The Legal Pad

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Freedom is never voluntarily given by the oppressor; it must be demanded by the oppressed. - Martin Luther King, Jr.

In This Issue:

MN Legislature vs. Fugelseth	1-2
The Process is the Punishment: Waiting for Judge Frank to Rule on the Punitive Nature of S.O Commitment in MN	2-3
Your Help Needed Now!! The *Gladden Case Needs Names of DOC SOs Right Now!*	3-4
Wage Case Latest	4-5
What's Up with the Last Batch of 1994 Legislative CDs?	5
'Meth Magnus': Whither the Prosecution?	5
Gladden Complaint Excerpt: Pedophilia Is Not a Disorder.	5-9
Child Abductors Not on SO Registry	9
Polygraph Testing of SOs – Limits, Problems, Inaccuracy	9-12
Bio-Fusion as Thought Detector and Lie Detector	12
Jessica's Law (FL): no impact on forcible rape prevalence	12-13
Exceptional Internet Offenders Would Be Just as Horrible Without the Internet	13
Online Predators' Misconceived - Wolak 2008 article	13
NACDL Against SO Commits	13-14
Victim of the Month: Chris Fretham	14
Overlap & Unconvicted Claims in ARAIs—Back to the Future	15-18
Legal Overreaction to Perceived Sex Offender Danger	18-20
Reply to MSOP Annual Performance Report 2015 Revisited	20-24

Coming This Year:

- ✓ The Routine & Nonroutine of the Static-99R: The Good, the Bad, & the Very Ugly
- ✓ Pedosexuality Does Not Impair Volition or Predict Recidivism
- ✓ No Science = No Due Process
- ✓ Far More from the *Gladden* Complaint
- ✓ Denial of Internet Access to Hold You Incommunicado
- — & Tons More!

What It Is

This issue covers the gamut, hence it defies terse description or summary. Of particularly great concern is the need for YOUR help to prevent the *Gladden* case going down in flames (see pages 3-4). News on the Wage case front will reassure you. Meanwhile, the lack of news about 'Meth Magnus' will mystify you. In this issue, we continue a series featuring the stories of those whose winding up in this destination was unusually unfair — or worse. Will your story be next? Let me know if you think it qualifies. This issue also inaugurates serialization of certain topics that are simply too large to address adequately in just one issue (see the *Gladden* case excerpt on pedophilia at pages 5-9). As of this issue, we also begin reaching out for topics that have marginal significance for now, but which may prove to have central relevance in due time (see article on "biofusion", page 12). Finally, the usual assortments of friends, enemies, and frenemies rounds out this issue. Good reading!

Legislative Bloviation Strikes Again!

Fugelseth: MN Legislature vs. MN Supreme Court

Unless you've been living without any news, you are already aware of a decision by the Minnesota Supreme Court effectively ending the commitment of Kirk Alan Fugelseth (that is, changing his release status from provisional to unconditional). Really, all the state Supreme Court did was deny review of a decision of the Minnesota Court of Appeals upholding the SCAP panel decision to completely terminate Fugelseth's commitment.

In 2013, Fugelseth sought release via the Special Review Board (SRB) of the Dept. of Human Services, the administrative 'overlord' of MSOP. In a classic example of its generally glacial pace, the SRB slowly churned through Fugelseth's request. After more than three years passed, the SRB ruled that Fugelseth could have provisional, but not final discharge.

Fugelseth appealed to the Supreme Court Appellate Panel (a court established solely to handle release claims by committed sex offenders). After about another half year, the SCAP panel held a hearing on Fugelseth's request for final discharge. Fugelseth was then 50 years of age. During treatment, he had identified 31 juvenile victims of his acts of molestation over the years of his life. During an earlier federal sex-crime sentence, he completed a prison treatment program.

At the time of the SCAP decision on his request for release, Fugelseth had been in the Community Preparation Services (CPS) program for six years. The SCAP decision in the case recounts thus:

"In 2013, the SRB recommended Petitioner's request for provisional discharge be granted.

"The Commissioner took no position on the recommendation. Through no fault of his own, but rather due to community opposition to the Department of Human Services attempts to purchase and secure housing for MSOP residents granted provisional discharge, a housing placement for Petitioner could not be accomplished. As a result, Petitioner continued to reside at CPS. While not within a secure perimeter, the security measures at CPS exceeded the level of security necessary for Petitioner to continue his treatment goals.

"The Minnesota Department of Human Services' has been unable to secure housing options within the community due to zoning and code restrictions and general community outrage/opposition. As a result, MSOP presently has 8 clients that have been granted provisional discharge from this Panel but remain residents within a security level they do not require."

In a nutshell, that court's reasoning was that, since Fugelseth had shown that he was no longer in need of any inpatient treatment (a requirement for commitment under the U.S. Constitution), the end of that need meant that he could not constitutionally be kept under commitment at all — even on provisional discharge status. The SCAP decision also found that Fugelseth was no longer dangerous to the public. For these reasons, it concluded that, under *Call v. Gomez*, his "continued confinement no longer bears a reasonable relationship to the original reason for his commitment."

On appeal by the State, the Court of Appeals upheld the SCAP determination in late January of this year. That appellate court held that, in order to deny one committed under the MCCTA of 1994 a requested end to commitment ("full" discharge), the State must prove both that the individual remains dangerous to the public, and that he continues to need inpatient treatment and supervision.

The Court of Appeals agreed with the SCAP panel that the State had failed to prove either of these contentions. Therefore, ruled that higher court, keeping Fugelseth under commitment — even only on provisional discharge, would violate his constitutional rights and also would depart from the meaning of the *Call v. Gomez* state case. Since no appellate case had previously applied *Call* in this way to require complete end to a sex offender commitment, it is fair to say that the *Fugelseth* case was an extension of the holding in *Call*, not merely a reiteration of it.

Arguing that the position taken by SCAP and the Court of Appeals was an unwarranted extension of

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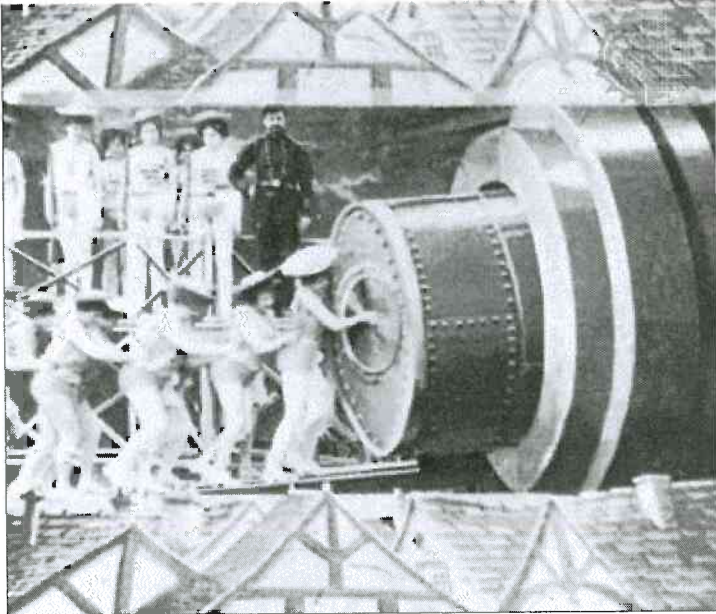

Senator Limmer's Real Wish for Release from Sex Offender Commitment: *A Trip to the Moon*

the *Call* principle, the State sought review by the state Supreme Court. However, in early April, the Supreme Court let the Court of Appeals decision stand, effectively affirming the end of Fugelseth's commitment with finality.

Following this last ruling, Warren Limmer, a Republican State Senator from Maple Grove, introduced a bill that would effectively prevent any others under SPP/SDP commitment in Minnesota from taking advantage of the *Fugelseth* decision.

The bill accomplishes this result by declaring that the *Call v. Gomez* standard for ending commitment can be refuted by the State merely by showing that any kind of treatment, including outpatient treatment, remains needed for the person in question. *Fugelseth* had clarified *Call v. Gomez* by ruling that continued commitment could only be justified where inpatient treatment remained needed. Hence, the *Fugelseth* clarification and Limmer's bill differ by just one word: the bill's deletion of the word "inpatient."

The outcome as to Fugelseth personally cannot be changed by that bill, due to the longstanding principle of American law known as res judicata. Nevertheless, future applicants to end their commitments could find their requests blocked if some assessor or clinician testifies that the applicant in question currently needs even just outpatient treatment.

Interestingly, the *Fugelseth* outcome was also alternatively based on the courts' conclusion that, even if further inpatient treatment were required, Fugelseth no longer represented a danger to the public. This observation may offer MSOP detainees seeking release and a complete end to their commitments an end-run to Limmer's legislative proposal even if that bill passes.

This is because the State's failure to also prove that a committed person currently remains dangerous to the public means that such person is constitutionally entitled to be freed from commitment altogether, regardless of the question of whether any treatment, either inpatient or outpatient, still remains needed.

As a practical matter, however, the two questions of whether someone remains dangerous and whether that person remains in need of treatment are typically interlinked. Therefore, cases in which one can establish that he is no longer dangerous, while the State can prove that he continues to need any treatment, may prove to be infrequent.

The state Senate immediately and overwhelmingly passed Sen. Limmer's bill. The House has not yet acted upon that proposal, but a companion (functionally identical) House bill introduced by Rep. Brian Jonson has gained approval by the committee to which it was assigned. Thus, final favorable legislative action is expected before the end of the legislative session in the middle of this month. The question will then become whether retiring Governor Dayton will sign or veto that measure.

No printout of the bill was available to TLP at press time for this issue. To be permissible under prevailing federal constitutional case law, the proposal cannot make full release from commitment subject to a higher standard than the standard the State had to carry in order to gain commitment of that person in the first place. If the bill offends the federal or state constitutions in that or any other way, a court challenge to it by a disappointed applicant for full discharge can be expected at some early time.

* * * * * * *

The Process is the Punishment: Waiting for Judge Frank to Rule on the Punitive Nature of S.O Commitment in MN

Only modestly related to the potential issue of unconstitutionality of the Limmer proposal discussed in the immediately preceding article, we are all waiting for Judge Frank's ruling in the sole remaining claim in the *Karsjens* case.

As you'll recall, that claim is that the commitment system established by the MCCTA of 1994 is punitive, both in its intent and its effect. Now that the Gustafson Gluek firm has moved for voluntary withdrawal of the so-called "Phase 2" claims in that case (as being based primarily on wrongful actions and inactions varying from one MSOP detainee to the next, and hence inappropriate for a class action), the Phase 1 claim about that punitive nature and effect is the only unadjudicated claim remaining in the case.

Sisyphus, forced to endlessly re-try the impossible.

Procedurally, the currently pending summary judgment motion by the defendants seeks a decision that there are insufficient facts to justify taking that claim to trial. However, Gustafson Gluek ably argued in opposition to that contention, pointing up numerous indications of the punitive nature and effect of the 1994 law.

Prior case law has ruled that a so-called "civil commitment" law that actually is either aimed at heaping on extra punishment for past offenses or at punishing someone simply for who they are or for being categorized as members of a legislatively defined disfavored group constitutes a violation of the substantive due process guarantee of the U.S. Constitution's Fourteenth Amendment.

In view of the facts that the GG law firm has already cited in support, together with such case law, most observers have opined that summary judgment for the defendants on that claim is unlikely. One existing indication of that improbability is the amount of time that summary judgment motion has been under court "advisement" (that is, has been pending after the date of hearing about it).

A decision granting summary judgment could have been issued quickly after that hearing, with fairly little analysis, instead simply on the often-encountered 'rubber stamp' endorsement by courts of any contentions advanced by attorneys for state-actor defendants, had Judge Frank intended such an outcome.

Therefore, so goes this interpretation, the extended analysis that Judge Frank now seems to be applying to that claim is very likely intended to support it and do what can be made to 'bulletproof it for purposes of any later appeal by the defendants.

Now we return for just one last thought to the legislative reaction to the *Fugelseth* decision. If, as conjectured above, that bill, when passed, does indeed violate the constitutional rights of those committed under the MCCTA of 1994 in stymying the end to that commitment, it would certainly appear to do so deliberately, simply as a means to deprive them of such constitutionally required endpoints to such commitment when they either are no longer dangerous or no longer need inpatient treatment.

Because that legislative intent smacks so

Pope Benedict (former Hitler Youth John Ratzinger) entering Auschwitz on a personal journey of penance.

(Continued from page 2)

clearly of a categorical decision to hold all committed sex offenders only because someone deems them inherently dangerous as a group, it is the very heart of pure preventive detention by class — the clearest possible implication of a "punitive" legislative intent.

As the preceding article stated, we shall know very soon whether the Legislature will pass this bill and whether then governor will sign it into law. It is tempting to think that this has not escaped Judge Frank. This last period before he releases his decision on that claim of punitive intent and/or effect may owe its length to exactly such judicial waiting to learn of that legislative outcome.

It would seem to be the last straw to confirm such a punitive intent. If the period before Judge Frank's ruling drags out to the end of May or even until the middle of June, it will likely be for this reason. From our perspective, this last legislative 'tell' of intent, and this last period of Judge Frank's deliberation in *Karsjens* are well worth the wait. This could well be the legislative admission that ends all of our commitments. So remain patient but hopeful. The truth shall set you free.

* * * * * * *

Your Help Needed Now!! The *Gladden* Case Needs Names of DOC SOs Right Now!

In the last issue of TLP, I outlined the need for additional named plaintiffs for the *Gladden* case, and stated that they had to be prisoners currently in any of the MN DOC's prisons. I asked for the help of everyone here in MSOP in this search for apt candidates for such additional named plaintiff slots in that case. The result: Crickets.

Looking back on that article, it is clear that I did not state the absolute necessity of succeeding in this effort to land such additional named plaintiffs and the urgency of the need. So let me try again, saying what needs to be said in clear and somewhat alarming, but true terms. First, let me review for you the crucially important role of the *Gladden* case.

The *Karsjens* case now has only one claim left, and its ability to go forward at all has been attacked by a summary judgment motion by the defendants in that case. That motion remains pending before Judge Frank. If defendants win summary judgment, the *Karsjens* case will end altogether, subject only to the plaintiffs' right to appeal to the 8th Circuit. The good news is that this last surviving claim in *Karsjens*, the contention that MSOP and the entire commitment regime in Minnesota is punitive in character, is a strong claim, well-founded on the facts before the federal District Court. However, the down side is that, assuming that claim succeeds, MSOP will probably not be closed, and no one will be sent home – at least not right away. As before in *Karsjens*, the likely outcome will be that MSOP will be given specific orders to reform, so as to provide a real treatment plan of reasonable duration to all MSOP detainees. While this would be real improvement, it would take years to see if such reforms are followed adequately to allow all a reasonable shot at release at some time within the next several years.

Practicing for rescue from MSOP? These men were still trapped 2,000 feet underground when this photo was taken. Do you have this kind of faith?

Distinctly, the Gladden case involves an attack upon the unconstitutionality of the MCCTA itself (as subsequently construed and applied by countless appellate judicial opinions). Specifically, it alleges that the MCCTA effectively imposes a Bill of Attainder upon all MSOP detainees and deprives each of us of substantive and procedural due process. It is an extraordinarily detailed Complaint founded on allegations straight from accepted scientific principles and research and related scientific works that have applied such principles to sex offender assessment and related matters.

Essentially, its strong core argument is that there is no science to support sex offender commitment as it is formulated by the SPP and SDP grounds for such commitment in Minnesota. Without such needed science, such so-called commitment simply boils down to locking people up because they are feared and hated, more formally, simply because some persons acting outside of such science, opine (effectively as mere laypersons) that they think one likely to recidivate if released. Since anyone can offer such an unscientific opinion, and it is a fundamental principle of law that cases cannot be decided upon such lay opinions, this method of proceeding violates both substantive and procedural due process rights of each sex offender commitment defendant.

In other words, the Gladden claims are exceptionally strong. Further, they have only one adequate relief if they (or any of them) succeed, namely: immediate shutdown of MSOP, immediate release unconditionally of every MSOP detainee, and voiding (from the beginning) of every commitment to MSOP. No waiting years to see if reformed treatment will gain release for you individually. And here's the capper: Unlike *Karsjens*, the *Gladden* case is not subject to the standard of requiring that the court's conscience be shocked. Instead, as an attack on the statute (not actions of various executive branch officials) where freedom is at stake, the standard is one of strict scrutiny of the law's provisions and the commitment system it creates. Challenges on the strict scrutiny basis are very difficult for state governments to defend against, meaning that the chance of victory is very high.

All of this means that the *Gladden* case is your last, best hope for winning your release. (As a class action, it will apply to all MSOP detainees equally). In turn, this means that the *Gladden* case is the one case you surely do NOT want to lose, especially through lazy inaction. Whenever your assistance is needed to support the *Gladden* case and to protect it from dismissal, you should immediately hasten to do whatever is required toward that positive outcome. In other words, act as if your freedom depends on it, because it does.

Now here is what is necessary right now, and why your personal help is urgently needed.

As I said at the outset, above, the *Gladden* class action absolutely needs additional named (that is, representative) plaintiffs who currently remain in MN DOC prisons. This need arises because the *Gladden* case, to be truly representative as all class actions must, MUST include not just one or more named plaintiffs to represent those already committed, but also named plaintiffs who represent the status and peril of those who might be subjected to such commitments in the future. Gustafson Gluek has advised me that the Gladden case CANNOT go forward unless it has these additional named plaintiffs. In other words, if you want your freedom, you MUST do everything you can to help us gain these extra named plaintiffs.

Thus, the Gladden class action sets forth five subclasses, only one of which includes those already committed. The other subclasses include, respectively, those already petitioned for commitment, but not yet adjudicated as to commitment; those not yet petitioned for commitment, but already evaluated and recommended by DOC psychological personnel; those who will be subjected to such evaluation in the near future for that purpose; and those who, although not yet on the 'doorstep' of such evaluation, have sufficient recidivist sex-crimes records to make their ultimate evaluation a probability. The only persons who can adequately represent those other subclasses in the *Gladden* Complaint are those who themselves have not yet been committed, but who stand in earnest peril of facing such commitment. Thus, every apt candidate for being added as a named plaintiff is in prison.

For reasons mostly having to do with the long-pending *Karsjens* case, the *Gladden* case remained on hold for a very long time. Now, however, the *Gladden* case must be brought to full action. Failure to do so at this time will probably result in permanent dismissal of the *Gladden* case. There is no time left to waste. In order to revitalize the *Gladden* case, we must now approach all those in MN DOC prisons who may be good candidates to become such additional named plaintiffs in the case. This is where you come in.

Unfortunately, I never was a 'social butterfly,' so I didn't have that many imprisoned correspondents even back when I got here. Since then, most of the ones I originally had back then have been either committed or released, and thus cannot fill the role we need them to fill.

Right now, most reading my newsletter have probably been here just as long as I have. So you probably don't have residual friends who are sex offenders still imprisoned in the MN DOC. However, you DO know who among us is relatively recently-arrived (say, sometime in the last year or so). Assuming so, I urge you to draw this article to their attention and fervently urge them to write to those imprisoned friends of theirs.

Some of those imprisoned correspondents may not be suitable candidates for these named-plaintiff slots, but even if so, they may know others who may be ideal candidates who could be eager to be one of those selected, if only they find out about this opportunity. To

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cover this possibility, ask each of these more recent arrivals to ask their correspondents to also mention this possibility to such others who may qualify.

In all, we will need at least five additional named plaintiffs. Experience teaches that, to get that final number, we will have to look at about 25-30 candidates. So this will take some considerable effort. That effort starts with you simply asking each of these recent arrivals to send letters to each of their old sex-offender friends still in prison. Please do this, and follow up with each recent arrival you approach to ensure that they actually send such letters, and then we'll see where it goes from there. Below, I reprint a sample form letter for the purpose. Please consult this sample letter to see what we are looking for, and be sure to let any recent arrival you approach study it too. Upon request, I will make reprints of this sample letter available. Simply tell me how many you need.

Remember, your freedom and that of everyone else here will likely depend on doing everything you can to help gain these extra named plaintiffs. In the *Gladden* case, if we win, we all go home right away, free of any 'strings.' So this really is a huge deal. Thanks much!

(Sample letter)

You and I have never met, and you may not ever have heard of me. I am currently committed under Minnesota's sex offender commitment law. More importantly, to date, I am also the only "Named Plaintiff" in the above-cited lawsuit in federal court that seeks class action certification. My proposed Class Action Complaint challenges Minnesota's sex offender commitment law as being outrageously unconstitutional and asks for a judicial ruling striking down that law and voiding all commitments under it, in effect resulting in everyone committed under that SPP/SDP law being set free.

Now a lucky break: The federal judge presiding over the somewhat similar *Karsjens et al. v. Jesson et al.* class action has determined that my case is a "related case" and should therefore be considered and decided after the *Karsjens* case. Because this was the judge's own idea, it means that my claims of unconstitutionality are being taken VERY seriously – and that is a very good thing. The Court has also appointed the same law firm representing the *Karsjens* plaintiff class to represent named plaintiffs in my case.

