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Sex Offender Risk Assessment: State-Level Policies for Determining Registration and Notification Requirements

A Report Prepared by the
Federal Research Division, Library of Congress
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Office of Sex Offender Sentencing, Monitoring, Apprehending, Registering, and Tracking,
U.S. Department of Justice

July 2022

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PREFACE

The Office of Sex Offender Sentencing, Monitoring, Apprehending, Registering, and Tracking (SMART Office) is housed within the U.S. Department of Justice’s Office of Justice Programs. Authorized in 2006 with President George W. Bush’s signing of the Adam Walsh Child Protection and Safety Act—legislation that “revamped the federal standards for sex offender registration and notification”¹—the SMART Office guides jurisdictions in implementing the Act’s provisions, and provides technical assistance to state, local, and territorial governments; American Indian tribes; and public and private organizations. It also tracks important legislative and legal developments and administers grant programs centered on the registration, notification, and management of sex offenders. In fall 2018, the SMART Office contracted the Federal Research Division (FRD) within the Library of Congress for research and analytical support, tasking FRD with analyzing states’ use of risk assessments to inform sex offenders’ registration and notification requirements.

The analysis in this report is based on FRD’s assessment of statutes in all fifty states and the District of Columbia, documents published by state and federal entities, state and federal websites, media publications, and other publicly available documents. FRD also examined records provided by selected states in response to public records requests.

FRD’s Commitment to Unbiased Research: FRD provides customized research and analytical services on domestic and international topics to agencies of the U.S. government, the District of Columbia, and authorized federal contractors on a cost-recovery basis. This report represents an independent analysis by FRD and the authors, who sought to adhere to accepted standards of scholarly objectivity. It should not be considered an expression of an official U.S. government position, policy, or decision.

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¹ U.S. Department of Justice (DOJ), SMART, “Legislative History of Federal Sex Offender Registration and Notification,” accessed June 23, 2022, <https://smart.ojp.gov/sorna/current-law/legislative-history>.

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1. EXECUTIVE SUMMARY

FRD partnered with the SMART Office to conduct this study of how state-level jurisdictions use risk assessments to inform sex offender registration and notification requirements.²

Generally, jurisdictions categorize sex offenders into classification levels or tiers, with registrants' classification level or tier determining individual requirements for registration and/or notification. Criteria that determine offenders' classification levels differ by jurisdiction; similarly, methods of classification differ by jurisdiction. Broadly speaking, two such methods of classification are those that are offense-based and those that incorporate the use of risk assessment methodologies.

To avoid a reduction in federal funding, the Sex Offender Registration and Notification Act (SORNA) requires jurisdictions to classify offenders into tiers based on offense of conviction.³ However, some states use risk assessments—evaluations of an individual's likelihood to re-offend—to inform classification systems. Approaches taken by states using risk assessments to classify sex offenders vary significantly.

FRD's research shows that risk assessment policies and practices vary widely across states in both administration and application. Jurisdictions do not employ the same methodologies, risk factors, instruments, or classification processes. For example, while most states that utilize risk assessment instruments use these instruments to assess offenders, Massachusetts employs a "structured professional judgment" risk assessment methodology.⁴ While Washington uses the Static-99R instrument to measure static risk factors, such as the offender's age at time of release, New Jersey's Registrant Risk Assessment Scale (RRAS) instrument measures both static and dynamic factors, such as the offender's response to treatment.⁵

² For the purposes of this report, "state" includes all fifty states and the District of Columbia; "registration requirements" are comprised of two aspects, the duration of time registrants must spend on a registry and the frequency with which registrants are required to report to law enforcement to verify their information; and "notification requirements" refers to the degree or means by which a jurisdiction publicizes a sex offender's registration information.

³ Twenty-two states are considered by SMART to be compliant with SORNA's tier system: Alabama, Colorado, Delaware, Florida, Hawaii, Iowa, Kansas, Louisiana, Maryland, Michigan, Mississippi, Missouri, Nebraska, Nevada, New Hampshire, Ohio, Oklahoma, South Carolina, South Dakota, Tennessee, Virginia, and Wyoming. See DOJ, SMART, "Sex Offender Registration and Notification Act (SORNA): State and Territory Implementation Progress Check," September 30, 2020, <https://smart.ojp.gov/progress-check>.

⁴ In a "structured professional judgment" methodology, the risk assessment is based on the professional experience of the evaluator, whose judgments are based on consideration of a predetermined list of risk factors.

⁵ According to Sarah L. Desmarais and Jay P. Singh, "static factors are historical or otherwise unchangeable characteristics (e.g., history of antisocial behavior) that help establish absolute level of risk," while "dynamic factors are changeable characteristics (e.g., substance abuse) that establish a relative level of risk and help inform intervention" ("Risk Assessment Instruments Validated and Implemented in Correctional Settings in the United States," Council of State Governments, Justice Center, March 27, 2013, 8, <https://csgjusticecenter.org/publications/risk-assessment-instruments-validated-and-implemented-in-correctional-settings-in-the-united-states/>).

Classification processes can vary widely across jurisdictions. For example, in Arizona, the supervisory agency having custody of the offender at the time of release or sentence to probation scores each offender on the risk assessment instrument, then local law enforcement agencies make the final determination of each offender's official tier classification. In New York, the Board of Examiners of Sex Offenders (BOE) scores each offender on the risk assessment instrument, and the court determines each offender's official tier classification.

States have varying classification thresholds—for instance, Minnesota has three risk-level tiers, while Arkansas has four risk-level tiers. States additionally have proprietary methods of applying risk assessment results and risk-level classifications to determine registration and notification outcomes. Examples of proprietary methods include:

- In Montana, sexual offender evaluators with the Department of Corrections (DOC) produce reports for the sentencing courts.⁶ These “psychosexual evaluation report[s]” provide courts with recommendations for offenders’ risk-level classifications (Level 1, 2, or 3). The courts’ classifications of offenders’ risk levels are ultimately based on reviews of these reports, as well as any statements made by victims and offenders themselves.⁷
- In Vermont, “initial referral[s]” by the state DOC are based on offenders’ scores on risk assessment instruments and “other appropriate factors.” After the DOC makes its referral, the Sex Offender Review Committee determines an offender’s final classification, which is also based on the offender’s scores on the risk assessment instruments and “any other appropriate factors [the committee] deems relevant.”⁸

FRD conducted research for this report in two phases. In Phase I, the authors conducted a broad but shallow overview of fifty-one state jurisdictions (all fifty states and the District of Columbia) to determine which jurisdictions are using risk assessments to inform decisions about sex offenders’ registration and notification requirements. Based on this survey, FRD identified fifteen states in which risk assessments are consistently considered when determining offenders’ registration and/or notification requirements.⁹ In Phase II, the authors researched each of these states’ policies and practices for administering risk assessments, classifying offenders, and applying assessments to requirement determinations. FRD produced deep-dive narrative case studies of five of the fifteen states (Appendix III) and ten shorter profiles of the remaining states (Appendix IV). Additionally, in Appendix V, FRD briefly presents the policies of two states, Iowa and New Hampshire, in which risk assessments affect registration and notification requirements for a

⁶ A “sexual offender evaluator” is defined as “a person qualified under rules established by the department [of corrections] to conduct psychosexual evaluations of sexual offenders and sexually violent predators” (Mont. Code Ann. § 46-23-502 [2021]).

⁷ Mont. Code Ann. § 46-23-509 (2021).

⁸ 13-130 Vt. Code R. § 025 (2022).

⁹ These fifteen states are Arizona, Arkansas, California, Georgia, Massachusetts, Minnesota, Montana, New Jersey, New York, North Dakota, Oregon, Rhode Island, Texas, Vermont, and Washington.

smaller group of select offenders. The key findings from this research are listed below. Overall, 17 states were identified as using risk assessment in some form for sex offender registration and notification purposes.

- **Risk Assessment Methodologies and Instruments**

- Methodologies: Fourteen of the fifteen profiled states generally use a risk assessment instrument to assess registrants; however, Massachusetts uses a structured professional judgment risk assessment methodology.
- Instruments: FRD identified nineteen risk assessment instruments approved for use in seventeen states, with some states having multiple approved instruments.¹⁰

- **Risk-Level Tiers**

- Most states use a three- or four-tier classification system, in which the lowest number tier is considered to have the lowest risk to re-offend, and the highest number tier is considered to have the highest risk to re-offend. Vermont stands out as an exception with a two-tier system, simply distinguishing between “high-risk” offenders and all others.
- Offenders’ risk-level classification affects requirements in unique ways; states vary in this regard. For example, in Georgia, classification affects aspects of registration requirements, while in Arizona, Massachusetts, and New Jersey, risk level affects aspects of notification requirements. In the remaining eleven states, risk level affects aspects of both registration and notification requirements.

- **Instrument Scoring Agencies and Tier/Risk-Level Classifying Agencies**

- Depending on the state, different government entities are responsible for scoring risk assessment instruments. Examples of scoring entities include states’ Departments of Corrections, local prosecutors, or special boards established to manage sex offenders. In five of the profiled states, a single agency is solely responsible for both scoring risk assessment instruments and classifying offenders.¹¹ In 10 states, classification is handled separately by local law enforcement, the court, or a separate executive-branch agency than the scoring agency.

¹⁰ As previously noted, in addition to the fifteen profiled states, FRD analyzed statutes in Iowa and New Hampshire.

¹¹ These five states are Arkansas, Georgia, New Jersey, Oregon, and Rhode Island. It is important to note, however, that in New Jersey, scoring and classification are conducted by local prosecutors rather than a centralized agency.

- **Relief from Registration**

Each state has its own policy for whether, when, and how offenders may file a petition for relief from registration. Such petitions affect individual offenders' duration requirements. In some states, such petitions are impacted by risk assessments. These impacts generally occur in one of two ways: the state only permits offenders in certain risk assessment-informed classification levels to file such petitions, or the state performs a risk assessment or considers a prior risk assessment score when determining whether to grant a petition.

- **Reassessments and Judicial Reviews**

- Each state has its own policy for whether, when, and how offenders may be reassessed or reclassified.

- **Backlogs**

- FRD found evidence of backlogs in seven states; however, the available information on backlogs is limited.¹²

- **Costs**

- The costs of conducting risk assessments, classifying offenders into tiers, reassessing or reclassifying offenders when necessary, and adjudicating offenders' judicial appeals of their classifications are often borne among several entities in the executive and judicial branches of state governments. While publicly accessible information on the costs associated with risk assessments is limited, due in part to the fact that costs are spread among multiple state agencies in the executive and judicial branches, FRD was able to locate piecemeal budgetary information for nine states.¹³

- **Courts**

- Courts have generally found that sex offender registration and notification laws do not constitute "punishment" for the purposes of legal challenges based on the Bill of Attainder, the Ex Post Facto Clause, and the Eighth Amendment.
- Courts have held that registrant classification schemes based on the crime of conviction, such as that required for SORNA implementation, provide registrants with adequate due process under the Fourteenth Amendment.

¹² See *infra* Section 5.2.7, which discusses backlogs in greater detail.

¹³ These nine states are Arizona, California, Georgia, Massachusetts, Minnesota, New York, Oregon, Rhode Island, and Texas.

- Courts have varied in their determinations that addressed due process challenges to state laws that require registrants be classified based on the use of risk assessment for registration and notification purposes. Courts differ as to whether a privacy interest exists and, if so, whether it arises from the U.S. Constitution, state constitutions, or both; where venue is appropriate; which party has the burden of proof; and what standard of evidence must be met.

2. SEX OFFENDER REGISTRATION AND NOTIFICATION LAWS

In 1947, California established the first U.S. sex offender registry and over the years, other states followed suit.¹⁴ By 1996, every state in America operated such a registry; most of these were accessible only to local law enforcement personnel.¹⁵ Laws governing sex offender registries existed only on a state level until 1994, when Congress passed the Jacob Wetterling Crimes Against Children and Sexually Violent Offender Registration Act (Wetterling Act). Enacted as part of the Violent Crime Control and Law Enforcement Act of 1994, the Wetterling Act required states to form registries of offenders convicted of sexually violent offenses or offenses against children, and to enforce more rigorous registration requirements for sex offenders.¹⁶ It was the first federal law requiring every state to maintain a registry and it standardized the states' registry programs.

The Wetterling Act required most offenders to register for a period of ten years and to verify their address with law enforcement annually; however, the most serious offenders, designated as sexually violent predators (SVPs), were required to register for life and to verify their information every ninety days.¹⁷ The Act had a basic provision for notification that allowed, but did not mandate, the release of information about registered sex offenders (RSOs) to the public when authorities deemed it necessary for the public's protection.¹⁸ Two years later, in 1996, Congress passed Megan's Law, which strengthened the Wetterling Act's notification policies by requiring all states to notify the public about RSOs. Shortly thereafter, states began to create public registry websites, which are a type of notification; currently, all fifty states and the District of Columbia have public sex offender registry websites. Additional types of notification vary from state to state; they may take the form of direct mailings to community members, flyers, newspaper ads, or press releases. Megan's Law's notification requirements apply to all sex offenders, without distinction among categories of offenders.¹⁹

¹⁴ California DOJ, Office of the Attorney General, "California Sex Offender Registry," accessed May 30, 2022, <https://oag.ca.gov/sex-offender-reg>.

¹⁵ Lori McPherson, "The Sex Offender Registration and Notification Act (SORNA) at 10 Years: History, Implementation, and the Future," *Drake Law Review* 64, no. 3 (2016): 751–52, 756–58, 761, <https://lawreviewdrake.files.wordpress.com/2015/01/mcpherson-final.pdf>.

¹⁶ Violent Crime Control and Law Enforcement Act of 1994, Pub. L. No. 103–322, §§ 170101–170303, 108 Stat. 1796, 2038–45 (1994). The Act is named for Jacob Wetterling, an 11-year-old boy abducted from his hometown of St. Joseph, Minnesota, in 1989. The case remained unsolved until 2016, when a longtime person of interest confessed to his murder.

¹⁷ DOJ, SMART, "Legislative History of Federal Sex Offender Registration and Notification." The Wetterling Act defines "sexually violent predator" as "a person who has been convicted of a sexually violent offense and who suffers from a mental abnormality or personality disorder that makes the person likely to engage in predatory sexually violent offenses" (Violent Crime Control and Law Enforcement Act of 1994, §170101).

¹⁸ Violent Crime Control and Law Enforcement Act of 1994, §§ 170101–170303.

¹⁹ Megan's Law, Pub. L. No. 104–145, 110 Stat. 1345 (1996). The law is named for Megan Kanka, a 7-year-old girl from Hamilton Township, New Jersey, who was raped and murdered in 1994 by a neighbor with two previous sexual assault convictions.

In 2006, ten years after passing Megan’s Law, Congress passed the Adam Walsh Child Protection and Safety Act (AWA), containing SORNA under Title I.²⁰ Similar to the Wetterling Act and Megan’s Law, the AWA set federal minimum standards for jurisdictions’ sex offender registries. The AWA established baseline national standards stipulating which offenders must register and how long they must remain on the registry.²¹

SORNA’s Goals

SORNA has several goals, which are:²²

- Extending “the jurisdictions in which registration is required beyond the 50 states, the District of Columbia, and the principal U.S. territories, to include also federally recognized [American] Indian tribes.”
- Incorporating “a more comprehensive group of sex offenders and sex offenses for which registration is required.”
- Requiring RSOs “to register and keep their registration current in each jurisdiction in which they reside, work, or go to school.”
- Requiring “sex offenders to provide more extensive registration information.”
- Requiring “sex offenders to make periodic in-person appearances to verify and update their registration information.”
- Expanding “the amount of information available to the public regarding registered sex offenders.”
- Making “changes in the required minimum duration of registration for sex offenders.”

Sex offender registration and notification (SORN) laws encompass both federal and state statutes and require jurisdictions to maintain sex offender registries for law enforcement and public sex offender registry websites.

SORNA sets minimum standards for jurisdiction-level SORN policies; however, jurisdictions may choose to enact statutes imposing stricter limitations, such as residency restriction laws or proactive notification policies not required by SORNA.²³

SORNA requires offenders’ registration requirements to stem from their crime of conviction, which jurisdictions may meet by implementing offense-based tier systems. In a jurisdiction that has implemented an offense-based tiering approach, sex offenders in that jurisdiction are grouped into tiers according to the offenses committed, and registration obligations would vary based on

²⁰ Adam Walsh Child Protection and Safety Act of 2006, Pub. L. No. 109–248, §§ 101–55, 120 Stat. 587, 590–611 (2006). The Act is named for Adam Walsh, a 6-year-old boy kidnapped from a department store in Hollywood, Florida, in 1981.

²¹ AWA requirements apply to all fifty states, the District of Columbia, the principal U.S. territories, and eligible federally recognized American Indian tribes. Jurisdictions that do not substantially implement SORNA are subject to a 10-percent reduction in federal funds from the Edward Byrne Memorial Justice Assistance Grant Program. Eligible American Indian tribes that do not substantially implement SORNA are subject to delegation of registration duties to the state in which the tribe is located.

²² DOJ, SMART, “SORNA: Sex Offender Registration and Notification Act,” accessed June 13, 2022, <https://smart.ojp.gov/sorna>.

²³ Adam Walsh Child Protection and Safety Act of 2006, §§ 101–55.

tier assignment.²⁴ SORNA further provides jurisdictions with the ability to exempt juveniles and certain Tier I sex offenders (i.e., Tier I sex offenders “convicted of an offense other than a specified offense against a minor”) from their public sex offender registry websites.²⁵

SORNA’s approach classifies offenders into one of three tiers:

- **Tier I** offenders include offenders convicted of the least severe offenses and they must register for a minimum of fifteen years and verify their registration information annually;
- **Tier II** offenders include offenders convicted of more severe offenses and they must register for a minimum of twenty-five years and verify their registration information semiannually; and
- **Tier III** offenders include offenders convicted of the most severe offenses and they must register for life and verify their registration information quarterly.

SORNA's Offense-Based Tiers Defined

Tier I offenses involve:

- Sex offenses, including sexual acts or sexual contact with another, that are not Tier II or Tier III offenses (e.g., possession or receipt of child sexual abuse material [child pornography]).

Tier II offenses involve:

- Use of minors in prostitution (including solicitations).
- Enticing a minor to engage in criminal sexual activity.
- Non-forcible sexual acts with a minor 13 to 15 years old.
- Sexual contact with a minor 13 or older.
- Use of a minor in a sexual performance.
- Production or distribution of child sexual abuse material (child pornography).
- Any sex offense that is not a first sex offense and that is punishable by more than one year in jail.

Tier III offenses involve:

- Nonparental kidnapping of a minor.
- Sexual acts with another by force or threat.
- Non-forcible sexual acts with a minor under 13.
- Sexual contact with a minor under 13.
- Any sex offense punishable by more than one year in jail where the offender has at least one prior Tier II offense.²⁶

²⁴ While SORNA stipulates other requirements related to sex offender registration, as previously noted, for the purposes of this report, “registration requirements” are comprised of two aspects, the duration of time registrants must spend on a registry and the frequency with which registrants are required to report to law enforcement to verify their information.

²⁵ Jurisdictions that exempt low-level offenders from public sex offender registry websites based on other criteria, such as risk assessments, may be out of compliance with SORNA (DOJ, SMART, “Implementation Documents: Using Risk Assessment Under SORNA,” accessed May 30, 2022, <https://smart.ojp.gov/sorna/current-law/implementation-documents/using-risk-assessment-under-sorna>).

²⁶ DOJ, SMART, “Sex Offender Registration and Notification Act: Substantial Implementation Checklist,” accessed May 30, 2022, 6–8, https://smart.ojp.gov/sites/g/files/xyckuh231/files/media/document/checklist_suppguidelines.pdf.

Across all jurisdictions, sex offender registration involves the collection of certain information from sex offenders that allows law enforcement to track sex offenders in the community. It is distinct from notification, which “involves making information about released sex offenders more broadly available to the public.”²⁷

Notification requirements vary among jurisdictions. For instance, some jurisdictions make decisions about whether to actively disseminate information (such as through town hall meetings and/or notices sent to community entities) and others vary in the access the public has to information through the jurisdiction’s public sex offender registry website.

Registration requirements vary across two subcategories:

- **Duration:** how long sex offenders must maintain their registration, and
- **Frequency:** how frequently sex offenders must report to authorities to verify their information.²⁸

For both registration and notification, and in contrast to SORNA’s offense-based tier system, some jurisdictions make determinations based on individual risk assessments, intended to gauge the likelihood of registrants re-offending.²⁹ These jurisdictions generally classify offenders into tiers or categories based on their predicted risk level, with each tier having its own registration or notification requirements.³⁰

Currently, eighteen jurisdictions have substantially implemented SORNA and an offense-based system.³¹ Of the remaining thirty-three jurisdictions (thirty-two states and the District of Columbia, as of September 30, 2020), twenty-nine have not implemented a SORNA-compliant scheme for “[o]ffense-based tiering and required duration of registration and frequency of reporting,” one of SORNA’s minimum requirements.³² Of the twenty-nine jurisdictions that have not implemented SORNA-compliant offense-based tiers, seventeen use some form of risk assessment to inform

²⁷ DOJ, SMART, “National Guidelines for Sex Offender Registration and Notification,” accessed May 30, 2022, 3, https://smart.ojp.gov/sites/g/files/xyckuh231/files/media/document/final_sornaguidelines.pdf.

²⁸ For the purposes of this report, reductions in duration of registration and termination of registration requirements are considered part of the broader category of “duration.”

²⁹ Association for the Treatment of Sexual Abusers (ATSA), “Risk Assessment,” accessed May 30, 2022, <https://www.atsa.com/risk-assessment>. States may use risk assessments for several purposes other than determining registration and notification requirements, including decisions related to offenders’ release, civil commitment, treatment, or supervision; however, these uses do not affect states’ SORNA compliance (DOJ, SMART, “Implementation Documents”).

³⁰ As previously noted, most states that use risk assessment-informed tiering systems classify sex offenders into either three or four tiers, except for Vermont, which uses risk assessments to identify “high-risk” offenders in need of different requirements.

³¹ DOJ, SMART, homepage, accessed May 30, 2022, <https://smart.ojp.gov/>.

³² DOJ, SMART, “SORNA: State and Territory Implementation Progress Check.” It is important to note, however, that this does not necessarily mean that these states have not implemented offense-based tiering, frequency requirements, *and* duration requirements. Instead, these states may have failed to implement only one of the three things.

how registered sex offenders are categorized or tiered for the purpose of determining offenders' registration or notification requirements.³³

Duration of registration requirements may also be affected if a jurisdiction allows an offender to petition for relief from registration or a termination of registration requirements. In jurisdictions that allow such petitions, an offender must typically meet certain minimum requirements and must file a petition with the court to be granted relief.³⁴ The jurisdictions' requirements for filing such a petition may include the offender having been placed into a lower-risk tier based on a risk assessment. Courts also may consider an offender's score on a risk assessment instrument in determining whether to grant the petition. Some jurisdictions, such as California, have a similar process in which offenders may petition or apply for relief from some or all public notification requirements (while still requiring them to register with law enforcement).³⁵ Because of inherent effects on duration the affect petitions for relief from registration can have an offender's registration, this report discusses petitions for relief from registration and modifications of notification requirements if risk assessments play a role.³⁶

³³ Jurisdictions that use risk assessments to determine certain aspects of registration and notification requirements also have requirements based on the nature of the offense or use a risk-based system for some, but not all, offenders. Jurisdictions that do not base such requirements on either of these methods use a variety of different schema to determine requirements. They may have a single requirement for all offenders, or they may determine requirements based on other factors, such as the registrant's prior conviction history or whether the offender is a sexually violent predator.

³⁴ Nine of the profiled states allow at least some sex offenders to petition for relief from registration: Arkansas, California, Georgia, Massachusetts, Montana, New York, Oregon, Texas, and Washington. Additionally, in New Hampshire, offenders convicted before the registry was established in 1996 can petition for relief. See Appendices III and IV for more information.

³⁵ See, for example, Cal. Penal Code § 290.46 (Deering 2022).

³⁶ Two states (Iowa and New Hampshire) that use offense-based tiers and are SORNA-compliant are briefly discussed in this report because they allow some offenders to petition to modify their registration or notification requirements in a process that considers risk assessment scores.

3. SEX OFFENDER RISK ASSESSMENTS

“Risk assessment” applies to a wide range of methodologies and applications. One significant application of risk assessment is to predict recidivism of convicted offenders, not merely those who commit sexual offenses.³⁷ Risk assessments targeting “general criminal behavior” may be applied throughout offenders’ interactions with the criminal justice system—that is, through pre-sentencing, sentencing, incarceration, release, and community supervision—to identify those individuals who have the greatest need of resources and risk-management interventions.³⁸

Risk assessments for sex offenders comprise a subset of offender risk assessment, with specific tools designed to assess the offenders’ risk of committing another sex offense.³⁹ As with “general” offender risk assessments, a variety of approaches apply to sex offender risk assessments, some of which do not use actuarial risk assessment tools (See section 3.1). Furthermore, sex offender risk assessments may be conducted at various procedural stages, from pre-sentencing through the offender’s registration period. Criminal justice officials can use sex offense-specific risk assessments to inform a variety of determinations,⁴⁰ including:⁴¹

- Determination of registration requirements (including the initially determined duration of the offender’s registration period, petitions for termination, and the frequency with which the offender must report to verify their information during the registration period);
- Determination of notification requirements;
- Determination of whether certain sex offenders meet the criteria for being designated sexually violent predators (SVPs);
- Sentencing decisions;

³⁷ Mary M. Janicki et al., *A Study of the Sex Offender Sentencing, Registration, and Management System* (New Britain, CT: Connecticut Sentencing Commission, 2017), 21, http://ctsencingcommission.org/wp-content/uploads/2018/05/Sex_Offender_Report_December_2017.pdf.

³⁸ Desmarais and Singh, “Risk Assessment Instruments:” RTI International, “Countering Violent Extremism: The Application of Risk Assessment Tools in the Criminal Justice and Rehabilitation Process,” U.S. Department of Homeland Security, Science and Technology Directorate, First Responders Group, February 2018, 1, https://www.dhs.gov/sites/default/files/publications/OPSR_TP_CVE-Application-Risk-Assessment-Tools-Criminal-Rehab-Process_2018Feb-508.pdf; ATSA, “Sex Offender Risk Assessment,” August 30, 2012, 1, <https://www.atsa.com/pdfs/SexOffenderRiskAssessmentBriefWithBibliography2012.pdf>

³⁹ ATSA, “Sex Offender Risk Assessment,” 1. However, some offenders may be assessed for the purpose of determining registration and notification requirements using an instrument designed to assess “general criminal behavior.” Instruments for assessing such behavior may be used in addition to sex offender-specific instruments, or they may be used alone if the offender is not a good candidate for assessment using a sex offender-specific instrument. For instance, some states do not use a sex offender-specific instrument on female sex offenders.

⁴⁰ Risk assessments may be just one of a variety of inputs that officials consider when making registration and notification decisions and determinations. Furthermore, states that use risk assessments for these purposes do not necessarily use them in other instances.

⁴¹ ATSA, “Sex Offender Risk Assessment,” 1.

- Supervision decisions (such as the use of GPS monitoring devices); and
- Treatment decisions.

Among states identified as using risk assessment in the categorization of sex offenders, the use of sex offender risk assessment instruments varies significantly. Some states use separate risk assessment instruments for different populations, as is the case in Oregon, which uses the Static-99R to score male sex offenders and the Level of Service/Case Management Inventory (LS/CMI), as well as an “in-person evaluation,” to assess the risk of registrants who do not qualify for the Static-99R, such as juvenile offenders and female offenders.⁴² Some states use multiple instruments to assess an individual offender’s risk. For example, male offenders in Texas who petition for relief from registration are scored on three instruments (the Hare Psychopathy Checklist—Revised, the Level of Service Inventory—Revised [LSI-R], and either the Static-2002 or Matrix 2000). Female offenders in Texas, however, are scored on two instruments (the Hare Psychopathy Checklist—Revised and the LSI-R).⁴³ In other states, such as Rhode Island,⁴⁴ the state has approved the use of multiple risk assessment instruments (e.g., the Static-99R, Static-2002R, and Stable 2007).

In preparing this report, available information was limited. For example, the authors were unable to determine from publicly available information whether Rhode Island applies more than one instrument to an individual. Additionally, as this report concerns sex offender risk assessments used for the purposes of determining registration and notification requirements, the policies, procedures, and instruments that states use to assess sex offender risk for purposes other than determining registration and notification requirements were not further pursued.

3.1. General Risk Assessment Approaches

Criminal justice professionals have been developing risk assessment techniques for the last century.⁴⁵ Over the years, the techniques have evolved, the procedures for conducting risk assessments have been refined, and several different methodologies have emerged. In their 2009

⁴² Or. Admin. R. 255-085-0020 (2020); Oregon Board of Parole, “Sex Offender Notification Leveling Program,” accessed June 5, 2022, <https://www.oregon.gov/BOPPPS/Pages/sonl.aspx>.

⁴³ Texas Health and Human Services Commission, Council on Sex Offender Treatment, “Deregistration Evaluation Methodology and Report Format,” December 9, 2010, <https://www.hhs.texas.gov/sites/default/files/documents/doing-business-with-hhs/licensing-credentialing-regulation/csot/deregistration-evaluation-method-and-report.pdf>; Texas Department of Public Safety (DPS), “Criminal History Records and Texas Sex Offender Registration Program FAQ,” accessed June 5, 2022, <https://www.dps.texas.gov/section/crime-records-service/faq/criminal-history-records-and-texas-sex-offender-registration>.

⁴⁴ Rhode Island Parole Board, *Sexual Offender Community Notification Guidelines: R.I. General Laws § 11-37.1-1 Et Seq.*, September 23, 2019, 9, <https://paroleboard.ri.gov/sites/g/files/xkqbur641/files/guidelines/2019-SOCN-Guidelines-FINAL-Sep-2019.pdf>.

⁴⁵ Desmarais and Singh, “Risk Assessment Instruments,” 1.

study, "The Accuracy of Recidivism Risk Assessments for Sexual Offenders: A Meta-Analysis of 118 Prediction Studies," R. Karl Hanson and Kelly E. Morton-Bourgon identified five methodologies used to assess risk:⁴⁶

- **Unstructured:** The assessment is based on the professional experience of the evaluator, whose judgments are not based on the consideration of a predetermined list of risk factors.⁴⁷
- **Structured Professional/Clinical Judgment:**⁴⁸ The assessment is based on the professional experience of the evaluator, whose judgments are based on the consideration of a predetermined list of risk factors. This type of risk factor list differs from using risk assessment instruments, which apply "explicit methods for combining the items." In the structured professional judgment approach, the "method of combining the factors into a total score [is] not specified in advance."
- **Mechanical:** The assessment is based on the evaluator's use of an instrument consisting of a predetermined list of items with an explicit scoring methodology. Each instrument's risk-factor items and scoring methodology are "based primarily on theory or literature reviews instead of direct analysis of specific data sets," and therefore do not link an offender's total score to "recidivism probabilities."⁴⁹
- **Empirical Actuarial:** The assessment is based on the evaluator's use of an instrument consisting of a predetermined list of items with an explicit scoring methodology. Each instrument's risk-factor items and scoring methodology are based on "empirical evidence" associating risk factors with recidivism. These instruments link scores to recidivism probabilities.
- **Adjusted Actuarial:** The assessment is based on the evaluator's use of either a mechanical or an actuarial instrument; however, the evaluator may "override" the risk level indicated by the instrument based on consideration of "external factors" that are not predetermined.

⁴⁶ *Psychological Assessment* 21, no. 1: 4, <https://doi.org/10.1037/a0014421>.

⁴⁷ Within literature discussing risk assessment, terminology usage and definition varied. For example, several authors refer to any approach that does not use instruments as "unstructured." However, despite not using any instruments, Massachusetts describes its risk assessment approach as "structured clinical judgment." See Appendix III for more information.

⁴⁸ While Hanson and Morton-Bourgon refer to this methodology as "structured professional judgment," some sources refer to it as "structured clinical judgment" or "guided clinical judgment" (National Criminal Justice Association, *Sex Offender Management Assessment and Planning Initiative* [Washington, DC: DOJ, SMART, updated March 2017], 135, https://smart.ojp.gov/sites/g/files/xyckuh231/files/media/document/somapi_full_report.pdf).

⁴⁹ FRD chose this framework because it includes the structured clinical judgment approach and because while other frameworks only refer to "actuarial instruments" and do not make a category for instruments that are not, in fact, based on "actuarial data," Hanson and Morton-Bourgon point out that some instruments are not based on "specific data sets."

3.2. Sex Offender Risk Assessment without Instruments

The unstructured and structured professional judgment approaches (see above for the Hanson and Morton-Bourgon terminology) do not use risk assessment instruments. Instead, evaluators apply their professional judgment and experience to determine offenders' risk of re-offense. Researchers who study risk assessment refer to these approaches as "first generation"—i.e., they evolved prior to the development of risk assessment instruments. However, despite being first generation, FRD found that Massachusetts and (in some cases) Rhode Island currently use a structured professional judgment methodology to assess sex offenders.⁵⁰

3.3. Sex Offender Risk Assessment with Instruments

A risk assessment instrument, in the context of criminal justice, is a guiding document "composed of empirically or theoretically based risk and/or protective factors used to aid [an evaluator] in the assessment of recidivism risk." Risk factors may be static, comprising immutable characteristics (such as prior history of drug abuse), or they may be dynamic characteristics that could change over time (such as an offender's participation in a drug treatment program).⁵¹ Evaluators follow instrument scoring guidelines to assign numeric scores to risk factors during evaluation. Evaluators then tally risk factor scores to arrive at a total risk-level score for each offender.⁵²

3.3.1. Static-99R Instrument

Some common elements of sex offender risk assessment instruments are illustrated below using a popular instrument, the Static-99R, as an example.⁵³

The Static-99R consists of a list of risk factors, or "items," each of which receives a numeric score. Evaluators usually score the instrument based on information obtained from offenders' written records; sometimes, however, interviews or self-reported information from offenders may be

⁵⁰ RTI International, "Countering Violent Extremism," 7; Desmarais and Singh, "Risk Assessment Instruments," 1; National Criminal Justice Association, *Sex Offender Management Assessment and Planning Initiative*, 133. As previously noted, Massachusetts assesses all offenders using what it calls a "structured clinical judgment" methodology, while Rhode Island only uses this methodology to assess offenders who are not good candidates for assessment with a risk assessment instrument. See Appendices III and IV for more information on each state's assessment practices.

⁵¹ Desmarais and Singh, "Risk Assessment Instruments," 6, 54.

⁵² Hanson and Morton-Bourgon, "The Accuracy of Recidivism Risk Assessments," 4; Amy Phenix et al., *Static-99R Coding Rules: Revised 2016* (Ottawa, ON: Public Safety Canada, Research Division, 2017), 94, <https://publications.gc.ca/site/eng/9.838379/publication.html>.

⁵³ FRD found that seven of the profiled states use the Static-99R instrument to assess sex offenders for the purpose of determining registration and notification requirements, making it the most-used instrument. See Table 10 in Appendix II for more information.

used.⁵⁴ The evaluator uses the Static-99R Coding Form to determine how each item should be scored.

The Static-99R consists of ten static risk factor items. Table 1 lists each of these items and the scoring options for each one.

Table 1. Static-99R Items, Risk Factors, Codes, and Scores

Item No.	Risk Factor	Codes	Score	
1	Age at Release from Index Sex Offense	Aged 18 to 34.9	1	
		Aged 35 to 39.9	0	
		Aged 40 to 59.9	-1	
		Aged 60 or Older	-3	
2	Ever Lived with a Lover	Ever Lived with Lover for at Least Two Years?		
		Yes	0	
3	Index Non-Sexual Violence—Any Convictions	No	0	
		Yes	1	
4	Prior Non-Sexual Violence—Any Convictions	No	0	
		Yes	1	
5	Prior Sex Offenses	Charges	Convictions	
		0	0	0
		1, 2	1	1
		3–5	2, 3	2
		6+	4+	3
6	Four or More Prior Sentencing Dates (excluding Index)	3 or Less	0	
		4 or More	1	
7	Any Convictions for Non-Contact Sex Offenses	No	0	
		Yes	1	
8	Any Unrelated Victims	No	0	
		Yes	1	
9	Any Stranger Victims	No	0	
		Yes	1	
10	Any Male Victims	No	0	
		Yes	1	
TOTAL SCORE		Add Scores from Individual Risk Factors		

Source: Amy Phenix et al., *Static-99R Coding Rules: Revised 2016* (Ottawa, ON: Public Safety Canada, Research Division, 2017), 99, <https://publications.gc.ca/site/eng/9.838379/publication.html>.

The Static-99R Coding Form includes instructions on how to translate the “total score” (the summation of scores of the ten items) into a “nominal” risk level. See Table 2.

⁵⁴ Phenix et al., *Static-99R Coding Rules*, 18.

Table 2. Static-99R Scores Translated into Nominal Risk Levels

Total	Risk Level
-3, -2	I–Very Low Risk
-1, 0	II–Below Average Risk
1, 2, 3	III–Average Risk
4, 5	IVa–Above Average Risk
6 and higher	IVb–Well Above Average Risk

Source: Phenix et al., *Static-99R Coding Rules*, 99.

3.3.2. Use of Instruments on Offender Populations

Risk assessment instruments may be designed and validated for recidivism prediction for specific populations of offenders.⁵⁵ For example, the Static-99R is designed to assess risk for “adult males who have already been charged with or convicted of at least one sex offense against a child or a non-consenting adult.” It was not designed to assess risk for female offenders, juvenile offenders, or offenders who have only been convicted of statutory rape, “prostitution-related offenses, pimping, sex in public locations with consenting adults, or possession/distribution of pornography/indecent materials including child pornography.”⁵⁶

There are no sex offender risk assessment instruments that are validated for use on female offenders.⁵⁷ Some states, such as Washington, administer instruments designed to assess male offenders to female offenders.⁵⁸ Other states, such as Oregon, assess female offenders’ risk using instruments for predicting general criminal behavior.⁵⁹ For the remaining states, FRD was unable to determine, through open-source research, how they assessed risk in female sex offenders.

⁵⁵ An instrument or measurement is valid if it measures what it is intended to measure (Ellen A. Drost, “Validity and Reliability in Social Science Research,” *Education Research and Perspectives* 38, no. 1 [2011]: 114, <https://www3.nd.edu/~ggoertz/sgameth/Drost2011.pdf>). Validation studies of risk assessment instruments determine whether they accurately predict which sex offenders are at the highest risk for re-offense.

⁵⁶ Phenix et al., *Static-99R Coding Rules*, 17. Additionally, “Static-99R cannot be used with offenders only charged or convicted of possession or distribution of child pornography, unless their behavior involved the creation of child pornography with a real identifiable child.”

⁵⁷ Franca Cortoni and Theresa A. Gannon, “The Assessment of Female Sexual Offenders,” in *Assessment*, eds. Leam A. Craig and Martin Rettenberger, vol. II, *Wiley Handbook on the Theories, Assessment, and Treatment of Sexual Offending* (Chichester, UK: Wiley-Blackwell, 2016), 10, <https://www.researchgate.net/publication/299274048>.

⁵⁸ Washington Association of Sheriffs and Police Chiefs (WASPC), “Static-99R and Community Notification” (slide presentation, accessed June 5, 2022), 3, <https://www.waspc.org/assets/SexOffenders/static%2099r%20and%20community%20notification%202016%20coding%20rules.pdf>.

⁵⁹ See Or. Admin. R. 255-085-0020. The Level of Service/Case Management Inventory (LS/CMI) instrument Oregon uses is “predictive of the risk of violent re-offending” (California State Authorized Risk Assessment Tools for Sex Offenders [SARATSO] Review Committee, “Risk Assessment Instruments,” accessed June 5, 2022, <https://saratsso.org/index.cfm?pid=1360>). It is also “used to assess risk of engaging in further criminal behavior,” as opposed to instruments like Static-99R, which is used to “predict the potential for sexual re-offending,” or the Minnesota Registrant Screening Tool (MnSOST), which is used to create a “numerical value associated with sex offender risk” (Minnesota Department of Corrections [DOC], Policy No. 205.220,

3.4. Risk-Level Classification

Each state identified as using some form of risk assessment approach to classify sex offenders into risk levels has distinct laws and policies for how it uses scores and “nominal risk levels” generated by instruments to classify offenders.⁶⁰

In at least some cases, states that score offenders using risk assessment instruments allow classifying agencies to base final risk-level determinations on considerations other than the instrument scores. Some states determine risk levels based on multiple factors—outside of instrument scores—that are stipulated by statute or policy. For example:

- In Montana, the court’s classification of the offender’s risk level is based on a review of the recommended risk level produced by the instrument scoring agency, statements from the victim, and any statements made by the offender.⁶¹
- In Rhode Island, risk-level classification is based on consideration of fifteen factors, including risk assessment instrument scores and factors such as “presence of psychosis, mental retardation, or behavioral disorder” and “degree of family support of offender accountability and safety.”⁶²
- In Vermont, the Department of Corrections makes an “initial referral” based on the offender’s score on the risk assessment instruments and “other appropriate factors,” which “may include, but are not limited to, offender’s age, physical conditions (such as sickness, age, etc.), pattern of sexual offending, nature of sex offense(s), pattern of cooperation while under correctional supervision, and recent behavior, recent threats, or expressions of intent to commit additional offenses.” After the Department of Corrections makes its initial referral, the Sex Offender Review Committee is required to make a final classification based on the offender’s score on the risk assessment instruments and “any other appropriate factors it deems relevant.”⁶³

Similarly, some states allow the classifying agency to “override” the nominal or presumptive classification indicated by the instrument score. Usually, this means that if a classifying agency is aware of information about an offender that would warrant either a higher or lower classification than the one indicated by the instrument, the classifying agency may “depart” from the nominal risk-level when assigning that offender to a classification. For example:

“Predatory Offender: Registration, Notification, Public Registrant Website, and Risk Level Assessment,” April 28, 2020, 3, <https://policy.doc.mn.gov/DocPolicy/>; SARATSO Review Committee, “Risk Assessment Instruments”).

⁶⁰ While “nominal risk level” is the term used by Static-99R, some states use the term “presumptive risk level.”

⁶¹ Mont. Code Ann. § 46-23-509.

⁶² Rhode Island Parole Board, *Sexual Offender Community Notification Guidelines*, 25–26.

⁶³ 13-130 Vt. Code R. § 025.

- In Arkansas, the classifying agency may increase or decrease an offender's classification level from the instrument score based on a "nonexclusive and non-binding" list of factors for such overrides, such as statements by the offender indicating he or she will re-offend or evidence that treatment has decreased the offender's likelihood of re-offending.⁶⁴
- In New Jersey, prosecutors may only depart from the risk classification recommended by the score on the instrument if an offender has "indicated" that he or she will re-offend and there is "credible evidence" in the available records supporting this statement, or if the offender "demonstrates a physical condition that minimizes the risk of re-offense," such as "advanced age or debilitating illness."⁶⁵
- In Texas, a court, the Risk Assessment Review Committee, or the Texas Department of Criminal Justice has the statutory authority to override the risk level indicated by the risk assessment instrument score "only if the entity: (1) believes that the risk level assessed is not an accurate prediction of the risk the offender poses to the community; and (2) documents the reason for the override in the offender's case file."⁶⁶

⁶⁴ Arkansas Sex Offender Assessment Committee, *Guidelines and Procedures: Community Notification Assessment Process*, 2014, 18–19, <https://www.sos.arkansas.gov/uploads/rulesRegs/Arkansas%20Register/2014/aug14/004.00.14-004.pdf>.

⁶⁵ New Jersey Office of the Attorney General, *Attorney General Guidelines for Law Enforcement for the Implementation of Sex Offender Registration and Community Notification Laws*, June 1998, revised February 2007, Exhibit E, <https://www.nj.gov/oag/dcj/megan/meganguidelines-2-07.pdf>.

⁶⁶ Tex. Code Crim. Proc. Ann. art. 62.007 (2021).

4. METHODOLOGY

4.1. Initial Research

Research supporting this paper took place in two phases. In Phase I, researchers performed broad overview research of all fifty states and the District of Columbia's classification systems of sex offenders and determined, in part, which jurisdictions use an offense-based tier system and which jurisdictions use risk assessments to determine sex offender registration and notification requirements. Researchers also looked at factors other than an offense-based tier system, such as whether an offender is determined to be a sexually violent predator, that impact two aspects of registration requirements:

- The required duration of registered sex offenders' inclusion on a sex offender registry ("Duration"); and
- The required frequency with which registered sex offenders must report to a designated state agency ("Frequency").

This research reflects the law as it would apply to a "standard" RSO who is convicted of an in-state offense as an adult, who lives at a fixed address, and who has not been convicted of failure to register.⁶⁷ However, some information on sexually violent predators is also included. While registered sex offenders who are experiencing homelessness are not included in this analysis, in some states these individuals are subject to more frequent reporting requirements.

Sources for the first phase of research were limited to:

- Registry websites for each of the fifty states and the District of Columbia;
- Statutes for each of the fifty states and the District of Columbia;
- The SMART Office's SORNA substantial implementation reviews; and
- Any website, document, or information linked from a state registry website.⁶⁸

If these sources indicated that a jurisdiction uses risk assessments to help determine SORN requirements, FRD conducted further research on the jurisdiction in Phase II. If there was no

⁶⁷ While registered sex offenders experiencing homelessness are not included in this analysis, in some states these individuals are subject to more frequent reporting requirements.

⁶⁸ Unless the state's administrative code was linked from the registry website, it was not used as a source in this phase of the research.

indication in these sources that a jurisdiction uses risk assessments for SORN, then FRD did not conduct further research on the jurisdiction in Phase II.

4.2. State Profiles

In the second research phase, researchers used the data collected in Phase I to identify states that use some form of risk assessment when setting registration and notification requirements for sex offenders that have been released from prison. The criteria for selecting these states are:

- The state must administer risk assessments to all registered sex offenders who were convicted and served their sentence in the state;⁶⁹ and
- The state must use the resulting risk level to inform either registration or notification requirements, or both.

Application of these parameters resulted in a list of fifteen states that FRD profiled through closer research. Most of the profiled states expressly administer risk assessments for the purpose of placing offenders into categories or tiers that determine their registration or notification requirements (or both).⁷⁰ This analysis does not include:

- States that use risk assessments to inform SVP designations for enhanced supervision or civil commitment proceedings, even if SVPs are subject to enhanced duration, frequency, or notification requirements;
- States that administer risk assessments for other purposes—such as to inform sentencing, treatment, or monitoring decisions—but do not administer them for the purposes of registration or notification; and
- States that do not administer risk assessments to all registered sex offenders who were convicted and incarcerated in the state for the purposes of determining SORN requirements.⁷¹

⁶⁹ While this report may discuss offenders released to supervision, these offenders were not considered as part of this selection criteria.

⁷⁰ California, however, is an unusual case in that it administers risk assessments to all offenders and places them into tiers, but most offenders are placed based on the type of offense they have committed. For example, offenders may be placed into a tier called “Tier Three—Risk Assessment Level” if they have a high risk assessment score, but these offenders are eligible to petition for relief from registration. Therefore, risk assessments may affect the duration of registration for these offenders. Still, California was considered in-scope for this analysis because while in practice risk assessments only affect duration requirements for those offenders who score high enough to be placed in Tier Three—Risk Assessment Level, in theory they could affect any offender’s duration requirements since all offenders are assessed and can be placed in that tier.

⁷¹ As previously noted, Iowa and New Hampshire allow some offenders to petition to modify their registration or notification requirements in a process that considers risk assessment scores. See Appendix V for more information.

The profiles and analysis included in Appendices III and IV examine select state-level policies and practices related to risk assessment and risk-level classification. Because even these states may have different procedures and requirements for different populations of sex offenders, profiles reflect the risk assessment procedures and requirements as they pertain to offenders who:

- Were convicted as adults;
- Were convicted by a court within the state for a registerable offense under current registration law;
- Were serving their sentence in the state;
- Have not been determined to be sexually violent predators or a similar designation;
- Remain in compliance with registration requirements (i.e., have not absconded or failed to register or report); and
- Are not transient (homeless).⁷²

Of the states profiled, the researchers selected five states (Arizona, California, Massachusetts, Minnesota, and New York) for deep-dive profiles that explain the risk assessment and risk-level classification process in detail. These profiles appear in Appendix III. These states were selected because of the diversity of their policies and procedures related to risk assessment. Ten states (Arkansas, Georgia, Montana, New Jersey, North Dakota, Oregon, Rhode Island, Texas, Vermont, and Washington) received more succinct profiles highlighting the most important aspects of their risk assessment practices; these appear in Appendix IV. Additionally, Appendix V briefly describes the policies of two states (Iowa and New Hampshire) that use an offense-based tier system but use risk assessments in part to determine whether petitions for modification of registration or notification requirements will be granted.

The amount of publicly available information varies by state. Some states post online detailed information on risk assessment and classification policies and procedures, the tasks for which each agency is responsible, and the risk assessment instruments used. Other states may not have the same information publicly available, or the available material may be older. FRD prioritized the most recent source material available, given that laws and policies related to sex offenders are subject to change over time.

⁷² It is important to note that the described procedures for risk assessment and classification do not apply to juvenile offenders, sexually violent predators (unless otherwise stated), offenders convicted and incarcerated in other states and then transferred to a new state, or offenders convicted in federal or military courts.

4.3. Constitutional Challenges

FRD analyzed constitutional challenges to the use of risk assessments filed in the profiled states. The cases were selected for analysis based on two sources of information:

- Cases mentioned in the source material that were uncovered during FRD's research on risk assessment practices in the profiled states, and
- A search of cases in LexisNexis.

The search parameters used for LexisNexis were:

- **Jurisdiction:** State name or "Federal Cases" [searches were conducted for federal cases and each of the profiled states];
- **Initial Search Keyword:** "Sex Offender";
- **Dates:** January 1, 1994—August 17, 2021 [January 1, 1994 was selected as the start date because the first national sex offender law, the Wetterling Act, went into effect in that year, while August 17, 2021 is used as the end date because that is when the search was conducted, and was the latest date the database would allow];
- **Search within Results to Include the Following Keywords:** "Risk assessment" and "due process";
- **Search within Results to Exclude the Following Keywords:** "Civil commitment," "sexually violent predator," "juvenile," and "residency restrictions."

The search results were sorted by relevancy, and the results were skimmed to identify cases that appear to be most directly related to due process challenges to the use of risk assessments.

4.4. Public Records Requests

To supplement the information obtained through web-based materials research, the researchers submitted public records requests to agencies in the five states selected for in-depth profiles (Arizona, California, Massachusetts, Minnesota, and New York) seeking information related to administration, budgets, and potential backlogs in their sex offender risk assessment programs. The researchers submitted these requests under each state's public records law, either through direct email communication with the head of the relevant agency or department, or through submission to the state's public record request portal, if one existed. Four states provided

information that was sufficiently substantive to fill gaps in the research. This information is incorporated into the deep-dive profiles.

5. RESEARCH FINDINGS

5.1. Initial Research Findings

An initial overview survey queried all fifty states and the District of Columbia to identify how each jurisdiction determines sex offenders' SORN requirements. The Phase I overview research consulted a limited set of sources, including each jurisdiction's statutes, public sex offender registry website, any website, document, or information linked from a state registry website, as well as the SMART Office's compliance documentation. Based on this limited sourcing, it was not always possible to determine definitively whether a state uses risk assessments, or how risk assessments are used.⁷³ The summary findings below represent those states that explicitly fit the set parameters.

The researchers found that states use diverse methods to determine sex offender registration and notification requirements. For example:

- Twenty-two states determine registration requirements (duration and frequency) using offense-based tiers that meet or exceed SORNA's minimum requirements.⁷⁴
- Fifteen states apply some form of risk assessment—either a structured professional judgment approach or an approach using instruments (e.g., the mechanical, empirical actuarial, or adjusted actuarial approaches)—to all offenders and use these assessments, often along with other considerations, to help inform some offenders' registration and/or notification requirements.⁷⁵ Of these:
 - One state uses risk assessments to help determine registration requirements,⁷⁶
 - Two states use risk assessments to help determine notification requirements,⁷⁷ and
 - Eleven states use risk assessment approaches to help determine both registration and notification requirements.⁷⁸

⁷³ For instance, statutory language may refer to a sex offender undergoing an "evaluation" without stipulating whether it would be a psychological evaluation, a physical evaluation, or a risk assessment evaluation.

⁷⁴ As previously noted, these twenty-two states are Alabama, Colorado, Delaware, Florida, Hawaii, Iowa, Kansas, Louisiana, Maryland, Michigan, Mississippi, Missouri, Nebraska, Nevada, New Hampshire, Ohio, Oklahoma, South Carolina, South Dakota, Tennessee, Virginia, and Wyoming.

⁷⁵ As previously noted, these fifteen states are Arizona, Arkansas, California, Georgia, Massachusetts, Minnesota, Montana, New Jersey, New York, North Dakota, Oregon, Rhode Island, Texas, Vermont, and Washington.

⁷⁶ This state is Georgia, where risk assessments are used to determine aspects of registration: Risk-level classification determines an offender's required reporting frequency, and it may affect whether some offenders are eligible to petition for relief from registration, thus influencing their duration of time on the registry.

⁷⁷ These two states are Arizona and New Jersey.

⁷⁸ These eleven states are Arkansas, California, Massachusetts, Minnesota, Montana, New York, North Dakota, Oregon, Rhode Island, Texas, Vermont, and Washington. However, it is important to note that these states may include either duration requirements or frequency requirements, not necessarily both. Additionally, these requirements may not affect all offenders. For instance, risk assessments may be only one factor in determining duration requirements for offenders who petition for relief from registration.

