

"Every great cause begins as a movement, becomes a business, and eventually degenerates into a racket." - Eric Hoffer

In This Issue:

1. Littlefield TX Protest Gets Coverage & Support.	1
2. We're Confined. By Definition We Need to Be Online.	1-2
3. Testosterone Reduction Treatment Won't Reduce Recidivism, But It Sure Will Rot Your Bones.	2
4. Sex Offending Happens as a Deliberate Criminal Choice, Not as a Compulsion You Reacted to Automatically.	2
5. The Virginia Report Tears into the Junk Science of So-Called "Actuarial Risk Assessment."	2-7
6. MnSOSt-4: Spinning Ever Farther Away from Science to Label a Few as 'Superpredators.'	7-9
7. Trying to Get Released? The Static-99R Will Block You by Inaccurately Predicting High Recidivism.	9
8. Deriving Dismaying Lessons from the Missouri SOCC Experience.	9-10
9. The MN Health Dept. Cited MSOP for Many Violations.	10

Coming Soon:

- ✓ Residency & Employment Restrictions: No Impact on Recidivism, Just Politics
- ✓ Banishment by a Thousand Laws
- ✓ Packingham - Wayne Logan's Take
- ✓ Remorse Bias - What's THAT?
- ✓ A Little History Yields Deja Vu
- ✓ Othering and Resistance. Huh?
- ✓ The Latest on Anti-SO Vigilantism
- ✓ Beware the Deepfake
- ✓ What Is E-Carceration? Why You Will Care
- ✓ RNR vs. Good Lives vs. Virtue Ethics vs. Desistance: Any bets?
- ✓ SAPROF, Survival Analysis, etc.— Talking Smack about Junk
- ✓ Lie-Detector Interrogation & Peter Meter Testing: Keeping You Down by False Hope, Fear, & Shame
- ✓ Conscience Confrontation of Legislators (Real Psychopaths)
- ✓ More Evidence against Libido Suppression Drugs
- ✓ Butler Redux Study Discredited
- ✓ Estimating Quantity of Unreported Recidivistic Sex Crimes Is Junk Science
- ✓ Residence Restrictions Have No Impact on Recidivism
- ✓ Hi-Tech Punishment Oblivates Need for Prison - and SOCC.
- ✓ Vigilantism against Sex Offenders
- ✓ What Does Substantive Due Process Say about PPG Testing?

Feedback? News? Write!

TLP Editor Address (Exactly & Only as Below)

Cyrus P. Gladden II
1111 Highway 73
Moose Lake, MN 55767-9452

Protest Outside Littlefield, TX SOCC Facility

Excerpts and summary from *Texas Tea Newsletter*, Vol. 1, Issue 5 (April 2022):

"On April 9th, a group of family members, friends, and advocates came together for a Public Awareness Event at the Texas Civil Commitment Center [TCCC] in Littlefield, Texas, to bring awareness and to educate others about the TCCC. What started as just an idea shared between a few friends quickly spread and gained momentum. This protest was planned by women with loved ones inside the facility.

Meeting up at the best Western Hotel in Littlefield, strangers embraced each other and began talking like long-lost friends. Over the past few months, connections have been made, many not being able to converse with anyone who understood what TCCC is. The turnout and the support was absolutely awesome! T-shirts were passed out and we were given instructions by Lamb County Sheriff, Gary Maddox. He instructed us as where to park and what we could and couldn't do.

[Ed.: Deserving special focus are Lonnell Hanks and Mandi Harner-Brady. Lonnell puts in hours of work daily on her son's cases and is still able to find the time to help with putting together a protest against civil commitment. Hearing her say her son, Lonnie Welsh, has been in civil commitment longer than prison really does tell you that something is wrong with the 'program. Mandi decided awhile back to do whatever she could to make a difference. Seeing firsthand the unconstitutional and immoral acts within the TCCC has had a profound effect on her life, and she now speaks out against the facility that used to pay her bills and support her family.]

Driving to the facility, there was an area sectioned off toward the back, just for us, but it was tucked away out of sight. Hidden, just like the men in Littlefield. None of us drove all this way to be out of sight and out of mind. We wanted to be heard. We wanted to be seen. The members of the event moved signs, chairs, and cars all towards the highway out front.

[Ed.: A photo shows the empty flat land of the vicinity, with cars of protesters parked at roadside. The facility in question is so distant that it is nearly impossible to see in this photo, taken just feet away from the protesters.] Management and Training Corporation [the facility-operating contractor] refused to allow the attendees near the property, threatening legal action if anyone drew near.

Many of the attendees created posters with undeniable facts that the TCCC tries to hide from the public eye. [Editor's note: One sign shown in a photo declares, for instance, "Since 2015 more men have left civil commitment dead than alive."

Texans Against Civil Commitment (TACC) attended the Public Awareness Event and

shared this poster with the blatantly neglectful acts that are made by the current overseer and executive director of the Texas Civil Commitment Office [TCCO, which oversees TCCC by malignant neglect], Marsha McClane. [Ed.: A photo bears a 'crystal ball' for scrying, and this text: "TCCO's Fortune Telling by the Clairvoyant Marsha McClane: Your nutrition will suffer. -Your medical care will suffer. You'll make money for prisons. You'll never finish therapy. You'll die before release." Other signs in the protest say such things as, "Shadow Prison Zero Science"; "They Have Served ALL Their Time"; "Millions of Taxpayers' \$\$ Used for Failed Facility."]

An award-winning photographer from Austin, Texas, Alan Pogue, was there to take pictures and video the event. KLBK News from Lubbock [about 45 miles distant] captured the story and interviewed family members. Amarillo attorney Ryan Brown graciously offered his representation that day if anything were to happen. Although we did not need it, his presence was greatly appreciated. Local attorney, Daniel Hurley, was present and kindly listened to each of us tell stories about our loved ones. Several members of Lubbock's Covenant Presbyterian Church were in attendance, with Elder Edward George leading us in prayer during the Public Awareness Event to bring hope to the families, friends, and others who attended. A moment of silence and balloon release was conducted for all the men who have passed away since the facility opened in 2015. Despite TCCO's claims, we have an accurate count of all these deaths.

The whole purpose of the Public Awareness Event was to spread awareness of the atrocities within the facility, reach more family members, to bring hope to the families, friends, and others who attended, and to let the men inside know that they have not been forgotten. We are working hard and we will keep working until they come home. Many thanks to all who attended or participated in some form. We could not have done this without you!"

Online Behind Bars: A Human Right

Dan Tynan, "Online Behind Bars: If Internet Access Is a Human Right, Should Prisoners Have It?," *The Guardian* US News (Oct. 3 2018)

Text excerpts:

"...[I]n a world increasingly defined by technology, denying internet access makes it harder for inmates to prepare for life on the outside, notes Dave Maass, investigative

researcher for campaign group the Electronic Frontier Foundation (EFF). It makes it harder for inmates to report on conditions inside prisons or communicate with their families - and also contravenes the May 2011 declaration by the UN that internet access is now a fundamental human right.

Internet access is simply not a top priority for most activists, says David Fathi, director of the ACLU National Prison Project. ...Yet prisons do have an obligation to maintain inmates' first amendment rights, and being internet savvy is rapidly becoming an essential survival skill. "If you want prisoners to succeed, go straight, and get a job when they get out, it doesn't make sense to cut them off from an increasingly essential part of the world," Fathi adds.

Ryan Baxter is serving a 10-year sentence at North Dakota state penitentiary for possession of drugs with intent to deliver. He uses a tablet PC to stay in touch with his family. His parents visit every few months, but his primary contact with the outside worlds is via email, which he creates on the tablet then uploads via one of the prison's kiosks. He uses his tablet for between two and four hours a day, mostly to listen to music or play games. But email, he says, is his lifeline.

"If I get a little depressed or have thoughts I need to get off my chest, I can sit down and type them out on the tablet without having to wait in line at the kiosk, he says. 'Most of my family is on the west or east coast, so email is great for inmates like me who don't have as many physical visits with their family.'

Publishing from Prison

Some inmates manage to work around these restrictions to publish online. Chelsea Manning, serving 35 years in for leaking more than 700,000 government files to WikiLeaks, publishes regularly on Medium (and also contributes to the *Guardian*) by relying on supporters to post them for her. 'Her articles are either dictated over the phone or mailed as letters,' writes Melissa Keith of the Chelsea Manning Support Network. 'Comments to her pieces are read aloud to her on the phone or printed out and mailed back to her.'

Barrett Brown, serving more than five years in federal prison for his role in the 2012 hack of the Strafor intelligence firm, regularly publishes on the Intercept using the federal prisons' private email system. Every message is read and approved by prison officials before it is transmitted. 'Back when Barrett was in the hole - and thus without email or phone access - he had to send the column on paper, handwritten in pencil,' adds Roger Hodge, the Intercept's national editor.

Many prison systems prohibit any internet activity other than email, and some states ban inmates from Facebook - even banning

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friends or family from posting on their behalf.

In February 2015, EFF issued a scathing report detailing how the South Carolina department of corrections punished nearly 400 inmates for 'conspiracy, aiding, [or] abetting in the creation or updating of an internet web site or social networking site.' The average punishment for accessing social media is 517 days in disciplinary detention, the report claims. In the most egregious case, inmate Tyheem Harris received 37.5 years in solitary confinement – far exceeding the amount of time he'll spend in prison – for making 38 posts to Facebook.

Alabama, Indiana, Maine, New Mexico, North Dakota and Texas also restrict prisoners from having active social media accounts, while Facebook's own terms of service forbid friends or family members from managing an individual's account. Since EFF's report, Facebook has made it more difficult to remove inmates' pages, and now requires legal authority to remove accounts or proof of a potential safety risk.

'A Drop in Recidivism'

Despite the US correctional system's aversion to change, technology is slowly making its way between the bars. Over the last two years, companies including American Prison Data Systems, Edovo and JPay have begun to distribute basic tablet computers to thousands of inmates, offering educational and entertainment content which, they say, can help improve behavior and reduce the chances of recidivism.

JPay has distributed 80,000 of its JP5S Tablets to US prisons, and claims an immediate 'improvement in prison culture and a drop in recidivism.' A modified 7 inch Android tablet, the JP5S looks like a less colorful version of a tablet designed for preschoolers, but with a clear case that prevents inmates from hiding contraband materials inside. It is preloaded with 20 apps including email, an ebook reader, music player, games, tutorials on how to develop job skills and handle money and a selection of educational videos.

At North Dakota state penitentiary, a maximum security facility for men, nearly 700 inmates use tablets made by Florida-based JPay for communication, entertainment or education, says deputy warden Troy Schulz. Inmates plug their tablets into one of the prison's 14 kiosks to update their messages, music, and games. They are limited to 15 minutes, though the prison offers extended access as a reward for good behavior, says Schulz.

