

"Nothing in the world is more dangerous than sincere ignorance and conscientious stupidity." -- H.E. Cuccolo & M.L. Perlin, "Promoting Dignity and Preventing Shame and Humiliation by Improving the Quality and Education of Attorneys in Sexually Violent Predator (SVP) Civil Commitment Cases," 28 U. Fla. J.L. & Pub. Pol'y 291 (Aug. 2017)

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Focus on OCEAN

OCEAN Takes MSOP Protest to the Top

By Cyrus Gladden
For members/volunteers and other interested individuals, OCEAN (which stresses that it is not an organization, but a movement) held an online Zoom meeting on May 22, 2021, from 3:00-5:00 p.m.

More recently, law Professor Eric Janus agreed to take a seat on the OCEAN Advisory Board. At his online education seminar ("Why Civil Commitment for Sex Crimes is a Bad Idea") on June 24th, at 7:00-8:30 p.m., Prof. Janus spoke about many issues pertaining to MSOP and about sex offender "civil" commitment ("SOCC"). Those wishing to participate were able to do so at <https://umn.zoom.us/j/93124678565> (using Meeting ID: 93124678565). These events went well, and many received further enlightenment. It is not known at press time if the latter meeting can be viewed now at that same URL or possibly another. To gain an answer this question, or simply to talk about such issues, call: 651.372.8299.

Now OCEAN has scheduled two gatherings in St. Paul. The first will be held on the Capitol Mall in front of the State Capitol on Sunday, July 18, 2021. The first speaker will be introduced at 1:00 p.m. to educate the public on the terrors of preventive detention in the state of Minnesota.

The second event will follow directly after the first (at approximately 3:30 p.m.). It will be a drive/walk from Capitol Mall in St. Paul to the Governor's Mansion, where OCEAN supporters will demand an Executive Order from Governor Tim Walz to shutdown preventive detention in Minnesota.

OCEAN hopes that all of your friends, fami-

ly, and other supporters will join in this 'mobile protest' in St. Paul on July 18th.

OCEAN reminds readers that about 750 Minnesotans are now detained "indefinitely" (permanently?) — NOT for crimes they committed, but for projected crimes that someone somewhere fears they might commit.

MSOP Deputy Director James Berg admitted under oath that the MSOP treatment "program" cannot be completed, from which its 'death trap' nature can be inferred. The American Psychiatric Association adopted a formal position that MSOP and other SOCC systems are "an unacceptable misuse of psychiatry," in light of the fact that almost none of those committed are mentally ill.

Gov. Tim Walz and do-nothing state legislators are violating our rights under the U.S.



- OCEAN -

Constitution, as well as the European Convention on Human Rights, Article 5 (a sad day when it takes Europeans to lecture the U.S. about rights of individuals — refusing to send back a fugitive facing likely SOCC, calling it a "flagrant denial" of his human rights).

Each year, Minnesota taxpayers shell out a total of about \$140 million to fund this abomination unto law, liberty, governmental ethics, and just plain morality.

To date, 88 people (mostly the elderly) have died in MSOP captivity. In the ultimate slap in the corpse's face, MSOP looks for any assets of the deceased confinee, claiming a 'right' to be paid for the 'privilege' of having been confined by MSOP.

Minnesota has committed 4 times and even more people per-capita of state population to MSOP than any of the other 19 states having similar commitment laws have committed to their own "shadow prisons."

Even though preventive detention does nothing to lower sex crime rates, much of its funding is at the expense of budget cuts to sexual violence prevention programs that actually work.

Eight hundred staffers of MSOP (more than all those confined) are paid salaries ranging up to \$346,000 per year to operate MSOP. Is it really any wonder that MSOP releases comparatively so few each year? They are paid to come up with excuses not to let anyone go.

All of this must end. OCEAN suggests that you urge your friends, family and supporters to stay updated about all future events to be held by OCEAN by checking out <http://www.thevoicesofocan.net> and the [endmsop Facebook page](#) on a regular basis. They should also become Facebook followers so they can stay informed. MSOP confinees can also receive the OCEAN Ripple Effect Newsletter.



Old Faithful

Coming Soon:

- ✓ Banishment by a Thousand Laws
 - ✓ Looking at the Good Lives Model.
 - ✓ Remorse Bias — What's THAT?
 - ✓ Risk Assessment — Categorical Report Format Yields Distortion
 - ✓ SAPROF's Inaccuracy
 - ✓ Ignorance, Animus, Political Pressure & Gaming Dictate SO Policy, in Opposition to Science
 - ✓ SO Residence Restrictions & Registration Convolutions
 - ✓ A Little History Yields Deja Vu
 - ✓ Othering and Resistance. Huh?
 - ✓ 'New' SOCC Laws Are Punitive
 - ✓ The Latest on Anti-SO Vigilantism
 - ✓ Beware the Deepfake
 - ✓ Janus Speaks Out on the Preventive State Threat
 - ✓ COMPAS Illustrates Guessing at Risk
 - ✓ Schrödinger Redux: If You Look, It's CP - What Dost They Do?
 - ✓ Legislators' Pandering to Fear & Hate Make SO Registry Laws Insane
 - ✓ NARSOL: Too Polite?
 - ✓ Hold the PPG: More Evidence of Missing the Mark
 - ✓ Blanket Exclusions: Redlining against SOs
 - ✓ Levine Explains *Harmful to Minors*
 - ✓ Desistance: Harris Book (Pt. 4)
 - ✓ What Is E-Carceration?
 - ✓ Male Chronophyllas: EU: 1; US: 0
- And the torrent is endless!

Feedback? News? Write!

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OCEAN 2021 Survey Results Provide Revelations.

Daniel A. Wilson & Russell J. Hatton, "April 2021 OCEAN Data Point Survey Results," *OCEAN Pamphlet No. 1* (2021), <https://www.thevoicesofocan.net>; OCEAN, P.O. Box 582, Pelican Rapids, MN 56572

Text excerpts & charts:
[Disavowing status as a peer reviewed research group, the authors state that this survey was conducted by distributing the questionnaire to each one of the 454 men confined at MSOP-Moose Lake. The following data was collated from the 100 responses received. Calling MSOP a "Shadow Prison," the authors believe the survey's results are useful for the following:]

"1) Showing the public the truth to the point where they will demand transparency from this tightly shuttered program that effectively deprives its confinees of access to the internet or even merely just email, thus stifling dissemination by them of the truth.

2) Bringing such truths to release authorities (as to MSOP specifically, the 'Special Review

Board' & the 'Commitment Appeal Panel') to show why confinees are behind in treatment.
3) Use in defending a confinee's position against his therapist.
4) Showing the Legislature why the Shadow Prison is useless.

5) Helping families of the confined understand why they can't 'Just do treatment and come home.'

p. 4: "The men surveyed represent a combined 1353 years confined in this Shadow Prison. One man has been confined in Minnesota's so-called 'civil commitment' system for over 44 years. He is also one of the men who have no criminal record.

...Here men transfer to a new therapist's case load on average every 1.5 years. The common experience is that [with each such transfer, the treatment "client" must] start their treatment over again. None of the [survey respondents] here for 10 years or more had less than 4 therapists.

Thirty percent of the men report that they've

had 20-50 therapists or had 'too many to remember while at [MSOP-ML].

...[A]n individual can expect to transfer to a new therapist's case load [10 times] on average during confinement at the Shadow Prison."

p. 15: "Fifteen percent of the men were kidnapped and sent to this so-called 'civil commitment' facility in the woods of northern Minnesota. Some of the stories include:

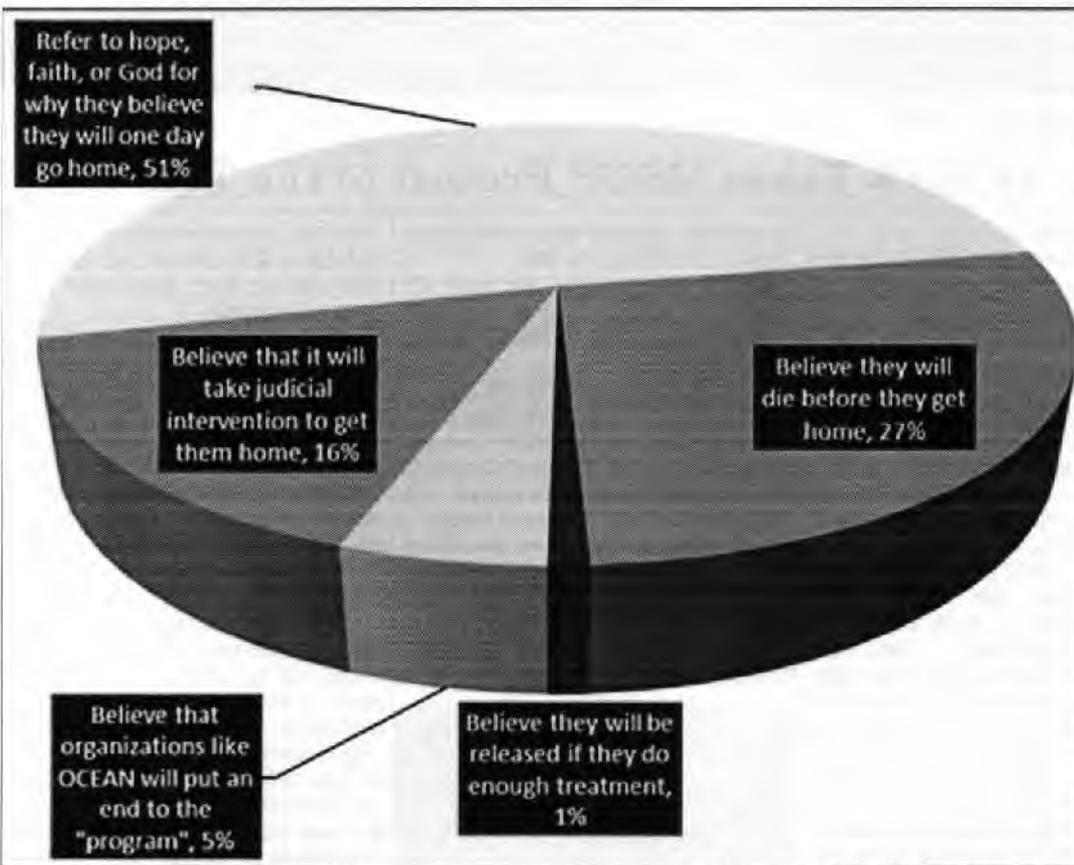
'I was off paper and out of prison for 4 months. ...The Sheriff showed up at my home.'

