The Legal Pad

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"We define 'pretextuality' as courts' acceptance, either implicitly or explicitly, of 'testimonial dishonesty' and their 'engage[ment] similarly in dishonest decision making.'" — *Michael L. Perlin*, "Morality and Pretextuality, Psychiatry and Law: Of 'Ordinary Common Sense,' Heuristic Reasoning and Cognitive Dissonance," 19 *Bul. Am. Acad. Psychiatry & L.* 131, 133 (1991)

In This Issue:

Coming Soon:

- ✓ Banishment by a Thousand Laws
- ✓ 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?
- ✓ Lie-Detector Interrogation & Peter Meter Testing: Keeping You Down by False Hope, Fear, & Shame
- ✓ What Does Substantive Due Process Say about PPG Testing?
- ✓ Findings Change Everything.
- ✓ Bayes, Monahan, Chaos, Uncertainty — Oh My!: Actuarial Prediction? Good Luck with That!
- ✓ As If Bias Wasn't Enough: Now There's "Machine Bias"!
- ✓ Vigilantism: No Time to Stick Your Head in the Sand!
- ✓ Health Disservices? People Are Dying. What Can Be Done?
- ✓ Pell Grants for Us?
- — And a ton of new excerpts are coming. Stay Tuned!

Feedback? News? Write!

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Do "Habeas Corpus" and "Class Action" Have a Nexus?

Using an Unusual Form of Court Action to Seek Mass Release of MN SOCC Victims

By Cyrus Gladden

This story starts in 1996, when I filed a personal habeas corpus petition challenging my own SOCC as unconstitutional. My grounds were threefold:

First, the statutory elements upon which commitment is based in Minnesota are vague and overbroad and are applied to individual cases in ways that increase those problems. Both on its face and as applied, the statute, with its two alternative formulations of the elements needed to commit ("sexually psychopathic personalities" and "sexually dangerous persons") substantially diverges from the requirements of *Kansas v. Hendricks* (1997) and *Kansas v. Crane* (2002).

In doing so, it violates both decisions, especially as Minnesota appellate decisions have interpreted those two commitment bases over the 27 years of the existence of Minnesota's SOCC law — to the point where the words of the statute pose no meaningful limit on who can be committed.

Second, that statute, and especially the court rules devised specifically for such cases, deprive those petitioned for such commitment of their fundamental right to the basics of procedural due process.

Finally, in my particular case, a First Amendment issue arose from prosecutorial use of letters of mine, etc. as claimed evidence suggesting that I met one or more elements for commitment. Actually, these items had zero probative effect toward proving such qualification to be committed.

But more fundamentally, even if they had such significance, it has long been a SCOTUS First Amendment principle that one must not be tried upon one's opinions, what he knows, or how he feels. In fact, the prosecution's submission of those letters and articles was aimed to precisely portray what she contended my authorship of some of those items and possession of the rest supposedly conveyed as to my cognitive and emotional frame of mind. This is squarely in violation of that case law principle.

One problem my habeas case presented was that, in order to prove up the substantive due process violation, I would have to adduce testimony from an expert witness in sex offenders as a matter of forensic psychology to show the mere 'junk science' basis for commitments under the statute in question. Due to the high fees charged by such experts for their case-specific reports and such testimony and my personal poverty (after 18.5 years in prison), I would not be able to put an expert on the stand.

Nonetheless, a contemporaneous class action case for all confined under SOCC judgment in Minnesota (*Karsjens v. Jesson et al.*) had already adduced expert testimony that, in some respects at least, had already furnished some of the supporting expert testimony I needed.

So I filed that habeas petition in 2016 (with only days left within the 1-year statute of limitations period for federal habeas corpus partitions), effectively taking my chances that some way would eventually come to light to gain the balance of the expert testimony needed to win my habeas case.

However, within days after being filed, my case was stayed by the federal District Court, joining about 100 other cases brought by other victims of SOCC in Minnesota relegated to stayed status pending the outcome of the *Karsjens* case.

Technically, even today, some six years later, there is no definitive end to the *Karsjens* case. Even though the *Karsjens* case is once again on appeal (its third), the District Judge for both *Karsjens* and all those other cases apparently believes that *Karsjens* is about as close to well done as the turkey thermometer can register. So he dissolved the stay on all those other cases, including that one of mine.

Unfortunately, on a 'move-it-or-lose-it' basis, that meant I had to engage in a filing storm. The purpose of this was far beyond simply moving that personal case forward, however.

Allow me to return to the *Karsjens* case a minute. That case illustrates the principle that a 'civil rights' case under 42 U.S.C. § 1983 cannot liberate confined individuals or a class from confinement. However, the controlling holding by the 8th Circuit in that first *Karsjens* appeal instead was that *County of Sacramento v. Lewis* (1998) required that plaintiffs must "shock" the court's by the defendants' misconduct, but that the *Karsjens* scenario had not risen to that level.

But that is not the true reason why Section 1983 lawsuits cannot free anyone. Now, the 8th Circuit could concede in the currently pending third appeal of *Karsjens* that *Kingsley v. Hendrickson* (2015) amply clarifies that the applicable standard in *Karsjens* is that of judgment employed by competent and ethical professionals, not a need to shock the court's conscience (i.e., the *Lewis* standard). But even if so, that does not get at the real reason for that bar on liberation through Section 1983 actions.

Instead, the longstanding bar on release by a Section 1983 judgment originated in *Preiser v. Rodriguez* (1973). Since then, a long uninterrupted string of lower-court authority has applied the *Preiser* bar to civil commitment as well as to prison confinement.

Unfortunately, one outfall from the *Karsjens* case has been the inevitable conclusion that the best we can do in a Section 1983 case toward that end, whether in *Karsjens* or my case, is to gain court injunctive relief requiring MSOP to engage in such repetitive, laborious steps to justify keeping us confined that eventually they will give up in their quest to retain us until we respectively die.

Effectively, a habeas corpus petition is the only way to gain liberation from confinement pursuant to any state court judgment of any kind in the federal courts. A sizable minority of MSOP confinees have sought federal habeas liberation. However, I am unaware of any such petition that resulted in liberation for any MSOP confinee.

I believe that many of these petitions had at least some merit, but that all failed due to three factors: (1) lack of counsel; (2) inability to obtain expert witness testimony and other factual and scientific proofs; and (3) lack of legal education sufficient to successfully navigate the narrow straits in habeas corpus cases to advance to victory. In my layperson's opinion, these insufficiencies all but weld the door shut to most individuals seeking to challenge their commitment and gain liberation from its confinement via habeas corpus — the only theoretically available course to liberty from SOCC confinement in the federal judicial system.

Returning from this digression, allow me to say that, along the way in my research, I had learned of a small number of cases in which habeas corpus petitioners were contesting — not their civil commitments, but instead post-commitment circumstances that made it either impossible or nearly so to ever gain release, much less a complete end to their commitments.

In this group of cases, the habeas petitioners requested permission to advance their claims as class actions because they addressed circumstances shared in common among many, if not all confinees under the type of commitment at hand. This emerging kind of habeas corpus claims became known as "habeas corpus class actions." Case law is divided on whether these uncommon cases are governed by all aspects of Federal Rules of Civil Procedure, Rule 23, governing claimed class actions generally. Nonetheless, the class action requirement of representation by counsel (as opposed to proceeding *pro se*) has been extended to these 'hybrid' cases.

Even though not yet having attorney representation, I wished to avail myself of this form of proceeding, mindful that most of the as-

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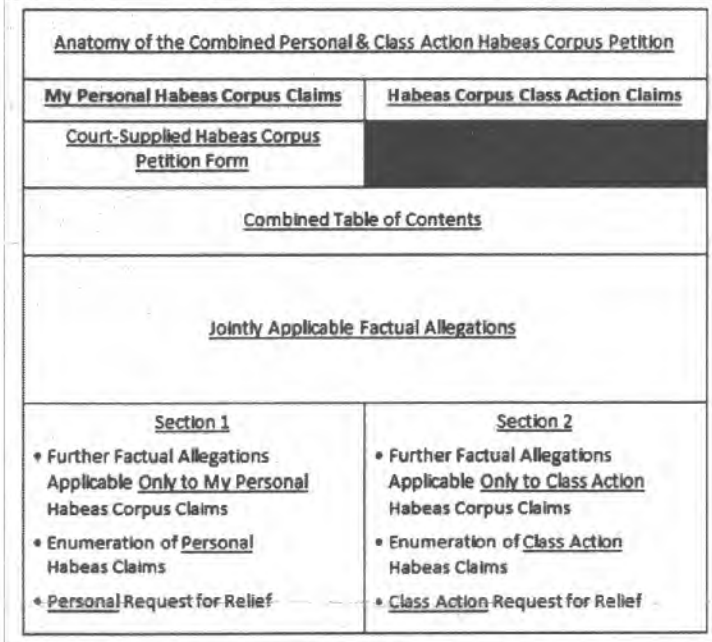

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pects of which I was personally complaining about SOCC commitment applied to all or nearly all confinees of the Minnesota Sex Offender Program (MSOP). Some of these shared circumstances concerned the same substantive and procedural due process violations as my own SOCC case had presented.

Other aspects of MSOP post-commitment assessment and treatment, and also the grounds for, and procedure of seeking release from confinement under that commitment and also for "Final Discharge" from it were also shared in common with each other, including myself.

Thus, when I received the 'ultimatum' from the District Court to either proceed right away or take dismissal of my habeas corpus petition, I immediately began wondering whether I could mount a habeas corpus class action, side-by-side in the same case with my personal habeas claims.

Hence, most of the work I did then went — not toward augmenting my own habeas corpus claims from my commitment case, but instead toward turning that initial legal research I had done earlier into an earnest attempt to use a habeas corpus class action, and toward spiffing up my countless findings from research into how completely bunk the notion of SOCC is, as well as the further notion of the extremely long treatment MSOP claims it needs before safely releasing anyone. So, as of Oct. 28th, that case was fully filed (finally).

