The Legal Pad

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"If you are neutral in situations of injustice, you have chosen the side of the oppressor." – Desmond Tutu

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The Cost Isn't Just Ours.

Feedback? News? Write!

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Karsjens – DOJ Amicus Brief, July 2022:
What It Says & Why It Matters

by Cyrus Gladden

The *Karsjens* case is now well into its third appeal to the federal 8th Circuit Court of Appeals. The main brief on behalf of the Plaintiffs-Appellants was filed by their attorneys, the Gustafson Gluek law firm, on June 27, 2022. That main brief for the Appellants advanced five arguments for reversal and remand.

The first two points of that brief by counsel argued respectively that, contrary to the District Court's retrospective view, the 8th Circuit's earlier rulings in the case had not decided Count 6 adversely to the Appellants, and that none of the surviving counts (5 through 7) duplicated other counts that were disposed of by the 8th Circuit in those earlier appeals in the case.

Count 6 sought a clear and expeditious path to release, including assessments of all class members' current status as to the *Hendricks-Crane* required elements to continue commitment of sex offenders. Collectively, those three counts allege that Plaintiff-Appellants' commitment conditions are unconstitutionally punitive.

The other three points advanced by counsel for Plaintiffs-Appellants in this third appeal support those two points and extend them thus: First, they contend that testimony by professionals in sex offender treatment at trial showed that Plaintiff Class Members can and should be treated in less restrictive environments, not confinement, and that defendants' restraint of them has extended far beyond what treatment professionals deemed appropriate. Second, they contend that Plaintiff Class Members' conditions of confinement in prison-like facilities were punitive considering the totality of the circumstances. Finally, the last point in Plaintiffs' counsels' brief argues that Plaintiffs' claim of inadequate medical care should not have been dismissed.

In the second appeal, the 8th Circuit Court of Appeals had reversed the dismissal of these same counts and directed the District Court to review them under the *Bell v. Wolfish* standard. However, in the current appeal, Plaintiffs-Appellants complain about this District Court consideration thus:

"The district court cursory application of the *Bell* standard to Counts V, VI and VII was also flawed. Under *Bell*, pretrial detainees [like civil committees in this case] may not be punished at all. 441 U.S. at 535. The Supreme Court has held in *Youngberg v. Romeo*, 457 U.S. 307 (1982), that individuals who are involuntarily committed have a right to freedom from unreasonable restraints and makes clear that the decisions made by professionals are presumptively valid. Therefore, when a decision is a substantial departure from accepted professional judgment, practice, or standards, liability may be imposed.

Reinforcements

The uncontroverted evidence presented at trial and argued at every stage in this case demonstrates that, rather than operating consistent[ly] with professional judgment, MSOP operates directly contrary to professional judgment and for political reasons, and as such, the conditions of confinement at MSOP amount to punishment. As such, the district court erred in dismissing Counts V, VI and VII under the *Bell* standard." (Plaintiffs-Appellants' Brief, pages 17-18)

Key to Plaintiffs-Appellants' position in this appeal are the following additional excerpts on pages 24-25, and 26:

"Plaintiffs' argument as presented to this Court in *Karsjens II* and to the district court on remand is that *Bell* necessarily implicates *Youngberg v. Romeo*, 457 U.S. 307 (1982), which held 'the state may not restrain persons except when and to the extent that professional judgment deems it necessary.' *Id.* at 321-22 (emphasis added) ....

In short, the district court's characterization of Plaintiffs' Count VI (and by extension Counts V and VII) is in error. Plaintiffs do not seek to litigate whether they are entitled to the least restrictive alternatives available. Rather, they argue that they are entitled to freedom from restraint except when and to the extent professional judgment deems it necessary. *Youngberg*, 457 U.S. at 321-22. Otherwise, the restraints are no longer reasonably related to a legitimate goal but rather are arbitrary and punitive under the *Bell* standard that this Court directed the district court to apply. See *Bell*, 441 U.S. at 539; *Karsjens II*, 988 F.3d at 1052 (citing *Bell v. Wolfish*, 441 U.S. at 535, (holding that pretrial detainees may not be punished); *Youngberg*, 457 U.S. at 316))."

On July 1, 2022, attorneys for the Civil Rights Division of the United States Department of Justice surprisingly filed an amicus brief in support of the Plaintiffs-Appellants' arguments in the appeal.

However, this amicus brief limited its argument to two issues, namely: (1) that the district court (per Judge Frank in his dismissal order) did not tailor its analysis to the civil commitment context particularly; or (2) did not meaningfully consider the totality of plaintiffs' conditions of confinement.

In this, that amicus brief submits that the district court needed to tailor its analysis under the U.S. Supreme Court's opinion in *Bell v. Wolfish* (1979) to the civil commitment context to determine whether plaintiffs' conditions of confinement were unconstitutionally punitive.

But, the brief continues, the subsequent SCOTUS case *Youngberg v. Romeo* (1982) requires courts to examine the purpose of civil confinement and whether qualified professional judgment was appropriately exercised in imposing the challenged conditions. On this, that amicus brief argues that the district court failed to incorporate *Youngberg*'s key principles into its *Bell* analysis.

Yet the amicus brief, at page 20, observes that the District Court ruling appealed from 'did not address *Youngberg* or its progeny, or meaningfully consider the purpose of plaintiffs' civil commitment: treatment and supervision to enable a safe return to society. See pp. 9-12, *supra*.'

Moreover, at pages 24-25, the amicus brief states:

"The court's post-trial order also found that the MSOP's sex-offender treatment program failed to align with the expectations of experts and professionals. The court stated, for instance, that the 'Matrix factors' — which the MSOP uses to advance residents through treatment — 'are not used by any other civil commitment program in the country.' R. Doc. 966, at 29. And, '[i]ndependent evaluators and internal staff at the MSOP have repeatedly observed confusion regarding how the Matrix factors were to be used and inconsistencies with the application of the Matrix factors.' R. Doc. 966, at 29....

The court observed that 'evaluators and outside experts have repeatedly criticized the lack of progression, and that the annual reports by the Site Visit Auditors repeatedly voiced concern 'about the disproportionately high number of committed individuals in Phase I compared to those in Phase III of the treatment program.' R. Doc. 966, at 32. 'In some reports, the auditors observed that slow movement through the MSOP 'hampers program effectiveness' and has a 'demoralizing' effect that 'in the long run may increase security concerns.' R. Doc. 966, at 32-33. According to one of the MSOP's clinical directors and the Site Visit Auditors, some residents even had 'reached the maximum benefit' of treatment available at the MSOP. R. Doc. 966, at 33."

As to the need to meaningfully consider the totality of plaintiffs' conditions of confinement, the amicus brief argues that the District Court should have considered all of Plaintiffs' challenged conditions of confinement, as well as

(Continued from page 1)

their duration, severity, and necessity, in their aggregate impact, not just independently. The following passage on page 29 sets this forth with pristine clarity:

"The district court reasoned incorrectly that Count 6's challenge to the lack of less restrictive alternatives at the MSOP was subsumed within the dismissal of plaintiffs' constitutional challenge to MCTA Section 253D (Counts 1 and 2) in *Karsjens I*. Add. 7-9 30. Not so. First, this Court in *Karsjens II* differentiated the "remaining claims" before it in Counts 5, 6, and 7—which included "the lack of less restrictive alternatives"—from those that had been dismissed in *Karsjens I*. 988 F.3d at 1051. Second, *Karsjens II* instructed the district court to consider Count 6 on remand. Id. at 1053-1054. Third, *Karsjens II* directed the district court to consider plaintiffs' punitive conditions claims in their "totality," an analysis that includes allegations that may not constitute freestanding violations. Thus, the district court erred in refusing to consider less restrictive alternatives apart from a passing footnote (Add. 9 n.8). See *Villanueva*, 659 F.2d at 854 (assessing whether challenged conditions are excessive in relation to whether less restrictive conditions are sufficient)."

The brief adds that even conditions not deemed independently eligible for a lawsuit must be considered in this aggregate consideration, adding, at pages 29-30, "As already explained, this analysis incorporates each of the challenged conditions, whether or not they may give rise to an independent legal claim. See, e.g., *Morris*, 601 F.3d at 810." In other words, the brief argues, everything counts and must be considered together as the totality of Plaintiffs' conditions of confinement.

> The court stated, for instance, that the 'Matrix factors' "are not used by any other civil commitment program in the country." R. Doc. 966, at 29.

The amicus brief concluded by noting the extent of confinement and subjection to such prison-like conditions:

"Finally, the district court does not appear to have weighed at all the duration of plaintiffs' exposure to the challenged conditions. This was so even though, based on the trial record, the court concluded that the MSOP constituted 'indefinite and lifetime detention' from which no person ever had been released. R. Doc. 966, at 11. Although this Court in *Karsjens II* indicated that 'the indefinite nature of [plaintiffs'] confinement was among the challenges considered and dismissed in *Karsjens I*, the Court did not bar the district court from considering this as part of the totality analysis. 988 F.3d at 1051. To the contrary, *Karsjens II* incorporated Eighth Circuit precedent holding that the duration of contested conditions is key to evaluating whether they are punitive. *Id.* at 1053 (citing *Smith*, 87 F.3d at 268-269 ('[T]he length of time a [detainee] is subjected to harsh conditions is a critical factor in our analysis.')).

Thus, while the district court analyzed both separately and cumulatively each subpart of plaintiffs' allegations in Counts 5 and 7, it erred by failing to include core aspects of plaintiffs' challenge that were important to performing the tailored, context-specific analysis that *Bell* and *Youngberg* envision. Omitting these aspects of the challenge may have hindered the district court from properly evaluating whether plaintiffs conditions of confinement are constitutional."

Thus, from a content perspective, the US DOJ amicus brief serves the valuable purpose of saying things left unsaid in the brief by counsel for Plaintiffs-Appellants and saying them from a perspective not clearly taken by that brief by counsel.