'Bridging 'the Digital Moat'

At the Five Keys charter school inside the San Francisco county jail, more than 200 adult inmates acquire skills and earn high school credits using tablets provided

by the American Prison Data Systems.

Since the program launched in October 2014, more than 1,000 inmates have used the specially modified Samsung tablets, which offer access to educational material from a dozen sources including Kahn Academy, Brain Pop and TED Talks. The tablets connect to a secure private network, are monitored 24/7 and can be immediately shut down at the request of prison officials, says Chris Grewe, CEO of American Prison Data Systems (APDS).

'Until recently, correctional institutions were surrounded by a digital moat, isolating the people inside,' says Grewe. 'We're trying to build a bridge across that moat. But first we had to convince prison officials we'd developed a safe and secure platform that could let the good parts of the internet in while excluding the bad things.'

Edovo's tablets, secured and encased versions of the 7 or 8 inch Samsung Galaxy Tabs, are used in a dozen states across the country, says CEO Brian Hill. Each morning they're distributed to inmates, who earn points by taking educational and rehabilitation courses, and can spend those points later on games, music, or videos.

Hill said the company wants to help reform the criminal justice system by bringing thousands of hours of educational content and drug treatment programs to inmates on a daily basis. 'Profiting from Prison?'

Current prison email service providers typically charge between 5 cents to \$1.25 per message, according to the Prison Policy Initiative.

JPay charges prisoners and their families \$120 to buy the tablet, 35 cents to send and receive an email message and about \$10 for a 30-minute video message. Some state prison systems charge JPay to operate inside their walls. JPay declined to say how much, but said most states spend the money on sports equipment for inmates.

'They charge an arm and a leg for crappy substandard service,' claims Paul Wright, director of the Human Rights Defense Center, who accuses companies like JPay of 'monetizing human contact.' 'And they're giving kickbacks to government for monopoly contracts to financially exploit people in captivity.'

21st Century Communications

The problem is that many prison officials are wary of technology and risk averse, says Edovo's Hill. 'Every prison should be connected,' he says. 'But if prisons gave unfettered internet access to inmates today, I fear they wouldn't know how to secure it properly. Then all you need is one inmate to send an improper email or Facebook message to a victim. When that story makes the front pages, the prisons will use that data point to make sure no one ever gets connected again.'

And that leaves millions of Americans not only incarcerated in a cell but also frozen in a pre-internet world, says EFF's Dave Maass.

'This is how people communicate in 2016,' he says. 'We're making fewer calls, and do most of our communications through instant messaging, Facebook and other types of social media. There's a better chance of rehabilitation if inmates are allowed to communicate in the way people do it in the 21st century.'

Sex Hormone Agonist Treatment -

No Evidence of Recidivism Reduction, but Osteoporosis Is a Side Effect

Alexandra Lewis, Don Grubin et al., "Gonadotrophin-Releasing Hormone Agonist Treatment for Sexual Offenders: A Systematic Review," 31(110) *Jour. of Psychopharmacology* 1281-1293 (2017).

Text Excerpts:

p. 1282: [Authors cite evidence from reviews of use of anti-sex hormone drugs about] 'significant side effects, including osteoporosis, which are regarded as a barrier to wider implementation of GnRH (Gonadotrophin-Releasing Hormone) agonists.'

p. 1291: 'After examining the findings of this study, clinicians who are seriously considering or already prescribing this type of medication may wish to keep a number of the following matters in mind: ...2. The rate of dropouts for patients on this medication is large.... A wide range of side effects are documented across all studies where GnRH agonists are employed....

3. A number of larger studies have shown potentially irreversible effects on bone mineral density.... It is possible that the treatment dose may need to be adjusted or stopped in severe cases of osteoporosis.

4. The only study examining potential effects of GnRH on fertility highlighted possible irreversible negative consequences. ...[T]he study by Safarinejad (2009) suggests that there is likely to be some reduction in male fertility even after cessation of therapy.

5. Reliable, large-scale evidence for a reduction in recidivism is poor. This should be borne in mind when considering the risks and benefits of prescription.'

Sex Offending: A Choice, Not an Inability to Control

Theodore S. Donaldson, Ph.D., *Initial Comments on DSM-IV-TR, July 25, 2000* (unpublished manuscript)

Text Excerpts:

p. 4: "It is worth noting that the most prevalent treatment for sex offenders is cognitive-behavioral-relapse prevention. This form of treatment is aimed at getting the offender to change their behavior primarily to avoid punishment. The approach reflects the position that sex offending is a matter of choice. Thus, the wide use of this treatment modality strongly implies that most sex offenders are viewed as not suffering from a condition that renders them unable to control their dangerous behavior."

*: California Clinical Psychologist License # Psy 2744 350 Arbutus Ave., Morro Bay, CA 93442 ph.: 805.772.5086.

Virginia Report, # 15

Actuarial Risk Assessment

VI. H. 3. At Best, Actuarial Risk Assessment ("ARA") is Approximately as Incorrect as Pure Chance, Embraces the Very Worst, Most Unscientific 'Tool' Misused for Such ARA Purposes, Namely, the MnSOST-3.1, and Also Embraces Static-99R/2002R Use Without Restriction to Its "Routine" Table, All Depriving Sex Offender Commitments of Any Real Scientific Basis.

Conversely, although actuarial risk assessments ("ARA") was initially hailed as superior to clinical assessment, since then it has been criticized extensively, as not being science at all, and as being surprisingly inaccurate. ARA has proved to be only approximately as accurate as pure chance at predicting later recidivism. See, e.g., R. Karl Hanson, "Predictors of Sexual Offender Recidivism: A Meta-Analysis," 1996-04 (*Public Safety and Emergency Preparedness Canada*), p. 3, finding statistical risk procedures only 42-46% accurate. Referring to inability of RAIs to identify which sex offenders will recidivate, Jeffrey Abracen & Jan Looman, "Evaluation of Civil Commitment Criteria in a High Risk Sample of Sexual Offenders," 1 *Jour of Sexual Offender Commitment: Science and the Law*, 124-140 (2006), observe at p. 137: "...[I]t appears that the specificity (i.e., true positive rates) of the best of the actuarial instruments

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designed to assess risk for sexual recidivism is only about 30% for offenders in the age range of 35-50 years and for those over 50 years of age it is even lower ...Inadvertently, forensic health professionals may be returning to a point in history where predictions of risk are at chance levels." Accord: *John A. Fennel, J.D., Ph.D.*, in "Punishment by Another Name: The Inherent Overreaching in Sexually Dangerous Person Commitments," 35 *New England J. on Crim. & Civ. Confinement* 37, at 39 (Winter, 2009), *Italy declares*, "The science of sex offender research cannot accurately sort those offenders likely to recidivate from those who are not."

More recently, *Alan Butters*, writing in "Sex Offender Risk Assessment: A Reexamination of the Coffee Can Study," 42/43 *Int'l Jour. Of Law & Psychiatry* 31-36; DOI: 10.106/j.ijlp.2015.08.004 (September 2015), made these observations about the equivalence of actuarial tools and pure chance in assessing probability of re-offense by any given sex offender

[Abstract]

"There exists a valid concern among forensic psychology scholars that measures intended for sexual offenders have plateaued in their predictive accuracy. The current study examined this concern using the 'coffee can' methodology of Kroner, Mills, and Reddon (2005). The Iowa Sex Offender Risk Assessment (ISORA8), Level of Service Inventory - Revised (LSI-R), and Static-99R were used to predict various methods of detected recidivism (general, sexual, and violent recidivism) as compared to three randomly generated measures and a weighted generated measure. Independent correlation and receiver operating characteristic comparisons found that in almost all cases, generated measures outperformed established measures.... [emphases supplied]"

Obviously, a "generated measure" represents pure chance. Hence, outperformance by such generated measures of "established measures" (such as the Static-99R) implies that such established measures perform even less accurately than pure chance.

Beyond observations about inaccuracies in the various actuarial instruments in use, there is an inherent impossibility in applying even the most accurate actuarial figures derived from a given group of sex offenders to any sex offender who may be categorized in that group. *Richard W. Etwood*, "Defining Probability in Sex Offender Risk Assessment", *Int'l Jour. Of Offender Therapy & Comparative Criminology*, December 2016, Vol. 60(16), pp. 1928-1941, makes this point clearly by distinguishing between the "frequentist" theory, which ascribes such

group figures to individuals, and the "Bayesian" Theory, which holds that only data directly applicable to a specific individual can be used to determine any probabilities of future action as to that person. "By definition, only Bayesian probability can be applied to the single case. ...Although Bayesian probability is well accepted in risk assessment generally, it has not been widely used to assess the risk of sex offenders. I...show how the Bayesian view alone provides a coherent scheme to conceptualize individuals' risk of sexual recidivism" *Id.*, p. 1928.

a. An Indispensable Primer on Actuarial Risk Assessment ("ARA") and its Instruments ("ARAs")

Melissa Hamilton, "Adventures in Risk: Predicting Violent and Sexual Recidivism in Sentencing Law," 47 *Ariz. St. L. J.* 1 (2015), sets forth an invaluable yet succinct guide to the field of actuarial risk assessment that, despite its context of criminal sentencing, applies with equal rigor and clarity to sex offender commitment, as the following excerpts show:

(Text, p. 19):

"A. Fitness

"A primary hurdle for the introduction of any evidence in a legal proceeding is one of relevance. Also known as fitness, relevance requires that the proffered evidence should assist the trier of fact in understanding a fact at issue in the case.⁶⁷ Proponents of evidence-based sentencing advocate the use of actuarial risk tools as instructive for the utilitarian functions of sentencing. They presume that actuarial results are relevant to a factual determination of the individual defendant's future potential to cause harm. Unfortunately, such a premise may be naive, even inimical to the interest of justice." For several reasons, the data and other information that current actuarial tools provide appear to be a poor fit for such purposes.

"First, even promoters of evidence-based sentencing acknowledge that a key question is: measuring 'the risk of what?'"⁶⁸ Major goals of evidence-based sentencing practices include the ability to detect low risk defendants deserving short prison terms or potentially diverting them to community sanctions, while at the same time to sort out high risk defendants where preventive incapacitation might be justifiable. Presumably the idea of risk for this purpose is not some unitary characteristic focused solely on an abstract likelihood of antisocial behavior sometime in the distant future. Instead, at least five different dimensions of risk are conceivably pertinent. Probability is one of them, but it may not even be as important as the other four. The additional dimensions of risk include imminence of antisocial acts, type of offense (e.g., violent/sexual/other, contact/noncontact,

victim/victimless; child/adult victim), severity of harm, and frequency and duration of offending.⁶⁹

"In contrast to this more relevant multidimensional perspective on risk, developers of risk, developers of risk assessment tools generally have addressed only two dimensions. Many instruments count any illegal act, though the ones addressed more specifically herein at least differentiate violent and/or sexual recidivism from more general offending. Otherwise, the instruments tend to operationalize recidivism as a simple dichotomous measure."

