

# COLLATERAL CONSEQUENCES OF NEW YORK CONVICTIONS

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## INTRODUCTION

The collateral consequences of a conviction are largely unrecognized even by those who participate in the criminal justice system. In this article, I detail some aspects of three of those consequences: (1) the creation by New York laws of unwaivable economic obligations; (2) the enhancement of federal sentences based on prior criminal convictions adjudicated in New York State; and, (3) the registration obligations and restrictions on the behavior of those convicted of sex-related crimes imposed by New York law.

### I.

#### FEES AND SURCHARGES

##### *A. Overview: The Fees and Surcharges*

Pursuant to Public Law ("P.L.") Section 60.35, anyone convicted before an administrative tribunal or court of a felony, misdemeanor, or violation as defined in P.L. Section 10.00, shall have levied against her at the time of sentencing specified fees and a surcharge.<sup>1</sup> The Vehicle and Traffic Law separately authorizes fees and a surcharge for crimes thereunder.<sup>2</sup> The Parks, Recreation and Historic Preservation Law does the same in Section 27.12. The fees and surcharges currently authorized by the Penal Law and some of those authorized by the Vehicle and Traffic Law ("V.T.L.") are set out here.<sup>3</sup>

##### *1. Mandatory Surcharge<sup>4</sup>*

Felony: 250-dollars

Misdemeanor: 140-dollars

Violation: 75-dollars

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1. P.L. § 60.35(1)(a). The only violations to which the fees and surcharges apply are those in the Penal Law. P.L. § 60.35(7).

2. See V.T.L. §§ 1809, 1809-c(1).

3. As noted later, some of the surcharges have been increased several times since their initial passage. See *infra* part I.B.

4. P.L. § 60.35(1)(a)(i)–(iii) (first effective May 12, 1982).

## 2. *Crime Victim Assistance Fee*<sup>5</sup>

Felony: 20-dollars

Misdemeanor: 20-dollars

Violation: 20-dollars

## 3. *Town and Village Court Fee*<sup>6</sup>

This separate 5-dollar fee is added to the other fees.

## 4. *Sex Offender Registration Fee*<sup>7</sup>

Anyone convicted of a sex offense as defined in Correction Law Section 16 a (2) and (3) must pay a 50-dollar fee. P.L. Section 168-a(2) defines “sex offense” as a conviction for particular completed crimes or attempts under the Penal Law. Some of the offenses listed include factual components different from the elements defining the crime. In addition, some are crimes under other state or federal statutes with elements common to crimes defined in New York. Each case needs to be individually examined.

## 5. *DNA Databank Fee*<sup>8</sup>

Anyone convicted of an offense defined in Executive Law Section 955(7) must pay a 50-dollar fee. These offenses include assault, homicide, sex offenses, incest, kidnapping, and arson. The list is extensive.

## 6. *Supplemental Sex Offender Victim Fee*<sup>9</sup>

A 1000-dollar fee is imposed based on a conviction for a felony or misdemeanor as defined in the Penal Law for sex offenses,<sup>10</sup> incest,<sup>11</sup> or sexual performance by a child.<sup>12</sup>

## 7. *Vehicle and Traffic Law Surcharges and Fees*<sup>13</sup>

V.T.L. Section 1809, setting fees and surcharges, is effective until September 1, 2007. Historically, this statute has had a sunset clause and has been extended regularly. The amounts of the fees and surcharges enacted in

5. *Id.* (first effective April 19, 1989).

6. P.L. § 60.35(9) (first enacted 1998).

7. P.L. § 60.35(1)(a)(iv) (first enacted 2003).

8. P.L. § 60.35(1)(a)(v) (first enacted 2003).

9. P.L. § 6035(1)(b) (first enacted 2004).

10. P.L. art. 130.

11. P.L. § 255.25.

12. P.L. art. 263.

13. V.T.L. § 1809 (first enacted 1983). Despite the complexity of the V.T.L. sections set out here, there are other applicable provisions.

2003<sup>14</sup> are the current ones. In 2003, the surcharges and fees were extended to September 2005. In August of 2005 they were extended to September 1, 2007.<sup>15</sup>

The mandatory surcharge and crime victim assistance fees under V.T.L. Section 1809(1) are not imposed if the surcharge and the fee are imposed pursuant to P.L. Section 60.35.

