CHAPTER 36

SPECIAL CONSIDERATIONS FOR SEX OFFENDERS*

A. Introduction

If you have been convicted of or pled guilty to a sex offense, there are special issues you should know about. Sex offenses are defined differently in each state. Common sex offenses include sex with or the touching of sexual or other intimate parts of another person,[1] when that other person is:

(1) forced to act;
(2) unable to agree to sexual behavior ("incapacitated");[2] or
(3) under the age of consent (a child).

Most sex offenses are felonies. However, some lower-level sex offenses are characterized as misdemeanors. These lower-level offenses include sexual misconduct,[3] forcible touching,[4] and sexual abuse in the third degree.[5] In New York State, most sex offenses appear in Article 130 of the Penal Law of the State of New York.[6]

This Chapter will focus mainly on the more serious felony sex offenses and specifically on New York law. However, laws from other states are sometimes discussed and cited to as examples. Each state has very specific laws on this topic, so you must always check the laws in the state where you were convicted.

Some sex offender laws may apply to people who have committed crimes not normally considered sex offenses. For example, the New York Sex Offender Registration Act[7] applies to people convicted of crimes which are not included in section 130 of the Penal Code and do not necessarily involve any sexual contact with another individual, or are not even sexual in nature. The Act applies to crimes under Articles 135 (kidnapping offenses),[8] 230 (prostitution offenses),[9] or 250 (offenses against the right to privacy, particularly unlawful surveillance in the first degree, which usually involves the use of an imaging device to view the

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1. While the Supreme Court has not decided on this question, the Seventh Circuit in United States v. Gladish, 536 F.3d 646 (7th Cir. 2008) held that sending sexual messages online to a minor, without a plan to actually have sexual contact with that minor, is not a crime under 18 U.S.C. § 2422(b), as the facts of the case do not prove that a substantial step was taken to induce the minor. The Second Circuit (New York is in the Second Circuit) has held differently. In United States v. Brand, the court emphasized, "[a] conviction under [18 U.S.C.] § 2422(b) requires a finding only of an attempt to entice or an intent to entice, and not an intent to perform the sexual act following the persuasion." 467 F.3d 179, 202 (2d Cir. 2006). In a later Second Circuit case, the court explained that it is enough that a person merely persuades a minor to engage in sexual conduct with himself or a third party to violate the above federal statute (§ 2422(b)). United States v. Douglas, 626 F.3d 161, 164 (2d Cir. 2010). That is, even if the person fails to go through with the sexual acts, he can still be found guilty of violating the statute. Similarly, the Ninth Circuit has held that a defendant intending to violate a statute and taking a substantial step toward completing the violation (sending sexual letters to a boy and encouraging a meeting) is sufficient to support a conviction for attempting to persuade, induce, entice, or coerce a minor to engage in unlawful sexual activity. United States v. Goetzke, 494 F.3d 1231 (9th Cir. 2007).

2. A person might not be able to agree to engage in sexual behavior because he or she is mentally disabled or mentally incapacitated. N.Y. Penal Law § 130.25.

3. N.Y. Penal Law § 130.20 (McKinney 2009) (sexual misconduct is a class A misdemeanor).

4. N.Y. Penal Law § 130.52 (McKinney 2009) (forcible touching is a class A misdemeanor).

5. N.Y. Penal Law § 130.55 (McKinney 2009) (sexual abuse in the third degree is a class B misdemeanor).

6. N.Y. Penal Law § 130 (McKinney 2009 & Supp. 2011).

7. N.Y. Correct. Law § 168 (McKinney 2003 & Supp. 2011).

8. N.Y. Penal Law § 135 (McKinney 2009). Kidnapping, which is not a sex offense under normal circumstances, becomes a sex offense for purposes of the Sex Offender Registration Act (and, therefore, it will apply to a kidnapper) if the victim is under seventeen years of age and the perpetrator is not the parent. N.Y. Correct. Law § 168 (McKinney 2009 & Supp. 2011).

9. N.Y. Penal Law § 230 (McKinney 2008). Specifically, the New York Sex Offender Registration Act requires registration for persons convicted of §§ 230.04 (patronizing, that is, using, a prostitute in the third degree) if the person patronized is under the age of seventeen, 230.05 (patronizing a prostitute in the second degree), 230.06 (patronizing a prostitute in the first degree), 230.30 (promoting prostitution in the second degree), 230.32 (promoting prostitution in the first degree), and 230.33 (compelling prostitution).

intimate or sexual parts of another located in private areas, such as fitting rooms or restrooms, without their knowledge or consent).[10]

Laws about sex offenses are always changing, and you must be careful to read current statutes to see which apply to you. This Chapter covers issues of special importance for sex offenders based upon the laws in effect at the time of publication.

This Chapter begins with topics most important to your everyday life in prison, such as protective custody (if you believe that you are in danger of being harmed by other prisoners), counseling and the consequences of not going to counseling, and good time credits.

Next, this Chapter discusses other issues that might come up in legal proceedings in which you're involved. These issues include HIV testing and post-conviction DNA testing. The courts may require these tests based upon your status as a sex offender. They might even be required if you have only been accused, but not convicted, of the offense for which you are incarcerated.

Finally, this Chapter discusses issues that may arise during and after your release from prison. Some of these issues include special parole conditions for sex offenders, community registration, the Adam Walsh Act (a federal sex offender law), and civil confinement.

Some of these topics are addressed in more detail in other places in the *JLM*.[11]

B. Protective Custody

You may become a target for abuse if other prisoners know you have been convicted of a sex crime. If this happens, or if you think it may happen, most prisons will let you seek "protective custody."

In protective custody, you are kept from contact with the general prisoner population. Prisoners who may be placed in protective custody include potential victims, witnesses likely to be intimidated, or prisoners who, for one reason or another, are unable to live safely in the general population. You can agree to go into protective custody, or it may be required of you.[12] Although protective custody is for the prisoner's protection and not punishment, prisoners in protective custody may have limited opportunities for things like scheduling out-of-cell time, access to library services, and use of the commissary.[13] Despite these limitations, you might be better off in protective custody if you feel threatened or in danger.

C. "Recommended" Counseling and the Loss of Good Time Credits

The New York Department of Corrections and Community Supervision ("DOCCS") has an Earned Eligibility Program, which is supposed to give eligible prisoners an incentive to work on the underlying issues that may have led to their incarceration.[14] This program recognizes that "many inmates are motivated to achieve a positive change in their lives," it aims to help them "prepare to live law abiding lives in the community," and it "assist[s] and guide[s] inmates in preparing for their release."[15] In New York, you may be able to earn time off your sentence ("good time credit") for "good behavior and efficient and willing performance of duties" that are assigned to you while in prison and/or for "progress and achievement in an assigned treatment program."[16] Assigned treatment programs can include sex offender counseling.[17] If you do not attend counseling, you risk losing your good time credits.[18]

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10. N.Y. Penal Law § 250 (McKinney 2008). You should note that the Sex Offender Registration Act applies to unlawful surveillance in the first degree, which requires that a person has previously been convicted, within ten years of unlawful surveillance either in the first or second degree. N.Y. Penal Law § 250.50 (McKinney 2008).

11. *See*, for example, *JLM*, Chapter 11 on using DNA analysis to challenge your conviction and "Rights Upon Release" (*JLM* online chapter).

12. *See generally* N.Y. Comp. Codes R. & Regs. tit. 7, § 330.2 (2010) (defining voluntary and involuntary protective custody prisoners as potential victims or witnesses likely to be intimidated, or prisoners who cannot live in the general prison community); Fla. Admin. Code Ann. r. 33-602.221(1)(j) (2010) (defining Florida's "protective management" of prisoners as "the protection of inmates from other inmates.").

13. For specific details about conditions of confinement for New York prisoners in protective custody, *see* N.Y. Comp. Codes R. & Regs. tit. 7, § 330.4 (2010).

14. N.Y. Comp. Codes R. & Regs. tit. 7, § 2100.2 (2010) (describing the policy behind the Earned Eligibility Program).

15. N.Y. Comp. Codes R. & Regs. tit. 7, § 2100.2(a) (2010).

16. N.Y. Correct. Law § 803(1)(a) (McKinney Supp. 2011). This law is in effect until September 1, 2013. For further information about good time credits, *see JLM* Chapter 34, "Getting Out Early: Conditional & Early Release," for a detailed explanation of the requirements and procedures for earning good time credits.

JLM Chapter 34, "Getting Out Early: Conditional & Early Release" explains how each New York State prison has its own Time Allowance Committee ("TAC"). The TAC at your prison looks at your file and tells the superintendent the amount of good time credit, or "good behavior allowance" (as it is called in the statute) it thinks you should have.[19] The superintendent then looks at the recommendation and forwards it to the Commissioner of Correctional Services, who makes the final decision.[20]

In New York, you have no right to demand good time credits.[21] The Commissioner's decision will be final, unless it is not made "in accordance with the law."[22] Courts explain that when making a recommendation and decision about good time credits, TACs should look at your entire experience in prison and not just apply a simple rule automatically.[23] The law regarding the requirements for good time credit refers only to "assigned" (required) treatment programs, and not "recommended" ones.[24] However, the New York Department of Corrections and Community Supervision will not usually give good time credits to sex offenders who do not complete sex offender treatment programs after the programs have been recommended to them.[25] The courts have allowed TACs to withhold good time credits for this reason.[26] Prisoners have tried

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17. Twenty facilities in New York State that offer sex offender counseling and treatment programs are currently listed on the New York State Department of Corrections and Community Supervision website. The length of the program will vary depending on the category you will be assigned to. The treatment is divided into three categories: Low Risk, Moderate/High Risk, and High Risk. If you are assigned to the Low Risk category, then treatment will last 6 months. If you are in the Medium/High Risk category, the program will last anywhere from 9 to 12 months. If you are in the High Risk category, the program will last anywhere from 15 to 18 months. Your risk level will be determined at a program site by a sex offender program staff member. *Sex Offender Counseling and Treatment Program (SOCTP)*, N.Y. State Dept. of Corr. & Cmty. Supervision, http://www.doccs.ny.gov/ProgramServices/guidance.html#soctp (last visited Feb. 9, 2013). Enrollees have 10–12 hours a week of group counseling, so a low risk participant will go through approximately 260 hours of counseling in his six months in the program. *DOCCS Fact Sheet: SOMTA/Civil Management*, N.Y. State Dept. of Corr. & Cmty. Supervision (Dec. 2007), http://www.doccs.ny.gov/FactSheets/somta.html (last visited Feb. 9, 2013). If you are considered a sex offender because you either committed (or attempted to commit) a sex offense, displayed behavior of a sexual nature in committing a non-sex crime, or your need for sex offender counseling is identified, you will be transferred to one of the institutions where counseling is offered when you are eligible to begin the program. If you are in the Low Risk category, you can begin the program 18 months before your release date. If you are in the Moderate/High Risk or High Risk category, you can begin the program 36 months before your release date. *Sex Offender Counseling and Treatment Program Guidelines*, N.Y. State Dept. of Corr. & Cmty. Supervision (Nov. 2008), http://www.doccs.ny.gov/ProgramServices/SOCTP_Guidelines_Nov08 (last visited Feb. 9, 2013).

18. N.Y. Corr. Law § 803(1)(a) (McKinney Supp. 2011). This law is in effect until September 1, 2013 and explains that good behavior allowances (or good time credits) may be withheld, forfeited or canceled in whole or in part for, among other things, "failure to perform properly in the duties or program assigned."

19. N.Y. Comp. Codes R. & Regs. tit. 7, § 262.1(a) (2010).

20. N.Y. Comp. Codes R. & Regs. tit. 7, § 262.1 (2010).

21. N.Y. Comp. Codes R. & Regs. tit. 7, § 260.2 (2010). The statute makes clear that the good behavior allowances, or good time credits, are a privilege that need to be earned by a prisoner and, therefore, no prisoner has the right to demand these allowances/credits.

22. N.Y. Corr. Law § 803(4) (McKinney Supp. 2011), which will expire on September 1, 2013.

23. N.Y. Comp. Codes R. & Regs. tit. 7, § 261.3(c) (2010). *See also* People ex rel. Gittens v. Coughlin, 143 Misc. 2d 748, 751, 541 N.Y.S.2d 718, 720 (1989) (explaining that, according to N.Y. Comp. Codes R. & Regs. tit. 7, § 261.3 (2010), the TAC should look at the entire experience of the prisoner and not just a rule when making its decision regarding good behavior allowances); Amato v. Ward, 41 N.Y.2d 469, 473–74, 362 N.E.2d 566, 570, 393 N.Y.S.2d 934, 937 (N.Y. 1977) (citing N.Y. Comp. Codes R. & Regs. tit. 7, § 261.3 (2010)) (holding that the TAC should appraise the entire institutional experience of the prisoner in making its decision).