'I was at work when they picked me up off the streets and locked me up.'

'I had only 30 days left of conditional release [an add-on period applied to all sex offenders after parole]. After being on the street in the community for 6½ years, they came and picked me up.'

'I was home for 6 years. That explains most of it.'

(Continued on page 2)



diagnostician gave them 'Antisocial Personality Disorder as a primary or secondary diagnosis even though they did not have conduct disorder as a child. *Id.*'

Data Point Graph 10: It takes on average 5.7 years to get promoted to Phase 2. It took one man 17 years to earn his Phase 2.

Data Point Graph 11: Almost 2/3 have been confined for longer than a decade.

Data Point Graph 12: 37% of confinees have participated in treatment for 11-20 years; 10% have participated for 21-30 years.

Data Point Graph 13: Do the men believe they will go home one day, and on what do they base such belief? (See chart at left.)

[Additional Figures:]
 *250+ suits have been filed against the Shadow Prison.

84% of the men report that they have been involved in lawsuits against the Shadow Prison.

58% of the men report that they are considering filing lawsuits against the institution in the future.

48% of the men report that they have made complaints to the MN Board of Psychology.

83% of the men report that they are considering filing a complaint to the MN Board of Psychology.

90% of the men report that they wear black, or will wear black on Mondays, to remind staff of the deaths at the Shadow Prison over the years.

45% of the men report that they have written to legislators to tell them about the institution.

86% of the men report that they are willing to write to legislators to expose the Shadow Prison."

I took one man 17 years to earn his Phase 2.

Karsjens v. Lourey Update

(Source: Memo by Kevin Karsjens)

by Cyrus P. Gladden II
Summary with Commentary:

The memo by Kevin Karsjens reports that a hearing was held on May 19, 2021 on the *Karsjens* case. The Named Plaintiffs at MSOP-ML attended that hearing via Zoom videoconference. The subject of the hearing was a motion by Plaintiffs' attorneys (the Gustafson Gluek firm) for leave to file a Fourth Amended Complaint and to conduct further discovery in support of it.

Kevin Karsjen's impression was that the argument went in favor of Plaintiffs. However, Judge Donovan Frank (who

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[Per MSOP procedure, a confinee at MSOP-ML can be approved for transfer to MSOP-St. Peter, the other MSOP facility, claimed to represent being closer to eventual release. Yet 3.8 years is the average time it takes for Shadow Prison administration to transfer men to St. Peter after being approved to go there. Most of these transfers are to a pre-release program at St. Peter known as "C.P.S." By Minnesota Statute § 253D.28, transfer to that program should occur within 75 days of that approval. One man has been waiting 16 years to be transferred to St. Peter.]

[Data from the charts:

Data Point Graph 1: Percentage of MSOP-ML confinees who want their interactions with staff to be audio recorded to keep staff accountable: 84%.

Data Point Graph 2: Men who have found lies or inconsistencies in their 'treatment' charts: 93%.

Data Point Graph 3: Over the 27-year history of MSOP, percentages of MSOP confinees who: have been released – 2%; died while confined – 10%; still remain confined in MSOP – 88%.

Data Point Graph 4: Only 18% have not experienced racism or religious discrimination.

Data Point Graph 5: 36% of confinees who have participated in treatment in MSOP have completed 56-200 module instances, or "all of Phase 1 modules multiple times" or "all of Phase 1 and Phase 2 modules multiple times" or "too

many to remember'."

Data Point Graph 6: 43% or respondents reported they were denied treatment progression after passing a polygraph. 85% or respondents reported they were denied treatment progression after participating in a PPG assessment.

Data Point Graph 8: Ten ways MSOP diagnosticians keep MSOP confinees locked up:

*20% of the men report their diagnostician has given them a primary diagnosis unrelated to sex.

75% of the men report that their diagnostician has given them a secondary diagnosis unrelated to sex.

9% of the men report that they were given the diagnosis of 'Antisocial Personality Disorder' as a primary diagnosis. ('...[A]ntisocial personality disorder is not an appropriate diagnosis in SVP cases...' – Allen Frances, MD, 'Misuse of Diagnostic and Statistical Manual Diagnosis in Sexually Violent Predator Cases').

27% of the men report that they were given 'Antisocial Personality Disorder as a secondary diagnosis.

55 of the men report that their diagnostician gave them 'Other Specified Paraphilic Disorder (Non-Consent)'. This is based on a misunderstanding and misuse of the DSM definition of 'paraphilia.' *Id.*

24% of the men report that their diagnostician gave them 'Other Specified Paraphilic Disorder,' without the required specifier. DSM-5, 705.

25% of the men reported that their

fied Paraphilic Disorder,' without the required specifier. DSM-5, 705.

One man has been waiting 16 years to be transferred to St. Peter...

28% of the men report that their diagnostician used 'In a Controlled Environment' in an unauthorized way (e.g., the specifier 'In a Controlled Environment' is not authorized for 'Unspecified Paraphilic Disorder' or 'Other Specified Paraphilic Disorder').

3% of the men report that they have 'Z- Codes' as a Primary Diagnosis. (A Z-Code is not as mental diagnosis. It is not legal to use it to justify continued confinement.)

40% of the men reported that 'Antisocial Disorder' has been referenced in their diagnosis although they did not have conduct disorder as a child. *Id.* 659.

25% of the men reported that their



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presided over the case since the beginning and to whom the case was remanded after the 8th Circuit's ruling on the second appeal left Counts 5, 6, and 7 viable) stated that the text added by the proposed Fourth Amended Complaint was closely related to Counts 1 and 2 in the case, which the 8th Circuit has disallowed in the first appeal in the case. As to such overlapping, the judge said that the case would not be going down that rabbit hole.

Defendant's counsel Aaron Winter (of the Minnesota Attorney General's Office) argued that there was a bright line dividing Counts 1 and 2 from Counts 5, 6, and 7, and that Counts 1 and 2 had been finally disposed of already by the 8th Circuit in the first appeal in the case. However, in fact, according to the version of the Complaint that was tried and appealed, the lack of access to "less restrictive" alternatives to confinement in MSOP facilities was mentioned in Counts 5-7 no less than 20 times, one of which is in the very heading of Count 6.

It should be borne in mind that even the proposed 4th Amended Complaint does not seek release for anyone; rather, those three surviving Counts simply argue that the practical impossibility of MSOP confinees ever attaining such less restrictive alternatives (beyond placement in "CPS", the claimed pre-release preparatory services unit, where 89 confinees languish, stalled by the system at the doorstep of supposed release). According to other confinees in MSOP-ML, at least 30 confinees in that facility await transfer to CPS, but cannot even enter it due to lack of open beds there).

This, all versions of the Complaint state, is evidence that the MSOP program is not intended as mental health treatment followed by reasonably prompt release, but rather, is punitive (like an additional prison sentence), with a design and a practice of continuing to detain confinees long after even their own decision making has found a given confinee effectively safe for less restrictive placement. This, the Plaintiffs argue, is a punitive [indeed, the most punitive] condition of confinement.

It seems to this observer that, given the prominence of the theme of denial of access to such less-restrictive alternatives to confinement, the 8th Circuit's ruling in the second (latest) appeal would not have remanded those Counts for further proceedings at all if that court had meant that those three remanded Counts had simply been a reprise of the argument in dismissed Counts 1 and 2 for immediate assessments and release pending their favorable results.

Defendants' response is merely that anything that can have the effect of accelerating release, such as greater access to class restrictive alternatives, is, in essence, inherently about release. This,



Unsuccessful Negotiations

however, would leave very little under the *Bell v. Wolfish* standard, which the second appeal's opinion endorsed as the decision standard to apply to the remanded Counts.

Lack of access to "less restrictive" alternatives to confinement in MSOP facilities was mentioned in Counts 5-7 no less than 20 times, one of which is in the very heading of Count 6.

Judge Frank urged the parties to consider undertaking settlement discussions. However, in the event that no settlement is reached, Judge Frank indicated that he would decide on this motion for a 4th Amended Complaint within 45 days from that hearing, and would do so on an expedited basis.

According to Kevin Karsjens, Dan Gustafson spoke up at this point, saying, "Whatever the ruling is by you, judge, whether allowing us the Amended Complaint or not, I will file a new complaint if you deny my request to amend and I will not need your permission for that, your honor. My clients are suffering from their rights being violated."

The judge then noted by way of response that there is another case on stay ready to become a class action at this time. He also mentioned that there are 33 open cases in that federal court right now and an additional 86 cases currently stayed that are waiting to be un-stayed, plus 7 habeas corpus cases, 6 of which are stayed and 1 active. Judge Frank also referred to many cases apparently currently pending in various state courts in Minnesota.

Bear in mind that the one portion of the *Karsjens* case absolutely certain to continue on involves medical neglect, incompetent diagnosis by nurses (not doctors) and incorrect treatment by them. If you have any evidence or narratives of such medical mistakes and/or neglect, write to David Goodwin at the Gustafson Gluek PLLC firm, as they are gathering information now for that portion of the case.



Releases & Rumors of SOCC Releases

Clearing Up the True Status in WA & Relaying a Rumor about NY

by Cyrus Gladden

The May 2021 edition of *TLP* (page 1) reported that the State of Washington is explicitly avowing an intent to bring its SOCC program to an end and to take actions, including actual closure of its only "total confinement facility" ("TCF"), on McNeil Island in Puget Sound).