However, those lawyers have aptly pointed out that, to be more representative of those not yet committed under that law, one or more additional named plaintiffs are needed who either: (1) are already petitioned for commitment or have been "referred" by the Dept. of Corrections to a prosecutor for possible petition for commitment; or (2) due to their record of sex crimes or for other reasons, can probably expect to be referred for such commitment, or at least to be scrutinized closely for such possible referral. I write to you about this because one or more individuals under commitment here in MSOP mentioned you as someone who just may fit either of these two categories. If this is incorrect, please accept my apology for troubling you.

However, if you do fit in either category, this is to request that you consider joining this lawsuit as an additional Named Plaintiff. This will not cost you anything and your actual participation will be minimal. If you are willing to join me in this important effort to preserve your own rights and those of other sex offenders against permanent preventive detention masquerading as psychiatric commitment based on science, please write to me at the return address above, stating facts about your current situation sufficient to determine whether you fall into either of the categories described in the last paragraph above. I will then reply, advising you on how to dialog with the law firm handling this case and answering any questions you may have. Time is short, so please write this letter to me at your very earliest opportunity.

Whether or not you choose to do so, please also feel free to show this letter to anyone else you believe may fit either of these two categories of those in peril of SPP/SDP commitment who might be interested in helping to bring down this outrageous law. Please encourage him or them to write to me right away.

Waiting for your communication….

* * * * * * *

The Latest News on the Wage Case

I spoke by phone again on May 2nd with

Attorney Charles Alden. He has graciously agreed to accept representation of us five named plaintiffs in the Wage Case. All five of us (including the temporarily 'lost' Jerrad Wailand) have signed the retainer agreement, formally sealing that representation deal.

Attorney Alden will accept a percentage of the recovery in the case, an arrangement customary in such labor law disputes. It is also the case that the federal minimum wage statute under which we are suing provides for a court order forcing the defendants to pay toward the cost of the plaintiffs' attorney if they lose. Hence, the impact of Alden's fee upon our recovery may be significantly less in this kind of case.

Mr. Alden acknowledges that the overall recovery of damages for all who have worked since 2009 will likely total over $10 million. Of course, assuming the suit is successful, the amount payable to each worker who was underpaid will vary widely, depending on how much one worked from 2009 to date. Nonetheless, this large overall total implies that individual recoveries through this case could be quite substantial, rather than merely nominal.

Attorney Alden will determine soon whether to seek to amend the Complaint in the case or to simply proceed on the sole count currently in the case under the FLSA.

With that out of the way, he will re-file the motion for collective action status that will cause the case to act similarly to a class action, insofar as those who choose to join in will be able to benefit by a favorable judgment in the case.

A formal notice to each person who has worked as a patient-worker in MSOP in the time period in question (2009 to date) will be distributed as soon as that motion can be approved. When you receive it, it will be vital to the success and the speed of the case that you return the consent form that will be a part of it as soon as you can, filled out correctly.

This will be necessary regardless whether you previously may have filled out the informal version we circulated before Attorney Alden became involved in the case. Nonetheless, it is important that you understand that signing that earlier form did serve two useful purposes anyway.

First, it demonstrated to Alden that we are very serious as a very large group about suing to get our unpaid wages. Second, it has already shown the federal court the same thing. This, plus gaining attorney representation, have resulted in our case being given much more respect by the court.

The defendants appear to pin their defense on the claim that the state entities involved have been providing most of our daily needs. This, they claim, means that we simply do not need the federal minimum wage rate.

Our reply to this is that, in the first place, It simply is not true that most of our costs are paid for by MSOP. Certainly, we all pay for our own clothes and our health care and personal cleanliness products, as well as countless other items we buy through Canteen and from outside vendors by special orders. We also are forced to pay for medical devices if we cannot get insurance to cover their cost..

These categories simply illustrate by example the endless list of expenses we are forced to shell out for. Here in MSOP. We ask each of you to write down or type up a list of other expenditures you have had to make that are unreimbursed by MSOP.

Please submit these to any of us named plaintiffs. We will see that these listed expenses are reported in full to Attorney Alden. This alone will blow a large hole in the defendants' claim of lack of need for minimum wage rates.

We have additional legal arguments to make against the defendants' claim that we are not entitled to the minimum wage.

Also, more usable facts will emerge through the "discovery" part of the case. The judge appears to be willing to allow Attorney

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Alden to restarting the discovery process from the beginning. This will maximize the efficiency of that process and the results of his own discovery requests.

Any lawyer would caution his clients against counting on victory or on recovery of money through litigation. Nevertheless, it does appear that some optimism is in order in this matter.

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What's Up with the Last Batch of 1994 Legislative CDs?

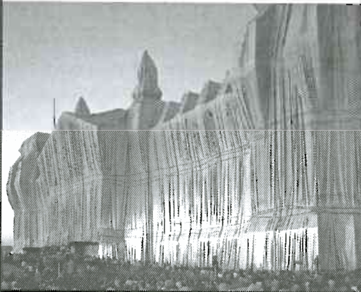
Joe McCarthy — Then: The Red Scare; Now: The Sex Scare

Two issues ago, I printed the last segment of excerpts from the first batch of CDs comprising a large part of the hearings held in 1994 on the legislative bill called the "Minnesota Civil Commitment and Treatment Act of 1994" ("MCCTA" of 1994 or simply, "MCCTA," for short).

However, this left batch 2 of those CDs somewhere in the process. This last batch was ultimately sent in two sets of copies to the Gustafson Gluek law firm. In turn, at my request, just as for the first batch, they sent one of those sets to MSOP, attention to the IT Department. This occurred about three weeks ago. It is the last location of that set of CDs known to me.

When the same protocol was used as to the first batch, ultimately, the IT Department made de-compressed versions of those recordings (resulting in 30 CDs, which were then sent to the MSOP-ML Library). Those 'finished product' CDs were held on reserve in the Library's staff office, from which subsets of some of those CDs at a time were available for checkout, to be played on one's own CD/DVD/Blu-Ray player. It was at that time that I was finally able to listen repeatedly to that first batch of CDs, deciding which statements were worth excerpting, and transcribing each of them in sequence. Afterward, I set them into the format which appeared in the first three issues of TLP this year.

If all goes well, this second batch will show up in the Library here sometime within the month. As soon as that occurs, I will follow the same serial checkout procedure to create similar transcripts of whatever statements reflect the true intent of legislators in creating that sex offender commitment law. I have reason to hope that, minute-for-minute, the statements I expect to hear from this batch will be even more vitriolic and hysterical than statements were in the first batch. As before, assuming so, I will print them in future issues of TLP. For the moment, stay tuned and stand by.



The Reichstag, in Shame

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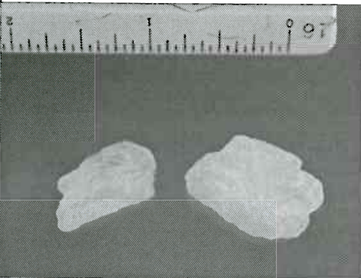
'Meth Magnus': Whither the Prosecution?



No news about the progress of this criminal case has come to the attention of the editor, despite some checking. Hence, I regret my inability to shed any light on how this prosecution is currently going. If anyone has seen any news article concerning this case printed within the last two weeks, please enlighten me ASAP. I will endeavor to obtain a copy and to summarize, paraphrase, and/or simply quote from it, as may prove most apt. Thanks!

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Gladden Complaint Excerpt: Pedophilia Is Not a Disorder.

Editor's Note: In this ongoing series of excerpts from the *Gladden* Complaint, we have reached a substantial portion dealing with the notions of "pedophilia" as a disorder, and as a purported predictor of future sex-crime recidivism by reason of supposed connotation of uncontrollable urges, that is, volitional impairment. Due to overall length of this excerpt, we must divide it in two for inclusion in *TLP*. This first portion refutes the idea that pedophilia comprises a sexual disorder. The portion refuting the contention that pedosexuality (actually, an orientation, not a disorder) involves any volitional impairment will appear in the next issue of *TLP*.

Lacking Any Clear Definition and Any Supporting Science, Pedophilia Is Simply Not a Mental Illness, Disorder of Any Kind, or Partial Disorder ("Dysfunction"); It Therefore Cannot Support Civil Commitment of Any Individual.

Charles Moser, "Paraphilia: A Critique of a Confused Concept," Chapter 5 in: *New Directions in Sex Therapy: Innovations and Alternatives* 91-108 (Peggy J. Kleinplatz, ed. 2001); separately available at: http://tempik.webzdarma.cz/literatura/parmoser, at 105, declares:

"Removal of pedophilia from the DSM would imply that those who violate the law should be punished in the criminal justice system. If someone sexually abuses a child, that person belongs in the criminal justice system, whether or not strong preferential sexual interest in children exists. We do not care about sexual interest; we care about acts.

"Conversely, "just" being a pedophile – meaning that one has a sexual interest in prepubescent children but does not ever act on it – is not necessarily a problem. Acting on it is a problem. When individuals who are neither dysfunctional nor distressed by their behavior engage in sexual activity with minors, their behavior should not be construed as evidence of mental illness. Such individuals are criminals. They have engaged in a crime....

"Although society has a responsibility and a duty to protect individuals from all types of attack, we do not include bank robbers, bigamists, and those who commit libel in the list of psychiatric diagnoses. Criminals are dealt with by the justice system; those who suffer from a mental illness should be dealt with by the mental health system."

"...[P]sychiatry does not have a precise definition of pedophilia for its own purposes, nor has it provided the law with any sort of adequate substitution for its current practices." *Jennifer Jason*, "Beyond No-Man's Land: Psychiatry's Imprecision Revealed by Its Critique of SVP Statutes as Applied to Pedophilia," 83 *So. Cal. L. Rev.* 1319, 1331 (2010).

First in this regard, *Allen Frances*, *The Essentials of Psychiatric Diagnosis*, in the section discussing "Paraphilic Disorders" (pp. 169-74), notes that those intended by the DSM-5's definition of pedophilia exclude simple criminals who opportunistically use children as sex objects because they are vulnerable, because adult partners are unavailable, or because they are under the disinhibiting influence of a substance. *Frances, ibid.*, states that this crucial distinction has largely been ignored in forensic evaluations of sex offenders with children victims.

"There has been considerable debate within the fields of psychiatry and clinical psychology about the conceptual validity of the diagnosis of pedophilia. ...[T]he fact that behavior is legitimately deemed a crime does not, by itself, justify its being labeled a mental disorder. If it did, the DSM would incorporate the criminal codes of every state....

"In questioning the conceptual validity of the diagnosis of pedophilia, Green (2002) cited numerous anthropological studies that have documented the acceptance of adult-child sexual activity in other cultures (*C.S. Ford & F.A. Beach*, *Patterns of Sexual Behavior* (New York: Harper & Row, 1951); *M. Diamond*, "Selected Cross-Generational Sexual Behavior in Traditional Hawaii: A Sexological Ethnography," in *J. Feierman* (ed.), *Pedophilia: Biosocial Dimensions* (New York: Springer, 1990), pp. 422-414; *R. Bauserman*, "Man-Boy Sexual Relationships in a Cross-Cultural Perspective," in *J. Geraci* (ed.), *Dares to Speak: Historical and Contemporary Perspectives on Boy-Love* (Norfolk, England: Gay Men's Press, 1997), pp. 120-137; *Bullough*, 1990). Among the Siwans of North Africa and Artanda aborigines of Central Australia, pederasty (sexual relationships between men and boys) was an accepted cultural practice found by *Ford and Beach* (1951). *Diamond* (1990) described heterosexual relationships between men and prepubescent girls in Hawaii and Polynesia as commonly accepted, and viewed as beneficial to the girls. *Bauserman* (1997) documented pederasty between men and boys ages 10 or 11 in New Guinea. *R. Green*, "Is Pedophilia a Mental Disorder?", 31(6) Archives of Sexual Behavior 467-71 (2002) also pointed to the fact that, until the end of the 19th century, the legal age of sexual consent in England was 10. 'This was not in some loin cloth clad tribe living on the side of a volcano, but the nation that for six centuries was already graduating students from Oxford' (*Green*, 2002, p. 468). Child prostitution was rampant

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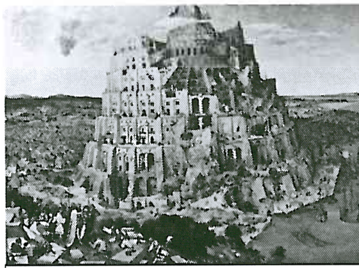
in England during the late nineteenth century (*Bullough*, 1990). *Green* (2002, p. 468) asked, 'Were all customers pedophiles? Were they all mentally ill?'



The Tower of Babel: Then and now, confusion and confoundment reign supreme.

"Indeed, it has been well documented that pederasty was an accepted cultural practice in ancient Greece (*E. Bloch*, "Sex between Men and Boys in classical Greece: Was It Education for Citizenship or Child Abuse?", 9(2) Jour. Of Men's Studies 183-204 (2001)). In China, until the mid-20th century, boys were married to adult women, and sexual activity between them as an accepted cultural practice (*T.K. Lou, Hun-su-zhi* [*Marital Customs*] (Taipei: Commercial Press, 1970)). Today, in Ethiopia, child brides as young as 7 are married to adult men (*P. Salopek*, "In the Heart of Ethiopia, Child Marriage Takes a Brutal Toll," Chicago Tribune, December 12, 2004). In the U.S., it was not long ago that child brides as young as 10 years old were permitted to be married in some states; indeed, in Texas, sixty 14-year-old girls were married in 2002 (*P. Salopek*, "From Child to Bride: Early Marriage Survives in the U.S.," *Chicago Tribune*, Dec. 12, 2004, p. 22) . In the wake of volumes of evidence from history and from anthropological research that sexual activity between adults and prepubescent children has been accepted in many cultures – including subcultures in the U.S. – the rhetorical questions posed by *Green* (2004, p. 468) are, '[A]re we to conclude that all the adults engaged in these practices were mentally ill? If arguably they were not pedophiles, but following cultural or religious tradition, why is frequent sex with a child not a mental illness under those circumstances'

"*Green* (2002) cited further evidence to question the conceptual validity of the diagnosis of pedophilia. First, several studies have found that a significant percentage of members of the general public report sexual attraction to prepubescent children. *J. Briere & M. Runtz*, "University Males' Sexual Interest in Children: Predicting Potential Indices of 'Pedophilia' in a Non-Forensic Sample," 13(1) *Child Abuse and Neglect* 65-75 (1989) surveyed 200 university males and found that 21% reported some sexual attraction to small children, 9% experienced sexual fantasies involving children, 5% had masturbated to fantasies of children, and 7% said they might have sex with a child if not caught. In another sample with 100 male and 180 female undergraduate students, 22% of males and 3% of females reported feelings of sexual attraction to a child (*K. Smiljanich & J. Briere*, "Self-Reported Sexual Interest in Children: Sex Differences and Psychosocial Correlates in a University Sample," 11 *Violence and Victims* 39-50 (1996)).

"Second, *Green* pointed to five studies that measured penile arousal in men who were recruited from community samples. These studies found that 17-58% of the men had measured arousal when shown images of prepubescent girls. For example, *G.C.N. Hall, R. Hirschman, & L.L. Oliver*, "Sexual Arousal and Arousability to Pedophilic Stimuli in a Community Sample of Normal Men," 26 *Behavior Therapy* 681-694 (1995) found that, in a community sample of 80 men with no history of pedophilic behavior, 26.25% showed penile arousal when shown slides of prepubescent girls. These researchers reported that their findings replicated the findings of four other studies reported within the previous 6 years." (*Thomas K. Zander*, "Civil Commitment without Psychosis: The Law's Reliance on the Weakest Links in Psychodiagnosis," 1 *Jour. Of Sexual Offender Civil Commitment: Science and the Law* 17, at 37-38 [2005]).

Generally on this point, see also these: *John Briere & Marsha Runtz*, "University Males' Sexual Interest in Children: Predicting Potential Indices of 'Pedophilia' in a Nonforensic Sample," 13 *Child Abuse & Neglect* 65 (1989) (surveying 193 male university students, finding nine percent reported fantasizing about sex with a young child, five percent masturbating to fantasies of sex with children, and seven percent likely to have sex with a child if assured they would not be caught or punished); *Claude Crepault & Marcel Couture*, "Men's Erotic Fantasies," 9 *Archives of Sexual Behavior* 565 (1980) (sampling ninety-four men, finding sixty-two percent reported fantasizing about sexually initiating with a young girl and three percent with a young boy); and *Terrell L. Templeman & Ray D. Stinnett*, "Patterns of Sexual Arousal and History in a 'Normal' Sample of Young Men," 20 *Archives of Sexual Behavior* 137 (1991) (surveying sixty college men where five percent expressed an interest in sex with a girl under twelve).

Wesley Stephenson, "How Many Men Are Paedophiles?", 57 *BBC News* July 30, 2014 (www.bbc.com/new/magazine-28526106), describes the 2008 research by Dr. Michael Seto, a clinical/forensic psychologist at Royal Ottawa Healthcare Group, who wrote a book in which he put the prevalence of pedophilia in the general population at 5%. Stephenson states: "The figure was based on surveys conducted in Germany, Norway, and Finland in which men were asked whether they had ever had sexual; thoughts or fantasies about children or engaged in sexual activity with children.

Most recently, *Beate Dombert, Alexander F. Schmidt et al.*, "How Common Is Males' Self-Reported Sexual Interest in Prepubescent Children?", *Jour. Of Sex Research* (Feb.2016), doi: 10.1080/00224499.2015.1020108, examined the prevalence of pedosexual interest/attraction, both by meta-analysis of contemporary findings in numerous studies by others and through a direct survey in Europe. At Proof, p. 4, they report finding that:

> "...9% of males from the general population reported some likelihood of having sex with children or viewing child pornography if they would not be caught or punished (*Wurtele, Simons, & Moreno*, 2014) ...Moreover, in a large dataset of sexual behavior on the internet (*Ogas & Gaddam*, 2012) 'preteen' was the third most frequent search term in males' age-related online sex searches (N>3,000,000 individual searches; (*Ogas & Gaddam*, 2013) and 20.5% of age-specific sex searches aimed at prepubescent children ≤ 12 years of age (*O. Ogas*, personal communication, December 5, 2014). This finding dovetails with the roughly 20% of community males who indicated child pornography use in a study on problematic pornography use on the Internet (*Ray, Kimonis & Seto*, 2014). In sum, these findings suggest that a considerable amount of sexual interest in children is common in non-forensic male populations."
>
> Slip p. 5: "Child pornography use has recently gained increasing interest as a valid indicator of pedophilic interest (e.g., *Schmidt, Gykiere, Vanhoeck, Mann, & Banse*, 2014; *Seto*, 2010). *Seto* and colleagues (2006) compared child pornography offenders with contact sexual offenders victimizing children utilizing penile plethysmographic assessments and found that child pornography offenders were about three times more likely to show pedophilic sexual arousal than contact sexual offenders."
>
> Slip p. 8: "...[T]he effective sample consisted of N = 8,718 male participants aged 18 to 89 years (M = 43.5, SD = 13.7). This represents a response rate of 48.7% of the originally invited sample and 82.7% of the persons who began to fill in the survey."
>
> Slip p. 10: "...[A]ll participants were asked to estimate their likelihood to ever sexually acting out on a child, as well as about their criminal history...."
>
> Slip p. 12: Results
>
> Prevalence of Sexual Interest in Prepubescent Children
>
> "Of all participants, 5.5% (n = 482) reported any indication of pedophilic sexual interest (i.e., any report of fantasy, behavior, child pornography consumption, having paid a child for sexual services, or travelling into another country with the intent to have sexual contact with a child). Specifically, 4.1% (n = 358) reported sexual fantasies involving prepubescent children."
>
> Slip pp. 17-18: "...Overall, 5.5% of all participating men indicated any form of pedophilic interest with 3.2% of all participants reporting sexual behavior involving prepubescent children. Specifically, 1.7% of all men had used child pornography but did not indicate sexual contact with children, 0.8% had exclusively committed sexual contact offenses against prepubescent children, and 0.7% committed both contact and child pornography offenses. Hence, child pornography use was the most frequently reported sexual offense against prepubescent children. The most informative study so far (*Seto et al.*, 2015) reported 4.2% of child pornography use referring to a representative sample of Swedish men aging 18 to 20 years. Compared with our German sample (aged from 18 to 89 years), the much younger Swedish sample was supposedly more sexually active, had easier internet access, and thus, was more experienced with this media. These factors might explain the lower frequencies reported in this study."