(p. 20): "...[T]he goal of identifying low risk offenders cannot, including from a scientific standpoint, be informed by current actuarial risk assessments. These tools have not directly, or even indirectly, been developed or modeled to detect non-recidivists or to predict desistance from reoffending.⁹³ Instead, developers generally have tested and chosen factors that were positively correlated with future recidivism.⁹⁴

(p. 21): "...[T]he questions scored ...often constitute variables of convenience, items that evaluators will likely be able to score from available institutional or public files.⁹⁶ Thus, many individuals assessed in a purportedly 'low risk' grouping may simply fall there because the tool used lacks those statistically significant factors that are otherwise relevant to them. Notice ...that each of VRAG and Static-99, respectively, includes variables found to statistically correlate with violence recidivism that the other omits."

(p. 23): "B. Validity & Reliability

"A separate fundamental requirement for the admissibility of evidence in the law is that the information be sufficiently trustworthy, which, critically for expert evidence, requires that it be valid and reliable.¹¹⁹ According to Supreme Court doctrine, for purposes of legal evidence, validity asks 'does the principle support what it purports to show?' while reliability asks 'does application of the principle produce consistent results?'"¹¹¹"

(p. 24): "1. Predictive Validity

"...A form of psychometrics, predictive validity represents the ability of the tool to accurately foresee the outcome of interest occurring.¹¹³ Two empirical measures typify predictive validity: calibration and discrimination.¹¹⁴ Calibration refers to the consistency between predictions and observed outcomes.¹¹⁵ A well-calibrated tool for recidivism risk is one in which the average predicted recidivism rate is relatively equal to the actual rate of recidivism.¹¹⁶ For example, a tool is well-calibrated if it predicts that 10% of persons classified in the moderate risk group will recidivate if the actual observed recidivism rate of the moderate

risk group is about 10%. Discrimination determines how well a tool can differentiate those who experienced the outcome of interest from those who did not.¹¹⁷ For violence risk tools, if those who recidivated with a violent offense all were scored at higher risk levels than those who did not, the tool discriminates perfectly. A high degree of discrimination does not require, or even signify, a well-calibrated instrument.¹¹⁸ Thus, a scale can achieve a high rating for discrimination even when the average predicted risk of violent re-offense is significantly different than the actual percentage of violent recidivists.¹¹⁹"

(p. 25): "Several statistical measures of discrimination for actuarial tools are available, yet one of them in particular has come to dominate the relevant literature. The discrimination indicator of popular choice is called the 'area under the curve' (AUC), which is a fraction obtained from the receiver operating characteristic ("ROC") curve.¹²⁰ ... The AUC is a fraction providing a statistical measurement of the ROC curve.¹²⁵ AUC values lie between 0 and 1, with .5 indicating discriminatory ability no better than chance and 1 indicating perfect discrimination.¹²⁶

(p. 26): "...An effect size is a generic term to represent the statistical magnitude of the phenomenon studied.¹³² Yet these categorical descriptions are far more about improvement on chance than a clear barometer of statistical or practical significance.¹³³ ...In sum, the labeling of the discrimination ability of an actuarial tool as low or high is merely a social construct that is not only contested within the forensic field, it does not itself offer sufficient evidence about the predictive ability of the tool.

"...Even with AUCs in [the] range [of .70-.75], studies are showing a not insignificant occurrence of mistaken rankings. Erroneous ranking ...occurs often, perhaps 25 to 30% of the time."

(p. 28): "...[E]xperts contend that there is a natural limit to predicting human behavior and that actuarial technologies for recidivism risk have likely reached that limit already.¹⁴²

b. Calibration

"...One of the major differences in the tests for calibration and discrimination is that discrimination measures ignore base rates, which is the frequency of a given outcome in the population of interest.¹⁴⁵ If 10% of a sample of sex offenders were arrested for a new sexual offense within the period of observation, 10% would be the base rate of sexual recidivism for that sample. AUC measures ignore base rates."

(p. 29): "Only very recently have a few researchers focused on computing and reporting calibration statistics for the most popular violent and sexual recidivism actuarial tools. This Article

(Continued on page 4)

(p. 30): "Table 3 *Measures of Discrimination and Calibration*

Measure	Definition
Sensitivity	The proportion of recidivists correctly predicted to recidivate.
Specificity	The proportion of non-recidivists correctly predicted not to recidivate.
True Positive Rate	The proportion of recidivists correctly predicted to recidivate. Also known as sensitivity.
False Positive Rate	The proportion of non-recidivists who had been predicted to recidivate. It is the reciprocal of specificity (1 - specificity). Also known as false alarms and false positive predictions.
Positive Predictive Value	The proportion of people predicted to recidivate who were observed to recidivate.
Negative Predictive Value	The proportion of people predicted not to recidivate who are not observed to have recidivated.
Number Needed to Detain	The number of individuals judged to be at high risk who need to be detained in order to prevent a single incident of violence or sexual offense in the community.
Number Safely Discharged	The number of individuals judged to be at low risk who could be discharged prior to a single incident of violence or sexual offense in the community.

(p. 31): "Table 4 *2 x 2 Contingency Table*

		Outcome		
		Recidivist	Non-Recidivist	
Tool Results	Predicted to Recidivate	True Positives	False Positives	Positive Predictive Value
	Not Predicted to Recidivate	False Negatives	True Negatives	Negative Predictive Value
		Sensitivity	Specificity	

(Continued from page 3)

adds to this small body of research by calculating a few additional statistics which can be used to evaluate the predictive validity of the two most popular risk tools used today for violent and sexual recidivism."

[See tables, above.]

(p. 34): "...A meta-analysis of VRAG and Static-99 replication studies using new samples shows that at the deemed 'high risk' cutoffs of 7 and 6, respectively, the average PPVs were 66% and 33% respectively, meaning four out of ten false positives with VRAG and seven out of ten false positives for Static-99 in the high risk bins.¹⁵⁰ The alternative violent and sexual recidivism tools do not appear to perform any better.¹⁵¹"

(pp. 36-7): "[T]he evaluator's initial question should be whether the developmental sample(s) is sufficiently representative of the present group or individual to be examined. It may well not be. For instance, recall that VRAG's normative groups entirely comprised patients discharged from a maximum-security mental health hospital in Canada. Of the developmental samples

totaling about six hundred over two hundred had been adjudicated not guilty by reason of insanity and another one hundred were diagnosed psychotics.¹⁵² ...Static-99 was also reliant upon significant percentage of forensic psychiatric patients in their developmental samples.¹⁵¹ This means that the normed samples from these popular tools possessed quite unique group characteristics (e.g., significant numbers of mental disorders and mental health institutionalizations) that are quite unlikely to be shared by many other groups or in other settings. Plus, with these tools' developmental samples being entirely Canadian and United Kingdom offenders, they are unlikely to be representative of any group of routine sentencing defendants in the United States. Studies explicitly addressing the issue of differences between countries regularly find that the discrimination ability of actuarial recidivism risk tools for violence and sexual reoffending tends to be lower with samples in the United States as compared to samples in Canada¹⁵³ and the United Kingdom.¹⁶⁴

"The lack of representativeness renders the practice of reusing the proportionate estimates of recidivism from the

developmental samples (the experience tables) a particularly egregious practice as a result. If the new group is not similar to the developmental sample, the developmental sample is not a representative reference for the individual to be assessed, or the base rates significantly differ, adopting such estimates is specious.¹⁶⁵

"Some studies purport to have cross-validated and upheld the use of the popular recidivism tools on new samples by accentuating that the study found a large effect size for the AUC.¹⁶⁶ Yet, recall that this statistic tells only part of the story about predictive ability. [A] critical aspect to judging the desirability of relying upon any risk tool's experience table is to either validate that the observed recidivism rates in the new sample appropriately replicates or, in the very likely case that it does not, to either decline to use the tool or perhaps to replace it with one appropriately normed to the new group. Unfortunately, neither option often occurs in practice, whether in clinical settings or in legal contexts."

(p. 41): "The Static-99 developers have issued a revision, Static-99R,¹⁷⁷ with a new normed group which they call routine offenders, with a base rate of 6%.¹⁷⁸ ... [T]he Static-99R's calibration index remains weak. At its best (at risk bin 9), the revised instrument earns a PPV of 33%, meaning that two-thirds would be false positive predictions.¹⁷⁹

"...The authors concluded that the predicted base rate fluctuations were likely due to the various impacts of disparities in 'cohort effects (i.e., year of release), country, recidivism criteria, quality of recidivism information, offender type, or treatment participation' and the 'density of unmeasured risk factors external to Static-99R.'¹⁸³ The same meta-analysis found great variability from an alternative perspective. The underlying studies associated a predicted five-year sexual recidivism rate of 15% with Static-99R scores ranging from two to eight.^{184*}

(p. 42): "...The most recent revision to Minnesota's sexual recidivism instrument (MnSOST 3.1) performs even worse: PPVs of 20% and 16% in its top 10% and 15% ranking categories, respectively, leaving 80% false positive predictions at the highest levels.¹⁸⁶ ... [T]he great degree of false positives ... eight out of ten for Minnesota, reflect the tendency toward exceptional error rates.¹⁸⁷ ...

...So far, the analysis has focused on the fit, validity, and reliability of actuarial risk instruments and drew on empirical and logical issues that should provide cause for their use in legal proceedings."

(pp. 42-3): C. Group-Based Statistics: The G2i Problem

"...The G2i problem represents a basic disconnect between the scientific method, which operates by studying at the group level, and the law, which focuses on the individual case.¹⁸⁹ Translating from the population, being the group level - the "G" in G2i - to the individual case - the "I" in G2i - is a precarious adventure fraught with errors; but many judges, practitioners, even forensic assessors, fail to notice.¹⁹⁰

"...Actuarial tools are not case studies focused on individuals, nor are they intended to incorporate idiosyncratic traits or qualities of any single person.¹⁹¹ ... [R]arely occurring variables naturally cannot achieve the requisite significance.¹⁹² In the actuarial field for recidivism, the nature of study has been to build models for group-based predictions for reoffending, without attention to being able to predict which specific individuals in the group will relapse.¹⁹³

"...Scientific studies may properly show that young, undereducated males are significantly more likely to commit violent acts, but in the law the prosecution must still prove beyond a reasonable doubt that this particular young, undereducated male committed the violent crime for which he is prosecuted. Similarly, while scientific studies may find positive correlations between sexual recidivism and variables regarding race/ethnicity, neighborhood, and sexual preference, presumably in sentencing we remain interested in the prosecution's burden to show this individual defendant poses a high risk or re-offense to justify a longer prison sentence.¹⁹⁵ Otherwise, the law is merely profiling in its criminal procedure decisions."

