CHAPTER 36

SPECIAL CONSIDERATIONS FOR SEX OFFENDERS*

A. Introduction

If you have been convicted of a sex offense, there are special issues you should know about. This Chapter will focus mainly on issues that apply to the more serious felony sex offenses, often focusing on New York law. However, this Chapter will also discuss laws from other states as examples. Each state has very specific laws on this topic, so it is important to check the laws in the state where you were convicted. Additionally, sex offense law frequently changes, so it is also important to check the current law, which may have changed since this edition of the *JLM* was published.

Sex offenses are defined differently in each state. In New York, most sex offenses are in Article 130 of the New York Penal Law.[1] Common sex offenses include sexually touching or having sex with another person[2] when that other person is forced into the act, incapacitated[3] (unable to consent to the act), or under the age of consent. Most sex offenses are felonies. However, some lower-level sex offenses—like sexual misconduct,[4] forcible touching,[5] and third-degree sexual abuse[6]—are misdemeanors. Some sex offender laws may apply to people who have committed crimes that are not usually considered sex offenses. For example, the New York Sex Offender Registration Act[7] also

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[1] *See* N.Y. PENAL LAW § 130.00 (McKinney 2020 & Supp. 2019) (defining terms used in sex offense charges under New York law).

[2] In some states, sending sexual messages to a minor without a plan to have sexual contact with that minor is a crime. While the Supreme Court has not decided on this question, the Seventh Circuit 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), because that person did not take a "substantial step" towards completing the crime. United States v. Gladish, 536 F.3d 646, 650 (7th Cir. 2008). The Second Circuit (New York is in the Second Circuit) has held that this crime *only* requires intent to *entice*. United States v. Brand 467 F.3d 179, 202 (2d Cir. 2006); 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, they can still be found guilty of violating the statute if they had an intent to entice someone into engaging in these acts with them. Similarly, the Ninth Circuit has held that sending sexual letters 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, 1235–1237 (9th Cir. 2007).

[3] A person might not be able to agree to engage in sexual behavior because he or she has a mental disability, or is mentally disabled or mentally incapacitated. N.Y. PENAL LAW § 130.30(2) (McKinney 2020 & Supp. 2019).

[4] N.Y. PENAL LAW § 130.20 (McKinney 2020 & Supp. 2019) (sexual misconduct is a class A misdemeanor).

[5] N.Y. PENAL LAW § 130.52 (McKinney 2020 & Supp. 2019) (forcible touching is a class A misdemeanor).

[6] N.Y. PENAL LAW § 130.55 (McKinney 2020 & Supp. 2019) (sexual abuse in the third degree involves subjecting another to sexual contact without the latter's consent, and is a class B misdemeanor).

[7] N.Y. CORRECT. LAW § 168 (McKinney 2014).

applies to people convicted of kidnapping a minor (Article 135),[8] prostitution offenses (Article 230),[9] and offenses against the right to privacy (Article 250).[10]

This Chapter begins with topics relevant to you while you are in prison. **Part B** discusses protective custody (if you believe you are in danger of being harmed by other incarcerated people) and **Part C** discusses counseling, including the consequences of not going to counseling, and good time credits. **Part D** discusses laboratory tests—specifically HIV and DNA tests—that might come up in your legal proceedings. Finally, this Chapter discusses issues that may come up during and after your release from prison. **Part E** discusses parole, **Part F** discusses state and federal sex offender registry laws, and **Part G** discusses civil confinement.

B. Protective Custody

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

In protective custody, you are kept from contact with the general population of incarcerated people. Incarcerated people who may be placed in protective custody include potential victims of abuse, witnesses of abuse likely to be intimidated, and incarcerated people who, for one reason or another, are unable to live safely in the general population. Protective custody can be required or voluntary.[11] Although protective custody is for the incarcerated person's protection and not punishment, incarcerated people in protective custody may have limited opportunities for some things, such as scheduling out-of-cell time, access to library services, and use of the commissary.[12] Despite these limitations, you might be better off in protective custody if you feel threatened or in danger.

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[8] N.Y. PENAL LAW § 135 (McKinney 2020 & Supp. 2019). Kidnapping, which is not a sex offense under normal circumstances, becomes a sex offense for purposes of the Sex Offender Registration Act (and, therefore, the Act 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-a(2) (McKinney 2014).

[9] N.Y. PENAL LAW § 230 (McKinney 2024). Specifically, the New York Sex Offender Registration Act requires registration for persons convicted of §§ 230.04 (patronizing, that is, using, a prostitute) if the person patronized (that is, the prostitute) is under the age of seventeen, 230.05 (patronizing a person below the age of fifteen for prostitution, while being above the age of eighteen), 230.06 (patronizing a person below the age of eleven for prostitution, or patronizing a person below the age of thirteen for prostitution while being above the age of eighteen), 230.30 (promoting prostitution through force or intimidation, profiting from another's promotion of prostitution, or promoting or profiting from the prostitution of a person below the age of eighteen), 230.32 (knowingly promoting or profiting from the prostitution of a person below the age of thirteen, or doing the same for a person below the age of fifteen while being above the age of twenty-one), and 230.33 (compelling prostitution of a person less than eighteen years old while being above the age of eighteen). N.Y. CORRECT. LAW § 168-a(2) (McKinney 2014).

[10] Offenses against the right to privacy include unlawful surveillance in the first degree. This usually involves the use of an imaging device to view the intimate or sexual parts of another located in private areas, such as fitting rooms or restrooms, without their knowledge or *consent*. N.Y. PENAL LAW §§ 250, 250.45 (McKinney 2017). You should note that the Sex Offender Registration Act applies *only* to unlawful surveillance in the first degree. *See* N.Y. CORRECT. LAW § 168-a(2) (McKinney 2014) (referencing N.Y. PENAL LAW § 250.50 (McKinney 2017)). In order for you to be charged with this crime, you have to have been convicted within the last ten years of unlawful surveillance either in the first or second degree from a different incident. N.Y. PENAL LAW § 250.50 (McKinney 2017).

[11] *See* N.Y. COMP. CODES R. & REGS. tit. 7, § 330.2 (2019) (defining voluntary and involuntary protective custody incarcerated people as potential victims or witnesses likely to be intimidated, or incarcerated people who cannot live in the general prison community); FLA. ADMIN. CODE ANN. r. 33-602.220(3) (2020) (describing procedure for an incarcerated person to request "protective management" under FLA. ADMIN. CODE ANN. r. 33-602.221 (2020)).

[12] For specific details about conditions of confinement for incarcerated people in New York in protective custody, *see* N.Y. COMP. CODES R. & REGS. tit. 7, § 330.4 (2019).

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 incarcerated people an incentive to work on the issues that may have led to their incarceration.[13] 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."[14] 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 you are assigned while in prison and/or for "progress and achievement in an assigned treatment program."[15] Assigned treatment programs can include sex offender counseling.[16] If you do not attend counseling, you risk losing your good time credits.[17]

JLM Chapter 35, "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 will look at your file and tell the superintendent the amount of good time credit or "good behavior allowance" it thinks you should have.[18] The superintendent then looks at the recommendation and forwards it to the Commissioner of Correctional Services, who makes the final decision.[19]

In New York, you have no right to demand good time credits.[20] The Commissioner's decision will be final unless it is not made "in accordance with law."[21] 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.[22] The law on the requirements for good time

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[13] *See* N.Y. COMP. CODES R. & REGS. tit. 7, § 2100.2 (2019) (describing the policy behind the Earned Eligibility Program).

[14] N.Y. COMP. CODES R. & REGS. tit. 7, § 2100.2(a) (2019).

[15] N.Y. CORRECT. LAW § 803(1)(a) (McKinney 2014). On September 1, 2021, this law will change the amount of time that can offset your sentence for incarcerated people serving two or more indeterminate sentences. For further information about good time credits, see *JLM* Chapter 35, "Getting Out Early: Conditional & Early Release," for a detailed explanation of the requirements and procedures for earning good time credits.

[16] Nineteen 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 Moderate/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. N. Y. Dep't of Corr. & Cmty. Supervision, *Sex Offender Counseling and Treatment Program (SOCTP)*, *available at* https://doccs.ny.gov/sex-offender-counseling-and-treatment-program-soctp (last visited Mar. 16, 2024). 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. N.Y. Dep't of Corr. & Cmty. Supervision, *Sex Offender Counseling and Treatment Program Guidelines* (Apr. 2018), *available at* https://doccs.ny.gov/system/files/documents/2022/01/soctp-procedures-and-guidelines-2018.pdf (last visited Mar. 16, 2024).