The fees and surcharges apply “to sentences imposed upon a youthful offender finding.”<sup>16</sup> The amount of the mandatory surcharge and the crime victim assistance fee is that specified for the crime that was the basis of the youthful offender adjudication.<sup>17</sup> The crime victim assistance fee may be waived for anyone eligible for youthful offender treatment if the imposition of the fee would work an unreasonable hardship on the defendant, her immediate family, or other dependent.<sup>18</sup>

*a. Mandatory Surcharge:*

Felony conviction:<sup>19</sup> 250-dollars<sup>20</sup>

Misdemeanor conviction:<sup>21</sup> 140-dollars<sup>22</sup>

Traffic infraction:<sup>23</sup> 25-dollars<sup>24</sup>

Other V.T.L. offense convictions (with exceptions): 45-dollars<sup>25</sup>

*b. Crime Victim Assistance Fee:*

Traffic infraction conviction:<sup>26</sup> 5-dollars<sup>27</sup>

Conviction under V.T.L. Section 1192: 20-dollars<sup>28</sup>

Other V.T.L. offenses (with exceptions): 5-dollars<sup>29</sup>

14. 2003 Sess. Laws, Ch. 62, Part M, § 2.

15. 2003 Sess. Laws, Ch. 166, Subdiv. P 2005; Sess. Laws, Ch. 56, Subdiv. P. There are some printed versions of Section 1809 that indicate that the surcharge is reduced and the crime victim assistance fee is eliminated. They are not correct.

16. P.L. § 60.35(10).

17. P. L. § 60.02.

18. See Donnino, 39 McKinney Penal Law, *Additional Supplementary Practice Commentary* to § 60.35, 2005 Pocket Part at 23–24.

19. See V.T.L. § 1192.

20. V.T.L. § 1809(1)(b)(i).

21. See V.T.L. § 1192.

22. V.T.L. § 1809(1)(b)(ii).

23. See V.T.L. art. 9.

24. V.T.L. § 1809(1)(a).

25. V.T.L. § 1809(1)(c).

26. See V.T.L. art. 9.

27. V.T.L. § 1809(1)(a).

28. V.T.L. § 1809(1)(b).

29. V.T.L. § 1809(1)(c).

*c. Town and Village Court Fee:*

Baseline: 5-dollars<sup>30</sup>

Conviction under V.T.L. Section 1192: additional 25-dollars<sup>31</sup>

*8. Parole Fee*<sup>32</sup>

Executive Law Section 259-a(9) requires a 30-dollar monthly fee from those over 18 years of age who are under the supervision of the Parole Division. The Division must waive all or part of the fee if it causes unreasonable hardship to the person supervised, the family or another dependent.

*9. Sex Offender Registration Address Fee*<sup>33</sup>

Correction Law Sections 168(f)(4) and 168(b)(8) require the payment of a 10-dollar fee to record a change of address or school by a person registered under the Sex Offender Registration Act (“SORA”).<sup>34</sup>

*10. Prison Fees*<sup>35</sup>

- Tier II and Tier III violation fees: 5-dollars
- Room and Board Fees at work release facilities
- Day Reporter Fees

*B. Ex Post Facto Issues*

The mandatory surcharge under P.L. Section 60.35 and V.T.L. Section 1809 has been increased four times<sup>36</sup> since its effective date of May 12, 1982.

The crime victim assistance fee, first enacted in 1989, has been increased three times.<sup>37</sup> The 1989 statute explicitly applied the fee to crimes that took place on or after April 10, 1989, and the 1991 statute applied the increase to crimes committed on or after June 12, 1991. Later revisions included an effective date; for example, the 2000 legislation became law 45 days after the stated effective date. The 2003 increases in the fee and surcharge were made

30. V.T.L. §1809(9).

31. V.T.L. § 1809-c(1) (added in 2003).

32. Exec. Law § 259-a(9).

33. N.Y. Correct. Law §§ 168(f)(4), 168(b)(8).

34. N.Y. Correct. Law art. 6. *See infra* text accompanying notes 77–114.

35. *See* DOCS/Today April 2004 (N.Y. State Dep’t of Correct. Serv.).

36. May 12, 1982: 75-dollars; May 17, 1985: 100-dollars; May 25, 1990: 150-dollars; Apr. 1, 2000: 250-dollars; Nov. 11, 2003: 250-dollars.

