Gladden article (M.S.O.P.) January 25, 2019

The Legal Pad — Volume 3, Issue 1 — January 25, 2019
"I'm no longer accepting the things I cannot change . . . I'm changing the things I cannot accept" — Angela Davis

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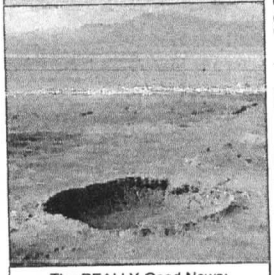

The REALLY Good News:
Apophis will MISS us
— All 3 Times!

Coming Soon:

- ✓ The Routine & Nonroutine of the Static-99R: The Good, the Bad, & the Very Ugly Got Much Worse in 2015.
- ✓ The Math behind the MnSOST-3.1 Pushed Pencil-Whipping into a Whole New Dimension
- ✓ Far More from the *Gladden* Complaint
- ✓ 3 Profs Named Mud: The High Cost of Telling a Very Inconvenient Truth
- ✓ 'Stranger Danger' Debunked
- ✓ MSOP Media Censorship vs. Disconnect between Imagery & 'Hands-on' Sex Crimes
- ✓ Equal Protection – Strict Scrutiny Can Strike Down SO Commitment As Quasi-Criminal
- ✓ Polygraphs for the Defense
- ✓ For Effective Defense Assistance, SO Commitment Appointed Attorneys Must Be Educated Specialists
- ✓ Increase in registered SOs as a form of national blacklist
- — & Tons More!

No News Yet Dept.

The *Karsjens* case is now winding up briefing in the second appeal based on an argument that Minnesota SPP/SDP commitment is effectively punitive in nature. Judge Frank ruled against us on these last four remaining claims, thinking that the 8th Circuit's "shock the conscience" rationale for reversing his original ruling would apply here too. However, a 2015 SCOTUS opinion (*Kingsley*, discussed in the Oct.'18 TLP edition and *post*) gives grounds for a powerful contrary argument that may be raised in the current appeal.

Meanwhile, the *Gladden* case remains on hold until that appellate decision.

The latest on the Wage Case is reported *post* as well. In brief, we wait on an important ruling by the District Judge in that case.

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Demonstrating the Need for Reform

Coalinga — A Seismic Event

Editor's Note: The following is news coverage of a compellingly newsworthy event especially of interest to our readership and of obvious concern to all. Despite some educated guessing to fill in holes in the available facts, it is not opinion. Nor under any view should it be considered inspirational. To the contrary, the point of this coverage is as a cautionary tale for all on how to avoid such needless and catastrophic outcomes. Toward this end, to learn from events, we must study them. So grab your supplies; it's time to go to school.

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1. Introduction/Factual Background

Like Minnesota and 18 other states, California has a statutory system of commitment applicable to those who have completed their prison terms for sex crimes. Unlike Minnesota and most other states, California originally placed those committed under that law in an actual hospital for mental illness located in Atascadero, CA. In that initial period of years, the total number of those committed grew to a little over 500 inmates.

In that timeframe, a substantial portion of those committed to this system were released. As an article in *TLP* Issue 2-9 (Sept. 2018: "CA Hid Study Showing Low SVP Recidivism") discussed, leaders of that California commitment system went to great lengths to cover up and eventually destroy research results by the head of the clinical function in that program. Those results found that the recidivism rate of formerly committed sex offenders released from that system were no higher than recidivism rates for other California sex offenders who had never been committed.

In short, that finding, although accurate, was 'politically inconvenient' to those who had sponsored that system legislatively and those involved in its operation. Not only did that internal report of those research findings disappear, but, in its absence, a new political campaign was started by those political forces to bar releases from that commitment system except on the strongest possible proof by a committed individual that he would never commit another crime of any kind.

Of course, in reality, just as there is no real proof of any likely future recidivism, there is no real way to prove to a certainty that one seeking release will never reoffend again, whether sexually or otherwise — any more than that any proof exists that any given prison releasee will never reoffend.

Nevertheless, an amending bill was passed by referendum effecting such a bar on releases from that sex offender commitment system. The immediate and lasting result of that law-change was to drastically reduce the rate of releases to a mere trickle of only a few each year. Meanwhile, taking that referendum as a cue, California prosecutors aggressively stepped up their rate of attempts to commit sex offenders. Because that law-change also made such commitment easier, the number of successful commitments soared.

The outcome was predictable: by the beginning of 2018, nearly 1500 individuals were under sex offender commitment in California, making that state the numerical leader among all jurisdictions having such commitment systems (however, still outstripped by Minnesota, with the most committed sex offenders per capita in the country).