- Two states factor risk assessments into determinations of SORN requirements if the offender petitions to modify his or her registration or notification requirements.⁷⁹
- Eleven states and the District of Columbia have conditions that use offense-based methods, but they do not comply with SORNA requirements.

Jurisdictions use a wide variety of schema to determine offenders' registration duration and frequency-of-reporting requirements, and they cannot simply be categorized as jurisdictions that use an approach based on SORNA's offense-based tiers and as jurisdictions that use an approach based on the results of risk assessments.

Jurisdictions employ a variety of methods to determine the duration of sex offender registration and largely fall into the following groups:

- Twenty-three states apply offense-based tiers or use a single duration requirement for all offenders in accordance with SORNA to delineate the duration of registration requirements;⁸⁰
- Two states apply offense-based tiers in accordance with SORNA to delineate the duration of registration requirements; however, some offenders have the option to petition for relief from their registration obligations, and the success of their petition rests, in part, on risk assessment instrument scores;⁸¹
- Two states apply offense-based tiers to delineate the duration of registration requirements; however, they are not in accordance with SORNA;⁸²
- Five states apply a single duration requirement for all offenders (i.e., all offenders are registered for the same length of time); however, this requirement is not sufficient for the state to be deemed in accordance with SORNA because some offenders have the option to petition for early relief from registration;⁸³ and

⁷⁹ These two states are Iowa and New Hampshire which may include aspects of whether the person must register and how much information is publicly shared.

⁸⁰ These twenty-one states are Alabama, Colorado, Delaware, Florida, Hawaii, Kansas, Louisiana, Maryland, Michigan, Mississippi, Missouri, Nebraska, Nevada, New Hampshire, Ohio, Oklahoma, South Carolina, South Dakota, Tennessee, Wyoming, and Virginia. See DOJ, SMART, "SORNA: State and Territory Implementation Progress Check."

⁸¹ These states are New Hampshire and Iowa.

⁸² These two states are Arizona and Maine. See DOJ, SMART, "SORNA Substantial Implementation Review: State of Arizona," November 2015, 8, <https://smart.ojp.gov/sorna-arizona>; DOJ, SMART, "SORNA Substantial Implementation Review: State of Maine," August 2012, 3–7, <https://smart.ojp.gov/sorna-maine>.

⁸³ These five states are Georgia, Idaho, Montana, New Jersey, and Oregon.

- Twenty-one states and the District of Columbia apply multiple paradigms to duration of registration requirements.⁸⁴

In many jurisdictions, any one or a combination of factors may either lengthen or shorten an offender's required registration period. These factors may include:

- The results of petitions for relief from registration;⁸⁵
- The results of risk assessments;
- The offender's conviction or release date;⁸⁶
- The type of offense requiring registration;
- Whether the offender has been designated an SVP;
- Whether the offender is compliant with past or current registration or treatment requirements;
- Whether the registrant is a repeat offender;
- Whether the registrant offended against certain categories of victim, such as minors;
- Whether a court order mandates that the offender must remain on the registry for a specific period of time;
- Whether the state's sex offender management board has determined that the offender must remain on the registry for a specific period of time; and
- Whether the offender used violence or force in commission of the offense.

In states that consider multiple factors to determine offenders' registration duration, these factors may impact offenders' time on the registry in complex ways. For example, Arkansas has a default lifetime registration period for all offenders; however, some offenders are eligible to petition for relief from registration after fifteen years on the registry. Arkansas offenders are barred from filing

⁸⁴ These twenty-one states are Alaska, Arkansas, California, Connecticut, Illinois, Indiana, Kentucky, Massachusetts, Minnesota, New Mexico, New York, North Carolina, North Dakota, Pennsylvania, Rhode Island, Texas, Utah, Vermont, Washington, West Virginia, and Wisconsin.

⁸⁵ Risk assessments may affect these petitions in some states, either because only offenders in certain risk assessment-based tiers are allowed to file such petitions, or because the court considers risk assessments in determining whether to grant the petition.

⁸⁶ Offenders' conviction or release date may affect the requirement if, for example, due to changes in the law, offenders convicted or released before a certain date are now subject to a different set of requirements than those convicted or released after that date.

for relief from registration and are required to register for life if at least one of the following factors applies: they have been designated an SVP,⁸⁷ they have committed a severe type of offense, they are a recidivist, or they have failed to comply with their registration requirements.⁸⁸ Arkansas courts hearing petitions for relief from registration may consider risk assessments in their determinations, therefore risk assessments play a role in determining the duration of registration for offenders who file such petitions.⁸⁹ Any of these factors—SVP status, the severity of offense, recidivism, compliance with requirements, the granting of relief from registration, and risk assessments—may affect the duration of the registration period for an individual offender in Arkansas, depending on his or her unique circumstances.

State practices regarding sex offender frequency-of-reporting requirements fall into the following groupings:

- Twenty-one states base their requirements for frequency of reporting on offense-based tiers in accordance with SORNA;⁹⁰
- Four states base their requirements for frequency of reporting on the type of offense requiring registration, but do not follow a SORNA-compliant tier scheme;⁹¹
- One state bases its requirements for frequency of reporting on whether the registrant is a repeat offender,⁹² although most states will increase a repeat offender's tier based on additional offenses;
- Two states apply a single, uniform frequency-of-reporting requirement for all offenders;⁹³

⁸⁷ In Arkansas, a sexually violent predator is referred to as a "sexually dangerous person" and defined as "a person who has been adjudicated guilty or acquitted on the grounds of mental disease or defect of a sexually violent offense and who suffers from a mental abnormality or personality disorder that makes the person likely to engage in predatory sexually violent offenses" (Ark. Code Ann. § 12-12-903 [2022]).

⁸⁸ See Ark. Code Ann. § 12-12-919 (2022), which states, "Lifetime registration is required for a sex offender who: (1) Was found to have committed an aggravated sex offense; (2) Was determined by the court to be or assessed as a Level 4 sexually dangerous person; (3) Has pleaded guilty or nolo contendere to or been found guilty of a second or subsequent sex offense under a separate case number, not multiple counts on the same charge; (4) Was convicted of rape by forcible compulsion, § 5-14-103(a)(1), or other substantially similar offense in another jurisdiction; or (5) Has pleaded guilty or nolo contendere to or been found guilty of failing to comply with registration and reporting requirements under § 12-12-904 three (3) or more times."

⁸⁹ Dexter Payne and Sheri Flynn, "Sex Offender Community Notification Assessment: Legislative Update FY2020," Arkansas DOC, July 1, 2020, 4, [https://www.arkleg.state.ar.us/Calendars/Attachment?committee=000&agenda=3389&file=Exhibit+H.04\(d\)+--+2020+SOCNA+Legislative+Report+07-01-2020-Final.pdf](https://www.arkleg.state.ar.us/Calendars/Attachment?committee=000&agenda=3389&file=Exhibit+H.04(d)+--+2020+SOCNA+Legislative+Report+07-01-2020-Final.pdf).

⁹⁰ These twenty-one states are Alabama, Colorado, Delaware, Florida, Hawaii, Iowa, Kansas, Louisiana, Maryland, Michigan, Mississippi, Missouri, Nebraska, Nevada, New Hampshire, Ohio, Oklahoma, South Carolina, South Dakota, Tennessee, Virginia, and Wyoming.

⁹¹ These jurisdictions are Kentucky, Maine, Utah, and the District of Columbia.

⁹² This state is Texas. However, many states bump recidivists up a tier, which often means more frequent reporting.

⁹³ These two states are Arizona and Connecticut.

- Eight states apply a single, default frequency-of-reporting requirement for offenders other than SVPs;⁹⁴
- Two states base their requirements for frequency of reporting on individualized results of risk assessments;⁹⁵ and
- Twelve states base their frequency-of-reporting requirements on multiple factors ascribed to the registrant or to his or her offense.⁹⁶ Any one, or a combination, of several factors may affect how frequently an offender is required to report to the authorities to verify/update his or her information. The factors considered in determining the offender's frequency-of-reporting requirements are similar to those that affect registration duration requirements, and in some states, the requirements are linked.⁹⁷ These factors may include:
 - The results of risk assessments;
 - The offender's conviction or release date;⁹⁸
 - The type of offense requiring registration;
 - Whether the offender has been designated an SVP;
 - Whether the offender is compliant with past or current registration or treatment requirements;
 - Whether the registrant is a repeat offender;
 - Whether the registrant offended against certain categories of victim, such as minors;
 - Whether a court order mandates that the offender must remain on the registry for a specific period of time; or
 - Whether the offender used violence or force in the commission of the offense.

⁹⁴ These eight states are Arkansas, California, Idaho, Illinois, Indiana, Massachusetts, Oregon, and West Virginia.

⁹⁵ These two states are Georgia and Montana.

⁹⁶ These twelve states are Alaska, Minnesota, New Jersey, New Mexico, New York, North Carolina, North Dakota, Pennsylvania, Rhode Island, Vermont, Washington, and Wisconsin.

⁹⁷ For instance, in Wisconsin, the duration requirement is linked to the one for frequency of reporting. The state duration requirement is fifteen years for most sex offenders convicted of a single registerable offense, and these offenders must report to law enforcement on an annual basis. Lifetime registration is required for recidivists, offenders convicted of severe offenses, sexually violent predators, and offenders who receive a court order for lifetime registration. These registrants must report every ninety days.

⁹⁸ As previously noted, offenders' conviction or release date may affect the requirement if, for example, due to changes in the law, offenders convicted or released before a certain date are now subject to a different set of requirements than those convicted or released after that date.

5.2. Profiled State Findings

5.2.1. Risk Assessment Methodologies and Instruments

Most states that use the results of risk assessments to determine SORN requirements do so by employing standardized risk assessment instruments. Only one state—Massachusetts—does not use a risk assessment instrument; instead, Massachusetts classifies offenders into tiers using a “structured clinical judgment” risk assessment approach.⁹⁹

The researchers identified nineteen instruments that are used by seventeen states for the purposes of determining SORN requirements:¹⁰⁰

- Acute-2007
- Arizona Risk Assessment Screening Profile for Regulatory Community Notification (Arizona Risk Assessment)
- Child Pornography Offender Risk Tool (CPORT)
- Female Sex Offender Screening Tool (F-SOST)
- Hare Psychopathy Checklist—Revised (used to assesses psychopathy)
- Iowa Sex Offender Risk Assessment (ISORA)
- Level of Service/Case Management Inventory (LS/CMI)
- Level of Service Inventory—Revised (LSI-R)
- Matrix 2000
- Minnesota Sex Offender Screening Tool Revised (MnSOST-R)
- Minnesota Sex Offender Screening Tool 4 (MnSOST-4)
- [New Jersey] Registrant Risk Assessment Scale (RRAS)
- [New York] Risk Assessment Instrument (RAI)
- Stable 2007
- Static-99
- Static-99R
- Static-2002
- Static-2002R
- Vermont Assessment of Sex Offender Risk (VASOR)

⁹⁹ Massachusetts Sex Offender Recidivism Commission (SORC), “Final Report of the Special Commission to Reduce the Recidivism of Sex Offenders,” May 20, 2016, 88–89, <http://commissiononsexoffenderrecidivism.com/wp-content/uploads/2016/05/Final-Report-of-the-Special-Commission-to-Reduce-the-Recidivism-of-Sex-Offenders-as-filed-with-the-Governor-Senate-President-Speaker-of-the-House-and-House-and-Senate-Clerks.pdf>. As previously noted, Rhode Island also uses this methodology, but only to assess offenders who are not good candidates for assessment with a risk assessment instrument.

¹⁰⁰ See Table 10 in Appendix II for more information on which states use which instruments. It is important to note that FRD was unable to determine which instruments are used in Montana, New Hampshire, and Vermont.

Nine of these seventeen states have endorsed more than one instrument for use.¹⁰¹ A state may apply different instruments to different populations of offenders (such as males and females) or it may administer various instruments at different times or under different circumstances.¹⁰² The Static-99R—used by seven states—is the most-used risk assessment instrument for determining state-level SORN requirements in the United States.¹⁰³

5.2.2. Risk-Level Tiers

All fifteen profiled states use risk assessment results to inform the categorization of sex offenders. Most states separate offenders into one of either three or four tiers/levels, with Tier/Level One offenders being the lowest risk and Tier/Level Three or Four offenders being the highest risk. Vermont is the exception: Rather than classifying all offenders into tiers or levels, the state simply distinguishes offenders that are “high risk” from all other offenders. See Table 3 for a list of the tiers/levels used in each of the profiled states.

Table 3. Risk Assessment-Informed Tiers in Profiled States

State	Risk Assessment-Informed Tiers
Arizona	Level 1, Level 2, Level 3
Arkansas	Level 1, Level 2, Level 3, Level 4 (Sexually Dangerous Persons)
California	Tier One, Tier Two, Tier Three–Risk Assessment Level*, Tier Three
Georgia	Level 1, Level 2, Sexually Dangerous Predator
Massachusetts	Level 1, Level 2, Level 3
Minnesota	Level 1, Level 2, Level 3
Montana	Level 1, Level 2, Level 3
New Jersey	Level 1, Level 2, Level 3
New York	Level 1, Level 2, Level 3
North Dakota	Low Risk, Moderate Risk, High Risk
Oregon	Level I, Level II, Level III
Rhode Island	Level I, Level II, Level III
Texas	Level One, Level Two, Level Three
Vermont	High Risk, (all other offenders)
Washington	Level I, Level II, Level III

* Only offenders in Tier Three–Risk Assessment Level are placed into this tier based on risk assessment.

5.2.3. Risk Assessment Instrument Scoring Agencies

¹⁰¹ These nine states are Arkansas, California, Georgia, Iowa, Minnesota, North Dakota, Oregon, Rhode Island, and Texas.

¹⁰² See, for example, Minnesota DOC, Policy No. 205.220.

¹⁰³ These seven states are California, Georgia, Iowa, North Dakota, Oregon, Rhode Island, and Washington.

Researchers identified the state-sanctioned entities responsible for the scoring of risk assessment instruments in thirteen of the fifteen profiled states.¹⁰⁴ In most cases, the responsibility for scoring instruments falls directly under a state government agency (see table 4) in some or all circumstances. However, New Jersey lacks a centralized scoring agency; instead, risk assessment instruments are scored by local prosecutors. In seven of the thirteen states, the state's department of corrections is the central state agency responsible for scoring risk assessment instruments.

Table 4. Risk Assessment Instrument Scoring Agencies in Profiled States

State	Agency Responsible for Scoring Risk Assessment Instruments
Arizona	Department of Corrections, Rehabilitation & Reentry
Arkansas	DOC Sex Offender Community Notification Assessment Program
California	Department of Corrections and Rehabilitation AND Probation Officers AND Treatment Providers
Georgia	Department of Behavioral Health and Developmental Disabilities, Sexual Offender Registration Review Board
Massachusetts	N/A
Minnesota	DOC Risk Assessment/Community Notification Unit
Montana	Department of Corrections
New Jersey	Local Prosecutors (no central agency)
New York	Board of Examiners of Sex Offenders
North Dakota	Department of Corrections and Rehabilitation
Oregon	Board of Parole and Post-Prison Supervision
Rhode Island	Sex Offender Board of Review
Texas	Department of Criminal Justice AND Deregistration Specialists Licensed by Health and Human Services Commission's Council on Sex Offender Treatment
Vermont	DOC
Washington	DOC Law Enforcement Notification Program*

* Within the state of Washington, while the End of Sentence Review Committee makes the risk-level recommendation, the risk assessment instrument is scored by a specialist in the Law Enforcement Notification Program (End of Sentence Review Committee and Law Enforcement Notification Program), *2018 Annual Report*, March 2019, 9, <https://www.doc.wa.gov/docs/publications/reports/300-SR001.pdf>.

5.2.4. Risk-Level Tier-Classifying Agencies

¹⁰⁴ Massachusetts does not use risk assessment instruments and FRD was unable to determine which entity scores risk assessment instruments in Montana.

Researchers found that agencies scoring risk assessment instruments are not necessarily the same agencies as those assigning offenders to a risk-indicating tier/level, though some fit this description. In five of the fifteen profiled states, a single agency was solely responsible for performing both tasks. In Arizona and Washington, the state departments of corrections score risk assessment instruments, while local law enforcement agencies determine offenders' risk-level classifications. In Montana, New York, and (in some cases) Texas, courts determine offenders' risk-level classifications (see table 5).

Table 5. Risk-Level Tier-Classifying Agencies in Profiled States

State	Agency Responsible for Assigning Offenders to a Tier/Level Classification
Arizona	Local Law Enforcement (no central agency)
Arkansas	Same as Scoring Agency
California	State Department of Justice
Georgia	Same as Scoring Agency
Massachusetts	Sex Offender Registry Board
Minnesota	DOC End of Confinement Review Committees
Montana	Court
New Jersey	Same as Scoring Agency
New York	Court
North Dakota	Office of the Attorney General
Oregon	Same as Scoring Agency
Rhode Island	Same as Scoring Agency
Texas	State Department of Criminal Justice OR Court
Vermont	DOC Sex Offender Review Committee
Washington	Local Law Enforcement (with input from DOC End of Sentence Review Committee)

5.2.5. Relief from Registration

Some, but not all, states allow registrants to petition to be removed from a state sex offender registry before the expiration of their statutory registration term. In some states, such as California, petitions for relief from registration are the only way offenders can be removed from the registry. Approaches to petitions for relief from registration vary among states. Petitions for relief from registration are often filed with the court, as in New York,¹⁰⁵ but in some states, such as Massachusetts,¹⁰⁶ the agency in charge of risk-level classification is also responsible for hearing and granting petitions for relief from registration.

¹⁰⁵ N.Y. Correct. Law § 168-o (Consol. 2022).

¹⁰⁶ Mass. Ann. Laws ch. 6, § 178G (LexisNexis 2022); 803 Mass. Code Regs. 1.29–1.30 (LexisNexis 2016).

Risk assessments may impact petitions for relief from registration in two ways. Some states allow only offenders in lower tiers/risk levels to file such petitions. These states may have originally determined offenders' tiers/risk levels by means of a risk assessment approach. Risk assessments also may be considered by the entity responsible for granting petitions (the court or classifying agency) in determining whether to grant sex offenders' petitions for relief from registration. However, not all states use risk assessments in making this decision.¹⁰⁷

Researchers identified eight states where risk assessments play a role in petitions for relief from registration. In these states, either registrants must qualify for consideration based on receiving a low risk assessment-based risk-level classification, or courts consider risk assessment results in rendering their decisions. The following states consider risk assessment results in some part of the petition process:

- **Arkansas:** Some categories of Arkansas registrants may petition for relief from registration but may be prohibited from filing such petitions for several reasons, including classification as a sexually dangerous person, which is a determination that may be based on the risk assessment process.¹⁰⁸ The court may additionally consider risk assessments as part of the petition process.¹⁰⁹ If the offender has not been assessed in the previous five years, he or she may request a reassessment and "an order terminating the obligation to register shall not be granted without a reassessment."¹¹⁰
- **California:** California allows Tier I, Tier II, and Tier III registrants (who are designated as Tier III solely based on their risk level and who are not convicted of certain enumerated offenses), to petition for relief from registration.¹¹¹
- **Georgia:** While several circumstances allow Georgia's offenders to petition for relief, one set of circumstances involves risk assessment. Offenders may petition for relief from registration if they have completed prison, parole, probation, and supervised release, and are confined to a hospice facility, skilled nursing home, residential care facility for the elderly, or nursing home; are totally or permanently disabled, or are otherwise seriously physically incapacitated due to illness or injury; were convicted of certain enumerated

¹⁰⁷ It is important to note that FRD did not examine states where risk assessments are not a part of the relief-from-registration process, so it is possible that those states use differing procedures. However, many states that do not have a formal risk assessment process do consider certain "risk" factors in deciding on a petition for relief from registration.

¹⁰⁸ Ark. Code Ann. § 12-12-919. Additionally, offenders convicted of aggravated offenses and recidivists are prohibited from filing petitions for relief from registration; however, these factors are not influenced by risk assessment.

¹⁰⁹ Payne and Flynn, "Sex Offender Community Notification Assessment," 4.

¹¹⁰ Ark. Code Ann. § 12-12-919.

¹¹¹ Cal. Penal Code § 290.5 (Deering 2022); California DOJ, California Justice Information Services, Sex Offender Registry, "Frequently Asked Questions: California Tiered Sex Offender Registration (Senate Bill 384) for Registrants," last updated February 2021, 1, <https://oag.ca.gov/sites/all/files/agweb/pdfs/csor/registrant-faqs.pdf>. California sex offenders may be placed into Tier III for other reasons, such as being "a habitual sex offender" or "committed to a state mental hospital as a sexually violent predator" (Cal. Penal Code § 290 [Deering 2022]).

offenses; do not have any prior convictions; did not use a deadly weapon during the commission of the offense; the victim did not suffer any intentional physical harm and was not physically restrained during the commission of the offense; and the offense did not involve the transportation of the victim. The offender may be considered for release only if the offender is classified as a low-risk Level 1 offender (based on a risk assessment).¹¹² At the request of a court, the state may conduct a new risk assessment of the petitioning registrant.¹¹³

- **Montana:** Montana offenders who are classified as Level 0 (“non-designated”), Level 1, and Level 2 based on risk assessment, are allowed to petition for relief from registration.¹¹⁴
- **New York:** New York allows some Level 2 offenders, based on a risk assessment, to petition for relief from registration. When an offender files for relief from registration, the instrument scoring agency provides an updated risk-level recommendation for the offender to the court.¹¹⁵
- **Oregon:** Oregon’s Level 1 offenders who meet certain conditions may petition for relief from registration.¹¹⁶ Any offender who has ever been classified as a Level 3 offender is restricted from petitioning for registration relief.¹¹⁷ As part of the petition process, the state reassesses the offender using a risk assessment instrument, which may result in the offender being reclassified to a higher classification level.¹¹⁸
- **Texas:** Texas offenders who wish to petition for relief from registration are scored on an “individual risk assessment” instrument by “deregistration specialists” licensed by the Texas Health and Human Services Commission’s Council on Sex Offender Treatment. The Council on Sex Offender Treatment certifies assessments prior to offenders filing the

¹¹² Ga. Code Ann. § 42-1-19 (2021).

¹¹³ Georgia Sexual Offender Registration Review Board (SORRB), “SORRB Rules,” accessed May 30, 2022, <https://www.sorrb.org/board-information/sorrb-rules>.

¹¹⁴ Montana DOJ, Sexual or Violent Offender Registry, “Registration Requirements,” accessed June 12, 2022, <https://dojmt.gov/sexual-or-violent-offender-registry/registration-requirements/>; Montana DOJ, Sexual or Violent Offender Registry, “Petition for Removal,” accessed June 12, 2022, <https://dojmt.gov/sexual-or-violent-offender-registry/petition-for-removal/>. Some offenders, such as sexually violent predators, recidivists, or those who committed certain crimes with use of force and/or against a victim under the age of 12, are not eligible to petition for relief from registration.

¹¹⁵ N.Y. Correct. Law § 168-o. Only Level 2 offenders who have not been designated a sexual predator, sexually violent offender, or predicate sex offender may petition the court for relief from registration.

¹¹⁶ Oregon Board of Parole, “Sex Offender Notification Leveling Program.” In addition to the requirement that they be currently classified as Level 1 and never have been classified as Level 3, to be eligible for relief from registration, offenders must meet the following conditions: they must not have been convicted of certain enumerated crimes, such as rape in the first degree; they must not have committed a subsequent felony or “person Class A misdemeanor”; they must not have been designated a “sexually violent dangerous offender”; and they must not have been originally classified by the Psychiatric Security Review Board.

¹¹⁷ *Id.*

¹¹⁸ Oregon Board of Parole, “Sex Offender Notification Leveling Program;” Or. Admin. R. 255-085-0010 (2020).

petition for relief from registration.¹¹⁹ Offenders provide courts with the results of the risk assessments when they file their petitions.¹²⁰

- **Washington:** While risk-level classification does not affect an offender's ability to file a petition, courts must consider thirteen different factors "as guidance to assist the court in making its determination," including "[a]ny risk assessments or evaluations prepared by a qualified professional."¹²¹

5.2.6. Reassessments and Judicial Reviews

In some states, offenders may be reassessed or reclassified after their initial classification, either periodically or at the request of the offender or an agent of the state. The researchers identified procedures for reassessment or reclassification in twelve of the fifteen profiled states. However, not all states allow reassessment and/or reclassification. Of those that do, states' approaches to reassessment, like other aspects of sex offender risk assessment, vary significantly among jurisdictions. For example:

- Arkansas offenders may be reassessed at their own request every five years, or at any time at the request of the Arkansas Parole Board, the Department of Community Correction, or a law enforcement agency.¹²² Offenders undergoing reassessment must appear for another risk assessment interview and may be required to take a polygraph or voice stress analysis test.¹²³ Offenders may also be reassessed if they petition for relief from registration.¹²⁴
- Montana allows Level 2 offenders to petition the court for reclassification if they have "enrolled in and successfully completed the treatment phase of either the prison's sexual offender treatment program or of an equivalent program" since the court's original classification at the time of sentencing.¹²⁵ While the court may reclassify an offender's tier level, the statutory language does not indicate whether offenders are rescored on a risk assessment instrument during this process.
- North Dakota allows offenders to file a request every two years for agency reassessment of their tier classification. Offenders' tier classification may also be reassessed at the

¹¹⁹ Texas DPS, "Criminal History Records and Texas Sex Offender Registration Program FAQ."

¹²⁰ Tex. Code Crim. Proc. Ann. art. 62.404 (2021).

¹²¹ Wash. Rev. Code Ann. § 9A.44.142 (LexisNexis 2022).

¹²² Arkansas Sex Offender Assessment Committee, *Guidelines and Procedures*, 25–26; Ark. Code Ann. § 12-12-919.

¹²³ Arkansas Sex Offender Assessment Committee, *Guidelines and Procedures*, 25–26.

¹²⁴ Ark. Code Ann. § 12-12-919.

¹²⁵ Mont. Code Ann. § 46-23-509.

request of law enforcement, “upon the occurrence of a known event,”¹²⁶ or if the offender is convicted of a subsequent offense.¹²⁷

In some states, classifying agencies’ tier/risk-level determinations are subject to judicial review. The researchers identified eight states that grant offenders the right to appeal their tier classifications to the courts. See Table 6 for additional information.

Table 6. Reassessments and Judicial Reviews in Profiled States

State	Offenders May Be Reassessed or Reclassified After Initial Classification	Classification Is Subject to Judicial Review
Arizona	X	—
Arkansas	X	X
California	—	—
Georgia	X	X
Massachusetts	X	X
Minnesota	X	X
Montana	X	—
New Jersey	X	X
New York	X	X
North Dakota	X	—
Oregon	X	—
Rhode Island	—	X
Texas	—	—
Vermont	X	X
Washington	X	—

5.2.7. Backlogs

Some jurisdictions are unable to promptly complete their risk assessment or risk-level classification processes, creating backlogs, and these backlogs cause delays in determining sex offenders’ SORN requirements. In states that base notification requirements on risk assessment, backlogs may mean that offenders are living in the community without being subject to notification. States may incur backlogs due to insufficient staffing or resources,¹²⁸ or because

¹²⁶ North Dakota Office of the Attorney General, *Risk Assessment and Community Notification Guidelines*, May 2014, 7, <https://attorneygeneral.nd.gov/sites/ag/files/documents/Risk-Assessment-Community-Notification-Guidelines.pdf>.

¹²⁷ North Dakota Office of the Attorney General, North Dakota Sex Offender Registry, “Laws,” accessed June 12, 2022, <https://sexoffender.nd.gov/Laws/laws.shtml>.

¹²⁸ For instance, in Georgia, “officials on the special state review board said the classification process has been hindered because their analysts who investigate cases were stretched too thin” (Andria Simmons, “Georgia Sex Offender Tracking Falls Off,” *Atlanta Journal-Constitution*, December 12, 2012, <https://www.ajc.com/news/georgia-sex-offender-tracking-falls-off/HOVpfDj1TweNfJ8n4g25OI/>).

changes to state law (sometimes in response to court rulings)¹²⁹ require agencies to assess or classify offenders already living in the community, in addition to assessing or classifying newly released offenders.

The researchers found evidence of backlogs in seven states (see table 7); however, the information available was limited.¹³⁰ Backlogs may continue to exist over the span of several years. Based on available information, researchers grouped states into four categories: states whose backlog information indicated backlogs occurred more than fifteen years ago (prior to 2006); states whose backlog information indicated backlogs occurred in the last fifteen years (since 2006); states with a confirmed ongoing backlog (in 2020–21); and states with no present backlog (in 2020–21). A state may fall into more than one of these categories.

- FRD confirmed the existence of backlogs in two states prior to 2006.
- FRD confirmed the existence of backlogs in six states since 2006. Available sources indicate that one of these states, Oregon, has an ongoing backlog.
- FRD confirmed that four states, despite past evidence of a backlog, do not have a current backlog.

Table 7. Confirmed Risk Assessment Backlog Statuses in Profiled States

State	Backlog Existed Prior to 2006	Backlog Existed Since 2006	Confirmed Ongoing Backlog (in 2020–21)	Confirmed No Current Backlog (in 2020–21)	Unable to Confirm Backlog at Any Time
Arizona					X
Arkansas		X		X	
California				X	
Georgia		X			
Massachusetts		X		X	
Minnesota				X	
Montana					X
New Jersey	X				
New York	X	X			
North Dakota					X

¹²⁹ For instance, in Massachusetts, the Auditor of the Commonwealth reported in 2006 a backlog associated with a 1999 amendment to the sex offender registry statute which required the state's Sex Offender Registry Board to review data back to 1981 on approximately 19,000 offenders in the Board of Probation Database in order to locate, register, and classify sex offenders ("State Auditor's Report on Certain Activities of the Sex Offender Registry Board," Report No. 2006-1408-3S, June 5, 2006, ii, 10–11, <https://www.mass.gov/doc/sex-offender-registry-board/download>).

¹³⁰ It is important to note that the absence of documentation in publicly available material does not definitively rule out the presence of backlogs in any state.

State	Backlog Existed Prior to 2006	Backlog Existed Since 2006	Confirmed Ongoing Backlog (in 2020–21)	Confirmed No Current Backlog (in 2020–21)	Unable to Confirm Backlog at Any Time
Oregon		X	X		
Rhode Island		X			
Texas					X
Vermont					X
Washington					X

5.2.8. Costs

Ascertaining the total cost to each state utilizing risk assessments to determine SORN requirements poses a significant challenge. The costs of conducting risk assessments, classifying offenders into tiers, reassessing or reclassifying offenders when necessary, and adjudicating offenders' judicial appeals of their classification are often spread among several entities in the executive and judicial branches of state governments. However, the researchers were able to locate some budgetary information for nine of the profiled states: Arkansas, California, Georgia, Massachusetts, Minnesota, New York, Oregon, Rhode Island, and Texas.

Publicly accessible information on the costs associated with risk assessments in these states is limited, due in part to the fact that costs are spread among multiple state agencies in the executive and judicial branches. What data are available tend to be in the form of piecemeal operating cost data points (such as staff salaries) or a line item for an office's total budget (when the office's portfolio includes performing other tasks in addition to risk assessment or offender classification). A few states offered more detailed information. For example:

In California:¹³¹

- "On an annual basis, the total cost to score the risk assessment screening tool used to determine sex offender community notification and/or registration requirements is approximately \$373,291."
- "The cost to the CDCR DAPO [California Department of Corrections and Rehabilitation (CDCR) Division of Adult Parole Operations (DAPO)] to administer the risk assessment screening tool used to determine sex offender community notification and/or registration requirements is \$374,457."¹³²

¹³¹ CDCR DAPO email message to FRD, August 25, 2021.

¹³² The source states that the figure of \$374,457 "does not include the training or recertification cost."

- “The average cost associated with offenders appealing their assessments is \$215 per offender appeal.”
- “The costs of training staff to score and interpret the risk assessment tool is as follows: Initial costs are \$40,194; biannually, the recertification course costs are \$3,696.”

In Georgia:

- According to Georgia’s fiscal year 2022 appropriations bill, the budget of the Sexual Offender Registration Review Board (SORRB) is \$845,682.¹³³ As sex offender risk assessment and risk-level classification is solely the responsibility of SORRB, and it is SORRB’s only responsibility,¹³⁴ this budget appears to represent the total sum that Georgia spends on sex offender risk assessment, other than costs incurred by the courts for judicial review of SORRB’s classifications.

In Rhode Island:

- Under Rhode Island’s fiscal year 2021 enacted budget, the Sex Offender Board of Review’s (BOR’s) budget allocation was \$429,601, with \$530,928 allocated to the BOR in the fiscal year 2021 revised budget.¹³⁵ As sex offender risk assessment and risk-level classification is solely the responsibility of the BOR, and it is BOR’s only responsibility,¹³⁶ this budget appears to represent the total sum that Rhode Island spends on sex offender risk assessment, other than costs incurred by the courts for judicial review of the BOR’s classifications.

5.3. Public Records Requests Returns

To supplement the information available through open-source materials, researchers submitted public records requests for documents and information related to any backlogs that may exist in

¹³³ Georgia General Assembly, “Conference Committee Substitute to H.B. 81,” 40, accessed June 12, 2022, <https://opb.georgia.gov/document/document/hb-81-fy-2022-appropriations-bill/download>.

¹³⁴ SORRB, “SORRB Rules.” The board’s homepage states: “Our purpose and mission is protecting Georgia’s children and communities at large by identifying convicted sexual offenders that present the greatest risk of sexually re-offending. It is the board’s responsibility to determine the likelihood that a sexual offender will engage in another crime against a victim who is a minor or a dangerous sexual offense. Assessments are used by the SORRB to determine the risk level. Offenders are classified as a Level 1, Level 2, or Sexually Dangerous Predator” (accessed May 30, 2022, <https://www.sorrb.org/home>).

¹³⁵ Rhode Island Department of Administration, Office of Management and Budget, “Volume IV: Public Safety, Natural Resources, and Transportation; Department of Corrections,” 33, accessed June 12, 2022, http://www.omb.ri.gov/documents/Prior%20Year%20Budgets/Operating%20Budget%202022/BudgetVolumeIV/2_Department%20of%20Corrections.pdf. The budget allocation is designated for the “Sex Offender Board of Revenue,” however, in context, this appears to be a typographical error.

¹³⁶ 11 R.I. Gen. Laws § 11-37.1-6 (2022). “Upon passage of this legislation, the sex offender board of review will utilize a validated risk assessment instrument and other material approved by the parole board to determine the level of risk an offender poses to the community and to assist the sentencing court in determining if that person is a sexually violent predator. If the offender is a juvenile, the Department of Children, Youth, and Families shall select and administer a risk instrument appropriate for juveniles and shall submit the results to the sex offender board of review.”

the assessment or classification process. FRD also requested any information on costs associated with risk assessment, including costs of scoring instruments and costs of operating those agencies tasked with conducting risk assessments. Researchers obtained substantive responses from four states: California, Massachusetts, Minnesota, and New York. The quantity and level of detail in the responses varied: Some states were only able to fulfill requests for specific documents, while other states crafted more personalized responses to the request. Several states needed additional time to fulfill the public records request.

- Three states (California, Massachusetts, and Minnesota) stated that there is not currently a backlog of sex offenders waiting risk assessment.¹³⁷
- Three states (California, Massachusetts, and New York) provided information on the costs associated with risk assessments. New York provided only staff salary data, while California and Massachusetts provided more detailed information on costs and budgets.

¹³⁷ Under New York's public records law, the state is only able to respond to requests for records; therefore, FRD was unable to learn whether risk assessment backlogs exist.

6. CONSTITUTIONAL CHALLENGES

As previously noted, several jurisdictions use risk assessment processes for a variety of purposes relating to sex offender registration and notification. Offenders have raised several state and federal constitutional challenges to the use of the same, including challenges under the Bill of Attainder Clause, the Ex Post Facto Clause, the prohibition against double jeopardy, the Eighth Amendment prohibition on cruel and unusual punishment, and the Due Process Clause of the Fourteenth Amendment under the U.S. Constitution, as well as challenges based on state constitutions.

Generally, challenges under the Bill of Attainder Clause, the Ex Post Facto Clause, the Double Jeopardy Clause, and the Eighth Amendment brought against SORN laws are dependent on a finding that SORN laws constitute a form of additional “punishment.” Universally, petitioners have failed to persuade the courts to reach this finding. Courts have reasoned that SORN laws “function as a regulatory measure,”¹³⁸ finding that legislatures did not “intend” for them to be punitive,¹³⁹ that SORN laws “do not rise to the level of harshness to constitute punishment,”¹⁴⁰ and indicating that “[t]he fact that some deterrent punitive impact may result does not...transform [the law] into ‘punishment’ if that impact is an inevitable consequence of the regulatory provision.”¹⁴¹

In jurisdictions assessed by FRD, courts have either held that sex offender registration notification laws do not constitute punishment for the purposes of the Bill of Attainder Clause, the Ex Post Facto Clause, or the Eighth Amendment or, in the alternative, indicated that they did not reach consideration of those claims in light of other concerns.¹⁴² At times, sex offenders have brought challenges alleging other constitutional violations, such as equal protection or vagueness; these challenges, like those requiring a finding of punishment, were similarly unsuccessful before the courts.

¹³⁸ See *State v. Samples*, 2008 MT 416, 347 Mont. 292, 198 P.3d 803, and *State v. Germane*, 971 A.2d 555 (R.I. 2009), which found that though “it follows as a consequence of a criminal conviction, sexual offender registration and notification is a *civil* regulatory process.” *Editor’s Note*: For ease of reading, all internal brackets and citations have been omitted from legal sources.

¹³⁹ *Doe v. Poritz*, 661 A.2d 1335 (N.J. 1995).

¹⁴⁰ “A statute can violate the Ex Post Facto Clause, the Eighth Amendment, or the Double Jeopardy Clause only if the statute is punitive. ...Courts use an intent-effects test to make that determination: ‘If the intention of the legislature was to impose punishment, that ends the inquiry;’ but if the law was not intended to be punitive, the question becomes whether it is ‘so punitive either in purpose or effect as to negate the state’s intention to deem it civil.’ ...‘Only the clearest proof will suffice to override legislative intent and transform what has been denominated a civil remedy into a criminal penalty.’ ...There is no question that Chapter 62 was not intended to be punitive. But the Does argue that its ‘cumulative effects... retroactively imposed, qualify as punishment.’ The district court concluded that ‘although...some of Chapter 62’s requirements are more burdensome than the Alaska statute in *Smith v. Doe*, they do not rise to the level of harshness to constitute punishment.’ ...We agree” (*Doe v. Abbott*, 945 F.3d 307 [5th Cir. 2019]).

¹⁴¹ *Doe v. Poritz*.

¹⁴² See *Doe v. AG*, 426 Mass. 136 (1997), where the court indicated it “[did] not reach the question of whether the act imposes constitutionally impermissible punishment on the plaintiff.” See also *Noble v. Board of Parole*, 327 Or. 485 (1997), where the court “reach[ed] only...[the] procedural issues.”

6.1. Bill of Attainder

The Bill of Attainder Clause is set forth under Article I, Section 9 of the U.S. Constitution and prohibits legislative acts that apply to a specific set of individuals and that inflict punishment without a judicial trial. Within the context of challenges to risk assessment-based systems, sex offenders facing requirements to register have claimed that states' SORN laws violate the ban on bills of attainder, resting on the premise that SORN laws are punitive. Courts, however, have held that because SORN laws do not constitute "punishment" on registered offenders, the laws therefore also do not violate the constitutional prohibition against bills of attainder. Furthermore, as the New Jersey Supreme Court indicated in *Doe v. Poritz*.

The law does not apply to all offenders but only to sex offenders, and as for those who may have committed their offenses many years ago, it applies only to those who were found to be repetitive and compulsive offenders, *i.e.*, those most likely, even many years later, to reoffend, providing a justification that strongly supports the remedial intent and nature of the law. It applies to those with no culpability, not guilty by reason of insanity, those who would clearly be excluded if punishment were the goal but included for remedial purposes. And it applies to juveniles, similarly an unlikely target for double punishment but included for remedial protective purposes.

The notification provisions are as carefully tailored as one could expect in order to perform their remedial function without excessively intruding on the anonymity of the offender. The division of notification into Tiers has that as its clear purpose, and the definition of the factors that determine the Tiers are those not only rationally related, but strongly related to the risk of reoffense and the consequent need for greater or lesser notification. The warnings against vigilantism, the requirements of confidentiality, the restriction of notification to those likely to encounter the offender, all point unerringly both at a remedial intent and remedial implementation...The conclusion of our analysis is that the laws before us today not only have a regulatory purpose, and solely a regulatory purpose, but also have implementing provisions that are similarly solely regulatory, provisions that are not excessive but are aimed solely at achieving, and, in fact, are likely to achieve, that regulatory purpose.

6.2. Ex Post Facto

The Ex Post Facto Clause is set forth in Article I, Section 9 of the U.S. Constitution and prohibits federal and state governments from passing retroactive criminal laws. Within the context of SORN, sex offenders facing requirements to register have claimed that retroactive applications of SORN laws, enacted after the offenders' convictions for crimes requiring registration, constitute ex post facto laws prohibited by the federal constitution and, in some instances, state constitutions.

Because courts have held that SORN laws do not constitute “punishment” of registered offenders, SORN laws have not been found to have violated the ex post facto elements of the federal and states’ constitutions.¹⁴³

6.3. Double Jeopardy

The Double Jeopardy Clause of the Fifth Amendment to the U.S. Constitution prevents a person from being prosecuted twice for the same crime. In cases where convicted sex offenders have claimed double jeopardy violations arising out of their SORN obligations, courts have found that SORN laws do not constitute “punishment” and therefore do not violate the constitutional prohibition against double jeopardy.¹⁴⁴

6.4. Cruel and Unusual Punishment

The Eighth Amendment of the U.S. Constitution prohibits the federal government from imposing excessive fines and protects citizens from cruel and unusual punishment. Challenges under the Eighth Amendment often arise when offenders allege that requiring registration without an individualized risk assessment identifying an offender’s risk of re-offense/dangerousness/etc. amounts to cruel and unusual punishment. In cases where convicted sex offenders have claimed Eighth Amendment violations arising out of their SORN obligations, courts have found that SORN laws do not constitute “punishment” and therefore do not violate the constitutional prohibition against cruel and unusual punishment.¹⁴⁵

¹⁴³ See *Doe v. Poritz* (holding that the New Jersey registration and notification laws, under both federal and New Jersey constitutions, did not constitute “punishment” for the purposes of Ex Post Facto, Bill of Attainder, double jeopardy, or cruel and unusual punishment considerations); *Doe v. Pataki*, 120 F.3d 1263 (2d Cir. 1997) (holding that retroactive application of the registration and notification provisions of New York’s Sex Offender Registration Act to the offender, where the extent of notification is based on the offender’s risk assessment, does not constitute punishment and therefore does not violate the Ex Post Facto Clause of the U.S. Constitution); *E.B. v. Verniero*, 119 F.3d 1077 (3d Cir. 1997) (holding that the notification elements of New Jersey’s Megan’s Law, passed after the plaintiffs’ conviction, did not constitute “punishment” for the purposes of Ex Post Facto and double jeopardy considerations); *Does v. Abbott* (holding that the Texas Sex Offender Registration Program did not “rise to the level of harshness to constitute punishment” for the purposes of Ex Post Facto, double jeopardy, or Eighth Amendment considerations); *State v. Germane* (holding that the Rhode Island Sexual Offender Registration and Community Notification Act did not violate the state constitution’s Ex Post Facto Clause because the Act was a “civil regulatory process” and not punitive).

¹⁴⁴ See *Doe v. Poritz*; *E.B. v. Verniero*; *Does v. Abbott*.

¹⁴⁵ See *Doe v. Poritz*.

6.5. Due Process

The Fourteenth Amendment of the U.S. Constitution protects individuals' rights to due process and protects both procedural and substantive due processes. Procedural due process requires that an individual be provided with notice and an opportunity to be heard before he or she is deprived of life, liberty, or property. Substantive due process protects certain individual rights beyond that of procedure.

When evaluating due process claims associated with risk assessment-based SORN schemes, courts generally take a two-pronged approach. First, courts must find that defendants have been deprived of a substantive due process right; second, courts determine or answer questions as to what procedures are necessary to protect that right.

In 2003, the U.S. Supreme Court held in *Connecticut Department of Public Safety v. Doe* that sex offender "registry requirement[s] based on the fact of previous conviction, not the fact of current dangerousness," do not violate due process. Meanwhile, some states that did not adopt the offense-of-conviction tiering system instead adopted a two-prong scheme for classifying offenders: First, offenders are convicted and receive their sentencing; second, offenders are classified based on post-conviction assessments of risk.

A variety of challenges to risk assessment-based sex offender laws have been raised under the federal Due Process Clause and similar state constitution provisions, including challenges to sex offenders' classifications or tier and the ensuing notification requirements that follow in many jurisdictions. Many sex offenders have raised the enhanced public notification that followed from their risk assessment-based classification as a basis for their claims that their due process rights had been violated.¹⁴⁶ Many courts in these jurisdictions have held that "a liberty interest [under the due process clause] is at stake whenever a sex offender risk assessment is conducted."¹⁴⁷

6.5.1. Procedural Due Process

With respect to procedural due process within risk assessment-based SORN systems, courts that have found the existence of a substantive due process right have generally required that sex offenders be afforded evidentiary hearings. Risk assessment results are usually considered a component of evidence in such hearings. Beyond this, respective jurisdictional procedures differ in many aspects; for example, they differ on which body of government determines final tier

¹⁴⁶ See *Brummer v. Iowa Dep't of Corr.*, 661 N.W.2d 167 (Iowa 2003), and *State v. Germane*.

¹⁴⁷ *State v. Germane*, quoting *Brummer v. Iowa Dep't of Corr.*, and citing, among others, *State v. Samples*, *Doe v. Poritz*, and *Noble v. Board of Parole*.

assignments and who hears appeals, whether sex offender designation can occur before an appeal hearing is initiated by a sex offender or if hearings must precede designations, and who bears the burden of proof at such hearings, as well as the standard of evidence.

Regardless of how jurisdictions structure sex offender classification hearings and appeals, where courts have found a due process liberty interest, courts have stressed the importance of affording sex offenders hearings that grant them opportunity to offer evidence and to defend. The court in *State v. Germane*, for example, emphasized that “all sexual offenders who opt to appeal their risk-level classifications [in Rhode Island]...must be afforded an opportunity to be heard before the Superior Court; moreover, such hearings must be *meaningful*.”¹⁴⁸

In 1999, Massachusetts amended its statutes to provide its indigent sex offenders a statutory right to legal representation in board classification hearings following a string of court holdings indicating that sex offenders had a “liberty and privacy interest” under due process, protected by the U.S. and Massachusetts Constitutions:

The [statutory] amendment followed several decisions of this court holding parts of the Sex Offender and Community Notification Act unconstitutional for failing to comport with due process requirements. Taken together, these decisions required the board to provide sex offenders with individualized, evidentiary hearings before requiring registration or assigning a final classification level. See *Doe v. Attorney Gen.*, 430 Mass. 155, 157-158, 715 N.E.2d 37 (1999) (individualized hearing required for persons adjudicated delinquent or convicted under G. L. c. 265, § 23, before obligation to register as sex offender could be imposed); *Doe...No. 972 v. Sex Offender Registry Bd.*, 428 Mass. 90, 98, 103-104, 697 N.E.2d 512 (1998) (classification hearing to be held before board, rather than Superior Court; board must show appropriateness of classification by preponderance of evidence and make specific findings supporting classification); *Doe v. Attorney Gen.*, 426 Mass. 136, 143-146, 686 N.E.2d 1007 (1997) (presumptive level one sex offender entitled to evidentiary hearing before registration requirement imposed and private information disclosed).¹⁴⁹

6.5.2. Substantive Due Process

Courts have found that post-conviction risk assessments implicate a substantive due process interest in liberty. In a quote often cited by similar decisions in other jurisdictions, the Oregon Supreme Court described the interest as follows:

¹⁴⁸ See also *Burchette v. Sex Offender Screening and Risk Assessment Comm.*, 374 Ark. 467, 288 S.W.3d 614 (2008) (holding that plaintiff's circumstances satisfied the “meaningful opportunity to be heard” element of due process, and that plaintiff's procedural due process rights were not violated under either the Arkansas or U.S. Constitutions as plaintiff had an opportunity to be heard during his classification interview and had the opportunity to appeal administratively and judicially).

¹⁴⁹ *Poe v. Sex Offender Registry Bd.*, 456 Mass. 801, 811, 926 N.E.2d 187 (2010).

When a government agency focuses its machinery on the task of determining whether a person should be labelled publicly as having a certain undesirable characteristic or belonging to a certain undesirable group, and that agency must by law gather and synthesize evidence outside the public record in making that determination, the interest of the person to be labelled goes beyond mere reputation. The interest cannot be captured in a single word or phrase. It is an interest in knowing when the government is moving against you and why it has singled you out for special attention. It is an interest in avoiding the secret machinations of a Star Chamber. Finally, and perhaps most importantly, it is an interest in avoiding the social ostracism, loss of employment opportunities, and significant likelihood of verbal and, perhaps, even physical harassment likely to follow from designation. In our view, that interest, when combined with the obvious reputational interest that is at stake, qualifies as a "liberty" interest within the meaning of the due process clause.¹⁵⁰

Similarly, the Iowa Supreme Court in *Brummer v. Iowa Department of Corrections* held that "the risk of an erroneous assessment and the associated opprobrium arising from such an assessment implicate a liberty interest protected by the due process clauses [of both the U.S. and Iowa Constitutions]" due to the severity of reputation damage associated with SORN. In *E.B. v. Verniero*, the New Jersey Supreme Court found the petitioner sex offender had a substantive liberty interest under the New Jersey state constitution "to be free of the disclosures required by Megan's Law, absent a demonstration that such disclosures are required by a legitimate and substantial state interest."¹⁵¹ The New Jersey Supreme Court additionally held in *Doe v. Poritz* that the loss of reputation alone was enough to implicate a protected liberty or privacy interest under the state constitution. In *State v. Germane*, the Rhode Island Supreme Court referred to the "permanently altered" legal status of sex offenders subject to lifetime registration in finding that there was a protected liberty interest.¹⁵²

In addition to findings of substantive liberty interests, some courts have indicated that the "adjudicative" and evidentiary-based nature of risk assessment-determined classification processes necessitates the need for hearings. For example, the Rhode Island Supreme Court indicated in *State v. Germane* that "when an agency gathers and synthesizes evidence in making...a determination [that a person is a predatory sex offender]," a liberty interest is implicated. Similarly, the Iowa Supreme Court stated in *Brummer v. Iowa Department of*

¹⁵⁰ *Noble v. Board of Parole* (holding that the decision of the Oregon Board of Parole and Post-Prison Supervision to designate a person as a predatory sex offender "implicates a due process interest in liberty" under the U.S. Constitution).

¹⁵¹ The court held that Tier II and Tier III sex offenders are entitled to due process under the Fourteenth Amendment and must be afforded a pre-notification hearing where the prosecution has the burden of persuasion and must prove their case by clear and convincing evidence before the public notification provisions of New Jersey's Megan's Law can be applied.

¹⁵² "The fact that certain classes of sexual offenders are subject to lifetime registration and community notification requirements further supports the conclusion that we are dealing with a protected liberty interest...Sex offenders like [the Appellant] must adhere to the registration requirements indefinitely or else face criminal repercussions; as a result, their legal status is permanently altered."

Corrections that “[b]ecause the underlying proceeding—the risk assessment—involves adjudicative facts, an evidentiary hearing is required.”

Some courts have not found that post-conviction risk assessments implicate a due process interest in liberty. In a case arising out of Texas, *Does v. Abbott*, the Fifth Circuit Court of Appeals held that the plaintiffs failed to show the required “infringement of some other interest” in addition to stigma, necessary for their claims of substantive due process violations. Plaintiffs claimed that Texas’s tiering system, which did not afford them hearings or individualized considerations, constituted violations of these rights.

6.6. Venue

Courts have considered the appropriateness of venue for evidentiary hearings. Such hearings may take place at the administrative level with the state entities responsible for conducting risk assessments. Alternatively, other states allow for appeal through judicial review processes, though these often must be initiated by the convicted sex offender. In still other jurisdictions, sex offenders not only receive a hearing at the administrative level, they also have the option to appeal the decisions of the administrative boards to the judiciary.

For example, the Arkansas Supreme Court indicated in *Burchette v. Sex Offender Screening & Risk Assessment Committee* that the sex offender appellant had already had the opportunity to have an in-person interview during his Arkansas Sex Offender Screening and Risk Assessment program interview. The court indicated that this satisfied the “meaningful opportunity to be heard” element of due process. Furthermore, the same court noted that the appellant had an opportunity to appeal to both the Arkansas Sex Offender Assessment Committee and thereafter, the county circuit court for judicial review. The Court of Appeals of Minnesota indicated in 2010 in *In re Risk Level Determination of F.C.M.* that Minnesota sex offenders have the opportunity to be heard separately, both by the Minnesota Department of Corrections End-of-Confinement Review Committee during the classification process, and thereafter, by an administrative law judge on appeal. In *State v. Germane*, the Rhode Island Supreme Court noted that while the appellant “did not have a statutory right to a hearing before the [Rhode Island] Sex Offender Board of Review, ...he did have a statutory right to appeal that body’s risk-level classification to the Superior Court.”

