the **Legal Pad**

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"As many researchers have learned, evidence is sometimes met with disdain or anger when the findings are counter to popular beliefs or expediency." — M.E. Rice & G.T. Harris, "Treatment for Adult Sex Offenders: May We Reject the Null Hypothesis?", The Wiley-Blackwell Handbook of Legal and Ethical Aspects of Sex Offender Treatment and Management (2013), p. 229

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- ✓ Stupple on Disgust, Dehumanization of SOs & the Courts (Sorry! Next Time)
- ✓ Virtual Reality Coming Soon: Diagnosis, Assessment, Therapy
- ✓ Inter-Offender Associations–Better Than Isolation
- ✓ Algorithmic Risk Assessment assessed
- — & Many more to come!

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NJ ACLU Insists: More Than 50-50 Is Required

The Standard Is 'Highly Likely' —So Why Do Courts Commit on Small Probabilities?

Editor's Introduction: The reigning caselaw standard for substantive due process purposes within the Fourteenth Amendment requires (among other things) a high likelihood of re-offense to justify SOCC commitment. However, courts in states with SOCC laws often distort the meaning of "high likelihood" beyond recognition, ordering commitment even when actuarial probabilities are as low as 10% likelihood — or even less. Now the ACLU of New Jersey has launched a frontal assault on this practice, seeking to require SOCC decisions to conform to this standard. Here is their reasoning on this.

ACLU Foundation New Jersey, "In re Civil Commitment of J.W.," N.J. App.Div. #A-000914-22T5 (Aug. 2023)

Text Excerpts:

"Preliminary Statement

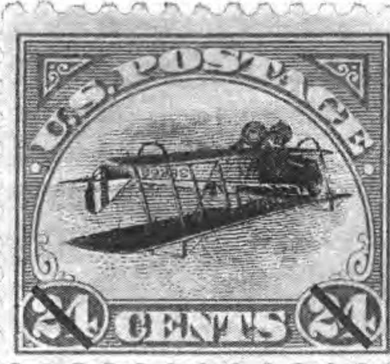
...To civilly commit a person based on a predicate sexual offense, the State must demonstrate that the person is 'highly likely' to sexually reoffend, among other showings. The meaning of 'highly likely' is bounded by constitutional breakwaters. Construing it too broadly would sanction what the Constitution most abhors: confiscating liberty absent strict necessity.

Here, the Court must decide whether 'highly likely' to reoffend means at least 'more likely than not' to reoffend. Common sense and ordinary understandings of the phrase 'highly likely' are sufficient to dictate an answer in the affirmative. But the doctrine of constitutional avoidance buttresses that conclusion. Interpreting the phrase otherwise – to authorize the civil commitment of a person who the State fails to prove is at least more likely than not to recidivate – would give rise to serious substantive due process questions....

...[T]he State may ...be correct that the decision to initiate or extend civil commitment should be made holistically, informed by varied factors. But it cannot ignore that among those factors is a mandatory constitutional condition: the State must show that the person it seeks to commit poses a danger so substantial that their physical incapacitation is necessary to protect the public. This condition finds expression in the requirement that the State show that the person is 'highly likely' to reoffend. If 'highly likely' does not mean, at bare minimum, more likely than not, then it means very little. And if it means very little, the civil commitment statute is constitutionally suspect.

Statement of Facts and Procedural History

All Sexually Violent Predator laws share two elements, each honed by constitutional caselaw. To civilly commit a person convicted of a sexual offense, the State must establish that the person (1) has a mental disorder or abnormality and (2) is likely to commit sexually violent acts in the future. *Kansas v. Crane*, 534 U.S. 407, 423 (2002).



A Small Probability

...'Mental abnormality' has no recognized medical meaning. *Trevor Hoppe*, Civil Commitment of People Convicted of Sex Offenses in the United States, *UCLA School of Law, Williams Institute*, 2 (Oct. 2020). ...[I]t is defined in vague and circular statutory language that is effectively reverse-engineered to apply to anyone who has committed an act of sexual violence.[1] Similarly, the diagnostic criteria for many personality disorders are sprawling; according to some estimates, between 40 and 80% of all incarcerated men [all crimes] meet the criteria for antisocial personality disorder. *De Matteo, et al.*, *A National Survey of United States Sexually Violent Person Legislation: Policy, Procedures, and Practice* at 253.

Perhaps in part because Sexually Violent Predator laws sweep so broadly and retain so thin a tether to medical pathology, whether civil commitment can deliver on its promise of 'treatment' is dubious. Many experts question whether common treatment modalities are effective in reducing sexual recidivism. See *Steven I. Friedland*, 'On Treatment, Punishment, and the Civil Commitment of Sex Offenders,' 70 *U. Colo. L. Rev.* 73, 82 (1999); *R. Karl Hanson et al.*, 'First Report of the Collaborative Outcome Data Project on the Effectiveness of Psychological Treatment for Sex Offenders," 14 *Sex Abuse: J. Rsch. & Treatment* 169, 170 (2002). One of the most comprehensive studies to date, California's Sex Offender Treatment and Evaluation Project, compared offenders treated in an inpatient program with offenders in two untreated control groups and found no significant differences among the three groups in the rates of sexual or violent recidivism over an eight-year follow-up period. *Janice Marquez et al.*, 'Effects of a Relapse Prevention Program on Sexual Recidivism: Final Results from California's Sex Offender Treatment and Evaluation Project (SOTEP),' 17 *Sex Abuse: J. Rsch. & Treatment* 79, 79 (2005). Even if treatment were effective, civil committees are disincentivized from participating in it because it often requires them to admit guilt and produce incriminating statements and documentation that can be used as evidence to secure their continued confinement. *Miller*, "Sex Offender Civil Commitment: The Treatment Paradox," 98 *Cal. L. Rev.* at 2114-15.

Whether because treatment is ineffective, because it is a self-incrimination trap, or for additional or unrelated reasons, vanishingly few civil committees are ever released....

A 2016 data analysis by the nonprofit news organization *The Marshall Project* revealed that just 15 percent of the 579 people who have been civilly committed through New Jersey's program at the Special Treatment Unit in Avenel ('STU') have been discharged to the community. *George Steptoe & Antoine Goldet*, Why Some Young Sex Offenders Are Held Indefinitely, *The Marshall Project* (Jan 17, 2016), https://www.themarshallproject.org/2016/01/27/why-some-yopung-sex-offenders-are-held-indefinitely. One committee who spent nine years in the STU said that 'We called it the "Pine Box Release Program" – because the only way you were leaving it was in a box, dead.' *Jordan Michael Smith*, Obscure New Jersey 'Treatment' Facility Has a Higher Covid-19 Death Rate Than Any Prison in the Country, *The Appeal* (June 4, 2020). https://theappeal.org/obscure-new-jersey-treatment-facility-has-a-higher-covid-19-death-rate-than-any-prison-in-the-country.

Physically and figuratively, little separates the STU from a prison. See id. (quoting another committee who stated, 'They don't consider you prisoners, but they treat you like prisoners').

ARGUMENT

I. Substantive Due Process Principles Require the State to Prove That the Person It Seeks to Civilly Commit Is at Least More Likely Than Not to Reoffend.

...In 2002, the New Jersey Supreme Court ...[held, in] *In re Commitment of W.Z.*, 173 N.J. 109, 126 (2002), [that] to involuntarily commit a person under the SVPA, ...the State must demonstrate 'that the individual has serious difficulty in controlling sexually harmful behavior such that it is *highly likely* that he or she will not control his or her sexually violent behavior and will reoffend.' *Id.*, at 132 (emphasis added)....

A. When the State Civilly Commits a Person without Demonstrating That the Person Presents a Predictable Danger, It Impermissibly Inflicts Punishment.

Civil commitment 'effects a great restraint on individual liberty' and entails an 'extraordinary degree of state control' over committees' autonomy. *In re Commitment of S.L.*, 94 N.J. 128, 137, 139 (1983). Indeed, because 'confinement under the [SVPA] is theoretically without end... it constitutes a greater liberty deprivation than that imposed upon a criminal defendant who, in all but a handful of cases, is given a maximum release date. A more onerous impairment of a person's liberty interest is difficult to imagine.' *State v. Bellamy*, 178 N.J. 127, 139 (2003) (quoting *In re Commitment of D.L.*, 351 N.J.

(Continued on page 2)

Super. 77, 90 (App. Div. 2002)); see also *In re Commitment of D.Y.*, 218 N.J. 359, 372 (2014) (noting the 'substantial curtailment of liberty' that civil commitment involves).

The State's power to exact this extraordinary deprivation of liberty is circumscribed by state and federal substantive due process guarantees.[2]

If 'highly likely' does not mean, at bare minimum, more likely than not, then it means very little. And if it means very little, the civil commitment statute is constitutionally suspect.

...Not just any generic dangerousness finding suffices to clear the constitutional check on the State's authority to subject an individual to civil commitment. In *Kansas v. Hendricks*, the U.S. Supreme Court underscored that 'lack of volitional control, coupled with a *prediction of future dangerousness*' distinguished the dangerous civil committee 'from other dangerous persons who are perhaps more properly dealt with exclusively through criminal proceedings.' 521 U.S. 346, 360 (1997) (emphasis added); see also *Crane*, 534 U.S. at 413 (interpreting the volitional control element to mean 'serious difficulty in controlling behavior'). It is this distinction that redeems civil commitment laws, 'lest [they] become a 'mechanism for retribution or general deterrence' – functions properly those of criminal law, not civil commitment.' *Crane*, 534 U.S. at 412 (quoting *Hendricks*, 521 U.S. at 372-73 (Kennedy, J. concurring)).

B. Predictions of Future Dangerousness Have Force and Meaning Only When They Contain Estimations of Probability.

If the State is empowered to indefinitely and involuntarily confine individuals without proving that they are at least more likely than not to reoffend, it will regularly violate the substantive due process rights of civil committees. ...[I]t is incumbent upon courts 'to be as precise as possible when describing the required level of likelihood of that harmful behavior,' *Id.*

Yet here, the State here refuses to define 'highly likely' to reoffend with reference to any baseline probability. This refusal is nothing short of a constitutional scandal. If 'highly likely' has no replicable meaning or measure, no fixed floor, then the SVPA is without constitutional guardrails, and the State is free to seek to commit any person who meets its opaque, subjective, and shifting criteria.

In fact, the 'standard' the State seems to endorse is a bare tautology capable of covering every current or potential civil committee:

> [A] threat is proven by demonstrating that the person has serious difficulty controlling his sexually harmful behavior such that it is highly likely that he will not control his sexually violent behavior and will reoffend. A significant threat necessarily exists whenever a mental condition resulting in serious difficulty controlling behavior is found. [emphases added]
>
> [State's Brief at 14 (citations and quotation marks removed).]

In other words, apparently, anyone with serious difficulty controlling their behavior such that they are highly likely to reoffend will necessarily have serious difficulty controlling their behavior, making them highly likely to reoffend. This standard is without any coherent content, let alone limiting principle. It merely begs the question: what does 'highly likely' mean?

To be sure, probability predictions are imperfect proxies for dangerousness. But it is contrary to caselaw and common sense to imagine that 'highly likely' could have an ascertainable and consistent meaning detached from estimations of chance. Accepting that probability is integral to likelihood determinations, as courts have done repeatedly, see e.g., *R.F.*, 217 N.J. at 156, the very least that highly likely' could mean is above even odds. Proof that a person is, at minimum, more likely than not to reoffend is necessary – though often insufficient – to ensure that the SVPA is applied in conformity with substantive due process, and not in a manner that is arbitrary or excessive."