(p. 45): "A cognitive error known as an ecological fallacy occurs when one attributes a group characteristic to any individual in the group.²⁰³ Some properties of a group only reside at the aggregate level. For instance, researchers may have observed in the sample studied the occurrence of every type of sexual offense imaginable (e.g., adult rape, statutory rape, child molestation, bestiality, voyeurism, exhibitionism, child pornography viewing). But no one individual in the group is likely to have committed several of them, much less all of them. Thus, the occurrence of a wide variety of sexual recidivism offenses is merely an aggregate statistic; it would be fallacious to describe the study results as evidence that individuals tend not to specialize in their sexual reoffending."

"Surely, the group level statistic that actuarial recidivism tools are perhaps most prized for is the proportional statistic tied to the relevant score or risk bin (e.g., 52% of those who scored 6 and higher sexually reoffended). Apply-

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ing that group proportion to any individual is likewise an ecological fallacy and deceptive. Thus, the communication of risk in absolutist terms ('this defendant is 52% likely to sexually reoffend') is perhaps the worst offender in terms of correctly interpreting the aggregate statistics."

(p. 46): "To be certain, actuarial tools cannot now, or ever, technically operate as a sort of test of an individual's propensity. ...Altogether, then, actuarial models cannot offer what many unfortunately presume they do, which is the ability to predict which individuals will reoffend."

(p. 47): "...[T]he assumption seems to be that offenders at each score or in each bin share common characteristics or histories. To the contrary, they may only share equivalent point totals. Because of the variety of factors available in the tools, study subjects may have received the same ending point totals based on completely different factors. To offer an example, two different people may share the same score where one received points on factors relating to criminal history, mental disorder, and trouble with alcohol, and the other for the recidivism predictors involving choice of victim, never being married, and young age. Thus individuals assessed with the same resulting scores, or combined in the same risk bins, may share none or just a few of the same characteristics. The pair may be more dissimilar than similar."

(p. 56): "...The notion that unreliable science (even junk science) should somehow be protected because it might constitute simply one source of information in a multi-factor decision should offend any strong adherent to the principles of law and the desire to admit only truthful evidence. A plethora of other independent authorities would claim to have the knowledge and ability to predict future behavior and would honestly assert a conviction that the foundations of those predictions lie in science and based on reliable methods. Envision astrologers, numerologists, and palmists who purportedly predict the future through objective and standardized means. Consider those trained in psychology and psychiatry who have in our history promoted prognostications of antisocial behavior founded on such 'scientific' theories as phrenology, physiognomy, and somatotypes. The 'only one piece of evidence' rationalization would admit as expert evidence each of

The Static-99R's calibration index remains weak. At its best (at risk bin 3), the revised instrument earns a PPV of 33%, meaning that two-thirds would be false positive predictions.

them."

Endnotes:

35 *Melissa Hamilton*, "Public Safety, Individual Liberty, and Suspect Science: Future Dangerousness Assessments and Sex Offender Laws," 83 *Temp. L. Rev.* 697, 744-49 (2011); *Jennifer Lantierman et al.*, "Sex Offender Risk Assessment, Sources of Variation, and the Implications of Misuse," 41 *Crim. Just. Behav.* 822, 834 (2014).

37 *Jeffrey C. Singer et al.*, "A Convergent Approach to Sex Offender Risk Assessment," in *The Wiley-Blackwell Handbook of Legal and Ethical Aspects of Sex Offender Treatment and Management* 341, 341 (Karen Harrison & Bernadette Rainey, eds., 2013).

38 Actuarial models presume multiple factors produce a better predictive tool than a few. *Joanna Amirault & Patrick Lussier*, "Population Heterogeneity, State Dependence and Sexual Offender Recidivism: The Aging Process and the Lost Predictive Impact of Prior Criminal Charges over Time," 39 *J. Crim. Just.* 344, 344 (2011).

87 *Daubert v. Merrell Dow Pharm., Inc.*, 509 U.S. 579, 591 (1993).

88 *Jordan M. Hyatt et al.*, "Reform in Motion: The Promise and Perils of Incorporating Risk Assessments and Cost-Benefit Analysis into Pennsylvania Sentencing," 49 *Duq. L. Rev.* 707 (2011), at 743.

89 *Michael H. Fogel*, "Violence Risk Assessment Evolution: Practices and Procedures," in *Handbook of Violence Risk Assessment and Treatment: New Approaches for Forensic Mental Health Professionals* 41 (Joel T. Andrade, ed. 2009), at 43.

93 *Leam A. Craig & Anthony Beech*, "Best Practice in Conducting Actuarial Risk Assessments with Adult Sex Offenders," 15 *J. Sexual Aggression* 193, 206 (2009).

94 *Id.*

96 *Vernon L. Quinsey et al.*, *Violent Offenders: Appraising and Managing Risk* 143 (1998).

110 *Daubert v. Merrell Dow Pharm., Inc.*, 509 U.S. 579, 592 (1993).

111 *Id.* at 590 n. 9.

113 *Jay P. Singh*, "Predictive Validity Performance Indicators in Violence Risk Assessment: A Methodological Primer," 31 *Behav. Sci. & L.* 8, 8 (2013).

114 *Id.*

115 *N. Tollenaar & P.G.M. van der Heijden*, "Which Method Predicts Recidivism Best?: A Comparison of Statistical, Machine Learning and Data Mining Predictive Models," 176 *Royal Stat. Soc'y* 565, 569 (2012).

116 *Nancy R. Cook*, "Use and Misuse of the Receiver Operating Characteristic Curve in Risk Prediction," 115 *Circulation* 928, 928 (2007).

117 *Tollenaar & van der Heijden*, *supra* note 115, at 569.

118 *Cook*, *supra* note 116, at 928.

119 *Id.*

120 *Paul R. Falzer*, "Valuing Structured Professional Judgment: Predictive Validity, Decision-Making, and the Clinical-Actuarial Conflict," 31 *Behav. Sci. & L.* 40, 43 (2013). Since its introduction in 1994, ROC testing is the dominant predictive validity diagnostic in violence risk assessment. *Id.* at 44.

125 *Martin Rattenberger et al.*, "Prospective Actuarial Risk Assessment: A Comparison of Five Risk Assessment Instruments in Different Sexual Offender Subtypes," 54 *Int'l J. Offender Therapy & Comp. Criminology* 169, 176 (2010).

126 *Id.*

132 *Ken Kelley & Kristopher J. Preacher*, "On Effect Size," 17 *Psychol. Methods* 137, 140 (2012).

133 *Id.* at 138-39.

142 *John Monahan & Jennifer L. Skeem*, "Risk Redux: The Resurgence of Risk Assessment in Criminal Sanctioning," 26 *Fed. Sent'g Rep.* 158, 158 (2014).

145 *Erica Beecher-Monas*, "The Epistemology of Prediction: Future Dangerousness Testimony and Intellectual Due Process," 60 *Wash. & Lee L. Rev.* 353, 390 n. 201 (2003).

150 *Jay P. Singh et al.*, "A Comparative Study of Violence Risk Assessment Tools: A Systematic Review and Meta-regression Analysis of 68 Studies Involving 25,980 Participants," 31 *Clinical Psychol. Review* 499, 507 tbl 4 (2011).

151 *Seena Fazel et al.*, "Use of Risk Assessment Instruments to Predict Violence and Antisocial Behavior in 73 Samples Involving 24,827 People: Systematic Review and Meta-Analysis," 345 *Brit. Med. J.* 1, 10 tbl. 3 (2012) (reporting averages from meta-analysis averages in sexual recidivism tool studies: sensitivity (88%), specificity (34%), PPV (23%), NPV (93%), NND (5), and NSD (14))....

159 *Marnie E. Rice et al.*, "Validation of and Revision to the VRAG and SO-RAG: The Violence Risk Appraisal Guide - Revised (VRAG-R)," 25 *Psychol. Assessment* 951, 953 (2013).

161 *R. Karl Hanson & David Thornton*, "Improving Risk Assessments for Sex Offenders: A Comparison of Three Actuarial Scales," 24 *Law & Hum. Behav.* 119, 122-23 (2000).

163 *Min Yang et al.*, "The Efficacy of Violence Prediction: A Meta-Analytic Comparison of Nine Risk Assessment Tools," 136 *Psychol. Bull.* 740, 754 (2010).

164 *R. Karl Hanson & Kelly E. Morton-Bourgon*, "The Accuracy of Recidivism Risk Assessments for Sexual Offenders: A Meta-Analysis of 118 Prediction Studies," 21 *Psychol. Assessment* 1, 7 (2009) (reporting meta-analysis findings of AUCs for Static-99 in samples in the UK were much higher (average .90)

than for US samples (average .60)).

165 *Gina M. Vincent et al.*, "The Use of Actuarial Risk Assessment Instruments in Sex Offenders," in *Sex Offenders: Identification, Risk Assessment, Treatment, and Legal Issues* 70, at 81 (Fabian M. Saleh, et al., eds. 2009).

166 See generally *Hanson & Morton-Bourgon*, *supra* note 164; *Rice et al*, *supra* note 159.

177 *Rebecca E. Swinburne Romine et al.*, "Predicting Reoffense for Community-Based Sexual Offenders: An Analysis of 30 Years of Data," 24 *Sexual Abuse* 501 at 502-03 (2012).

178 *Jay P. Singh et al.*, "Rates of Sexual Recidivism in High Risk Sex Offenders: A Meta-Analysis of 10,422 Participants," 7 *Sexual Offender Treatment* 1, 6 (2012) (noting average follow-up of 81.4 months).

179 See "Static-99R, Observed and Estimated 5 Year Sexual Recidivism Rates for Static-99R: Routine Sample," *Static99* (Nov. 15, 2009), http://www.static99.org/pdfdocs/detailed_recid_tables_static99r_2009-11-15.pdf (using fixed follow-up).

183 *Leslie Helmus et al.*, "Absolute Recidivism Rates Predicted by Static-99R and Static-2002R Sex Offender Risk Assessment Tools Vary Across Samples: A Meta-Analysis," 39 *Crim. Just. & Behav.* 1148, 1164 (2012) (weighted averages reported in the text from fixed effects models).

184 *Id.*

186 *Minn. Dept. of Corr., The Minnesota Sex Offender Screening Tool-3.1 (MnSOST-3.1): An Update to the MnSOST-3*, at 20 tbl. 3 (2012), available at <http://www.doc.state.mn.us/pages/files/large-files/Publications/MnSOST3-IDOCReport.pdf>, for PPV calculation data.

187 See *Va. Criminal Sentencing Comm'n, Assessing Risk Among Sex Offenders in Virginia* 89 fig 3 (2001), available at http://www.vscs.virginia.gov/sex_off_report.pdf for PPV calculation data. *Id.* at 19-20.