6.7. Timing of Classification

Another jurisdictional difference regarding required procedure is whether sex offenders can be classified prior to a hearing or whether a hearing must take place before classification. For

example, the Rhode Island Supreme Court reasoned in *State v. Germane* that, because “the board of review’s risk-level determination has no *immediate* legal effect on a sexual offender’s liberty interest..., [offenders] are...informed of their right to seek judicial review..., [and] [f]iling an application for review effectively suspends the legal effect of the board’s determination,” the appellant was “accorded adequate procedural due process.” In contrast, the Oregon Supreme Court held in *Noble v. Board of Parole and Post-Prison Supervision* that “due process requires notice and an evidentiary hearing when the [Oregon Board of Parole and Post-Prison Supervision] proposes to designate a person as a predatory sex offender..., and that...the hearing must occur *before* the designation decision is made, ...because due process requires that the hearing be provided before the deprivation actually takes place.”

6.8. Burden of Proof

Courts have differed on the question of which party carries the burden of proof at sex offender evidentiary hearings, as well as what standard of evidence the party must meet. In some jurisdictions, the burden of proof to establish the risk level of convicted sex offenders is on the state, while in others, the risk level established by the board is presumed accurate and the burden is on the objecting sex offender to establish that the board had erred. In some jurisdictions, the standard of evidence is held to be “a preponderance of the evidence;” in others, the standard is “clear and convincing evidence.” Still other jurisdictions have established their own standards.

For example, in 1995, the New Jersey Supreme Court in *Doe v. Poritz* indicated that the burden of proof was on the appellant sex offender to prove in court, by “a preponderance of the evidence,” that the offender’s risk-level classification was in error. Two years later, in 1997, the Third Circuit in *E.B. v. Verniero*, a case appealed from New Jersey, shifted the burden of proof to the state and set a new evidentiary threshold of “clear and convincing evidence” that the state must meet when classifying offenders to a risk level. Similarly, Massachusetts has raised the threshold of evidence that the state must meet to “clear and convincing evidence” that a sex offender should be classified at a particular level.¹⁵³

Minnesota takes a different approach. Sex offenders are assessed by the Minnesota Department of Corrections End-of-Confinement Review Committee (ECRC) for their risk level, after which they may appeal their risk-level classification to an administrative law judge. The Court of Appeals of

¹⁵³ In *Doe v. Sex Offender Registry Bd.*, 473 Mass. 297, 41 N.E.3d 1058 (2015), the Supreme Judicial Court of Massachusetts overruled its previous 1998 decision (*Doe v. Sex Offender Registry Bd.*, 428 Mass. 90, 697 N.E.2d 512) regarding standard of proof for registrant classification evidentiary hearings. Whereas the previous standard required the Massachusetts Sex Offender Registry Board to “establish a [registrant’s] risk of re-offense by a preponderance of the evidence,” the new standard required the board to prove an offender’s risk of re-offense by clear and convincing evidence.

Minnesota in the 2010 case, *In re Risk Level Determination of F.C.M.*, indicated that when offenders appeal their risk-level assignments to an administrative law judge, the burden of proof is on the offender appellant; on appeal before an administrative law judge, Minnesota requires the offender to prove, by a preponderance of the evidence, “that the ECRC’s risk-level determination was erroneous.” The court further indicated that (presumably on further appeal) an administrative law judge’s decision “may be reversed if unsupported by *substantial evidence*” (emphasis added)—a statutory standard established by Minnesota.¹⁵⁴

¹⁵⁴ “Substantial evidence [is] defined as...such relevant evidence as a reasonable mind might accept as adequate to support a conclusion.”

7. CONCLUSION

This report presents an overview of the practices and policies of states that use risk assessments for the purposes of sex offender registration and notification. It is based on a two-phase research methodology: Phase I research identified seventeen states that use risk assessment to inform some aspect of sex offenders' registration and notification requirements, while Phase II research profiled the relevant policies and practices in each of these states.

FRD found that these states apply risk assessments to registration and notification requirements using a wide variety of methodologies, instruments, policies, and practices. Risk assessments do not have a singular application for sex offenders: Jurisdictions utilize them for a variety of purposes, including determining sex offender notification, duration of time on the registry, or frequency of reporting. They also use risk assessments to make treatment determinations, an application outside the scope of this report. Risk assessments also do not consist of a singular approach or method to evaluating risk factors. While most states base risk assessments on a risk assessment instrument that assigns a numerical score to an offender's risk of re-offense, this methodology is not universal. Furthermore, a variety of instruments are in use across the profiled states, each based on a specific list of risk factors that are weighted and scored by a unique scoring paradigm.

Additionally, jurisdictions have numerous approaches for applying risk assessments to offenders' risk-level classification. For many offenders, a risk assessment is only one of a combination of factors that will ultimately be used to determine an individual's registration and/or notification requirements.

Finally, states that use risk assessments to classify offenders have faced a variety of constitutional challenges, with most challenges failing before the courts; however, in several states, courts have held that registrants have a privacy interest inherent in the due process provisions of state constitutions, the U.S. Constitution, or both, and that states must establish procedures of notice and hearing to afford registrants the necessary protections.

8. APPENDIX I: Research Findings

8.1. Summary of Research Findings

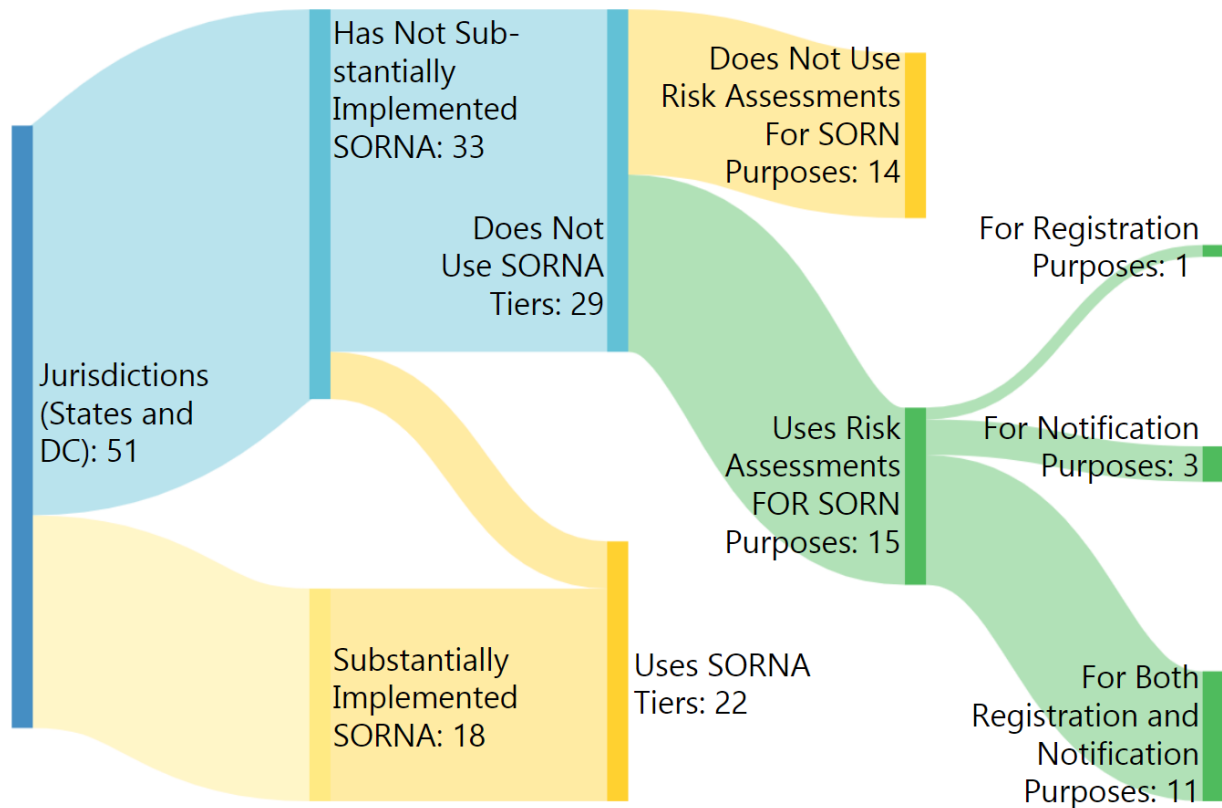
Table 8. Summary of Research Findings

State	Has State Substantially Implemented SORNA?	Does State Use Tiers That Meet SORNA's Min. Requirements?	Does State Use Risk Assessments?	Are Risk Assessments Used for Registration or Notification Purposes (for Adults)?
Alabama	Y	Y	Y	Neither
Alaska	N	N	Unclear	N/A
Arizona	N	N	Y	Notification
Arkansas	N	N	Y	Both
California	N	N	Y	Both
Colorado	Y	Y	Y	Notification (only for SVPs)
Connecticut	N	N	Unclear	N/A
Delaware	Y	Y	Y	Neither
District of Columbia	N	N	Unclear	N/A
Florida	Y	Y	Y	Neither
Georgia	N	N	Y	Registration
Hawaii	N	Y	Unclear	N/A
Idaho	N	N	Y	Unclear
Illinois	N	N	Y	Neither
Indiana	N	N	Unclear	N/A
Iowa	N	Y	Y	Registration–Duration (only for offenders petitioning for relief from registration)
Kansas	Y	Y	Unclear	N/A
Kentucky	N	N	Y	Neither
Louisiana	Y	Y	Unclear	N/A
Maine	N	N	Y	Neither
Maryland	Y	Y	Y	Neither
Massachusetts	N	N	Y	Both
Michigan	Y	Y	Unclear	N/A
Minnesota	N	N	Y	Both
Mississippi	Y	Y	Unclear	N/A
Missouri	Y	Y	Unclear	N/A
Montana	N	N	Y	Both
Nebraska	N	Y	Y	Neither
Nevada	Y	Y	Unclear	N/A

State	Has State Substantially Implemented SORNA?	Does State Use Tiers That Meet SORNA's Min. Requirements?	Does State Use Risk Assessments?	Are Risk Assessments Used for Registration or Notification Purposes (for Adults)?
New Hampshire	N	Y	Y	Notification (only for offenders petitioning to modify requirements)
New Jersey	N	N	Y	Notification
New Mexico	N	N	Unclear	N/A
New York	N	N	Y	Both
North Carolina	N	N	Y	Neither
North Dakota	N	N	Y	Both
Ohio	Y	Y	Unclear	N/A
Oklahoma	Y	Y	Y	Unclear
Oregon	N	N	Y	Both
Pennsylvania	N	N	Y	Neither
Rhode Island	N	N	Y	Both
South Carolina	Y	Y	Unclear	N/A
South Dakota	Y	Y	Unclear	N/A
Tennessee	Y	Y	Unclear	N/A
Texas	N	N	Y	Both
Utah	N	N	Unclear	Unclear (possible registration–duration: only for offenders petitioning for relief from registration)
Vermont	N	N	Y	Both
Virginia	Y	Y	Y	Neither
Washington	N	N	Y	Both
West Virginia	N	N	Unclear	N/A
Wisconsin	N	N	Unclear	Unclear (possible notification)
Wyoming	Y	Y	Y	Neither

Sources: DOJ, SMART, "Substantially Implemented: Jurisdictions That Have Substantially Implemented SORNA," accessed June 12, 2022, <https://smart.ojp.gov/sorna/substantially-implemented>; DOJ, SMART, "SORNA: State and Territory Implementation Progress Check;" relevant state laws.

Figure 1. Summary of Research Findings



It is important to note that for the purposes of this report, Colorado, Iowa, and New Hampshire were not considered to use risk assessments for registration and notification requirements. Colorado only uses risk assessments with regard to notification determinations for those with “sexually violent predator” designations, while Iowa and New Hampshire only use risk assessment scores when determining the requirements for offenders who petition to have them modified.

Table 9. Determining Factors for Duration of Registration and Frequency of Reporting in Profiled States

State	Determining Factors for Duration of Registration	Determining Factors for Frequency of Reporting
Arizona	Type of Offense, Relief from Registration, SVP Designation	Single Frequency for All Non-Transient Offenders
Arkansas	Type of Offense, Number of Offenses, SVP Designation, Compliance, Relief from Registration, Risk Assessment	Single Frequency for All Non-SVP Offenders
California	Type of Offense, Number of Offenses, SVP Designation, Relief from Registration, Risk Assessment	Single Frequency for All Non-SVP Offenders
Georgia	Single Duration for All Offenders (option for some to petition for relief based on risk assessment)	Risk Assessment
Massachusetts	Type of Offense, Number of Offenses, SVP Designation, Relief from Registration, Sex Offender Registry Board Determination	Single Frequency for All Non-SVP Offenders
Minnesota	Type of Offense, Number of Offenses, SVP Designation	Risk Assessment, SVP Designation
Montana	Single Duration for All Offenders (option for some to petition for relief based on risk assessment)	Risk Assessment
New Jersey	Single Duration for All Offenders (option for some to petition for relief)	Type of Offense (not SORNA-compliant)
New York	Type of Offense, Number of Offenses, SVP Designation, Relief from Registration, Risk Assessment	Risk Assessment, SVP Designation
North Dakota	Type of Offense, Number of Offenses, SVP Designation, Risk Assessment, Victim	Type of Offense, Number of Offenses, SVP Designation, Risk Assessment, Victim
Oregon	Single Duration for All Offenders (option for some to petition for relief based on risk assessment)	Single Frequency for All Non-SVP Offenders
Rhode Island	Number of Offenses, SVP Designation, Risk Assessment, Victim, Use of Violence/Force	Number of Offenses, SVP Designation, Risk Assessment, Victim, Use of Violence/Force
Texas	Type of Offense, Number of Offenses, Relief from Registration, Risk Assessment	Number of Offenses
Vermont	Type of Offense, Number of Offenses, SVP Designation, Compliance, Risk Assessment	Risk Assessment, SVP Designation, Compliance
Washington	Type of Offense, Number of Offenses, SVP Designation, Relief from Registration, Risk Assessment	Risk Assessment, SVP Designation

Note: These determining factors are current as of June/July 2020.

8.2. Definitions of Data Labels

COMPLIANCE. An offender's registration or notification requirement(s) are impacted by a documented history of the offender's failure to comply with past or current registration or treatment requirements.

DURATION. The amount time on the registry. For the purposes of this report, risk assessments are considered to affect duration if the state has a provision that allows some or all offenders to petition for relief from registration or notification, and a risk assessment score is considered as part of the petition process. Risk assessments are also considered to affect duration if there are specific duration requirements for SVPs and risk assessments are considered as part of the determination of SVP status.

FREQUENCY. The frequency of reporting. For the purposes of this report, risk assessments are considered to affect frequency of notification if the state has a provision that allows some or all offenders to petition for relief from registration or notification, and a risk assessment score is considered as part of the petition process. Risk assessments are also considered to affect frequency if there are specific frequency requirements for SVPs and risk assessments are considered as part of the determination of SVP status.

N/A and **NEITHER.** Not applicable, "N/A," is used to identify jurisdictions that do not use risk assessments at all, or when it is unclear whether they do. "Neither" is used when jurisdictions use risk assessments but do not use them for registration or notification purposes (such as jurisdictions that only use risk assessments to determine treatment options), or when jurisdictions do not use them on adults. In the case of Colorado, "Neither" was also used for the purposes of scope determination because it only uses risk assessments with regard to notification determinations for those offenders with SVP designations.

NOTIFICATION. Refers to the use of risk assessments in making determinations related to community notification. This may include notification by placement on the public sex offender registry website or more active forms of notification. Some jurisdictions perform risk assessments on all registrants to determine the amount and type of community notification, whereas other jurisdictions only perform risk assessments on some registrants, such as SVPs, who are subject to enhanced community notification.

NUMBER OF OFFENSES. Refers to an offender's prior criminal history and/or whether the conviction is for the offender's first offense. In some states, registrants are required to be on the

registry for longer and/or report more frequently if they have been convicted of more than one offense.

REGISTRATION. Refers to the use of risk assessments in making determinations related to registration, particularly the duration of time the offender must register and the frequency of required reporting. Some jurisdictions perform risk assessments on all registrants to place them into classifications or tiers that have different duration or frequency requirements. Other jurisdictions only perform risk assessments that affect registration for some RSOs, such as SVPs or registrants who are petitioning for relief from registration.

SVP DESIGNATION. SVPs are often defined as individuals convicted of a sexually violent offense who have “a mental abnormality or personality disorder”¹⁵⁵ that makes them more likely to engage in predatory sexually violent offenses; the designation is often adjudicated by the courts. Some jurisdictions use slightly different terminology; however, SVPs are often subject to lifetime registration. In some states, they also are subject to enhanced monitoring and/or civil commitment.

SORNA TIERS. If the jurisdiction’s tier system meets SORNA’s minimum requirements for offense-based tiering, duration of registration, and frequency of reporting, then the tiers are referred to as “SORNA tiers.” All other references to tiers refer to classification systems that are not necessarily SORNA-compliant.

TYPE OF OFFENSE. The offense of conviction. SORNA’s tier system is based on the type of offense.

UNCLEAR. The information in the sources is ambiguous and further research would be necessary to determine the answer for the jurisdiction. For instance, some statutes call for “evaluations” to be administered to sex offenders in certain situations, but it is unclear from the statutory language whether these evaluations are risk assessments or some other form of psychological evaluation.

¹⁵⁵ Violent Crime Control and Law Enforcement Act of 1994, §170101.

9. APPENDIX II: Risk Assessment Instruments Used in Profiled States

FRD identified nineteen risk assessment instruments used for determining SORN requirements in the seventeen profiled states. As shown in Table 10, nine states have authorized more than one risk assessment instrument for use.¹⁵⁶

Table 10. Risk Assessment Instruments Used in Each State

Risk Assessment Instrument Used	AZ	AR	CA	GA	IA	MA	MN	MT	NH	NJ	NY	ND	OR	RI	TX	VT	WA
Acute-2007			X														
Arizona Risk Assessment	X																
CPORT				X													
F-SOST							X										
Hare Psychopathy Checklist															X		
ISORA					X												
LS/CMI			X				X						X				
LSI-R							X								X		
Matrix 2000															X		
MnSOST-R												X					
MnSOST-4							X										
RRAS										X							
RAI											X						
Stable 2007			X		X									X			
Static-99		X															
Static-99R			X	X	X							X	X	X			X
Static-2002															X		
Static-2002R				X										X			
VASOR		X															
Structured Clinical Judgment						X [†]								X [†]			
Unknown								X	X							X	

* For all offenders.

† For offenders who cannot be scored on instruments.

¹⁵⁶ Table 10 includes states that use structured clinical judgment, a risk assessment approach that does not use instruments, and states for which FRD was unable to identify the name of any authorized risk assessment instruments.

10. APPENDIX III: Profiled States—Deep Dives

10.1. Arizona

10.1.1. Key Findings

- Arizona classifies offenders into one of three tiers for the purpose of determining their notification requirements:
 - Level 1 offenders who pose a low risk of re-offense are subject to fewer community notification requirements than Level 2 or Level 3 offenders;
 - Level 2 offenders pose an intermediate risk of re-offense and are subject to more community notification requirements than Level 1 offenders; and
 - Level 3 offenders pose a high risk of re-offense and are subject to more community notification requirements than Level 1 offenders.¹⁵⁷
- An offender’s tier classification is informed by his or her score on Arizona’s risk assessment instrument—the Arizona Risk Assessment Screening Profile for Regulatory Community Notification (“Arizona Risk Assessment”).
- The supervisory agency that has custody of the offender at the time of release or sentence to probation (i.e., the Arizona Department of Corrections, Rehabilitation & Reentry or local probation department) scores each offender on the Arizona Risk Assessment to produce a recommended tier classification for local law enforcement.¹⁵⁸
- After receiving the results of the Arizona Risk Assessment, local law enforcement agencies make the final determination of each offender’s official tier classification.¹⁵⁹
- Much of the available open-source material related to the Arizona Risk Assessment instrument dates from 2000 through 2010. Generally, FRD was unable to locate more recent information to confirm that the practices described in these sources reflect current practices in 2021. In particular, the most recent version of the Arizona Risk Assessment that researchers were able to obtain was published in 2002. Based on open-source material, it is unknown whether Arizona is still using this version of the instrument or if the state has updated the instrument but not made the updated version available online.

¹⁵⁷ Yuma County Sheriff’s Office, “Sex Offender Community Notification Information,” accessed June 12, 2022, <https://www.yumacountysheriff.org/sex-offender-notification-info.html>.

¹⁵⁸ Arizona DPS, “Public Services Portal: Sex Offender Compliance; Community Notification,” accessed June 6, 2022, <https://www.azdps.gov/services/public/offender>.

¹⁵⁹ Ariz. Rev. Stat. Ann. § 13-3825 (2022).

10.1.2. Introduction

In Arizona, risk-level classifications are used to determine offenders' community notification requirements. Arizona does not use risk-level classifications to determine sex offender registration requirements for duration of registration or frequency of reporting.¹⁶⁰ The supervisory agency that has custody of that offender at the time of release or sentence to probation (the Arizona Department of Corrections, Rehabilitation & Reentry or local probation department) administers the Arizona Risk Assessment, which produces a recommended risk-level classification.¹⁶¹ Final risk-level classification is ultimately determined by the local law enforcement agency of the community in which the offender will reside, after it receives a risk-level recommendation from the supervisory agency.¹⁶² Local law enforcement agencies determine whether offenders should be categorized as Level 1 (low risk), Level 2 (intermediate risk), or Level 3 (high risk).¹⁶³

10.1.3. Risk Assessment Uses

In Arizona, sex offenders are placed into one of three risk levels based on the offender's score on the Arizona risk assessment instrument.¹⁶⁴ The risk level determines the amount of community notification requirements to which offenders are subject:

- Level 1 offenders pose a low risk of re-offense and are subject to fewer community notification requirements than Level 2 or Level 3 offenders;
- Level 2 offenders pose an intermediate risk of re-offense and are subject to more community notification than Level 1 offenders; and
- Level 3 offenders pose the highest risk of re-offense and are subject to more community notification requirements than Level 1 offenders.¹⁶⁵

While Arizona uses risk-level classifications to determine sex offenders' community notification requirements, it does not use risk classification to determine their registration requirements in terms of duration of registration or frequency of reporting. Instead, all Arizonan sex offenders register for life, unless they have been convicted of "Kidnapping of a Minor" or "False Imprisonment;" these offenders register for ten years. Also, all offenders must report once per year, unless they are transient, in which case they report every ninety days.¹⁶⁶

¹⁶⁰ DOJ, SMART, "SORNA Substantial Implementation Review: State of Arizona," 8.

¹⁶¹ Arizona DPS, "Public Services Portal: Sex Offender Compliance; Community Notification."

¹⁶² Ariz. Rev. Stat. Ann. § 13-3825.

¹⁶³ Yuma County Sheriff's Office, "Sex Offender Community Notification Information."

¹⁶⁴ Arizona DPS, "Public Services Portal: Sex Offender Compliance; Community Notification."

¹⁶⁵ Yuma County Sheriff's Office, "Sex Offender Community Notification Information."

¹⁶⁶ DOJ, SMART, "SORNA Substantial Implementation Review: State of Arizona," 10.

Community notification statutes authorize or require government agencies to notify community members, such as neighborhood residents or schools,¹⁶⁷ that a convicted sex offender lives in the community; these statutes are intended to prevent sexual victimization by alerting potential victims to the presence of a sex offender in their vicinity.¹⁶⁸

Risk-level classification determines the Arizonan sex offender's community notification requirements:

- **Level 1 Offenders:** Notification is not mandatory.¹⁶⁹ Local law enforcement such as police and sheriff departments are permitted (but not required) to disseminate the information they maintain on Level 1 offenders; however, Arizona law limits the recipients of this information to other law enforcement agencies and the people with whom the offender resides.¹⁷⁰
- **Level 2 and 3 Offenders:** Notification is mandatory.¹⁷¹ Local law enforcement must actively notify "the surrounding neighborhood, area schools, appropriate community groups, and prospective employers" that these offenders are present. Notifications include the offender's photograph and address, as well as a summary of the offender's status and criminal background. Local law enforcement provides offender information in a press release for the local media.¹⁷² Additionally, Arizona makes information about Level 2 and 3 offenders available to the public on its sex offender registry website.¹⁷³

¹⁶⁷ Unless states specifically enumerate receivers of community notification information, it is difficult to give examples in a general definition because the exact community members can vary from state to state, and by offenders' risk levels. Here, FRD has given general examples. Notification is distinct from registration in that registration programs are systems for law enforcement to track sex offenders in the community, while notification "involves making information about released sex offenders more broadly available to the public" (DOJ, SMART, "National Guidelines," 3).

¹⁶⁸ Richard G. Zevitz and Mary Ann Farkas, "Sex Offender Community Notification: Assessing the Impact in Wisconsin," *National Institute of Justice Research Brief* (December 2000): 1, <https://www.ojp.gov/pdffiles1/nij/179992.pdf>.

¹⁶⁹ Arizona DPS, "Public Services Portal: Sex Offender Compliance; Community Notification."

¹⁷⁰ Ariz. Rev. Stat. Ann. § 13-3825. The statute does not define the term "local law enforcement agency;" however, it does state, "If the community does not have a chief law enforcement officer, the sheriff shall perform the duties of the local law enforcement agency."

¹⁷¹ Arizona DPS, "Public Services Portal: Sex Offender Compliance; Community Notification."

¹⁷² Ariz. Rev. Stat. Ann. § 13-3825.

¹⁷³ DOJ, SMART, "SORNA Substantial Implementation Review: State of Arizona."

10.1.4. Policies and Practices

10.1.4.1. Arizona Risk Assessment Screening Profile for Regulatory Community Notification

The Arizona Department of Corrections, Rehabilitation, & Reentry, probation departments, and local law enforcement currently use the Arizona Risk Assessment to assess sex offenders' risk of recidivism.¹⁷⁴

10.1.4.1.1. Development

Developed based on an instrument previously used in Minnesota, the Arizona Risk Assessment was first implemented in 1996.¹⁷⁵ At the time of this writing, the most recent version of the Arizona Risk Assessment available online was implemented in 2002.¹⁷⁶ All descriptions in this report of the Arizona Risk Assessment's risk factors and scoring criteria are based on this document. Table 11 shows documented milestones in the development of the Arizona Risk Assessment.

Table 11. Documented Milestones in the Development of the Arizona Risk Assessment

Year	Milestone
1996	Assessment is implemented as part of Community Notification Law.
2000	Assessment is recalibrated to improve its predictive validity.
2002	Most recent version of the Assessment becomes available online.

Source: Arizona State Legislature, Community Notification Guidelines Committee, *Final Report*, December 15, 2004, 45, 58, <https://azmemory.azlibrary.gov/digital/api/collection/statepubs/id/169/download>.

10.1.4.1.2. Risk Factors and Scoring

The Arizona Risk Assessment contains nineteen static risk-factor criteria, each of which is assigned a score (these scores are totaled to calculate a "Suggested Community Notification Level"),¹⁷⁷ and ten unscored dynamic factors.¹⁷⁸ Local law enforcement agencies responsible for community notification sometimes use these dynamic factors to override the Suggested Community

¹⁷⁴ Arizona DPS, "Public Services Portal: Sex Offender Compliance; Community Notification;" Arizona DPS, "Public Services Portal: Sex Offender Compliance; FAQs," accessed June 12, 2022, <https://www.azdps.gov/services/public/offender>; Arizona DOC, *Sex Offender Risk Assessment Validation Study*, August 1, 2000, ii, <https://azmemory.azlibrary.gov/digital/collection/statepubs/id/5812/>.

¹⁷⁵ Arizona DOC, *Sex Offender Risk Assessment Validation Study*, ii.

¹⁷⁶ The original 1996 version of the instrument may be viewed beginning on page 26 of the *Sex Offender Risk Assessment Validation Study*.

¹⁷⁷ Arizona DPS, "Public Services Portal: Sex Offender Compliance; FAQs;" Phoenix Police, "Arizona Sex Offender Assessment Screening Profile for Regulatory Community Notification," August 1, 2002, 14, <http://azrsol.org/wp-content/uploads/2018/02/AZ-Sex-Offender-Assessment-Screening-Profile.pdf>.

¹⁷⁸ This figure is based on the 2002 Arizona Risk Assessment, which is the most recent version of the instrument FRD was able to locate online.

Notification Level recommended by the scoring of the nineteen static factors.¹⁷⁹ Table 12 provides examples of static and dynamic risk factors from the 2002 Arizona Risk Assessment.

Table 12. Examples of Static and Dynamic Risk Factors from 2002 Arizona Risk Assessment

Scored Static Factors	Unscored Dynamic Factors
Number of convictions (or adjudications if offender is/was a juvenile) for sex/sex-related offenses, including current offense.	Permanent medical incapacitation of offender.
Use of weapon in sex/sex-related conviction(s) (or adjudications if offender is/was a juvenile).	Location of offender's place of residence, including remoteness, lack of access to children, and transportation.
Relationship of offender to victim.	Completion of formal residential or outpatient sex offender treatment program, with attendant written diagnosis by a board-certified psychologist or psychiatrist that offender's risk for re-offense is minimal.

Source: Phoenix Police, "Arizona Sex Offender Assessment Screening Profile for Regulatory Community Notification," August 1, 2002, 3, 4, 6, 15, <http://azrsol.org/wp-content/uploads/2018/02/AZ-Sex-Offender-Assessment-Screening-Profile.pdf>.

The instructions for the 2002 Arizona Risk Assessment state that evaluators score the instrument based on "only officially documented data sources," such as prison records or materials from the Federal Bureau of Investigation; however, for some factors, the evaluator may base the score on self-reported information from the offender if it is "considered reliable."¹⁸⁰

The Arizona Risk Assessment produces two "scales" for each of the nineteen scored items: one score for the "Sex Offense Risk" (S) scale and one score for the "General Recidivism Risk" (G) scale. For example, to score Item 4 on the instrument ["Age at first CONVICTION (or adjudications if offender is/was a juvenile) for sex/sex related offense"], the evaluator assigns both an S score and a G score based on the offender's age when he or she was first convicted of a sex offense (see fig. 2).¹⁸¹

- If the offender was 24 years or older "when first convicted for a sex/sex related offense," the evaluator:
 - Scores "0" on the S scale, and
 - Scores "0" on the G scale.

¹⁷⁹ Phoenix Police, "Arizona Sex Offender Assessment Screening Profile," 15.

¹⁸⁰ *Id.*

¹⁸¹ *Id.* at 4.

- If the offender was 23 years or younger “when first convicted for a sex/sex related offense,” the evaluator:
 - Scores “3” on the S scale, and
 - Scores “8” on the G scale.

Figure 2. Example of Scoring a Risk Factor on 2002 Arizona Risk Assessment

4.	Age at first CONVICTION (or adjudications if offender is/was a juvenile) for sex/sex related offense.	
	Subject's age when first convicted for a sex/sex related offense.	
	<u>S/G</u>	
	A. 24 or older	0/0
	B. 23 or younger	3/8
		<u>S</u> <u>G</u>
		SCORES ___/___

Source: Phoenix Police, “Arizona Sex Offender Assessment Screening Profile for Regulatory Community Notification,” 4.

After an S score and a G score have been determined for each item, the evaluator sums them to calculate a total S score and a total G score.¹⁸² These are then translated into risk levels (from Lower Risk to Very High Risk for the S scale, and from Lower Risk to Ultra High Risk for the G scale), which in turn are translated into a Suggested Community Notification Level (Level 1, 2, or 3). Higher S and G scores correlate with greater assessed risk. Table 13 compares the risk levels for the S and G scores.

Table 13. Sex Offense and General Recidivism Risk Scales on 2002 Arizona Risk Assessment

Sex Offense Risk		General Recidivism Risk	
S Score Range	Risk Level	G Score Range	Risk Level
0–20	Lower Risk	0–19	Lower Risk
21–30	Intermediate Risk	20–44	Intermediate Risk
31–47	High Risk	45–52	High Risk
48+	Very High Risk	53–68	Very High Risk
—	—	69+	Ultra High Risk

Source: Phoenix Police, “Arizona Sex Offender Assessment Screening Profile for Regulatory Community Notification,” 14.

¹⁸² *Id.* at 1.

Offenders receive a Level 1 “Suggested Community Notification Level” if:

- They are “Lower Risk” on the S scale, AND
- They are “Lower Risk” on the G scale.

Offenders receive a Level 2 “Suggested Community Notification Level” if:

- They are “Intermediate Risk” on the S scale, OR
- They are “Intermediate Risk” or “High Risk” on the G scale.

Offenders receive a Level 3 “Suggested Community Notification Level” if:

- They are “High Risk” or “Very High Risk” on the S scale, OR
- They are “Very High Risk” or “Ultra High Risk” on the G scale.¹⁸³

10.1.4.1.3. Scoring Procedures

An offender’s initial risk assessment is administered by evaluators within the agency having custody of that offender at the time of release or sentence to probation. In Arizona, those agencies are the Arizona Department of Corrections, Rehabilitation & Reentry or a county adult probation department.¹⁸⁴

When an offender is released from incarceration or sentenced to probation, the offender’s supervisory agency (the Arizona Department of Corrections, Rehabilitation & Reentry or local probation department) scores him or her on the Arizona Risk Assessment instrument. Application of the Arizona Risk Assessment produces two scores, one for sex offense risk (S) and one for general recidivism risk (G). These two scores are then translated into a sex offense risk scale and a general recidivism risk scale. The Arizona Risk Assessment converts each scale to a Suggested Community Notification Level of Level 1, Level 2, or Level 3.¹⁸⁵ While the Department of Corrections, Rehabilitation & Reentry or local probation department conducts the initial assessment and produces a Suggested Community Notification Level, local law enforcement agencies are responsible for the final categorization of offenders into a risk level.¹⁸⁶

10.1.4.2. Classification

While the Department of Corrections, Rehabilitation & Reentry or local probation department conducts the initial assessment and produces a Suggested Community Notification Level, local

¹⁸³ *Id.* at 14.

¹⁸⁴ Arizona DPS, “Public Services Portal: Sex Offender Compliance; Community Notification.”

¹⁸⁵ Phoenix Police, “Arizona Sex Offender Assessment Screening Profile,” 14.

¹⁸⁶ Arizona DPS, “Public Services Portal: Sex Offender Compliance; FAQs;” Ariz. Rev. Stat. Ann. § 13-3825.

law enforcement agencies are responsible for determining offenders' official risk-level classification.¹⁸⁷ Law enforcement agencies local to the sex offender's intended place of residence (such as police or sheriff agencies) receive the offender's scored Arizona Risk Assessment, along with the Suggested Community Notification Level, from that offender's supervisory agency.¹⁸⁸ These local law enforcement agencies have discretion to reassess the offender prior to determining the offender's risk-level classification if they believe they have information that is not reflected in the supervisory agency's scoring of the Arizona Risk Assessment.¹⁸⁹ Additionally, the Arizona Risk Assessment includes ten unscored dynamic factors, with instructions stating that "[t]he local law enforcement agency responsible for completing community notification should note that these factors, if present, may be utilized to override the notification level otherwise indicated by the risk assessment score."¹⁹⁰ The instrument does not provide further instructions or a formula for how such overrides should be applied.

While multiple agencies may score offenders on the Arizona Risk Assessment in the process of arriving at risk-level categorizations, there is no evidence that the categorizing agency considers factors other than the score on the instrument when making its categorization decisions. For example, the 2004 "Sex Offender Notification Survey" of Arizonan criminal justice agencies queried respondents on where they get offender risk assessment scores that they then use to determine final risk levels. The majority reported that they used a score produced by the local law enforcement agency. When the same offender undergoes multiple risk assessment sessions with differing scores, most respondents said their agency discusses the differences with the other scoring agency.¹⁹¹

Local law enforcement agencies, which are responsible for categorizing offenders into a "community notification level," may either accept the Suggested Community Notification Level or re-score the Arizona Risk Assessment for the offender.¹⁹²

¹⁸⁷ *Id.*

¹⁸⁸ Ariz. Rev. Stat. Ann. § 13-3825.

¹⁸⁹ Arizona DPS, "Public Services Portal: Sex Offender Compliance; FAQs."

¹⁹⁰ Phoenix Police, "Arizona Sex Offender Assessment Screening Profile," 15.

¹⁹¹ Arizona DOC, *Sex Offender Notification Survey: Summary of Results*, September 2004, 3–4, <https://azmemory.azlibrary.gov/digital/collection/statepubs/id/5812/>. *Editor's Note*: The 2004 survey is contained in the same file as the 2000 validation study. It is located after the study and commences a new pagination sequence with page "1."

¹⁹² Arizona DPS, "Public Services Portal: Sex Offender Compliance; FAQs;" Ariz. Rev. Stat. Ann. § 13-3825; Arizona DPS, "Public Services Portal: Sex Offender Compliance; Community Notification." The source is ambiguously phrased, but it appears to indicate that law enforcement agencies re-score offenders using the Arizona Risk Assessment, rather than another instrument. It states, "All criminal justice agencies must use the standardized Arizona Risk Assessment; however, occasionally law enforcement discovers information which can affect an offender's risk level. As such, law enforcement is given the discretion to either accept the recommended risk level or complete another risk assessment" (Arizona DPS, "Public Services Portal: Sex Offender Compliance; FAQs").

10.1.4.3. Relief from Registration

While offenders may petition for relief from registration for a crime committed before the offender turned 18, there is no provision for the modification of registration requirements for offenders who commit offenses as adults.¹⁹³

10.1.5. Issues

10.1.5.1. Validation and Reception

In 2000, the Arizona Department of Corrections, Rehabilitation & Reentry published the results of a validation study of the Arizona Risk Assessment, entitled the *“Sex Offender Risk Assessment Validation Study.”* The study found that the instrument was a valid predictor of sex offender recidivism, both for general recidivism (whether the sex offender is re-arrested for a felony, sex, or violent offense), as well as specifically for sex offense recidivism (whether the sex offender is re-arrested for a sex offense), although it also indicated some potential improvements.¹⁹⁴ Arizona released updated versions of the instrument in 2000 and 2002.¹⁹⁵

The 2004 *“Sex Offender Notification Survey”*¹⁹⁶ queried local criminal justice agencies responsible for administering the Arizona Risk Assessment and found that 36 percent of agencies reported recurring problems *“completing”* the assessment instrument, while 57 percent of agencies reported that they had not experienced recurring problems administering the instrument.¹⁹⁷ In comments on the question, the majority of respondent agencies that experienced problems administering the risk assessment instrument described challenges related to acquiring information necessary to administer the instrument. Other *“problems”* or *“areas of concern”* related to the instrument included the following:¹⁹⁸

- *“The question regarding sex offender treatment does not address those actively participating in an approved sex offender treatment program. It only allows for completion of a program or fail[ure] to participate or comply.”*

¹⁹³ DOJ, SMART, *“SORNA Substantial Implementation Review: State of Arizona.”*

¹⁹⁴ Arizona DOC, *Sex Offender Risk Assessment Validation Study*, ii–iii, 8.

¹⁹⁵ Phoenix Police, *“Arizona Sex Offender Assessment Screening Profile;”* Arizona State Legislature, Community Notification Guidelines Committee, *Final Report*, December 15, 2004, 45, <https://azmemory.azlibrary.gov/digital/api/collection/statepubs/id/169/download>.

¹⁹⁶ It is important to note that FRD was unable to determine if Arizona has updated the risk assessment instrument since the survey was administered in 2004. As a result, it may be that feedback provided by respondents in 2004 reflects neither the contents of the current version of the assessment, nor the current attitudes of the criminal justice agencies administering it.

¹⁹⁷ Responses for the remaining seven percent of respondents were not reported.

¹⁹⁸ Arizona DOC, *Sex Offender Notification Survey*, 5.

- “The instruments [*sic*] seems to be open to the way the assessor reads into the question other than what the offender has done.”

Respondents provided suggestions for improving the risk assessment process, including recommendations to simplify the risk assessment instrument, suggestions on how to alter how scores are assigned, and suggestions for increased training for risk assessment evaluators. Some of these responses include:¹⁹⁹

- “Simplify the assessment.”
- “Allow a scoring factor for those actively participating in sex offender treatment. Currently, the question seems to assume that treatment was completed and therefore a zero score is indicated, or that they are not addressing the issue and a higher risk score of 3 is indicated. A person who is actively addressing the issue in a therapeutic environment does not fit in either risk category. It would seem that they would fall somewhere in between the two risk scores allowed.”
- “Semi-annual or annual training on the risk assessment tool.”

The 2004 survey²⁰⁰ further found that most of these agencies had only one or two staff members who conducted risk assessments. FRD did not locate recent information on current training provided to risk assessment evaluators at either the state or the local level; however, the 2004 Sex Offender Notification Survey found that at the time, 68 percent of responding agencies had only formally trained staff using the risk assessment instrument, while 29 percent of agencies saw staff who had not been formally trained using the instrument. When asked for recommendations for solving problems associated with the instrument, several survey respondents indicated that they desired more training than they were receiving at the time.²⁰¹

10.1.5.2. Costs

Because risk assessments are performed in a decentralized manner by both Department of Corrections, Rehabilitation & Reentry and local agencies, there is not a single line-item for the cost of risk assessments in Arizona. The Department of Corrections, Rehabilitation & Reentry's budget for fiscal year 2021 was \$1,381,388, however, this budget covers all of the many functions the department provides in addition to risk assessments.²⁰²

¹⁹⁹ *Id.* at 6.

²⁰⁰ The surveyed agencies consisted of police, sheriff, and probation departments. Police and sheriff departments may reassess offenders, while probation departments are responsible for the initial risk assessments of offenders sentenced to probation.

²⁰¹ Arizona DOC, *Sex Offender Notification Survey*, 1, 4, 6.

²⁰² Arizona, Office of the Governor, *Executive Budget: State Agency Budgets; Fiscal Year 2021*, January 2020, 84, https://azgovernor.gov/sites/default/files/state_agency_budgets.pdf.

10.1.5.3. Backlogs

No evidence was found in open-source research that Arizona has experienced backlogs of offenders needing either risk assessments or tier assignments. By state law, the agency with supervision over the offender must, within seventy-two hours of the offender's release from confinement, enter a risk assessment into the Arizona sex offender profile and notification database. Local law enforcement agencies must review the information, place the offender into a notification level, and notify the community of the offender's presence within forty-five days.²⁰³

10.2. California

10.2.1. Key Findings

- With the exception of offenders classified as Tier III because of their risk assessment score, an offender's tier does not have anything do to with their risk of re-offense.
- California classifies offenders into one of three tiers (one of which has two types) for the purpose of determining duration of time on the registry:
 - Tier I offenders are required to register for the least amount of time;
 - Tier II offenders are required to register for an intermediate amount of time;
 - Tier III "Risk Assessment Level" offenders are required to register for an intermediate amount of time; and
 - Tier III "Lifetime" offenders are required to register for the longest period of time.²⁰⁴
- The California Department of Justice determines offenders' tier classifications, which are based on several factors, including the offense of conviction and the offender's risk assessment score.²⁰⁵
- The California Department of Corrections and Rehabilitation (CDCR) scores each male sex offender on the Static-99R prior to his release from prison.²⁰⁶
- Offenders' notification requirements are not determined by their tier classification; however, law enforcement may take risk assessment instrument scores into consideration when making notification decisions about individual offenders.²⁰⁷

²⁰³ Ariz. Rev. Stat. Ann. § 13-3825.

²⁰⁴ California DOJ, California Justice Information Services, Sex Offender Registry, "Frequently Asked Questions," 2.

²⁰⁵ *Id.* at 2, 7, 8.

²⁰⁶ Cal. Penal Code § 290.06 (Deering 2022); SARATSO Review Committee, "FAQs," accessed June 5, 2022, <https://saratso.org/in dex.cfm?pid=1355>.

²⁰⁷ Cal. Penal Code § 290.45 (Deering 2022).

10.2.2. Introduction

In California, risk-level classifications, which may be affected by risk assessments, are a consideration used in coordination with the offense conviction to determine how long offenders are required to register. Evaluators from the CDCR score each male offender on the Static-99R prior to sentencing and prior to release from incarceration.²⁰⁸

The California Department of Justice classifies offenders as Tier I, Tier II, or Tier III, with Tier III being subdivided into Tier III “Risk Assessment Level” and Tier III: “Lifetime.”²⁰⁹

California administers risk assessments to all offenders, and it places all offenders into tiers, but tier determinations are based on an accounting of multiple factors including but not limited to risk assessments, such as the offense of conviction or recidivism.²¹⁰ A sex offender’s tier is based on the underlying offense of conviction, unless the offender is specifically included in Tier III as a result of the offender’s risk assessment. The only time a risk assessment must be considered in determining whether an offender is a Tier II or Tier III offender when they have not been convicted of a registerable offense, is when the court finds that the offense committed was the result of a sexual compulsion or for purposes of sexual gratification. Under those circumstances, the offender must register as a Tier I offender unless a court finds that the offender should register as a Tier II or Tier III offender based on several factors, including a risk assessment.²¹¹ Offenders may be placed into a tier called “Tier Three – Risk Assessment Level” if they have a high risk assessment score. These offenders are eligible to petition for relief from registration, unlike other Tier III offenders;²¹² therefore, risk assessments may affect the duration of registration for these offenders.

In addition to the Static-99R, California also scores male sex offenders on the Acute-2007/Stable 2007, a dynamic risk assessment instrument, and it scores both male and female offenders on the LS/CMI, a future violence risk assessment instrument.²¹³ Offenders’ scores on all three risk assessment instruments may affect community notification: Law enforcement agencies may take offenders’ risk assessment scores into consideration when making notification decisions about individual offenders;²¹⁴ however, notification requirements are not determined by an offenders’ tier classification.

²⁰⁸ Cal. Penal Code § 290.06; SARATSO Review Committee, “FAQs.”

²⁰⁹ California DOJ, California Justice Information Services, Sex Offender Registry, “Frequently Asked Questions,” 1–2.

²¹⁰ Cal. Penal Code § 290.

²¹¹ Cal. Penal Code §§ 290(d)(2); 290.06.

²¹² California DOJ, California Justice Information Services, Sex Offender Registry, “Frequently Asked Questions,” 4.

²¹³ California DOJ, “California Megan’s Law Website: FAQ,” accessed June 12, 2022, <https://www.meganslaw.ca.gov/Mobile/FAQ.aspx>.

²¹⁴ Cal. Penal Code § 290.45.

10.2.3. Risk Assessment Uses

In December 2017, the California legislature passed Senate Bill 384, legislation which amended the state's sex offender registration laws. It went into effect on January 1, 2021, and, among the many revisions made by the legislation, it changed California's lifetime sex offender registration scheme to a tier-based scheme.²¹⁵ Under the new law, California classifies sex offenders into three tiers.²¹⁶

10.2.3.1. Registration Requirements

The following list summarizes registration requirements for Tier I, II, and III offenders:

- Tier I offenders are required to register for life with the opportunity to petition for relief after ten years;
- Tier II offenders are required to register for life with the opportunity to petition for relief after twenty years;
- Tier III "Risk Assessment Level" offenders are required to register for life with the opportunity to petition for relief after twenty years; and
- Tier III "Lifetime" offenders are required to register for life.²¹⁷

All offenders, except Tier III Lifetime offenders, may petition for relief from registration if certain conditions are met.

10.2.3.2. Notification Requirements

In California, most offenders are included on the public sex offender registry website and risk assessment instrument scores are used to determine whether offenders are subject to additional forms of community notification.²¹⁸ Under California Penal Code § 290.45, "any designated law enforcement entity may provide information to the public about a person required to register as a sex offender pursuant to Section 290, by whatever means the entity deems appropriate, when necessary to ensure the public safety based upon information available to the entity concerning that specific person's current risk of sexual or violent re-offense, including, but not limited to, the

²¹⁵ California Sex Offender Management Board (CASOMB), "Tiered Registration FAQs," February 2021, 1, https://casomb.org/pdf/Tiered_Registration_FAQ_simple_Edits_02_21.pdf.

²¹⁶ Cal. Penal Code § 290.

²¹⁷ California DOJ, California Justice Information Services, Sex Offender Registry, "Frequently Asked Questions," 7–8.

²¹⁸ SARATSO Review and Training Committees, "Sex Offender Risk Assessment in California," January 3, 2017, 5, http://www.saratso.org/docs/RA_summary_for_judges_attys_rev_1-3-17.pdf.

person’s static, dynamic, and violence risk levels on the State Authorized Risk Assessment Tools for Sex Offenders (SARATSO) risk tools.”²¹⁹ Therefore, local law enforcement agencies may consider an offender’s risk assessment score when making notification decisions, but notification requirements are not determined by an offender’s tier classification.

Law enforcement may provide information about registered sex offenders to the public, including “the offender’s name, known aliases, gender, race, physical description, photograph, date of birth, address...description and license plate number of the offender’s vehicles or vehicles the offender is known to drive, type of victim targeted by the offender, relevant parole or probation conditions, crimes resulting in classification...and date of release from confinement.” Information that would identify the victim must be excluded.²²⁰

10.2.4. Policies and Practices

10.2.4.1. Risk Assessment Agencies

In California, two main government entities manage statewide sex offender risk assessment policies and practices: the California Sex Offender Management Board (CASOMB), and the State Authorized Risk Assessment Tools for Sex Offenders (SARATSO) Review Committee (SARATSO Review Committee).²²¹ CASOMB and the SARATSO Review Committee are related and aligned. However, they have distinct statutory mandates and, in some ways, separate roles.²²² The SARATSO Review Committee focuses specifically on risk assessment instruments, while CASOMB has a broader mission to address California’s policies and practices related to the community management of adult sex offenders.²²³ The following summarizes the roles of CASOMB and the SARATSO Review Committee.

CASOMB:

- Addresses issues, concerns, and problems related to the community management of sex offenders;

²¹⁹ A “designated law enforcement agency” is defined as “the Department of Justice, a district attorney, the Department of Corrections and Rehabilitation, the Division of Juvenile Justice, and every state or local agency expressly authorized by statute to investigate or prosecute law violators.”

²²⁰ Cal. Penal Code § 290.45.

²²¹ CASOMB, “What’s New,” accessed June 12, 2022, <http://www.casomb.org/index.cfm?pid=1211>; SARATSO Review Committee, “What is SARATSO?,” accessed June 12, 2022, <https://saratso.org/>.

²²² CASOMB, *Annual Report 2019*, 18, accessed June 12, 2022, http://www.casomb.org/pdf/2019_Annual_Report.pdf.

²²³ CASOMB, “Mission,” accessed June 12, 2022, <http://www.casomb.org/index.cfm?pid=1211>; CASOMB, *Annual Report 2019*, 18.

- Develops standards and procedures for providers of risk assessments as well as sex offender management programs;
- Certifies sex offender management program providers according to these standards; and
- Holds hearings to receive input from stakeholders and the public.²²⁴

SARATSO Review Committee:

- Selects California’s risk assessment instruments to be used to assess sex offenders;²²⁵
- Conducts research on the validity and reliability of risk assessment instruments;
- Provides scorer training on California’s approved risk assessment instruments;
- Certifies all risk assessment scorers as well as their trainers;²²⁶ and
- Retains risk assessment experts to provide advice, develop training curriculum, and provide training to scorers and the trainers who train the scorers.²²⁷

10.2.4.1.1. California Sex Offender Management Board

CASOMB gives recommendations for policy and practice improvement, and addresses concerns that arise in relation to the community management of adult sex offenders.²²⁸ CASOMB consists of seventeen members who meet monthly and serve without compensation.²²⁹ It operates under the jurisdiction of the CDCR, with support staff services provided by CDCR employees.²³⁰

CASOMB membership must consist of the following individuals:

- Representatives from state government agencies (including a state judge and representatives for the Attorney General, the Secretary of CDCR, the Adult Parole Services, and the Director of State Hospitals);

²²⁴ CASOMB, “What’s New,” Cal. Penal Code § 9002 (Deering 2022).

²²⁵ Cal. Penal Code § 290.04 (Deering 2022).

²²⁶ CASOMB, *Provider Agency Certification Requirements*, January 2019, 26, https://casomb.org/pdf/Provider_Agency_Certification_Requirements_January_2019.pdf; SARATSO Review Committee, “Training Information,” accessed June 12, 2022, <https://sarato.org/index.cfm?pid=1357>; CASOMB, *Annual Report 2019*, 18–19; Cal. Penal Code § 290.04.

²²⁷ CASOMB, *Annual Report 2019*, 18.

²²⁸ CASOMB, “Mission,” Cal Pen Code § 9002.

²²⁹ Cal. Penal Code §§ 9001, 9003 (Deering 2022); CASOMB, “What’s New,” CASOMB, “Meeting Notices and Agendas,” accessed June 12, 2022, <https://casomb.org/index.cfm?pid=1213>.

²³⁰ Cal. Penal Code § 9001.

- Representatives from local government agencies (including a county administrator and city manager and representatives for law enforcement, prosecuting attorneys, probation officers, and criminal defense attorneys); and
- Representatives from nongovernmental agencies (including mental health professionals and experts in the field of sexual assault).²³¹

10.2.4.1.2. SARATSO Review Committee

The SARATSO Review Committee’s goal is to ensure that each risk assessment instrument it approves “reflects the most reliable, objective, and well-established protocols for predicting sex offender risk of recidivism, has been scientifically validated and cross validated, and is, or is reasonably likely to be, widely accepted by the courts.”²³² The SARATSO Review Committee is comprised of three members, including representatives of CDCR, the Department of State Hospitals, and the Attorney General’s Office, and it is responsible for guiding and supporting the state’s sex offender risk assessment systems.²³³

10.2.4.1.3. California Department of Justice Sex Offender Registry Unit

The California Department of Justice Sex Offender Registry (CSOR) unit is responsible for classifying sex offenders into tiers. As of 2018, CSOR included three sections consisting of forty-five employees: the Registration Resource Center and Record Management Section, the Assessment Section, and the California Sex and Arson Registry (CSAR) Support Section. These sections are responsible for:²³⁴

- Maintaining the CSAR application and the state’s sex offender repository, as well as ensuring the accuracy, completeness, and timeliness of these records;
- Providing community notification through the public sex offender website;
- Serving as keeper of records for sex offender registration and notification information, such as risk assessment data, registration events, registrant images, and other relevant data;
- Providing support to prosecution for failure to register;

²³¹ *Id.*

²³² Cal. Penal Code § 290.04.