[17] N.Y. CORRECT. LAW § 803(1)(a) (McKinney 2014) (stating 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."

[18] N.Y. COMP. CODES R. & REGS. tit. 7, § 262.1(a) (2019).

[19] N.Y. COMP. CODES R. & REGS. tit. 7, § 262.1 (2019).

[20] N.Y. COMP. CODES R. & REGS. tit. 7, § 260.2 (2019). The statute makes clear that the good behavior allowances, or good time credits, are a privilege that need to be earned by an incarcerated person and, therefore, no incarcerated person has the right to demand these allowances/credits.

[21] N.Y. CORRECT. LAW § 803(4) (McKinney 2014).

[22] N.Y. COMP. CODES R. & REGS. tit. 7, § 261.3(c) (2019). *See also* People ex rel. Gittens v. Coughlin, 143 Misc.

credit refers only to "assigned" (required) treatment programs, and not "recommended" ones.[23] However, DOCCS 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.[24] Courts have allowed TACs to withhold good time credits for this reason.[25] Courts have been strict in upholding such denials of good time credits even where:

(1) the incarcerated person was on a waitlist for such a program, but had refused treatment twice before;[26]
(2) the incarcerated person 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";[27] and
(3) the incarcerated person was told he needed additional counseling, but he was not allowed to transfer to a facility with an appropriate sex offender therapy program.[28]

2d 748, 751, 541 N.Y.S.2d 718, 720 (Sup. Ct. Sullivan County 1989) (explaining that, according to N.Y. COMP. CODES R. & REGS. tit. 7, § 261.3 (2019), the TAC should look at the entire prison experience of the incarcerated person and not just a rule when making its decision regarding good behavior allowances); Amato v. Ward, 41 N.Y.2d 469, 473–474, 362 N.E.2d 566, 570, 393 N.Y.S.2d 934, 937 (1977) (citing N.Y. COMP. CODES R. & REGS. tit. 7, § 261.3 (2019)) (holding that the TAC should appraise the entire institutional experience of the incarcerated person in making its decision).

[23] N.Y. CORRECT. LAW § 803(1)(a) (McKinney 2014).

[24] *See, e.g.*, 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 Dep't 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, 638–639, 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) (explaining that when an incarcerated person 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 an incarcerated person fails to participate in "recommended" treatment programs).

[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); 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); 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 incarcerated person'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, 739–740, 705 N.Y.S.2d 419, 420 (3d Dept. 2000), the court explained that, because the incarcerated person 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" made it neither unreasonable nor against the law for the TAC to withhold good time credits from him. *See also JLM*, Chapter 18, "Your Rights at Prison Disciplinary Proceedings."

[26] 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 incarcerated person'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).

[27] 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 incarcerated person'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.

[28] Coleman v. Boyle, 270 A.D.2d 739, 739–740, 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 even if you had requested a transfer to a facility where they had a full program).

Courts have also said that these requirements do not violate the Fifth Amendment right against self-incrimination.[29] For these reasons, you should make every attempt to get and complete counseling if it is recommended to you.

1. Self-incrimination in counseling

Before October 2008, incarcerated people could be required to essentially admit to crimes in counseling. For example, they could be forced to produce "sexual autobiographies." This rule has been changed. You can only be required to speak about your past sexual behavior in general terms, without having to mention specific details. You cannot be required to admit to any specific crime in order to participate in treatment and receive good time credits.[30]

D. Laboratory Testing

1. HIV Testing

HIV is the virus that causes AIDS. HIV can be spread in several ways, including through sexual contact, shared use of drug needles, and other methods that result in an exchange of bodily fluids. Because sexual contact is one way to transmit this virus, almost every state (including New York) has a law allowing or requiring courts to order HIV testing for convicted sex offenders or defendants charged with sex offenses.[31] Additionally, the federal government may perform HIV testing on any incarcerated person who has been sentenced to at least six months imprisonment if the health services staff at the prison determines that the incarcerated person is at risk for an HIV infection. The federal government may also perform an HIV test on any incarcerated person sentenced to less than six months, who may have transmitted HIV to prison employees or to other non-incarcerated people.[32]

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[29] Lamberty v. Schriver, 277 A.D.2d 527, 528, 715 N.Y.S.2d 510, 511 (3d Dept. 2000) (explaining that requiring an incarcerated person 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).

[30] In VanGorder v. Lira, No. 9:08-CV-281 (NAM/ATB), 2010 U.S. Dist. LEXIS 30584, at *3–4 n.1 (N.D.N.Y. Mar. 30, 2010) (*unpublished*), the court held that incarcerated people could not be required to sign a confession before participating in a treatment program. The settlement terms were said to apply to future claims that an incarcerated person's 5th Amendment rights were violated. The settlement agreement also says that when any incarcerated person is admitted to a Sex Offender Counseling Program, DOCCS has to provide that incarcerated person with a form titled "Limits of Confidentiality, Partial Waiver of Confidentiality and Acknowledgment."

[31] *See* ALA. CODE § 22-11A-17(a) (LexisNexis 2011); ALASKA STAT. § 18.15.300 (2007); 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 (2019); COLO. REV. STAT. § 18-3-415 (2010); CONN. GEN. STAT. ANN. § 54-102a (2018); CONN. GEN. STAT. ANN. § 54-102b (2019); DEL. CODE ANN. tit. 10, § 1077(a) (2011); DEL. CODE ANN. tit. 11, § 3911 (2008); FLA. STAT. ANN. § 960.003 (2013); GA. CODE ANN. § 17-10-15 (2012); 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. 5/5-5-3(g) (2019); IND. CODE ANN. § 35-38-1-10.5 (2018); IND. CODE ANN. § 35-38-1-10.6 (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 (2008); LA. CODE CRIM. PROC. ANN. art. 499 (2008); ME. REV. STAT. ANN. tit. 5, § 19203-F (2007 & Supp. 2009); MD. CODE ANN., CRIM. PROC. § 11-112 (LexisNexis 2011); 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 (1994); N.J. STAT. ANN. § 2C:43-2.2 (2011); N.M. STAT. ANN. § 24-2B-5.1 (2010); N.Y. CRIM. PROC. LAW § 390.15 (McKinney 2012); N.C. GEN. STAT. § 15A-534.3 (2009); N.D. CENT. CODE § 23-07.7-01 (2007); OHIO REV. CODE ANN. § 2907.27 (2014); OKLA. STAT. ANN. tit. 63, § 1-524 (2011); 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 (2011); 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 (2011); W. VA. CODE ANN. § 16-3C-2(f) (2016); WIS. STAT. ANN. § 968.38 (2010); WYO. STAT. ANN. § 7-1-109 (2011).

[32] 28 C.F.R. § 549.12(a)(2) (2018).

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 incarcerated person.[33] 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 about 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.[34]

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

(a) 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,[35] while other statutes require the court to order testing if the victim requests it.[36] In some states, testing is automatic.[37]

Some states do not allow test results to be shown to the court[38] or to be used in criminal or civil proceedings against the defendant.[39] Other states allow the use of HIV test results by the prosecution.[40] Be sure to read a copy of the statute from your state in order to learn what the law is for your case.

Some defendants have challenged statutes that allow pre- or post-conviction HIV testing against their wishes by claiming that these statutes violate the Fourth Amendment's ban on unreasonable searches. Most of the time, the courts have determined that these statutes are constitutional.[41] Some

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[33] *See* WASH. REV. CODE § 70.02.220 (2018). *See also* HAW. REV. STAT. § 325-16.5 (2009); LA. REV. STAT. ANN § 15:535 (2008); WIS. STAT. ANN. § 252.15 (2010).

[34] *See* 730 ILL. COMP. STAT. 5/5-5-3 (2013). *See also* GA. CODE ANN. § 17-10-15(c) (2012).

[35] *See, e.g.*, OR. REV. STAT. § 135.139 (2003) (allowing court to order HIV testing for charges where body fluids may have been transferred from one person to another when the court finds there is probable cause to believe (1) you committed the crime; and (2) the victim was substantially exposed).

[36] *See, e.g.*, N.Y. CRIM. PROC. LAW § 210.16(1) (McKinney 2018) (requiring HIV testing when (1) the victim requests it within six months of the date of the alleged felony offense; and (2) the felony offense includes as an essential element an act of "sexual intercourse," "oral sexual conduct," or "anal sexual conduct" as defined in section 130.00 of the penal law).

[37] *See, e.g.*, COLO. REV. STAT. ANN. § 18-3-415 (West 2016) (requiring HIV testing when the defendant is charged for any sexual offense).

[38] *See, e.g.*, N.Y. CRIM. PROC. LAW § 390.15(6)(a)(ii) (McKinney 2018) (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 plainly forbidding disclosure "to any other person or the court").