More recent correspondence from Richard ("Scotty") Scott has clarified the actual situation in Washington. From this later report, it now appears clear that Washington State has not overtly declared an intention to end civil commitment or to close its McNeil Island facility.

Nonetheless, various actions seem to clearly convey such an aim, or at the very least, to reduce its SOCC program to a skeleton of its former size. The overall trend is an apparent shift to "community-based SOTP" (sex offender treatment programs) as a means for handling committed sex offenders.

The current population of those remaining confined in the McNeil Island TCF is only about 100 confinees. This has been a long gradual reduction from its former peak occupancy of about 320 confinees in 2014. "Scotty" Scott believes this

downward trend will continue. He expresses the belief that when the remaining population there gets down to 50 or so, the high fixed costs of keeping that TCF in operation will no longer be justifiable on a per-confinee basis, and that this will then force closure of that facility.

Scotty says other states with SOCC programs have followed Washington's lead in the past, and he hopes they will do so in this reduction-and-closure phase.

In contrast to MSOP's "CPS" (community preparation services), Washington has a large number of county-based facilities serving a similar purpose of LRA readiness preparation (combined with LRA revocation placements).

This preparation lasts for six months. Then confinees are released to "LRAs" (less-restrictive-alternative, community placements). That status also lasts for another six months, followed (if all goes well) by unconditional discharge ("UCD", same as "full discharge" in Minnesota).

The differences in Minnesota are that both the wait to get admitted to CPS after becoming eligible and the term of CPS retention are typically measured in years, not months, and that "provisional discharge" is a period projected to last five years (for no compelling reason) before "full discharge."

Scotty reports that Washington has given a special first priority to "old men" (i.e., those at or above age 69), and also those who are chronically physically ailing. As a result, now only three of the 100 last occupants of its TCF are past age 68.

Both these aged men and the chronically physically infirm are discharged from the TCF facility directly to UCD (without LRA/provisional discharge). By this, Washington implicitly acknowledges that neither the aged nor the physically infirm present any current significant probability of re-offense.

This is in contrast to MSOP's doctrinaire insistence in Minnesota that even aged former sex offenders are seriously likely to reoffend until the day they die of old age).

Even for younger confinees, Scotty reports that neither completion of, nor even merely participation in treatment is a prerequisite for release or even for full discharge. Many of these are also being released now in Washington.

This effectively recognizes that people no longer present the same risk of re-offense that they did when arrested for their most recent sex crime (often as many as two to three decades before commitment release is under consideration).

This policy also acknowledges that the undisputed process of desistance from criminality is underway in most cases long before release, and that most research studies have produced statistical

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results showing little or no difference in recidivism percentages regardless whether or not a sex offender engaged in treatment before release.

Relaying a new rumor about SOCC practice in New York, one of the confined there has recently stated that New York is now creating an LRA program that will greatly expand the number of men in that SOCC system who can be granted LRA status.

TLP's position has long been, and remains, that there is no adequate substitute for full and unconditional dissolution of all sex offender commitments, for all the reasons that have been printed in TLP editions over the years.

In a nutshell, this position is based on the observations:

(1) that there is no actual scientific justification for post-sentence confinement of those with long-past sex offenses; and

(2) that surreptitiously add-on lifetime sentences after overt imprisonment through the devious ruse of commitment are simply an inhuman infliction of horror-and-hate-based extra lifetime-punishment for past criminality — real or imagined.

The first observation above is an utter abandonment of all reason, and the second is a substitution of extreme, uncontrolled rage and hysterical fear in its place.

Together, they represent an utter rejection of every concept of proportion, fairness, and scientific allegiance to truth, instead cowardly succumbing to threats from ignomani determined to install a dictatorship of a renewed dark ages of willful stupidity.

Yet, if this rumor out of New York bears some kernel of truth, TLP would be remiss in failing to hail it as being at least a halting initial step in the right direction: freeing at least some, even if only on conditions.

However, we resolutely counsel those in New York SOCC to watch this development closely, rather than simply assuming that it is a true sign of a permanent and substantial shift to a replacement policy of meaningfully consistent releases from confinement, followed by an equally large-scale program of full discharges, all within a reasonable period of time after commitment.

Regrettably, whether merely fortuitous or for deceptive purposes, there have already been too many 'false starts' elsewhere casting that unfulfilled promise.

Just bear in mind the immortal words of Martin Luther King, Jr.: "Freedom is never voluntarily given by the oppressor; it must be demanded by the oppressed."



Martin Luther King, Jr.

Fourth Segment: TLP Report to Virginia Debunks Junk Science Behind All SOCC, Presses Repeal of Its SOCC Law.

1. Specific Problems

a. The Junk Science Concept of Sexual Psychopathy as a Mental Illness or Disorder

The notion of psychopathy has never been accepted in psychiatry or psychology as a personality disorder. Edwin H. Sutherland, "The Diffusion of Sexual Psychopath Laws," 56 *Am. J. Soc.* 142, 142 (1950), declared: "[T]he concept of the 'sexual psychopath' is so vague that it cannot be used for judicial and administrative purposes without the danger that the law may injure the society more than do the sex crimes which it is designed to correct."

First, "psychopathy" is not a diagnostic mental illness or disorder under the DSM-5. Psychopathy is merely a "heuristic construct for modeling purposes. Erica Beecher-Monas & Edgar Garcia-Rill, "Danger at the edge of Chaos: Predicting Violent Behavior in a Post-Daubert World," 24 *Cardozo L. Rev.* 1845, 1873 (2003). "No one is quite sure what psychopathy means.... The [PCL-R] instrument consists of twenty risk factors, ...: Glibness/superficial charm; grandiose sense of self-worth; need for stimulation/proneness to boredom; pathological lying; conning/manipulative; lack of remorse or guilt; shallow affect; callous/lack of sympathy; parasitic lifestyle; poor behavioral controls; promiscuous sexual behavior; early behavioral problems; lack of realistic long-term goals; impulsivity; irresponsibility; failure to accept responsibility; many short-term marital relationships; juvenile delinquency; revocation of conditional release; criminal versatility.... [T]hese factors appear to be rather subjective...." (Ibid.) As such, it is a label arrived at merely upon behavioral observation of the offender.

Indeed, the first edition of the DSM took pains to make clear that no such psychiatric diagnosis ever existed. *Mama J. Johnson*, "Minnesota's Sexual Psychopathic Personality and Sexually Dangerous Persons Statute: Throwing Away the Key," 21 *William Mitchell Law Review* 1139 [1996], flatly states, at Footnote 10: "The term 'psychopathic personality,' however, was expunged from the psychiatric nomenclature in 1952." "Psychopathy ... is not an acknowledged psychiatric diagnosis in the DSM...." R.A. Prentky, E.Janus, H. Barbaree, B.K. Schwartz & M.P. Kafka, "Sexually Violent Predators in the Courtroom: Science on Trial," 12 *Psychology, Public Policy & Law* 357, 368-69 (2006).

"Psychopathy" is merely an unscientific impression in the eyes of certain psychologists. One of these is Robert Hare, who designed a questionnaire of 44 points in total. According to Hare, one must achieve a score of 30 on his checklist to be considered psychopathic. Hare, as creator of the PCL-R (Psychopathy Checklist-Revised) refuses to grant access to the instrument or any of the data upon which it is claimed to be based except to those who have taken a training program offered by Hare, and have been approved ("qualified") by Hare to receive such materials. He has even engaged in litigation against lawyers and judges for disseminating the instruments and such materials to clients, other parties to litigation, and to the public. As a result, the PCL-R has never been subjected to robust critique and hence cannot be deemed to be the valid product of a scientific process. *Beecher-Monas & Garcia-Rill, supra*, notes 201-203.

The PCL-R was designed to determine one's propensity to resort to physical violence, not to commit sex crimes. (*Beecher-Monas & Rill, ibid.*) No RAI has been as misapplied to sex offenders as the PCL-R. Designed to ascertain the likelihood of future physical violence by a given offender, it inherently has no appli-

The notion of psychopathy has never been accepted in psychiatry or psychology as a personality disorder.

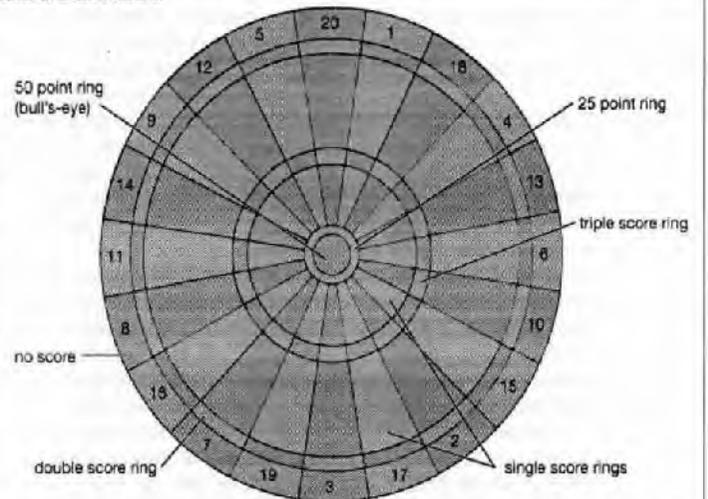
cation to the commission of future crimes of a sexual, rather than a violent nature. While some sex crimes involve violence, it is axiomatically true that the motivation for sex crimes — even those that include violence — is completely different from the motivations that prompt acts of non-sexual physical violence. Accordingly, none of the factors used in the PCL-R serve as indicators of the probability of sex crime recidivism. See, e.g., *United States v. King*, 2013 U.S. Dist. LEXIS 54655 (E.D. N.C. 2013) (stating that the PCL-R does not predict sexual recidivism....). To same effect, see also: *United States v. Lange*, 2012 U.S. Dist. LEXIS 159498 (E.D. N.C. 2012) (stating that the PCL-R does not predict sexual recidivism at all)."