Margo Kaplan, "Taking Pedophilia Seriously," 72 *Wash. & Lee L. Rev.* 75 (Winter 2015), adds considerable information supporting the conclusion that pedophilia cannot be deemed a disorder:

> p. 92: "Treatment cannot convert sexual interests; therapy to redirect sexual attraction away from children toward adults has fared no better with pedophilia than it has with same-sex attraction." [citing *M. Seto*, *Pedophilia and Sexual Offending Against Children* (2008), at 175-76 (discussing the efficacy of therapy aimed at changing a pedophile's interest in children and noting that it is unclear whether the therapy results in actual changes in interest or greater control over pedophilic sexual arousal); *Alice Dreger*, "What Can Be Done about Pedophilia?", *The Atlantic* (Aug 26, 2013, 9:42 AM),http://www.theatlantic.com/health/

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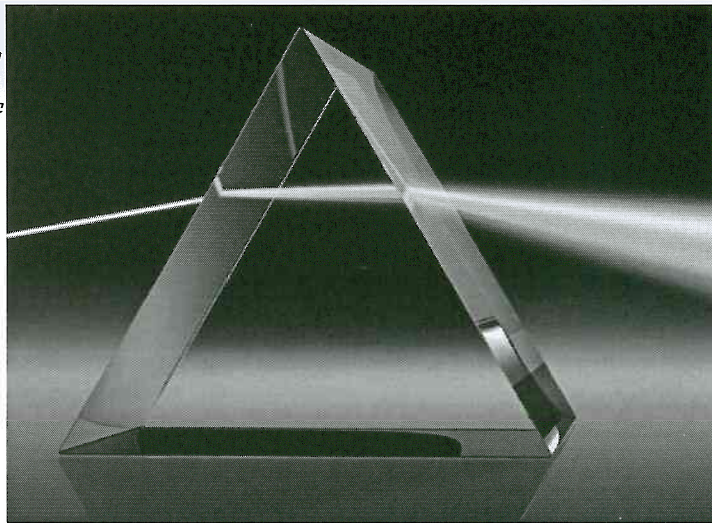
archive/2013/08/what-can-be-done-about-pedophilia/279024/ ("We have not yet found a way to convert pedophiles into non-pedophiles that is any more effective than the many failed attempts to convert gay men and lesbians into heterosexuals.")

p. 104: "Changing social mores, including prejudices, often inform judgments of what desires are pathological. [stating, at note 122: "For example, same-sex attraction was once considered pathological. *Andreas De Block & Pieter R. Adriaens*, "Pathologizing Sexual Deviance: A History," 50 *J. Sex. Res.* 276, 287-89 (2013); *Charles Moser*, "Paraphilia: A Critique of a Confused Concept," in *New Directions in Sex Therapy: Innovations and Alternatives* 91 (*Peggy J. Kleinplatz*, ed. 2001), at 96. Psychiatrists also diagnosed slaves that attempted to escape with a psychological disorder called drapetomania. *Patrick Singy*, Letter to the Editor, "What's Wrong with Sex?," 39 *Archives of Sexual Behav.* 1231 (2010)."] The DSM's current definition of a paraphilia is oddly broad and archaic, entailing 'any intense and persistent sexual interest other than sexual interest in genital stimulation or preparatory fondling with phenotypically normal, physically mature, consenting human partners.'" [citing: DSM-V at 685]

p. 105: "Distress and interpersonal difficulty are also questionable criteria because they may be caused by the individual's shame and fear of societal response rather than the sexual desire itself. [citing: *Agustin Malón*, "Pedophilia: A Diagnosis in Search of a Disorder," 41 *Arch. Sexual Behav.* 1083 (2012) at 1084 (discussing the criteria of distress in a pedophilic disorder diagnosis); *Alan W. Shindel & Charles A. Moser*, "Why Are the Paraphilias Mental Disorders?," 8 J. *Sexual Med.* 927, 928 (2010) (explaining that an individual with a paraphilia may experience distress because of societal discrimination). The DSM attempts to avoid this problem by requiring that the distress and impairment be caused by the paraphilia as opposed to societal response. But it is impossible to tease out causation in this way. All distress likely has some internal and external cause. An individual may be repulsed by his sexual interest for children in part because he finds it morally repugnant and in part because he knows society condemns it as morally repugnant."] ...As one critic notes, '[i]t does not seem possible for a person sexually interested in children not to be socially impaired in some way because societal norms dictate that it is abnormal for a person to be sexually interested in children." [citing: *Wm. T. O'Donohue et al.*, "Problems with the DSM IV Diagnosis of Pedophilia," 12 *Sexual Abuse: J. Res. & Treatment* 95, 102 (2000).]

p. 107: 2. Erotic Age Orientation: Pedophilia as a Sexual Orientation

"The fifth edition of the DSM, as originally published in October 2013, referred to pedophilia as a sexual orientation. [DSM-V, at 698] It specifically stated that an intense and persistent sexual interest in prepubescent children that is not acted on or accompanied by distress or impairment is better characterized as a sexual orientation than a mental disorder." [ibid., stating that if individuals "have never acted on their impulses, then these individuals have a pedophilic sexual orientation but not a sexual disorder."]



Light is not enough; precise distinction is required.

pp. 108-09: "While sexual orientation is commonly used to describe the gender to which one is attracted, several scholars and advocates argue for a more expansive definition. [citing: *Elizabeth M. Glazer*, "Sexual Reorientation," 100 *Geo. L.J.* 997, 1057-58 (2012) (arguing for a broader definition of sexual orientation); *Ann E. Tweedy*, "Polyamory as a Sexual Orientation," 79 *U. Cin. L. Rev.* 1461, at 1479-1509 (2011) (discussing expanding sexual orientation to include the preference of polyamorous relationships); *Michael D. Storms*, "Theories of Sexual Orientation," 38 *J. Personality & Soc. Psychology* 783, 783-91 (1980) (discussing the limits of common theories regarding the nature of sexual orientation); see also: *Elizabeth F. Emens*, "Compulsory Sexuality," 66 *Stan. L. Rev.* 303, 338-344 (2014) (proposing additional axes by which to measure asexuality).] Some have proposed, for example, that sexual orientation should include an axis of sexuality versus asexuality – the extent to which one experiences sexual urges or interest, if at all. [citing: *Emens, supra*, at 338-340 (discussing asexuality using existing models of sexual orientation); *Storms, supra*, at 783-91 (positing asexuality as a distinct sexual orientation).] Sexual orientation might also consider the extent to which one focuses sexual interest on others as opposed to autoeroticism. [See *Emens, supra*, at 341-42 (discussing asexuality along an autoerotic axis); *Glazer, supra*, at 1054-55 (arguing for separation of sexual orientation into general orientation and specific orientation).] Other scholars have proposed expanding it to include the extent to which individuals are polyamorous as opposed to monogamous. [See *Tweedy, supra*, at 1482-1509 (discussing polyamory as a sexual orientation.) More controversial definitions of the term might also include whether one is attracted to humans, non-human animals, or inanimate objects. [See *Jesse Bering, Perv: The Sexual Deviant in All of Us* (2013) at 117-18 (discussing sexual attraction to non-human animals and inanimate objects).]

"Those who argue that pedophilia is a type of sexual orientation distinguish between different types of sexual orientations; sexual gender orientation, the focus of most research on sexual orientation, is but one. [See *M. Seto*, at 231 (defining sexual gender orientation).] This view places pedophilia on a larger spectrum of erotic age orientation, which describes how individuals experience sexual attraction to age groups ranging from infants to the elderly. [See *Seto*, at 3-4 & n. 1, 231 (explaining age orientation); *Bering, supra*, at 169 (discussing erotic age orientation); *Hall & Hall*, supra, at 458 (same).] Erotic age orientation contains at least five categories of sexual interest: (1) pedophilia (attraction to prepubescents); (2) hebephilia (attraction to minors in early puberty); (3) ephebophilia (attraction to older adolescents); (4) teliophilia (attraction to sexually mature persons); and gerontophilia (attraction to the elderly). [*Bering, supra*, at 169 (noting the different categories of sexual interest); *Seto, supra* at 3-4 & n. 1 (defining the types of sexual interest); *Hall & Hall, supra*, at 458 (discussing categories of sexual interest within erotic age orientation).] Some also categorize nepiophilia (attraction to infants) as a separate type of erotic age orientation rather than as a subset of pedophilia. [*Seto, supra*, at 4 ("It is not clear if sexual preference for infants ...represents variants of pedophilia or instead represent different paraphilias.").]

pp. 109-10: "One difficulty in determining whether pedophilia should be considered a type of sexual orientation is that, despite over a century of social science research and legal analysis, there is no one accepted definition of sexual orientation. [See *Emens, supra*, at 339-44 (discussing various models of sexual orientation); *Jessica A. Clarke*, "Inferring Desire," 63 *Duke L.J.* 525, 541 (2013) (noting that "there is no unitary definition"); *Randall L. Sell*, "Defining and Measuring Sexual Orientation: A Review," 26 *Archives Sexual Behav.* 643, 644-49 (1997) (describing confusion surrounding the conceptual definition of sexual orientation).] Several means of organizing individuals into categories of sexual orientation based on sexual interests or behaviors have been proposed, accepted, and subsequently rejected and replaced throughout history.[See *Clarke, supra*, at 541-42 (noting that the understanding of sexual orientation has fluctuated over time.] The concept of homosexuality has transformed over the past century from a tendency to engage in same-sex sexual behavior, to a type of gender deviance, to an abnormal personality and mental disorder, and finally to an affirmative social identity. Still, terms such as 'homosexual' and 'bisexual' do not have universally accepted characteristics. Nor are these terms even widely accepted by the very communities they identify; those who prefer to identify as gay, lesbian, or queer, for example, reject the word 'homosexual.'

pp. 110-11: "Modern conceptions of sexual orientation generally share certain characteristics. Perhaps most prominently, sexual orientation generally involves a type of sexual interest. [Some researchers also distinguish different types of psychological components, such as sexual interest versus affection and love. See *Sell, supra*, at 648-49 (discussing various psychological components).] It also requires sexual interests

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Pedophilia, like heterosexuality or homosexuality, represents sexual arousal to a particular identifiable group, and is not voluntarily decided

have a certain breadth and depth. [*Tweedy, supra*, at 1466-68 (discussing the concept of sexual orientation as an identity), and at 1482-83 (discussing importance of "embeddedness").] It implies something stronger than, say, an individual's interest for individuals with green eyes or dimples. Comparing a sexual orientation to this type of preference trivializes sexual orientation's depth and its role in the individual's psyche. Erotic age orientation is similarly defined by sexual interest. Such sexual interests must be intense and persistent in order to fall into a category; a fleeting attraction to a child is insufficient to qualify as pedophilia."

"Sexual orientation is also widely accepted as immutable, unchosen,.... [See *John Money, Gay, Straight and In-Between* 11 (1988) (stating sexual orientation is not a choice or preference)]. Sexual gender orientation is something that one discovers rather than acquires and which cannot be reoriented.... [See *Seto*, at 231 noting that "reorientation therapies have not worked for homosexual men"). Indeed, reorientation therapy has been so discredited and its attendant risks so high that some states have banned such therapy for minors.]

p. 112: "There is also evidence that erotic age orientation is ...immutable [unchangeable].... [*Studer & Aylwin, supra*, at 776 (describing arguments that "pedophilia," like heterosexuality or homosexuality, represents sexual arousal to a particular identifiable group, and is not voluntarily decided); *Dreger, ibid*.]."

"*R. Spitzer & J.C. Wakefield*, "Why Pedophilia Is a Disorder of Sexual Attraction – at Least Sometimes," 31(6) *Archives of Sexual Behavior* 499-500 (2002) have ...defended the conceptual validity of the diagnosis of pedophilia. They argued that pedophilia ...is a 'harmful dysfunction'....

"Unquestionably, adult-child sexual behavior can cause serious psychological harm to the child. However, contrary to the assertions of *Spitzer and Wakefield*, adult-child sexual behavior does not always result in harm to the child (*J.N. Briere & D.M. Elliott*, "Immediate and Long-Term Impacts of Child Sexual Abuse, 4 *The Future of Children* 54-69 (1994); *K.A. Kendall-Tackett, L.M. Williams, & D. Finkelhor*, "Impact of Sexual Abuse on Children: A Review and Synthesis of Recent Empirical Studies," 13 *Psychological Bulletin* 164-180 (1993). In a comprehensive meta-analysis, *B. Rind, P. Tromovitch, & R. Bauserman*, "A Meta-Analytic Examination of Assumed Properties of Child Sexual Abuse Using College Samples," 124 *Psychological Bulletin* 22-53 (1998) documented that many children who had child-adult sexual experiences did not suffer adverse psychological consequences. *Berlin* (2002, p. 480) cited this study to observe that, while adult-child sexual behavior may be considered morally and/or legally wrong, it is not necessarily psychologically harmful,....

"In the *Rind, Tromovitch and Bauserman* (1998) study referred to by *Berlin*, the researchers statistically examined the correlations between child-adult sexual experience, family environment, and psychological adjustment in a large group of studies based on college samples. They found that although child experiences with adults were associated with adjustment problems for the child, this effect was heavily confounded with poor family environment. In fact, the factor of family environment predicted adjustment variance better than child-adult sexual experience by a factor of 10. When they examined studies that controlled for family environment, statistically significant correlations between child-adult sexual experience and childhood adjustment problems usually disappeared. These results call into question the common assumption that child-adult sexual experience inevitably causes psychological problems for the child.

"*T.P. Sbraga & W. O'Donohue*, "Post Hoc Reasoning in Possible Cases of Child Sexual Abuse: Symptoms of Inconclusive Origins," 10 *Clinical Psychology: Science and Practice* 320-334 (2003) presented a strong argument to question the expertise of many expert witnesses in child sexual abuse court testimony. They argued that by employing post hoc (backward) reasoning from current symptomatology to past child sexual experience with adults, expert opinion is scientifically invalid and should not be offered or allowed. Observing that these experts usually base their *post hoc* reasoning on one of several models of assumed consequences of child sexual experiences with adults, these researchers demonstrated the lack of scientific validity of these models. *B. Rind*, "An Elaboration on Causation and Positive Cases in Child Sexual Abuse," 10(3) *Clinical Psychology: Science & Practice* 352-357 (2003) elaborated on the reasoning of *Sbraga and O'Donohue*, offering case studies in which adults, who had child sexual experiences with adults, reported them as positive contributions to their psychosexual development. *Rind* (2003) concluded his treatise by cautioning:

'This is not to argue that CSA [child sexual abuse] does not cause psychological harm in particular cases. Rather the point is that the assertion that CSA invariably or even typically causes psychological harm is highly suspect on empirical, statistical, and methodological grounds. Thus, it is inadvisable for researchers and clinicians automatically to assume that CSA explains current psychological problems, especially when there is evidence for confounding factors.... Societal ignorance or forgetfulness of the logical fallacy post hoc ergo propter hoc (after this therefore because of this) is pervasive on this issue, perhaps in part because people do not want to appear to be unsympathetic to victims. But the role of scientific psychology should be to get beyond such motivations and examine nature as it is, applying rigorously rational and empirical approaches. (p. 252, 356).'

"In summary, the debate about the conceptual validity of the diagnosis of pedophilia centers around how adult-child sexual activity can be deemed pathological when it is, and has been, so prevalent cross-culturally and historically, and when the core feature of it – arousal to images of naked children – is so commonly found in the general public. Again, while there is unanimity of opinion in the serious clinical world about the legitimacy of laws prohibiting adult-child sexual behavior, the diagnostic codification of such behavior as a mental disorder remains the focal point of considerable debate within the mental health professions. In contrast, as explained previously, there is virtually no serious debate within psychiatry and clinical psychology that psychotic disorders – the traditional basis for civil commitment – are appropriately conceptualized as mental disorder." (*Allen Frances,, supra*, pp. 39-40)

Even as to others who have been found to meet the criteria for a DSM diagnosis of pedophilia, *Melissa Hamilton*, "Adjudicating Sex Crimes as Mental Disease,": 33 *Pace L. Rev.* 536 (Spring, 2013), at 579, states: "While child molestation is an immoral act, there is no medical evidence of it deriving from a mental deficiency; rather, it is a social construction that pedophilia is linked to a sick mind." See also: *Stephen T. and Ronald M. Holmes, Sex Crimes: Patterns and Behaviors* (3d ed. 2009), at 110, offering a variety of postulated: social learning, psychological, and sociobiological explanations for pedophilia; *Fred S. Berlin*, "Commentary of Pedophilia Diagnostic Criteria in DSM-5," 39 *J. Am. Acad. Psychiatry & Law* 242, 243 (2011), conceding that it is disingenuous to suggest that the pedophilia diagnosis in the DSM is not based in part on value judgment.) The fact is that "...psychiatry does not have a precise definition of pedophilia...." *Jennifer Jason*, "Beyond No Man's Land: Psychiatry's Imprecision Revealed by Its Critique of SVP Statutes as Applied to Pedophilia," 83 *S. Cal. L. Rev.* 1319, 1331 (2010).

More troubling than this apocryphal nature of pedophilia itself as a "disorder" is the fact that in the DSM-IV-TR, a diagnosis of pedophilia could be reached on nothing more than the subject's behavior, i.e., past sex offenses involving children. *Jennifer Jason, id.*, at 1337. At 1338, *Jason* explains:

"...Under the DSM-IV-TR, a diagnosis of pedophilia necessitates that an individual ...meet two requirements. The first criterion is 'recurrent, intense, sexually arousing fantasies, sexual urges, or behaviors involving sexual activity with a prepubescent child....' ...The second criterion requires that 'the person has acted on these sexual urges' and is markedly distressed by them. Pedophilia includes any combination of the two.... When the 'or behaviors' component of the first criterion is combined with the 'acted' component of the second criterion, an individual can be diagnosed with pedophilia based simply on a sexual act with a child, absent a particular mental state."

See also: *M. Hamilton, supra*, at 565. Hamilton concludes: "This makes the pedophilic disorder intrinsically indistinguishable from the crime." (Id., 578).

Because of this, such circular reliance solely on past alleged sex crimes of Plaintiffs involving children in effect means that the 'disorder element' disappears, merging as one with the 'criminal record element.' As commented supra, this reduces commitment to simply such a citation of past criminal

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"[I]t is a *social construction* that pedophilia is linked to a sick mind."

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record and a prediction of likely future re-offense – a classic example of pure preventive detention, in violation of substantive due process.

However, *Jason* hastens to note that the DSM editors were then (2010) planning to require a pattern of fantasies for a diagnosis of pedophilia. "...Thus, the next edition [DSM-V] will remove the phrase 'or behaviors' to clarify that a pedophilia diagnosis used as the basis for a civil commitment cannot rely solely on a history of repeated sexual acts with children. ...According to psychiatry, present, 'recurrent, intense, sexually arousing fantasies (i.e., mental imagery [involving children] that the individual considers to be erotic) and urges (i.e., to act on the fantasies) are the sine qua non in [pedophilic] diagnosis.' ...[A]n individual who has a mental disorder (pedophilia) will not necessarily ever engage in a sexual act with a child." *J. Jason*, at 1338-39, quoting *Michael B. First & Robert L. Halon*, "Use of DSM Paraphilia Diagnoses in Sexually Violent Predator Commitment Cases," 36 *J. Am. Acad. Psychiatry & Law* 443, 445 (2008).

Anthony D. Perillo, Ashley H. Spada, Cynthia Calkins & Elizabeth L. Jeglic, "Examining the Scope of Questionable Diagnostic Reliability in Sexually Violent Predator (SVP) Evaluations," 37 *International Journal of Law and Psychiatry* 190-197 (No. 2, March 2014) DOI: http://dx.doi.org/10.1016/j.ijlp.2013.11.005, astutely observes,

> (p. 192): "The <u>subjectivity</u> required for a clinician to evaluate whether the deviant fantasies and behaviors are 'recurrent' and 'intense,' as well as whether the disorder results in 'distress' or 'impairment' for the offender, presents yet another challenge that can impact the reliability of the paraphilia diagnoses (*First & Halon*, 2008); *Levenson*, 2004a). The <u>ambiguity</u> of the descriptors 'recurrent' and 'intense' requires clinicians to make subjective inferences about deviant sexual fantasies and behaviors that may not be on record and that may not be disclosed by the sex offender being evaluated (*Levenson*, 2004a). Further, in addition to this overall subjectivity, 'distress' and 'impairment' due to arrest and criminal justice involvement <u>must be differentiated from that of the paraphilia itself, as only distress and impairment that stem directly from the disorder qualify as meeting the diagnostic criteria for a paraphilia</u> (*Levenson*, 2004a)."

In this light, the following observation by Perillo et al. (p. 191) assumes crucial importance: "...[H]igh levels of variance have been observed among clinician scores on sex offender risk instruments (*Murrie et al*, 2009), bringing into question the interrater reliability on more standardized practices of sex offender risk assessment."

Hippocrates, who cautioned his fellow doctors, "First, do no harm."

At 1339-40, *Jason* adds:

"...[P]sychiatry has not provided an empirically validated way to measure fantasies besides inferring them on the basis of a pattern of sexual behavior with children.