The proposed *Amended Petition*, although long, is structured to clarify which claims are personal to me and which apply to all in the Petitioner Class of all MSOP confinees. The structure of the *Amended Petition* is shown directly above. After the pre-printed form which must be used for a habeas corpus petition, an initial recitation of facts applicable to both my personal claims and to those of the class is given (the "commons" portion of the petition).

Following this, the balance of the *Amended Petition* is divided into two sections. The first sets forth my personal claims and the facts personal to me (and not to the class in general). Conversely, the second section sets forth claims held by all members of the class and includes all facts beyond those in the commons section that support only those claims in common to the whole class. Sections 1 and 2, respectively, contain the claims for relief as to me personally and as to the class. A terse summary of the *Amended Petition*'s contents is given at right.

The Allegations in Common section of this *Amended Petition* span a myriad of challenges, first to the Act creating SOCC in Minnesota and its subsequent judicial construction, including vast expansion of its coverage. It also complains of 32 distinct unconstitutional aspects of MSOP's operation.

An in-depth examination of the ways in which SOCC in Minnesota violates both substantive and procedural due process follows. This includes, among numerous other things, the ways in which the junk science of so-called sex offender risk assessment departs completely from science and instead invites pure biased guessing by assessors.

Claims of so-called dynamic risk are busted as sheer ipse dixit fiat and deliberate ignoring of even basic protective facts. The most obvious and powerful of these facts, the inevitable and universal impact of aging, is called out as proving the spiteful true agenda of lifetime detention as further pure retribution against those who, due to the decrepitude of aging, present no risk of harm to anyone.

Count III of Section II appears cryptic in this Summary, but it challenges mandatory interrogation with polygraphy in order to progress toward treatment completion and to release from confinement. This violates both the right against self-incrimination and the First Amendment right against compelled speech.

The surprising length of this Amended Petition is necessitated by the constellation of facts that comprise the allegations showing the unconstitutionality of the statutory terms asserted to be the legal basis for the actions and failure/refusals to acted complained of, as well as the unconstitutionality of those acts and inactions themselves. The original draft of the Amended Petition was more than twice the length finally arrived at through careful editing. However, because of the scientific complexity of the field, a point of 'incompressibility' of the facts was reached, such that further attempted cuts each resulted in failure to adequately state the claims and to do so in comprehensible terms.

Assuming that the proposed Amended Petition is approved, I will seek class counsel. In turn, if that motion is successful, I will urge class counsel to move to reinstitute the stay on this case pending the final resolution of *Karsjens*. Not to do so would be to make irreversible moves in this case that could be rendered moot or pointless in light of the

(Continued on page 3)

Summary of Contents

(Continued from page 2)

Karsjens end-result, potentially ruining the potential held by this case.

Finally, to the extent that the *Karsjens* outcome leaves remaining the opportunity to gain freedom for the class through this case, I plan to ask class counsel to move for Rule 41 consolidation of the substance of the original *Gladden* Section 1983 case with this case, so that all forms of relief can be decided in the same case.

However, whether the case will go forward may be subject to decision by the Magistrate Judge as to whether he has discretion to dismiss it as being a "poor vehicle" for class claims (a quote from his last previous order) and whether he wishes to use that discretion to kick my hybrid class action in habeas corpus out of the stadium.

If not, I might get the chance to go forward. However, I'll also have to round up a willing class action attorney to represent us all in that case. As of this writing, I have not been able to get a clear response from Gustafson Gluek on whether that firm is willing to take up representation in this case.

All in all, my chances of success at gaining class action status for my claims on behalf of all MSOP confinees are about 10%, I'd say. Nonetheless, it's worth it to try because if we can go forward, it could wind up being the touchdown blowout of the century for us all (so to speak).

It is important to bear in mind that the class action claims in this *Amended Petition* specifically avoid any contention of invalidity of the original commitment judgments of any member of the class. Instead, those claims all address current circumstances of the ongoing commitments, as shown by the contrast between currently known science versus practices of MSOP and of state officials in ruling upon petitions for release and/or termination of their commitments.

Further, despite an objection by Respondents that members of the class have not "exhausted" their state remedies before becoming class members in this federal case, the reality is that they cannot use state habeas corpus proceedings due to a specific exception in that statute.

Moreover, the years-long timeline for completing the SRB-CAP process and, cumulatively, its insistence on satisfying statutory qualifications for release (thus effectively barring entertaining constitutional claims as herein without such statutory qualification for a right to release) effectively roadblock the way to freedom through constitutional litigation.

These aspects show that SRB-CAP proceedings are not a means to demand release on constitutional grounds. This shows that Class Members herein must be allowed to proceed in this case without exhaustion of such mythical state remedies.

And most fundamentally of all, there is no avenue of court action other than habeas corpus that can provide release or termination of commitment. This includes Section 1983 "civil rights" actions, which can only remediate conditions of confinement without ordering release. This is the '*Preiser* problem' mentioned above.

While individual class members could instead file their own personal habeas corpus petitions, the practical reality is that none of us have the financial resources to bankroll the major litigation that would be required — not just hiring a law firm to present the complex facts, but also having to pay massive sums to retain competent experts in psychological science to prove those facts in court. In short, no individual in the class can present the case required to win individually.

All of these points mean that, with the sole exception of relatively recently committed individuals with personally unique arguments to overturn their own commitments and who are still within the short AEDPA limitations period, as a practical matter, this case is the only potential avenue of judicial relief left to any of the rest of us (that is, probably more than 90% of us) from our commitments and our preventive detention by MSOP. This is why this case must be brought and must succeed if we are to be freed.

I am currently seeking to enlist representation by the Gustafson Gluek firm for the class in this case. That firm remains the only firm experienced and knowledgeable in Minnesota as to the MSOP scenario. I will update you later as to this aspect and all other developments in this case.

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Perlin and Cucolo, Part 3 :

How Propagandists Use 'Thinking Shortcuts' We All Use to Create Public Hysteria & Rage against SOs for Political Gains

Michael L. Perlin & Heather Ellis Cucolo, Shaming the Constitution: The Detrimental Results of Sexual Violent Predator Legislation (Philadelphia: Temple Univ. Press, 2017), Chapter 2, cont'd

Editor's Note: This is the third in a series of excerpts from *Shaming the Constitution*, a watershed book about sex offender civil commitment (SOCC) that has brought the light of true understanding to many who previously had been completely fooled by the longstanding massive propaganda advanced to support SOCC. This portion explains "heuristics," by use and manipulation of which many were taken in by that deliberate propaganda. It also contains Perlin and Cucolo's explanation of the false way that supposed "ordinary common sense" is appealed to by those propagandists. Prepare to have your mind opened:

Text excerpts:

p. 14: "Heuristics

'Heuristics' is a cognitive psychology construct that refers to the implicit thinking devices that individuals use to simplify complex, information-processing asks, the use of which frequently leads to distorted and systematically erroneous decisions and causes decision makers to 'ignore or misuse items of rationally useful information.' Empirical studies reveal jurors' susceptibility to the use of these devices. Similarly, legal scholars are notoriously slow to understand the way that the use of these devices affects the way that individuals think. The use of heuristics allows us to willfully blind ourselves to the gray areas of human behavior, and predisposes people to beliefs that accord with, or are heavily influenced by, their prior experiences.

Experts are similarly susceptible to heuristic biases, specifically the seductive allure of simplifying cognitive devices in their thinking; further, they frequently employ such heuristic gambits as the vividness effect or attribution theory in their testimony. Also biases are more likely to be *negative*; individuals are more likely to retain and process negative information than positive information. Judges' predispositions to employ the same sorts of heuristics as do expert witnesses further contaminate the process.

Consider how some of these heuristic biases are building blocks of our sexual offender jurisprudence. By way of example, the *'vividness' heuristic* is a cognitive -simplifying device through which a single vivid, memorable case overwhelms mountains of abstract, colorless data upon which rational choices should be made. Through the *'availability' heuristic*, we judge the probability of frequency of an event based upon the ease with which we recall it. Through the *'typification' heuristic*, we characterize a current experience via reference to past stereotypic behavior; through the *'attribution' heuristic* we interpret a wide variety of additional information to reinforce preexisting stereotypes. Through the *'hindsight bias,'* we exaggerate how easily we could have predicted an event beforehand. Through the *'outcome bias,'* we base our evaluation of a decision on our evaluation of an outcome. Through the *'representative' heuristic*, we extrapolate overconfidently based upon a small sample size of which we happen to be aware. Through the *heuristic of 'confirmation bias,'* people tend to favor information that confirms their theory over

disconfirming information.

p. 15: Research confirms that heuristic thinking dominates all aspects of the mental disability law process, and it should not be a surprise that it specifically dominates the law as it applies to sexual offenders. By way of example, Daniel Filler has argued that the availability heuristic was significantly responsible for the passage of Megan's Law. The vivid, media-driven case overwhelms statistical data and valid and reliable research, leaving us with ineffective and dangerous policies that, as subsequent chapters demonstrate, make a mockery of constitutional protections and civil rights. Media obsessions trigger the availability heuristic and the representativeness heuristic, causing the public to perceive most or all so-called sex offenders as extremely threatening and intractably deviant. James Billings and Crystal Bulges explain comprehensively:

'The representativeness heuristic theory hypothesizes that people judge the likelihood of events by how well they match any previously formed representations of such an event. For example, individuals are more likely to believe all sex offenders are similar to those sex offenders they have already seen. Because most people's readily accessible memories of sex offenders are derived from violent and outrageous media depictions, they are more likely to believe that sex offenders are like those they see on TV.... [O]ne of the great dangers of the representativeness heuristic is that it encourages maintenance of these beliefs to the exclusion of other reliable information. Thus, people who come to believe sex offenders are violent predators in this way are very likely to ignore more accurate information that advises toward more realistic beliefs.