Livin' on the Fault Line

Meanwhile, as the California numbers began to burgeon, it became clear that either the Atascadero facility would have to be greatly expanded, or another location would have to be chosen to house this population (about the size of a small town). Coalinga, a small town itself in California's largely agricultural Central Valley, was selected. A sprawling facility was built with capacity for all 1500 inmates, plus expansion. Because of the single-level layout, with long hallways with various service provision and goods sale hubs at various points, the overall impression almost resembles a shopping mall anywhere else — a mall with no exit.

Even when that system was still at Atascadero, defense attorneys, well aware that treatment statements made by their clients were being used against them, both in commitment trials and later when they sought release, they consistently advised their clients not to participate in treatment. The majority of those in commitment took that advice, especially once that law-change began to have sufficient effect to clarify that almost no one in the new Coalinga facility was ever going to get out despite years or even decades of treatment.

All of this being said, California had at least one redeeming feature making life in the commitment system somewhat more tolerable: A longstanding sensitivity in California courts to the constitutional rights of those committed, including sex offenders, had guarded their First Amendment rights to full communication with the outside world, eventually coming to include Internet access. Nonetheless, conservative forces in place in the other governmental branches had meanwhile made a strong push to replace all retiring or dying judges with those with extremely conservative agendas, including a heavy downplay on the availability of all individual rights. As it is relevant in this context, the stage was being set for an effort to restrict the communication means of committed sex offenders. This is a political tactic that has been in play for more than the latest decade throughout all jurisdictions in the United States, as if to subtly but persistently make communication from, or even to committed sex offenders more difficult, almost as if sending a message to simply forget about everyone in this plight.

2. The Excerpts from Published Sources:

a. *Rory Appleton*, "As Small Riots Rage at Coalinga State Hospital, Details Begin to Emerge," *The Fresno Bee* (Jan. 17, 2018)

Text Excerpts:

"...On Sunday, [the facility] initiated a lockdown on all patients. No visitors are allowed on the campus.

But patients, attorneys and family members describe varying scenes of pandemonium throughout the hospital, as frustrations over newly tightened rules boiled over. One patient, who did not want to be named for fear of hospital retaliation, said the lockdown went into effect Sunday after 400-500 patients met in a common area Saturday to protest new, extreme rules that began that day. These demonstrations are common in the hospital but typically only involve about 100 patients. The staff was apparently worried about this large group and called for additional security.

He stressed that most of these protests, as far as he knows, have been peaceful. This one, however, appears to have crossed a few lines.

On Saturday, a group of patients apparently threw urine at the employees of the hospital's patient café. He was not sure of the scale of the destruction, but he has heard that several fires have been started since the lockdown began. A nurse's station in unit 16 was attacked, he said, as patients apparently used mop buckets and chairs to smash the windows. His floor was flooded temporarily.

He explained that thumb drives, portable hard drives and video game consoles – which also

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utilize hard drives – were banned after hospital staff learned some patients were using hard drives to share child pornography. He stressed that most of the patients were not using these devices improperly, but all were punished...

The patient said the new rule was rushed through the state hospital system in a way that did not let the patients exercise their rights to appeal. The ban was approved internally on Jan. 2, he said, and patients had to submit their appeals by Jan. 7. Given the length of time it takes to send outgoing mail from the hospital, there was no way to submit the appeals by the deadline, he said.

No information has been shared with patients, he said. They do not know why they are being locked down or how long it will last. In prison, the patient said, a memo would be given out within one day of a lockdown that would outline what happened, what the prisoners were and were not allowed to do and how long the punishment would last. He has heard from other patients that the lockdown is scheduled to end Wednesday afternoon.

Renella Smith's son, Tim, is currently a patient at the hospital. He served a prison sentence for assault with the intent to commit rape and is now awaiting a hearing to determine if he can be released.

Tim called his mother Friday night to tell her that order at the hospital had begun to deteriorate. Some of the patients were screaming in anger as they ran around, throwing themselves against walls. One man threw a typewriter through a window. Others bought jam and jelly from the hospital's store and smeared it across the walls. One of the security offices was vandalized.

Smith and her husband spent most of Saturday with Tim. After they left, he called them on a cordless phone shared by patients within his unit. He said he had been threatened by other inmates and was told not to attend classes, or else he would be beaten up.

Her son must attend these classes, Smith said, in order to be released. She worries that if Tim were involved in a fight, he would be disciplined, even if he was only defending himself from attack.

Smith has not been able to reach her son since Saturday night. No one is allowed to visit while the lockdown is in place, she said – not even her son's attorney, who planned to meet with him later this week.

Several other patients and family members have also described near-riotous conditions.... Around 60 windows have been broken, they said, and staff members now need security escorts to move throughout the hospital.

Staff has threatened to take away privileges and personal devices, which some patients believe to be a violation of their rights. They point out that they have served their prison sentences and are now patients awaiting release, not prisoners serving a sentence.

On Thursday, the Department of State Hospitals approved an emergency regulation regarding digital devices, according to a California Administrative Law document.

