The Legal Pad

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"The Constitution protects all people, and it prohibits the deprivation of liberty based solely on speculation and fear."
– SCOTUS Justice Sonya Sotomayor in a Feb. 22, 2022 dissent to denial of certiorari

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Feedback? News? Write!

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(Exactly & Only as Below)

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Covid-Omicron Outbreak in MSOP-ML Forces Mass Quarantine, Passes Quickly; No Deaths.

by Cyrus Gladden

In order to understand this event, it is necessary to first consider some antecedents that brought it about. First, at least three, and perhaps as many as five, MSOP-ML confinees died from Covid or complications from it between the close of 2020 and the end of 2021.

MSOP staff have insisted that these victims died from the original COVID-19 virus. However, at least some of these victims died well into the period when the Delta variant was already circulating in the surrounding community and was becoming rife throughout Minnesota in general.

Whether these deaths were caused by the original or the Delta variant, what is clear is that efforts by Health Services staff and administrators were redoubled in the wake of those deaths to stop Covid cold at the door. For many months, all staff were required upon arrival for each daily work shift to be examined for symptoms consistent with Covid symptoms. Many were sent home instead of working when symptoms were deemed too suspicious.

Visiting was suspended on a number of occasions. When visiting was allowed, incoming visitors were likewise visually inspected for such symptoms, with some being turned away for the same suspicion.

Within the facility, lining up for meals required standing on vinyl footprints aimed at keeping each waiting diner at least six feet from the one preceding him and from the one following him. Respective living units were not allowed to have their confinees mix with those from other units. This required segregation by unit not just for meals, but also for work assignments, and even use of the gym and library.

If someone was diagnosed with Covid, they were immediately placed in a single cell in one of two unused living units that were reserved for such quarantine use as to given infected individuals. This arrangement was given grudging respect by confinees, who obviously saw the need to report themselves for diagnosis and treatment of such potentially lethal strains as of paramount importance.

All of this worked pretty well against those two earliest Covid variants because, despite their possible lethality, they were far less transmissible than Omicron and its newest variants.

However, apparently, little thought was given to how confinees might see the Omicron variants, given that the most likely outcome if one contracted a case of one of these variants. Many discussed among themselves whether, given the probable maximal symptoms resembling a heavy cold or a light case of flu, there was actually no perceived need to report oneself for testing and quarantine. It was seen as an unnecessary nuisance to have to undergo, when so little danger of advanced symptoms was present.

This was especially underscored by the fact that the few who had contracted Omicron and had a positive test were simply relegated to one of those quarantine cells with no actual treatment, as by a course of antiviral medicine, instead only being periodically observed and conferred with by nurses. It was simply a 10-day ticket to isolation, while the Omicron took its surprisingly short course.

Further, the quarantine units were not actually fully ready for residency by confinees in general. The two empty units, for instance, had no computers, unlike other living units. Again, the rather unrealistic assumption by nursing staff and their administrators was that someone with Covid would be flat on their back, such that availability of computing would be to no avail. In the case of Omicron, this was clearly not the case.

In the closing days of February 2022, many MSOP-ML confinees started developing various symptoms of respiratory infections. For quite sometime, these symptoms seemed to almost exclusive impact the nasal passages and sinuses of the affected individuals.

Over the ensuing two months, many more caught this unnamed infection, often remarking about how easy it is to catch, and, having recovered, to catch it again later. By the tail end of April, a high percentage of confinees were infected by it.

Some began to seek Health Services attention. Given the arrival not long before of a rapid Covid test, it rapidly emerged that many of these had the Omicron variant. The number of those quarantined in those special units rapidly rose into double digits.

By May 3rd, total positive test results had skyrocketed, such that, out of a facility population of 450, about 180 were infected with Omicron. Health Services, in concurrence with facility administration, concluded that the only way to staunch this wave of infections would be to place the most-impacted living units on room-restriction internal quarantine.

At that time, three large living units in the facility were placed on that status, and each remained so for ten days. However, testing was not made mandatory.

Instead, nurses came through each of these living units periodically asking whether those not yet tested would like to be tested. As it happened, about half of those tested produced a positive result. Others within earshot of such rooms with positive tests noted that the occupants were sent off to the quarantine units. The moral of this story was not missed by those listeners or those to whom they relayed this outcome: Don't volunteer to take the test, or you'll be removed.

One distinctly adverse sequel of this is that staff would ransack one's footlockers, and then declare, upon carelessly tossing everything together, that the person quarantined had "excess property" that would have to be sent out. This imposed an extra inhibition to volunteer for the test.

The most irritating thing about a quarantine lockdown is that one can only come out for one-half hour each day, for showering and other quick errands.

However, everything comes to an end eventually. After ten days, that seemed more like 30, confinees in the quarantined houses were released from room restriction. However, the restrictions barring contact with confinees in other living units remain in place as this is written. It is believed that treatment groups and work schedules will be reinstated or perhaps differently reconstructed very soon.

It is gratifying that no one died, and that only a very small number suffered serious symptoms. After this experience, the contemporaneous warnings that a fall wave of even further different variants is expected later this year still rings uneasily in our ears.

It is hoped that everyone will keep up their guard, lest any of these variants turn out to be new killers. On the other hand, it is also hoped that official reaction to any new non-lethal variants will not reach excessive levels that effectively discourage sufferers from seeking testing and treatment.

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The Cost of Needless Permanent Detention

Longtime MSOP Confinee Attempts Suicide, Fails on a Fluke.

by Cyrus Gladden; dateline: May 16, 2022

On Friday evening, May 13, 2022, a longtime confinee of MSOP-ML tied a sheet around his neck, secured the other end to the walkway rail, and jumped off from the second tier. He left no suicide note.

The sheet didn't hold, causing the very obese confinee to fall to the floor. An auditory witness said he heard an "Oghh" sound and chairs sliding together and hitting each other, followed by a very loud thud on the floor.

Staff arrived between 1 and 1.5 minutes later. They asked him what happened and if he was hurt. However, his state of consciousness was in doubt. He didn't respond to staff for about 2-3 minutes.

It is unclear exactly where and how the sheet failed to hold. However, the sheet remained tied to the railing, according to

other witnesses.

Eventually, he regained sufficient consciousness to report pains in his neck, back, ankle, and wrist. Staff transported him to a local hospital for evaluation of his injuries. To date of this article, he has not returned to his living unit and it is believed that he currently remains hospitalized.

The confinee in question is fortunate, given his weight, that the jump itself didn't snap his neck when the sheet went taut before giving way.

The confinee seldom talked to anybody about how he was feeling; mostly he stayed to himself. It seems clear that a confluence of the general despair felt by many in this facility at the perceived improbability of their release and the complete Covid quarantine reported in the lead article at left contributed substantially to this confinee's depression.

Thus, it would emerge that there are two battles to be fought by staff from this incident.

Obviously, the first is to bring this confinee out of his personal depression and to find a reason for the will to live, so as to foster his.

But the second battle is the far larger of the two. Staff at this facility must find a way to convince everyone here that a way to exit through the mandated hearing process is not just available, but easy to achieve by anyone trying to fulfill simple and unchallenging requirements.

This act of persuasion may be difficult, given a past record of only nominal releases, compared to the total MSOP population. It would seem that, in order to successfully persuade the confinee population as a whole that release is available with only reasonable effort, the release rate must be greatly accelerated, and soon.

To do this, MSOP will be tasked with reducing the impediments and unreasonable requirements to release. And in turn, this requires that MSOP disconnect from political pressures in existence for many years for MSOP to serve as a permanent containment program, for reasons of pure spite and utterly unrealistic fears.

Let's hope that this second battle can be won, to prevent needless deaths, whether by detention 'til death or by despairing suicide.

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Needless, Heartless Deaths in Littlefield

SOCC—Texas Style: Of a Profiteering Sham and Indifference to the Deaths It Caused.

[Anonymous Resident, Texas Civil Commitment Center ("TCCC"), Littlefield TX], [untitled], 1(2) *Texas Tea Newsletter* 7-8 (Jan. 2022), as edited and supplemented by *TLP*

Text:

"What would make a person kill himself?

Recently at the Texas Civil Commitment Center a "Resident," Mr. England, killed himself. But what drove him to do so? Hopelessness.

This Resident was on the former "sex offender civil commitment" (SOCC) outpatient program used by Texas until 2015. That year the Texas Legislature decided to end that program and instead to confine all of those committed under that law.

At the time, Mr. England was living in some degree of comparative freedom as one of over 200 men who were suddenly rounded up from their assigned halfway houses one day that year for no fault of their own. All of those men were forced to shuffle in manacles, handcuffs and body chains onto buses under heavy armed guard, and were sped off to what had previously been a failed private prison, the Bill Clayton Detention Center, in Littlefield, 35 miles northwest of Lubbock.

Littlefield is an isolated community in a dusty part of west Texas. Its only enterprise is that privately-owned detention facility.

To cast an appearance of rationality to this change, the Texas state administrative agency overseeing SOCC in Texas, the Texas Civil Commitment Office (TCCO), immediately renamed that detention facility the Texas Civil Commitment Center ("TCCC"), and also started to refer to it as a "treatment center".

[Ed.: The many shortcomings of this facility that bar it from seriously being regarded as a facility to treat and release sex offenders – in this case, sex offenders who had already been living and working in freedom without sexually reoffending – have been described in earlier articles in TLP. *See, e.g.,* TLP *6:2, pp. 1-3, quoting an article by Lenore Skenazy summarizing many of the fatal problems of that facility.]*

Mr. England had been at the Center for over five years, but before that he had been in the halfway house-based SOCC program for 11 years with no path to discharge from his commitment. Thus, at the time of his hopeless suicide, he had been under SOCC for a total of 16 years, and, at the Littlefield facility without a single release since its establishment as a "treatment center," had no rationally believable hope of ever getting out.

Unlike a prison, where a person has an out date (parole or discharge), the men who are civilly committed to the Littlefield TCCC have no expected out date. This leads the men there to become hopeless and to see that the only way out is to kill themselves.

What a shame when you think that the only way out is to kill yourself.

What is the price of medicine?

There was another Resident, Mr. Martinez, at the TCCC who was denied his cancer medication because it cost too much. Apparently, the private contractor operating that Littlefield facility felt that this cost would eat into its annual profits. Several times Mr. Martinez tried to get the medication that he needed to fight his cancer but was denied. This ultimately led to his life being cut short.