37. Apr. 19, 1989: 2-dollars; June 21, 1991: 5-dollars; Apr. 1, 2000: 10-dollars; Nov. 11, 2003: 20-dollars.

effective as of November 11, 2003.<sup>38</sup>

The approach of the courts has been to apply *ex post facto* principles to determining what fee and surcharge should be imposed and the courts have imposed those in effect at the time of the crime.<sup>39</sup>

The DNA Databank Fee and the Sex Offender Registration Fee were enacted in 2003 and made effective as of May 15, 2003. The Supplemental Sex Offender Victim Fee was added in 2004. The effective date was stated to be April 1, 2004, but the legislation did not become law until August 20, 2004. The Commentaries state that the *ex post facto* clause should apply to these fees too; there are no cases yet.<sup>40</sup>

### C. Payment

C.P.L. Section 420.10(1) allows the sentencing court to order the defendant to pay the entire amount when the sentence is imposed, the entire amount of fees and/or surcharges at different times: at a later time, or pay the designated portions at specific intervals. To effectuate a partial payment a court order may be needed. The payment can be a condition of probation.

If the defendant is required to make restitution or reparation and makes the payment before sentence is imposed, the defendant is not required to pay the Mandatory Surcharge or the Crime Victim Assistance Fee.<sup>41</sup> However, if the restitution or reparation is imposed but not paid before sentence is imposed, the judge must also impose the fee and surcharge.<sup>42</sup> The defendant can seek a refund of the fee and surcharge after restitution is paid pursuant to P.L. Section 60.35(4) and V.T.L. Section 1809(4).<sup>43</sup>

The fees and surcharges must be paid to the clerk of the court.<sup>44</sup> The Mandatory Surcharge and Crime Victim Assistance Fee can be paid by credit card and a reasonable administrative fee may be added to these.<sup>45</sup>

38. See also V.T.L. § 1809(8).

39. *People v. McQueen*, 11 A.D.3d 1005 (N.Y. App. Div. 4th Dep't 2004), *lv. denied*, 4 N.Y.3d 765 (2005); *People v. Sullivan*, 6 A.D.3d 1175 (N.Y. App. Div. 4th Dep't), *lv. denied*, 3 N.Y.3d 648 (2004); *People v. Hagar*, 5 A.D.3d 981 (N.Y. App. Div. 4th Dep't 2004); *People v. Moye*, 4 A.D.3d 488 (N.Y. App. Div. 2d Dep't), *lv. denied*, 2 N.Y.3d 803 (2004); *People v. Goldwire*, 301 A.D.2d 677, 678 (N.Y. App. Div. 3d Dep't 2003); *People v. Fabela*, 240 A.D.2d 677, 678 (N.Y. App. Div. 2d Dep't), *lv. denied*, 90 N.Y.2d 939 (1997); *People v. Vasalka*, 233 A.D.2d 412 (N.Y. App. Div. 2d Dep't 1996), *lv. denied*, 89 N.Y.2d 989 (1997); *People v. Ancrum*, 182 A.D.2d 521 (N.Y. App. Div. 1st Dep't), *lv. denied*, 80 N.Y.2d 926 (1992).

40. See Donnino, 39 McKinney Penal Law, § 60.35, *Practice Commentary* at 427–28; *Main Volume Supplementary Practice Commentary* at 428 (2004) and 2005 *Cumulative Pocket Part* at 23.

41. P.L. § 60.35(6). V.T.L. § 1809(6).

42. *People v. Quinones*, 95 N.Y.2d 349 (2000).

43. *Id.* at 352; *People v. Ziolkowski*, 9 A.D.3d 915 (N.Y. App. Div. 4th Dep't), *lv. denied*, 3 N.Y.3d 683 (2004).

44. P.L. § 60.35(3).

45. C.P.L. § 420.05.

*D. Collection from Defendants Incarcerated Fewer Than Sixty Days*

An offender who is not incarcerated or who will be incarcerated for fewer than sixty days must pay the fees and surcharges within sixty days of the imposition of sentence. At the time of sentence all courts must, and the Town and Village Courts may, issue a summons directing the offender to appear before the court in the event that the fees and surcharges have not been paid within the requisite time. The date for appearance is the first court day after the sixtieth day after the imposition of the fee and surcharge.<sup>46</sup> The summons must state the name of the court, the name of the defendant, that if the fees and surcharges are not paid the defendant must appear, and the date and time of the required appearance.