"The vagueness in the proposed psychiatric definition of pedophilia ...has been exposed by the law's use of these definitions for substantiation of civil commitment. ...[T]he relevant consideration is the vagueness of the 'intense' and 'recurrent' fantasies criteria. In terms of the 'intense' aspect, what does it mean to have an intense fantasy – 'is it more vivid, more arousing, or more real?" Where do persistent but moderate- or low-intensity fantasies fit into this definition? In terms of the 'recurrent' aspect, how many fantasies must occur in order to qualify as 'recurrent'? Recurrent clearly implies more than one fantasy, but how many fantasies are necessary within the six-month timeframe? Two fantasies over the course of a lifetime? Twice a week? Twice a day? Twice an hour? Also, the six-month period appears arbitrary. A rationale is needed to conclude that individuals experiencing six months of fantasies are pedophiles while those who experience only five months' worth are not. In terms of longevity, the DSM does not specify whether an individual who has qualified for pedophilia under its definition at a given point in time necessarily still has the disorder years or even decades later." (Id., 1340, citing *Allen Frances & Shoba Sreenivasan*, Commentary, "Sexually Violent Predator Statutes: The Clinical/Legal Interface," 25 *Psychiatric Times* 49, 49 (2008).

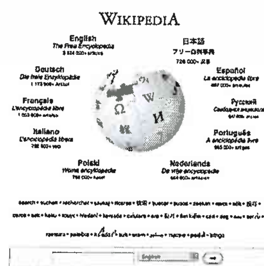
"This lack of specificity is relevant because the SVP evaluations are conducted after years in prison. ...[I]t should be noted that far more specific qualifications and guidelines are given for other DSM disorders." (*Jason*, p. 1341)

In sum from these observations by Jason, sex crimes involving children, of themselves, can no longer now be used to make a diagnosis of pedophilia. The DSM-V requires that there be present, "recurrent, intense, sexually arousing fantasies involving children" and present "urges to act on the fantasies" on the part of the patient. Without these, no current diagnosis of pedophilia can be made at all as to any Plaintiff herein.

Yet, to dodge this requirement of the DSM-V, hired "examiners" in SPP/SDP cases regularly assert either: (1) that it is nonetheless their "impression" that the person under SPP/SDP consideration is a pedophile; or (2) alternatively that, even though lacking the DSM-V required element of such current strong urges to act on fantasies of sex with children or of lack of any significant control over one's actions in response to such urges, the specific SPP/SDP defendant (who therefore does not have the "disorder" of pedophilia) nonetheless has a pedophilic "dysfunction." This last dodge ignores that the DSM-V clarifies that "dysfunction" is not truly a diagnosis, since it really is just an admission that the acts at hand do not fulfill the diagnostic elements required for a given "disorder." Finally, when examiners can't find sufficient evidence to support even such a "dysfunction," they often resort to assertions such as "deviant sexual interest in children," as a way of implying pedophilia without having to prove it.

* * * * * *

Child Abductors Not on SO Registry



<u>Let's Be Clear Here Dept.</u>:

Warren, Janet et al., "An Investigative Analysis of 463 Incidents of Single-Victim Abductions Identified through Federal Law Enforcement," 30 *Aggression & Violent Behavior* 59-67 (Sep. 2016)

<u>Abstract Excerpt</u>: "Only 5% of offenders who abducted a female child and <u>none</u> of the perpetrators who abducted male child victims <u>during or after 1994</u> were found to be registered as SOs."

* * * * * * *

Polygraph Assessment of Sex Offenders – Limitations, Problems, Inaccuracy

<u>Editor's Note</u>: the article excerpt below follows on from preceding articles about polygraphy usage in sex offender treatment. The same themes of limits on the utility, of problems in that application, and of inaccuracy — especially in that context — are expanded upon in this particularly useful and straightforward article.

I.B. Wiener & R.K. Otto (eds.), <u>*The Handbook of Forensic Psychology*</u> (4th ed., Hoboken, NJ: John Wiley & Sons, 2014): Chapter 19: *William G. Iacono and Christopher J. Patrick*: "Employing Polygraph Assessment" (pp. 612-651)

pp. 616-7: CURRENT APPLICATIONS

<u>Specific Incident Investigations</u> The pretest phase of the CQT is critical to the successful administration of the test. It is during this interview that the polygrapher attempts to create circumstances that lead the innocent person to be more disturbed by the possibly trivial issues raised by the control items than by the relevant questions that have to do with the matter under investigation. A common criticism of the CQT [control question test] is that it is biased against truthful persons, because the relevant questions may be just as arousing to innocent suspects, who may view their freedom or livelihood as dependent on their physiological response to these items, as they are to the guilty (*Lykken*, 1974). To reduce the likelihood of this occurrence, polygraphers use the pretest interview to focus the subject's "psychological set" on the control questions if the examinee is innocent or on the relevant questions if she or he is guilty. Two tactics are used to accomplish this objective.

The first is to convince the subject that lies will be detected. One way to achieve this goal is to demonstrate that the polygraph can detect a known lie. In a typical scenario, the examiner connects the subject to the

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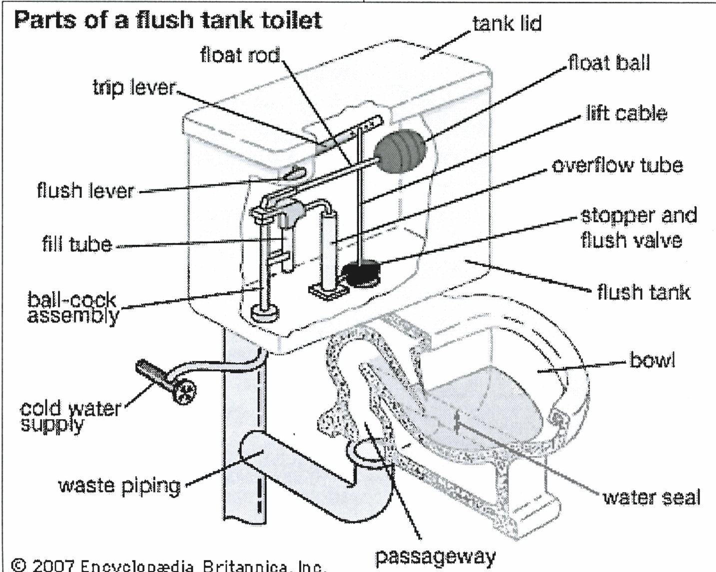
polygraph and says, "I'm going to ask you to pick a number from 1 to 10, write it down, and then show it to me. Both of us will know which number you've picked. After that, I will say a number and ask you if it is yours. I want you to answer 'no' to each number I say, including the one you picked." The examiner then records the subject's responses to each number and tells him or her afterward that the largest reaction occurred when the person lied; if this was indeed the case, the examiner may point it out to the subject on the chart. If it was not the case, the examiner may imply that it was anyway ("I can see from the results that I will be able to tell you when you are lying or telling the truth") or alter the subject's response to the target number to create the impression that it elicited a clearly detectable reaction. Some examiners achieve the desired result by having the subject pick a card from a stacked deck and then rely on the physiological record to "determine" which one he or she picked. Most polygraphers routinely use some variant of this type of demonstration procedure, often called a stim or acquaintance test.

A second tactic for establishing the correct psychological set is to continually emphasize the importance of always being truthful. No distinction is made between the relevant and the control questions regarding the burden of truthfulness. Consequently, innocent individuals are led to believe that lying to control questions will lead to a failed test outcome. How it is that they should reach this conclusion is explained for a case of theft by one of polygraphy's leading proponents, *David Raskin* (1989), as follows:

> Since this is a matter of a theft, I need to ask you some general questions about yourself in order to assess your basic honesty and trustworthiness. I need to make sure that you have never done anything of a similar nature in the past and that you are not the type of person who would do something like stealing that ring and then would lie about it. So if I ask you, "Before the age of 23, did you ever lie to get out of trouble, ...?" you could answer that no, couldn't you? Most subjects initially answer no to the control questions. If the subject answers yes, the examiner asks for an explanation ...[and] leads the subject to believe that admissions will cause the examiner to form the opinion that the subject is dishonest and therefore guilty. This discourages admissions and maximizes the likelihood that the negative answer is untruthful. However, the manner of introducing and explaining the control questions also causes the subject to believe that deceptive answers to them will result in strong physiological reactions during the test and will lead the examiner to conclude that the subject was deceptive with respect to the relevant issues concerning the theft. In fact, the converse is true. Stronger reactions to the control questions will be interpreted as indicating that the subject's denials to the relevant questions are truthful. (pp. 254-255).



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Impressed by polygraphy? Then study this diagram until the comparison becomes clear.

pp. 618-19: Directed Lie Technique. The directed lie technique (DLT) is considered a subtype of the CQT. The chief difference lies in the nature of the control questions. For a DLT, the "probable lie" control questions of the CQT are replaced with "directed lie" questions. Directed lies are statements that the subject admits involve a lie before the test begins. In fact, the polygrapher specifically instructs the subject to answer the question deceptively and to think of a particular time when he or she has done whatever the directed lie question covers. Examples of directed lies are "Have you ever done something that hurt or upset someone?" or "Have you ever made even one mistake?" As with the CQT, guilty subjects are expected to respond more strongly if the relevant questions, and innocent subjects should react more strongly to the directed lies.

Guilty Knowledge or Concealed Information Test. An alternative to the CQT for specific incident investigations is the guilty knowledge test (GKT; *Lykken*, 1959, 1960), sometimes referred to as a concealed information or knowledge test. Rather than asking directly whether the examinee was responsible for the crime under investigation, the GKT probes for knowledge indicative of guilt – details regarding a crime or incident that only the person who did it would know about. The GKT consists of a series of questions about the crime posed in multiple-choice format. Each question asks about one specific detail of the crime and is followed by a series of alternative answers, including the correct answer as well as other plausible but incorrect options. The following is an example of a GKT question concerning one detail of a homicide: "If you were the one who beat Donna Fisbee to death, then you will know what was used to kill her. Was she beaten with: (a) a brick? (b) a crowbar? (c) a pipe? (d) a baseball bat? (e) a hammer?" When presented with a question of this type, the true culprit would be expected to emit a larger physiological reaction to the correct alternative than an innocent person who knows nothing about the incident and would respond at random.

The simple premise underlying the GKT is that a person will exhibit larger orienting reactions to key information only if he or she recognizes it as distinctive or important. The GKT tests for knowledge of information rather than for deceptiveness, and the irrelevant alternatives are true controls rather than pseudocontrols. In the CQT, deceptiveness is inferred from a pattern of enhanced reactions to relevant questions, but the possibility that "innocent concern" rather than deception is responsible for this outcome can never be ruled out. A pattern of consistent reactions to critical items on a GKT can (within a small, estimable probability) mean only that the examinee possesses guilty knowledge. On a GKT question with five alternative answers, the odds that an innocent person with no knowledge of the crime would react most intensely to the key (relevant) alternative are 1 in 5. On a GKT that included 10 such questions, the odds are vanishingly small (<1 in 10,000,000) that an innocent person would react differentially to the key alternative on each and every test question.

pp. 619-20: The first study of the GKT (*Lykken*, 1959) and most others conducted since have utilized peripheral response measures, most commonly skin resistance or skin conductance, as indices of stimulus orienting. More recently, brain potentials recorded from the electroencephalogram have been utilized to detect deception within a GKT format. Measuring how reaction times differ to GKT key and irrelevant multiple choice alternatives has provided another method for identifying those with guilty knowledge (*Seymour & Fraynt*, 2009). The "attentional blink" paradigm has also been adapted to the GKT (*Ganis & Patnaik*, 2009). This paradigm makes use of the fact that when two stimuli are presented in close temporal proximity, attention to the first stimulus in the pair (which may or may not convey guilty knowledge) makes identifying the second stimulus difficult (causing a "blink" in attention).

Personnel Screening Modern screening tests differ from specific incident tests in that it is not known whether any particular transgression has taken place. Consequently, the relevant questions typically cover extended periods of time and many topics, leaving ambiguous what form an adequate "control" question should have. Whereas there are many different types of screening tests, these procedures are historically linked to the relevant/irrelevant technique (RIT), a polygraphic interrogation method that preceded the development of the CQT and was used originally in criminal investigations.

Relevant/Irrelevant Technique. In the original RIT, relevant questions (like those used on the CQT) were each preceded and followed by an irrelevant question (e.g., "Is your name Ralph?" or "Is today Tuesday?"). Consistently greater reactions to the relevant items of the test were interpreted as evidence of deceptiveness. However, because of the obvious confound posed by the differential potency of the two categories of questions, the traditional RIT has been roundly criticized and thus is used only occasionally today. For purposes of employment screening, polygraph examiners now commonly use a variant of the RIT procedure that might more appropriately be called the relevant/irrelevant technique, because interpretation of test outcome depends on the pattern of responses across all of the relevant questions.

In contrast to specific incident tests, screening examinations contain relevant questions of the form "Have you ever?" or "During the period in question, did you...? These questions, which may tap themes related to drug use, trustworthiness, and rule violations, are alternated with innocuous or irrelevant questions (also called norms). Law enforcement and security agencies use these types of tests both with prospective and current employees. Although government

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secrecy makes it difficult to determine how these two types of subjects fare on these tests, it is clear that prospective employees are much more likely to fail such tests (perhaps a third or more do, depending on the government agency) than those already screened, trained, and employed (where failure rates hovering around 1%-2% are seen).

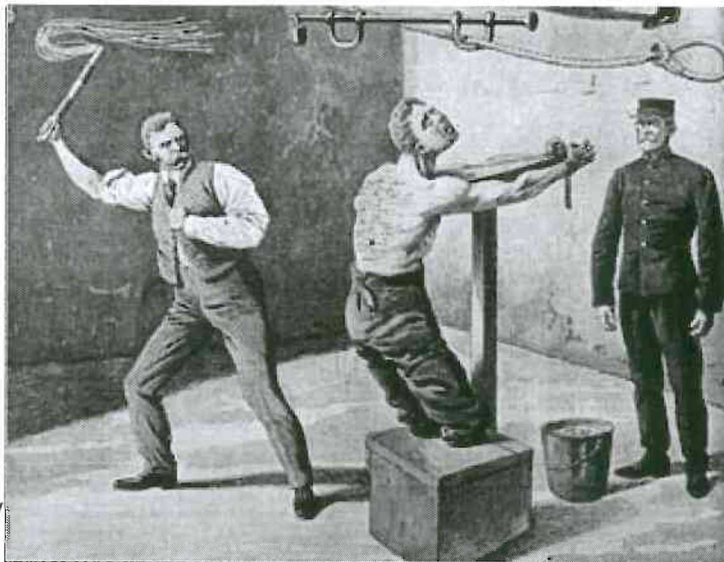
pp. 620-21: In a screening test of this type, typically three or more question sequences are presented covering the same topics, but with the form of the questions and their order varied. The irrelevant items are included mainly to provide a rest period or return to the baseline rather than a norm for comparison purposes. The RIT is a polygraph-assisted interview in which the development of questions is guided both by the polygrapher's impressions of the examinee's truthfulness as well as the comparative reactions to the various relevant items: "The cardinal rule in chart interpretation is, any change from normal requires an explanation" (*Ferguson*, 1966, p. 161). If the subject shows persistently strong reactions to one or more content areas in relation to the rest, the examiner concludes that the subject lied or was particularly sensitive about these issues for some hidden reason. In this case, the examiner will probe the examinee for an explanation of what might have provoked these responses and will administer additional question sequences focusing on these specific issues. Examinees who are adept at explaining away their reactions are thus likely to avoid incrimination. *Thurber* (1981) reported that, among applicants for a police training academy, those who scored highest on a questionnaire measure of impression management were most likely to pass a polygraph screening test.

National security organizations use both periodic and aperiodic screening tests. Periodic screening tests are conducted at regular intervals to determine whether existing employees have been honest in their work and remain loyal to the agency. Aperiodic screenings are conducted less frequently and with minimal advance warning. Besides being more economical, this practice is thought to produce a more powerful deterrent to malfeasance. The knowledge that they may be asked to submit to a polygraph test at any time is believed to dissuade existing employees from engaging in misconduct. In effect, the polygraph establishes a climate of fear in which employees are less inclined to be dishonest because they fear detection (*National Research Council* [NRC], 2003; *Samuels*, 1983).

DETERMINING VALIDITY

pp. 621-22: Evaluation of Polygraph Charts. Although currently semi-objective numerical scoring is the preferred technique for chart evaluation among professional polygraphers, the global approach to chart interpretation still is used occasionally. For CQT's conducted using either procedure, the field examiner is exposed to extrapolygraphic cues, such as the case facts, the behavior of the suspect during the examination, and sometimes inculpatory admissions from the examinee. For a validity study to provide a meaningful estimate of the accuracy of the psychophysiological test, the original examiner's charts must be reinterpreted by blind evaluators who have no knowledge of the suspect or case facts. Even though those trained in numerical scoring are specifically taught to ignore extrapolygraphic cues, *Patrick and Iacono* (1991b), in their field study of Royal Canadian Mounted Police (RCMP) polygraph practices, showed that even these elite examiners nevertheless attend to them. In 21% of the 279 examinations investigated, the original examiners contradicted the conclusions dictated by their own numerical scores by offering written verdicts that were not supported by the charts. We also found that original examiner opinions were likely to be more accurate than their numerical scores, indicating that examiners improved their accuracy when they relied on case facts and other extraneous information. Although one may be tempted to use such data to argue that blind chart scoring underestimates the accuracy of polygraph verdicts (e.g., see *Honts, Raskin, & Kircher*, 2002), the probative value of the CQT derives from the possibility that the psychophysiological measurements provide a scientifically valid method for detecting liars. No court of law would accept as evidence the opinion of a human "truth verifier," a skilled interviewer who can use the available evidence to reach a correct judgment. The fact that our RCMP data showed that original examiners were more accurate when they overrode the charts speaks to the invalidity of the psychophysiological test when used to determine truthfulness.

Field Versus Laboratory Investigations Field studies, like our study with the RCMP just discussed, involve real-life cases and circumstances. The subjects are actual criminal suspects. Laboratory studies require naïve volunteers to simulate criminal behavior by enacting a mock crime. The latter approach provides unambiguous criteria for establishing ground truth but cannot be used to establish the real-life error rate, because the motivational and emotional concerns of the suspects are too dissimilar from those involved in real-life examinations. Unlike those faced with an actual criminal investigation, guilty subjects in the laboratory have little incentive to try and no time to research how to "beat" the test, guilty subjects are following instructions to lie rather than lying out of self-interest, and both guilty and innocent subjects have little to fear if they are classified as deceptive. Administering the CQT to laboratory subjects is especially likely to lead to overestimates of accuracy for the innocent; innocent subjects can reasonably be expected to respond more strongly to the potentially embarrassing control questions concerning their personal integrity and honesty than to the relevant questions dealing with a simulated crime they carried out only to satisfy experimental requirements.


Polygraphy — An earlier version

p. 623: Although the CQT has been subjected to field research, there are no field studies of personnel screening tests and only two of the GKT, facts that limit efforts to evaluate these techniques.

p. 626: Directed Lie Technique Little is known about the validity of the DLT. Although one field study involving the DLT has been published (*Honts & Raskin*, 1988), this study was also subject to the confession-bias problem. In addition, only a single directed lie question was used, and this question was embedded in a conventional CQT, making it difficult to determine how the test would have fared had directed lie controls been used exclusively. The DLT appears especially susceptible to countermeasures. When the examiner introduces the directed lies to the subject, they are explained as questions designed to elicit a response pattern indicative of lying. Hence, their purpose is made transparent to subjects, who may understand that an exaggerated response to these questions will help them to pass test items on which they lie and presumably offer a less significant response. In addition, the examiner has no idea what issues are covered by the directed lies and how strong an emotional response they are capable of eliciting. For instance, if the subject is directed to answer no to the question "Have you ever done something that you later regretted?" and the subject had an abortion or killed someone in a drunk driving incident, might not the emotions elicited by the directed lie elicit stronger autonomic responses than the material covered by a question concerned with less significant matters, such as a theft or fraud?

pp. 627-28: [Referring to the GKT] Because the test is virtually never used in North America, no field studies of the GKT have been conducted here. However, the GKT is routinely used in Japan (*Nakayama*, 2002), and two studies have been reported by investigators in Israel. *Elaad* (1990) and *Elaad, Ginton, and Jungman* (1992) examined the GKT records of 178 criminal suspects tested by examiners from the Israel Police Scientific Interrogation Unit, whose criterion status had been established via confessions. In all but one instance, the GKT was administered following a CQT and included from one to six questions repeated from two to four times, a procedure that, as noted (*Ben-Shakhar & Elaad*, 2002), diminishes the effectiveness of the GKT. Excluding inconclusive outcomes, innocent examinees were identified with high accuracy (error rate of 2%-3%).

p. 629: Personnel Screening [Discussing the RIT & TES techniques] The results of [the NCCA] study indicated a high rate of correct classifications for innocent participants (94%) but a low hit rate for guilty participants (34%).

p. 650: CONCLUSION

...[T]hose administering sex offender treatment programs have come to rely on polygraph tests to encourage offenders to divulge fully their past sexual misdeeds, so much so that the use of polygraph tests in these programs is now widespread. When used in such contexts, the polygraph is little more than a prop intended to encourage

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socially undesirable self-disclosure among those who believe it genuinely works, a phenomenon established over 40 years ago as the "bogus pipeline" effect (*Jones & Sigall*, 1971). However, as the NRC panel noted, in the long run, evidence that a technique lacks validity will eventually undercut its utility.