An unnecessary death.

So I would say that the price of medicine and the corporate greed to refuse to buy it cost one man's life.

The Death of Mr. Hoyt

A few weeks ago Resident Darrel Hoyt collapsed from a massive heart attack and died on the sidewalk on the way to the facility's medical office. Mr. Hoyt had been complaining to medical staff for several days about not feeling good. On each occasion of these complaints, he was sent back to his dorm with medical doing nothing, even simply to attempt to discover the cause. This last time, he did not make it to the medical office to be denied again. When the staff loaded Mr. Hoyt's now-lifeless body onto the gurney, many of the staff were laughing. Mr. Hoyt was a tiny man, no more than 5'6" and maybe 125 lbs., wet. They laughed at how they manhandled Mr. Hoyt's body. They found this greatly funny.

This story goes along with the above info. I would say that the price of medicine is the cost of a man's life. Before the men were sent to the TCCC, they were living in halfway houses and were able to see 'free world' doctors. They were able to go to the VA and other medical appointments NOT connected to the halfway houses or to the TCCO. The TCCC is now run by the Management and Training Corp. ["MTC], which runs many private prisons -- many in Texas. Under such private management, the TCCC is now concerned about the dollar above all else. Medical is now directed by MTC. So they are looking at ways to deny medicine and medical treatment to their "Residents" – a term now revealed as simply a kind cover for their detainees-until-death.

– Which is funny. Not ha-ha funny but ironic funny. MTC's motto is BIONIC – 'Believe It Or Not, I Can!' This is intended to project an image of competence and devotion to care, neither of which is seen more than very seldom in their actions. What the "Residents" find far more believable is that "Believe It Or Not, I Can!" actually is a private self-satisfied assurance that, in mistreating their detainees/"Residents," TCCC administrators and staff have unbridled carte blanche and will never be held accountable in the slightest – even when the subjects of their mistreatment and malignant neglect are killed as a result.

If they (MTC) are concerned so much about costs, it is bitterly ironic that they are able to host parties for the staff at the expense of life-and-death medicines they refuse to buy. Often they have BBQs for the staff, or some type of meal, give away sodas and popcorn while "Residents" die due to medical cost "concerns."

Coming up on June 16th, MTC will have a fish fry with mini-golf for the staff -- while budget cuts reduce the "Resident's" food and medical care and medicines. If only Marsha McLane, the Director, would take a budget cut to her pay, but she is asking for a pay raise – another irony. That money could be put back into medical.... It seems ironic that such misconduct, which would have been condemned and banned in the times of Charles Dickens in Old England, runs in the USA of modern times as unobstructed as a runaway train engineered by madmen, with all responsible for it simply turning a blind eye and having another BBQ and beer.

The whole TCCO/TCCC program is a sham. ...Remember: MTC runs other prisons and is a for-profit company that cares about their shareholders, not us "Residents."

The bottom line is that the program needs to be scrapped. There are many states that do not have civil commitment and they are doing fine. No more sex crimes occur there per capita in any decade than occur in Texas or any other states with SOCC. SOCC does nothing to prevent sex crimes. It is simply a money pit from which state employees and piratical profiteers suck dollars like party-goers suck a piña colada.

This is money that could be going to programs with known success at preventing sex crimes. The facts of this are well known and have been for at least the last 20 years. It is now long past time to disband programs like the TCCO, based solely on terrorizing fictions with no basis in reality and rooted only in attempted political extortion, and instead put their money to good use. Please see to it. We can't.

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SCOTUS's Sotomayor Objects to NY's Indefinite Incarceration of SOs

Emily Zantow, "Sotomayor Sounds Constitutional Alarm on NY Residency Law for Those with Sex Offenses," *Courthouse News Service*, Feb. 22, 2022

Text Excerpts:

The Supreme Court turned down a challenge Feb. 22 from a convicted sex

offender whom the state refused to let out of prison when he was otherwise eligible because he couldn't find residential accommodations far enough away from a school to meet probationary requirements.

[However, in dissent,] Justice Sotomayor said the situation raises constitutional concerns.

'All told, because of New York's residency prohibitions, [Angel] Ortiz was imprisoned for two years longer than he otherwise would have been,' the Obama appointee wrote.

Calling it 'practically impossible' for inmates to find residency within the densely populated city, Sotomayor said New York's law effectively 'requires indefinite incarceration for some indigent people judged to be sex offenders.'

'Rather than tailor its policy to the geography of New York City or provide shelter options for this group, New York has chosen to imprison people who cannot afford compliant housing past both their conditional release date and the expiration of their maximum sentences,' Sotomayor wrote.

Against this backdrop, Sotomayor notes, multiple scholars, courts and law enforcement agencies have all acknowledged that residency restrictions do not reduce recidivism and could actually increase the likelihood of reoffending.

There is 'no empirical support for the effectiveness of residence restrictions' such as New York's, the Department of Justice wrote in its 2017 Sex Offender Management Assessment and Planning Initiative. Sotomayor quoted this finding and a 2014 study from the *Journal of Criminology and Public Policy*, which concluded that residency restrictions have 'little or no effect on recidivism.'

Illinois, North Carolina and Wisconsin already revised policies similar to that of New York's that they had on the books, and the Empire State should do the same, Sotomayor advised.

Because of the grave importance of these issues and the frequency with which they arise, it seems only a matter of time until this court will come to address the question presented in this case,' she wrote."

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SCOTUS 's Jackson's Comments on SOs That Troubled Senator Hawley

Jacob Sullum, "Here Is What Ketanji Brown Jackson Said in the Harvard Law Review Article That Josh Hawley Found 'Alarming'." *Reason*, March 21 2022
Text Excerpts:

"Sen. Josh Hawley (R-Mo.) last week presented a highly misleading summary of Supreme Court nominee Ketanji Brown Jackson's sentencing practices in child pornography cases. Hawley claimed that Jackson ...had shown an 'alarming pattern' of 'sentencing leniency for sex criminals' who are 'preying on children.' But the cases he cited actually involved defendants convicted of possessing or sharing child pornography rather than defendants convicted of sexually abusing children. Furthermore, Jackson's downward departures from the penalties recommended by federal sentencing guidelines are the norm among federal judges, who have long criticized those penalties as excessive – with good reason....

'As far back as her time in law school,' Hawley tweeted, ' Judge Jackson has questioned making convicts register as sex offenders – saying it leads to "stigmatization and ostracism." She's suggested public policy is driven by a "climate of fear, hatred & revenge" against sex offenders.' He added that 'Judge Jackson has also questioned sending dangerous sex offenders to civil commitment.'

...Hawley implies that anyone who questions the ...problematic justification for indefinite civil commitment of sex offenders must be blind to the damage done by sexual abuse of children. In his view, any policy that purports to protect children is obviously good, regardless of whether it works as advertised or whether it is consistent with the Constitution....

Jackson's Harvard Law Review article focuses on the legally crucial distinction between 'prevention' and 'punishment' in the context of policies aimed at sex offenders. Broadly speaking, policies that courts deem preventive are subject to undemanding standards are likely to be upheld, while policies they deem punitive must comply with stricter constitutional limits, including due process requirements and the bans on double jeopardy, ex post facto laws, and 'cruel and unusual' punishment.

Based on the limited number of cases addressing that distinction at the time, Jackson argued that courts were taking misguided approaches to the issue. 'Courts have been unable to devise a consistent, coherent, and principled means of making this determination,' she wrote.

In assessing the constitutionality of laws aimed a sex offenders, Jackson argued, courts should not focus on the intent of legislators, which may be indeterminate, disingenuous, or self-deceptive. She also thought it was a mistake to focus on the factors that the Supreme Court had said may indicate whether a statute is 'penal or regulatory in character,' such as the question of whether a law's punitive impact is 'excessive' when weighed against its regulatory rationale. Instead, she said, courts should consider 'the impact of sex offender statutes' and deem laws 'punitive' when 'they operate to deprive sex criminals of a legal right in a manner that primarily has retributive or general-deterrent effects.'

Jackson also offered this warning: 'In the current climate of fear, hatred, and revenge associated with the release of convicted sex criminals, courts must be especially attentive to legislative enactments that 'use public health and safety rhetoric to justify procedures that are, in essence, punishment and detention.' Although that is the way debates about sex offender laws typically proceed, it clearly offended Hawley, possibly because he epitomizes the overheated, irrational attitude that Jackson was describing.

[Referring to sex offender commitment legislation, Jackson declared,] 'Commitment legislation must be examined carefully ...for although it clearly sacrifices the offender's fundamental right to freedom, courts must determine whether its primary effect is treatment of the affected individual, or satisfaction of the societal interest in locking sex offenders up and throwing away the key.' Under that standard, a civil commitment program in which 'treatment' is rarely or never successful enough to allow a detainee's release might be deemed 'punishment' by another name."

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Rep. Sandell Visits MSOP-ML

Editor's Introduction: The following three items show one ongoing effort to gain at least reform of the MSOP system, both concerning internal operating problems and also to establish a working system that focuses on immediate release for those who are entitled to it, and on release at a reasonably prompt time for all others, and on assisting successful reentry to the community, as well as on alternatives to confinement from the start for those committed.

Part 1: Rep. Sandell's Pre-Meeting Memo

Steve Sandell, MN State Representative, District 53B,Memo dated April 13, 2022
Text excerpt:

"The MSOP staff has arranged a visit for me with three or four Moose Lake residents non this Friday, April 15. Madeline Ranum, an attorney at Mitchell Hamline Law School will be with me. Ms. Ranum is an expert in issues relating to civil commitment and will be a great partner in our conversations. She and Eric Janus, formerly president of Mitchell-Hamline, organized a conference on the issue last week at Metro State. They had an excellent audience and I thought the event was enormously helpful. A few MSOP staff attended too.

Madeline and I also have a Zoom meeting with MSOP administration scheduled for Tuesday, April 19 to talk about our visit to ML and the proposals we offered for reform and improvement of the civil commitment process. This will be our second meeting and our intention is to ask directly what we can get done.

