the **Legal Pad**

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"Prediction is very difficult, especially if it's about the future." – Niels Bohr

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— & Many more to come!

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Part 2 of 2

Sex Offender Dehumanization in the Courts

Text Excerpt:
Alexandra Stupple, "Disgust, Dehumanization, and the Courts' Response to Sex Offender Legislation," 71(3) *National Lawyers Guild Review* 130 (Fall 2014) [Part 2 of 2]
Text excerpts (cont'd):

"IV. Emotion and Empirical Data in the Law

'[T]he Courts have a duty to protect the rights of even the most despised among us. Alleged sexual predators have no social sympathy, making their rights especially vulnerable. Allowing the Government to trample the rights of one group weakens the rights of all of society. The Government cannot be permitted to establish such a precedent.'[87]

Although at its inception, the Constitution explicitly mentioned a dehumanized group (or at least 2/5 dehumanized), the Constitution and the Bill of Rights are now viewed by many as designed to act as a bulwark against the tyranny of the majority, i.e., it is meant to protect the out-group against the in-group. As the first Justice Harlan states in his dissent in *Plessy v. Ferguson*: 'In the view of the Constitution, in the eye of the law, there is in this country no superior, dominant, ruling class of citizens. There is no caste here.'[88] The Constitution should serve as a 'hedge against "what everyone already knows,"' i.e., prejudice. Therefore, when a group is widely and vehemently reviled, the law and its constitutional protections are even more important: 'The Constitution is tested most when its protections shield those who we most despise.'[90]

However, the history of sex offender laws has proven that if a group is hated enough the law may not very readily offer protection. The Supreme Court has repeatedly upheld the codification of disgust against this group and has allowed the dismantling of the rights to due process, equal protection, and other constitutional rights of this extreme out-group.

To ensure that a currently despised group is not stripped of constitutional rights, courts must ensure, to the best of their ability, that laws are not based on false information. With regard to sex offenders, the law, like major media and the general public, has largely ignored the empirical data. It has therefore denied this group of people constitutional rights in a way it would be hard to imagine happening to other classes of people. Disgust – its own, that of the public, or both – has influenced the judgment of our courts.

[p. 138:] The political and legal response to the public outcry over sex crimes, particularly repeat-offender, stranger-on-stranger sexual crimes, has been one of following the public's lead. Disgust has become institutionalized. Ostracism, banishment, and a suspension of constitutional rights have been the result. Although it may be impossible to change this aspect of human nature, and not necessarily a desirable thing to do,[91] it is possible to restrain the legal response to such emotional reactions. The law's enabling of the 'vicious cycle' of disgust, dehumanization, and banishment would be checked if more judges (and especially Supreme Court Justices) were to depend more on empirical data than commonly accepted 'knowledge' when deciding an issue.

Aurora borealis often appears during a hard freeze – of attitudes and emotions, but neither the natural show nor the freeze lasts forever.

[p. 140:] **B. Civil context**

...[I]n the civil commitment context, ...[t]he sex offender has already been found to be responsible, in his criminal trial, and the legal notion of culpability is no longer an issue. If it were, the *ex post facto* and double jeopardy clauses would be violated.[108] Adding another legal culpability standard post–punishment results in the guilty person having been incapacitated as a culpable moral agent. First, he exercised his free will to perform bad deeds and then after serving his sentence, he is deemed to have not enough free will to be released back into society. They can be found 'not responsible for precisely the behavior for which they were convicted and punished.'[109] That a swath of people, categorized by the type of crime they have committed, is automatically put to a legal test in civil court of whether they have a free will seems to contradict a few assumptions on which the law generally relies: everyone is assumed to possess free will, and one must answer for his deeds, not his character.[110] Here, the state has its cake and eats it too.

It is hard to imagine other types of criminals being held to this post-punishment standard. Stephen J. Morse illustrated how extreme such a statute is by removing all reference to sex from the Kansas definition of who may be civilly committed: 'Any person who has been convicted of or charged with a violent offense and who suffers from a mental abnormality or personality disorder that makes the person likely to engage in repeat acts of violence.'[111] Such an exception is made in the case of this group of people because civil commitment laws are based on disgust and dehumanization. The sex offender must be banished from society, either because of his deeds (prison) or because of his being (civilly committed).[112]

Indeed, that is what happens. With no scientific operational definition behind it, 'mental abnormality' remains within folk-psychology, and fact-finders are free to use 'common sense' and emotion, including disgust, to find whether a person has control over their actions. This is dangerous for people for whom 'common sense' typically commands dehumanization. One judge found that the lack of a mental illness requirement created a tautology wherein 'a sexually violent predator suffers from a mental condition that predisposes him or her to commit acts of sexual violence.'[113] In other words, it would not be unreasonable for fact-finders to determine that all sex offenders be institutionalized.

[p. 141:] Sex offenders engender disgust, which looks to the 'essence' of a person – essentially what civil commitment statutes are asking fact-finders to do anyway – and that results in dehumanization and a finding that no moral agent with free will resides inside the person. Asking for such an assessment belies a purpose of punishment.

To protect against this, and because '[f]reedom from restraint is essential to the basic definition of liberty in the Fifth and Fourteenth Amendments,'[114] the law should not create pseudo-scientific standards, standards that are legal ones but act as scientific ones, in the area of civil commitment. Courts must insist on the truth that, in civil proceedings, whether someone is capable of exercising free will is an empirical question and therefore whatever concepts and standards are used to define that free will should be ones firmly rooted in fields that employ scientific methodology. In this area, the law should consistently hold a scientific attitude toward evidence. 'Common sense' often smuggles in dehumanization and extreme bias. Therefore, the law should have the propensity to doubt that it already has the right answers before empirical inquiry has been engaged in, and it must allow for the changing of the law when research has shown that a 'common sense' belief was in fact erroneous.[115]....

C. The Courts' deference to legislative findings.

Another constitutional bulwark against the tyranny of the majority is found in federalism. The judiciary should act to ensure that other branches are not creating laws that are violative of the Constitution. One way to do this is for courts to demand [that] legislatures produce data in support of their lawmaking. While courts generally proclaim that great deference should be given Congress and other legislative bodies regarding their findings of fact and their stated purposes, such deference is given haphazardly and there seems to be no stated rule of when deference is owed and when it is not. Not surprisingly, courts have been extremely deferential toward lawmakers in the field of sex offenders.

However, in non-sex offender contexts, examples of the Supreme Court refusing to follow the findings of legislatures exist. For instance, in *Brown v. Entertainment Merchants Ass'n*, the Court found that the California legislature had not shown that laws against violent video games were proportionate to California's stated need for

(Continued on page 2)

them, and therefore had not proven that its need outweighed the risks to the First Amendment.[117] The majority did not go outside the record to back that finding up, but Justice Breyer, who dissented, did. Although he said he agreed that deference should be given to legislative findings, he also compiled studies, including ones dealing with 'cutting edge neuroscience,' that showed the need for such laws was great.[118]

[p. 142:] There are times courts must use evidence and data to determine whether something is constitutional. There is no other way to determine whether a law is out of proportion to a stated harm, whether it is based on animus, or whether it has an improper effect. Justice Breyer – who has espoused elsewhere that governmental agencies must break out of a vicious circle of allowing Congress and the public 'to set agendas and manage particular results,' where the science does not back such a result[119] – has stated how he would apply strict scrutiny to laws whose constitutionality is being challenged. Among other things, he would evaluate 'the degree to which the statute furthers [the state's] interest' and 'the nature and effectiveness of a statute and the effectiveness of alternatives. In his dissent in *Hendricks*, he also looked at evidence of the intent behind the civil commitment statute and found it was based on pure animus.[121]

Similarly, judges should not convert a lack of evidence in the record to proof that a lawmaker has acted justifiably. Although a reliance on 'common sense' and 'folk-wisdom,' i.e., 'the simple truth,' is pervasive in the legal world, judges must be careful when employing it.[122] Common sense has 'an uneasy relationship with empirical truth.'[123] Common sense should be constrained to the world of normative judgments, not to factual ones. For instance, it is common sense that children should be protected from sex offenders. However, it is not common sense 'how' they should be protected from them. Where issues of 'how' are raised, courts would do best to look to empirical data. If none is presented, it should strike down the law.

V. Conclusion

[p. 144:] Today, all communities rightfully think of crimes such as child rape and molestation as the grave and heinous acts they are; however, a panic has ensued which has led to a squandering of public resources, the dehumanization of a swath of people, and the denigration of the Constitution. For the protection of everyone's constitutional rights, a conscious commitment by all lawmakers to use empirical data in their fact-finding and decision-making is required, even if done while feeling and expressing emotions like anger and contempt. This may be the only way evidence-based practices and policies that *actually* protect the public from sexually violent persons will be born."

Part 2 Notes:

87 *U.S. v. Edwards*, 777 F. Supp. 2d 985 (E.D. N.,C. 2011) (footnote omitted).

88 163 U.S. 597 (1896) (Harlan, dissenting).

90 *Faigman, et al. supra* note 84 at § 11:23.

91 See *Nussbaum, supra* note 55at 121-22. Disgust likely played a valuable evolutionary role, such as by recognizing toxic or dangerous substances that would sicken us if ingested.

108 *Id.* at § 11:8.

109 *Stephen J. Morse*, "Protecting Liberty and Autonomy: Desert/Disease Jurisprudence," 48 *San Diego L. R.* 1077, 1102 (2011).

110 See *id.* at 1104.

111 *Id.* at 1101.

112 See *Id.*

113 *Young v. Weston*, 898 F. Supp. 744, 747 (Wash. 1995).

114 *Id.* at 747.

115. See *Lee McIntyre*, Dark Ages: The Case for a Science of Human Behavior 20 (2006).

117 *Brown v. Entertainment Merchants Ass'n*, 131 S.Ct. 2729 (2011).

118 *Id.* at 2768.

119 *Breyer, supra* note 50, at 50.

121 *Kansas v. Hendricks*, 521 U.S. at 384-85.

122 See *Terry A. Maroney*, "Emotional Common Sense as Constitutional Law," 62 *Vand. L. Rev.* 851.

123 *Id.* at 857.

Editor's Comment: Disgust and dehumanization, as well as the insidious infiltration of so-called "common sense" must be drummed out of the body of laws concerning sex offenders, since they simply serve as a vehicle to deliver pallets of bias with which to corrupt the law.