Indeed, even merely as a predictor of the likelihood of future physical violence, it has been found that the PCL-R lacks fundamental validity and reliability. Thus, e.g., *United States v. Taylor*, 320 F Supp. 2d 790, 2004 U.S. Dist. LEXIS 10957 (N.D. Ind. 2004), banned its use even in the context of death penalty proceedings:

"The Court takes issue with one of the proposed tests in particular. In recent years, the reliability of the Interview Schedule for Psychopathy Checklist-Revised ('PCL-R') has been called into question as an indicator of a defendant's future dangerousness. Specifically, following an extensive review of literature addressing institutional violence and the PCL-R that concentrated on the use of the PCL-R in capital sentencing proceedings, John F. Edens, a psychologist with extensive experience in the area of risk assessment concluded, 'the posi-

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Standard dart board



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Like a blind man throwing darts.

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tion that PCL-R scores for any one offender provide much useful information regarding his relative or absolute risk for future institutional violence while incarcerated clearly is untenable... Edens, J. F., Petria, J., & Buffington-Vollum, J. K. (2001) Psychopathy and the Death Penalty: Can the Psychopathy Checklist-Revised Identify Offenders Who Represent 'A Continuing Threat to Society?' *Journal of Psychiatry and Law*, 29:433-481; see also Edens, J.F., (Oct. 2001) "Misuses of the Hare Psychopathy Checklist -Revised in Court: Two Case Examples," *Journal of Interpersonal Violence*, Vol. 16, No. 10, 1082-1093; "Declaration of Thomas V. Ryan, Ph.D., ABPP, *United States v. Stitt*, Cause No. 298 CR 47 (E.D. Va.) Document No. 175, filed March 18, 2004. Thus, due to the uncertainty of the validity and reliability of the PCL-R as it is used in capital sentencing hearings, the Government and any of its experts is prohibited from utilizing this test in eval-

The PCL-R does not predict sexual recidivism at all.

uating Defendant Thomas."

A *fortiori*, since the PCL-R has been determined to lack validity even in its avowed field of specialization (violence prediction), it cannot be said to have any validity in the field of sex-crime recidivism prediction.

John A. Fennel, "Psychopathy Could Use a Little Skepticism," 4 *AJOB Neuroscience*, No. 2, p. 14 (Apr. 2013), offers these observations about the unscientific nature of purported assessment of psychopathy:

Text excerpt, p. 14: "Unfortunately, [the analysis by Grant Gillett & Jiaochen Huang, "What We Owe the Psychopath: A Neuroethical Analysis," *AJOB Neuroscience* 4(2): 3-9 (2013)] simply assumes the existence of psychopaths. Attention to the research shows that most efforts to pick out supposed psychopaths rest on small samples and infirm methods that lose significance when analyzed in meta-analyses. Hare's Revised Psychopathy Checklist (PCL-R), the most widely used tool for picking out supposed psychopaths (Hare 2006), has two faults. First, scoring the PCL-R is susceptible to partisan alliance. Second, the core of psychopathy, the Factor 1 traits on the PCL-R, does not appear to predict recidivism.

The PCL-R is a rating instrument of 20 items scored on a 3-point scale (0, 1, 2) for a total range of possible scores 0 to 40. An individual who scores over 30 is typically labeled a psychopath (Hare 2006). Edens, Boccaccini, and Johnson (2010) report on a study of adversarial experts at sex offender civil commitment cases in Texas that revealed an average difference of 8 points for the same

individual depending on whether the expert favored or opposed release. Considering that 98% of the offenders evaluated fall between 5 and 36 on the PCL-R, an average difference of 8 points would be significant in many cases (Edens et al. 2010). Other studies, including a meta-analysis, have shown similar, although not as extreme, results (Boccaccini, Murrie, and Turner 2008; Cooke and Michie 2010; Edens et al. 2010). These discrepancies in scoring the PCL-R typically arise in the items associated with the 'psychopathic personality,' the Factor 1 traits (Edens et al. 2010).

In contrast, the items that measure antisocial behavior, the Factor 2 items, have higher rates of interrater agreement. More importantly, a meta-analysis found that it is the Factor 2 items, not the Factor 1 items, that are correlated with recidivism (Yang, Wong, and Coid 2010). Since the Factor 2 items are, for the most part, based on past criminal behavior, it seems that the 'psychopathy personality' does little to predict recidivism. Furthermore, the Factor 2 traits do not predict recidivism any better than traditional instruments based on behavioral measures (Yang et al. 2010).

Thus, the psychopathic personality, when it comes to predicting and preventing crime, lacks support. Its distinctive traits are difficult to measure with unbiased assessments. And whatever personality traits the Factor 1 traits are measuring, they have not been shown to predict recidivism.

As a defense attorney litigating for the release of civilly committed sex offenders, I have managed to secure the release of several men labeled as 'psychopaths' by forensic psychologists. None have recidivated. Unlike the evaluators paid by the Department of Corrections, my professional reputation depended upon me understanding my client's perspective and presenting it before a jury. A defense attorney cannot give up and cast off a client into the pit of the irredeemable. My clients were sometimes hostile, usually misunderstood, and always scared. Based on the literature written by the proponents of psychopathy, it seems I should have encountered someone like the purported psychopaths described in Hare (1994). I never did. 'Herein lies an ethical lesson, not only for policymakers and forensic authorities, but for all of us.' (Gillett and Huang, *supra*, 2013, 7)." Bruce J. Winick, *The Right to Refuse Mental Health Treatment*, (Am. Psychol. Ass'n., Washington, DC, 1997), flatly declares, at p. 316-19: "...[M]erely labeling a class of offenders as mentally disordered sex offenders or as sexually violent predators does not itself mean that they are mentally ill within the meaning of the Constitution or that their hospitalization or

treatment would be medically justified." At Footnote 22, Winick applies this to 'sexual psychopathy':

"S. Brakel, et al., *The Mentally Disabled and the Law* 743 (3rd ed. 1985) (referring to the '[g]rowing awareness that there is no specific group of individuals who can be labeled sexual psychopaths by acceptable medical standards and that there are no proven treatments for such offenders...'); A. Stone, "Mental Health and Law: A System in Transition" 192-94 (DHEW Pub. No. (ADM) 76-176, 1975); LaFond, "Washington's Sexually Violent Predator Law: A Deliberate Misuse of the Therapeutic State for Social Control," 15 *U. Puget Sound L. Rev.* 655, 662 (1992) ('Most experts and policymakers had concluded that sex offenders were not mentally ill and that involuntary indeterminate treatment was ineffective in changing their criminal behavior. Coercive rehabilitation simply did not work.'). Reardon, "Sexual Predators: Mental Illness or Abnormality? A Psychiatrist's Perspective," 15 *U. Puget Sound L. Rev.* 849 (1992).

"...It has become common practice to modify risk assessments based on the Static-99/99R because of the presence of psychopathy and indicators of deviant sexual interests, although to date there has been no research validating this procedure. The current research was conducted to fill this gap in the literature. Using a sample of 272 sexual offenders, the extent to which psychopathy, sexual deviance, and their interaction added to the predictive validity of the Static-99R was examined. Analyses were conducted using the whole sample as well as subgroups of rapists and child molesters. It was found that although the Static-99R predicted sexual recidivism, adding psychopathy and sexual deviance in a Cox regression analysis did not improve the prediction. This held true for child molesters when examined on their own..." (Jan Looman, Nicola A.C. Morphett & Jeff Abracen, "Does Consideration of Psychopathy and Sexual Deviance Add to the Predictive Validity of the Static-99R?," 57 *Int'l. Jour. of Offender Therapy & Comparative Criminology* 939-965 (Issue 8, Aug. 2013), Abstract, p. 939; emphasis supplied)

"...[S]ome researchers have not found



General Douglas MacArthur watches the stunningly successful Inchon landing [Korean War], which he boldly planned. Hare would call him a psychopath.

Merely labeling a class of offenders as mentally disordered sex offenders or as sexually violent predators does not itself mean that they are mentally ill within the meaning of the Constitution or that their hospitalization or treatment would be medically justified.

that psychopathy predicts sexual recidivism. For example, *Barbaree, Seto, Langton and Peacock* (2001) and *Langstrom and Grann* (2000) reported that the PCL-R predicted violent and general but not sexual recidivism in their samples. More recently, *Murrie, Boccaccini, Caperton, and Rufino* (2011) found that psychopathy was unrelated to sexual recidivism in a sample of 333 sexual offenders who underwent an assessment for civil commitment as SVPs.

p. 941: "...It is commonly assumed that the combination of high psychopathy and sexual deviance is a 'deadly combination' (Hare, 1999), in that those sexual offenders with both psychopathy and sexual deviance are assumed to reoffend at a very high rate. However, the research results do not lend consistent support for this conclusion. First, a literature review conducted by the first author (J.L.) indicates that there are relatively few studies that examine the combination of psychopathy and phallometrically measured sexual deviance, and second, the findings of the research have been inconsistent.

p. 942: "Current results indicate that the consideration of sexual deviance, psychopathy, and their interaction term is not necessary when the Static-99R score is known and that these additional variables do not contribute significantly to predicting that outcome once the Static-99R score has been accounted for. Thus, the current results do not support the modification of risk estimates based on the Static-99R because of the presence of sexual deviance and psychopathy when sexual recidivism is the outcome of interest." (*Id.*). Without medical/psychological moorings, SOCC laws simply identify a disfavored class of individuals for permanent preventive detention.