The procedures for determining how to treat the nonpayment of a Mandatory Surcharge, Sex Offender Registration Fee, DNA Databank Fee, and Crime Victim Assistance Fee are set out in C.P.L. Sections 420.10, 420.40, and 430.20, which are made applicable to the fees and surcharges (except for the Supplemental Sex Offender Victim Fee) by C.P.L. Section 420.35. The Crime Victim Assistance Fee is treated differently from the other fees and surcharges in some of the procedural sections and, consequently, it is important to examine each section for that difference.

As of 1995, C.P.L. Section 420.30(3) prohibited remission of the Mandatory Surcharge. In 2004, the section was expanded to prohibit the remission of the Sex Offender Registration Fee, DNA Databank Fee, and the Crime Victim Assistance Fee, and as of 2004, C.P.L. Section 420.35(2) prohibited waiver of these fees and surcharges. The one exception both for remission and waiver is the Crime Victim Assistance Fee, but only if the defendant is eligible for youthful offender status. That fee can be waived for an eligible youth if the unreasonable hardship test is satisfied.<sup>47</sup>

On the appearance date of the summons issued pursuant to P.L. § 60.35(8),<sup>48</sup> if the defendant has not paid the Mandatory Surcharge, Sex Offender Registration Fee, or DNA Databank Fee, the defendant may present information showing that an order deferring payment is appropriate because the payment would work an unreasonable hardship on the defendant or her immediate family.<sup>49</sup>

If the evidence is found by the judge to meet the unreasonable hardship test, the judge may defer payment of these required payments and must state the factual reasons for doing so.<sup>50</sup> The written order of the judge deferring payment is filed with the court and it becomes a civil judgment under the Civil Practice

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46. P.L. § 60.35(8).

47. C.P.L. §§ 420.35(2), 420.30(3).

48. Section 420.40(2) incorrectly states that the summons is issued pursuant to P.L. Section 60.35(3).

49. C.P.L. § 420.40(2)–(5).

50. C.P.L. § 420.40(4).

Law and Rules, collected in the same manner as any other civil judgment.<sup>51</sup>

If the court finds that the payment will not cause unreasonable hardship on the defendant or his family, the judge can impose a prison sentence of up to fifteen days for refusal to pay.<sup>52</sup> There is a sentence in the section that is not complete, but appears to say that incarceration cannot be ordered until the fee or surcharge is "satisfied." It is unclear if the imprisonment is discretionary.

C.P.L. Section 420.40 does not include the Crime Victim Assistance Fee or the Supplemental Sex Offender Victim Fee as fees that can be deferred and converted to a civil judgment. However, C.P.L. Section 420.35 does refer to the Crime Victim Assistance fee and states that Section 420.40 covers that fee. It is arguable that the Crime Victim Assistance Fee can be deferred under the statute and imprisonment imposed for improper refusal to pay. However, because there is no reference to the 1000-dollar Supplemental Sex Offender Victim Fee, it is unclear whether the fee is deferrable and whether a prison term can be imposed for nonpayment. Nevertheless, because it is unconstitutional to imprison a person for nonpayment if the person has no funds and if the claim is made that the 1000-dollars is not paid because of indigence, procedures for determining indigence will likely be required despite the statutory omission.

Although C.P.L. Section 420.10 is made applicable to the "unreasonable hardship" proceedings by C.P.L. Section 420.35, it is uncertain how C.P.L. Section 420.10 should be used in light of the detail provided in C.P.L. Section 420.40 and the authority given in C.P.L. Section 420.35 to impose a prison term.

Finally C.P.L. Section 430.20(5) deals with instances in which a judge orders incarceration of a defendant. The section explains how to calculate the prison time if a prison sentence imposed and what to do if there is no sentence.

#### *E. Collection From Defendants Serving More than Sixty Days in Prison*

No summons is issued for defendants sentenced to more than sixty days in custody. If a fee or surcharge is not paid to the clerk of the court and the offender is in custody for more than sixty days, the clerk must notify the authorities at the institution at which the offender is held of the failure to make the payment. The money owed is to be taken from the offender's inmate fund, which consists of money in the inmate's possession at the time of entry into the institution, funds earned in work release, and other funds received by the inmate at the institution.<sup>53</sup>

A written order of deferment when there is a failure to pay must be entered

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51. C.P.L. § 420.40(5).