[Another] example of psychological theory demonstrating the power of media to portray false images is the availability heuristic. The availability

(Continued on page 4)

(Continued from page 3)

heuristic states that individuals judge the likelihood of events by the availability of similar occurrences in their memory. Under this theory, therefore, if instances of violent sexual offense readily come to mind, individuals will presume their occurrence to be more frequent than it really is. The available memories may also include fiction: if someone has just seen a movie about a sex offender, he is more likely to inflate the rate of sex offense he believes to be accurate. The media contribute to this theory by providing the prior instances of sex offense with which to compare current events. This is especially true if the media are presenting more violent sex crime information than nonviolent sex crime information; people will thus overestimate the rate of sex offense in general as well as the incidence of violent sex offense. Because most sex offenses are nonviolent, these media portrayals of violent sex offenses cause people to increase their belief in the prevalence of such crimes.'

...We believe it is impossible to understand the thrall in which the 'sex offender story' has captured the public without understanding the pernicious power of these cognitive-simplifying heuristics....

p. 16: 'Ordinary Common Sense'

'*Ordinary Common Sense*' (OCS), a powerful unconscious animator of legal decision making, is a psychological construct that reflects the level of the disparity between perception of reality that regularly pervades the judiciary in the deciding of cases involving individuals with mental disabilities. OCS is self-referential and non-reflective: 'I see it that way; therefore everyone sees it that way. I see it that way; therefore that's the way it is.' It is further supported by our reliance on a series of heuristics-cognitive-simplifying devices that distort our abilities to consider information rationally.

One of us (MLP) has written extensively about how this reliance on OCS is key to understanding of why and how insanity defense jurisprudence has developed: 'Not only is it prereflexive and self-evident; it is also susceptible to precisely the type of idiosyncratic, reactive decision making that has traditionally typified insanity defense legislation and litigation. Paradoxically, the insanity defense is necessary precisely because it rebuts common-sense everyday inferences about the meaning of conduct. Similarly, every newspaper article reporting that a sex offender was released into the community expresses the public misconception that there are reliable and valid means to assess recidivism risk in ways that comport directly with the distortions caused by this use of false OCS. We use such false OCS to generalize and wrongly stereotype persons with mental disorder in order to justify prejudiced decision making against them. We hope, in this book, to expose the extent to which our sexual offender policies are dominated by these inaccurate generalizations."

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Virginia Report, #20: Criticism of the MnSOST Tools, Continued

MnSOST-3.1 Coding Manual

Under these bizarre coding rules, one's supposed risk percentage is also impacted by such idiosyncrasies as: whether one was sentenced in only one, or more than one county as to the same victim; whether one completed chemical dependency treatment; and whether a self-reported offense appears in a psychological report, as opposed to any other document. Such scoring approaches are unheard of in any other RAI and completely lack any scientific basis.

The very worst aspect of the MnSOST-3.1 is its "coding rules" for scoring. Under these bizarre rules, one's supposed risk percentage is impacted by such idiosyncrasies as whether one received an aggregate sentence, versus count-specific sentences; whether one was sentenced in only one, or more than one county as to the same victim; whether one completed chemical dependency treatment; whether a self-reported offense appears in a psychological report, as opposed to any other document; and up to four extra points (with large resulting increase in predicted percentage) for the homophobic fortuity of male victims. *Andrew J.R. Harris & R. Karl Hanson*, "Sex Offender Recidivism: A Simple Question," 2004-03 (*Public Safety and Emergency Preparedness Canada*), at p. 9, admit: "...the 15 year estimate for boy-victim child molesters ...was based upon only 95 observations." Any statistician will agree that no statistical significance can be drawn from such an infinitesimal sample. The MnSOST-3.1 scoring approaches are unheard of in any other RAI – except its predecessor, the MnSOST-R. More bluntly, *Marcus A. Galeste, Henry F. Fradella & Brenda Vogel*, "Sex Offender Myths in Print Media: Separating Fact from Fiction in U.S. Newspapers," 13 *Western Criminology Review* 4, 6 (2012) (http://wcr.sonoma.edu/v13n2/Galeste.pdf): *Keith Soothill et al.*, "Sex Offenders: Specialists, Generalists – or Both? A 32-Year Criminological Study," 40 *British Jour. Of Criminology* 56-67 (No. 1, 2000), at p. 6, found that those who had "committed offenses against someone of the same sex were less likely to commit subsequent violent or property offenses than sex offenders whose original offense had been against someone of the opposite sex."

The MnSOST-3/3.1/3.12 (and all other versions of the MnSOST "tool" were created by the Minnesota Department of Corrections. That same Department is statutorily charged with the duty of assessing the purported likelihood of sex-crime re-offense for each scrutinized offender.

Yet that MnSOST-3 (etc.) series is not truly a sex-crime re-offense actuarial risk assessment instrument at all, but rather an internal tool of said Department for purposes of determining a combined likelihood of any one of the following occurring in the case of the scrutinized offender: (1) committing another sex crime; (2) committing any other kind of crime; or (3) violating any condition of parole, ISR, or conditional release during the term of any such form of post-release supervision. Combination of all three of these risks into the probability percentages calculated as to each offender seriously exaggerates the likelihood of sex-crime recidivism specifically.

Further, inclusion in that series of "tools" of matters such as disorderly conduct convictions and violations of orders for protection show beyond question that the MnSOST-3x series departs completely from the field of actuarial science as to sex-crime recidivism prediction, given that such factors have no relationship to commission of sex crimes.

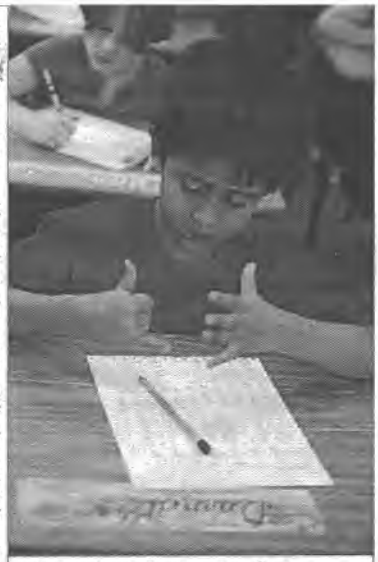
The MnSOST-3.1 is the classic example of all of these failures to conform to known actuarial scientific principles.

First, the MnSOST-3.1 was developed from a statistically insignificant sample of only 200 sex offenders. This is patently insufficient to draw any statistical conclusions for any purpose. Any statistician will agree that no statistical significance can be drawn from such an infinitesimal sample.

Second, the MnSOST-3.1 is not actually an RAI at all, incorporating such unrecognized factors as institutional misconduct.

Third, its developers have steadfastly refused to divulge the data upon which it was based – secrecy that deprives it of any "peer-reviewed" scientific validity.

Fourth, the idiosyncratic coding rules of the MnSOST-3.1 render it utterly unscientific (for instance, turning on procedural flukes such as whether count-specific or instead "aggregate" sentencing was used by a judge). Non-sexually motivated crimes, such as harassment, violation of an Order for Protection, and disorderly conduct, are counted. (*MN Dept. of Corrections, MnSOST-3.1 Coding Manual*). Under these bizarre coding rules, one's supposed risk percentage is also impacted by such idiosyncrasies as: whether one was sentenced in only one, or more than one county as to the same victim; whether one completed chemical dependency treatment; whether a self-reported offense appears in a psychological report, as opposed to any other document; and up to four extra points (with large resulting increase in predicted percentage) for the homophobic fortuity of male victims. The MnSOST-3.1 scoring approaches are unheard of in any other RAI and completely lack any scientific basis.



Independent Contractor Scores a MnSOST Tool

The MnSOST-3 and MnSOST-3.1 – just like their predecessor, the MnSOST-R, were constructed by 'multiple-counting' the recidivism tendency of the same individual. This was caused by fully crediting that recidivism tendency of each given member of the study sample, to each 'factor' of that test found in that given member of the study sample, regardless of the relative, contributory level of any cumulative additional impact (if any) on that recidivism tendency worked by that specific factor. Thus, any given test subject would then be artificially, 'penalized twice' in test score and hence in ascribed recidivism probability, for each pair of such factors found to be present. Rather like cribbage, this multiple counting has geometric impact the more factors are found to be present. This ignores that the study sample members either did or did not recidivate (a yes/no dichotomy); under the MnSOST approach, it is as if each separate factor in the same study sample member were a separate sample member who recidivated. This can exponentially exaggerate the predicted probability of re-offense by any given test subject with multiple factors present (as most have).

Discussions in professional or academic literature of the creation of the MnSOST-3.1 version of that "tool" state or necessarily imply that that version was constructed from "construction samples that only comprised 200 to 300 sex offenders. In psychological science, particularly as applied to sex-offender recidivism studies, such low numbers amount only to an insignificant statistical pool. Therefore, the MnSOST-3.1 and any other so-called

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"tools" or claimed "actuarial risk assessment instruments" created from such statistically insignificant samplings are inherently unscientific, and no meaningful data can be derived from them. Accordingly, the MnSOST-3.1 and all other similar low-sample tools and RAIs must be banned from sex offender assessment.

We have seen, for instance, that the MnSOST-3.1 chalks up adverse points for disorderly conduct convictions and for violations of orders for protection -- incidents that have no scientifically established predictive value as to future sex crimes.

MnSOST's inclusion of other factors such as whether one was under some form of correctional supervision when a crime was committed, or whether crime was committed in some place nominally considered "public" (including, e.g., areas within secured apartment buildings), and including non-criminal violations of probation or parole, which lack any scientific support outside of the same extremely small samplings used to construct that "tool," also illustrates this problem.