²³³ CASOMB, *Provider Agency Certification Requirements*, 26; Cal. Penal Code § 290.04.

²³⁴ California DOJ, “Stage 1 Business Analysis: SB 384; Sex Offender Tiering,” 2–3, February 26, 2018, <https://test5.test.sites.ca.gov/wp-content/uploads/sites/21/2019/06/0820-223-SB384-S1BA-Final-Rev-20190108-Form-Fields.pdf>.

- Validating the registration requirement for sex offenders;²³⁵
- Identifying sex offenders arriving from jurisdictions outside California who are required to register; and
- Serving as the main point of contact for the public, criminal justice business partners, and sex offender registrants seeking information on all facets of sex offender registration and notification.

With the passage of SB 384, in 2017, the CSOR planned to develop three new units—the Tiering Unit, the Exclusion Unit, and the Termination Unit—and hire additional staff, including sixty-three new employees in the Tiering Unit (who will conduct tier assessments),²³⁶ and fifty new employees in the Termination Unit (who will process petitions for relief from registration).²³⁷

10.2.4.2. Risk Assessment Instruments

There are three official risk assessment instruments used in California: the Static-99R, which is based on static risk factors; the Acute-2007/Stable 2007, which is based on dynamic or changing risk factors; and the LS/CMI, which is based on the risk of violent re-offending.²³⁸ The state considers the dynamic risk assessment instrument (Acute-2007/Stable 2007) in conjunction with the static risk assessment instrument (Static-99R) to enhance the accuracy of determining risk of re-offense.²³⁹ The Static-99R is administered by probation offices during pre-sentencing and while the offender is on probation and by parole offices prior to release on parole. The future violence instrument (LS/CMI) is administered by treatment professionals as part of a treatment program and used to inform decisions about offenders' treatment and parole or probation supervision.²⁴⁰

²³⁵ "Validation" is the process of verifying that an offender is required to be registered. "Currently under...California's lifetime registration requirement, the CSOR relies on one single qualifying offense to validate registration. Once that registration requirement is validated, the CSOR does not pursue or validate additional qualifying offenses committed in-state or in non-California, federal, or military jurisdictions. Pursuant to SB 384, by January 1, 2021, the CSOR will have to assess the complete criminal history of all sex offender registrant criminal records both in-state and out-of-state and considers the person's risk level on the Static99 risk assessment tool to determine the appropriate tier level of the 103,166 registrants" (California DOJ, "Stage 1 Business Analysis: SB 384; Sex Offender Tiering," 3).

²³⁶ As of 2018, it was estimated that each tier assignment would take up to one hour to complete (California DOJ, "Stage 1 Business Analysis: SB 384; Sex Offender Tiering," 10).

²³⁷ California DOJ, "Stage 1 Business Analysis: SB 384; Sex Offender Tiering," 10. Processing tasks include providing assistance to law enforcement and district attorneys to determine if the offender meets the requirements for termination. As of 2018, it was estimated that each petition for termination would take more than two hours for staff to process.

²³⁸ SARATSO Review and Training Committees, "Sex Offender Risk Assessment in California," 1–2. None of these instruments were developed by California.

²³⁹ SARATSO Review and Training Committees, "Sex Offender Risk Assessment in California," 1; SARATSO Review Committee, "Risk Assessment Instruments."

²⁴⁰ California DOJ, "California Megan's Law Website: Risk Assessment," accessed June 12, 2022, https://www.meganslaw.ca.gov/SexOffenders_RiskAssessment.aspx.

The Static-99R is used to inform decisions about sentencing, as well as risk-level classification if the offender is classified as Tier III “Risk Assessment Level”),²⁴¹ and it is administered to assign a numerical score to each of the instrument’s ten risk factors. Offenders undergo a Static-99R assessment twice²⁴²—once prior to sentencing and again at least four months prior to release from incarceration—to account for changing factors during incarceration.²⁴³ In 2017, 93 percent of all California registered sex offenders convicted that year were scored on the Static-99R risk assessment.²⁴⁴

The Acute-2007/Stable 2007 is used to assess adult male sex offenders.²⁴⁵ Offenders are scored by certified sex offender management professionals as part of their mandatory participation in sex offender management programs while on parole or probation. The instrument is primarily used to evaluate offenders on probation or parole for treatment and supervision purposes,²⁴⁶ and it may also inform community notification decisions.²⁴⁷

The LS/CMI is used to predict risk of future violence in both male and female adult offenders.²⁴⁸ It is based on static and dynamic risk factors and predicts risk of both sexual and nonsexual violence.²⁴⁹ Certified sex offender management professionals administer the LS/CMI to offenders during probation or parole as part of their mandatory participation in a sex offender management program to inform treatment decisions during the probation or parole period.²⁵⁰ The LS/CMI may also inform community notification decisions.²⁵¹ See the following textbox for a comparison of the main factors of the three instruments.

²⁴¹ California DOJ, California Justice Information Services, Sex Offender Registry, “Frequently Asked Questions,” 2–3; SARATSO Review and Training Committees, “Sex Offender Risk Assessment in California,” 2, 5.

²⁴² Static-99R is a 2009 revision of the original instrument. Therefore, offenders who were assessed prior to 2009 are scored on the previous version, the Static-99 (California DOJ, “California Megan’s Law Website: FAQ”).

²⁴³ SARATSO Review and Training Committees, “Sex Offender Risk Assessment in California,” 2–3.

²⁴⁴ CASOMB, *Annual Report 2018*, accessed June 12, 2022, 20, http://www.casomb.org/pdf/2018_CASOMB_Annual_Report.pdf.

²⁴⁵ SARATSO Review and Training Committees, “Sex Offender Risk Assessment in California,” 1; California DOJ, “California Megan’s Law Website: FAQ.”

²⁴⁶ SARATSO Review and Training Committees, “Sex Offender Risk Assessment in California,” 2; California DOJ, “California Megan’s Law Website: Risk Assessment,” Cal. Penal Code § 290.09 (Deering 2022).

²⁴⁷ Cal. Penal Code § 290.45.

²⁴⁸ SARATSO Review and Training Committees, “Sex Offender Risk Assessment in California,” 2.

²⁴⁹ CASOMB, *Annual Report 2018*, 21; CASOMB, *Annual Report 2017*, accessed June 12, 2022, 13, http://www.casomb.org/pdf/2017_CASOMB_Annual_Report_uploaded_7_16.pdf.

²⁵⁰ California DOJ, “California Megan’s Law Website: Risk Assessment.”

²⁵¹ Cal. Penal Code § 290.45.

California's Risk Assessment Instruments

Static-99R:

- Static risk assessment instrument used to assess adult male sex offenders.²⁵²
- Cannot be used for female offenders or male offenders who have been living in the community without a subsequent offense for ten years.²⁵³
- Primarily used, in conjunction with other factors, to inform the assignment of risk-level classifications (tiers), which indicate the length of time an offender is required to register.²⁵⁴
- Scores may be used by law enforcement to inform decisions about community notification. While law enforcement may consider risk level from the static instrument, there is no statutory mandate to consider tier designation when making community notification decisions.²⁵⁵

Acute-2007/Stable 2007

- Dynamic risk assessment instrument used to assess adult male sex offenders.²⁵⁶
- Primarily used for treatment and supervision purposes.
- Scores may be used by law enforcement to inform decisions about community notification.²⁵⁷

LS/CMI

- Future violence risk assessment instrument used to assess both male and female sex offenders.²⁵⁸
- Used to inform decisions related to treatment and parole or probation supervision.²⁵⁹
- Scores may be used by law enforcement to inform decisions about community notification.²⁶⁰

10.2.4.2.1. Scoring Procedures

In California, three distinct entities administer risk assessment instruments to sex offenders: probation officers, the CDCR, and treatment providers.

²⁵² There is no valid static risk assessment instrument to predict sex offense recidivism for female sex offenders; however, the LS/CMI is used to predict violent re-offense by adult female offenders. California uses the Juvenile Sexual Offense Recidivism Risk Assessment Tool-II for juvenile male sex offenders (SARATSO Review and Training Committees, "Sex Offender Risk Assessment in California," 1).

²⁵³ California DOJ, "California Megan's Law Website: About Sex Offenders; Risk Assessment." Static-99R is not recommended for those who have never committed a sex offense, nor is it recommended for making recommendations regarding the determination of guilt or innocence in those accused of a sex offense. Static-99R is not appropriate for individuals whose only sexual "crime" involves consenting sexual activity with a similar age peer (e.g., statutory rape [a U.S. charge] where the ages of the perpetrator and the victim are close and the sexual activity was consensual) (Phenix et al., *Static-99R Coding Rules*, 17).

²⁵⁴ Cal. Penal Code § 290.

²⁵⁵ SARATSO Review and Training Committees "Sex Offender Risk Assessment in California," 5; Cal. Penal Code § 290.4 (Deering 2022).

²⁵⁶ CSARATSO Review and Training Committees, "Sex Offender Risk Assessment in California," 1.

²⁵⁷ SARATSO Review and Training Committees, "Sex Offender Risk Assessment in California," 1; Cal. Penal Code § 290.45.

²⁵⁸ California distinguishes between the risk assessment tool used to predict risk of violent re-offense by sex offenders (LS/CMI) and the risk assessment tool used to predict risk of sexual re-offense (the Static-99R). While only the static risk assessment tool (Static-99R) and the dynamic risk assessment tools (Acute-2007/Stable 2007) have been empirically shown to be valid predictors of recidivism in adult men, the future violence risk assessment tool has been shown to be a valid predictor of recidivism in both men and women (SARATSO Review and Training Committees, "Sex Offender Risk Assessment in California," 2).

²⁵⁹ California DOJ, "California Megan's Law Website: Risk Assessment."

²⁶⁰ Cal. Penal Code § 290.45.

Probation officers administer the Static-99R to offenders prior to sentencing, the CDCR administers a second Static-99R prior to the offender's release from prison,²⁶¹ and treatment providers administer the Acute-2007/Stable 2007 and LS/CMI as part of offender treatment programs after offenders' release from confinement and/or as a part of a probationary period.²⁶²

10.2.4.2.2. Training

The SARATSO Training Committee (distinct from the SARATSO Review Committee) is responsible for training individuals who will administer and score the static (Static-99R), dynamic (Acute-2007/Stable 2007), and future violence (LS/CMI) risk assessment instruments.²⁶³ It is comprised of four members: a representative of the Department of State Hospitals, a representative of CDCR, a representative of the Attorney General's Office, and a representative of the Chief Probation Officers of California.²⁶⁴

The SARATSO Training Committee provides training every two years that "certified trainers" must attend.²⁶⁵ Risk assessment trainings must be conducted by experts in the field of risk assessment and the use of actuarial instruments.²⁶⁶ Certified trainers then train personnel within their organizations who administer and score the risk assessment instruments ("scorers").²⁶⁷ All scorers, regardless of the instrument they will be using, are required to attend an 8- to 12-hour training course, conduct their initial assessments under the supervision of a "trained scorer," and attend training at least every two years.²⁶⁸

Static-99R-Specific Training

Evaluators, including parole agents, probation officers, and psychologists, are both trained and certified to score the Static-99R, which is administered to offenders during legal proceedings or around the time of release from custody.²⁶⁹ Evaluators are required to attend training provided by

²⁶¹ Cal. Penal Code § 290.06; SARATSO Review Committee, "FAQs."

²⁶² SARATSO Review Committee, "FAQs."

²⁶³ Cal. Penal Code § 290.05 (Deering 2022).

²⁶⁴ Cal. Penal Code §§ 290.05, 290.09.

²⁶⁵ Each agency administering risk assessment instruments to sex offenders must designate key personnel in their organizations to be "certified trainers" (SARATSO Review and Training Committees, "Sex Offender Risk Assessment in California," 4).

²⁶⁶ Cal. Penal Code § 290.05; SARATSO Review and Training Committees, "Sex Offender Risk Assessment in California," 4. "When an actuarial instrument is used to assess risk, an offender is scored on a series of items that were most strongly associated with recidivism in the development sample. The offender's total score is cross-referenced with an actuarial table that translates the score into an estimate of risk over a specified timeframe (e.g., 10 years). This estimate represents the percentage of participants in the instrument's development study who received that score and recidivated" (Desmarais and Singh, "Risk Assessment Instruments," 5).

²⁶⁷ SARATSO Review and Training Committees, "Sex Offender Risk Assessment in California," 4.

²⁶⁸ CASOMB, *Annual Report 2018*, 21; SARATSO Review and Training Committees, "Sex Offender Risk Assessment in California," 4. While training is provided by the SARATSO Training Committee, sources do not specify whether certification is conferred by the SARATSO Training Committee or the SARATSO Review Committee.

²⁶⁹ CASOMB, *Annual Report 2019*, 19.

the SARATSO Training Committee. Trained personnel then train other scorers within their organizations.²⁷⁰ Table 14 shows the training responsibilities of the agencies administering the Static-99R.

Table 14. Training Responsibilities of California Agencies Administering the Static-99R

Department	Training Role	Population Assessed by Trained Personnel
Corrections and Rehabilitation	Oversees training	Offenders in prison or on parole
State Hospitals	Oversees training	Offenders in state hospitals
Correction Standards Authority	Develops standards for training	Offenders at the time of pre-sentencing or offenders on probation
Commission on Peace Officer Standards and Training	Develops standards for training	When law enforcement requests assessment of offender

Source: Cal. Penal Code § 290.05 (Deering 2022).

Training for Acute-2007/Stable 2007 and LS/CMI

The SARATSO Training Committee trains treatment providers and certifies them to score the Acute-2007/Stable 2007 and the LS/CMI.²⁷¹ Each treatment program must have a minimum of one certified provider who is trained to administer the Acute-2007/Stable 2007 and the LS/CMI.²⁷² Certified scorers must be recertified on the risk assessment instrument they use every two years.²⁷³ In addition to treatment providers, the SARATSO Training Committee may train and authorize probation officers or parole agents to administer the Acute-2007/Stable 2007.²⁷⁴

10.2.4.3. Classification

Tiers carry varying minimum registration requirements, and offenders are placed into tiers based on consideration of multiple factors, including their offense of conviction, static risk assessment score, and other circumstances, such as an offender's recidivism.²⁷⁵ In fact, offenders' risk assessment scores are only considered if they return as "well above average risk."²⁷⁶ Offenders who score "well above average risk" are placed into Tier III, even if their offense of conviction

²⁷⁰ Cal. Penal Code § 290.05; SARATSO Review and Training Committees, "Sex Offender Risk Assessment in California," 4.

²⁷¹ Cal. Penal Code § 290.09; SARATSO Review Committee, "Training Information."

²⁷² California DOJ, "California Megan's Law Website: FAQ; Risk Assessment FAQ," accessed June 12, 2022, <https://www.meganslaw.ca.gov/FAQ.aspx>. If a certified program is operated by a single provider, then that individual must have training to score the instruments. If a certified program has multiple providers, then the program may choose to have only one staff member who is trained to score the instruments and conduct risk assessments.

²⁷³ CASOMB, "Certification," accessed June 12, 2022, <http://www.casomb.org/index.cfm?pid=1215>; CASOMB, *Annual Report 2019*, 19.

²⁷⁴ Cal. Penal Code § 290.05.

²⁷⁵ CASOMB, "Tiered Registration FAQs," 1.

²⁷⁶ Cal. Penal Code § 290.

would otherwise qualify them for Tier I or Tier II.²⁷⁷ The California Department of Justice classifies these offenders as “Tier III Risk Assessment Level,” while all other Tier III offenders are classified as “Tier III Lifetime.”

In most cases, the CSOR unit makes tier determinations.²⁷⁸ If the offender’s tier cannot be immediately determined, the offender is placed on a tier-to-be-determined status (for up to twenty-four months) until the California Department of Justice makes a tier determination.²⁷⁹ Offenders are required to continue to register while in a tier-to-be-determined status, and they receive credit toward their mandated minimum registration period for any period of time in which they register while in a tier-to-be-determined status.²⁸⁰ Offenders who are in a tier-to-be-determined status are unable to petition for termination of their registration requirement.²⁸¹

10.2.4.4. Judicial Appeals

The California Department of Justice advises registrants who believe they were assigned to the incorrect tier to consult with the public defender’s office or a private attorney; however, no additional information is provided regarding the appeals process.²⁸² Since the state’s new tiering scheme has only recently gone into effect, it is not yet clear whether a formal process for appealing tier designations exists.

10.2.4.5. Relief from Registration or Notification

Under California’s old system, all offenders were required to register for life.²⁸³ Under the new system, California allows Tier I, Tier II, and some Tier III offenders to petition for removal from the registry once they have met their respective minimum registration periods;²⁸⁴ however, offenders

²⁷⁷ California DOJ, California Justice Information Services, Sex Offender Registry, “Frequently Asked Questions,” 4; Cal. Penal Code § 290.

²⁷⁸ CASOMB, “Tiered Registration FAQs;” California DOJ, Office of the Attorney General, “California Sex Offender Registry;” California DOJ, Justice Information Services Division, “Senate Bill 384: Sex Offender Tiering—Operative January 1, 2021,” Information Bulletin No. 18-12-CJIS, January 1, 2019, 1, https://oag.ca.gov/sites/all/files/agweb/pdfs/info_bulletins/18-12-cjis.pdf; California DOJ, “Stage 1 Business Analysis: SB 384; Sex Offender Tiering.” In some cases, the court may order an offender to register. This occurs when the offense of conviction is not one that requires registration, but the court makes a finding that the offense was motivated by sexual compulsion or sexual gratification. In these circumstances, the court, rather than the California Department of Justice, determines the offender’s tier (California DOJ, California Justice Information Services, Sex Offender Registry, “Frequently Asked Questions”).

²⁷⁹ California DOJ, California Justice Information Services, Sex Offender Registry, “Frequently Asked Questions;” California DOJ, Justice Information Services Division, “Senate Bill 384;” Cal. Penal Code § 290.

²⁸⁰ Cal. Penal Code § 290.

²⁸¹ California DOJ, California Justice Information Services, Sex Offender Registry, “Frequently Asked Questions.”

²⁸² *Id.* at 3.

²⁸³ CASOMB, “Tiered Registration FAQs,” 1.

²⁸⁴ California DOJ, California Justice Information Services, Sex Offender Registry, “Frequently Asked Questions,” 1. Offenders who are in Tier III due to scoring “well above average risk” on the static risk assessment tool but would otherwise have been in either Tier I or II, can petition if requirements are met.

must petition the court for relief. Registrants are never automatically removed from the registry; the only way for an offender to be relieved of the duty to register is through the petition process.²⁸⁵

10.2.4.5.1. Relief for Tier I and Tier II Offenders

Beginning July 1, 2021, Tier I and Tier II offenders who have been registered for the mandatory minimum period of time may file a petition with the superior court in the county of their registration for termination of their registration requirements.²⁸⁶ The district attorney may request a hearing if the offender has not met the minimum registration requirement or if community safety would be significantly enhanced by the offender's continued registration.²⁸⁷ If no hearing is requested, the court will grant the petition provided the offender has met the required registration period, has no pending charges that could extend the registration period or change the offender's tier status, and is not in custody or on parole, probation, or supervised release. The court may summarily deny a petition if it determines the offender does not meet the requirements for relief from registration or has not fulfilled the filing and service requirements.²⁸⁸

If a registered sex offender petitions for relief, the district attorney may present evidence regarding whether community safety would be significantly enhanced by the offender's continued registration. The court's determination may be based on affidavits, police reports, or any other evidence submitted by the parties that is reliable, material, and relevant. If the court denies termination, it sets a time period of between one year and five years, after which the offender may file another petition to terminate registration. In determining whether to terminate registration, the court considers several statutorily prescribed factors, including the offender's scores on the Static-99R, Acute-2007/Stable 2007, and LS/CMI instruments.²⁸⁹

10.2.4.5.2. Special Circumstances for Tier II Offenders

Tier II offenders are required to register for twenty years before they may petition for relief from registration. However, they may petition for relief from registration after just ten years if all the following apply: the registerable offense involved no more than one victim aged 14 to 17 years

²⁸⁵ CASOMB, "Tiered Registration FAQs," 2.

²⁸⁶ The minimum registration requirement is ten years for Tier I offenders and twenty years for Tier II offenders (Cal. Penal Code § 290.5).

²⁸⁷ Although Cal. Penal Code § 290.5 states that offenders are allowed to file petitions for "termination" from the sex offender registry "on or after their next birthday after July 1, 2021, following the expiration of the person's mandated minimum registration period," the statute implies that there may be exceptions, as a district attorney may request a hearing "if the petitioner has not fulfilled the requirement described in subdivision (e) of Section 290," which describes the "minimum time period for the completion of the required registration period."

²⁸⁸ Cal. Penal Code § 290.5.

²⁸⁹ *Id.*

old, the offender was under age 21 at the time of the offense, and the registerable offense is not one of several specified severe offenses, such as rape or human trafficking. Additionally, the offender is not eligible if they have been convicted of “a new offense requiring sex offender registration” or convicted of a new offense defined as a “violent felony,” such as murder or rape, under California Penal Code § 667.5.²⁹⁰

10.2.4.5.3. Special Circumstances for Tier III Offenders

Tier III offenders are required to register for life. However, offenders who are Tier III offenders based only on their static risk assessment score may petition for relief after twenty years if they have not been convicted of certain new offenses and the registerable offense is not one of several specified severe offenses. If the court denies the petition, the offender may not file another petition for termination for at least three years.

10.2.4.5.4. Relief from Notification

California allows some offenders to modify their notification requirements by applying for “exclusion” from the public registry website. Offenders will qualify for exclusion if they have been convicted of certain offenses, are not recidivists, and have a “Low” or “Moderate–Low” static risk assessment score.²⁹¹ Qualifying offenders must file an application for exclusion with the California Department of Justice. If the exclusion is granted, the offender will not appear on the public registry website, although they will still be required to register.

10.2.5. Issues

10.2.5.1. Validation Studies

Validation studies sponsored by the SARATSO Review Committee have shown that the use of the Static-99R in California was more successful at predicting sexual re-offense than in most other national or international jurisdictions.²⁹² Some recent research has included the following:

- “The Field Validity of Static-99/R Sex Offender Risk Assessment Tool in California,” a 2014 study by R. Karl Hanson et al. that studied the reliability and validity of the Static-99 and Static-99R in California and found that scores on these instruments were strongly related to future recidivism.²⁹³

²⁹⁰ Cal. Penal Code §§ 290.5, 667.5 (Deering 2022).

²⁹¹ Beginning January 1, 2022, offenders who are granted exclusion must have a risk level of average, below average, or very low as determined by the Coding Rules for the SARATSO risk assessment instrument (Cal. Penal Code § 290.46).

²⁹² CASOMB, *Annual Report 2017*.

²⁹³ *Journal of Threat Assessment and Management* 1, no. 2 (2014): 102–17, <https://doi.org/10.1037/tam0000014>.

- “The Predictive Validity of Static-99R for Sexual Offenders in California: 2016 Update,” a 2016 study by Seung C. Lee et al. that found the “Static-99R works well in discriminating between recidivists and nonrecidivists” and that the “predictive accuracy of Static-99R across different ethnic groups (e.g., White, Black, and Hispanic) is generally all good.”²⁹⁴
- “The Predictive Validity of Static-99R Over 10 Years for Sexual Offenders in California: 2018 Update,” a 2018 update by Seung C. Lee et al. to Hanson et al.’s (2014) research with a 10-year follow-up period. It found that the Static-99R continued to work effectively at distinguishing recidivists from non-recidivists in a 10-year follow-up period.²⁹⁵

10.2.5.2. Costs

In open-source research, FRD identified several costs related to risk assessments:

- In 2010, the SARATSO Review Committee was awarded \$250,000 to adopt and implement evidence-based sex offender risk assessment instruments in California.²⁹⁶
- In 2017, the SARATSO Review Committee stated that its budget, combined with that of CASOMB, was \$200,000 per year. However, the review committee indicated it was “impossible” to fulfill its mission on this budget and stated that it relied on special deposit funds to cover the shortfall.²⁹⁷
- In 2018, CASOMB stated in its annual report that the average annual cost of risk assessments and polygraph exams was \$2,000.²⁹⁸

In response to a public records request filed by FRD, CDCR provided the following information on costs related to risk assessments:²⁹⁹

- **Cost of Scoring Risk Assessment Instruments:** “On an annual basis, the total cost to score the risk assessment screening tool used to determine sex offender community notification and/or registration requirements is approximately \$373,291.”
- **Paying for Risk Assessments:** “California Department of Corrections and Rehabilitation (CDCR) Division of Adult Parole Operations (DAPO) pays the associated costs in administering the risk assessment. The offender does not pay for the risk assessment.”

²⁹⁴ Posted July 13, 2016, 2, https://saratsso.org/pdf/ThePredictiveValidity_of_Static_99R_forSexualOffenders_inCalifornia_2016v1.pdf.

²⁹⁵ Accessed June 12, 2022, https://saratsso.org/pdf/Lee_Hanson_Fullmer_Neeley_Ramos_2018_The_Predictive_Validity_of_S_.pdf.

²⁹⁶ However, this does not appear to be the first use of risk assessment instruments, as the Static-99 was approved for use in California as early as 2007 (SARATSO Review and Training Committees, “Sex Offender Risk Assessment In California,” 1).

²⁹⁷ SARATSO Review Committee, letter about “Annual Report of the SARATSO Committee,” January 25, 2017, 2, https://saratsso.org/docs/2017_SARATSO_Committee_Letter_to_Assembly_Rules_Committee.pdf.

²⁹⁸ CASOMB, *Annual Report 2018*, 20.

²⁹⁹ CDCR DAPO email message to FRD.

- **Costs of Operating Agency That Administers Risk Assessments:** “The cost to the CDCR DAPO to administer the risk assessment screening tool used to determine sex offender community notification and/or registration requirements is \$374,457. This does not include the training or recertification cost.”
- **Methods of Defraying Costs or Collecting Revenue:** “The CDCR DAPO does not currently have a method to collect associated costs related to the sex offender risk assessments.”
- **Costs Associated with Offender Appeals:** “The average cost associated with offenders appealing their assessments is \$215 per offender appeal.”
- **Staff Training Costs:** “The costs of training staff to score and interpret the risk assessment tool is as follows: Initial costs are \$40,194; bi-annually, the recertification course costs are \$3,696.”
- **Risk Assessment Instrument Costs:** “The Static-99R was not created internally or through a vendor. It was created by the [Canadian] government and there is no cost associated with its use.”

10.2.5.3. Backlogs

In response to FRD’s public records request, a representative from CDCR stated that offenders never leave a CDCR institution without first receiving a static risk assessment instrument score, and therefore, there is no backlog of offenders waiting to be scored on the static risk assessment instrument.³⁰⁰ However, researchers were unable to establish whether there are any backlogs of offenders waiting to receive their tier classification, as California’s risk assessment-informed tier system was recently implemented. There is the potential for offenders to face waiting periods as the California Department of Justice has up to twenty-four months to make tiering determinations.³⁰¹

10.3. Massachusetts

10.3.1. Key Findings

- Massachusetts classifies offenders into three tiers for the purpose of determining their notification requirements.

³⁰⁰ Kim Ly, California Department of Corrections and Rehabilitation, email message to FRD, August 11, 2021.

³⁰¹ California DOJ, California Justice Information Services, Sex Offender Registry, “Frequently Asked Questions,” 4.

- Level 1 offenders pose a low risk of re-offense. Information on Level 1 offenders is not released to the public.
 - Level 2 offenders pose a moderate risk of re-offense. Information on Level 2 offenders is available to the public.
 - Level 3 offenders pose high risk of re-offense. Information on Level 3 offenders is actively disseminated to the public.
- Massachusetts’ tier classification relies on a “guided,” or “structured,” clinical judgment risk assessment methodology, rather than risk assessment instrument scores.
 - Massachusetts’ Sex Offender Registry Board (SORB) assesses offenders’ risk using the structured clinical judgment approach and determines offenders’ tier classification.

10.3.2. Introduction

Massachusetts does not use risk assessment instruments to assess offenders’ risk of re-offense. Instead, the Massachusetts’ Sex Offender Registry Board (SORB) uses a guided, or structured, clinical judgment risk assessment methodology to classify offenders into one of three tiers, which determine offenders’ notification requirements.³⁰² Level 1 offenders’ registration information is accessible only to law enforcement and registry personnel while Level 2 and Level 3 offenders’ information is publicly available.

10.3.3. Risk Assessment Uses

In Massachusetts, risk assessment-determined classification levels govern aspects of offenders’ public notification requirements and whether an offender must register or can be removed from the registry.³⁰³ The state uses a guided, or structured, clinical judgment risk assessment

³⁰² A structured professional judgment methodology, what Massachusetts calls “structured clinical judgment,” is defined as such: “Evaluators were given a structured list of risk factors determined in advance. The method of combining the factors into a total score was not specified in advance, and the overall evaluation of risk was left to the professional judgment of the evaluator” (Hanson and Morton-Bourgon, “The Accuracy of Recidivism Risk Assessments,” 4).

³⁰³ Regarding duration requirements, sex offenders are required to register for twenty years unless they meet the requirements for lifetime registration. The requirements are based on factors such as recidivism for a sex offense or determination by a court that the offender is a “sexually violent offender.” However, offenders who have not committed a subsequent offense for ten years and who can show that they are “not likely to pose a danger to the safety of others” are eligible to petition SORB for relief from the duty to register (Mass. Ann. Laws ch. 6, § 178G). Because SORB uses a structured clinical judgment risk assessment methodology, it is not clear whether its consideration of such petitions would constitute a reassessment of the offender. Conversely, frequency of reporting requirements are not determined by risk assessment or tier classification. However, the method of reporting is affected by an offender’s tier: Level 1 offenders must verify their registration annually with SORB by mail, while Level 2 and 3 offenders must verify their registration annually in person with their local police department (SORB, “Sex Offender Registry Requirements,” 2, accessed June 12, 2022, <https://www.mass.gov/doc/sex-offender-registration-brochure-0/download>).

methodology,³⁰⁴ in which SORB assesses offenders through a “qualitative analysis of the individual sex offender’s history and personal circumstances.” The risk assessment consists of consideration of thirty-eight risk factors created by SORB based on statutory criteria. Based on this assessment, SORB classifies offenders into three risk levels: Risk Levels 1, 2, and 3 (with 3 representing the highest level of risk).³⁰⁵

In Massachusetts, Level 1 offenders are not subject to notification, Level 2 offenders have their information made publicly available, and Level 3 offenders’ information is actively disseminated by police. Local police departments have flyers available to the public on all Level 2 and Level 3 offenders and the public can request information about Level 1 offenders in their area. Additionally, SORB provides information on these offenders to the public, if requested.³⁰⁶

Level 1 Offenders:

- Massachusetts has determined that Level 1 offenders’ “risk of re-offense is low, and the degree of dangerousness posed to the public is not such that a public safety interest is served by public availability of registration information.”³⁰⁷ Level 1 offenders are not subject to the public release of their information; only law enforcement and other government agencies receive information on these offenders.³⁰⁸

Level 2 Offenders:

- Massachusetts has determined that Level 2 offenders’ “risk of re-offense is moderate, and the degree of dangerousness posed to the public is such that a public safety interest is served by of registration information.”³⁰⁹ The public has access to information on Level 2 offenders classified after July 12, 2013, on the SORB Public Website. The public can request information on Level 2 offenders classified before this date from police departments or SORB.³¹⁰

³⁰⁴ Risk assessment researchers describe the guided/structured clinical judgment methodology as one in which “the evaluator begins with a finite list of factors thought to be related to risk, drawn from personal experience and/or theory rather than...relevant empirical evidence” (National Criminal Justice Association, *Sex Offender Management Assessment and Planning Initiative*, 135). Unlike in states that use risk assessment instruments—in which an offender is, usually, first assessed and then assigned to a risk-level classification by an official—in Massachusetts, the act of assessment and the act of classification are the same.

³⁰⁵ SORB, “Sex Offender Registry Requirements”; SORC, “Final Report,” 85.

³⁰⁶ *Id.*

³⁰⁷ Mass. Ann. Laws ch. 6, § 178K (LexisNexis 2022).

³⁰⁸ SORB, “Levels of Sex Offenders,” accessed June 12, 2022, <https://www.mass.gov/service-details/levels-of-sex-offenders>.

³⁰⁹ Mass. Gen. Laws Ann. ch. 6, § 178K.

³¹⁰ SORB, “Levels of Sex Offenders.”

Level 3 Offenders:

- Massachusetts has determined that Level 3 offenders’ “risk of re-offense is high, and the degree of dangerousness posed to the public is such that a substantial public safety interest is served by active dissemination” of registration information. Information on Level 3 offenders is also on the SORB Public Website. Police departments must have a community notification plan to actively notify members of the community or organizations, such as schools, that are deemed likely to encounter a Level 3 sex offender. Police must actively disseminate Level 3 offender information at least once per year, or whenever offenders change their home address, work address, or enroll as students. Active notification methods may include announcements via local newspapers or television or posting information in public buildings or on the police department’s website.

10.3.4. Policies and Practices

10.3.4.1. Sex Offender Registry Board

SORB states that its mission is to promote public safety by “educating and informing the public to prevent further victimization” by sex offenders. SORB’s duties include assessing and classifying sex offenders according to their risk of re-offense, determining if offenders have a duty to register, registering offenders, and maintaining the state’s SORB Public Website (which contains information on all Level 3 offenders and Level 2 offenders who were classified after July 12, 2013).³¹¹ SORB is also responsible for the registration of Level 1 offenders, who register with the board by mail (Level 2 and Level 3 offenders register with police in person).³¹² It conducts hearings to reclassify offenders whose risk of re-offense has changed since the board initially determined their classification, as well as hearings to determine whether to continue registration requirements for offenders who file motions with the board requesting to terminate their registration obligation.³¹³ Additionally, SORB provides services to the survivors of sexual violence, such as notifying victims of offenders’ final classification level.³¹⁴

Organizationally, SORB is situated in the Massachusetts Executive Office of Public Safety and Security (EOPSS), which is “responsible for the policy development and budgetary oversight of its

³¹¹ EOPSS, “Sex Offender Registry Board (SORB),” accessed June 12, 2022, <https://www.mass.gov/orgs/sex-offender-registry-board>. Information on Level 1 offenders is not available on Massachusetts’s public sex offender registry website.

³¹² SORB, “Register as a Sex Offender,” accessed June 12, 2022, <https://www.mass.gov/how-to/register-as-a-sex-offender>.

³¹³ 803 Mass. Code Regs. 1.29–1.32.

³¹⁴ SORB, “Governor Baker Appoints Lidia A. Maldonado to Sex Offender Registry Board,” September 17, 2020, <https://www.mass.gov/news/governor-baker-appoints-lidia-a-maldonado-to-sex-offender-registry-board>; 803 Mass. Code Regs. 1.26.

secretariat agencies, independent programs, and boards that aid in crime prevention, homeland security preparedness, and ensuring the safety of residents and visitors in the Commonwealth."³¹⁵

There are seven organizational units within SORB: Board Members, Hearings, Program Services, Classification and Registration, Legal, Finance/Personnel, and Victim Services.³¹⁶

SORB consists of seven members who are appointed by the governor for six-year terms, "with the exception of the chairman."³¹⁷ Board members have expertise in the fields of criminal justice, victim services, and the assessment and treatment of adult and juvenile sex offenders.³¹⁸ Massachusetts law requires that members of SORB, who may participate in risk assessment-based classifications of offenders, possess relevant experience. The board must consist of:³¹⁹

- A chairman with criminal justice experience;
- At least two licensed psychologists or psychiatrists with expertise in sex offender assessment and the forensic mental health system;
- At least one licensed psychologist or psychiatrist with expertise in the assessment of juvenile sex offenders and the forensic mental health system;
- At least two members who have expertise in corrections, parole, or probation; and
- At least one member who has expertise or experience with sexual abuse victims.

In addition to its seven members, SORB may hire the support staff and consultants necessary to carry out its duties.

³¹⁵ EOPSS, "Executive Office of Public Safety and Security (EOPSS)," accessed June 12, 2022, <https://www.mass.gov/orgs/executive-office-of-public-safety-and-security>.

³¹⁶ Massachusetts Office of the Governor, "Budget Summary: FY2020 Enacted; Sex Offender Registry Board: Org. Chart," accessed June 12, 2022, <https://budget.digital.mass.gov/summary/fy20/enacted/public-safety/sex-offender-registry/?tab=org-chart>.

³¹⁷ SORB, "Governor Baker Appoints Lidia A. Maldonado;" Mass. Gen. Laws Ann. ch. 6, § 178K. There is no statutory limit on the length of the chairman's term.

³¹⁸ SORB, "Educating Communities; Raising Awareness," accessed June 12, 2022, <https://www.mass.gov/doc/community-notification-brochure/download>.

³¹⁹ Mass. Gen. Laws Ann. ch. 6, § 178K. The source does not specify which instruments Massachusetts would allow to be used in these circumstances.

Defining Hearing Examiners

Offenders may request a classification hearing; however, in determining which officials are empowered to preside over such hearings and make classification determinations, there appears to be some ambiguity in how Massachusetts uses the term “hearing examiner.” In response to our public records request, SORB’s General Counsel stated, “Classification hearings may be conducted by a board member or a hearing examiner, pursuant to G.L. c. 6 § 178L (2).”³²⁰ G.L. c. 6 § 178L (2) states: “[i]f an offender requests a hearing in accordance with subsection (1), the chair may appoint a member, a panel of three board members or a hearing officer to conduct the hearing, according to the standard rules of adjudicatory procedure or other rules which the board may promulgate, and to determine by a preponderance of evidence such sex offender’s duty to register and final classification.” Therefore, both the statute and SORB’s General Counsel appear to consider hearing officers (or “examiners” per SORB General Counsel), to be distinct from board members. However, the Department Of Criminal Justice Information Services’ *Sex Offender Registry Board, Registration, Classification And Dissemination* guidelines define a hearing examiner as “individual[s] employed by the Sex Offender Registry Board, a single member of the Sex Offender Registry Board, or a hearing panel, or the Chair’s designee to conduct administrative hearings to determine by clear and convincing evidence a sex offender’s duty to register and final classification level.”³²¹ This definition includes SORB members within the category of hearing examiners. It seems that SORB members may serve as hearing examiners for the purpose of sex offender classification, but the qualifications to become a board member and those to become a hearing examiner differ.³²² However, according to a report 2016 report by the State Auditor, “There are currently six board members, two contract-hearing examiners, and the Assistant Director of Hearings to conduct hearings, a reduction of three

³²⁰ Letter from Megan McLaughlin, General Counsel Sex Offender Registry Board, dated August 12, 2021, in response to FRD public records request.

³²¹ Department Of Criminal Justice Information Services, “803 CMR 1.00: Sex Offender Registry Board, Registration, Classification and Dissemination” MA REG # 1308, dated March 11, 2016, 3, <https://www.mass.gov/doc/803-cmr-1-sex-offender-registry-board-registration-classification-and-dissemination/download>.

³²² In response to a public records request by FRD, SORB’s General Counsel stated: “The board is comprised of seven members appointed by the Governor. Requirements for board positions are outlined in G.L. c. 6. § 178K. Classification hearings may be conducted by a board member or a hearing examiner, pursuant to G.L. c. 6 § 178L (2). Current minimum entrance requirements for the position of hearing examiner at the time of hiring are as follows: Applicants must have at least (A) three years of full-time, professional experience, the major duties of which included the adjudication, examination and/or review of claims, benefits and/or taxes; the practice of law; labor relations work; claims investigation or adjustment work; credit management or credit investigation work; or (B) any equivalent combination of the required experience and the substitutions below. Substitutions: I. A Bachelor’s or higher degree with a major in law may be substituted for the required experience.* II. A Bachelor’s or higher degree with a major other than in Law may be substituted for a maximum of two years of the required experience.* *Education toward such a degree will be prorated on the basis of the proportion of the requirements actually completed A board member or hearing examiner conducting a classification hearing is obligated to follow our governing statute, our regulations and the current case law. Training is largely conducted on the job on a rolling basis, with the most training occurring for new board members or hearing examiners. The agency provides regular legal updates to board members and hearing examiners, while the psychologists employed by the board keep board members and hearing examiners advised of developments in the research regarding sex offender recidivism. The agency regulations are updated with regularity to account for new research, and our regulations also allow for consideration of new advances in research that may not yet be incorporated within them.” [See: Letter from Megan McLaughlin, General Counsel Sex Offender Registry Board, dated August 12, 2021, in response to FRD public records request. The qualification for SORB members stipulated in G.L. c. 6. § 178K are: “There shall be, in the executive office of public safety and security, a sex offender registry board which shall consist of seven members who shall be appointed by the governor for terms of six years, with the exception of the chairman, and who shall devote their full time during business hours to their official duties. The board shall include one person with experience and knowledge in the field of criminal justice who shall act as chairman; at least two licensed psychologists or psychiatrists with special expertise in the assessment and evaluation of sex offenders and who have knowledge of the forensic mental health system; at least one licensed psychologist or psychiatrist with special expertise in the assessment and evaluation of sex offenders, including juvenile sex offenders and who has knowledge of the forensic mental health system; at least two persons who have at least five years of training and experience in probation, parole or corrections; and at least one person who has expertise or experience with victims of sexual abuse. Members shall be compensated at a reasonable rate subject to approval of the secretary of administration and finance.” [See: § 178K. Sex Offender Registry Board., ALM GL ch. 6.]

hearing examiners since 2002...Each of the nine hearing officers handles 15–18 [hearings] per month.”³²³ This source appears to consider SORB members to be within the category of “hearing examiners” or “hearing officers,” but distinct from “contract-hearing examiners,” who appear to be a separate group with that category. Furthermore, a 2017 report by the State Auditor states that, “SORB...has seven full-time board members appointed by the Governor. The day-to-day operations of the agency are administered by an executive director, and during our audit period, SORB had 42 other employees, including 3 hearing examiners.”³²⁴ This source appears to refer to “hearing examiners” as distinct from SORB members.

For the purposes of this report, references to “hearing examiners” broadly indicate individuals who conduct classification of Massachusetts sex offenders, regardless of whether they are SORB members or if they are hired separately under a “hearing examiner” title.

10.3.4.2. Classification

The Massachusetts legislature tasked SORB with promulgating guidelines for determining sex offender risk levels (“level of risk for re-offense and degree of dangerousness posed to the public”).³²⁵ Statutory language stipulates that the guidelines should be based on nineteen factors that the legislature considered relevant to the risk of re-offense.³²⁶ In its current form, SORB’s structured clinical judgment methodology for assessing risk considers a total of thirty-eight factors, which are described by SORB as “a blend of up-to-date scientific research and statutory requirements.”³²⁷ According to the *Sex Offender Registry Board, Registration, Classification, and Dissemination* guidelines, “The final classification level is not based on a cumulative analysis of the applicable factors, but rather a qualitative analysis of the individual sex offender’s history and personal circumstances.” Some factors, such as “Hostility towards Women” and “History of Abusing Children,” apply differently to adult male, adult female, and juvenile offenders; for example, “Hostility towards Woman” is only a risk factor for adult males (not adult females or juveniles) and “History of Abusing Children” is only a risk factor for adult females³²⁸ (not adult males or juveniles). Additionally, SORB acknowledges the lower recidivism rate of female offenders and applies this as a mitigating factor to risk determinations of such offenders.³²⁹ SORB’s classification of offenders is based on “documentary evidence,” such as information about employment and criminal history.³³⁰ SORB considers the results of risk assessment instruments as

³²³ Auditor of the Commonwealth, “State Auditor’s Report on Certain Activities of the Sex Offender Registry Board,” NO. 2006-1408-3S, June 5, 2006, 12, <https://www.mass.gov/doc/sex-offender-registry-board/download>

³²⁴ Commonwealth of Massachusetts, Office of the State Auditor, “Sex Offender Registry Board Official Audit Report, Audit No. 2016-1408-3S, September 26, 2017, 3, <https://www.mass.gov/doc/sex-offender-registry-board-sorb/download>.

³²⁵ 803 Mass. Code Regs. 1.33; Mass. Gen. Laws Ann. ch. 6, § 178K.

³²⁶ Mass. Gen. Laws Ann. ch. 6, § 178K.

³²⁷ 803 Mass. Code Regs. 1.33; Massachusetts SORC, “Final Report,” 85.

³²⁸ The source explains, “Female offenders with a history of engaging in any type of non-sexual child abuse have an increased risk of re-offense. The Board shall consider evidence of prior child abuse, including charges, investigations, and convictions.”

³²⁹ 803 Mass. Code Regs. 1.33.

³³⁰ SORB, “Educating Communities; Raising Awareness.”

part of its analyses only if mental health professionals testify as expert witnesses at the respective classification hearings.³³¹

The risk assessment and classification process in Massachusetts is comprised of the following steps:

- **Initiation of Classification and Assembly of Evidence:** No later than two days prior to release, incarcerated sex offenders must register with SORB by providing information such as their name, date of birth, Social Security Number, address of intended residence, address of intended job, and the name and address of any educational institution at which they will be employed or enrolled.³³² Prior to that and upon receipt of offenders' registration information, SORB commences risk assessment-based classification. SORB gathers evidence for consideration on the offender, including documentation of "Victim Impact Statements" and information about the offender's criminal history, offending behaviors, sex offender treatment, compliance while in custody or under supervision, job status, lifestyle, and other information useful in weighing risk and dangerousness.³³³ Offenders have thirty days to provide information to SORB on treatment they have received or are receiving, "current lifestyle," employment, or any other factors they want considered.³³⁴ A SORB staff member completes a classification worksheet based on the compiled information.³³⁵
- **Preliminary Classification and Offender Notification:** For each offender undergoing assessment, one SORB member (preliminary determinations are done by SORB members) reviews a classification worksheet, weighs risk factors, and gives the offender a preliminary classification level: Level 1 (low risk to re-offend), Level 2 (moderate risk to re-offend), or Level 3 (high risk to re-offend).³³⁶ SORB then informs the offender of this preliminary classification level. The offender can either accept the classification level or request a hearing to challenge it.³³⁷ If the offender fails to respond within twenty days, the classification becomes final.³³⁸
- **Preliminary Classification Challenged; SORB Hearing and Final Classification:** In the event that an offender challenges the preliminary classification, a hearing examiner—who may be a SORB member other than the member who made the preliminary classification, a SORB employee, a hearing panel, or a designee of SORB's chair—holds a classification hearing.³³⁹ In determining the classification, the hearing examiner(s) follows the definitions

³³¹ 803 Mass. Code Regs. 1.33.

³³² 803 Mass. Code Regs. 1.05.

³³³ SORB, "Educating Communities; Raising Awareness."

³³⁴ SORB, "Sex Offender Classification Process," accessed June 12, 2022, <https://www.mass.gov/service-details/sex-offender-classification-process>.

³³⁵ 803 Mass. Code Regs. 1.05.

³³⁶ SORB, "Sex Offender Classification Process"; 803 Mass. Code Regs. 1.06.

³³⁷ SORB, "Educating Communities; Raising Awareness."

³³⁸ SORB, "Sex Offender Classification Process."

³³⁹ 803 Mass. Code Regs. 1.03.

and explanations in SORB's risk factor guidelines and is not bound to uphold the board's preliminary classification.³⁴⁰ Hearings are subject to the following rules:

- The offender has the right to receive the documentary evidence gathered by SORB during preliminary determinations.³⁴¹
- The offender has the right to represent themselves at the hearing or have an authorized representative or private counsel, or have counsel appointed if they are found indigent.³⁴²
- All parties have the right to subpoena witnesses and documents, and SORB bears the burden of proof at the hearing.³⁴³
- Parties may introduce written evidence provided by an expert witness, including the expert witness's opinion of the offender's risk of re-offense, only if the witness testifies at the hearing and is qualified as an expert in the area of their testimony.³⁴⁴

The hearing examiner(s) determines the offender's duty to register and risk-level classification at the challenge hearing.³⁴⁵ This classification is based on "the totality of all the relevant evidence introduced at the sex offender's individualized hearing."³⁴⁶ The examiner(s) may decrease, increase, or maintain SORB's recommended preliminary classification.³⁴⁷ The resultant classification is issued at a later date following the challenge hearing, and consists of "a lengthy written decision" establishing the offender's duty to register on the sex offender registry and the current level of risk the offender poses to the public.³⁴⁸

There are two avenues for offenders to change their classification: They can file for a judicial review of SORB's final classifications immediately after the hearing examiner issues the classification decision resulting from the challenge hearing, or they can wait three years and file to have SORB reclassify them.

10.3.4.3. Judicial Appeals

Offenders may appeal their final classification in Massachusetts Superior Court.³⁴⁹ Offenders have thirty days to appeal after receipt of hearing examiner(s)' final determinations of levels of risk.³⁵⁰ Offenders may obtain a court order to prevent public notification while their appeal is pending.³⁵¹

³⁴⁰ 803 Mass. Code Regs. 1.04.

³⁴¹ SORB, "Educating Communities; Raising Awareness;" SORB, "Sex Offender Classification Process."

³⁴² 803 Mass. Code Regs. 1.08.

³⁴³ 803 Mass. Code Regs. 1.14.

³⁴⁴ 803 Mass. Code Regs. 1.18.

³⁴⁵ Massachusetts SORB, "Educating Communities; Raising Awareness."

³⁴⁶ 803 Mass. Code Regs. 1.04.

³⁴⁷ 803 Mass. Code Regs. 1.21.

³⁴⁸ Massachusetts SORB, "Sex Offender Classification Process."

³⁴⁹ SORB, "Educating Communities; Raising Awareness."

³⁵⁰ SORB, "Sex Offender Classification Process;" 803 Mass. Code Regs. 1.24.

³⁵¹ SORB, "Sex Offender Classification Process."

However, offenders maintain their classification level during the appeals process.³⁵² The court has sixty days from the time of the offender's petition for review to reach its final decision.³⁵³ If not satisfied by the superior court's decision, the offender may appeal to an appellate court.³⁵⁴

10.3.4.4. Reclassification

Three years after initial classification, SORB may hold a hearing to reclassify an offender if new information would alter the classification level.³⁵⁵ Offenders who meet qualifications for reclassification may file a motion for the same with SORB.³⁵⁶ SORB hearing examiners determine whether to reduce offenders' classification levels.³⁵⁷ To justify reclassification to a lower level, offenders must provide "clear and convincing" evidence to SORB that their risk of re-offense or danger to the public has diminished; however, SORB may reclassify offenders to higher levels based on new information.³⁵⁸ Furthermore, offenders have the right to judicial review of the reclassification decision.³⁵⁹ Offenders may again re-apply for reclassification three years after their previous classification hearing; however, subsequent motions must be predicated on new information.³⁶⁰ Under certain circumstances, the board may summarily dismiss reclassification requests.³⁶¹

10.3.4.5. Relief from Registration

Some states, including Massachusetts, allow sex offenders to petition to be relieved of the duty to register earlier than they otherwise would be. Eligible sex offenders in Massachusetts may file petitions with SORB to terminate their duty to register at least ten years after "conviction, adjudication, or release from all custody or supervision, whichever is later," and every three years

³⁵² Massachusetts Office of the State Auditor, "Sex Offender Registry Board."

³⁵³ Mass. Ann. Laws ch. 6, § 178M (LexisNexis 2022).

³⁵⁴ Massachusetts Office of the State Auditor, "Sex Offender Registry Board."

³⁵⁵ SORB, "Educating Communities; Raising Awareness."

³⁵⁶ "No sooner than three years after the date of his [or her] final classification pursuant to 803 CMR 1.08, or 803 CMR 1.20, a sex offender who is finally classified as a Level 2 or 3 sex offender may file a written motion with the board to re-examine his or her classification level. Sex offenders who have been convicted of a new sex offense may not seek reclassification sooner than ten years from the date of the last classification decision" (803 Mass. Code Regs. 1.31).

³⁵⁷ 803 Mass. Code Regs. 1.31.

³⁵⁸ SORB, "Sex Offender Registry Requirements." The process by which SORB can reclassify offenders to a higher level is a separate process from the offenders' petition for reclassification. SORB can initiate the former process at any time that it receives new information relevant to an offender's risk of re-offense or degree of dangerousness.

³⁵⁹ However, decisions by SORB to deny a motion for reclassification are not subject to judicial review (803 Mass. Code Regs. 1.31).

³⁶⁰ *Id.*

³⁶¹ "The Board may summarily deny, without a hearing, an offender's motion for reclassification if: 1. the offender is incarcerated; 2. the offender has pending criminal charges; 3. the offender has not remained offense free for more than three continuous years since his or her last classification; or 4. the offender's last classification decision is currently under Judicial Review pursuant to M.G.L. c. 30A, § 14 or on appeal, or on review by the Board as a result of an order by a court of the Commonwealth or a federal court" (803 Mass. Code Regs. 1.31).

thereafter if the petition is denied.³⁶² If the offender meets the criteria for a termination hearing, hearing examiner(s) conduct a hearing and determine whether to terminate the offender's obligation to register as a sex offender.³⁶³

The hearing examiner's determination is based on two factors: The offender must prove "by clear and convincing evidence" that (1) he or she has not committed a sex offense for ten years after his or her adjudication, conviction, or release from custody, and (2) that he or she "is not likely to pose a danger to the safety of others."³⁶⁴ It is not clear from the source material whether the termination hearing constitutes a further risk assessment of the offender: Neither the relevant statute nor the Department of Criminal Justice Information Services' *Sex Offender Registry Board, Registration, Classification, and Dissemination* guidelines state whether hearing examiners assess offenders according to the thirty-eight risk factors used to determine risk classification when they determine whether or not an offender "is not likely to pose a danger to the safety of others."