52. C.P.L. § 420.35(1).

53. P.L. § 60.35(5). V.T.L. § 1809(5).

as a civil judgment.<sup>54</sup> P.L. Section 60.35(8) authorizes sanction pursuant to P.L. Section 60.30 for nonpayment of fees and surcharges. Section 60.30 permits a court to order forfeiture of property, suspend or cancel a license, remove a person from office, or impose any other civil penalty.

In the past, defendants have applied for waiver of the mandatory surcharge and Crime Victim Assistance Fee at the time of sentence or a remission of the fee and surcharge while in custody serving a prison sentence. Many courts have held that applications to avoid payment can be made only when the defendant has been released from prison after serving any sentence imposed.<sup>55</sup>

However, the prohibition on waiver and remission of the Mandatory Surcharge, DNA Fee, Sex Offender Registration Fee, and Crime Victim Assistance Fee limits the relief available. The present statutory scheme, as set out above, allows only a deferment of payment with conversion of the fee to a civil judgment.

## II.

### FEDERAL ENHANCEMENTS<sup>56</sup>

#### *A. Weapons Charge and Weapons Sentence Enhancements*

Under federal law, it is unlawful for a person to ship or transport in interstate or foreign commerce, or to possess in interstate or foreign commerce, or to affect interstate or foreign commerce by such possession, a firearm or ammunition or to receive such a firearm if the person has been convicted in any court of a crime punishable by imprisonment for a term exceeding one year,<sup>57</sup> or convicted in any court of a misdemeanor crime of domestic violence.<sup>58</sup>

A violation of Section 922(g) is punishable by ten years imprisonment and a fine. However, a person convicted of violation of Section 922(g) is subject to a penalty of not less than fifteen years (an Armed Career Criminal sentence) if the person has three previous convictions by any court punishable by a sentence exceeding one year for a violent felony, or a serious drug offense,

54. C.P.L. § 420.10(6).

55. See, e.g., *People v. Bradley*, 249 A.D.2d 103 (N.Y. App. Div. 1st Dep't), *lv. denied*, 92 N.Y.2d 923 (1998); *People v. Gamble*, 248 A.D.2d 896 (N.Y. App. Div. 3d Dep't 1998); *People v. Otero*, 245 A.D.2d 116 (N.Y. App. Div. 1st Dep't 1997); *People v. Burke*, 204 A.D.2d 345 (N.Y. App. Div. 2d Dep't 1994); *Ancrum*, 182 A.D.2d at 521; *People v. Snell*, 161 A.D.2d 1125 (N.Y. App. Div. 4th Dep't), *lv. denied*, 76 N.Y.2d 796 (1990). *But see* *People v. Kistner*, 291 A.D.2d 856 (N.Y. App. Div. 4th Dep't 2002); *People v. Abdus-Samad*, 274 A.D.2d 666 (N.Y. App. Div. 3d Dep't), *lv. denied*, 95 N.Y.2d 862 (2000).

56. The enhancements laid out in this article were uncovered by a nonexhaustive search—leaving open the possibility that enhancements not discussed herein may also exist. In addition, the statutes listed are not quoted in their entirety.

57. 18 U.S.C. § 922(g)(1).

58. 18 U.S.C. § 922(g)(9).



or both committed at different times.<sup>59</sup>

Among the serious drug offenses defined in the statute is an offense under state law involving distribution and possession with intent to distribute a controlled substance for which a maximum term of imprisonment of ten years or more is prescribed.<sup>60</sup>

A violent felony is defined as a crime punishable by a term exceeding one year in prison or any act of juvenile delinquency involving the use or carrying of a firearm, knife, or destructive device that would be punishable for a term exceeding one year if committed by an adult. In order to qualify as a violent felony, the violation must also include, as an element, the use, attempted use, or threatened use of force against another person, or must be a burglary, arson, or extortion involving conduct that creates a serious potential risk of physical injury to another.<sup>61</sup> The term conviction includes a finding of juvenile delinquency involving a violent felony.<sup>62</sup>