"Neither sexual psychopathy, the label once given to the propensity to commit sex offenses, nor antisocial personality disorder, the condition rejected as a basis for involuntary hospitalization in *Foucha*, are medical conditions for which psychiatric hospitalization or intrusive treatment would be therapeutically justified. In its study on sexual psychopath legislation, the Group for the Advancement of Psychiatry concluded that these laws 'lack clinical validity.' The study found that sexual psychopathy is 'not a psychiatric diagnostic category' but 'a meaningless grouping from a diagnostic and treatment standpoint.' It observed that offenders committed

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under these statutes are given little treatment or 'inappropriate or ineffective treatment.' These 'mentally disordered sex offender' statutes once were in vogue but now have fallen into disfavor. In those jurisdictions that retain them or that have adopted a newer version under which sex offenders are hospitalized as sexually violent predators, they must be regarded as constitutionally suspect under *Foucha* to the extent they authorize involuntary psychiatric hospitalization or intrusive treatment of those committing sex offenses who, apart from their criminal behavior, are not mentally ill. Sexual psychopathy is not regarded by clinicians as a mental disorder, even if it were, it would not satisfy the narrow definition of mental illness that may be implicit in *Foucha*. It has no apparent organic etiology, is not itself a treatable condition (at least absent motivation for treatment on the part of the individual), and does not produce cognitive or volitional incapacity that would justify involuntary hospitalization or treatment. Like antisocial personality disorder, found not to be a mental illness justifying commitment to a psychiatric hospital in *Foucha*, this or similar labels should not justify forced hospitalization or intrusive treatment." (Winick, p. 319).

Some of the claimed 20 'risk factors' for psychopathy would seem to apply to some attorneys. Information used to score these factors can be drawn from any portion of one's lifetime to date, so the PCL-R cannot measure changes over time; it treats subjects as stable 'statues.' E. Bescher-Monas & E. Garcia-Rill, *ibid*. Kevin B. Riech, "Psycho Lawyer, Qu'Est-Ce Que C'est: High Incidence of Psychopaths in the Legal Profession and Why They Thrive," 39 *Law & Psychol. Rev.* 287 (2015), observes at 287:

"Kevin Dutton, a research psychologist at the University of Oxford, makes this claim in his book, 'The Wisdom of Psychopaths: What Saints, Spies, and Serial Killers Can Teach Us About Success.' According to Dutton, 'Any situation where you've got a power structure, a hierarchy, the ability to manipulate or wield control over other people, you get psychopaths doing very well.'¹³ In a ranking of professions with the most psychopaths, lawyers come in at number two, after CEOs.⁴

Without medical/psychological moorings, SOCC laws simply identify a disfavored class of individuals for permanent preventive detention.

p. 294: "...[Law] students who were characterized as 'feeling' types were twice as likely to drop out [of law school] compared to those characterized as 'thinking' types.⁵⁸ The personality type



Suppose I don't call this poor bloke anything. What do you see? Now suppose I call him a "psychopath." Now what do you see? Does the number of cops and their SWAT outfits affect your judgment? Other than this photo and my labeling of him, what do you really know about him? Are you experiencing the snap-judgment instilling impact of "heuristics"? (Look it up.) Right now, are you thinking, "He must be dangerous"? Can you help yourself from thinking this? If you were a juror, would you vote to commit him?

that was both overrepresented in law school and had the lowest dropout rate was one that was characterized as typically 'dependable and practical with a realistic respect for facts'. And tending to emphasize 'analysis, logic, and decisiveness.'⁵⁷ [Paul V. Miller] also found that students who preferred to make decisions based on a 'feeling' were more likely to drop out than those who preferred to make decisions on the basis of 'thinking.'⁵⁸ These 'thinking' type students could easily discern inaccuracies, often hurt others' feelings without knowing it, and were excellent problem solvers.⁵⁹

...Lawyers are thought by some to have a lacking sense of morality – a focus on maintaining rules and regulations rather than 'moral' compassion.⁶⁰ There is little research supporting this stereotype. However, gender differences might offer an explanation. Studies have shown that law school 'dramatically shifts female students' orientations from an ethic of care and compassion to an orientation similar to that of men, which typically emphasizes a rights and justice orientation.⁶¹ Additionally, lawyers certainly tend to think differently, and perhaps value things differently, than the general population.⁶² This difference may cause lawyers to appear cold and impersonal, or even amoral.⁶³

pp. 298-99: "As discussed and contrary to popular perception, psychopaths are not necessarily deranged monsters. In fact, some psychopaths may be able to master their psychotic attributes and excel over 'normal' people. Studies suggest that 'successful psychopaths have intact or enhanced neurobiological functioning that underlies their normal or even superior cogni-

tive functioning, which in turn helps them to achieve their goals.'⁶⁷ Accordingly, it is not surprising that psychopaths are so disproportionately common in the legal profession. A good lawyer should have the ability to make unemotional, rational decisions with laser-focus, much in the same way some psychopaths do. It appears not only that psychopaths might be able to function as lawyers, but also that the legal field is especially suited to take advantage of the traits many psychopaths possess."

Riech also points out that those in other professions and endeavors requiring boldness and steady nerves succeed best when they exhibit that attribute of psychopathy:

p. 290: "On July 20, 1969, Neil Armstrong and the Apollo 11 crew had a short window – measured in seconds – to find a safe place to land the spacecraft on the surface of the moon.²² Data later showed Armstrong barely broke a sweat or exhibited signs of stress during one of the most giant leaps in the history of mankind.²³ Those who are able to control their response to stress in this almost psychopathic manner have a distinct advantage over the average person, who may fold under such intense pressure."

Sorman, K., Edens, J.F. & Kristiansson, M. et al., "Boldness and Its Relation to Psychopathic Personality: Prototypicality Analyses Among Forensic Mental Health, Criminal Justice, and Layperson Raters," *Law and Human Behavior*, Feb. 2016 (advance online publication), doi: 10.1037/lhb0000176, studied the role of boldness in the purported "psychopathic personality." At Abstract, slip, p. 1, those researchers explained their study and presaged their conclusion thus:

"...In 3 samples (forensic mental health practitioners, probation officers and a layperson community sample), we investigated adaptive traits as conceptualized in the Triarchic model of psychopathy (Patrick et al., 2009), specifically the relevance of boldness to constructs of psychopathic personality. Participants completed prototypicality ratings of psychopathic traits, including 3 items created to tap components of boldness (Socially bold, Adventurous, Emotionally stable).... The composite Boldness scale was rated as moderately to highly prototypical among forensic mental health practitioners and probation officers.... For the individual items, Socially bold was rated as highly prototypical and was associated with theoretically relevant correlates. Adventurous also was seen as prototypical, though to a lesser degree. Only forensic mental health practitioners endorsed Emotionally stable as characteristic of psychopathy...."

Text excerpts, starting at slip, p. 1, explain the background, starting in nothing more than the a priori intuitive declara-

In a ranking of professions with the most psychopaths, lawyers come in at number two, after CEOs.

tions of one psychiatrist before and just after World War II:

"Despite this extensive focus on criminality, dysfunction, and psychopathology, some historical (e.g., *Cleckley*, 1941) and more recent models (e.g., *Patrick, Fowles, and Krueger*, 2009; see also *Lilienfeld & Widows*, 2005; *Lykken*, 1995) have argued that psychopathy also includes certain characteristics (e.g., social prowess, lack of anxiety, fearlessness) that may not be overtly maladaptive and might in fact be associated with some positive outcomes. For example, in describing the backgrounds of psychopaths, *Cleckley* (1946) asserted:

'Not rarely the records will show that he has won the chancellor's prize at college for an essay on the Renaissance, or graduated from high school summa cum laude, or outstripped 20 rival salesmen over a period of six months, or married the most desirable girl in town, or, on a first venture into politics, got himself elected to the state legislature. (p. 22)'

p. 10: "Discussion

"...Among forensic mental health practitioners and probation officers, who would be expected to have considerable experience working with persons who demonstrate varying levels of psychopathic traits, Socially bold and Adventurous items were rated as moderately to highly prototypical of psychopathy. In fact, these ratings were in a range similar to or higher than the average CAPP item. These findings seem to clearly support the content validity of such traits and bolster the argument that they represent important aspects of how forensic mental health and criminal justice professionals conceptualize this disorder. Jury venirepersons also rated Socially bold as moderately prototypical, though the Adventurous item ratings were near the mid-point of the scale, indicating an essentially neutral attitude about this concept.

"In contrast to the generally positive prototypicality data for the Socially bold and Adventurous items, results for the Emotionally stable item were less clear. Forensic mental health practitioners, whose daily job functions include the assessment, treatment, and/or management of forensic detainees with serious psychiatric disorders, viewed this item as moderately prototypical of psychopathy, whereas probation officers (and jury venirepersons) clearly did not. One plausible interpretation of these results is that the emotional stability component of boldness is an especially salient indicator of psychopathy among practitioners in a forensic mental health set-

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ting specifically because typical detainees may suffer from severe symptoms such as gross disorganization, fragmented thought processes, emotional outbursts, or social withdrawal. Therefore, clients who display optimism, self-confidence or emotional resiliency might particularly stand out in an environment in which a majority of clients demonstrate a very different pattern of personality and interpersonal characteristics. Recall that in *Cleckley's* (1941) seminal clinical profile for psychopathy several characteristics (e.g., absence of nervousness, absence of delusions, good intelligence) seemed to differentiate psychopathic patients from those with whom he worked who were suffering from serious mental disorder...."

"...Being emotionally stable in situations in which it is in fact appropriate to be distraught or afraid is not actually normal, *per se*, though it may be generally viewed as advantageous or even 'heroic' (Lykken, 1995). Had we chosen descriptors more indicative of atypical affective dispositions (e.g., 'Abnormally calm in emotionally provocative situations'; 'Abnormally cheerful about life despite facing severe legal sanctions') perhaps our participants might have viewed such characteristics as more representative of a psychopathic personality constellation. Future prototype studies should investigate other common language indicators of low stress reactivity and the ability to 'remain calm and focused in situations involving pressure or threat' (Patrick et al., 2009, p. 926)."

p. 11: "...[I]t is interesting to note that no aspects of Boldness were seen as relevant to a greater propensity to engage in crime. ...In terms of moral judgments, only the forensic mental health practitioners tended to associate higher Boldness with more negative views about psychopaths (in terms of being evil and deserving of greater punishment). This might indicate that individuals working in a forensic psychiatric setting perceive at least some aspects of the potential social attainments resulting from psychopathy to be essentially undeserved or ill-gotten (e.g., through socially exploitative behavior, perhaps directed at more vulnerable detainees.