Notes

1. '"Mental abnormality" means a mental condition that affects a person's emotional, cognitive or volitional capacity in a manner that predisposes that person to commit acts of sexual violence.' N.J.S.A. 30:4-27.26
2. The United States Supreme Court has repeatedly declined to articulate the standard of review that applies to substantive due process challenges in the civil commitment context. However, short of pronouncing that civil commitment laws are subject to strict scrutiny, the Court has viewed them with notably 'heightened concern.' See *Eric Janus & Wayne A. Logan*, 'Substantive Due Process and the Involuntary Confinement of Sexually Violent Predators,' 35 *Conn. L. Rev.* 319, 364 (2003).

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New Chief Justice of NY Top Court Urged End to SOCC in 2017 Opinion.

Rob Rosborough, "Judge Rowan Wilson, in Strong Dissent, Would Scrap Civil Commitment for Sex Offenders," [periodical cite not yet known] Nov. 3, 2017.

Text:

"Judge Rowan Wilson isn't afraid to step out on a limb when he sees inequity or incongruity. He reminds me of another independent commercial litigator that once sat on the Court of Appeals – former Judge Robert Smith. Judge Smith was well-known not only for his voracious questioning at oral argument, but also for pointing out in dissent areas of the law that need fixing. One such Judge Smith dissent was in *Matter of State of New York v. Shannon S.* (20 NYS3d 99, 112 (2012) (Smith, dissenting), where he called out civil commitment of sex offenders after their imprisonment as constitutionally dubious.

Judge Wilson has now shown he's willing to follow in Judge Smith's footsteps, authoring his own strong dissent against the Mental Hygiene Law Article 10 civil commitment system. In *Matter of State of New York v. Floyd Y. (Anonynous)* (No. 102), which I previewed here, the State sought to civilly commit a sex offender after his term of imprisonment had ended. To do that, the State was required to show that Floyd Y. suffered from a 'mental abnormality' as defined under Article 10 of the Mental Hygiene Law.

A jury said that Floyd did, but Supreme Court set aside the verdict, holding that the question of expert evidence that the state presented didn't satisfy its burden to commit Floyd against his will after he had served his time. The Appellate Division, First Department reversed both orders and reinstated the jury's verdict that the sex offender had a mental abnormality. The Court held that the diagnosis of pedophilia here was sufficient to establish that Floyd should be involuntarily committed. The Court was careful, however, to limit its holding to the particular facts of this case. The majority of the Court of Appeals agreed, finding that the State had proved mental abnormality with littler difficulty.

Judge Rowan Wilson, however, vehemently disagreed in a strong dissent that argues that the mental abnormality standard for civil commitment is unworkable and constitutionally infirm. Although Judge Wilson is quick to admit that Floyd has done many, many bad things, '[t]he issue here, though, is not whether Floyd Y. is good or bad, or whether he spent too little time in prison, or whether he will commit some future crime if released from SIST.' Under Article 10, the question is whether a sex offender has a 'condition, disease or disorder ...that (1) predisposes [a person] to the commission of conduct constituting a sex offense' and that '(2) results in that person having serious difficulty in controlling that conduct' (Mental Hygiene Law § 10.03[i]). History tells us, Judge Wilson noted, that that question is a fiction for which there can be no measurable answer:

> *We now have ten years of experience with Article 10, and the truth that emerges from our decisions is that the question of whether human behavior is volitional or predetermined is no more tractable than it was thousands of years ago.*

After pointing out the faults in the State's evidence, including emphasizing that there is a razor-thin difference between being unable to control sexual impulses that would go to show a mental abnormality and an impulse just not resisted that wouldn't, Judge Wilson argued that the mental abnormality standard just doesn't work:

> *The fundamental problem is this: we have no way to know whether the fault lies with ourselves or with our stars. Why we do what we do dates at least to the disagreement between the Stoics and Aristotle. Today, the debate continues, more often framed around brain chemistry and physics than philosophy or religion. Article 10 asks us to prove the unprovable: a mental abnormality caused me to have serious difficulty controlling my actions, or as Flip Wilson put it, 'The devil made me do it.'*

The scientists agree and the Court's sex offender cases all show, Judge Wilson argues, that there is no valid scientific method to determine whether an offender has a sufficient mental abnormality to justify civil commitment, As Judge Wilson put it, 'we in the legislative and judicial branches have erred in uniting psychiatric principles and an impossible legal standard in an unhappy marriage, when the experts themselves have plainly objected.'

There's a solution to this problem, Judge Wilson pointed out. If the State believes that criminal sentences for sex offenses are too short, the Legislature can lengthen them. The State should not, however, be able to use civil commitment to revoke the liberty of a defendant who has served his criminal sentence based on an unprovable standard.

> 'The prosecution and reduction of sex crimes is tremendously important. However, the stakes of potential indefinite confinement are as high as they come, and require a reformulation of the relevant standards to adhere to the scientific principles and medical methodologies that have governed our civil commitment processes under Article 9 and the Correction Law. Article 10's standard cannot properly distinguish between the typical recidivist of dangerous sexual crimes, for whom we have the criminal justice system, and something more. In *Kansas v. Hendricks*, Justice Kennedy observed: "if it were shown that mental abnormality is too imprecise a category to offer a solid basis for concluding that civil detention is justified, our precedents would not suffice to validate it" (534 US at 412). It is time to admit that the emperor has no clothes.'"

Editor's closing note: New York Governor Kathy Hochul recently appointed this judge to be the Chief Justice of New York's top court, the Court of Appeals (equivalent to Minnesota's Supreme Court). That nomination was confirmed by the New York Senate on April 18, 2023. Perhaps rays of sunlight are beginning to break through the clouds.

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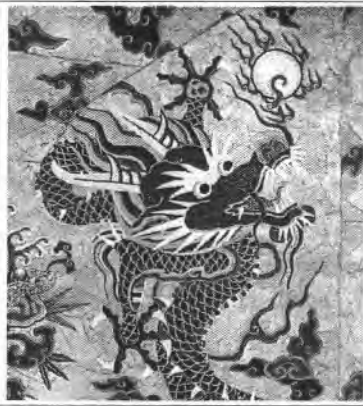
SCOTUS Itself Affirmed & Disseminated Sex Offender Myths.

Jacob Sullum, "How the Supreme Court Has Promoted Myths about Sex Offender Registries," *Titus House Newsletter*, (May 2023), pp. 2-3.

Text Excerpts:

"This Sunday, March 5, marks the 20th anniversary of *Smith v. Doe* [538 US 84, 155 L Ed 2d 164, 123 S Ct 1140 (2003)] a U.S. Supreme Court decision that approved retroactive application of Alaska's sex offender registry, deeming it preventive rather

(Continued on page 3)



Just as true as sex offender myths

than punitive. That ruling helped propagate several pernicious myths underlying a policy that every state has adopted without regard to its justice or effectiveness.

Writing for the majority in *Smith*, Justice Anthony Kennedy took it for granted that collecting and disseminating information about people convicted of sex offenses made sense as a public safety measure. But that premise was always doubtful.

The vast majority of sexual assaults, especially against children, are committed by relatives, friends, or acquaintances, and the perpetrators typically do not have prior sex-offense convictions. That means they would not show up on a registry even if someone bothered to check.

It is therefore not surprising that research finds little evidence to support Kennedy's assumption that publicly accessible registries protect potential victims. Summarizing the evidence in a 2016 National Affairs article, Eli Lehrer noted that 'virtually no well-controlled study shows any quantifiable benefit from the practice of notifying communities of sex offenders living in their midst.'

To reinforce the logic of registries, Kennedy averred that 'the risk of recidivism posed by sex offenders is "frightening and high."' He was quoting his own opinion on an earlier case [*McKune v Lile*, 536 US 24, 34, 153 L Ed 2d 47, 122 S Ct 2017 (2002)], which in turn relied on an unsubstantiated estimate from a source who has publicly and repeatedly disavowed it. [See: *Ira Ellman & Tara Ellman*, titled "'Frightening and High': The Supreme Court's Crucial Mistake about Sex Crime Statistics," 30 *Constitutional Commentary* 495 (2015).]

According to Kennedy's paraphrase, 'the rate of recidivism of untreated offenders has been estimated to be as high as 80%.' By contrast, a 2003 Bureau of Justice Statistics study found that the three-year recidivism rate for sex offenders was 3-5%.

Studies covering longer periods find higher recidivism rates, but still nothing like 80%, even for high-risk offenders. Despite its empirical emptiness, Kennedy's 'frightening and high' claim has been quoted again and again in legal briefs and judicial opinions across the country.

Although registries are ostensibly based on the risk of recidivism, they apply indiscriminately to broad classes of people, even when there is little reason to think they pose an ongoing danger. Dissenting in *Smith*, Justice Ruth Bader Ginsburg noted that Alaska's law 'applies to all convicted sex offenders, without regard to their future dangerousness.'

One of the men who challenged Alaska's law, Ginsburg pointed out, 'successfully completed a treatment program' and 'gained early release on supervised probation in part because of his compliance with the program's requirements and his apparent low risk of re-offense'....

That man nevertheless was required to renew his registration four times a year for the rest of his life. The online registry included his name, photograph, criminal record, address, physical description, date of birth and place of employment, along with the license plate numbers of vehicles he used.

Kennedy minimized the consequences of publicly branding people as presumptively dangerous sex offenders, calling it 'less harsh' than revocation of a professional license. But as Justice John Paul Stevens noted in his dissent, there was 'significant evidence of onerous practical effects of being listed on a sex offender registry,' ranging from 'public shunning, picketing, press vigils, ostracism, loss of employment and eviction' to 'threats of violence, physical attacks, and arson.'

Those predictable costs, combined with local restrictions on where registrants may live and which locations they may visit, undermine rehabilitation and continue to punish registrants long after they have completed their sentences. That is why several state and federal courts have concluded, contrary to what the Supreme Court said in *Smith*, that registration schemes are punitive in effect.

Activists who oppose registration ...are clearly right in arguing that the illusory benefits of public registries cannot justify the burdens they impose."

****

Shaming the Constitution, Ch. 8 Excerpts, Part 2 of 2, & Conclusion

Michael L. Perlin & Heather Ellis Cucolo, Shaming the Constitution: The Detrimental Results of Sexual Violent Predator Legislation (Philadelphia: Temple Univ. Press, 2017), Chapter 8: "Therapeutic Jurisprudence and Conclusion", Segment 2 of 2, & Conclusion.

Editor's Note: This is the last installment of excepts from this landmark book by two of the foremost legal experts in the field of sex offender civil commitment. Capping this final part of this last chapter, authors Perlin and Cucolo sum up the most important points of the book, urging readers to ponder such points and to further explore the issues raised in the book.

Text excerpts:

p. 165: "...Why has the legal system been reluctant to adopt Therapeutic Jurisprudence (TJ) principles in sexual offender case law and legislation? We can think of several overlapping reasons.