[39] *See, e.g.*, N.Y. CRIM. PROC. LAW § 390.15(8) (McKinney 2018) (stating that information on HIV status obtained by consent, hearing, or a court order may not be used as evidence against you in a criminal or civil proceeding related to the events that you were convicted for); TEX. CODE CRIM. PROC. ANN. art. 21.31(c) (Vernon 2009) (preventing use of test results in any criminal proceeding resulting from the alleged offense).

[40] *See, e.g.*, ALASKA STAT. § 18.15.310(e)(2) (2007) (allowing the use of HIV test results when necessary for civil proceedings against a defendant); CAL. PENAL CODE § 1202.1(c) (West 2015) (allowing disclosure of HIV test results to the prosecution for use in an additional criminal charge or to increase the defendant's sentence).

[41] *See, e.g.*, Seaton v. Mayberg, 610 F.3d 530, 534 (9th Cir. 2010) ("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." (quoting Hudson v. Palmer, 468 U.S. 517, 527–28, 104 S. Ct. 3194, 3201, 82 L. Ed. 2d 393 (1984))) (*Seaton* found that the 4th Amendment did not prevent disclosure of the incarcerated person's medical records); Connor v. Foster, 833 F. Supp. 727, 730–731 (N.D. Ill.

courts say that some Fourth Amendment protections—the search warrant and probable cause requirements—do not apply when (1) the reason for the test is a "special need" beyond ordinary law enforcement, and (2) that special need justifies the privacy intrusion.[42]

(i) *New York*

New York has its own laws about HIV testing. In New York, the nature of the testing depends on the status of your case. If you have not been convicted but there is an indictment or information filed, then the court must order you to take an HIV test if the victim requests one and the test "would provide medical benefit to the victim or a psychological benefit to the victim." The results will be given to you and the victim, but not to the court.[43]

If you have publicly announced your HIV status, you may be required to take an HIV test even if there is no showing that it would benefit the victim for them to be aware of your HIV status.[44] This is because by announcing your HIV status, you placed your medical status at issue and gave up your right to confidentiality.[45] If you have been convicted of certain sex offenses, a separate law requires that a court order HIV tests at a victim's request.[46] If you have been tested under a court order, the results of the test cannot be used against you in court.[47]

(ii) *Federal*

Under federal law, specifically the 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.[48] "[T]he victim may then disclose the test results only to any medical professional, counselor, family member or sexual partner(s) the victim may have had since the attack."[49]

1993) (finding that HIV testing against an incarcerated person's wishes did not violate the 4th Amendment when incarcerated person's 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) (holding that the 4th Amendment allowed HIV testing against defendant's wishes), *aff'd*, Virgin Islands v. Roberts, 961 F.2d 1567 (3d Cir. 1992); People v. Adams, 149 Ill. 2d 331, 352–354, 597 N.E.2d 574, 584–586 (1992) (finding that an Illinois statute requiring incarcerated people 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, 121 Wash. 2d 80, 98, 847 P.2d 455, 463 (1993) (en banc) (holding that a statute requiring HIV testing of sexual offenders is reasonable under the 4th Amendment, does not violate the right to privacy, and may be applied to juveniles).

[42] *See In re* Juveniles A, B, C, D, E, 121 Wash. 2d 80, 91, 847 P.2d 455, 459 (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, 341-342 (3d Cir. 1997) (holding that a convicted rapist had to undergo a mandatory HIV test, because telling the victim about a potential HIV infection and preventing the spread of HIV were "special needs," which justified the blood test).

[43] N.Y. CRIM. PROC. LAW § 210.16(1)(a) (McKinney 2007).

[44] *In re* Gribetz, 159 Misc. 2d 550, 553, 605 N.Y.S.2d 834, 836 (Rockland Cnty. Ct. 1994) (finding that although the defendant did not break the skin of the victim, which would have put them at risk of getting HIV, the defendants HIV test results were a compelling part of the government's case. As a result, the court ordered an HIV test).

[45] People v. Durham, 146 Misc. 2d 913, 916, 553 N.Y.S.2d 944, 946-947 (Sup. Ct. Queens Cnty. 1990) (ordering the defendant to be tested for HIV after he told 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 (Rockland Cnty. Ct. 1994) (holding that HIV 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).

[46] N.Y. Crim. Proc. Law § 390.15(1) (McKinney 2019).

[47] N.Y. CRIM. PROC. LAW § 210.16(1)(a) (McKinney 2007); N.Y. CRIM. PROC. LAW § 390.15(8) (McKinney 2019).

[48] N.Y. CRIM. PROC. LAW § 210.16(1)(a) (McKinney 2007); N.Y. CRIM. PROC. LAW § 390.15(8) (McKinney 2019).

Note that VAWA consists of several subtitles, which can be found throughout the United States Code. Only the subtitle relevant to HIV testing of incarcerated people is cited here.

[49] 42 U.S.C. § 14011(b)(5), *transferred to* 34 U.S.C. §12391(b)(5) (transferred 2017).

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.[50] This means that no matter what the laws of your state say, you could be required to take an HIV test and provide the results under VAWA. However, in New York, victims can also request HIV test results under New York State law.[51]

(b) 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 without telling the other person your HIV status beforehand.[52] 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.[53]

2. 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 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.

E. Special Parole Considerations

You may be paroled (conditionally released from prison) before you have served your entire sentence.[54] If so, 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.[55] It is extremely important to comply with the requirements and conditions of your parole. If you have been convicted of a sex offense, the parole division 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.[56]

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

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[50] 42 U.S.C. § 14011(b)(2)(a), *transferred to* 34 U.S.C §12391(b)(2)(A) (transferred 2017).

[51] N.Y. CRIM. PROC. LAW §210.16 (McKinney 2007).

[52] *See, e.g.*, FLA. STAT. ANN. § 775.0877(3) (West 2016) (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 (West 2016) (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); MICH. COMP. LAWS ANN. § 333.5210 (1) (West 2019) (criminalizing "anal or vaginal intercourse" by a person who knows they are infected with HIV or AIDS, and who does not tell their sexual partner about their infection).

[53] *See, e.g.*, People v. C.S., 583 N.E.2d 726, 731, 222 Ill. App. 3d 348, 355, 164 Ill. Dec. 810, 815 (Ill. App. Ct. 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).

[54] *Parole*, BLACK'S LAW DICTIONARY (11th ed. 2019). *See also* N.Y. EXEC. LAW § 259-a–c (McKinney 2018) (describing generally the organization and duties of the New York State Division of Parole).

[55] *Parole Board,* BLACK'S LAW DICTIONARY (11th ed. 2019). *See also* N.Y. EXEC. LAW § 259-a–c (McKinney 2018) (describing generally the organization and duties of the New York State Division of Parole).

[56] *See, e.g.*, Farrell v. Burke, 449 F.3d 470, 499 (2d Cir. 2006) (upholding the lower court's decision to grant defendants' motion to dismiss a parolee's 14th Amendment claim after he was re-arrested and re-incarcerated for violating a special condition of parole prohibiting him from owning pornography).

to a range of time).[57] If you have received a determinate sentence, you will also be subject to a period of "post-release supervision."[58] The state board of parole supervises incarcerated people released under both parole and post-release supervision. In New York, the parole division is also required to assist you in reintegrating into the community.[59]

1. 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. These conditions may include mandatory address verification and restrictions on how close you can come to school grounds or childcare facilities.[60] Courts will not review whether the rules imposed by a parole officer are helpful or fair.[61] 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.[62]

2. Incarceration Beyond Your Conditional Release (Parole) 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.[63] The Parole Board can make you change your plans.[64] 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).[65] Courts will allow you to be held until you have a living

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[57] N.Y. PENAL LAW § 70.40 (McKinney 2021). 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 indeterminate sentence or after you have served six-sevenths of the determinate sentences, whichever is later. N.Y. PENAL LAW § 70.40(1)41(a)(iii) (McKinney 2021). 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 total length of the sentences put together. N.Y. PENAL LAW § 70.40(1)(a)(iv) (McKinney 2021).

[58] N.Y. PENAL LAW § 70.45 (McKinney 2021).

[59] 58.N.Y. EXEC. LAW § 259-c (McKinney 2018) (describing the reintegration duties of New York State Division of Parole).

[60] N.Y. Dep't of Corr. & Cmty. Supervision, *Community Supervision Handbook: Questions and Answers Concerning Release and Community Supervision* (May 2019), *available at* https://doccs.ny.gov/system/files/documents/2019/05/Community_Supervion_Handbook.pdf (last visited Mar. 20, 2024).