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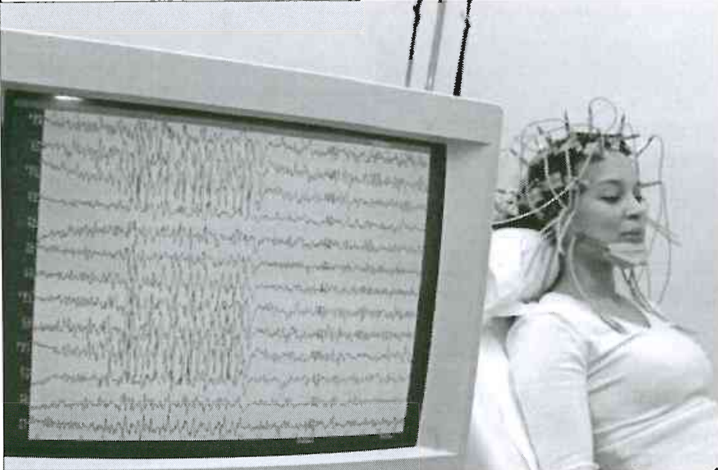
"Biofusion" — Can Mind-Meld Be Far Behind?



Sharon Berry, "Decoding Minds, Foiling Adversaries," *SIGNAL Magazine* , (October 2001) (available @ cartome.org)

Text excerpts:

"A technology, known as bio-fusion, combines sensors to examine biological systems to understand how information and neural structures produce thought and to display the thought in mathematical terms. By creating an advanced database containing these terms, researchers can now look at brain activity and determine if a person is lying, ...or concentrating on certain thought types that may indicate aggression.

...[U]sing multiple components of the electromagnetic spectrum allows investigators to produce a different snapshot of the brain to gain additional insight.

...'If you go to an automatic teller machine and the sensor system is in place, you could walk away and I would be able to access your personal identification code.'

...Worldwide, most individuals process certain information in the same regions of the brain.

Dr. John D. Norseen, systems scientist for embedded systems, Lockheed Martin Aeronautics Company, Marietta, GA, ...has been asked by military and law enforcement agencies to show how brainprints can be used to determine probable cause.... "...If someone is walking through the airport and he goes through the security checkpoint and we get a feeling that this person is preoccupied with certain numbers or certain thought types that may indicate hostility or aggression we could ask him questions and verify the answers. Then it gives you probable cause.... Norseen is confident that if such a system were fully developed it would be accepted if it meant everyone would be safer at the airport gate. The data he collects may not only show probable cause but also truth verification, he adds. The brain, which uses energy, does not want to expend it needlessly, he says. If someone is telling the truth, it is kept on the outside portion of the brain in low-energy domain areas of the brain. "If someone starts to light up in more areas of the brain and at a higher energy level, it means that the person is now starting to confabulate or obfuscate." Research so far indicates a 90 to 95 percent accuracy rate.

Now that bio-fusion research has developed beyond the initial stages and the database of what, how and where thoughts occur in the brain is mature, scientists are looking at information injection, a contentious issue, Norseen admits. The concept is based on the fact that human perception consists of certain invariant electromagnetic and biochemical lock-and-key interactions with the brain that can be identified, measured and altered by mathematical operations. If researchers can recreate the inverse function of what has been observed, they gain the ability to communicate or transmit that information back – intact or rearranged – to the individual or to someone else, Norseen says. 'When you get down to the mathematical properties, information injection is beginning to be demonstrated.'

The brain is very susceptible to accepting information that is either real and comes from its own memory mechanisms or from injection from an outside source, Norseen notes. 'I am sure you have memories of when the lawn was being cut in late summer and of the smell of the chlorophyll,' he says. 'The chlorophyll would then evoke other memories. I could possibly ping you with a light sequence or with an ELF (extremely low field) radiation sequence that will cause you to think of other things, but they may be in the area that I am encouraging. Those are direct ways in which I can cause the inverse function of something to be fired off in the brain so that you are thinking about it. I have now caused you to think about something you would not have otherwise thought about."

By using information injection, a person could be isolated from a group and made to believe that something is happening, while others in the group are being left alone. Likewise, someone at a command post monitoring information on a screen could be affected. Some experts believe that adversaries now are designing techniques that could affect the brain and alter the human body's ability to process stimuli.

Norseen hopes his work will lead to filters and walls that would block intentional or unintentional corrupted information. 'Look at the incident in Japan where a lot of young children were watching a cartoon, and it caused many of them to have cerebral seizures,' he explains. 'The information that came over the screen showed lights at particular timing and pulsing frequencies and in a certain combination of colors that caused the brain to go into a seizure. If you were alerted, you could slow parts of the video stream or change the timing mechanisms so the stream would not have a negative impact on the brain....

Bio-ethics specialists are reviewing bio-fusion and its applications, specifically neural emulation software. Rather than involving a human, the software captures human mental activity and can be tested against psychological attacks. Software corrections and builds then would be put in place to protect users. 'Our ethics people are excited about this because this is a way to protect people without subjecting them to experimentation,' he says.

Synthetic reality is another approach to protection. 'If I pick up a phone right now, is it a person I talked to or a recording of the person's voice? Or was it synthetically generated?' Norseen asks. Scientists can look at components of a personality in a software application, select certain components of the personality and create a synthetic person. 'We can look at 150 things that Joe Smith, a special forces agent, does. He smiles 20 percent of the time. He has a tick in his eye. We can extract those features and create mini-morphs of him – we create identical Joes on the computer. I want to communicate with Joe about secret information, but I want other parts of my system to communicate with avatars of Joe. If someone tried to find our communication, they would have to sift through a lot of other communications that looked an awful lot like Joe. I would bury Joe in the noise of himself.'

Scientists have found that human errors also could possibly be corrected using external means. A recent discovery determined that error correction coding parameters of the brain involve the globus pallidus, a powerful error correction mechanism. When people consider a decision, they visualize it and talk to themselves and send it to the kinesthetic nerve to say, 'Do you feel good about this?' Then it comes back through the globus pallidus for one more visual look, and people decide to do it or not do it – the go/no-go decision. 'If we proceed and do something that is in error, our globus pallidus comes into play,' Norseen notes. 'It is connected to the kinesthetic nerve, which is ineffable. It can't talk to the "talk" areas of the brain, but it can send signals that go back through the stomach, and that's why you get that sick feeling in your stomach. Something's wrong here.'"

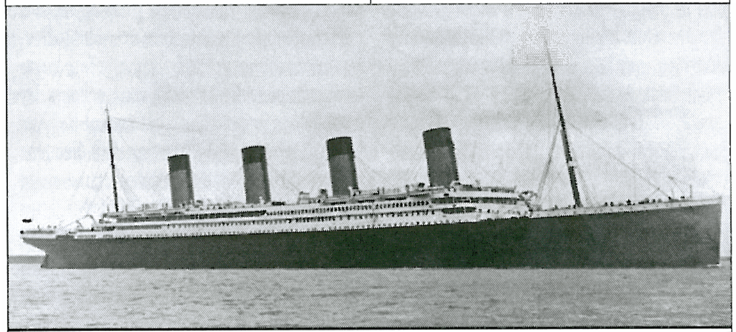
* * * * * * *

Flash from Florida -- Jessica's Law Has No Impact on Forcible Rape Prevalence

Rick Dierenfeldt et al., "Examining the Influence of Jessica's Law on Reported Forcible Rape," 28 *Criminal Justice Policy Review* 87-101 (Issue 1, Feb. 2017)

Abstract Excerpt: "Examining crime records in FL shows that enactment of Jessica's law

(Continued on page 13)



Titanic Folly — They said she'd never go down.

has had no effect on prevalence of forcible rape reports."

Editor's End-Note: Why is that, you ask? Well, let's see: While everyone is surveilling known past sex offenders (who by then are probably deeply into desistance from any further sexual offending), the never-arrested new sex offenders nobody knows about are serially committing up a storm of rapes. What does commitment do that would staunch that crime wave??

* * * * * * *

Exceptional Internet Offenders Would Be Just as Horrible Without the Internet

Sheehan, V. & Sullivan, J., "A Qualitative Analysis of Child Sex Offenders Involved in the Manufacture of Indecent Images of Children," 16 *Jour. Of Sexual Aggression* 143-167 (2010)

Note: This article focuses on producers of child porn on the Internet, saying that little is known about such individuals who, despite the prevalence of such images on the Internet, are actually fairly rare. (p. 144).

"*Taylor and Quayle* (2003) noted an emerging trend involving organized criminals, originating in Eastern Europe, selling and/or producing indecent images of children....The Child Exploitation and Online protection (CEOP) Annual Review 2008-9 contend that the majority of commercially produced child exploitation images are coming from Russia; ....

"In a review of case files undertaken by the National Centre for Missing and Exploited Children (NCMEC), *Sher* (2007) showed that producers of indecent images come primarily from the victims' immediate families, social or educational worlds. This seems to support the findings of *Estes and Weiner* (2007), who reported that approximately 75% of the child victims shown in indecent images are living at home when they are exploited/photographed.

"*Cameron* (2008), in a poll for CEOP, found that in law enforcement investigations, peer-to-peer (p2p) sharing was the main source of indecent images (24.6%) for offenders. General web browsing was the second most popular source (21.5%), and pay-per-view sites were found to be the source of indecent images in only 7.5% of cases...." (*ibid.*)

The authors survey the wide range of Internet offenses and those who commit them. Inter alia, at p. 160, they describe the five levels of Internet child pornographic images outlined by the British entity known as the "Sentencing Advisory Panel (2002). Those levels are as follows:

Level 1: Images depicting erotic posing with no sexual activity

Level 2: Non-penetrative activity between children or solo masturbation by a child

Level 3: Non-penetrative sexual activity between adults and children

Level 4: Penetrative sexual activity involving a child(ren), or children with adults

Level 5: Sadism or penetration of or by an animal

"The authors focused on a group of only four offenders to illustrate this gamut of experience. All of these produced Internet images of female children. The most extreme of these was a "Ryan," currently serving a life sentence for Internet sex and related crimes. The authors summarized his description thus:

"Ryan (46, white male)

Was convicted of rape, sexual assault and taking indecent images of his daughter between the ages of six to nine. He was ordered to spend the remainder of his life in prison. He was a married man (now divorced) with three children and had completed second-a and third-level education. He disclosed abuse and bullying as a child. Ryan was a computer engineer who had been collecting indecent images of children from the Internet since 1996. He acknowledged using adult pornography regularly and that his sexual interest in children pre-dated the Internet. He boasted that he had 10,000 of the most extreme images of child abuse to be found on the Internet. The images he produced of his daughter reflected this interest depicting the child being sadistically tortured. Ryan also ran a snuff website which featured images of torture and death and bestiality."

(p. 161:) "Ryan admitted to soliciting a murder and aiding and abetting another offender in the sexual abuse of a child.... "

(Re *Online Predators Misconceived*, below:) All we are missing is Don Quixote.

Peter Lorre, in Fritz Lang's movie, "M" (1931), fueled early myths about sex offenders by his riveting portrayal of a child-killing sexual psychopath, here pictured envisioning a flaming M on his back, symbolizing his concern that his crime spree was becoming obvious, yet something he could not stop.

End Note: The point of including this excerpt is to show that the fault lies not in access to the Internet, but instead in the heinous character of criminal personas such as "Ryan" in this article. It makes no sense to bar Internet access by all sex offenders — or even just by those who have been subjected to civil commitment, but who have never misused the Internet to perform and profit from rape with its publication. To stop that misconduct, you must instead arrest those horrific perpetrators.

* * * * * * *

Online Predators Misconceived

Janis Wolak et al., "Online 'Predators' and Their Victims: Myths, realities, and implications for prevention and treatment" 63 *American Psychologist* 111-128 (No. 2, Feb.-March 2008)

Abstract excerpt:

"The publicity about online 'predators' who prey on naïve children using trickery and violence is largely inaccurate. Internet sex crimes involving adults and juveniles more often fit a model of statutory rape – adult offenders who meet, develop relationships with, and openly seduce underage teenagers – than a model of forcible sexual assault or pedophilic child molesting. This is a serious problem, but one that requires approaches different from those in current prevention messages emphasizing parental control and the dangers of divulging personal information.

Table I excerpt: selected resources:

The *CyberTipline*. Operated by the National Center for Missing and Exploited Children, this is a federally funded online reporting center for crimes involving child pornography, child sexual molestation (not in the family), and online enticement of children for sexual acts. Reports are investigated and forwarded to appropriate law enforcement agencies. http://www.cybertipline.org/ or 1-800-843-5678.

Stop It Now. This group runs a confidential help line for people who suspect others, such as family members, of child sexual abuse or are concerned about their own behavior. http://www.stopitnow.com/

* * * * *

NACDL's Opposition to Sex Offender Commitment

All evil tyranny looks glorious — even noble, at first.

(Continued on page 14)

Report of the Sex Offender Policy Task Force
Adopted by the Board of Directors,
National Association of Criminal Defense Lawyers

Patrick Henry, of "Give Me Liberty or Give Me Death" fame

Excerpt:
IV. NACDL opposes civil commitment laws because they punish offenders who have paid their debt to society. If employed at all, sex offender civil commitment statutes should provide a full panoply of due process rights including the right to a jury trial, the right to confront adverse witnesses, the right to present evidence, rules of evidence, a high burden of proof on the government and a process for review and discharge which levels the burden squarely on the government.

Another facet of the new wave of sex offender legislation which is sweeping the country is the use of civil commitment legislation to lock up sex offenders who have completed their sentences and "paid their debt to society." NACDL opposes these statutes.

The law will generally allow civil commitment when a person suffers from a mental disease or illness, cannot control his actions, and poses a danger to the community. [citing Kansas v. Crane] It is extremely important that civil commitment proceedings do not become a method to simply extend the sentences of incarcerated sex offenders. The following safeguards must be provided in every civil commitment statute:

Gregory Peck plays the unswerving seeker of justice, Attorney Atticus Finch, in the gripping film *To Kill a Mockingbird.*

1. The criteria to be committed must, at a minimum, include: a) prior conviction or convictions for sex offenses, b) a mental illness or disease which causes an offender to lack control over his actions, and c) proof that the offender poses a danger to the community because he is likely to re-offend.
2. The burden of proof must rest upon the committing authority. That burden must be carried beyond a reasonable doubt.
3. The offender must have the option to be tried by a jury.
4. The offender must have the right to counsel and to have counsel appointed and paid for by the state if he is indigent.
5. The offender must have the right to confront and cross examine witnesses supporting commitment.
6. The offender must have the right to present favorable evidence.
7. The offender must have the right to be heard and testify on his own behalf if he so chooses.
8. The offender must have the right to remain silent if he so chooses without any adverse inference drawn from his silence.
9. The proceeding must ensure that only reliable evidence is considered and therefore the rules of evidence should apply at all commitment proceedings.
10. Civil commitment of offenders may not be indefinite.
11. The offender must be discharged from commitment once he no longer satisfies the commitment criteria.
12. The burden of proof must remain upon the committing authority if it opposes discharge of the offender.

Because the liberty interest implicated by a civil commitment statutes is similar to the liberty interest effected in criminal trials the person facing civil commitment should be afforded all of the same rights afforded to a criminal defendant.

VI. Sex Offender Treatment and Rehabilitation Programs Should Be Adequately Funded and Available Both in Our Prisons and in the Community. Such Programs Should Not Include Mandatory Polygraph Examinations and Should Respect Fifth Amendment Rights.

...[O]ne treatment component often utilized is the polygraph. Mandatory polygraph testing violates the Fifth Amendment prohibition against compelled self incrimination. Additionally, polygraphy has never been generally accepted as a reliable method of determining deception. Eight of nine Supreme Court justices have recognized that "the scientific community remains extremely polarized about the reliability of polygraph techniques." [citing *United States v. Scheffer*, 523 U.S. 303, 118 S.Ct. 1261 (1998)] The revocation of liberty interests should not be conditioned upon such a controversial and unreliable method.

* * * * * * *

Victim of the Month: *Christopher Fretham*

This is the second in our series of articles about individuals of whom it is reasonably fair to say that they were victimized in the process that culminated in their commitment to MSOP, and in how it is that they are still confined here. This month's victim is Christopher Fretham.

Christopher Fretham is currently a 33-year-old individual confined in MSOP-Moose Lake. However, he is one of the "juvenile offenders" – that is, he has no adult crimes. His only sex crimes were committed when he was a minor. Only two such crimes resulted in actual criminal charges. However, approximately another 13 juvenile sex acts were either reported in administrative documents or were self-reported by Christopher himself. These included acts dating back as far as when young Master Christopher was then only five years old. All of them were consensual interactions. One additional charge was for disorderly conduct when Christopher slapped a girl on her buttocks when he was age 15.

Alan Turing, a victim of the socio-sexual phobia of his time and place.

When Christopher was either 14 or 15 (he cannot now clearly recall which), he downloaded 63 individual pictures of children ranging in age between 3 and 17-years-old. These were ultimately ruled to be illegal child pornography, although at that young age it is far from clear whether Christopher then understood what comprises child pornography. Even today, it is unclear whether these pictures all actually met that statutory definition; most of them were simply nude pictures.

The day before Christopher turned 19 (and thus would have been released from juvenile custody), he was instead sent to MSOP-St. Peter on a hold-order pending a civil commitment trial under the MCCTA of 1994. The same judge who had presided over Christpher's various cases as a juvenile also presided at his civil commitment trial. Christopher raised a conflict of interest objection to this, but that objection was merely brushed off.

As with so many other sex offender civil-commitment defendants, Christopher was fraudulently misadvised by his attorney to accept a prosecution offer to drop the Sexually Psychopathic Personality count for commitment in exchange for his stipulation to commitment as a sexually dangerous person. Not understanding that a commitment on either ground would result on his retention in confinement for many years, Christopher accepted that offer.

As of last November, Christopher passed his 14th anniversary of being confined in MSOP. He reports that he has seen a number of sequential 'incarnations' of the treatment regimen come and go while in MSOP treatment. Each time, he has lost much 'forward progress' toward possible completion of treatment. On one of those occasions, he was close to graduation when that changeover occurred, forcing him back to a near-beginner level.

Since Christopher was 13-years-old, he has only had four days outside of institutions. He justly laments that, effectively, he grew up within the juvenile system, only to be deprived of a free adulthood, all for someone's unjustified fears that he might commit an adult sex crime.

Christopher expresses his current belief that he is now well prepared to move on with his life, indeed, that he has been ready to do so for quite some time. He yearns for freedom so that he can settle down and start a family and enjoy life, just as all others do in the free world outside these razor-wire-topped high double fences. He fervently hopes that someday soon he will get that chance.

Human Rights Day, celebrated resolutely, lovingly, with moral certainty, by some young men on the far side of our small planet. Courage is not the deeds of some superhero. It is undertaking to do the right and caring thing, no matter the cost or peril.

* * * * * *

Overlap & Unconvicted Claims in ARAIs—Back to the Future

Overlapping categories, use of unconvicted/ uncharged criminal accusations in ARAIs, preventive detention as punishment for status of 'dangerousness', use of ancient crimes, & disregard of age-out desistance — all combine to impose unjust commitments upon former sex offenders.

Excerpts from: *Melissa Hamilton*, "Back to the Future: The Influence of Criminal History on Risk Assessments," 20 *Berkeley J. Crim. L.* 75 (Spring 2015):

Text, p. 98: "Another reason for the n-tuple effect arises within the risk technologies themselves. Many risk instruments assign points more than once for a single prior criminal event, particularly those that maintain numerous and overlapping criminal offending items in their scoring sheets.[115] For instance, six of the nine variable in a sexual recidivism risk tool with the acronym Mn-SOST developed in Minnesota (and used in other jurisdictions) may have overlapping consequences as all involve convictions, events in prison, and release conditions. A hypothetical offender convicted of stalking and forcing sexual contact with a male victim in a public place and who was released after serving time without supervision would be scored in six of the nine categories.[116] This risk scoring represents a sextuple effect of the same course of conduct.