Some recidivism tools, notably the MnSOST-3.1, calculate multiple points for the same victim either where multiple charges are laid against the defendant by the prosecuting attorney or where charges involving the same perpetrator and victim arise in two or more counties. These are sheer fortuities having nothing to do with probability of re-offense. Further, these situations tend to arise in scenarios of ongoing crimes with the same victim that occur over time, a common scenario in the case of sexual abuse of a child, but which are rare in adult rapes. Therefore, such scoring comparatively greatly exaggerates the impact of recidivism for sexual abuse, as compared to serial rapists. As an example, victimization of a single, known-victim child on two occasions, each in a separate county, with two convicted acts on each occasion, would equal a serial rapist attacking four women anywhere, if only one conviction per attack resulted. This disparity simply does not comport with actual differences in probability of recidivism between these utterly different scenarios. The MnSOST-3.1 and all other actuarial instruments permitting such point calculation and resulting skewed recidivism probabilities must be banned.

Another problem specific to the MnSOST-3.1 is that it scores sentences, not convictions, and allows multiple points per victim. This causes skewing of recidivism probabilities reported, in this case based on the fortuitous fact of the number of separate sentences that may be imposed in various sex-crime cases. Under Minnesota law, and apparently also in at least some other states, judges presiding in such cases have discretion to impose either individual sentences for each convicted count for the same victim or, alternatively, to levy an aggregate sentence as to all such counts (even as to multiple victims in the same case) or as to some of such counts. This practice of sentencing discretion does not definitely indicate probability of later re-offense, since the number of victims, number of sex crime acts, or the relative severity of such acts do not definitely dictate such sentencing decisions. This points up that such scoring must be based on convictions, rather than upon sentences. Tools such as the MnSOST-3.1 that use sentences for such scoring must be banned.

Distinctly, as noted *infra* as to the Static -99R, the MnSOST-3.1 assesses a given sex offender up to four extra points (with large resulting increase in predicted percentage) for the homophobic fortuity of male victims. *Andrew J.R. Harris & R. Karl Hanson*, in Sex Offender Recidivism: A Simple Question, 2004-03 (*Public Safety and Emergency Preparedness Canada*), at p. 9, admit, "...the 15 year estimate for boy-victim child molesters ... was based upon only 95 observations." Any statistician will agree that no statistical significance can be drawn from such an infinitesimal sample. Consequently, at best, there simply is no scientific evidence that having male victims makes sex-crime recidivism more likely at all. Indeed, this addition of up to four points (one per male victim) poses yet another unanswered question, i.e., whether there actually is any difference in recidivism in that minuscule sample for offenders who had 3, versus 4 male victims, or 2, versus 3, or 1, versus 2, or even 0, versus 1. Apparently, the creators of the MnSOST 3 and 3.1 simply took on faith the existence of such a difference, based on earlier literature. However, this ignores that recent research shows that no such relation to recidivism exists; indeed, it actually shows that abusers of teenage girls have higher recidivism than abusers of male minors.

Finally, the MnSOST, in both its current series and the MnSOST-R version, does not adjust for the age-at-release of the offender in question – a factor acknowledged to singlehandedly be at least as important as the combined weight of all other factors in the Static-99, comparatively, for instance. Thus, e.g., in *Belleau v. Wall et al.*, 2015 U.S. Dist. LEXIS 125909 (E.D. Wis. 2015), that court ruled that:

> "Although Belleau scored higher on the MnSOST-R, another actuarial risk assessment tool, Dr. Ellwood gave less weight to that score because of the MnSOST's greater margin of error and the fact that it did not account for the effect of aging as did the Static-99R. Since Belleau was sixty-seven years old at the time, the latter fact would appear especially significant."

The MnSOST-R/3/3.1 is not truly an RAI at all, incorporating such unrecognized factors as institutional misconduct. Its state-specific limit (i.e., Minnesota sex offenders only) and small samples deprive it of statistic validity, while refusal by its originators to disclose the data upon which it is based blocks peer review and cross-validation. The idiosyncratic coding rules of MnSOST-R/3/3.1 render it utterly unscientific (turning, e.g., on the mere procedural fluke of whether count-specific or instead aggregate sentencing was used in a given case). Admitted, but non-convicted sex offenders are ignored, unless they appear in a psychological report. Non-sexually motivated crimes, such as harassment and disorderly conduct, are counted, while clearly sexually motivated crimes in the category of burglary are not.

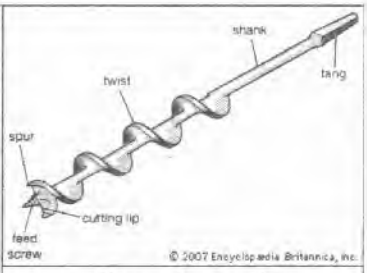
The MnSOST-3.1 was constructed through use of a "construction sample" comprised of sex offenders in Minnesota who were then imprisoned on a recidivistic sex crime. As the *MCCTA Act* has been applied, most of those committed under it were subjected to that commitment petition while in prison on a recidivistic sex offense. This justifies an inference that they were in fact part of the sample used to devise that "tool." This means that their own crimes and other attributes were used as the very basis for that test to compare a sex offender against to supposedly determine his likelihood of re-offense.

However, in the case of all such 'construction sample' subjects, because they had already then recidivated, and because their own other attributes were abstracted as a means of divining probability of re-offense, their scores and corresponding probabilities on that test reflect only their similarity to themselves, and do not prospectively predict a likelihood of re-offense, but instead retrospectively recap the fact that they recidivated in the past. This is therefore a scientific fraud, rendering its resulting scores unusable as evidence.

In re Ince, 847 N.W.2d 13, 14; 2014 Minn. LEXIS 197 (Minn. Supr. 2014), states: "Numeric probabilities also varied, showing Ince's ...4-year probability of reoffending as 7.92 percent (which is higher than 89.9 percent of sex offenders in Minnesota) (MnSOST-3.1 assessment); or, a "rule of thumb" suggested by one of the test's developers, in which the 5-year estimated rate of reoffending (31.2 percent) is doubled to establish a lifetime risk of reoffending (62.4 percent)."

The "31.2 percent" recidivism figure is apparently the "base rate" used by the MnSOST-3.1. This alone is anti-scientific in the extreme, since it flies directly in the face of the Minnesota Dept. of Corrections' own statistics, ascertaining sex-offense recidivism statistics as reflecting a base rate of 3.4%. The doubled MnSOST-3.1 "lifetime" figure of a 62.4% base rate is astronomical, even as applied to a young man such as Cedrick Ince. Note also that the concession in *Ince* that even a mere 7.92% predicted recidivism rate is so comparatively high as to outstrip 89.9% of all incarcerated Minnesota sex offenders (again, including those in younger categories with much higher recidivism percentages than men in their sixties. This amply shows the surrealism of such MnSOST-3.1 lifetime claimed base rate of 62.4%. That this figure is arrived at through mere 'rule of thumb' unscientific guesswork of just doubling the prediction period's base rate (as outrageously high as it already is) demonstrates beyond question the abdication of science by the MnSOST-3.1's originators. The MnSOST-3.1 is anti-scientific junk and must be disregarded.

Most critically about the MnSOST 3.1/3.12 series of 'tools', their false-positive rate or recidivism prediction of those with the claimed highest probability of re-offense is 80% incorrect (that is, for each person in that assigned category who actually reoffended, four did not). *Melissa Hamilton*, "Adventures in Risk: Predicting Violent and Sexual Recidivism in Sentencing Law," 47 *Ariz. St. L. J.* 1 (2015), at 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. ...[T]he great degree of false positives, ...eight out of ten for Minnesota, reflect the tendency toward exceptional error rates. ...." This means that for every one person actually prevented from perpetrating a recidivistic sex crime through commitment on the 'strength' of the MnSOST 3.1/3.12, four others languish needlessly and unjustly in interminable commitment due to that false-positive rate. Such outcomes are intolerable!"



This is also a tool.
Both do the same thing.

[SOCC as a Penal Treadmill?]

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(Continued on page 6)

Open Letter to MN Legislators (and to Those in All Other SOCC States)

Note to *TLP* Readers: This is most of the text of a letter to a specific MN legislator who wishes to remain anonymous. It is offered here not just as an explanation of the onerous futility of attempting any legislative 'band-aid' solution to internal problems of MSOP that bar or severely impede release of its confines, but also as a testament to why similar attempts in federal court are also doomed to a similar failure. It will not be possible to understand why the only remedy that will 'fix' MSOP is to permanently end SOCC in MN, to close MSOP once and for all, and to send all of its confinees home. Please have the patience required to read through this entire document. You won't understand, much less appreciate the need for this unless you do so.

Text Excerpts: "...I do understand the reluctance of legislators (frankly, yourself included) to vote to end the Minnesota Sex Offender Program (MSOP). Never in my life have I encountered such a brazenly false but protracted and emotionally impactful propaganda campaign.

I refer to the campaign that started in advance of the enactment of the Minnesota Civil Commitment and Treatment Act of 1994 (MCCTA of 1994). However, almost every factual assertion made in that campaign of propaganda was absolutely false and, I believe, made by people who certainly knew the falsity of those assertions. Perhaps they acted in a state of hysterical desperation, perhaps earnestly believing that there was a veritable wave of sex crimes by an unseen army of sex offenders.

Of course, this core belief was wildly mistaken, based completely on heuristic impressions, not facts. The biggest problem I face in trying to urge reform (or better yet, abolition) of sex offender civil commitment (SOCC) is the residual state of such emotional 'gut' reactions that, out of emotional wedding to such insanely untrue and illogical claims, blink away the entire constellation of science and other true facts that completely debunk every aspect of such claims.