10.3.5. Issues

10.3.5.1. Special Commission to Reduce the Recidivism of Sex Offenders

The Case of John Burbine

John Burbine, after his first conviction in 1989 in Massachusetts for indecent assault against a child, was originally classified as a Level 2 offender and later reclassified to Level 1. Nevertheless, he and his wife owned an unlicensed daycare center after his conviction. Over time, he was suspected of subsequent abuses, resulting in two investigations by the Department of Children and Families, but no prosecution or conviction followed. In 2012, Mr. Burbine was finally arrested based on an accusation involving a child under the care of Mr. Burbine and his wife, and he was subsequently charged with the rape and sexual abuse of thirteen children. (He died by suicide in jail shortly before his trial was to start.) Those interim investigations of Mr. Burbine did not result in reclassification, because, at the time, SORB only took into consideration new criminal convictions, rather than investigations.³⁶⁵

In response to the Burbine case, the Massachusetts legislature, in the fiscal year 2014 state budget, instituted several reforms to sex offender statutes, including new registration and notification requirements for Level 2 offenders, provisions allowing SORB to consider "non-conviction investigations and information" in classification determinations, and enhanced interagency

³⁶² Mass. Ann. Laws ch. 6, § 178G; 803 Mass. Code Regs. 1.30. An offender who is convicted of any two offenses in the category of "sex offense involving a child," who is convicted of one sexually violent offense," or who is a sexually violent predator, has a lifetime registration requirement, and is not eligible for removal from registration.

³⁶³ 803 Mass. Code Regs. 1.30.

³⁶⁴ Mass. Ann. Laws ch. 6, § 178G.

³⁶⁵ SORC, "Final Report," 5; Brian MacQuarrie, "Sex Offender, Accused in 13 Molestations, Dies," *Boston Globe*, March 8, 2014, <https://www.bostonglobe.com/metro/2014/03/07/john-burbine-wakefield-man-accused-molesting-children-rushed-area-hospital/Fq6gOasDCwQ2mKZ6mb8ZeI/story.html>.

communication. In addition, the legislature formed the Special Commission to Reduce the Recidivism of Sex Offenders. Unlike SORB, which is a standing board with an ongoing set of tasks to perform, the commission was established for a finite period to study a particular set of topics and issue a report addressing an enumerated list of tasks. Specifically, the Massachusetts legislature gave the following tasks to the commission:³⁶⁶

- Study the most reliable protocols for assessing and managing sex offender risk for re-offense;
- Develop authorized risk assessment protocols (including special assessment protocols for juveniles, female offenders, and persons with disabilities); and
- Assess the effectiveness and necessity of state law and SORB's guidelines as they relate to the sex offender registry and offenders' risk of re-offense.

The commission faced challenges in fulfilling its mandates. It was unable fulfill its charge to develop authorized risk assessment protocols, including protocols for special populations. The commission issued its Final Report in 2016, explaining:³⁶⁷

The development of risk assessment protocols is a highly technical project involving large-scale data collection and complex statistical analysis. Only a few members of the Commission had the kind of expertise necessary to undertake such a project. The Commission was not funded by the legislature, and the expert members of the Commission indicated that the development of authorized risk assessment protocols could cost in the millions of dollars. Additionally, for juveniles, there is no good scientific basis for predicting recidivism and models currently in use in other parts of the country do not account for adults with disabilities.

Discussions of the most reliable protocols for assessing and managing sex offender recidivism risk resulted in internal disagreements among members regarding actuarial risk assessment instruments. Consequently, the commission's final report contains two separate and opposing recommendations regarding Massachusetts' use of these instruments.³⁶⁸

³⁶⁶ SORC, "Final Report," 5–6. The commission was comprised of members of the state Senate and House of Representatives; the chairman of the SORB, Commissioner of Probation, Commissioner of Mental Health, Secretary of Public Safety and Security, Secretary of Health and Human Services, or their designees; and six individuals appointed by the governor (four experts in sex offender risk assessment, treatment, and management; one representative of the Massachusetts District Attorneys Association; and one representative of the committee for public counsel services).

³⁶⁷ *Id.*

³⁶⁸ Rather than a unified presentation of findings or recommendations, the final report consists of summaries of presentations heard by the commission (which the commissioners "may or may not concur" with), final statements by the individual commissioners, and a "set of statements or recommendations," which "some, but not all, commissioners have joined" (7).

Some commissioners joined a statement, authored by SORB, supporting the continued use of structured clinical judgments to assess offender risk. In the statement, SORB rejects the notion of changing its risk assessment protocol and defends its “structured clinical judgment and quasi-judicial analysis” risk assessment methodology. SORB argues that actuarial risk assessment instruments are not highly accurate predictors of recidivism, and states that its mandate to notify the public about the presence of sex offenders “does not and should not align perfectly with known recidivism rates.” SORB also estimates that adopting and validating a risk assessment instrument would be, at minimum, an 8-to 10-year process that would not guarantee a meaningful change in the distribution of classification levels.³⁶⁹

Other commissioners joined an opposing statement recommending that SORB change its protocols and begin assessing risk in adult male offenders using actuarial risk assessment instruments. They argued that Massachusetts’ current risk-factor criteria (such as “whether the sex offender served the maximum term of incarceration” or “whether the sex offender was an adult who committed a sex offense on a child”)—created by state legislature in 1999 to serve as the basis of its structured clinical judgment risk assessment methodology—had never been empirically tested and that, therefore, the reliability and predictive validity of the criteria had not been established. Furthermore, they stated that “SORB does not provide rules on how to combine or weigh items in reaching a decision, and that individual ‘factors’ neither have specific quantitative anchors nor provide clear cutoffs for presence or absence of the risk factors.”

Relying on individual evaluators’ subjective determinations, argued these commissioners, meant that structured clinical judgment classification “is vulnerable to distortions of clinical judgment, has difficulties achieving adequate levels of interrater reliability, and has been consistently shown to have predictive validity that is inferior to empirical actuarials.” They argued that while some of the current risk-factor criteria were based on the best research available at the time of enactment, they are not supported as predictors of recidivism by current science. However, the commissioners conceded that a structured clinical judgment methodology is superior to an unstructured clinical judgment methodology of risk assessments.³⁷⁰

³⁶⁹ *Id.* at 6, 85–92.

³⁷⁰ *Id.* at 6, 88–92. The commission cites Hanson and Morton-Bourgon, who define “unstructured judgment” as such: “Neither the risk factors nor the method of combining the risk factors was specified in advance. Risk assessments were based on individual case analysis, case conferences, or professional experience” (“The Accuracy of Recidivism Risk Assessments,” 4).

10.3.5.2. Costs

In fiscal year 2020, SORB had a budget of \$5,398,674 for the “operation of the sex offender registry, including, but not limited to, the costs of maintaining a computerized registry system and the classification of persons subject to the registry.” The budget breakdown is:³⁷¹

- \$4,841,104 for wages and salaries;
- \$119,767 for employee benefits; and
- \$437,803 for operating expenses.

In response to a public records request FRD submitted, SORB’s General Counsel stated:

Our classification, hearings and legal units all work to ensure that offenders are finally classified. The hearings unit is responsible for making final classification determinations, which includes assessing the offender’s current risk of re-offense, degree of danger and the need to disseminate their information publicly on the agency’s website. For FY2020, our classification, hearings and legal unit staff comprised 73% [of] our salary budget. Salaries comprised 87% of the total FY2020 budget. It is not possible to calculate what portion of the remaining agency costs are attributable only to the classification process, though certainly a large portion of these costs go to support the work of the classification, hearings and legal unit staff.³⁷²

The Massachusetts governor appoints seven full-time board members; state law requires that they are to be compensated “at a reasonable rate.”³⁷³ An executive director administers agency operations. A 2017 report by the Massachusetts Auditor General found that SORB had forty-two other employees, which included three hearing examiners.³⁷⁴ In 2018, Massachusetts’ Public Safety Secretary Daniel Bennett told a local media outlet that SORB had approximately fifty employees.³⁷⁵

SORB collects a statutorily required \$75 registration fee from offenders at their initial registration and annually thereafter for the duration of the registration period.³⁷⁶ The line-item language of

³⁷¹ Massachusetts Office of the Governor, “Budget Summary: FY2020 Enacted; Sex Offender Registry Board: Budget Summary,” accessed June 12, 2022, <https://budget.digital.mass.gov/summary/fy20/enacted/public-safety/sex-offender-registry/?tab=budget-summary>.

³⁷² McLaughlin, email message to FRD.

³⁷³ Mass. Gen. Laws Ann. ch. 6, § 178K; Massachusetts Office of the State Auditor, “Sex Offender Registry Board.”

³⁷⁴ Massachusetts Office of the State Auditor, “Sex Offender Registry Board,” 3.

³⁷⁵ Tamara Sacharczyk, “Here’s How Hundreds of Sex Offenders Fell off the Grid in Massachusetts,” *WWLP*, March 28, 2018. <https://www.wwlp.com/news/i-team/heres-how-hundreds-of-sex-offenders-fell-off-the-grid-in-massachusetts>.

³⁷⁶ Mass. Ann. Laws ch. 6, § 178Q (2022).

SORB's fiscal year 2020 budget required the registration fee paid by sex offenders to be retained and expended by SORB.³⁷⁷

10.3.5.3. Backlogs

In response to the same public records request FRD submitted, SORB's General Counsel stated with regard to possible Massachusetts sex offender backlogs, "The board does not currently have a backlog of cases, though there are always cases in process for initial classification, as well as reclassification and termination requests."³⁷⁸ However FRD's research yielded two audit reports (2006 and 2017) documenting previous backlogs in the classification of sex offenders in Massachusetts.³⁷⁹

The 2006 report, issued by the Auditor of the Commonwealth, found a backlog associated with the 1999 amendment to the sex offender registry statute, which required SORB to review data going back to 1981 on approximately nineteen thousand offenders in the Board of Probation Database in order to locate, register, and classify sex offenders. Known as the "look-back requirement," this provision created a backlog by requiring SORB to locate and classify offenders who had committed past crimes. In its response to the auditor, SORB stated that it began registering and classifying offenders in 2001, "effectively making the look-back period more than 20 years." However, during the audit period, SORB eliminated the backlog caused by the requirement, decreasing the number of offenders waiting for the classification process to begin from more than five hundred in February 2005 to zero by November of the same year.³⁸⁰ Researchers could not locate more information detailing how SORB cleared the backlog.

The 2006 report also found delays in the hearing process, stating that, at the time of the audit, there were more than nine hundred cases at the hearing phase; furthermore, the auditor stated that complicated cases could require up to a year to reach final classification. Classification delays

³⁷⁷ The line item language describes SORB's budget as "for the operation of the sex offender registry including, but not limited to, the costs of maintaining a computerized registry system and the classification of persons subject to the registry; provided, that the registration fee paid by convicted sex offenders under section 178Q of chapter 6 of the General Laws shall be retained and expended by the sex offender registry board; and provided further, that not later than December 13, 2019, the sex offender registry shall submit a report to the house and senate committees on ways and means outlining: (i) utilization of data-sharing agreements with state agencies to find addresses of offenders that are out of compliance; (ii) plans to establish new data-sharing agreements with other executive branch agencies; and (iii) detailed plans to improve overall data collection and registry maintenance to enhance public safety" (Massachusetts Office of the Governor, "Budget Summary: FY2020 Enacted; Sex Offender Registry Board: Budget Summary").

³⁷⁸ McLaughlin, email message to FRD.

³⁷⁹ Massachusetts Office of the State Auditor, "Sex Offender Registry Board;" Massachusetts Auditor of the Commonwealth, "State Auditor's Report."

³⁸⁰ Massachusetts Auditor of the Commonwealth, "State Auditor's Report," ii, 10–11.

meant that offenders were living in the community without being subject to community notification. Reported reasons for hearing delays included:³⁸¹

- **A High Number of Requested Hearings:** The auditor reported that approximately 40 percent of offenders requested a hearing, seeking either a lower classification than their preliminary assessment or a delay of the dissemination of their information, as the public cannot be notified until a final classification is assessed.
- **A Complicated Hearing Process:** Court rulings on evidentiary hearings produced a long and complex hearing process, requiring preparation similar to that for a court hearing.
- **Staffing Shortages and High Workload:** In 2006, SORB had nine hearing examiners, three fewer than the twelve examiners it had in 2002. Furthermore, SORB only held approximately fifty hearings in 2002, whereas in 2003, it held approximately three hundred, and in 2005, it held one thousand. At the time of the audit report, each of the nine hearing examiners handled fifteen to eighteen cases per month.
- **A Limited Number of Hearing Locations:** At the time, there was no dedicated location for hearings, and SORB relied on criminal justice agencies to provide hearing locations. Hearings were held at sites throughout the state, but due to lack of funding and unwillingness of potential hearing sites to have sex offenders in their area, locations were limited. At the time of the audit, SORB was in the process of negotiating a dedicated facility near its headquarters.
- **A Need to Appoint Legal Counsel for Offenders:** Thirty-five percent of offenders requesting a hearing needed appointed counsel, which can add four or five months to the hearing process.
- **Other Reasons:** Scheduling of witnesses and lawyers, weather-related concerns, and illness presented additional challenges.

A 2017 report by the Massachusetts Office of the State Auditor found that a backlog of classification hearings resulted from a 2015 decision by the Supreme Judicial Court of Massachusetts,³⁸² which had ruled that SORB must prove its findings by the legal standard of “clear and convincing evidence” rather than the lower “preponderance of evidence” standard that had previously governed. This ruling remanded all classification cases under appeal or pending in the courts back to SORB. During the period of January 2016 to August 2016, 378 cases were remanded to SORB, and the board completed reclassification of 10 percent of those cases. The

³⁸¹ *Id.* at iii, 12.

³⁸² *John Doe 380316 v. SORB*, 473 Mass. 297 (2015).

report noted that the remanding of cases delayed notification to the public about offenders in their community because notification could not take place until an offender had been classified.³⁸³

In the 2017 report, auditors examined the cases of 103 sex offenders released from incarceration during the period of July 2015 to June 2016, to determine whether they received final classifications ten days before release (as required by Section 178E of Chapter 6 of the General Laws). Auditors found that:³⁸⁴

- Sixty-three of these offenders did not have final classifications at least ten days before their earliest possible release date, and thirty-three of these were not classified until after their release, waiting an average of 109 days beyond the time during which they were supposed to receive their classification. SORB responded to the audit, contending that forty-nine of the sixty-three cases were not classified within ten days of release due to operational reasons; for example, SORB argued that some offenders had prison sentences too short to allow SORB to conduct timely classification hearings.³⁸⁵
- SORB had not completed final classification for 936 offenders who were not in compliance with the requirement to maintain current registration. In response, SORB contended that many noncompliant offenders lacked addresses, preventing SORB from initiating the classification process by establishing notice with the offender (as required by law, regulation, and due process requirements). SORB also stated that some of the 936 offenders were deceased, deported, or had moved out of state.

In a 2018 case, the Supreme Judicial Court of Massachusetts stated that there was a “significant backlog” of offender-initiated reclassification and termination hearings. The court stated that SORB did not have “unfettered discretion” to delay these hearings and ordered the board to begin to promptly address the backlog.³⁸⁶

10.3.5.4. Constitutional Challenges

In *Doe v. Attorney General*, a 1997 case before the Supreme Judicial Court of Massachusetts, the plaintiff sex offender, categorized as a Level 1 sex offender, challenged the constitutionality of the registration and notification requirements of the Massachusetts sex offender act, “contend[ing]

³⁸³ Massachusetts Office of the State Auditor, “Sex Offender Registry Board.”

³⁸⁴ *Id.*

³⁸⁵ SORB stated that the process to reach final classification of an offender takes ten to twelve months and may be longer if unexpected delays occur; however, SORB maintained that this timeframe is necessary to afford offenders their due process rights as established by the courts. Due process is guaranteed by the Fifth Amendment to the U.S. Constitution, which states that no person shall “be deprived of life, liberty, or property, without due process of law.” For example, SORB stated that the due process rights established in *Doe 7083 v. SORB*, 472 Mass. 475 (2015) mean that if SORB classifies an offender too early, the offender may seek a continuation of their hearing at a time closer to their release date.

³⁸⁶ *Doe v. SORB*, SJC-12462 (Mass. Aug. 1, 2018).

that the act's automatic classification as a level one sex offender deprive[d] him of procedural due process in violation of the state and federal constitutions."

The Supreme Judicial Court agreed with the plaintiff and held that the act "unconstitutionally denied [him] procedural due process rights guaranteed by the [Massachusetts] state constitution," stipulating that the Act "fails to grant him a hearing and fails to require a finding, if a hearing is held, as to whether [the offender] presents a risk to children and other vulnerable persons for whose protection the legislature adopted the registration and notification requirements of the Act." The court indicated that "the due process test requires a balancing of the individual interest at stake and the risk of an erroneous deprivation of liberty or property...Deprivation of greater individual liberty interests requires greater procedures and stronger countervailing state interests."

The court referred to several cases in other jurisdictions (including the New Jersey Supreme Court case *Doe v. Poritz* and the Third Circuit case *E.B. v. Verniero*—also arising from New Jersey) and found that "the plaintiff [had] a constitutionally protected liberty or property interest" due to a "combination of...circumstances:"

The combination of the following circumstances persuades us that the plaintiff has a liberty and privacy interest protected by the Constitution of the Commonwealth that entitles him to procedural due process: (1) the requirement that he register with local police; (2) the disclosure of accumulated personal information on request; (3) the possible harm to his earning capacity; (4) the harm to his reputation; and, most important, (5) the statutory branding of him as public danger, a sex offender. That statutory classification implicitly announces that, in the eyes of the state, the plaintiff presents a risk of committing a sex offense. We need not pass on the plaintiff's federal procedural due process claim.

The court indicated that the Massachusetts sex offender act did not give sex offenders like the plaintiff the opportunity to challenge registration requirements and held that "the registration requirements and notification provisions of [the law] are unconstitutional as applied to the plaintiff in the absence of a right to a hearing and, if a hearing is requested, to a determination concerning his threat, if any, to minors and others for whose protection the act was passed." The state had argued that "the legislative classification itself" gives all necessary due process, but the court indicated that "there is...nothing inherent in the crime of indecent assault and battery, or in the circumstances (on the record before us) of the plaintiff, that indicates that either a person convicted of that crime, or the plaintiff himself, is a threat to those persons for whose protection the legislature adopted the sex offender act. Nor is the state's interest in registration or notification so great that the risk of error in classifying the plaintiff as a sex offender must be tolerated."

The court compared Massachusetts' law to the New York version of Megan's Law, stating that New York law allowed its registrants to "petition the original sentencing court to be relieved of the duty to register," whereas in Massachusetts, registrants must wait at least fifteen years. The court indicated that "[t]he availability of [the] opportunity to seek relief from the registration requirement [in New York] appears to be provide an offender adequate procedural due process."

A year later, in 1998, in *Doe v. Sex Offender Registry Board*, also before the Supreme Judicial Court of Massachusetts, two lower Superior Court judges had previously ruled that Massachusetts sex offender registrants classified as Level 3 offenders "have constitutionally protected liberty and privacy interests sufficient to require evidentiary hearings before a final classification,...before [the requirements] to register, and [before]...the public [dissemination of their information]." The Supreme Judicial Court of Massachusetts agreed, indicating that the "combin[ation of] circumstances" of offenders' registration duties, active public dissemination of information by the state, and that "[r]egistration represents a 'continuing, intrusive, and humiliating regulation of the person himself' ...create[s] the constitutionally protected interest here."³⁸⁷

The plaintiff offenders had argued "that, because the Legislature did not anticipate the need for evidentiary hearings and failed to provide constitutionally sufficient procedures, the statute is constitutionally defective." The plaintiffs wanted the entire act to be held defective and struck down as unconstitutional. In the alternative, if it is not struck down, plaintiffs requested that "the board...prove the appropriateness of its classification by clear and convincing evidence."³⁸⁸

The Supreme Judicial Court of Massachusetts held that the statute "satisf[ied] constitutional due process, that the evidentiary hearing should be held before the board [and did not require a hearing in the Superior Court]," that the evidentiary standard is "a preponderance of the evidence" [this was later overruled by the same court in 2015 and changed to "clear and convincing evidence"], and that "the board must make specific, written, detailed, and individualized findings to support the appropriateness of each offender's risk classification." The role of the Massachusetts Superior Court would be "to review...[the] decision of the board under a restricted standard."³⁸⁹

Seven years later, in 2015's *Doe v. Sex Offender Registry Board*, the Supreme Judicial Court of Massachusetts partially overruled its previous 1998 decision in *Doe v. Sex Offender Registry Bd.* regarding the standard of proof for registrant classification evidentiary hearings. Whereas the previous standard required the Massachusetts Sex Offender Registry Board to "establish a

³⁸⁷ *Doe v. Pataki*, 3 F. Supp. 2d 456 (S.D.N.Y. 1998).

³⁸⁸ *Id.*

³⁸⁹ *Id.*

[registrant's] risk of re-offense by a preponderance of the evidence," the new standard required the board to prove an offender's risk of re-offense by clear and convincing evidence.³⁹⁰

The 2015 court agreed with the plaintiff sex offender, noting that "[i]n light of amendments to the sex offender registry law and other developments since our decision in that case,...the preponderance standard no longer adequately protects [the due process rights of plaintiff and other sex offenders]."³⁹¹ "The risk classifications that SORB must make now have consequences for those who are classified that are far greater than was the case when we decided *Doe No. 972*.³⁹² The preponderance standard no longer adequately protects against the possibility that those consequences might be visited upon individuals who do not pose the requisite degree of risk and dangerousness."³⁹³

The court noted that "[a]lthough a preponderance standard is generally applied in civil cases...the clear and convincing standard is applied when 'particularly important individual interests or rights are at stake'...it is a greater burden than proof by a preponderance of the evidence, but less than the proof beyond a reasonable doubt required in criminal cases. The evidence must be sufficient to convey a 'high degree of probability' that the contested proposition is true....Otherwise put, requiring proof by clear and convincing evidence reflects a judicial determination that '[t]he individual should not be asked to share equally with society the risk of error.'" [Citations omitted.]

³⁹⁰ *Id.*

³⁹¹ Previously, in "*Doe No. 972*" (*Doe v. Sex Offender Registry Bd.* [1998]), the Supreme Judicial Court had indicated that the stigma accompanying public notification "was not substantial enough to require a heightened standard of proof. The risk of an erroneous classification was thought to be minimal because both the offender and SORB had the opportunity to present evidence and examine and cross-examine witnesses at a classification hearing, because SORB was required to make 'particularized, specific, and detailed findings' based on a set of statutory factors, and because the offender could appeal SORB's decision in court." The court weighed these factors against the state's interest in protecting the public from possible offender recidivism and determined that "the 'possible injury to sex offenders from being erroneously overclassified' was 'nearly equal' to 'any harm to the state from [*sic*] an erroneous underclassification.'" The same court, in the present case, then noted that the state's sex offender registry law had been amended since *Doe No. 972*, but the changes added burdens to registrants "more often...than [it] provided them with additional protections. [For example,] more offenses are now subject to a registration requirement. ...Furthermore, reporting requirements, and the penalties for failing to meet those requirements are harsher, information about registered offenders is being disseminated more broadly, including on the internet...[and] there is reason to question whether SORB's risk classification guidelines continue to reflect accurately current scholarship regarding statutory factors that concern risk assessment."

³⁹² *Doe v. Sex Offender Registry Bd.* (1998).

³⁹³ *Doe v. Pataki.*

10.4. Minnesota

10.4.1. Key Findings

- Minnesota classifies offenders into one of three tiers for the purpose of determining their notification requirements.³⁹⁴ Additionally, for some offenders, risk-level classification plays a role in determining how frequently they report to verify their information.³⁹⁵ The risk-level categories are:
 - Level 1 offenders have a low risk of re-offense and are subject to limited disclosure of offender information to the community;
 - Level 2 offenders have a moderate risk of re-offense and are subject to limited partial disclosure of offender information to the community; and
 - Level 3 offenders pose a high risk of re-offense and are subject to full disclosure of offender information to the community.³⁹⁶
- An offender’s tier classification is informed by his or her score on a risk assessment instrument. Offenders are scored on one or more of the following instruments: Minnesota Sex Offender Screening Tool (MnSOST), Female Sex Offender Screening Tool (F-SOST), Level of Service Inventory-Revised (LSI-R), or Level of Service/Case Management Inventory (LS/CMI).³⁹⁷
- The Minnesota DOC’s Risk Assessment/Community Notification (RA/CN) unit scores offenders on the risk assessment instruments.³⁹⁸
- The Minnesota DOC’s End of Confinement Review Committees (ECRCs), which are standing committees operated by the DOC within each correctional facility, assign offenders to a risk-level classification.³⁹⁹

10.4.2. Introduction

In Minnesota, risk-level classifications are used to determine offenders’ community notification requirements, and, for some offenders, their frequency requirements.⁴⁰⁰ Minnesota does not use risk-level classifications to determine sex offender registration requirements for duration of

³⁹⁴ Minnesota DOC, Policy No. 205.220.

³⁹⁵ Minn. Stat. § 243.166 (2022).

³⁹⁶ Minn. Stat. § 244.052 (2022); Minnesota DOC, “Fact Sheet: Community Notification Act,” January 2020, https://mn.gov/doc/assets/Community%20Notification%20Act_2020_tcm1089-301295.pdf; Minnesota DOC, Policy No. 205.220.

³⁹⁷ Grant Duwe and Michael Rocque, “Predicting Sex Offense Recidivism: The Perils of Professional Judgment and the Home-Field Advantage,” February 2018, 6–7, https://mn.gov/doc/assets/Predicting%20Sex%20Offense%20Recidivism_The%20Perils%20of%20Professional%20Judgment%20and%20the%20Home-Field%20Advantage_tcm1089-325810.pdf; Minnesota DOC, Policy No. 205.220.

³⁹⁸ Minnesota DOC, Policy No. 205.220.

³⁹⁹ Duwe and Rocque, “Predicting Sex Offense Recidivism,” 7; Minnesota DOC, Policy No. 205.220.

⁴⁰⁰ Minn. Stat. § 243.166; Minnesota DOC, Policy No. 205.220.

registration. The DOC's RA/CN unit administers the approved risk assessment instruments, which are the MnSOST, F-SOST, LSI-R, and LS/CMI.⁴⁰¹

Risk-level classification is ultimately determined by the DOC's ECRCs. After they receive an offender's risk assessment score,⁴⁰² ECRCs determine whether offenders should be categorized as Level 1 (low risk), Level 2 (intermediate risk), or Level 3 (high risk).⁴⁰³

10.4.3. Risk Assessment Uses

In Minnesota, sex offenders are classified into one of three risk-level classifications based on their risk assessment score. These risk-level classifications determine the amount of community notification to which the offender is subject. The three classifications are as follows:⁴⁰⁴

- Risk Level 1 for offenders whose risk assessment score indicates a low risk of re-offense;
- Risk Level 2 for offenders whose risk assessment score indicates a moderate risk of re-offense; and
- Risk Level 3 for offenders whose risk assessment score indicates a high risk of re-offense. Level 3 offenders may be subject to residency restrictions, which restrict where a sex offender may live, often prohibiting them from residing within a certain distance from schools or other places children may congregate.

10.4.3.1. Registration Requirements

In Minnesota, the duration of registration requirements is determined by factors such as conviction or civil commitment conviction rather than offenders' scores on risk assessment instruments.⁴⁰⁵ For some offenders, the requirement for frequency of reporting is based on risk assessment: Offenders who are "assigned to Risk Level III and who are no longer under correctional supervision for a registration offense or a failure to register offense" must verify their address twice per year, while most other offenders verify their address once per year.⁴⁰⁶

⁴⁰¹ Duwe and Rocque, "Predicting Sex Offense Recidivism," 6–7; Minnesota DOC, Policy No. 205.220.

⁴⁰² Minnesota DOC, Policy No. 205.220.

⁴⁰³ Minn. Stat. § 244.052.

⁴⁰⁴ *Id.*

⁴⁰⁵ DOJ, SMART, "SORNA Substantial Implementation Review: State of Minnesota," September 2016, 7, <https://smart.ojp.gov/sorna-minnesota>.

⁴⁰⁶ Minn. Stat. § 243.166. While most offenders must report annually, offenders who have been committed by a court as a sexually dangerous or sexual psychopathic personality have the same reporting requirement as Level III offenders—twice per year.

10.4.3.2. Notification Requirements

In Minnesota, the level of notification to which an offender is subject is tied to risk assessment scores.

10.4.3.2.1. Level 1 Offenders

Law enforcement agencies maintain information on offenders within the agency.⁴⁰⁷ Information on Level 1 offenders is not readily available to the public, and law enforcement only discloses it to select community members (see Table 15).⁴⁰⁸

Table 15. Notification Requirements for Level 1 Offenders in Minnesota

Entity Making Notification	Community Members Receiving Notification	Criteria or Qualifications for Notification (if applicable)
Local Law Enforcement	Other law enforcement agencies	N/A
Local Law Enforcement	Victims or witnesses of the offense	Law enforcement must notify victims if they request it.
Local Law Enforcement	Adults in offender's household	N/A

Source: Minn. Stat. § 244.052 (2022).

10.4.3.2.2. Level 2 Offenders

Information on Level 2 offenders is generally not public. Local law enforcement only discloses to the community members listed in Table 16.⁴⁰⁹

⁴⁰⁷ Minn. Stat. § 244.052.

⁴⁰⁸ Jeffrey Diebel, "Minnesota's Predatory Offender Community Notification Law," Minnesota House of Representatives, Research Department, 1–2, last reviewed September 2014, <https://www.house.leg.state.mn.us/hrd/pubs/ss/ssmpocnl.pdf>.

⁴⁰⁹ *Id.* at 2.

Table 16. Notification Requirements for Level 2 Offenders in Minnesota

Entity Making Notification	Community Members Receiving Notification	Criteria or Qualifications for Notification (if applicable)
Local Law Enforcement	Other law enforcement agencies	N/A
Local Law Enforcement	Victims or witnesses of the offense	Law enforcement must notify victims if they request it.
Local Law Enforcement	Adults in offender’s household	N/A
Local Law Enforcement	Agencies and groups serving community members likely to be victimized by offender or that offender is likely to encounter	N/A
Local Law Enforcement	Individuals likely to be victimized by offender, based on preferences or pattern of offending	N/A

Source: Jeffrey Diebel, “Minnesota’s Predatory Offender Community Notification Law,” Minnesota House of Representatives, Research Department, 2, last reviewed September 2014, <https://www.house.leg.state.mn.us/hrd/pubs/ss/ssmpocnl.pdf>; Minn. Stat. § 244.052.

10.4.3.2.3. Level 3 Offenders

Local law enforcement typically notifies the community members (see table 17) about Level 3 offenders through community meetings; however, they may disseminate information about Level 3 offenders to the public through media outlets or “other distribution methods.”⁴¹⁰ Additionally, Minnesota discloses information on Level 3 offenders—but not Level 1 or Level 2 offenders⁴¹¹—on its public sex offender registry website.⁴¹²

⁴¹⁰ Minnesota DOC, “Fact Sheet: Community Notification Act,” 2.

⁴¹¹ Level 1 and 2 offenders are on the sex offender registry, but not the publicly available website.

⁴¹² DOJ, SMART, “SORNA Substantial Implementation Review: State of Minnesota,” 8.

Table 17. Notification Requirements for Level 3 Offenders in Minnesota

Entity Making Notification	Community Members Receiving Notification	Criteria or Qualifications for Notification (if applicable)
Local Law Enforcement	Other law enforcement agencies	N/A
Local Law Enforcement	Victims or witnesses of the offense	Law enforcement must notify victims if they request it.
Local Law Enforcement	Adults in offender’s household	N/A
Local Law Enforcement	Agencies and groups serving community members likely to be victimized by offender or that offender is likely to encounter	N/A
Local Law Enforcement	Individuals likely to be victimized by offender, based on preferences or pattern of offending	N/A
Local Law Enforcement	Parents of children served by an agency or group that qualifies for notification	Law enforcement must notify parents if an agency or group primarily serves children, and offender is participating in agency or group in manner that would allow or require them to interact with the children.
Local Law Enforcement	Other members of community whom offender is likely to encounter	Law enforcement must determine if disclosure would compromise protection of victim’s identity.
Minnesota Public Sex Offender Registry Website	General public	N/A

Source: Jeffrey Diebel, “Sex Offenders and Predatory Offenders: Minnesota Criminal and Civil Regulatory Laws,” Minnesota House of Representatives, Research Department, 2, updated January 2012, <https://www.house.leg.state.mn.us/hrd/pubs/sexofdr.pdf>; Minn. Stat. § 244.052.

10.4.4. Policies and Practices

10.4.4.1. Risk Assessment Agencies

10.4.4.1.1. Minnesota Department of Corrections Risk Assessment/Community Notification Unit

Prior to a convicted sex offender’s release from a prison facility, the staff of the Minnesota DOC’s RA/CN unit assesses the offender for risk of re-offense using one of several screening tools: the MnSOST, F-SOST, LSI-R, or LS/CMI.⁴¹³

In addition to scoring risk assessment instruments, the RA/CN unit performs several other tasks related to sex offenders, including administering Minnesota’s public sex offender website; screening offenders to determine which individuals are required to register as sex offenders under

⁴¹³ Duwe and Rocque, “Predicting Sex Offense Recidivism,” 6–7; Minnesota DOC, Policy No. 205.220.

Minnesota Statute §§ 243.166 and 243.167; determining whether an offender qualifies to be reassessed; and maintaining documentation related to sex offenders, such as audio recordings of ECRC meetings.⁴¹⁴

10.4.4.1.2. Minnesota Department of Corrections End of Confinement Review Committees

Each correctional facility in Minnesota has an End of Confinement Review Committee (ECRC). The ECRC is led by a chief executive officer, a head of the confinement facility, or a designee of the head of a facility. The CEO/facility head, or his or her designee, chairs the committee and uses facility staff to administer the committee, gather needed information, and prepare ECRC risk assessment reports.⁴¹⁵ Each ECRC also includes a caseworker with experience supervising sex offenders, a law enforcement officer, a treatment professional trained in the assessment of sex offenders, and a victim services representative. Except for the facility head, committee members are appointed to two-year terms by the Minnesota Commissioner of Corrections.⁴¹⁶

10.4.4.2. Risk Assessment Instruments

10.4.4.2.1. Minnesota Sex Offender Screening Tool

Minnesota's main actuarial risk assessment instrument used to score male offenders⁴¹⁷ is the MnSOST, which has undergone several revisions since the state first implemented the instrument in 1997.⁴¹⁸ The MnSOST was developed for the Minnesota Department of Corrections in response to the department's 1991 special report that called for improved processes for identifying predatory and violent sex offenders.⁴¹⁹ Currently, the DOC scores most male offenders on the most recent version of the instrument, MnSOST-4.⁴²⁰ Evaluators score the instrument's sixteen items, which are based on both static and dynamic factors.⁴²¹ Evaluators then enter the scoring data for each item into the MnSOST-4 computer program, which calculates offenders'

⁴¹⁴ Minnesota DOC, Policy No. 205.220.

⁴¹⁵ An ECRC risk assessment report "specifies the community notification risk level assigned by the ECRC and lists the reasons underlying the committee's community notification risk level decision" (Minnesota DOC, Policy No. 205.220, 3).

⁴¹⁶ Minn. Stat. § 244.052. The source does not state the term length for the facility head.

⁴¹⁷ Much of the open-source information available on sex offender risk assessments focuses on the assessment of male offenders. FRD specifies when a particular instrument is used only on male offenders and includes information on the risk assessment of female offenders when available.

⁴¹⁸ Duwe and Rocque, "Predicting Sex Offense Recidivism," 7.

⁴¹⁹ Douglas L. Epperson et al., "Minnesota Sex Offender Screening Tool—Revised (MnSOST-R) Technical Paper: Development, Validation, and Recommended Risk Level Cut Scores," December 2003, 7, <https://rsoresearch.files.wordpress.com/2012/01/ia-state-study.pdf>.

⁴²⁰ Minnesota DOC, Policy No. 205.220.

⁴²¹ Minnesota Office of Administrative Hearings, "In the Matter of the Risk Level Determination of Larry K. Hinton," OAH 60-1100-36684, accessed June 17, 2022, https://mn.gov/oah/assets/1100-36684-larry-hinton-ecrc-risk-level-determination-summary-disposition-order_tcm19-434844.pdf; Epperson et al., "Minnesota Sex Offender Screening Tool—Revised," 36–38.

presumptive risk level.⁴²² Grant Duwe, a researcher who studied the MnSOST-4, reported that he found that it has good reliability and it outperformed other risk assessment instruments—such as the Static-99, as well as two previous versions of the MnSOST, the MnSOST-R and MnSOST-3—at predicting recidivism for sexual offenses.⁴²³

10.4.4.2.2. Female Sex Offender Screening Tool, Level of Service Inventory-Revised, and Level of Service/Case Management Inventory

The Minnesota DOC uses three additional risk assessment instruments to score offenders for whom the MnSOST would not be the appropriate instrument. Evaluators score female sex offenders using the F-SOST. Additionally, the LSI-R and LS/CMI are used to score both male and female offenders for whom the MnSOST or F-SOST are not recommended.⁴²⁴

10.4.4.2.3. Instrument Scoring Procedures

Staff at the Minnesota DOC's RA/CN unit administer a risk assessment instrument (the MnSOST, F-SOST, LSI-R, or LS/CMI) to an offender before his or her release.⁴²⁵

10.4.4.3. Classification

After the RA/CN unit staff administers and scores an offender's MnSOST, F-SOST, LSI-R, or LS/CMI, an ECRC assigns the offender to one of three risk levels (Level 1, Level 2, or Level 3) based on the score. These risk-level classifications determine the amount of community notification to which the offender is subject.⁴²⁶ ECRCs at facilities of release are statutorily required to convene and commence the process of risk-level classification at least ninety days prior to an offender's scheduled release. In practice, Minnesota DOC policy for most sex offender cases is to commence the risk-level classification process five to six months prior to an offender's release. There are alternative ECRC schedules for offenders who have life sentences, have been granted supervised release, or have confinements in their current facility of less than ninety days.⁴²⁷

⁴²² An offender's presumptive risk level informs the ECRC's assignment of community notification risk-level classification (Minnesota DOC, Policy No. 205.220; Minnesota Office of Administrative Hearings, "In the Matter of the Risk Level Determination of Larry K. Hinton").

⁴²³ Grant Duwe, "The Minnesota Sex Offender Screening Tool-4 (MnSOST-4)" (slide presentation, April 2017), 16, <http://www.crj.org/assets/2017/09/MN-Sex-Offender-Screener-Duwe.pdf>; Grant Duwe, "Better Practices in the Development and Validation of Recidivism Risk Assessments: The Minnesota Sex Offender Screening Tool-4," *Criminal Justice Policy Review* 30, no. 4 (2017): 538–64, <https://doi.org/10.1177/0887403417718608>.

⁴²⁴ Minnesota DOC, Policy No. 205.220. The source does not specify the circumstances under which the MnSOST or F-SOST would not be recommended for male or female offenders, respectively.

⁴²⁵ Duwe and Rocque, "Predicting Sex Offense Recidivism," 7.

⁴²⁶ Minn. Stat. § 244.052.

⁴²⁷ Minnesota DOC, Policy No. 205.220.

In preparation for an ECRC meeting to determine an offender's risk-level classification, an ECRC caseworker⁴²⁸ creates a packet of relevant information on an offender, which includes the offender's score on a risk assessment instrument and a Risk Assessment Recommendation⁴²⁹—a report prepared by a treatment professional recommending the registrant's community notification risk level. After receiving the information packet from the ECRC caseworker, ECRC committee members convene a meeting three to four months prior to the offender's release to determine the offender's risk-level classification. In this meeting, offenders have a right to appear, to present information, and to privately retain attorneys to appear at the meeting and speak on their behalf. The ECRC then makes a risk-level classification at the meeting based on "the totality of circumstances and articulable facts" and provides the rationale behind the determination. Offenders are given copies of this document and have access to data collected that underlie their risk-level classification (unless that data is confidential court services and/or corrections data).⁴³⁰

Minnesota law and DOC policy provide guidance to ECRCs on how to determine an offender's risk-level classification. The statutory guidance is based on a "risk assessment scale" that "assigns weights to the various risk factors" stipulated in the statute and "specifies the risk level to which offenders with various risk assessment scores shall be assigned." Minnesota Statute § 244.052 tasked the Minnesota DOC with developing the risk assessment scale and stipulated that it should consider, at a minimum, the following risk factors in determining "the seriousness of the offense should the offender re-offend:"

- Offenders' prior criminal history;
- Offenders' characteristics, such as substance abuse history and response to treatment;
- Physical conditions that mitigate the risk of recidivism, such as "advanced age or a debilitating illness or physical condition";
- Offenders' access to community support; and
- Indications or evidence that the offender intends to recidivate if released into the community."

⁴²⁸ The source does not state whether the caseworker is an ECRC committee member or another individual employed as staff by the ECRC or correctional facility.

⁴²⁹ This phrasing is ambiguous, as there is a treatment professional serving on each ECRC, and it is not clear if the Risk Assessment Recommendation is prepared by this individual, a treatment professional at the RA/CN unit, or by a different treatment professional. Additionally, the Minnesota DOC policy does not specify whether the treatment professional uses any criteria other than the instrument score to arrive at their recommendation.

⁴³⁰ Minn. Stat. § 244.052.

This risk assessment scale, when applied to individual offenders, is constructed based on an offender's score on a risk assessment instrument (the MnSOST, F-SOST, LSI-R or LS/CMI) coupled with the ECRC's determination of the presence or absence of "special concerns" or "mitigating circumstances" that would warrant a higher or lower risk-level classification. Minnesota DOC policy delineates the mitigating circumstances and special concerns that ECRCs may consider.⁴³¹ Evaluation of special concerns and mitigating circumstances allow ECRCs to override risk levels indicated by risk assessment instruments when assigning risk levels to offenders.⁴³²

10.4.4.4. Judicial Appeals

Individuals assigned by an ECRC to Risk Level 2 or Risk Level 3⁴³³ may initiate an administrative review of their assigned risk level by notifying the ECRC of their wish to do so within fourteen days of the initial risk-level classification.⁴³⁴ The request for review is made to the ECRC chair, and the hearing is conducted by an administrative law judge. Unless the judge orders otherwise, the review hearing does not delay the notification process. The ECRC's risk-level classification is defended by the Minnesota Attorney General or a designee. The offender has the right to be present and be represented by counsel at the hearing, to present evidence, and to call and cross-examine witnesses. The judge issues a written decision after the hearing to maintain or alter the ECRC's determination. The offender may appeal this decision through the courts.⁴³⁵

10.4.4.5. Reassessment and Reclassification

Under certain circumstances, the ECRC may reassess an offender's risk-level classification. The reassessment process, in which the offender's risk-level classification is reassessed by the ECRC, is different than the administrative review process (discussed in the previous section), in which the ECRC's risk-level classification is reviewed and either upheld or altered by a judge.

Both criminal justice officials and offenders may request reassessments; however, these parties are allowed to make such requests at different times and under different circumstances. The timing and criteria for reassessment are outlined in Table 18.

⁴³¹ Minnesota DOC, Policy No. 205.220. The policy itemizes eight special concerns that may be considered if the offender was scored on the MnSOST, fourteen special concerns if the offender was scored on the F-SOST, and ten special concerns if the offender was scored on the LSI-R or LS/CMI. Many of the concerns are related to the offender's criminal history, psychological or mental state, and post-release plans. There are also seven mitigating circumstances, such as satisfactory treatment response and incapacitating illness, which may be applied to all offenders.

⁴³² Duwe and Rocque, "Predicting Sex Offense Recidivism."

⁴³³ Level 1 offenders, who are already at the lowest risk-level classification, would presumably not wish to have their risk-level classification altered.

⁴³⁴ Minnesota DOC, Policy No. 205.220.

⁴³⁵ Minn. Stat. § 244.052; Jeffrey Diebel, "Sex Offenders and Predatory Offenders: Minnesota Criminal and Civil Regulatory Laws," Minnesota House of Representatives, Research Department, 19, updated January 2012, <https://www.house.leg.state.mn.us/hrd/pubs/sexofdr.pdf>.

Table 18. Requests for Reassessment in Minnesota

Party Bringing Request	Timing of Request	Criteria for Reassessment
Law enforcement agency that brought charge resulting in offender's incarceration	Within 30 days of receiving offender's risk-level classification	<ul style="list-style-type: none"> ▪ Circumstances that arose after initial assessment. ▪ ECRC did not consider information known to law enforcement in risk-level classification.
Offender's corrections agent, "in consultation with the chief law enforcement officer in... area where...offender resides or intends to reside"	Any time there is evidence that offender's risk level should be reassessed	<p>Evidence for reassessment includes, but is not limited to:</p> <ul style="list-style-type: none"> ▪ "Treatment failures or completions;" ▪ "Exceptional crime-free community adjustment or lack of appropriate adjustment;" ▪ "Substantial community need to know more about...offender or mitigating circumstances that would narrow the proposed scope of notification;" or ▪ "Other practical situations articulated and based in evidence of...offender's behavior while under supervision."
Offender	Three years after initial risk-level classification and once every two years following a reassessment or denial of reassessment	<p>To be considered for reassessment, offender must:</p> <ul style="list-style-type: none"> ▪ Be fully compliant with conditions of supervised release; ▪ Have completed required post-release treatment program; ▪ Be fully compliant with all registration requirements; ▪ Not be incarcerated; and ▪ Not have been convicted of any "felony, gross misdemeanor, or misdemeanor offenses" following original risk-level classification.

Source: Minn. Stat. § 244.052; Minnesota DOC, Policy No. 205.220, "Predatory Offender: Registration, Notification, Public Registrant Website, and Risk Level Assessment," April 28, 2020, <https://policy.doc.mn.gov/DocPolicy/>.

All reassessment requests (by offenders, law enforcement, or corrections agents) are made to the RA/CN unit for review. If an offender meets the criteria for the reassessment, the RA/CN unit conducts an interview with the offender and scores three instruments (if they are determined to be appropriate for the offender): Acute-2007, Stable 2007, and Static-99R. After the offender has been scored, an ECRC at the DOC central office convenes to consider reassessment. In determining the offender's reassessment, the ECRC may consider the following factors:

- Risk assessment instrument scores;
- Compliance with registration, supervision, and treatment;
- High-risk behavior or statements indicating intent to re-offend by the offender;

- The amount of “at-risk time” the offender has been in the community; and
- Illness or physical condition that would lower the risk to re-offend.⁴³⁶

If the ECRC reassigns an offender to a higher risk level, the offender has the right to an administrative review of the committee’s decision by a judge.⁴³⁷

10.4.5. Issues

10.4.5.1. Costs

The Minnesota Department of Corrections fiscal year 2022 budget lists \$2,388,000 for risk assessment and community notification.⁴³⁸

10.4.5.2. Backlogs

In response to a public records request submitted by FRD, the director of the Minnesota DOC RA/CN unit stated, “We are funded to do our assessments so there is no backlog in assessments for those subject to registration who are released from a state facility in Minnesota. We have adjusted our meeting system with video conferencing but have kept up the assessment schedule without creating any backlog.”⁴³⁹

10.4.5.3. Constitutional Challenges

In a 2010 case before the Court of Appeals of Minnesota, *In re Risk Level Determination of F.C.M.*, petitioner “F.C.M.” brought a challenge to his Minnesota Level III designation, first before the administrative law judge, and now on appeal before the Court of Appeals of Minnesota. F.C.M. argued that “because he denies ever having committed a sexual offense,⁴⁴⁰ the Minnesota Department of Corrections End of Confinement Review Committee (ECRC) erred in using the Minnesota Sex Offender Screening Tool-Revised (MnSOST-R);” Minnesota alternatively assesses offenders without “sex-related convictions” on the LSI-R. Petitioner F.C.M. contends that had he been assessed under the LSI-R, his risk level would have been lower. The procedural question is therefore whether the ECRC appropriately determined the correct risk assessment instrument to use on F.C.M. The administrative law judge had affirmed the ECRC’s Level III designation of F.C.M.,

⁴³⁶ Minnesota DOC, Policy No. 205.220.

⁴³⁷ Minn. Stat. § 244.052.

⁴³⁸ Minnesota DOC, “Minnesota DOC Budget—Fiscal Year 2022,” accessed June 13, 3033, <https://mn.gov/doc/about/budget/>.

⁴³⁹ Mark Bliven, Director, Risk Assessment/Community Notification, Minnesota DOC, email message to FRD, March 8, 2021.

⁴⁴⁰ However, F.C.M. “was convicted of an offense that caused him to be the subject of notification,” which distinguished him from another case where a court had held “the predatory-offender-notification act [was] unconstitutional as applied to [that offender].”

noting that “the MnSOST-R was the appropriate tool for evaluating F.C.M., [and] that even without the MnSOST-R, application of statutory risk factors to F.C.M.’s history supports a risk level three [finding].”

The Court of Appeals indicated that “consideration of allegations” was appropriate procedure in risk determinations when the offender had an opportunity to be heard by the ECRC and administrative law judge. The Court of Appeals reviewed the procedural lawfulness of the judge’s decision and found that the procedures used by the ECRC were lawful, reasoning that, though F.C.M. was “never proved to have committed a sex offense,” the administrative law judge found his “version of the events...not credible, leaving the allegations in the complaint essentially uncontested.” The Court of Appeals indicated that Minnesota agencies have the authority “to consider and give probative effect to evidence commonly accepted by reasonable prudent persons in the conduct of their affairs,” and that “[s]uch evidence includes hearsay,” and that this applies to the administrative law judge in the context of reviewing registered offender risk levels.⁴⁴¹

The Court of Appeals indicated that when offenders appeal their risk-level assignments, the burden of proof is on the offender appellant; Minnesota requires the offender to prove, by a preponderance of the evidence, “that the ECRC’s risk-level determination was erroneous.” The court further indicated that the judge’s decision “may [then] be reversed if unsupported by substantial evidence,” a statutory standard established by Minnesota. “Substantial evidence [is]...defined as...such relevant evidence as a reasonable mind might accept as adequate to support a conclusion, ...more than a scintilla of evidence, ...more than some evidence, ...more than any evidence, or...the evidence considered in its entirety.”

The Court of Appeals ultimately held that the offender, F.C.M., “failed to demonstrate any of the circumstances that would leave [the court] to reverse or modify the decision of the [judge, who had] affirm[ed] the [ECRC’s] assignment of a risk-level three.”

10.5. New York

10.5.1. Key Findings

- New York classifies offenders into one of three tiers for the purpose of determining their registration and notification requirements.

⁴⁴¹ The Court of Appeals stated the administrative law judge “may admit all evidence that possesses probative value, including hearsay, if it is the type of evidence on which reasonable prudent persons are accustomed to rely in the conduct of their serious affairs” (citing *Lee v. Lee*, 459 N.W.2d 365 [Minn. App. 1990]).

- Level 1 offenders pose a low risk of re-offense. The SORN requirements for Level 1 offenders are generally less strict than the requirements for Level 2 or Level 3 offenders.
 - Level 2 offenders pose a moderate risk of re-offense. The SORN requirements for Level 2 offenders are generally stricter than the requirements for Level 1 offenders and less strict than the requirements for Level 3 offenders.
 - Level 3 offenders pose a high risk of re-offense and a threat to public safety. They are not able to petition for relief from registration. The SORN requirements for Level 3 offenders are generally stricter than the requirements for either Level 1 or Level 2 offenders.
 - In addition to the three tiers, offenders designated as sexual predators, sexually violent offenders, or predicate sex offenders are subject to enhanced registration requirements.
- An offender’s tier classification is based on his or her score on the Risk Assessment Instrument (RAI).
 - The Board of Examiners of Sex Offenders (BOE) scores each offender on the RAI and produces a recommended tier classification for the sentencing court.
 - The court considers the BOE’s recommendation and determines offenders’ official tier classification, as well as whether the offender is a sexual predator, a sexually violent offender, or a predicate sex offender.

10.5.2. Introduction

In New York, risk-level classifications are factors for the determination of the amount and type of community notification to which the offenders are subject, as well as offenders’ required duration and frequency of registration.⁴⁴² Evaluators at the Board of Examiners of Sex Offenders (BOE) administer the “Risk Assessment Instrument,” (RAI), which produces a recommended sex offender risk-level classification.

Risk-level classification for an offender upon discharge or release is ultimately determined by the sentencing court,⁴⁴³ after receiving a risk-level recommendation from BOE.⁴⁴⁴ The court determines whether the offender should be placed in a Level 1, Level 2, or Level 3 classification

⁴⁴² New York Division of Criminal Justice Services (DCJS), “New York State’s Sex Offender Registry: Risk Level & Designation Determination,” accessed June 13, 2022, https://www.criminaljustice.ny.gov/nsor/risk_levels.htm; New York City Bar, “Committee Report: Updating the Guidelines of the Sex Offender Risk Assessment Instrument,” February 22, 2022, <https://www.nycbar.org/member-and-career-services/committees/reports-listing/reports/detail/updating-the-guidelines-of-the-sex-offender-risk-assessment-instrument>.

⁴⁴³ Reclassification and relief from registration petitions are filed with “the sentencing court or the court which made the determination regarding the level of notification” (N.Y. Correct. Law § 168-o).