The field of actual knowledge about sexual offending is based on many years of rigorous scientific research and hypothesis testing, not merely on intuition and old tales. These latter, comprising such 'common sense,' serve only to block the apt application of true science to all matters about sex crimes and sex offenders.

Engaging in such emotionally driven blockage of crucial knowledge in judicial and legislative decision-making is reckless and inflicts harm and fails to prevent crime when rational decisions could avoid such harms and instead make such sound policy choices.

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Animus Excludes SOs from Criminal Justice Reforms.

Catherine L. Carpenter, "All Except for: Animus That Drives Exclusions in Criminal Justice Reform," 50(1) *Southwestern Law Rev.* 1-43 (2020).

Abstract Excerpts:

"Saying something is true does not make it so. And saying it louder does not make it truer. But such is the legislative posture behind modern day sex offense registration laws that punish those who commit sex crimes because of entrenched myths that overstate the laws' positive impact on public safety and exaggerate recidivism rates of offenders. And it is not only registration schemes themselves that have been scaffolded by these myths, but numerous ancillary laws that exclude benefits to offenders strictly because they have committed sex offenses.

Sadly, this sticky but false narrative has provided the animus that galvanized implementation of registration and notification regimes. And in its most recent chapter, the narrative has been formalized into blanket exclusions – or what this article calls 'all except for' provisions – that have been inserted into a myriad of criminal justice reform efforts without much notoriety.

The effect? Registrants and their families have been prohibited from broad-based and important ameliorative changes to the carceral state, many to which they should be entitled and to which they are denied only because of their status as registrants. Indeed, within comprehensive legislation covering numerous crime and sentencing reforms, these ubiquitous blanket exclusions have the markings of boilerplate language that have been introduced even where the new legislation has no rational relationship to the protection of the public's safety or the prior sex offense conviction.

This article examines the moral panic and false data used to buttress blanket exclusions – their inflated importance obvious in the conversation. It concludes that these measures, which are untethered to public safety concerns, and only supported by governmental and community animus, violate Fourteenth Amendment protections."

Text Excerpts & Summaries:

pp. 3-4"Despite empirical studies to the contrary,[5] legislatures persist in the assertion that these offenders must be singled out for harsher treatment because their convictions portend future dangerousness.[6] The basis for this assertion is the wildly familiar perception but wholly inaccurate finding that sex offenders recidivate at rates that are 'frightening and high.'[7] Ira and Tara Ellman's article, '"Frightening and High": The Supreme Court's Crucial Mistake about Sex Crime Statistics,' exposes the faulty and scant data that was used by the Supreme Court in two decisions[8] to promote this inaccurate view.[9]

p. 4: And even if the data were not faulty, we know that registration schemes do not deliver what was promised: they do not keep the community safe. In a groundbreaking study by J.J. Prescott and Jonah E. Rockoff, they offered a nuanced look at sex offense registration and notification laws based on data that spanned time and geography.[11] Their two takeaways unmask the false position that notification laws enhance public safety. Their findings support the premise that notification laws do not curtail crime,[12] and more importantly, 'convicted sex offenders become more likely to commit crimes when their information is made public because the associated psychological, social, or financial costs make crime-free life relatively less attractive.'[13] So powerful were their conclusions that courts have paused over them in reviewing the constitutionality of registration

Animus

schemes.[14]

pp. 5-8: There is no doubt that the country is on the precipice of change. At all levels of government, we are witnessing reforms in incarcerating16 and policing policies.[17] Too slowly, it has dawned on us the seriously negative consequences of mass incarceration, propped up by decades of retributive policies,[18] monetary bail requirements,[19] three strikes laws,[20] and lengthy prison sentences.[21] The bill has come due and we can no longer afford it.[22]

The era of criminal justice reform did not happen overnight, but changes have been sweeping and with bipartisan support rarely seen these days on other topics.[23] Occurring at both the national[24] and state level,[25] reform efforts have resulted in a dizzying array of legislation to reclassify crimes to shorten prison time,[26] provide parole[27] and expungement opportunities,[28] change long-standing policies on monetary bail,[29] and create reentry and diversion programs.[30]

That is, all except for those who have been convicted of sex offenses.[31]

Blanket provisions that exclude those who have committed sex offenses are commonplace in this era of reform, inserted into legislative reform regimes without much opposition or notoriety.[33] Indeed, within comprehensive legislation covering numerous crime and sentencing reforms, these ubiquitous 'all except for' provisions have the markings of boilerplate language that have been introduced even where the new legislation has no rational relationship to the protection of the public's safety or the prior sex offense conviction.

pp. 8-9: It is not only in newly enacted laws or downgraded felonies where registrants are excluded. In what is best described as a demonstration of governmental animus, registrants have also been excluded from receiving compensation from a state victim's compensation fund, *even where the compensation requested does not arise from circumstances of the crime the registrant had committed.*[40] That is the effect of this blanket exclusion: a one-size-fits-all punitive stance that deems all registrants unworthy of benefits from criminal justice reform, reintegration efforts, or compensation that is available to others.[41]

I. 'ALL EXCEPT FOR' LAWS: BLANKET EXCLUSIONS BASED ON ANIMUS

pp. 9-10: ...Historically, by definition and operation, registration and notification schemes were designed specifically to set apart these actors from their criminal counterparts.[43] The registry's origin was checkered; arguably the first registry was motivated by homophobia.[44] Adopted in California

(Continued on page 3)

in 1947, the earliest registry has been critiqued as a not-so-subtle attempt to target and criminalize the sexual conduct of gay men.[45] But even with that unseemly historical context, the earliest registry, with eleven registrable offenses and no public notification,[46] is a far cry from the breadth and scope of state registration schemes today, which are complex and mammoth, often including forty registrable offenses, residency and presence restrictions, GPS satellite monitoring, and frequent in-person registration.[47]

The dramatic increase in the burdens associated with registration was not accidental. With support from two Supreme Court decisions in 2003,[48] registration and notification laws have flourished modernly as civil regulatory measures, still expanding and largely unchecked.[49]

pp. 11-12: [The author cites *Smith v. Doe*[51] and *Connecticut Department of Public Safety v. Doe*[52] as authorizing broader registration requirements.] Nearly twenty years later, '*super*-registration schemes' have become a staple for the carceral state.[53] A brief look at today's registry paints a grim picture of a society intent on punishing and ostracizing those who have committed sex offenses.[54] Today, nearly one million people have been forced to register,[55] obligated to meet onerous burdens and prohibitions on their housing, employment, education, and movement, [56] which deeply harm not only the registrant but family members as well.[57]

p. 13: With this as our landscape, it is not surprising that legislatures have enacted reform efforts that specifically and intentionally exclude registrants. What knits these unrelated laws together is animus toward the registrant, Not one demonstrates a rational relationship between the blanket exclusion and the state's goal to protect the safety of the community. Instead, each law described below suffers from an important failing: each is wildly overinclusive and untethered to public safety concerns.

Primarily, reform efforts arise in two forms: automatic entitlement and allowance based on discretionary judicial review. Under new legislation that provides automatic entitlement, all registrants are categorically barred from receiving the benefit of reform even though, like their counterparts, they meet the other statutory requirements. Under statutes that incorporate judicial review to receive the benefit, registrants are even *denied the opportunity* to present the same evidence that their counterparts are able to show to receive the benefit.

p. 15: *Denial of good time credits.* ... Despite being model prisoners, all sex offenders are prohibited from seeking good time credits or risk having their credits reduced.[75] And in a clear example of animus directed at registrants, even those who commit violent felonies in California may receive fifteen percent conduct credit,[77] while those who commit sex offenses may not receive any credit.[78]

Denial of parole. ...Here, legislatures continue to contort the term 'non-violent.' Recognizing that all sex offenses are not violent, some states have created a new category of exclusions for sex offenses specifically for the purpose of excluding them.[80]

Guernica (Animus Squared)

p. 16: *Denial of other benefits.* Other benefits are lost to those who have committed sex offenses for no reason other than animus.[85]

In Delaware, expungement is available through the petition process.[88] Yet even though the language of the bill builds in discretion in the petition process, it statutorily excludes most sex offenses from even that opportunity.[89]

pp. 16-17: California's Victim Compensation Fund offers another illustration of animus at work. In 2016, the California legislature reformed the Victim's Compensation Fund to specifically exclude registrants from receiving compensation even if they fit other criteria of 'victim.'[90] ...As one legislator put it, 'The purpose of this bill is to ...deny compensation to registered sex offenders.'[91]

Finally, another snapshot of the laws reveals the obstacles registrants face upon reentry. Louisiana House Bill 681 lifts restrictions for people who were convicted for drug offenses from receiving welfare, cash and food stamp benefits, but does not extend to people who committed violent or sex offenses under Louisiana law.[94] The irony cannot be lost that registration regimes which block gainful employment and limit housing also make it more difficult for registrants to receive subsidies.

II FAULTY ASSUMPTIONS THAT DRIVE THE EXCLUSIONS

p. 18: *A. The Moral Panic That Overtakes the Conversation*

That the myth of high recidivism rates persists is cause for circumspection. Before this Part of the article delves into the empirical studies that refute the underlying premise for registration schemes, it is important to understand its stranglehold. Why, in the face of reputable statistics, does such a false message continue to resonate with the public and with a judicial body that values empiricism?