24. N.Y. Correct. Law § 803(1)(a) (McKinney Supp. 2011).

25. Matter of Jones v. Goord, 35 A.D.3d 951, 952, 824 N.Y.S.2d 575, 576 (3d Dept. 2006) (upholding the determination to withhold good time credit because of the petitioner's failure to participate in recommended treatment programs); Benjamin v. N.Y. State Dept. of Corr. Serv., 19 A.D.3d 832, 833, 796 N.Y.S.2d 747, 748 (3d Dept. 2005) (citing Matter of McPherson v. Goord, 17 A.D.3d 750, 751, 793 N.Y.S.2d 230, 231 (3d Dept. 2005) (holding that "petitioner's refusal to participate in a recommended [drug] treatment program provide[d] a rational basis for withholding a good behavior allowance")); Matter of Thomas v. Time Allowance Comm., 4 A.D.3d 637, 638, 771 N.Y.S.2d 739, 740 (3d Dept. 2004) (upholding the withholding of petitioner's good behavior allowance because of his failure to participate in an alcohol and substance abuse treatment program); Matter of Burke v. Goord, 273 A.D.2d 575, 575, 710 N.Y.S.2d 136, 137 (3d Dept. 2000), *appeal dismissed*, 95 N.Y.2d 898, 739 N.E.2d 1141, 716 N.Y.S.2d 637 (2000) (explaining that when a prisoner does not participate in a recommended therapeutic program, the TAC can deny him good time credit); Matter of Pfeifer v. Goord, 272 A.D.2d 886, 886, 708 N.Y.S.2d 217, 218 (4th Dept. 2000) (explaining that a TAC can deny good time credit when a prisoner fails to participate in "recommended" treatment programs).

26. Matter of Jones v. Goord, 35 A.D.3d 951, 952, 824 N.Y.S.2d 575, 576 (3d Dept. 2006) (upholding the

to challenge this sort of decision with an Article 78 proceeding,[27] but they have not been successful.[28] Courts have found that it is reasonable and legal to deny prisoners good time credits if the prisoners did not accept treatment for the underlying behavior that resulted in their incarceration.[29] Courts have been strict in upholding such denials of good time credits even where:

(1) the petitioner was on a wait-list for such a program, but had refused treatment twice before;[30]
(2) the petitioner had previously participated in a behavior intervention program and some sex offender counseling, but he "refused to sufficiently participate in and complete certain recommended offender and aggression counseling programs";[31] and
(3) the prisoner was told he needed additional counseling but he was not allowed to transfer to a facility with an appropriate sex offender therapy program.[32]

Courts have also rejected the argument that requiring a prisoner to participate in sex offender and aggression therapy programs violates the petitioner's Fifth Amendment right against self-incrimination.[33]

For these reasons, you should make every attempt to get counseling if it is recommended to you.

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determination to withhold good time credit because of the petitioner's failure to participate in recommended treatment programs); Ferry v. Goord, 268 A.D.2d 720, 721, 704 N.Y.S.2d 315, 316 (3d Dept. 2000) (explaining that failure to participate in "recommended" (rather than "assigned") programs may be a reason for withholding good time credit); *see also JLM*, Chapter 18, Part C, "Due Process in Prisons."

27. For further information, see *JLM,* Chapter 22, "How to Challenge Administrative Decisions Using Article 78 of the New York Civil Practice Law and Rules."

28. *See, e.g.* Matter of Maxson v. Fischer, 61 A.D.3d 1192, 1192–93, 876 N.Y.S.2d 765, 766 (3d Dept. 2009) (upholding the decision of the lower court in an Article 78 proceeding, which upheld the withholding of good time credit because of "the petitioner's failure to complete the sex offender counseling program, from which he had been removed for disciplinary reasons"); Benjamin v. N.Y. State Dept. of Corr. Serv., 19 A.D.3d 832, 833, 796 N.Y.S.2d 747, 747 (3d Dept. 2005) (citing Matter of Burke v. Goord, 273 A.D.2d 575, 575, 710 N.Y.S.2d 136, 137 (3d Dept. 2000) (allowing the TAC to withhold prisoner's good time credits because the prisoner refused to participate in the prison's sex offender treatment program)); Lamberty v. Schriver, 277 A.D.2d 527, 528, 715 N.Y.S.2d 510, 511 (3d Dept. 2000) (allowing the TAC to withhold good time credit from a prisoner who failed to attend recommended treatment programs and saying the court could not review such a decision because it was made in accordance with the law); Ferry v. Goord, 268 A.D.2d 720, 721, 704 N.Y.S.2d 315, 316 (3d Dept. 2000) (holding that withholding of good time credits because prisoner failed to participate in recommended counseling programs was reasonable); Jones v. Coombe, 269 A.D.2d 632, 632, 703 N.Y.S.2d 554, 554 (3d Dept. 2000) (finding it was not irrational to withhold "good time allowance credits" when prisoner refused to participate in recommended counseling programs); Coleman v. Boyle, 270 A.D.2d 739, 739–40, 705 N.Y.S.2d 419, 420 (3d Dept. 2000) (holding that withholding of prisoner's good time credits was not unreasonable and was not contrary to law where prisoner delayed seeking counseling); Staples v. Goord, 263 A.D.2d 943, 944, 695 N.Y.S.2d 190, 191 (3d Dept. 1999) (upholding prison TAC's denial of prisoner's request for good time credits because he had not completed sex offender counseling, even though he was on the wait list, because he had twice before decided not to participate in a counseling program).

29. Majeed v. Goord, 279 A.D.2d 832, 833, 719 N.Y.S.2d 739, 740 (3d Dept. 2001) (holding that where "an inmate has refused to accept adequate treatment for the behavior that resulted in the incarceration, a decision to withhold good time allowance is not irrational"); *see also* Matter of Martin v. Goord, 45 A.D.3d 992, 994, 845 N.Y.S.2d 524, 526 (3d Dept. 2007) (explaining that a refusal to address the behavior that resulted in the prisoner's incarceration by not properly participating in a recommended or required program is an acceptable and rational reason for withholding good time credits). Furthermore, in Coleman v. Boyle, 270 A.D.2d 739, 739–40, 705 N.Y.S.2d 419, 420 (3d Dept. 2000), the court explained that, because the prisoner refused to attend several similar programs in the past, the fact that he later requested a transfer "to another correctional facility that offered a … sex offender therapy program" did not make it unreasonable nor against the law for the TAC to withhold good time credits from him.

30. Staples v. Goord, 263 A.D.2d 943, 944, 695 N.Y.S.2d 190, 191 (3d Dept. 1999) (upholding the TAC's denial of prisoner's request for good time credits because he had not completed sex offender counseling, even though he was on the wait list, because he had twice before refused to participate in a counseling program).

31. Jones v. Coombe, 269 A.D.2d 632, 632, 703 N.Y.S.2d 554, 554 (3d Dept. 2000). In this case, the court explained that the prisoner's failure to participate in the recommended programs meant that he did not receive "adequate" treatment for "the very thing that resulted in his incarceration." For this reason, the court concluded that the TAC's decision to withhold good time credits was not irrational.

32. Coleman v. Boyle, 270 A.D.2d 739, 739–40, 705 N.Y.S.2d 419, 420 (3d Dept. 2000) (explaining that if you ask for counseling after refusing it earlier, the TAC can decide to withhold good time credits).

33. Lamberty v. Schriver, 277 A.D.2d 527, 528, 715 N.Y.S.2d 510, 511 (3d Dept. 2000) (explaining that requiring a prisoner to participate in sex offender and aggression therapy programs does not violate his 5th Amendment rights); Burke v. Goord, 273 A.D.2d 575, 575, 710 N.Y.S.2d 136, 137 (3d Dept. 2000) (holding that withholding good time credits for failure to participate in sexual offender programs does not violate the 5th Amendment).

1. Self-incrimination in counseling

Before October of 2008, prisoners could be required to essentially admit to crimes in counseling when they were asked, for example, to produce "sexual autobiographies." Some prisoners filed a lawsuit claiming that such a requirement violated their Fifth Amendment right against self-incrimination. The lawsuit was settled, and as part of the settlement, you can only be required to speak about your past sexual behavior in general terms, without having to mention specific details, and you cannot be required to admit to any specific crime in order to participate in treatment and receive good time credits.[34]

D. HIV Testing

HIV is the virus that causes AIDS. HIV can be spread in several ways, including through sexual contact and the exchange of bodily fluids. Because sexual contact is one way to transmit this virus, almost every state has a law allowing or requiring courts to order HIV testing for convicted sex offenders or defendants charged with sex offenses.[35] Additionally, the federal government may perform HIV testing on any prisoner who has been sentenced to at least six months, if the health services staff at the prison determines that the prisoner is at risk for HIV infection. It may also perform an HIV test on any prisoner, even those sentenced to less than six months, who may have transmitted HIV to prison employees or to other non-prisoners. [36]

Typically, there are two kinds of HIV testing that may be required by law: "informational testing" and "evidentiary testing."

Informational testing laws require testing criminal defendants so that the state can provide information about the defendant's HIV status to others who may have been exposed to HIV by the prisoner. This includes telling the defendant's HIV status to either a crime victim or someone who had contact with the defendant's fluids during arrest. Informational HIV test results may sometimes be allowed as evidence in the defendant's trial, but each state has a different rule regarding who may access the test results and how they may be used.

Evidentiary testing laws exist in states where transmission of HIV can be a crime. In these states, a defendant is tested for HIV in order to produce evidence for the prosecution.

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34. In Van Gorder v. Lira, 2010 U.S. Dist. LEXIS 30584, at *3–4 (N.D.N.Y. Mar. 30, 2010) (*unpublished)*, the court held that the settlement terms of Donhauser v. Goord, 314 F. Supp. 2d 119 (N.D.N.Y. 2004) applied to the petitioner's 5th Amendment self-incrimination claims and, therefore, it did not consider them further. The court briefly discussed the class action settlement and explained that the settlement applied to possible future claims that a prisoner's 5th Amendment right was violated. This was because he was either denied parole or good time credits because he refused to participate in DOCCS' Sex Offender Counseling Program, which would require him to discuss his history of sex offenses. The settlement agreement said that when any prisoner is admitted to a Sex Offender Counseling Program, DOCCS has to provide that prisoner with a form titled "Limits of Confidentiality, Partial Waiver of Confidentiality and Acknowledgment."

35. *See* Ala. Code § 22-11A-17(a) (LexisNexis 2011); Alaska Stat. § 18.15.300 (2012); Ariz. Rev. Stat. Ann. § 13-1415 (2010); Ark. Code Ann. § 16-82-101(B) (2011); Cal. Penal Code § 1202.1 (West 2004); Cal. Penal Code § 1524.1 (West 2000 & Supp. 2010); Colo. Rev. Stat. § 18-3-415 (2010); Conn. Gen. Stat. Ann. § 54-102a (West 2009); Conn. Gen. Stat. Ann. § 54-102b (West 2009); Del. Code Ann. tit. 10, § 1077(a) (2011); Del. Code Ann. tit. 11, § 3911 (2007 & Supp. 2008); Fla. Stat. Ann. § 960.003 (2006 & Supp. 2010); Ga. Code Ann. § 17-10-15 (2008 & Supp. 2010); Haw. Rev. Stat. Ann. § 801D-4(b) (LexisNexis 2007); Idaho Code Ann. § 39-601 (2012); Idaho Code Ann. § 39-604 (2012); 730 Ill. Comp. Stat. Ann. 5/5-5-3(g) (West 2007 & Supp. 2010); Ind. Code Ann. § 35-38-1-10.5 (LexisNexis 1998 & Supp. 2009); Ind. Code Ann. § 35-38-1-10.6 (LexisNexis 1998 & Supp. 2009); Iowa Code Ann. § 915.42 (West 2003); Kan. Stat. Ann. § 65-6009 (2002); Ky. Rev. Stat. Ann. § 510.320 (LexisNexis 2008); La. Rev. Stat. Ann. § 15:535 (2005 & Supp. 2010); La. Code Crim. Proc. Ann. art. 499 (2003 & Supp. 2010); Me. Rev. Stat. Ann. tit. 5, § 19203-F (2007 & Supp. 2009); Md. Code Ann., Crim. Proc. § 11-112 (LexisNexis 2008); Mich. Comp. Laws Ann. § 333.5129 (2011); Minn. Stat. Ann. § 611A.19 (West 2009); Miss. Code Ann. § 99-19-203 (2007); Mo. Ann. Stat. § 191.663 (West 2004); Mont. Code Ann. § 46-18-256 (2010); Neb. Rev. Stat. § 29-2290 (2008); Nev. Rev. Stat. Ann. § 441A.320 (LexisNexis 2009); N.H. Rev. Stat. Ann. § 632-A:10-b (2012); N.J. Stat. Ann. § 2A:4A-43.1 (West 1987 & Supp. 2010); N.J. Stat. Ann. § 2C:43-2.2 (2011); N.M. Stat. Ann. § 24-2B-5.1 (LexisNexis 2010); N.Y. Crim. Proc. Law § 390.15 (McKinney 2003); N.C. Gen. Stat. § 15A-534.3 (2009); N.D. Cent. Code § 23-07.7-01 (2007 & Supp. 2009); Ohio Rev. Code Ann. § 2907.27 (West 2006 and Supp. 2010); Okla. Stat. Ann. tit. 63, § 1-524 (West 2004); Okla. Stat. Ann. tit. 63, § 1-524.1 (2011); Or. Rev. Stat. § 135.139 (2009); 35 Pa. Cons. Stat. Ann. § 7608 (West 2003); R.I. Gen. Laws § 11-34.1-12 (2009); R.I. Gen. Laws § 11-37-17 (2010); S.C. Code Ann. § 16-3-740 (2010); S.D. Codified Laws § 23A-35B-3 (2011); Tenn. Code Ann. § 39-13-521 (2010); Tex. Code Crim. Proc. Ann. art. 21.31 (West 2009); Utah Code Ann. § 76-5-502 (LexisNexis 2008); Utah Code Ann. § 76-5-504 (2011); Vt. Stat. Ann. tit. 13, § 3256 (2009); Va. Code Ann § 18.2-62 (2008); Wash. Rev. Code Ann. § 70.24.340 (West 2011); W. Va. Code Ann. § 16-3C-2(f) (LexisNexis 2006); Wis. Stat. Ann. § 968.38 (West 2007); Wyo. Stat. Ann. § 7-1-109 (2011).