[61] *See* Ahlers v. N.Y. State Div. of Parole, 1 A.D.3d 849, 849, 767 N.Y.S.2d 289, 289 (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").

[62] M.G. v. Travis, 236 A.D.2d 163, 167–169, 667 N.Y.S.2d 11, 14–15 (1st Dept. 1997) (citing Briguglio v. N.Y State Bd. of Parole, 24 N.Y.2d 21, 28, 246 N.E.2d 512, 516, 298 N.Y.S.2d 704, 710 (1969) to support the idea 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 the court's only ability is to review the board's decision to determine whether the decision was arbitrary or capricious).

[63] N.Y. EXEC. LAW § 259-c (McKinney 2018) (describing generally the functions, powers, and duties of the State Board of Parole).

[64] *See* Monroe v. Travis, 280 A.D.2d 675, 676, 721 N.Y.S.2d 377, 378 (2d Dept. 2001) (holding that the Parole Board was justified in refusing to grant conditional release to a convicted sex offender until the incarcerated person found housing that was satisfactory to the Parole Board).

[65] *See* Billups v. N.Y. State Div. of Parole, 18 A.D.3d 1085, 1085–1086, 795 N.Y.S.2d 408, 409 (3rd Dept. 2005) (holding that due to the 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 (2d Dept. 2001) (holding that the Parole Board was justified in refusing to grant conditional release to a convicted sex offender until the incarcerated person 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 (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).

situation the Parole Board approves. Often, the Board will not let you live near schools or other places that care for children under the age of eighteen.[66] Sometimes the state has rules about where you may or may not live after release, but other times these rules are local (in a county, city, town, or village).

F. Sex Offender Registration and Notification Laws

1. Generally

There are both state and federal laws that require sex offender registration (providing certain information about yourself to be added to a list, called a "registry") and notification (letting the public know that you are a sex offender).

In states, registration and notification laws are often referred to as "Megan's Laws," after a seven-year-old girl who was murdered in 1994 and whose death prompted New Jersey to pass the first Megan's Law.[67] The official name of the Megan's Law in many states is the Sex Offender Registration Act ("SORA"), so you may hear these laws referred to by either name. Today, all fifty states have some version of a Megan's Law.[68] Because the exact laws are different in each state, it is important to do research into your state's laws.

The federal government has also passed its own laws on sex offender registry and notification. If you have been convicted of a sex offense, 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, a copy of your state-issued license/identification card, and license

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[66] N.Y. Dep't of Corr. and Cmty. Supervision, *Community Supervision Handbook: Questions and Answers Concerning Release and Community Supervision* (May 2019), *available at* https://doccs.ny.gov/system/files/documents/2019/05/Community_Supervion_Handbook.pdf (last visited Mar. 20, 2024) ("The parolee will not be allowed to live 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 they meet certain criteria and have the written permission of their PO.").

[67] N.J. STAT. ANN. §§ 2C:7-1–2C:7-23 (2015).

[68] Each state has interpreted its sex offender registration and notification 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, 2019 CODE OF ALA. tit. 15 Ch. 20A; ALASKA STAT. ANN. §§ 12.63.010–12.63.100 (West 2007); ARIZ. REV. STAT. ANN. §§ 13-3821–13-3829 (2020); ARK. CODE ANN. §§ 12-12-901–-923 (West 2014); CAL. PENAL CODE §§ 290–290.5 (West 2014); COLO. REV. STAT. ANN. §§ 16-22-101–16-22-115 (West 2016); CONN. GEN. STAT. ANN. §§ 54-250–54-261 (2009); DEL. CODE ANN. tit. 11, §§ 4120–4122 (West 2010); FLA. STAT. ANN. §§ 775.21–775.24 (West 2017); GA. CODE ANN. §§ 42-1-12–42-1-19 (West 2016); HAW. REV. STAT. §§ 846E-1–846E-12; IDAHO CODE ANN. §§ 18-8301–18-8331 (West 2006); 730 ILL. COMP. STAT. ANN. 150/1–12, 152/101–152/999 (West 2007); IND. CODE ANN. §§ 11-8-8-1–11-8-8-22 (West 2016); IOWA CODE ANN. §§ 692A.101–692A.130 (West 2016); KAN. STAT. ANN. §§ 22-4901 to 22-4913 (West 2017); KY. REV. STAT. ANN. §§ 17.500–17.580 (2010); LA. REV. STAT. ANN. §§ 15:540–15:553 (West 2022); ME. REV. STAT. ANN. tit. 34-A, §§ 11201–11256, 34-A §§ 11271–11304. (2010); MD. CODE ANN., CRIM. PROC. §§11-701–11-726 (West 2011); MASS. GEN. LAWS ANN. ch. 6, §§ 178D–178Q (West 2016); MICH. COMP. LAWS ANN. §§ 28.721–28.736 (2020); MINN. STAT. ANN. §§ 243.166–243.167 (2020); MISS. CODE ANN. §§ 45-33-21–45-33-59 (West 2012); MO. ANN. STAT. §§ 589.400–589.426 (2012); MONT. CODE ANN. §§ 46-23-501 to 46-23-520 (West 2009); NEB. REV. STAT. §§ 29-4001 to 29-4014 (West 2009); NEV. REV. STAT. ANN. §§ 179D.010–179D.850 (West 2015); N.H. REV. STAT. ANN. §§ 651-B:1–651-B:12 (2016); N.J. STAT. ANN. §§ 2C:7-1–2C:7-23 (2015); N.M. STAT. ANN. §§ 29-11A-1–29-11A-10 (West 2011); N.Y. CORRECT. LAW §§ 168–168-w (McKinney's 2014); N.C. GEN. STAT. §§ 14-208.5–14-208.45 (West 2014); N.D. CENT. CODE ANN. § 12.1-32-15 (West 2008); OHIO REV. CODE ANN. §§ 2950.01–2950.99 (2020); OKLA. STAT. ANN. tit. 57, §§ 581–590.2 (2017); OR. REV. STAT. §§ 163a.225–1632a.235 (West 2015); 42 PA. CONS. STAT. §§ 9799.10–9799.42 (West 2022) (registration requirements for offenses on or after December 20, 2012), § 4915.1 (West 2015) (failure to comply with registration requirements for offenses on or after December 20, 2012), §§ 9799.51–9799.75 (West 2022) (registration requirements for offenses from April 22, 1996, to December 20, 2012), § 4915.2 (West 2015) (failure to comply with registration requirements for offenses from April 22, 1996, to December 20, 2012); R.I. GEN. LAWS ANN. §§ 11-37.1-1–-20 (West 2006); S.C. CODE ANN. §§ 23-3-400–-555 (2007); S.D. CODIFIED LAWS §§ 22-24B-1–22-24B-34 (2017); TENN. CODE ANN. §§ 40-39-201 to 40-39-215 (West 2017); TEX. CODE CRIM. PROC. ANN. arts. 62.001–62.408 (2018); UTAH CODE ANN. § 77-41-101 to 77-41-112 (West 2017); VT. STAT. ANN. tit. 13, §§ 5401–5415 (West 2007); VA. CODE ANN. §§ 9.1-900 to 9.1-922 (West 2011); WASH. REV. CODE ANN. §§ 9A.44.130–9A.44.145 (2015); W. VA. CODE ANN. §§ 15-12-1 to 15-12-10 (West 2017); WIS. STAT. ANN. §§ 301.45–301.48 (West 2010); WYO. STAT. ANN. §§ 7-19-301–7-19-308 (West 2007); D.C. CODE §§ 22-4001–22-4017 (West 2007).

plates of your car if you have one.[69] 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.[70]

Challenges to state Megan's Laws have usually failed. States are generally allowed to impose Megan's Law requirements on sex offenders who were convicted before the laws existed.[71] States are also allowed to post a convicted sex offender's picture and information on the internet without giving them a hearing.[72] The Sixth Circuit has upheld a law that made young sex offenders register even though their records had been sealed.[73]

In *Connecticut Department of Public Safety v. Doe*, the Supreme Court suggested that someday, a defendant might show that a Megan's Law violated "substantive due process," referring to a set of rights protected by the Fourteenth Amendment of the United States Constitution.[74] Under substantive due process, laws have to be fair and reasonable and the government has to have a legitimate reason for creating them.[75] Even though the Court left this possibility open, the Supreme Court has not yet invalidated a state Megan's law on substantive due process grounds.

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. For example, 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 1,000 feet of a daycare.[76] 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.[77] The court also said that Georgia was still allowed to forbid a convicted sex offender from working near

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

[70] Adam Walsh Child Protection and Safety Act of 2006, Pub. L. No. 109-248 § 117, 120 Stat 587 (2006).