189 *David L. Faigen et al.*, "Group to Individual (G2i) Inference in Scientific Expert Testimony," 81 *U. Chi. L. Rev.* 417, 418 (2014).

190 *Id.* at 420.

191 *Vincent et al. supra* note 165 at 82.

192 *Id.*

193 *Thomas Nilsson et al.*, "The Precarious Practice of Forensic Psychiatric Risk Assessments, 32 *Int'l J. L. & Psychiatry* 400, 403 (2009).

195 Still, a potential difference between these situations is that adjudicating guilt is a retrospective exercise whereas sentencing, at least to the extent it incorporates utilitarian concerns, is forward-looking where future

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predictions are involved. Others argue predictions of future behavior are always group-based thinking exercises. Eric S. Janus & Robert A. Prentky, "Forensic Use of Actuarial Risk Assessment with Sex Offenders: Accuracy, Admissibility and Accountability," 40 *Am. Crim. L. Rev.* 1443, 1478-79 (2003) 203 Nicholas Scurich et al., "Innumeracy and Unpacking: Bridging the Nomothetic/Idiographic Divide in Violence Risk Assessment" 36 *Law & Human Behav.* 548, 549 (2012).

[Text continued next page.]

b. ARA Cannot Make Any Prediction as to Any Individual's Probability of Re-Offense.

Actuarial models cannot offer what many unfortunately presume they do, which is the ability to predict which individuals will reoffend.

A governmental review of sex offender civil commitment undertaken by the State of Virginia questioned whether any ARAI is able to reliably predict whether a given individual will re-offend. ARAIs "have limited predictive ability for a single person. Researchers emphasize that accurate predictions for a large group as a whole do not necessarily translate into accurate predictions for a specific individual within that group." *Joint Legis. Audit & Rev. Comm'n. Review of the Civil Commitment of Sexually Violent Predators* H.R. Doc. No. 5 (Va. 2012), at 32.

Melissa Hamilton, "Back to the Future: The Influence of Criminal History on Risk Assessments," 20 *Berkeley J. Crim. L.* 75, 115-16 (Spring 2015), addresses the impossibility of prediction of future crimes by a specific individual thus:

"...[C]ritics argue that it seems unfair to penalize a person just for the potential of future behavior. From a theoretical perspective, these future risk-based practices deny the specific deterrence ability of the immediate conviction, sentence, or programming. They tend to negate broader notions of free will as well. Humans are fundamentally unpredictable. There can be no certainty as to whether a person will or will not commit some speculative future act. A policy that permits aggravated discipline for a hypothetical, future offense is akin to an informal scheme of inchoate crimes. Imperfectly, such a policy disregards criminal law's otherwise fundamental elements of proving a culpable mental state (*mens rea*) coupled with voluntary conduct (*actus reus*). The crime is merely hypothetical; the consequences to the individual, however, are very real..."

p. 119: "Virtually all research that presents a scheme to predict dangerous behavior (be it future offending,

violence, substance use, or another undesirable outcome) is not technically predictive. Rather, ...these are better thought of as 'post-diction' studies in which offenders are retrospectively classified into groups based on measures of past behavior. (citing Kathleen Auerhahn, "Conceptual and Methodological Issues in the Prediction of Dangerous Behavior," 5 *Criminology & Pub. Pol'y* 771, 772 (2006)."

"...The actual method compares similarities of an individual's profile to the combined knowledge of the past events of a convicted group of offenders. An individual may share some, but typically not all, of the characteristics of the original sample. Hence, applying the results of an actuarial scale to an individual can have the effect of reducing the predictive accuracy of the scale. This is known as the "statistical fallacy effect."

"A related complaint regarding the G2i [group-to-individual] challenge applies to criminal justice penalties based on risk: the person is not necessarily being sanctioned on his own merits. Penalizing a person by a risk assessment arrived from group data means that punishment becomes situated on shared group characteristics and thereby is too de-individualized. The scheme is akin to punishing someone for what other, purportedly statistically-matched persons have done." (emphases supplied)

David J. Cooke & Christine Michie, in "Limitations of Diagnostic Precision and Predictive Utility in the Individual Case: A Challenge for Forensic Practice," 34 *Law and Human Behavior* 259, 260 (Aug. 2010), explain:

"The problem of making predictions for individuals from statistical models is now recognized in other disciplines. In relation to medical risks, Rose (1992) expressed the position clearly: 'Unfortunately, the ability to estimate the average for a group, which may be good, is not matched by any corresponding ability to predict what individuals are going to fall ill soon.' (p. 48). In relation to reoffending, Copas and Marshall made a related point: '...the score is not a prediction about an individual, but an estimate of what rate of conviction might be expected of a group of offenders who match that individual on the set of covariates used by the score.' (p. 170)" (further cites omitted; emphases supplied)

At pp. 271-72, Cooke & Michie explain further and conclude thus:

"The application of between-subject information to guide within-subject inference is subject to the logical fallacy of division (Roper, 1990). One form of this fallacy rests on drawing an invalid conclusion about an individual member of a group based on the collective properties of the group.... A common

defense of the actuarial approach is founded upon this fallacy. 'If it is alright for life insurance companies, it should be alright for psychology.' The analogue is false. The actuary makes a profit by predicting the proportion of insured lives that will end in a particular time period. The actuary has no interest in predicting the deaths of particular individuals...."

"In summary, in the basis of empirical findings, statistical theory, and logic it is clear that predictions of future offending cannot be achieved, with any degree of confidence, in the individual case." (emphases supplied)

Stephen D. Hart & David J. Cooke, "Another Look at the (Im-)Precision of Individual Risk Estimates Made Using Actuarial Risk Assessment Instruments [ARAIs]," 31 *Behav. Sci. Law* 81-102 (2013), explain these points and add other related ones:

[p. 81, Abstract]: "Consistent with past research, ARAI scores were moderately and significantly predictive of failure in the aggregate, but group probability estimates had substantial margins of error and individual probability estimates had very large margins of error. We conclude that, without major advances in our understanding of the causes of violence, ARAIs cannot be used to estimate the specific probability or absolute likelihood of future violence with any reasonable degree of precision or certainty. The implications for conducting violence risk assessments in forensic mental health are discussed.

[p. 94]: "As Niels Bohr purportedly quipped, 'Prediction is difficult, especially about the future.'"

[p. 97]: "Legal Admissibility of ARAIs
"The issue of legal admissibility of ARAIs is complex, especially as the relevant laws vary across jurisdictions (Janus & Prentky, 2003). But in jurisdictions that consider them scientific or technical procedures, it is difficult to understand how ARAIs can be found legally admissible under *Daubert* or similar criteria (e.g., *Daubert v. Merrell Dow Pharmaceuticals*, 1993; *Kumho Tire Co. v. Carmichael*, 1999) when the margins of error for individual risk estimates made using the tests are large, unknown, or incalculable."

Thus, ARA tells us nothing of use for predicting a given individual's personal risk of re-offense. Even in the hypothetical previously discussed of an ARA-based 75% score, there is simply no way to know if the particular individual under scrutiny (an SOCC respondent, let us say) is within the 75% who reoffended or the 25% who did not. Permit a coin-flipping simile. Flip two coins. The 50-50 chance outcome of the first flip determines, we will assume, that our hypothetical individual is within the marginal 50%, that is, where half will reoffend and half

will not. Now simply flip the second coin. Such is pure chance, not scientific prediction.

Now recall our 'auditorium' thought experiment from Section VI.D, supra. The outcome of that supposition was that prediction of which specific sex offenders out of that hypothesized 1,000 in the auditorium would later reoffend would be wrong 96.8% of the time – regardless which ARA instrument the raters used.

This conceptual flaw of the ARA approach caused the court in *State v. Rosado*, 889 N.Y.S.2d 369 (Supr. Ct. Bronx County 2009) to reject a Static-99 score. "The Static-99 has no predictive value for an individual. The Static-99 does not and cannot measure an individual's risk of reoffending. ...[T]he Static-99 score only indicates that a respondent has characteristics which correlate within a group of individuals whose rate of recidivism was "x" percent." *Id.*, at 379. Because of this, and the fact that such actuarial outcomes cannot say anything about a given respondent's volitional control capacity, such ARA evidence was rejected in *Rosado* as confusing to the factfinder. The *Rosado* court also found that, due to a 2008 revision by the developers of the Static-99, replacing the former edition and involving a two-tier system of deriving greatly varied percentages, the Static-99R was not accepted by the scientific community (see *infra*).

As a purely statistical approach, it is important to note that ARA inherently cannot make a prediction as to a given individual, but instead only to some group that is claimed to include that individual. Percentages derived through ARA only refer to the portion of that group who later committed a sex crime. There is no way to tell if the individual in question would later turn out to be in that portion, or instead in the portion that did not commit a later sex crime, even assuming that assignment of the individual to that statistical group is fair and accurate on the facts. As we shall see, it is instead arbitrary, without relationship to actual facts in common, or their absence. To grasp these fatal flaws, one must first consider the ARA technique. ARA starts with a series of "factors" placed on a checklist form (a "risk assessment instrument"/"RAI"). Each of these factors was selected by the creators of a given RAI because, without regard to interaction with any other factors, some typically modest level of correlation to later sexual re-offense had previously been reported by some researcher. Whether or not any true causal relationship connects a give factor to such future recidivism is unknown, and ARA disregards this question altogether.

(Continued on page 7)

(Continued from page 6)

c. Scoring Points for Any Un-Convicted Criminal Allegations, Charged or Uncharged, Is Unscientific and Deprives the Scored Individual of Fundamental Fairness.

Melissa Hamilton, "Back to the Future: The Influence of Criminal History on Risk Assessments," 20 *Berkeley J. Crim. L.* 75 (Spring 2015), succinctly discusses this point of unscientific and unfair forensic assumptions as follows:

pp. 104-05: "B. Nonadjudicated Criminal History
"Formal recidivist premiums usually require official convictions to trigger them. Most risk tool measures of past offending do not limit themselves to convictions. Depending on the instrument, a variety of measures are counted, including arrests¹⁴⁰, charges¹⁴¹, parole/probation revocations¹⁴², other types of supervision violations¹⁴³, incarceration¹⁴⁴, other official records¹⁴⁵, or self-report¹⁴⁶. Generally, coding rules for many instruments do not exclude counting any of the aforementioned even if the individual was otherwise officially exonerated, such as via an acquittal, police decision not to arrest, or prosecutorial declination based on insufficient evidence. In other words, risk instruments tend to presume that any evidence – even circumstantial – of prior offending behavior must be truthful and accurate as proving the occurrence of such behavior, and accordingly deserves to be tallied to increase the risk profile. This scenario is generally the case regardless of the evidence actually obtained and/or events occurring afterward that might refute such allegations.