It addresses 'the possession, viewing, and distribution of illicit materials by removing digital memory storage, other means of memory storage, specified digital media players and digital media burners from the personal possession of patients.'

Patients are only allowed to have commercially produced CDs and DVDs and media players with no access to the Internet, the document reads, and the hospital is allowed to supervise patient's use of digital media.

The change went into effect on Friday and expires July 12.

A Santa Barbara attorney, who did not wish to give her name, called the recent crackdown a retaliation against the patients' recent dooming of a much-needed sales tax measure in the city of Coalinga...."

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b. *Matt Clarke*, "New Rule Sparks Uprising at California Sex Offender Civil Commitment Facility," *Prison Legal News* (Sept. 2018)

Text Excerpts:

"On January 14, 2018, about 400 to 500 civilly committed sex offender 'patients' met ...to protest a stringent new rule that went into effect that day. The rule banned the possession of electronic devices with Internet access or writable storage media, such as MP3 players, e-book readers, video games, flash drives, and computer-like devices.

If a patient agreed to allow a device to be searched, it would be mailed to an address of the patient's choosing. If no consent to a search was given, the device would be destroyed.

...Supporting the patients' version of events is the fact that only 12 of the hospital's nearly 1,300 patients were charged with possession of child pornography between September 2016 and January 2018. Considering that about a sixth of the sex offenders housed at Coalinga State Hospital were previously convicted of child porn-related offenses, an average of one charge per month in such a highly-monitored population hardly qualifies as an epidemic that warrants restrictions on electronic devices owned by all patients.

In November 2017, an attempt to increase Coalinga's sales tax by one cent failed by 37 votes. Records showed that over 100 of the hospital patients participated in that vote. The City of Coalinga has since filed a lawsuit against Fresno County, seeking to have the election results thrown out due to the allegedly 'illegal' participation of the patients. Both city and hospital officials blamed the patients for defeating the sales tax hike.

According to a federal civil rights lawsuit filed by two patients with the help of Sacramento attorney Janice Bellucci, the new rule was rushed into effect in retaliation for patients exercising their right to vote. The rule was internally approved on January 2, 2018. Patients seeking to appeal had to submit their appeals within five days – faster than was possible given the length of time required to send outgoing mail from the facility.

The suit accuses hospital supervisor Brandon Price and his staff of tearing down campaign signs and confiscating communication devices patients had used to organize politically. It also describes unlawful conditions at the hospital.

...Three patients were arrested and charged with obstruction of a public officer and rioting. Two suffered minor injuries , but no staff members were hurt. Following the uprising, the hospital was placed on lockdown and security personnel escorted staff during their rounds; night shift employees staged an informational picket, claiming that the failure to increase staffing on that shift had contributed to a prolonged patient assault on a staff member.

...The hospital has become a prison where 'patients' who have completed their sentences are held with the promise of release that rarely occurs.

'We have taken men and made them believe that if you go to these classes that you can have your life back. But that's a lie,' stated Jeff Gambord, who has been a patient at the hospital since 2006. 'It would be one thing to take these men and tell them we're going to keep you locked up for the rest of your life. People can come to terms with that. But I want you to understand what it's like to really come to terms with what you did to hurt women or children and to become a better person ...and in spite of these changes, you can't get out.'

According to the Fresno Bee, as of April 2018, state officials said that 'only about a third of the hospital's patients are actually taking the therapy that is offered.' The rest are discouraged by years of even decades of therapy, which includes intrusions into their personal privacy – such as polygraphs and penile arousal pressure measurement tests – that do not lead to release.

...Violations of terms of release can include activities that are not illegal. For example, Jeffrey Snyder was arrested in March 2018 for having consensual sex with an adult male at the Fresno motel where he lived. A judge ordered him returned to the hospital for at least a year.

Like most other states' civil commitment programs, Coalinga State Hospital seems to have morphed from the laudable idea of providing treatment to sex offenders to holding them under prison-like conditions indefinitely, using therapy as a pretext."

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c. (*Eds.*), "Welcome to Coalinga State Hospital, A Broken Facility: Patients Cry Out for Help," https://www.cshabuse.com/

Text Excerpts:

"Coalinga Conference Call – February 27, 2018

On February 27, 2018, CSHAbuse.com and several patients at Coalinga State Hospital, posted a successful and dynamic conference call where presentations were made regarding the ongoing crisis and a variety of alarming deficiencies at the facility....

The Theme of the Conference Call Was:

A. Coalinga State Hospital is unconstitutional, and has failed to meet its burden as a mental health facility to provide patients with reasonable therapeutic opportunities, that have proven exit strategies, are rational, and not merely a façade to keep human beings perceived by society as 'irredeemable, confined until they die.'

