

New York's Shadow Prisons



A little-known system incarcerates people long after their prison sentences end

Shadow prisons lock people up for what they *might* do in the future. In 2007, New York passed a sweeping implementation of mechanisms to block some people from being released after they complete their prison sentence. This legislative scheme, codified as Mental Hygiene Law Article 10 in New York, created our shadow prisons (euphemistically termed “civil management”). This system operates by indefinitely confining people in carceral settings — *prisons in all but name*. Most people incarcerated in shadow prisons are never released.

There are 395 New Yorkers in our shadow prisons, and many will likely die behind bars.

New York has two shadow prisons, STARC–Oakview and STARC–Bridgeview, located in Marcy and Ogdensburg. Although situated on the grounds of the Central New York Psychiatric Center and St. Lawrence Psychiatric Center, these carceral facilities are separate and distinct from the traditional involuntary psychiatric commitment system. New York was the last state to implement a shadow prison system in 2007 after the courts rejected attempts to hijack traditional involuntary psychiatric commitment laws to prevent persons completing a prison sentence for a sex-related crime from being released.²

Black men are imprisoned at nearly twice the rate of white men.

Incarcerating people in shadow prisons does not protect the public. Sex panics fueled the drive to create shadow prisons beginning in the

New York spends \$326,445.05 per person indefinitely detained in a shadow prison each year.¹

Instead, we should invest those resources to:

- 1. SUPPORT SURVIVORS of sexual violence**
- 2. OFFER STATEWIDE EDUCATION on healthy relationships, consent, and bystander intervention**
- 3. END THE ECONOMIC AND CULTURAL DYNAMICS that enable gender-based and sexual violence**

1990s, despite the lack of evidence behind (later debunked) media-fueled alarmism.³ Research shows that systems of pre-crime preventative detention, like New York’s shadow prisons, have no measurable impact on recidivism or sexual violence.⁴ The 30 states that do not have these systems do not have higher rates of sexual violence or sex-related recidivism. The U.S. Department of Justice’s Bureau of Justice Statistics has published reports showing people with sex-related convictions are significantly less likely to be re-arrested. Yet stigma, alarmism, and cruelty towards people living with a past sex-related conviction fuel these ineffective public safety strategies. The American Psychiatric Association formally opposes states’ “scientific” justifications given for these laws as a “misuse of psychiatry.”⁵

Indefinite detention on a (biased) hunch. The tactics used to assess the hypothetical risk of someone committing future crime are biased against Black people, LGBTQ people, and other marginalized groups. Some of the tools used to assess “risk of reoffending” in New York are not well-studied or proven reliable, and have not been tested against concerns of racial bias. Projections of future dangerousness ultimately rest on the subjective opinion of evaluators who are paid by the state and who serve as a *de facto* arm of the prosecution.

The statistical tool to project recidivism is overtly homophobic. Static-99R, the name for the tool used to “assess” the probability of recidivism, requires assessors to rate men convicted of behavior involving “male victims” as more likely to reoffend. Consequently, men whose victims were of the same sex are disproportionately detained in shadow prisons.⁶ It also requires rating people as more likely to commit another crime if they haven’t previously lived with a lover, which inequitably impacts those in the LGBTQ community who continue to face systemic barriers to cohabitation.

The “shadow” system operates outside the traditional protections of the criminal legal system. People in criminal legal proceedings are afforded many rights under the U.S. and New York constitutions, including an assurance that they can’t be criminalized retroactively for actions that were previously legal, and that they cannot be prosecuted twice for the same conduct.⁷ People also have the right not to be forced to incriminate themselves, to a trial by a jury of their peers, and to be found innocent if their guilt is not proved beyond a reasonable doubt. However, the shadow prison system is designed to skirt these essential protections against state power. For example, New York only requires evidence in shadow

Racist and homophobic bias drives people into this secretive system.

prison proceedings to be “clear and convincing,” a standard far below the “beyond a reasonable doubt” requirement of a criminal conviction.⁸ Lifetime detention can result under this legislative scheme based on evidentiary standards that would not even support a misdemeanor conviction under criminal law. While the Supreme Court of the United States held that indefinite, post-sentence civil confinement schemes are theoretically constitutional in a controversial 5–4 decision, that opinion was predicated on the state’s false promise that in practice these systems would not become prisons-by-another-name.⁹

Sham treatment is a pretext for detention.

People locked up in shadow prisons are required to participate in dubious therapeutic programs if they ever hope to be released, but they have no assurance of confidentiality in treatment. Defying ethical and legal requirements that protect patients in other settings, anything someone in a shadow prison says in therapy can be used against them by the New York courts to keep them indefinitely locked up. People locked up in shadow prisons can also be penalized if they do not actively participate in questionable treatment, putting everyone inside in a high-stakes lose-lose scenario.

It’s time for New York to close its shadow prisons and abandon its failed experiment in pre-crime detention.



For more information or to get involved, reach out to abolishshadowprisons@hivlawandpolicy.org.

NOTES

1. OMH Response to FOIA Request by Charles Gerena. On file with Just Future Project. See also Barbara Koepfel, “Modern Day Gulag in the Golden State,” *The Washington Spectator* (June 4, 2019). (“In New York, it cost taxpayers \$117 million in 2017 alone for 359 SVPs.” That’s about \$325,905.29 per person per year. By comparison, to hold a regular prisoner costs about one tenth of that).
2. *State of N.Y. ex rel. Harkavy v. Consilvio* (7 NY3d 607) [2006] and *State of N.Y. ex rel. Harkavy v. Consilvio* (8 NY3d 645) [2007].
3. Laura Mansnerus, “For What They Might Do: A Sex Offender Exceptionalism to the Constitution,” in *The War on Sex*, ed. David M. Halperin and Trevor Hoppe (Durham: Duke University Press, 2017), p. 273. See also Roger N. Lancaster, *Sex Panic and the Punitive State* (Oakland: Univ. of California Press, 2011).

4. Tamara R. Lave, “Throwing Away the Key: Has the Adam Walsh Act Lowered the Threshold for Sexually Violent Predator Commitments Too Far?” 14 U. Pa. J. Const. L. 391 (2011), pp. 395–398.
5. American Psychological Association, *Dangerous Sex Offenders: A Task Force Report of the American Psychological Association*, United States, APA, 1999, p. 174.
6. See *Baughman v. Commonwealth*, Amicus Brief, VA Sup Ct, CHLP (2020), available at www.hivlawandpolicy.org/resources/baughman-v-commonwealth-amicus-brief-va-sup-ct-center-hiv-law-and-policy-2020.
7. Respectively, see U.S. Const., Art. 1, sec. 10, cl. 1.5 (*Ex Post Facto*) and U.S. Const., Amend. V, Sec. 1, cl. 1.2 (*Double Jeopardy*).
8. N.Y. Mental Hygiene Law § 10.07(d), (f).
9. *Kansas v. Hendricks*, 521 U.S. 346, 371 (1997).