However, distinctly, the greater importance of this amicus brief is that this advocacy has emanated from the United States Department of Justice, and in particular its Civil Rights Division. This therefore has a *vox ex cathedra* dimension: This division of the highest level of the executive branch of the federal government has, by this brief, effectively endorsed the theory of the case advanced by plaintiffs-appellants, and has explained and amplified it in a way that fortifies it greatly, as consistent with the position of the federal government's own advocates charged with protecting and explicating individual rights under the Fourteenth Amendment to the United States Constitution.

Of course, not even such powerful advocates and defenders of constitutional rights can order any court about; their power instead is in the persuasive effect of their argumentation from their status as zealous keepers of the integrity and applicability of those rights.

Yet, after the decision in *Karsjens I*, applying a unique and only narrowly applicable standard of "shocking the conscience" of a court under *County of Sacramento v. Lewis* (1998) and silently ignoring the more recent and directly applicable standard of objective professional judgment set forth for confinement environments in *Kingsley v. Hendrickson* (2015), the legal press roundly criticized that *Karsjens I* opinion, questioning whether it embodied a departure from legal reasoning and adherence to precedent as obfuscation of a decision arising instead from bias.

For such federal advocates to explain to the 8th Circuit how *Youngberg* applies to and controls the outcome in *Karsjens*, as the classic ad elegantly states, is "priceless." And it will be very difficult for that court or the District Court on remand, to defy that undeniably applicable logic. The submission of this amicus brief has switched on a white-hot spotlight illuminating the *Karsjens* case like never before. The attention of the entire legal community in the country is now focused on it, and justice is expected and demanded. And that is a change to die for.

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What Do We Do Now That the Shadow Prison Is Under the DOJ Microscope?

by Eliseo Padron, Rusell J. Halton & Daniel A Wilson

As you know, on July 1, 2022 the United States Department of Justice (DOJ) filed an Amicus Brief on our behalf [in the *Karsjens v. Harpstead* case]. Although the DOJ has not started an official investigation on MSOP, they *are* accepting reports of abuse.

Now is the best time to report abuse and Civil Rights violations to the DOJ. However, we need to send the *right* information to the correct department. Once we show a pattern of abuse, the DOJ *may* decide to take a more authoritative role on our behalf.

We urge the men detained at the Shadow Prison to work with us. We can help you determine whether your complaint falls within the jurisdiction of the DOJ, and how to get it to the right department so there is minimal delay.

We have spent the last two years developing a professional relationship with the DOJ. Our lines of communication are not public and you will not find a better way to report to the DOJ. Our supporters in the free world can email documents to the lawyers overseeing this case, bypassing all other departments. In addition, we have a direct phone line to lawyers at the DOJ, so we know what they are looking for in terms of Civil Right violations.

Please Do Not Hesitate To Approach Us. We Are All In This Together.

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Cost of Committing Those with Past Sex Crimes against Children versus Cost of Primary Prevention Programs

[eds.], News Release: "New Study Estimates Annual Cost of Incarcerating Adults Convicted of Child Sex Crimes Topped $5.4 Billion in 2021," *Johns Hopkins University*, Categories: Reproductive and Sexual Health, Child and Adolescent Health, contact: Maria Blackburn at mariablackburn@jhu.edu (2022)

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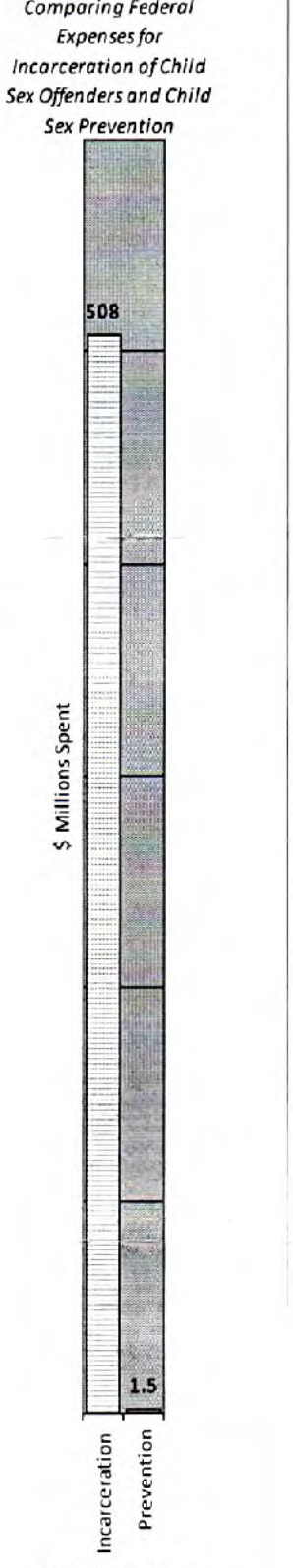

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[Reviewing: Elizabeth Letourneau, Travis T.M. Roberts, Luke Malone, and Yi Sun, "No Check We Won't Write: A Brief Report on the High Cost of Sex Offender Incarceration", 34 *Sexual Abuse*, slip pages 1-29 (March 2022)
Note: All charts added by *TLP* editor.]
Text Excerpts:

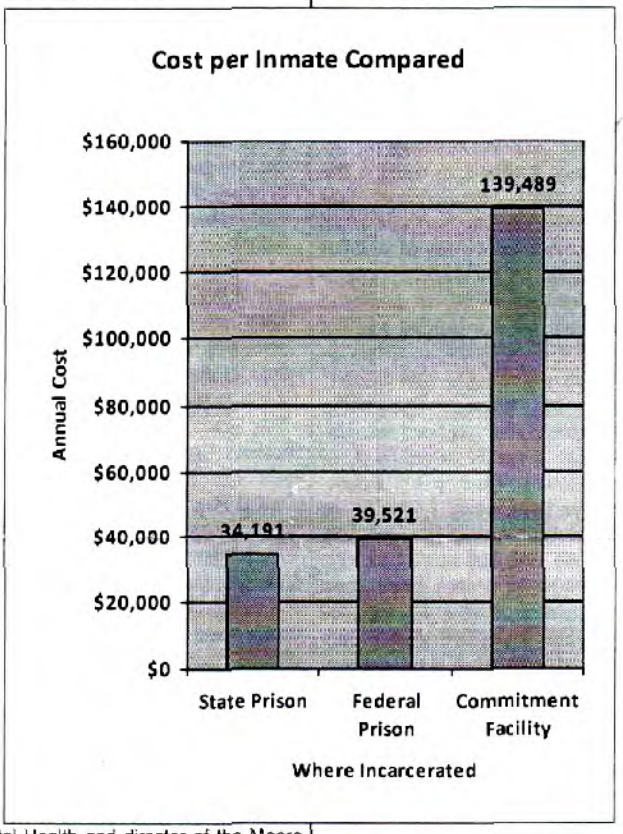
"The U.S. government spent an estimated $5.4 billion last year at the state and federal level to incarcerate adults convicted of sex crimes against children under age 18, according to a new study led by a Johns Hopkins Bloomberg School of Health researcher.

The study calculated annual spending on incarcerated adults convicted of sex crimes against children under age 18 in U.S. federal and state prisons and sex offender civil commitment facilities. The findings, published online March 23 in the journal *Sexual Abuse*, highlight the cost of what is considered a preventable public health problem....

'The cost for this incarceration are extraordinary,' says study author Elizabeth J. Letourneau, Ph.D., professor in the Bloomberg School's Department of Mental Health and director of the Moore Center for the Prevention of Child Sexual Abuse. 'We spend billions of dollars on criminal justice remedies after child sexual abuse has already occurred, and yet there are very limited resources for preventing this abuse from occurring in the first place.'

The study notes that the U.S. federal government budgeted $1.5 million in 2021 to support child sexual abuse prevention research. Research aimed at identifying ways to reduce child sexual abuse has focused on the importance of perpetration prevention. Promising prevention efforts include online self-help intervention programs for people with sexual attraction to minors and middle school education programs designed to reduce child sexual abuse by promoting responsible behaviors with younger children and with peers.

For their study, the researchers used publicly available sources – including U.S. Bureau of Justice Statistics' National Prisoner Statistics data – to calculate annual cost estimates for incarcerating adults convicted of sex crimes against children under age 18. The study estimates there were 127,282 incarcerated in 2021 in state prisons for sex offenses involving children, at an average annual cost of $34,191, for a total of $4.4 billion in spending at the state level. At the federal level, the study estimates there were 12,850 inmates incarcerated in federal prisons for child sex offenses in 2021, at an annual average cost per inmate of $39,521, a total of $508 million in spending. For the estimated 4,321 [ed.: this figure is obsolete; current occupancy = 6,500; however, to preserve comparisons, we use 4,321 here] inmates with child victims in high-security sex offender civil commitment facilities, the study estimates an annual average cost per inmate of $139,489, a total of $538 million in annual spending after adjusting for individual cost fluctuations.



(Ed.: This total is questionable; multiplication yields a total of nearly $603 million annually. No reason is given for the downward "adjustment" apparently employed.]

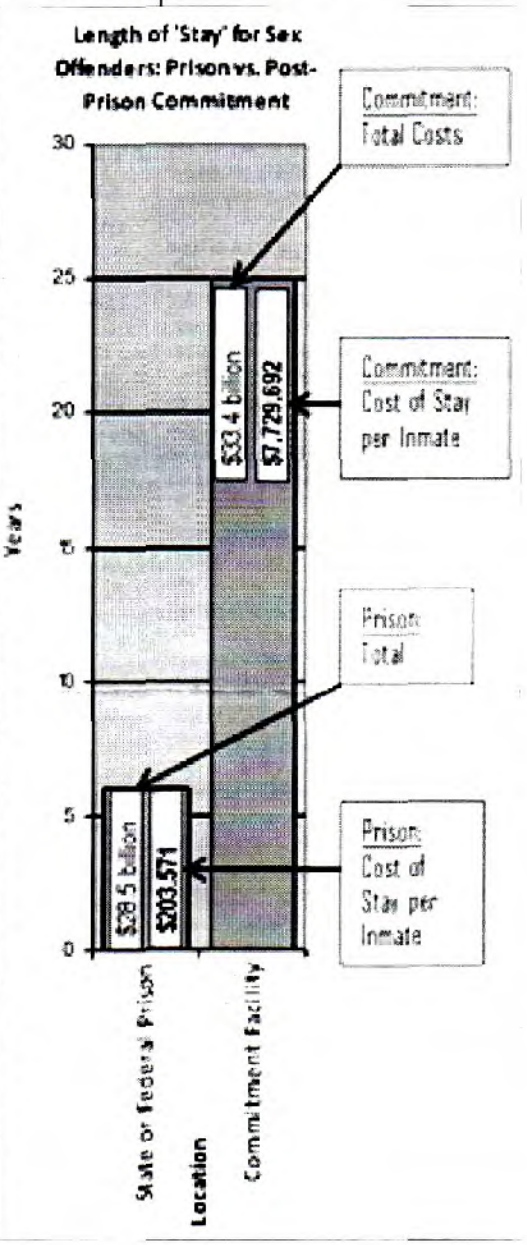
The authors note that the estimated costs of incarcerating adults convicted of sex crimes against children are conservative, since they do not include costs related to the justice process – including investigation, prosecution, and adjudication in their analysis.