B. ALL operations of Coalinga State Hospital are currently in a state of crisis – top to bottom – affecting both patients and staff. The Executive Management Team, including many in middle management positions, have demonstrated that they lack the qualifications to operate effective treatment programs, assessments of patients, maintain appropriate staff levels of the hospital, provide appropriate medical care, investigate patient abuse complaints, and stem the high patient death rate. Further, they have fostered an environment of corruption and a code of silence where CSH staff are afraid to report what they know (e.g., patient abuse).

The following is an overview of the ...topics that were addressed:

- A scathing presentation was made against The Office of Patient Rights. Documentary evidence was also presented. There is currently a hospital-wide petition to banish this organization from Coalinga State Hospital because of their failure to adequately advocate for the patients and protect them from abuse. The Civil Detainee Advisory Council (CDAC) at CSH has drafted a memorandum of no confidence in the PRA organization, and nine of its members signed a separate memorandum calling for the PRA service contract to be terminated at the end of 2018. In furtherance of this request, they are circulating a petition throughout the hospital, citing these problems:
- $200,000+/year cost per patient
- Unqualified management
- Widespread corruption
- Open-ended treatment

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- Rampant abuse of patients
- Staff fear of retaliation if they complain or report abuse
- Toxic, non-therapeutic environment
- Patients giving up on life, the will to live
- Recordings of police staff on CSHAbuse.com reporting operational deficiencies at facility
- Disability Rights California/Patients' Rights not fulfilling their contractual obligations
- Lack of timely and adequate medical care
- Torturous transportation to outside medical appointments
- Patients refusing transportation to outside medical appointments (can amount to passive suicide)
- Patients with a Stockholm-type Syndrome without receiving any type of mental evaluations
- Cancelled ALL educational programs (GED, college, Basic Literacy)
- No Internet or email access whatsoever (even supervised)
- No Skype to join families for dying patients or dying family members.

...Approximately 110 patients have died at CSH since 2005, and at least 20+ walking around CSH are in the dying process, and many are committing what we view as passive suicide by refusing medical treatment for serious illnesses. Hundreds of professional staff have fled the facility and current working conditions for the remaining staff are almost unbearable for many of them. Psychologists and Social Workers have double their normal caseloads, or worse. Nurses are being pulled away from nursing duties to work as Psychiatric Technicians....

Medical doctors are responsible for 200-300 patients and many patients are not being seen in 'sick call' in a timely manner or at all. Outside medical specialists have cancelled contracts because of patients not showing up for appointments because they refused to be transported by CDCR for fear of being abused during the transportation process.

VISITORS TO THIS SITE: Please view our 'Audio Recordings' page to hear recordings from patients who speak from their heart about how they believe they are going to die at CSH, how they have made the decision that they want to die at CSH, or how they think of suicide every day. There are also recordings from men who describe in explicit detail how CSH has crushed their souls, crushed their spirits, and how the treatment programs at CSH in most cases has taken 10, 15, 20 years of their lives, and any hope that they will ever be free again (at a cost to taxpayers of $200,000+ per year).

Please DON'T MISS the STAFF/LAW ENFORCEMENT recordings where they speak about the alleged crimes involving the Director of State Hospitals, Pam Ahlin, and her staff, as well as patient abuse going on at the hospital, and what happens to staff who report it.

FACT BLOG: Please view our Fact Blog page where we report with more detail on issues inside the hospital. We have also identified by name all of the Psychologists, Social Workers, and Behavior Specialists, who have refused to conduct a hospital-wide mental health assessment to determine exactly which patients specifically (and how many) have made the decision they want to die at CSH, believe they will die at CSH, or who have given up on life, so that this information could be reported to the Governor and the Legislature. These same doctors have refused to declare a 'mental health emergency at CSH,' in spite of that the patient recordings on this website which reveal a grave mental health crisis.

...Governor Jerry Brown has ignored multiple requests to place the hospital into a 'State of Emergency'. Every member of the California State Senate has similarly disregarded the need for the State of Emergency. Coalinga State Hospital needs a Crisis Management Team to immediately take control of all hospital operations. This team must include agents from the FBI, representatives from the legislature and, most importantly, independent mental health experts to assess the patients.

...The hospital has always been an environment where hostility, anger, despair, conflict and hopelessness permeates the overall milieu. The first couple of years after opening in 2005, hospital administrators at the time were somewhat proactive about problem solving and trying to set a more positive tone. Since 2008/2009, the hospital tone is consistently negative, almost completely anti-therapeutic, and for many patients it has literally crushed their souls, their self-esteem, and their view of themselves as valuable human beings who have a place in this world. Patient complaints about these conditions are generally treated as a low priority nuisances by administrators, are barely given a cursory response, and always include standardized catch phrase responses cut and pasted from prior complaints.