The answer is obvious, pervasive, and controlling. The country is suffering from what sociologists describe as a 'moral panic.' It is a societal reaction that is wildly out of proportion to its factual predicate but is nonetheless stoked by elected officials, affirmed by courts, and relayed by the media.[98]

p. 19: The fear is palpable. As the district court wrote in *Millard v. Rankin*, 'The fear that pervades the public reaction to sex offenses – particularly as to children – generates reactions that are cruel and in disregard of any objective assessment of the individual's actual proclivity to commit new sex offenses.'[101]

p. 20: An interesting phenomenon occurs in a moral panic: the panic inspires and adopts faulty messaging. As noted by sociologist Kenneth Thompson, an inaccurately perceived threat or one that is blown out of proportion leads to the exaggeration and fabrication of statistics and stories designed to fuel the panic's longevity.[108]

pp. 21-2: Because a moral panic inflates concepts of harm, a critical weakness is laid bare: society has no ability to distinguish true harm from that manufactured by the panic. As a consequence, the panic has ushered in zero tolerance policies leading to absurd results. For example, children are now labeled sex offenders[116] for what a generation ago was called 'playing doctor.'[117]

pp. 25-6: Societal panics give communities permission to unleash their hatred. Support by governmental adoption of registration and notification schemes gives the community a sense of agency over the fate of registrants. Lancaster calls the exaggerated community panic 'poisoned solidarity' or 'mutual suspicion.'[142] Sadly, it is not uncommon that those who have committed sex offenses are targets of violence.[143] But even if not targeted for violence, they come under the kind of scrutiny that makes reintegration impossible. Fearful of losing their livelihood and their homes, they live in constant fear of being outed and ostracized.[144] Finally, vigilantism from panic causes people to target those who they incorrectly believe are registrants,[145] or who 'just look suspicious.'[146]

p. 27: Yes, it appears we are in the throes of a moral panic. ...Only with this appreciation can we understand the depth of resistance to empirical data that upends the status quo. And only with this appreciation can we understand why it is so difficult for the public to let go of the false messaging.

B. *The* **Real** *Data*

Statistics play the leading role in registry analysis. In effect, their use serves as a legal crystal ball; we rely on the numbers to assess future dangerousness of a specific part of the offending population.

pp. 28-9: Conflicting statistical evidence took center stage in the Sixth Circuit in 2016 when it grappled with recidivism rates that were in contradiction to those claimed by the Supreme Court. As noted earlier, in 2003, the Supreme Court in *Smith* asserted that sex offenders recidivate at rates that are 'frightening and high.'[162] By comparison, in 2016, the accuracy of the *Smith* assessment was questioned by the Sixth Circuit in *Does #1-5 v. Snyder*,[163] the court writing, 'The record below gives a thorough accounting of the significant doubt cast by recent empirical studies on the pronouncement in *Smith* that "the risk of recidivism posed by sex offenders is 'frightening and high."'[164]

...[T]wo decades of study, as referenced in *Snyder*, offer a very different conclusion: registrants recidivate at much lower rates than is believed.[168]

p. 31: ...Professor Ellman examined a study used by the *Smith* Court to support lifetime registration, and not surprisingly, he found that the summary of the study upon which the Court had relied, mischaracterized the findings.[178] Extrapolating the value of lifetime registration for all registrants from this study was misleading because the study had only examined a small subset of a registrant population to confirm its findings.

p. 33: *Years from the registering offense.* One statistical fact that has emerged from the studies is that re-offense rates of registrants – no matter the seriousness of their crime – steadily decline over the years.[189]...

...Armed with the knowledge that re-offense rates decline precipitously with the offender's age, the one-size-fits-all approach to future dangerousness is suspect. And if suspect, then blanket rules affecting all registrants including 'all except for' provisions should be eliminated.

pp. 33-4: *The hidden reality of ineffectiveness.*

Buried beneath the infrastructure of registration and notification schemes is the open secret shared by social scientists: registration and notification schemes are ineffective. Amanda Y. Agan summed it up well after conducting a myriad of empirical tests from different angles and across numerous states: 'I find little evidence to support the effectiveness of sex offender registries, either in practice or in potential.'[192]

p. 36: It is not difficult to understand why registrants have largely failed in the courts. Without a fundamental interest to anchor strict scrutiny analysis, conventional thinking suggests that the traditional rational basis test offers little hope for registrants. ...Indeed, quite cynically declared by one legal scholar, the rational basis test was 'tantamount to declaring that the legislation was constitutional.'[205]

Adopted in California in 1947, the earliest registry has been critiqued as a not-so-subtle attempt to target and criminalize the sexual conduct of gay men.

p. 41: B. *The Role of Animus*

Without accurate empirical evidence to bolster the exclusion, the emptiness of the State's argument must be revealed for what it is: boilerplate language designed to feed the community's panic. What we are left with is animus. On that topic, Randy Barnett writes, 'It cannot be enough that a

(Continued on page 4)

legislature *claims* its acts are within one of its just powers. Such an inquiry must include the question of whether such an assertion is being made in *good faith*.'[240] But, because illicit motives might be difficult for the challenger to prove, Barnett argues that arbitrary and irrational decisions serve as evidence of bad faith decision making.[241]

Auschwitz (Animus Cubed)

pp. 41-2: We are left with no choice but to understand that the moral panic surrounding sex offenses is our lens through which we must recognize that there is bad faith decision making. It is frustrating to identify discriminatory governmental behavior but not believe there is a legal path to rectify it. In *Romer v. Evans*, we find that path.[244] Although it was an equal protection challenge, the Court's language transcends that narrow analysis: even under a rational basis review, laws based on animus will not survive constitutional scrutiny.[245]"

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

Notes:

5 *Amanda Petteruti & Nastassia Walsh, Just. Pol'y Inst.*, Registering Harm: How Sex Offense Registries Fail Youth and Communities 12 (2008))reporting 61 studies that found recidivism rates of non-sexual offenders much higher than sexual offenders).

6 *Barrows v. Mun. Ct.*, 464 P.2d 383, 486 (Cal. 1970)

7 *Ira Mark Ellman & Tara Ellman*, "'Frightening and High': The Supreme Court's Crucial Mistake About Sex Crime Statistics, 30 *Const. Comment.* 495, 497-98 (2015). *State v.Chapman*, 944 N.W.2d 864, 879 (Iowa 2020).

8 *Smith v. Doe*, 538 U.S. 84, 103 (2003); *Catherine L. Carpenter*, "Throwaway Children: The Tragic Consequences of a False Narrative," 45 *Sw L. Rev*, 461, 487-89 (2016).

9 *Heather Ellis Cucolo & Michael L. Perlin*, "'The Strings in the Books Ain't Pulled and Persuaded': How the Use of Improper Statistics and Unverified Data Corrupts the Judicial Process in Sex Offender Cases," 69 *Case W. Rsrv. L. Rev.* 637, 640 (2019).

11 *J.J. Prescott & Jonah E. Rockoff*, "Do Sex Offender Registration and Notification Laws Affect Criminal Behavior, 54 *J.L. & Econ.* 161, 165, 181 (2011.

12 *Id.* at 164.

13 *Id.* at 165.

14 *Does #1-5 v. Snyder*, 834 F.3d 696, 704-05 (6th Cir. 2016); *Hoffman v. Vill. Of Pleasant Prairie*, 249 F. Su8pp. 3d 951, 963 n. 10 (E.D. Wis. 2017); *Jordan v. Lee*, 2020 WL 4676477 at *16 (M.D. Tenn. 2020).

17 *Weihua Li & Humera Lodhi*, "The States Taking on Police Reform After the Death of George Floyd," *FiveThirtyEight*, https://fivethirtyeight.com/features/which-states-are-taking-on-police-free-form-after-George-Floyd.

18 *Alfred Blumstein*, "Dealing with Mass Incarceration," 104 *Minn. L. Rev.* 2651, 2655-60 (2020).

19 *Elizabeth Hardison*, "Cash Bail, Explained: How It Works and Why Criminal Justice Reformers Want to Get Rid of It," *Pa. Cap. Star* (July 14, 2019).

20 *Ewing v. California*, 538 U.S. 11, 30-031 (2003).

21 *Michelle Alexander*, *The New Jim Crow: Mass Incarceration in the Age of Color Blindness* (New Press 2020).

22 *Brown v Plata*, 563 U.S. 493, 501-06 (2011).

23 *Shon Hopwood*, "The Effort to Reform the Federal Criminal Justice System," 128 *Yale L.J.F.* 791, 800-03 (2019); *Jonathan Feniak*, Article, "The First Step Act: Criminal Justice Reform at a Bipartisan Tipping Point," 96 *Denv. U.L. Rev. Online* 166, 171-72 (2019); *Jessica Kelley & Arthur Rizer*, "Keep Calm and Carry on with State Criminal Justice Reform," 32 *Fed. Sent'g Rep.* 86, 87-89 (2019).

24 First Step Act of 2018, Pub. L. No. 115 -391.

25 *Rachel Frazin*, "Florida Legislature Passes Criminal Justice Reform Bill," *The Hill* (May 3, 2019).

26 Safe Neighborhoods and Schools Act, 20-14 Cal. Legis. Serv. Prop. 47 (West).

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45 Johnson (Werdegar, J., dissenting, *supra* note 44); Origin of the Registry,, *SOL Rsch.* (Sept 8, 2009).

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101 265 F. Supp. 3d 1211, 1226 (D. Colo. 2017).

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116 *Hum. Rts. Watch*, No Easy Answers: Sex Offender Laws in the U.S. 68 (2007).

117 *Jose I. Concepcion*, "Understanding Preadolescent Sexual Offenders: Can These Children Be Rehabilitated to Stem the Tide of Adult Predatory Behaviors?", 78 *Fla. Bar J.* 30, 33 (2004)

142 *Roger N. Lancaster*, *Sex Panic and the Punitive State* 21 (2011); see also *Sara Sun Beale*, "What's Law Got to Do with It? The Political, Social, Psychological and Other Non-Legal Factors Influencing the Development of (Federal) Criminal Law," 1 *Buff. Crim. L. Rev.* 23 (1997).

143 *Ramon Antonio Vargas*, "Teen Beat Up a Stranger He Recognized as a Sex Offender, Now Faces Hate Crime Count, NOPD Says," *Nola.com* (Oct. 25, 2019); *David Boroff*, "Vigilante Pleads Guilty to Beating Three Sex Offenders, Implores Others Not to Take Law into Own Hands," *N.Y. Daily News* (Jan. 2, 2018).

144 For a sampling of the extremely difficult experiences facing registrants who attempt to reintegrate, see *Millard v. Rankin*, 265 F. Supp. 3d 1211, 1217-21 (D. Colo. 2017).

145 "California Man Beaten to Death After Being Mistaken for Sex Offender," *Mercury News* (Sept 3, 2019).

146 *Lancaster, supra* note 142, at 4-5.

162 Even prior to *Smith*, lower courts had relied on similarly inflated numbers. See, e.g., *Neal v. Shimoda*, 905 F. Supp. 813, 819 (D. Haw. 1995).

163 834 F.3d 696 (2016).

164 *Id.* at 704.