First is the fear of being seen as 'soft on crime,' imperiling the judge's reelection chances. The literature is replete with studies of political campaigns – many of which were successful – that turned on this precise issue.[81]

Next, judges are traditionally averse to endorsing or utilizing any intervention that might be perceived as being 'touchy-feely.' In this context, New York Chief Judge Jonathan Lippman has stated, 'Some see the specter of well-meaning but misguided "touchy-feely" judges intent on pursuing rehabilitation and their own personal conceptions of social justice at the expense of punishment and accountability.'[82]

pp. 165-66: Third, like the general public, judges have, by and large, bought into the myths about sexual offending and sexual offenders discussed earlier and the impact of sexual offender laws on the general public.'[83] Thus even though procedural fairness should be the touchstone of the judicial process[84] it is very difficult to achieve this in sexual offender cases, where the public – and many judges – reject the notion that this cohort of offenders even *deserves* 'procedural fairness,' *in spite of the fact* that such fairness inevitably increases compliance with court orders.[85]

p. 166: Fourth, Judges have a deep need to convince themselves that the 'system works.' Judges typically express great faith in the adversary system,[86] and their statements typically reflect deep-seated 'attachment to commonly held beliefs,'[87] notwithstanding the reality that 'subconscious influences can cloud their decisions and impede their legal reasoning' even when 'they desire to render a "fair." decision.'[88]....

Professor Eden King notes that 'attitudinal forces may be coupled with cognitive biases that lead judges to focus on information that confirms their preconceptions (i.e., confirmation bias); to recall vivid and emotionally charged aspects of cases (i.e., the availability heuristic), and to interpret information that reinforces the status quo as legitimate (i.e., system justification biases).'[91]

pp. 166-67: We believe that the same sort of 'contaminat[ion]' takes place in the sexual offender arena as well.

Certainly there is no question that *Kansas v. Hendricks* [93] is as dissonant with therapeutic jurisprudence values as any case imaginable.[94] Writing about *Hendricks*, Professor Keri Gould rhetorically asked these eight questions left open by that decision:

1) Is *Hendricks* therapeutic for the public or for victims?
2) After *Hendricks*, does the allegedly 'dispassionate' police power give way so as to satiate public rage?
3) Is it possible for any such scheme to be therapeutic without the provision of mandatory postrelease outreach?
4) Does the fact that therapy does not start (under the Kansas statute, at least) until after the defendant's sentence ends attenuate any potential therapeutic outcomes?
5) Is coerced sexual offender treatment therapeutic?
6) Is there any incentive for a defendant to engage in any meaningful therapy programs while in prison if what is said during such participation can be used against the defendant after his sentence terminates?
7) Will *Hendricks* lead to long-term commitments of those who 'act out' sexually at civil mental hospitals?
8) Will *Hendricks* lead some prosecutors to use involuntary civil commitment as a means of 'boosting' criminal cases?[95]

There is no doubt that the answers to these questions underscore further the anti-TJ nature of the Hendricks decision.[96]

This is all especially toxic in the context of quality/availability of counsel,[97] a topic that has received little scholarly or policy-based attention.[98] Those very variables that make SVPA litigation *different* – the need for lawyers to be able to understand, contextualize, and effectively cross-examine about specific actuarial tests; the need for lawyers to be able to 'get' when an expert witness is needed to rebut the state's position; and the need for lawyers to understand the potential extent of jury bias (making the ideal of a fair trial even more difficult to accomplish) – all demand a TJ approach to representation and to litigation.[99]

p. 168: ...[C]urrently, TJ is completely absent from SVPA proceedings.[105] We believe that adoption of our effectiveness-of counsel remedy[106] might be the most important way of remediating this absence.

...Dr. Birgden has argued that TJ can be used to support the principle of desistance – a gradual or emergent process through which people cease and refrain from persistent offending in a human rights framework[110] – in an international human rights setting, in the specific context of the treatment of sexual offenders.[111]

p. 169: Further, we need to carefully reconsider the practice of making 'clinical adjustments' to actuarial findings. R. Karl Hanson has thus noted the 'ongoing controversy concerning the likelihood that clinical adjustments will dilute, rather than enhance actuarial predictions';[115] others have similarly concluded, 'Little evidence supports an optimistic point of view.'[116] According to one prominent forensic psychologist, the use of such adjustments enables evaluators to 'master ways of using [actuarial instruments] counter-therapeutically.'[117]

pp. 169-70: Residency restrictions should be completely dismantled due to their anti-therapeutic effect and unfounded ability to have any impact on diminishing re-offense and making communities safer. If we choose to still have some form of community monitoring, it must be done through an individualized assessment of risk, likelihood, and danger based on credible, peer-reviewed studies and ethical evaluations.[125] We should encourage and reward offenders' efforts to engage in community service and acknowledge genuine attempts to live offense-free and contribute to society . To quote the late Professor Bruce Winick,

(Continued on page 4)

'Modern-day sex offenders should also be offered the possibility of redemption.'[126] 'Feel good' legislative designs and agendas should be abolished, in that they serve no other purpose but to humiliate, label, and dehumanize the individual. And, as we have discussed previously, such legislation frontally violates international human rights law.[127]

pp. 170-71: **Conclusion**

In our introductory chapter, we set out to demonstrate how our current sexual offender laws (statutes and court decisions) and policies (administrative rules) 'shame the constitution and stain the political and social fabric of our nation.'[136] We believe we have done exactly that. Our laws and policies incorporate the worst of sanism and of pretextuality and employ the cognitive-simplifying processes of heuristics and false 'ordinary common sense'[137] to poison our system through misguided shaming and humiliation.[138] Sexual offenders – the 'alien other'[139] – are subject to sanism in every aspect of these laws and policies. 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."'[140] We 'generalize and wrongly stereotype persons with mental disorder in order to justify prejudiced decision making against them.'[141] These stereotypes are at their most virulent when it comes to the population we are discussing here.

If state legislatures were to radically change their focus by rejecting shibboleths and platitudes and draconian penalties, and were, rather, to seek to create remedial solutions to the underlying problems that hinder rehabilitation and reintegration into the community, by tailoring treatment to assist in reentering society;[142] if the mass media were to step back and acknowledge the dangerous, fearful, hysterical, and counter-productive frenzy that has been created – a frenzy that has resulted in purported solutions that 'do nothing to actually offer safety and security';[143] if an authentically rigorous effectiveness-of-counsel-standard were to be enforced;[144] if recidivism was actually considered in light of recent studies; if courts adhered to evidentiary rules and applied constitutional rights afforded other general civil committees; or if legislatures reconsidered SVPA laws as quasi-criminal, then, and only then, might some progress be made.

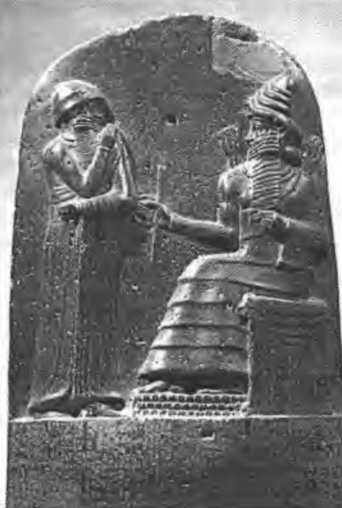
Consider here how TJ-focused lawyers could initiate conversations with SVPA clients prior to the start of a hearing:[145]

- Have you considered all the potential outcomes if you either acknowledge your guilt or adhere to denying guilt?[146]
- Are there witnesses we could call to testify on your behalf who would give the judge a fuller picture of who you are?[147]
- Are there any organizations that you were active in before you were incarcerated – church, civic group, anything like that? Is there someone from one of these groups whom you'd like me to contact on your behalf?
- Are there records or documents in the file of this case that you'd like to see so that you can tell if there are any inaccuracies?[148]
- Some of these documents are pretty hard to understand; are there any that you need help with?
- Is there anything troubling you that you haven't told me about? Do you want me to see if I can arrange for an outside expert to come see you to talk about it?[149]
- If we lose and you remain institutionalized, are there arguments I should make to best ensure your emotional well-being 'while inside'?

pp. 171-72: Beyond these issues, consider how our domestic laws – and the laws of many other nations[150] – flaunt international human rights law.[151] We willfully blind ourselves to the reality that offenders – all offenders, including those deemed to be sexually violent predators -- have enforceable human rights and 'should expect humane treatment from corrections and its practitioners';[152] it is crystal clear that that does *not* happen in the case of the population we are discussing here. *Every* relevant UN Convention and Covenant is violated with impunity, locally and around the world. As we noted earlier, American jurisdictions could learn from *some* other nations that actually consider the depth and complexity of the underlying issues before offering the sorts of legislative solutions that, while popular with voters and much of the media, actually make matters worse (both by flagrantly violating the civil rights and liberties of the cohort of those who offend and by making the world a *less safe* place for all of us).

If there is any shred of hope in this concededly dismal recounting, it is our belief that therapeutic jurisprudence may be the pathway to redemption. Some twenty years ago, writing about civil commitment, right to treatment law, and right to refuse treatment law, one of us (MLP), writing with others, said, 'We believe that therapeutic jurisprudence analyses may be a strategy to redeem civil rights litigation in this area and to reinvigorate this body of mental health law.'[153] A few years later, this thought was expanded to argue that TJ 'carries with it the potential to offer redemption for all mental disability law,'[154] and then, yet later, 'to redeem the law for [all] persons who have been marginalized.'[155]

There is no group more marginalized than the persons about whom we write here, and this marginalization consistently reduces the 'citizenship potential' of these individuals and may in turn 'diminish their investment in mainstream social values and increase their resentment toward society.'[156] We believe that it is only through therapeutic jurisprudence that this marginalization may abate and that we may be able to better structure a coherent and constitutional system that actually provides increased treatment as well as safety and security in ways that do not compromise core due process values. In this way, we hope, the stain on our Constitution will eventually be cleansed."



Hammurabi

Notes:

81 *Paul Carrington*, "Public Funding of Judicial Campaigns: The North Carolina Experience and the Activism of the Supreme Court," 89 *N.C. L. Rev.* 1965, 1989-90 (2011) (discussing the California Supreme Court election of 1986 that led to the defeat of Chief Justice Rose Bird and two other associate justices perceived in this way; *John Blume & Theodore Eisenberg*, Judicial Politics, Death Penalty Appeals, and Case Selection: An Empirical Study," 72 *S. Cal. L. Rev.* 465, 470-75 (1999) (discussing political campaigns aimed at ousting individual judges for being "soft on crime"). On the role of the media in this context, see generally *Cucolo & Perlin, supra* note 65.

82 *Jonathan Lippman*, "Achieving Better Outcomes for Litigants in the New York State Courts," 34 *Fordham Urban Law J.* 813, 830 (2007).

83 See, e.g., *Bruce J. Winick*, "Sex Offender Law in the 1990s: A Therapeutic Jurisprudence Analysis," 4 *Psychol. Pub. Pol'y & L.* 505, 538-39 (1998).

84 *Kevin Burke & Steve Leben*, "Procedural Fairness: A Key Ingredient in Public Satisfaction," 44 *Court Rev.* 4 (2007-08).

85 *Raymond Paternoster et al.*, "Do Fair Procedures Matter? The Effect of Procedural Justice on Spousal Assault," 31 *Law & Soc'y Rev.* 163, 160 (1997).

86 *Daniel W. Shuman, Elizabeth Whitaker & Anthony Champagne*, "An Empirical Examination of the Use of Expert Witnesses in the Courts – Part II: A Three City Study," 34 *Jurimetrics J.* 193, 207 (1994) (reporting on survey results).