There is no question whatsoever that hundreds of patients are afflicted with something resembling Stockholm Syndrome. At least 300-400 patients, or more, feel so powerless and hopeless, they have decided to spend the remainder of their lives at the hospital until they die. For over 5 years the Chief of Psychology, the Executive management team, and the Director of State Hospitals have been admonished that they have a responsibility to conduct a survey and try to identify who these patients are. Next, they have a responsibility to reach out to those patients and vet them about the certainty of their decision. If those patients are found to be firmly committed to their decision that they wish to die at Coalinga State Hospital, administrators would then be legally and morally required to consider how to deploy the resources taxpayers have provided for those patients' care and treatment in a manner that brings meaning and stimulation to their lives.

Coalinga State Hospital is a very grim place for a large segment of its population who find that it devours their soul and spirits. Breaking them down as human beings to the point where they live in a persistent state of emotional despair. Those patients exist in a state of hopelessness and are completely disconnected from the outside world. The hospital strives to keep patients disconnected from the outside world with policies such as not even allowing dying patients the opportunity to say goodbye to family or friends through a Skype or Facetime visit. If a patient's mother is dying and can't visit the hospital, a patient is similarly forbidden from saying goodbye to her via Skype or Facetime.

As several audio recordings reveal, staff who show compassion for the patients in their charge are viewed negatively by fellow staff. They discover that CSH is a place where large numbers of their fellow staff secretly harbor the view that the patient population is detestable, irredeemable, and unforgivable. These senior staff set a tone for patients to generally be treated in an overall manner which is anti-therapeutic, abusive, neglectful, and completely at odds with the mission of a mental health treatment facility.

Many patients, who are suffering from something similar to Stockholm Syndrome, languish 5, 10, 15 years in front of shared communal televisions with staff barely noticing their existence, their apathy, their despair, and their hopeless state of mind. One patient was observed pacing in front of pay telephones for more than 6 years – 3 feet from staff offices and nobody trying to help this man. Several hundred other men who have similarly lost hope lay in bed for years, sleeping 12-18 hours per day. These behaviors are symptoms of decomposition of the human spirit – a mental condition which most staff members ignore or don't even notice (Psychiatrists, Psychologists, Social Workers, and Psychiatric Technicians) On licensed treatment units, staff simply observe these patients during rounds: On 9 unlicensed units, rounds are conducted by police officers who are not trained to notice or report such behavior.

An extremely confidential source within the hospital administration revealed that someone went on the Internet and consulted strategies to subdue and control the CSH population of men in ways that are insidious and evil. Comprehensive investigations are needed by state licensing agencies, the U.S. Department of Justice, as well as hearing in the California State Legislature. When the facts become known, there will likely be a study done of CSH and how what is occurring was ever allowed to take place.

Hospital administrators have utilized techniques and adopted procedures which are intended, and designed, to isolate patients from their families, as well as the real world which lays beyond the fences topped with razor wire encircling the facility. The hospital environment has been stripped of cues or reminders which would stimulate patients to think about or long for life outside of the facility....

A majority of the patients at CSH served many years in prison and have never seen the internet. As a mental health facility which is purportedly treating these patients so they can return to society as functioning members, it forbids them to access the internet, even on a closely monitored system where the service provider tracks keystrokes and blocks access to designated web sites. Federal prisoners have been allowed to send/receive email on a restricted and monitored server for many years, yet most patients at CSH don't even know what email is.

...The harm to these patients caused by deficiencies in psychiatric care takes many forms. Among them, inadequate, ineffective, and counterproductive treatment, excessively long hospitalizations which compound psychiatric distress and an overall lower quality of life. The Department of State Hospitals has failed miserably to provide a credible treatment program for this population.

Equally egregious is the fact that on a daily basis there are serious incidents at CSH which are driven by the underlying sense of hopelessness and frustration a majority of the men feel. Patients and staff screaming at each other, patients stealing from each other – turning on each other with their frustrations. Staff regularly activate wireless personal alarms eliciting ...other staff to run to a crisis in progress, risking their safety by tripping and falling.

What is profoundly outrageous is the complete lack of resources or treatment being deployed toward the anger and hostility patients are directing toward each other. Staff immediately disperse the moment incidents deescalate and leave the patients to their own devices. Other than a cursory appearance before a Treatment Team meeting the next day, there is almost never any effort at conflict resolution or mediation of conflict between patients."

3. Correspondence from Cory Hoch:

Cory Hoch is one of the inmates at Coal-

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inga. He has written extensively about the situation there over recent years. In response to my inquiry, his August 23, 2018 letter explains:

"We do not have Internet access here for patient use. ...Actually, there is specifically a state regulation that 'lawfully' allows the broad denial of Internet access to all those civilly confined in ...California. I have an extensive writ ...addressing the First and Fourteenth Amendments. This case has been temporarily placed off-docket pending higher courts' interpretation of *Packingham v. North Carolina*. This case has been off-docket now for approximately one year. I am hoping that sometime soon this case will be on calendar once again and we can finally move forward on it."