168 *Ryan W. Porte*, Note, "Sex Offender Regulations and the Rule of Law: When Civil Regulatory Schemes Circumvent the Constitution," 45 Hastings Const. L.Q. 715, 727 (2018).

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189 *R. Karl Hansen et al.*, "High Risk Sex Offenders May Not Be High Risk Forever," 29 *J. Interpers. Violence* 2792, 2807 (2014).

192 *Amanda Y. Agan*, "Sex Offender Registries: Fear without Function?," 54 *J.L. & Econ.* 207, 208 (2011).

205 *Scott H. Bice*, "Rationality Analysis in Constitutional Law," 65 *Minn. L. Rev.* 1, 4 (1980).

240 *Randy E. Barnett*, "Why Popular Sovereignty Requires the Due Process of Law to Challenge 'Irrational or Arbitrary' Statutes,"14 *Geo. J.L. & Pub. Pol'y* 355, at 368 (2016).

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Ongoing Series:

Can Risk Assessmt & Actuarial Prediction Be Reconciled with Bayes, Monahan, Chaos, Uncertainty, & Other Limits?

Students learning about uncertainty and lack of clarity

Robert A. Prentky, Howard E. Barbaree, & Eric S. Janus, eds., *Sexual Predators: Society, Risk, and the Law* (New York:

(Continued on page 5)

Routledge, 2015)
[Part 2]
Text Excerpts:

p. 127: "Besides the five-year rates, Helmus et al. (2012) also provided ten-year base rates for 15 samples, and these base rates varied widely as well. Our new understanding of Bayes' Theorem and its relevance to actuarial assessment helps us to understand that, with varying base rates across samples, the absolute rates attached to each score value must vary as well.

...Harris and Rice reported the results of numerous attempts at using Bayes correction and concluded that such estimates are reasonably good in some circumstances but that the estimates do not approximate the empirical findings in many circumstances.

In fact, the Bayesian correction does not work because neither of the Bayesian coordinates (base rate or LRs) is stable across diverse samples (Mossman, personal communication).

Ch. 8: "Risk Judgments Under Conditions of Uncertainty: Heuristics and Biases"

pp. 173-74: "Steve Hart (2009) posed the didactic though [an] arguably provocative question:

'If it is impossible, even with the assistance of astounding measurement instruments and supercomputers, to predict with a high degree of precision which teapots will drip, when Microsoft stocks will rise or fall, when it will next rain in Lisboa, or when the toss of a 100-escudos coin will turn up the figure of Pedro Nunes, how can we think it is possible to make precise quantitative predictions regarding whether a person will commit an act of violence? Yet, on my home continent at this time it is fashionable for forensic psychologists, both clinical and academic, to conceptualize the clinical task of risk assessment as the *prediction* of violence.

...Hart's (2009) warning, 'Some of us who work with adults, in our scientific zeal, have allowed ourselves to be used as a justification for draconian political decisions and social policies.' (pp. 66-67).

pp. 174-75: *Monahan's 1981 Book*

The import of Monahan's 1981 book is simply that it is, to the best of our knowledge, the first – and remains one of the very few – discussions of sources of bias among those retained to evaluate criminals. Monahan (1981) pointed to five primary factors that contribute to overprediction of violent behavior: (1) political influences, (2) illusory correlations, (3) cultural differences, (4) conceptual and contextual problems, and (5) low base rates. Several of these – illusory correlations and base rates – we address separately in this chapter.

Political Influences we allude to on various occasions. Political Influences refers to the potential consequences for the examiner if the individual reoffends. If the examiner was insightful enough – or lucky enough – to have judged the individual at high risk of reoffending, there will be *no* consequences. Ever. We are not aware of any instance in which an examiner has suffered social, political, or legal (law suit) repercussions from finding that a defendant is high risk. If the examiner found the individual was not at high risk and the individual is released and reoffends, the consequences may include negative media coverage, embarrassment, and, in rare instances, even lawsuits. These adverse repercussions seem disproportionately to occur when the individuals are sex offenders, and the 'degree of adversity' of the fallout is invariably a function of the severity of the re-offense. For a sex offender to reoffend by taking the life of the victim is all the more intolerable when the professional has judged the offender *not* to be 'high' risk. To avoid the possible adverse repercussions of making a mistake, judgments are frequently biased in the 'conservative' direction (defined here as a reluctance to find someone *not* dangerous or *low* risk). Saleem Shah (1975, 1978) observed long ago that because of social and political pressure, the recommended decision rule is 'better safe than sorry.' Erring on the conservative tends to increase the potential false positive error region and decrease the potential false negative error region, or, as Monahan said, lead to overprediction. When nonregressive predictions are made under conditions of uncertainty, the customary response is to predict conservatively. Stated otherwise, by avoiding a possible 'bad' outcome, we tip the judgment scale toward a false positive error.

Phillips and Edwards (1966) defined conservatism somewhat differently – a reluctance or 'slowness' to revise a prior probability estimate when presented with new data, or as Plous (1993) stated it, 'Conservatism is the tendency to change previous probability estimates more slowly than warranted by new data.' (p. 138).

pp. 176-77: *Conceptual and Contextual Problems* refers to the training and indoctrination of most mental health professionals, principally psychologists and psychiatrists, who render judgments about risk of offense-related behavior. Mental health professionals are all trained to examine and diagnose psychopathology. Consequently, risk of engaging in violence is conceptualized as a trait and described in terms of clinical signs and symptoms. ...Thirty years after Monahan (1981) described *Conceptual and Contextual Problems* as a biasing concern, we have moved to an increasingly complex relationship between risk and diagnosis and civil law that commits those deemed at high risk. As we have discussed in Chapter 1, the statutory role of diagnosis (the 2nd prong) is essential for constitutional authority but in practice by experts is subordinated in importance to the 3rd prong (risk). The full breadth and scope of psychiatric nosology (DSM-V) has been functionally shrunken to the exclusion of all but a handful of diagnoses, principally a few paraphilias. Paradoxically, although medical certification via the DSM-V provides the imprimatur the court seeks, the rigorous application of the DSM-V is nil.

From the vantage of a mathematical sociologist, Freudenburg (1988) argued that scientists were just as subject to human error as the general public when it comes to estimating risk."

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Helmus, L., Hanson, R.K., Thornton, D., Babchishin, K.M., & Harris, A.J. (2012). Absolute recidivism rates predicted by Static-99R and Static-2002R sex offender risk assessment tools vary across samples: A meta-analysis. *Criminal Justice and Behavior, 39*, 1148-1171, doi: 10.1177/0093854812443648

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Plous, S. (1993). *The psychology of judgment and decision-making.* New York: McGraw-Hill.

Shah, S.A. (1975, 1978). Dangerousness and civil commitment of the mentally ill: Some public policy considerations. *American Journal of Psychiatry, 132(5)*, 501-505.

Monahan (1981) pointed to five primary factors that contribute to overprediction of violent behavior: (1) political influences, (2) illusory correlations, (3) cultural differences, (4) conceptual and contextual problems, and (5) low base rates.

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Algorithmic Risk Assessment – Judicial Gatekeeping on Scientific Validity *(Part 2)*

Melissa Hamilton, "Judicial Gatekeeping on Scientific Validity with Risk Assessment Tools," 38(3) *Behavioral Sciences & the Law* 226-245 (May-June 2020).

Part 2 – Text Excerpts:

pp. 229-30: **3. Accuracy**

"The second dimension of scientific validity concerns whether the particular tool performs to a sufficient degree of accuracy in terms of predicting recidivism. In the criminal justice risk assessment literature, the terminology of 'validation' is often loosely used to imply a significant degree of accuracy. Tool developers regularly promote their tools as having been 'validated,' as if that term was the single arbiter of its statistical significance and dependability. However, an algorithmic tool that is said to be 'validated' is not necessarily one that is highly accurate in predicting risk. Instead, the existing literature suggests that 'validation' is achieved if the tool predicts recidivism at a rate statistically greater than chance.[43] This equates to the proverbial state of being better than a coin toss or a random guess.[44] In other words, where 51% predictive accuracy might qualify as better than chance, the tool would still exhibit a 49% error rate. Even the *Daubert* line of decisions would not mandate acceptance simply because algorithmic tools are generally accepted in the forensic science field of risk assessment.[45]

Such a nominal bar for accuracy may not justify algorithmic risk assessment as expert evidence to inform any criminal justice decision. For the purpose of sentencing, with its greater procedural and substantive protections to individuals, a more significant degree of accuracy should be demanded before a tool is given the deference of expert evidence. Regrettably, an assumption that available tools perform at adequate levels is unwarranted. 'A charitable assessment is that to date, the accuracy of criminal justice forecasts is unknown or mixed.'[46] The claimed proprietary nature of risk tools undermines transparency on their abilities. Allegiance bias may then taint much of the scant information available about accuracy as developers of risk tools and other interested parties tend to report results far more favorable than do studies conducted by independent third parties.[47] As a consequence, performance studies conducted by those with a stake in the results deserve a critical eye.[48]

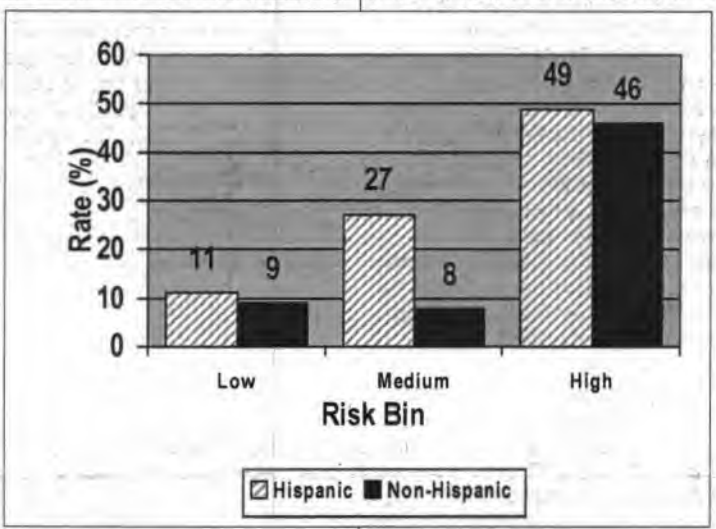
What should a judge in a gatekeeping role look for in assessing a tool's accuracy? An overall accuracy rate can be calculated, but then accuracy should be deconstructed into two elements regarding the particular tool: its discriminative ability and the calibration.