[71] *See* Smith v. Doe, 538 U.S. 84, 105-106 (2003) (holding that Alaska's sex offender registration law could be applied to people who were convicted before the law was passed, since the law was passed to protect the public rather than punish people and it was not so harsh as to be the equivalent of punishment); *see also* .Adam Walsh Child Protection and Safety Act of 2006, Pub. L. No. 109-248 § 117, 120 Stat 587 (2006) (stating 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). *But see* Commonwealth v. Muniz, 164 A.3d 1189, 1223 (Pa. 2017) (holding that Pennsylvania's former sex offender registration law was punitive in nature and could not be applied retroactively under the *ex post facto* clause of the federal and state constitutions); Doe v. Snyder, 834 F.3d 696, 705–706 (6th Cir. 2016) (finding that certain provisions of Michigan's sex offender registration law were punitive and could not be applied retroactively under the federal *ex post facto* clause). *See generally* Starkey v. Okla. Dept. of Corr., 305 P.3d 1004, 1037 (Okla. 2013) (Winchester, J., dissenting) (collecting cases).

[72] Conn. Dep't of Pub. Safety v. Doe, 538 U.S. 1, 4, 123 S. Ct. 1160, 1162–1163, 155 L. Ed. 2d 98, 103 (2003).

[73] Doe v. Mich. Dep't 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.

[74] Conn. Dep't 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 notice before the state can take some action against you, substantive due process protects certain fundamental rights that are more difficult for the state to interfere with, such as privacy within the home.

[75] *Due Process* (*Substantive Due Process*), BLACK'S LAW DICTIONARY (11th ed. 2019).

[76] Mann v. Ga. Dep't of Corr., 653 S.E.2d 740, 745, 282 Ga. 754, 760 (2007).

[77] Mann v. Ga. Dep't of Corr., 653 S.E.2d 743, 761, 282 Ga. 740, 757 (2007).

any childcare facility.[78] In another case addressing similar restrictions, the Third Circuit 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.[79] 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"). SORA requires convicted sex offenders to register with the New York Division of Criminal Justice Services. You will have to re-register 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 ninety days.[80]

The Division will keep a file on you which will include the following information and any other information the Division deems "pertinent" (relevant):

(1) Your name (including any aliases, or other names, you are known by);
(2) Your date of birth, sex, and race;
(3) Your height, weight, and eye color;
(4) Your driver's license number;
(5) Your home address (or the address of the place you expect to live) and, if you are a "High Risk" offender, your work address;
(6) Your internet account information and any screen names you use;
(7) Your photograph and fingerprints;
(8) A description of the crime of which you were convicted;
(9) If you are enrolled, attending, or employed by a higher education institution, that institution's name and address

If you were convicted of committing or attempting to commit any of the offenses listed below, you are considered a "sex offender" under SORA and you **must** register with the Division of Criminal Justice Services before you leave prison.[81]

- New York Penal Law Sections 120.70 (luring a child), 130.20 (sexual misconduct), 130.25, 130.30, 130.40, 130.45, or 130.60 (certain offenses involving rape, criminal sexual acts, or sexual abuse)
- New York Penal Law Sections 230.34 (sex trafficking), 250.50 (unlawful surveillance), 255.25, 255.26, or 255.27 (offenses involving incest) or any provision of Article 263 of the penal law (offenses involving sexual performance by a child);
- New York Penal Law Sections 130.52 or 130.55 (forcible touching or sexual assault). 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;
- New York Penal Law Sections 135.05, 135.10, 135.20, or 135.25 (offenses involving imprisonment or kidnapping if the victim of the kidnapping is less than 17 years old and you are not the parent of the victim);
- New York Penal Law Section 230.04 (when you are convicted of patronizing a prostitute who is actually younger than seventeen);

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[78] Mann v. Ga. Dep't of Corr., 653 S.E.2d 754, 746, 282 Ga. 740, 761 (2007).

[79] Doe v. Pa. Bd. of Prob. & Parole, 513 F.3d 95, 112 (3d Cir. 2008).

[80] N.Y. CORRECT. LAW § 168-h (McKinney 2014).

[81] N.Y. CORRECT. LAW § 168-f (McKinney 2014).

- New York Penal Law Sections 230.05, 230.06, 230.30(2), 230.32, or 230.33 (offenses involving patronizing prostitutes or promoting prostitution);
- New York Penal Law Section 250.45 (2), (3), or (4) (offenses involving unlawful surveillance), *unless* you petition the trial court, and the court holds that registration would be too harsh;
- the following federal laws: 8 U.S.C. § 2251, 18 U.S.C. § 2251A, 18 U.S.C. § 2252, 18 U.S.C. § 2252A, or 18 U.S.C. § 2260 (various offenses involving sexual exploitation of minors), 18 U.S.C. § 2422(b), 18 U.S.C. § 2423, or 18 U.S.C. § 2425 (offenses involving the use of interstate channels to solicit, transport, or transport information about, minors);
- New York Penal Law Sections 130.35 (first-degree rape), 130.50 (first-degree criminal sexual act), 130.65, 130.66, 130.67, or 130.70 (offenses involving sexual abuse), 130.75 or 130.80 (offenses involving course of sexual conduct against a child), 130.95 (predatory sexual assault), or 130.96 (predatory sexual assault against a child); or
- New York Penal Law Sections 130.53 (persistent sexual abuse), 130.65-a (aggravated fourth-degree sexual abuse), or 130.90 (facilitating a sex offense with a controlled substance).

If you were convicted of a sex offense in federal court or a different state's court, you still have to register under SORA if (1) the crime you were convicted of is the same sort of crime as those listed above *or* (2) the state you were convicted in would have required you to register.[82]

(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."[83] Your "risk level" is the court's decision about how likely it is that you will commit other sex offenses. Level one is for Low-Risk offenders, level two is for Medium-Risk offenders, and level three is for High-Risk offenders.

The court will decide which category to place you in after the Board of Examiners of Sex Offenders looks at your case and makes a recommendation to the court.[84] The Board uses a worksheet to decide what your risk level should be.[85] This worksheet lists different factors and gives a number value to each factor. The Board sees which factors you have and then adds up the number for all of those, which corresponds to your risk level.[86] The factors are related to your crime, criminal history, personal background, and future plans. If *any* of the following applies to you, you are automatically a level 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

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[82] N.Y. CORRECT. LAW §§ 168-a(2)(d), 168-a(3)(b) (McKinney 2014).

[83] *See* N.Y. Bd. 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 Mar. 21, 2024).

[84] N.Y. CORRECT. LAW § 168-*l* (McKinney 2014) (describing generally the organization and duties of the Board of Examiners of Sex Offenders).

[85] *See* N.Y. Bd. 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 Mar. 21, 2024).

[86] *See* N.Y. Bd. 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 Mar. 21, 2024).

(4) there is a clinical assessment that you have a psychological, physical, or biological problem making you unable to control your sexual behavior.[87]

Your risk level hearing will happen about a month before your release. Under SORA, you have a right to a lawyer, which includes the right to a court-appointed lawyer if you cannot afford to hire one.[88] If you had a court-appointed lawyer at your trial, the court should automatically appoint one for your risk assessment hearing.[89] If you paid for your lawyer at trial but cannot afford one now, you need to apply to have one appointed to you.

You should attend your risk assessment hearing. The hearing is your one opportunity to challenge your risk level by giving the court information about the case or your history that it otherwise would not know about. 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.[90]

Before your hearing, the district attorney must give you the evidence used to decide your proposed risk. If the district attorney wants you to have a different risk level than the Board recommended, they have to tell you and explain why at least ten days before your hearing.[91]

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.[92]

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.[93]

(c) Registration and Notification

Your risk level determines how much information about you and your crime can be given to the public.[94]

If you are classified as level one (Low-Risk offender), local law enforcement will be 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.[95] 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 (Medium-Risk offender), law enforcement will be notified and may release the information above as well as your exact name and any aliases.[96] Also, law enforcement will keep a list of schools, parks, libraries, and other vulnerable areas and organizations, and will notify these organizations of your identity automatically.

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[87] N.Y. Bd. 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 Mar. 21, 2024).

[88] N.Y. CORRECT. LAW § 168-n(3) (McKinney 2014).

[89] N.Y. CORRECT. LAW § 168-n(3) (McKinney 2014).

[90] *See* Alan Rosenthal, DEFENDING AGAINST THE NEW SCARLET LETTER: A DEFENSE ATTORNEY'S GUIDE TO SORA PROCEEDINGS 171–172 (2019), *available at* https://www.ils.ny.gov/files/SORA%20Manual%202019.pdf (last visited Mar. 21, 2024).