On December 18, 2018, Cory responded to a follow-up inquiry of mine by adding this clarification:

"As to the rule change,... [t]he regulation is *California Code of Regulations*, Section 4350. ...This regulation, since like 2009/2010, had already disallowed certain electronic items from our personal possession. This regulatory change was an expansion of that regulation to further limit us with what specific electronic items we can no longer possess. This new regulatory action has now deprived us of Xboxes, PSPs, certain boom boxes, thumb drives, memory cards, SD cards (and other similar storage devices) and now limits us to only factory CDs/DVDs (which are limited to 30 per person at any given time).

(Referring to the January 17th event,) "As a direct result of this search, there was property damage being conducted or threatened by several patients [that] resulted in a facility-wide lockdown. Ultimately, this lockdown did not end for an entire month. During this lockdown, they conducted more searches for contraband items or potential contraband items. During this time, there were numerous continued protests going on that included verbal assaults toward staff and state property damage. Also during this lockdown we were met with a heightened police force (many geared up like 'goon squad' or in riot gear)....

The property damage that occurred here was destruction of state-issued chairs, table, and other such state property items. Additionally, there were broken and scratched windows — approximately 60 windows were actually broken/shattered, requiring replacement ...for obvious safety/security reasons.

"During this period, we were limited as to phone calls — all phones were placed in the staff office and were handed out by staff, only one allowed at a time. Normally, we have eight lines available for incoming and outgoing calls. These phone calls were limited to 15 minutes each, were logged in, and were overheard by staff. Normally, these calls have no time limit and by state law and regulation cannot be monitored. The facility got a waiver on this specific right simply by declaring the facility under a state of emergency and claiming safety and security of the facility. They additionally claimed that patients were calling other patients at the facility inciting them to assault staff and cause property damage. For a short period of time, we could not get incoming calls at all, even from our attorneys. Further, they limited us to calls only to our attorneys for nearly one week after the initial lockdown began. After hundreds of complaints about this, the administration suddenly changed its tune.

There has been a lawsuit filed in court that is represented by an attorney out of Sacramento, CA. She filed an emergency injunction, which we lost. However, as I understand it, a general injunction has been filed and is still pending. We understand that all of the confiscated items are being held in storage pending the outcome of this particular case.

...Regarding Internet access, ...the status of that case is still pending the judicial opinion from one last federal court here in CA....

Regarding the solidarity behind our conditions of confinement and 'adequate treatment' being provided, ...those legally-minded, such as myself, have engaged in an organization development called The Working Group — Coalinga. We are hoping to gain nonprofit status soon. This organization publishes a monthly newsletter that includes a variety of information as to what is happening here at any given point in time."

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4. Editor's Closing Thoughts:

All of the foregoing reporters conclude that the claim of "epidemic" child pornography crimes by Coalinga inmates is completely untrue. Even the largest number cited as to both actual charges and mere "investigations" combined amounts only to about one individual per month. In a facility holding close to 1500 individuals, this equates to far less than one-tenth of 1%.

While any quantum of crimes of this type is certain to raise disgust and ire, such crimes happen ubiquitously throughout society by random individuals ranging from the merely curious to those who have never actually sexually assaulted any child and who use such pornography as a means to divert their interest in such criminal activity to mere fantasy-driven masturbation instead.

If the evil is perceived to be such child pornography collection and use, then quite frankly, the proper means of suppression is to disrupt its supply, rather than a futile attempt to block the entire Internet to only specific, selected would-be collectors.

From a constitutional standpoint, to attack the problem of child pornography on the Internet in this way is a classic example of action which is both extremely underinclusive, in that blocking Internet access only to any given residential facility cannot hope to make the slightest dent in that worldwide mega-commerce, and at the same time is massively overinclusive, in that, despite the availability of measures far more specifically aimed at screening out such pornography from Internet users connections, the action opted for by Coalinga officials is a sweeping blockage of all access to the Internet.

This is uncalled for and is effectively a punitive measure, based on the implicit views that sex offenders, as a class, do not 'deserve' Internet access, and that, having such access, every sex offender will commit the criminal act of child pornography collection.

The first of these views is purely a devaluing judgment as to an entire class of individuals — obviously an impermissible basis for deprivation of an important (and these days the *de facto*) means of communication, commerce, information gathering, and exchange of perspectives and opinions — the very stuff of the free speech guarantee of the First Amendment.

The second view (the belief in inherently certain or at least highly probable child pornography crimes by sex offenders) is baseless and is refuted by the tiny percentage itself cited above.

The fact that child pornography acquirers are in fact being caught and prosecuted points to the efficiency and ability of law enforcement agents assigned to interdict such criminal activity. That being the case, the criminal law is working as it should at accomplishing this goal through apprehension and punishment of guilty individuals. There is therefore no need for any complete ban on Internet access within Coalinga or any other sex offender commitment facility than there is for a complete ban on Internet use by everyone in society.