36. 28 C.F.R. § 549.12 (2011).

For more detailed information about HIV testing and testing for other infectious disease, see *JLM* Chapter 26 "Infectious Diseases (AIDS, Hepatitis, and Tuberculosis in Prison)."

1. Informational Tests

Different states have different regulations for informational HIV testing. States have different rules for when a test should be done, for who is allowed to find out about your test results, and for whether the results can be used in criminal proceedings. Some statutes allow the court to decide if you should be tested for HIV, while other statutes require the court to order testing if the victim requests it and other states have automatic testing in place.

Some of the states do not allow test results to be revealed to the court[37] or used in criminal or civil proceedings against the defendant,[38] but other states permit the use of HIV test results by the prosecution.[39] Be sure to read a copy of the statute from your state in order to learn what the law is in relation to your case.

Some defendants have challenged statutes that allow pre- or post-conviction HIV testing against the defendant's wishes, claiming that these statutes violate the Fourth Amendment's prohibition on unreasonable searches. Most of the time, the courts have determined that these statutes are constitutional.[40] Some courts say that some Fourth Amendment protections—warrant and probable cause—do not apply when (1) the reason for the test is a "special need" beyond ordinary law enforcement, and when (2) that special need justifies the privacy intrusion.[41]

(a) New York

New York has its own laws regarding HIV testing. The New York law requires that when a defendant is convicted of certain sex offenses, the court *must* order the defendant to submit to HIV testing if the victim requests it.[42] The victim must request the test before the conviction or within the first ten days after it,[43] and the test must be performed within fifteen days of the order.[44] The court that controls Richmond (Staten

37. *See*, *e.g.*, N.Y. Crim. Proc. Law § 390.15(6)(a)(ii) (McKinney 2010) (limiting disclosure "to the victim, the victim's immediate family, guardian, physicians, attorneys, medical or mental health providers, and to his or her past and future contacts to whom there was or is a reasonable risk of HIV transmission," and explicitly barring disclosure "to any other person or the court").

38. *See, e.g.,* N.Y. Crim. Proc. Law § 390.15(8) (McKinney 2010) (information on HIV status obtained by consent, hearing, or a court order may not be used against you in a criminal or civil proceeding relating to the events resulting in your conviction); Tex. Code Crim. Proc. Ann. art. 21.31(c) (Vernon 1989 & Supp. 2005) (preventing use of test results in any criminal proceeding arising out of the alleged offense).

39. *See, e.g.,* Alaska Stat. § 18.15.310(e)(2) (2006) (allowing use of HIV test results in civil proceedings against a defendant); Cal. Penal Code § 1202.1(c) (West 2004) (allowing disclosure of HIV test results to the prosecution for use in an additional criminal charge or to increase the defendant's sentence).

40. *See, e.g.,* Seaton v. Mayberg, 610 F.3d 530, 530 (9th Cir. 2010) (citing Hudson v. Palmer, 468 U.S. 517, 527–28, 104 S. Ct. 3194, 3201, 82 L. Ed. 2d 393 (1984) ("A right of privacy in traditional Fourth Amendment terms is fundamentally incompatible with the close and continual surveillance of inmates and their cells required to ensure institutional security and internal order.")) (*Seaton* found that this incompatibility with the Fourth Amendment also applied to prisoner's medical records); Connor v. Foster, 833 F. Supp. 727, 730–31 (N.D. Ill. 1993) (permitting prisoner to be tested involuntarily under the 4th Amendment when his hypodermic needle pricked the finger of an officer during a frisk search); Virgin Islands v. Roberts, 756 F. Supp. 898, 904 (D.V.I. 1991) (requiring an alleged rapist to undergo an HIV test), *aff'd,* 961 F.2d 1567 (3d Cir. 1992); People v. Adams, 597 N.E. 2d 574, 584–586, 149 Ill. 2d 331, 352–354 (Ill. 1992) (finding that an Illinois statute requiring prisoners convicted of sex offenses to undergo HIV testing was constitutional, and did not violate the 4th Amendment or the Equal Protection Clause); *In re* Juveniles A, B, C, D, E, 847 P.2d 455, 463, 121 Wn.2d 80, 98 (Wash. 1993) (en banc) (allowing juveniles found to have committed sexual offenses to be tested for HIV).

41. *See In re* Juveniles A, B, C, D, E, 847 P.2d 455, 459, 121 Wn.2d 80, 91 (Wash. 1993) (en banc) (citing Skinner v. Ry. Labor Executives' Ass'n, 489 U.S. 602, 619, 109 S. Ct. 1402, 1414, 103 L. Ed. 2d 639, 661 (1989)). *See also* United States v. Ward, 131 F.3d 335, 342 (3d Cir. 1997) (holding that a convicted rapist had to undergo a mandatory HIV test because notifying the victim of a potential HIV infection and preventing the spread of HIV were "special needs" justifying the blood test).

42. N.Y. Crim. Proc. Law § 390.15(1)(a) (McKinney 2010). The specific offenses that can lead to a mandatory HIV test include any felony offenses under Article 130 of New York Penal Law, or any offenses under section 130.20 of the same law, where the offenses include "sexual intercourse," "oral sexual conduct," or "anal sexual conduct."

43. N.Y. Crim. Proc. Law § 390.15(2) (McKinney 2010).

44. N.Y. Crim. Proc. Law § 390.15(5) (McKinney 2010).

Island), Kings (Brooklyn), Queens, Nassau, Suffolk, Westchester, Dutchess, Orange, Rockland, and Putnam counties says that according to the statute, these tests can be ordered only after you have been convicted of certain sex offenses.[45]

In New York, your confidential HIV-related information can only be given to the victim or to the "victim's immediate family, guardian, physicians, attorneys, medical or mental health providers," as well as to the victim's past or future sexual partners where there is a risk of HIV transmission.[46] No one else can have access to this information, not even the court.[47] If you have been tested under a court order, the results of the test cannot be used against you in court. Additionally, New York Criminal Procedure Law section 390.15 requires that you have actually been convicted before you can be forced to submit to a test.[48] Courts will not usually order a test for a defendant who has not been convicted.[49]

However, if you *tell* the victim about your HIV status, then a court may force you to take a test before you are convicted, because you have made your medical condition an issue and have given up your right to confidentiality.[50]

(b) Federal

Under federal law, specifically the 1994 Violence Against Women Act (VAWA), a victim of certain sex offenses can ask a federal district court to order a defendant to get tested for HIV. These results are given to the victim (and/or the victim's parent or legal guardian) and the defendant.[51]

Unlike New York law, which only authorizes testing the defendant after conviction, VAWA allows a court to order testing of a defendant *before* they have been convicted of certain sex offenses. Although VAWA is a federal law, it applies to accused sex offenders who are being prosecuted in state court under state criminal laws.[52]

This means that no matter what the laws of the state you are in, you could be required to take an HIV test and provide the results under VAWA. However, in New York, most victims continue to request HIV test results under New York State law, not VAWA.

Some provisions of VAWA have been challenged in federal courts.[53] However, the federal testing provision still applies and has been specifically upheld for sex offenders by the Court of Appeals for the Third Circuit.[54]

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45. *See* Matter of McClain v. Grosso, 2006 NY Slip Op. 05964, 31 A.D.3d 765, 766, 820 N.Y.S.2d 93, 93 (2d Dept. 2006) (a defendant convicted of attempted sexual abuse could not be forced to take an HIV test because attempted sexual abuse was not one of the crimes specifically listed in section 390.15 of New York Criminal Procedure Law). Section 390.15 does not list specific felonies that result in mandatory testing. Instead, it provides that "where an act of 'sexual intercourse,' 'oral sexual conduct' or 'anal sexual conduct' . . . is required as an essential element for the commission [of the felony], the court must, upon a request of the victim, order that the defendant submit to human immunodeficiency (HIV) related testing." N.Y. Crim. Proc. Law § 390.15(1)(a) (McKinney 2010).

46. N.Y. Crim. Proc. Law § 390.15(6)(a)(ii) (McKinney 2010).

47. N.Y. Crim. Proc. Law § 390.15(6)(a)(ii) (McKinney 2010).

48. N.Y. Crim. Proc. Law § 390.15(6)(a)(ii) (McKinney 2010).

49. *See*, *e.g.*, *In re* Garinger, 2003 N.Y. Slip Op. 14474, 305 A.D.2d 677, 678, 759 N.Y.S.2d 550, 552, (2d Dept. 2003) (citing *In re* Michael WW., 203 A.D.2d 763, 764, 611 N.Y.S.2d 47, 48 (3d Dept. 1994) (denying order to compel testing of suspect accused of sexually abusing a boy and stating that, even if the allegations were proven, the only way to tell if the victim had been infected with HIV would be to test the victim himself)); Doe v. Connell, 179 A.D.2d 196, 199–200, 583 N.Y.S.2d 707, 710 (4th Dept. 1992) (holding that prosecution could not force the defendant, who was charged with rape and sodomy but not yet convicted of the crimes, to provide blood for an HIV test sought by the alleged victim and her husband); *In re* Harry G., 157 Misc. 2d 959, 960–61, 599 N.Y.S.2d 425, 426 (Fam. Ct. Broome County 1993) (denying request to require the defendant, accused of sexually assaulting a young boy, to submit to an HIV test on the grounds that there needed to be evidence suggesting the accused had HIV, and a general fear on the part of the alleged victim was not enough).

50. People v. Durham, 146 Misc. 2d 913, 916, 553 N.Y.S.2d 944, 946–47 (Sup. Ct. Queens County 1990) (ordering defendant to be tested for HIV after he disclosed to his rape victim that he had HIV and thus placed his medical condition at issue); *In re* Gribetz, 159 Misc. 2d 550, 553, 605 N.Y.S.2d 834, 836 (County Ct. Rockland County 1993) (holding that test results were needed to prove defendant had acted recklessly and with depraved indifference to human life, and that the defendant had waived her right to privacy since she had already discussed her HIV status).

51. 42 U.S.C. § 14011(b)(5) (2006). Note that VAWA consists of several subtitles, which can be found throughout the United States Code. Only the subtitle relevant to HIV testing of prisoners is cited here.

52. 42 U.S.C. § 14011(b)(2)(a) (2006).

53. For example, in United States v. Morrison, 529 U.S. 598, 627, 120 S.Ct. 1740, 1759, 146 L. Ed. 2d 658 (2000),

There is a possibility that eventually a challenge to the HIV testing provisions of VAWA might someday succeed. You should read the most recent case law to determine if the rules have changed at all. Furthermore, VAWA was amended in 2006. Although the amendments do not change the specific laws on HIV testing, be sure to look at the most recent version of VAWA if you believe it applies to your case.

2. Evidentiary Testing Laws

In many states, if you know you are HIV positive, it is a crime for you to have sexual contact with another person if you do not tell the other person your HIV status beforehand.[55] In states that criminalize HIV transmission, the court must order an HIV test in order for the prosecution to prove one element of the crime (that is, that you are HIV positive). In such situations, the HIV test results may be used against you in your criminal case.[56]

E. Post-Conviction DNA Testing

Investigations of sex offenses often involve collecting bodily fluids like semen or blood. These fluids can then be submitted for DNA testing to help identify perpetrators. If you have been convicted of a sex offense and you are contesting your conviction (trying to prove that you are innocent), DNA evidence could be helpful and may be available. See *JLM* Chapter 11, "Using Post-Conviction DNA Testing to Attack Your Conviction or Sentence," for more detailed information.

F. Special Parole Considerations

1. Parole Generally

You may be paroled—that is, released from prison—before you have served your entire sentence.[57] You will be required to follow certain rules from the time of your early release until your full sentence is finished. The state parole division will supervise you and make sure that you do not "violate parole" by breaking these rules.[58] During this time, the parole division is also required to assist you in reintegrating into the community.[59] In New York, you are not usually eligible for parole if you have received one or more "determinate" sentences (a sentence where the court specifies a fixed amount of time you will be in prison, as opposed to a range of time).[60] If you have received a determinate sentence, you will also be subject to a

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the Supreme Court invalidated 42 U.S.C.A. § 13981(c), the portion of VAWA that provides a civil remedy to victims of gender-motivated violence.