Based on average periods of imprisonment and commitment – an average of eight years – the researchers found that the U.S. stands to spend nearly $49 billion on the cohort of about 144,453 people convicted of sex crimes against children currently in prison and sex offender civil commitment facilities: $33 billion for state prisoners, $5 billion for federal prisoners, and $10.7 billion for inmates in sex offender civil commitment facilities. [*Ed.*: Again, since $538 million times 8 years equals only $4.3 million, this figure clearly includes estimates of additional costs beyond housing, basic support, and treatment while in commitment. Elsewhere, such estimates have ranged from an additional one to two times that 'base' figure. Hence, The $10.7 billion figure for 8 years of post-prison commitment total costs is quite reasonable, and we use it in further calculation, below.]

[*Ed.*: However, we know that since most incarcerated in commitment facilities have never been released, the true average 'stay' for these can better be estimated at least at 25 years each (beyond their preceding terms of prison sentence). Since these BJS statistics 'homogenized' these with prisoners with limited sentences, the true average 'stay' for prisoners would thus have to be less, perhaps at about 6 years each on average, to aggregate with the aforesaid 25 years for those incarcerated in commitment. Hence, the total cost for all incarceration 'stays' ($48.7 billion) can fairly be apportioned at 6 years for all prison 'stays', versus 25 years for commitment 'stays.' (See chart below, showing true comparative monetary impact over these disparate stays.)

In this chart, the eight-year cost ($38 billion) for all prison inmates must be adjusted downward (minus 25% to reflect 6-year stays versus 8-year stays, equaling $28.5 billion). This 6-year imprisonment cost figure can be contrasted to the total expenses for prevention programs in that same 6 years (6 times $1.5 million, or $9 million), to reflect imprisonment expenditures about 3167 times the expenditures for prevention of sex crimes with minors.

By contrast, the 8-year cost for commitment ($10.7 billion) must be multiplied by the inverse of the comparative fraction 8/25 as a decimal (0.32, or 3.125) times



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that 8-year cost figure, equaling $33.4 billion over 25 years. This 25-year cost can only be distributed over the claimed figure per Letourneau of 4,321 committed inmates. In this same 25-year 'stay,' total projected expenses for prevention programs will amount to 25 times $1.5 million, or $37.5 million. This total lockup cost for these 4321 commitment inmates is approximately 891 times the total of those prevention expenses over 25 years.

However, the meaningful comparison is between the per prison-inmate cost and the per-commitment-inmate cost over these respective average stays: $28.5 billion divided by 140,000 prison inmates, or $203,571 per prison inmate, versus $33.4 billion divided by 4321 commitment inmates, or $7,729,692 per commitment inmate.

Thus, the enormous total cost of incarcerating 140,000 prison inmates over six years simply saps away enormous volumes of money that could alternatively be applied (at least in part) to increased efforts to prevent sexual assaults and abuse upon children. This is folly by any measure, considering that the recidivism "base rate" for sex crimes is only about 3%.

Yet, by comparison, more total billions are going to be spent incarcerating only 1/32nd the lesser number of commitment inmates over their longer average 'stays.' Current research shows that those released from such sex-offender commitment have an average recidivism rate usually calculated at no more than 5% and sometimes less. Even this 5% figure only slightly exceeds that 3% for those never considered for such commitment. In this light, the total incapacitative effect of locking up only the 1/32 of sex offenders who get committed, versus the 140,000 other sex offenders who do not is, in absolute numbers, miniscule.

By the same token, for that trivial extra impact, committing that mere 4,321 sex offenders costs substantially more in total than for the imprisonment of all those other sex offenders. In this light, the deprivation impact produced in terms of less available funding for programs to prevent sex crimes against children by such commitments is, both in absolute dollars and in proportionate deprivation, vastly larger and more limiting for any balancing effect than even wasting money on prison terms. See chart below.]

... [R]esearch suggests that incarceration in and of itself fails to prevent new incidents of child sexual abuse, nor does it reduce or prevent recidivism. And longer sentences do not make incarceration more effective at preventing violence ...

'Child sexual abuse is indisputably both a criminal justice problem and a public health problem,' Letourneau says. 'We need to develop, evaluate, and disseminate effective sex crime prevention strategies and these efforts ...also require more resources.'

Letourneau conducted the study after hearing from many elected officials and staff that they supported the concept of child sexual abuse prevention research but cited federal budget caps and deficits as barriers to funding new prevention initiatives. She and her coauthors thought estimating how much federal and state governments spent on incarceration for child sexual abuse offenses would underscore potential savings associated with preventing child sexual abuse in the first place.

'If we really want to prevent harm, then it is going to require more government investment,' Letourneau said. 'We are not going to reduce rates of child sexual abuse with just $1.5 million in federal research funding. It's time for more significant government investment in prevention.'"

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Virginia Report 17:

Problems with Actuarial Risk Assessment Instruments

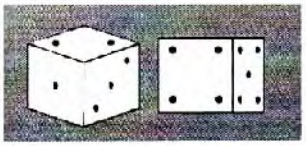
i. The Unscientific Inaccuracy of Recidivism Risk Prediction by RAIs Generally

Astrid Rossegger et al. "Current Obstacles in Replicating Risk Assessment Findings: A Systematic Review of Commonly Used Actuarial Instruments." 31 *Behavioral Sciences and the Law* 154-164 (2013), available at: wileyonlinelibrary.com, DOI: 10.1002/bsl.2044, recount a meta-analysis of 84 studies involving samples of sex offenders addressing the Violence Risk Appraisal Guide (VRAG), the Sex Offender Risk Appraisal Guide (SORAG), and the Static-99 RAIs. These authors start from the premise (at p. 161) that "ARAIs can be considered valid [only] if independent studies can replicate the findings of the development study." However, they found that:

"None of the replications matched the development study of the instrument they were attempting to cross-validate with respect to key sample and design characteristics. Furthermore, none of the replications strictly followed the manual-recommended guidelines for the instruments' administration.

"Additional replication studies that follow the methodological protocols outlined in actuarial instruments' development studies are needed before claims of generalizability can be made." (Abstract).

Amplifying at p. 162: "Of the 108 samples investigated, no study could be identified with a perfect replication match. Roughly half of the study samples matched the development study in two-thirds or fewer of the relevant criteria, although the replication match was better for Static-99R studies than for SORAG/VRAG validation studies.



RAIs have always been startlingly inaccurate, even assuming the 'totals' percentage actually did apply to the offender under scrutiny. The commonly used "Static-99" RAI, for instance, was found to have mis-predicted almost as many non-recidivists to recidivists as it correctly predicted true recidivists as such (a 46% false positive rate — again, close to pure chance). Other common RAIs were also found to be ridiculously inaccurate as well: MnSOST-R: 45-50% accurate; VRAG: 20% accuracy; SORAG: 50% accuracy; RRASOR: 25% accuracy. *Stephen D. Hart, Christine Michie & David J. Cooke*, in "Precision of Actuarial Risk Assessment Instruments," 190 *British Jour. of Psychiatry* (sup. 49), S60-s65, at s60 (2007), reported that both the VRAG and Static-99 RAIs had such wide "confidence intervals as to be "virtually meaningless" as to any individual.

Anecdotally, it should be noted in this connection that Alfonso Rodriguez (later the rapist-killer of Dru Sjodin in 2003) was first evaluated by the MnSOST-R RAI. Based on his low predicted percentage of likelihood of sexual re-offense derived from that risk tool, he was not referred for commitment consideration and instead was released from prison to perpetrate that atrocity. Comparably, Jeffery Dahmer, who killed and cannibalized at least 17 sex abuse victims of his, was not previously rated by RAI. However, had he been, using RRASOR, he would have been rated a low probability of re-offense, and thus would also have been released to commit those serial killings. (Accord: *State v. Rosado*, 889 N.Y.S.2d, 369, 393 [2009; Jeffrey Dahmer ...would score only a 2 of the Static-99 (low risk)"... .].) RAIs and sex offender commitment protect no one. In fact, even using those original recidivism figures, among particular subgroups of sex offenders with lower-than-average rates of recidivism (e.g., older offenders) rates of false-positives soared upward.

ii. The Problem of Wide Confidence Intervals and the Impact of Low Base Rates

Researchers examining the Static-99 found that its 95% "confidence interval" ("CI") at its highest-risk score was an unbelievably wild spread: 6-95%. *Stephen D. Hart, et al.*, "Precision of Actuarial Risk Assessment Instruments: Evaluating the Margins of Error" (etc.), 190 *British J. Psychiatry* (supp. 49) s60 (2007), at s60, s62.