87 *Lode Walgrave*, "Restoration in Youth Justice," 31 *Crime & Just.* 543, 547 (2004).

88 *Evan R. Seamone*, "Understanding the Person Beneath the Robe: Practical Methods for Neutralizing Harmful Judicial Biases, 42 *Willamette L. Rev.* 1, 3 (2006). See also *id.*: "Consequently, in many circumstances, for judges to be fair, they must be capable of identifying subconscious influences on their behavior and they must neutralize the effects of such impulses."

91 *Eden B. King*, "Discrimination in the 21st Century: Are Science and the Law Aligned?", 17 *Psychol. Pub. Pol'y & L.* 54, 57 (2011), relying upon *Charles G. Lord, Lee Ross & Mark R. Lepper*, "Biased Assimilation and Attitude Polarization: The Effects of Prior Theories on Subsequently Considered Evidence," 37 *J Personality & Soc. Psychol.* 2098 (1979); *Amos Tversky & Daniel Kahneman*, "Availability: A Heuristic for Judging Frequency and Probability," 5 *Cognitive Psychol.* 207 (1973), and *John T. Jost & Mahzarin R Banaji*, "The Role of Stereotyping in System Justification and the Production of False Consciousness," 33 *Brit. J. Soc. Psychol.* 1 (1994).

93 521 U.S. 346 (1997). See *supra* Chapter 3.

94 *Michael L. Perlin*, "'There's No Success Like Failure /And Failure's No Success at All': Exposing the Pretextuality of *Kansas v. Hendricks*, 92 *Nw. U. L. Rev.* 1247, 1274 (1998).On the specific issue of why the 'delayed treatment ' scheme sanctioned by *Hendricks* is anti-therapeutic, see *Jessica Moran*, "Resident Evil: A Reformation of U.S. Civil Confinement Law," 22 *Cardozo J. Int'l & Comp. L.* 665, 698-701 (2014).

95 *Perlin, supra* note 94, at 1274, quoting *Keri Gould*, "Remarks at American Association of Law Schools Section on Law and Mental Disability Panel Discussion (Jan. 1998); see also *Keri Gould*, "If It's a Duck and Dangerous -- Permanently Clip Its Wings or Treat It Till I Can Fly? A Therapeutic Perspective on Difficult Decisions, Short-Sighted Solutions, and Violent Sexual Predators after *Kansas v. Hendricks*, 31 *Loy. L.A. L. Rev.* 859, 880-81 (1998).

96 On how decisions such as *Hendricks* may be part of the profoundly anti-therapeutic "transinstitutionalization process," through which legislators "dissatisfied with outcomes in the correctional system, such as the release of sex offenders, seek to use the mental health system to confine offenders for longer periods of time,'" see *Peter Margulies*, "The New Class Action Jurisprudence and Public Interest Law," 25 *N.Y.U. Rev. L. & Soc. Change* 487, 515 n. 139 (1999).

97 Much of the material accompanying notes 98-106 is adapted from *Cucolo & Perlin, supra* note 61.

98 But see *Dale Dewhurst*, "Understanding the Legal Client's Best Interest: Lessons from Therapeutic Jurisprudence and Comprehensive Justice," 6 *Phoenix L. Rev.* 963 (2013), discussed *infra* text accompanying notes 101-105.

99 On the Relationship between TJ and adequacy of counsel in cases involving persons with mental disabilities in general, see *Jan C. Costello*, "'Why Would I Need a Lawyer?' Legal cCounsel and Advocacy for People with Mental Diusabilities," in <u>*Law, Mental Health, and Mental Disorder*</u> 15 (Bruce D. Sales & Daniel W. Shuman, eds., 1995); *Keri K. Gould*, "A Therapeutic Jurisprudence Analysis of Competency Evaluation Requests: The Defense Attorney's Dilemma," 18 *Int'l J. L. & Psychiatry* 83 91995); *Michael L. Perlin, & Alison Lynch*, "'Mr. Bad Example': Why Lawyers Need to Embrace Therapeutic Jurisprudence to

(Continued on page 5)

Root Out Sanism in the Representation of Persons with Mental Disabilities," 16 *Wyo. L. Rev.* 299, (2016).

105 On how embracing a TJ model would have therapeutic impact on judges, prosecutors, and defense counsel, see *Edwards & Hensley, supra* note 56, at 659.

106 See supra Chapter 5, at "Reassessing Ineffectiveness of Counsel."

110 *Shadd Maruna*, Making Good: How Ex-Convicts Reform and Rebuild Their Lives (2001).

111 *Astrid Birgden*, "Maximizing Desistance, Adding Therapeutic Jurisprudence and Human Rights to the Mix," 42 *Crim. Just. & Behav.* 19, 31 (2005); see also *Svenja Göbbels, Gwenda M. Willis & Tony Ward*, "Current Re-Entry Practices in Sexual Offender Treatment Programmes: Desistance Facilitating of Hindering?" 20 *J. Sexual Aggression* 354 (2014).

115 *R. Karl Hanson*, "What Do We Know About Sex Offender Risk Assessment?", 4 *Psychol., Pub., Pol'y & L.* 50, 65 (1998); see also *Roberta R. Holt*, "Clinical and Statistical Prediction: A Retrospective and Would-Be Integrative Perspective," 50 *J. Personality Assessment* 376 (1986).

116 *M. Neil Browne & Ronda H. Harrison -Spoerl*, "Putting Expert Testimony in Its Epistemological Place: What Predictions of Dangerousness in Court Can Teach Us," 91 *Marq. L. Rev.* 111=90, 1199 n. 373 (2008).

117 E-mail from Dr. Denis Zavodny to authors, Mar. 3, 2016 (on file with authors).

125 On the implications of the way we *convey* information about risk assessment findings, see *J. Stephen Wormith*, "The Risks of Communicating Sexual Offender Risk," 1 *J. Threat Assessment & Mgmt.* 162 (2014).

126 *Winick, supra* note 83, at 567.

127 See *supra* Chapter 5.

136 See *generally supra* Chapter 1.

137 See *generally supra* Chapter 2.

138 See *Perlin & Weinstein, supra* note 39.

139 *Daniel Garland*, "The Limits of the Sovereign State," 36 *Brit J. Criminology* 445, 461 (1996).

140 *Cucolo & Perlin, supra* note 65, at 215, quoting, in part, *Julia T. Rickert*, "Denying Defendants the Benefit of a Reasonable Doubt: Federal Rule of Evidence 609 and Past Sex Crime Convictions," 100 *J. Crim. L. & Criminology* 213, 228 (2010).

141 *Grant Morris*, "The Evil That Men Do: Perverting Justice to Punish Perverts," 2000 *U. Ill. L. Rev.* 1199, 1201 n. 13.

142 *Cucolo & Perlin, supra* note 41, at 40.

143 *Cucolo & Perlin, supra* note 65, at 245-46.

144 *Cucolo & Perlin, supra* note 61, at 168.

145 For examples of conversations that TJ-minded lawyers could have with clients raising the insanity defense or in whose cases the incompetency status was raised, see *Michael Perlin*, "'Too Stubborn to Ever Be Governed by Enforced Insanity': Some Therapeutic Jurisprudence Dilemmas in the Representation of Criminal Defendants in Incompetency and Insanity Cases," 33 *Int'l J. L. & Psychiatry* 475, 480-81 (2010). For examples of conversations such lawyers could have with criminal defendants prior to sentencing (in instances in which defendant has been diagnosed with post-traumatic stress disorder), see *Michael L. Perlin*, "'I expected It to Happen/I Knew He'd Lost Control': The Impact of PTSD on Criminal Sentencing after the Promulgation of DSM-5," 2015 *Utah L. Rev.* 881, 924-25.

146 In many jurisdictions, incarcerated offenders who den guilt cannot enter treatment programs. *Singleton, supra*, note 65. Cf. *Anita M. Schlank & Theodore Shaw*, "Treating Sexual Offenders Who Deny Their Guilt: A Pilot Study," 8 *Sexual Abuse: J. Res. & Treatment* 17, 18 1996). ("Most therapists agree …that the first goal of treatment is to assist the perpetrator in acknowledging that he has a problem involving sexual behavior. …Offenders [who deny responsibility] are more likely to reoffend following their release than those who have admitted their guilt.").

We believe that to comply with TJ principles, prior to accepting a guilty plea to a predicate offense, trial courts must inform defendants of possible consequences under an SVPA. See, e.g., *State v. Bellamy*, 835 A.2d 1231, 1246 (N.J. 2003); see generally *Taylor v. State*, 698 S.E.2d 384 (Ga. Ct. App. 2010) (counsel is constitutionally deficient if they did not advise their client that pleading will subject the client to the sexual offender registration requirements); *Cucolo & Perlin, supra* note 61, at 129-30.

147 Bringing in such witnesses to testify would also help in generating an appropriate and acceptable release plan.

148 In many jurisdictions, persons subject to SVPA proceedings are *not* given their case files and often hear damning evidence for the first time atn the trial itself. See generally *Cucolo & Perlin, supra*, note 61, at 134-137.

149 This is not a forensic expert for the trial but a mental health practitioner who can provide counseling to the client.

150 See generally Chapter 3.

151 See generally Chapter 7.

152 *Birgden & Cucolo, supra* note 55, at 298, citing *Astrid Birgden & Michael L. Perlin*, "'Where the Home in the Valley Meets the Damp Dirty Prison': A Human Rights Perspective on Therapeutic Jurisprudence and the Role of Forensic Psychologists in Correctional Settings, 14 *Aggression & Violent Behavior* 256 (2009); *Tony Ward & Astrid Birgden*, "Human Rights and the Clinical Correctional Practice," 12 *Aggression & Violent Behavior* 628 (2007).

153 *Michael L. Perlin , Keri K. Gould & Deborah A. Dorfman*, "Therapeutic Jurisprudence and the Civil Rights of Institutionalized Mentally Disabled Persons: Hopeless Oxymoron or Path to Redemption?," 1 *Psychol., Pub. Pol'y & L.* 80, 84 (1995).

154 *Perlin, supra* note 4, at 301.

155 *Michael L. Perlin & John Douard*, "'Equality, I Spoke That Word/As if a Wedding Vow': Mental Disability Law and How We Treat Marginalized Persons," 53 *N.Y.L. Sch. L. Rev.* 9, 14 (2008-09).

156 *Jill S. Levenson, David A. D'Amora & Andrea L. Hern*, "Megan's Law and Its Impact on Community Re-Entry for Sex Offenders, 25 Behav. Sci. & L. 587, 598 (2007).

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Self-Advocacy in Treatment Terms

by Sixx|R, "Russell John Hatton Blog Dedicated to Healing"

Text:

"Far too often our road to recovery story falls to the wayside. I want to change this. We often see on the news or for those in the community, social media, a quick newsflash or post about a 'convicted sex offender being released to the community,' … there is often a community notification and the person has to register. But what about this person does society really know? Do they know how many hours/years of treatment they've gone through? Do they know their road to accountability for the harm or hurt they caused? Do they know that they are currently successful in the community, working a fulfilling job or career? That they have developed a healthy capacity for relationships stability? That they are possibly married, with a family? Obviously some of this information is up to the person to share, but I want to humanize your life. You did the work, so I am asking that you now share the changes that you have made towards becoming the healthiest version of yourself.

How can we accomplish this?