### *B. Sexually Explicit Material Sentence Enhancements*

Any interstate or foreign transport or transfer of a visual depiction of a minor engaging in sexually explicit conduct, or receipt or distribution of such visual duplication<sup>63</sup> is punishable by a term of between five and twenty years in prison<sup>64</sup> or a term of not more than ten years in prison.<sup>65</sup> If, however, the defendant has a prior conviction under the laws of any state relating to aggravated sexual abuse, sexual abuse, or abusive sexual conduct involving a minor or any activity involving pornography, the terms of imprisonment are from fifteen to forty years for crimes defined in 18 U.S.C. § 2252(a)(1)–(3) and ten to twenty years for crimes defined in Section 2252(a)(4).<sup>66</sup>

### *C. Illegal Reentry Sentence Enhancements*

An alien who has been excluded, deported, denied entry, or removed, or who has departed from the United States while an order requiring departure is pending and who enters or attempts reentry into the United States without consent (if consent was required) can be imprisoned for two years.<sup>67</sup>

59. 18 U.S.C. § 924(e)(1).

60. 18 U.S.C. § 924(e)(2)(A)(ii).

61. 18 U.S.C. § 924(e)(1)(B)(i),(ii).

62. 18 U.S.C. § 924(e)(1)(C).

63. 18 U.S.C. § 2252(a)(1)–(4).

64. 18 U.S.C. § 2252(b)(1) (relating to crimes defined in 18 U.S.C. § 2252(a)(1)–(3)).

65. 18 U.S.C. § 2252(b)(2) (relating to crimes defined in § 2252(a)(4)). Some circuits have held parts of Section 2252 unconstitutional, but these instances do not affect this analysis and are beyond the scope of this article.

66. 18 U.S.C. § 2252(b)(1), (b)(2).

67. 8 U.S.C. § 1326(a).

If the removal<sup>68</sup> was after three or more misdemeanor convictions involving either drugs or crimes against the person, or for a felony, the sentence is up to ten years in prison.<sup>69</sup> If the prior conviction is for an aggravated felony, the term of imprisonment is up to twenty years.<sup>70</sup>

#### *D. Drug Sentence Enhancement*

It is unlawful for a person to knowingly or intentionally manufacture, distribute, or dispense a controlled substance or to possess a controlled substance with intent to do the same.<sup>71</sup>

The terms of imprisonment for a violation will vary depending on the classification and the amount involved in the illegal act. Furthermore, the length of imprisonment will increase if the defendant has a prior final drug felony conviction. The following table sets out the sentence and potential enhancements for particular classifications:<sup>72</sup>

Classification	Term of Years	Enhanced Term
§ 841(b)(1)(A)	10 to life	20 to life (1 prior felony) 10 to life (2 prior felonies)
§ 841(b)(1)(B)	5 to 40 years	10 years to life
§ 841(b)(1)(C)	Not more than 20 years	Up to 30 years
§ 841(b)(1)(D)	Not more than 5 years	Up to 20 years
§ 841(b)(1)(D)(2)	1 year	Up to 6 years

Those convicted of drug distribution at a truck stop,<sup>73</sup> drug distribution to people under twenty-one,<sup>74</sup> drug distribution near schools and colleges,<sup>75</sup> and use of persons under eighteen years old in drug operations<sup>76</sup> shall receive life terms if previously convicted of two final prior drug convictions.

### III.

#### THE SEX OFFENDER REGISTRATION ACT

This summary of the Sex Offender Registration Act ("SORA"),<sup>77</sup> explains

68. The cases appear to assume that removal includes the other forms of departure.

69. 8 U.S.C. § 1326(b)(1).

70. 8 U.S.C. § 1326(b)(2).

71. 21 U.S.C. § 841(a).

72. The term of post release suspension is also increased by a prior conviction.

73. 21 U.S.C. § 849.

74. 21 U.S.C. § 859.

75. 21 U.S.C. § 860.

76. 21 U.S.C. § 861.

77. N.Y. CORRECT. L. art. 6.

the consequences faced by an offender whose conviction falls within the parameters of the act. Certain provisions, definitions, and obligations of relevant agencies and the courts have been omitted because they are not implicated in the discussion of consequences to the offender.