Such inaccuracy defies science and deprives Respondents of due process. Ironically, the drastic reduction in sex-crime recidivism over the last twenty years has also inherently reduced the predictive accuracy and certainty of ARA (this last reflected in "confidence intervals" so wide as to render any probability percentage derived through any given "risk assessment instrument" ["RAI"] utterly meaningless). The current base rate for sex offense recidivism in Minnesota is declared by the Minnesota Department of Corrections to be 3.2%. (This is exaggerated, however, see ¶ 471a, *supra*.) *Doren, supra*, at pp. 151-52, explains this:

"Statistically, the more rare an event is, the more difficult it is to predict those situations in which it will occur without also including many cases in the same prediction where the event would not actually occur. Put in terms of sexual recidivism predictions, the rarer is the sexual recidivism being predicted, the more likely the predictions will include nonrecidivists in the predicted recidivist category. Predictions trying to distinguish the occurrence of rare events from the far more common are notoriously high in their inaccurate inclusion of the common events in the set where the rare one is predicted, an error that is largely statistically determined rather than reflective of 'bad' assessment techniques *per se*.

"...Knowing a reasonable approximation of the underlying sexual recidivism base rate, therefore, tells evaluators something about the statistical limitations of the predictive accuracy of the methods being employed,...."

See, e.g., *E. Janus & R. Prentky*, "Forensic Use of Actuarial Risk Assessment with Sex Offenders:..." 40 *Am. Crim. L. Rev.* 1443, 1456 (2004). Actuarial risk assessment hovers at just around 50% accuracy – the same as by sheer guessing. (*Id.*, at 1465-67). The point is that neither of these procedures is scientifically valid at forecasting sexual re-offense, even when couched only in terms of "probability."

Worse for RAIs, the most-recent twenty years have seen nationwide collapse in the statistical frequency of sex-crime recidivism. A comparison of Minnesota's 1990 average sex-crime recidivism rate (17%) to the same statistic compiled in 2007 (3%) aptly illustrates this reduction. This new "base rate" for sex-crime recidivism is only 17.6% of the former rate. This applies at all deemed levels of probability of re-offense. (*Minn. Dept. of Corrections*, "Sex Offender Recidivism in Minnesota," 2007). Applying this multiple (0.176) to derive current probability per-

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centages as to a commitment defendant in [the] age-60-plus cohort (formerly at 3%), yields a current actuarial probability of 0.528%, or roughly one out of 200.

Risk assessment hovers at just around 50% accuracy – the same as by sheer guessing.

Quite distinctly, *Richard Wollert*, "Low Base Rates Limit Expert Certainty When Current Actuarials Are Used to Identify Sexually Violent Predators," 12 *Psychology, Public Policy, and Law* 56 (2006), at p. 59, demonstrated mathematically that RAIs are inherently unacceptably inaccurate and uncertain at base rates below 50% (e.g., at the former 17% Minnesota base rate), a problem that gets worse the lower base rates go. All RAIs, using such higher former recidivism base rates, barely exceeded the 50% probability prediction-accuracy level for any specific offender (not to be confused with the base rate), even those with the maximum point score possible on a given RAI. In fact, *Wollert*'s proof also showed that the farther a given offender's percentage of claimed probability of re-offense exceeded the base rate, the more this error and uncertainty become. Hence, even in such earlier times, actuarial risk assessment held no scientific validity. In current times of far lower sex-crime recidivism, the exceedingly low base rate multiplies this error rate. This error inevitably greatly overstates the probability estimate for each such sex offender. In light of the aforesaid six-fold reduction in base rate, this overestimation error has been conversely multiplied by six times. *Richard Wollert, id.* at p. 59, presented evidence that all current actuarials are useless, and even revised and more accurate actuarials in the future might be useless for valid estimation of recidivism probabilities because that base rate of sexual recidivism has dropped so dramatically in the United States in recent years. Currently then, no RAI can accurately predict recidivism probabilities of sex offenders. Such inaccuracy is inherent, yet intolerable. It follows that reliance upon any actuarial estimate of probability of future sex-crime recidivism inherently violates a sex-offender-commitment defendant's right to substantive due process.

Thus, demonstrated *Wollert*, the lower the base rate, the greater the inherent inaccuracy and uncertainty of all RAIs. At a miniscule base rate of 3.2%, conversely, the inaccuracy and uncertainty of all RAIs is enormous – perhaps in the range of 97% inaccurate.

Prentky, Janus, et al., "Sexually Violent Predators in the Courtroom (etc.), *supra*, at p. 374, notes: "The problems inherent in low base-rate prediction of dangerousness have been addressed numerous times (e.g., *Grove & Meehl*, 1996; *Monahan & Steadman*, 1994; *Swets, Dawes, & Monahan*, 2000; *Wollert*, 2006)."

Montaldi, supra, at 858-59, states:

"...[I]t is not likely that any actuarial instrument currently available can be used as a valid gauge of absolute risk. No instrument of which the author is aware has a score category associated with even one sample of sex offenders released well into the nationwide decline in sexual offense/recidivism base rates (since 1993 but especially since 1999) showing an observed sexual recidivism rate anywhere close to 50%. ...[M]ost offenders who reoffend do so within a few years of release,... [citing *Daniel F. Montaldi*, "A Philosophy of SVP: One Approach to Identifying Sexually Violent Predators," in Civic Research Inst., *The Sexual Predator, Legal, Administrative, Assessment, and Treatment Concerns* (Anita Schlank, ed. 2014), at 4-121 to -30; *R. Karl Hanson et al.*, "High-Risk Sex Offenders May not Be High Risk Forever," 29 *J. Interpersonal Violence* 2729, 2805 ((2014))].

"No instrument is likely to function as intended for sex offenders released after 1999....

"Released offenders who were recommended for commitment have, for the most part, extensive histories. But their sexual recidivism rates are low, virtually as low as rates for offenders without much history. Why?

"It is impossible to know at this point, but speculation is reasonable. In this author's opinion, the reason, at least in part, is an interaction between longer sentences and a still underestimated age effect."

k. ARA Choice of Predictive Scoring Factors Does Not Account for Variance in Sexual Recidivism, Leading to Massive Inaccuracy.

Melissa Hamilton, in "Public Safety, Individual Liberty, and Suspect Science: Future Dangerousness Assessments and Sex Offender Laws," 83 *Temple L. Rev.* 697 (Spring, 2011), at 728, deriving the variance of the Static-99's correlation coefficient, determined that only 10% of the variance in sexual recidivism in the development sample used in the Static-99 is explained by any or all of the scoring factors of the Static-99. *Hamilton* observes, "...[T]his means that 90% of what helps influence sex-offense recidivism is based on other factors." Consequently, as a tool for predicting risk of sexual re-offense, the Static-99 simply is not. Next, using the U.S. Dept. of Justice's sex-crime recidivism base rate (5.3%), and an "ROC" (receiver operator characteristic) rating of .70, *Hamilton* determined that, as to its predictive accuracy, the Static-99 will be wrong 9 times out of ten. (*Id.*, p. 731).

Nonetheless, these are not just problems of the Static-99 itself. As *Hamilton* observes more broadly:

"Humans are simply hard to predict, making assessments of future behavior impractical. As a result, the politically charged atmosphere surrounding the post-release management of sex offenders may lead participants in the process to err on the side of confirming SVP status rather than risk the consequences of not applying SVP restrictions to those who eventually reoffend. Expert witnesses admit feeling pressure in the adversarial process to provide positive assessments of risk without adequately explaining contrary research, and even distorting the limitations of the actuarial tools." (*Id.*, pp. 725-26)

"Thus, many legal and mental health practitioners and researchers who work in the sex offender area, and who feel strongly and justifiably about it enough to publish their professional opinions in peer-reviewed journals, warn against the use of actuarial tests in legal settings because significant limitations with the tests make their use questionable in light of the significant deprivation of liberty they may facilitate. Putting the use of actuarial evidence in context, a mental health practitioner extrapolated from the Department of Justice's sex-offender recidivism study to conclude that using Static-99 would have averted only three percent of sexual offenses committed by released offenders ...while hundreds of non-recidivists would have been unnecessarily detained. Further, some suggest, it may be professionally unethical for mental health practitioners to testify in court about the likelihood of an individual reoffending, at least without being absolutely clear about all of the substantive limitations in making such predictions." (*id.*, p. 734).

l. RAIs Generally Are Subject to Vast Inaccuracy.

In SOCC cases currently, the two most frequently used RAIs are the MnSOST-3.1 and the Static-99R. However, both of them are rife with unscientific flaws, such that predictions made through their use are scientifically meaningless. Both are subject to vast disparities in scoring depending on how a specific "rater" interprets the applicability of the various "factors" used in the particular RAI.

All RAIs, specifically including VRAG, SORAG, RRASOR, Static-99, and MnSOST-R/3/3.1, are based on recidivism statistics compiled before the RAI in question was designed — from 13 to 30 years ago. In turn, those earlier statistics were derived from recidivism histories (or the lack thereof) over years and even decades before then. Since then, sex offense rates have plummeted dramatically. Therefore, since all RAIs were based on such old recidivism rates, they now inaccurately greatly overstate all percentages of probability by that same ratio of former base rate to modern base rate (17% divided by 3%, or 5.67 times too high). Thus, e.g., assuming an individual declared by an RAI, using 'old' recidivism statistics, to be in a 'cohort' with a 50% probability of re-offense, the corrected current figure for recidivism would be 8.8% — a probability knowing which no court anywhere would commit any sex offender. Given the original inaccuracy of RAIs, this 'multiplier effect' reduces their accuracy to less than 20% in every case — so egregious as to not to be science at all. They are therefore now worthless as predictors of individual likelihood of recidivism.

Currently then, no RAI can accurately predict recidivism probabilities of sex offenders. Such inaccuracy is inherent, yet intolerable.

m. RAIs Overpredict Sexual Dangerousness.

RAIs overpredict dangerousness, as a large majority of offenders classified as dangerous never commit violent crimes. See, e.g.: *Guyora Binder & Ben Notterman*, "Penal Incapacitation: A Situationist Critique," 54 *Am. Crim. L. Rev.* 1, 26 (2017). ("[A] U.S. Department of Justice study of almost 10,000 sex offenders (almost all convicted of rape, sexual assault, or child molestation) found that only 5.3% were arrested for a new sex crime within the first three years after release. Only 3.3% of convicted child molesters were rearrested for a sex crime against a child during that period. In the face of such low base rates, any tool predicting recidivism is likely to be far less accurate than the assumption that any given past offender will not recidivate. ...[A]ctuarial tools exaggerate the likelihood that any particular offender poses a danger to the public."). See also *Richard Wollert*, "Low Base Rates Limit Expert Certainty When Current Actuarials Are Used to Identify Sexually Violent Predators: An Application of Bayes' Theorem," 12 *Psychol. Pub. Pol'y & L.* 56, 56 (2006) ("[A]ctuarial scores for predicting sexual recidivism in civil commitment cases ...were inaccurate for identifying recidivists, and misclassified many nonrecidivists as recidivists.")