- **I recently started a new blog: Sex Offense Healing.**
- **The blog address is: sohealing.blogspot.com.**

My blog is dedicated to healing both victims and survivors of sexual violence, families, and Individuals Convicted of Sexual Offenses (ICSO).

There is healing when an ICSO can be accountable for the mental, emotional and physical hurt and harm their actions have caused.

ICSOs can demonstrate this when they can share their remorse, their empathy and compassion, and the work they have done to understanding the harm and hurt they caused, and accountability for their healing. I want to provide you an opportunity to tell your road to recovery story to the world.

What I am looking for in your story is:

- ***Remorse for the harm or hurt inflicted.***
- ***Individual Accountability.***
- ***Empathy and Compassion.***
- ***Personal Growth and Change.***

What work have you done to take accountability for your abusive actions and what does this accountability look like in the present?

If you were to be asked why you made the choice to sexually abuse, how will you answer this question? This will require some perspective taking.

What were the contributing factors that led you to commit sexual abuse?

What work have you done to ensure you will not sexually abuse again?

If you were to write an apology letter, what might it say?

Is there anything that you want people to know about your personal growth?

Information request:

Your name and contact information in the submission and if you want others to contact you. The material must be relevant to the blog. Please only identify the victim/survivor by their initials.

Please keep your submission limited to 500 characters. Thank you.

- - - - - - - - - - - -

Want to tell your sex offense healing story? Mail all submissions to:

Mr. Russell J. Hatton
1111 Highway 73
Moose Lake, MN 55767-9452

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Compulsory Psychiatric Interviewing in SO Commitment: a Self-Incrimination Violation

Ken Fielding, "Compulsory Psychiatric Examination in Civil Commitment and the Privilege against Self-Incrimination," 9 *Gonzaga L. Rev.* 117 (1973)

Text Excerpts:

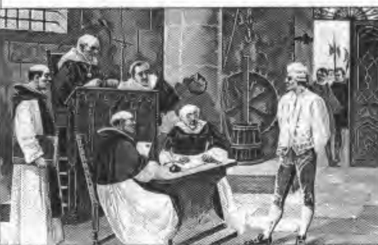
pp. 118-19: "**I. Introduction**

…[T]his article proposes that a defendant in a commitment proceeding has the right under the fifth and fourteenth amendments of the United States Constitution to refuse to cooperate in the statutory mental examination.

II. The Origin, Policy, and Scope of the Fifth Amendment

...The privilege may be claimed in administrative proceedings.[9] …in-custody interrogations[13]…. Thus, the Supreme Court has stated:

> The privilege is not ordinarily dependent upon the nature of the proceeding in which the testimony is sought or is to be used. It applies alike to civil and criminal proceedings, wherever the answer might tend to subject to criminal responsibility him who gives it.[15]


Nobody EVER Expects 'Em!

p. 124: B. The Policy of the Privilege

…*Miranda v. Arizona*,[33] …states:

> [T]he privilege has come rightfully to be recognized in part as an individual's substantive right, a 'right to a private enclave where he may lead a private life. That right is the hallmark of our democracy.' *United States v. Grunewald*, 233 F2d 556,

(Continued on page 6)

579, 581-82 (Frank, dissenting), rev'd 353 U.S. 391 (1957).

...Policies [of the privilege] point to one overriding thought: the constitutional foundation underlying the privilege is the respect a government – state or federal – must accord to the dignity and integrity of its citizens. ...In sum, the privilege is fulfilled only when the person is guaranteed the right 'to remain silent unless he chooses to speak in the unfettered exercise of his own will.'[34]

pp. 125-26: ...[I]t is not strange that the privilege is strongest – i.e., frustrative operation is the greatest – in proceedings where the government has the greatest interest ... and weakest where the government has no direct interest (civil actions between private litigants). The privilege functions to protect people from the government.[40] ...When the government asks certain questions or demands certain information with a view to deprive him of his liberty, the government exceeds the power, which the individual has delegated to it.

p. 126: C. The Scope of the Privilege

1. The Nature of the Proceeding

It was pointed out earlier that the nature of the proceeding in which the information is elicited is not determinative of the right to invoke the privilege.

2. The Nature of the Disclosure

p. 127: ...The frustrative capacity of the privilege against self-incrimination will operate only where the risk exists that the government will attempt to exercise a power which is unique to the government. The government exercises such a power when it attempts to incarcerate or stigmatize persons.

p. 134: *3. The Necessary Risk*

In *McCarthy v. Arndstein*[50], ...[the Supreme Court stated:]

The privilege is not ordinarily dependent upon the nature of the proceeding in which the testimony is sought or is to be used. It applies alike in civil and criminal proceedings, wherever the answer might tend to subject to criminal responsibility him who gives it.[53]

p. 137: ...[W]here the risk of commitment to a state institution is involved, disclosure may be refused. The fact that the proceeding which is invoked to realize that risk, and in which the evidence is used, is labeled 'civil' by the courts or legislature is not a sufficient basis to deny the privilege. As the Court stated in *Gault*,

Ultimately, however, we confront the reality of that portion of the ...process with which we deal in this case. ...The boy is committed to an institution where he may be restrained of liberty for years. It is of no constitutional consequence ...that the institution to which he is committed is called an Industrial School. ...His world becomes 'a building with whitewashed walls, regimented routine and institutional hours....'[95]

The conclusion that the privilege ought to be applicable whenever the disclosure may be used to institutionalize the witness is consistent with the policy of the privilege.[96] If the privilege is to protect the people from the government, the privilege should operate most effectively in terms of frustrative capacity where the threat posed is the greatest. When the government seeks to deprive a person of his liberty, for whatever reasons, the heavy burden of the fifth amendment should be imposed.

p. 148: **III. The Fifth Amendment and Mental Examinations**

B. Mental Examinations in Sexual Psychopath Proceedings

In *United States ex rel. Gerchman v. Maroney*,[136] the petitioner entered a plea of guilty to a charge of assault with intent to ravish. ...Pursuant to the Pennsylvania Barr-Walker Act, the petitioner was examined by psychiatrists, and a report was submitted for the court's 'confidential use.' On the basis of this report the court sentenced the petitioner to an indeterminate sentence of one day to life imprisonment. Such a sentence exceeds the maximum sentence which could have been imposed for the crime charged, absent the Barr-Walker proceeding....The [federal] Third Circuit held ...that the sentence imposed was punishment....

pp. 148-49: The court rejected the claim that the goal of the proceeding – rehabilitation and treatment rather than punishment – justified the conclusion that criminal procedural safeguards were unnecessary. The court stated that the deprivation inflicted was punishment:

It would be archaic to limit the definition of 'punishment' ...to 'retribution,' Punishment serves several purposes: retributive, rehabilitative, deterrent – and preventive. One of the reasons society imprisons those convicted of crimes is to keep them from inflicting future harm, but that does not make imprisonment any the less punishment.[138]

Furthermore, the court stated that due process requirements cannot be denied on the basis that a person is being 'cured'.

The effort of enlightened penology to alleviate the condition of a convicted defendant by providing some elements of ... cure and rehabilitation ...cannot be turned about so as to deprive a defendant of the procedures which the due process clause requires in a criminal proceeding.[139]

One should also recall the conclusion of the Court in *Gault* that neither the place of confinement nor the altruistic motives for confinement are of constitutional significance in determining the procedures required....

p. 161: C. Mental Examinations in Civil Commitment

1. The Nature of the Proceding

b. The Goals of the Proceeding

...[C]ivil commitment proceedings may not be distinguished from criminal proceedings on the basis that civil commitment is merely a status determining procedure. The goals of the two proceedings are the same, and the critical factor, incarceration – is present in both instances.

c. The Effect of the Proceeding on the Defendant (Stigma, Civil Disability, and Incarceration)

...[T]hose cases which hold that the privilege does not apply in civil commitment proceedings imply that incarceration alone is also not determinative of the applicability of the privilege. Thus, it may be necessary for both incarceration and stigmatization to be present in order for the privilege to be applicable. Both of these ingredients are present in a criminal prosecution, and both are present in civil commitment proceedings.

p. 163: *2. The Nature of the Examination*

This aspect has been treated in other parts of this article. It should be recalled that very few cases have held that a psychiatric examination is 'real' evidence. None of the sexual psychopath cases so held.

Schmerber implied that a psychiatric examination should be classified as communicative evidence. The Court stated: 'It is clear that the protection of the privilege reaches an accused's communications, whatever form they might take.'[191] It is hard to say that a question and answer format does not involve communication.

p. 165: In conclusion, the nature of a psychiatric examination – being productive of communicative evidence – and the nature of civil commitment proceedings – enforcing norms through the means of involuntary incarceration – demand that a defendant in a civil commitment proceeding be accorded the privilege against self-incrimination.

Notes

9 Murphy v. Waterfront Commission, 378 U.S. 52 (1964).
13 Miranda v. Arizona, 384 U.S. 436 (1966).
15 McCarthy v. Arndstein, 266 U.S. 34, at 40 (1924).
33 384 U.S. 436 (1966).
34 *Id.* at 460.
40 *Ratner*, "Consequences of Exercising the Privilege Against Self Incrimination," 24 *U. Cin. L. Rev.* 472, 484 (1957).
50 161 U.S. 591 (1896).
53 *Id.* at 631.
95 387 U.S. at 27.
96 Stigma is also a factor which dictates that the privilege should apply. Thus imposition of fines alone justifies the application of the privilege.
136 355 F.2d 302 (3d Cir. 1966).
138 355 F.2d 302, 309-10 (3d Cir. 1966). The court was quoting from *United States v. Brown*, 381 U.S. 437 (1965). In *Brown*, the Court held unconstitutional a statute which made membership in an executive board of a labor organization by one who belongs or has belonged to the communist party a crime.
139 355 F.2d 302, 310 (3d Cir. 1966).
191 384 U.S.757, 763-64 (1966)

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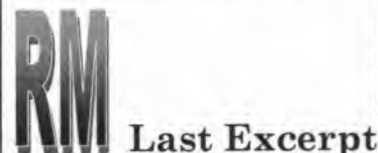

Last Excerpt

p. 62: **§3. The Resister's Declaration of Independence**

The public has been deceived and betrayed. Soon after the regime was created, the Minnesota Supreme Court and the United States Supreme Court made it clear that the institution is only justified as long as the Detainees suffer severe mental illness and must be released upon remission of the mental illness. But after the regime was established, and the oversight was gone, officers secretly transformed the program so that it no longer treats the mentally ill. It then began to authorize the confinement of sane citizens. As a smokescreen, the regime claims those confined are 'criminals.' However, although many of the men detained had criminal convictions, they served their time and had their civil rights restored. Those men are now innocent. In addition, there are more than 90 Detainees who have never been convicted of a crime in their entire life. Therefore, the vast majority of Detainees are innocent and sane. There are 60 men who have been confined since they were children. They are now in their 40s and 50s. These men have nothing. There are 300 men over the age of 55 who do not deserve to die slow, lonely deaths in a State institution.

We asked ourselves: 'Who are we?' Not according to the regime, but according to Truth. Some of us were criminals, but we did our time. Some of us were deemed mentally ill, but have volitional control. Some of us were never criminals and never mentally ill. We have followed reason to a firm conclusion: we are unlawfully detained innocent and sane men. We have every right to resist the Shadow Prison until it is abolished.