54. United States v. Ward, 131 F.3d 335, 342–43 (3d Cir. 1997).

55. *See, e.g.*, Fla. Stat. Ann. § 775.0877(3) (West 2005) (allowing a defendant who was previously convicted of a sexual offense and tested positive for HIV, who then commits a second sexual offense, to be charged with criminal transmission of HIV); Ga. Code Ann. § 16-5-60 (2003) (criminalizing behavior by a person who knows that he is HIV positive, who then exposes another person to HIV through sexual behavior, sharing drug paraphernalia, or donating blood or other bodily fluids); 720 Ill. Comp. Stat. Ann. 5/12-5.01 (West 2002) (allowing a defendant to be charged with criminal transmission of HIV, a class 2 felony, if defendant knows he is HIV positive and then engages in sexual contact, donates blood or other bodily fluids, or shares intravenous drug paraphernalia with another person); Iowa Code Ann. § 709C.1 (West 2003) (criminalizing as a class B felony the knowing transmission of HIV positive bodily fluids or drug paraphernalia previously used by the person infected with HIV); Mich. Comp. Laws Ann. § 333.5210 (West 2001) (criminalizing "sexual penetration" by a person who knows he is infected with HIV or AIDS, and who does not tell his sexual partner about his infection).

56. *See, e.g.*, People v. C.S., 222 Ill.App.3d 348, 355, 164 Ill.Dec. 810, 583 N.E.2d 726, 731 (2d Dist 1991) (noting that the positive results of the HIV test performed on defendant would be essential to a future prosecution under state statute that prohibits those who know they are infected with AIDS from having certain conduct that has the potential of transmitting the virus).

57. Black's Law Dictionary 1227 (9th ed. 2009). *See also* N.Y. Exec. Law § 259-a–c (McKinney 2012) (describing generally the organization and duties of the New York State Division of Parole).

58. N.Y. Exec. Law § 259-c (McKinney 2012) (describing the supervisory duties of New York State Division of Parole).

59. *See, e.g.*, N.Y. Exec. Law § 259-c (McKinney 2005 & Supp. 2008) (describing the reintegration duties of New York State Division of Parole).

60. N.Y. Penal Law § 70.40–45 (McKinney 2012). For example, "5 years" would be a determinate sentence, and you would probably not be eligible for parole. However, if you received "3 to 6 years," this would be an indeterminate sentence, and you might be eligible for parole after three years. If you received more than one sentence, with one sentence determinate and another indeterminate, you might still be eligible for parole. If you received sentences that can be served concurrently (at the same time) then you may be paroled after you have served the minimum period of the

period of "post-release supervision."[61] However, the state board of parole supervises prisoners released under both parole and post-release supervision.

2. Special Parole Conditions for Sex Offenders

If you are convicted of a sex offense and released on parole, your parole officer will probably impose special conditions or restrictions on you. The parole board tells its officers some of the things they should consider when making rules for parolees convicted of sex offenses.[62] The board says officers should:

(1) identify high risk sex offenders early in the parole process; [63]
(2) consider special factors, like alcohol or drug use, or the age of the victim;[64]
(3) notify the community you are moving to that you are a convicted sex offender;[65] and
(4) give you a curfew or keep you from traveling, if they think it is necessary.[66]

According to board guidelines, if you have to follow any special rules, they must be related to your "pattern of criminal behavior" and your parole officer needs to write a memorandum explaining why these rules are appropriate. This memorandum can be used to explain and protect the officer's decision under the rule explained in Gerena v. Rodriguez.[67]

In *Gerena*, the parolee had been convicted of committing sodomy and attempted sodomy after luring victims to his car. Because of this, he was not allowed to have a driver's license or drive a car without first getting approval from his parole officer. The court said the parole officer and the parole board were allowed to make this sort of rule, because it was related to the specific risks that they thought the parolee might pose.[68] Parole officers can look at the type of crime you were convicted of or the methods you were alleged to have used, and can use this information to make special rules for your parole.[69]

Your parole officer might require you to:

(1) participate in and cooperate with therapy and counseling. The parole board will ask you to sign a waiver saying that your therapist can talk about your case with your parole officer;
(2) stay away from children under the age of eighteen unless you get a prior approval from a parole officer;
(3) not contact the victim;
(4) stay away from places where there may be children;
(5) not own children's toys;
(6) obey a curfew (stay home during certain hours of the day or night);
(7) stay away from adult nightclubs, bookstores, and other forms adult entertainment;
(8) limit your use of the internet and the kinds of websites you visit;

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indeterminate sentence or after you have served six-sevenths of the determinate sentences, whichever is later. N.Y. Penal Law § 70.41(a)(iii) (McKinney 2012). If you received sentences that have to be served consecutively (one after another), then you may be paroled after you have served the minimum amount of time in the indeterminate sentence plus six-sevenths of the aggregate term. N.Y. Penal Law § 70.41(a)(iv) (McKinney 2012).

61. N.Y. Penal Law § 70.45 (McKinney 2012).

62. Raul Russi, New York State Division of Parole, Guidelines for the Supervision of Sex Offenders (1994). *See also*, New York State Parole Handbook: Questions and Answers Concerning Parole Release and Supervision (November 2010), available at: https://www.parole.state.ny.us/pdf/handbook-nov2010.pdf (last visited October 14, 2012).

63. High-risk sex offenders are defined as those persons who are likely to be repeat offenders or who present a threat to public safety. N.Y. CLS Correct. § 168-l (5) (2012).

64. These special factors also include "persistence of behavior, associated drugs, associated alcohol, use of weapons and violence, age of the offender at the time of the commission of the first sex crime (not always significant), [and] mental instability (not always significant)." The characteristics of the victim that should be considered, according to the pamphlet, include "gender (pedophiles often offend against either sex), infant, child, adolescent, adult, elderly." Raul Russi, New York State Division of Parole, Guidelines for the Supervision of Sex Offenders (1994).

65. Raul Russi, New York State Division of Parole, Guidelines for the Supervision of Sex Offenders (1994).

66. Raul Russi, New York State Division of Parole, Guidelines for the Supervision of Sex Offenders (1994).

67. Gerena v. Rodriguez, 192 A.D.2d 606, 607, 596 N.Y.S.2d 143, 144, 1993 N.Y. App. Div. LEXIS 3572 (2d Dept. 1993).

68. Gerena v. Rodriguez, 192 A.D.2d 606, 607, 596 N.Y.S.2d 143, 144, 1993 N.Y. App. Div. LEXIS 3572 (2d Dept. 1993).

69. Gerena v. Rodriguez, 192 A.D.2d 606, 606–07, 596 N.Y.S.2d 143, 144, 1993 N.Y. App. Div. LEXIS 3572 (2d Dept. 1993).

(9) tell your officer when you enter into a significant relationship (such as with a girlfriend or boyfriend); and
(10) attend alcohol or substance abuse treatment.

These are only some of the rules the parole officer can require you to follow. You may not have to follow all of these rules: for example, unless you were convicted of a sex crime involving a child, you will probably not have to stay away from children. However, you will almost certainly have a curfew, and will be forbidden from contacting victims. Also, if you want to travel, you will have to get a travel permit from your parole officer. You can only get this sort of permit if you have a verified family emergency or a special circumstance like a family illness, a wedding, or a funeral.[70] If you travel, you will be assigned a second parole officer located in the area that you have traveled to.[71]

Courts will not look at the rules a parole officer makes you follow to decide whether they are helpful or fair.[72] As long as the parole officer's decision follows the law and makes some sense as a response to your record, the officer's decision is final.[73]

3. Incarceration Beyond Your Conditional Release Date

If you are imprisoned in New York State you will have to tell the Parole Board where you plan to live after prison when your release date is coming up.[74] The Parole Board can make you change your plans.[75] If you do not get approval for your living plans after release, you can be held in prison beyond your conditional release date (parole date).[76] Courts will allow you to be held until you have a living situation the parole board approves of. Often, the Board will not let you live near schools or other places that care for children under 18.[77] Sometimes the state has rules about where you may or may not live after release; sometimes these rules are local (in a county, city, town, and village).

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70. Raul Russi, New York State Division of Parole, Guidelines for the Supervision of Sex Offenders (1994).

71. Raul Russi, New York State Division of Parole, Guidelines for the Supervision of Sex Offenders (1994).

72. *See* Ahlers v. N.Y. State Div. of Parole, 1 A.D.3d 849, 849, 767 N.Y.S.2d 289, 289, 2003 N.Y. App. Div. LEXIS 12601, at *1–2 (3d Dept. 2003) (holding that a parole officer was allowed to require a convicted sex offender to attend substance and alcohol abuse treatment programs as a condition of the offender's parole and that this decision was "beyond judicial review");

73. M.G. v. Travis, 236 A.D.2d 163, 167–169, 667 N.Y.S.2d 11, 14–15, 1997 N.Y. App. Div. LEXIS 12822, at *7–8 (1st Dept. 1997) (citing Briguglio v. N.Y State Bd. of Parole, 24 NY2d 21, 28, 246 N.E.2d 512, 516, 298 N.Y.S.2d 704, 710, 1969 N.Y. LEXIS 1512, at *15–17 (1969) to support the proposition that decisions of the parole board cannot be reviewed by the courts, as long as the parole board does not violate any statutory obligations, and reviewing the board's decision to determine whether it was arbitrary or capricious).

74. N.Y. Exec. Law § 259-c (McKinney 2012) (describing generally the functions, powers, and duties of the State Board of Parole).

75. *See* Monroe v. Travis, 280 A.D.2d 675, 676, 721 N.Y.S.2d 377, 378, 2001 N.Y. App. Div. LEXIS 1797, at *2 (2d Dept. 2001) (holding that the Parole Board was justified in refusing to grant conditional release to a convicted sex offender until the prisoner found housing that was satisfactory to the Parole Board).

76. *See* Billups v. N.Y. State Div. of Parole, 18 A.D.3d 1085, 1085–1086, 795 N.Y.S.2d 408, 409 2005 N.Y. App. Div. LEXIS 5686, at *2 (3rd Dept. 2005) (holding that due to petitioner's violent history and the fact that he sexually assaulted his daughter, the condition that petitioner reside in an approved residence was rationally based); Monroe v. Travis, 280 A.D.2d 675, 676, 721 N.Y.S.2d 377, 378, 2001 N.Y. App. Div. LEXIS 1797, at *2 (2d Dept. 2001) (holding that the Parole Board was justified in refusing to grant conditional release to a convicted sex offender until the prisoner found housing that was satisfactory to the Parole Board); People *ex. rel.* Wilson v. Keane, 267 A.D.2d 686, 686, 700 N.Y.S.2d 408, 409, 1999 N.Y. App. Div. LEXIS, at 12795 *1–2 (3d Dept. 1999) (finding that due to petitioner's history as a sex offender and his failure to participate in available sex offender treatment programs, the condition that petitioner reside in an approved residence was rationally based).

77. New York State Parole Handbook: Questions and Answers Concerning Parole Release and Supervision (November 2010) at 22, available at: https://www.parole.state.ny.us/pdf/handbook-nov2010.pdf (last visited October 14, 2012). ("You will not be allowed to be near or enter upon any school grounds or any other facilities or institutions primarily used for the care and treatment of persons under the age of 18, unless you meet certain criteria and have the written permission of your Parole Officer.").

4. The Importance of Following Parole Rules

If you have been convicted of a sex offense, the Division of Parole will be especially strict in making sure you follow all the rules of your parole, and will send you back to prison if you break those rules.[78] It is very important that you comply with the requirements and conditions the Parole Board imposes.

G. Community Registration and Notification Laws

1. Generally

In 1989, states began to pass Community Registration and Notification laws, often called "Megan's Laws." These are called Megan's Laws after Megan Kanka, a seven year old girl who was murdered in New Jersey in 1994, and whose death prompted New Jersey to pass the first Megan's Law.[79] Today, all fifty states have these laws.[80] Although the exact laws are different in each state, the Federal Government requires that all states collect your name, addresses of where you live and work, information about your physical appearance, fingerprints, a DNA sample, conviction history, and a copy of your state issued license/identification card and license plates of your car if you have one.[81] Additionally, States are required by federal law to tell you about your duty to register, to check your address every year, to tell the police when you move, and to give the public any information about you that it might need to protect itself.[82] Please take note, if you were convicted of a sex offense prior to your state passage of a Megan's Law, you may not be required to register such information.

The Supreme Court does not like to restrict states' Megan's Laws. States are allowed to impose Megan's Law requirements on sex offenders who were convicted before the laws existed.[83] States are also allowed to post a convicted sex offender's picture and information on the internet without giving him a hearing.[84]

In *Connecticut Department of Public Safety*, the Court suggested that someday, a defendant might show that a Megan's Law violated "substantive due process," a set of rights protected by the Fourteenth Amendment of the United States Constitution.[85] Under substantive due process, laws have to be fair and

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78. *See*, *e.g.*, Farrell v. Burke, 449 F.3d 470, 2006 U.S. App. LEXIS 13438 (2d Cir. N.Y. 2006), (upholding grant of defendants' motion to dismiss 14th Amendment claim by a parolee who was re-arrested and re-incarcerated for violation of a special condition prohibiting him from owning pornography).