	Converted risk categories (n)		
Measure	Low (0-38%)	Moderate (39-90%)	High (91-100%)
SORAG (score range: -27 to 51)	44 (53.7%)	35 (42.7%)	3 (3.7%)
SVR-20 (score range: 0-40)	62 (83.8%)	9 (12.2%)	2 (2.7%)
SVR-20 (clinician rated)	27 (38.6%)	32 (45.7%)	11 (15.7%)

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n. Reported Probabilities of Recidivism by the Same Sex Offender Vary Drastically and Inconsistently from RAI to Different RAI

Sandy Jung, Anna Pham & Liam Ennis, "Measuring the Disparity of Categorical Risk among Various Sex Offender Risk Assessment Measures," 24 *Jour. Of Forensic Psychiatry & Psychology* 353-370 (No 3, 2013), available at http://dx.doi.org/10.1080/14789949.2013.806567, analyzes the inconsistent probabilities of recidivism derived from various different RAIs, specifically examining results from these RAIs: Static-99R, Static-2002R, Sex Offender Risk Appraisal Guide (SORAG), and SVR-20.

	Percentage agreement
Static 2002R	
Low	36.2
High	57.9
Percentage agreement (overall)	62.9
SORAG	
Low	14.0
Percentage agreement (overall)	37.2

	Static-2002R - High Risk Category
SORAG	
Percentage Agreement (overall)	11.8

Recapping prior research, they report at p. 355:

"...*Barbaree et al.* examined the consistency of ranking risk among five risk assessment measures: RRASOR, Static-99, Violence Risk Appraisal Guide (VRAG), Sex Offender Risk Appraisal Guide (SORAG), and MnSOST-R. They predicted that, based on the fact that items in each instrument as being high risk, only 3% of the sample was identified as high risk by all five instruments. Similarly, only 4% were identified as low risk simultaneously by all of the measures. Hence, different instruments appear to yield different outcomes (*Barbaree et al.*, 2006)."

At p. 364, *Jung et al.* add: "...*Barbaree et al.*'s (2006) study ...found that the five actuarial instruments (VRAG, SORAG, RRASOR, MnSOST-R, and Static-99) did not produce consistent risk rankings for the same evaluations." (emphases supplied)

At pp. 359-360, *Jung et al.* report ascertaining that, "[d]espite the similarity in development and items between the Static-2002R and its predecessor , the Static-99R, only moderate percentage agreements among the risk categories of these two measures were seen, ranging from 36.2% to 81.1% (see Table 3 for frequencies and percentage agreements by risk category)."

In Table 1, *Jung et al.* report their findings as to two different RAIs, one of which (the SVR-20) was scored in the two alternative ways suggested in its manual (simply actuarially, or alternatively with clinician modification, using considerations not within the SVR-20 itself). Note the widely inconsistent varying probabilities between these RAI as highlighted in this table (italics: lateral comparison; bold: vertical comparison) – even within the SVR-20 itself, based only on the two different scoring methods.

Tables 3 and 4 display findings as to agreement (by percentage) between risk categorizations derived from the Static-2002R and the SORAG RAIs, respectively, as compared to the Static-99R. As underscored in those tables, overall agreement was dismally lacking, especially between the Static-99R and the SORAG. Even worse, the percentage of agreement between the SORAG and the Static-2002R – High Risk Category (Table 4) was found by *Jung et al.* to be only 11.8% (88.2% disagreement).

Table 3. Percentage agreement between risk categories of the Static-99R with the Static-2002R and the SORAG

Table 4. Percentage agreement between risk categories of the Static-2002R with the SORAG

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To Top It Off, Most ARAIs Use "Linear Addition" Method of Rating Risk, Double Counting Their Respective Factors, Often Multiple Times.

Demosthenes Lorandos & Terence Campbell, "Cross-Examining Actuarial Assessments as Mathematically Flawed Models", in: *Cross-Examining Experts in the Behavioral Sciences*, BEHSCI § 9:102, "Predicting Future Violence"

Initial Text Excerpts:

p.350: "A chief reason for the problems regarding the current actuarial instruments is the use of mathematically improper methods for construction of these instruments. Indeed, most actuarial instruments are basically 'linear additive models'... The linear additive model ignores the inter-correlation (i.e., 'overlap') among the variables....

...Linear additive models include: the Violence Risk Appraisal Guide (VRAG), Sex Offender Risk Appraisal Guide (SORAG), Historical-Clinical-Risk Management-20 (HCR-20), Sexual Violence Risk Management-20 (SVR-20), the Psychopathy Checklist-Revised (PCL-R), and the Level of Service Inventory-Revised (LSI-R)...."

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Sex Offender Registries Should Be Abolished

Emily Horowitz, "The Real Monsters – Sex Offender Registries Don't Make Us Any Safer. Abolishing Them Would.", https://inquest.org?topic/insitutions-practices/ June 3, 2022

Full Text, reprinted by permission of author:

"Watching the Senate hearings for Supreme Court nominee Ketanji Brown Jackson, I was struck by how Republican senators pounced on the judge's thoughtful, considered, and mainstream sex offense sentencing. My research examines why our sex offense policies are based on fear-driven myths and how excessive criminal-legal responses do not genuinely and effectively address sexual violence – and do create new harm. At the time, based on this knowledge, I wrote about the spectacle, where politicians like Josh Hawley accused Jackson of 'endangering our children' and not 'protecting the most vulnerable,' while those voting in her favor were branded 'pro-pedophile' by the likes of Marjorie Taylor Greene.

The message was clear: Supporting sex offense policy as it exists on the books is the same as supporting sexual violence, not caring for children, and, as in Salem, the equivalent of being someone who sexually offends.

Since 1994, ostensibly in the name of public safety, legislators passed sweeping federal, state, and local laws imposing onerous requirements and restrictions on people who have completed sentences for sex-offense convictions. On pain of further punishment and incarceration, these provisions require their names' inscription on registries easily consultable by the public, notification of their moving into a new community, and restrictions on residency, travel, work, and presence. In practice, these burdens fail to reduce recidivism while subjecting those on them to never-ending state surveillance; even after sentence completion, not adhering to the myriad of complex and ever-changing rules, such as failure to update personal information to law enforcement, can result in reincarceration. An example: A 62-year-old, last convicted of a sex offense in 1989, and off probation since the mid-1990s with no sexual re-offense, received two years in prison for failing to update his registration in 2020.

For almost three decades, the Sex Offender Registration and Notification Act, also known as SORNA, has subjected millions with sex-offense convictions to a period or even a lifetime of being openly named, shamed, and essentially banished from society.

As I argue here, and in greater detail in my forthcoming book, *From Rage to Reason: Why We Need Sex Crime Laws Based on Facts, Not Fear*, the experiences of those convicted of sex offenses starkly reveal what happens when our society gets drunk on punishment. In my work, I focus exclusively on the post-sentence, public, and specialized punishments to which those convicted of sex offenses are subject. I do not question the need for them to be held accountable or to be prosecuted in the criminal legal system. Those decisions have their place, but they are not the focus of my work. What I address, instead, is the enhanced and extraordinary civil and criminal punishments for this group of people beyond the already extensive range of collateral consequences faced by others with criminal histories.

Public and political support for registries remains high. There is little evidence that attitudes have been impacted by a growing body of research showing that public registration, community notification, and residency restrictions do not decrease the incidence of sexual offense. Rates of sexual re-offense have been low both before and after registries, and sex offenses have lower recidivism than almost all other crimes. Further, decades of data consistently show that the majority of sex offenses involve non-strangers and those without prior sex offense convictions. In other words, there's scant proof that sex offender registries make us any safer.

Yet the absence of empirical support for registries doesn't seem to matter, not even to people who should know better. The Supreme Court has upheld the constitutionality of registries and related post-sentence restrictions on the grounds that they are not punishment but necessary civil remedies required because of 'frightening and high' recidivism rates. The Supreme Court did not use reliable research or data in their decision. Instead, as scholars Ira Ellman and Tara Ellman discovered in 2015, the justices based their ruling solely on an offhand comment about 'frightening and high' recidivism. This was a remark made by a treatment provider quoted in an article published in the popular magazine *Psychology Today*.

My research is one of many efforts by advocates and scholars to educate the public about the hidden danger and destructiveness of these policies. In this work, I hope to vividly convey the experience of living life branded a 'sex offender,' in the hopes of revealing – and end-

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ing – the cruel and unusual human impact of misguided strategies that purport to address the very real and pervasive problem of sexual violence.

Shining a light on this post-sentence cruelty matters because these registries' continued existence feeds harmful binaries about degrees of guilt and harm that are so prevalent in the criminal legal system – contributing to the noxious idea that there are people who are 'deserving' and 'undeserving,' 'violent' and 'nonviolent,' and 'guilty' and 'innocent,' and so forth. Yet this entrenched thinking is what often stymies attempts at reform. While there have been successful efforts to remove housing, employment, and educational barriers for those with criminal histories, those on sex-offense registries are often excluded or subject to special rules that don't apply to anyone else.

Residency restrictions that require those on registries to live specified distances from schools and places where children congregate make many communities, particularly high-density cities, completely off-limits; as Justice Sonia Sotomayor recently observed, the restrictions also force many into homelessness or render them unable to leave prison after completing their entire sentence when their families live in non-approved areas. Some home associations build small parks for the sole purpose of triggering these restrictions. Even when permissible, many landlords are fearful of having their properties listed on public sex offense websites.