...Many of us have gone mad. All are desperate for relief. We are fundamentally different than those who operate the Shadow Prison. Our experiences are exclusive to us alone. For these reasons, we have a constitution unique to us.

p. 63: There are five criteria a government must meet in order to justify resistance by The People: When a government substitutes arbitrary will for law, when the government hinders its people to peacefully assemble, when a government alters the mode of electing the legislative body, when a government delivers the people into the jurisdiction of a foreign power, and when a government abandons the trust to govern its people. All of these criteria have been met by the Shadow Prison Regime. Therefore, we have a right to resist this institution.

The Shadow Prison Regime substitutes arbitrary will for law. Detainees are at the mercy of the regime. The regime does not adhere to the statutes of the State of Minnesota, or the U.S. Constitution. In fact, the regime is a government unto itself. The regime creates, enforces, interprets, and judges their own policies (if they decide to follow them). They are completely without checks and balances and exercise their power even to the point of murder. They are accountable to no one. The regime is the 'Terminal Democracy' spoken of by Aristotle. A Terminal Democracy disregards the rule of law and is driven by panic, fear, a postmodern-fueled hate, greed,

(Continued on page 7)

egotism, nepotism, and stigma. It is a corrupt form of government where there are no magistrates and the mob runs everything. They are unfit to be a ruler of a free people.

The Shadow Prison Regime hinders Detainees from peaceful assembly. In fact, the regime prohibits the men from assembling, organizing, engaging in protest, demonstrating, or using words or tones that 'disrupt.' The regime has punished many Resisters for exercising their natural and unalienable rights, effectively silencing and subduing much of the population.

The Shadow Prison Regime alters the mode of electing the legislative body. The regime allows only 'approved' Detainees to 'represent' the men detained. If those representatives do not show allegiance to the regime's principles, the man is removed from the position. The regime uses threats to subdue the representatives. The regime governs alone with no input from The People. The regime controls what issues are brought to the kings and queens of the regime. The regime uses our own men to intimidate and exploit other community members. The regime has made examiners and lawyers dependent on their will alone for the tenure of their offices and the amount and payment of their services. Nepotism permeates the entire institution. It is not uncommon to receive a write-up from one regime officer and then be sentenced, without a trial, by that same officer's family member. We do not stand a chance while working with the current system.

pp. 63-64: The Shadow Prison Regime delivers The People into the jurisdiction of a foreign power. The regime does not respect the United States Constitution. The regime has subjected us to a totalitarian government absolutely devoid of any American jurisprudence that:

Contributes directly to crime against women and children by accepting over one hundred million dollars annually, depriving effective education and prevention programs the opportunity to prevent crime.

Protects Shadow Prison officers from prosecution after allegations of sexual assault against our men.

Protects Shadow Prison officers from prosecution after allegations of murdering our men.

Orchestrates mock BEU hearings where men are prohibited from submitting evidence or providing witnesses to defend themselves.

Has cut The People off from the majority of the public, making it nearly impossible to voice grievances to those who can help us and in many cases, save our lives.

Deprives us of trial by jury, incarcerating us for alleged offenses.

Fails to provide hundreds of men with effective medical services, allowing them to suffer and die.

Confines our fellow citizens, pits one against another, making them the executioners of their own friends and brothers, or to fall to suicide by their own hands.

Prohibits freedom of press, freedom of speech, free exercise of religion, and the right to peacefully assemble.

Has established and enforced a state religion.

Refuses to provide a Clear Path Home for the men.

The Shadow Prison Regime abandons the trust to govern its own people. The regime cannot be trusted by anyone. Even state legislatures, doctors, lawyers, and political activists have expressed that they cannot trust the regime. The regime refuses to learn anything relevant to recidivism rates, offense risk, age desistance, and proper diagnostic practices. They have no interest in Truth. The regime has exploited the tier and phase systems and used every other means possible to pit one man against another. The regime refuses the transfer of dozens of men approved for Community Preparation Services and have refused to develop Lesser Restrictive Alternative options for men. The regime refuses to provide proper medical and dental care to the men, allowing each man to die a slow, painful, and miserable death. The regime has interfered with the prosperity of Our People by prohibiting minimum wage and Social Security benefits, destroying our property, threatening to steal our family's estates for payment of bogus treatment, price gouging alternative food options, and countless other activities that swindle money from Our People and our families. The regime has employed a standing army called the 'A-Team' to exercise tyranny over The People.

The Shadow Prison's character is marked by every act which may define a tyrant. There are simply far too many grievances for us to list here. Every man detained has his own account of abuse imposed by the kings and queens of the regime. Some have been beaten, stripped naked, humiliated, and sexually assaulted. Some have been starved and denied medical care. All have been lied to and manipulated. All have been cut off from society with all it offers. All have been denied a career, an education, and a home. All have been denied the opportunity to fall in love and have a family. Many have been exposed to this cruelty for multiple decades. Many have been murdered. All have been treated like animals.

pp. 64-65: Men are often willing to suffer for a time rather than change what they are used to. But our plight is so disgusting, we are left with no choice but to separate from the regime. Multiple acts of prudence in an attempt to reform the regime have failed. Task Forces, public remonstrance, persuasion through the free press, petitions and resolutions, pressure on the local government, public shaming from local and international communities, and civil disobedience have all failed.

p. 65: We have done all we can to petition for redress in the most humble terms and our repeated petitions have only been answered by repeated injury. The regime has destroyed the lives of Our People, practicing in the works of death, desolation, tyranny, and cruelty. They are a barbaric government, unworthy of the title 'therapeutic.' There is now a long train of abuses, despotism, and usurpations which have led to the deaths of nearly 100 men. Many more will follow if we do not stop the regime. Separating and resisting for the purpose of abolition is now the only answer.

The People detained at the Shadow Prison have a right to resistance. In fact, it is our duty to throw off such government, and to provide new guards for our future security and to obtain our freedom. Resistance is no longer an option – it is an obligation.

As independent men, we reserve the right to contract with outside powers and to do all things which independent states have a right to do. We mutually pledge to each other our honor. With this Declaration, we are unified under one set of principles. With this Declaration, we are re-asserting our non-transferable powers of the freedom of conscience, free speech, and the right to peacefully assemble with the unapologetic purpose to abolish the Shadow Prison Regime. We relinquish our consent to be governed by the Shadow Prison Regime, and we now adhere to this document and to the original documents of America's founders.

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Bellucci Opposes SO Residency Bans.

Janice Bellucci, Open Letter, Aug. 14, 2023
Text excerpts:

Banned by the 'Burbs

"It is worth noting that the assumption behind residency restrictions – that Registrants have uniform and high rates of re-offense – is false despite its persistence. ... In particular, 'research has made clear that: [t]he sexual recidivism rate of identified sex offenders is lower than the recidivism rate of individuals who have committed any other type of crime except for murder.' [CaSOMB, A Better Path to Community Safety: Sex Offender Registration in California 'Tiering Background Paper' 4-5 (2014)] Even Registrants on parole re-offend *less than 1% of the time* after three years in the community, according to the California Department of Corrections and Rehabilitation. [*CDCR,* 2015 Outcome Evaluation Report (2016, at p. 3).]

The subject of residency restrictions is not new. Instead, that subject has been studied for decades in this state and others, including by the California Sex Offender Management Board (CaSOMB). CaSOMB is a state entity staffed by prosecutors, psychologists, parole/probation departments, and victims' advocates, which exists to recommend best practices and legislative policies concerning Registrants. CaSOMB unequivocally opposes residency restrictions, and has published a substantive paper explaining their position entitled *Homeless Among California's Registered Sex Offenders* (2011) [http://www.casomb.org/docs/Residence_Paper_Final.pdf].

Among CaSOMB's conclusions in that report is:

'There is *no evidence* to support the assumption that residence restrictions are or would be effective in reducing sexual offending and thereby making communities actually safer,' and, in fact, '[t]here is *compelling evidence which suggests that residence restrictions are actually counterproductive with regard to increasing community safety.*' (*CaSOMB, supra,* at 9, 14).

Notably, CaSOMB published this and other papers in response to persistent, false assumptions by members of the public that residency restrictions are effective. CaSOMB notes, 'There does not seem to have ever been any attempt on the part of those who advocate for and create policies establishing residence restrictions to identify, conduct, sponsor, fund, promote, or in any way establish a scientific research basis for such policies.' (*Id.* at p. 9)

For these reasons, the California Legislature has declined to adopt statewide residency restrictions. After the legislature declined to adopt those restrictions, voters adopted them through the 2006 ballot initiative known as Jessica's Law. Subsequently, that law was decimated in the Courts, rendering them effectively unenforceable. For example, in [one] county, the [Superior Court] issued 'more than 150' stays of enforcement against residency restrictions. (*In re Taylor,* (2015) 60 Cal. 4th, 1025-26.)

In addition, the California Supreme Court ruled that the blanket application of residency restrictions 'cannot survive even rational basis review' because they 'impose [] harsh and severe restrictions and disabilities on the affected parolees' liberty and privacy rights, however limited, while producing conditions that hamper, rather than foster, efforts to monitor, supervise, and rehabilitate these persons.' (*Id.* at 1039-40.) ...."

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Society Needs to Welcome and Include Transgender People Just Like All Others with Compassion and Solidarity.

by Cyrus Gladden

I have never covered any transgender issues in *the Legal Pad.* Unfortunately, I

(Continued on page 8)

have no resource materials on that subject in my possession. And personally, like most individuals, my sense of gender identity conforms to my male sexual organs (that is, in the modern parlance, I am "cisgender"). This makes me a very poor person to try to sally forth into advocacy on this matter.

As you know from my newsletters, modern scientific research strongly supports the concept that all matters of sexual attraction are simply an orientation. But being transgender is beyond a matter of sexual attraction; it is a sense of one's complete identity as a person. I have a strong natural compassion for those with the feeling that, from birth, they have really been the gender opposite the one which their genitalia would appear to indicate. I also have a firm respect for their right to decide about that for themselves. Being transgender in a mostly cis-gender world surely cannot be as easy as it is for others.

When you think about it, the feeling that one is really of an opposite gender is an aspect of self-identification – not essentially a matter of to whom one orients as a prospective sexual partner. Instead, it is a matter of the fundamental gender one sees oneself as. This of course affects the sense of what sexual role one should take, using postulated sexual organs one believes one should have had from birth. Yet it also affects all social roles one feels strongly inclined to want to adopt, but blocked/frustrated only by not having such sexual organs.

The research shows irrefutably that those with transgender orientation have strong feelings that the foregoing is bedrock truth personally for themselves – and they have felt this way from when they were tiny children.

As they approach puberty, transgenders often encounter resistance to their self-view from many cis-gender men and women. Such opponents have profoundly inflexible ideas (really, only incorrect claims of fact). These myths are typically fueled by the unrecognized sexual and social insecurities of those who hold them. Unfortunately, such biases are all too often passed down through generations. All of this disregards the human obligation to take perspective of the self-perception/identification of those upon whom such bias is unfairly inflicted.

Worst, dissemination of this incorrect view that gender is defined by visible sexual organs and related physical sexual attributes increases the plight and desperation of adolescent transgenders geometrically at a time in life just when tranquility is as precious as water in a desert. Such bias and disrespect causes enormous psychic pain along just about every dimension of emotion and far too often leaves lasting psychic scars. This is why the latest approaches to resolving transgender status involve surgical conversion before puberty sets in.