⁴⁴⁴ New York DCJS, “New York State’s Sex Offender Registry: Risk Level & Designation Determination;” DOJ, SMART, “SORNA Substantial Implementation Review: State of New York,” May 2015, 4, 7, <https://smart.ojp.gov/sorna-new-york>.

and whether the offender should be designated as a “sexual predator,” “sexually violent offender,” or “predicate sex offender.”⁴⁴⁵ The court makes both determinations thirty days before the offender’s discharge, parole, or release.⁴⁴⁶ Although the court has the authority to depart from the risk level recommended by the board if warranted by special circumstances, courts usually accept the risk-level recommended by the RAI.⁴⁴⁷

10.5.3. Risk Assessment Uses

New York has three classification levels, which affect offenders’ notification requirements and both duration and frequency registration requirements (see Table 19):

- Level 1 offenders are considered to have low risk of re-offense;
- Level 2 offenders are considered to have moderate risk of re-offense; and
- Level 3 offenders are considered to have high risk of re-offense and threat to public safety.⁴⁴⁸

In addition to these three risk-level classifications, offenders may be designated a “sexual predator,” “sexually violent offender,” or “predicate sex offender.”⁴⁴⁹ These designations also affect duration of registration and reporting frequency.⁴⁵⁰

⁴⁴⁵ New York DCJS, “New York State’s Sex Offender Registry: Risk Level & Designation Determination.”

⁴⁴⁶ N.Y. Correct. Law § 168-n (Consol. 2022).

⁴⁴⁷ New York City Bar, “Committee Report;” New York State Unified Court System, *Sex Offender Registration Act: Risk Assessment Guidelines and Commentary*, 2006, 4–5, http://www.nycourts.gov/reporter/06_soraguidelines.pdf.

⁴⁴⁸ New York DCJS, “New York State’s Sex Offender Registry: Risk Level & Designation Determination.”

⁴⁴⁹ A “sexual predator” is an offender convicted of a sexually violent offense who has a mental abnormality or personality disorder that makes them likely to engage in predatory sexually violent offenses. A “sexually violent offender” is an offender convicted of a sexually violent offense. A “predicate sex offender” is an offender convicted of a sex offense or sexually violent offense after previously being convicted of committing a sex offense or sexually violent offense. See N.Y. Correct. Law § 168-a (Consol. 2022).

⁴⁵⁰ N.Y. Correct. Law § 168-h (Consol. 2022); New York City Bar, “Committee Report.”

Table 19. Duration and Frequency Requirements for Each Classification and Designation Category of New York State’s Risk Assessment Instrument

Classification	Designation	Duration of Registration	Frequency of Reporting
Level 1	No Designation	20 Years	By mail annually and in person every three years
Level 1	Sexually Violent Offender or Predicate Sex Offender	Life	By mail annually and in person every three years
Level 1	Sexual Predator	Life	By mail annually and in person every 90 days
Level 2	No Designation	Life (may be relieved after 30 years*)	By mail annually and in person every three years
Level 2	Sexually Violent Offender or Predicate Sex Offender	Life	By mail annually and in person every three years
Level 2	Sexual Predator	Life	By mail annually and in person every 90 days
Level 3	No Designation	Life	By mail annually and in person every 90 days
Level 3	Sexually Violent Offender or Predicate Sex Offender	Life	By mail annually and in person every 90 days
Level 3	Sexual Predator	Life	By mail annually and in person every 90 days

*A sex offender who is classified as Level 2 and who is not designated a sexual predator, sexually violent offender, or predicate sex offender may be relieved of the duty to register (N.Y. Correct. Law § 168-h [Consol. 2022]).

Source: N.Y. Correct. Law §§ 168-h, 168-o; New York City Bar, “Committee Report: Updating the Guidelines of the Sex Offender Risk Assessment Instrument,” February 22, 2022, <https://www.nycbar.org/member-and-career-services/committees/reports-listing/reports/detail/updated-the-guidelines-of-the-sex-offender-risk-assessment-instrument>; DOJ, SMART, “SORNA Substantial Implementation Review: State of New York,” May 2015, <https://smart.ojp.gov/sorna-new-york>.

In New York, the type and amount of notification to which offenders are subject is determined by their risk-level classifications (Level 1, Level 2, or Level 3).⁴⁵¹ Offenders who are registered but have not yet had a risk-level hearing are placed into a “pending” risk-level classification, and confirmation of their registration is only available to the public by calling the Sex Offender Registry Information Line.⁴⁵²

New York disseminates information about offenders to the public in three ways:

- Through law enforcement notification to community groups;
- Through the public sex offender registry website; and

⁴⁵¹ New York DCJS, *Sex Offender Registry: 2019 Annual Report*, 6–7, accessed June 13, 2022, <https://www.criminaljustice.ny.gov/crimnet/ojsa/FINAL%202019%20Sex%20Offender%20Registry%20Annual%20Report.pdf>.

⁴⁵² New York DCJS, “New York State’s Sex Offender Registry: Risk Level & Designation Determination.” “The New York State Sex Offender Registration Act requires...establishment of a telephone number which employers, parents, children’s groups, and the general public can call to determine whether an individual is a convicted sex offender who is required to register” (New York DCJS, “Sex Offender Registry Information Line,” accessed June 14, 2022, <https://web.archive.org/web/20220102200725/https://www.criminaljustice.ny.gov/nsor/800info.htm>).

- Through the Sex Offender Registry Information Line, a toll-free phone number the public may call to request information on a specific offender (see Table 20).⁴⁵³

Table 20. Community Notification for Each Risk Level in New York State

Type of Community Notification	Level 1	Level 2	Level 3
Law enforcement may disseminate information to entities with vulnerable populations.	X	X	X
Information available via telephone line.	X	X	X
Information available in online sex offender registry.		X	X
Only offender's ZIP code is provided.	X		
Offender's exact address is provided.		X	X

Sources: N.Y. Correct. Law § 168-l (Consol. 2022); New York DCJS, *Sex Offender Registry: 2019 Annual Report*, 4, 6, accessed June 13, 2022, <https://www.criminaljustice.ny.gov/crimnet/ojsa/FINAL%202019%20Sex%20Offender%20Registry%20Annual%20Report.pdf>.

Due to legal challenges on the manner in which some offenders were formerly assigned a risk-level classification, there is a court injunction against those Level 2 and Level 3 offenders appearing on the public sex offender registry who were assigned a risk level in a manner the court found to be unconstitutional.⁴⁵⁴ Offenders who committed a registerable offense prior to January 21, 1996, and were assigned a risk-level classification prior to January 1, 2000, will not have their information released on the Public Registry of Sex Offenders website until they have been afforded a due process hearing to determine their risk-level classification.⁴⁵⁵ However, information about these

⁴⁵³ New York DCJS, *Sex Offender Registry: 2019 Annual Report*, 3–4.

⁴⁵⁴ New York DCJS, "Registered Sex Offenders by County: As of December 2, 2021," accessed June 14, 2022, https://web.archive.org/web/20220102140048/https://www.criminaljustice.ny.gov/nsor/stats_by_county.htm. In the 1998 case *Doe v. Pataki*, the U.S. District Court for the Southern District of New York ruled that risk-level classification hearings as they were practiced at the time violated offenders' due process rights. The court's ruling stated: "A system that permits a convicted sex offender to be classified at a risk level that subjects him to community notification on the basis of a perfunctory proceeding or incorrect information, that fails to provide a full and fair opportunity to be heard or legal representation, that places the burden on him to prove that the board's findings were wrong without disclosing to him the bases [*sic*] for those findings, and that offers no avenue for appellate review even in the face of gross error does not pass constitutional muster." In response to the ruling, New York amended the Act on January 1, 2000 to provide for the requisite due process hearing (see New York DCJS, *Sex Offender Registry: 2017 Annual Report*, 8, accessed June 14, 2022, <https://www.criminaljustice.ny.gov/crimnet/ojsa/2017-Sex-Offender-Registry-Annual-Report.pdf>). According to a settlement notice dated June 1, 2004, following "a lawsuit filed by the Legal Aid Society on behalf of all persons who were convicted of sex offenses and required to register under the Sex Offender Registration Act (SORA)," a federal judge "issued an injunction in the case[which] has largely prevented community notification for registrants on probation or parole on January 21, 1996, or who were incarcerated on January 21, 1996, and assigned risk levels before January 1, 2000. It has remained in effect until the present. The injunction will soon be lifted on a case-by-case basis for those designated risk level 2 or level 3, after each registrant has had an opportunity for a hearing in his or her case" (New York DCJS, "SORA Settlement Notice," accessed June 14, 2022, https://web.archive.org/web/20170123233446/https://apps.criminaljustice.ny.gov/nsor/settlement_notice.htm).

⁴⁵⁵ New York DCJS, *Sex Offender Registry: 2019 Annual Report*, 8.

offenders is available to the public through inquiries via the Sex Offender Registry Information Line.⁴⁵⁶

10.5.4. Policies and Practices

10.5.4.1. Board of Examiners of Sex Offenders

New York's BOE is the executive-branch agency conducting sex offenders' risk assessments. Its tasks related to risk assessments include:

- Scoring sex offenders on the RAI and recommending a tier classification for each offender to the court, which makes the final determination of the offender's risk-level classification,⁴⁵⁷ and
- Providing the court with updated reports on sex offenders who file petitions for relief from registration or modification of their risk-level classification.⁴⁵⁸

The BOE consists of five members, state employees who are experts in "the behavior and treatment of sex offenders." The New York governor appoints board members for six-year terms; the governor also appoints one member to serve as chairperson.⁴⁵⁹ The board is one of several advisory boards and commissions supported by the New York Division of Criminal Justice Services (DCJS); DCJS and the New York Department of Corrections and Community Supervision pay its costs.⁴⁶⁰

10.5.4.2. New York's "Risk Assessment Instrument"

In 1995, the New York legislature tasked the board with developing "guidelines and procedures to assess the risk of a repeat offense by such sex offender[s] and the threat posed to the public safety," based on a number of factors delineated in the statute.⁴⁶¹ In fulfillment of this mandate,

⁴⁵⁶ New York DCJS, "Sex Offender Registry Information Line."

⁴⁵⁷ New York DCJS, *Annual Performance Report: 2017–2018*, May 2019, 30, <https://www.criminaljustice.ny.gov/crimnet/ojsa/DCJS-Annual-Performance-Report-2017-18.pdf>; New York DCJS, *Sex Offender Registry: 2019 Annual Report*.

⁴⁵⁸ New York DCJS, *Sex Offender Registry: 2019 Annual Report*, 7.

⁴⁵⁹ N.Y. Correct. Law § 168-1 (Consol. 2022).

⁴⁶⁰ New York DCJS, *Annual Performance Report*.

⁴⁶¹ These risk factors include: "(a) criminal history factors indicative of high risk of repeat offense, including: (i) whether the sex offender has a mental abnormality or personality disorder that makes him or her likely to engage in predatory sexually violent offenses; (ii) whether the sex offender's conduct was found to be characterized by repetitive and compulsive behavior, associated with drugs or alcohol; (iii) whether the sex offender served the maximum term; (iv) whether the sex offender committed the felony sex offense against a child; (v) the age of the sex offender at the time of the commission of the first sex offense; (b) other criminal history factors to be considered in determining risk, including: (i) the relationship between such sex offender and the victim; (ii) whether the offense involved the use of a weapon, violence, or infliction of serious bodily injury; (iii) the number, date and nature of prior offenses; (c) conditions of release that minimize risk or [sic] re-offense, including but not limited to whether the sex offender is under supervision; receiving counseling, therapy or treatment; or residing in a home

in 1996, the board created a risk assessment instrument (known simply as the Risk Assessment Instrument, or RAI), which assigns a numerical value to each risk factor and calculates a recommended risk level for offenders.⁴⁶²

The RAI was developed by the state of New Jersey. At the time of development, the instrument was reviewed and modified by BOE and a panel of eight experts and tested against a sample of cases. In 2006, the board made some minor updates to the RAI, which “d[id] not change the scoring of the instrument but, rather, simply include[d] updated statutory language and clarification.”⁴⁶³

The RAI contains fifteen items and assigns a numeric score to each risk factor to create a presumptive,⁴⁶⁴ or recommended, risk level—Level 1 for the lowest-scoring offenders, Level 2 for moderate-scoring offenders, and Level 3 for the highest-scoring offenders. Additionally, there are four overrides that automatically place an offender in presumptive Level 3:⁴⁶⁵

- “The offender has a prior felony conviction for a sex crime;
- “The offender inflicted serious physical injury or caused death to the victim;
- “The offender has made a recent threat that he will re-offend by committing a sexual or violent crime; or
- “There has been a clinical assessment that the offender has a psychological, physical, or organic abnormality that decreases his ability to control impulsive sexual behavior.”

The BOE evaluates sex offenders at time of release from incarceration by administering the RAI to each offender. Prior to the board’s evaluation, the offender is permitted to submit any information to the board relevant to the review of the offender’s case.⁴⁶⁶ The board must make its recommendation within sixty days prior to the offender’s discharge, parole, release to post-release

situation that provides guidance and supervision; (d) physical conditions that minimize risk of re-offense, including but not limited to advanced age or debilitating illness; (e) whether psychological or psychiatric profiles indicate a risk of recidivism; (f) the sex offender’s response to treatment; (g) recent behavior, including behavior while confined; (h) recent threats or gestures against persons or expressions of intent to commit additional offenses; and (i) review of any victim impact statement” (N.Y. Correct. Law § 168-l).

⁴⁶² New York City Bar, “Committee Report”; New York State Unified Court System, *Sex Offender Registration Act*.

⁴⁶³ New York State Unified Court System, *Sex Offender Registration Act*, 2006, 4–5, 23.

⁴⁶⁴ Scores are presumptive because the court may depart from recommended risk level when assigning classification to an offender. The board’s guidelines state that, in most cases, “the expectation is that the instrument will result in the proper classification...so that departures will be the exception—not the rule.” However, departures are allowed if the court or board determines “there exists an aggravating or mitigating factor of a kind, or to a degree, that is otherwise not adequately taken into account by the guidelines” (New York State Unified Court System, *Sex Offender Registration Act*, 4).

⁴⁶⁵ *Id.* at 2–5.

⁴⁶⁶ N.Y. Correct. Law § 168-n.

supervision, or release.⁴⁶⁷ The board is responsible for scoring the RAI and providing a recommended risk level to the sentencing court, while the sentencing court is responsible for setting the offender's risk-level classification.⁴⁶⁸ Board recommendations include risk-level classifications of sex offenders and whether the offender warrants the designation of sexual predator, sexually violent offender, or predicate sex offender.⁴⁶⁹

10.5.4.3. Classification

After receiving the BOE's risk-level recommendation, the sentencing court holds a hearing to classify the offender's risk level (Level 1, Level 2, or Level 3), as well as whether the offender is designated as a sexual predator, sexually violent offender, or predicate sex offender.⁴⁷⁰ Courts determine offenders' risk levels at time of release.⁴⁷¹ Offenders have the right to appear and be heard at the classification hearing, and to be represented by counsel and have counsel appointed if the offender is financially unable to retain counsel.⁴⁷²

In addition to administering the RAI,⁴⁷³ the BOE created a document, the "Sex Offender Registration Act Risk Assessment Guidelines and Commentary," to provide context and guidance on the RAI, stating that "[n]o one should attempt to assess a sex offender's level of risk without first carefully studying this commentary." The commentary gives the circumstances and conditions on which the court may base an upward or downward departure from the RAI,⁴⁷⁴ and it states that the "court may not depart from the presumptive risk level unless it concludes that there exists an aggravating or mitigating factor of a kind, or to a degree, that is otherwise not adequately taken into account by the guidelines." Further, the commentary states, "The expectation is that the instrument will result in the proper classification in most cases so that departures will be the exception—not the rule."⁴⁷⁵

If the state of New York seeks determinations differing from the board's recommendations, district attorneys must provide statements naming the determinations they seek and their reasoning for

⁴⁶⁷ N.Y. Correct. Law § 168-l.

⁴⁶⁸ New York DCJS, "New York State's Sex Offender Registry: Frequently Asked Questions," accessed June 14, 2022, <https://www.criminaljustice.ny.gov/nsor/faq.htm>.

⁴⁶⁹ N.Y. Correct. Law § 168-l.

⁴⁷⁰ New York DCJS, "New York State's Sex Offender Registry: Risk Level & Designation Determination."

⁴⁷¹ New York DCJS, "New York State's Sex Offender Registry: Frequently Asked Questions."

⁴⁷² N.Y. Correct. Law § 168-n.

⁴⁷³ New York DCJS, *Annual Performance Report*, New York City Bar, "Committee Report."

⁴⁷⁴ The commentary is a guide to interpreting and scoring the RAI. The most recent version was released in 2006 and "outlines how the RAI should be scored and provides background about its development and rationale." The RAI, however, also "purports to set the rules courts must follow in deciding whether to depart from the RAI's presumptive determinations. Courts, in turn...have held that the dictates of the RAI with respect to both its scores and what courts are entitled to do in departing from them must be followed to the letter" (Daniel Conviser, "After 25 Years, It Is Past Time to Reform New York's Sex Offender Risk Assessment System: Part II," *New York Law Journal* [February 9, 2021], <https://advance.lexis.com/api/permalink/046f86a2-6ebc-4848-abdc-2bdab42b7643/>).

⁴⁷⁵ New York State Unified Court System, *Sex Offender Registration Act*, 1, 4.

doing so. The state bears the burden of proving facts supporting determinations by clear and convincing evidence. During review, courts may examine victim statements and other relevant materials and evidence submitted by sex offenders, district attorneys, or the board. It may even consider reliable and relevant hearsay evidence provided by either party. Courts eventually render orders containing their determinations, findings of facts, and conclusions of law on which determinations were based. Either party may appeal courts' determinations.⁴⁷⁶

10.5.4.4. Judicial Appeals

Either the state or the offender may appeal the court's risk-level classification determination.⁴⁷⁷

10.5.4.5. Reclassification

Both offenders and the district attorney may petition the court for reclassification of offenders' risk levels. The party filing must state the risk-level classification the party seeks and the reasons for seeking the new determination. Regardless of filing party, BOE provides an updated risk-level recommendation to the court. If the petition is filed by the district attorney, the offender is notified that they are permitted to submit relevant information to the board for review of their risk-level recommendation.⁴⁷⁸

After it receives BOE's updated risk-level recommendation for the offender, the court holds a hearing on the petition. The petitioning party bears the burden of proving to the court by clear and convincing evidence facts that support the requested reclassification. Offenders have the right to be represented by counsel and to have counsel appointed if they are financially unable to retain counsel. The court considers BOE's newly recommended risk level and "any relevant materials and evidence submitted by the sex offender and the district attorney" and determines whether to grant the petition.⁴⁷⁹

Any registered sex offender may file a reclassification petition once a year. Meanwhile, the district attorney may file a petition with the court to modify an offender's risk-level classification if both of the following circumstances are met:⁴⁸⁰

⁴⁷⁶ N.Y. Correct. Law § 168-n.

⁴⁷⁷ *Id.*

⁴⁷⁸ "Upon receipt of a petition submitted pursuant to subdivision one, two, or three of this section, the court shall forward a copy of the petition to the board and request an updated recommendation pertaining to the sex offender and shall provide a copy of the petition to the other party...Where the petition was filed by a district attorney, at least thirty days prior to making an updated recommendation the board shall notify the sex offender and his or her counsel that the offender's case is under review and he or she is permitted to submit to the board any information relevant to the review" (N.Y. Correct. Law § 168-o). However, the statute appears to be silent regarding whether a similar procedure is followed if the offender files a petition.

⁴⁷⁹ N.Y. Correct. Law § 168-n.

⁴⁸⁰ *Id.*

- The offender has been convicted of a new crime or has violated conditions imposed as part of a sentence of a conditional discharge, probation, parole, or post-release supervision; and
- The conduct underlying the new crime or violation indicates an increased risk of a repeat sex offense.

10.5.4.6. Relief from Registration

New York allows some offenders, who would otherwise be required to register for life, to petition for relief from their duty to register: Level 2 offenders who have not been designated a sexual predator, sexually violent offender, or predicate sex offender may petition the court for relief from registration after a minimum registration period of thirty years. Offenders may file such a petition every two years. When an offender files for relief from registration, BOE provides an updated risk-level recommendation for the offender to the court.⁴⁸¹

10.5.5. Issues

10.5.4.1. Criticisms of RAI

The RAI has come under criticism from a variety of stakeholders, including the courts,⁴⁸² sex offender management professionals,⁴⁸³ the New York City Bar Association,⁴⁸⁴ and authors of law journal articles.⁴⁸⁵ The instrument was critiqued for its reliance on outdated research, flawed methodology, and lack of validation studies:

- **Outdated Research:** Critics point out that the RAI was developed in 1996 and has not been substantively updated since then. It is based on research that is at least 25 years old and does not reflect newer advances in the study of sex offender recidivism and risk factors.⁴⁸⁶
- **Flawed Methodology:** Critics allege that the RAI does not have a coherent methodology and is based on an apparently arbitrary design.⁴⁸⁷ A 2009 New York State Supreme Court ruling stated, “[T]he instrument mixes and matches purportedly objective factors related

⁴⁸¹ *Id.*

⁴⁸² See *People v. Santos*, 25 Misc. 3d 1212, 2009 N.Y. Slip Op. 52040(U); *People v. McFarland*, 29 Misc. 3d 1206, 2010 N.Y. Slip Op. 51705(U).

⁴⁸³ See New York State Association for the Treatment of Sexual Abusers and New York State Alliance for the Prevention of Sexual Abuse, “The Position of the New York State Association for the Treatment of Sexual Abusers and the New York State Alliance for the Prevention of Sexual Abuse on Assembly Bill 4191 and Senate Bill 7509,” January 4, 2020, 1–3, <http://nysatsa.com/wp-content/uploads/2020/01/0-NYSATSA-and-Alliance-position-paper-on-new-RAI-Final-1-4-2020.pdf>.

⁴⁸⁴ See New York City Bar, “Committee Report.”

⁴⁸⁵ See Daniel Conviser, “After 25 Years, It Is Past Time to Reform New York’s Sex Offender Risk Assessment System: Part I,” *New York Law Journal* (January 5, 2021), <https://advance.lexis.com/api/permalink/c43b2e54-d121-458f-be7b-31978f4b5a55/>.

⁴⁸⁶ New York City Bar, “Committee Report.”

⁴⁸⁷ *Id.*

to the risk of re-offense, with numerical value judgments about the degree of harm an offender's conduct causes and policy considerations. Some RAI factors are based on 'harm,' some on recidivism risk, some on both of those factors, some on policy grounds, and, for some factors, it is not clear on what basis points are assessed."⁴⁸⁸ Critics point out that the numerical points assigned to each risk factor are not based on actuarial data, and they claim the BOE has never explained the rationale of the score ranges.⁴⁸⁹ Finally, critics say that the inclusion of overrides in the methodology essentially allows some offenders to be assigned a presumptive risk level on the basis of a single risk factor.⁴⁹⁰

- **Lack of Validation Studies:** New York has never conducted a validation study of the RAI.⁴⁹¹ Critics point out that New York has available the necessary data on registered sex offenders to conduct such a study, but no effort to do so has ever been taken up.⁴⁹²

The BOE's commentary states that the circumstances and conditions under which the court, in determining an offender's risk-level classification, may make an upward or downward departure from the RAI. It limits departures to circumstances in which the court "concludes that there exists an aggravating or mitigating factor of a kind, or to a degree, that is otherwise not adequately taken into account by the guidelines."⁴⁹³ Some critics of the RAI have argued that these restrictions on departures do not effectively allow the courts to redress RAI scores that do not accurately reflect the offender's circumstances and risk factors. Furthermore, critics claim that the court's decisions at risk-level classification hearings are rarely informed by expert testimony from risk assessment practitioners, and that judges often make classification decisions based only on the facts of the case, the board's recommendation, and the arguments of lawyers for the offender and the state.⁴⁹⁴

⁴⁸⁸ People v. Santos.

⁴⁸⁹ People v. Santos; New York City Bar, "Committee Report." Conviser also notes in "After 25 Years: Part I," that "scores from 0 to 70 are low risk; from 75 to 105 are moderate risk; and from 110 to 300 are high risk. Thus the 'low risk' category comprises 23% of the scoring range; the 'moderate risk' category 10%; and the 'high risk' category 63%. No one has ever attempted to explained [*sic*] why."

⁴⁹⁰ New York City Bar, "Committee Report." "Additionally, the RAI's use of four 'overrides' that require individuals, no matter their point score on the instrument and risk level adjudication, to register for life, has also been criticized. Experts believe that no one factor should be used to assign a risk level or an override. Doing so is also contrary to SORA itself, which directs the board to make recommendations after examination of all relevant factors."

⁴⁹¹ A 2011 study conducted by a University of Albany researcher found that the RAI scores marginally correspond to risk of re-offense but are not as accurate as scores from other instruments. See New York City Bar, "Committee Report."

⁴⁹² Conviser, "After 25 Years: Part I."

⁴⁹³ New York State Unified Court System, *Sex Offender Registration Act*, 4.

⁴⁹⁴ Conviser, "After 25 Years: Part II."

10.5.4.2. Costs

BOE's costs are supported by the DJCS and Department of Corrections and Community Supervision.⁴⁹⁵

The total fiscal year 2021 operating budget of DCJS is \$363,912,500, which is comprised of \$84,276,000 for state operations and \$254,636,500 for aid to localities, and \$25,000,000 for capital projects.⁴⁹⁶ It is unclear how much funding DCJS provides to the board. A 2011 DCJS annual report states that, at the time, DCJS provided the board with technology, administrative, human resources, and internal audit support services.⁴⁹⁷ However, the division's more recent annual reports do not provide this level of information, so it is unknown if DCJS is currently providing the board with these support services.

The Department of Corrections and Community Supervision has a fiscal year 2021 operating budget of \$3,389,741,000, which includes \$2,935,248,000 for state operations, \$29,493,000 for aid to localities, and \$425,000,000 for capital projects.⁴⁹⁸ It is unclear how much or what type of support the department provides to the BOE.

In response to FRD's public records request, the DCJS provided finance records for the salaries of BOE support staff for the period from April 3, 2019, to April 1, 2020. These records show that support staff salaries for that year totaled \$193,576.69. These records show:

- Expenditures of \$88,029.78, supporting salaries for three to four staff members from April 3, 2019, through September 18, 2019; and
- Expenditures of \$105,546.91, supporting salaries for four staff members from October 2, 2019, through April 1, 2020.⁴⁹⁹

⁴⁹⁵ New York DCJS, *Sex Offender Registry: 2019 Annual Report*.

⁴⁹⁶ New York Division of the Budget (DoB), "FY2022 Executive Budget: Agency Appropriations; Criminal Justice Services, Division of," 2, accessed June 17, 2022, <https://www.budget.ny.gov/pubs/archive/fy22/ex/agencies/appropdata/CriminalJusticeServices/Divisionof.pdf>.

⁴⁹⁷ New York DCJS, *2011 Annual Performance Report for the New York State Division of Criminal Justice Services*, September 2012, 11, 60–61, 72, <https://stage.criminaljustice.ny.gov/pio/annualreport/2011-annual-dcjs-performance-report.pdf>.

⁴⁹⁸ DoB, "FY2022 Executive Budget," 6.

⁴⁹⁹ New York DCJS, email message to FRD, August 25, 2021.

10.5.4.3. Backlogs

The BOE is required to administer the RAI within sixty days prior to the offender's release,⁵⁰⁰ and the court is required to assign a risk-level classification thirty days before the offender's release.⁵⁰¹ The most recently available (2019) New York State sex offender registry annual report states that at the end of 2018, 916 of the state's 41,892 registered sex offenders had not yet had their risk-level classification determined by the court.⁵⁰² In 1998, a court ruling required that offenders who committed a registerable offense before January 21, 1996, and were assigned a risk-level classification prior to January 1, 2000, would require a new risk-level classification hearing before they would be subject to community notification.⁵⁰³ As of the writing of the 2019 annual report, sixty offenders affected by this ruling had not yet received a new classification hearing.⁵⁰⁴

10.5.4.4. Constitutional Challenges

In a 1998 case before the U.S. District Court for the Southern District of New York, *Doe v. Pataki*, plaintiffs challenged the constitutionality of the New York State Sex Offender Registration Act as it applies to those convicted prior to the Act's effective date, on the basis of due process. The court noted that the plaintiffs had previously lost their Ex Post Facto claim before the Second Circuit Court. The plaintiffs additionally claimed that the procedure⁵⁰⁵ by which they were

⁵⁰⁰ N.Y. Correct. Law § 168-l.

⁵⁰¹ N.Y. Correct. Law § 168-n.

⁵⁰² New York DCJS, *Sex Offender Registry: 2019 Annual Report*.

⁵⁰³ *Doe v. Pataki*.

⁵⁰⁴ New York DCJS, *Sex Offender Registry: 2019 Annual Report*.

⁵⁰⁵ The court describes New York's sex offender risk assessment process as follows: "For convicted sex offenders in state custody, the Department of Correctional Services (DOCS) notifies the board when an individual who is subject to the Act is about to be released from prison or jail. The board then assesses the offender's risk and forwards a risk level recommendation to the sentencing court within 60 days prior to the offender's release from custody. A board member is assigned to perform the initial review of the offender's file, which includes, among other things, the pre-sentence investigation prepared for the current offense, pre-sentence investigations for prior felony offenses, the sentencing court's commitment papers, papers generated by the offender, including legal papers generated by the offender and information concerning the offender's disciplinary history. The initial reviewer also receives the offender's criminal history from the Division of Criminal Justice Services (DCJS) as well as quarterly reviews of the offender prepared by the offender's corrections counselor. If certain aspects of the offender's case are unclear or more information is necessary, the board member is required to make the necessary contacts to gather the pertinent information. Thus, the board member performing the initial review may obtain information concerning the offender from a variety of sources, including the prosecuting district attorney's office, the courts, probation and parole departments and officers, DOCS computerized databases, and even the offender himself, in the form of his statements at the time of the arrest, at the time of the pre-sentence investigation, and while serving his time in the DOCS system. The offender is also entitled to submit any relevant information for the board's consideration. After a review of the offender's file and all other available information, the board member completes the risk assessment instrument by assigning points for each relevant factor contained in the guidelines, drafts a case summary, and makes a risk level recommendation. After the initial review, the file is assigned to a second reviewer, who conducts an independent review of the offender's case. The initial assessment is reviewed for accuracy and agreement with the recommended risk level. If the second reviewer agrees with the recommended risk level, he or she initials the file, and the file is then assigned to a third reviewer. Again, if the third reviewer agrees with the recommendation, he or she initials the file. Three of the five board members must agree on a risk level recommendation before it is forwarded to the sentencing court. If the three board members assigned to a particular case cannot agree, a fourth board member examines the file. The risk level recommendation and case summary are then forwarded to the sentencing court for

“administratively assigned risk level classifications” by the state of New York “deprived [them] of the fundamental elements of due process: notice and an opportunity to be heard.” Additionally, “[proposed class members still incarcerated contended] that, even though they were judicially classified, the procedures implemented at their hearings were so deficient that they, too, were deprived of due process.”

The facts of the case contained accounts of several plaintiffs. First, Plaintiff Coe, who was indigent and “borderline mentally retarded,” had been assigned a risk level 2 based on an incorrect set of facts that he said differed from those upon which he had been charged. He was not represented by an attorney at the hearing, “was not provided with counsel or prior notice of the board’s recommendation or disclosure of evidence relied on by the board,” and was denied a review before the New York State Court of Appeals. The Court of Appeals wrote in its decision that “no avenue exists to appeal a judicial determination of a sex offender’s risk assessment under [the Act].” Furthermore, the same court stated, “we recognize that the lack of provision for appellate review may raise constitutional questions as to this portion of the statute.”

For another plaintiff in the same case, the court noted that although he was assigned to risk level 3 prior to his hearing, “he was not represented by counsel, ...not advised that he had a right to counsel, ...did not understand what [he had scored on his risk assessment], ...how [the score was] calculated, and...given no meaningful opportunity to challenge his classification. The court undertook no independent review of the board’s risk-level recommendation, nor...provided [the plaintiff]...with a copy of the risk assessment instrument or the case summary.”

The court held that plaintiffs had a constitutionally protected liberty interest and referred to language in the U.S. Supreme Court case *Paul v. Davis*⁵⁰⁶ that “reputation alone, apart from some more tangible interests such as unemployment,” and “neither ‘liberty’ nor ‘property’ [alone are] sufficient to invoke the procedural protection of the Due Process Clause.” The New York court held that plaintiffs met the “harm to reputation in addition to some other impediment to establish a constitutional deprivation.” The court indicated that “damage to reputation” occurred—though much of information disseminated through notification are matters of public record—when “the

a final risk level determination. The offender’s file itself, containing the information upon which the recommendation is based, is not automatically forwarded to the court, but the board will forward the primary information relied upon if requested by the court. The Act provides that the board’s recommendation to the court is ‘confidential and shall not be available for public inspection.’ The sentencing court has 30 days within which to render a final decision on the offender’s risk level classification. Section 168-n(3) requires the court to ‘allow the sex offender to appear and be heard.’ Within the 30-day period, the court must set a date for the offender’s classification proceeding, provide notice to the offender of this proceeding, arrange for the offender’s production from prison, assign counsel for the offender ‘if necessary,’ review the board’s risk level recommendation and case summary and any other materials submitted by the offender, determine the offender’s risk level classification, and inform the offender of his risk level and the consequences thereof. In the vast majority of cases, the court affirms the risk level recommendation submitted by the board.”

⁵⁰⁶ *Paul v. Davis*, 424 U.S. 693 (1976).

Act makes such information readily available to the community at large, and in some cases, provides for immediate dissemination of such information on a widespread basis.” The court added, “...such widespread dissemination of the above information is likely to carry with it shame, humiliation, ostracism, loss of employment and decreased opportunities for employment, perhaps even physical violence, and a multitude of other adverse consequences. Thus, there is no genuine dispute that the dissemination of the information contemplated by the Act to the community at large is potentially harmful to plaintiffs’ personal reputations.” The court additionally indicated that “the registration provisions of the Act place a ‘tangible burden’ on plaintiffs, potentially for the rest of their lives.” The Court additionally referenced the New Jersey decision in *Doe v. Poritz* in agreeing that plaintiffs had “a protected liberty interest that entitles them to procedural due process.”

The court held that “plaintiffs have not been afforded due process protection required by the Constitution...and are entitled to due process in the classification proceedings under the Act...” and granted permanent injunctive relief to the plaintiffs and held that New York “may not classify [the plaintiffs] higher than a risk level one unless these individuals are first given new hearings that comport with the requirements of due process....”

11. APPENDIX IV: Profiled States—Summaries

11.1. Arkansas

Purpose of Risk Assessment: In Arkansas, risk assessments are used for the purposes of community notification and registration. While the “primary goal”⁵⁰⁷ of risk assessment is toward informing community notification requirements, risk assessments may impact duration or frequency requirements for some offenders. For example, an Arkansan offender’s risk assessment score may impact the offender being designated a “sexually dangerous person.”⁵⁰⁸ Such a designation means the offender must register for life, would not have an opportunity for relief from registration, and would have more frequent reporting requirements than those of offenders without such a designation.⁵⁰⁹ Furthermore, risk assessments are considered by the courts when a registrant petitions for relief from registration; thus, assessments may affect the duration of registration for those offenders.⁵¹⁰

Risk Assessment Instrument(s): As of 2012 (the most recent information available), Arkansas uses two risk assessment instruments: the Static-99 and the Vermont Assessment of Sex Offender Risk.⁵¹¹ Sources do not specify whether offenders are scored on one or both instruments; however, the Sex Offender Assessment Committee’s (SOAC’S) regulatory document on sex offender risk assessment, *Sex Offender Assessment Committee Guidelines and Procedures*, states that the evaluator “will complete the actuarial instruments deemed appropriate in accordance with the scoring guidelines for each instrument.”⁵¹²

- **In-State Instrument Development:** Arkansas did not develop its own risk assessment tool.
- **Instrument Items:** The Static-99 consists of ten items related to static factors.⁵¹³ The Vermont Assessment of Sex Offender Risk contains nineteen items related to both static and dynamic factors.⁵¹⁴

⁵⁰⁷ Payne and Flynn, “Sex Offender Community Notification Assessment,” 4.

⁵⁰⁸ Arkansas Sex Offender Assessment Committee, *Guidelines and Procedures*, 16–18.

⁵⁰⁹ Ark. Code Ann. § 12-12-919. “To verify residency, Levels 1, 2 & 3 offenders must present themselves every six (6) months to the law enforcement agency having jurisdiction. ...Sexually Dangerous Persons/Level 4 offenders must present themselves every three (3) months to the law enforcement agency having jurisdiction to verify residency” (Arkansas Sex Offender Assessment Committee, *Guidelines and Procedures*, 10).

⁵¹⁰ Payne and Flynn, “Sex Offender Community Notification Assessment,” 4.

⁵¹¹ Sheri Flynn, “The Arkansas Sex Offender Assessment Process: Doing It Right,” *Corrections Today* (January 1, 2012), <https://www.thefreelibrary.com/The+Arkansas+sex+offender+assessment+process%3A+doing+it+right.-a0279915390>.

⁵¹² Arkansas Sex Offender Assessment Committee, *Guidelines and Procedures*, 15.

⁵¹³ Society for the Advancement of Actuarial Risk Needs Assessment (SAARNA), “Scales and Resources: Static-99R Users,” accessed June 17, 2022, <https://saarna.org/static-99/>.

⁵¹⁴ Robert J. McGrath and Stephen E. Hoke, *Vermont Assessment of Sex Offender Risk Manual*, 2001, 1, <http://www.forensiccounselor.org/images/file/Vermont%20Assessment.pdf>; Flynn, “The Arkansas Sex Offender Assessment Process.”

- **Translation of Risk Assessment Score(s) into SORN Requirements:** *SOAC's Guidelines and Procedures* state, "The actuarial tools used during the assessment are only one component of a community notification assessment." While the sources do not state exactly how evaluators weigh the instrument scores and translate them into risk levels, the guidelines state that classification levels are determined based on "a consideration of all of the relevant factors," including risk instrument scores, as well as "a review of the sex offender's criminal history;" an interview with the offender, a polygraph or computerized voice stress test, a "review of any mental health or treatment records;" "[p]sychological testing when deemed necessary;" "[c]hild maltreatment reports, incident reports, disciplinary charges from correctional facilities, and criminal offenses for which the offender was charged but not convicted;" and "[o]ther information that is relevant to the offender's offense history and/or pattern of behavior."⁵¹⁵
- **Instrument Scoring Agency:** Risk assessment instruments are scored by individuals affiliated with the Sex Offender Community Notification Assessment Program (SOCNA) in the Arkansas Department of Correction (ADC).⁵¹⁶ SOAC, a nine-member committee that promulgates guidelines for sex offender assessment and notification procedures,⁵¹⁷ oversees SOCNA.⁵¹⁸

Risk-Level Tiers: Arkansas has four risk-level tiers. Level 1 offenders are low risk and subject to the least notification, Level 2 offenders are moderate risk and subject to moderate notification, Level 3 offenders are high risk and subject to higher notification, and Level 4 offenders are those designated as "sexually dangerous persons"⁵¹⁹ and subject to the highest level of notification. Offenders are categorized as "Default Level 3" if they do not comply with the risk assessment.⁵²⁰

⁵¹⁵ Arkansas Sex Offender Assessment Committee, *Guidelines and Procedures*, 10–11, 15.

⁵¹⁶ *Id.* at 4.

⁵¹⁷ Of the nine members, "six...are appointed by the governor; the remainder of the committee is comprised of directors of Division of Community Correction (ACC), Arkansas Crime Information Center, and the ADC [Arkansas Division of Correction], or the designees of those respective directors." In addition to promulgating guidelines, the committee "votes to assign Level 4 status and reviews cases in which offenders seek administrative review" (Payne and Flynn, "Sex Offender Community Notification Assessment," 1–2). It "must also establish qualifications for examiners and qualify examiners to prepare reports in accordance with the assessment protocol" (Arkansas Sex Offender Assessment Committee, *Guidelines and Procedures*, 4).

⁵¹⁸ Sheri J. Flynn and J. Michael Wood, "Community Notification: The Importance of Individualized Sex Offender Assessment" (slide presentation, accessed June 17, 2022), 3, <https://info.nicic.gov/nicrp/system/files/Importance%20of%20Individualized%20Sex%20Offender%20Assessment.pdf>.

⁵¹⁹ An offender may be determined to be a sexually dangerous person in one of two ways: by the court at the time of conviction, or by SOAC based on a risk assessment conducted by SOCNA (Arkansas Sex Offender Assessment Committee, *Guidelines and Procedures*, 16–18).

⁵²⁰ The full text reads: "Offenders who appear for the assessment under the influence of alcohol, illegal drugs, or who fail to timely disclose the use of medications, individuals who fail to appear for any phase of the assessment, individuals who are aggressive, threatening, or disruptive to the point that SOCNA staff cannot proceed with the assessment process, and individuals who voluntarily terminate the assessment process having been advised of the potential consequences will be classified as being a Level 3 or referred to SOAC for sexually dangerous person status" (Arkansas Sex Offender Assessment Committee, *Guidelines and Procedures*, 17–18).

Agency Responsible for Tier Classification: SOCNA classifies offenders into the four risk-level tiers. If SOCNA believes, based on a risk assessment, that an offender should be classified as Level 4 (sexually dangerous person), it notifies SOAC, which makes the final determination of whether to classify the offender as Level 4 based on a vote of the SOAC members.⁵²¹

Classifying Agency’s Ability to Modify or Override Instrument Score: SOCNA bases risk-level classification on “a consideration of all of the relevant factors,” in addition to the offender’s risk assessment instrument score. These factors include a review of documents related to the offender’s criminal history, an in-person interview with the offender, and, if necessary, a polygraph or computerized voice stress analysis test. In addition to these considerations, SOCNA evaluators may increase or decrease offenders’ classification level from the score indicated on the risk assessment instruments. The *Sex Offender Assessment Committee Guidelines and Procedures* provide a “nonexclusive and non-binding” list of factors for such overrides, such as statements by the offender indicating he or she will re-offend or evidence that treatment has decreased the offender’s likelihood of re-offending.⁵²²

Relief from Registration: Some Arkansan Level 1, 2, and 3 offenders may petition for relief from registration after completing a 15-year registration period, and every three years after that if their petition is denied. Offenders may be prohibited from filing such petitions for several reasons, including classification as a sexually dangerous person—a determination that may be based on or affected by SOCNA’s risk assessment of the offender.⁵²³ The court may consider risk assessments as part of the petition process.⁵²⁴ “An order terminating the obligation to register shall not be granted without a reassessment,” and offenders can request reassessments if they have not previously had an assessment within the last five years.⁵²⁵

Reassessment/Reclassification: Offenders may be reassessed at their own request every five years or at any time at the request of the Arkansas Parole Board, the Department of Community Correction, or a law enforcement agency.⁵²⁶ Reassessment requires offenders to appear for an interview, and they may be required to take a polygraph or voice stress analysis test.⁵²⁷

Judicial Review of Classification: Offenders may seek judicial review of their risk-level classification; however, they must first file for an administrative review. Offenders are not afforded

⁵²¹ *Id.* at 4, 17. Researchers did not find any indication that SOCNA needs to refer Level 1, 2, or 3 offenders to SOAC for a final determination; this requirement appears to apply only to potential Level 4 (sexually dangerous person) offenders.

⁵²² *Id.* at 10–11, 18–19.

⁵²³ Ark. Code Ann. § 12-12-919.

⁵²⁴ Payne and Flynn, “Sex Offender Community Notification Assessment,” 4.

⁵²⁵ Ark. Code Ann. § 12-12-919.

⁵²⁶ Arkansas Sex Offender Assessment Committee, *Guidelines and Procedures*, 25–26; Ark. Code Ann. § 12-12-917 (2022).

⁵²⁷ Arkansas Sex Offender Assessment Committee, *Guidelines and Procedures*, 25–26.

a hearing during an administrative review; rather, one member of SOAC reviews offenders' records and determines "whether to uphold the assessment or submit the review to SOAC for modification consideration." If the review is submitted for consideration by the full committee, SOAC determines by a vote of its members whether to modify the offender's risk-level classification.⁵²⁸ After receiving results of such review, offenders have thirty days to file a petition with the court for a judicial review of the classification level.⁵²⁹

Backlogs: In its annual report for fiscal year 2020, SOCNA stated that there was no backlog of offenders waiting to be assessed.⁵³⁰ Contrast this with a 2006 report released by the California State Library that stated that, at the time, there was a backlog of 1,500 paroled sex offenders living in the community in Arkansas who had not yet been assessed.⁵³¹ Researchers were unable to locate information on the causes of the 2006 backlog or how Arkansas cleared it.

Costs: Researchers were unable to locate information on the specific costs of risk assessment. However, SOCNA's annual report for fiscal year 2020 provides details on SOAC's expenses:

Committee members are not paid a salary. The majority of the SOAC is comprised of state employees, who perform their duties on the SOAC on a voluntary basis or as included with their job duties at a state agency. There are five members who are not state employees. Two do not ask for any compensation. Two submit...for reimbursement for the mileage incurred travelling to and from the SOAC meetings. ADC covers these expenses. Each could seek a \$75 per diem, but none do. The SOAC does not have any other expenditures.⁵³²

SOCNA's 2020 annual report does not provide much information on its costs; however, it does state that SOCNA's six regional interviewers operate out of offices that have been "generously donated by local law enforcement offices and have not cost the ADC anything, beyond small office equipment and computer connectivity."⁵³³

Constitutional Challenges: In the 2008 Arkansas Supreme Court case, *Burchette v. Sex Offender Screening & Risk Assessment Committee*, the plaintiff Burchette appealed an Arkansas circuit court decision, arguing that his procedural due process rights were violated when he was categorized as a Level 3 offender by the Arkansas Sex Offender Screening and Risk Assessment Program (SOSRA). Arkansas classifies its sex offenders into risk levels by "a consideration of

⁵²⁸ *Id.* at 21–22.

⁵²⁹ Ark. Code Ann. §12-12-922 (2022).

⁵³⁰ Payne and Flynn, "Sex Offender Community Notification Assessment," 6.

⁵³¹ Marcus Nieto and David Jung, *The Impact of Residency Restrictions on Sex Offenders and Correctional Management Practices: A Literature Review* (Sacramento: California State Library, California Research Bureau, August 2006), 10, <https://ccoso.org/sites/default/files/residencyrestrictionsimpact.pdf>.

⁵³² Payne and Flynn, "Sex Offender Community Notification Assessment," 2.

⁵³³ *Id.* at 5.

all...relevant factors," one of which is sex offenders' score on risk assessment instruments.⁵³⁴ The plaintiff Burchette had pled guilty to one count of sexual assault in the fourth degree and two counts of sexual indecency with a child; he was "later notified that he was a Level 3 offender." He "administratively appealed the SOSRA assessment to the [SOAC]" and requested, but was denied, a hearing. The plaintiff had, in the course of appeal, provided additional information to SOAC for review, after which his Level 3 assessment was upheld.⁵³⁵

The plaintiff raised a procedural due process claim; the court noted that "[his] sole point on appeal is that he was entitled to a hearing before the seven-person SOAC before it could affirm the initial assessment that he was a Level 3 sex offender, ...argu[ing]...that constitutional due-process requirements demand that he receive a hearing." The court further noted that it could not determine with certainty what the plaintiff meant by "hearing," but that it appears to not refer to a right to counsel, for witnesses to appear, to conduct cross examination, or even to give his own testimony under oath. Rather, it seemed the plaintiff "wants to give his unsworn version of events...in person to SOAC...."

The court noted that Burchette had already had the opportunity to have an in-person interview during his SOSRA interview, and that this satisfied the "meaningful opportunity to be heard" element of due process. Furthermore, the court noted that Burchette had an opportunity to appeal to both SOAC and, thereafter, the county circuit court for judicial review. The Arkansas Supreme Court held that the plaintiff's procedural due process rights under neither the Arkansas nor the U.S. Constitutions were violated.

Additional Information: SOCNA's annual report for fiscal year 2020 states, "Arkansas'[s] assessment process is considered by professionals in the field to be among the best in the United States."⁵³⁶

⁵³⁴ "[SOSRA examiners] are required to consider, but are not limited to, the following information: (1) the offender's criminal history; (2) the interview with the offender conducted by a SOSRA staff member; (3) a polygraph examination or voice stress analysis, if SOSRA believes they otherwise lack adequate information to assess the offender; (4) a review of any available, relevant mental health records; (5) psychological testing; (6) actuarial instruments designed to assess individuals convicted of sexual offenses; and (7) other information relevant to the offender's offense history and/or pattern. Based on this assessment, an examiner determines the appropriate level of risk. The assessed level of risk determines the amount of information about the offender that is made available to the public."

⁵³⁵ "In short, Burchette contends that he could not protect his rights merely by presenting written statements to SOAC. Instead, he urges that due processes requires that he be allowed to personally appear before SOAC, answer their questions, and 'plead to be believed.' And yet, as was underscored by the court in *Weems*, in the instant case, Burchette had an in-person opportunity to give his version of the events during his SOSRA interview. In fact, the SOSRA Assessment Summary prepared after Burchette's November 1, 2005 interview includes a portion titled 'Offender Version.' The interviewer included a handwritten report of Burchette's assertions that he did not engage in the conduct initially alleged but for which he was not charged. Hence, despite his disagreement with his risk assessment, it is clear from the record that Burchette had a meaningful opportunity to be heard on the matter in his interview. Moreover, the Act gave Burchette an opportunity to appeal the SOSRA staff's Level 3 assessment to SOAC and, following that, to the Pulaski County Circuit Court as part of judicial review."

⁵³⁶ Payne and Flynn, "Sex Offender Community Notification Assessment," 2.

11.2. Georgia

Purpose of Risk Assessment: In Georgia, risk assessments are used to determine aspects of registration: Risk-level classification determines an offender’s required reporting frequency, and it may affect whether some offenders are eligible to petition for relief from registration, thus influencing their duration of time on the registry.⁵³⁷

Risk Assessment Instrument(s): Risk assessment instruments used by Georgia include, “but [are] not limited to,” the Child Pornography Offender Risk Tool (CPORT), the Static-99R, and the Static-2002R.⁵³⁸ Researchers did not locate any information on whether offenders are scored on more than one instrument, nor on whether any of the instruments are only applied to certain demographic groups of offenders.

- **In-State Instrument Development:** Georgia did not develop its own tool.
- **Instrument Items:** The CPORT consists of seven items related to static factors.⁵³⁹ The Static-99R consists of ten items related to static factors.⁵⁴⁰ The Static-2002R consists of fourteen items related to static factors.⁵⁴¹
- **Translation of Risk Assessment Score(s) into SORN Requirements:** Risk assessment instruments provide SORRB with a “baseline” for risk-level classification.⁵⁴² Sources do not state exactly how evaluators weigh the instrument scores and translate them into risk levels.
- **Instrument Scoring Agency:** The Georgia Sexual Offender Registration Review Board (SORRB), which operates under the Department of Behavioral Health and Developmental Disabilities, scores all of Georgia’s risk assessment instruments.⁵⁴³

⁵³⁷ Ga. Code Ann. §§ 42-1-12, 42-1-14, 42-1-19 (2021); SORRB, “SORRB Rules.” While this report focuses on the use of risk assessments for registration and notification purposes, one of the main uses of risk-level classification in Georgia is to determine monitoring requirements. The highest classification of offenders (sexually dangerous predators) is required to wear a GPS monitoring device for life. However, this requirement may be subject to change as the Georgia Supreme Court ruled in 2019 that the GPS requirement is an unconstitutional violation of offenders’ Fourth Amendment rights (Beau Evans, “Georgia High Court Pushes Lawmakers to Fix Sex Offender Monitoring,” *Georgia Recorder*, October 31, 2019, <https://georgiarecorder.com/brief/georgia-high-court-pushes-lawmakers-to-fix-sex-offender-monitoring/>).

⁵³⁸ SORRB, “SORRB Rules.”

⁵³⁹ Angela W. Eke, L. Maaik Helmus, and Michael C. Seto, “FAQ Version 2: The Child Pornography Offender Risk Tool (CPORT) and Correlates of Admission to Sexual Interest in Children (CASIC) Scale,” June 20, 2018, 5, 7, https://www.researchgate.net/profile/Angela-Eke-2/project/Child-Pornography-Offender-Risk-Tool-CPORT/attachment/5b2b920a4cde265cb649dbe6/AS:639927821815818@1529582090802/download/CPORT_CASIC+FAQs+V2+20+June+2018.pdf.

⁵⁴⁰ SAARNA, “Scales and Resources;” Tracy Alvord, “Sexual Offender Registration Review Board (SORRB)” (PowerPoint presentation, October 30, 2019), 3, <http://www.senate.ga.gov/committees/Documents/October302019PresentationSORRB.pptx>.

⁵⁴¹ Kelly M. Babchishin, R. Karl Hanson, and Leslie Helmus, *Corrections Research: User Report; The RRASOR, Static-99R, and Static-2002R All Add Incrementally to the Prediction of Recidivism among Sex Offenders* (Ottawa, ON: Public Safety Canada, January 2011), 5, <https://www.publicsafety.gc.ca/cnt/rsrscs/pblctns/2011-02-prs/2011-02-prs-eng.pdf>; Alvord, “Sexual Offender Registration Review Board (SORRB)” 3.

⁵⁴² Alvord, “Sexual Offender Registration Review Board (SORRB),” 3.