To illustrate various concepts regarding accuracy, discrimination and calibration, references will be made herein to statistical analyses derived from a well-known risk assessment tool using a live dataset. The dataset includes information on offenders who were scored on a risk assessment tool called COMPAS (Correctional Offender Management Profiles for Alternative Sanctions) in Broward County, Florida, in 2013-2014 (the 'sample dataset'). COMPAS is one of the most popular algorithmic tools in use today to inform criminal justice officials in managing their offender populations.[49] While Broward County officials administered COMPAS in a pretrial setting, the tool is also employed by various jurisdictions in sentencing decisions.[50] The illustrations herein focus on the COMPAS algorithm that predicts violent offending specifically (COMPAS also offers general recidivism

(Continued on page 6)

and pretrial algorithms) because, as discussed earlier, a tool that predicts only serious offending might be perceived as providing a better fit for the purposes of sentencing.

Figure 1 Violent recidivism rates by ethnicity

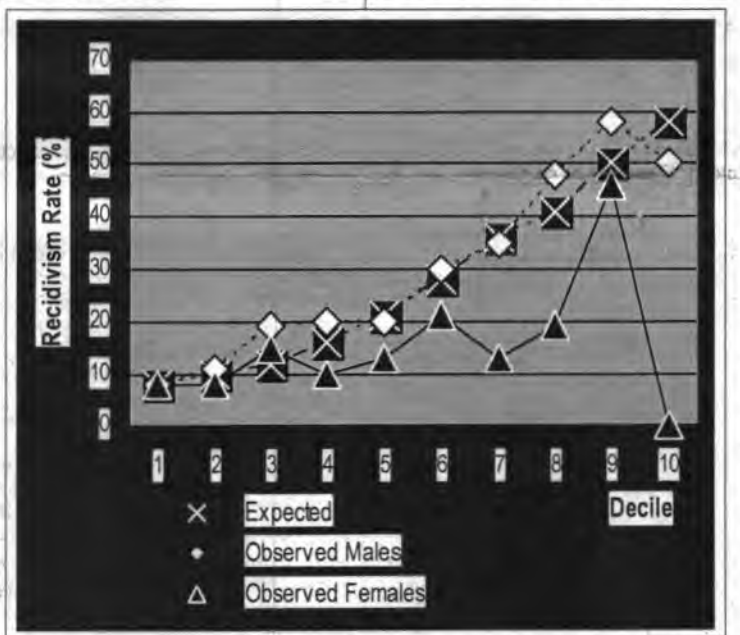


3.1 Discriminative and calibration capabilities

Discrimination reflects how well a tool distinguishes between recidivists and non-recidivists. Discrimination thereby represents the tool's relative accuracy.[51] A tool might show a positive attribute of discriminative ability if it more often than not ranks recidivists at higher levels of risk than non-recidivists.

Figure 1 [above] illustrates discriminative ability using the sample dataset. To reflect deviations in discriminatory ability, Figure 1 subdivides the population into two groups: Hispanics and non-Hispanics (i.e., Whites, Blacks, and other).

Figure 2 Expected versus observed violent rates of recidivism



p. 231: COMPAS outcomes slot offenders into 10 scores (1-10) and then recombines the scores into three risk bins of violent recidivism with low (scores 1-4), medium (5-7), and high risk (8-10). Figure 1 depicts the violent recidivism rates in each risk bin by ethnic grouping. Notice that for non-Hispanics, the tool discriminates well, in that violent recidivism rates are incrementally larger as the predicted risk level increases [i.e., 11% (low) to 27% (medium) to 49% (high). However, this is not the case with Hispanics (i.e., 9% down to 8% then up to 46%) While the higher-risk bin for Hispanics noticeably achieves a significantly increased violent recidivism rate (46%), the medium-risk bin recidivism rate is unfortunately lower than that of the low-risk bin. This means that for Hispanics, discriminative ability is compromised.

The second critical element of accuracy is calibration. Calibration reflects the tool's goodness of fit, meaning the extent to which the tool's predictions agree with actual recidivist acts. Calibration represents the tool's absolute predictive accuracy.[52] Suppose a particular tool predicted that 40% of the assessed population would commit recidivist acts. The tool would be well calibrated if, indeed, about 40 out of every 100 actually did reoffend. By this contrast, if 10% or 60%, respectively, of the population reoffended, the tool instead would exhibit poor calibration and thus be less credible because the tool would be over- or under-calibrated, respectively.

Calibration accuracy can be judged more incrementally by how well the tool's predicted probabilities of reoffending are evidenced at different levels. Using the sample dataset again, Figure 2 presents a graph of COMPAS's predicted probabilities of violent recidivism plotted against the actual rates of violent reoffending using its 10-point scoring system. Again, to depict favorable and unfavorable performances, Figure 2 splits the population, but this time by gender.

In Figure 2 [lower left], the solid expected rates line reflects the algorithm's predicted probability of reoffending at each decile's score for the entire population.[53] Then the two observed dotted lines plot actual rates of violent reoffending, one for males and one for females. Calibration errors are indicated by the gaps between the predicted and the observed points. Notice that for males, while the algorithm is not perfect, it appears well-calibrated overall. The actual violent recidivism rates for males closely track the algorithm's expected rates at each score. In comparison, it is evident that the tool is poorly calibrated for females, as it systematically overestimates risk at almost every decile, most significantly at deciles 7, 8, and 10.

Essentially, discrimination and calibration each offers a distinct contribution to surveying a tool's accuracy., A tool may vary in how well it meets either of these dimensions. Let us again refer to a tool that predicts that 40% of the population will reoffend. Suppose that the tool ranked most of the recidivists as higher risk, but overall only 20% reoffended. This tool would exhibit good discrimination, yet be poorly calibrated by systematically overestimating risk.. By contrast, if 40% did reoffend, but the tool failed to rank most recidivists at higher risk, the tool would be well calibrated yet have poor discriminative properties. As a result, it is essential for judges to have sufficient information on the tool's accuracy concerning both its discriminative ability and its calibration performance.[54]

pp. 231-32: The more popular discrimination statistics employed in the relevant literature are the true positive rate, true negative rate, and the area under the curve (AUC), which will be discussed shortly. Additional metrics include the Dispersion Index for Risk (DIFR), correlation statistics, Cohen's *d*, H measure, precision recall curve (PRC), Harrell's C, and logistic regression coefficients.

p. 232: For calibration, the widely used statistics in the relevant literature are the positive predictive value and the negative predictive value. Additional possible metrics include the Brier score, chi-squared analyses, Hosmer-Lemeshow analyses, root mean square error (RMSE) and the E/O index.

It is beyond the scope of this essay to delve into all of the foregoing metrics to expound upon their values and limitations. Instead, it appears more useful to elaborate on the currently popular measures which are also more likely to be accessible to judges who may lack the advanced statistical skills the others require to be fully understood."

[The next installment of excerpts from this very detailed and useful article will appear in the next edition of *tLP*.]

A charitable assessment is that to date, the accuracy of criminal justice forecasts is unknown or mixed.

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B4QR Review

Study Examines the Nature of Pedophilia in Terms of Attraction to Physical and Psychological Features of Children

Review: Martijn, F.M., Babchishin, K.M., Pullman, L.E., Roche, K. & Seto, M.C., "Attraction to Physical and Psychological Features of Children in Child-Attracted Persons," ___ *Journal of Sex Research* ___ (2021) https://doi.org/10.1080/00224499.2021.1948957, reviewed at 2(1) B4U-Act Quarterly Review 23-26 (Winter 2022).

Review excerpts:

"The authors use the term child-attracted persons (CAPs) rather than minor-attracted persons (MAPs) as the majority of participants in this study were persons attracted to prepubescent children, though many of them were also attracted to older children and/or adults....

Participants were also asked whether they were attracted only to boys, only to girls, or to both boys and girls. The study found that 27% were attracted only to boys, 24% only to girls, and 49% to both. ...When asked whether they had ever fallen in love with a child, 74% of the CAPs responded that they had. The study found, as hypothesized, that those who experienced falling in love were moved more by the children's psychological features than by the physical ones. The attraction thus had a romantic quality....

In the quantitative component of the study, the researchers inquired about 9 physical features and 12 psychological features of children. Unfortunately, they made the mistake of listing the features in a very general fashion (slimness, complexion, curiosity, charm, etc.) As a result, almost all participants found all the features highly attractive, rating them 4 or 5 on a Likert scale of 5. This universally high rating was problematic for the researchers, who were interested in discovering whether any correlations existed between the identifying characteristics of the CAPs and the physical or psychological features of children they found attractive. The study found only small effect sizes in almost all of the categories and was consequently able to draw few

(Continued on page 7)

conclusions in this regard.

...The researchers distinguish between three 'styles of response': the 'simple' consisted of just a word or two (hair, smile, gait, boldness, playfulness, sensitivity); the 'descriptive' offered a bit more detail (bright eyes, lack of body hair, desire for adventure, lack of drama); and the 'lyrical' expressed enthusiasm ("I absolutely adore the way boys smile, that big cheeky grin or that small delicate smile"; "I love that boys are so themselves and haven't learned to be fake like adults always seem to be').

...The 74% of CAPs who had fallen in love with a child tended to rate psychological features only slightly higher than CAPs who had not, and there was no difference in the two groups' rating of physical features. The researchers express surprise that the small number of participants who had a sexual offense history rated physical features slightly lower and psychological features slightly higher than those without such a history.

...Whether the attraction is to children, to adolescents, or to adults, it inevitably depends on a highly complex combination of qualities in the attractive person, not just particular features. The researchers suggest as much in the very last sentence of their article: 'The results of this study point toward attraction to children being a complex and multifaceted sexual and romantic phenomenon, as we find with the complex construct of sexual orientation for gender.'"

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Virtual Reality Opens a World of Possibilities for Diagnosis, Risk Assessment, Therapy & Management of Former Child Sexual Abusers

Peter Fromberger et al., "Virtual Reality Applications for Diagnosis, Risk Assessment and Therapy Of Child Abusers" 36(2) *Behav. Sci. & L.* 235-244 (2018)

Editor's Introduction: In *tLP* 6:11 (p. 6), excerpts from an article by the same authors were provided on the closely related subject of use of virtual reality in behavioral monitoring of past sexual offenders against children. The article addressed here, however, addresses the much broader applications of virtual reality to diagnosis, risk assessment, and treatment of sex offenders against children.

