of enhanced cooperation and positive therapeutic effects, combined with the risk of error and due process concerns, indicate that North Dakota should implement independent review of sex offender risk assessments.⁴⁵²

V. CONCLUSION

This article has defined the phrase "sex offender" under North Dakota law and has outlined the current procedures for assigning and reviewing sex offender risk assessments in the state, including the origins of the law and legislative history.⁴⁵³ Part III detailed the sex offender risk assessment procedures of four other jurisdictions and analyzed the legislative and judicial action which instigated their development.⁴⁵⁴ Part IV described changes

444. *Id.*

445. *Id.* at 990.

446. *Id.* at 991.

447. *Id.*

448. *Id.*

449. *Id.*

450. *See supra* notes 440-41 and accompanying text (explaining why it is important for a sex offender to have the opportunity to participate in the risk assessment process).

451. *See supra* notes 440-41, 443-45 and accompanying text (explaining that individuals rate the fairness of a process by the manner in which the decisions were made).

452. *See supra* Part III.A (analyzing the impact of sex offender risk assessments on the offender, the community, and the state).

453. *See supra* Parts II.A-B (discussing the broad categories of offenders who must register as sex offenders and the requirements of sex offender registration).

454. *See supra* Part III.B (detailing the sex offender risk assessment and review procedures in New York, New Jersey, Massachusetts, and Minnesota).

North Dakota should make based on statutes and regulations in New Jersey, New York, Minnesota, and Massachusetts.⁴⁵⁵

According to Justice Benjamin Cardozo, “[s]tatutes are designed to meet the fugitive exigencies of the hour.”⁴⁵⁶ Exigency in the 1990s resulted in all United States jurisdictions passing some form of a sex offender registration laws.⁴⁵⁷ North Dakota’s 2001 sex offender registration statute and the resulting guidelines may have met the exigency of the time, but have remained relatively unchanged in the last seven years.⁴⁵⁸ North Dakota should follow the trend of states such as New Jersey, New York, Minnesota, and Massachusetts by amending the current risk assessment procedures to allow for judicial review.⁴⁵⁹ By allowing for independent review of sex offender risk assessment procedures, North Dakota’s system will be strong enough to meet the “fugitive exigencies” of the future.⁴⁶⁰

*Lori Conroy**

455. See *supra* Part IV.A (describing how changes modeled after New York, New Jersey, Massachusetts, and Minnesota could help ensure the integrity of North Dakota’s sex offender risk assessment system).

456. BENJAMIN N. CARDOZO, *THE NATURE OF THE JUDICIAL PROCESS* 83 (Yale Univ. Press 1921).

457. Logan, *supra* note 1, at 1289.

458. N.D. CENT. CODE § 12.1-32-15 (2007).

459. See *supra* Parts III.A., IV.B (outlining the reasons why North Dakota should provide for independent review of sex offender risk assessments).

460. CARDOZO, *supra* note 456, at 83.

*2009 J.D. with distinction from the University of North Dakota School of Law. Lori is an associate with the Vogel Law Firm in Fargo, North Dakota. I would like to extend a special thanks to my husband Shane. He is my teammate and partner in all things. He held down the fort as I wrote this article just as he did throughout law school and beyond. I look forward to our next adventure.