Community notification provisions require that neighbors receive a postcard warning them that someone convicted of sex offense is moving nearby. Some even have to pay for the publication and distribution of these notifications. One person told me that his new housing complex held a community meeting after receiving such a warning. The assembly was standing-room-only. Tears ran down his face as he walked in to face his new neighbors expressing their rage at his presence among them.

Companies that hire those with criminal histories often reject those on registries; similarly, college programs for the formerly incarcerated regularly exclude such people or dictate specific rules. These carve-outs are largely due to the ease with which anyone can find out about conviction history. Some organizations committed to criminal justice reform, which actively seek to hire those with justice involvement, exclude registrants.

Registrants also suffer other experiences of exclusion, such as being asked to leave houses of worship or organizations where they volunteer. They are often prohibited from visiting relatives – including those in hospice – due to travel restrictions. I know of one person who was told by his parole officer that he was forbidden to go to movies, museums, or sporting events. He dreads the boredom of his weekends because his feelings of isolation, emptiness, and exile become too much to bear. Another told me that he loved attending adult dance classes, and there was no rule banning his participation; however, someone at the studio discovered he was on the registry and he was asked to leave. I have heard such stories over and over, regarding places such as yoga studios and gyms. There was no legal barrier on registrants' presence, yet they were shunned or actually thrown out.

Some states, such as Florida, require that those visiting for even just a few days register with local officials and are then listed on that state registry for life. Since 2016, those with sex-offense convictions are issued passports with a special mark and must notify the government of any international trips. Travel becomes gravely challenging and often impossible, even for those with work or family abroad.

Others fear 'compliance checks,' whereby police make surprise visits to ensure that they are living where they are registered. In Oklahoma, driving licenses are branded with the words 'sex offender.' One person I spoke to says he routinely avoids interactions or purchasing products requiring identification.

Some states, such as North Carolina, have presence restrictions mandating that those with sex-offense convictions avoid 'child safety zones' where 'minors frequently congregate,' including libraries, recreation parks, and swimming pools. Laws restricting presence are worded loosely, enhancing the fear among those affected that they may inadvertently be in violation. Some may avoid driving by schools lest their vehicle break down in front and they find themselves guilty of a violation. Another person I spoke to wrote a book and was invited to speak about it at three universities. He was disinvited after he notified the institutions, as required by law, that he was on the registry.

Many registrants fear leaving their homes; others worry that they will be attacked *in* their homes by vigilantes. Some have installed video cameras to document harassment by neighbors. As one woman noted to me, the very worst thing she has ever done in her life, for which she served her criminal sentence, is the very first thing her neighbors and those she meets learn about her. Many worry about ending up unemployed and homeless, because a school or daycare will open nearby, or the residency restrictions will change, or they will be outed by a co-worker.

The consequences, thus, go far beyond the criminal and legal. There is constant apprehension of social rejection on being 'outed,' and the pain that comes from disclosing their status to new friends or potential partners and then being 'ghosted.'

Such experiences are unique to registrants, due to the exceedingly easy public access to the registries. Anthropologist Roger Lancaster has applied the sociological concept of 'social death' affecting this 'pariah class of unemployable, uprooted criminal outcasts.' The taint of being associated with someone on the registry is enough to repel most people. The stigma of a sex offense undermines the ability to be human, form friendships and relationships, and be part of a community.

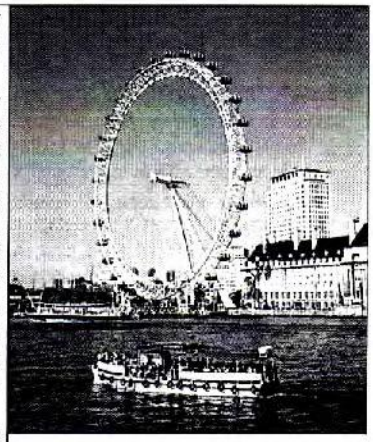
Many who experience harassment due to their presence on the registry do not call the police because they know they'll be ignored or worse. Some have received calls from scam artists who find their names on registry websites and identify as police demanding cash for outstanding fines. Some pay out of fear, even if they are vaguely aware they are likely victims of a ruse. Others report the event to indifferent or mocking law-enforcement officers.

A Florida county commissioner recently mocked and derided those on registries who were fighting for the right to testify against yet another ordinance limiting their ability to live freely. He chided their audacity in considering themselves victims. He clearly stated he did not see them as veterans, taxpayers, fathers or spouses, but solely as perpetrators of harm who had no right to complain about their endless punishment.

The question raised by the never-ending punishment we inflict on those who have been convicted of sexual offenses extends to injustices faced by *all* those harmed by excesses in our criminal -legal system. There is a growing consensus that our approach to punishment in the criminal legal system creates more harm rather than reduce it. Yet we summarily exclude those with sex offenses from these conversations.

Figuring out how to address those who commit sexual violence forces us to consider the limits of our own ability to allow for repentance and to forgive. In the documentary *Untouchable*, we see how Florida lobbyist Ron Book, one of the most vocal proponents of registry laws, reacts when told that sexual offense recidivism is low and the laws are largely ineffective at preventing sexual abuse. He dismisses these facts out of hand as unbelievable. Indeed, the very point of the registry is the brutality and dehumanization it delivers. The message we often hear is that those on it deserve such treatment, so the data or research or even the inconsistency regarding religious or philosophical ideas about redemption are inconsequential.

Those on registries are primarily men, and these laws are presented as policies that protect women and children. Yet those on registries live with partners, children, and parents who are also directly impacted by these restrictions and experiences of shaming. Those close to those with sex-offense histories often face bullying for not turning their backs on their family members; a number of women have told me of losing jobs, friends, and family because they continue to support their husbands and sons. Children of those on registries face taunting at school and ostracization. Some are home-schooled because their parents wish to shield them from bullying.



A Wheel of Justice?

Some home associations build small parks for the sole purpose of triggering these restrictions.

One man told me that someone vandalized the swingset he had built for his children; he said that truly confused him, because the destruction harmed not him but his children. And the mother of a man incarcerated for a sex offense was subjected to viral social media harassment for her work advocating for those on the registry; her home address was published and she was threatened with physical violence.

These acts of violence, public and private, have created a class of so-called monsters denied basic human and civil rights, without decreasing sexual violence. Because of this ostracization, those who have harmed others cannot constructively repent when branded with a scarlet letter; the socially sanctioned humiliation to which they are subjected removes the very possibility of active repentance.

A broader question that might arise is why we should care about those who have done terrible things to others. After all, society tells us, they made a choice to do something that caused their predicament. Yet the reality is that registries do absolutely nothing to deal with the scourge of sexual harm. They don't make us safer. They're merely a punitive tool of social control that subjects

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millions to cruelty and harm that then spreads to their families and communities. Denying so many people an opportunity to be part of our polity and a chance to thrive, while paying lip service to a carceral notion of public safety, disserves the rest of us. By making monsters out of them, we reveal who the real monsters are."

Indeed, the very point of the registry is the brutality and dehumanization it delivers.

Editor's After-Note: In response to a relayed request for permission for the foregoing full reprint, Prof. Horowitz (who is Co-Director of the Justice Initiative and Chair of the Department of Sociology and Criminal Justice at St. Francis College and author of books and numerous academic and other articles, many on the topics of sex offender registration and commitment) replied, "I'd be honored if Mr. Gladden publishes the piece. He's a hero of mine!" Thank you, Professor Horowitz and identical reciprocation!

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New ACSOL Lawsuits Regarding Registrants

[ACSOL Eds.], "Janice's Journal: The Wheels of Justice Are Moving," *Titus House Newsletter*, July 2022, pp. 2-3

Text:

pp. 2-3: "The wheels of justice are moving in California and across the nation. Perhaps the wheels of justice will take us to the Tipping Point where the public will recognize there is no need for registries and that those currently listed on a registry as well as their families will be allowed to lead peaceful and productive lives.

In California a significant lawsuit was filed in federal court this week that challenges the SORNA regulations that became effective earlier this year. The lawsuit includes a request for an injunction which, if granted, would stop the enforcement of the SORNA regulations that threaten almost one million registrants with the possibility of up to 10 years in federal prison.

The SORNA regulations lawsuit is also significant because it was filed by a large organization that has the resources necessary to continue its challenge all the way to the U.S. Supreme Court if necessary. ACSOL is a plaintiff in the lawsuit representing registrants and their families.

Also in California, the number of petitions that have been granted ending registrants' requirement to register continues to grow. An assortment of attorneys, both in private practice and employed in Public Defenders' offices, have filed these petitions. One data point is that 17 of the petitions I have filed thus far have been granted in nine different counties. And in San Diego County, more than 100 petitions have been granted.

Further, the appeal of a lawsuit is pending in California that challenges the exclusion of all registrants convicted of a felony sex offense from serving on a jury. The basis of the lawsuit is equal protection because the same legislation that excludes registrants allows individuals convicted of murder to serve on a jury.

Lawsuits are also pending in other states including Illinois and Connecticut. In Illinois, a lawsuit is pending that challenges the conviction of a registrant who visited a school campus. In Connecticut, a lawsuit is on appeal regarding whether the state can require registrants to disclose all email addresses."

[ACSOL Eds.], "Preliminary Injunction Motion Sought in SORNA Regulations Challenge," *Titus House Newsletter*, July 2022, p. 3

Text:

pp. 3 "A motion for preliminary injunction has been filed in the pending challenge to SORNA regulations that became effective in January 2022. The motion was filed on June 3 by the Pacific Legal Foundation (PLF) in federal district court. The motion requests a hearing date of July 18. If that request is granted, the hearing will take place in Riverside County.

'The Pacific Legal Foundation is to be commended for filing this important motion,' stated ACSOL Executive Director Janice Bellucci. 'If the motion is granted, it could stop the enforcement of SORNA regulations for registrants throughout the nation.'

According to the motion, the SORNA regulations at issue are causing irreparable harm to Plaintiff John Doe and to ACSOL members. For example, the regulation's requirement that registrants provide all remote communication identifiers impermissibly burdens speech. The motion argues that the plaintiffs in the case are likely to succeed on the merits.