We'll propose four initiatives:

1. Establishing an advisory committee (including 2 MSOP residents) to meet with the commissioner once a month during its first year to discuss concerns with both the daily lives of residents and the overall effectiveness of the program.
2. Add a focus on the prevention of sexual aggression and harm, and support for all affected by sexual aggression and violence.
3. Fund an extensive research project to discover and evaluate the way other states and countries deal with sex-related crime; effective methods of treatment, prevention, counseling, and re-entry; costs, benefits, and implications of civil commitment; effective state programs and measurements of success.
4. Changing the name and focus of the program to "The Office of Prevention, Support and Treatment."

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Part 2: MSOP's Confined Published Poet's Perspective

Matthew Feeney, "Meeting with My State Representative," Article not previously published (April 18, 2022)
Text:

"On Friday 4/15/22 I was humbled to be the second of four MSOP clients invited to spend an hour talking to Representative Steve Sandell (53B: Woodbury/ Cottage Grove) about my concerns with the MSOP Treatment program,. He was joined by Maddie, an attorney working with Eric Janus at the Mitchell Hamline School of Law's Sex Offense Litigation and Policy Resource Center, as well as Carrie, a DHS employee tasked with reporting our concerns to DHS Commissioner Harpstead. We met in the MSOP-ML Visiting Room (supervised by a MSOP staff at the staff desk).

The meeting was very positive and constructive. Throughout our time they all were actively engaged, took copious notes, and asked pertinent questions.

I started by placing two bulging file folders on top of each other, stacked 8 inches high on the table in front of us. I explained this represented 2 years' worth of my grievances. They were appropri-

(Continued on page 4)

ately shocked. Then I said the real shock was that during my 8 years in DOC, I never filed a single grievance. That seemed to be a simple and effective way to concretely represent the overwhelming issues MSOP clients face every day.

I referred to the grievance folders and explained I didn't want to waste time talking about details, because those were merely symptoms of a systemic failure of the MSOP administration. Even if Representative Sandell could wave a magic wand and instantly bring positive resolution to all 33 of my grievances, it wouldn't make any difference. It's like playing 'Whack a Mole' – tomorrow we'd just be faced with new issues #34, 35, 36, 37....

I gave everyone a copy of my 40-page report to take home with them, which cites and documents extensive details about 33 specific MSP problems. But then I said instead of talking about those problems, I'd prefer to use my limited time talking about SOLUTIONS.

My solution was to call for a change of top Administration, noting that nothing will fundamentally or philosophically change until that happens. The current administration doesn't listen to the courts (they've been found in contempt of court and are paying fines for not honoring CPS decisions). The current administration doesn't utilize the existing laws (by existing statute, the MSOP Executive Director has the ability to recommend and present clients directly to SRB – this right has never once been used). The current administration hasn't resolved a single recommendation presented by the Task Force, merely because they didn't have to. The HRB routinely makes recommendations that are blatantly ignored by MSOP. These are signs of long-term systemic failure and the Administrators need to be held accountable for their inactions (or intentional obstructions).

I cited the Bridgewater Treatment Center in Massachusetts. According to Wikipedia their Governor called for a clean sweep and fired 75% of that facility's civil commitment staff. I proffered my opinion that most working staff [of MSOP] feel their hands are tied and they're being forced by Administration to 'follow policy.' I suggested that the top Administrators need to be terminated for dereliction of duty and failure to perform, and that the replacement Executive Director needs to be recruited from outside MSOP, and must have experience running a bona fide sex offender treatment program where completing is a real option, and clients need to have a voice and seat at the table in any solutions that are brought about.

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Part 3: A Confined Advocate for Freedom Offers His Take.

Russsell J. Hatton, Matthew Feeney Joshua Gardner, & Daniel A. Wilson, "State Representative Says State Facility 'Appears to Be Illegal'," Article not previously published (April 18, 2022)

Text

"Supervised by facility staff, House Representative Steve Sandell visited four residents at a state facility on Friday [April 15, 2022] after reports of abuse and maltreatment. Accompanying the lawmaker was Madeline Ranum, an attorney from Mitchell Hamline School of Law and Carrie Briones, the Human Services Program Director at the Minnesota Department of Human Services (DHS).

The visitors wasted no time proclaiming their purpose for coming. During introductions, Representative Sandell began making a comment, yet corrected himself mid-sentence: 'This facility *seems* to be ...' He then paused to make an unequivocal statement: 'This facility is punitive!' he explained. 'This needs to be fixed.'

The trio met with residents Russell J. Hatton, Matthew Feeney, Joshua Gardner, and Daniel A. Wilson.

Gardner focused on recent violations reported in a *Duluth News Tribune* article. He explained that facility staff have ignored the directives of the Minnesota Department of Health. For instance, they continued to use pepper spray on the residents and prohibit residents from making private phone calls to report abuse and maltreatment. Gardner also spoke about the detainment of over 60 residents who were initially confined as children but remain detained decades later. Gardner grieved that there is no Clear Path Home and facility staff do not follow their own policies in regard to progression through the 'program.' The 'discharge process' provided by statute should only take months to complete. However, it takes years and even then rarely results in release.

Wilson presented documents that were accidentally leaked by facility staff. The documents prove what administration has known for decades: that the 'vast majority' of residents are not mentally ill. The documents also prove that administration is knowingly breaking the law by operating a permanent variance that changes the qualifications of staff. According to state statute and DHS rules, residents are entitled to psychiatric evaluations. However, because of the variance, hundreds of residents have not been assessed for decades, making it impossible for them to be released. Representative Sandell stated that the variance 'appears to be illegal.' Wilson assured him that it is and then put a spotlight on [*Karsjens v. Harpstead*] trial testimony by Jannine Hébert, the Clinical Director of the [program]. Hébert testified in federal court that she made a 'conscious decision' to delete the Medical Model structure because she knows the resident are 'not sick.' In every instance that a resident files a petition for discharge, the staff argue that the resident is a 'risk' to the public due to 'severe mental illness,' although administrators know this is not true.

Hatton contends that immediate termination of the variance would mean the employment of qualified staff – namely psychiatrists – who follow the standards of the American Psychiatric Association. Hatton explained that when the variance is terminated, it will replace the current staff with qualified psychiatrists who will assess the mental health of the residents based on an individual's *current* presentation of *severe* mental illnesses. Currently, the variance dismisses this requirement. Hatton has been detained in the facility for over 15 years. Throughout that time, he has been a witness to those who suffer from real mental illness, as well as the vast majority who do not. Hatton provided his studies and stories that are a culmination of over 15 years of personal experience inside the facility. Hatton left the meeting with conviction that the visitors will address these human rights violations.

Feeney explained that staff oppose independent experts who opine that Feeney would benefit in a different environment where he would have more effective treatment services. Feeney stressed the practice of opposing independent experts is the status quo. DHS official Carrie Briones was especially concerned that Feeney is not the only resident to experience this kind of repression. Feeney then moved on to solidify his main point by presenting a stack of grievances 8 inches high, asserting:

'Even if you bring resolution to these grievances, it would not matter. These grievances are *symptoms* of a systemic problem. Executive Director Nancy Johnston told me that if I want to go home, I should 'stop worrying about changing external rules' and focus on changing myself. I suggested that Ms. Johnston might have proffered that same advice to Rosa Parks. At the very least, Ms. Johnston needs to be terminated for dereliction of duty and failure to perform. Radical reform has been accomplished in other states. Just look at what happened in Massachusetts. We can do the same here in Minnesota.'

The United States should be an example for how to treat the mentally ill who are among the most vulnerable. However, these violations bear an eerie resemblance to times in history – both domestic and foreign – when governments illegally detained their citizens. Fortunately, it seems there are still some state officials advocating not only for the mentally ill who are entitled to proper mental health services but also for the non-mentally ill who are entitled to release.

Notes:

1 53B Woodbury/Cottage Grove.

2. "Minnesota S.O. Program Found in Violation of State Requirements" by Laura Butterbrodt (March 2, 2022) *Duluth News Tribune*.

3. Variance Request Application for Rule 9515.3030, Subp. 2.

4. *Minn. Stat.* 253B.04, Subd. 9. In addition, the variance violates the terms of the license granted by the Minnesota Department of Health. See license under Commissioner Number 3989829.

5. *Minn. Stat.* 253B.03 Rights of Patients, Subd. 5. Periodic assessment: "A patient has the right to periodic medical assessment of continuing care and, if the treatment facility declines to provide continuing care, the right to receive specific written reasons why continuing care is declined at the time of the assessment. The treatment facility shall assess the physical and mental condition of every patient as frequently as necessary, but not less often than annually...." Administrative Rule 9515.3030, subpart 2 Psychiatric evaluation. A psychiatrist must evaluate each person within three working days after the person is admitted and reevaluate each person at least annually.

6. Testimony of Jannine Hébert before the Honorable Judge Donovan Frank, *Karsjens v. Jesson* [now *Harpstead*], Case No. 11-CVC-3659 (DWF/JJK), March 5, 2015, pp. 4001, 4002.

7. DSM-5, p. 22.

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Virginia Report, # 14

Clinical Risk Assessment & "Guided" CRA: Impressionistic, Anti-SO Biased, Full of Debunked Factors & Wrong 9 Times in 10.

by Cyrus Gladden

1. **Clinical Risk Assessment ("CRA") Is Inherently Based on Subjective Impression and Is Incorrect 86-94% of the Time, and It Ignores That "Examiners": (1) Are Typically Biased Against the Commitment Defendant; (2) Regularly Cite Factors Which Have Been Scientifically Debunked; and (3) Are Regularly Permitted to Testify to the Ultimate, Legal Issue of Fulfillment of the SOCC Commitment Standards, All of Which Deprives Commitments under SOCC Laws of Any Real Basis in Science.**

So-called "clinical risk assessment" is

(Continued on page 5)

nothing more than some hired psychologist opining as to whether or not he thinks one will sexually recidivate at some future point in one's life. Unsurprisingly, since those psychologists do not possess a crystal ball, these predictions, studied after the fact, have consistently been found to be correct only 6 to 14 percent of the time. (*R. Karl Hanson*, "Predictors of Sexual Offender Recidivism: A Meta-Analysis," 1996-04 [*Public Safety and Emergency Preparedness Canada*], p. 3: "...In general, clinical assessments performed poorly [.06 to .14]...."). Given that in this yes/no guess, pure chance would dictate a 50% likelihood of accuracy, such predictions are dismally less accurate than pure chance and are bereft of any basis in science whatsoever. The psychologist may as well have been blindfolded and spun around several times and then ordered to throw darts.