79. N.J. Stat. Ann. §§ 2C:7-1--2C:7-23.

80. Each state has interpreted its Megan's Laws differently. Before citing to any of the following statutes, be sure to research how these statutes have been interpreted by the courts in your state. *See*, *e.g.*, Alabama Sex Offender Registration and Community Notification Act, 2011 Ala. Acts 640; Alaska Stat. Ann. §§ 12.63.010–.100; Ariz. Rev. Stat. Ann. §§ 13-3821 to -3829; Ark. Code Ann. §§ 12-12-901 to -923; Cal. Penal Code §§ 290–290.5; Colo. Rev. Stat. Ann. §§ 16-22-101 to -115; Conn. Gen. Stat. Ann. §§ 54-250 to -261; Del. Code Ann. tit. 11, §§ 4120–4122; Fla. Stat. Ann. §§ 775.21–.24; Ga. Code Ann. §§ 42-1-12 to -19; Haw. Rev. Stat. §§ 846E-1 to -12; Idaho Code Ann. §§ 18-8301 to -8331; 730 Ill. Comp. Stat. Ann. 150/1–12, 152/101–999; Ind. Code Ann. §§ 11-8-8-1 to -22; Iowa Code Ann. §§ 692A.101–.130; Kan. Stat. Ann. §§ 22-4901 to -4913; Ky. Rev. Stat. Ann. §§ 17.500–.580; La. Rev. Stat. Ann. §§ 15:540–:553; Me. Rev. Stat. Ann. tit. 34-A, §§ 11201–11256, 34-A §§ 11271-11304.; Md. Code Ann., Crim. Proc. §§11-701 to -726; Mass. Gen. Laws ch. 6, §§ 178D-Q; Mich. Comp. Laws Ann. §§ 28.721–.736; Minn. Stat. Ann. §§ 243.166–.167; Miss. Code Ann. §§ 45-33-21 to -59; Mo. Ann. Stat. §§ 589.400–.426; Mont. Code Ann. §§ 46-23-501 to -520; Neb. Rev. Stat. §§ 29-4001 to -4014; Nev. Rev. Stat. Ann. §§ 179D.010–.850; N.H. Rev. Stat. Ann. §§ 651-B:1 to :12; N.J. Stat. Ann. §§ 2C:7-1 to :7-23; N.M. Stat. Ann. §§ 29-11A-1 to -10; N.Y. Correct. Law §§ 168 to 168-w; N.C. Gen. Stat. §§ 14-208.5 to .45; N.D. Cent. Code Ann. § 12.1-32-15; Ohio Rev. Code Ann. §§ 2950.01–.99; Okla. Stat. Ann. tit. 57, §§ 581–590.2; Or. Rev. Stat. §§ 181.592–.606, 181.820–.833; 42 Pa. Cons. Stat. Ann. §§ 9791–9799.41; R.I. Gen. Laws Ann. §§ 11-37.1-1 to -20; S.C. Code Ann. §§ 23-3-400 to -555; S.D. Codified Laws §§ 22-24B-1 to -34; Tenn. Code Ann. §§ 40-39-201 to -215; Tex. Code Crim. Proc. Ann. arts. 62.001–.408; Utah Code Ann. § 77-41-101 to -112; Vt. Stat. Ann. tit. 13, §§ 5401–5415; Va. Code Ann. §§ 9.1-900 to -922; Wash. Rev. Code Ann. §§ 9A.44.130–.145; W. Va. Code Ann. §§ 15-12-1 to -10; Wis. Stat. Ann. §§ 301.45–.48; Wyo. Stat. Ann. §§ 7-19-301 to -308; D.C. Code §§ 22-4001 to -4017.

81. Adam Walsh Child Protection and Safety Act of 2006, Pub. L. No. 109-248 § 114, 120 Stat 587 (2006).

82. 42 U.S.C. § 14071 (2008); Adam Walsh Child Protection and Safety Act of 2006, Pub. L. No. 109-248 § 117, 120 Stat 587 (2006).

83. Smith v. Doe, 538 U.S. 84, 102–03, 105–06, 123 S. Ct. 1140, 1152, 1154, 155 L. Ed. 2d 164, 183, 185 (2003) (holding that the sex offender registration law had a legitimate civil purpose to increase public safety, and was not an additional, after-the-fact criminal sanction on convicted sex offenders).

84. Conn. Dept. of Pub. Safety v. Doe, 538 U.S. 1, 4, 123 S. Ct. 1160, 1162–63, 155 L. Ed. 2d 98, 103 (2003).

85. Conn. Dept. of Pub. Safety v. Doe, 538 U.S. 1, 7–8, 123 S. Ct. 1160, 1164, 155 L. Ed. 2d 98, 105 (2003); *See* U.S. Const. amend. XIV, § 1 (prohibiting any state from depriving "any person of life, liberty, or property, without due process of law"). In contrast with procedural due process, which may require that a state provide you with a hearing and/or

reasonable and the government has to have a legitimate reason for creating them.[86] Even though the Court left this possibility open, it has mostly let states do what they want with Megan's Laws, and a substantive due process challenge to a Megan's Law would probably not succeed right now.[87]

One case which deals with substantive due process and Megan's Laws is Doe v. Michigan Dept. of State Police. In *Doe v. Michigan*, the Sixth Circuit upheld a law that made young sex offenders register even though their cases had been dismissed because they had completed a "diversion program."[88] The Court said that there was no substantive due process violation here.[89]

2. Residency Restrictions

Most states have laws that forbid certain convicted sex offenders from living near any sort of childcare center, but courts have required that these laws make an exception and allow an offender to stay where he is *if* a daycare center moves nearby *after* he has purchased a home. In Mann v. Georgia Dept. of Corrections, the Supreme Court of Georgia said that the state could not make a convicted sex offender move from a home he owned near a daycare, even though there was a Georgia law forbidding him from living within 1000 feet of a daycare.[90] The court explained that because he owned the home (instead of renting it, or living in it for free) it was unfair for the state to make him move without paying him for the house.[91] The court also said that Georgia was still allowed to forbid a convicted sex offender from working near any childcare facility.[92]

Another case addressing similar restrictions is Doe v. Pennsylvania Board of Probation and Parole, where the court ruled that if a state law treats convicted sex offenders who were *convicted in* that state differently from convicted sex offenders who were *convicted out of that state and moved there after release*, that law may be unconstitutional.[93] This case only applies to the Third Circuit (Pennsylvania, New Jersey and Delaware), so you should check what laws apply in your area.

3. New York

(a) Overview

New York's version of Megan's Law is called the Sex Offender Registration Act of 1996 (or "SORA"), which requires convicted sex offenders to register with the New York Division of Criminal Justice Services. The Division will keep a file on you which will include your:

(1) name;
(2) aliases (other names) used;
(3) date of birth;
(4) sex;
(5) race;
(6) height;
(7) weight;

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notice before the state can take some action against you, substantive due process protects certain fundamental rights that the state cannot interfere with, such as privacy or family.

86. Black's Law Dictionary 575 (9th ed. 2009).

87. *See*, *e.g.*, Paul P. by Laura L. v. Verniero, 170 F.3d 396, 405 (3d Cir. 1999) (holding that New Jersey's version of Megan's Law did not violate a sex offender's constitutionally protected privacy interest); Russell v. Gregoire, 124 F.3d 1079, 1094 (9th Cir. 1997) (holding that Washington's Megan's Law did not violate a sex offender's substantive due process right to privacy).

88. Doe v. Michigan Dept. of State Police, 490 F.3d 491, 494–497, 506 (6th Cir. 2007). The appellants had been charged under Michigan's Holmes Youthful Trainee Act (HYTA), which is only available for certain sex crimes and which seals their criminal records once they plead guilty and complete the diversion program. They were then required to register as convicted sex offenders under Michigan's Sex Offender Registration Act, which makes information about the charges publicly available. The court held that individuals' substantive due process rights do not entitle them to individual hearings on whether they should be required to register, if the statute requires all sex offenders to register. Offenders charged after October 31, 2004 are only required to register if youthful trainee status is revoked and they are found guilty.

89. Doe v. Michigan Dept. of State Police, 490 F.3d 491, 499–502 (6th Cir. 2007).

90. Mann v. Georgia Dept. of Corrections, 653 S.E.2d 740, 745, 282 Ga. 754, 760 (2007).

91. Mann v. Georgia Dept. of Corrections, 653 S.E.2d 754, 761, 282 Ga. 740, 745 (2007).

92. Mann v. Georgia Dept. of Corrections, 653 S.E.2d 754, 755, 282 Ga. 740, 742 (2007).

93. Doe v. Pennsylvania Bd. of Probation and Parole, 513 F.3d 95 (3d Cir. 2008).

(8) eye color;
(9) driver's license number;
(10) home address, or the address of the place you expect to live;
(11) Internet account information and any screen names you use;
(12) photograph;
(13) fingerprints;
(14) a description of the crime of which you were convicted;
(15) the name and address of any higher education institution where you are or expect to be enrolled, attending, or employed, and whether you will live in housing provided by that institution;
(16) if you are a high risk offender (discussed below), the address where you either work or expect to work; and
(17) any other information deemed pertinent by the division.[94]

If you were convicted of (not just charged with) any of the offenses in the paragraph below, you are a "sex offender" under SORA and you *must* register with the Division of Criminal Justice Services before you leave prison.[95] You must register if you were convicted on or after January 21, 1996, *or* if you were in prison on parole for a sex offense on January 21, 1996.

You **MUST** register as a sex offender if you have been *convicted* of committing or attempting to commit one or more offenses under any of the following sections: (a) New York Penal Law Sections 120.70, 130.20, 130.25, 130.30, 130.40, 130.45, 130.60, 230.34, 250.50, 255.25, 255.26, 255.27, or any provision of Article 263 of the penal law; (b) New York Penal Law Sections 130.52 or 130.55 (if you have previously been convicted of another listed sex offense, then the age of the victim of the offense under 130.52 or 130.55 does not matter; otherwise, you must register as a sex offender only where the victim of the offense was under 18 years old); (c) New York Penal Law Sections 135.05, 135.10, 135.20, or 135.25 (if the victim of the kidnapping is less than 17 years old and you are not the parent of the victim); (d) New York Penal Law Section 230.04 (when you are convicted of patronizing a prostitute who is actually younger than seventeen); (e) New York Penal Law Sections 230.05, 230.06, 230.30(2), 230.32, 230.33; (f) New York Penal Law Section 250.45 (2), (3), or (4) (*unless* you petition the trial court, and the court holds that registration would be too harsh.); (g) the following federal laws: 8 U.S.C. § 2251, 18 U.S.C. § 2251A, 18 U.S.C. § 2252, 18 U.S.C. § 2252A, 18 U.S.C. § 2260, 18 U.S.C. § 2422(b), 18 U.S.C. § 2423, or 18 U.S.C. § 2425; or (h) any offense in any jurisdiction which has the same elements as any of the crimes listed above.

If you were convicted of a sex offense in another state, you still have to register under SORA, as long as the crime you were convicted of is the same sort of crime as those listed above, *or* if the state you were convicted in would have required you to register.[96]

You will have to re-register with the Division of Criminal Justice every year for at least twenty years. If you are a "high risk offender,"(discussed below) you will have to register every year for the rest of your life, and you will have to give your address to the local police every 90 days.[97]

(b) Risk Assessment Hearing and Right to Appointed Counsel

Under SORA, the sentencing court will put you in one of three categories depending on your "risk level."[98] Your "risk level" is the court's decision about how likely it is that you will commit other sex offenses. The court makes this decision after a Board of Examiners of Sex Offenders looks at your case and makes a recommendation to the court.[99]

The Board uses a Sex Offender Registration Act Risk Assessment Instrument worksheet to decide what your risk level should be.[100] This worksheet lists different factors and gives a number value to each factor.

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94. N.Y. Correct. Law § 168-b (McKinney 2003 & Supp. 2012).
95. N.Y. Correct. Law § 168-f (McKinney 2003 & Supp. 2012).
96. N.Y. Correct. Law §§ 168-a(2)(d), 168-a(3)(b) (McKinney 2003 & Supp. 2012).
97. N.Y. Correct. Law § 168-h (McKinney 2003 & Supp. 2012).
98. *See* New York Board of Examiners of Sex Offenders, Sex Offender Registration Act: Risk Assessment Guidelines and Commentary (2006), *available at* http://www.nycourts.gov/reporter/06_SORAGuidelines.pdf. (last visited Oct. 11, 2012).
99. N.Y. Correct. Law § 168-l (McKinney 2003 & Supp. 2012) (describing generally the organization and duties of the Board of Examiners of Sex Offenders).
100. *See* New York Board of Examiners of Sex Offenders, Sex Offender Registration Act: Risk Assessment Guidelines and Commentary (2006) *available at* http://www.nycourts.gov/reporter/06_SORAGuidelines.pdf.. (last visited

The Board sees which factors you have and then adds up the number for all of those, which corresponds to your risk level.[101] The factors are related to your crime, criminal history, personal background, and future plans.