The original lawsuit was filed by PLF on May 23, 2022, in U.S. District Court, Central District of California. The case has been assigned to Judge Jesus Bernal who previously ruled in favor of registrants in a case challenging presence restrictions in the City of Adelanto and against registrants in a case challenging presence restrictions in the City of Ontario [CA]."

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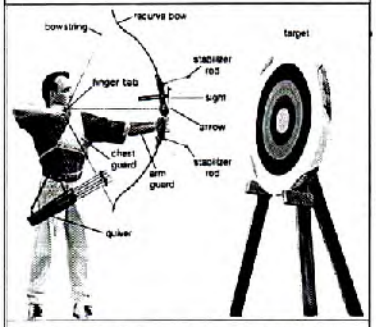
Sex Offender Treatment: Does It Work?



All right, Doctor, let's see if you can hit the target from this distance.

The British Ministry of Justice evaluation of the "Core" psychological sexual offender treatment program (SOTP) recently highlighted the importance of understanding "what works" in treating sexual offending.[1] In this study, -- which is the largest single study evaluation to date – the reoffending rates for men who completed the "Core" SOTP (n = 13,219) in England and Wales (between 2000 and 2012) were compared to those of a propensity score-matched untreated comparison group (n = 2562). Over an average 8.2-year follow-up, nonsexual reoffending rates appeared largely similar across the groups. However sexual reoffending for the treated sample was found to be *higher* than that of the untreated comparison group (10% versus 8%, respectively), representing an absolute increase in sexual reoffending of 2% and a relative increase of 25%. The findings from this study understandably created concern. In short, they suggested that tens of thousands of individuals who had sexually offended and received psychological "treatment" may have been made worse by a program intended to make them better.[2]

A number of meta-analyses have been undertaken over the last 20 years that have synthesized outcome evaluations of treatments for sexual offending.[3] Many of these studies have examined both biological and psychological treatments[4].

Gannon et al. also examined whether or not programs included polygraph testing as part of their treatment protocol. Although only a small number of programs incorporated polygraph testing (k = 6),they generated weaker effects than programs that did not contain n this element or for whom this element was unknown.[5] It is possible that use of the polygraph may impede the treatment process and effectiveness. The use of the polygraph within treatment has been found to be associated with poorer outcomes.

Schmucker and Losel's 2015 meta-analysis found that only community-based treatment programs (as opposed to institutional programs) significantly reduced sexual reoffending.[6]

Notes:

1 *Mews, A. et al.*, Impact of Evaluation of the Prison-Based Core Sex Offender Treatment Programme, Ministry of Justice Analysis Series (2017), https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/623876/sotp-report-web-.pdf.

2 *Brown, P.*, Ross, C., Academic Oversight in Policy Research: Questions Arising from the Sex Offender Treatment Programme Study, 3 *Lancet Psychiatry* 224-6 (2019), https://doi.org/10.1016/S2215-0336(19)30374-8.

Each of the following:

Gannon, T.A., Olver, M.E., Mallon, J.S., James, M., Does Specialized Psychological Tretament for Offendeing Reduce Recidivism? A Meta-Analysis Examining Staff and Program Variables as Predictors of Treatment Effectiveness, *Clin. Psychol. Review* (2019), https://doi.org/10.1016/j.cpr.2019.101752.

Dennis, J.A. et al., Psychological interventions for adults who have sexually offended or are at risk of offending. *Cochrane Database Syst. Rev.* 2012;12, https://doi.org/10.1002/14651858.CD007507.pub2/full

3 *Beech, A. et al.*, An Examination of Potential Biases in Research Designs Used to Assess the Efficacy of Sex Offender Treatment, 7 *Jour. Aggress Confl Peace Res.* 204-22 (2015), https://doi/org/10.1108/JACPR-01-2015-0154

4 See, e.g., *Beech, supra* note 3.

5 *Gannon et al, supra* note 3.

6 *Schmucker, M., Lösel, F.*, The Effects of Sexual Offender Treatment on Recidivism: An International Meta-Analysis of Sound Quality Evaluations, 11 *J. Exp. Criminol.* 5987-630 (2015), https://doi.org/10.1007/s11292-015-9241-z.

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Drugs for Libido Suppression – Poor Supporting Evidence

Keith Rix, "Pharmacological Interventions for Sex Offenders: A Poor Evidence Base to Guide Practice," 23 *BJPsych Advances* 361-365 (2017)

Text Excerpts:

pp.361-62: "... The Cochrane review

The studies reviewed are on the effects of hormonal drugs that suppress libido and of drugs that affect libido through other means (Box 1). These are drugs that are administered with the objective of

(Continued on page 9)

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reducing, or completely eradicating, sexual desire and capacity, either temporarily for the purposes of attempting psychological therapy, or permanently. This contrasts with the objective of psychological therapy, which is to alter sexual behavior without affecting libido, for example changing from nonconsensual to consensual sexual activity.

p. 362: *Search results: A small and dated haul*

Box 1: *Biological treatments of sexual offending*

Hormonal drugs that suppress libido:

* Progestogens, e.g., ethinyl oestradiol, medroxyprogesterone acetate (MPA)
* Anti-androgens, e.g., cyproterone acetate (CPA)
* Gonadotrophin-releasing hormone (GnRH analogues, e.g., triptorelin, goserelin

Other medications that affect libido:

* Antipsychotics, e.g., benperidol, chlorpromazine
* Selective serotonin re-uptake inhibitors (SSRIs)

The investigators found only seven small trials, with a total of 123 participants for whom data were available, and the results of all these were published before 1994. All studies but one were of the effects of testosterone-suppressing drugs, either progestogens or anti-androgens; a small study assessed anti-psychotics (benperidol and chlorpromazine). This means that there have been no qualifying studies of the effects of the newer drugs currently in use, particularly selective serotonin reuptake inhibitors (SSRIs) or gonadotrophin-releasing hormone (GnRH) analogues, indeed apparently no RCTs [randomized controlled trials] of any pharmacological interventions for over two decades.

Sample sizes varied from 9 to 37. No study included a reference to any power calculation for change within this population. ...The recorded age range was from 16 to 68 years, but the largest study included no data on age....

The limited evidence

Khan et al. regarded the results for cyproterone acetate (CPA) as moderately encouraging, with reductions on targets such as physiological arousal, but there was no formal collection of recidivism data and follow-up was for only 13 months.

They found mixed results in studies involving medroxyprogesterone acetate (MPA). They state that there was no reported recidivism in two small studies (Hucker 1988; McConaghy 1988), but in one of these (Hucker 1988) no formal data were reported for sexual recidivism as measured by reconviction, self-report or caution and its authors do no more than infer that 'no charges were made during the course of the trial.' Understandably, Khan et al describe the results of one trial of oral MPA (Langevin 1979) as discouraging, having regard to the high level of drop-out (even though treatment had been mandated by the court) ....

Although three studies (Bancroft 1974; Cooper 1981; Bradford 1993) found that testosterone-reducing drugs reduced the frequency of self-reported sexual fantasies, in none of these was there a significant effect when objective assessment of sexual arousal was made by measurement of penile tumescence....

Khan et al. refer to the effect of drug therapy in reducing sexual recidivism as 'not compelling' and conclude that 'the evidence in support of any pharmacological intervention for those who sexually offend is very limited.'

p. 363: Implications for further research

...Although there have been trials of SSRIs in sexual offenders, there have been no RCTs and the studies have been small.

Outcome measures

Careful attention must be paid to outcome measures.

Self-reports of sexual arousal, frequency of masturbation and spontaneous erections, sexual preferences and actual sexual offending must be treated with caution in populations with higher than usual propensities for deception and where the participants know that decisions about hospital leave, parole, discharge, and release from compulsory treatment may be influenced by such reports. This is illustrated in three of the studies. In the study by Bancroft et al (1974), where both ethinyl oestradiol and CPA were found to decrease sexual activity as measured by the number of times that masturbation or 'any overt sexual acts' were reported to lead to orgasm, phallometric data (erectile responses to fantasy, slides, and films) did not demonstrate a statistically significant effect for ethinyl oestradiol and only a mild effect for CPA. In the study of anti-psychotics Tennent (1974), chlorpromazine was superior to benperidol in reducing self-reported 'sexual activity,' but when arousal to erotic stimuli was measured, no significant differences between the drugs, or placebo, could be detected. Measurement of physiological capacity for sexual arousal should always be included because participants probably knew when they have been treated with the active drug and respond by reporting what they regard as improvement.

Reoffending may occur but not be reported or detected.

p. 364: The ethical paradox

Briken et al. (2017) spent six years planning a double-blind RCT of triptorelin in sexual offenders with severe paraphilic disorders who were detained in a German forensic psychiatric hospital, but the Federal Institute for Drugs and Medical Devices rejected the proposal, referring to the German Drug Law, and the Hamburg Medical Association considered that the study would be unethical as the participants were detained patients....

Paradoxically, a third of sex offenders detained in German forensic psychiatric institutions are being treated with drugs (Turner 2013). Thus, on the one hand Germany allows the treatment of sex offenders with drugs of uncertain effectiveness and little understood profiles of adverse effects, including two officially approved agents, but on the other hand it will not allow the research necessary to assess the effectiveness and the safety of these drugs; the purpose of an RCT is to determine whether the intervention is effective and that it does no harm."

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Bradford, J.M.W. et al. (1993). "Effects of Cyproterone Acetate on Sexual Arousal Patterns of Paedophiles." *Archives of Sexual Behavior*, 22: 629-41.

Briken, P. et al. (2017). [German text, English title: "Failure of a Study in Forensic Psychiatric Hospitals: Clinical Trial to Investigate the Additive Effect of Triptorelin on the Efficacy of Psychotherapy"]. *Der Nervenarzt*, 88: 480-85.

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McConaghy, N. et al. (1988). "Treatment of Sex Offenders with Imaginal Desensitization and/or Medroxyprogesterone." *Acta Psychiatrica Scandinavica*, 77: 199-206.

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Turner, D. et al. (2013). "Prescription of Testosterone Lowering Medication for Sex Offender Treatment in German Forensic Psychiatric Institutions." *Jour. of Sexual Medicine*, 10: 570-78.