Surely, a total ban on Internet access by anyone in the country would interdict all pornography. However, the First Amendment holds that this drastic and devastating measure is both unnecessary and unjust; it suffices quite adequately that vast legions of law enforcement agents specializing in detection and apprehension of those committing that crime exist, are extraordinarily well-trained in their task, and perform it relentlessly and with high efficiency. Access can and should continue for all in society, including those physically detained in non-punitive settings.

It also should not escape note that, inasmuch as Internet access itself has been blocked in Coalinga for nearly a decade, any child pornography present in the facility is not in fact being downloaded by any of its inmates. Instead, the only means of receipt of such illicit materials is through smuggling by staff or, alternatively, staff downloading and physical sale to inmates. This being true, the claim that Internet access by inmates is to blame is doubly disingenuous. It is simply a flip excuse to dismiss the need to investigate staff members engaged in this illicit commerce. Were this drug sales instead, this would be tantamount to 'blaming the addict' and ignoring the distribution network and its dealers. Again, this simply exponentiates the punitive impact upon all Coalinga facility residents without any closer connection to Internet access, but instead, in the face of the distancing effect of such smuggling quite apart from any inmate Internet access.

But let us now leave the realm of legal arguments of unconstitutionality of the specific regulation barring Internet access and now, further removing virtually every electronic device permitted hitherto for inmates to possess and use.

The facts cited in the last published source, *supra*, show that, quite apart from that 'straw that broke the camel's back' effect of that regulatory amendment, the overall plight of Coalinga inmates provided the underlying basis for all of the angst and frustration that led to their explosive reaction last January.

First and foremost, the lack of any substantial number of releases from Coalinga spoke convincingly to all detained within it that system officials had no serious intent to bring about such releases. In fact, many of their actions appeared and still appear to convey the contrary intent: to preside over a system that effectively has an exit door firmly welded shut permanently.

Further, disregard by judges of Coalinga inmates' collective plight as to such unattainable release and as to various conditions of confinement most important to them, including Internet-provided contact with the real world, fed their sense of hopelessness and extreme frustration.

The further facts that the regulatory amendment was hustled through deliberately in haste so that Coalinga inmates could not be heard on the proposal before it was adopted, that it was apparently prompted by a facility director suspected of criminal wrongdoing, and therefore believed to be using this issue as simply a distraction to cause such suspicions to be forgotten, and the fact of a retaliation motive by the surrounding municipality for Coalinga inmates' opposition (their voting right) to a city sales tax hike, all added a pervasive delegitimization to the mix — a sense in other words that the action was purely bogus.

Add to this the endless, go-nowhere, utter-

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ly circular treatment that includes humiliating, stressful, and dehumanizing procedures such as repetitive polygraph exams purely as criminal interrogation tactics and 'peter-meter' penile erection testing aimed at nothing more than confirming the obviously self-evident proposition that someone who has engaged in an act of sexual deviance has a deviant interest. (Parenthetically, as I have discussed in an earlier TLP article, a lack of deviant response is invariably dismissed as bad data with no reason, and at the same time, the "circumferential" means of such PPG testing inherently misreads a shrinking penis and the beginning of an erection, guaranteeing a false result.)

Staff incompetence, abuse and a pervasive 'code of silence inexorably have added to the futility of any efforts by Coalinga inmates, as have an endless round of repetitive 'whitewashes' by those responsible to oversee and intervene in bad practices by Coalinga staff and officials.

Watching co-inmates succumb to depression and/or the self-delusion wrought by staff actions over time deliberately aimed at inducing "Stockholm Syndrome" as a means to render inmates more manageable and docile through brainwashing with a constant stream of propagandistic lies adds another huge source of angst and frustration.

This mere listing of the woes to which Coalinga inmates are subjected clearly intimates that the disruption last January was only partly about a 'final straw' of deprivation of electronic devices. Just as much, if not more, its main prompting cause was the realization by Coalinga inmates that their situation was grim and effectively hopeless, and that it held no realistic possibility of change for the better at any time in the near or even foreseeable future.

Thus, it remains an open question altogether whether those in charge of Coalinga and the entire commitment machinery over sex offenders in California will act to meaningfully reform their system, or instead will remain complacent to continue to preside over the 'gradual death machine' that it now comprises. One certainly would hope that the former, and not the later course will be chosen and aggressively pursued.

However, the larger cautionary-tale aspect cannot be ignored. Those of us here in Minnesota's MSOP facilities cannot help but notice the comparisons and similarities that exist to unite, more than divide, our experience as to the experience of those in the Coalinga facility. The differences that exist are more in degree than in character.

I have received and currently I am in the process of analyzing summarizing findings made late in 2018 by "SOCCPN," an entity that tracks that conditions and practices of sex offender commitment systems in place in this country. These findings will be at least part of the subject of an article in a subsequent *TLP* edition.