If any of the following four factors are present, you are automatically a category 3 (high risk) offender:

(1) you have a prior felony conviction for a sex crime;
(2) you inflicted serious physical injury or caused death;
(3) you have made a recent threat that you will re-offend by committing a sexual or violent crime; or
(4) there is a clinical assessment that you have a psychological, physical, or biological problem making you unable to control your sexual behavior.[102]

According to 1999 amendments to SORA, you have a right to a lawyer at your risk level hearing, which occurs about a month before your release.[103] The court can appoint one for you if you cannot afford one.[104] If you had a court-appointed lawyer at your trial, the court should appoint one for you automatically.[105] If you paid for your lawyer at trial, but cannot afford one now, you must apply to have one appointed before your hearing.

You should attend your risk assessment hearing. The hearing is the one opportunity to challenge your risk level by giving the lawyer information about the case or your history that the court otherwise would not have. Many convicted offenders have chosen not to attend, either to avoid the hassle of transportation or the embarrassment of the subject, only to realize later the harsh lifetime consequences of receiving a level three risk classification.[106]

Before your hearing, the district attorney must give you the evidence used to decide your proposed risk. If he wants you to have a different risk level than the Board recommended, he has to tell you and explain why at least ten days before your hearing.[107]

Any information the Board used to determine your risk level should be available to you and your lawyer. This information may include records from state or local correctional facilities, hospitals, institutions, District Attorneys, law enforcement agencies, probation departments, the Division of Parole, courts, and child protective agencies.[108]

The court is allowed to delay your hearing until after your release if they need to do that in order to decide your case properly.[109]

(c) Registration and Notification

Your risk level says how much information about you and your crime can be given to the public.[110]

If you are classified as level 1 (low risk), local law enforcement is notified of your presence in the community and may release any information about you to the community generally or to specific institutions at its discretion. Information it may release includes a photograph, your zip code, background information (including the crime you were convicted of), the method of the crime, the type of victim, the name and address of any institution of higher education at which you are enrolled, work, attend, or reside, and any special conditions imposed on you (such as a condition that says you are not allowed to be around children).

If you are classified as level 2 (moderate risk), law enforcement is notified and may release the information above as well as your exact name and any aliases.[111] Furthermore, law enforcement will keep a

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Oct. 11, 2012).

101. *See* New York Board of Examiners of Sex Offenders, Sex Offender Registration Act: Risk Assessment Guidelines and Commentary (2006) *available at* http://www.nycourts.gov/reporter/06_SORAGuidelines.pdf. (last visited Oct. 11, 2012).

102. New York Board of Examiners of Sex Offenders, Sex Offender Registration Act: Risk Assessment Guidelines and Commentary (2006) *available at* http://www.nycourts.gov/reporter/06_SORAGuidelines.pdf. (last visited Oct. 11, 2012).

103. N.Y. Correct. Law § 168-n(3) (McKinney 2003 & Supp. 2012).

104. N.Y. Correct. Law § 168-n(3) (McKinney 2003 & Supp. 2012).

105. N.Y. Correct. Law § 168-n(3) (McKinney 2003 & Supp. 2012).

106. *See* Memorandum from Thomas O'Brien, Legal Aid, February 13, 2009.

107. N.Y. Correct. Law § 168-n(3) (McKinney 2003 & Supp. 2012).

108. N.Y. Correct. Law § 168-m (McKinney 2003 & Supp. 2012).

109. N.Y. Correct. Law §§ 168-l(6)-(8), 168-n(2) (McKinney 2003 & Supp. 2012).

110. N.Y. Correct. Law § 168-l(6) (McKinney 2003 & Supp. 2012).

list of schools, parks, libraries and other vulnerable areas and organizations, and will notify these organizations of your identity automatically.

If you receive a level 3 (high risk) designation, all of the information above, as well as your exact address and place of employment, can be given both to vulnerable institutions and to the public at large.

There are also phone numbers (1-900-288-3838 and 1-800-262-3257), which citizens can call to find out whether someone is a registered sex offender.[112] These phone numbers include all registered sex offenders in New York (levels 1–3). A person calling this number will learn only that a level 1 offender is listed in the registry; far more detailed information is available about level 3 offenders. Callers must identify themselves and must also provide identifying information about the sex offender in order to secure information by telephone. They must know the sex offender's social security number, license number, address, and date of birth.[113]

In addition, each police department in New York is required to have a publicly accessible book, the "Subdirectory of High-Risk (Level 3) Sex Offenders," people can look at if they send a written request. The subdirectory provides detailed information about level 3 sex offenders residing in New York, including the offender's address, photograph, and a description of the crimes they committed and how they committed them.[114]

The New York state sex offender registry is also available online at http://criminaljustice.state.ny.us/nsor/index.htm. Beyond the information law enforcement makes available, parent volunteers, from at least one private organization, hand-copy additional information and have made it available in an online database.[115]

(d) Amendments to SORA

Amendments that went into effect in March 2002 changed the definition of "sexually violent offender" and "sexual predator." Currently, you are considered a "sexually violent offender" if you were convicted of a "sexually violent offense."[116] You are considered a "sexual predator" if you were convicted of a "sexually violent offense" *and* you have a mental or personality disorder that makes you likely to commit predatory sexually violent offenses.[117] If you are found to be a "sexually violent offender" or "sexual predator" you will automatically get a level 3 risk (high risk) classification. While the court has to look at each case individually, you can be classified as level 3 even if the crime you were convicted of is a misdemeanor.

Other amendments to SORA give sex offenders the right to a civil appeal after the court assigns you a risk level and a right to a lawyer in that appeal.[118] You also have the right to appointed counsel if you file a motion to have your sex offender classification changed, which you may do if your circumstances change.

4. The Adam Walsh Act

(a) Generally

In July 2006, Congress passed The Adam Walsh Child Protection and Safety Act. Title I of the Act set out a national system for the registration of sex offenders called the Sex Offender Registration and Notification Act ("SORNA").[119] SORNA is a very complicated law, and states have had difficulty implementing it. Therefore, this chapter will only discuss some key provisions, as it is unlikely your state has adopted all of SORNA. You must check your own state's law carefully and see what, if any, parts of SORNA it has adopted.[120]

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111. N.Y. Correct. Law § 168-l(6) (McKinney 2003 & Supp. 2012).

112. N.Y. Correct. Law § 168-p (McKinney 2003 & Supp. 2012).

113. N.Y. Correct. Law § 168-p (McKinney 2003 & Supp. 2012).

114. N.Y. Correct. Law § 168-q (McKinney 2003 & Supp. 2012).

115. The online data is available at http://www.parentsformeganslaw.org/public/meganStateByState.jsp (last visited March 6, 2012).

116. N.Y. Correct. Law § 168-a(7)(b) (McKinney Supp. 2008).

117. N.Y. Correct. Law § 168-a(7)(a) (McKinney Supp. 2008).

118. N.Y. Correct. Law § 168-n(3) (McKinney Supp. 2008).

119. The Adam Walsh Child Protection and Safety Act of 2006, Pub. L. No. 109–248, 120 Stat. 587 (2006). SORNA created a new sex offender registry law at 42 U.S.C. §§ 16901–62 (2006) and created new criminal offenses and penalties for failure to register at 18 U.S.C. § 2250 (2006).

120. For a list of state laws, see footnote 79.

New York has not adopted SORNA (which sounds similar to, but is different from SORA, the New York State law). If you live in New York, you must register with the New York state registration system, SORA, described in Section G(2) of this Chapter. If you were convicted in New York, the only way SORNA is likely to apply to you is if you fail to register after moving or travelling to a new state.

If your state has adopted the SORNA system, SORNA applies to you if you have been convicted of a "sex offense" in your state.[121] SORNA requires that certain juvenile offenders register as well. If you were fourteen-years-old or older at the time of the offense, and were convicted or adjudicated delinquent for "aggravated sexual abuse" or a similar crime, or for an attempt or conspiracy to commit these crimes, you have to register.[122]

Under a Department of Justice rule, SORNA requires registration by *anyone* charged with a crime listed in SORNA *at any time*, even if it occurred before SORNA existed.[123] Therefore, you *must* register even if you were convicted before SORNA was enacted.

Under the Attorney General's guidelines for SORNA, some definitions of offenses may be broader than they are under other laws and may apply to you even if they had not before SORNA.[124]

States have been resistant to SORNA because of how difficult and expensive it is to put into practice, and because parts of the law are different than state's own laws.[125]

Just like under New York law (SORA), SORNA requires sex offenders to register either just before release, or right after sentencing if you are not in custody.[126] SORNA, like SORA, divides sex offenders into three tiers based on the seriousness of their crime and places different restrictions on each. Tiers are assigned according to the length of imprisonment, the age of the victim of the offense, and the nature of the offense committed.[127]

How long you have to register as a sex offender depends on what SORNA Tier you are in. Tier I offenders must register for fifteen years; Tier II offenders must register for twenty-five years; and Tier III offenders must register for their entire life.[128]

Under SORNA, you will also have to personally appear before the government to verify their registration information.[129] How often you have to appear before the government is determined by which Tier offender you are. Tier I offenders must appear in person at least once a year; Tier II offenders have to appear at least every six months; and Tier III offenders must appear at least every three months.[130]

If anything changes during the period of time in which you are required to register, you must notify the government within three days of any changes to your name, address, employment, and student status.[131]

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121. 42 U.S.C. § 16911(1) (2006).

122. 42 U.S.C. § 16911(8) (2006); 18 U.S.C. § 2241 (2006).

123. The rule, at 28 C.F.R. § 72.3 (2012), states:

"The requirements of the Sex Offender Registration and Notification Act apply to all sex offenders, including sex offenders convicted of the offense for which registration is required prior to the enactment of that Act."

"Example 1. A sex offender is federally convicted of aggravated sexual abuse under 18 U.S.C. § 2241 in 1990 and is released following imprisonment in 2007. The sex offender is subject to the requirements of the Sex Offender Registration and Notification Act and could be held criminally liable under 18 U.S.C. § 2250 for failing to register or keep the registration current in any jurisdiction in which the sex offender resides, is an employee, or is a student."

"Example 2. A sex offender is convicted by a state jurisdiction in 1997 for molesting a child and is released following imprisonment in 2000. The sex offender initially registers as required but relocates to another state in 2009 and fails to register in the new state of residence. The sex offender has violated the requirement under the Sex Offender Registration and Notification Act to register in any jurisdiction in which he resides, and could be held criminally liable under 18 U.S.C. 2250 for the violation because he traveled in interstate commerce."

124. *See* 42 U.S.C. §§ 16914(a)(7), (b)(8) (2006); The National Guidelines for Sex Offender Registration and Notification, 72 Fed. Reg. 30210, 30217–18 (May 30, 2007).

125. *See* Abby Goodnough & Monica Davey, *Effort to Track Sex Offenders Draws Resistance*, N.Y. Times, February 8, 2009, at A1.

126. 42 U.S.C. § 16913(b) (2006).

127. 42 U.S.C. § 16911 (2006).

128. 42 U.S.C. § 16915 (2006).

129. 42 U.S.C. § 16916 (2006).

130. 42 U.S.C. § 16916 (2006).

131. 42 U.S.C. § 16913(c) (2006). Although one judge in the Northern District of New York has held this part of SORNA to be unconstitutional, *see* United States v. Nasci, 632 F. Supp. 2d 194, 202 (S.D.N.Y. 2009), the reasoning in that case has been rejected by other judges in the same district, *see* United States v. Herbert, No. 1:09-CR-438 (LEK),

Your state may adopt SORNA and use *more* strict classifications than those required by the Act, but it cannot adopt less strict classifications.[132]

Keep in mind that even in states that have adopted SORNA, implementation and effectiveness can vary. For this reason, your state's regulations will probably influence your situation more than SORNA.

(b) Who can access this information and how?

(i) Through local registries and law enforcement notification

All information you provide under SORNA will be put in your jurisdiction's registry. Most of the information contained in the registry will be available to the public.[133] In addition, law enforcement in your jurisdiction will have to provide your information to certain parties, including the Attorney General, and schools, public housing agencies and other vulnerable communities in your area.[134]

There are some exceptions, however.[135] States *cannot* post information about:

(1) any victim's identity;
(2) your social security number;
(3) arrests that did not result in conviction; and
(4) any other information that the Attorney General decides should not be released.[136]

States can *choose* whether or not they want to include:

(1) any information about a Tier I offender convicted of an offense other than a "specified offense against a minor;"
(2) the name of your employer;
(3) the name of any school where you are a student; and
(4) any other information that the Attorney General decides should not be released.[137]

Each state offender registry website must include directions on how to change information that you believe is "erroneous" (incorrect).[138] Each website must also include a warning that any use of the site's information to "unlawfully injure, harass, or commit a crime" against any person named on the registry "could result in civil or criminal penalties."[139]

(ii) Through the National Registry

Each convicted sex offender and any other person required to register will also be included on the National Sex Offender Registry maintained by the FBI.[140]

The National Sex Offender Public Website will be maintained by the Attorney General and will include "relevant information for each sex offender and other person listed on a jurisdiction's internet site," making "relevant information" publicly accessible.[141] The website can be found online at http://www.nsopr.gov/.