"...[W]e believe the results of this study for the most part support the content validity of boldness as an important component of psychopathic personality, particularly traits associated with being Socially bold (dominant, socially assured, persuasive) and Adventurous (courageous, thrill-seeking, tolerant of uncertainty)...."

This examination of aspects of boldness as claimed attributes of psychopathy suggests that people who might



Blowing Smoke...

simply remind one of Errol Flynn's characters are psychopaths. This in turn shows the vacuity of the definition of psychopathy.

No RAI has been as misapplied to sex offenders as the PCL-R. Designed to ascertain the likelihood of future physical violence by a given offender, it inherently has no application to the commission of future crimes of a sexual, rather than a violent nature. While some sex crimes involve violence, it is axiomatically true that the motivation for sex crimes – even those that include violence – is completely different from the motivations that prompt acts of non-sexual physical violence. Accordingly, none of the factors used in the PCL-R serve as indicators of the probability of sex crime recidivism. See, e.g., *United States v. King*, 2013 U.S. Dist. LEXIS 54655 (E.D. N.C. 2013) (stating that the PCL-R does not predict sexual recidivism....). To same effect, see also: *United States v. Lange*, 2012 U.S. Dist. LEXIS 159498 (E.D. N.C. 2012) (stating that the PCL-R does not predict sexual recidivism at all).

Distinctly but cumulatively, *David DeMatteo, John F. Edens, Meghann Galloway, Jennifer Cox, Shannon Toney Smith, Dana Formon*, "The Role and Reliability of The Psychopathy Checklist-Revised in U.S. Sexually Violent Predator Evaluations: A Case Law Survey," 38 *Law & Human Behavior* 248 (2014), at pp. 252-53, report: "Certainly in the context of criminal responsibility/sanity cases, the presence of psychopathy or the related diagnosis of antisocial personality disorder does not indicate that an offender lacks the capacity to either understand right from wrong or exercise control over his behavior. (American Law Institute, [Model Penal Code and Commentaries, Sec. 4.01, 1985). As such, its use in some SVP cases as an indicator of impaired volitional control is ironic, if not downright contradictory."

The "SRA-FV/FV Light" is governed by the same criticisms: *United States v. King*, 2013 U.S. Dist. LEXIS 54655 (E.D.

N.C. 2013), at Footnote 7, reveals that: "The Structured Risk Assessment-Forensic Version (SRA-FV) includes scoring from the Psychopathy Checklist (PCL-R). See Govt. Ex. 2, at 16."

In sum, "sexual psychopathy" is not a mental illness or disorder of any kind, or any partial disorder ("dysfunction"). Therefore, it cannot support civil commitment of any individual.

This examination of aspects of boldness as claimed attributes of psychopathy suggests that people who might simply remind one of Errol Flynn's characters are psychopaths. This in turn shows the vacuity of the definition of psychopathy.

b. The Junk Science Concept of Raps as Comprising Unspecified Paraphilic Disorder, Nonconsent as a Disorder

Thomas K. Zander, "Civil Commitment without Psychosis: The Law's Reliance on the Weakest Links in Psychodiagnosis," 1 *Jour. of Sexual Offender Civil Commitment: Science and the Law* 17, at 45 [2005], after an exhaustive examination of the development of the DSM in its sequential editions, flatly concludes that "the weight of opinion among experts in the treatment of paraphilias is that the omission of non-sadistic rape from the paraphilias category of the DSM was, and continues to be deliberate decision of the American Psychiatric Association. None of the experts has published a statement supporting the use of the diagnosis of paraphilia-NOS for rapists."

One of the actual editors of the DSM, *Allen Frances*, *The Essentials of Psychiatric Diagnosis*, in the section discussing "Paraphilic Disorders" (pp. 169-74), declares flatly that rape is a crime, not a mental disorder. He states that the claimed diagnostic category of "Unspecified Paraphilic Disorder, Non-consent" is an utterly unreliable diagnosis. Rape has been rejected as a mental disorder in all editions of the DSM since DSM-3. *Frances* states that rape is almost always an opportunistic behavior

that reflects simple criminality – not a mental disorder. He adds that Unspecified Paraphilic Disorder, Nonconsent has been carelessly, unreliably, and incorrectly diagnosed in forensic proceedings in countless cases as a convenient way to promote inappropriate psychiatric preventive detention... This, *Frances* insists, is a misuse of psychiatric diagnosis and an abuse of involuntary psychiatric commitment. He concludes that a claimed diagnosis of Unspecified Paraphilic Disorder, Nonconsent, should not be taken seriously when presented in expert testimony. To same effect, see: *A. Frances*, "Going for Wins in Sexually Violent Predator Cases," *Psychiatric Times*, July 8, 2011,

None of the factors used in the PCL-R serve as indicators of the probability of sex crime recidivism.

available at www.psychiatristimes.com/blog/cpuchincris/content/article/10168/1900563.

c. The Junk Science Concept of "Antisocial Personality Disorder" as a Disorder.

Certainly in the context of criminal responsibility/sanity cases, the presence of psychopathy or the related diagnosis of antisocial personality disorder does not indicate that an offender lacks the capacity to either understand right from wrong or exercise control over his behavior. ...As such, its use in some SVP cases as an indicator of impaired volitional control is ironic, if not downright contradictory.

Jeffrey Abracen & Jan Looman, "Evaluation of Civil Commitment Criteria in a High Risk Sample of Sexual Offenders," 1 *Jour. of Sexual Offender Commitment: Science and the Law*, 124-140 (2006), at p. 125, bluntly state: "...[T]he term personality disorder is left completely undefined in the majority of States whose commitment criteria discuss these disorders."

As *Deirdre M. Smith*, "Dangerous Diagnoses, Risky Assumptions, and the Failed Experiment of 'Sexually Violent Predator Commitment,'" 67 *Oklahoma Law Rev.* 619, 677 (No. 4, Summer 2015), states, "...ASPD is a diagnosis that, by definition, could apply to most people incarcerated in the United States."

Eric Janus, in *Failure to Protect*, p. 36, relays this basic truth as to the ubiquity of so-called "antisocial personality disorder" among criminals: "As one author put it, 'Applying the diagnosis antisocial personality to imprisoned offenders [is like] looking for hay in a hay stack.'" [citing: *Gail F. Stevens*, "Applying the Diagnosis Antisocial Personality to Imprisoned Offenders: Looking for Hay in a Hay-stack," 19 *Jour. of Offender Rehabilitation* 1-26 (1993)]

Zander, supra, at pp. 51-52, explains the problem thus:

"Among psychologists and psychia-

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trists, the personality disorders may be the single most controversial diagnostic category in the DSM. For example, in a survey of 146 psychologists and psychi-

Rape has been rejected as a mental disorder in all editions of the DSM since DSM-3.

atrists in 42 countries, *Maser, Kaelber, and Weise* (1991) asked respondents to rate their satisfaction with the DSM diagnostic categories. 'The personality disorders led the list of diagnostic categories with which respondents were dissatisfied' (p. 275), with 56% expressing dissatisfaction;.... One of the primary reasons for the controversial nature of the personality disorders has to do with the fact that, contrary to the DSM-IV-TR's claim that personality disorders 'are qualitatively distinct syndromes,' they appear instead to 'represent maladaptive variants of personality traits that merge imperceptibly into normality and into one another' (APA, [DSM-IV] p. 686)....

"Because personality disorders categorize behavior that differs from normal behavior only by its degree of expression of universal traits, rather than qualitative behavioral differences, the conceptual validity of these categories is inherently suspect. ...[P]ersonality disorder diagnoses are much more likely to be conceptually invalid, because their behavioral manifestations are exhibited by many people considered to be normal.

"The most fundamental question concerning antisocial personality disorder is whether it should be considered a mental disorder and be included in the DSM-IV. (*Francis & Ross*, 2001, p. 293)

Francis was the chair of the APA's Task Force on DSM-IV."

"The over-inclusiveness of the diagnosis of antisocial personality disorder apparently was a major concern of the U.S. Supreme Court justices deciding *Kansas v. Crane* (2002). When the U.S. Supreme Court justices were considering the oral arguments of the two lawyers who litigated the *Crane* case before the Court, Justice Ginsburg expressed concern about the large number of people who would appear to qualify for the DSM-IV-TR definition of antisocial personality disorder, observing, '...they say pick three out of a list of seven, you could pick out habitually doesn't work, doesn't pay debts, is reckless, irritable ... There are a lot of ordinary people who would fit that description' *Kansas v. Crane* Oral Argument, 2001, pp. 8-9) [italics supplied by *Zander*]. Later in the oral argument, Justice O'Connor pointed out that a prosecution expert in the trial of the case had testified that 75% of the male prison population in the U.S. was diag-

nosable with antisocial personality disorder (p. 15). When the Kansas Attorney General acknowledged that a sex offender satisfying the criteria for antisocial personality disorder could be committed as an SVP, another justice, apparently astonished by how easily this diagnosis could result in civil commitment, simply responded, 'Wow' (p. 15). In the majority decision in *Crane*, the Court favorably cited research showing that 40 to 60% of the male prison population in the U.S. is diagnosable with antisocial personality disorder (*Kansas v. Crane*, 2002, p. 412).