As a primary matter, it is important to note that SORA not only applies prospectively, but also to offenders whose crimes took place before the effective date of the statute, January 4, 1996.<sup>78</sup> In addition, Section 168-a(2) has been amended to add to the list of crimes that trigger the applicability of SORA. Furthermore, the 2002 amendment specifically applies to crimes committed before the amendment where the offender is still in custody.<sup>79</sup>

The statute's impact begins at the time sentence is imposed for a crime listed in Section 168-a(2) and (3). Under Section 168-d, an offender who is convicted of a crime listed in the statute<sup>80</sup> is certified by the judge as a sex offender. If the sex offense as defined in Section 168-a(2) includes a special factor, such as the age of the complainant, and the offender challenges either the factor or an allegation that he has previously been convicted of a sexual offense or a sexually violent offense, the judge, prior to certification, must hold a hearing without a jury to determine whether the factor or the allegation is proven by clear and convincing evidence.<sup>81</sup> Upon certification, either with or without a hearing, the judge must give the offender notice of the duty to register under the statute.

When the offender is convicted for a crime listed in sections 168-a(2) and (3), but is given a nonincarceratory sentence or is released from custody on payment of a fine or for another reason, the offender is not only advised of the duty to register at the time of sentence, she must actually do so at that time.<sup>82</sup> While in the courtroom, the offender must read and sign a form prepared by the Division of Criminal Justice Services ("DCJS"). The form includes the offender's name and address, and the name of any institution of higher education with which the offender will have any association in any capacity.<sup>83</sup> The form must also list any residence provided by the educational institution to be used by the offender.

For offenders receiving nonincarceratory sentences, the court must hold a hearing to determine the level of the risk that the offender will commit another crime. The levels are 1 (lowest risk), 2 (moderate risk), or 3 (highest risk). The level of risk of reoffense determines the reporting requirements by the offender,<sup>84</sup> and the access by others to information about the offender.

78. See, e.g., *People v. Brown*, 302 A.D.2d 919, 921 (N.Y. App. Div. 4th Dep't 2003); *People v. Lee*, 292 A.D.2d 639, 640 (N.Y. App. Div. 3d Dep't 2002); *People v. Hernandez*, 264 A.D.2d 783 (N.Y. App. Div. 2d Dep't 1999), *lv. denied*, 94 N.Y.2d 863 (1999).

79. 2002 N.Y. SESS. L. ch.11 § 24.

80. § 168-a(2) and (3).

81. § 168-d(1)(b) and (c).

82. § 168-f(1)(b).

83. See § 168-a(13) and N.Y. EDUC. L. § 2(8) (2000).

84. § 168-d(3).

The factors to be considered by the court are set out by the Board of Examiners of Sex Offenders (“Board”) in accordance with Section 168-l(5). Section 168-d(3) sets out the procedures for the hearing, determination, and appeal of the risk level. The judge must also determine whether the offender is to be designated a sexual predator,<sup>85</sup> a sexually violent offender,<sup>86</sup> or a predicate sexual offender.<sup>87</sup>

If an offender is incarcerated pursuant to a conviction, within sixty days prior to release of the offender, the Board must prepare a risk assessment document based on factors or criteria set out in the statute,<sup>88</sup> and propose to the sentencing court a recommended risk level and a designation of predator, violent or predicate.<sup>89</sup> To make its recommendations, the Board may consider information supplied by other government agencies and medical facilities.<sup>90</sup> This information is subject to a request by the offender for sealing under privacy laws.<sup>91</sup>

The recommendation is submitted to the sentencing judge to determine the factual basis for the level of risk. The assessment document must also include information to enable the judge to make a designation of whether the offender is a sexual predator, a sexually violent offender, or a predicate sex offender. At least fifteen days prior to the release of the offender, the offender must be notified of the duty to register and must register at that time.<sup>92</sup> This process requires the offender to read and sign the form provided by DCJS. The form must state the offender’s address and the name and address of any institution of higher education to which she<sup>93</sup> is or will be connected in any capacity.<sup>94</sup> The form must also indicate whether the offender will be living in a facility provided by the institution.<sup>95</sup> The offender is entitled to challenge the factual claims in the proposed assessment, to have a lawyer for the court proceeding, and to appeal the determination. The procedures are set out in the statute.<sup>96</sup>

An offender who is determined to be a level 1 or level 2 risk is required to

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85. § 168-a(7)(a).

86. § 168-a(7)(b).

87. § 168-a(7)(c) (These classifications are not generally relevant to an offender who receives probation, or other nonincarceratory sentence.)

88. § 168-l(5).