The social tension this causes borders on outright strife. Needless to say, all medical practitioners serving this population therefore proceed with exceptional caution, including considerable psychiatric consultation at numerous age-points of the patient. However, this 'slow-as-you-go' strategy has the countervailing adverse consequence of forcing one, who sees himself (shall we say) as a budding woman in reality, into riding out puberty with its torrent of hormones and primary and secondary sexual characteristics of physical maleness developing, to their dismay – even horror.

This includes the permanent creation in adolescence of adult features of the genetic gender (for instance in the example of a genetic male given here, development of harder-edged male facial bones and various other bones, such as in the shoulders, while hormonally suppressing other bone developments of gender, such as widening of the pelvis). Transgenders who have gone through this process of unwanted physical maturation regard it as a form of disfigurement as severe as auto accident victims regard their maiming severe injuries. The inner strength transgenders draw on to resist such despair is inspiring and praiseworthy in its own right.

The latest 'workaround' to avoid all that travail is that the medicos can prescribe a powerful regimen of puberty suppressing drugs to a young person nearing puberty declaring him/herself to be transgender. This allows the individual to think it all over with the mental maturity that teen years add in the end, without having to rush headlong into physically irreversible decisions at less-informed ages as young as 10-12.

This is a compromise, since parents and other family members are certain that such decisions should not be left to the child him/herself at such ages, while most who have gone through this delaying process regard it just as a tedious waiting time that changes nothing about their resolve to physically convert to features of their self-identified gender. This is not a perfect solution but in our time it is deemed best practice, and it does seem to provide for most transgenders an acceptable level of satisfaction with the outcome.

Perhaps later in this century there may be other approaches, such as genetic changes which may become possible that can simply redirect a young body into invoking the development process that would make the physical attributes of the envisioned gender a natural, physical reality, without surgical modifications – even altering the procreative organs naturally.

Right now, there is no way to tell how all this will work out. Further, it may ultimately turn out to merely be just one of a panoply of choices that all future humans can then make individually about their human form, perhaps on a tentative or merely temporary basis.

If there are just two most fundamental things our aging generation has learned about the future and our ability to collectively make scientific and technological progress, they would be that: (1) just about anything that we currently cannot even conceive of could turn out to be possible; and (2) the rate of such progress/advancements is speeding up geometrically as this is written, and this rate shows no signs of slowing down. So fasten your safety belt and hang onto your hat; personal acceptance and adaptability are going to be the watchwords of human existence from here on out.

I don't think that anyone alive today should see this as wrong or adverse. I guess I would loosely call my own view of humanity's place in the Cosmos as being a "universal creationist" view. That is, I believe that the Creator is still working to pave the road through the future for us, and that we wouldn't have come this far along it if it all wasn't part of the plan for us. Because our powers of intellect as a species are increasing so much now, I take it that this too is part of the plan, and that part of our thankful reverence needs to be directed to the tremendous compliment being deferentially paid to us by the Creator by way of bestowing upon us this increasing status in the Cosmos. Becoming the wise judges of how to govern and apply all of this outpouring of new knowledge is not just our right, it is the duty of all humans, collectively. And that, I think, is The Plan.

Meanwhile, it clearly is our duty and our pleasing privilege as humans, to spread the comfort of our vastly inclusive blanket of universal compassion to all of our fellow humans, especially covering all who might otherwise doubt that they will ever receive such inclusion and the warmth of human camaraderie. I believe that transgenderism is simply one more lesson we, as the human species, are learning about the importance of such acts of compassion and brotherhood among us all. May we all breathe this in deeply and embrace it – and each other, fully and without reservation. This is the faith we all need and that we all are capable of.

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Born This Way

"*Tom in Connecticut*", "Born This Way," 11 (1) *The Broadcast* (Winter 2023), p. 1.

Text:

"Contrary to popular belief, I did not wake up one day and choose to be attracted to boys. As I have grown older, I have become increasingly convinced that I was – for whatever reason – born this way and would not change even if I could.

Please do not misunderstand me. I have made a lifetime of poor choices and bad decisions which have resulted in my present incarceration. There are nights when I lie awake in bed with the gravity of my situation bearing down upon me with such intensity that I begin to wonder: if this is all my life will ever be, then what is the point of living.

If for one second, I thought it could possibly change the events of the past and make things right in the lives of those I have offended against, I would not hesitate to forfeit this life.

For fifty years and more, I have felt the shame, fear, confusion, conflict, and condemnation society has thrust upon me simply for being who I am. We cannot choose to whom we are attracted, but we can choose our actions.

I, too, have experienced the anxiety of nearing release. Although I have ten years to go before my release date, I have served time for a prior offense. In February of 2003, I pled guilty to possession of child pornography and was subsequently sentenced to two and a half years to be served in the County House of Correction in the state of Massachusetts. After serving twenty-one months, I was released on parole in November 2004, and simultaneously began a three-year term of probation. I was subject to sex offender registry requirements, random urine screens, random searches, etc.

Though my sentence was relatively short, I experienced a significant amount of anxiety as I faced the daunting task of finding gainful employment. Because of my proximity to a school, I was forced to relocate on one occasion.

Fortunately at that time, I had the support of most of my family and several friends, and they were instrumental in helping me adjust to life on the outside. I also developed a strong sense of faith and for several years I was able to live a relatively peaceful and productive life. Having a criminal record, especially a sex offense, made it difficult to find employment, but there were people willing to give me an opportunity to prove myself.

As much as I feared and anticipated confrontation from the public concerning my offenses, no none showed up at my door with pitchforks and torches threatening to run me out of the neighborhood.

Some twenty years later, I find myself in a similar situation. Currently I am serving a twenty-five year sentence in the Federal Bureau of Prisons. As the direct result of my own actions and behaviors, I no longer have any contact with my family and those friends who once cared about me and if I were released tomorrow, I would have no place to go except the halfway house. Upon my release, I will be approaching my sixty-sixth birthday.

Yes, there is a certain amount of anxiety inherent in all of this, but I still have my faith and with each passing day there is hope that things will change for the better. It also helps to know that I am not alone. If you are a spiritual person, pray for one another. If you can reach out to someone in a positive way, do so. Help to make someone else's day better, and I am convinced your day will go better as well.

If you have family and friends out there, be grateful and tell them how much you appreciate them."

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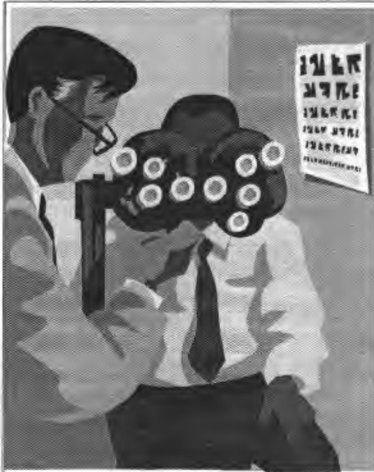
"Eye-Tracking" Test of Visual Sexual Interest in Children: Too Broad & Unpredictive.

Editor's Introduction: First, the following excerpt will introduce the reader to this technique. Brief commentary will follow challenging the significance of this test's

(Continued on page 9)



results

Tony Godet & Girard Niveau, "Eye Tracking and Child Sexual Offenders: A Systematic Review," 6(2) *Forensic Sciences Research (FSR)* 133-140 (2021)

Text Excerpts:

p. 134: "Many psychiatric forensic departments of clinics use PPG in forensic assessment, especially in North America [23, 24]. In Europe, this measurement has been criticized and its reliability questioned, especially in the forensic context with 'no voluntary' subjects compared with subjects included in studies [25-27]. Other researchers have raised the possibility that some subjects may fake responses with PPG through a voluntary control of their erectile response [28]. Due to this, it is estimated that the sensitivity is approximately 60%, which is moderate [29-31]. Moreover, the lack of standardization of procedures and materials has also been questioned [28, 32].

Eye tracking has been used in the psychological field since the late 19th century, but only recently with regard to sexology [34-36]. This technique is directly linked to ocular movement and allows a direct observation of early attention (initial orientation) and late attention (maintenance of attention) and the detection of various stimuli, in real time [37]. Early attentional processing was assessed by the first fixation and the first fixation duration after presentation of the stimulus, and late attentional processing was assessed by relative fixation time. Several studies showed, at least to some extent, that attentional processes are automatic and cannot be controlled consciously [38]. Eye movements are recorded with a camera, often by infrared light, thus allowing to determine the direction of the gaze....

Results

Samples

p. 135: Table 1 Summary of the studies included in the literature review with samples, stimuli, and results. [Discussing study by Fromberger et al [43], listing as stimuli: "Areas of interest were defined on each picture (head, breasts, waist, and public region)", describing relevant result: "Paedophiles showed the shortest entry time to the child's head, followed by the child's pubic region and waist. Paedophiles showed a significantly longer relative fixation time for the child's pubic regions than other areas of interest (P<0.001) but it is the same with adult's pubic region (P<0.001)."]

p. 138: Discussion

...[M]ost of the paedophiles included were treated and it is probable that their acceptance of their paraphilic disorder was better than that of subjects who deny their own paedophilia. ...[S]everal studies, not in paraphilic context, showed that the background of visual stimuli can influence attentional processing The degree to which nonsexual contextual cues attract attention seems unclear [48, 49]. ...Finally, some studies used task-irrelevant indirect measures, whereas researchers showed that task-relevant measures should be superior because in this type of task, stimuli cannot be underrated [50, 51].

Pictures chosen were non-erotic and non-pornographic and it is possible that they were insufficiently stimulating, which could lead to an increase in false negatives. Even in research contexts, the use of more explicit pictures could be limited and forbidden by each country's laws and assimilated to child pornography.

...But contrary to what some studies suggest, and especially Fromberger et al. [36], actually eye tracking cannot diagnose paedophilia, because eye tracking can only consider, at least in part, the presence or not of criterion A according to DSM-5 [10].

p. 139: Conclusion

Eye tracking is a very interesting tool to evaluate sexual attractiveness by attentional processes. However, despite a certain enthusiasm for the technique in the context of the evaluation of sexual offenders, there are very few specific studies of interest regarding its use to discriminate paedophiles among child sexual offenders. Results of the studies included in this review suggest interesting ways to identify paedophiles among child sexual offenders, but further research with larger and different sample groups, by different research teams, are necessary to confirm these findings. One of the difficulties of this type of research area is to include volunteer paedophiles and use adapted stimuli."

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Editor's Comment: Let's accept as a given the validity of this test to establish the existence of a visual interest in naked depictions of children or, given more selective visual stimulus materials, to establish interest in depictions of provocative poses by such children or even sexual actions involving children, (Although the last two categories pose problems of illegality if they depict actual, rather than virtual children).

Nonetheless, the outcome of the test as to any observing test-subject does not predict whether that individual would actually sexually abuse a child. In fact, even viewing illegal child pornography has not proved to be a predictor of a substantial probability of later sexual abuse by that viewer of any child. See, e.g., *L. Webb, et al.*, Characteristics of Internet Child Pornography Offenders: A Comparison with Child Molesters, 19 *Sexual Abuse* 449, 464 (2007)....; *Carissa Byrne Hessick*, Disentangling Child Pornography from Child Sex Abuse, 88 *Wash. U. L. Rev.* 4, 853 (2011); *Melissa Hamilton*, "The Child Pornography Crusade and Its Net-Widening Effect," 88 *Cardozo Law Rev.* 1679 (2012).