(c) Sentence Increases under The Adam Walsh Act

(i) Mandatory Minimums

A mandatory minimum sentence is the shortest, or least severe, sentence a court can give you if you are convicted of a certain crime. Title II of the Adam Walsh Child Protection and Safety Act established new mandatory minimums for a number of sexual crimes. These include:

2009 U.S. Dist. LEXIS 121645 at *16 (N.D.N.Y. Nov. 20, 2009) (*unpublished*), and the same judge's finding of unconstitutionality of this part of SORNA has been subsequently overturned by the Second Circuit, *see* United States v. Guzman, 591 F.3d 83, 86 (2d Cir. 2010).

132. 42 U.S.C. § 16912 (2006).
133. 42 U.S.C. § 16918(a) (2006).
134. 42 U.S.C. § 16921(b) (2006).
135. 42 U.S.C. § 16918 (2006).
136. 42 U.S.C. § 16918(b) (2006).
137. 42 U.S.C. § 16918(c) (2006).
138. 42 U.S.C. § 16918(e) (2006).
139. 42 U.S.C. § 16918(f) (2006).
140. 42 U.S.C. § 16919 (2006).
141. 42 U.S.C. § 16920 (2006).

(1) New mandatory minimums for a "crime of violence against the person of an individual who has not attained the age of 18," including murder, kidnapping, acts that result in serious bodily injury, and others;[142] and
(2) New mandatory minimum of 15 years for sex trafficking accomplished through force, fraud, or coercion involving a minor under 14.[143]

(ii) Mandatory Maximums

A statutory maximum is the longest, or most severe, sentence a court is allowed to give you if you are convicted of a certain crime. In addition to the mandatory minimums discussed above, Title II of the Adam Walsh Child Protection and Safety Act also established new statutory maximums (increasing the previous statutory maximums) for a number of sexual crimes.[144]

(d) Statute of Limitations

The Act has gotten rid of the statute of limitations for certain crimes, which means that if you are accused of one of these crimes, you can be prosecuted at any time, no matter how long ago the crime was committed.

Under the Act, there is no longer a statute of limitations for any felony listed in Chapter 109A (Sexual Abuse), Chapter 110 (Sexual Exploitation and Other Abuse of Children),[145] and Chapter 117 (Transportation for Illegal Sexual Activity and Related Crimes), or for charges under Sections 1201 (kidnapping of a minor) or 1591 (sex trafficking).[146]

(e) Bail

The Act adds certain sex offenses to the list of those for which a court must hold a bail hearing (if the government moves for one). The offenses that require one of these bail hearings now include "any felony that is not otherwise a crime of violence that involves a minor victim or that involves the possession or use of a firearm . . . or any dangerous weapon, or involves the failure to register [as a sex offender]." [147]

(f) DNA Collection

The Adam Walsh Act lets the government collect the DNA of certain people, even if those people do not consent. Individuals who are facing charges may be compelled by the Attorney General to give a DNA sample. The category of people "facing charges" includes those who are currently charged by indictment, information, or complaint, but are not currently under arrest.[148] Individuals who are convicted also *must* give samples to the Attorney General. This category includes persons who are convicted of any offense—not only felonies or crimes of violence—but they must at least be "in custody."[149]

(g) Probation/Supervised Release

The Act creates a discretionary condition of probation or supervised release (meaning that the judge can choose to impose this condition but does not have to dispose it).[150] If the judge does impose such a condition, you must submit yourself and your property, including your house, vehicle, and computer and electronic devices, to a search any time a law enforcement officer has a "reasonable suspicion" that you have violated a

142. 18 U.S.C. § 3559(f)(1)–(3) (2006).
143. 18 U.S.C. § 1591(b)(1)–(2) (2006).
144. *See, e.g.*, 18 U.S.C. § 2422(b) (2006) (maximum term of imprisonment for coercion and enticement by sex offenders increased from 30 years to life); 18 U.S.C. § 2423(a) (2006) (maximum term of imprisonment for conduct relating to transportation of minors for prostitution increased from 30 years to life); 18 U.S.C. § 2242 (2006) (maximum term of imprisonment for sexual abuse increased from 20 years to life).
145. Except for violations of the record-keeping requirements set forth in sections 2257 and 2257A of Chapter 110, for which the statute of limitations still applies. 18 U.S.C. § 3299 (2006).
146. 18 U.S.C. § 3299 (2006).
147. 18 U.S.C. § 3142(f)(1)(E) (2006).
148. 42 U.S.C. § 14135a(a)(1)(A) (2006).
149. 42 U.S.C. § 14135a(a)(1)(A)–(B), (a)(5), (d) (2006).
150. 18 U.S.C. § 3563(b)(23) (2006).

condition of probation.[151] In this case, the officer does not need a warrant to search you or your property as long as the he is acting within his law enforcement duties.[152]

(h) Sex Offender Management and Treatment Programs

The statute requires the Bureau of Prisons to make appropriate treatment available to sex offenders who need treatment and who are suitable for it.[153] Such programs include sex offender management programs[154] and residential sex offender treatment programs.[155] Participation in this type of program can be very important for determining whether you are eligible for parole. Programs in New York State are discussed in Part C of this Chapter, which gives you an overview of the kinds of services available.

(i) Victim Rights

The Act now permits minor victims of sex crimes to initiate *civil actions* against the person who violated them, regardless of whether the victim actually suffered a *physical* injury while a minor.[156] Furthermore, the Act raised the amount of money available to the victim from $50,000 to $150,000.[157]

The Act also gives specific rights to victims in habeas corpus proceedings (see *JLM*, Chapters 13 and 21 for more information about habeas corpus): the right not to be excluded, the right to be reasonably heard, the right to proceedings free from unreasonable delay, and the right to be treated with fairness and respect for the dignity and privacy of the victim.[158]

H. Civil Commitment

Civil commitment is the practice of confining someone without a criminal conviction because the person is determined to be dangerous. This confinement may be involuntary and indefinite. It may be imposed instead of a criminal sentence, or after a criminal sentence is completed. However, civil commitment requires a determination that you are likely to commit future sexually violent acts. Many states have a general civil commitment statute, which allows for the commitment of persons who fall into various categories of mental illness or dangerousness.

While some sexually violent individuals can be committed under more general civil commitment statutes, many cannot because their behavior often does not fit within the narrow definitions of "mental illness" used in these statutes. In response to these narrow definitions in general civil commitment statutes, many states have passed laws providing for the involuntary civil commitment of sex offenders.[159] The Supreme Court has said that involuntary civil commitment does not violate a person's due process rights as long as the State can show that the person has a mental illness and presents a risk of future danger to himself or to others.[160] In addition to these state laws, Congress, through the Adam Walsh Act, created the Jimmy Ryce Civil Commitment Program for Dangerous Sex Offenders, a federal civil commitment law discussed in detail in Part I(2)(b) below.

It is difficult to challenge civil commitment statutes, as courts have generally upheld them when the state can show that the person the state wants to confine is a danger to himself or to others. In Kansas v. Hendricks, the Supreme Court explained that civil confinement of a sex offender does not violate substantive due process, equal protection, or the double jeopardy provisions of the Constitution.[161] The court determined that the Kansas statute was a civil remedy, which only applied to the "dangerously mentally ill," and that

151. 18 U.S.C. § 3563(b)(23) (2006).
152. 18 U.S.C. § 3563(b)(23) (2006).
153. 18 U.S.C. § 3621(f)(1) (2006).
154. 18 U.S.C. § 3621(f)(1)(A) (2006).
155. 18 U.S.C. § 3621(f)(1)(B) (2006).
156. 18 U.S.C. § 2255(a) (2006).
157. 18 U.S.C. § 2255(a) (2006).
158. 18 U.S.C. § 3771(b)(2)(A) (2006).
159. *See, e.g.,* Mental Hyg. § 10.01, et seq. (McKinney 2007) (establishing standards and procedures for involuntary commitment of dangerous sex offenders).
160. Kansas v. Hendricks, 521 U.S. 346, 357, 371, 117 S. Ct. 2072, 2079–80, 2086, 138 L. Ed. 2d 501, 512, 521 (1997) (finding that the Kansas civil commitment act satisfied due process requirements because it unambiguously required a finding of dangerousness either to one's self or to others as a prerequisite to involuntary confinement).
161. Kansas v. Hendricks, 521 U.S. 346, 371, 117 S. Ct. 2072, 2086, 138 L. Ed. 2d 501, 521 (1997).

the statute was not an additional criminal punishment for sex offenders.[162] Later, in Seling v. Young, the Court said that, if a commitment statute is civil (as opposed to criminal) in nature, it cannot be considered a punishment, and therefore it does not violate the Constitution.[163]

It is important for you to know that the Supreme Court recently refined its decision in Kansas v. Hendricks, setting a limit on how long states can keep convicted sexual predators in civil confinement after their criminal sentences have expired.[164] In Kansas v. Crane, the Court said that states must prove not only that an offender remained dangerous and was likely to repeat a crime, but also that the offender had a psychiatric diagnosis which included a "serious difficulty in controlling behavior."[165] Therefore, each civil commitment case must be evaluated individually to see if it meets this standard. The Court decided to require this additional finding to make certain that a civilly confined offender was actually mentally ill and dangerous, not simply a "typical recidivist convicted in an ordinary criminal case."[166] A *recidivist*, commonly called a "repeat offender," is "someone who has been convicted of multiple criminal offenses, usually similar in nature."[167]

After *Crane*, civil commitment requires a psychiatric evaluation that an offender lacks control over his actions. Without such a determination, the practice would not be sufficiently different from criminal punishment. This reflects a shift towards using civil commitment statutes for treatment and not merely for detention of sex offenders. Those offenders who are civilly confined are now usually held in mental health facilities—either separate from a correctional facility or part of a larger correctional facility. Under New York law, these facilities must have staff from "the office of mental health or the office for people with developmental disabilities for the purposes of providing care and treatment to persons confined…."[168]

Civil commitment will affect your life in many ways. As an example, sex offenders in civil commitment facilities are now no longer able to receive federal Pell grants to pay for their education.[169] You should do further research to determine how else civil commitment will change your rights and options.

5. Procedures

Civil commitment procedures vary by state, so be certain to check what statutes apply to you. Civil commitment of sex offenders typically occurs after you have completed your criminal sentence. Generally, the state attorney general's office and various other agencies will be notified when you are nearing release from prison. One or more state committees, usually composed of mental health experts, will review your records and will recommend confinement if they determine that you are a sexually violent predator.[170]

After getting a recommendation for civil commitment, the attorney general, state prosecutors, or other state officials will file a petition alleging that you are a sexually violent predator. You will then have a trial in front of a judge or jury. In most states, you are entitled to assistance of counsel at all stages of these proceedings.[171] You may also be entitled to have a psychological expert of your choice examine you, at the state's expense.[172]

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162. Kansas v. Hendricks, 521 U.S. 346, 363, 117 S. Ct. 2072, 2082, 138 L. Ed. 2d 501, 516 (1997).

163. Seling v. Young, 531 U.S. 250, 263, 121 S. Ct. 727, 735, 148 L. Ed. 2d 734, 746 (2001).

164. Kansas v. Crane, 534 U.S. 407, 411, 413, 122 S. Ct. 867, 869, 870, 151 L. Ed. 2d 856, 861, 862 (2002) (finding that where a sexual offender suffered from both exhibitionism and anti-social personality disorder, the state was required to prove a serious difficulty in controlling behavior in order to commit sexual offender).

165. Kansas v. Crane, 534 U.S. 407, 413, 122 S. Ct. 867, 870, 151 L. Ed. 2d 856, 862 (2002).

166. Kansas v. Crane, 534 U.S. 407, 413, 122 S. Ct. 867, 870, 151 L. Ed. 2d 856, 863 (2002).

167. Black's Law Dictionary 1186 (9th ed. 2009).

168. N.Y. Mental Hyg. § 10.03(o) (McKinney 2007).

169. Higher Education Opportunity Act of 2008, Pub. L. No. 110–315, 122 Stat. 3078 (amending 20 U.S.C. 1070a(b)(2)(A)).

170. *See, e.g.*, Fla. Stat. Ann. § 394.913 (LexisNexis 2011) (describing the multidisciplinary team that evaluates your record); Va. Code Ann. § 37.2-902 (2011) (stating that records are reviewed by committee); Cal. Welf. & Inst. Code § 6601 (Deering 2011); Tex. Health & Safety Code Ann. §§ 841.022 to .023 (West 2010).

171. *See, e.g.*, Fla. Stat. Ann. § 394.916 (LexisNexis 2011) (stating person is entitled to counsel); Va. Code Ann. § 37.2-901 (2011) (specifying person's right to counsel); N.J. Stat. Ann. §§ 30:4-27.29 (West 2011); 725 Ill. Comp. Stat. Ann. 207/25 (LexisNexis 2011); Iowa Code Ann. §§ 229A.5(2)(d) (LexisNexis 2010); Tex. Health & Safety Code Ann. §§ 841.005 (West 2010).