"...Static-99, the popular sexual recidivism instrument, tallies separately the number of prior sex offenses, any convictions of non-contact sexual offenses, number of prior sentencing dates, convictions for non-sexual offenses, and convictions of non-sexual violence.[119]"

p. 103: "...[C]ritics have recognized, with the support of research studies, that incarceration often is criminogenic itself, and thus may actually exacerbate recidivism risk.[134] Other experts acknowledge the likely diminishing returns of the increased rate of imprisonment with reductions in crime.[135] At the same time, recidivist premiums may operate to increase the risk of future reoffending by interfering with successful reentry.[136]

"Consider the case of likely recidivists who are disproportionately denied parole or sentenced under enhanced statutes and are therefore disproportionately represented in prisons. The symbolic message associated with this disproportionate representation – that is, with the correct perception that prisons are 'filled with recidivists' – is the following: 'If you offend once, you are likely to offend again; if you offend twice, it's all over.' The result is a powerful symbolic message that turns convicts into even worse offenders – in the public imagination, but also in the reentry context. This too will have the effect of a self-fulfilling prophecy, reducing employment and education opportunities upon reentry.[137]"

Peter Benenson, Amnesty International founder

pp. 104-05: "B. **Nonadjudicated Criminal History**

"Formal recidivist premiums usually require official convictions to trigger them. Most risk tool measures of past offending do not limit themselves to convictions. Depending on the instrument, a variety of measures are counted, including arrests[140], charges[141], parole/probation revocations[142], other types of supervision violations[143], incarceration[144], other official records[145], or self-report[146]. Generally, coding rules for many instruments do not exclude counting any of the aforementioned even of the individual was otherwise officially exonerated, such as via an acquittal, police decision not to arrest, or prosecutorial declination based on insufficient evidence. In other words, risk instruments tend to presume that any evidence – even circumstantial – of prior offending behavior must be truthful and accurate as proving the occurrence of such behavior, and accordingly deserves to be tallied to increase the risk profile. This scenario is generally the case regardless of the evidence actually obtained and/or events occurring afterward that might refute such allegations.

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

p. 105: "1. *Evidentiary Inadequacy*

"As the coding for criminal history in actuarial tools often does not require a formal conviction, individuals may score positively for criminal acts that they did not commit. In the law, a simple arrest is insufficient proof that the arrestee actually committed the criminal offense alleged.[147] Arrests frequently 'happen to the innocent as well as the guilty.'[148] ...Outside of conviction data, recordkeeping can be sketchy or the evidence too thin to reasonably score as criminal history events. Thus, counting anything other than convictions when the legal and practical consequences to the defendant may be significant renders risk instrument coding for criminal history variables as subjective, unreliable, and unjust.[149]"

pp. 115-16: "*1. Preventive Detention*

"Risk assessments are used in punitive determinations such as whether to incarcerate, lengthen a sentence, deny parole, enhance restrictions, or require registration. Yet critics argue that it seems unfair to penalize a person just for the potential of future behavior.[198] From a theoretical perspective, these future risk-based practices deny the specific deterrence ability of the immediate conviction, sentence, or programming. They tend to negate broader notions of free will as well. Humans are fundamentally unpredictable. There can be no certainty as to whether a person will or will not commit some speculative future act. A policy that permits aggravated discipline for a hypothetical, future offense is akin to an informal scheme of inchoate crimes. Imperfectly, such a policy disregards criminal law's otherwise fundamental elements of proving a culpable mental state (mens rea) coupled with voluntary conduct (actus reus). The crime is merely hypothetical; the consequences to the individual, however, are very real...."

p. 119: "'Virtually all research that presents a scheme to predict dangerous behavior (be it future offending, violence, substance use, or another undesirable outcome) is not technically predictive. Rather, ...these are better thought of as 'post-diction' studies, in which offenders are retrospectively classified into groups based on measures of past behavior.[212]'

An individual may share some, but typically not all, of the characteristics of the original sample. Hence, applying the results of an actuarial scale to an individual can have the effect of reducing the predictive accuracy of the scale. This is known as the "statistical fallacy effect."'[213]

"A related complaint regarding the G2i challenge applies to criminal justice penalties based on risk: the person is not necessarily being sanctioned on his own merits. Penalizing a person by a risk assessment arrived from group data means that punishment becomes situated on shared group characteristics and thereby is too de-individualized.[214] The scheme is akin to punishing someone for what other, purportedly statistically-matched persons have done.[215]

pp. 119-20: "**C. Punishing Status**

"An alternative construction to framing the idea of sanctioning the hypothetical crime via the proxy of criminal history is to conceive of the issue as one of penalizing an individual for his status. Here, the criminalizing status

(Continued on page 16)

(Continued from page 15)

is one presumed to be indicative of future dangerousness. A couple of overlapping frames can be explored in this idea of exploiting incapacitating options based on perceived status. The status-oriented perspectives are that of a 'criminal' or one based on his (assumed) deviant character. Each potential status is formed on the existence of past offending behavior, is presumed causative of future antisociality, and is deemed fixed in nature.

Being a 'Criminal' – A Status Offense?

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

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

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

p. 123: "**D. Informal Statute of Limitations**

"...Risk assessment technologies generally qualify a past criminal act no matter how dated. The practice undercuts scientific principles as recidivism studies consistently show that the predictive ability of a prior offense decays over time and that many offenders actually desist from further criminal activities. The typical failure to place any statute-of-limitations-type of time restriction on prior crimes also ignores the age-crime curve in which people often naturally age out of criminal law violations. Further, risk assessment tools that do not consider dynamic factors ignore rehabilitation successes that should realistically drive down individual recidivism risk."

pp. 124-25: "Correspondingly, studies show significant decay in the predictive ability of a prior criminal event. A past crime's predictive salience fades over time.[236] Thus, the record of a criminal event appears to provide mainly a short-term correlation to recidivism.[237] Of even more import, the longer the person remains crime-free, the risk of criminal offending greatly decreases as time passes, though the degree obviously varies depending on the type of crime and history of the individual.[238] This pattern of declining risk profiles applies even to categories of offenders that risk assessment tools often consider high-risk, like sex offenders.[239] In general, the empirical picture regarding patterns of recidivism indicates that most offenders who have remained offense-free for any appreciable period will eventually become low risk.[240] Indeed, with sufficient time elapsed, the non-recidivist's risk of reoffending becomes roughly equivalent to the risk of those in the public who have never offended.[241]."

p. 126: *2. Desistance*

"A concept closely associated with the decaying risk level is the idea of desistance.245 The slight difference is that desistance is viewed as a process in which the recidivism rate continues to decrease over time to a point where a crime-free existence becomes a stable trait.246 Desistance is considered generally achieved when the recidivism rate declines to near zero.247 A Bureau of Justice Statistics study of prisoners release in 30 states in 2005, perhaps the best embodiment of a nationally representative sample to date, found an overall pattern of desistence with risk of recidivism steadily declining over time after release.248 Positively, the 'general tendency for recidivism risk to decline over time is among the best replicated results in empirical criminology.'249"

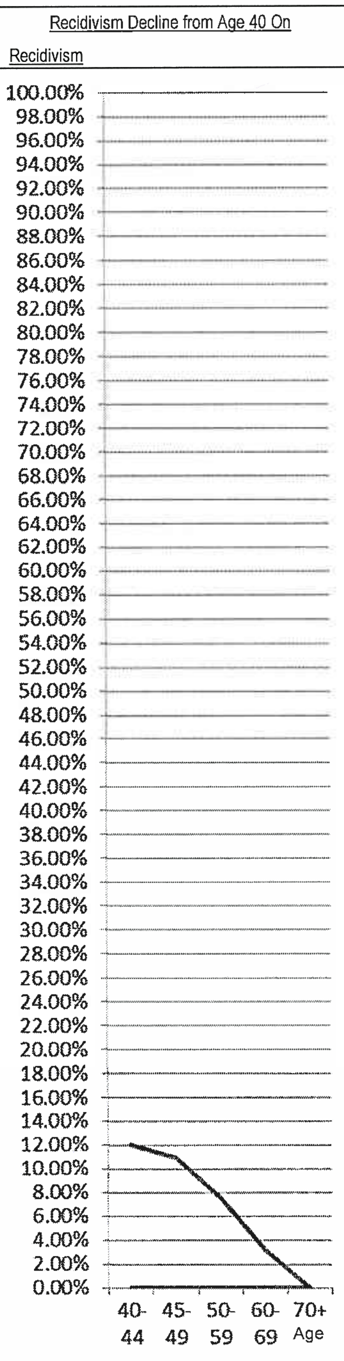
pp. 126-27:

"'...[I]f a person with a criminal record remains crime free for a period of about [seven] years, his or her risk of a new offense is similar to that of a person without any criminal record.'[250]

Interestingly, other investigators have concurred with the seven-year tolling. Desistance research indicates that risk profiles at the seven-year mark of a crime-free life for known offenders are similar to those of persons without prior convictions.[251] As further explained by a legal academic, the

...'reasons why these outdated sentences [should] not [be] counted is rather simple: they do not capture the individual's current threat matrix, and an individual's desert for prior crimes has grown stale. Put in individual autonomy terms, the older sentences may not be indicative of the internal progress that the offender has made over time.'[252]

'I. Age-Crime Curve



"Age is also highly relevant in decay and distance models. For a variety of offenses, studies indicate consistent and distinct patterns in terms of aging. Young people are far more likely to commit most types of crimes and the risk usually declines thereafter.[253] Still, the pattern is not entirely linear across the lifespan. The 'age-crime curve' accurately assesses research findings:

"The work on age-crime curves shows that very large percentages of young people commit offenses; rates peak in the mid-teenage years for property offenses and the late teenage years for violent offenses flowed by rapid declines. For most offenders, a process of natural desistance results in cessation of criminal activities in the late teens and early 20s.'[254]

"Overall, 'a common theme of life course criminology is the finding that a majority of one-time offenders do not go on to lead lives of crime but indeed age out of, or otherwise desist from, criminal ctivity.'[255] For this reason, the United States Sentencing Commission has suggested that factoring criminal history along with age would improve the predictive validity for recidivism.[256]"

p.128: "...Several instruments increase risk rating to adjust for a youthful age.[258] Few, though, control for the back-end to materially reduce risk scores as offenders approach or exceed middle-age.[259] Institutional practices remain entrenched in reifying criminal history as a whole in recidivism predictions with a presumption that evidence of a criminal past retains value over a lifespan. Yet, the results are inconsistent with a true-evidence-based culture and lead to the unnecessary incapacitation of many offenders who would otherwise have simply desisted as they aged."

Footnotes:

115 *Office of Prob. & Pretrial Servs., Federal Post Conviction Risk Assessment: Scoring Guide* §§ 1.1-1.7 (2011) (scoring on juvenile arrests; prior misdemeanor and felony arrests; varied offending pattern; supervised release violation; institutional misconduct; age at first admission).

116 *Minnesota Sex Offender Screening Tool – 3.1 (MnSOST-3.1) Coding Rules*, Minn. Dept. of Corrs. 24 (2012), http://www.doc.state.mn.us/pages/files/large-files/Publications/MnSOST3-1DOCReport.pdf (scoring (1) predatory offense sentence, (2) felony sentence, (3) stalking, (4) unsupervised release, (5) male victim, (6) crime in a public place).

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

134 See *Francis T. Cullen et al.*, "Prisons Do Not Reduce Recidivism: The High Cost of Ignoring Science," 91 *Prison J.* 48S, 48S (Supp. 2011) (reviewing studies, concluding "the use of custodial sanctions may have the unanticipated consequence of making society less safe"); *Daniel P Mears et al.*, "Gender Differences in the Effect of Prison on Recidivism," 40 *J. Crim. Just.* 370, 375 (2010) (finding imprisonment produced modest criminogenic effect); *Robert DeFina & Lance Hannon*, "For

(Continued on page 17)

Incapacitation, There Is No Time Like the Present: The Lagged Effects of Prisoner Reentry on Property and Violent Crime Rates," 39 *Soc. Science Res.* 1004, 1013 (2010) (concluding "any crime-reducing benefits of increased incarceration are completely wiped out by the crime-promoting effects associated with the increasing prevalence of ex-inmates").

135 *Franklin E. Zimring, The Great American Crime Decline* 51-52 (2007); *Anne Morrison Piehl & Bert Useem*, "Prisons," in *Crime and Public Policy* 532, 542 (James Q. Wilson & Joan Petersilia eds., 2011).

136 *Bernard E. Harcourt, Against Prediction: Profiling, Policing, and Punishing in an Actuarial Age* (2007) at 164.

137 *Id.* At 30.

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

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

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

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

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

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

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

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

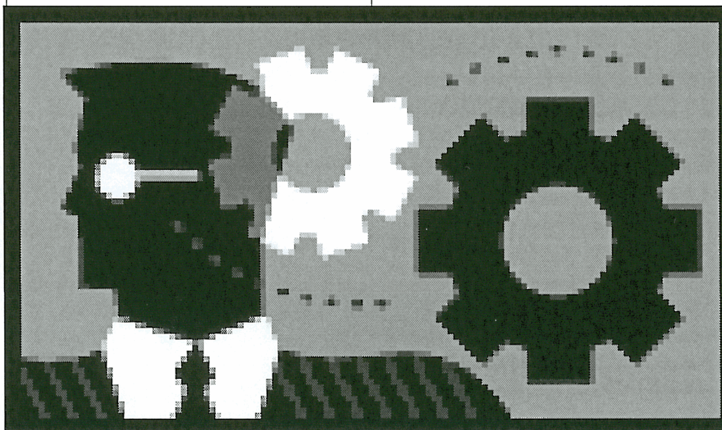
148 *United States v. Zapete-Garcia*, 447 F.3d 57, 60 (1st Cir. 2006)

149 *O'Neill, supra* note 147.

198 *Kelly Hannah-Moffat*, "Actuarial Sentencing: An 'Unsettled' Proposition," 30 *Just. Q.* 270 (2013), at 277; *Michael Marcus*, "MPC – The Root of the Problem: Just Deserts and Risk Assessment," 61 *Fla. L. Rev.* 751, 754 (2009)

212 *Kathleen Auerhahn*, "Conceptual and Methodological Issues in the Prediction of Dangerous Behavior," 5 *Criminology & Pub. Pol'y* 771, 772 (2006).

213 *Leam M. Craig & Anthony Beech*, "Best Practice in Conducting Actuarial Risk Assessments with Adult Sexual Offenders," 15 *J. Sexual Aggression* 193, 203 (2009).



214 *Hannah-Moffat, supra* note 198, at 277.

215 *J.C. Olesen*, "Risk in Sentencing: Constitutionally Suspect Variables and Evidence-Based Sentencing," 64 *S.M.U. L. Rev.* 1329 (2011), at 1390.

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

218 *Id.* at 666.

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

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

231 *Id.*

232 *Id.* at 600.

236 *Joanna Amirault & Patrick Lussier*, "Population Heterogeneity, State Dependence and Sexual Offender Recidivism: The Aging process and the Lost Predictive Impact of Prior Criminal Charges over Time," 39 *J. Crim. Just.*, 344, 351 (2011)

237 *Megan C. Kurlychek et al.*, "Enduring Risk? Old Criminal Records and Predictions of Future Criminal Involvement," 53 *Crime & Delinq.* 64, 80 (2007) ("The problem is that a recent criminal record seems to be far more predictive of short-term future behavior than older criminal records from many years ago."); *Rappaport, supra* note 230, at 592 ("[T]he utilitarian has a ready and plausible explanation – the predictive effect of a prior record likely diminishes with age. Common sense suggests that a recent prior record is more likely to indicate future risk than a crime committed twenty years ago, followed by a long period of apparently law-abiding conduct.").

238 *Megan C. Kurlychek et al.*, "Long-Term Crime Desistance and Recidivism Patterns – Evidence from the Essex County Convicted Felon Study," 50 *Criminology* 71, 71 (2012) (finding evidence of a trajectory of desistance in a sample of felons in a northeastern county); *Alfred Blumstein & Kiminori Nakamura*, "Redemption in the Presence of Widespread Criminal Background Checks," 47 *Criminology* 327, 350 (2009) ("Younger starting age generally points to a longer time necessary to become comparable with a person of the same age from the general population."), at 327 (concluding from recidivism study of offenders first arrested in New York in 1980 for robbery, burglary, or aggravated assault that "[r]ecidivism probability declines with time 'clean', so some point in time is reached when a person with a criminal record, who remained free of further contact with the criminal justice system, is of no greater risk than a counterpart of the same age – an indication of redemption from the mark of crime").

239 *R. Karl Hanson et al.*, "High-Risk Sex Offenders May Not Be High Risk Forever," 29 *J. Interpersonal Violence* 2792, 2792 (2014) (finding "sexual offenders' risk of serious and persistent sexual crime decreased the longer they had been sex offense-free in the community" and "[w]hereas the 5-year sexual recidivism rate for high-risk sex offenders was 22% from the time of release, this rate decreased to 4.2% for the offenders in the same static risk category who remained offense-free in the community for 10 years").

240 *Blumstein & Nakamura, supra* note 238 at 349 ("The risk of recidivism declines with time clean, so we know that a person who has stayed clean for an extended period of time must be of low risk.").

241 [R]isk of recidivism for a cohort of offenders returning to the community peaks fairly quickly and then diminishes considerably with the passage of time. Based on this consistently observed empirical pattern of criminal recidivism, we suggest that there may be a point at which the risk of a new criminal event among a population with a prior record becomes similar to the risk of a criminal event among individuals who have not offended in the past. *Kurlychek et al., supra* note 238, at 70.

245 For more information about the theories and empirical studies concerning criminal career trajectories and desistance, see generally *John F. MacLeod et al., Explaining Criminal Careers: Implications for Justice Policy* (2012); *Keith Soothill et al., Understanding Criminal Careers* (2009).

246 *Kurlychek et al., supra* note 238, at 72.

247 *Kurlychek et al., supra* note 238, at 73.

248 *Matthew R. Durose et al., Recidivism of Prisoners Released in 30 States, Dept. of Just., Bur. Of Justice Statistics* 7 fig. 2 (2014), http://www.bjs.gov/content/pub/pdf/rprts05p0510.pdf

249 *Kurlychek et al., supra* note 238, at 75.

250 *Kurlychek et al., supra* note 238, at 80.

251 *Julian V. Roberts & Orhun H. Yalincak*, "Revisiting Prior Record Enhancement Provisions in State Sentencing Guidelines," 26 *Fed Sent'g Report* 177 (2014) at 184 (citing Lila Kazemian, "Assessing the Impact of a Recidivist Sentencing Premium on Crime and Recidivism Rates," in *Previous Convictions at Sentencing* 227 (*Julian V. Roberts & Andrew von Hirsch* eds., 2010)) **(indicating research has "demonstrated that offenders with seven crime-free years are no more likely to reoffend than people with no prior convictions. In other words, [prior history] enhancements beyond the seven-year-mark carry no crime preventative benefits**, although they may well exacerbate disproportionate minority offender impacts.

252 *Dawinder S. Sidhu*, "Moneyball Sentencing," 56 *Boston Coll. L. Rev.* 671 (2015)

253 *Gary Sweeten et al.*, "Age and the Explanation of Crime, Revisited," 42 *J. Youth & Adolescence* 921, 921 (2013).

254 *Michael Tonry*, "Sentencing in America: 1975-2025," 42 *Crime & Just.* 141 (2013), at 182.

255 *Kurlychek et al., supra* note 238, at 69.

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256 "Measuring Recidivism: The Criminal History Computation of the Federal Sentencing Guidelines," _U.S. Sentencing Comm'n_ 16 (2004)

258 _Federal Pretrial, supra_ note 141, at 10 (variable for age at interview); _Office of Prob. & Pretrial Servs., Federal Post Conviction Risk Assessment: Scoring Guide_ § 1.7 (2011) (containing a category for young age at onset of current supervision); _Andrew Harris et al._, "STATIC-99 Coding Rules: Revised – 2003," _STATIC-99_ at 23 (2003) (increased risk rating for young age at interview).

259 But see _Quinsey et al., supra_ note 140, at 239 (containing factor to deduct points as the offender's age at index offense increases with increments of: (1) age 28-33, (2) age 34-38, (3) over age 38; _Susan Turner et al._, "Development of the California Static Risk Assessment (CSRA): Recidivism Risk Prediction in the California Department of Corrections and Rehabilitation," _UC Irvine Ctr. For Evidence-Based Corrs_ 5 tbl. 3 (2013) (indicating decreasing number of risk points in a linear fashion).