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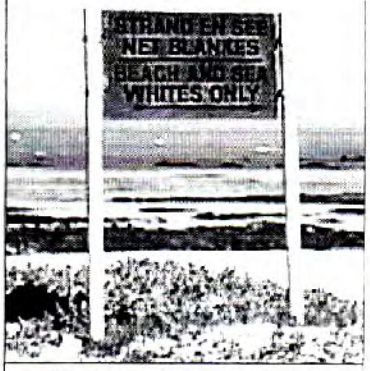
Blanket Exclusions Are Unfair Treatment.



Blanket Exclusion Is Always Harsh & Unfair

[Eds.], "Unfair Treatment of Sex Offenders," 9(2) *The Broadcast*, Winter 2021, p. 3

Text:

"[Digest of an article "Blanket Exclusions, Animus, and the False Policies They Promote," by UCLA law Professor Catherine L. Carpenter, which will appear in a forthcoming issue of the *SW Law Review*. A longer digest also appears in the February *Criminal Legal News*.]

Saying something is true does not make it so. And saying it louder does not make it any less false. But this seems to be the legislative posture behind modern-day sex offender registration laws that punish sex offenders because of entrenched myths that overstate the laws' positive impact on public safety and exaggerate recidivism rates of offenders. Not only are registration laws based on these myths, but many ancillary laws exclude benefits to offenders strictly because they committed a sex offense.

Despite statistics, legislators persist in the assertion that sex offenders must be singled out for harsher treatment because their convictions portend future dangerousness. The basis for this assertion is the wildly familiar, but wholly inaccurate belief that sex offenders recidivate at rates that are 'frightening and high.' Sadly, this false narrative has provided the animus that galvanized implementation of registration and notification regimes.

In its most recent chapter, the narrative has been formalized into blanket exclusions – what the article calls 'all except for' provisions – that have been inserted into many criminal justice reform efforts. *The effect?* Registrants and their families are prohibited from broad-based and important ameliorative changes to the carceral state, to which others are entitled, but which they are denied only because of their status as registrants.

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The country is on the precipice of change. At all levels of government we are witnessing reforms in criminal justice policies. The era of this reform did not happen overnight, but changes have been sweeping and with bipartisan support rarely seen on other topics. Occurring at both the national and state level, reform efforts have resulted in legislation to reclassify crimes, to shorten prison time, provide parole and expungement opportunities, change long-standing policies on monetary bail, and create reentry and diversion programs.

That is, all except for those who have been convicted of sex offenses.

Blanket provisions that exclude those who have committed sex offenses are now commonplace, inserted into legislative reforms without opposition or notoriety. Within comprehensive legislation covering numerous crimes and sentencing reforms, these ubiquitous 'all except for' provisions have the markings of boilerplate language that have been introduced even where the new legislation has no rational relationship to the protection of the public's safety or the prior sex offense conviction.

In what is best described as a demonstration of governmental animus, registrants have been excluded from compensation from a state victim's compensation fund, even where the compensation requested does not arise from circumstances of the crime the registrant committed. That is just one effect of this blanket exclusion: a one-size-fits-all punitive stance that deems all registrants unworthy of benefits from criminal justice reform, reintegration efforts, or compensation that is available to others.

The 'all except for' provision to reform efforts is only one piece of a much larger tapestry that isolates and marginalizes those who have committed sex offenses. Historically by definition and implementation, registration and notification schemes were designed specifically to set apart these citizens from other felons. The first registry, adopted in California in 1947, motivated by homophobia, was a not-so-subtle attempt to target and criminalize the sexual conduct of gay men. But the breadth and scope of state registration laws today often include up to forty registrable offenses, residency and presence restrictions, GPS satellite monitoring, and frequent in-person registration.

The dramatic increase in the burdens associated with registration was not accidental. With support from two Supreme Court decisions in 2003, registration and notification laws have flourished modernly as civil regulatory measures, still expanding and largely unchecked. The Court's limited jurisprudence on this issue nonetheless delivered a one-two punch. In an opinion from which twenty years of lower court decisions have flowed, *Smith v. Doe* held that sex offender registration laws are not punitive but regulatory in nature, and thus constitutional protections, such that *ex post facto* or cruel and unusual punishment do not apply. In that same term, in a case that legitimized public notification under 'Megan's Law' websites, *Connecticut Department of Public Safety v. Doe* held that procedural due process did not demand individualized assessment in order to disseminate registrants' information to the community. Together these decisions 'green lighted' the ensuing wave of increased governmental burdens and prohibitions protected by the label of civil regulation.

Nearly twenty years later, 'super-registration schemes' have become a staple for the carceral state. A brief look at today's registry paints a grim picture of a society intent on punishing and ostracizing those who have committed sex offenses. Today, nearly one million people have been forced to register, obligated to meet onerous burdens and prohibitions on their housing, employment, education, and movement, and which deeply harm not only the registrant but family members as well.

[The article here includes a lengthy overview of the various state-led 'all except for' exclusions.] What knits these unrelated laws together is animus toward the registrant. Not one demonstrates a rational relationship between the blanket exclusion and the state's goal to protect the safety of the community. Instead, each law suffers from an important failing: each is wildly over-inclusive and untethered to public safety concerns.

Faulty assumptions drive these exclusions: Writing laws commonly requires categorizing people or behaviors -- which places burdens on one group of people over another. In the case of registrants, this classification is based on the faulty assumption that all registrants are unworthy because they continue to be dangerous.

What makes the presumption faulty – beyond the lack of individualized assessment – is that robust and valid empirical data refute the assumption that all registrants recidivate at alarmingly high rates. Why, in the face of reputable statistics, does such a false message continue to resonate with the public and with judicial bodies that value empiricism?

The answer is obvious, pervasive, and controlling. The country is suffering from what sociologists describe as a 'moral panic' – a societal reaction that is wildly out of proportion to its factual predicate but is nonetheless stoked by elected officials, affirmed by courts, and relayed by the media. Taken at face value, Megan's Law sees a society in which sexual violence is rare, recognizable by its physical brutality, and perpetrated by mentally disturbed monsters who strike without warning or reason.'

Moral panics generally include the following: elevated concern over the behavior of a particular group of people and the impact of that behavior on society; an escalated level of hostility towards this group, who are stereotypically labeled as enemies of society; and a widespread agreement that the threat posed by that group is real and serious. The concern is blown out of proportion compared to a realistic appraisal of the threat, usually the result of presenting exaggerated numbers of crimes, victims, injuries, damages, deaths, etc. The 'volatility' of moral panics may cause them to burst suddenly and vanish, but not without generating fear and hostility -- the so-called 'cultural and institutional legacy.'

The Real Data. Statistics play the leading role in registry analysis. Their use should serve as a legal crystal ball; we rely on the numbers to assess future dangerousness of a specific part of the offending population. But too many examine the use of statistical evidence with a jaundiced eye. It harkens back to the famous quote, 'There are lies, damned lies, and statistics.' Despite their alleged malleable nature, statistics must play an important role in the law. Competing statistics often fight for supremacy in the message. If we are concerned by their ability to manipulate the message, the solution is not to give up on statistics, but to become better judges of what they mean.

The country is suffering from what sociologists describe as a 'moral panic' – a societal reaction that is wildly out of proportion to its factual predicate but is nonetheless stoked by elected officials, affirmed by courts, and relayed by the media.

A high-profile crime is not in itself a statistic. Yet laws are routinely written as a reaction to a single event, such as – and most notably – the kidnapping and brutal murder of Adam Walsh, the rape and murder of Megan Kanka, and the abduction, rape and murder of Jessica Lunsford, each of which were the basis of laws to regulate convicted sex offenders. The men who raped and murdered Megan and Jessica were both repeat offenders who had previously assaulted young girls.

It was a natural conclusion for legislators nationwide to assume that repeat offenses such as these were rare, but routine, and of law enforcement only knew the whereabouts of convicted sex offenders they could put an end to such assaults. But statistically, new assaults by convicted sex offenders are not the norm, and most sexual assaults are perpetrated by men who do not have a record of a previous offense.

Further, statistics do indicate that the recidivism of sex offenders once convicted is extremely low – less than that of almost any other class of felons. Yet, as discussed above, they are singled out for punishment far greater than even murderers."

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Your Right to Send Mail — To Anyone, Anywhere

Sabir Abdul-Haqq Yasir v. Donald Sawyer, "U.S. Dist Ct, No. 2:20-cv-249-JES-MRM (M.D. Fla., Aug. 4, 2021)

Text Excerpts:

"Plaintiff ...Yasir is detained at the Florida Civil Commitment Center (FCCC), having been deemed a sexually violent predator by a Florida court. Defendant ... Sawyer is the Facility Administrator of the FCCC. Yasir sues Sawyer under 42 *U.S.C.* § 1983, alleging FCCC's prohibition on mail between current and former FCCC residents violates his First Amendment rights....

Yasir challenges [Defendant's] assertion that most contraband found in incoming mail came from former residents. He submitted incident reports – ranging from May 2019 through March 2021 – relating to violations of FCCC mail rules, none of which involved contraband sent by former residents....Sawyer urges the Court to apply the test articulated in *Turner v. Safley*, 482 U.S. 78 (1987), as modified for civil detainees by *Pesci v. Budz*, 730 F.3d 1291 (11th Cir. 2013). That test applies to regulations on incoming mail, but courts apply a different test to regulations on outgoing mail. In *Procunier v. Martinez*, 4516 U.S. 396 (1974), the Supreme Court held that such a regulation must 'be "generally necessary" to a legitimate governmental interest.' *Thornburgh v. Abbot*, 490 U.S. 401, 411 (1989). The *Martinez* Court observed that unlike incoming mail, 'outgoing personal correspondence from prisoners did not, by its very nature, pose a serious threat to prison order and security.' *Id.* The same reasoning applies to mail sent by residents of the FCCC.

...Sawyer identifies no governmental interest in blocking outgoing mail to former residents. He thus fails to demonstrate that the complete ban on current resident sending mail to former residents is justified under *Martinez*."

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