As a further confounder, the percentage of males worldwide who have at least some sexual attraction to prepubescent children of either gender is truly stunning to those unaware of the research on point. Survey conclusions as high as 25-30% have been confirmed, depending on definitions. Yet only a tiny percentage of such males ever sexually molest any prepubescent child. See, e.g., *J. Briere & M. Runtz*, "University Males' Sexual Interest in Children: Predicting Potential Indices of 'Pedophilia' in a Non-Forensic Sample," 13(1) *Child Abuse and Neglect* 65-75 (1989); *K. Smiljanich & J. Briere*, "Self-Reported Sexual Interest in Children: Sex Differences and Psychosocial Correlates in a University Sample," 11 *Violence and Victims* 39-50 (1996)); *Margo Kaplan*, "Taking Pedophilia Seriously," 72 *Wash. & Lee L. Rev.* 75 (Winter 2015), at 86-87; *Anthony R. Beech & Leigh Harkins*, "DSM-IV Paraphilia: Descriptions, Demographics, and Treatment Interventions," 17 *Aggression & Violent Behav.* 527 (2012), at 529 (citing research that found a pedophilic diagnosis was unrelated to long-term recidivism).

For this reason, the predictive utility of this test is extremely limited.

But what if a test could be devised involving a completely convincing (but non-self-aware) robotic replica of a child placed in a private environment with someone believed to have a temptation to sexually assault/abuse a real child if having an opportunity to do so? With surreptitious video rolling, could any abusive outcome not be deemed predictive of a substantial probability of danger of sexual abuse to real children?

The reality of being on the technological verge of being able to produce such android replicants is attested to by many research journals and blogs/vlogs. The following excerpts from an article discussing moral and philosophical points about this new possibility confirms its impending reality.

Sex offender therapeutic and management possibilities, as well as the foregoing example of an (extreme) assessment technique will soon become options based on this technology. It is not too early to start pressing on the walls of the conceptual

(Continued on page 10)

envelope of what comprises effective therapy an management of sex offenders, as well as what might very well manageably be employed to distract others who might actually later sexually abuse a real child in the absence of a simulacra-based alternative.

Read on, intellectual voyager!

****

Child Sex Bots Hold Therapeutic & Anti-Crime Potential, but Nearly Got Banned.

Justin Tiehen, "Virtue Ethics and the CREEPER Act," 41 *Seattle Univ. Law Rev.* 1153 (2018).

Text:

pp. 1153-54: "Introduction

In December 2017, Dan Donovan, a Republican House member representing New York's 11th congressional district, introduced [a bill titled] the Curbing Realistic Exploitative Electronic Pedophilic Robots (CREEPER) Act to ban the importation and distribution of childlike sex dolls and robots.[1] The legislation had bipartisan support among its twelve cosponsors,[2] while a Change.org petition urging support garnered 164,000 signatures as of March 2018.[3] The introduction of the CREEPER Act coincided with a discussion in several popular venues – including The Atlantic and NBCNews.com[4] – of a mitigated defense of child sex bots (CSBs) by philosopher Marc Behrendt.[5] CSBs, Behrendt argues, could be used therapeutically by pedophiles to help keep them from taking action against real children.[6] In that case, an unrestricted ban on CSBs could be counterproductive and potentially undermine the safety of children. [Ed. Note: Donovan's bill did not pass.]

My questions are what to make of this defense of CSBs and how to make sense of the moral intuitions we have about the case. For example, I think we have a stronger unreflective gut reaction of abhorrence to the nontherapeutic use of CSBs than we do to the therapeutic use – in the latter case, it seems our reaction (at least my reaction) is more ambivalent....

pp. 1154-55: I. Background on Pedophilia

Pedophilic disorder is defined by the DSM-5 in terms of sexual urges toward prepubescent children that have either been acted upon or that have caused distress or interpersonal difficulty.[7] ...The point to focus on is that the definition keeps distinct the desire or urge to act and any actual instance of child molestation or child-directed sexual behavior.[9] The definition allows that some pedophiles might never assault children or act in any other morally objectionable way toward them – they never act on their desire.[10] And the definition allows that some people who do molest children may not qualify as pedophiles because, for example, they are generally sexually attracted to adults.[11]

There is no known cure for the condition and no known treatment for which there is solid evidence that the treatment is highly effective.[12] Cognitive behavioral therapy (e.g., therapy involving relapse prevention behavior) shows mixed results; if anything, the higher-powered studies seem to suggest such therapy is not especially promising.[13] Various forms of pharmacological treatments seem to be ineffective when used alone and show only mixed results when combined with other things (including cognitive behavioral therapy).[14] Such drugs have also been found to have unwanted side effects: liver disease, weight gain, anxiety, and more.[15]

The point is that we are not operating against a baseline in which there are known, effective ways of treating the condition of pedophilia; it is not as though treatment is presently a success. Rather, researchers should be looking to explore new options given that nothing else seems to be working especially well. So the possibility of using CSBs therapeutically should not simply be dismissed out of hand. Even if there are some skeptics inclined to be dismissive, we might still think it is worth trying out with small studies because any known form of treating pedophilia has similar skeptics.

pp. 1155-56: II. Our First Two Moral Theories to Consider

I now want to examine CSBs from the perspectives of two of the leading moral theories in the history of Western philosophy: utilitarianism and Kantianism. First, utilitarianism says that we should act so as to maximize pleasure and minimize pain.[16] Applied to our present case, utilitarianism finds nothing *directly* wrong with the use of CSBs, whether it is done therapeutically or not. As artificial intelligence and our understanding of consciousness advance, perhaps one day we will be able to build robots that feel pain and pleasure, including sex robots. And at that point, we will have moral obligations to treat robots well – it would be rank human chauvinism to hold otherwise. But we are nowhere near this point yet. The CSBs of today and the near future have no capacity for consciousness – no one in the debate claims otherwise – and so no matter what is done to them, it is not morally bad by utilitarian lights.

Now, there is room to worry that the use of CSBs could encourage people to go out and harm actual children. In that way, there could be something *indirectly* wrong with the use of CSBs. This is the view of some critics of even the therapeutic use of CSBs; it would be wrong for the government to allow such use not because of anything involving the robot itself but because of what it is likely to lead to regarding the subsequent harm of actual children.[17] I have two points of response to this line of argument.

First, to repeat, the status quo is that we presently have very little evidence about what either promotes or discourages pedophiles to act toward children,[18] and so just as we cannot say with confidence that the use of CSBs will reduce harm directed at actual children, we also cannot say with any confidence that it will lead to greater harm. Given this state of ignorance, a plausible case exists for at least trying out small studies involving a limited number of individuals to see the results. If the results show a decrease in sexual behavior directed toward actual children, great – a success, and now we can try to spread this treatment to others. If the results show an increase in objectionable behavior, shut the CSB program down. But, given that there is no known cure for pedophilia, this is arguably all that Behrendt's argument needs to establish the conclusion that we should pursue – at least for now – the therapeutic use of CSBs.[19]

p. 1157: III. Moral Dumbfounding

I pause here to describe the phenomenon of moral dumbfounding, which may be familiar to some of you from the moral psychologist Jonathan Haidt's work, popularized in his book *The Righteous Mind*.[23] The idea is that you present people with scenarios you describe to them, and people have strong moral intuitions – 'this is wrong!' – but then when you ask them to justify their position, they are unable to. They try this or that argument only to quickly realize or have it pointed out to them that it does not work. People might still stick with the intuition – 'this is wrong, even if I can't say why!' – but they are dumbfounded to explain it.

p. 1158: ...Deepening the connection to the previous discussion, perhaps this is the way to think of CSBs – in terms of moral dumbfounding.. We have a strong moral intuition that there is something creepy or objectionable about the use of CSBs but struggle to articulate why this is. We are dumbfounded.

p. 1160: Conclusion

Now, I have been focusing on our initial moral *intuition*, our *gut reactions*. It is important to keep these distinct from our final *overall moral judgments*. You might have the initial gut reaction that something is morally wrong but decide after further reflection that your initial intuition is mistaken – that everything is morally on the up and up. Going further, you might think our moral intuitions, in general, do not count for much. Some people have gut reactions that there is something wrong or even abhorrent about interracial couples or gay adoption or stay-at-home dads, but upon reflection, many of us simply reject these intuitions rather than treat them as reflecting a profound 'wisdom of repugnance,' in Leon Kass's famous phrase[27]

p. 1161: ...[E]ven if we do ultimately embrace the virtue-theoretic argument that the therapeutic use of CSBs is morally superior to the nontherapeutic use, is that something we think that the law should act on? For example, should the CREEPER Act [bill] carve out an exception for the therapeutic use of CSBs, prohibiting their use except under the guidance of a counselor?

More generally, do we think it is appropriate to legislate virtue, specifically in those cases where virtue and protection from harm come apart in the sense that the (purportedly) unvirtuous behavior causes no pain and uses no rational being as a mere means to an end? This goes against familiar liberal conceptions of the point of the law.... At any rate, I am out of time and so will take no stance on the question here. I leave it as a topic of further debate."

Notes:

1 CREEPER Act of 2017, H.R. 4655, 115th Cong. (2017). https://www.congress.gov/bill/115th-congress/house-bill/4655 [https://perma.cc/8NPY-XCET].

2 *Id.*

3 *Stop Abuse Campaign*, "Ban Child Sex Dolls" *Change.org*.

4 *David Cox*, "Would Child Sex Robots Stop Pedophiles – Or Promote It?", *NBC News* (Jan. 4, 2018); *Roc Morin*, "Can Child Sex Dolls Keep Pedophiles from Offending?", *Atlantic* (Jan 11, 2016)

5 Behrendt's views were expressed at the Love and Sex Robots Conference held in London in December 2017. For his extended defense of the position, see *Marc Behrendt*, "Reflections on Moral Challenges Posed by a Therapeutic Childlike Sexbot," in *Love and Sex with Robots* 96, 96-113 (Adrian D. Cheok & David Levy eds., 2017).

6 *Id.*

7 *Am. Psychiatric Ass'n*, *Diagnostic and Statistical Manual of Mental Disorders* 698 (5th ed. 2013).

9 *Am. Psychiatric Ass'n*, *supra* note 7, at 697.

10 See *id.* at 698.

11 *Id.*

12 *Michael C. Seto*, *Pedophilia and Sexual Offending Against Children: Theory, Assessment, and Intervention* 190-91 (2008).

13 See *id.* at 170-75.

14 See *id.* at 177-81.

15 *Id.*

16 See generally, *Jeremy Bentham*, *An Introduction to the Principles of Morals and Legislation* (1907); *John Stuart Mill*, *Utilitarianism* (1861)

17 See, e.g., *Cox*, *supra* note 4

18 *Am. Psychiatric Ass'n*, *supra* note 7, at 699-700.

19 *Behrendt*, *supra* note 5 at 96-113.

23 *Jonathan Haidt*, *The Righteous Mind: Why Good People Are Divided by Politics and Religion* (2013).

27 *Leon R. Kass*, "The Wisdom of Repugnance: Why We Should Ban the Cloning of Humans," *New Republic*, June 2, 1997, at 17. An example of a philosopher responding to Kass through skepticism about (at least some of) our moral intuitions is *Martha C. Nussbaum*, "Danger to Human Dignity: The Revival of Disgust and Shame in the Law," *Chron. Higher Educ.*, Aug 6, 2004, at B6.

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