⁵⁴³ Ga. Code Ann. § 42-1-13 (2021); Alvord, “Sexual Offender Registration Review Board (SORRB),” 3.

Risk-Level Tiers: Georgia assigns offenders to three risk-level tiers: Level 1, Level 2, and Sexually Dangerous Predator.⁵⁴⁴ Level 1 offenders are deemed lowest risk and need “light” monitoring; Level 2 offenders are deemed moderate risk and need “substantial” monitoring; and Sexually Dangerous Predators are deemed to be highest risk and need “intensive” monitoring.⁵⁴⁵

Agency Responsible for Tier Classification: In addition to calculating scores from the application of risk assessment instruments, SORRB assigns offenders to risk-level classifications (Level 1, Level 2, or Sexually Dangerous Predator).⁵⁴⁶

Classifying Agency’s Ability to Modify or Override Instrument Score: In determining offenders’ risk-level classifications, SORRB may increase or decrease offenders’ risk levels indicated by risk assessment instrument(s), based on dynamic risk factors and “risk-reducing factors.”⁵⁴⁷ While sources do not state how SORRB weighs these factors, the information comes “from criminal and collateral documents, prison behavior, community supervision behavior, and sex offender treatment information.”⁵⁴⁸

Relief from Registration: Some Georgian sex offenders who meet certain statutory criteria may petition for relief from registration.⁵⁴⁹ While there are several circumstances that allow offenders to file relief petitions, one set of circumstances involves risk assessment: Offenders who have completed prison, parole, probation, and supervised release; who meet specified criteria indicating that their crime was a less serious offense; and who are classified as Level 1 offenders are permitted to file petitions for relief from registration.⁵⁵⁰ At the request of the court, SORRB

⁵⁴⁴ SORRB, homepage.

⁵⁴⁵ Alvord, “Sexual Offender Registration Review Board (SORRB),” 3.

⁵⁴⁶ SORRB, homepage.

⁵⁴⁷ While “risk-reducing factors” are not defined, dynamic factors are described as: “Any deviant sexual interest, sexual interest in children, paraphilic interests, sexual preoccupation, antisocial personality, antisocial traits (self-regulation problems, employment instability, substance abuse, intoxicated during offense, hostility), antisocial history/history of rule violations, intimacy deficits, [and] negative social influencers” (Alvord, “Sexual Offender Registration Review Board [SORRB],” 3–4).

⁵⁴⁸ Alvord, “Sexual Offender Registration Review Board (SORRB),” 3.

⁵⁴⁹ Ga. Code Ann. § 42-1-19. “An individual required to register pursuant to Code Section 42-1-12 may petition a superior court for release from registration requirements and from any residency or employment restrictions of this article if the individual: (1) Has completed all prison, parole, supervised release, and probation for the offense which required registration pursuant to Code Section 42-1-12; and (A) Is confined to a hospice facility, skilled nursing home, residential care facility for the elderly, or nursing home; (B) Is totally and permanently disabled as such term is defined in Code Section 49-4-80; or (C) Is otherwise seriously physically incapacitated due to illness or injury; (2) Was sentenced for a crime that became punishable as a misdemeanor on or after July 1, 2006, and meets the criteria set forth in subparagraphs (c)(1)(A) through (c)(1)(F) of Code Section 17-10-6.2; (3) Is required to register solely because he or she was convicted of kidnapping or false imprisonment involving a minor and such offense did not involve a sexual offense against such minor or an attempt to commit a sexual offense against such minor. For purposes of this paragraph, the term ‘sexual offense’ means any offense listed in division (a)(10)(B)(i) or (a)(10)(B)(iv) through (a)(10)(B)(xix) of Code Section 42-1-12; or (4) Has completed all prison, parole, supervised release, and probation for the offense which required registration pursuant to Code Section 42-1-12 and meets the criteria set forth in subparagraphs (c)(1)(A) through (c)(1)(F) of Code Section 17-10-6.2.”

⁵⁵⁰ *Id.*

conducts risk assessments of registrants petitioning for relief from registration.⁵⁵¹ However, researchers were unable to determine how common it is for judges to request risk assessments when considering relief petitions.

Reassessment/Reclassification: Offenders may petition SORRB for reassessment ten years after their last assessment, if they have not committed any subsequent offenses of a “violent or sexual nature.”⁵⁵²

Judicial Review of Classification: Offenders classified as Level 2 or as Sexually Dangerous Predators may file for judicial review of SORRB’s risk-level classification. Such offenders must file a petition with the court for a review of SORRB’s classification within thirty days of receiving notice of the classification determination.⁵⁵³

Backlogs: Media sources report a long-standing backlog of Georgian offenders waiting to be assessed and classified. The first such reports identified by researchers, dating from 2012, reported that 4,300 offenders were awaiting classification.⁵⁵⁴ The backlog was attributed to Georgia’s 2006 sex offender law, which required SORRB to assess and classify offenders, but did not provide adequate resources for SORRB to keep up with the workload.⁵⁵⁵ Furthermore, although the 2012 media reports state that analysts from the Georgia Bureau of Investigation had been brought in to assist in assessing and classifying offenders, a 2017 article reported the backlog still comprised approximately four thousand offenders at that time, and a 2019 article stated that a backlog still existed, although it did not state the number of offenders awaiting classification.⁵⁵⁶

Costs: SORRB’s budget in Georgia’s fiscal year 2022 appropriations bill is \$845,682.⁵⁵⁷ As sex offender risk assessment and risk-level classification are solely the responsibilities of SORRB, and they are SORRB’s only responsibilities,⁵⁵⁸ this budget appears to represent most of the sum that Georgia will spend on sex offender risk assessment, presumably aside from aforementioned contributions made by the Georgia Bureau of Investigations. SORRB members “serve without

⁵⁵¹ SORRB, “SORRB Rules.”

⁵⁵² SORRB, “Standing Procedures,” updated November 11, 2021, <https://www.sorrb.org/board-information/standing-procedures>.

⁵⁵³ Ga. Code Ann. § 42-1-14.

⁵⁵⁴ Associated Press, “Backlog in Sex Offenders at Issue in Georgia,” *Florida Times-Union*, April 7, 2012, <https://www.jacksonville.com/story/news/2012/04/07/backlog-sex-offenders-issue-georgia/15870303007/>; Associated Press, “GA Trying to Clear Sex Offender Registry Backlog,” *WTVM*, updated December 12, 2012, <https://www.wtvm.com/story/20326515/2012/12/Wednesday/ga-trying-to-clear-sex-offender-registry-backlog/>.

⁵⁵⁵ Simmons, “Georgia Sex Offender Tracking Falls Off.”

⁵⁵⁶ Associated Press, “GA Trying to Clear Sex Offender Registry Backlog”; Rhonda Cook, “Ga. Sex Offender Registry Problems Cost the State Federal Funds,” *Atlanta Journal-Constitution*, May 28, 2018, <https://www.ajc.com/news/crime--law/sex-offender-registry-problems-cost-the-state-federal-funds/844SoM4b3mgq8ZzptyJEnL/>; Evans, “Georgia High Court.”

⁵⁵⁷ Georgia General Assembly, “Conference Committee Substitute to H.B. 81,” 40.

⁵⁵⁸ SORRB, homepage.

compensation but shall be entitled to an expense allowance and travel cost reimbursement. Additionally, the board is allowed to hire staff, such as administrative staff and evaluators.”⁵⁵⁹

11.3. Montana

Montana Sources

Researchers were unable to locate many open-source resources describing the risk assessment process in Montana. Information on Montana’s risk assessment tool was extremely scant. Searches for the section of administrative code detailing the risk assessment process were unsuccessful. Regulations in the Administrative Rules of Montana dealing with sex offenders, Mont. Admin. R. 20.7.301–20.7.304, “deal only with the qualifications and certification of sex offender evaluators and do not provide insight into the methods used to determine tier levels.” Two sources mention an operational procedure, “Procedure PPD 1.5.1000, Sexual and Violent Offender Registration and Level Designation,” published by the Montana DOC’s Probation and Parole Division (last revised November 13, 2017). However, the link to this document provided in one of the sources was inactive, and researchers were unable to locate the document on the Montana DOC website, in Nexis databases, or through web searches.

Purpose of Risk Assessment: In Montana, risk assessments inform community notification requirements⁵⁶⁰ and registration requirements. To the latter, risk assessments are used to determine how frequently offenders must report,⁵⁶¹ and may affect the duration of registration for some offenders, as they determine which offenders may petition for relief from registration.⁵⁶²

Risk Assessment Instrument(s): Montana uses a “risk assessment tool” to classify offenders’ risk level;⁵⁶³ however, researchers were unable to determine which risk assessment instrument is used for this purpose.

- **In-State Instrument Development:** Researchers were unable to locate any information on which risk assessment instrument Montana uses; they also were not able to determine whether Montana developed its own tool.
- **Instrument Items:** Researchers were unable to locate any information on the risk instrument Montana uses; they also were not able to determine how many items are on the instrument nor whether it includes static or dynamic factors.

⁵⁵⁹ SORRB, “SORRB Rules.”

⁵⁶⁰ Montana DOJ, Sexual or Violent Offender Registry, “Law Enforcement Guidelines,” accessed June 17, 2022, <https://dojmt.gov/sexual-or-violent-offender-registry/law-enforcement-guidelines/>.

⁵⁶¹ Montana DOJ, Sexual or Violent Offender Registry, “Registration Requirements.”

⁵⁶² DOJ, SMART, “SORNA Implementation Review: State of Montana—Revised,” April 2017, 6, <https://smart.ojp.gov/sorna-montana>.

⁵⁶³ Madison Mattioli, “SORNA in Montana” (slide presentation, accessed June 17, 2022), 39, <https://leg.mt.gov/content/Committees/Interim/2019-2020/Law-and-Justice/Committee-Topics/SJ-19-Study/SORNA-Compliance-Montana-Final-Mattioli-November-2019.pdf>.

- **Translation of Risk Assessment Score(s) into SORN Requirements:** Researchers were unable to locate any information on which risk instrument Montana uses; they also were not able to determine how instrument scores are translated into risk levels.
- **Instrument Scoring Agency:** Sources did not state clearly who scores the Montana “risk assessment tool;” however, it is possible that the instrument is scored by the Department of Corrections or “sexual offender evaluator” tasked with producing for the sentencing court a “psychosexual evaluation report” recommending a risk-level classification (Level 1, Level 2, or Level 3) for the offender.⁵⁶⁴ A slide presentation prepared by the assistant attorney general stated that offenders are classified into risk levels based on “a psychosexual evaluation risk assessment process,”⁵⁶⁵ which may imply that the “psychosexual evaluation report” is based on a risk assessment instrument score; however, none of the sources explicitly state how the psychosexual evaluation is conducted.

Risk-Level Tiers: Montana classifies offenders convicted in the state into one of three levels. Level 1 offenders are deemed to have the lowest risk of re-offense and are subject to the least community notification; their reporting requirement is the least frequent. Level 2 offenders are deemed to have a moderate risk of re-offense and are subject to moderate community notification; their reporting requirement is of a moderate frequency. Level 3 offenders, who are designated “sexually violent predators,” are deemed to have the highest risk of re-offense and are subject to the most community notification; Level 3 offenders are subject to a reporting requirement of the highest frequency.⁵⁶⁶ Approximately half of Montana’s registered sex offenders were convicted in a court outside of those in Montana, and they are not classified into any of the three previously mentioned tiers “unless the offender moves to Montana from a state where Montana recognizes the foreign tier level, or until such time as the Montana Attorney General or appropriate county attorney petitions a district court to assign a risk level designation.” These unclassified offenders are designated Level 0, and they have the same reporting frequency as Level 1 offenders.⁵⁶⁷

Agency Responsible for Tier Classification: If convicted in Montana, generally, offenders’ sentencing courts provide classification. However, some offenders, such as those sentenced prior to October 1, 1997, were not classified at the time of sentencing; instead, the Montana Department of Corrections classifies them at the time of their release from incarceration.⁵⁶⁸

⁵⁶⁴ Mont. Code Ann. § 46-23-509.

⁵⁶⁵ Mattioli, “SORNA in Montana,” 19.

⁵⁶⁶ Montana DOJ, Sexual or Violent Offender Registry, “Registration Requirements,” Montana DOJ, Sexual or Violent Offender Registry, “Offender Types and Tier Levels,” accessed June 17, 2022, <https://app.doj.mt.gov/apps/svow/offendertypes.aspx>; Montana DOJ, Sexual or Violent Offender Registry, “Law Enforcement Guidelines.”

⁵⁶⁷ Mattioli, “SORNA in Montana,” 21.

⁵⁶⁸ Mont. Code Ann. § 46-23-509.

Classifying Agency’s Ability to Modify or Override Instrument Score: The Department of Corrections or “sexual offender evaluator[s]” produce, for the sentencing courts, “psychosexual evaluation report[s]” recommending risk-level classifications (Level 1, Level 2, or Level 3) for offenders. The courts’ classifications of the offenders’ risk levels are based on “review[s] of psychosexual evaluation report[s], any statement[s] by victim[s], and any statement[s] by offender[s].”⁵⁶⁹

Relief from Registration: In Montana, all sex offenders register for life, but many Level 0 (“non-designated”), Level 1, and Level 2 offenders qualify to petition courts for relief from registration.⁵⁷⁰ Level 0 and Level 1 offenders may petition for relief from registration after a 10-year registration period, and Level 2 offenders may petition after a 25-year registration period.⁵⁷¹

Reassessment/Reclassification: Level 2 offenders may petition the court for reclassification if they have “enrolled in and successfully completed the treatment phase of either the prison’s sexual offender treatment program or of an equivalent program,” since the original classification and at the time of sentencing.⁵⁷² While the court may reclassify an offender’s tier level, the statutory language does not indicate whether offenders are re-scored on a risk assessment instrument during this process.

Judicial Review of Classification: Researchers found no information on whether offenders may appeal their risk-level classification to the judiciary; however, because most offenders receive their initial classification from the court, FRD presumes that a judicial appeals process would be unnecessary.

Backlogs: Researchers did not locate any information on Montana risk assessment backlogs in the sources.

Costs: Researchers were unable to locate information on the specific costs of risk assessment in Montana that would allow a successful isolation from other costs associated with registration and notification.

Constitutional Challenges: In the 2008 Supreme Court of Montana case *State v. Samples*, on appeal from the District Court of the Thirteenth Judicial District, in and for the County of Yellowstone, the defendant sex offender Samples argued that the Montana “Sexual and Violent

⁵⁶⁹ *Id.*

⁵⁷⁰ Montana DOJ, Sexual or Violent Offender Registry, “Registration Requirements;” Montana DOJ, Sexual or Violent Offender Registry, “Petition for Removal.”

⁵⁷¹ Montana DOJ, Sexual or Violent Offender Registry, “Petition for Removal.”

⁵⁷² Mont. Code Ann. § 46-23-509.

Offender Registration Act requiring an offender to report a change of residence was void for vagueness.” However, the court held that the language of the requirement to “update registration when [offenders] change their residence” was “reasonably clear” as to its applicability to Samples when he left a shelter and became homeless. The court stated that this language gave Samples “fair notice” of his obligations and that the statute was not void for vagueness as applied to Samples, as Samples had in fact “changed residence” when he became homeless and failed to inform the authorities of this.

Additionally, the defendant sex offender argued that “the 1999 version of the Sexual and Violent Offender Registration Act...as applied to [him] deprive[d] him of his constitutional right to due process of law, because the Department of Corrections (DOC) set his sexual offender risk level without notifying him or giving him an opportunity to contest the designation.”

Samples had pled guilty to one count of sexual assault in 1989, the same year that “the Montana Legislature enacted the Sexual Offender Registration Act, [which was later] amended and retitled in 1995 as the Sexual or Violent Offender Registration Act.” Ultimately, upon discharge from prison, the “DOC designated him as a level 3 sexual offender.... However, [Samples] ‘did not receive any notice that DOC intended to designate him as a level 3 and did not have an opportunity to see or contest the data DOC relied on to designate him as a level 3 offender.’”

Regarding due process, the Supreme Court of Montana reasoned, first, that “both the Fourteenth Amendment of the United States Constitution and Article II, Section 17, of the Montana Constitution guarantee that no one shall be deprived of life, liberty, or property without due process of law.” The court referred to decisions on the question of “whether...sex offender registration [and notification] laws implicate a life, liberty, or property interest” by the Iowa Supreme Court in *Brummer v. Iowa Department of Corrections* and in *Noble v. Board of Parole and Post-Prison Supervision* and indicated that it “agree[d] with those jurisdictions [in] ...conclud[ing that] there is a liberty interest at stake when a person is designated as a particular risk level under the Act.”⁵⁷³ Though it invoked the U.S. Constitution, the court appears to have relied on the Montana state constitution for this analysis. The court indicated that it had previously held that “the Act is non-punitive and functions as a regulatory measure to assist law enforcement and protect the public...”; however, “[s]till, [it] places a burden on offenders to update their registration or face criminal sanctions, [and] [t]he extent of that burden depends on their offense risk level.”

⁵⁷³ “Unlike the law at issue in *Connecticut Department of Public Safety*, the designation of a risk level does not turn on an offender’s conviction alone. In Montana, facts other than conviction are used to make the designation, and the designation leads to varying requirements for an offender” (State v. Samples).

Because the Montana “DOC set Samples’ risk level based on information unknown to him and he had no chance to argue for a lesser risk level designation, [because] [t]he risk of an erroneous assessment and the associated opprobrium arising from such an assessment implicate a liberty interest protected by Article II, Section 17, of the Montana Constitution, [the Montana Supreme Court] conclude[d] that Samples was denied his right to due process of law when DOC designated him a level 3 sex offender.” The court indicated that Samples should have had “the opportunity to know what information was used to designate his risk level, ...[the] right to contest that information, and ...[the] ability to argue for a different designation,” and remanded the case to correct these deficiencies.⁵⁷⁴

11.4. New Jersey

Purpose of Risk Assessment: In New Jersey, risk assessments are used for the purpose of community notification.⁵⁷⁵

Risk Assessment Instrument(s): New Jersey’s risk assessment instrument is the Registrant Risk Assessment Scale (RRAS).⁵⁷⁶ Researchers found no evidence that New Jersey assesses adult offenders using any other risk assessment instruments. It is therefore assumed that this instrument is used to assess all populations, including both male and female offenders.

- **In-State Instrument Development:** New Jersey developed the RRAS in 1995.⁵⁷⁷
- **Instrument Items:** The RRAS contains thirteen items that assess both static and dynamic factors.⁵⁷⁸
- **Translation of Risk Assessment Score(s) into SORN Requirements:** The numerical scores of the thirteen items are tallied to produce a “total risk score,” which is then translated into a risk level (low, moderate, or high). Each risk level corresponds to a tier (Tier 1, Tier 2, or Tier 3).⁵⁷⁹
- **Instrument Scoring Agency:** New Jersey does not have a centralized state agency that is responsible for administering the RRAS; rather, county prosecutors score the instrument.⁵⁸⁰

⁵⁷⁵ New Jersey Office of the Attorney General, *Attorney General Guidelines*, Exhibit E.

⁵⁷⁶ *Id.* and Exhibit F.

⁵⁷⁷ Philip H. Witt and Natalie Barone, “Assessing Sex Offender Risk: New Jersey’s Methods,” *Federal Sentencing Reporter* 16, no. 3 (2004): 173, ProQuest (219956585).

⁵⁷⁸ New Jersey Office of the Attorney General, *Attorney General Guidelines*, 34, Exhibit F; Glenn E. Ferguson, Roy J. Eidelson, and Philip H. Witt, “New Jersey’s Sex Offender Risk Assessment Scale: Preliminary Validity Data,” *Journal of Psychiatry and Law* 26, no. 3 (1998): 329, <https://heinonline.org/HOL/P?h=hein.journals/jpsych26&i=335>.

⁵⁷⁹ New Jersey Office of the Attorney General, *Attorney General Guidelines*, Exhibits E, F.

⁵⁸⁰ *Id.* at 4.

Risk-Level Tiers: Offenders are placed into one of three risk-level classifications based on their score on the RRAS.⁵⁸¹ Tier 1 offenders are deemed low risk and are subject to the least notification, Tier 2 offenders are deemed moderate risk and are subject to moderate notification, and Tier 3 offenders are deemed high risk and are subject to the most notification.⁵⁸²

Agency Responsible for Tier Classification: New Jersey does not have a centralized agency that classifies offenders into tiers. County prosecutors are responsible both for scoring offenders on the RRAS and classifying offenders into risk-level tiers.⁵⁸³

Classifying Agency’s Ability to Modify or Override Instrument Score: Prosecutors may only depart from tier classifications recommended by RRAS scores if offenders “indicate” that they will re-offend and there exists “credible evidence” in the available records supporting these statements, or conversely, if offenders “demonstrate. . . a physical condition that minimizes the risk of re-offense,” such as “advanced age or debilitating illness.”⁵⁸⁴

Relief from Registration: Researchers found no evidence that risk assessments are a factor affecting petitions for relief from registration in New Jersey.

Reassessment/Reclassification: Researchers found little information on New Jersey’s process for reassessment of offenders after initial tier designations have been determined (either by county prosecutors or the court, if the offender appeals). However, the *Attorney General Guidelines for Law Enforcement for the Implementation of Sex Offender Registration and Community Notification Laws* states that “the determination as to which tier is appropriate in any given case will be an ongoing process.”⁵⁸⁵ Additionally, the National Institute of Justice, reporting the results of a 1996 study, stated that New Jersey offenders are reassessed if they move because “residential support” is one of the items on the RRAS, and new housing situations can change offenders’ scores.⁵⁸⁶

Judicial Review of Classification: New Jersey county prosecutors’ risk-level determinations are subject to judicial review. Offenders who have been classified as Tier 2 or Tier 3 may appeal their

⁵⁸¹ *Id.* at Exhibit E.

⁵⁸² New Jersey Office of the Attorney General, Department of Law and Public Safety, State Police, “New Jersey Sex Offender Internet Registry: Frequently Asked Questions,” accessed June 17, 2022, <https://www.njsp.org/sex-offender-registry/faqs.shtml>.

⁵⁸³ New Jersey Office of the Attorney General, *Attorney General Guidelines*, 4.

⁵⁸⁴ *Id.* at Exhibit E.

⁵⁸⁵ *Id.* at 56.

⁵⁸⁶ Peter Finn, “Sex Offender Community Notification,” *National Institute of Justice Research in Action* (February 1997), 10, <https://www.ojp.gov/pdffiles/162364.pdf>.

classification to the court “on or before a set date, which must not be shorter than two weeks from the date of the notice” of classification.⁵⁸⁷

Backlogs: Researchers identified little information on New Jersey backlogs; however, the same National Institute of Justice report, which surveyed criminal justice officials conducting community notification, reported the experiences of a prosecutor in New Jersey who experienced a backlog in the wake of the passage of the state’s law requiring community notification in 1994. With the implementation of the law, prosecutors had to assess and execute notification for offenders already in the community as well newly released offenders, creating a backlog. In addition, “many” offenders requested a court hearing to appeal their classification (requiring more time from prosecutors), and offenders must be reassessed if they move because “residential support” is an item on the RRAS.⁵⁸⁸

Costs: Researchers were unable to locate information that specifically addressed the costs of administering risk assessments. Because county officials, rather than state officials, perform risk assessment and tier classification tasks in New Jersey, there is not a centralized agency responsible for bearing the costs of risk assessment.

Constitutional Challenges: Two significant due process cases arose in New Jersey in the 1990s that resulted in changes to how the state handled its notification-related classification of sex offenders. In New Jersey, risk assessments are used for the purposes of community notification, and New Jersey county prosecutors use the Registration Risk Assessment Scale (RRAS) to categorize offenders. In contrast, convicted sex offenders share a single durational requirement for registration, with an option for some offenders to petition for earlier relief, and the registrant’s type of offense dictates how frequently they must report their information. Offenders are placed into one of three risk-level classifications based on their RRAS score, with level 1 being low risk and level 3 being the highest risk. Prosecutors may depart from tier classifications recommended by RRAS scores under certain conditions.⁵⁸⁹

In 1995, the Supreme Court of New Jersey held in *Doe v. Poritz* that the state’s registration and notification laws were constitutional under both the federal and state constitutions;⁵⁹⁰ however, it

⁵⁸⁷ New Jersey Office of the Attorney General, *Attorney General Guidelines*, 7, 27.

⁵⁸⁸ Finn, “Sex Offender Community Notification,” 10.

⁵⁸⁹ As previously noted, in New Jersey, prosecutors may only depart from the risk classification recommended by the instrument score if an offender has “indicated” that they will re-offend and there is “credible evidence” in the available records supporting this statement, or if the offender “demonstrates a physical condition that minimizes the risk of re-offense,” such as “advanced age or debilitating illness” (New Jersey Office of the Attorney General, *Attorney General Guidelines*, Exhibit E).

⁵⁹⁰ “Under the [New Jersey] state constitution, we find protectable interests in both privacy and reputation. Our analysis differs from that under the federal constitution only to the extent that we find a protectable interest in reputation without requiring any other tangible loss.”

also stipulated that New Jersey prosecutors' decisions to provide community notification for Tier 2 and 3 offenders require judicial review, and that "such review is constitutionally required by the New Jersey state constitution."

Furthermore, the *Poritz* court defined "for [offenders in] Tiers Two and Three, what the phrase 'likely to encounter the offender' means, and set forth standards intended to clarify the difference between low, moderate, and high risk." The court additionally "clarified or revised" the Guidelines accompanying the notification law "in order to assure that they conform to the statute"; "requiring that the statutory factor, 'behavior in the community following service of sentence,' be considered in all tier classifications; and requiring that the statutory factor, 'whether psychological or psychiatric profiles indicate a risk of recidivism' be available not only to increase the risk assessment, but [also] to decrease it."

The *Poritz* court "concluded that, despite its constitutionality, [the notification law] sufficiently impinges on liberty interests to trigger both procedural due process and the fairness doctrine in [New Jersey]."⁵⁹¹ It held that the state must ensure "the invasion of the fundamental right of privacy...be minimized by utilizing the narrowest means which can be designed to achieve the public purpose."

The *Poritz* court reasoned that under the notification law, information is disclosed to the public. While registrants lacked an expectation of privacy in most information readily available publicly, the notification law's "analysis is altered...by the disclosure of plaintiff's home address, and more importantly, by the totality of the information disclosed to the public."⁵⁹² Accordingly, the court also held that the New Jersey registration law did not impinge on registrant privacy, noting that registrants had no expectation of privacy in information already available to authorities, such as

⁵⁹¹ "Under both the [New Jersey] and federal constitutions...neither the registration, nor the notification law, violates the right to privacy; however, "considering the totality of the information disclosed to the public, the notification law implicates a privacy interest." The court further noted, "Grounded in the Fourteenth Amendment's concept of personal liberty, the right of privacy safeguards at least two different kinds of interests: 'the individual interest in avoiding disclosure of personal matters,' and 'the interest in independence in making certain kinds of important decisions.'"

⁵⁹² "In exposing those various bits of information to the public, the notification law links...information—name, appearance, address, and crime—that otherwise might remain unconnected. However public any of those individual pieces of information may be, were it not for the notification law, those connections might never be made. We believe a privacy interest is implicated when the government assembles those diverse pieces of information into a single package and disseminates that package to the public, thereby ensuring that a person cannot assume anonymity—in this case, preventing a person's criminal history from fading into obscurity and being wholly forgotten. Those convicted of crime may have no cognizable privacy interest in the fact of their conviction, but the notification law, given the compilation and dissemination of information, nonetheless implicates a privacy interest. The interests in privacy may fade when the information is a matter of public record, but they are not non-existent." The court also indicated "privacy interests [are] implicated where disclosure of a person's address [may result] in unsolicited contact." However, the court distinguished public disclosure of home addresses from more protected information, such as HIV status and other medical information: "State interest in public disclosure [of registrant addresses] substantially outweighs plaintiff's interest in privacy." That is, the "express public policy militating toward disclosure: the danger of recidivism posed by sex offenders. The state interest in protecting...members of the public from sex offenders is clear and compelling."

court and criminal records; the disclosure of their names, crimes, and places of conviction; or information concerning registrants' age, places of legal residence, vehicle description, physical description, photograph, and fingerprints.⁵⁹³

The *Poritz* court indicated that judicial review⁵⁹⁴ of Tier 2 and Tier 3 classifications (the two classifications that trigger notification requirements in New Jersey) were necessary to protect the registrant's privacy interest, and further indicated that such due process could be accomplished through other means should the state set up an alternative process, such as administrative review. Furthermore, the court indicated that, not only is the New Jersey Tier 2 notification required to be based on "likely to encounter," it was now no longer "automatic;" instead, evaluators are "require[d to make] an individual determination concerning...institutions and organizations [that the offender will 'likely encounter']."⁵⁹⁵ Additionally, the New Jersey Attorney General must formulate a set of procedures by which offenders will be notified prior to Tier 2 or 3 designation. If the offender objects, the court will schedule an in-camera hearing where the offender has a right to be represented by counsel, but also bears the burden of proving the degree of risk he or she poses of committing another crime.⁵⁹⁶

Following the decision in *Doe v. Poritz*, in 1997, another group of plaintiffs in *E.B. v. Verniero*, a case reviewed by the Third Circuit Court of Appeals, challenged New Jersey's registration and community notification laws. The plaintiffs in *E.B. v. Verniero* had been convicted prior to the passage of the laws and challenged them on the basis that they violated the Ex Post Facto Clause, the Double Jeopardy Clause, and the Due Process Clause of the U.S. Constitution. While the Third Circuit held that the laws did not violate the Ex Post Facto Clause or the Double Jeopardy Clause

⁵⁹³ "[Regarding] plaintiff's expectation of privacy in the information disclosed under the registration law...Information that is readily available to the public, which an individual cannot expect to remain private, is not within the ambit of constitutional protection."

⁵⁹⁴ "The most significant change, of course, is the requirement, on application, of judicial review of the tier classification and the manner of notification prior to actual notification. Because we have concluded that despite constitutionality [of the notification law], the statute sufficiently impinges on liberty interests to trigger both procedural due process and the fairness doctrine in our state...those subject to the statute are entitled to the protection of procedures designed to assure that the risk of re-offense and the extent of notification are fairly evaluated before Tier Two or Tier Three notification is implemented...The Attorney General, therefore, as a condition to the enforcement of this law, shall formulate procedures designed to assure that notice is given in sufficient time prior to Tier Two or Tier Three notification to allow the offender to object."

⁵⁹⁵ "As for the manner of notification, the limitations set forth in our opinion are mandatory. For Tier Two notification, only those community organizations that own or operate an establishment where children gather under their care, or where women are cared for, shall qualify, and only those that are 'likely to encounter' the offender as discussed in connection with Tier Three. The notice that goes out to such organizations shall specifically direct them *not* to notify anyone else, that being the acknowledged intent of the statute as interpreted by the Attorney General, an interpretation with which we agree. Organizations concerned with the welfare of children and women, but not having them under their custody or care, do not qualify, and as we understand the guidelines, the Attorney General does not take a different position. There shall be no automatic inclusion of an organization simply because it is 'registered.' Tier Two notification can easily amount to the same notification as required for Tier Three if these limitations are not observed."

⁵⁹⁶ "The court...shall affirm the prosecutor's determination unless it is persuaded by a preponderance of the evidence that it does not conform to the laws and guidelines."

of the U.S. Constitution, like the New Jersey Supreme Court in *Doe v. Poritz*, it held that the Due Process Clause of the New Jersey Constitution required the state to give registrants classified as Tier 2 or Tier 3 the “opportunity to challenge the...classification and notification plan, in a hearing....” Notably, however, the Third Circuit shifted the burden of proof at these hearings to the state, indicating that “the prosecutor has the burden of persuasion and must prove [their] case by clear and convincing evidence.”

Additional Information: As of 2004, no “predictive validity” studies of New Jersey’s RRAS had been completed.⁵⁹⁷ However, an exploratory study conducted in 1998 found “preliminary support for the use of the RRAS in making sex offender risk determinations.”⁵⁹⁸

11.5. North Dakota

Purpose of Risk Assessment: In North Dakota, risk assessments are used to determine both offender registration requirements and community notification requirements.⁵⁹⁹

Risk Assessment Instrument(s): North Dakota offenders are scored on one of two risk assessment instruments: the Static-99R or the Minnesota Sex Offender Screening Tool Revised (MnSOST-R). Most offenders in North Dakota are scored on the Static-99R prior to sentencing and again six to eight months before release from incarceration. Because of this, risk-level determinations may be based on a pre-existing Static-99R score, provided the score was obtained within the previous two years. Offenders who are not scored on the Static-99R are scored on the MnSOST-R.⁶⁰⁰

- **In-State Instrument Development:** North Dakota did not develop its own risk assessment instrument.
- **Instrument Items:** The Static-99R consists of ten items related to static factors,⁶⁰¹ while the MnSOST-R consists of sixteen items comprising both static and dynamic factors.⁶⁰²

⁵⁹⁷ The source explains: “That is, no study has yet examined to what extent specific RRAS scores are related to future recidivism. Consequently, the RRAS is not an actuarial scale” (Witt and Barone, “Assessing Sex Offender Risk,” 173).

⁵⁹⁸ Ferguson, Eidelson, and Witt, “New Jersey’s Sex Offender Risk Assessment Scale,” 328.

⁵⁹⁹ North Dakota Office of the Attorney General, North Dakota Sex Offender Registry, “FAQ,” accessed June 17, 2022, <https://sexoffender.nd.gov/FAQ/faq.shtml>; North Dakota Office of the Attorney General, “Offender Registration,” accessed June 17, 2022, <https://attorneygeneral.nd.gov/criminal-justice-resources/offender-registration>; N.D. Cent. Code § 12.1-32-15 (2022).

⁶⁰⁰ North Dakota Office of the Attorney General, *Risk Assessment and Community Notification Guidelines*, 2. The guidelines state that while the MnSOST-R has not been validated for “females and intrafamilial or probationary sex offenders, it will be scored for those offenders unless a more appropriate tool is available.”

⁶⁰¹ SAARNA, “Scales and Resources.”

⁶⁰² Epperson et al., “Minnesota Sex Offender Screening Tool—Revised,” 36–38.

- **Translation of Risk Assessment Score(s) into SORN Requirements:** In North Dakota, offenders' scores on the Static-99R or MnSOST-R are translated into "risk levels;" risk-level designations vary according to which instrument is used: The Static-99R designations are "low," "low/moderate," "moderate/high," and "high;" the MnSOST-R classifications are "low," "moderate," and "high." The score and corresponding risk level serve as the "starting point" for classifying an offender to one of three tiers ("low risk," "moderate risk," or "high risk").⁶⁰³
- **Instrument Scoring Agency:** The North Dakota Department of Corrections and Rehabilitation (DOCR) scores the Static-99R or MnSOST-R for offenders under its supervision when offenders are incarcerated, paroled, or on probation. The North Dakota Attorney General's office is responsible for scoring offenders who are not under DOCR's supervision.⁶⁰⁴

Risk-Level Tiers: North Dakota offenders are placed into one of three risk-level tiers. "Low risk" offenders must register for fifteen years, verify their information annually, and are subject to the least community notification. "Moderate risk" offenders must register for twenty-five years, verify their information twice a year, and are subject to moderate notification.⁶⁰⁵ "High-risk" offenders are subject to lifetime registration,⁶⁰⁶ must verify their information four times a year, and are subject to the most notification.⁶⁰⁷

Agency Responsible for Tier Classification: The North Dakota Attorney General's Sex Offender Risk Assessment Committee (SORAC) assigns offenders to risk-level tiers.⁶⁰⁸

Classifying Agency's Ability to Modify or Override Instrument Score: Offenders' scores on the Static-99R or MnSOST-R serve as "starting point[s]" for SORAC's risk-level determinations. In addition to instrument scores, SORAC's tier determinations are based on "offender-specific information and dynamic factors that may change with greater frequency."⁶⁰⁹

⁶⁰³ North Dakota Office of the Attorney General, *Risk Assessment and Community Notification Guidelines*, 5.

⁶⁰⁴ *Id.* at 2. It is not clear from the source whether the Sex Offender Risk Assessment Committee or a different entity within the Attorney General's office scores these risk assessments.

⁶⁰⁵ North Dakota Office of the Attorney General, North Dakota Sex Offender Registry, "FAQ;" North Dakota Office of the Attorney General, "Offender Registration," N.D. Cent. Code § 12.1-32-15.

⁶⁰⁶ Lifetime registration may be based on factors other than assessment as "high risk," including "offenders who have more than one conviction for a sex offense, individuals who were convicted after August 1999 of certain sex offenses against young children, and any person who has been civilly committed as a 'sexually dangerous individual' under North Dakota, federal, or any state's laws" (North Dakota Office of the Attorney General, North Dakota Sex Offender Registry, "FAQ").

⁶⁰⁷ North Dakota Office of the Attorney General, North Dakota Sex Offender Registry, "FAQ;" North Dakota Office of the Attorney General, "Offender Registration" N.D. Cent. Code § 12.1-32-15.

⁶⁰⁸ North Dakota Office of the Attorney General, "Offender Registration."

⁶⁰⁹ North Dakota Office of the Attorney General, *Risk Assessment and Community Notification Guidelines*, 2, 5.

Relief from Registration: Researchers found no evidence that risk assessments are a factor affecting petitions for relief from registration in North Dakota.

Reassessment/Reclassification: Offenders may file a request that SORAC reassess their risk-level classification every two years. SORAC may also reassess an offender's risk level at the request of law enforcement or "upon the occurrence of a known event."⁶¹⁰ A reassessment may be triggered by offenders' conviction of a subsequent offense.⁶¹¹

Judicial Review of Classification: Researchers found no evidence that offenders may appeal their risk-level classification to the judiciary in North Dakota.

Backlogs: Researchers found no evidence of backlogs in classification of offenders in North Dakota.

Costs: Researchers were unable to locate information that would allow FRD to isolate specific costs of North Dakota's administration of risk assessment from those associated with registration and notification generally.

Additional Information: A 2003 study validated the Static-99R and MnSOST-R for populations incarcerated or on probation in North Dakota.⁶¹²

11.6. Oregon

Purpose of Risk Assessment: In Oregon, risk assessments are used for the purposes of community notification and to determine which offenders may petition for relief from registration.⁶¹³

Risk Assessment Instrument(s): Oregon scores adult male sex offenders on the Static-99R. Offenders who cannot be scored on the Static-99R, such as female offenders and juvenile offenders, are assessed using the Level of Service/Case Management Inventory (LS/CMI) instrument and an "in person evaluation."⁶¹⁴

- **In-State Instrument Development:** Oregon did not develop its own risk assessment instrument.

⁶¹⁰ *Id.* at 7.

⁶¹¹ North Dakota Office of the Attorney General, North Dakota Sex Offender Registry, "Laws."

⁶¹² North Dakota Office of the Attorney General, *Risk Assessment and Community Notification Guidelines*, 3.

⁶¹³ Oregon Board of Parole, "Sex Offender Notification Leveling Program."

⁶¹⁴ *Id.*

- **Instrument Items:** The Static-99R consists of ten items related to static factors.⁶¹⁵ The LS/CMI consists of forty-three items comprising both static and dynamic factors.⁶¹⁶
- **Translation of Risk Assessment Score(s) into SORN Requirements:** An offender's score on the Static-99R is translated into one of the instrument's designated "risk levels:" "very low," "below average," "average," "above average," and "well above average." The instrument's produced risk level then corresponds to one of Oregon's three tiers: the "very low," "below average," and "average" risk levels correspond to Level 1; the "above average" risk level corresponds to Level 2; and the "well above average" risk level corresponds to Level 3.⁶¹⁷ Sources do not state how the scores of offenders assessed with the LS/CMI are translated into risk levels.
- **Instrument Scoring Agency:** The Oregon Board of Parole and Post-Prison Supervision (BoPPPS) scores the Static-99R for offenders sentenced to an Oregon Department of Corrections institution, as well as offenders who are sentenced "in another United States court."⁶¹⁸ For offenders in jail and those discharged, released, or on probation, a "supervisory authority" scores the Static-99R.⁶¹⁹ The Psychiatric Security Review Board scores the Static-99R for offenders who have been "found guilty except for insanity of a sex crime" no later than ninety days after the person is placed on conditional release by the board, is discharged from the jurisdiction of the board, placed on conditional release by the court pursuant to Or. Rev. Stat. § 161.327, or discharged by the court pursuant to Or. Rev. Stat. § 161.329.⁶²⁰ For offenders who are scored on the LS/CMI, an "independent evaluator who is a licensed provider or Sex Offender Treatment Board-certified provider qualified to conduct sexual offense risk assessments" scores the instrument.⁶²¹

⁶¹⁵ SAARNA, "Scales and Resources;" Alvord, "Sexual Offender Registration Review Board (SORRB)," 3.

⁶¹⁶ D.A. Andrews, James L. Bonta, and J. Stephen Wormith, *LS/CMI: Level of Service/Case Management Inventory* (Toronto, ON: MHS, 2004), 2, https://www.assessments.com/assessments_documentation/LSCMI_Tech_Brochure.pdf.

⁶¹⁷ Oregon Board of Parole and Post-Prison Supervision, "Static-99R Score to Oregon Sex Offender Notification Levels," in *Static-99R Coding Rules*, Phenix et al., 94, <https://www.oregon.gov/boppps/Documents/Exhibits/ExhibitQ2.pdf>. *Editor's Note:* It appears that the Oregon Board of Parole and Post-Prison Supervision took the original coding rules (cited previously in this report) and reformatted the document, which is labeled as "Exhibit Q-2."

⁶¹⁸ Oregon Board of Parole, "Sex Offender Notification Leveling Program;" Or. Rev. Stat. § 163A.105 (2022); Or. Admin. R. 255-085-0020.

⁶¹⁹ A "supervisory authority" is defined as "the state or local corrections agency or official designated in each county by that county's board of county commissioners or county court to operate corrections supervision services, custodial facilities, or both" (Or. Rev. Stat. § 44.087 [2022]).

⁶²⁰ "A person is guilty except for insanity if, as a result of a qualifying mental disorder at the time of engaging in criminal conduct, the person lacks substantial capacity either to appreciate the criminality of the conduct or to conform the conduct to the requirements of law" (Or. Rev. Stat. § 161.295 [2022]). While the Oregon statutes state that the Psychiatric Security Review Board assesses individuals "found guilty except for insanity of a sex crime," a website for the Oregon State Police appears to make a contradictory statement: "Oregon law requires the [board] to complete sex offender risk assessments for all convicted and registered sex offenders...who were convicted of a sex crime and required to register as a sex offender or who were found guilty except for insanity of a sex crime and required to register as a sex offender under ORS Chapter 163A" ("Sex Offender Registration (SOR): Leveling & Classification of Sex Offenders," accessed June 17, 2022, <https://www.oregon.gov/osp/programs/SOR/Pages/statuteslaws.aspx#levelingclassificationoffenders>).

⁶²¹ Or. Admin. R. 255-085-0020.

Risk-Level Tiers: Oregon offenders are placed into one of three risk-level tiers, based primarily on their risk assessment scores: Level 1 offenders are deemed low risk and are subject to the least notification, Level 2 offenders are deemed moderate risk and are subject to moderate notification, and Level 3 offenders are deemed high risk and are subject to the most notification.⁶²²

Agency Responsible for Tier Classification: In Oregon, the agency that scores an offender's risk assessment (BoPPPS, a supervisory authority, or the Psychiatric Security Review Board) also determines that offender's risk-level classification.⁶²³

Classifying Agency's Ability to Modify or Override Instrument Score: Sources did not specify whether classifying agencies consider factors that would mitigate or override the risk levels indicated by scores on risk assessment instruments.

Relief from Registration: In Oregon, Level 1 offenders who meet certain conditions may petition for relief from registration.⁶²⁴ While Oregon allows offenders who have been classified as Level 2 or 3 to be reclassified to a lower level, any offender who has ever been classified as a Level 3 offender is restricted from petitioning for registration relief.⁶²⁵ Level 1 offenders may file the petition five years after the end of supervision for the sex crime or, if they were reclassified from Level 2 to Level 1, five years after their reclassification.⁶²⁶ If an offender files a petition for relief from registration, BoPPPS or the Psychiatric Security Review Board must hold a hearing⁶²⁷ and, if it is found that the offender is statistically unlikely to re-offend and does not pose a threat to the safety of the public, the petition must be granted.⁶²⁸

Reassessment/Reclassification: Level 2 and Level 3 offenders who meet specific conditions may apply to be reclassified after ten years have passed since the end of supervision for the sex

⁶²² Oregon Board of Parole, "Sex Offender Notification Leveling Program." While classification is often based on risk assessment, offenders who have been living in the community for at least ten years, are not recidivists, and meet certain other criteria may be placed into Level 1 without a risk assessment. Additionally, classifying agencies may, at their discretion, choose to classify female offenders as Level 1 without a risk assessment "unless evidence-based risk factors exist to indicate that the female registrant is at a higher risk to re-offend sexually and a higher level of notification may be appropriate." Examples of these risk factors include "arrest, charge, or conviction for a child abuse offense," as well as "arrest, charge, or conviction for promoting prostitution or compelling prostitution." Furthermore, certain offenders are automatically classified as Level 3. This includes any offender "who was previously designated as a predatory sex offender between February 10, 2005 and December 31, 2013;" "is designated as a sexually violent dangerous offender under ORS 137.765;" or "who has failed or refused to participate in a sex offender risk assessment (Or. Admin. R. 255-085-0020).

⁶²³ Or. Rev. Stat. § 163A.105.

⁶²⁴ Oregon Board of Parole, "Sex Offender Notification Leveling Program."

⁶²⁵ Oregon Board of Parole, "Sex Offender Notification Leveling Program." Offenders who have been reclassified from Level 3 to Level 2 are not eligible for further reclassification to Level 1. See Or. Admin. R. 255-085-0030 (2020).

⁶²⁶ "Supervision" means probation, parole, post-prison supervision, or any other form of supervised or conditional release" (Or. Rev. Stat. § 163A.125 [2022]); Oregon Board of Parole, "Sex Offender Notification Leveling Program."

⁶²⁷ See Or. Rev. Stat. § 163A.125(4)(a).

⁶²⁸ Oregon Board of Parole, "Sex Offender Notification Leveling Program"; Or. Admin. R. 255-085-0010 (2020).

crime.⁶²⁹ Level 2 offenders who were previously classified as Level 3 may not be reclassified as Level 1.⁶³⁰ If an offender files a petition for reclassification, BoPPPS or the Psychiatric Security Review Board must hold a hearing⁶³¹ and a reassessment of the offender must be conducted, which may result in the offender being reclassified to a higher classification level.⁶³² Reassessments may be completed as part of the petition-to-be-reclassified process; also, classifying agencies conduct reassessments when offenders are convicted of new sex offenses and when the classifying agency “determines that a factual mistake caused an erroneous assessment or classification.”⁶³³

Judicial Review of Classification: Researchers found no evidence that offenders may appeal their risk-level classification to the judiciary.

Backlogs: BoPPPS has experienced risk assessment backlogs stemming from the legislative requirement to assess and classify all offenders who were registered prior to the commencement of the assessment program in 2015. There are approximately twenty-three thousand of these “historical” registrants; however, BoPPPS is required to prioritize the classification of newly registered offenders over “historical” offenders. BoPPPS states, “With the current staffing level, [BoPPPS] can just keep up with leveling new registrants plus a few individuals classified as highest risk to recidivate under the old system. At the current funding level, the board will not meet the 2026 [Oregon Revised Statutes] deadline to assess all historical registrants.”⁶³⁴

Costs: Researchers were unable to locate much data on the specific costs of risk assessment in which those costs were isolated from other costs associated with registration and notification. However, the 2015 legislation implementing the requirement that BoPPPS assess and classify sex offenders’ risk level also “appropriated \$3,163,183 [to the] General Fund to establish...12 positions (10.00 FTE) to adopt a sex offender risk assessment methodology and to classify sex offenders into risk levels.”⁶³⁵ This number provides some indication of staffing costs related to risk assessment and risk-level classification.

⁶²⁹ Oregon Board of Parole, “Sex Offender Notification Leveling Program.”

⁶³⁰ Oregon Board of Parole, “Sex Offender Notification Leveling Program;” Or. Rev. Stat. § 163A.125.

⁶³¹ Oregon Board of Parole and Post-Prison Supervision, “Notice of Rights and Procedures in Sex Offender Registration Relief Hearings,” August 2020, 2, <https://www.oregon.gov/boppps/Documents/R%26R/3a.RR%20Notice%20of%20Rights%20and%20Procedure-Relief.pdf>; Or. Rev. Stat. § 163A.125.

⁶³² Oregon Board of Parole, “Sex Offender Notification Leveling Program;” Or. Rev. Stat. § 163A.125.

⁶³³ Or. Admin. R. 255-085-0010.

⁶³⁴ Oregon Board of Parole, “Public Safety Joint Ways & Means Committee; Agency Presentation 2021–23: Written Reference Materials,” accessed June 17, 2022, 13, 15, <https://apps.oregonlegislature.gov/liz/2021R1/Downloads/CommitteeMeetingDocument/230997>.

⁶³⁵ Oregon Legislative Fiscal Office, “2019–21 Legislatively Adopted Budget: Detailed Analysis,” October 2019, 180, <https://www.oregonlegislature.gov/lfo/Documents/2019-21%20Legislatively%20Adopted%20Budget%20Detailed%20Analysis.pdf>.

Constitutional Challenges: In a 1998 case before the Supreme Court of Oregon, *Noble v. Board of Parole & Post-Prison Supervision*, the petitioner sex offender, upon his release from prison, had been designated a “predatory sex offender” by the BoPPPS. His petition for administrative review of this designation was denied. While the Oregon Court of Appeals affirmed the order, the Supreme Court of Oregon held that “the petitioner was entitled to notice and a hearing before the board designated him as a predatory sex offender, under the due process clause of the United State Constitution” and remanded the case for reconsideration.

The petitioner asserted additional constitutional violations in an administrative review request to the board, arguing that the “retroactive application of the sexual predator statute violates the Ex Post Facto principles expressed in [both]...the Oregon Constitution [and] ...the United States Constitution.” He also asserted that the statute “is a bill of attainder prohibited by Article I, Section 10, of the United States Constitution.” Additionally, the petitioner argued that “the board’s application of the...statute constitutes double jeopardy, in violation of [both] the Fifth Amendment to the United States Constitution and Article I, Section 12, of the Oregon Constitution.” Last, the petitioner argued that “the statute imposes cruel and unusual punishment,” “is not based on principles of reformatory justice, and, thus, violates the Eight[h] Amendment of the United States Constitution and Article I, Sections 15 and 16 of the Oregon Constitution.” However, the Oregon Supreme Court “reach[ed] only...[the] procedural issues”—that “the petitioner was not afforded the process to which [he] was entitled under the due process clause and, consequently, that his designation as a predatory sex offender is invalid.” The petitioner had asserted three “implicated...liberty interests:” an interest in reputation, an interest in privacy, and an interest in remaining free of legal obligations that otherwise would not apply.

The Oregon Supreme Court held that “the [b]oard’s decision to designate a person as a predatory sex offender...implicates a due process interest in liberty.” The court opined that while *Paul v. Davis* indicated that “reputational interests alone are not ‘liberty’ interests within the meaning of the due process clause and do not merit due process protections,” the petitioner’s case “differs from *Paul* in that the prior U.S. Supreme Court case ‘in essence [was a] defamation claim[.]’ against a government employee while [the] petitioner’s case involves a government agency ‘designat[ing] an individual as a predatory sex offender.’” This, the Oregon Supreme Court indicated, is an interest that “cannot be captured in a single word or phrase,” and the court described many of the components of such an interest in its opinion, such as the loss of employment and potential for verbal and physical harassment.

The Oregon Supreme Court used the three-factor consideration established in *Mathews v. Eldridge*⁶³⁶ and determined that first, “the private interests [of sex offenders such as those of the petitioner] affected by [the law in question] are significant.” Second, the court determined that “[t]he risk of an erroneous decision under...circumstances [of the methods by which the Oregon BoPPPS assesses its offenders] is significant” and that “[i]f there is error in the materials that the agency considers, petitioner[s] never will have the chance to know of the error, much less to correct it.” The court reasoned that materials used by the board go beyond “objective facts” and that at least “[s]ome of the evidence employed by the [b]oard...is necessarily subjective and, worse, unknown.” Third, the court considered the interests of the government and the board, concluding that “requiring the state to afford a pre-deprivation hearing...would not impose a significant procedural burden on the state.” It reasoned that first, the government “clearly has an interest in identifying predatory sex offenders *before* they are released into the community,” and that second, “...the state does not identify...interests, such as avoidance of delay or expense, that justifies or requires postponement of the hearing until after designation occurs.”

Weighing these factors, the Oregon Supreme Court held that “due process requires notice and an evidentiary hearing when the [b]oard proposes to designate a person as a predatory sex offender..., and that...the hearing must occur *before* the designation decision is made, ...because due process requires that the hearing be provided before the deprivation actually takes place.” [Citation omitted.] The court required that the board remove the designation from the petitioner, reversed the Court of Appeals decision, and remanded the case to the board.

11.7. Rhode Island

Purpose of Risk Assessment: In Rhode Island, risk assessments are primarily used to determine notification requirements.⁶³⁷ Risk assessments do play a limited role in affecting registration

⁶³⁶ “[A] court determines the specific requirements of due process by considering three factors: [first,] the private interest that will be affected by the government action, [second,] the risk of an erroneous decision inherent in the procedure employed, along with the probable value or any additional or different procedural safeguard, and [third,] the government’s interest, including any fiscal and administrative burdens involved in providing additional or substituted procedures” (424 U.S. 319 [1976]).