"Thus, some of the justices on the U.S. Supreme Court had strong concerns about the conceptual validity of the diagnosis of antisocial personality disorder as it could be applied in SVP commitment cases. This should not have been surprising considering that, just 10 years earlier in *Foucha v. Louisiana* (1992), the Court had held that a



Would you know him if you saw him? Would you know his techniques of fear-mongering hate speech if you heard them? Are you hearing them these days?

diagnosis of antisocial personality disorder was an insufficient 'mental illness' to justify the commitment of an insanity acquittee whose commitment was ending. In the *Foucha* and *Crane* decisions, the Supreme Court expressed concerns that Mr. Foucha and Mr. Crane, both of whom were diagnosed as having antisocial personality disorder, were, by virtue of that diagnosis, indistinguishable from most other men imprisoned in the United States. In *Foucha*, Justice White, writing for a plurality of the Court, noted that Mr. Foucha was similarly situated to other prisoners about to be released from confinement, adding, 'Many of them will likely suffer from the same sort of personality disorder that Foucha exhibits.' (p. 85).

"...*Widiger & Corbitt* (1995) reviewed five studies that reported the prevalence

of antisocial personality disorder in incarcerated male populations at between 49% and 80%. Moran (1999) reported the proportion of prisoners diagnosed with antisocial personality disorder at 60%, commenting, 'Such high prevalence estimates raise important questions about the validity of the diagnosis and the medicalization of criminality.' (p. 234)." (*Zander, id.*, at 53) *Zander, supra*, at pp. 55-56, adds:

"The body of scholarly research about the diagnosis of antisocial personality disorder is rich with data questioning its conceptual validity. *Rogers & Dion* (1991) reviewed the significant changes in the diagnostic criteria for antisocial personality disorder through DSM-III-R, pointing out that these redefinitions of the diagnosis had no empirical basis, and that the diagnosis lacked descriptive consistency and diagnostic validity....

"...[A]s *Rogers & Dion* (1991) demonstrated, the expansiveness of the diagnosis is, in part, a function of the huge number of diagnostic criterion permutations possible with the antisocial personality disorder category and its linked diagnosis of conduct disorder. *Rogers, Salekin, Sewell and Cruise* (2002) commented on this problem with the diagnosis of antisocial personality disorder, noting, 'DSM-IV continues to offer a bewildering array of diagnostic possibilities with 3.2 million variations.' (p. 237).

"...The failure of the diagnosis of antisocial personality disorder to definitively distinguish between unlawful behaviors that are contextually adaptive from those that are not has been questioned by *Cunningham and Reidy* (1998) : '...[I]f a behavior patten represents a widespread social phenomenon, i.e., criminality, is it appropriate to diagnose the individual expression of these traits as a personality disorder?'"

Last, at p. 62, *Zander* points up the unreliability of the diagnostic criteria for antisocial personality disorder from one

As one author put it, 'Applying the diagnosis antisocial personality to imprisoned offenders [is like] looking for hay in a hay stack.'

subject and rater to the next:

"In *Levenson's* (2004b) real world analysis of interrater reliability of the SVP evaluations of 295 Florida sex offenders, she found that the reliability quotient for the diagnosis of antisocial personality disorder was 0.521 - well into the 'poor' category of interrater reliability.... The interrater reliability for the diagnosis of personality-disorder-NOS was even worse, with a kappa of 0.23. It is not known how many of the personality-disorder-NOS diagnoses in this study were made because the diagnostician felt that the examinee's history fell short of satisfying the diag-

nostic criteria for antisocial personality disorder."

Segment 5 will appear in the July TLP edition (Ed.).

Second Segment: Desistance Is Your Future. Dr. Harris's Book Continues to Tell Us How.

Danielle Arianda Harris, Desistance from Sexual Offending: Narratives of Retirement, Regulation and Recovery, Palgrave MacMillan (2019), excerpts, 2nd segment:

Chapter 7: Desistance by Regulation p. 179: I identified 36 men who appeared to desist by employing a strategy of Regulation. The men who used this approach outnumbered all the other strategies, combined. Their desistance was characterized in terms of their ability to navigate and adapt to the increasingly restrictive rules and requirements set forth by law. None of them achieved this with ease. Their transition from custody to the street was not smooth. Their desistance was neither natural or automatic, nor the product of extensive psychotherapy. ...I observed four specific approaches within this strategy, each essentially describing a different degree of optimism and acceptance about their current situation and circumstances. These four approaches were: 'restricted,' 'rehearsed,' 'resistant,' and 'reclusive.'

'Restricted' desisters tread very carefully and monitor themselves hypervigilantly to ensure that they are in strict compliance with the rules and regulations that govern their current correctional status.

p. 180: The 'rehearsed' desisters take a certain pride in their obedience to the law and appear to be slightly less encumbered by the restrictions. They attend group therapy and readily regurgitate the buzzwords and treatment scripts the have been taught. The 'resistant' desisters are motivated almost exclusively by the deterrence of further sanctions but also vociferously reject all agents of the criminal justice system. The men who use this strategy are quite militant in their disregard for treatment guidelines and vocal in their rejection of any kind of psychotherapy. They too have found a way to navigate the rules and regulations, but it includes actively ignoring all conditions. Finally, the 'reclusive' desisters demand isolation and seclusion. They

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Strategies of Desistance

<i>Retire</i>		<i>Regulate</i>				<i>Recover</i>	
resign	rebuild	restrict	recluse	resist	rehearse	rehabilitate	resilient

(Continued from page 8)

strongly favor solitude, and although they don't disobey the law, they desist by removing themselves from society. They seldom engage with their community and almost never leave the house. The 'reclusive desisters are not offending, but they also are not living.

A Theory of Regulation

...The themes that emerged from the interviews with the men described in this chapter, however, do not lend themselves easily to an extant desistance theory. They didn't stop naturally, on their own. They didn't knife off or age out. Their offending behavior was curbed neither by the stakes in conformity that fulfilling employment delivered, nor by the security and love of a meaningful, romantic relationship. They did not benefit from the influence of informal social controls or social bonds, but they are paralyzed by the obstacles that stand between them and their pursuit of any discernible social capital. They actively rejected or were minimally moved by the promises of therapy, and none spoke of (let alone demonstrated) any notable cognitive transformation.

p. 181: The men in this chapter and indeed, most of the men I interviewed, appeared to cease and desist from sexual aggression in spite of not being able to access any of these more typical predictors of desistance. Their behavioral change was more often described, quite simply, as the product of zealous regulation.

Reflections on Meeting the Men in this Chapter

Taken together, the men who used a 'regulation' strategy were struggling and unsure of themselves. The most striking variable that characterized these men was their orientation to the present. They labored the importance of the 'here and now' (doubtless language learned in treatment), and they spoke with extreme caution (and often in intricate detail) about their day-to-day existence. I mean this quite literally: as Morgan and Ruben demonstrate below, they described at length the limited hours during which they felt comfortable visiting a grocery store, or the several extra blocks they would walk to avoid the hassle of (being seen to be) walking past a public park or school.

p. 182: They all expressed feeling very tightly regulated by the formal surveillance of the criminal justice system but to an even stronger extent, by their own paranoia and fear...

The retirees (Chapter 6) and the re-

coverees (Chapter 8), by comparison, were decidedly more confident in their ability to live offense-free lives.

p. 198: The Restricted Strategy

The men who employed a restricted strategy of desistance were adamant that they would never reoffend, but their certainty came from what felt like a manufactured hypervigilance. They had been conditioned to *literally* watch their every step, and in turn, they were convinced that every step they took was being watched...

Their lives were dictated entirely by the restrictions set forth by their probation and parole officers and therapists.

p. 201: According to the interviews featured in the other chapters, constant surveillance was seen at best, as an inconvenience and, at worst, as an invasion. For the restricted desisters, however, surveillance was their insurance. Constant monitoring was a way that they could ensure their safety. This was seldom considered necessary for anyone's *actual* safety, it was entirely viewed as a tool that *they* could use (sometimes as an alibi), to protect themselves from being accused of something.

p. 203: The Resistant Strategy

A few men actively resisted therapy and were extremely belligerent during their interview. They each spent at least the beginning of our conversation denying their index offense completely.

p. 205: The Reclusive Strategy

For a range of reasons, the reclusive strategy involved favoring and actively seeking solitude.

p. 209: The Rehearsed Strategy

The men who used a strategy of rehearsal were well practiced in the parrot-



Have they rehearsed enough?

ing of buzzwords, but they had not necessarily internalized that knowledge. They endeavored to make me under-

stand that they thought about it all the time, but that didn't feel particularly healthy to me; it came across as obsessive and paranoid to me, rather than vigilant and safe.

p. 210: They could readily regurgitate phrases and passages from their workbooks, but tended to do so without thought or integration.

p. 211: The men in recovery (Chapter 8) convincingly demonstrated that they had integrated their therapy into their everyday lives. In contrast, the men who used rehearsal as a desistance strategy simply recited their treatment plans and showed me their 'safety people' on speed dial.

p. 219: Chapter 8: Recovery: The Strategies of Resilience and Rehabilitation

...There were two specific orientations within recovery: resilience and rehabilitation. Although this is where I had hoped to discuss 'redemption scripts' and answer the lingering question of whether the men in my sample could ever 'make good,' I can definitively conclude that redemption was not a theme for these men.

Redemption was simply not an option. The single biggest conclusion to come from these interviews as a whole is that the heavy stigma that accompanies the label of 'Sexually Dangerous Person' or 'sex offender' or, even, 'person with a single conviction for a noncontact sexual offense who is now on the registry for life' is eternal. The very few men who described themselves as religious or who invoked some faith-based language alluded to *desiring* redemption and *pursuing* atonement, but it was largely out of reach. Some men spoke enthusiastically of rehabilitation and detailed how they now find meaning in helping others. Some had gratefully reconnected with distant relatives. A few described being accepted back into their family. But no one mentioned successfully turning over a new leaf, being able to honestly start anew, or to have truly righted their wrongs.

p. 220: These men represented, in many cases, exactly the 'kind' of sex offender they were supposed to be. What I mean by that is that they were the ones who seemed to fit all of the treatment tropes that failed to resonate with the men I described in previous chapters. The model of therapy that they were prescribed matched their characteristics and their behaviors. The offending cycle they were presented with and description of precipitating factors and cognitive distortions made sense to them. They

had the intellect to understand the theories, and they could recognize and articulate their shortcomings. They had the ability to apply these lessons to their personal situation, and perhaps curiously, they had done it enough times to establish (and notice) a pattern, and then be motivated to learn how to break it.