The situation in terms if seeking legislative relief from this injustice that, legislatively speaking, what I would settle for at this point would simply be the opportunity to come to a full hearing on this issue and make my case squarely in the faces of legislators, with all attendant media attention. But the recent experience of EndMSOP representatives (referring here to the uncommitted civilians in that organization) teaches me that even this modest request gets rebuffed by legislators who either are in the ranks of the zombies lost in that fictional world born of crazy propaganda or are aware, to some extent, of the truth, but who quail to raise any objections to the status quo for fear of losing their seats at the next election.

Perhaps this may be part of the basis for your personal position. In any event, it strikes me that what may be necessary is some 'underground' quiet sharing among legislators of the true facts, a few of which I have already sent you. I am hoping that you are willing to do at least this much.

But now let me get down to the subject of this response to the essence of your letter. More or less, you imply that it is not now possible to drum up the political will to end the MSOP program and to repeal the Minnesota SOCC law (the aforementioned MCCTA of 1994). If I understand you correctly, this is one main reason (if not the main reason) to instead support reform of MSOP.

The first question is what you may deem to be such 'reform.' If by this you simply mean legislative measures or directives that would address the mostly superficial problems of conditions of our confinement within MSOP facilities, such minor matters are indeed in need of redress because they impact our day-to-day wellbeing and our comfort as guests of the state (not as prisoners, and hence not legitimately to be punished by harsh prison-like conditions).

However, this is not what I mean by reform. As I have already cited to you, the number of MSOP confinees who have died while in such confinement is about six times the number of those who have been finally discharged from MSOP. Almost all of these deceased died of old-age related causes after having been confined for long periods, during which they earnestly participated in MSOP's so-called treatment, but to no avail.

The brute reality is that MSOP is not intended or designed to 'treat and release' anyone. Its true, unspoken intent is to confine former sex offenders who have reached the end of their prison terms for the rest of their lives.

Probably the best evidence of this is that no MSOP confinees were released until the *Karsjens* v. *Jesson* case was filed, complaining of that very fact. While that case was succeeding, MSOP, apparently afraid of an even more sweeping outcome, started to release at least some confinees. However, as soon as the judgment by Judge Frank was overturned on appeal, that new campaign plateaued, and since then has actually declined somewhat.

At current release rates, it would take nearly 40 years for MSOP to release everyone currently confined. (Further, this ignores the fact that, meanwhile, MSOP would be receiving newly committed confinees at about that same rate, as is the case currently.) Of course, given the average age of MSOP confinees (in their 50s), many would already have died before any such future release.

And MSOP would still continue on as now, continuing to confine until death far more than would ever be released in the meantime. Because these numbers would never include more releases than new commits, MSOP's existence would thereby be tacitly permanentized – effectively, the agency tasked with execution of a retroactive, supplemental sentences of death-on-the-installment-plan. Is this really your idea of compassionate or even just or proper governance?

On the assumption that your answer is negative, I write on. The question is simply what is to be done about this.

In 2015, when Judge Frank had already ruled that MSOP was in violation of the constitutional rights of its confinees, I wrote to that court. I enclosed a 186-page document of mine addressing the reliefs that would, at a minimum, be required to remediate the wrongs that Judge Frank had cited. I see this report as being directly responsive to your question as to what measures the Legislature could take to remediate some of these ills.

I would love to print out a copy of that report and send it to you. However, in MSOP, although we are allowed to use MSOP-supplied collective computers to draft documents, an artificial bottleneck in printing such documents is created by the very small number of printer toner cartridges that MSOP is willing to buy for this purpose.

Therefore, all that I can do now if you wish to read this report of mine is to propose that you do one of the following: (1) Contact the U.S. District Court in St. Paul and ask for a copy of this report to be delivered to you, whether via digital means or in hard copy via mail. (2) Contact MSOP-Moose Lake and do likewise. As to the former alternative, I do not know the document number given to that report in that case (Number 11-3659). I can only tell you that it is titled 'Amicus Curiae Resident Advisory And Family Council, Org. Memorandum In Support Of Proposed Reliefs' and that I sent it to the Court sometime in the latter half of that year. As to the latter alternative, the file is named 'Memo to Judge Frank re Proposed Reliefs' and is located at this location in my 'network space': Cyrus Gladden/My Documents/All Else/Correspondence, Forms & WP Work Files/Legal/Karsjens/. Please be sure to tell the MSOP staff person you deal with about this that I am authorizing you to receive a copy of this file, not the original.

However, I can condense the core portions of this report to you thus:

First, the 16 proposals mentioned by the Court were:

1. 'Requiring risk and phase placement reevaluation, with all deliberate speed, of all current patients, starting with the elderly, individuals with substantive physical or intellectual disabilities, and juveniles'

2. 'Requiring periodic, independent risk assessments to determine whether the clients still satisfy the civil commitment requirements and whether the treatment phase placement is proper'

3. 'Requiring and creating a variety of alternate less restrictive facilities'

4. 'Revising the discharge process, including the possibility of using a specialized sex offender court with authority to request information, order transfer, provisional discharge, or discharge, and order appropriate conditions and supports for individuals transitioning to the community'

5. 'Requiring the MSOP to promptly file petitions for any person the MSOP believes does not meet the criteria for civil commitment upon arrival, may no longer meet the criteria for civil commitment, or should be transferred to an alternative facility, including for individuals that cannot be well served at the MSOP (for example, due to an individual's physical or intellectual disability)'

6. 'Requiring the MSOP to proactively and continuously develop and adjust specific treatment and discharge plans, no matter which phase a person is in'

7. 'Requiring the MSOP to provide annual notice to all clients of the right to petition and provide assistance with the petitioning process dependent upon the client's needs'

8. 'Requiring the state to have the burden to prove that the committed individuals meet statutory and constitutional standards for continued commitment and placement'

9. 'Requiring the statutory standards for discharge and commitment be the same'

10. 'Requiring a judicial bypass mechanism'

11. 'Requiring changes to the civil commitment process to correct systemic problems and to ensure that only those who need further inpatient treatment and supervision for a sexual disorder and pose a danger to the public are civilly committed, taking into account an individual's age, adult convictions, severity of adult convictions, and physical or intellectual disability'

12. 'Requiring the provision of qualified defense counsel and professional experts to all petitioners'

13. 'Requiring ongoing external review and evaluation by experts to recommend changes to the MSOP treatment program processes, including an overview of the structure of the treatment program and phase progression processes'

14. 'Requiring continued and specific training for all employees of the MSOP

(Continued on page 7)

(Continued from page 6)

and for those people involved with the petitioning, commitment, or discharge process'

15. 'Requiring a plan for educating the public on civil commitment, civil commitment alternative facilities, provisional discharge conditions, and risk of re-offense data, among other things, and requiring funding for such education'

16. 'Appointing a Special Master to monitor compliance with all of the remedies.'

Second, the forms of relief urged in that 'Memorandum' (hereinafter informally, the 'report') for the Court's consideration were:

1. Order Permanent Transfer Of All MSOP Detainees Who Are Under A Coexisting Commitment As Mentally Ill And Dangerous Under Minn. Stat. § 253B.18 To The Minnesota Security Hospital, St. Peter, MN Or To Other Appropriate Facility For Those Under Such Commitments.

2. Order The Unconditional Release Of Every MSOP Detainee Held Solely On The Strength Of Commitments Predating Enactment Of The MCTA Under The Aegis Of Minn. Stat. § 526.09 (A Version Of The Pearson Standard For 'Psychopathic Personality' Commitment Lacking In Any Element Of Lack Of Control And Hence Struck Down As Unconstitutional In *In Re Rickmyer* (Nov. 1993)).

3. Dissolve All SPP And SDP Commitments As In Violation Of The Fourteenth Amendment To The United States Constitution.

a. The MCTA Act Of 1994 Lacks Any Foundation Whatsoever In Psychological Science And Instead Is Purely The Product Of Political Action.

b. The MCTA Act Of 1994 Is Fatally Utterly Vague And Limitlessly Overbroad On Its Face And As Judicially Expanded Through Construction In Defiance Of Science And Of Substantive Due Process.

1. Vagueness of the Terms of the Act on Its Face

2. The Vagueness Is Exacerbated, Not Cured, by Appellate Judicial Interpretation, Construction and Application of said Terms.

3. The Lack of Any Meaningful Limit Against Impermissibly Boundless Application of the SDP Law

4. Other Than Detainees Governed By Relief 1, *supra*, Free All Other MSOP Detainees Immediately And Unconditionally And Destroy All Commitment Case Files (Including All Files Possessed By Opposing Counsel And By Any Witnesses And Department Of Corrections Files Relating To Referrals For Commitment And Sex Offender Assessment Files Of Those Thus Referred For Commitment Consideration) And All MSOP Treatment Files, And Nullify All Bills And Claims Against MSOP Detainees Made By MSOP Or The Dept. Of Human Services For Cost Of Care Of Any MSOP Detainee.

5. If Relief 4 Is Not Granted, Free, Immediately And Unconditionally, All MSOP Detainees In At Least These Three Groups Of Those Statistically Extremely Unlikely To Ever Reoffend:

- Those whose last sexual offense occurred while they were still juveniles;
- Those who are seriously, chronically physically disabled or suffer from a seriously debilitating illness; and
- Those who have attained at least the age of 60.