In essence, the argument against 'clinical risk assessment' ("CRA") is that it is wholly impressionistic and therefore unscientific, and that studies of its use in predicting sex offender recidivism have shown it to be inaccurate 90% of the time on average. *E. Janus & R. Prentky*, "Forensic Use of Actuarial Risk Assessment with Sex Offenders," 40 *Am. Crim. L. Rev.* 1443, 1456 (2004). Accord: *R. Karl Hanson*, "Predictors of Sexual Offender Recidivism: A Meta-Analysis," *ibid.* (That is, CRA is inaccurate 86 to 94% of the time.)

Nor is this a function of long professional experience. "Mental health experts often justify diagnostic and predictive judgments on the basis of 'years of experience' with a particular type of person ...However, research shows that the validity of clinical judgment and amount of clinical experience are unrelated." *Dawes, R.M.*, "Experience and Validity of Clinical Judgment: The Illusory Correlation," 7 *Behav. Sci. & the Law* 457-467 (1989). An earlier study reported that psychologists did no better than nonprofessionals in formulating prediction on the basis of a detailed case history. The predictive accuracy of both groups did not exceed the level of pure chance. (*Oskamp, S.*, "Overconfidence in Case-Study Judgments," 29 *J. of Consulting Psychol.* 261-265 (1965).)

This is not a valid scientific tool; it is merely a guessing game with a record of inaccuracy far worse than flipping a coin. Accord: *Erica Beecher-Monas*, "The Epistemology of Prediction: Future Dangerousness Testimony and Intellectual Due Process," 60 *Wash. & Lee Law Rev.* 353, 362-63, 369.

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, 371-72 (2006), makes these troubling observations about clinical assessment in sex offender commitment cases:

"Risk assessment has been aptly referred to as 'the mother of all uncertainties' (*Bailar & Bailar*, 1999, p. 273)...

"We must not ignore, moreover, the natural human proclivity to overvalue vivid or emotionally laden information. Vivid detail, for experts as well as juries, can be misleading and frequently detracts from the objectivity and reliability of an opinion. ...As *Jackson, Rogers, and Shuman* (2004) demonstrated experimentally, 'certain types of information, such as emotionally evocative victim statements, can bias the professional conducting the forensic evaluation' (p. 125). Focusing on highly evocative, vivid information can lead to an overattribution of predictive efficacy and erroneous opinions. This form of bias is distinguished here because it appears to be especially common, given the nature of the behaviors (i.e., facts) under scrutiny in SVP evaluations and hearings."

At p. 377, these authors also describe the "cherry picking method of clinical assessment: "selectively harvesting information that supports and confirms an *a priori* opinion." (emphasis added) Obviously, such exclusion of other information, either contrary on a specific selected point, or generally indicative of less risk or impeaching any risk-elevating significance of any points thus selected, seriously slants any estimate of risk reached in such clinical evaluations.

Eric S. Janus, Failure to Protect: America's Sexual Predator Laws and the Rise of the Preventive State (*Cornell University Press*, Ithaca, N.Y., 2006), at pp. 33-4, says this about clinical assessment of sex offenders:

"Once a person is caught in the spotlight of a predator commitment, everything the individual says or does is subject to interpretation woven into the professional's diagnosis and prediction. Much of the foundation for the expert opinions comes from the voluminous records of prisons and treatment facilities. Key information is based on the unsworn handwritten notes of institutional guards and attendants, whose propensity for accurate and unbiased observation is unknown, and whose absence from the courtroom shields them from the mouth of the person subject to loss of liberty, because in predator commitments, the Fifth Amendment right of silence and the confidentiality of psychological treatment is nullified."

A.J.R. Harris & R.K. Hanson, "Clinical, Actuarial and Dynamic Risk Assessment of Sexual Offenders: Why Do Things Keep Changing?," 16 *Jour. of Sexual Aggression*, No. 3, p. 296-310 (November 2010), at 298 (adding: "having been sexually abused as a child" and "having low self-esteem" to the 'debunked list') and, at pp. 302-03 (adding these attitude items: "the offender's attitudes supportive of sexual entitlement, rape, and sexual activity with children," and, at 304: "emotional collapse, collapse of social support, and substance abuse" – all of which were found to have no relationship to sexual or violent recidivism).

Grant Duwe & Michael Rocque, "Predicting Sex Offense Recidivism: The Perils of Professional Judgment and the Home-Field Advantage," *Minn. Dept. of Corrections* (paper, released: February 2018), p. 25, illustratively point out that "Hanson and Morton-Bourgon (2005) found that clinical judgment often utilizes factors that are not related to recidivism (e.g., 'low victim empathy')."

Indeed, the very concept of use of "dynamic factors" has come under strenuous criticism. See, e.g., *Gregory DeClue*, "Avoiding Garbage 2: Assessment of Risk for Sexual Violence after Long-Term Treatment," 33 *J. Psychiatry & Law* 179, 198 (205) (advising caution in the use of dynamic factors in determining whether offenders continue to meet commitment criteria).

One such commonly cited factor: "the offender's acceptance of attitudes supportive of sexual entitlement, rape and sexual activity with children," was dropped from "Stable-2007" (a revised "dynamic RAI") "due to a lack of association with sexual recidivism." *A.J.R. Harris & R.K. Hanson*, at pp. 302-03. At 304, *Harris & Hanson* add, "During the DSP [Dynamic Supervision Project], between January 2001 and May 2002, 149 officers submitted more than 7000 ACUTE-2000 ratings for 744 adult male offenders. From these data we found that ...emotional collapse, collapse of social support, and substance abuse were not related consistently to sexual or violent recidivism." Two other claimed factors, denial and hostility to treatment, have been repeatedly determined by forensic studies as having no link to future sex crimes. *Laura Mansnerus*, "Unfinished Sentences: Keeping Prisoners as Patients," *N.Y. Times*, Nov. 17, 2003, at A1; accord: *Prentky, Janus, et al, supra*, at 378. Additionally, *R. Karl Hanson*, "Predictors of Sexual Offender Recidivism: A Meta-Analysis," 1996-04 (*Public Safety and Emergency Preparedness Canada*), p. 12, debunks yet another supposed 'clinical' factor thus: "...Contrary to what is commonly assumed, those sexual offenders who denied their offenses were no higher risk than other offenders."

Let's pause for a moment to consider denial of sexual offenses with regard to prediction of future sex crimes. *Jayson Ware, W.L. Marshall & L.E. Marshall*, "Categorical Denial in Convicted Sex Offenders: The Concept, Its Meaning, and Its Implication for Risk and Treatment," xxx *Aggression and Violent Behavior*, Xxx-xxx (Aug. 2015; 12 pages in press) examined this question making the following observations and drawing the following conclusions:

(Text, galley proof, p. 2): "Of course, it is possible, and even likely, that some of these offenders [who categorically deny having committed any sex offense] may be innocent ..."

"*Barbaree and Marshall* (1988), for example, reported that 25% of their outpatient group of child molesters categorically denied having offended. *Nunes et al.* (2007) found that 28% of a mixed group of sex offenders attending a community clinic denied having committed a crime."

"...[I]n studies of convicted sex offenders some 25% to 30% deny having committed an offense. *Barbaree* (1991) and Marshall (1994) independently examined incarcerated convicted sex offenders. Both studies reported similar rates of categorical denial (31% and 35% respectively). A comparable study of incarcerated sex offenders (*Hood, Shute, Feilzer & Wilcox*, 2002) identified 33% as categorical deniers. Interestingly, in each of these three studies, there were no differences in rates of denial across sex offender types (i.e., rapists, intrafamilial and extra-familial child molesters)"

(p. 3): "...[C]ategorical deniers appear to be at lower risk to reoffend.... (*Marshall & Fernandez*, 2003)...."

"...[S]ome sexual offenders admit to some offenses yet maintain innocence to others,.... Again, it is well to keep in mind that some categorical deniers may be telling the truth." (Ask: Why would one do this, if not due to actual innocence of the denied charge?)

"...[D]enial might 'buy time' for the offender and his family to adjust to the reality that he actually did commit an offense. Under these later circumstances we would expect many deniers to voluntarily change their position at some later point, most likely after conviction, but that clearly does not always happen."

(p. 4): "On the one hand, *Mann, Webster, Wakeling, and Keylock* (2013) found that those incarcerated sex offenders who denied their offenses indicated that they feared the stigma (and possible assaults) associated with being identified as a sex offender among other prisoners...." (But why deny in a sex offender commitment facility – where these fears have no basis –except for actual innocence?)

"...Since the majority of sex offenders who deny having offended appear to be at no greater risk to reoffend than those who admit (*Hanson & Morton-Bourgon*, 2005), the idea that the motivation for denying guilt is to facilitate continued reoffending appears to be on shaky grounds."

(p. 5): ...*Hanson & Morton-Bourgon*, 2005 conducted a second meta-

(Continued on page 6)

analysis that specifically separated categorical denial from other aspects of a failure to take full responsibility; they still found that denial did not predict sexual recidivism…."

"…*Nunes et al.* found that categorical denial was associated with decreased reoffending among actuarially-determined high-risk offenders."

"…Other studies have reported that categorical deniers have lower recidivism rates than those who admit. *Barbaree and Marshall* (1988) reported a recidivism rate of 14% for categorical deniers compared to 23% for admitting offenders."

(p. 10): "…[T]he common assumption that these clients are more likely to commit further sexual crimes than is true for admitters, is not supported by the evidence to date."

"…[R]esearch suggests that denial is not predictive of reoffending." (citations omitted here but remain available).

In light of this body of research, clearly, there is no basis for any claim that denial of sexual offenses, whether partial or categorical as to a given offense or victim, or as to more than one alleged or convicted past offense, elevates any probability of future sexual offending.

More generally, the inexpertise of this guessing-game-cum-character-assassination overall is aptly exemplified by the testimony of Dr. John Austin in *In re Conard*, 2011 Minn. App. Unpub. LEXIS 852 (2011), where he opined that Mr. Conard should be committed because "he is a loser."