"...[R]isk instruments generally permit coding for criminal history measures without requiring convictions. Hence, the potential for weak, if not entirely inaccurate, information to guide risk assessment outcomes is real."

[Notes 140-46:

140 James L. Johnson et al., "The Construction and Validation of the Federal Post Conviction Risk Assessment (PCRA)," 75 *Fed. Probation* 16, 26 app. 2 (2011); N.S.W. Dept. of Corrective Servs., LSI-R Training Manual, at 19-20 (2002); Vernon L. Quinsay et al., *Violent Offenders: Appraising and Managing Risk* at 239 (1998).

141 "Federal Pretrial Risk Assessment Instrument: User's Manual and Scoring Guide," *Off. Of Prob. And Pretrial Servs.* (2013) at 7; MnSOST, supra note 116; "Validation of Risk Scale," *PA. Comm'n on Sent'g* 6 tbl. 1 (2013); Hanson & Thornton, supra note 119

142 N.S.W. Dept. of Corr. Servs. supra note 140, at 15; Quinsay et al., supra note 140, at 238; Christopher D. Webster et al. *HCR-20: Assessing Risk for Violence* 11 (1997)

143 Johnson et al., supra note 140;

Thomas Blomberg et al., "Validation of the Compas Risk Assessment Classification Instrument," *Ctr. for Criminology and Pub. Policy* 15 (2010); N.S.W. Dept. of Corr. Servs. supra note 140, at 19-20; Quinsay et al., supra note 140, at 238.

144 N.S.W. Dept. of Corr. Servs. supra note 140, at 19-20.

145 *Federal Pretrial*, supra note 141; *Office of Prob. & Pretrial Servs.*, "Federal Post Conviction Risk Assessment: Scoring Guide" § 1.1 (2011) ("Count all contact with law enforcement resulting from criminal conduct or status offenses [truancy, curfew violations, run-away]. Count arrests and referrals to court for all offenses [including traffic]. Consider official records and self-report."); N.S.W. Dept. of Corr. Servs. supra note 140, at 15.

146 Shannon Toney Smith et al., "Adapting the HCR-20V3 for Pre-trial Settings," 13 *Int'l J. Forensic Mental Health* 160, 169 (2014); *Fed. Pretrial*, supra note 145, at 7; *Office of Prob. & Pretrial Servs.*, "Federal Post Conviction Risk Assessment: Scoring Guide" § 1.3 (2011)

p. 105: "1. Evidentiary Inadequacy

"As the coding for criminal history in actuarial tools often does not require a formal conviction, individuals may score positively for criminal acts that they did not commit. In the law, a simple arrest is insufficient proof that the arrestee actually committed the criminal offense alleged.¹⁴⁷ Arrests frequently 'happen to the innocent as well as the guilty.'¹⁴⁸

...Outside of conviction data, record-keeping can be sketchy or the evidence too thin to reasonably score as criminal history events. Thus, counting anything other than convictions when the legal and practical consequences to the defendant may be significant renders risk instrument coding for criminal history variables as subjective, unreliable, and unjust.¹⁴⁹"

[Notes 147-49:

147 Michael Edmund O'Neill et al., "Past as Prologue: Reconciling Recidivism and Culpability," 73 *Fordham L. Rev.* 245, 267 (2004).

148 *United States v. Zapate-Garcia*, 447 F.3d 57, 60 (1st Cir. 2006)

149 O'Neill, supra note 147.]

As Nials Bohr purportedly quipped, "Prediction is difficult, especially about the future."

d. Predicting Future Crime from Prior Criminal Record Effectively Creates an Impermissible Status Offense of Being a "Criminal."

Melissa Hamilton, "Back to the Future..." supra at 119-23, continues, shifting to examine future crime probability prediction from this perspective of effective creation of a status crime of criminality with these observations:

pp. 119-20: "C. Punishing Status
"An alternative construction to framing the idea of sanctioning the hypothetical crime via the proxy of criminal history is to conceive of the issue as one of penalizing an individual for his status. Here, the criminalizing status is one presumed to be indicative of future dangerousness. A couple of overlapping frames can be explored in this idea of exploiting incapacitating options based on perceived status. The status-oriented perspectives are that of a 'criminal' or one based on his (assumed) deviant character. Each potential status is formed on the existence of past offending behavior, is presumed causative of future antisociality, and is deemed fixed in nature.

Being a 'Criminal' – A Status Offense?

"Two constitutional issues arise with criminalizing an individual for his status. The United States Supreme Court in the case of *Robinson v. California* held that it was constitutionally impermissible to impose criminal punishments based on mere status.²¹⁶ ...One of the Court's aversions appeared to be the state's concession that a person could be continuously guilty of a criminal offense that targeted one's chronic status.²¹⁸..."

p. 122: "[A] person with a criminal record is presumed dangerous, one especially deserving contempt and fear. The criminal is conceived 'in terms of degeneracy, avarice, malice, and lust.'²²⁷"

pp. 122-23: "A debate among retributivists exists on the legitimacy of this character-based approach. A prominent retribution theorist suggests that a second-time offender bears greater culpability by demonstrating a 'character trait' in repeatedly disregarding others' rights.²³⁰ 'This approach views a prior record as a factor used to assess the defendant's character, presumably on the assumption that character has some relatively fixed quality that can be measured.' The question, in short, is reduced to whether this defendant has an evil character, and how evil.²³¹ Others disagree on retributivist grounds. One author contends that a character-based approach would be a slippery slope: such an approach would likewise authorize evidence in addition to criminal history that could attest to character, a regime in which strict just desert philosophers would likely disapprove.²³²"

[Notes 216-232:

216 *Robinson v. California*, 370 U.S. 660, 666-667 (1962).

218 *Id.* at 666.

227 *Harcourt*, supra note 136, at 190.

230 Aaron J. Rappaport, "Rationalizing the Commission: The Philosophical Premises of the U.S. Sentencing Guidelines," 52 *Emory L.J.* 557, at 599 (2003)

(regarding Andrew von Hirsch) 231 *Id.*
232 *Id.* at 600.]

e. Most ARAs (Actuarial Risk Assessment Instruments) Double-Count Single Prior Criminal Events, Exaggerating Their Reported Probability of Future Re-Offense.

Melissa Hamilton, "Back to the Future..." supra at 98, addresses this ridiculously anti-scientific mis-counting thus:

"Another reason for the n-tuple effect arises within the risk technologies themselves. Many risk instruments assign points more than once for a single prior criminal event, particularly those that maintain numerous and overlapping criminal offending items in their scoring sheets. For instance, six of the nine variables in a sexual recidivism risk tool with the acronym Mn-SOST developed in Minnesota (and used in other jurisdictions) may have overlapping consequences as all involve convictions, events in prison, and release conditions. A hypothetical offender convicted of stalking and forcing sexual contact with a male victim in a public place and who was released after serving time without supervision would be scored in six of the nine categories. [Note 116: "Minnesota Sex Offender Screening Tool – 3.1 (MnSOST-3.1) Coding Rules," *Minn. Dept. of Corrs.* 24 (2012), <http://www.doc.state.mn.us/pages/files/large-files/Publications/MnSOST3-1DOCReport.pdf> (scoring (1) predatory offense sentence, (2) felony sentence, (3) stalking, (4) unsupervised release, (5) male victim, (6) crime in a public place).] This risk scoring represents a sextuple effect of the same course of conduct

"...Static-99, the popular sexual recidivism instrument, tallies separately the number of prior sex offenses, any convictions of non-contact sexual offenses, number of prior sentencing dates, convictions for non-sexual offenses, and convictions of non-sexual violence. [Note 119: R. Karl Hanson & David Thornton, "Improving Risk Assessments for Sex Offenders: A Comparison of Three Actuarial Scales," 24 *Law & Human Behav.* 119, at 122 (2000).]"

The Latest Monstrosity by the MN-DOC Data-Cookers:

The MnSOST-4: Spinning Farther Away from Science to Perpetuate the Myth of a Small Cadre of 'Superpredators.'

by Cyrus Gladden

(Continued on page 8)

(Continued from page 7)

As reported by Brian Heinsohn, Scoring the MnSOST-4, Risk Assessment/Community Notification Unit, Minn. Dept. of Corrections, the MnSOST-4, like its predecessors, is scored by number of sentences, rather than by convictions – a highly idiosyncratic method otherwise unknown to the entire field of risk assessment of sex offenders. At the very least, this prevents any comparison of predicted recidivism probabilities with predictions made by other actuarial recidivism-risk instruments. Worse, however, use of sentences introduces the prospect of departure from the practice of counting instances of sexual abuse or rape, since sentencing in most states can either be separate by victim or act, or can alternatively be a single aggregate sentence covering numerous acts, even with separate victims – a scoring practice that makes results vary randomly and lack any true relationship to a past record of offenses.

Further, sentences are scored for violent felonies (including terroristic threats and all sexual felonies), predatory (sexual crimes, plus either murder or kidnapping) felonies, and for simply any felonies, all cumulative to each other. In this way, all sexual felonies will be scored triply (once in each category), and non-sexual violent felonies will always be scored doubly, simply for fitting in the respective category and in the 'any felony' category.

As a departure from the sentences-only general approach of the MnSOST-4, it also counts 'citations' for any of the following acts "Harassment"; "Harassing phone calls"; "Stalking"; and violations of: (a) an "Order for Protection"; (b) a "No Contact Order"; or (c) a "Restraining Order." The creators of MnSOST-4 claim to have statistically discovered a relationship between such acts or acts of criminal violence and later sexual offending, despite the lack of such relationship being found by other actuarial instruments, and no relationship discovered through other scientific investigation. However, they do not release either such statistics or the algorithm by which they were derived. This makes validity of the MnSOST-4 impossible to verify; we simply have to take the creators' word for the existence of such relationship and for the assigned weight given to each such claimed relationship.

MnSOST also assigns an additional point for "stranger victims" (many rapes) and defines a "stranger" as one known to the perpetrator for anything less than 24 hours (which includes many date rapes). This contorts the notion of a sexual assault on a perfect stranger into a different concept of a sexual crime of any kind with a very recent acquaintance.

Up to five sexual convictions for each

male victim are tallied, but with no parallel limit stated for a given female victim. This design flaw appears to leave scoring for female victims up to the arbitrary discretion of the scorer.

Other factors used, such as whether the crime was committed in a public place (inherently true of an outdoor rape), but not assignable as a point if the rape occurred in a residence), and whether victims from more than one age range were victimized by the offender, (presumably over an entire criminal career) have unknown relationships, if any, to later sexual reoffenses. So, for that matter, suicide concerns and completion of both chemical dependency treatment and sex offender treatment have no known relationship to later sexual offending (or its lack).