The desistance strategy I describe in this chapter is divided into one that features personal resilience and one that emphasizes the impact of rehabilitation. It is well beyond the scope of the book to assess the extent to which their experiences can truly be considered 'rehabilitative,' but the main point I wish to make is that this is the language that they used.

p. 223: The recovery narrative provides addicts with a model to meaningfully account for their behavior. It offers a neatly packaged 'replacement self' (Giordano, Cernkovich, & Rudolph, 2002) and helps them understand what they did and make sense of why they are not like that anymore (Maruna, 2001). The only recovery script that is made available to my interviewees is one of confession, acceptance of stigma, and statement of perpetual risk. What begs explanation in the present sample is how people can come to change their behavior without ever being allowed to change their identity. The behavioral change that my interviewees described was being maintained while they shouldered a permanent label of 'sex offender' and are forced to subscribe to a perpetual, restrictive and stigmatizing 'risk narrative.'

p. 226: The Resilient Strategy

As a group, those who demonstrated an ability to bounce back and adapt to changes in their surroundings described the shared experience of certain barriers upon release, but they all made it clear that these obstacles were not insurmountable. When they looked to the future, they described tempered hope. They wanted me to know they would be okay. They were typically much more optimistic about their situation than the other interviewees. Some even went so far as to say that the other group members who complained about being on the registry 'just needed to get over it' (Dusty) and that the ones who struggled to find work 'just weren't trying hard enough.' (Cody).

p. 227: Taking responsibility for one's actions was a strong theme that emerged for the resilient men. This theme reflected the notion that the ability to stop offending, like the decision to offend in the

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first place, was under the sole control of the man himself.

The strategies introduced in previous chapters were implemented by men who argued that they didn't need treatment (retirement) or were unreasonably burdened by it (regulation). In contrast, the impact of treatment was profound and positive for the participants who used a strategy of recovery. Interestingly, this was most often observed for the men who reported multiple victims over many years. It was especially true for those men who had been convicted on a single occasion, but who, upon being apprehended, disclosed many additional victims. Here, the process of rehabilitation and the treatment narrative that was presented to and embraced by the men clearly resonated with their experiences and their escalating offending behavior. Most importantly, from a narrative perspective, this gave them a way to describe and account for what they did. Furthermore, it ultimately provided them with a blueprint from which to turn their lives around.

pp. 227-28: Resilient desistance was often described by the men as occurring external to any kind of intervention. This is distinct from the natural desistance – which also occurs without treatment – that I described in Chapter 6. For the men who 'retired,' natural desistance was the product of a kind of burn out. In contrast, the men who employed a resilient strategy emphasized personal strengths beyond a treatment program. They described pre-existing social competence and self-control:

'The release plan, all that shit, right? I'm sorry, but a lot of it is shit, you know? It don't work in the real world. You got to re-do it [when you get released] because it doesn't work that way. ...I honestly don't know how to cope and I, I, did what I did to cope. For whatever reason, I did it.' (Joshua). Cody and his wife abused his ten-year-old niece over a period of several months. He says they stopped by themselves, but then recalled being caught, convicted, and incarcerated five years later.

p. 229: Although he never holds his niece responsible for the onset or the progression of the abuse, he almost 'credits' her with it ending.

p. 230: He clarified:

'We stopped ourselves. I stopped myself. We just, (pause), it really, really bothered my wife. And one night, after probably the last offense, ah, she was crying – very, very distraught. And so, everything. That, and the distance, and just coming to my senses – which I don't like the sound of – ah, everything just created the situation that allowed us, me, again, I can't really speak for her, me to stop my behaviors.' (Cody).

Either way, the interesting question from the perspective of a desistance researcher is how and why he stopped when he did, and how he maintained that change in behavior. This left me wondering what it was like for Cody and his wife in the years that passed between the offense and arrest especially while they knew they could be caught at any time:

'Um, we spent years hoping. "Geez, y'know? Just let us [trails off]" We learned our lesson. This was horrible. She seems to be doing really good. She's doing good in school. She would still associate with us. She just never would come over to visit. It was like, "Okay. Just let us get through life. Let us. We learned our lesson." Didn't work out that way. We accepted responsibility immediately. We never denied anything.' (Cody).

Clearly, this phenomenon is not unheard of – the news is replete with (especially high profile) cases where survivors come forward many years after the fact.

p. 231: Cody went on at great lengths to explain the way he behaves in the community nowadays. I found his approach quite disconcerting. It was ironic to me that of all the men who might be able to convince us that they've moved on and stopped offending, here was a man who had apparently already lived an offense-free life for years in the community before being arrested. Albeit without any formal training (or even strong faith) in risk assessment, I would have argued that Cody be a candidate for much less restrictive supervision conditions than those to which he is currently subjected. He, on the other hand (perhaps in an attempt to justify them), seems to understand the need for such extensive supervision:

Cody: I spend every minute of every day that I am not sitting in my house, when I'm out in the world, I look everywhere and ask myself "Okay, how can this situation turn negative for me very fast?"

DH: *And this is something that's in your mind all the time?*

Cody: Yeah, it's uh ...Basically paranoia is underrated. If everyone were a little bit more paranoid, the world would be a better place.

DH: *Okay.*

Cody: ...I believe that we all, offenders, have to live the rest of our lives with a low heat setting of paranoia. You've always, you've got to be paranoid because you have to be thinking "Well, how will they think? / I know why I'm standing here but if somebody sees me, what will they think? How would they interpret the situation? How would, how could it be used against me? Innocent men have gone back to jail. If a sex crime occurs within a ten mile radius of my home, I'm gonna have

someone knockin' on my door. They're gonna come investigate and if I do not have a very good explanation of the previous 48 hours, they will take me away for 72 [hours] just because. Just to keep me on my toes.

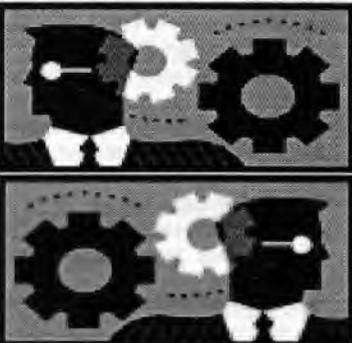
p. 232: He [Cody] also expands upon the damning notion that he is considered 'at risk' until death:

'No one is going to believe me until the day after I die. That's when they'll start trusting me again. That's when they'll look back and go "Wow, he did live another 40 years without doing anything wrong." But until then, until the day after I die, they're gonna keep looking at me. And that's a rough way to live. It's a painful way to live.' (Cody)

pp. 238-39: The Rehabilitation Strategy.

The emphasis for the treatment of sexual offending by the criminal justice system and its auxiliaries is often placed explicitly on rehabilitation. The dictionary defines rehabilitation as the process by which one re-establishes themselves in good repute or to educate for the purpose of resuming normal activities. As my interviews began, it was quickly clear that achieving such restoration or true 'rehabilitation' was unlikely and out of reach for most of the men that I met.

For the small group of men who did appear to subscribe to a strategy of



Are you looking back, or forward?

rehabilitation, they heartily embraced the treatment narrative that was provided to them during group therapy. The popular side of recovery where one hits rock bottom, seeks help, and makes changes resonated strongly for them. The quintessential 'recovery script' that paves the way for cognitive transformation contains a few very specific themes: spiraling out of control, needing a wake-up call, feeling relief to get caught, agreeing that therapy is necessary, and sometimes wishing the intervention had happened sooner.

p. 239: The men who spoke of rehabilitation, however, had often quite striking records of profound and serious violence as well as multiple victims. Some of the men who described having experienced 'rehabilitation' or at least using a rehabilitative strategy presented with the most serious, complicated and violent criminal

histories.

p. 241: The rehabilitated men needed to explain why things were different this time. They were done. They had moved on from their offending past and were keen to describe their demonstrated successes upon release. Just like the retirees who described resigning or re-building (in Chapter 6), these men also talked about having lived two lives, but here the emphasis was always on the influence of therapy. The most common theme here was: 'I didn't take it seriously back then, and I'm different now.'

p. 243: [The rehabilitated men] also went further to separate themselves from the other men in their therapy groups, often by proposing that the other participants weren't taking things seriously enough....

What begs explanation in the present sample is how people can come to change their behavior without ever being allowed to change their identity. The behavioral change that my interviewees described was being maintained while they shouldered a permanent label of 'sex offender' and are forced to subscribe to a perpetual, restrictive, and stigmatizing 'risk narrative.'

Giordano et al. (2002) described 'complete desisters' as almost without exception using the past tense to describe their deviant behavior and putting a 'great deal of distance between their old, discarded selves and those they currently claim.' (p. 1031). This theme was patently clear in the narratives of these men....

p. 246: The Professional Ex

It certainly bears repeating that the men who shared the most profound and articulate stories were often the ones who appeared to be the most charming and transformed, and who had committed the most serious offenses and recidivated with the most violent and prolific crimes. Again, my suspicions regarding psychopathy were strong, but I do not have the data or the ability to make such a determination, much less a diagnosis.

p. 249: Chapter Summary

It is also important to reflect on the fact that it was in these most dramatic tales of utter and complete transformation, service to one's fellow man, and 'owing my life to the treatment that saved me' that I felt most vulnerable to being duped.

...However, the overall conclusion for the men that used these strategies and described themselves as being 'in recovery' was that, as in other chapters, they achieved desistance from sexual offending and were living offense-free lives without and sometimes in spite of that intervention.

[The last installment of excerpts from this book will appear in the next edition of TLP.]