Daniel Kriegman, Ph.D., "New Salem Witch Trials: Evaluating Bias in Expert Witness Conclusions of 'Sexual Dangerousness,' Part 1," *Sex Offender Law Report*, Vol. 15, No. 4 (June/July, 2014), pp. 49-50, concludes:

"Researchers have shown that there is considerable bias and/or questionable validity in expert predictions of dangerousness. (*W.M. Grove, D.H. Zald, B.S. Lebow, B.E. Snitz & C. Nelson*, 'Clinical Versus Mechanical Prediction: A Meta-Analysis,' 12(1) *Psychol. Assessment* 19-30 (2000); *E.S. Janus & R.A. Prentky*, 'Forensic Use of Actuarial Risk Assessment with Sex Offenders: Accuracy, Admissibility, and Accountability,' 40 *Am. Crim. L. Rev.* 1143-489 (2003); *J. Monahan, Predicting Violent Behavior: An Assessment of Clinical Techniques* (1981); *G.G. Woodworth & J.B. Kadane*, 'Expert Testimony Supporting Post-Sentence Civil Incarceration of Violent Sexual Offenders,' 3 *L., Probability, & Risk* 221-41 (2004).

"However, as we will see, when it comes to predicting the likelihood of future sex offending, the bias becomes literally astronomical. Based on the actual patterns of experts opining 'sexually dangerous,' it can be established beyond the possibility of doubt that the methodology used and conclusions reached by the Qualified Examiners employed by the Commonwealth of Massachusetts leads (or allows) them to grossly overpredict dangerousness…. [emphasis supplied]

"…[I]t is this level of certainty we can reach about the extraordinarily high degree of bias demonstrated by 'experts' in sexual dangerousness proceedings, a degree of bias that is so extreme that it may justify referring to the resultant courtroom proceedings as the 'New Salem Witch Trials.'…." [emphasis supplied]

In essence, clinical risk assessment is that it is wholly impressionistic and therefore unscientific, and that studies of its use in predicting sex offender recidivism have shown it to be inaccurate on average 90% of the time. This is not a valid scientific tool; it is merely a guessing game with a record of inaccuracy far worse than flipping a coin. Accord: *Erica Beecher-Monas*, "The Epistemology of Prediction: Future Dangerousness Testimony and Intellectual Due Process," 60 *Wash. & Lee Law Rev.* 353, 362-63, 369.

Doubtless, 'clinical' use of claimed 'factors' such as "negative clinical presentation"; lack of "victim empathy"; "denial"; "low motivation for treatment"; "poor progress in treatment"; and "minimization" – all of which have been debunked as having any significant risk-relevance – has contributed to such predictive failure. *Prentky, Janus, Barbaree, Schwartz & Kafka*, "Sexually Violent Predators….(etc.), *infra*, at 12 *Psychol., Pub. Pol'y, & Law* 378, 385.

Add to the foregoing these further 'factors, all of which have been debunked as having no significant correlation to sex-crime recidivism: any alcohol/substance abuse problem; general psychological problems; low social skills; length of treatment; Antisocial Personality Disorder; deviant sexual preference(s) or attitude(s); anger problems; marital status; prior nonviolent offenses; history of juvenile delinquency; developmental history of family problems; negative relationship with mother; negative relationship with father; and sexually abused as a child. (*Hanson, R.K., & Bussiere, M.T.*, "Predicting Relapse: A Meta-Analysis of Sexual Offender Recidivism Studies," 66 *J. of Consulting and Clinical Psychology* 348-362 (1998).)

Clinical judgments of likelihood of sexual re-offense have been studied extensively. The conclusion repeatedly reached is that "clinical risk assessment" ("CRA") predictions of future recidivism have proved to be to be incorrect (almost always, overstated) about 86 to 94% of the time. A different meta-analysis of 61 sex offender recidivism studies involving a total of over 23,000 subject sex offenders found the correlation between CRA and actual subsequent recidivism to be a mere 10%. Bear in mind that, since future recidivism is yes/no question, a 50% accuracy rate would reflect pure chance. In light of the far-less-than-pure chance accuracy of CRA, allowing evidentiary admission of, and judicially relying on such CRA evidence and testimony, largely based on subjective "impressions," is an act of criminally unethical judicial irresponsibility, and, of itself, completely deprives Respondents of substantive due process.

By definition, CRA is an exercise of human judgment. In such judgments, at least these sources of error have been noted: (1) ignoring correct, or using incorrect base rates; (2) assigning sub-optimal or incorrect weights to information (e.g., overweighting emotionally impactful, but relatively non-predictive information); (3) failing to account for regression toward the mean; (4) failing to properly take into account covariation; (5) relying on illusory correlations between predictor variables and criterion; (6) failing to acknowledge the natural bias among forensic examiners toward "conservative" judgments, defined as an incarcerated potential for incorrect judgments of dangerousness associated with a reluctance to find someone not dangerous; (7) failing to receive, and to benefit from feedback on judgment errors; (8) external social forces; (9) monetary and/or political pressures; (10) overconfidence; and (11) confirmatory bias (defined as the tendency to look for evidence that supports one's hypothesis and to ignore, or fail to seek information inconsistent with that hypothesis and to interpret a given item of data in a way that supports one's preconceptions even when either of two opposing interpretations is equally possible). Because the critical steps in CRA occur in the clinician's mind, such errors may be difficult to expose through cross-examination. These corrupting, error-causing tendencies explain in large part the overwhelming, less-than-pure-chance predictive inaccuracy of CRA.

More often than not, CRA does not include any interviewing of the subject sex offender, yet the 'examiner' purports to arrive at a specific diagnosis of supposed disorders in the offender, solely by review of the offender's criminal record. *See, e.g., In re Kaelble*, 2011 Minn. App. Unpub. LEXIS 394 (Minn. App. 2011) (Dr. Hoberman); *In re Lange*, 2011 Minn. App. Unpub. LEXIS 781 (Minn. App. 2011) (Dr. Linderman). CRA testimony first arose in death penalty cases, in which the U.S. Supreme Court imposed a "heightened standard of reliability" requirement as to such expert testimony, in part due to its high propensity of such inaccuracy. (*Ford v. Wainwright*, 477 U.S. 399, 341 [1986]). In contrast, Minnesota accepts and upholds CRA testimony on nothing more than a trial judge's discretion as to general witness-credibility determinations.

Existing scientific literature shows that clinical judgment (CRA) alone, or combined with actuarial scores, does not improve the predictability of recidivism over that provided by actuarial (ARA) scores alone.

Because of all the foregoing allegations, reliance by prosecutors and judges on CRA evidence and testimony in committing SOCC respondents under SOCC laws and in upholding said commitments on appeal therefrom deprives respondents of substantive due process.

2. <u>At Best, "Guided" Clinical Risk Assessment ("GCRA") Consists of Experimental Procedures and Holds Alarming Potential to Mislead and Misinform a Trier of Fact.</u>

"As Hanson has acknowledged, GCRAs inevitably contend with the problem of how to best weight and combine the different factors. [*Hanson, R.K.*, "What Do We Know about Sex Offender Risk Assessment?," 4 *Psychology, Public Policy, and Law* 50-72 (1998).] Despite Testing standard 6.1, there is no manual available for GCRAs to address this issue. Without an explicitly defined method for converting various risk factors into recidivism probabilities, different evaluators can reach very different conclusions when assessing the same offender. When they occur, these inconsistent conclusions correspond to variations in clinical judgment between two or more evaluators assessing the same offender. Psychologist A attributes considerable significance to the offender's age, but psychologist B views the offender's failure to complete treatment as more compelling. Ultimately, the value of GCRAs are undermined by their unavoidable reliance on clinical judgment.

"Moreover, there are no data available for GCRAs to answer the four critical questions for evaluating an assessment method for sexual predators:

What is its sensitivity?
What is its specificity?
What is the frequency of false positives?
What is the frequency of false negatives?

"As a result, GCRAs fail to comply with Ethical standard 2.902(a). Without a generally available manual for GCRAs relying on them for predator evaluations also disregards Testing standard 6.1. Relatedly, opinions premised on GCRAs regarding recidivism risk also neglect Testing standard 7.9 and Ethical standard 2.04(a).

"The considerations discussed above lead to a sobering conclusion – For purposes of assessing the recidivism risk for previously convicted sexual offenders, GCRAs are – at best – experimental procedures. As experimental procedures, they do not possess sufficient evidentiary reliability to support expert testimony in a legal proceeding. In particular, GCRAs

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present an alarming potential for misleading and misinforming a trier of fact." (*Terence Campbell & Demosthenes Lorandos, Cross-Examining Experts in the Behavioral Sciences* § 9:25, pp. 444-445.)

Gregory DeClue, "Avoiding Garbage 2: Assessment of Risk for Sexual Violence after Long-Term Treatment," 33 *Jour. Of Psychiatry & Law* 179 (Summer 2005), concurs, summarizing:

p. 184: "Is there an empirical basis for favoring either an adjusted-actuarial approach or a guided clinical approach over [a pure actuarial approach]? I do not believe so. Most if not all studies that address the accuracy of actuarial risk-assessment instruments have measured the accuracy of the instrument itself, as if it were used in a pure actuarial approach. There is little if any data to show that routine use of a procedure to adjust assessments based on additional factors enhances the accuracy of risk assessments. Few studies have directly compared the accuracy of a guided-clinical approach versus a pure actuarial or an adjusted-actuarial approach; one such study found no clear superiority." (emphases supplied; citing *Dempster, R.J.*, (1998), *Prediction of Sexually Violent Recidivism: A Comparison of Risk Assessment Instruments*. Unpublished Master's Thesis, Simon Frasier Univ.)

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Inaccurate Prediction of Future Offending — What a Surprise!

Sonia K. Katyal, "Private Accountability in the Age of Artificial Intelligence," 66 *UCLA L. Rev.* 54 (January 2019)

Text excerpts:

[re COMPAS] pp. 85-86: "ProPublica studied the sentencing of 7000 defendants in Florida's Broward County, obtaining their risk scores and comparing the predictions to how many were charged with new crimes over the next two years (the same bench mark relied upon by the algorithm).[181] When ProPublica tested the proprietary algorithm used to predict recidivism, it discovered that the scores were wrong almost 40 percent of the time, and gravely biased against black defendants, who were 'falsely labeled future criminals at almost twice the rate of white defendants.'[182] Out of every five people Northpointe predicted would commit another violent crime, the study found that only one actually did.[183] Notably, '[t]he formula was particularly likely to falsely flag black defendants as future criminals, wrongly labeling them this way at almost twice the rate as white defendants.'[184]"

Notes:

181 *Julia Angwin et al.*, "Machine Bias," *ProPublica* (May 23, 2016), http://www.propublica.org/article/machine-bias-risk-assessments-in-criminal-sentencing [https://perma.cc/92FK-RNFD] at 1 (explaining methodology and results); see also *Julia Angwin & Jeff Larson*, "Bias in Criminal Risk Scores Is Mathematically Inevitable, Researchers Say," *ProPublica* (Dec 30, 2016), http://propublica.org/article/bias-in-criminal-risk-scores-is-mathematically-inevitable-researchers-say [https://perma/cc/58UU-3JV&Y] (discussing implications of findings).