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Fear the Bogeyman: Legal Overreaction to Perceived Danger Threatens Families and Children

Quotes & Notes from: _David Pimentel_, "Fearing the Bogeyman: How the Legal System's Overreaction to Perceived Danger Threatens Families and Children," 42 _Pepperdine Law Review_ 235 (February 2015)

pp.248-49: "B. The Child Protection Priority and the New Trend Toward Intensive Parenting

"A primary theme of Intensive Parenting is an obsession with safety, especially with the risk of stranger abduction. Parents operating under these new norms no longer allow their children to lay in parks or the neighborhood unsupervised.[74] What might have been a typical pickup baseball (or stickball) game in the neighborhood sandlot has now given way to organized soccer leagues. Children are shuttled to and from practices and games in minivans, are under constant adult (and usually parental) direction and control, and are provided with adult-arranged treats after each game.[75] In the name of safety, children who in previous generations would have walked or bicycled to school are now routinely driven there, primarily so they can be under constant adult observation on the way.[76]

pp.249-51: "1. Assumptions Underlying Overprotective Parenting

"The cultural shift that brings this highly protective approach to parenting is documented –and lamented -- in Bernstein and Triger's important article _Over-Parenting_.[77] The authors are unsparing, noting that the obsession with protecting children is often unhealthy, even for the child whose safety is being safeguarded.[78]

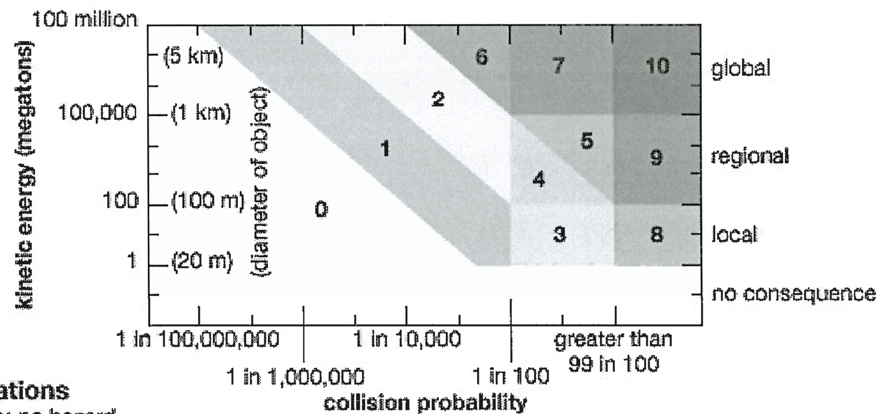
"The new emphasis on child safety apparently comes at least in part from the perception that the world is more dangerous for children than it used to be:

'Some argue that ...the world has become – or appears to be – a more dangerous place. Consequently, parents are 'simply' responding to that new danger – or to a perception of danger. Many point to a new 'culture of fear' and especially to widely publicized stories of kidnaping, Internet pornography, and sexual predators.'[79]

"Surveys show that people in the United States believe their communities are more dangerous now than in the past,[80] despite overwhelming evidence that children, in the United States at least, are far safer today than they have ever been.[81] Moreover, the things parents fear, and consequently take precautions against, are not the primary threats to their children.[82] Overlooking the risk of car accidents, a far more serious risk to children,[83] parents are motivated by the risk of stranger abduction. They forbid their children to roam freely in neighborhoods, walk to school, or play unsupervised in parks or even in their own front yards for fear that they will be abducted.[84]

At the same time, parents today have far lower expectations of their children's competence to care for themselves, exercise judgment, or bear responsibility.[85] In previous generations, it was typical to expect preteens to milk cows, manage newspaper routes, or babysit infants.[86] Today, however, it is virtually unheard of to leave small children in the care of a preteen or even a young teenager.[87] 'This development is all the more marked considering that mobile phones have created a virtually instant line of communi-

Torino Impact Hazard Scale



Classifications

White zone: no hazard

0 The likelihood of a collision is zero or is so low as to be effectively zero. Also applies to small objects such as meteors and bodies that burn up in the atmosphere as well as infrequent meteorite falls that rarely cause damage.

Green zone: normal

1 A routine discovery in which a pass near Earth is predicted but poses no unusual level of danger. Current calculations show the chance of collision is extremely unlikely with no cause for public attention or public concern. New telescopic observations very likely will lead to reassignment to Level 0.

Yellow zone: attention by astronomers

2 A discovery, which may become routine with expanded searches, of an object making a somewhat close but not highly unusual pass near Earth. While meriting attention by astronomers, there is no cause for public attention or public concern, as an actual collision is very unlikely. New telescopic observations very likely will lead to reassignment to Level 0.

3 A close encounter, meriting attention by astronomers. Current calculations give a 1% or greater chance of collision capable of localized destruction. Most likely, new telescopic observations will lead to reassignment to Level 0. Attention by the public and by public officials is merited if the encounter is less than a decade away.

4 A close encounter, meriting attention by astronomers. Current calculations give a 1% or greater chance of collision capable of regional devastation. Most likely, new telescopic observations will lead to reassignment to Level 0. Attention by the public and by public officials is merited if the encounter is less than a decade away.

Orange zone: threatening

5 A close encounter posing a serious but still uncertain threat of regional devastation. Critical attention by astronomers is needed to determine conclusively whether a collision will occur. If the encounter is less than a decade away, governmental contingency planning may be warranted.

6 A close encounter by a large object posing a serious but still uncertain threat of a global catastrophe. Critical attention by astronomers is needed to determine conclusively whether a collision will occur. If the encounter is less than three decades away, governmental contingency planning may be warranted.

7 A very close encounter by a large object that, if occurring this (i.e., 21st) century, poses an unprecedented but still uncertain threat of a global catastrophe. For such a threat in this century, international contingency planning is warranted, especially to determine urgently and conclusively whether a collision will occur.

Red zone: certain collisions

8 A collision is certain, capable of causing localized destruction for an impact over land or possibly a tsunami if close offshore. Such events occur on average between once per 50 years and once per several thousand years.

9 A collision is certain, capable of causing unprecedented regional devastation for a land impact or the threat of a major tsunami for an ocean impact. Such events occur on average between once per 10,000 years and once per 100,000 years.

10 A collision is certain, capable of causing global climatic catastrophe that may threaten the future of civilization as we know it, whether impacting land or ocean. Such events occur on average once per 100,000 years or less often.

Haven't you got more likely things to worry about?
— Like, say, Apophys?

(Continued on page 19)

(Continued from page 18)

cation between the sitter and the parents, something unheard of in earlier eras, when younger sitters were considered acceptable.'[88]

"Parents take extraordinary precautions in any case, driven in large part by fears: many of them based not on reality, but on imagined and exaggerated threats to their children.[89] There are a variety of reasons that parents may overestimate the risks to their children, and psychologists have explored these various mental biases.[90]"

pp. 251-53: "Most compelling perhaps is the impact of the media, which has found that playing to viewers' fears can greatly increase viewership:

'The need for 'good numbers'—that is, high viewership – influences every channel, newspaper, and advertiser to aggressively compete for advertising and viewership within the ever-fragmanted media marketplace. This can result in a willingness to show more 'low-brow' images, and to 'hawk' violence with redoubled vigor ...In television and print news, far from merely reporting objectively on crime, media companies are now major stakeholders that profit from our carefully cultivated *fear of crime*.'[91]

"The principle applies not just to the crime threat, of course, but to any threat to one's children. The teaser 'could your child be next?' virtually guarantees that a parent will tune in, read on, or click through.[92] As a result, the media reports are crafted to overstate the risks to children and, at the same time, shape both public attitudes and parental response.[93]

"One reason for this response is explained by psychologists as the 'availability heuristic': the idea that people assess the likelihood of particular events occurring according to how easily they can recall such events occurring in the past.[94] Horrific stories about harm to children, including stranger abductions and sexual abuse, however rare those instances may be, are burned into people's memories – in part because the stories themselves are so horrible and in part because of the media saturation such stories generate – are therefore easily recalled.[95] Concluding that such events are common, loving parents naturally worry a lot about them[96] and take extraordinary precautions to protect their children from them. The reality, that the prevalence and probability of such harms are tiny, even negligible, and certainly unworthy of the typical investment in worry and precaution,[97] remain widely unacknowledged and is actively doubted even when pointed out.[98]"

The Children's Crusade.. Still following the long line of inapt responses....

Would you know him if you saw him? Would you know his techniques of fear-mongering hate speech if you heard them?

Footnotes:

74 The term "unsupervised" is itself problematic because some would apply the term to any child who is not under continuous observation and control. "Supervisors" in an employment context, however, assert reasonable checks and monitoring without watching their charges at all times. Similarly, it should be possible to responsibly "supervise" one's children – particularly as they get older – by sending them outside to play in their own yard. The fact that the parent is not physically outside, in the presence of the children and watching them play, does not mean they are "unsupervised"; the parent knows where they are and can check on them at regular intervals. The children also know that a parent is nearby and can be alerted of any problem.

75 While adults will arrange for treats after the game, it is unlikely that the treats will be homemade. Safety concerns – presumably the fear that homemade treats may be tainted in some way – again come into play, leading patents to opt for pre-packaged snacks. See, e.g., *Jessica Fisher*, "What to Take for Team Snack Day," *Life as Mom* (April 23, 2012), http://lifeasmom.com/2012/04/what-to-take-for-team-snack-day.html.

76 *Jane E. Brody*, "Turning the Ride to School Into a Walk," *N.Y. Times*, Sept. 11, 2007, at F7, available at www.nytimes.com/2007/09/11/health/11brod.html ("Forty years ago, half of all students walked or bicycled to school. Today, fewer than 15% travel on their own steam. One-quarter take buses, and about 60% are transported in private automobiles, usually driven by a parent or, sometimes, a teenager.").

77 *Bernstein & Triger*, *supra* note 7, at 1233.

Safety and monitoring are paramount. Parents can use baby monitors that alert them if the baby cries or, more importantly, if the baby ceases to breathe. Some parents who hire a nanny equip their home with "Nanny Cams." These cameras secretly monitor the nanny's behavior and alert the parents in case of any misconduct. In addition, unlike previous generations, parents assure that their children play in rubber-cushioned playgrounds, use sanitizing gel, sit in car seats, and wear helmets and knee pads while riding their bicycles.

Id. Different cultures naturally take different approaches to child safety and the levels which parents are responsible for their children. See *Kate Darnton*, Vigilance or Obsession?, *The Boston Globe*, Sept. 1, 2011, www.boston.com/bostonglobe/editorial_opinion/oped/articles/2011/09/01/vigilance_or_obsession_child_safety_across_the_cultural_divide/.

Life can be stressful as a parent, no matter where you live. Compared to a mother in Somalia, desperate enough for food and water to keep her child alive, my Indian-born anxieties about pollution and power outages seem small, and my Americans ones about playground safety and BPA-free bottles positively superficial.

78 *Bernstein & Triger*, *supra* note 7, at 1226.

79 *Margaret K. Nelson*, *Parenting Out of Control: Anxious Parents in Uncertain Times* 17 (2010).

80 *Warwick Cairns*, *How to Live Dangerously: The Hazards of Helmets, the Benefits of Bacteria, and the Risks of Living Too Safe* 6 (2008).

81 *Daniel Gardner*, *The Science of Fear: Why We Fear the Things We Shouldn't – and Put Ourselves in Greater Danger* 290-304 (2008) (describing how the world is safer now than it has ever been before); *Bryan Caplan*, *Selfish Reasons*

(Continued on page 20)

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to Have More Kids: Why Being a Great Parent is Less Work and More Fun Than You Think 96 (2011) ("Conditions today aren't merely better [than they were in the 1950s]. They improved so much that government statisticians changed their denominator [for youth mortality] from deaths per 1,000 to deaths per 100,000."); *Caplan* (showing tables demonstrating that in every age group – infants to age 24 – children are safer now than they were in the 1950s).

82 Christie Barnes contrasts the top ten concerns of parents (kidnapping, snipers, terrorism, and stranger-danger head the list) with "the real causes of death and injury for most children," which place car accidents as number one on the list and disease as second. *Christie Barnes, The Paranoid Parents Guide: Worry Less, Parent Better, and Raise a Resilient Child* 38-39 (2010).

83 *Id.*

84 *Barnes, supra*, note 82, at 398-39.

85 *Skenazy, supra* note 7, at 68-76. "Stay-at-home moms used to just tell their kids to go out and play. Now, moms and dads tag along with their kids as supervisors, or servants." *Caplan, supra* note 81, at 3.

86 See generally *Hara Estroff Marano*, "A Nation of Wimps," 37 *Psychology Today*, Nov. 1, 2004, at 64-68, available at www.psychologytoday.com/articles/200411/nation-wimps (arguing that as the nature of childhood moved away from children working, parents began to assume that kids could not handle difficult situations; parents feel the need to save their child from any difficulty, when in reality the child could cope with the situation if the parent had properly equipped her for it). "Children are a lot more resilient and robust than we give them credit for.... [A] few knocks along the way are unlikely to scar anyone for life; they might even make them stronger." *Carl Honore, Under Pressure: Rescuing Our Children from the Culture of Hyper-Parenting* 248 (2009).

87 And those who dare do it risk the opprobrium of the community. See *Bridget Kevane*, "Guilty as Charged," *Brain, Child Magazine*, http://web.archive.org/web/20120630132923/http://brainchildmag.com/essays/summer2009_kevane.asp

88 *David Pimentel*, "Notable & Quotable," *Wall St. J.*, March 15, 2012, http://online.wsj.com/article/SB10001424052702304692804577281842896031.

89 *Gardner, supra* note 81, at 16.

90 *Gardner, supra* note 81, at 16.

91 *Rachel Lyon*, "Media, Race, Crime, and Punishment: Re-Framing Stereotypes in Crime and Human Rights Issues," 58 *DePaul L. Rev.* 741, 744 (2009)

92 *David Pimentel*, "Criminal Child Neglect and the 'Free Range Kid': Is Overprotective Parenting the New Standard of Care?", 2012 *Utah L. Rev.* 947 (2012) (discussing fear of unwarranted CPS intervention), at 964.

93 *Gardner, supra* note 81, at 158-59 (explaining that the way people estimate risk is directly related to how images, such as those seen on the news, make them feel). See also generally: *Nassim Nicholas Taleb, The Black Swan: The Impact of the Highly Improbable* (2d ed. 2010).

94 *Gardner, supra* note 81, at 46-48

95 *Daniel Schachter, The Seven Sins of Memory: How the Mind Forgets and Remembers* 178-79 (2001).

96 One recent poll found that 50% of polled parents stated that they worried a lot about someone kidnapping their child. *Kim John Payne, Simplicity Parenting* 179 (22009).

97 *Caplan, supra* note 81, at 93-107.

98 The author, after presenting the data on child abductions at an academic conference in Cleveland, OH in 2012, was directly confronted by an otherwise brilliant scholar who insisted that he would *never* allow his daughter to walk to school regardless of what the data showed.

* * * * * * *

Can't we just find an honest man for a change, and make Diogenes happy?

Reply to MSOP Annual Performance Report 2015 Revisited

Editor's Introductory Note:

In May 2016, the RAFC produced a Reply Report for submission to Minnesota state legislators replying to an "Annual Performance Report" for 2015 prepared by MSOP. Over the two years since that Reply was generated, a number of facts have changed somewhat in MSOP. However, in the main, the overall picture of a commitment system failing to serve its claimed goal of 'treatment to release' remains essentially the same. It is a fair summation to state that developments in those two intervening years have effectively merely been a case of applying lipstick to a pig.

In the interest of setting forth the true situation, which shows the real application of that old expression to MSOP, the following excerpts from that Reply are offered, with updated observations and commentary where apt. Because of the length and factual detail of that Reply, it will take two additional issues beyond the present one to finish this revisiting of the claims made in that 2015 MSOP report, with an eye to how things are now.

We start with the caution that if you expect hopeful optimism here, the facts will disappoint you. The facts are far more consistent with MSOP merely casting a false appearance of reform toward vast increases of releases than they are toward any such reality.

Further, there is no indication that MSOP intends to end provisional discharge (with its intensively close surveillance and highly demanding supervision) for any releasee after any period of successful compliance following release from confinement, short of the death of that releasee.

Indeed, there appear to continue to be large scale plans to effectively confine many on provisional discharge in various locked facilities, from which any temporary departure depends on case-by-case permission by staff in charge. Additionally, those on provisional discharge are subject to "placement" in isolated areas of the state having no realistic employment opportunities. This also appears to be a current plan of MSOP.

Without further ado, we begin with selected excerpts, with running current commentary:

...First, an especially important clarification: We are not "prisoners." In every legal sense, we are not here for punishment -- or as punishment -- for any past crimes, or for anyone's hysterical imaginings, speculations, or collective attributions of supposed past unreported crimes.

Because we are not prisoners, we are entitled – just the same as any other citizen of this state and our country -- to dignity, respect, privacy, unrestrained communication and access to public media and information, due process, equal protection of law, and petition for redress of grievances, as well as all other constitutional and human rights accorded to anyone else.

It is also inaccurate and nothing more than an incendiary, propagandistic act of labeling to call us "sex offenders" or to apply to us any other, more inflammatory terms based

(Continued from page 20)

on conceptualization of such past crimes, real or projected. The literature uses that term so uniformly that we are compelled in this report to echo it. However, we decline to apply it to ourselves because of its inaccuracy to who we are now and because we rightly refuse to buy into the condemnation unfairly heaped upon us now.

The image of serial commission of sex crimes upon numerous stranger victims applies to very few in MSOP. Most committed to MSOP engaged in only one, two, or three episodes of sex misconduct, usually with those either related to them or who knew them well. Almost everyone in MSOP regrets those incidents and wishes that time travel were possible, so as to be able to return to the past and refrain from such misconduct on those occasions. Of course, that is simply not possible.

However, any sex crime or crimes committed by those present within MSOP occurred no more recently than several years ago – most well more than a decade ago, and some two decades ago or more distant than that in the past. Some confined in MSOP do not have a past sex crime at all. Others committed their only sex crime as a juvenile. Therefore, to label someone in MSOP as a "sex offender," implying a present intent to commit sex crimes, is simply incorrect.

Worse, it is grievously unfair to each of us to apply such collective labels to us as manipulation of the emotions of the constituency. To do so simply again stirs the public tendency to extreme fears and hatreds of those so mislabeled.

We ask all legislators, other politicians, and the media to stop this exploitation of our plight. It is the human thing to do, and it is absolutely necessary if Minnesota is ever to solve the problem that MSOP presents to state governance. Government should not be reduced to a never-ending hate-fest of disguised retribution, deterrence, and preventive detention beyond criminal sentencing, all disguised as claimed-but-unreal-treatment-toward-release, but in reality as nothing more than government-as-a-preventative-and-punitive-state. There are far more effective ways to spend the tax dollars of the State than to reach such a miserable, ignoble end. More importantly, the vast majority of sex crimes are committed by those never previously convicted of any sex crime. Therefore, such an official aim of further post-imprisonment (disguised) incarceration could never eliminate or seriously staunch the rate of sex crimes in the state.

At various times, MSOP has referred to those within its confinement facilities as "patients," "residents," and "clients." None of these terms are accurate in any meaningful sense.

With only rare exception, none of us is "mentally ill"; therefore we are not "patients," any more than MSOP's facilities can be called "hospitals." (Most assuredly, they are no such thing, they are detention facilities, simply with some so-called 'treatment' slathered on top for appearances sake.)

We are not "residents – a term that inherently implies a matter of choice. We are detained by order of the State of Minnesota. Were it not for such involuntary detention, almost none of us would remain here.

Lastly, to call us clients is as laughable as to suggest that concentration camp inmates of World War II were "guests" of the SS.

MSOP simply must stop manipulating the language to cast a more acceptable, but utterly false public image of its role. MSOP is our captor, and we are its detainees. Accordingly, we use the term "detainees" throughout this document instead where needed for clarity and uniformity of reference. At other points, we refer to ourselves as what we are: "individuals" and "people."

Part I: <u>Numerous Inaccurate and Misleading Statements Render the MSOP Annual Performance Report 2015 an Incorrect Picture of MSOP Overall.</u>

<u>*A. CPS is broken, in that it fails to serve MSOP detainees as a means of exit from confinement.*</u>

The Report states that the Community Preparation Services ("CPS") program within MSOP-St. Peter ("SP") has expanded from 27 detainees in 2014 to 51 detainees currently, and that an additional 30-bed expansion project is currently in the bonding process. The implication is that this increase in CPS capacity portends a massive increase in releases to provisional discharge status in the near future. However, no evidence actually supports that opinion. In fact, as will be discussed in Part 2, all real indicators strongly suggest that no significant numbers of releases – even just to the extraordinarily restrictive "provisional discharge" status – can reasonably be expected anytime in the foreseeable future. Instead, it appears that CPS will serve as an exit-less, politically-mandated repository of those who have been provided as much treatment as MSOP has to offer."

2018 Comment: By all standards, CPS continues to fail – if one accepts MSOP's claim that it should serve as an exit device for MSOP detainees.

Further below, we will touch on the extremely deceptive practice of 'stuffing' CPS with persons in Phase 2 (who, by MSOP definition, are not remotely ready to take part in CPS and thereby be granted provisional discharge).

We will also compare the paltry number of actual releases (as opposed to the far higher number of those in continued CPS detention who have been 'designated' as on provisional discharge, but who have not actually been released, allegedly due to a lack of any available "placement").

These facts will reveal the ruse that CPS-as-release amounts to.

We will also consider the ominous records of those actually released, as MSOP implications out of both sides of its mouth: to its detainees as implicitly claiming that anyone can be released, regardless of a terrible past, as long as one graduates treatment (although such 'graduation', if ever conferred, takes a current average of 17-20 years).

Yet, by selection of only those with such bad records, MSOP simultaneously is playing dice on the apparent hope that such extremely doubtful releases will eventually reoffend, thereby providing claimed evidence that committed sex offenders are simply too dangerous to release –ever. And thereupon, releases will end altogether, and will never resume, more than at a trickle, and then only when ordered by exceptional judges infrequently.

All available evidence supports the competing notion that MSOP detainees are political fodder to such mythical notions of 'inherent great danger', albeit fictional, where all such political posturing is designed only to perpetuate MSOP as a bureaucracy – one requiring its current and future detainees to continue to be detained in order to thrive as such a state agency, with careers and fortunes made off our permanently incarcerated backs.