6. If Relief 4 Is Not Granted, Then Also Destroy All MSOP Treatment Files And Free All MSOP Detainees Not Freed Pursuant To Relief 5 Unconditionally After Allowing The State 60 Days To File A Petition For Commitment Of Any Given MSOP Detainee(s) Either Under Minnesota's Mentally Ill And Dangerous Commitment Law Or Under Any New Legislation In Response To The Court's Order For Relief.

a. In conjunction with this requirement, require that any such new commitment statute comport with the requirements and restrictions as to the standard for commitment imposed upon such statutes on their face and as applied by reigning United States Supreme Court case law.

b. In conjunction with this requirement, require that any such new commitment statute provide that a petition for commitment is limited to a sex offender who has at least one conviction in his criminal record of a sex crime against a stranger that included violence, sex by force, or coercion on threat of violence.

c. In conjunction with this requirement, require that any such new commitment statute provide that, as a precondition to filing of a commitment petition, the petitioner must request the pre-petition screening recommended by the court's task force be done by an independent panel of experts. The panel must review the evidence and decide whether to recommend filing of such petition only upon principles of known science, not conjecture and speculation. No petition may be filed in the absence of a recommendation by the panel for such filing.

d. In conjunction with this requirement, require that any such new commitment statute provide that a special court be created solely as to sex offender commitments and with sole jurisdiction as to that subject matter, that the judges thereof be appointed by the Minnesota Supreme Court from the pool of retired judges.

e. In conjunction with this requirement, require that any such new commitment statute provide that any commitment petition brought pursuant to said statute must be brought within one year after conviction of the offender of one or more sex crimes of rape of any person or any form of sexual contact or penetration with a child, failing which timely petition, a prohibition shall attach upon any form of testimony or evidence of said conviction or of any crimes alleged in the complaint culminating in that conviction.

f. In conjunction with this requirement, require that any such new commitment statute provide that any commitment petition be brought by the State of Minnesota, and that no 'referral' or other request for consideration of commitment can be made by any person or entity.

g. In conjunction with this requirement, require that any such new commitment statute provide that the only forensic evidence and testimony allowed must be based on psychological science, and the decision must be exclusively based on science, not conjectural possibilities.

h. In conjunction with this requirement, require that any such new commitment statute provide that failure at sex offender treatment, refusal to enter such treatment, or quitting such treatment is inadmissible as evidence in support of any sex offender commitment petition.

i. In conjunction with this requirement, require that any such new commitment statute provide that any statements, implications, or inferences from statements made by any person while as a participant in sex offender treatment are inadmissible for any purpose in any judicial case or administrative proceeding.

j. In conjunction with this requirement, require that: (1) any such new commitment statute provide that such commitment be only for a term of one year; and (2) that no more than three sequential commitment petitions may be brought as to any given sex offender, such that one committed to all three terms in sequence shall be released unconditionally and the last of said commitments be discharged at the end of three years from the date of the first judgment of commitment. Thereafter, that same offender may not be recommitted except following conviction of a sex crime of rape of any person or any form of sexual contact or penetration with a child occurring after such unconditional release and commitment discharge.

k. In conjunction with this requirement, require that any such new commitment statute contain commitment criteria that include a 'highly likely' standard of probability of re-offense within three months of release, and explain that a merely 'likely'-to-reoffend standard connotes a probability in excess of 50% (i.e., more likely than not), and that this 'highly likely' standard inherently must mean a probability substantially greater than more likely than not, defined as a 75% likelihood of re-offense within that three-month period. The minimum quantum of

Sen. Joe McCarthy & the [manufactured] "Red Scare"

evidence necessary to establish this high likelihood must include at least one of the following: (1) the past record of the commitment respondent of such re-offense within the same period after release; or (2) a statement (either made in testimony by the commitment respondent or any earlier statement acknowledged by him in testimony or court document) of either (a) his intent, upon his next release, to sexually reoffend within that 3-month period, or (b) his belief that, upon his next release, he will not be able to prevent himself from sexually reoffending within that 3-month period. (Court's Order dated 6/15/15, Conclusion 32)

l. In conjunction with this requirement, require that any such new commitment statute contain a burden upon the respondent of proof beyond a reasonable doubt as to each requisite element of the commitment statute. This must not be confused with the requisite 75% likelihood of re-offense mentioned in the immediately preceding point.

m. In conjunction with this requirement, require that any such new commitment statute require the establishment of a special commitment court populated by Minnesota Supreme Court appointment of judges for a single, non-renewable term of five years, and that all petitions for commitment of a sex offender be brought exclusively in said court, and that each case be heard and decided by a panel of three of said judges.

n. In conjunction with this requirement, require that any such new commitment statute contain a prohibition upon any successive petition(s) to commit the commitment respondent after a petition under the same statute has been denied, until the sooner of the expiration of five years from the date of denial of said petition or the commission of a new sex crime by the commitment respondent.

o. In conjunction with this requirement, require that any such new commitment statute contain a prohibition upon any form of testimony or evidence of the existence within the commitment respondent of 'paraphilia' of any kind, of 'psychopathy,' of 'antisocial personality disorder,' or of any purported mental 'illness,' 'disorder,' 'dysfunction,' 'clinical construct,' or 'abnormality' that is defined

(Continued on page 8)

(Continued from page 7)

in terms either vague, lacking in clear bounds, or subject to subjective or impressionistic interpretation or application

1. *In General*

2. *Specific Problems*

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

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

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

d. The Junk Science Concept of Paraphilias as a Category of Disorders.

e. The Junk Science Concept of Hebephilia as a Disorder.

f. The Junk Science Concepts that Pedophilia Is a Disorder at All, and

g. That It Inherently Serves as a Recidivism Predictor.

p. In conjunction with this requirement, require that any such new commitment statute contain commitment criteria that include an indispensable element of a lack of volitional control by construing the requirement of Kansas v. Crane to have the meaning explained as to the DSM-V's requirement for a pedophilia diagnosis of 'urges' by *Michael B. First & Robert L. Halon*, 'Use of DSM Paraphilia Diagnoses In Sexually Violent Predator Commitment Cases,' 36 *J. Am. Acad. Psychiatry & Law* 443, 450 (2008).

1. *Meaninglessness of, and Lack of Protection from the Act's Terms, 'Impulse' and 'Lack of Control'*

2. *The Application of All of the Foregoing in Sex Offender Commitment Cases*

3. *The SPP Element Of Lack Of 'Adequate Control' And Minnesota Case Law Applying The Standard Of 'Serious Difficulty' In Controlling Harmful Sexual Behavior Presume Such A Lack From The Mere Existence Of A 'Disorder' Or From A Criminal Record, In Violation Of Plaintiffs' Right To Substantive Due Process.*

4. *In General, the Presumption Built Into the SPP/SDP Law of an Inherent Lack of Adequate Control from a Disorder's Existence Violates Substantive Due Process.*

a. Disregard of the requirement that specific claimed symptoms of a cited 'disorder' in a given commitment case defendant be shown to deprive him of his ability to control his actions.

b. The Mere Existence of a 'Disorder' Cannot Inherently Connote Uncontrollable or Difficult-to-Control 'Impulses.'

1. Not all Individuals with Pedophilia Have Volitional Impairment.

c. A Predisposition Does Not a Lack of Adequate Control Make

This requisite element for commitment should be of an absolutely irresistible impulse to commit a crime right now, not eventually, and must be clearly distinguished from a decision to commit a crime.

q. In conjunction with this requirement, require that any such new commitment statute limit testimony and evidence of probability of re-offense to the five year period immediately following release of the commitment respondent if not committed (since anyone lacking volitional control would surely reoffend by then if at all, and since it is now known that sex offense recidivism, if it will happen at all, almost invariably occurs within the first five years after prison-release. (Minn. Dept. Of Corrections, 'Sex Offender Recidivism' 2008).

r. In conjunction with this requirement, require that any such new commitment statute contain a prohibition upon any form of testimony or evidence addressing the ultimate legal question of whether the commitment respondent meets any or all of the statutory commitment elements.

s. In conjunction with this requirement, require that any such new commitment statute contain a prohibition upon any form of testimony or evidence of the existence of a danger to the public by reason of any of the following 'factors,' none of which have any actuarially established indicative or causative relationship to sexual re-offense:

1. *The commitment respondent's alleged demographic characteristics (e.g., age, education, etc.);*

2. *The commitment respondent's alleged history of violent behavior;*

3. *The alleged 'sources of stress' in the commitment respondent's environment, including any alleged cognitive or affective factors claimed to indicate that the person may be predisposed to cope with stress in a violent manner;*

4. *The commitment respondent's alleged record in sex therapy programs;*

5. *A claimed 'escalation' over time in the commitment respondent's history of sexual misconduct (often based on inaccuracies or trivial differences);*

6. *Denial by the commitment respondent of any convicted or alleged sex crime;*

7. *A claimed 'lack of remorse' or 'lack of empathy' on the commitment respondent's part (often directed at a commitment respondent claiming innocence of the underlying conviction);*

8. *Poor work history of the commitment respondent;*

9. *Alleged 'inadequate insight' on the part of the commitment respondent;*

10. *Hostility to treatment, 'low motivation for treatment' or 'poor progress in treatment' on the part of the commitment respondent;*

11. *'Minimization' by the commitment respondent of his/her crimes, criminal history, or criminal responsibility;*

12. *The commitment respondent's alleged acceptance of attitudes supportive of sexual entitlement, rape, or sexual activity with children;*

13. *A history of family instability;*

14. *Emotional collapse of the commitment respondent;*

15. *A collapse of social support for the commitment respondent;*

16. *Low self-esteem on the part of the commitment respondent;*

17. *Substance abuse by the commitment respondent; and*

18. *The commitment respondent had been 'abused as a child.'*

t. In conjunction with this requirement, require that any such new commitment statute contain a prohibition upon any form of evidence or judicial notice of records from the Minnesota Department of Corrections or of testimony by any present or former official, employee, or contractor of said department.

u. In conjunction with this requirement, require that any assessor of any sex offender be a specialist in the academic field of forensic psychology, but excluding the field known as sex offender assessment and treatment, due to the institutional anti-sex offender bias exhibited by that entire latter field.

v. In conjunction with this requirement, require that any such new commitment statute contain a prohibition upon any form of testimony or evidence based on 'clinical risk assessment' techniques, which have been repeatedly shown in retrospect to be 80-90% incorrect.

w. In conjunction with this requirement, require that any such new commitment statute contain a requirement that only testimony or evidence based on 'actuarial risk assessment' techniques be admissible, and require that, to be admissible, such testimony or evidence comply with each of the following requirements:

1. *Require that any such new commitment statute contain a prohibition upon any form of testimony or evidence based on 'extrapolation' from the probability of re-offense yielded by any sex offender assessment 'tool' or any 'actuarial risk assessment instrument' over any time period beyond the time period covered in the design of that tool or instrument, since there is no scientifically accepted method for such extrapolation and inaccuracy is inherent in such extrapolation.*

2. *Require that any such new commitment statute contain a prohibition upon any form of testimony or evidence based on any sex offender assessment 'tool' or any 'actuarial risk assessment instrument' in which any diagnosis of any form of deviance/paraphilia is scored as a factor for recidivism likelihood.*

3. *Require that any such new commitment statute contain a prohibition upon any form of testimony or evidence based on any 'dynamic risk factors' assessment techniques: (1) that are not based on academically accepted actuarial statistics establishing a substantial difference for each included dynamic risk factor in terms of observed recidivism rates in the comparative sample of offenders; (2) that include 'acute' factors subject to rapid change; (3) that are vague or otherwise capable of being subjectively judged to be present as to the test subject; or (4) which techniques fail to account for 'protective dynamic factors' applicable to the assessed person, including, but not limited to:*

a. Being subject to corrections 'intensive supervised release' or other similarly intensive government or governmentally overseen supervision;

b. Being required, whether by corrections or other officials, to participate in sex offender treatment, and complying with that requirement;

c. Abstaining from illicit drug or alcohol consumption; and

d. Being involved in a lawful intimate relationship.

a. *Require that any such new commitment statute contain a prohibition upon any form of testimony or evidence based on any sex offender assessment 'tool' or any 'actuarial risk assessment instrument' as to which the commitment respondent was a member of the 'development'/'construction' sample.*

b. *Require that any such new commitment statute contain a prohibition upon any form of testimony or evidence based on any sex offender assessment 'tool' or any 'actuarial risk assessment instrument' created for the Minnesota Department of Corrections or by any official(s), employee (s), and/or contractor(s) of said department.*

c. *Require that any such new commitment statute contain a prohibition upon any form of testimony or evidence based on any sex offender assessment 'tool' that does not comprise an 'actuarial risk assessment instrument' under academically accepted standards, including but not limited to the requirements for academic peer review, for cross-validation by forensic psychology experts with no connection to either the test authors or any organization by which they are employed or with which they are affiliated, and for published or publicly available data as to construction samples used and mathematical formulas and other methods of calculations used to derive claimed probabilities of re-offense.*

d. *Require that any such new commitment statute contain a prohibition upon any form of testimony or evidence based on any sex offender assessment 'tool' that uses statistical comparison samples containing less than 2,000 offenders to derive either comparative 'base rates' or any other comparative rate of recidivism incidence.*

(Continued on page 9)

(Continued from page 8)

e.Require that any such new commitment statute contain a prohibition upon any form of testimony or evidence based on any actuarial instrument that has been determined by any court within the United States or any state thereof not to fulfill the Frye test or the Daubert test of admissibility.

f.Require that any such new commitment statute contain a prohibition upon any form of testimony or evidence based on any actuarial instrument that either: (1) uses a 'base rate' that mathematically implies a scientifically unacceptable excessive error rate equal to or less than sheer chance of correctness for any probability of recidivism derived therefrom in excess of 50%; or (2) reports a 95% confidence interval of more than 10% total range as to any probability derived as to the assessed subject.

g.Require that any such new commitment statute contain a prohibition upon any form of testimony or evidence based on any actuarial instrument the projected probability percentages of which reflect a cumulative probability including the probability of a crimes of rape of any person or any form of sexual contact or penetration with a child, but also including one or more other contributory probabilities, such as (without limitation, strictly as examples) the probability of occurrence of any other type of crime or occurrence of a violation of a condition of probation or parole.

h.Require that any such new commitment statute contain a prohibition upon any form of testimony or evidence based on any actuarial instrument that includes scoring point(s) or partial points for any behavior of the subject other than crimes of rape of any person or any form of sexual contact or penetration with a child.

i.Require that any such new commitment statute contain a prohibition upon any form of testimony or evidence based on any actuarial instrument which permits scoring for any unconvicted accusations of sex crimes.

j.Require that any such new commitment statute contain a prohibition upon any form of testimony or evidence based on any actuarial instrument which permits scoring of more than one conviction per victim as cumulative points.

k.Require that any such new commitment statute contain a prohibition upon any form of testimony or evidence based on any actuarial instrument which permits scoring of sentences, rather than convictions.

l.Require that any such new commitment statute contain a prohibition upon any form of testimony or evidence based on any actuarial instrument which permits scoring points or partial points for the fact that one or more crimes of the subject involved male, rather than female victim(s).

m.Require that any such new commitment statute contain a prohibition upon any form of testimony or evidence based on any actuarial instrument which permits scoring points or partial points for the fact that the subject has never had a marriage or cohabitation relationship with an adult lover at all or for some minimum period of time.

n.Require that any such new commitment statute contain a prohibition upon any form of testimony or evidence based on any actuarial instrument which permits scoring points or partial points for the fact that one or more crimes of the subject occurred in a place deemed public, but which place in fact is not accessible by members of the general public.

o.Require that any such new commitment statute contain a prohibition upon any form of testimony or evidence based on discretionary choice in scoring any actuarial instrument by comparing the subject to a sample or group of samples of sex offenders with unusually high rates of sexual recidivism or by adjustment of the test-derived score or its correlated probability based on any factors or other matters not scored within that test itself.

p.Require that any such new commitment statute contain a prohibition upon any form of testimony or evidence based on any actuarial instrument which does not fully account for the diminishing effect of increasing age of the subject on probability of sex-crime recidivism.

q.Require that any such new commitment statute contain a prohibition upon any form of testimony or evidence based on any actuarial instrument which permits scoring points or partial points for attitudes, beliefs, or opinions on the part of, or statements by the subject as to any matter, including sexual topics.

x. In conjunction with this requirement, require that any such new commitment statute provide for the full panoply of procedural rights to a commitment respondent as is recognized in criminal cases because the potential loss of liberty in a sex offender commitment is at least equal to that which may result in a criminal case. This shall include, *inter alia*, the right to competent counsel, or to self-representation, at the commitment respondent's option, and to a psychiatrist to act as expert witness on behalf of that person. All of these procedural rights shall also apply to all other proceedings as to any individual committed under this new statute.

y. Upon judgment of commitment, a committed individual shall be entitled to the least restrictive setting, either in existence or which can be created, consistent with public safety in which to receive treatment. The burdens of production and persuasion shall be upon the commitment petitioner to show that no such facility/environment exists and that none can be created. Detention/confinement in any facility/environment more restrictive than this shall be prohibited. The department of human services shall be obligated to provide residential accommodations and treatment for each level of restriction established for risk management. Upon commitment, and thereafter upon petition by a committed individual for transfer to a less restrictive setting, a presumption of the least restriction as all that is required for public safety shall attach, and the state shall have the burden of proving beyond a reasonable doubt that any greater restriction level is required for public safety. Whenever a committed person is found to require a restriction level setting above the minimum level, a bed must be held available for that committed person at a residential accommodation of the next-lower restriction level. All treatment and all such residential accommodations shall be subject to the requirements of licensure and of accreditation by an independent accrediting agency for non-institutional care and treatment for the mentally ill.

z. In conjunction with this requirement, require that any such new commitment statute provide that all those rendering treatment in any residential treatment program or any residential portion of a treatment program pursuant to said statute must possess either a master's or doctorate degree in clinical psychology and current licensure by the Board of Psychology of the State of Minnesota as a licensed psychologist. Each such therapist rendering treatment must be supervised by a board-certified psychiatrist, and each confining facility of the treatment program and the treatment program itself must be administered by a board-certified psychiatrist. Each such confining facility must be operated under the authority of Rule 36, not Rule 26 and thus analogously to a psychiatric hospital, with all treatment provided directly by board-certified psychiatrists.

aa. In conjunction with this requirement, require that any such new commitment statute prohibit the use, in any treatment program pursuant to said statute, of: (1) any polygraph examination; or (2) a penile plethysmograph ('PPG') test, Abel/ABID assessment or any other form of test of sexual response, attraction or interest.

bb. In conjunction with this requirement, require that any such new commitment statute provide for:

1. Ongoing external review and evaluation by psychiatrists accredited to recommend changes to the commitment treatment program processes, including an overview of the structure of the treatment program and treatment progression processes;

2. Continued and specific training for all employees of the commitment treatment program and for all people involved in either the screening, petitioning, commitment or discharge processes;

3. A plan for educating the public on civil commitment, alternative, less-restrictive settings, provisional discharge conditions, and data concerning risk of sexual re-offense, and on all other relevant topics, and requiring funding for such education.

cc. In conjunction with this requirement, require that any such new commitment statute provide for a new risk assessment to be performed as to each committed individual every six months, with a report to be filed with the committing court and served upon the committed individual in question within ten days of performance of that assessment. Each of these risk assessments must be prepared by an independent examiner, and must conform to the requirements above as to risk assessment procedures, and must not include the use of any risk assessment instrument that has not been normed for an institutionalized population.

dd. In conjunction with this requirement, require that any such commitment must end immediately upon judicial determination by the aforesaid special court that the state has failed to establish beyond a reasonable doubt both that the committed individual in question continues to meet the constitutionally required commitment standard and, to the extent higher, the statutorily required commitment standard, and require that any committed individual may petition that court, whether by habeas corpus petition, Rule 60.02 motion, or otherwise, for release and dissolution of the commitment at any time on this ground. In any such petition proceeding, the state shall have the burden of persuasion that the committed individual still meets both constitutionally and statutorily required commitment standards.

ee. In conjunction with this requirement, require that any such new commitment statute provide that no person involved in the commitment process or the treatment or care or custody of a committed person shall have any form of immunity from action at law or equity or from damages therein.