182 Julia Angwin, Opinion, "Make Algorithms Accountable, *N.Y. Time* (Aug. 1, 2016), http://www.nytimes.com/2016/8/01/opinion/make=algorithms-accountable.html (arguing for greater transparency and accountability); see also *Angwin et al. supra* note 181. ProPublica found that roughly 60 percent of those classified as higher risk went on to commit future crimes (the same rate for both black and white defendants). Yet when it looked at the 40 percent of predictions that were incorrect, it found that '[b]lack defendants were twice as likely to be rated as higher risk, but not re-offend. And white defendants were twice as likely to be charged with new crimes after being classed as lower risk." *Julia Angwin & Jeff Larson*, "ProPublica Responds to Company's Critique of Machine Bias Story, *Pro Publica* (July 29, 2016), http://www.propublica.org/article/propublica-responds-to-companys-critique-of-machine-bias-story [https://perma.cc/QV8U-8368].

183 *Angwin et al., supra* note 181, at 1 (noting that '[o]nly 20 percent of the people predicted to commit violent crimes actually went on to do so').

184 *Angwin et al., supra* note 181.

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Predicting Sex Crimes by Those Without Any — You Knew That It Would Come to This!

by Cyrus Gladden

From its outset, *TLP* has scathed the ridiculously anti-scientific misuse of actuarial risk assessment to predict who, having already committed a sex crime, is likely to commit another one later. At its best, this is only an attempt to justify the old claim that the best predictor of the future is the past. Except that, when it comes to human behavior, this is far from a truism. In particular, when it comes to sexual offending, were that true, every sex offender would endlessly repeat their past crimes until they died.

Common sense alone will tell you that this does not happen. If it did, the rate of sex crimes would be so staggeringly high that every woman and child would be a victim of such crimes. In fact, the rate of sex crimes has dropped through the floor in recent years.

Second, the rate of recidivism has dropped even more, such that now far more sex crimes are perpetrated by those with no past sex-crime record, rather than by recidivists.

Finally, even statistical studies of sex offenders that habitually overestimate recidivism have recently drastically revised their recidivism predictions downward. A classic example is the MnSOST-4.0. One individual assessed by its predecessor, the MnSOST-3.12 was predicted to be 85% likely to commit another sex crime within eight years of prison release. When later assessed again using the MnSOST-4.0, the prediction dropped to a mere 6% likelihood.

It appears that the creators of these recidivism prediction tools are now taking the first modern look at actual recidivism, uninflated by the bias that was routinely substituted for science in the past. This doesn't mean that the new predictions are reliable. For reason explained below, they are not, and never can be. But at least some of them are not selling an inflated bill of goods to those already hysterically inclined.

Actuarial science is used by insurance firms to better understand the risk it undertakes when it insures many individuals against various possible adverse occurrences. It seeks to determine how many out of a pool of insured individuals will experience such occurrences/losses. What it cannot do with any accuracy is determine exactly who will experience such events. Actuarial science purports to assess certain heightened probabilities of such events as will be experienced by groups with higher than average risk factors.

Nonetheless, even as to such higher-risk groups, it is simply impossible to identify who in any such higher-risk group will be struck by the insured event. This is because actuarial science concerns itself with the frequency of occurrences in a given population – not the odds that a given individual in that population will be the one struck by that occurrence.

One of the insoluble math problems involved in this is that presented by Bayes' Theorem, a mathematical attempt to assign a risk prediction to yes/no one-time events, such as the question whether a sex offender will offend again later (yes/no)?

Sex crime perpetration by an individual cannot be equated to the risk of the group to which the individual is (rightly or wrongly) assigned. An example will explain why:

Suppose that a given former sex offender is correctly assigned to a group of sex offenders who share one specific risk factor with the offender in question. Let's assume that research has correctly divined that the group sharing this risk factor contains members, 25% of whom will sexually recidivate in a given period in the future. This does not mean that the offender in question is 25% likely to sexually reoffend. In fact, either he will (100%) or he will not (0%). There is no 25% reoffending. He might be among the 25% in that risk-factor group who will, or he might be in the converse 75% of that same group who will not.

It is simply impossible to tell with certainty whether he will or not, but, since the focus is on the adverse event (sex offense), Bayes Theorem makes clear that his individual probability is far less than that 25%, but that even at that low risk rate, his personal probability of re-offense cannot be ascertained.

Now recall that we engaged in a number of assumptions here that do not comport with real life.

First and most important, recidivism probability predictors readily agree that, at best, such probability is multi-factorial – not just based on one factor, as in the example above. They attempt such prediction of likelihoods like a cook applies seasonings: a little 'pinch' of this factor, a different quantum of the next one, and so on. In the case of such predictions, each factor comes with its own probability score (the 25% of the example above).

In the case of any individual sex offender, they then add these scores together and simply match them against a table that tries to rate that offender's individual probability out of 100% possible. Call this the 'factor-additive' method of prediction, on the assumption that each additional factor identified in a given individual increases their probability of re-offense in something like a simple additive way. This, of course, is merely an assumption that has never been subjected to earnest scientific scrutiny sufficient to conclude whether or not this is always, or even merely usually true.

And that question, of course, is gravely confounded by the question of whether any given factor impacts every individual the same way. This is clearly untrue. Amidst a sea of possible reasons for individual differences in this regard, perhaps the most obvious is that when, and under what circumstances then in place, a given factor occurs or begins to take effect. (These, incidentally, are not the same). Individual antecedents to the occurrence or impact of a given factor can have drastic effects of the extent, and even direction, that a factor may have for a given individual.

And all of this, of course, depends on whether the factors in a given predictive 'tool' are correctly formulated. This can be muddled by failing to understand common antecedents, which themselves might be the actual causative factor, such that the identified factor might only

be the behavioral outcome, not the mental dynamic that caused it. The fact that different mental dynamics may cause the same behavior can easily ruin the predictive causation depended upon by these predictive tools.

Now, we have briefly touched on just a few of the reasons why prediction of future human behavior (sex-crime recidivism or otherwise) is essentially an impossible fool's task whose predictions are correct only by chance. But to cap off this background, here's a comparison you should ponder:

Predicting the weather is incredibly difficult because it is so massively multifactorial. Even with the best of observations of weather conditions everywhere, weather forecasts that extend further than a few days become exponentially more uncertain with each additional day into the future. Except for climatological predictions (e.g., "Next winter, it will snow") that are based on nearly invariable regularities, predicting specific weather conditions for a specific locale on a given day or in a given week a month or more in advance is subject to highly probable error and thus approaches sheer coin-flipping by comparison.

By comparison, the continued blossoming of newly claimed factors asserted to make sexual recidivism more likely tells us that the question of whether someone will commit a sex crime in the future is at least equally massively multifactorial (if not much more so). Weather prediction teaches us that any of the myriad factors involved even in that comparatively simply area of science can interact in unexpected ways at any moment, and that interaction can require complete revision of a forecast in an attempt to avoid hopeless inaccuracy or complete incorrectness.

In the case of sex crime perpetration, the constant swirl of daily human experience can radically alter, or even totally rewrite human intention and even motivation (for clarity, not the same as sexual orientation). The criminological study of desistance by sex offenders informs us that this applies to the possibility of sex crime recidivism as well as of recidivism of any other kinds of crime. In fact, drastic recent reductions in sex-crime recidivism teaches that sex offenders are far more subject to desistance than are any other kinds of criminals.

However, lurking beneath this is an even more universal point. It is not enough to say that "not all" those with non-standard sexual orientations/attractions/"deviance" actually commit sex crimes; it turns out that, in just the case of pedosexuality, somewhere in the mid- to high-90% range of those with that orientation will never sexually offend.

Those among them whose sexual range includes other attraction(s) as well typically move in that direction exclusively. Those in this category whose intent to make that exclusive in behavior fails usually surface with incest charges. Others, who have an exclusive orientation to prepubescent children, simply live in quiet nonsexuality. In sum, the reality now clearly apparent is that only a very small minority of pedosexuals act upon that attraction, and that those who do are very unlikely to repeat crimes of that nature.

This reduction in recidivism is even more progressive as the number of sequential arrests is examined. That is to say, the percentage of recidivistic offenders who serve time on a second pedophilic offense and then emerge to commit a third one is far smaller still than the percentage of first-timers who commit a second, etc.

This points up an important revelation: The concept of endlessly recidivating sex offenders against children is just a false myth; the reality is to the contrary. Statistics from the third-quarter of the 20th century that supported that myth were based on 'catch-and-release' approaches of that time to "morals offenses" and lack of tools and training needed to competently investigate sex crimes – not to mention minimalist sentencing then that has now risen exponentially. Now that advances and reforms have removed those limiting factors, the additional myth that "most sex crimes are never reported" is also now clearly untrue. Even those who remained quiet about their victimization decades ago now come forward to belatedly report them. Taken together, this means that the near-disappearance of sexual recidivism can be taken as a reliable fact.

But now let's pull back from questions about sexual recidivism. Those who committed and were punished for a sex crime have been regarded as 'fair game' for predictions of future sex crimes (although in light of the foregoing and some of what will continue to emerge below, this will be shown to be open to strenuous question). But something new has begun occurring that casts an ominous shadow of 'typing' people and attempts to justify different dictated life-courses for those in a disfavored and/or feared class.

This started with the advent of actuarial tools claimed to be generated through the application of artificial intelligence ("AI) analysis of mountains of data to draw conclusions and predictions about future behavior of individuals. As one might expect, this started with an already -disfavored class: those awaiting sentencing for crimes.

A number of "instruments" of this type based on AI have arisen, most notably "COMPAS." COMPAS attempts to divine the level of probability that someone about to be sentenced for any crime (at least, certainly any felony) will engage in further criminality if/when released, and even what type(s) of crime he/she will likely commit and even the level of extremity of such forecast crimes. This, it is intended, will alter the sentence that the judge is contemplating, supposedly to reflect the amount of future harm to individuals and society that the person awaiting sentencing represents.