The MnSOST's various versions have produced wildly inconsistent predicted recidivism rates. Although the MnSOST 4.0 has drastically lowered certain of its insane claims of recidivism from previous versions, this change only applies to some, effectively just narrowing the spotlight onto other unfortunates still baselessly asserted to be near-certain future recidivists. MnSOST's creators have refused to divulge any data from the (very small) research studies on which the MnSOST was based and even the formula by which MnSOST scores are calculated, thwarting all attempts at academic review and replication of MnSOST procedures, factors, and calculations.

One thing, however, can be deduced from a distance: The math and statistical techniques used in the MnSOST (all versions) create a wide gulf between the great body of released inmates (as to which the average rate of recidivism is 2.0 percent and the range in which all in this artificially created grouping around that average is narrow) and a relatively isolated range of inmates with baseless and unbelievably extreme predicted recidivism rates, topping off in the 90-100% range. This is completely contrary to the probability calculations of any other recidivism prediction tool without explanation, much less proffered scientific justification. It appears to be a play to the myth of 'superpredators' supposedly responsible for most sexual recidivism. It is an attractive trope to prosecutors and judges, but is contrary to known facts.

Unscientific scoring factors on which this isolated group of inmates is selected to accuse them of essentially being 'recidivating machines' include such plays to modern myths of just generally violent, bad men capable of anything as these prior convictions or charges: terroristic threats, harassing phone calls, and stalking. Another scoring factor plays to homophobic bias: cumulative scoring for each male victim, with double and triple counting of each for interaction with other

factors (in 'cribbage-style' overlap).

Still other factors just make no scientific sense, and apparently were claimed simply to vilify specific individuals in the study sample or to imply an ineffable mystique of the MnSOST 4.0 – such idiosyncrasies without relevance as: deeming a vehicle a "private place" unless a convertible's top is down; artificial division of minor victims into age groups for the sole purpose of adding points if a former offender had victims in multiple age groups (this double-counting number of victims of a pedophile, as opposed to those of an adult-oriented rapist); past suicide attempts; educational attainment (or its lack); treatment completion only if both sex offender and chemical dependency treatments are both completed; and a technical parole violation regardless of lack of connection to sexual matters.

Finally, MnSOST 4.0 cannot be applied to any sex offender facing a petition for commitment or already under commitment, since the factor of age at anticipated release cannot be known. Yet this 'carve-out' dictated by the MnSOST itself is regularly ignored by raters eager to use it on this cohort because of its handy condemnatory calculation of extreme probabilities using mathematical manipulation alone.

Grant Duwe, "Better Practices in the Development and Validation of Recidivism Risk Assessments: The Minnesota Sex Offender Screening Tool-4 (MnSOST-4)," 30(4) *Criminal Justice Policy Review*, 538-564 (July 13, 2017), at p. 538, Abstract, states the following about creation of the MnSOST-4:

"This study examines the development and validation of the Minnesota Sex Offender Screening Tool-4 (MnSOST-4) on a dataset consisting of 5,745 sex offenders released from Minnesota prisons between 2003 and 2012. Bootstrap resampling was used to select predictors, and k-fold and split-sample methods were used to internally validate the MnSOST-4. Using sex offense reconviction within 4 years of release from prison as the failure criterion, the data showed that 130 (2.3%) offenders in the overall sample were recidivists. Multiple classification methods and performance metrics were used to develop the MnSOST-4 and evaluate its predictive performance on the test set. The results from the regularized logistic regression algorithm showed that the MnSOST-4 performed well in predicting sexual recidivism in the test set, achieving an area under the curve (AUC) of 0.835. Additional analyses on the test set revealed that the MnSOST-4 outperformed the MnSOST-3, MnSOST-R, and the Static-99 in predicting sexual reoffending."

To the contrary from its self-adulation (Duwe being one of the designers of the

MnSOST-4), each of the underlined passages point toward known issues that degrade accuracy of an ARAI. "Bootstrap resampling" simply repeats, and therefore overemphasizes the impact of any given factor used in the ARAI. "Internal validation" amount to nothing more than obtaining identical results with each run of the test on the very same data. Only "cross-validation" holds any significance in terms of scientifically accepted "validation." The fact that the current recidivism rate has shrunk to 2.3% (about a 30% drop from the previous MnSOST 3.1 base rate of 3.2%) greatly exacerbates the inaccuracy problem arising from discrepancy between a low base rate and the high risk probability percentage predictions the test was designed to create. Each of those high-risk predictions now have at least 150% worse inaccuracy and uncertainty rates than in the MnSOST 3.1. (Wollert's math [see: Richard Wollert, "Low Base Rates Limit Expert Certainty When Current Actuarial Are Used to Identify Sexually Violent Predators: An Application of Bayes's Theorem," 12 *Psychol., Pub. Pol'y & L* 56, 72 (2006)] indicates that the inaccuracy at great divergence of a high-probability recidivism prediction from the base rate is actually increased geometrically, not arithmetically). As in Version 3.1, "multiple classification methods" multiply the recidivism probabilities applicable to any individual by counting each such classification factor as if it were the sole cause of such recidivism in each member of the test sample. Using "performance metrics" as an adjustment is merely a fancy term for employing 'fudge factors' to cover inaccuracy in the actual calculation from such factors – a kind of statistical misuse of 'shims' when the outcomes do not meet expectations/hopes.

Lastly, use of a calculation known as a "regularized logistic regression algorithm" results in drawing in most individual results in a test sample to a mean average figure. In the case of such a low base rate, this has the effect of casting most offenders who are rated on the MnSOST-4 as being only at or only modestly in excess of that figure, while compensatorily mathematically adjusting the recidivism probability percentage of those furthest upward away from that base rate as having a vastly exaggerated risk percentage. That this effect is inescapable in the small-sample context of MnSOST-4 is explained in Brian Abbott, "Applicability of the New Static-99 Experience Tables in Sexually Violent Predator Risk Assessments," 4(1) *Sexual Offender Treatment* (May 2009):

"...The calculation of the logistic regression recidivism estimates are based on the number of subjects contained in the fixed follow up groups. This results in far fewer subjects comprising the risk groups as compared to the life table

(Continued on page 9)

(Continued from page 8)

analysis method. ...The available number of subjects in the overall Combined Sample and the two derivative samples (CSC and High Risk) contain substantially fewer subjects with the total reduction ranging between 9% and 75%. The reduced number of sexual offenders in the fixed follow up and logistic regression methods of calculating sexual recidivism rates has important implications regarding the accuracy and representativeness of these samples to sexual offenders in general and SVPs in particular. The declining number of subjects in the fixed follow up and logistic regression estimates become increasingly apparent in the small number of subjects at higher risk levels, which is evident in large margins of error in the 95% confidence intervals." The fact that the MnSOST-4 has an extremely wide 95% C.I. confirms this impact.

Thus, use of a "regularized logistic regression algorithm" is not just antiscientific nonsense, it is a vicious instance of 'victim-picking' by falsely casting those comparative few remaining after that bootstrap resampling as monstrously near-certain recidivists for purely political purposes.

Wallert's math ...indicates that the inaccuracy at great divergence of a high-probability recidivism prediction from the base rate is actually increased geometrically, not arithmetically

Static-99R Inaccuracy in SOCC Releasees

Allen Azizian, Mark Olver, James Rokop, Deirdre M. Orazio, "A Preliminary Analysis of Sexual Recidivism and Predictive Validity of the Static-99R in Men Discharged from State Hospitals Pursuant to California's Sexually Violent Predator Act," *PubMed*, <https://journals.sagepub.com/doi/abs/10.1177/10790632211019726?journalCode=saxb> (June 21, 2021)

Abstract Excerpts:
"We examined the recidivism rates and the predictive validity of the Static-99R in 335 men who were detained or civilly committed and released from California State Hospitals pursuant to the Sexually Violent Predator (SVP) Act, and followed up for approximately 21 years from the date of hospital admission. ...The Static-99R demonstrated small in magnitude discrimination for sexual, violent, and general recidivism (area under the curve [AUC]/C = .56 to .63. [Editor's note:

AUC equal to .50 equals pure-chance guessing.] Calibration analyses conducted through expected/observed (E/O) index, demonstrated that the Static-99R overpredicted sexual recidivism, irrespective of whether the Routine or High Risk/Need norms were used. Observed recidivism rates were lower than predicted by Static-99R scores and may be the result of the sample's older age at release, lengthy hospitalization, or other factors."

The Missouri SOCC Experience – Its Meaning to Notions of Treatment, Professional Judgment, Volitional Impairment, Recidivism, Predicting Future Behavior & Mandatory Lifetime Conditional Release

Michael Barzee, "Fifteen Years and Counting: The Past, Present, and Future of Missouri's Sexually Violent Predator Act," 82 *UMKC Law Rev.* 513 (Winter 2014)

Text Excerpts:
p. 513: "Imagine a statute that allowed a person to be criminally tried, convicted, and punished for one crime and upon release of imprisonment that same person could then be civilly tried and civilly committed under the same facts of the previous crime in which he was imprisoned. If such a statute existed people would be beating down legislators' front doors demanding the statute be amended or repealed. However, if a similar statute was created in which the crime in the previous illustration was one that was sexually violent in nature, few people would be crying for amendment or repeal. The difference in views seems to suggest that 'citizens view sexual deviance as qualitatively unique.' [citing: *Melissa Hamilton*, "Public Safety, Individual Liberty, and Suspect Science: Future Dangerousness Assessments and Sex Offender Laws," 83 *Temp. L. Rev.* 697, 702 (2011).] This difference is one reason why Sexually Violent Predator Acts are passed without much criticism or complaints from citizens.

In 2012, the number of people in Missouri that were committed or detained while awaiting a civil commitment decision was 212. These individuals were civilly committed under Missouri's Sexually Violent Predator Act ("the SVP Act"). In 2006, the SVP Act was amended to reduce the State's burden of proof in SVP commitment proceedings and to decrease the committed individual's oppor-

tunities for release.

IV. Treatments & Lack of National Standard

...Today, the various treatment options include cognitive, behavioral, and drug therapies. Despite these various forms of treatment, a nationally-accepted standard of treatment has not been adopted, which is due mostly to the ineffectiveness of these new forms of treatment. The lack of standard has created problems because of how courts use the professional judgment standard in SVP cases."

p. 523-24: B. Professional Judgment Standard

Despite the various treatment options discussed above, there is currently no real national treatment standard. [See *Eric S. Janus & Brad Bolin*, Symposium, "An End Game for Sexually Violent Predator Laws: As-Applied Invalidation," 6 *Ohio St. J. Crim. L.* 25, 32 (2008) ("While the states are granted wide latitude in developing treatment programs for SVPs, they cannot depart substantially from constitutional standards.) This stems from the fact that There is not enough current scientific evidence about the efficacy of sex offender treatments to warrant strict confidence in any set of treatment guidelines.' [citing: *Gregory DeClue*, "Practice Standards and Guidelines for the Evaluation, Treatment, and Management of Sexual Abusers: Bamboozle No More," 34 *Psychiatry & Law* 197, 207 (2006)]....