[91] N.Y. CORRECT. LAW § 168-n(3) (McKinney 2014).

[92] N.Y. CORRECT. LAW § 168-m (McKinney 2014).

[93] N.Y. CORRECT. LAW § 168-l(8) (McKinney 2014).

[94] N.Y. CORRECT. LAW § 168-l(6) (McKinney 2014).

[95] N.Y. CORRECT. LAW § 168-l(6)(a) (McKinney 2014).

[96] N.Y. CORRECT. LAW § 168-l(6)(b) (McKinney 2014).

If you are classified as level 3 (High-Risk offender), 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.[97] There are also phone numbers that any member of the public can call to find out whether someone is a registered sex offender.[98] 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 information about the sex offender such as his social security number, address, license number, and date of birth.[99]

In addition, each police department in New York is required to have a publicly accessible record, the "Subdirectory of High-Risk (Level 3) Sex Offenders," that people can look at online. The subdirectory provides detailed information about High-Risk sex offenders residing in New York, including the offender's address, photograph, and a description of the crimes he committed and how he committed them.[100] The New York sex offender registry is available online.[101] Beyond the information law enforcement makes available, there are also private organizations that compile additional information and publish it online.[102]

(d) Amendments to SORA

Amendments to SORA have 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."[103] Sexually violent offenses include crimes such as rape, criminal sexual acts (meaning forced anal or oral sexual contact), sexual abuse, aggravated sexual abuse, sexual abuse of a child, and predatory sexual assault against an adult or a child (meaning sexual assault involving physical injury, threat of injury, or repeated assaults).[104] 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.[105] 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, because risk level classification is based on how likely you are to repeat your offense.[106]

Other amendments to SORA give sex offenders the right to a civil appeal after the court assigns them a risk level and a right to a lawyer in that appeal.[107] You also have the right to appointed counsel

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[97] N.Y. CORRECT. LAW § 168-l(6)(c) (McKinney 2014).

[98] N.Y. CORRECT. LAW § 168-p (McKinney 2014). New York Division of Criminal Justice Services, *Sex Offender Registry Line, available at* https://www.criminaljustice.ny.gov/nsor/800info.htm (last visited Apr. 9, 2024).

[99] N.Y. CORRECT. LAW § 168-p(1) (McKinney 2014).

[100] N.Y. CORRECT. LAW § 168-q (McKinney 2014). The information of level 2 and 3 sex offenders is available online, and people may subscribe to email updates whenever a new or updated registration occurs in their geographic area.

[101] New York Division of Criminal Justice Services, *Sex Offender Registry Overview*, *available at* https://www.criminaljustice.ny.gov/nsor/ (last visited Apr. 10, 2024).

[102] *See* Parent's for Megan's Law, *Search for Sex Offenders in Your State, available at* https://www.parentsformeganslaw.org/sex-offender-search/ (last visited Apr, 10, 2024).

[103] N.Y. CORRECT. LAW § 168-a(7)(b) (McKinney 2014).

[104] N.Y. CORRECT. LAW § 168-a(3) (McKinney 2014).

[105] N.Y. CORRECT. LAW § 168-a(7)(a) (McKinney 2014).

[106] New York State Division of Criminal Justice Services, *Risk Level & Designation Determination*, *available at* http://www.criminaljustice.ny.gov/nsor/risk_levels.htm (last visited Mar. 21, 2024).

[107] N.Y. CORRECT. LAW § 168-n(3) (McKinney 2014).

if you file a motion to have your sex offender classification changed, which you may do if your circumstances change.[108]

4. Sex Offender Registration and Notification Act (SORNA)

(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").[109] SORNA is a very complicated law, and states have had difficulty implementing it because of how difficult and expensive it is to put into practice, and because parts of the law are different from states' own laws.[110]

This Section will only discuss SORNA's key provisions, as most states have not adopted all of SORNA. The Department of Justice maintains a database that tracks SORNA implementation in each jurisdiction, including all fifty states, the District of Columbia, federally recognized tribal nations, and U.S. territories.[111] According to the database, as of April 2024, only eighteen states have substantially implemented SORNA.[112] New York has not adopted SORNA. However, some courts have held that even if you live in a state that has not adopted SORNA, you may still have to register with SORNA if you travel between states.[113] You should check your own state's law carefully and see what, if any, parts of SORNA it has adopted.[114]

If your state has adopted SORNA, you must register under SORNA if you have been convicted of a "sex offense" in your state.[115] Just like New York's SORA law, SORNA requires sex offenders to register either just before release, or right after sentencing (if you are not in custody).[116] You do not need to register if you were convicted of a crime listed in SORNA before it existed.[117] SORNA also 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.[118]

Under 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. This is because SORNA establishes the minimum

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[108] N.Y. CORRECT. LAW § 168-o(4) (McKinney 2014).

[109] The Adam Walsh Child Protection and Safety Act of 2006, Pub. L. No. 109–248, 120 Stat. 587 (codified as amended in scattered sections of 18, 28, 42 U.S.C.). SORNA created a new sex offender registry law at 34 U.S.C. §§ 20901–20962 and created new criminal offenses and penalties for failure to register at 18 U.S.C. § 2250.

[110] *See* Abby Goodnough & Monica Davey, *Effort to Track Sex Offenders Draws Resistance*, N.Y. TIMES, February 8, 2009, at A1, *available at* https://www.nytimes.com/2009/02/09/us/09offender.html (last visited Oct. 10, 2023).

[111] Office of Sex Offender Sentencing, Monitoring, Apprehending, Registering, and Tracking, *SORNA Implementation Status, available at* https://smart.ojp.gov/sorna/sorna-implementation-status (last visited Apr. 12, 2024)

[112] These states are Alabama, Colorado, Delaware, Florida, Kansas, Louisiana, Maryland, Michigan, Mississippi, Missouri, Nevada, Ohio, Oklahoma, South Carolina, South Dakota, Tennessee, Virginia, and Wyoming.

[113] United States v. Guzman, 591 F.3d 83, 94 (2d Cir. 2010) (applying SORNA registration requirements to defendants, even though their state had not implemented the requirements).

[114] For a list of state laws, see footnote 70, of this Chapter.

[115] 34 U.S.C. § 20911.

[116] 34 U.S.C. § 20913(b). If you are not in custody, you have three business days to register after being sentenced.

[117] Reynolds v. United States, 565 U.S. 432, 445, 132 S. Ct. 975, 984, 181 L. Ed.2d 935, 946 (2012) (interpreting 28 C.F.R. § 72.3); *see also* Gundy v. United States, 139 S.Ct. 2116, 2124, 204 L.Ed.2d 522 529 (2019) (reaffirming that SORNA was meant to apply to pre-act convicted offenders).

[118] 34 U.S.C. § 20911(8); 18 U.S.C. § 2241 (defining aggravated sexual assault).

national standard that each state must follow, but each state can impose stricter requirements for registration.[119]

SORNA divides sex offenders into three tiers based on the seriousness of their crime and places different restrictions on each. Each tier is defined below:

- Tier III[120] includes people convicted of an offense that is *both* (1) punishable for more than one year in prison and (2) falls under any of the following categories:
  - Offenses (including attempts and conspiracy) that are comparable to or more severe than aggravated sexual abuse, sexual abuse involving coercion or threats of force, sexual abuse against a person incapable of consenting, or abusive sexual contact against a minor less than thirteen years old;
  - Offenses involving kidnapping of a minor (unless you were the parent or guardian of the minor); or
  - Offenses that occurred after you became a tier II offender.
- Tier II[121] includes people convicted of an offense that is (1) punishable for more than one year in prison, (2) not included in Tier III, *and* (3) falls under any of the following categories:
  - Offenses (including attempts and conspiracy) involving the use of a minor that are comparable to or more severe than sex trafficking, coercion and enticement, transportation with intent to engage in criminal sexual activity, or abusive sexual contact;
  - Offenses involving the use of a minor in a sexual performance, solicitation of a minor to practice prostitution, or the production/distribution of child pornography; or
  - Offenses that occurred after you became a tier I offender.
- Tier I[122] includes people convicted of any sex offense that is not included in tier II or tier III.

How long you have to register as a sex offender depends on what 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 lives.[123] 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.[124]

Under SORNA, you will also have to personally appear before the government to verify your registration information.[125] 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.[126]

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[119] *See* 34 U.S.C. § 20914(a)(8), (b)(8) (permitting the Attorney General to request additional information about an individual outside of what is already listed in the regulation).

[120] 34 U.S.C. § 20911(4).