The most troubling aspect of COMPAS is that, while it produces a prediction, the firm producing COMPAS software refuses to reveal the factors or the calculations that its predictive algorithm uses. Consequently, there is no way for a defense attorney to impeach or even to cause the court to carefully examine the grounds upon which it is supposedly based. It is simply a 'black box' conclusion spit out by the software with no meaningful explanation of how that conclusion was reached.

Northpointe Software the creator of COMPAS, resolutely claims that its algorithm, including both factors and calculations, is all protected "trade secret" information. Legal protection of trade secrets is nothing new. However, assertion of that right in the context of presentation of claimed evidence in a criminal case is truly shocking.

All evidence in any court case, but most critically, in a criminal case is subject to scrutiny, objection, and argument against judicially (or by a jury) according it any weight, based on countless facts that concern the provenance and/or the creation of such evidence.

A classic example of the breadth and depth of scientific challenge to evidence that has come into existence through the custom application of science to a set of facts and/or collected evidence in a case is DNA technology. Bringing DNA analysis to court requires not just a test result, but the testimony of both the technician who performed the test and a DNA testing expert who knows how the test is performed, the scientific principles upon which it is based, and exactly what its result signifies. Defense counsel has the right to challenge such testimony in any applicable way, including adducing testimony by a counter-expert who may take issue with any of the supporting testimony and even of the test procedure or its result or its significance to the facts of the case.

The extraordinary breadth of such challenges is allowed because the exceptional incriminating power of such test results can become a central factor producing a guilty verdict and because scientific evidence typically has an 'aura' of apparently unimpeachable truth that may not actually be valid, whether generically or in the context of the specific case. This right of challenge applies to any other scientifically grounded evidenced as well, including use of actuarial tests in sex offender commitment cases.

However, refusal to disclose its data and its calculations as trade secret effectively deprives the defense of any ability to challenge and implicitly demands that the court take it or leave it when it comes to their output of a probability of re-offense by the defendant. Many judges, overworked and hurried, simply allow COMPAS to be admitted as evidence, which is to say, as a powerful portion of the basis the judge is likely to rely upon when imposing sentence.

For all we know, the COMPAS algorithm may be nothing more than a scoring algorithm similar to that in use by some long-recognized actuarial risk assessment tool, with only the tiniest addition of some small calculation done on an artificially intelligent basis (that is, for instance, using some inference based on rules of decision allowing some digital discretion).

While AI has been hailed as vastly widening the ability to sift through mountains of data to draw inferences often both immense and as summing as calculus, if the simple arrangement I have just identified is all that COMPAS consists of, then its main purpose is not to draw any valid logical inferences, but instead to serve as a deliberate dodge (by claiming trade secret protection) from disclosing the data and calculations comprising the COMPAS risk assessment process.

Seeming to confirm this, Northpointe customers are usually prosecutors. This disclosure dodge aspect has created an uproar among the defense bar. It remains to be seen where this will all end up.

Now for the latest development in all of this so-called risk-assessment prediction: Certain professionals in the risk assessment field have recently proposed that it need not be limited to recidivists or even to people convicted of even just one sex crime. One of the first and certainly the most developed of these proposals is a risk assessment for the probability of future sexual offending by Minnesota prison inmates who have not been accused of any sex crime.

Grant Duwe, director of research and evaluation of the Minnesota Department of Corrections, authored an article, "Predicting First-Time Sexual Offending Among Prisoners Without a Prior Sex Offense History," 39(11) *Criminal Justice and Behavior* 1436-1456 (Nov. 2012), that announced a study of 9,064 male offenders in Minnesota DOC custody for various felony-level crimes. The purpose of the study was to determine whether identification of any factors could predict which such non-sex offenders would later commit a sex offense. A special statistical sampling technique known as "bootstrap resampling" was used not only to refine the selection of predictive factors for that actuarial tool, but also to internally validate the model settled upon by Duwe. This combination actually creates a problem of self-confirmation, rather than con-

(Continued on page 9)

firmation by use of any other metric.

This article by Duwe practically breathes the myths of popular misconceptions about sex offending. For starters, he recites approvingly the completely debunked claim that the "best predictor of future behavior is past behavior." (p. 1437). Nevertheless, he concedes that, in Minnesota corrections data, "we see that 90% of those convicted of a sex crime in 2005 did not have a prior sex offense conviction." (*Id.* p. 1436).

Like the contemporaneously developed MnSOST 3.12 did with regard to factors thought significant to risk of sexual re-offense, the MnSCORE used "multiple logistic regression" to develop factors claimed to be significant to risk of first-time sex crimes for those without any sex crimes thus far in life (p. 1442). While Duwe touts use of that statistical method as having a "high degree of transparency," in fact, Minnesota corrections officials have steadfastly refused to release the very Microsoft Excel formulas for scoring either the MnSOST-series of recidivism prediction tools or the MnSCORE tool that this article by Duwe announced.

Duwe's article concedes that no "external validation" had been performed as to the MnSCORE tool. He excuses this by saying that multiple logistic regression causes "overfitting" to the development sample's data. Hence, he admits, "when the prediction tool is applied to other samples [i.e., corrections samples and their data from other states], overfitting produces a reduction or 'shrinkage' in predictive accuracy." (p. 1442). This is the same problem encountered in creation of the MnSOST-3 recidivism prediction tools. However, cross-validation (what Duwe calls "external validation") by peer-reviewed study using such different samples is absolutely required before as predictive tool can be declared to have replicable accuracy and hence be recognized as consistent with science. Like the MnSOST recidivism predicting tools, MnSCORE fails this requirement, and hence is in the realm of junk science.

There is an even more severe problem with lack of scientific method in the case of the MnSCORE. Even though (as mentioned *supra*) nearly 10,000 Minnesota prison inmates were available for sampling, Duwe chose to use all of them as the development sample for the MnSCORE, thus leaving none available for a cross-sample check of accuracy after development. Duwe claims that his use of small-portion samples from within the development itself as a claimed cross-check on accuracy is equivalent to the cross-sample procedure he chose to skip. It is not. Because all of those 'mini-samples come from within the development sample itself, and because literally thousands of reiterative samplings were taken and then the results averaged, this is simply a different way of doing the math that produced the factors originally – not a check on their accuracy.

Effectively, the "bootstrap resampling" that Duwe indicates was used afterward as an accuracy check is effectively just another round of the same internal re-sampling. Therefore, it has no accuracy verifying value.

Most profoundly confounding any attempt at accuracy, the multiple logistic regression statistical method was used by selecting *a priori* certain factors as probably most significant predictors, and only then adding factors additionally one at a time until no further single addition achieved a significance level of .10" (p. 1443). What is wrong with this procedure is that it unscientifically favors both the *a priori* factors and the first additional factors chosen (again, *a priori*) to add before adding the rest (one at a time). In this way, whatever factors are selected as those first to be installed in the model can (either through random choice or through deliberate, politically motivated choice to support biases sought to thereby be perpetuated) be made to appear more "significant, and all later-added ones can, by cumulative effect, be made to appear less significant. That is not valid statistical use, it is abuse of statistics for unscientific purposes.

These statistical manipulations, thus, are probably responsible for selecting factors as intuitively completely unrelated to sex offending as making a false report to police or having a suicidal history (two of the MnSCORE factors). Note conversely that "age at [prison] release" (a core factor for determining future sex crime probability) is left out from this MnSCORE model, in favor of other factors such as "any juvenile convictions" (see Table 2, p. 1444). Further, the largest grouping of factors appear to be focused on violence or violent coercion scenarios (e.g., assaults, robberies, home-invasion burglaries). Violence is involved in rape, which is typically perpetrated upon adults or adolescents. However, a very high percentage of sexual abuse crimes involve neither violence nor violent coercion.

Duwe claims that the top 1% of inmates scored on the MnSCORE presented greater risk "than that observed among the majority of convicted sex offenders." (p 1448). In earlier articles, I have debunked the myth of exceptional recidivistic tendencies among those selected for SOCC, specifically showing that their odds of recidivism are, on average, no higher than other sex offenders simply released from prison instead of being committed. Therefore, what Duwe's claim here really shows is that most committed sex offenders have less probability of re-offense than someone who has never committed a sex offense – a profound failure of prediction of re-offense in the MnSOST-series of recidivism prediction tools.

Most critical is Duwe's concession (p. 1445) that the MnSCORE "model was able to explain about 16% of the variance" [between those who later offended sexually and those who did not]. This is not just a miserable failure of prediction, it is a failure to derive a true comprehension of what may actually cause or prompt sex crimes among those not previously convicted of any.

Connected to this, Duwe also concedes that, due to varying data in other states, "MnSCORE may have limited value outside Minnesota."

Worst of all, "For every true positive ... there were approximately 10 false positives." Applying this to the results, since the MnSCORE identified 41 who later committed sex crimes, it falsely identified 410 in the sample as those who would later sexually offend who in fact never did so.

At p. 1450, Duwe concedes that "[u]sing a prediction tool to assess the risk of committing a first-time sex offense may be considered by some to be too much like science fiction, invoking images of Aldous Huxley's *Brave New World* or the popular film Minority Report." But the harms that may be caused by use of the MnSCORE may be all too real and horrific. As Duwe himself admits (p. 1452), "[D]eveloping a program specifically for offenders with a high risk of first-time sexual offending may increase the chances that these inmates would be labeled as 'future sex offenders.' Given that the sex offender label caries a host of collateral consequences, including making it more difficult to find employment and housing after getting released from prison, the development of a program specifically for this population could do more harm than good." Since that is so, the preceding act of using a supposed 'prediction tool' to declare them to be that very thing is where the harm comes from. – And that is putting it very mildly.

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SORNA Registration Requirements Worsen — Will Life Remain Livable?

Bill Dobbs, "New SORNA Regulations Issued – Effective Immediately. They Will Impact Everybody on the Registry.", Dobbs Wire, printed in *Titus House Newsletter*, Feb. 2022, p.2

Text Excerpts:

"In the last months of the Trump administration, the Department of Justice (DOJ) suddenly issued draft regulations under the Sex Offender Registration and Notification Act (SORNA).....