These virtual reality techniques directly examine both sexual responses and situational behaviors (unlike current diagnostic, assessment, and treatment methods, which almost exclusively use surrogate metrics and conceptual concerns).

Because of this, such VR methods promise to sweep away preconceptions about sexual offending and distinguish sharply between pedosexual orientation and criminal behavior.

Additionally, these methods point the way to future use of prosthetic robotic surrogates to divert behaviors away from the criminally abusive and to work toward management of that orientation through such surrogates. This will replace obsolete, failed and futile attempts to extinguish pedophilic orientation or to convert it to teleiophilic orientation.

Without VR, Understanding Sexual Offending Against Children Can Make as Much Sense as a Dali Painting.

After reading the following excerpts, see if you agree that VR opens horizons and possibilities only dimly perceived before.

Abstract Excerpts:

"...For forensic mental health professionals, VR provides some advantages that outrun general advantages of VR, e.g., ecological validity and controllability of social situations. Most important seems to be the unique possibility to expose offenders and to train coping skills in virtual situations, which are able to elicit disorder-relevant behavior – without endangering others. VR has already been used for the assessment of deviant sexual interests, for testing the ability to transfer learned coping skills communicated during treatment to behavior, and for risk assessment of child abusers."

Text Excerpts:

2. Main Concepts of Virtual Reality Applications

p. 236: "Ideally, Virtual Reality [VR] allows the user sensory experiences, feelings and interaction within a computer-generated environment, which cannot be distinguished from reality (Parsons, Gagglioli, & Riva, 2017). The subjective feeling of being there, the feeling of being in the virtual environment even if one is physically in another reality, is called *presence*. (Schuemi, van der Straaten, Krijn, & van der Mast, 2001). The amount of presence, which depends on the technological basis of a VR system (e.g., extent of the field of view), can be subsumed under the term *immersion* (Fromberger, Meyer, Kempf, Jordan, & Müller, 2015). In the context of computer-generated (virtual) characters, social presence is another important concept within VR: social presence describes the subjective feeling that a virtual character in fact exists in the environment (Parsons et al., 2017). The concepts of presence and social presence are important for one of the main advantages of VR applications within psychiatric context. They provide an environment with high ecological validity by inducing presence and social presence. This allows the user to experience comparable emotions, and ideally triggers the same behavior in virtual social situations as in their real[-world] equivalent (Alsina-Jurnet, Gutierrez-Maldonado, and Rangel-Gomez, 2011). In psychological research, the higher the ecological validity of an experiment, the higher the generalizability of the experiential results to real-life situations. Thus, in contrast to non-VR environments, ecologically valid environments provided by VR offer the opportunity to simulate and induce behavior comparable to real-life situations....

3. Virtual Reality Applications and Forensic Mental Health

p. 237: ...In virtual environments, realistic physical, social, and emotional stimuli can be presented, which are able to modulate the self-regulation of the user. This seems to be an important advantage of VR for forensic clinicians: self-regulation abilities play an important role in the offender's behavior. By providing highly salient stimuli, VR allows evaluation of the offender's self-regulation abilities (Benbouriche et al, 2014).

4: VR Reality Applications for the Assessment of Deviant Sexual Interests

Until now, most studies have concentrated on the usefulness of VR for the assessment of deviant sexual interests, mainly of child abusers (Fromberger et al, 2015). Renaud et al. (2014) for instance, demonstrated that highly immersive visual stimuli surpass auditory stimuli regarding their effectiveness in inducing sexual arousal assessed with penis plethysmography (PPG). Twenty-two child abusers and 42 healthy males took part in this study. While both stimulus modalities elicited significantly different genital arousal for child abusers and healthy males, the VR modality yielded significantly higher classification accuracy. The authors conclude that, in comparison to auditory stimuli, the VR system makes it possible to improve not only accuracy of group classification but also discriminant validity (Renaud et al., 2014). In another study, Renaud et al. (2012) presented 30 male child abusers and 29 male non-deviant subjects with animated virtual characters (male and female adult, male and female child, neutral character with no texture) in a highly immersive virtual environment for 90 seconds. Child abusers showed significantly higher penile responses when presented with child characters in comparison to the control group. Thus, VR in combination with psychophysiological measures seems to be a powerful tool for the assessment of deviant sexual interests, especially due to the high ecological validity and sexual salience (the potential of virtual characters to induce sexual responses; Renaud et al. 2012).

5. Virtual Reality Applications for the Risk Assessment of Child Abusers

p. 238: Recently, a VR application was developed.... In a first pilot study, Meyer, Fromberger, Jordan, and Müller (2017) examined whether behavioral monitoring of child abusers in highly immersive virtual risk situations provides additional information for risk management. Six child abusers and seven non-child abusers walked through three virtual risk situations, confronting the subject with a virtual child character. Exclusion criteria were acute schizophrenic symptoms and drug abuse in the past four weeks. No subject showed compulsive shopping behavior. During the virtual risk situation, subjects had to choose between predefined answers representing approach (e.g., talk to the children) or avoidance (e.g., going away and avoiding interaction with the child). Following the rationale of current treatment programs for child abusers, a child abuser should be able to avoid approaching behavior in comparable, real risk situations during unsupervised privileges, in order to avoid situations that increase the risk of reoffending (McGrath, Cumming, Burchard, & Zeoli, 2010). The behavior of the subjects during risk situations was analyzed with regard to their knowledge about coping skills, and coping skills focused on during therapy. In most cases, child abusers showed a behavior that did not correspond to their own belief about adequate behavior in comparable risk situations. Only in one-half of all cases did the child abusers behave consistently with the coping skills that therapists stated that they had focused on during therapy. Despite the small sample size and the lack of an adequate control group, this study shows the potential of VR applications for the risk assessment of child abusers. Virtual risk scenarios provide the possibility for practitioners to monitor the behavior of child abusers and to test their decisions during unsupervised privileges, e.g., shopping or walking unsupervised, without endangering others....

Ecologically valid environments provided by VR offer the opportunity to simulate and induce behavior comparable to real-life situations

6 Virtual Reality Applications for the Treatment of Child Abusers.

p. 239: As mentioned, the concept of presence has been considered as central in VR research, based on the assumption that the higher presence within a virtual environment results in the same emotions and reactions as would be expected in a similar real-world situation (Alsina-Jurnet et al. 2011) Moreover, the sense of presence and its emotional engagement is assumed to be the basis of the power of VR 'for personal change because it offers a world where the individual can stay and live a specific experience' (Riva, Banois, Botella, Mantovani, & Gaggioli, 2016, p. 5). Personal change is one of the most important desired effects in psychotherapy. VR seems to provide a higher self-reflectiveness than provided by memory or imagination, and can be as effective as reality in inducing emotional responses. This may be one of the reasons for the effectiveness of VR-based treatment of anxiety disorders, post-traumatic stress disorders and phobias (Riva, et al. 2016). Furthermore, VR is able to induce disorder-relevant emotions and has been successfully applied to train coping skills in situations that risk relapse, e.g., in the context of addiction (Bordnick, Carter, & Traylor, 2011; Bordnick, Traylor, Carter, & Graap, 2012).

8 Conclusions

p. 242: The research projects discussed have demonstrated the potential of VR applications for the diagnosis, risk assess-

(Continued on page 8)

ment and therapy of child abusers. The most important advantage of VR for mental health seems to be the possibility to monitor, train, and correct the behavior of child abusers in high-risk situations without endangering others. Due to its high ecological validity and sexual salience of virtual characters, VR applications can trigger emotions as intense as real-world situations. ...Since the technology is nowadays consumer friendly, this workload will be lowered in the coming years. By providing easy and cost-effective access to virtual contents and VR hardware, larger studies will be possible without the background of commercially interested companies."

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These laws could fill a library this big.

Reframing the Punishment Test to Limit Burgeoning, Oppressive Sex Offender Registration and Restriction Laws

Jane Ramage, "Reframing the Punishment Test through Modern Sex Offender Legislation, 88(3) *Fordham L. Rev.* 1099-1132 (December 2019).

Editor's Introduction: This article discusses the birth in the latest decade of an alternative view of the so-called 'punishment test' under the sixty-year-old Supreme Court case, *Kennedy v. Mendoza-Martinez*, 372 U.S. 144. (1963).

Very restrictive application by courts of that punishment test under the *Mendoza-Martinez* factors made it almost impossible to prevail in court on claims that sex offender registry systems imposed such heavy burdens on sex offenders that they constituted violation of the substantive due process guarantee of the U.S. Constitution's Fourteenth Amendment. See, for example, *Smith v. Doe*, 538 U.S. 84 (2003), a case upholding the 1994 Alaska sex offender registry system. However, interestingly, in the wake of that system, a separate challenge to that system was launched in that state's own court system, based instead on the parallel due process provision of the Alaska Constitution. That challenge ultimately succeeded in the Alaska Supreme Court, striking down that original registration legislation. See *Doe v. Department of Public Safety*, 444 P.3d 116, 124, 126, 132 (Alaska 2019).

The austere application of the *Mendoza-Martinez* factors also made it possible in *Kansas v. Hendricks*, 521 U.S. 346, 368-69 (1997), for the U.S. Supreme Court to uphold post-imprisonment sex offender civil commitment.

Here are the *Mendoza-Martinez* factors:

1) Whether the sanction affirmatively disables or restrains those subject to it;

2) Whether the sanction has been historically regarded as a punishment;

3) Whether the sanction was imposed only on a finding of scienter (knowledge when committing an act of the criminal nature of the act sufficient to support an inference of an awareness that the act committed was probably a crime);

4) Whether the sanction's operation promoted the traditional aims of punishment: retribution and deterrence;

5) Whether the behavior to which the sanction applies is already a crime;

6) Whether the sanction has a rational connection to a nonpunitive purpose; and

7) Whether the sanction appears excessive in relation to the claimed nonpunitive purpose.

Because the *Mendoza-Martinez* factors can be 'cherry-picked, manipulated, or simply selectively ignored, they are often criticized as being virtually meaningless. In *Hendricks*, for example, Factor #1 was simply so downplayed as to be effectively ignored.