89. § 168-l(6).

90. § 168-m.

91. § 168-m.

92. § 168-l(a).

93. [Eds.: The author would like to remind the reader that the *N.Y.U. Review of Law & Social Change* uses feminine pronouns for the third person singular when the pronoun is used generically, as here.]

94. See § 168-a(13) and N.Y. EDUC. L. § 2(8).

95. § 168-e.

96. § 168-n. See also *Doe v. Pataki*, 940 F.Supp. 603 (S.D.N.Y. 1996) (describing the terms of the settlement for redetermination proceedings)

register annually for ten years from the initial date of registration.<sup>97</sup> The DCJS web site states that the annual verification must be made even while the offender is in custody. This annual verification form must be mailed to DCJS within ten days of receipt by the offender,<sup>98</sup> and must indicate whether the offender still lives at the previously reported address.<sup>99</sup>

An offender who is a level 3 risk, or is designated as a sexual predator, a sexually violent offender, or a predicate sex offender is required, to register for life.<sup>100</sup> A level 3 risk offender or a sex predator is also required to verify her address every ninety calendar days with the appropriate law enforcement agency.<sup>101</sup> A level 3 risk offender must also verify that her employment is the same as last reported to the DCJS.<sup>102</sup> Furthermore, a level 3 offender must report any change of address or association with a higher education institution within ten days of the change, with a 10-dollar fee charged to the offender when these changes are reported.<sup>103</sup>

The DCJS web site also states that the offender must report her driver's license number, the state in which her license is issued, and the year, model, make, and color of the vehicle that is owned or operated by the offender. If the vehicle is operated, but not owned, by the offender, the name of the vehicle's owner must also be provided.

DCJS is required to keep a directory or registry of every person must to register. The information provided in the file will include a photograph, fingerprints, a physical description, and a list of the offender's aliases, addresses, internet accounts, and screen names. In addition, the file shall list the name and address of any institution of higher learning with which the offender shall be associated in any capacity and whether the offender resides in facilities provided by the institution, the facts of the crime, mode of operation, vehicle identification information, and other pertinent information.<sup>104</sup> If the offender has been designated at level 3, her employer's name and address must also be included in the file.<sup>105</sup>

Level 3 offenders must also be included in a sub-directory.<sup>106</sup> This directory includes the offender's address, employment address, a photograph, description, age, markings, crime, mode of operation, targeted victim, name, and address of any institution with which the offender is associated, and any special conditions of release.

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97. § 168-h(1).

98. § 168-f(2)(a).

99. § 168-f(2)(b).

100. § 168-h(2).

101. §§ 168-h(3), -f(3).

102. § 168-f(2)-b(1).

103. §§ 168-b(4), 168-f(4).

104. §§ 168-b(1)(a-d, f).

105. § 168-b(1)(e).

106. §§ 168-b(6), -q.

Various provisions govern access to this information. The information can be shared with other registries,<sup>107</sup> and is accessible to the public.<sup>108</sup> The DCJS web site states that a member of the public can call, 1(800) 262-3257, to ascertain if a person is registered and their level of risk.<sup>109</sup> In order to receive information, the caller must have the name of the offender and the offender's date of birth, driver's license number or social security number. The caller must be over eighteen and supply her name, address and telephone number. These requirements, and others, are set out in further detail in Section 168-p. The caller must not use the information to harass, threaten, or act illegally toward the offender.

Law enforcement agencies receiving information about level 2 and level 3 offenders may disseminate relevant information about the offender to any entity, the population of which is vulnerable in any way that is related to the offense. The entity receiving the information may disseminate the information at its discretion.<sup>110</sup>

The subdirectory of level 3 offenders is given to all appropriate law enforcement agencies. The directory is available to the public on the DCJS website,<sup>111</sup> and must be made available to the public on request.<sup>112</sup>

An offender's failure to comply with the requirements of registration and verification are violations of probation and parole, with the possibility of immediate revocation.<sup>113</sup> The first failure is a misdemeanor; the second failure is a class D felony.<sup>114</sup>

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107. § 168-b(2).

108. *See* § 168-b(5).

109. *Id.*

110. §§ 168-l(6)(b), (c).

111. § 168-q.

112. § 168-l(6)(c).

113. §§ 168-d(2), -t.

114. § 168-t.

## APPENDIX