172. *See, e.g.*, Fla. Stat. Ann. § 394.916 (LexisNexis 2011) (stating that person may retain own professional); 725 Ill. Comp. Stat. Ann. 207/25 (LexisNexis 2011) (stating that person may appoint their own expert); N.Y. Mental Hyg. § 10.06 (Consol. 2008); Va. Code Ann. § 37.2-907 (2011).

If you are found to be a sexually violent predator, in most states you have the right to appeal that determination.[173] If you lose the appeal and are committed, you will likely be committed to a facility especially dedicated to the detention and treatment of sex offenders. You will be detained there indefinitely. Usually, your psychological health and danger to the community will be re-evaluated once a year in order to determine whether you should be released.[174]

Because of the wide variations in state civil commitment schemes, it is important that you consult your own state's criminal code to determine whether your state has a civil commitment statute, and to learn its specific details.

6. Statutes

(a) States generally

Following *Hendricks* and *Crane*, many states have adopted laws like the Kansas statute. The statutes have three main requirements that they share. To be committed, you must:

(1) have engaged in some criminal sexual conduct;
(2) have a specified mental condition; and
(3) because of your mental disease or defect, be likely to engage in criminal sexual conduct in the future.[175]

Although state statutes follow this general pattern, they differ in a number of ways. Regarding the first requirement, some states require a sex offense conviction, while others require only that a person be *charged* with a sex offense, and a few simply require that the person have "committed" an illegal sexual act.[176] States also vary on whether the case must be heard in front of a judge or jury, and how much proof of your condition, and the danger you pose, the state has to provide.[177] The statutes either require proof "beyond a reasonable doubt" or by "clear and convincing evidence." "Beyond a reasonable doubt" is a high standard of proof and is used at criminal trials. "Clear and convincing evidence" is a slightly easier standard for the state to meet. If you are facing civil commitment, you must research your state's laws and determine what sort of assistance you are entitled to.

(b) New York

Until April 2007, New York State did not have a civil commitment statute for sex offenders. Even without specific civil commitment legislation aimed at sex offenders, in some cases state officials had succeeded in civilly committing sex offenders under the regular civil commitment scheme. Some individuals who were civilly committed under the general scheme are entitled to have the issue adjudicated under the procedure set forth in New York's Sex Offender Management and Treatment Act.[178] The civil commitment scheme is mainly used for the mentally ill.[179]

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173. *See, e.g.*, Fla. Stat. Ann. § 394.917 (LexisNexis 2011) (specifying right to appeal determination); Wash. Rev. Code Ann. §§ 71.09.080 (LexisNexis 2011) (providing that nothing in the chapter prohibits a person from exercising a right available elsewhere); 725 Ill. Comp. Stat. Ann. 207/35 (LexisNexis 2011); Wash. Rev. Code Ann. § 71.09.060 (LexisNexis 2011).

174. *See, e.g.*, Fla. Stat. Ann. § 394.918 (LexisNexis 2011) (providing that individual will be evaluated yearly); Ariz. Rev. Stat. Ann. § 36-3708 (2011) (same); 725 Ill. Comp. Stat. Ann. 207/55 (LexisNexis 2011); Va. Code Ann. §§ 37.2-910 to 912 (2011).

175. *See, e.g.*, Cal. Welf. & Inst. Code § 6600(a)(1) (West 2010).

176. *See, e.g.*, Kan. Stat. Ann.§ 59-29a02(a) (LexisNexis 2011) (defining sexually violent predator as "any person who has been convicted of or charged with a sexually violent offense and who suffers from a mental abnormality or personality disorder which makes the person likely to engage in repeat acts of sexual violence.").

177. *See, e.g.*, Kan. Stat. Ann.§ 59-29a06(c) (LexisNexis 2011) (providing that a jury trial may be requested by one of the parties or the court, but if no jury is requested the trial will be before the court.).

178. State of N.Y. ex rel. Harkavy v. Consilvio, 8 N.Y.3d 645, 652, 870 N.E.2d 128, 132 2007 N.Y. Slip Op. 04681, 5 (NY 2007) (finding that certain individuals who were transferred without precommitment hearings, and thus were improperly committed under N.Y. Mental Hyg. § 9, were entitled to adjudication under the new N.Y. Mental Hyg. § 10 procedures.)

179. *See, e.g.*, Doe v. Pataki, 120 F.3d 1263, 1281, 1285 (2d Cir. 1997) (holding that a statute requiring the involuntary commitment of "mentally abnormal" sex offenders pursuant to a civil commitment statute is valid) *See generally* N.Y. Mental Hyg. §§ 9.27-9.37 (McKinney 2002) (describing the procedure for involuntary hospital admissions for mental illness).

In 2007, the New York Legislature passed The Sex Offender Management and Treatment Act, which can be found at N.Y. CLS Mental Hyg. § 10. The Act lays out a procedure for the civil commitment of dangerous sex offenders, discussed below. The Court of Appeals of New York upheld the Act as applied to people charged with sex offenses, convicted of sex offenses, or people who were patients of a state mental hospital since September 1, 2005.[180]

New York State's civil commitment statute is similar to other states' statutes. About 120 days before you are released from prison, the parole board will give notice to the commissioner on health, who determines if you are a sex offender who requires civil commitment.[181] Then, the Attorney General may file a petition seeking commitment, which you can contest in a hearing.[182] If, after the hearing, the court decides that you are probably a sex offender requiring civil commitment, the court will conduct a trial to figure out if this is really the case.[183] If you are found to be a danger in this trial, you will be committed.[184]

(c) Federal Civil Commitment: The Adam Walsh Act

Under the Federal Jimmy Ryce Civil Commitment Program for Dangerous Sex Offenders, codified at 18 U.S.C. §§ 4247, 4248, the Attorney General, the Director of the Bureau of Prisons, or anyone authorized by the Attorney General, can seek to civilly commit anyone in Bureau of Prisons custody (in federal prison) by "certifying" the offender as "sexually dangerous." This is a very serious designation because, practically speaking, civil commitment may turn into a life sentence for those in custody.

(i) Under the Adam Walsh Act, who can be civilly committed?

Anyone in Bureau of Prisons custody (in federal prison) may be civilly committed—even if you were not incarcerated for a sexual offense. It is, however, most common for a prisoner convicted of a sexual crime to be considered for civil commitment. There is no competency or insanity requirement.

(ii) What is the definition of a "sexually dangerous person?"

According to the statute, a "sexually dangerous person" is "a person who has engaged or attempted to engage in sexually violent conduct or child molestation and who is sexually dangerous to others."[185] A person is "sexually dangerous to others" if he "suffers from a serious mental illness, abnormality, or disorder as a result of which he would have serious difficulty in refraining from sexually violent conduct or child molestation if released."[186] Some of the key terms are not defined within the statute, such as "sexually violent conduct," "child molestation," and "serious difficulty." The definition of "sexually dangerous person" has been criticized for being overly broad and overly inclusive.

(iii) What is the procedure for determining whether a prisoner is "sexually dangerous?"

The BOP reviews all prisoners, and when they identify a prisoner they believe may be "sexually dangerous," BOP staff members then conduct a full evaluation of that prisoner. A prisoner is not provided with an attorney at this point, and no *Miranda* warnings are given.[187]

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180. State of N.Y. ex rel. Joseph v. Superintendent of Southport Corr. Facility, 15 N.Y.3d 126, 132, 931 N.E.2d 76, 79, 2010 NY Slip Op 5246 (N.Y. 2010) (affirming that Article 10's procedure is the appropriate standard for future civil commitment proceedings); State of N.Y. ex rel. Harkavy v. Consilvio, 8 N.Y.3d 645, 652, 870 N.E.2d 128, 132 2007 N.Y. Slip Op. 04681, 5 (N.Y. 2007) (holding that the state must adhere to the procedural protections set forth in Article 10 of the Mental Hygiene Law).

181. N.Y. Mental Hyg. § 10.05 (Consol. 2010).

182. N.Y. Mental Hyg. § 10.06 (Consol. 2010).

183. N.Y. Mental Hyg. § 10.07 (Consol. 2010) ("If the court finds by clear and convincing evidence that the respondent has a mental abnormality involving such a strong predisposition to commit sex offenses, and such an inability to control behavior, that the respondent is likely to be a danger to others and to commit sex offenses if not confined to a secure treatment facility, then the court shall find the respondent to be a dangerous sex offender requiring confinement.").

184. N.Y. Mental Hyg. § 10.07 (Consol. 2010).

185. 18 U.S.C. § 4247(a)(5) (2006).

186. 18 U.S.C. § 4247(a)(6) (2006).

187. *See* Memorandum from Amy Baron-Evans & Sara Noonan to Defenders & CJA Counsel 4 (Sept. 10, 2007, as revised Sept. 25, 2007), *available at* http://www.fd.org/docs/select-topics---civil-commitment/Adam-Walsh-III-REV-9-24-

The prisoner is given a form to sign which states that (1) he consents to an evaluation consisting of interviews, review of records, and testing; (2) he understands that it will be used to determine his eligibility for civil commitment as a sexually dangerous person after he serves his sentence; (3) he understands that the results will be related to BOP officials and "others with a need to know" including the court, the government, and his lawyer; and (4) the evaluation will be completed whether or not he participates. Prisoners have made statements during this process that were used to support a sexually dangerous certification.[188]

(iv) What happens after a prisoner is found to be "sexually dangerous?"

If the BOP certifies a prisoner as sexually dangerous, the certificate is filed with the court in the district in which the prisoner was confined.[189] The filing of the certificate "stays" the prisoner's release (meaning that the release is delayed) until a decision is reached about the prisoner possibly being civilly committed. This is a particular concern because these certificates are often filed immediately before a prisoner is due to be released—often within days or even hours.

(v) Can you challenge Federal civil commitment?

There have been several challenges to the federal civil confinement statute. A district court in North Carolina held that the statute is unconstitutional, both because the law does not help the Federal government achieve any "necessary and proper" goal and because it violates the prisoner's due process rights.[190] A district court in Minnesota agreed with the North Carolina court and also held that the civil confinement law was unconstitutional because Congress simply does not have the authority to prevent future criminal behavior.[191] On the other hand, district courts in Massachusetts, Wisconsin and Oklahoma have all upheld the civil confinement law.[192] Recently, the United States Supreme Court overruled the North Carolina court and settled the issue for now. The Court concluded that it was within Congress' power to enact 18 U.S.C. § 4248, and it was not an unconstitutional use of the Necessary and Proper clause.[193]

I. Conclusion

Sex offenders face special concerns both while they are in prison and after they are released. In prison, these issues include HIV testing, post-conviction DNA testing, protective custody, and the importance of attending sex offender counseling programs to receive good time credit. Upon release from prison, prisoners should be aware of special parole conditions, community registration laws, and the possibility of civil commitment to psychiatric hospitals.

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188. *See* Memorandum from Amy Baron-Evans & Sara Noonan to Defenders, CJA Counsel 4 (Sept. 10, 2007, as revised Sept. 25, 2007), *available at* http://www.fd.org/docs/select-topics---civil-commitment/Adam-Walsh-III-REV-9-24-07-FINAL.pdf. Referenced evaluation form *available at* http://www.fd.org/docs/select-topics---civil-commitment/4248-evaluation-consent-form.pdf.

189. 18 U.S.C. § 4248(a) (2006).

190. U.S. v. Comstock, 507 F.Supp.2d 522, 526 (E.D.N.C. 2007) (holding that the civil commitment provision of 18 U.S.C. § 4248 is unconstitutional because "it is not a necessary and proper exercise of Congressional authority" and its requirement of a "clear and convincing burden of proof violates the substantive due process rights of those subject to commitment under the statute").

191. U.S. v. Tom, 558 F.Supp.2d 931, 936–40 (D.Minn. 2008) (holding that "Congress exceeded its authority in enacting § 4248(a)" because the act "regulates noneconomic criminal activity that traditionally was the province of the states").

192. Frier v. Watters, No. 07-C-328, 2008 U.S. Dist. LEXIS 19174, at *3 (E.D.Wis. Feb 27, 2008) (holding that Comstock is not controlling over the states because individual states may "enact laws providing for the commitment of sex offenders with mental disorders that make control of their sexual impulses difficult or impossible"); U.S. v. Shields, 522 F.Supp.2d 317, 323 (D.Mass. 2007) (rejecting the defendant's constitutional challenge to civil commitment under 18 U.S.C. § 4248, also known as the federal civil confinement statute, on the grounds that states have the right to create "statutes allowing for the civil commitment of sexually violent predators"); U.S. v. Dowell, No. CIV-06-1216-D, 2007 U.S. Dist. LEXIS 96564 at *28 (W.D.Okla. Dec 05, 2007) (holding that involuntary commitment statutes are "rationally related to the goal of protecting the public from those who are unable to control their behavior").

193. U.S. v. Comstock, 130 S. Ct. 1949, 1965, 176 L. Ed. 2d 878, 899, 2010 U.S. LEXIS 3879 (holding that "the statute is a 'necessary and proper' means of exercising the federal authority that permits Congress to create federal criminal laws, to punish their violation, to imprison violators, to provide appropriately for those imprisoned, and to maintain the security of those who are not imprisoned but who may be affected by the federal imprisonment of others").