⁶³⁷ Rhode Island Parole Board, *Sexual Offender Community Notification Guidelines*, 11.

requirements for some offenders.⁶³⁸ They are used in decisions on sexually violent predator designations.⁶³⁹

Risk Assessment Instrument(s): Rhode Island has approved three risk assessment instruments for use: the Static-99R, Static-2002R, and Stable 2007. Sources do not specify whether offenders are scored on one, two, or all three instruments. Offenders not considered good candidates for any of these three instruments (e.g., because they have committed child pornography offenses or “non-hands-on offenses”) are assessed for risk using a “structured professional judgment” approach.⁶⁴⁰

- **In-State Instrument Development:** Rhode Island did not develop its own risk assessment tool.
- **Instrument Items:** The Static-99R consists of ten items related to static factors.⁶⁴¹ The Static-2002R consists of fourteen items related to static factors.⁶⁴² The Stable 2007 consists of thirteen items related to dynamic factors.⁶⁴³
- **Translation of Risk Assessment Score(s) into SORN Requirements:** Sources do not state exactly how Rhode Island’s evaluators weigh offenders’ instrument scores and translate them into risk levels denoting offenders’ classification levels.
- **Instrument Scoring Agency:** The Rhode Island Sex Offender Board of Review (BOR) scores risk assessment instruments. If an offender is not a good candidate to be scored on the Static-99R, Static-2002R, or Stable 2007 because of his or her offense of conviction, the BOR uses a “structured professional judgment” approach to assess the offender’s risk.⁶⁴⁴

Risk-Level Tiers: BOR classifies offenders into one of three tiers: Level I offenders are deemed to have the lowest risk of re-offending and are subject to the least notification, Level II offenders are

⁶³⁸ Sexually violent predators (SVP) must register for life and verify their addresses on a quarterly basis for life, while many other offenders must register for ten years and verify their addresses quarterly for only the first two years of the registration period. Additionally, all registered offenders must register in person with local law enforcement annually. However, SVP status is not the only circumstance that requires lifetime registration and quarterly address verification, although it is the only circumstance related to risk assessments: Offenders with a prior offense and those convicted of an aggravated offense are also subject to these requirements. See 11 R.I. Gen. Laws § 11-37.1-4 (2022); DOJ, SMART, “SORNA Substantial Implementation Review: State of Rhode Island,” January 2016, 8, <https://smart.ojp.gov/sorna-rhode-island>.

⁶³⁹ 11 R.I. Gen. Laws § 11-37.1-6.

⁶⁴⁰ Rhode Island Parole Board, *Sexual Offender Community Notification Guidelines*, 9.

⁶⁴¹ SAARNA, “Scales and Resources;” Alvord, “Sexual Offender Registration Review Board (SORRB),” 3.

⁶⁴² Babchishin, Hanson, and Helmus, *Corrections Research*, 5; Alvord, “Sexual Offender Registration Review Board (SORRB),” 3.

⁶⁴³ Yolanda M. Fernandez and L. Maaike Helmus, “A Field Examination of the Inter-Rater Reliability of the Static-99 and Stable-2007 Scored by Correctional Program Officers,” *Sexual Offender Treatment* 12, no. 2 (2017): <http://www.sexual-offender-treatment.org/181.html>.

⁶⁴⁴ Rhode Island Parole Board, *Sexual Offender Community Notification Guidelines*, 9.

deemed to have a moderate risk of re-offending and are subject to moderate notification, and Level III offenders are deemed to have the highest risk of re-offending and are subject to the most community notification.⁶⁴⁵

Agency Responsible for Tier Classification: The BOR classifies offenders into levels that denote their required level of notification.⁶⁴⁶

Classifying Agency's Ability to Modify or Override Instrument Score: According to the Rhode Island Parole Board's *Sexual Offender Community Notification Guidelines*, BOR arrives at its determinations of offenders' risk levels by considering fifteen factors, one of which is offenders' risk assessment instrument scores.⁶⁴⁷

Relief from Registration: Rhode Island does not allow registrants to petition for relief from registration.⁶⁴⁸

Reassessment/Reclassification: Researchers were unable to determine whether the BOR reassesses offenders' risk assessment scores or whether the BOR reassesses offenders' risk-level classifications.

Judicial Review of Classification: Offenders may file for judicial review of BOR's risk-level classifications. Offenders classified as Level II or Level III may file petitions with the courts for review of BOR's classification determinations within ten days of receiving notices of their determinations.⁶⁴⁹

Backlogs: Media articles quoted sources from 2007 and 2011 referring to a backlog of Rhode Island offenders awaiting risk-level classifications by the BOR.⁶⁵⁰ The 2011 article attributed the cause of the backlog to "the sheer volume of work," and also stated that judicial appeals of BOR's

⁶⁴⁵ *Id.* at 7, 28–30.

⁶⁴⁶ 11 R.I. Gen. Laws § 11-37.1-6.

⁶⁴⁷ Rhode Island Parole Board, *Sexual Offender Community Notification Guidelines*, 25–26. The other factors are degree of violence; other significant crime considerations (such as animal abuse or photographing the crime); degree of sexual intrusion; victim selection characteristics; known nature and history of sexual aggressions; other criminal history; substance abuse history; presence of psychosis, mental retardation, or behavioral disorder; degree of family support of offender accountability and safety; personal, employment, and educational stability; incarceration community supervision record; external controls; and participation in and response to sex offender-specific treatment program as well as admission of guilt, acceptance of responsibility for crimes, and commitment to ongoing safety, recovery, and treatment.

⁶⁴⁸ DOJ, SMART, "SORNA Substantial Implementation Review: State of Rhode Island," 8.

⁶⁴⁹ Rhode Island Parole Board, *Sexual Offender Community Notification Guidelines*, 31–32.

⁶⁵⁰ Beth Hurd, "Corrections Officer Publishes Newsletter about Sex Offender," *Johnston Sunrise*, October 18, 2007, <https://johnstonsunrise.net/stories/corrections-officer-publishes-newsletter-about-sex-offender,2136>; Stephen Beale, "The Communities with the Most Sex Offenders," *GoLocalProv*, November 10, 2011, <https://www.golocalprov.com/news/sex-offenders-per-capita>.

classification could delay an offender's final classification for "up to a year, or longer."⁶⁵¹ Researchers were unable to determine if BOR has resolved the backlog since these articles were published.

Costs: Under Rhode Island's fiscal year 2021 enacted budget, BOR's budget allocation was \$429,601; Rhode Island's fiscal year 2021 revised budget allocated \$530,928 to BOR.⁶⁵² As sex offender risk assessment and risk-level classification is solely the responsibility of BOR and is BOR's only responsibility,⁶⁵³ this budget appears to represent the total sum that Rhode Island spends on sex offender risk assessment, other than costs incurred by the courts for judicial review of the BOR's classifications.

Constitutional Challenges: In a 2009 case before the Supreme Court of Rhode Island, *State v. Germane*, the appellant Germane had been classified by Rhode Island as a Risk Level III offender and thus subject to the corresponding community notification requirements under state law. He appealed to the Superior Court of Providence County, which subsequently upheld the classification determination of the BOR. The defendant then appealed to Rhode Island's Supreme Court, asserting that his procedural and substantive due process rights under the federal and Rhode Island state constitutions were violated. While the state Supreme Court indicated "that a portion of [Rhode Island's Sex Offender Registration and Community Notification Act], in some instances, could be irreconcilable with the constitutionally protected right to procedural due process," it ultimately found that the defendant was not deprived of this "or any other constitutional right" and affirmed the decision of the Superior Court.

The court noted that, while Rhode Island had enacted its first sex offender registration statute in 1992, it was subsequently repealed, and another statute titled the "Sexual Offender Registration and Community Notification Act" was enacted in its place in 1996. This statute was amended in 1999, "creat[ing] a new category of offenses subject to lifetime registration"—"aggravated offenses." The amendment took place "after the commission of [a]ppellant Germane's offenses, but before the disposition of the criminal charges against him." "[H]aving pled *nolo contendere* to several aggravated sexual offenses, under the amended statute, [the appellant would then be] required to register...for the rest of his life." Regardless, the appellant remained unclassified for some time, and in November 2003, he was arrested "for soliciting two young women from a motor vehicle for an indecent purpose," violating his probation. Subsequently, the board classified the appellant as an overall Risk Level III and notified him of his right to appeal to the Superior Court, and the appellant availed himself of that opportunity.

⁶⁵¹ Beale, "The Communities with the Most Sex Offenders"; Hurd, "Corrections Officer Publishes Newsletter."

⁶⁵² Rhode Island Department of Administration, Office of Management and Budget, "Volume IV."

⁶⁵³ 11 R.I. Gen. Laws § 11-37.1-6.

On appeal, the appellant argued that the Rhode Island law violated the separation of powers doctrine, was an unconstitutional Ex Post Facto law, was “violative of appellant’s right to both procedural and substantive due process, and...violative of his right to equal protection.”

A district court magistrate had “denied the motion challenging (on various constitutional grounds) both the statute and the board of review’s determination” after reviewing the available documentation. The magistrate noted that the appellant was receiving due process and an opportunity to be heard and indicated that the burden was on the appellant to prove by a preponderance of the evidence that the risk-level determination was not in line with statutory provisions.

The Rhode Island Supreme Court applied the three-part test in *Mathews v. Eldridge*. First, it found that there was a “private interest affected by the official action;” second, it weighed the “risk of an erroneous deprivation of such interest through procedures used, and the probative value, if any, of additional or substitute procedural safeguards;” and third, it addressed the “[g]overnment’s interest, including the function involved and the fiscal and administrative burdens that the additional or substitute procedural requirement would entail.”

In finding that there was an implicated liberty interest, the court referred to decisions in other “two-tier scheme” states (states that classify offenders based on a post-conviction assessment of risk of re-offense) and it noted that, in Rhode Island, after the BOR assesses an offender’s “*current and future dangerousness*,” it transmits to the public the offender’s status as a convicted sex offender “*together with* information concerning his risk to re-offend.” The court further stated that “[t]he fact that certain classes of sexual offenders are subject to lifetime registration and community notification requirements further supports the conclusion that we are dealing with a protected liberty interest...Sex offenders like [the appellant] must adhere to the registration requirements indefinitely or else face criminal repercussions; as a result, their legal status is permanently altered.”

In weighing the risk of an “erroneous deprivation,” the court noted that while the appellant “did not have a statutory right to a hearing before the [Rhode Island] Sex Offender Board of Review, ...he did have a statutory right to appeal that body’s risk-level classification to the Superior Court” and that the appellant “in fact exercised that right, enjoy[ing] a full evidentiary review hearing.” The court reasoned that, because “the board of review’s risk-level determination has no *immediate* legal effect on a sexual offender’s liberty interest..., [offenders] are...informed of their right to seek judicial review..., [and] [f]iling an application for review effectively suspends the legal effect of the board’s determination.” The appellant was therefore “accorded adequate procedural due process.”

The court noted, however, that it was concerned with the current Rhode Island statutory language allowing a reviewing court to determine the “extent...of witness [production] and cross examination [permissions],” indicating that the statutory language permitted a reviewing court to deny offenders “the right to put on a full case for the purpose of disputing the findings of the board of review or to fully challenge those findings through standard adversarial proceedings.” The court indicated that this provision could “not be reconciled with the constitutional guarantee of procedural due process.” It also indicated that “[t]he danger of affirmance of an erroneous risk-level classification is substantially more significant in the absence of a hearing before the Superior Court.”

The court emphasized that “*all* sexual offenders who opt to appeal their risk level classifications...must be afforded an opportunity to be heard before the Superior Court; moreover, such hearings must be *meaningful*.” Additionally, the court noted in a separate section that it was concerned with the “opacity and brevity of the board of review’s report,” noting “several ambiguous statement[s] of fact regarding [the appellant’s] offenses,” and that “[b]oth reports are largely conclusory and offer little insight into the board of review’s decision-making process.” It noted that “basic fact-finding by the board of review should be thoroughly and transparently documented in any report transmitted to the Superior Court...permit[ting] meaningful public scrutiny of the actions of government.”

While the appellant challenged the burden and standard of proof in the Superior Court review process, the Rhode Island Supreme Court affirmed the burden is on sex offenders to prove that the board was erroneous, and that they must do so by a preponderance of the evidence.⁶⁵⁴

Though the appellant asserted a violation of his substantive due process rights, the court found that his record “in this case is significantly devoid of a ‘careful description’...of any *fundamental* liberty interest...that was allegedly violated,” and that the court, “at this juncture,” was unable to evaluate other constitutional claims.

With regard to those other constitutional claims, the appellant asserted that the process he received constituted “arbitrary and capricious government action,” but the court found “nothing clearly arbitrary or capricious...furthermore, the board of review’s ability to consider dynamic factors beyond the static factors analyzed by the Static-99 and to adjust its conclusion as to an

⁶⁵⁴ “The allocation of the evidentiary burden was appropriate in this case given the governmental and public interest at stake in the sex offender registration and community notification process. ...Moreover, requiring appellant to overcome the state’s *prima facie* case by a preponderance of the evidence (a significantly less demanding showing than either the ‘clear and convincing evidence’ or ‘beyond a reasonable doubt’ standards) is constitutional, especially given that evidence of mistaken or unlawful classification on the part of the board of review would be ‘peculiarly within [the appellant’s] own control and based upon knowledge immediately within his personal reach.’”

individual's future dangerousness on account of those dynamic factors, has a 'substantial relation to the public health, safety, morals, or general welfare.'"

The appellant also asserted that the Rhode Island law violates the separation of powers doctrine of Article 5 of the Rhode Island Constitution by shifting the burden of persuasion to the appellant in the judicial review process of his risk classification.⁶⁵⁵ The court found the appellant's "argument on this...to be unpersuasive," as "[t]he question of whether or not the risk of re-offense of an individual sexual offender has been properly determined by the board of review is left open to judicial determination on the basis of the proof offered by the sexual offender and/or the state. Thus, the legislatively mandated presumption is not impermissibly 'conclusive,' but is rather rebuttable."

The appellant additionally asserted that the Rhode Island Sexual Offender Registration and Community Notification Act violated the Ex Post Facto clause of the Rhode Island Constitution (though he "concedes that [it] is not sufficiently punitive...to trigger...[that] of the federal constitution). The Rhode Island Supreme Court reasoned that though "it follows as a consequence of a criminal conviction; sexual offender registration and notification is a *civil*/regulatory process." The court specified that the purpose of the act is not to punish the offender, but rather to protect the public.

The Rhode Island Supreme Court, though affirming the judgment of the Superior Court, noted that statutory language granted discretion to lower courts to deny "meaningful hearing," which could constitute a deprivation of the constitutional right to due process. It further stipulated that "[i]t is incumbent upon the state and the plea justice to secure a clear and unequivocal factual basis...we exhort the board of review to be far more meticulous in its submissions [of risk assessment review documentation to the Superior Court in the event of a judicial review] in the future. ...[I]t should at all times strive for maximum accuracy—especially setting forth the factual bases for its conclusions."

11.8. Texas

Purpose of Risk Assessment: Texas has two types of risk determination that are informed by risk assessments: offenders' "numeric risk level" and offenders' "individual risk assessment." Numeric risk levels (level one, level two, and level three) are based on risk assessments, and numeric risk

⁶⁵⁵ "[The appellant] argues that the [Rhode Island] General Assembly may not lawfully define what constitutes a *prima facie* case that will satisfy the state's burden of production. ...[In other words, he argues that] the General Assembly has impermissibly intruded into the judicial fact-finding process...[having] precluded [the Superior Court] from undertaking the fact-finding necessary to fulfill that charge."

levels are assigned to all registered sex offenders in Texas.⁶⁵⁶ Numeric risk levels are used for community notification purposes.⁶⁵⁷ Individual risk assessments involve the use of three risk assessment instruments and are administered only to offenders petitioning for relief from registration; thus, individual risk assessments may affect the duration of the registration period for those individuals.⁶⁵⁸

Risk Assessment Instrument(s): Offenders' numeric risk levels are based on "the sex offender screening tool" adopted by the Risk Assessment Review Committee established under the Texas Department of Criminal Justice. Researchers were unable to determine which risk assessment instrument(s) are currently approved by the Risk Assessment Review Committee. The "individual risk assessment" is a "series of evaluations."⁶⁵⁹ It includes scoring each adult male offender on three risk assessment instruments: the Hare Psychopathy Checklist—Revised, the Level of Service Inventory – Revised (LSI-R), and either the Static-2002 or Matrix 2000. Female offenders are only scored on the Hare Psychopathy Checklist—Revised and LSI-R.⁶⁶⁰

- **In-State Instrument Development:** Texas did not develop the Hare Psychopathy Checklist—Revised, LSI-R, Static-2002, or Matrix 2000. Furthermore, researchers were unable to identify which instrument(s) are used to determine offenders' "numeric risk levels;" therefore, we could not determine whether Texas developed the instrument(s) used.
- **Instrument Items:** The Hare Psychopathy Checklist—Revised consists of twenty items that assess psychopathy (rather than assessing for risk of re-offense).⁶⁶¹ The LSI-R consists of fifty-four items related to both static and dynamic factors.⁶⁶² The Static-2002 consists of fourteen items related to static factors.⁶⁶³ The Matrix 2000 consists of three scales related to static factors.⁶⁶⁴

⁶⁵⁶ Texas DPS, "Criminal History Records and Texas Sex Offender Registration Program FAQ."

⁶⁵⁷ Tex. Code Crim. Proc. Ann. art. 62.056 (2021). "Risk level three" offenders are subject to greater community notification than "risk level one" or "risk level two" offenders.

⁶⁵⁸ Texas DPS, "Texas Length of Duty to Register Compared to the Minimum Required Registration Period under Federal Law (34 USC § 20911)," June 2019, <https://records.txdps.state.tx.us/SexOffenderRegistry/sor-public/SORNA.pdf>; Texas DPS, "Criminal History Records and Texas Sex Offender Registration Program FAQ."

⁶⁵⁹ Texas DPS, "Criminal History Records and Texas Sex Offender Registration Program FAQ."

⁶⁶⁰ Texas Health and Human Services Commission, Council on Sex Offender Treatment, "Deregistration Evaluation." Offenders are scored on the Static-2002 instrument unless their "only sex offense is child pornography and there is no evidence of any contact sexual offenses," in which case, the offender is scored using the Matrix 2000 instead (1).

⁶⁶¹ Robert D. Hare, "Hare Psychopathy Checklist—Revised: Second Edition; Product Details," Pearson, accessed June 28, 2022, <https://www.pearsonassessments.com/store/usassessments/en/Store/Professional-Assessments/Personality-%26-Biopsychosocial/Hare-Psychopathy-Checklist-Revised-%7C-Second-Edition/p/100000336.html>.

⁶⁶² Lasheika Kassa, "Level of Service Inventory-Revised" (slide presentation, accessed June 28, 2022), 3, 7, <https://cacj.georgia.gov/document/document/level-service-inventory-revised-training-slides/download>.

⁶⁶³ Amy Phenix et al., *Coding Rules for Static-2002* (Ottawa, ON: Public Safety Canada, Research Division, 2009), 3, <https://saa.rna.org/static-2002r/>.

⁶⁶⁴ Leslie Helmus, Kelly M. Babchishin, and R. Karl Hanson, "The Predictive Accuracy of the Risk Matrix 2000: A Meta-Analysis," *Sexual Offender Treatment* 8, no. 2 (2013): 2, <http://www.sexual-offender-treatment.org/index.php?id=125&type=123>. "The

- **Translation of Risk Assessment Score(s) into SORN Requirements:** Researchers were unable to locate any information on the risk instruments Texas uses to determine numeric risk levels; similarly, FRD was unable to determine how instrument scores are translated into those risk levels.
- **Instrument Scoring Agency:** To determine offenders' numeric risk levels, the Texas Department of Criminal Justice scores a risk assessment instrument (FRD was unable to identify which) for incarcerated adult offenders.⁶⁶⁵ Individual risk assessments consist of the application of three separate risk assessment instruments that are scored by a "deregistration specialist" licensed by the Texas Health and Human Services Commission's Council on Sex Offender Treatment.⁶⁶⁶

Risk-Level Tiers: In Texas, three numeric risk-level tiers govern the notification requirements of those offenders that populate each level: Level One offenders are deemed to have the lowest risk for re-offending; Level Two offenders are deemed to have a moderate risk for re-offending; and Level Three offenders are deemed to have the highest risk of re-offending.⁶⁶⁷ Level Three offenders are subject to more community notification than Level One or Level Two offenders.⁶⁶⁸

Agency Responsible for Tier Classification: Adult offenders, after receiving their risk assessment scores, are classified into numeric risk levels by the Texas Department of Criminal Justice, the courts, or designees of the court.⁶⁶⁹

Classifying Agency's Ability to Modify or Override Instrument Score: The courts, the Risk Assessment Review Committee, and the Texas Department of Criminal Justice have the statutory authority to override an offender's risk level that was indicated by the risk assessment instrument score "only if the entity: (1) believes that the risk level assessed is not an accurate prediction of the risk the offender poses to the community; and (2) documents the reason for the override in the offender's case file."⁶⁷⁰

Relief from Registration: Texan offenders who have not committed more than one registerable offense and whose registration period exceeds the federally required minimum registration period may file petitions for relief from registration with the courts.⁶⁷¹ Prior to filing, offenders who wish

Risk Matrix 2000/Sex scale is designed to predict sexual recidivism. The Risk Matrix 2000/Violence scale is designed to predict non-sexually violent recidivism. Both scales can also be combined into an overall scale (the Risk Matrix 2000/Combined), which is designed to predict any violent recidivism (sexual or non-sexual)."

⁶⁶⁵ Tex. Code Crim. Proc. Ann. art. 62.053 (2021).

⁶⁶⁶ Texas DPS, "Criminal History Records and Texas Sex Offender Registration Program FAQ."

⁶⁶⁷ *Id.*

⁶⁶⁸ Tex. Code Crim. Proc. Ann. art. 62.056.

⁶⁶⁹ Texas DPS, "Criminal History Records and Texas Sex Offender Registration Program FAQ."

⁶⁷⁰ Tex. Code Crim. Proc. Ann. art. 62.007.

⁶⁷¹ Texas DPS, "Texas Length of Duty to Register."

to petition for relief from registration are scored on a series of evaluations termed an individual risk assessment. For each eligible petitioning offender, three risk assessment instruments are administered and scored by a “deregistration specialist” licensed by the Texas Health and Human Services Commission’s Council on Sex Offender Treatment. The Council on Sex Offender Treatment certifies these assessments prior to the offender filing the petition for relief from registration.⁶⁷² Offenders provide the court with the result of the individual risk assessment when they file their petition.⁶⁷³

Reassessment/Reclassification: Researchers were unable to determine whether Texas reassessed offenders’ numeric risk levels.

Judicial Review of Classification: Researchers found no evidence that offenders may appeal their classifications, which are based on “numeric risk levels,” to the judiciary.

Backlogs: Researchers did not locate any information on risk assessment backlogs associated with Texas in the sources.

Costs: In Texas, offenders who file petitions for relief from registration are responsible for paying the Council on Sex Offender Treatment for “all costs associated with and incurred by the council in providing the individual risk assessment.”⁶⁷⁴

Constitutional Challenges: In the 2019 case *Does v. Abbott*, originating from Texas and before the Fifth Circuit, plaintiffs challenged the state’s Sex Offender Registration Program, asserting that it violated the due process, Ex Post Facto, and double jeopardy clauses, as well as the Eighth Amendment.⁶⁷⁵ Texas law had a retroactive provision where individuals convicted of sex crimes on or after September 1, 1970, were subject to its requirements. Texas uses risk assessment instruments to assess convicted sex offenders; their scores are then used by classifying officials (the courts, the Texas Department of Criminal Justice, or “designees of the court”) to assign them to numeric risk levels:

[The law] imposes various requirements on registrants. ...Most registrants are assigned a “risk level” of “one (low),” “two (moderate),” or “three (high)” using an “objective point

⁶⁷² Texas DPS, “Criminal History Records and Texas Sex Offender Registration Program FAQ.”

⁶⁷³ Tex. Code Crim. Proc. Ann. art. 62.404.

⁶⁷⁴ Tex. Code Crim. Proc. Ann. art. 62.406 (2021).

⁶⁷⁵ “The Does timely appealed challenging only the Rule 12(b)(6) dismissal of four of their facial challenges: that Chapter 62 violates (1) the due process clause by classifying sex offenders into three tiers of present dangerousness with insufficient procedural due process, (2) the Ex Post Facto clause by imposing additional punishment for offenses committed before the 2017 amendments to Chapter 62, (3) the Eighth Amendment by imposing ‘excessive and arbitrary’ punishment, and (4) the double jeopardy clause by imposing additional punishment after sentencing requirements have been completed.”

system.” The “risk assessment review committee,” a court, or a state corrections agency may override a risk level only if it believes that the assigned level does not accurately predict the registrant’s risk to the community. [Citations omitted.]

The Does argued on appeal before the Fifth Circuit that “the classification of present risk provided for in [the new Texas law] compels additional [procedural due] process.” However, the court noted that the plaintiffs failed to raise this as an issue in their complaint to the district court. The court noted that the Does had in fact “stated in their complaint to the district court that the ‘classifications are based solely on the offense(s) of conviction.’” This, the court said, constituted a waiver of any argument that risk classifications are not based solely on the fact of conviction:

In light of this waiver, we consider only the arguments before the district court on these issues and, based upon those arguments, hold that the Does have been afforded enough [procedural] due process to be placed under [the law’s] strictures, including risk-level designation. ...Even assuming for the sake of argument that a convicted sex offender has a liberty interest in being free from registration as such, it is settled that conviction or similar adjudication of a sex offense supplies sufficient [procedural] due process for the imposition of sex offender conditions, including registration. [Citations omitted]

In addition to procedural due process, the plaintiffs asserted a substantive due process claim, arguing that “the tier ranking system employed by the statute...stigmatiz[es them] without affording them a hearing or individualized consideration.”⁶⁷⁶ This was rejected by the Fifth Circuit, which stated that the plaintiffs failed to show⁶⁷⁷ “an infringement of some other interest,” in addition to stigma.⁶⁷⁸ The court quoted a prior Fifth Circuit case: “Neither harm to reputation nor the consequent impairment of future employment opportunities are constitutionally cognizable injuries,”⁶⁷⁹ and further indicated that the harm must be “direct infringement on the part of the state” rather than “secondary harms resulting from [registrants’] placement on the registry, such as lending and housing hardships.” The court indicated that the plaintiffs had also failed to show that “a state actor has made concrete, false assertions of wrongdoing on the part of the plaintiff,”⁶⁸⁰ which had been the only circumstance under which the Fifth Circuit had previously found sufficient stigma.

⁶⁷⁶ Citing the lower Texas Northern District Court’s decision, issued November 19, 2018.

⁶⁷⁷ “The Does rely heavily on a Sixth Circuit opinion that found the Michigan sex offender registry to be punitive. But they identify no feature of Texas’s scheme, which does not share the most burdensome features of Michigan’s, that would compel a departure from *Smith [v. Doe]* or our prior decisions. Even if the Texas statute is harsher than the Alaska statute considered in *Smith*, and even if the Does are correct that sex offender registries have questionable efficacy, Chapter 62 still advances the nonpunitive public purpose of defending public safety. ‘A statute is not deemed punitive simply because it lacks a close or perfect fit with the nonpunitive aims it seeks to advance.’ We will not re-weigh the *Smith* factors here but instead defer to the analysis of the district court and our prior panels.”

⁶⁷⁸ Quoting *Paul v. Davis*.

⁶⁷⁹ Quoting *Vander Zee v. Reno*, 73 F.3d 1365 (5th Cir. 1996), and citing *Siegert v. Gilley*, 500 U.S. 226 (1991).

⁶⁸⁰ Quoting *Blackburn v. City of Marshall*, 42 F.3d 925 (5th Cir. 1995).

11.9. Vermont

Purpose of Risk Assessment: In Vermont, risk assessments contribute to the determination of offenders' community notification requirements.⁶⁸¹ Additionally, offenders deemed to be "noncompliant high-risk" offenders—one component of which is whether the offender is determined to be "high risk" based on risk assessment—are subject to lifetime registration and more frequent reporting requirements;⁶⁸² therefore, risk assessments play some role in determining registration requirements for some Vermonter offenders.

Risk Assessment Instrument(s): Vermont Administrative Rule 13-130-025 states, "DOC staff shall utilize current objective risk assessment instruments to identify or exclude a sex offender as high risk." However, researchers were unable to determine which risk assessment instruments Vermont uses for this purpose.

- **In-State Instrument Development:** Vermont developed its own sex offender risk assessment instruments: the Vermont Assessment of Sex Offender Risk (VASOR) and its successor, the VASOR-2;⁶⁸³ however, researchers were unable to determine whether these instruments are used by the Vermont Department of Corrections (DOC) to determine whether offenders classify as high risk (for the purpose of establishing their community notification or registration requirements).
- **Instrument Items:** Researchers were unable to determine the risk assessment instruments the Vermont DOC uses to determine whether offenders classify as high risk.
- **Translation of Risk Assessment Score(s) into SORN Requirements:** Researchers were unable to determine the risk assessment instrument(s) the Vermont DOC uses to classify offenders as high risk; researchers were, therefore, not able to determine how instrument scores translate to SORN requirements.

⁶⁸¹ Vt. Stat. Ann. tit. 13, § 5411b (2021).

⁶⁸² 28-50 Vt. Code R. § 002 (2022); DOJ, SMART, "SORNA Substantial Implementation Review: State of Vermont," October 2016, 7, <https://smart.ojp.gov/sorna-vermont>. According to SMART's implementation review, most sex offenders report annually and noncompliant high-risk offenders report every thirty days. Defining such a noncompliant high-risk sex offender, Vermont statute states: "Prior to releasing a person from total confinement, the Department of Corrections shall designate the person as a noncompliant high-risk sex offender if the person meets all of the following criteria: (2) is not subject to indeterminate life sentences under section 3271 of this title; (3) is designated as a high-risk sex offender pursuant to section 5411b of this title; and (4) is noncompliant with sex offender treatment as defined by Department of Corrections' directives." Additionally, a "noncompliant high-risk sex offender may petition the Criminal Division of the Superior Court to be relieved from the heightened registry requirements in this section once every five years from the date of designation. The offender shall have the burden of proving by a preponderance of the evidence that he or she: (A) no longer qualifies as a high-risk offender as defined in section 5401 of this title and rules adopted by the Department of Corrections in accordance with section 5411b of this title; and (B) has complied with and completed sex offender treatment as provided by Department of Corrections' directives" (Vt. Stat. Ann. tit. 13, § 5411d [2021]).

⁶⁸³ Robert J. McGrath et al., "Development of Vermont Assessment of Sex Offender Risk-2 (VASOR-2) Re-Offense Risk Scale," *Sex Abuse* 26, no. 3 (2014): 272, <https://doi.org/10.1177/1079063213486936>.

- **Instrument Scoring Agency:** Vermont DOC staff score the risk assessment instrument(s) used within the state.⁶⁸⁴

Risk-Level Tiers: Vermont has two classifications of offenders—those deemed “high risk” and all others. High-risk offenders are subject to enhanced community notification; additionally, high-risk offenders deemed “noncompliant high-risk sex offenders” are subject to lifetime registration and more frequent reporting requirements.⁶⁸⁵

Agency Responsible for Tier Classification: The Vermont DOC evaluates offenders and makes “initial referrals” of offenders designated as high risk to the DOC Sex Offender Review Committee.⁶⁸⁶ The DOC Sex Offender Review Committee makes the final determination of whether an offender should be classified as high risk.⁶⁸⁷

Classifying Agency’s Ability to Modify or Override Instrument Score: “Initial referrals” by the Vermont DOC are based on offenders’ scores on risk assessment instrument(s) and “other appropriate factors,” which “may include, but are not limited to, offender’s age, physical conditions (such as sickness, age, etc.), pattern of sexual offending, nature of sex offense(s), pattern of cooperation while under correctional supervision and recent behavior, recent threats, or expressions of intent to commit additional offenses.” The DOC Sex Offender Review Committee’s final classification is based on the offender’s score on the risk assessment instrument(s) and “any other appropriate factors it deems relevant.”⁶⁸⁸

Relief from Registration: Vermont does not offer offenders the opportunity to petition for relief from registration.⁶⁸⁹

Reassessment/Reclassification: Offenders designated as high risk may petition the DOC Sex Offender Review Committee every two years to change their high-risk classification.⁶⁹⁰

⁶⁸⁴ 13-130 Vt. Code R. § 025.

⁶⁸⁵ 28-50 Vt. Code R. § 002; DOJ, SMART, “SORNA Substantial Implementation Review: State of Vermont,” 7, 9.

⁶⁸⁶ The Sex Offender Review Committee consists “of five (5) people appointed by the Commissioner of Corrections to determine if referred cases meet the designation of high-risk established in statute for purposes of internet registration” (13-130 Vt. Code R. § 025).

⁶⁸⁷ 13-130 Vt. Code R. § 025.

⁶⁸⁸ *Id.*

⁶⁸⁹ DOJ, SMART, “SORNA Substantial Implementation Review: State of Vermont,” 8. However, lifetime registrants who are not “noncompliant high-risk” sex offenders may petition for relief from community notification. See Vt. Stat. Ann. tit. 13, § 5411.

⁶⁹⁰ 13-130 Vt. Code R. § 025. “An offender who has been designated high risk and who has exhausted his or her administrative remedies may petition the Sex Offender Review Committee for a change in his or her high-risk designation once every two (2) years, from the date the administrative remedies have been exhausted.” The text, however, does not state that noncompliant high-risk sex offenders are excluded from filing such petitions.

Judicial Review of Classification: Offenders classified as high risk by the DOC Sex Offender Review Committee may appeal the classification to the judiciary. However, offenders must first seek administrative appeals. During such an appeal, the DOC Sex Offender Review Committee holds a hearing where an offender may present evidence to reconsider its classification decision.⁶⁹¹

Backlogs: Researchers found no evidence of backlogs in Vermont regarding classification of offenders.

Costs: Researchers were unable to locate information on the specific costs of risk assessment in Vermont.

11.10. Washington

Purpose of Risk Assessment: In Washington, risk assessments contribute to the determination of offenders' community notification requirements.⁶⁹² Risk assessments also contribute to the determination of how frequently offenders report.⁶⁹³ Furthermore, Washington courts may consider risk assessments when offenders petition for relief from registration. In this manner, risk assessments, at times, affect duration of registration for some offenders.⁶⁹⁴

Risk Assessment Instrument(s): Washington assesses all sex offenders using the Static-99R risk assessment instrument.⁶⁹⁵

- **In-State Instrument Development:** Washington did not develop its own risk assessment instrument.
- **Instrument Items:** The Static-99R consists of ten items related to static factors.⁶⁹⁶

⁶⁹¹ *Id.* Offenders must initiate the administrative appeal process within thirty days of receiving notification of high-risk classification.

⁶⁹² Wash. Rev. Code Ann. § 4.24.550 (LexisNexis 2022).

⁶⁹³ Wash. Rev. Code Ann. § 36.28A.230 (LexisNexis 2022). Frequency depends on whether the jurisdiction in which the offender resides participates in the address verification grant program. If it does, reporting frequency is based on risk assessment level (level I: annually; level II: every six months; level III: every three months). However, if the jurisdiction does not participate in the program, then all RSOs are required to report annually, except for sexually violent predators, who are required to report every ninety days. See Wash. Rev. Code Ann. § 9A.44.135 (LexisNexis 2022).

⁶⁹⁴ Wash. Rev. Code Ann. § 9A.44.142. Duration of registration is primarily determined by the type of offense and number of offenses: There are three categories of duration based on these factors (life, fifteen years, and ten years). Sexually violent predators must also register for life. See Wash. Rev. Code Ann. § 9A.44.140 (LexisNexis 2022).

⁶⁹⁵ Washington DOC, "End of Sentence Review Committee," accessed June 28, 2022, <https://www.doc.wa.gov/corrections/justice/esrc.htm>. Washington uses Static-99R to assess some groups of offenders for whom the instrument was not "normed," including "adult aged sex offenders who committed their index sex offense as a juvenile, female sex offenders, [and] offenders who have only committed Category B offense as defined by the Static-99R scoring manual" (WASPC, "Static-99R and Community Notification," 3).

⁶⁹⁶ SAARNA, "Scales and Resources" Alvord, "Sexual Offender Registration Review Board (SORRB)," 3.

- **Translation of Risk Assessment Score(s) into SORN Requirements:** Washington translates offenders' numerical scores on the Static-99R into "baseline" risk-level classifications (Level I, Level II, or Level III).⁶⁹⁷
- **Instrument Scoring Agency:** "Law enforcement notification (LEN) specialists" in the Washington Department of Corrections LEN Program score offenders on the Static-99R risk assessment instrument.⁶⁹⁸

Risk-Level Tiers: Washington has three risk-level tiers: Level I offenders are deemed to have the lowest risk for re-offense; they are required to report least frequently and are subject to the least community notification. Level II offenders are deemed to have a moderate risk for re-offense and must report with moderate frequency; they are subject to moderate community notification. Finally, Level III offenders are deemed to have the highest risk for re-offense; they must report with the highest frequency and are subject to the highest level of community notification.⁶⁹⁹

Agency Responsible for Tier Classification: Local law enforcement determine offenders' risk-level classification (Level I, Level II, or Level III).⁷⁰⁰

Classifying Agency's Ability to Modify or Override Instrument Score: The LEN specialist sends offenders' Static-99R scores to the ESRC. The ESRC then uses the score to produce a recommended, but not final, risk-level classification for local law enforcement, who make the final risk-level classification.⁷⁰¹ While Washington has established guidelines for how Static-99R scores are translated into a "baseline" risk-level classification (Level I, Level II, or Level III), the ESRC's risk-level recommendation and law enforcement's classification decisions may take into consideration factors that "mitigate or aggravate the offender's risk."⁷⁰² Local law enforcement make the final determination of offenders' risk assessment classifications, and may depart from the one recommended by the ESRC. Reasons for such departures may include: "(1) risk assessment

⁶⁹⁷ Level I equals Static-99R scores between -3 and 3, Level II equals scores between 4 and 5, and Level III equals scores of 6 or more (WASPC, "Static-99R and Community Notification," 5).

⁶⁹⁸ End of Sentence Review Committee and Law Enforcement Notification Program, *2018 Annual Report*, March 2019, 9, <https://www.doc.wa.gov/docs/publications/reports/300-SR001.pdf>. LEN specialists give the Static-99R score and other relevant information to the committee, which uses that information to determine a recommended risk-level classification.

⁶⁹⁹ WASPC, "Sex Offender Information," accessed June 28, 2022, <https://www.waspc.org/sex-offender-information>; Washington DOC, "End of Sentence Review Committee," Wash. Rev. Code Ann. § 36.28A.230.

⁷⁰⁰ Wash. Rev. Code Ann. § 4.24.550; WASPC, "Static-99R and Community Notification," 2.

⁷⁰¹ Washington DOC, "End of Sentence Review Committee."

⁷⁰² "The End of Sentence Review Committee...has developed standardized aggravating and mitigating factors. These factors are not formalized in statute; however, [they] are widely utilized by the End of Sentence Review Committee and local law enforcement agencies" (WASPC, "Model Policy for Washington State Law Enforcement: Adult and Juvenile Sex Offender Registration and Community Notification," October 2007, last modified July 2020, 18, <https://www.waspc.org/assets/ProfessionalServices/modelpolicies/SO%20Community%20Notification%20Model%20Policy%202020%20Revisions%20adopted%20November%2018%202020.pdf>).

updated/corrected; (2) mitigating factors; (3) aggravating factors; (4) law enforcement discretion; [and] (5) used raw score with corresponding risk level (rejected ESRC aggravation/mitigation)."⁷⁰³

Relief from Registration: Some offenders in Washington may petition the court to be relieved of the duty to register after they have spent ten years in the community without a subsequent conviction for a "disqualifying offense."⁷⁰⁴ Sexually violent predators and offenders who have committed offenses involving "forcible compulsion" may not petition for relief from registration.⁷⁰⁵ While risk-level classification alone does not preclude an offender's ability to file a petition, the Washington statutes provide thirteen factors "as guidance to assist the court in making its determination." Among these factors are "[a]ny risk assessments or evaluations prepared by a qualified professional."⁷⁰⁶ Therefore, the court may consider risk assessments in determining whether to grant an offender's petition for relief from registration.

Reassessment/Reclassification: Washington statutes state: "Agencies may develop a process to allow an offender to petition for review of the offender's assigned risk-level classification. The timing, frequency, and process for review are at the sole discretion of the agency."⁷⁰⁷

Judicial Review of Classification: Researchers found no evidence that offenders may appeal their risk-level classification to the judiciary in Washington.

Backlogs: Researchers found no evidence of backlogs in the assessment or classification of offenders in Washington.

Costs: Researchers were unable to locate information on the specific costs of risk assessment in Washington.

⁷⁰³ WASPC, "Model Policy for Washington State Law Enforcement," 19–20.

⁷⁰⁴ Washington State Sex Offender Policy Board, "Fact Sheet: Obtaining Relief from Sex or Kidnapping Offender Registration," July 2016, 1, 2, 4, https://sgc.wa.gov/sites/default/files/public/sopb/documents/relief_from_registration_english.pdf. Offenders convicted of "a Class A or Class B sex or kidnapping offense" are qualified to petition for relief from registration. Offenders convicted of a Class C felony offense or gross misdemeanor are only required to register for ten years. A disqualifying offense is "any offense that is a felony; a sex offense as defined in Chapter 9A.44 RCW; a crime against children or persons as defined in RCW 43.43.830(7) and 9.94A.411(2)a); an offense with a domestic violence designation as provided in RCW 10.99.020; permitting the commercial sexual abuse of a minor as defined in RCW 9.68A.103; or any violation of Chapter 9A.88 RCW (indecent exposure, prostitution-related offense)."

⁷⁰⁵ *Id.* at 1. While these offenders may not be relieved of the duty to register, they may petition for relief from community notification after fifteen years in the community without a subsequent conviction for a "disqualifying offense."

⁷⁰⁶ Wash. Rev. Code Ann. § 9A.44.142.

⁷⁰⁷ Wash. Rev. Code Ann. § 4.24.550. The statute does not define which agencies it is referencing.

12. APPENDIX V: Profiled States—SORNA-Compliant Tiers

Most states that use risk assessments to determine SORN requirements score all registered sex offenders who were convicted and incarcerated in the state on a risk assessment instrument and assign all these offenders to a risk-level classification or “tier.” However, two states—Iowa and New Hampshire—do not score all registered sex offenders for the purposes of determining their SORN requirements but do score some offenders for SORN purposes under particular circumstances. Both states classify offenders into tiers that meet SORNA's minimum requirements (i.e., tiers that are based on the offense of conviction rather than a risk assessment).⁷⁰⁸ However, certain categories of offenders are subject to risk assessments that impact the applicable notification or registration requirements (see Table 21).

Table 21. Risk Assessments in States with SORNA-Compliant Tiers

State	Uses Tiers That Meet SORNA Requirements	Offenders Subject to Risk Assessment	Requirement Affected by Risk Assessment
Iowa	Yes	Petitioners for modification of registration requirements	Duration of registration
New Hampshire	Yes	Petitioners seeking removal from public registry website	Frequency of notification

Sources: DOJ, SMART, “SORNA: State and Territory Implementation Progress Check,” 13, 20; N.H. Rev. Stat. Ann. § 651-B:6 (2022); DOJ, SMART, “SORNA Substantial Implementation Review: State of Iowa—Revised,” December 2013, 8, <https://smart.ojp.gov/sorna-iowa>.

12.1. Iowa

Iowa’s registration requirements are determined by an offense-based tier system that meets SORNA’s minimum requirements for duration and frequency.⁷⁰⁹ However, risk assessments are performed on offenders who petition for modification of their registration requirements.⁷¹⁰ While the Iowa statutes do not stipulate which registration requirements may be modified by petition, the SMART Office’s implementation review states that modifications “can result in a suspension of registration requirements.”⁷¹¹ Offenders seeking modification must meet the filing criteria⁷¹²

⁷⁰⁸ DOJ, SMART, “SORNA: State and Territory Implementation Progress Check,” 13, 20.

⁷⁰⁹ DOJ, SMART, “SORNA: State and Territory Implementation Progress Check.”

⁷¹⁰ Iowa Code § 692A.128 (2021).

⁷¹¹ DOJ, SMART, “SORNA Substantial Implementation Review: State of Iowa—Revised,” December 3, 2013, 8, <https://smart.ojp.gov/sites/g/files/xyckuh231/files/media/document/iowa-hny.pdf>sorna-iowa.

⁷¹² Iowa DOC, Policy No. 917-15, “Sex Offender Registry Modification Evaluation,” December 5, 2014, 1–2, <https://sixthdcs.com/wp-content/uploads/2020/03/0917-15-Sex-Offender-Registry-Modification-Evaluation.pdf>. “Offenders in the following statuses are eligible for a Sex Offender Registry (SOR) modification assessment (Assessment): 1) Individuals who were convicted of a sexual crime as an adult, currently reside in Iowa, and are currently on probation or parole supervision. 2) Individuals who were convicted of a sexual crime as an adult, currently reside in Iowa, and are no longer on probation or parole supervision. 3) Individuals who were convicted of a sexual crime as a juvenile, currently reside in Iowa, and are no longer under the supervision

and be classified as low risk to re-offend on a risk assessment.⁷¹³ Risk assessments are performed by “the Director or Designee of the Judicial District in which the examinee has principal residence,” and the district may charge the offender a fee to cover the cost of the assessment. Offenders are scored on three risk assessment instruments: the Static-99R, the Iowa Sex Offender Risk Assessment (ISORA), and the Stable 2007.⁷¹⁴

Regarding constitutional challenges, in the 2003 case *Brummer v. Iowa Department of Corrections*, before the Supreme Court of Iowa, the petitioner Brummer—subject to “enhanced public notification” after a risk assessment by Iowa determined that he “presented a moderate risk to commit another sex offense”—received administrative review of the decision. He then appealed for judicial review in the Iowa District Court for Polk County; this petition was denied. The petitioner then appealed to the Supreme Court of Iowa.

The petitioner asserted that the designation requiring heightened public notification “impinged on a liberty interest protected by the due process clauses of the federal and [Iowa] state constitutions.” He had been assessed by a corrections agent using the Iowa Department of Corrections risk assessment instrument, “based on information gleaned from a limited number of documents.” Scoring 85, the petitioner was informed that he was in “the moderate risk category, [which] qualified him for heightened affirmative public notification.”

The petitioner filed an administrative appeal form with DOC, “particularly object[ing] to the assignment of risk-factor values for the number and nature of prior crimes and history of drug abuse risk factors.” He asserted that he had a “prior charge of possession of two grams of marijuana” at age 19, but also that he had “voluntary[ly] pursu[ed] drug treatment.” His appeal was denied. He then filed for judicial review, raising additional “constitutional dimensions underlying his risk assessment” and arguing that an evidentiary hearing was necessary. The judicial review request was also denied. On appeal, the Iowa Supreme Court noted that the petitioner’s

of the Juvenile Court or a Department of Correctional Services Judicial District. 4) The Department of Corrections (DOC) and the Iowa Department of Correctional Services (DCS) Directors, or their designees, by extension through existing Purchase of Service Agreements or MOUs [memoranda of understanding], have discretion on whether or not to perform an Assessment for offenders in categories 1.A.2 and 1.A.3, DOC and DCS must have a reasonable argument supporting a decision not to conduct an Assessment. Examples of factors that result in DOC exercising discretion include but are not limited to: The individual requesting the SOR modification assessment is incarcerated, has new charges pending, or has not paid the screening or assessment fee. ...Individuals meeting the above eligibility criteria must meet the following statutory requirements to qualify for an Assessment: 1) The date of the commencement of the requirement to register occurred at least two (2) years prior to the filing of the application for tier I offenders, and five (5) years prior to the filing of the application for tier II or III offenders. 2) The sex offender has successfully completed all sex offender treatment programs that have been required. 3) The sex offender scores low risk on validated DOC/DCS approved sex offender risk assessments. 4) The offender is not incarcerated.”

⁷¹³ Iowa Code § 692A.128.

⁷¹⁴ Iowa DOC, Policy No. 917-15. The policy states that all three instruments “must be completed;” however, it also states that each instrument is used “as appropriate” (3).

request was limited to “challeng[ing] the sufficiency and fairness of the process with which his risk to re-offend was assessed.”

The Iowa Supreme Court noted that one issue before it was whether “the [risk] assessment involved [adjudication by the agency, otherwise known as] a ‘contested case’” or fell into the category of “other agency action.” The court, resting on prior Iowa case law, determined that the petitioner’s case “presents the prototypical proceeding involving adjudicative facts...[such as] the assessment of risk-factor values for a history of drug abuse, ...the number and nature of prior crimes, ...[and] the assessment of points for the nature of his relationship to his victim. Each of these areas requires determinations resting on adjudicative facts.”

The court reasoned that the “absence of context is indicative of the vacuum in which decisions relevant to Brummer were made, [where] [a]djudicative facts should have been presented, considered, and processed to determine the appropriateness of assigning a risk-factor value and to ensure the fundamental constitutional values guaranteed by the due process clauses [of the federal and Iowa state constitutions] and the Iowa Administrative Procedure Act.”⁷¹⁵ The court then held that “[b]ecause the underlying proceeding—the risk assessment—involves adjudicative facts, an evidentiary hearing is required unless this case falls under one ‘of the exceptions to the evidentiary hearing requirement for proceedings involving adjudicative facts.’” [citation omitted.]

Citing a previous case which had itself cited a treatise on the Iowa Administrative Procedure Act, the court noted that none of the four “enumerated...exceptions”⁷¹⁶ to the hearing requirement applied, reasoning first that there were “numerous disputed facts, no indication [that the petitioner’s risk] assessment involved emergency action..., and no apparent ‘use of inspections, examinations, and testing to determine relevant facts.’”

The remaining exception to the hearing requirement for proceedings involving adjudicative facts is whether the risk assessment proceedings “implicate a liberty interest” associated with the due process clauses of the U.S. and Iowa State Constitutions. The court held that “the risk of an erroneous assessment and the associated opprobrium arising from such an assessment implicate” that interest. The court pointed out that the “corrections agent[s] take[] the additional step of

⁷¹⁵ “The facts missing in Brummer’s case are not ‘generalized factual propositions...consisting of demographical data and statistics compiled from surveys and studies, which aid the decision-maker in determining questions of policy and discretion,’ but are instead ‘individualized facts peculiar to’ Brummer, his offense, and any defense he might mount.”

⁷¹⁶ The four exceptions are: When the case involves “interests of an individual that cannot be characterized as either ‘life, liberty, [or] property’ within the meaning of the due process clause [of the U.S. Constitution]; when the case involves an “absence of relevant disputed facts”; when the case involves an “emergency agency action”; and when the case involves “use of inspections, examinations, and testing to determine relevant facts.”

assessing an offender based on a limited documentary record that may or may not provide the best evidence of factors indicative of an offender's likelihood to re-offend."

The court referred to the U.S. Supreme Court case *Paul v. Davis* and indicated that "'reputation alone, apart from some more tangible interests such as employment,' is insufficient' to invoke the procedural protection of the due process clause;" however, "[t]he standard can be met by showing that action taken by a state agency 'deprives a person of his or her liberty by damaging the person's reputation so severely that associational or employment opportunities are impaired or foreclosed.'" [Citations omitted.] The court further indicated that "sex offender risk assessment and the resulting public notification go far beyond the mere redisclosure of an offender's conviction [the latter of which is a matter of public record]" and referred to language used by the Oregon Supreme Court in *Noble v. Board of Parole & Post-Prison Supervision* in describing the "liberty interest" implicated. Holding that "a liberty interest is at stake whenever a sex offender risk assessment is conducted in Iowa," the court reversed and remanded the case to the DOC for a hearing.

12.2. New Hampshire

In New Hampshire, offenders' registration requirements are determined by an offense-based tier system that meets SORNA's minimum requirements for duration and frequency.⁷¹⁷ New Hampshire does not allow offenders convicted under current registration law to petition for relief from registration.⁷¹⁸ However, some offenders' notification requirements may be affected by risk assessments. Tier I and Tier II offenders who have met the statutory requirements may file a petition with the court to be removed from the "public list" of sex offenders; successful petitioners would still be required to register, but their registration would not be public.⁷¹⁹ When filing the petition, offenders must provide the court with a risk assessment. The risk assessment must be performed by "a qualified psychiatrist or psychologist at the offender's expense."⁷²⁰ FRD was unable to determine whether New Hampshire has authorized any particular risk assessment instruments for the purpose of fulfilling the petition requirement.

⁷¹⁷ DOJ, SMART, "SORNA: State and Territory Implementation Progress Check."

⁷¹⁸ New Hampshire does permit lifetime (Tier II and Tier III) offenders convicted "prior to the establishment of the sex offender registry" to petition for relief from registration (N.H. Rev. Stat. Ann. § 651-B:6 [2022]). However, these petitions are outside the scope of this report, as they do not affect offenders convicted under current registration law.

⁷¹⁹ DOJ, SMART, "SORNA Substantial Implementation Review: State of New Hampshire," July 2011, 9, <https://smart.ojp.gov/sites/sorna-new-hampshire>. Tier I offenders may petition five years after release and Tier II offenders may petition fifteen years after release. "The court may grant the petition if the offender has not been convicted of any felony, class A misdemeanor, sex offense, or offense against a child; has successfully completed any periods of supervised release, probation, or parole; and has successfully completed an appropriate sex offender treatment program as determined by the court."

⁷²⁰ N.H. Rev. Stat. Ann. § 651-B:6.