...Deference to a professional judgment standard becomes a problem, like here, where there is no accepted professional judgment, practice, or standard for the treatment of SVPs...

The professional judgment rule presents another problem in that it essentially transfers the safeguarding of constitutional rights from the courts to mental health professionals. [citing: *Sharp v. Weston*, 233 F.3d 116, 1171 (9th Cir. 2000).] 'Courts abandon their obligation to apply the law in a principled manner when they persist in using a standard that fails to provide a reliable metric. This creates a very broad, perhaps effectively limitless zone of discretion' [*David W. Nordsieck*, Note: "How the Professional Judgment Standard Could Undermine the Validity of Sexually Violent Predator Laws," 88 *Wash. U. Law Rev.* 1281, 1300 (2011)] because administrators could see to it that an SVP receives treatment that would be enough to pass judicial scrutiny even though such treatment in actuality would provide no real possibility of resulting in rehabilitation sufficient for release. As a result, administrators, through the use of the professional judgment standard, could detain an SVP indefinitely.

p. 524: C. Possible Solutions to the Professional Judgment Standard

One possible solution to the professional judgment standard is to remove the statutory provision for treatment

[*Nordsieck, supra*, at 1301.] In *Hendricks v. Kansas v. Hendricks*, 521 U.S. at 368], the Court suggested that there might be a situation where a state could civilly detain a person, even though there was no treatment, if that person posed a danger to others. [*Id.*] However, the Court made this suggestion in relation to those individuals who were deemed to have an 'untreatable, highly contagious disease.' [*Id.*] Oftentimes an SVP is diagnosed with having pedophilia or other paraphilias – neither of which are highly contagious diseases.

p. 527: V. Volitional Impairment & Culpability

To prevent ...allowing prosecutors to have it both ways, the Missouri SVP Act should be amended so that the evaluation of SVP status is determined at the sentencing hearing. This makes the most sense because the court then may decide whether the convicted sex offender had volitional control over his deviant behavior. If he did not, then he should be committed and treated. If he did, then he should be imprisoned. However, there is even a third possibility that may be the best of both worlds. Why not let courts sentence an SVP to serve a definite amount of time in prison as well as a definite amount of time in civil confinement for treatment. Once the SVP has served his time, then he is released regardless of whether or not he is still deemed to be an SVP. This solution follows the difficulties in predicting future behavior as well as the low rate of recidivism by SVPs.

p. 528: VI. Recidivism & Predicting Future Behavior

Not only are the recidivism rates minimally small, there is substantial doubt about whether or not future behavior can be predicted. There are two basic approaches used to predict future behavior. The first approach is the clinical approach, while the second approach is called the actuarial or statistical approach. While the actuarial approach has fewer drawbacks, both approaches have drawbacks that present serious problems in accurately predicting future behavior.

Under the clinical approach, the subjective judgment of experienced decision makers is used to predict the future behavior. ...[U]nder this approach, a psychiatrist or psychologist makes an opinion of future behavior based on their observation.

This approach has several drawbacks. One drawback is easily seen when the social sciences are compared with the traditional hard sciences. 'While the model for reliability in the traditional hard sciences is based on experimentation, replication, and validation, the model that social scientists use replaces the experimentation component with observation.' [*Hamilton, supra*, at 714 (2011)]. Thus, one drawback in the clinical ap-

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proach is its reliance on observation, instead of experimentation, replication, and validation, to predict future behavior.

Two other drawbacks of the clinical approach follow directly from the use of observation to predict future behavior. The first drawback relates to the inaccuracy of observation to predict future behavior. ...The American Psychiatric Association (APA) estimates the error prediction rate [of clinical judgment assessment] to be quite high. [Hamilton, id., at 717.] ... The second drawback that follows directly from observation is that opinions regarding observations vary among psychiatrists and other mental experts.

pp. 533-34; VII. Changes to the 2006 Amendments

B. Conditional Release and Annual Review

When the Missouri SVP Act was enacted, if it found that an SVP's mental abnormality had so changed that it was no longer likely that the person would commit an act of sexual violence, then the person would be unconditionally released. This unconditional release seemed to be exactly what the *Hendricks* Court required. The Court reasoned that if the reason a person is civilly committed is because that person is deemed dangerous to society, and unless the person is civilly committed he will commit an act of sexual violence, then once the person is deemed no longer a threat the Court suggested that the person must be unconditionally released. [Hendricks, 521 U.S. at 368-69.]

Nevertheless, in 2006, the Missouri legislature changed the release from an unconditional release to a conditional release. There are several reasons why the Missouri legislature should change the SVP Act back to how it was written when first enacted to allow for unconditional release. One reason is that under an unconditional release, no strings are attached upon release. Once an SVP is unconditionally released, the person is restored to all of his rights and liberties that he had before he was deemed an SVP and civilly committed. However, under a conditional release, many strings are attached. Section 632.505 of the Missouri Revised Statutes enumerates 21 different strings that are attached to released SVPs. If any of these strings are broken by the released SVP, then the SVP's conditional release is revoked and the person is returned to a secure facility for a minimum of six months. To make matters worse, these strings are attached to an SVP for the rest of his life. Thus, for example, an SVP may never consume alcohol, never leave the state of Missouri without permission of DMH, and must maintain a residence that is approved by DMH for the rest of his life.

Another reason to make the change is that DMH can make the SVP pay for the strings that are attached, such as outpa-

tient treatment and monitoring. This cost factor alone is a possible reason that an SVP may never be released. If the person has no resources to pay for treatment and monitoring then the person may elect, through intentional disobedience of the treatment program, to stay civilly committed.

The last reason that the SVP Act should be amended to provide for an unconditional release is because when a person is conditionally released he no longer is subject to an annual review. Prior to 2006, an SVP would have an annual review in which their status was reviewed. If it was determined that the SVP was no longer a danger then he would be unconditionally released. However, with the 2006 amendment, once an SVP is conditionally released, he is no longer given an annual review. As a result, the best 'status' that an SVP can be granted is a conditional release. This means that no matter how well an SVP does in the treatment program, the person will always be under the care, control, and treatment of DMH.

Despite these reasons, critics argue that there is no cure and that people with mental abnormalities, like those of SVPs, must receive continued treatment in order to decrease the likelihood that they relapse. In essence the state is saying that while it finds that the conditionally released SVP is no longer a threat, the person must be forever under the care, control, and treatment of DMH in order to prevent the chance that the person may become a threat again. While there is no cure, if the State finds that an SVP is no longer a threat, the State should not be able to control that person for the rest of his life merely because there is a chance that he might become a threat again. Therefore, the reasons for changing the release from a conditional release to an unconditional release outweigh the critics' argument."

Administrators, through the use of the professional judgment standard, could detain an SVP indefinitely

MSOP Violations Cited by MN Health Dept.

Laura Butterbrodt, "Sex Offender Program Found in Violation of State Requirements," *Duluth News Tribune*, March 2, 2022, pp. 1, 7

Text excerpts:

"The Minnesota Sex Offender Program was found by the Minnesota Department of Health to be in violation of several state requirements, including failing to have a medication control plan; to provide timely and appropriate interventions

to address resident self-harm and other medical issues; and to ensure resident access to a private phone, according to a state licensing compliance report.

The lack of a medication control plan led to MSOP residents in Moose Lake selling medication to one another for illegal use and to engage in suicidal behavior using medication, the department of health reported last week.

In an Oct. 19 incident report, staff were told by a resident that another resident was running a 'scrip store' and was allegedly threatening peers about receiving money. A staff member reported observing a client approach that resident and ask him for something, who then handed him 'something small' that could not be identified.

Another incident report from January 2021 stated a resident requested to move units because he was getting high everyday living with the resident mentioned in the October report. The resident making the complaint alleged that the pills they were taking came from multiple clients in the unit.

The program was required by the state to come up with a medication control plan for how administration, distribution and storage of medications at the facility will be handled. In addition, it must record the medications of each resident and periodically review those medication regimes.

The facility also failed to provide timely and appropriate interventions to address resident medical issues and routinely used chemical irritants for resident restraint and compliance.

A series of incident reports between March and December detailed at least six suicide attempts by a resident who would ingest various substances, including large quantities of pills, glass cleaner and contact lens solution. According to the report, facility staff used pepper spray on the resident five times in that period of time to extract the client from his room and gain his compliance after he made threats to himself and staff. Staff also used chemical irritants to induce vomiting after the resident was observed ingesting pills.

The resident, who had been diagnosed with antisocial personality disorder, fetal alcohol spectrum disorder and multiple mood-related disorders, including major depressive disorder, was examined in a facility Vulnerable Adult Assessment. The assessment did not mention any of the resident's suicide attempts and concluded that the resident was not a vulnerable adult because the personality and mood disorders did not impede his cognitive awareness.

In an interview with the investigators, the resident said when he self-harms, 'It always means pepper spray when they want my clothes off,' the report states. The client was required to undress for visual body searches after self-harming attempts.

According to the Centers for Medicare

and Medicaid Services State Operations Manual, the use of weapons, including pepper spray and mace, for restraint is not considered a safe or appropriate health care intervention. A Minnesota statute declares that pepper spray may only be used for law enforcement or military purposes, or for reasonable defense of the person or person's property.

However, the MSOP's Use of Force and Restraint Policy detailed that chemical irritants may be used to gain control of a situation when it is the safest way to maintain safety, including if there is a threat to the immediate security of staff or clients.

Several administrative staff were interviewed by the Minnesota Department of Health about chemical irritant deployment procedures and assessment of residents. They stated that the MSOP team is trained to use the chemicals and to decontaminate after. Clients are only medically assessed after chemical deployment if there are concerns from individual clients, a registered nurse said.

Another MSOP resident reported that staff was 'ignoring him and making fun of him' for reporting pain for 21 days after a surgery on his genital region. According to the resident, he had to threaten to overdose on medication before he was seen by a provider in the emergency room, who discovered a problematic stitch placement.

In addition, the Moose Lake MSOP was found to violate residents' rights to communication privacy by not providing a phone from which residents could make private phone calls. Several incident reports included in the state licensing complaint report stated that residents requested or attempted to call abuse prevention lines and the Common Entry Point, which receives reports of maltreatment.

Because staff and other residents could hear communications over the phone, residents reported getting 'in trouble' for reporting names, and being refused access to the phone to make reports.

The MSOP was required to submit plans for correction of all violations to the Minnesota Department of Health seven days after receiving the report, which was concluded Feb. 1."

Editor's Note: Due to continuing Covid precautions in effect at MSOP-ML, 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 with hope to a fully illustrated edition next time.