Most MSOP detainees committed their first sex crime at young ages and received a prison sentence for it. Most MSOP detainees committed a second sex crime after prison release and endured a very long 'repeater' prison sentence for that crime before their commitment. Typically, commitment to MSOP occurred upon their prison release, thwarting that release.

Therefore, the reality is that relatively few MSOP detainees were ever married, and fewer still had marriages that produced any children. Moreover, according to the Report itself, at p. 17, the average age of all MSOP detainees is 48 years of age. This includes those who have only recently arrived and those otherwise not yet in treatment at all, plus numerous detainees in Phase I of treatment.

Further, except for MSOP detainees with unusually devoted wives and exceptionally close children (by then, adults), the phenomenon of "family support" for MSOP detainees who are in Phase 3 approaches a rarity. With these facts in mind, we discuss these

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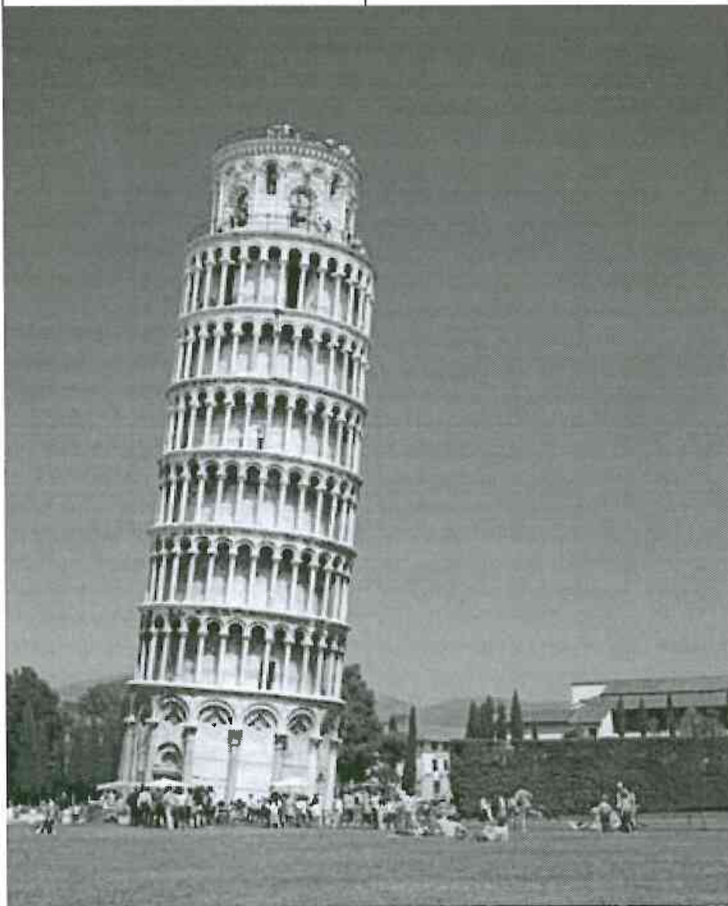

Bad by Design

(Continued from page 21)

two failings of MSOP treatment and release philosophy:

- MSOP embraces the myth that only an incest offender can be released from confinement – even merely onto the extraordinarily restrictive status of "provisional discharge" – with a certainty of public safety, and then only if the releasee is in a marital relationship and has additional "support" (for which read monitoring, surveillance, and reporting to authorities) by adult relatives; and
- MSOP seeks to avoid release of any of its detainees who do not meet this paradigm of such relationships and support and uses its own declaration of a purported fundamental importance of such relationships and support as an excuse not to endorse release of every detainee who does not have such relationship and such additional familial "support." This includes refusing to endorse the release of even elderly MSOP detainees, as to whom there is simply no statistical likelihood of sexual re-offense at all.

MSOP believes – or claims to believe – that all who have been committed to it currently are highly compulsive sex criminals who would certainly commit another sex crime if released and if able to find an opportunity to do so. This is simply tacitly clinging to the old false myth that sex offenders are "100% recidivists." In truth, sex offenders tie with murderers for the very lowest rate of recidivism.

Currently, that average recidivism rate for the first five years after release is a mere 3% (all offender ages at release combined). Recent research from the parallel commitment facility in Florida has shown that the recidivism rate by sex offenders released from commitment approximates this same 3% rate. This reveals the falsity of claims that those meeting statutory commitment criteria (roughly the same between Florida and Minnesota) are supposedly exceptionally likely to commit another sex crime.

Separate research has also established that sex offenders at age 60 (the nearest age cohort to the average age at projected MSOP release on average, if MSOP were to engage in more than trivial numbers of releases) is only about one-sixth of that overall recidivism rate. *R. Karl Hanson*, The Validity of Static-99 with Older Sexual Offenders, 2005-01 (*Public Safety and Emergency Preparedness Canada*), at p. 10; *R.A. Prentky, E.Janus, H. Barbaree, B.K. Schwartz & M.P. Kafka*, "Sexually Violent Predators in the Courtroom: Science on Trial," 12 *Psychology, Public Policy & Law* 357, 377-78 (2006), *Richard Wollert*, "Low Base-Rates Limit Expert Certainty When Current Actuarials Are Used....," 12 *Psychology, Public Policy and Law* 56, at 61 et seq (2006); *Daniel Montaldi*, "A Study Of The Efficacy Of The Sexually Violent Predator Act In Florida," 41 *Wm. Mitchell L. Rev.* 780, 845 (2015).

Applied to that modern, general 3% rate, this means that a 60-year-old MSOP detainee has a probability of sexual re-offense in that same first five-year period of only 0.5% (one-half of one percent, or: 1 out of 200). Even those with extensive criminal records of sex crimes in their past (and even within the most recent decade) are so subject to this natural (indeed biologically inevitable) desistance pattern that the highest adjusted estimate for such former serial recidivists remains no higher than about 2.5% at age 60. By time sex offenders reach age 70, there is no detectable recidivism at all (i.e., zero percent).

[2018 note: A large body of accumulated research has now universally confirmed that, at all ages, if someone released from prison does not reoffend within the first seven years after release, he almost surely never will. This applies to sex offenders as well as those with different kinds of crimes. This means that attempts by Minnesota to magnify recidivism probability by extending periods for one or more decades are utterly fallacious and a scientific fraud to attempt to justify permanent detention.]

MSOP and other sex offender commitment programs elsewhere insist that those committed by reason of sex crimes in the past are somehow special, such that these percentages do not apply to them. However, the Florida research unequivocally demonstrates that these figures do indeed apply to committed sex offenders. Indeed, the Florida research could not find a single recidivistic sex crime by any commitment releasee at or above age 60.

Therefore, in sum, MSOP is simply in error in claiming that only a family support structure can render released sex offenders safe to the public after release from commitment. The related MSOP claim that such a support structure is indispensable to successful treatment is simply an attempt to excuse not releasing anyone lacking such a support structure – even senior citizen releases. In reality, this demand for a nonexistent support structure as the price of exit (even just to extremely monitored and surveilled "provisional discharge") is simply a subterfuge for MSOP obedience to political direction not to release any detainees for whom any excuse can be trumped up.

8. As shown on page 17 of the Report, the fact that only 90 (12.3%) of the 726 MSOP detainees do not possess a high school diploma or a GED means that MSOP's exclusive educational efforts at achieving such GEDs effectively ignore the educational needs of the 87.7% of MSOP detainees by failing to provide them with college-level educational and vocational training that can equip them for jobs with a reasonable income expectation in the community upon release. This choice to ignore those needs bespeaks the true, tacit MSOP intent to never release any substantial portion of its detainee population. [This remains as true in 2018 as previously.]

A train wreck by any other name is still a train wreck.

The so-called "therapeutic community meetings" are simply meetings to discuss matters of living unit concern. The claim by MSOP clinical staff that polite and cooperative conduct of these meetings is somehow "therapeutic" is patently ridiculous, in that such matters of social cooperation and etiquette have nothing to do with propensity to commit sex crimes. Bluntly, the world is full of abrasive, irritating people – who never commit a sex crime.

The "vocational" programming in MSOP simply refers to jobs held by detainees. These include cleaning crews, kitchen work, and work supporting the industry program in MSOP. All of these positions are simply jobs that would otherwise be performed by workers hired from the surrounding area in the vicinity of the respective facilities. Hence, the main function of holding these jobs out to MSOP detainees at a net wage of half the federally required minimum wage is to save MSOP a substantial amount on its costs of operation. [2018 note: Lately, we have discovered that MSOP has duped the U.S. Dept. of Labor to issue an exemption certificate from minimum wage payment to anyone MSOP will claim is disabled. You can expect that MSOP will use this as a claim that all or most of its detainees are disabled in some way, even though everyone given a job to date has been able to perform the duties of the job assigned without staff assistance.]

The rule structure in MSOP closely resembles that in force in Minnesota's high-security prisons. Conceptually, this is completely inconsistent with MSOP's insistence that it is purely "therapeutic" and not punitive.

Further, MSOP adheres to a "behavioral" form of treatment. At many points, that treatment modality includes extensive prohibitions and restrictions upon those subjected to such treatment, as well as demands for certain actions by detainees in treatment. Since satisfactory completion of treatment is a requirement for release, in perceived

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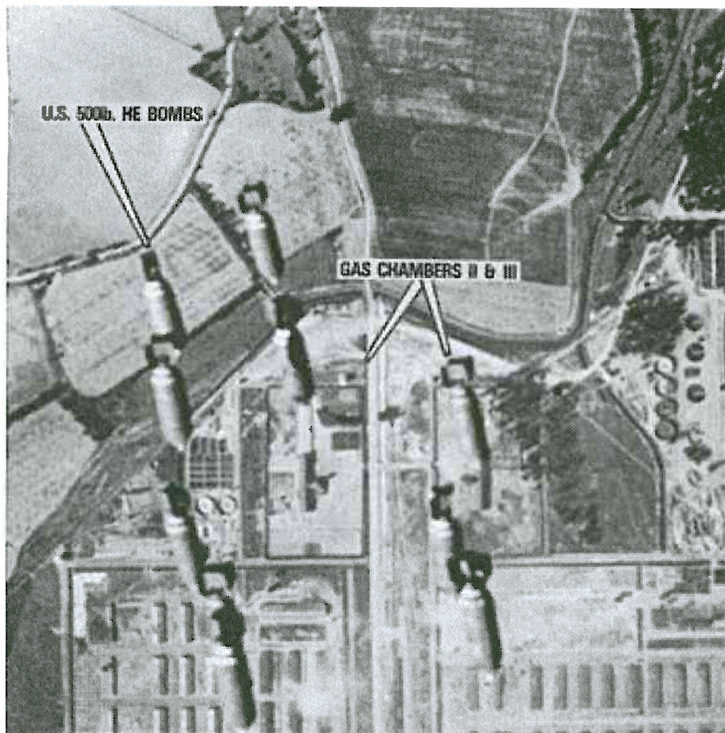

The Precision Bombing of Birkenau Concentration Camp

(Continued from page 22)

effect, compliance with such prohibitions, restrictions, and demands are seen as the equivalent of ransom demands, failing which compliance, release will be denied.

Given the extreme length of MSOP treatment in confinement and given the elaborate list of such dictates and prohibitions and their inherent conflict in many instances with human nature and barring conduct not prohibited outside of MSOP, chafing over such rules and staff actions appears to be frequent and seems to have grown more intense in recent times. An examination of the MSOP structure of such prohibitions, restrictions, and demands upon detainees would appear to be in order to determine which are absolutely essential, and which in contrast are simply needlessly punitive or excessive.

In the current era of ubiquitous and indispensable Internet usage and cell phone communication, the total ban on MSOP detainee use of these technologies and means of communication and information access is comparable to ancient imprisonment practices of barring visitors and mail to detainees. Comparatively, in the federal court system, even as to child pornography possessors, prohibitions on Internet access and cell phone usage have been struck down as an unconstitutional denial of freedom of communication and access to information. Particularly in light of the aforementioned record of good conduct by MSOP detainees in refraining from pornography usage and other forms of computing misconduct as well as prohibited cell phone possession, there is simply no rationale that justifies such an extreme, total ban on use of these technologies.

[2018 note: This absolute prohibition on all aspects of the modern communication means of the Internet continues, with the same lack of justification and the same spiteful aim to keep all MSOP detainees utterly in the dark as to all aspects of modern life. It must be added that this total ban extends into provisional discharge as well, making the 'house arrest aspect of provisional discharge appear all the more like being kept in some digital equivalent of a black hole.]

11. <u>Notions of "therapeutic culture" and of "therapeutic alliance" are pure official deceit when there is no prospect of treatment completion and release within any reasonable time.</u>

On page 4 of the *Site Visitors' Report* appended to and incorporated within the *MSOP Report*, MSOP complains of "a decrease in client engagement in treatment," including serious reductions in actual attendance by MSOP detainees in core groups and psychoeducational modules in which they are nominally enrolled. MSOP states that "[p]oor group attendance can undermine group cohesion and a positive therapeutic climate." MSOP blames "clients' reactions to the [*Karsjens*] lawsuit, and an increase in staff vacancies. This amounts to blaming the actions on the cart rather than the horse.

In reality, disengagement by MSOP detainees in treatment is entirely due to their realization at long last that release does not follow treatment after any reasonable period. Consider again the facts that: (a) The average period of treatment to declared "completion" is closer to 20 years. (b) There is no linear path in treatment; many treatment participants find themselves demoted to a lower phase or held back from advancement to a higher phase for trivial reasons or based on claims denied by the detainee. (c) Even those who ultimately complete such insanely interminable treatment are then relegated to a post-treatment program (CPS) with no reliable exit to release from confinement in any knowable, reasonably brief period, merely witnessing the rare, isolated few 'show releases' mentioned above, intended to fool judges, legislators, the media and the public – but fooling no one among MSOP detainees. This combination of deliberate design features ensures both a sense of hopelessness of release through treatment and an unquenchable resentment against those who, at every step, have barred the way and filled it with stumbling blocks.

[2018 note: This situation continues without any earnest remediation. In fact, the largest change has merely been imposition of penalties – notably loss of work hours – for failure to attend or even merely to 'satisfactorily' participate in treatment groups. This is aimed at casting an appearance of greater involvement by detainees in treatment, but in fact is based on nothing more than the desire for a paycheck for work, not for treatment advancement allegedly culminating in release – after 20 or more years, if ever.]

In all types of treatment other than sex offender 'treatment,' therapy only lasts for periods of six months or less. Indeed, it is widely recognized that if a goal cannot be achieved through a regimen of therapy over such a short term, it simply cannot be accomplished regardless of how much longer therapy is administered. Further, sex offender treatment elsewhere is almost universally concluded within three years at most. There simply is no excuse for the endless treatment term used by MSOP and filled with myriad repetitive Herculean tasks.

Worse, it is equally universally acknowledged that longer periods of attempted therapy very quickly begin to have deleterious effects upon the patient. Periods of therapy that have experimentally been lengthened to two or three years have been observed to have profoundly adverse effects, including a complete undoing of all aims initially thought mostly achieved, and indeed such reversals that patients in such overly long treatment often wind up worse than they were at the outset as to the specific cognitive/emotional/behavioral problem sought to be remedied or palliated through

(Continued on page 24)

MSOP Treatment Dummies

(Continued from page 23)

treatment in the first place.

Editorially, this lengthening to such multi-year periods in confinement environments appears to be solely for twofold goals: (1) to satisfy political masters who wish to impose the harshest, longest, and least endurable conditions of confinement and delayed release; and (2) an attempt to completely 're-create' each sex offender to be entirely someone else – a totally different persona – by the end of treatment – an utter impossibility. Such efforts result only in grievous harm to the psyche of all long-term MSOP treatment participants.

The first of these goals will only instill extreme frustration and rage in the hearts and minds of those subjected to such inhumane programs against the creators and political patrons of them.

The second goal is a fool's pursuit. There is no means to entirely eradicate one's persona and replace it with another persona, nor would doing so (effectively psychic murder), even if possible, be ethical. Attempts to achieve such impossible goals, repeated over extremely long periods, can only stir extreme resentments and ire on the part of involuntary treatment participants. In MSOP, by virtue of the parole requirement for treatment participation in MSOP, all MSOP detainees still on parole are, by definition, involuntary treatment participants under coercion.

The failure of the conditions-of-confinement aspect of the *Karsjens* lawsuit have apparently only signified to MSOP administration that it now possesses a green light to ramp up this cruel substitute for efficient and quickly concludable treatment toward reasonably quick release under a scientifically well-supported conclusion of acceptable level of unlikelihood of sexual re-offense.

13. The 'Tier System' will result in conditioning one's right to one's property and one's existing rights on pleasing clinical staff, and thereby will further result in loss to many MSOP detainees of both property and current rights, and will be applied by decisions by certain appointed 'lap-dog' detainees, who will act out of personal spite and a motivation to please their clinical-staff masters.

The *Site Visitors' Report*, at page 5, introduces a "Community Living Project" in MSOP. This is described as an "alternative to the current privilege and disciplinary systems." In fact, it is a nightmare on rails for MSOP detainees. [2018 note: This program remains alive and well, now known within MSOP as the "tier program."]

This explanation declares that "client privileges within the program would be based on behavior not treatment level." Although this program was claimed to ultimately replace the disciplinary BER system, in fact, BERs are now being written at a record pace and now for trivial noncompliance with the minutiae of the 1,000-policy system of governance in place in MSOP. Worse, under this new tier project MSOP detainees picked by Clinical staff will decide what property and privilege reductions would be applied to an detainee guilty of some minor rule infraction, pitting detainee against detainee in a system apparently designed to cause conflict and extreme resentment.

Currently, most matters concerning allowable property are uniform for participants in all treatment phases. The change as to property under the tier system is that an MSOP detainee's right to possess certain property that he already possesses will be curtailed if staff is displeased with his "behavior."

It is very difficult to believe that clinicians did not realize the strife between detainees this so-called "project" is likely to engender. Previously, disciplinary decisions were made by security staff. Now they will be effectively ruled upon by Clinical staff, who also will decide what property and privileges one receives and can keep, without clear standards, on a purely *ad hoc* basis, and with no due process.

14. "Bachelors' level staff now facilitate both such modules and also core groups.

Right now, core group facilitators typically have no master's or doctorate degree in psychology. Any advanced degree in other disciplines is simply irrelevant. This is also true of almost all module facilitators. This is an outrage that has been in effect since the commencement of MSOP. This 'proposal' would appear to simply legitimize this arrangement. It is ill-advised. It is utter hogwash to assert that a non-professional with only a bachelor's degree can suffice in this clinical role.

15. The Matrix is unscientific and unworkable and must go.

The Matrix is a failed and unworkable hugely-over-complex and vague set of treatment concepts. It is a hodgepodge of intuition-originated ideas with no basis in science at all taken from many different sources. Clinicians are constantly uncertain how to score it, and almost invariably produce scores inconsistent with other clinicians as to the same detainee's group behaviors in the same session. This is why, after numerous training regimens in the Matrix, clinicians continue to ask for more training as to the Matrix.

Moreover, the fact that the Matrix has so many aspects, each requiring instruction and then behavioral practice, is the single most impactful factor causing MSOP treatment to be endless. Regardless of all posings at claimed intent to accelerate treatment, as long as the Matrix governs and guides MSOP treatment, such treatment will remain interminable and impossible to complete satisfactorily. The Matrix simply must be jettisoned.

16. The Site Visitors' claim of "improved progress through the [MSOP] program" is irrelevant; a totally new, extremely abbreviated treatment program is required instead.

The *Site Visitors' Report*, at page 7, claimed that the rate of progress through the phases of treatment in MSOP has increased. This has already been addressed above, concluding that the only true increase in such phase progression has been to fill beds in CPS. The fact remains that there is still no evidence that treatment is intended to achieve release for any detainee in any reasonable period of time after arrival in MSOP (that is, in 1-2 years, as opposed to the minimum 15-20 years that currently appears to be a *de facto* minimum period.

A totally different treatment program is needed to replace this unworkable program dependent on fulfillment of each of a series of 34 "matrix" goals that mostly appear to be about living something close to someone's idea of an 'ideal life.' Effectively, MSOP clinicians are merely playing an unrealistic game with detainees as 'Ken dolls' who can be pushed around at whim of the juvenile players. Freedom should not depend on satisfying someone else's views on living an ideal life. Refraining from committing sex crimes does not require any such artificial and arbitrary 'perfection', according to anyone's personal view.

A very abbreviated replacement treatment program is needed, focusing on education/indoctrination as to the immorality of sex crimes and the consequential psychic harms wreaked thereby, and secondly, on the unceasing array of law enforcement tools and expert personnel who will surveil and investigate each sex offender constantly once released, thereby preventing any intended sex crimes, and jailing the releasee for merely taking the very first step of preparation for such sexual misconduct.

Kannon, Japanese bodhisattva of compassion

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In Memoriam: Matthew Johnson

In Memory of a Life Respected

Native American Encampment on Lake Huron