The Dec. 8 Federal Register has the finalized regulations. They're lengthy and complicated, lots of questions as to what they mean and how they will be enforced. Without a doubt these federal regulations will make life even more hellish for the ... 900,000+ [who are] listed on state sex offender registries. Counting their families and significant others, several million people will be impacted.

While the states are at the center of registration matters, these changes expand the responsibilities that registrants have under federal law, creating more trip wires and opportunities for prosecution. The screws are being tightened again.

The existing registry regime has produced no benefit to public safety. A more draconian regime will not change that. As of 2021 every state has had a registry for 25 years. There's still no coherent cry to get rid of these ineffective, destructive laws. I hope these SORNA changes will bring more people into this fight."

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RFID Microchip Implants in SOs for Life Proposed

Alex Rutgers, "Tracking Predators: Microchip Implants, a Constitutional Alternative to GPS Tracking for North Carolina?", 20 *North Carolina Jour. Of Law & Tech., Online* 149 (Dec. 2018)

Text excerpts:

p. 155: "II. Microchip Implant Technology

A microchip implant is a small, rice-sized, copper antenna wire coil encased in a glass cylinder inserted under the skin.[26] It does not have a battery and operates using Radio-Frequency Identification (RFID) which does not transmit information until coming into contact with a magnetic field generated by a reader.[27]

p. 156: [RFID implants] ...can be designed to be permanent by inserting it under the triceps muscle, requiring surgery to remove[35] [implying surgery is necessary to implant the chip in the first place].

pp. 157-59: [In this section, the author discusses a previous, Satellite-Based Monitoring ("SBM") GPS tracking requirement in a way clearly implying that at least for all sex offenders with child victims, that requirement was as a 'collateral consequence' for offenders as a mandatory, lifetime part of their post-sentence registration requirement (not as a part of, or limited by, their sentence). (Other sex offenders could apply to a judge, upon findings of suitable rehabilitation and elimination of dangerousness, to end that GPS requirement.)

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It is unclear from the article whether under the terms of that 'collateral consequence' statute the GPS requirement was applicable to any sex offenders whose convictions were in another state and who moved into, or merely visited North Carolina.

That GPS requirement was held by North Carolina's own Court of Appeals to be a violation of one's rights against warrantless search and against privacy intrusion.]

p. 160: [The author notes thus:] All states have some sort of electronic monitoring legislation for criminals.[55] Over forty states currently implement GPS monitoring of convicted sex offenders, up from twenty in 2006.[56] [The author does not mention, however, that, with only a few, at most exceptions, such monitoring ends with the end of the offender's sentence.

p. 162: In 2012, the Supreme Court of the United States decided in *United States v. Jones*73 that 'the Government's installation of a GPS device on a target's vehicle, and its use of that device to monitor the vehicle's movements, constitutes a "search"[74] within the meaning of the Fourth Amendment.[75] [The Court noted that] 'the Fourth Amendment protects people – and not simply 'areas' – against unreasonable searches and seizures...'

p. 164: [In a case arising from the ankle-attached GPS requirement in North Carolina, the U.S. Supreme Court took the case, *Grady v. North Carolina*, 135 S. Ct. 1368, 1371 (2015).] Looking at the attachment of a GPS ankle monitor to a sex offender, in a unanimous opinion, the Supreme Court ruled that 'in light of these decisions, it follows that a State also conducts a search when it attaches a device to a person's body, without consent, for the purposes of tracking that individual's movements.'[93]

pp. 164-65: [Of note, that Supreme Court opinion stated,] 'It is well settled, however, that the Fourth Amendment's protection extends beyond the sphere of criminal investigations, and the government's purpose in collecting information does not control whether the method of collecting constitutes a search.'[94] This holding eliminated the distinction between a Fourth Amendment search in a criminal proceeding compared to a civil context. ...[However, as with all 4th Amendment searches,] ...the Supreme Court sent the case back to the trial court for a *Grady* hearing on SBM's reasonableness.

p. 166: [On remand, the North Carolina Court of Appeals reversed a trial court decision of reasonableness, holding that] the SBM program interfered with Grady's reasonable expectation of privacy in two ways: '(1) the compelled attachment of the ankle monitor and (2) the continuous GPS tracking it effects.'[102]

pp. 166-71: [However, the North Carolina Court of Appeals ruled that the first interference – the attachment – was not unreasonably obtrusive.[104] This, however, seems to deliberately ignore the thrust of the U.S. Supreme Court holding, which focused on the nonconsensual, compulsory intrusion into one's bodily privacy. Nonetheless, that court held only that the mandatory lifetime requirement for child-victim sex offender made the North Carolina statute unconstitutional. It therefore let the requirement stand, simply forcing the state to entertain petitions (as by other sex offenders) to be relieved from that SBM requirement.]

pp. 172-73: [The author concedes the obvious: that] an implant is more physically intrusive than a GPS ankle monitor. [Further, even] ...the North Carolina Court of Appeals determined that modern ankle monitors are 'more inconvenient than intrusive' [but, shockingly, basing this in part on a 'defendant's diminished expectation of privacy as a convicted sex offender.'[129] [In other words, as a kind of 'bootstrap' argument, because sex offender registration has already been upheld against claims of Fourth Amendment violation , then the government is or should be allowed to go further without constitutional violation. The author argues that the technological distinction between GPS and RFID, by which the latter causes a response only when the RFID carrying person leaves (as in shoplifting) or enters (as in wandering into a 'forbidden area' under sex offender legislation) means that the warrantless search is not "continuous", and hence supposedly not "unreasonable." However, there is no Supreme Court precedent that would require searches to be continuously ongoing to be unreasonable. Further, this ignores that the hallmark of Fourth Amendment law is that all warrantless searches are presumptively unreasonable. Even a house search, regardless of only short, or even momentary, is unreasonable without a warrant. If a man's house is his castle, as the late Justice Scalia stated, then surely his body is his sanctum sanctorum, violable by nonconsensual search without warrant. Further, it is highly unlikely that the government will install a special set of RFID query-transmitter units at several-feet intervals around every 'no-go' perimeter established by the many laws for countless locations throughout North Carolina (or any state having such legislation). Therefore, in actual practice, it is obvious that such an RFID system would have to rely on existing RFID query transmitter units already emplaced commercially and for other purposes. Hence, in practice 'ping' reports of a RFID-carrying person's location would constantly be coming in 24/7 with any movement anywhere by a given sex offender 'off-paper.' This is tantamount to constant tracking.]

p. 174: [The author here cites the very few exceptional cases that have allowed momentary bodily intrusions upheld by the U.S. Supreme Court. These include a blood sample taken from railway workers acknowledged to be a special case, due to the potential for mass casualty disaster if such a worker is intoxicated (*Skinner v. Ry. Labor Execs. Ass'n*, 489 U.S. 602, 616 (1989)); and oral cheek-swab DNA identification procedures upon criminal conviction (*Maryland v. King*, 569 U.S. 435 (2013)). However, no Supreme Court decision has ever permitted any indwelling artificial device to be implanted permanently (or for indeterminately) into a human body nonconsensually without a warrant. Indeed, no such warrant has apparently ever been sought.]

p.178: [The author advocates deep implantation of the RFID chip under the triceps muscle near the armpit in order to thwart unauthorized efforts to remove the chip. He also concedes that] ...there are additionally some health concerns with implantable microchips160. [These points escalate the intrusion factor of Fourth Amendment analysis geometrically.]

[Distinctly, the author also concedes that] ...states that have passed anti-chipping statutes have cited a slippery slope argument, that when involuntary insertion of microchips are legal for sex offenders, 'technology can be introduced for one purpose... but evolve to permit other uses, like sub-dermal implants used to track our actions wherever we go.'[162]

[Overall, the banal approach taken by this author is shocking in its subordination of basic bodily integrity – everywhere regarded as a fundamental human right – to a claimed necessity to know where sex offenders are at every moment – even those whose sentences have long expired. This is exacerbated by the known fact (mentioned nowhere by this author) that recidivism by convicted sex offenders (including those with convictions of crimes against children – apparently the special, emotionally driven concern of this author –is very low upon prison release to start with (average of current statistics nationwide: 3%), and dwindles to micro-percentages (less than 1/20th of one percent, according to a very large sample-based study in California following the first five years after such release). Such hysterical insanity and political grandstanding as a form of lynch-mob legislation simply must cease, lest all principles of liberty on which our country was founded be quietly killed with our implicit permission.]

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Clarification and Update from Our Émigré in Germany

Steven Whitsett, Director of *Just Facts Not Fear, Live Free Project, UG*, www.justfactsnotfear.com, Personal letter to the Editor, dated March 27, 2022

Text Excerpts:

"...Your understanding of my story is generally correct, but a few notations are called for. No, I did not 'slip' through the cracks. In fact, my civil commitment case went to trial. At the conclusion of the two-week trial the jury returned a verdict finding that I did not meet the criteria for commitment. Rather than being released, I was returned to prison for an additional 20 years on a charge of armed escape. Following my release from prison in 2016, and subsequent release from parole in 2018, I flew to Norway. I visited Norway and Denmark before a close German friend of mine invited me to seek that protection of the German government. In May I will happily celebrate four years of life in Germany. Interestingly, the suggestion that I seek asylum in Germany came from two German federal police officers of the Bundeskriminalamt (BKA) after they interviewed me upon arriving in Hamburg.

Thank you for asking about my job. You will certainly understand the security concerns in keeping certain details to myself. In short, I'll explain that I am a General Manager [here] for an international company. I manage the office [for this corporate area] with a staff of [many] employees and [a few] line managers, with an annual budget of approximately [several hundred thousands of Euros]. My company is well aware of my criminal history and, clearly, doesn't give a damn....

...In addition to working approximately 60 hours each week at my paying job, I also donate about 40 hours per week to this organization [Just Facts Not Fear]. When factoring in the amount of correspondence I receive daily, you can understand that time is not a luxury for me.

In short, the United States is not a signatory to the Universal Declaration of Human Rights (UDHR), nor to either of the two follow-up conventions. Therefore, the United States feels free to scream that China or Russia are violating the conventions, [yet] it holds itself above the law. The hypocrisy is not lost on most nations that the United States now sits on the UN Human Rights Council.

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Editor's Note: Due to the Covid quarantine event, it was not possible to use any graphic material in this edition by its deadline. The Editor regrets this circumstance beyond our control and looks forward to a fully illustrated edition next time.