Factor #2 was manipulated by focusing on the availability of 'treatment,' rather than on the indefinite and presumptively lifetime detention in high-security prison-like settings, despite the fact that 'treatment' of sex offenders had already then been called ineffective and that the release rate of committed sex offenders under legislation stretching back to the 1930s had been nearly zero. In *Smith v. Doe*, showing the preposterousness of reasoning that the *Mendoza-Martinez* factors allow, SCOTUS sweepingly concluded that the relative recency of sex offender registry laws excluded them from substantive due process protection under this factor, since they were not 'old enough' to be either "historical" or "traditional" as criminal punishments.

Factor #3 was simply a makeweight intended to limit substantive due process violations to a focus on criminal action (since scienter presumes such an act and a law imposing detention without an actual sentence would still have to be for a specific crime to fall within this factor.

Factor #4 ignores other "traditional" aims of criminal law, such as, most obviously, incapacitation (through detention) and rehabilitation, conveniently ignoring that these two aims are the overtly claimed aims of SOCC. In the case of registry laws, the whole purpose of thus 'belling the cat' is to incapacitate former sex offenders from being able to successfully perpetrate sex crimes in the context of constant watchfulness of the offender by countless members of the public eager to report the slightest suspicion of that offender due to ambiguous behavior simply not understood by the reporting individual. Yet SCOTUS, in *Smith v. Doe*, chose to ignore Factors 3 and 4 by calling them "irrelevant" without meaningful consideration.

Factor #5 is a two-sided makeweight. If the behavior is already a crime, then the punishment was already imposed as part of a criminal sentence. If the behavior is not a crime, then the contention can be made that any official action is, *ipso facto*, not really "punishment," but only "regulation." The reality of this makeweight's misuse was contemporaneously demonstrated throughout the 1950s and before, notably as a basis for avoidance of claims of effective imposition of a "bill of attainder" to laws banning communists from certain occupations.

Factor #6 is yet another makeweight, in that any legislative rationale can be made to justify a purported need for some restriction. The sheer "rationality" of such an advanced justification entirely avoids the question whether that rationale was to the exclusion of a punitive intent or punitive effect.

Factor #7 again avoids the punishment intent or effect altogether, so long as the connection to a "nonpunitive purpose" is strong enough. Unfortunately, any legislative assertion that the proverbial 'sky is falling' and that dire consequences will befall victims if the restriction created by the statute in question is not enacted. Of course, since the same could be said if criminal laws are not created to hopefully interdict perpetration of criminal acts and hence prevent or at least greatly limit the incidence of such dire harms from crimes, this factor has no more inherent bearing on whether the law in question levies what amounts to punishment than Factor # 6. The fact that internet posting of criminal records of registered persons was held by the *Smith v. Doe* Court not to amount to public shaming, but instead only as infor-

(Continued on page 9)

mation to facilitate public safety. This appears counterfactual, since the recidivism rate of sex offenders is the same as first-degree murderers, yet no one contends that public safety commands posting of criminal records of such murderers, nor, ironically, would the public deem such criminal records of killings a public shaming; only sex crimes have that emotional impact (upon both recipients of that information and its sex-offender subjects.

In sum, each of the *Mendoza-Martinez* factors is not really a valid means of distinction between what is punishment and what is not as the entire list of those factors is simply an excuse to avoid real examination of punishment. Further, the emphasis of all factors in that list on crimes turns what should be such a consideration of imposition of harms that should be deemed as sufficient in character or extent as to be inflictions outside of criminal law into governmental action so harmful that it must be deemed to violate substantive due process (if not double jeopardy) by punitive aims that are often equal to, of not exceeding sentences for the crimes themselves into a tautology requiring punishment for an actual crime to qualify under that list of factors, yet inherently defining any governmental action imposing harms on individuals with any footing in possible crimes as justified under the *Mendoza-Martinez* list, and therefore ineligible to be deemed as substantive due process violations.

With all the foregoing in mind, we return to the sex offender registries. In the federal court system, claims of substantive due process violations from such systems were, until 2016, dismissed regularly on such reasoning, blindly following the SCOTUS outcome in *Smith v. Doe* (2003). However, the ruling of the Sixth Circuit has made it possible to challenge amended registry laws with provisions extending far beyond the limits of the law under consideration in that 2003 case.

In 2016, the Sixth Circuit held that Michigan's sex offender statutes, operating as a whole, have inflicted such onerous, (even in some aspects impossible) burdens and restrictions on sex offenders as to undeniably deprive convicted sex offenders (including those whose sentences were already completed) of every vestige of their rights under the substantive due process guarantee.

The following article points out aptly that the federal legislation known as "SORNA" changed everything about sex offender registration in many ways, most fundamentally in requiring (not just permitting) states to enact and enforce sex offender registration schemes and requiring a host of new provisions that were hitherto uncommon and in some instances nonexistent. In short, SORNA vastly expanded the requirements and restrictions of sex offender registration and its many compelled related provisions.

Further, a majority of states later went beyond the requirements of SORNA, even adding residency restrictions, occupational restrictions, area-based travel and presence prohibitions, GPS monitoring and surveillance authorizations, among other restrictions and requirement too numerous to mention here.

How Much Humiliation and Dehumanization Can You Take?

Just Wait 'Til You Get Out to Find Out!

As the article meticulously discusses, although many challenges have been mounted in federal courts to this array of restrictions and requirements, almost none met with any success – until the 2016 decision in *Does #1-5 v. Snyder*, 834 F.3d 696, 698, in the Sixth Circuit. That court examined the aspects of Michigan's sex offender registry scheme and its ancillary provisions that exceeded matters that were in place in the *Smith v. Doe* 2003 case. Notably, these included that Michigan's law had been expanded to include prohibition on sex offenders living, working, or loitering within 1,000 feet of any school, had added division of registrants into three tiers based solely on conviction without regard to current dangerousness, and added requiring in -person reporting of minor changes such as creation or alteration of internet identifiers. Overall, in conjunction with all previously existing restrictions and requirements in that Michigan body of registry law, it became nearly impossible for any registrant to comply fully with each restriction and requirement – or even to know of each such obligation and prohibition. The *Does #1-5* court characterized these burdensome changes as a movement towards a "byzantine code governing in minute detail the lives of the state's sex offenders." Id. at 697. The court concluded that these additional provisions effectively increased the punishment on registered sex offenders. Id. at 706. Although the law contained features that could suggest a punitive intent, the court determined that these features were similar to those in Smith and declined to find that the law's intent was punitive. Id. at 701. For the rest of the analysis of the holding in *Does #1-5* and to its effect on subsequent litigation on the same point, we now turn to quoting the Ramage article itself:

Text Excerpts:

[pp. 1124-25:] "In conducting its effects analysis, the court limited its review to the five *Mendoza-Martinez* factors considered by the Smith Court as the most relevant to SORN regimes. *Id.* The Sixth Circuit considered whether MSORA resembled a historical or traditional form of punishment, imposed an affirmative disability or restraint, promoted the traditional aims of punishment, bore a rational connection to a nonpunitive purpose, and was excessive with respect to its nonpunitive purpose. Id.

Considering the first factor, the court determined that MSORA's amendments resembled historical forms of punishment.... The court analogized MSORA's notification of tier classifications to public shaming (Id., p. 703), finding that the notification of nonpublic information functioned to shame registrants. The Court compared MSORA's residency restrictions and in-person reporting requirements top parole and probation.

[p. 1126:] Looking to the second Mendoza-Martinez factor, affirmative restraint or disability, the court determined that the geographical restrictions and in-person reporting requirements functioned as 'direct restraints on personal conduct.' The court emphasized that although these provisions did not place registrants in physical handcuffs, 'these irons are always in the background' as failure to comply with these provisions could result in imprisonment. Id. Considering the third Mendoza-Martinez factor, whether the law promotes the traditional aims of punishment, the court found MSORA's advancement of punitive aims to be insignificant. The Sixth Circuit determined that although MSORA advanced the traditional aims of punishment including incapacitation, retribution, and deterrence, the factor should be afforded little weight.

Under the fourth and fifth factors, the law's rational connection to a nonpunitive purpose and the excessiveness of that connection, the court determined that the legislature's goal of reducing the rate of recidivism was only loosely related to the amended provisions. in reaching this conclusion, the court referenced the legislature's lack of statistical evidence supporting the law's positive effects. The court focused instead on a study provided by the registrants, which demonstrated that SORN laws actually increased the risk of recidivism....

Looking at all five factors together, the court determined that the effects of the amendments were 'different from and more troubling' than the effects of the statutory scheme considered in *Smith*. Id. at 705. In reaching its decision, the Sixth Circuit refused to view *Smith* as a 'blank check' for states to expand sex offender legislation.

2. Lower Courts Follow *Does #1-5 v. Snyder's Lead*

[p. 1127:] In the wake of the Sixth Circuit's decision in *Snyder*, a minority of federal courts have altered the existing punishment analysis, to find that modern SORN laws can, in their effects, punish registrants. [See, e.g., *Doe v. Miami-Dade County*, 846 F.3d 1180 (11th Cir. 2017); *United States v. Wass*, No. 7:18-CR-45-BO, 2018 WL 3341180 (E.D. N.C. July 6, 2018); *Doe v. Gwyn*, No. 3:17-CV-504, 2018 WL 1957788 (E.D. Tenn. Apr. 25, 2018); *Evenstad v. City of West St. Paul*, 306 F. Supp. 3d 1086 (D. Minn. 2018); *Millard v. Rankin*, 265 F. Supp. 3d 1211 (D. Colo. 2017); *Hoffman v. Village of Pleasant Prairie*, 249 F. Supp. 3d 951 (E.D. Wis. 2017).] First, minority courts perform independent analyses of the challenged laws rather than rely solely on Smith, analogous SORN laws, or other civil sanctions. Second, minority courts look to the effects of the punishment rather than the act itself when analyzing the 'historical form of punishment' prong. Lastly, minority courts consider nonphysical restrictions when determining whether a SORN law imposes affirmative restraints or disabilities.