[121] 34 U.S.C. § 20911(3).

[122] 34 U.S.C. § 20911(2).

[123] 34 U.S.C. § 20915(a).

[124] 34 U.S.C. § 20913(c). Within three business days of each change, you must appear in person in at least one jurisdiction where you are registered to inform that jurisdiction of any changes. 34 U.S.C. § 20913(c); *see also* United States v. Guzman, 591 F.3d 83, 86 (2d Cir. 2010) (upholding SORNA's registration requirements for sex offenders).

[125] 34 U.S.C. § 20918.

[126] 34 U.S.C. § 20918.

Your state may adopt SORNA and use *more* strict classifications than those required by the Act, but it cannot adopt less strict classifications.[127] 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) How Can People Access SORNA Information?

(i) *Through Local Registries and By 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.[128] In addition, law enforcement in your jurisdiction will have to provide your information to certain parties, including the federal Attorney General, schools, public housing agencies, and other vulnerable communities in your area.[129]

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.[130]

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 United States Attorney General decides should not be released.[131]

Each state offender registry website must include directions on how to change information that you believe is incorrect.[132] 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."[133]

(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.[134] The National Sex Offender Public Website is maintained by the Attorney General and includes "relevant information for each sex offender and other person listed on a jurisdiction's internet site," making "relevant information" publicly accessible.[135] The website can be found online at http://www.nsopw.gov/.

(c) Sentence Increases Under the Adam Walsh Act

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:

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[127] 34 U.S.C. § 20912(a);; The National Guidelines for Sex Offender Registration and Notification, 73 Fed. Reg. 38030, 38033–38034 (July 2, 2008).

[128] 34 U.S.C. § 20920(a).

[129] 34 U.S.C. § 20923(b).

[130] 34 U.S.C. § 20920(b).

[131] 34 U.S.C. § 20920(c).

[132] 34 U.S.C. § 20920(e).

[133] 34 U.S.C. § 20920(f).

[134] 34 U.S.C. § 20921.

[135] 34 U.S.C. § 20922.

(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;[136] and
(2) A new mandatory minimum of 15 years for sex trafficking accomplished through force, fraud, or coercion involving a minor under 14.[137]

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.[138]

(d) Statute of Limitations

The Adam Walsh Act also got rid of the statute of limitations for certain crimes. This 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),[139] and Chapter 117 (Transportation for Illegal Sexual Activity and Related Crimes), or for charges under Sections 1201 (kidnapping), when the victim is a minor, or 1591 (sex trafficking of children).[140]

(e) Bail

The Adam Walsh 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]." [141]

(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.[142] Individuals who are convicted also *must* give samples to the Director of the Bureau of Prisons. This category includes persons who are convicted of any offense—not only felonies or crimes of violence—but they must at least be "in the custody of the Bureau of Prisons."[143]

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[136] 18 U.S.C. § 3559(f)(1)–(3).

[137] 18 U.S.C. § 1591(a), (b)(1)–(2).

[138] *See, e.g.*, 18 U.S.C. § 2422(b) (stating that the maximum term of imprisonment for coercion and enticement is life imprisonment and the minimum term is ten years); 18 U.S.C. § 2423(a) (indicating that the maximum term of imprisonment for conduct relating to transporting minors for prostitution is life imprisonment and the minimum term is ten years); 18 U.S.C. § 2242 (asserting that the maximum term of imprisonment for sexual abuse in prison can be up to life. There is no mandatory minimum term under this statute).

[139] 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.

[140] *See* 18 U.S.C. § 3299.

[141] 18 U.S.C. § 3142(f)(1)(E).

[142] 34 U.S.C. § 40702(a)(1)(A); *see also* DNA-Sample Collection and Biological Evidence Preservation in the Federal Jurisdiction, 73 Fed. Reg. 74,932, 74,936 (Dec. 10, 2008) (codified at 28 C.F.R. pt. 28) ("[T]he rule reflects a judgment that the implication of individuals in criminal activity to the extent of being arrested sufficiently supports the taking of certain identification information from such individuals.").

[143] 34 U.S.C. § 40702(a)(1)(A)–(B), (a)(5), (d).

(g) Probation/Supervised Release

The Adam Walsh Act creates a discretionary condition (meaning that the judge can choose to, but does not have to, impose it) of probation or supervised release.[144] If the judge does impose such a condition, you must submit yourself and your property, including your house, vehicle, computer, and electronic devices to a search any time a law enforcement officer has a "reasonable suspicion" that you have violated a condition of probation.[145] In this case, the officer does not need a warrant to search you or your property as long as they are acting within their law enforcement duties.[146]

(h) Sex Offender Management and Treatment Programs

The Adam Walsh Act requires the Bureau of Prisons to make appropriate treatment available to sex offenders who need treatment and who are suitable for it.[147] Such programs include sex offender management programs[148] and residential sex offender treatment programs.[149] 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 Adam Walsh Act permits victims of sex crimes to initiate *civil actions* against the person who committed the crime, if the victim was a minor at the time of the crime and the victim suffered a personal injury as a result of the crime.[150] However, the personal injury did not have to occur while the victim was still a minor.[151] Furthermore, the Act raised the amount of money available to the victim from $50,000 to $150,000.[152]

The Act also gives specific rights to victims in federal habeas corpus proceedings (see *JLM*, Chapter 13, "Federal Habeas Corpus Petitions" 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.[153]

G. 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

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144 18 U.S.C. § 3563(b)(23).

145 18 U.S.C. § 3563(b)(23).

146 18 U.S.C. § 3563(b)(23).

147 18 U.S.C. § 3621(f)(1).

148 18 U.S.C. § 3621(f)(1)(A).

149 18 U.S.C. § 3621(f)(1)(B).

150 18 U.S.C. § 2255(a)–(b)

151 18 U.S.C. § 2255(a).

152 18 U.S.C. § 2255(a); The Adam Walsh Child Protection and Safety Act of 2006, Pub. L. No. 109–248, § 707(b)(2), 120 Stat. 587, 650 (codified as amended in scattered sections of Titles 18, 28 and 42 of the U.S. Code).

153 18 U.S.C. § 3771(b)(2)(A).

commitment statutes, many states have passed laws providing for the involuntary civil commitment of sex offenders.[154] 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.[155] In *United States v. Comstock*, the Supreme Court said that a federal law allowing district courts to commit an incarcerated person in civil commitment beyond the date that the incarcerated person would otherwise be released was constitutional (legal) under the Necessary and Proper Clause.[156] 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 Subsection G(2)(c).

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.[157] The Court determined that the Kansas statute was a civil remedy, which only applied to the "dangerously mentally ill," and that the statute was not an additional criminal punishment for sex offenders.[158] 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.[159]

It is important for you to know that the Supreme Court has refined its decision in *Kansas v. Hendricks*, later setting a limit on the conditions under which states can keep convicted sexual predators in civil confinement after their criminal sentences have expired.[160] 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."[161] 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 sure that a civilly confined offender was actually mentally ill and dangerous, not simply a "typical recidivist convicted in an ordinary criminal case."[162] A *recidivist*, commonly called a "repeat offender," is "someone who has been convicted of multiple criminal offenses, usually similar in nature."[163]

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 detaining sex offenders. Those offenders who are civilly confined are now usually held

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[154] *See, e.g.*, N.Y. MENTAL HYG. LAW § 10.01 (McKinney 2020) (establishing standards and procedures for the involuntary commitment of some repeat sex offenders).

[155] Kansas v. Hendricks, 521 U.S. 346, 357, 117 S. Ct. 2072, 2079–2080, 138 L. Ed. 2d 501, 512 (1997) (finding that the Kansas civil commitment act satisfied due process requirements because it unambiguously required a finding of dangerousness either to oneself or to others as a prerequisite to involuntary confinement).

[156] United States v. Comstock, 560 U.S. 126, 129, 130 S. Ct. 1949, 1954, 176 L. Ed. 2d 878, 887–891 (2010).

[157] Kansas v. Hendricks, 521 U.S. 346, 371, 117 S. Ct. 2072, 2086, 138 L. Ed. 2d 501, 521 (1997).

[158] Kansas v. Hendricks, 521 U.S. 346, 363, 117 S. Ct. 2072, 2083, 138 L. Ed. 2d 501, 516 (1997).

[159] Seling v. Young, 531 U.S. 250, 262–263, 121 S. Ct. 727, 734–735, 148 L. Ed. 2d 734, 746–747 (2001) ("For those individuals with untreatable conditions, however, we explained that there was no federal constitutional bar to their civil confinement, because the State had an interest in protecting the public from dangerous individuals with treatable as well as untreatable conditions.").