7. To The Extent That The Court Or-

(Continued on page 10)

"At the Palais de Justice," by Honoré Daumier; in the Musée du Petit Palais, Paris

(Continued from page 9)

ders That Any Current MSOP Detainees And/Or Those On MSOP 'Provisional Discharge' Undergo 'Risk Assessment,' Whether As A Condition Of Release Or Final Discharge Or For Any Other Purpose, Require That All Of The Foregoing Provisions Of Relief 6 Of These Suggestions Applicable To Such Assessment Apply With Full Force As Requirements And Restrictions Upon Each Such 'Risk Assessment.'

8. Order The Department Of Human Services, MSOP, And Defendants, As Their Representatives, To Provide Each Person (Who Does Not Refuse It) Released From MSOP Detention, Whether Unconditionally Or Provisionally, Remedial Life-Skills, Vocational Training, And Education To The Fullest Level Of Such Person's Individual Ability, Each To The Extent Such Services Are Accepted By The Person. Additionally, The DHS Must Be Ordered To Find Us Adequate Housing, Jobs Suitable To Our Education And Training And To Provide All Necessary Means Of Support, Including Cash Stipends, Until We Can Support Ourselves Through Such Employment Or Stable Independent-Contractor Work Or Stable Small-Business.

9. Require That All Remedies Specified By The Court Be Effected Within 18 Months From The Date Of Judgment, Direct The Special Master To Monitor Compliance With All Such Remedies, And Develop An Appropriate Schedule Of Day-Fines And Other Meaningful Monetary Penalties For All Actions And Inactions In Violation Or Noncompliance With The Terms Of Said Judgment.'

In the Conclusion of this document, I wrote the following summation of how these proposed reliefs fit together:

'We fervently urge the Court to earnestly consider the alternative and additional forms of relief the RAFC has proposed above. In particular, we see Reliefs 1, 2, 5, 8 and 9, *supra*, as givens.

Having said this, however, we believe foremost of all that only Reliefs 3 and 4, *supra*, can suffice to effectively cure the monstrosity that MSOP was always intended to become, and that it has in fact become at present. Only to the extent that the Court declines to grant that crucial relief does it become necessary to operationalize all of the reliefs specified in Reliefs 6 and 7. In the event that Reliefs 3 and 4 are not granted, Reliefs 6 and 7 become indispensable to ensure the rights of members of the Plaintiff Class. However, as the intricate nature of that combination of reliefs within Relief 6 shows, enforcement of such rights in this piecemeal manner will almost certainly become a long and difficult process, uncertain of permanent effect.

RAFC submits that the more expeditious judicial solution is simply to order Reliefs 3 and 4, in conjunction with Reliefs 1, 2, 5, 8, and 9. This leaves to the Minnesota Legislature what, if any, replacement statute to enact. In this way, by incorporation of the provisions of Reliefs 6 and 7 as mere suggestions in the Court's judgment, the Court may simply suggest to the Legislature consideration of such changes in any such replacement statute.'

Hence, what this set of recommendations proposes as a legislative solution is to repeal and recreate all provisions of Minnesota Statutes (primarily in Chapters 253B and 253D) with regard to the MCCTA of 1994 (as subsequently amended) in the manner suggested in the lettered sub-recommendations of recommended Relief Number 6. My suggestion for legislative action is in accordance with the foregoing, with the addition that any such act declare the invalidity *ab initio* of all commitments under the MCCTA of 1994 and its predecessor acts calling for commitment of any persons denominated as 'sexual psychopaths' and retroactively bar the application of any and all collateral consequences to anyone for ever having been under any such commitment judgment and to seal all court records and records of MSOP and of any other governmental agency of the State of Minnesota or its counties as to any such commitment or concerning any individual ever subjected to any such commitment or to a petition therefor.'"

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Irregular Passion - The Unconstitutionality and Inefficacy of Sex Offender Residency Laws

Sarah E. Agudo, Comment: "Irregular Passion: The Unconstitutionality and Inefficacy of Sex Offender Residency Laws," 102(1) *Northwestern University Law Review* 307

pp. 312-13: "*2. Analysis of a Procedural Due Process Claim.*—In determining what process the state must provide to deprive an individual of his life, liberty, or property, courts consider three factors: first, the private interest involved; second, the risk of erroneous deprivation of that interest and the probable value of additional safeguards; and, third, the state's interest in maintaining its procedure.24 Most importantly, what process is due is not absolute; it varies with the severity of the restriction imposed.25

Notes for this excerpt:

24 *Mathews v. Eldridge*, 424 U.S. 319, 335 (1976).

25 *Id.* at 341.

pp. 314-14: *3. Analysis of a Substantive Due Process Claim.*—In addition to these procedural violations, broad residency laws violate substantive due process. The proper test for determining whether a government regulation offends the Substantive Due Process Clause depends on whether the regulation implicates a fundamental right.39 If so, courts employ a "strict scrutiny" test.40 Under this test, a court determines whether the regulation advances a compelling state interest and whether the regulation is "narrowly tailored" such that it is the least restrictive method available to effectuate that interest.41 If no fundamental right is involved, courts engage in a "rational basis" analysis.42 In rational basis review, a court determines whether the state acted in pursuit of a permissible objective and, if so, whether the means it adopted were reasonably related to accomplishing that objective.43 The next Subpart examines how these tests apply to sex crime laws.

Notes for this excerpt:

39 *Washington v. Glucksberg*, 521 U.S. 702, 720–21 (1997) (describing fundamental rights as those that are "deeply rooted in the Nation's history," rooted in the "traditions and conscience of our people," and "implicit in the concept of ordered liberty" (internal citations omitted)).40 *See Griswold v. Connecticut*, 381 U.S. 479, 503–04 (1965) ("The nature of the right invaded is pertinent, to be sure; for statutes regulating sensitive areas of liberty do . . . require 'strict scrutiny,' and 'must be viewed in the light of less drastic means for achieving the same basic purpose.'" (citations omitted)); *see also Reno v. Flores*, 507 U.S. 292, 302 (1993) (applying strict scrutiny to a substantive due process claim); *Skinner v. Oklahoma*, 316 U.S. 535, 541 (1942) (applying strict scrutiny to an equal protection claim).

41 *Reno*, 507 U.S. at 301–02.

42 *Glucksberg*, 521 U.S. at 728.

43 *Id.* at 735 (holding that the state's interests were important, legitimate, and reasonably promoted by the challenged law).

pp. 329-30: *D. Right to Inter/Intrastate Travel*

1. Background of Inter/Intrastate Travel.—The Constitution guarantees a right to interstate travel,139 specifically, the right to travel from one state to any other state for the purpose of engaging in "lawful commerce, trade, or business without molestation."140 This right is fundamental and subject to strict scrutiny.141 Numerous state and federal courts have considered, and disagreed upon, whether the Constitution also guarantees a right to *intra*state travel.142 The Supreme Court has not yet spoken on the issue. A reasonable reading of the Constitution and an in-depth analysis of case law, however, suggest that the Supreme Court will inevitably recognize the intrastate right as a logical extension of the right to interstate travel.143 If an intrastate travel right does exist, the following analysis demonstrates how residency laws infringe upon it. If not, the reasoning can still apply to

Your Next Residence?

interstate travel restrictions, albeit to a lesser extent simply because interstate travel is less common. Numerous circuit courts have already found that a right to intrastate travel exists.144 For example, in *King v. New Rochelle Municipal HousingAuthority*, the Second Circuit held that "[i]t would be meaningless to describe the right to travel between states as a fundamental precept of personal liberty and not to acknowledge a correlative constitutional right to travel within a state."145 Similarly, in *Lutz v. City of York*, the Third Circuit held that an unenumerated right to intrastate travel emanated from the substantive due process guarantee.146

Notes for this excerpt:

139 *Ward v. Maryland*, 79 U.S. (12 Wall.) 418, 430 (1871); *see also Attorney Gen. v. Soto-Lopez*, 476 U.S. 898, 901–02 (1986); *Jones v. Helms*, 452 U.S. 412, 417–18 (1981).

140 *See Soto-Lopez*, 476 U.S. at 901–02 (holding that there is a constitutional freedom to enter and reside in any state).

141 *See In re United States ex rel. Mo. State High Sch. Activities Ass'n*, 682 F.2d 147, 151 (8th Cir. 1982).

142 *See, e.g., Townes v. City of St. Louis*, 949 F. Supp. 731, 734–35 (E.D. Mo. 1996), *aff'd per curiam*, 112 F.3d 514 (8th Cir. 1997) (not finding a right to intrastate travel and recognizing a split between the First, Second, and Third Circuits (which found such a right) and the Fifth, Sixth, and Seventh Circuits (which did not find such a right)).

143 *See generally Andrew C. Porter*, Comment, *Towards a Constitutional Analysis of the Right to Intrastate Travel*, 86 *NW. U. L. REV.* 820 (1992) (providing a thorough analysis of the interstate travel doctrine and concluding that the right to intrastate travel must also exist).

144 *See, e.g., Lutz v. City of York*, 899 F.2d 255 (3d Cir. 1990); *King v. New Rochelle* Mun. Hous. Auth., 442 F.2d 646 (2d Cir. 1971); *Cole v. Hous. Auth.*, 435 F.2d 807 (1st Cir. 1970). *But see Wardwell v. Bd. of Educ.*, 529 F.2d 625 (6th Cir. 1976) (finding no right to intrastate travel); *Ahern v. Murphy*, 457 F.2d 363 (7th Cir. 1972) (holding that the Supreme Court's denial of certiorari "for want of a substantial federal question" in a similar case implied that there is no right to intrastate travel).

145 442 F.2d at 648.

146 899 F.2d at 256.

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