Courts in the minority have revised the punishment analysis by conducting independent *Mendoza-Martinez* analyses even where there is relevant precedent considering similar SORN laws. [See, e.g., *Wass*, 2018 WL 3341180 , at *4 (conducting an independent analysis of SORNA despite acknowledging that other courts had found *Smith* 'forceful when finding that SORNA's retroactive registration requirements are also constitutional"); *Millard*, 265 F. Supp. 3d at 1225 (performing an independent analysis of Colorado's SORN law after finding that the court in *Shaw v. Patton*, a case upholding Colorado's program as nonpunitive, only considered the requirements that applied to the registrant challenging the law).] Unlike many courts in the majority, these courts lay out the provisions of the challenged SORN law and perform a punishment analysis based on the cumulative effects of that particular scheme rather than deferring to factually similar cases.

[pp. 1127-28:] The decision of the District of Minnesota in *Evenstad v. City of West St. Paul* [306 F. Supp. 3d 1086 (D. Minn. 2018)] is illustrative. In this case, the registrant moved for a preliminary injunction against a city ordinance that prohibited registered sex offenders from residing within 1200 feet of schools, day care centers, and group homes. [*Id.* at 1091]. These restrictions were estimated to cover approx-

(Continued on page 10)

imately 90 percent of the city. The court acknowledged that there were two Eighth Circuit cases on point, both of which considered residency restrictions, but declined to find that they were binding. [*Id.* at. 1094]. Instead, the court reviewed the provisions of the challenged ordinance and went through the *Mendoza–Martinez* factors, acknowledging the similarities and differences between the ordinance and the residency restrictions of the other two cases. In considering the affirmative restraints imposed by the ordinance, the District of Minnesota highlighted that the ordinance was broader than the other two residency restrictions in three crucial ways: 'it is intended to protect more than just minors, it restricts offenders who victimized adults without an individualized case-by-case assessment, and it restricts residency near group homes.' In granting the injunction, the court concluded that these additional restrictions, 'outside the traditional operation of these sorts of statutes,' resulted in a SORN program that was 'more reminiscent of [a] complete ban.' [*Id.* at 1100] After conducting an independent analysis of the cumulative effects of the ordinance, the court determined that the ordinance had gone further than the residency restrictions considered in precedent and these additional restraints altered the outcome of the punishment analysis.

Courts in the minority have also altered the punishment analysis by changing the focus of the 'historical form of punishment' inquiry. Instead of comparing the acts of punishment alone, minority courts look to the effects of both traditional forms of punishment and modern SORN laws to determine whether they are analogous. [See, e.g., *Wass, supra; Millard, supra.*] For example, in *United States v. Wass*, the Eastern District of North Carolina accepted a registrant's challenge to SORNA as a violation of the *Ex Post Facto* Clause and agreed that the federal legislation functioned to punish. In its decision, the court determined that SORNA's notification component 'made it a tool of public shame, which has been a consistent mechanism for punishment in human history.' In differentiating SORNA from the Alaskan statute in *Smith*, the court focused on the public's reception of notification, rather than its actual dissemination: 'the purpose of the notification here is to elicit a reaction from the public who is notified, and that reaction is punitive in nature.' The court further emphasized, 'a punitive scheme does not become a nonpunitive one just because those who bear the burdens deserve to be punished.'

[pp. 1128-29:] Similarly, in *Millard v. Rankin* [*supra*], the District of Colorado struck down the Colorado Sex Offender Registration Act, finding that its in-person reporting provisions resembled parole or probation. The court focused primarily on the statute's requirement of in-person reporting of 'all e-mail addresses, instant-messaging identities, or chat-room identities prior to using the address of identity,' as well as any changes of such addresses or identities. The court concluded that in allowing law enforcement to 'monitor private aspects of a registered sex offender's life,' the law imposed burdens similar to those imposed on parolees.

Finally, minority courts have modified the punishment analysis by considering both physical and nonphysical restrictions when assessing 'affirmative restraint or disability' prong of the *Mendoza–Martinez* test. [See, e.g., *Doe v. Miami-Dade County*, 846 F.3d 1180, 1186 (11th Cir. 2017); *Doe v. Gwyn*, *supra* at *8; *Millard*, *supra* at 1229; *Hoffman v. Village of Pleasant Prairie*, *supra* at 960.] Consistent with the Sixth Circuit's analysis in Snyder, minority courts have determined that modern sex offender laws, particularly in-person reporting requirements, can be punitive because they impose affirmative restraints in registrants' liberty. Notably, in *Millard*'s review of the affirmative restraints imposed by the Colorado Sex Offender Registration Act, the District of Colorado highlighted that the law required in-person registration at the registrant's local law enforcement agency, a requirement not considered in *Smith*. In determining that the restraints imposed by in-person reporting requirements were far greater than those imposed by the written registration mandated in *Smith*, the court concluded,

'Having to report to law enforcement every time one moves, as well as at regular time intervals, is hardly a 'minor or indirect' restraint, especially when failure to do so is punishable as a crime and also may subject the registrant to in-person home visits and public humiliation by over-zealous, malicious, or at least insensitive law enforcement personnel.'"

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Protection for Newsgathering, Reporting, Analyzing, Commenting, and Publishing to Ensure the Right to a Free Press for Those in Captivity

Censorship, Old-School

Komal S. Patel, "Testing the Limits of the First Amendment: How Online Civil Rights Testing Is Protected Speech Activity," 118 (5) *Columbia Law Review* 1473-1516 (June 2018).

Editor's Introduction: This excerpt is included for inspiration to confined writers who wish to found their own newsletter. Particularly when a publication is mailed out of a prison, it is judged under standard First amendment principles, not the restrictive *Turner v. Safley* rules. *Turner* should not be applied to non-prison mental health facilities in any event. This excerpt discusses only one topic of First Amendment rights. Further applicable guaranties of freedom of the press will be addressed in future *tLP* editions as space permits.

Text excerpts:

pp. 1485-6: "1. *Conduct Incidental to Free Speech* – One line of First Amendment jurisprudence focuses on conduct incidental to, or preparatory for, speech.[75] This conduct has also been called newsgathering or information gathering in some cases,[76] because journalists and activists in these cases seek access to information for the purpose of subsequently engaging in speech. Under the doctrinal strand of conduct incidental to speech, the Court has protected the *means* of various kinds of speech, whether those are monetary contributions to political campaigns[77] or access to trials.[78]

One aspect of the doctrine is focused on the right of access to governmental affairs. This line of cases sprang from *Richmond Newspapers, Inc. v. Virginia*, a case that found a First Amendment right to attend criminal trials.[79] In coming to its decision, the majority focused on the necessity of access in order to write about trials[80] and explained that the First Amendment should be interpreted broadly.[81] Subsequently, the Court created a two-prong test to determine whether a First Amendment 'right of access' exists, looking first to whether the press or public historically had access to the process, and second to whether public access plays a significant role in the process's function.[82] This test has also been applied by courts of appeals to governmental proceedings other than trials.[83]

More generally, a right to gather information was referenced in *Branzburg v. Hayes*.[84] While the Court acknowledged the existence of such a right, it did not flesh out the contours of the right nor what it covered.[85]....

p. 1487: In determining where the line for protection can be drawn, Professors Alan Chen and Justin Marceau argue every action necessary to speech falls somewhere along a spectrum of activity.[87] On one end lie 'the most basic elements of conduct that are necessary to engage in communication.'[88]

p. 1489: ...[T]he Court's decision in *United States v. Alvarez* makes clear that false speech must be more than merely valueless to be restricted – it must be fraudulent, defamatory, or cause some other 'legally cognizable harm.'[109]"

Notes:

75 See *Citizens United v. FEC*, 558 U.S. 310, 336 (2010) ("Laws enacted to control or suppress speech may operate at different points in the speech process.").

76 Although "newsgathering" as a term may suggest that these rights are reserved for the press only, courts have rejected special status rights for only the press. See *Pell v. Procunier*, 417 U.S. 817, 631 (1974) (noting that the press does not get access to certain privileges that members of the general public do not have the benefit of); see also *Glik v. Cuniffe*, 655 F.3d 78, 84 (1st Cir. 2011) (explaining why newsgathering protections do not turn on "professional credentials or status").

77 See *Buckley*, 424 U.S. at 19 (explaining that restricting campaign financing "necessarily reduces the quantity of expression by restricting the number of issues discussed, the depth of their exploration, and the size of the audience reached"), superseded by statute, *Bipartisan Campaign Reform Act of 2002*, Pub. L. No. 107-155, 116 Stat. 81, as recognized in *McConnell v. FEC*, 540 U.S. 93 (2003).

78 *Richmond Newspapers, Inc. v. Virginia*, 448 U.S. 555, 575 (1980) ("In guaranteeing freedoms such as those of speech and press, the First Amendment can be read as protecting the right of everyone to attend trials so as to give meaning to those explicit guarantees.").

79 *Id.* at 580.

80 *Id.* at 576-77.

81 *Id.* at 576)"For the First Amendment does not speak equivocally, ...It must be taken as a command of the broadest scope that explicit language read in the context of a liberty-loving society, will allow." (quoting *Bridges v. California*, 314 U.S. 252, 263 (1941)).

82 *Press-Enter. Co. v. Superior Court*, 478 U.S. 1, 8-9 (1986) (applying this test in determining whether there is a First Amendment right to access polling places).

83 See *PG Publishing Co. v. Aichele*, 705 F.3d 91, 104 (3d Cir. 2013).

84 408 U.S. 665, 681 (1972) ("Without some protection for seeking out the news, freedom of the press could be eviscerated."); see also *Jane Bambauer*, "Is Data Speech?," 66 *Stan. L. Rev.* 57, 86 (2014) ("The First Amendment protects the right to gather information in some fashion.").

85 *Branzburg*, 408 U.S. at 681.

87 *Justin Marceau & Alan Chen*, "Free Speech and Democracy in the Video Age," 116 *Colum. L. Rev.* 991, 1019 (2016).

88 *Id.*

109 *United States v. Alvarez*, 567 U.S. 709 at 722 (2012) (plurality opinion); see also *Alan K. Chen & Justin Marceau*, "High Value Lies, Ugly Truths, and the First Amendment," 68 *Vand. L. Rev.* 1435, at 1452 (2015) ("*Alvarez*, then, reflects a turning point: an intentional lie of little or no value, which arguably caused some harm, was nonetheless deemed to be protected.").

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