[160] 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).

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

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

[163] *Recidivist*, BLACK'S LAW DICTIONARY (11th ed. 2019).

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 . . . ."[164]

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.[165] You should do further research to determine how else civil commitment will change your rights and options.

1. 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 they have completed their 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.[166]

After getting a recommendation for civil commitment, the state 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 the assistance of counsel at all stages of these proceedings.[167] You may also be entitled, in some states, to have a psychological expert of your choice examine you, at the state's expense.[168]

If you are found to be a sexually violent predator, in most states, you have the right to appeal that determination.[169] 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.[170]

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.

2. Statutes

(a) States Generally

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

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[164] N.Y. MENTAL HYG. LAW § 10.03(o) (McKinney 2020).

[165] Higher Education Opportunity Act of 2008, Pub. L. No. 110–315, 122 Stat. 3078 (2008) (amending 20 U.S.C. 1070a(b)(6).

[166] *See, e.g.*, FLA. STAT. ANN. § 394.913 (2014) (describing the multidisciplinary team that evaluates your record); VA. CODE ANN. § 37.2-902 (2011) (stating that records are reviewed by committee); CAL. WELFARE & INST. CODE § 6601 (2013); TEX. HEALTH & SAFETY CODE ANN. §§ 841.022 to .023 (2013).

[167] *See, e.g.*, FLA. STAT. ANN. § 394.916 (2014) (stating person is entitled to counsel); VA. CODE ANN. § 37.2-901 (2013) (specifying person's right to counsel); N.J. STAT. ANN. § 30:4-27.29 (2013); 725 ILL. COMP. STAT. ANN. 207/25 (2013); IOWA CODE ANN. § 229A.5(2)(d) (2013); TEX. HEALTH & SAFETY CODE ANN. § 841.005 (2013).

[168] *See, e.g.*, FLA. STAT. ANN. § 394.916 (2014) (stating that person may retain own professional); 725 ILL. COMP. STAT. ANN. 207/25 (2013) (stating that person may appoint their own expert); N.Y. MENTAL HYG. LAW § 10.06 (McKinney 2020); VA. CODE ANN. § 37.2-907 (2013).

[169] *See, e.g.*, FLA. STAT. ANN. § 394.917 (2014) (specifying right to appeal determination); WASH. REV. CODE ANN. § 71.09.080 (2013) (providing that nothing in the chapter prohibits a person from exercising a right available elsewhere); 725 ILL. COMP. STAT. ANN. 207/35 (2013); WASH. REV. CODE ANN. § 71.09.060 (2013).

[170] *See, e.g.*, FLA. STAT. ANN. § 394.918 (2014) (providing that individual will be evaluated yearly); ARIZ. REV. STAT. ANN. § 36-3708 (2013) (same); 725 ILL. COMP. STAT. ANN. 207/55 (2014); VA. CODE ANN. §§ 37.2-910–912 (2013).

(1) have engaged in some criminal sexual conduct;
(2) have a specified mental condition; **and**
(3) be likely to engage in criminal sexual conduct in the future because of your mental disease or defect.[171]

Although state statutes follow this general pattern, they differ in a number of ways. In finding "criminal sexual conduct" for the purposes of 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.[172] States also vary on whether the case must be heard in front of a judge or jury and how much proof the state must provide of your condition and the danger you pose.[173] 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 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.[174] The civil commitment scheme is mainly used for the mentally ill.[175]

In 2007, the New York Legislature passed The Sex Offender Management and Treatment Act, which can be found in Article 10 of the N.Y. Mental Hygiene Law. 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.[176]

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 of mental health, who will determine if you are a sex offender who requires civil commitment.[177] Then, the Attorney General may file a petition seeking commitment, which you can contest in a hearing.[178] If,

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[171] *See, e.g.*, CAL. WELFARE & INST. CODE § 6600(a)(1) (2013).

[172] *See, e.g.*, KAN. STAT. ANN. § 59-29a02(a) (2013) (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").

[173] *See, e.g.*, KAN. STAT. ANN.§ 59-29a06(d) (2013) (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).

[174] State of N.Y. *ex rel.* Harkavy v. Consilvio, 8 N.Y.3d 645, 651, 870 N.E.2d 128, 131, 838 N.Y.S.2d 810, 813 (2007) (finding that certain individuals who were transferred without precommitment hearings, and thus were improperly committed under N.Y. MENTAL HYG. LAW § 9, were entitled to adjudication under the new N.Y. MENTAL HYG. LAW § 10 procedures.)

[175] *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. LAW §§ 9.27–9.37 (McKinney 2020) (describing the procedure for involuntary hospital admissions for mental illness).

[176] State of N.Y. *ex rel.* Joseph v. Superintendent of Southport Corr. Facility, 15 N.Y.3d 126, 132, 135 931 N.E.2d 76, 79, 81, 2010 N.Y.S.2d 107, 110, 112 (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, 838 N.Y.S.2d 810, 814 (2007) (holding that the state must adhere to the procedural protections set forth in Article 10 of the N.Y. Mental Hygiene Law).

[177] N.Y. MENTAL HYG. LAW § 10.05 (McKinney 2020).

[178] N.Y. MENTAL HYG. LAW § 10.06 (McKinney 2020).

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.[179] If you are found to be a danger in this trial, you will be committed.[180]

(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) *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 an incarcerated person convicted of a sexual crime to be considered for civil commitment. There is no competency or insanity requirement.

(ii) *How Is "Sexually Dangerous Person" Defined?*

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."[181] 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."[182] 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) *How Is an Incarcerated Person Deemed "Sexually Dangerous?"*

The Bureau of Prisons ("BOP") reviews all incarcerated people, and when they identify an incarcerated person that they believe may be "sexually dangerous," BOP staff members then conduct a full evaluation of that incarcerated person. An incarcerated person is not provided with an attorney at this point, and no *Miranda* warnings are given.[183] You should respond truthfully during this evaluation if you participate, but think carefully before you respond to any questions and try not to share more information than is necessary. Incarcerated people have made statements during this process that were used to support a sexually dangerous certification.[184]

The incarcerated person is given a form to sign which states that (1) there will be 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

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[179] N.Y. MENTAL HYG. LAW § 10.07(a) (McKinney 2020),

[180] N.Y. MENTAL HYG. LAW § 10.07(f) (McKinney 2020).

[181] 18 U.S.C. § 4247(a)(5).

[182] 18 U.S.C. § 4247(a)(6).

[183] *See* Memorandum from Amy Baron-Evans & Sara Noonan to Defenders & CJA Counsel 4 (Sept. 10, 2007), *available at* https://www.prisonlegalnews.org/news/publications/memo-to-cja-counsel-civil-commitment-report-2007/ (last visited Mar. 16, 2024).

[184] *See* Memorandum from Amy Baron-Evans & Sara Noonan to Defenders, CJA Counsel 4 (Sept. 10, 2007, as revised Sept. 25, 2007), *available at* https://www.prisonlegalnews.org/news/publications/memo-to-cja-counsel-civil-commitment-report-2007/ (last visited Mar. 16, 2024). Referenced evaluation notice form can be found in Appendix A below.

to know" including the court, the government, and his lawyer; and (4) the evaluation will be completed whether or not he participates.

(iv) *What Happens After an Incarcerated Person is Deemed "Sexually Dangerous?"*

If the BOP certifies an incarcerated person as sexually dangerous, the certificate is filed with the court in the district in which the incarcerated person was confined.[185] The filing of the certificate "stays" the incarcerated person's release (meaning that the release is delayed) until a decision is reached about the incarcerated person possibly being civilly committed. This is of particular concern because these certificates are often filed immediately before an incarcerated person is due to be released—often within days or even hours.

(v) *Can You Challenge Civil Commitment?*

In *United States v. Comstock*, the United States Supreme Court concluded that the civil commitment portion of the Adam Walsh Act is constitutional.[186] The Court's reasoning rested on the idea that the federal government had a legitimate interest in protecting society from the incarcerated people who are committed, and that the law only affected a small portion of the population of incarcerated people.[187] Because of this Supreme Court ruling, a challenge to your civil commitment is unlikely to succeed.

H. 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, incarcerated people should be aware of special parole conditions, community registration laws, and the possibility of civil commitment to psychiatric hospitals.

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[185] 18 U.S.C. § 4248(a).

[186] United States v. Comstock, 560 U.S. 126, 149, 130 S. Ct. 1949, 1965, 176 L. Ed. 2d 878, 899 (2010) (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").

[187] United States v. Comstock, 560 U.S. 126, 148, 130 S. Ct. 1949, 1964, 176 L. Ed. 2d 878, 898 (2010).