Nonetheless, it is not premature to conclude that this observation of numerous identical or parallel conditions and practices across almost all sex offender commitment systems in the country is a valid and undeniable theme.

In other words, it is not accurate to think of Coalinga as an isolated incident: the only accurate way to think of it as the "Coalinga Effect," which as this is written, is spreading and sinking in wherever sex offender commitment is in place.

What is wrong with Coalinga is what is wrong with sex offender commitment in its current embodiment everywhere. Those who have designed what it has gradually become over the years of its existence have much to answer for.

As the foregoing quoted observation notes, an idea that once stood for efficient treatment culminating in a prompt release has been corrupted into myriad excuse-making for never-ending treatment. Such endless treatment is an excuse for continued detention of its subjects-victims, under the overarching excuse of myths of dangerousness and supposed lack of ability to control oneself. Sophisticated as they are, designers of such commitment systems now know full well that these myths are outrageous lies, diametrically contrary to the actual truth.

As long as we in this country adhere to such myths in service of crass political manipulation of the outcomes of the criminal law, we will continue to slide down the long, slippery ramp to an end to individual liberty of everyone in service to an unattainable mythic goal of a perfectly safe society.

When will we stop inventing excuses to create more confinement?

We must settle instead for what we can get. In this connection that is a sex offender treatment system that simply and quickly aims to show sex offenders the destruction and harm wreaked by their own and others' sexual misconduct, and to pragmatically convince them that, even if they might wish to repeat their crimes in future, the overwhelming power of the criminal law enforcement agencies and their stunning scientific forensic evidence detection, collection, and analysis powers of today will result in inexorable apprehension within days, if not mere hours, of that projected sexual crime, and, through prosecution, an effective permanent end to one's life in the free world.

Let us be clear: Repentance and remorse, to the extent that they are genuine, are no doubt helpful to desistance from sexual offending.

However, universal experience and all current statistics of shrinking tendencies toward recidivism in the face of vastly inflated sentences and such certainty of being detected and apprehended prove beyond the slightest doubt that deterrence works and works profoundly as to every class of sex offender and every level of prior recidivist.

Give me any array of sexual recidivists and within one year I will give you 100 percent of their number back to you as permanently desisting ex-offenders. It really isn't rocket science.

All else is political misuse of junk-psychology, and its practitioners should be ashamed. So let us join together now to bring an end to "the Coalinga Effect," and to erect in its place an efficient, rapid system to eliminate both sexual crime and the barbaric mistreatment of those who have engaged in it, and to successfully do so in our time.

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Media Case

Stone Moves for TRO/PI and Plans Huge Upgrade Of Complaint.

The *Stone* media case started simply enough.

Back when Clark Kruger was alive, he filed an action challenging the media policy at the time. That lawsuit ended in a settlement that set certain limits on what MSOP could prohibit when it comes to media (that is, video, books, magazines, photos, and the like). For a time, things went reasonably well under that settlement.

However, it should not escape note that Kruger settled for terms that left MSOP with considerable leeway that probably would have been held unconstitutional if that case had gone to trial. Perhaps the *Kruger* case went that way because Kruger was a somewhat conservative litigator, perhaps afraid of an adverse result at trial, especially because, without an attorney, he would have had grave difficulty actually trying the case, including the hardship of being housed for perhaps numerous days in a county jail during such a trial.

In any event, Kruger eventually died. After his death, MSOP began to roll out a series of amendments to its media policy, each in succession transgressing the terms of that *Kruger* settlement more and more. At some point, Charles Stone challenged the amendments already then in place by reason of their violation of various terms of that settlement.

However, the Minnesota Attorney General's Office defended those amendments on the rather curious argument that, Clark Kruger having died, the settlement and indeed, the entire *Kruger* case had effectively died with him. Thereafter, the case brought by Charlie Stone rotated around this central question.

Ultimately, when the *Karsjens* case was filed, the *Stone* media case, like so many other federal cases involving MSOP, was simply placed on hold until completion of the *Karsjens* case. However, at some point after the first appeal in *Karsjens* reversed our victory in front of Judge Frank, most of the stayed cases were released from stay.

This action included the *Stone* media case. Since then, that case has been slowly progressing, including that sole claim for enforcement of the *Kruger* settlement surviving a dismissal motion by the defendants.

At this point, the judge presiding over Stone's case entered a case scheduling order calling for, among other things, filing of any motion to amend the *Complaint* in the case by March 15th. By coincidence, that order was entered at nearly the same time that MSOP chose to amend its media policy yet again — this time redefining all videos not bearing an MPAA rating, a Canadian rating, or a TV rating, as inherently prohibited and contraband. This means that such videos cannot be reviewed upon request; they cannot be changed from prohibited status.

That policy creates a grace period that expires at the end of February 4th. This means that any videos possessed on or after February 5th that lack ratings will be deemed contraband. If anyone is found in possession of any such 'rating-less' videos then, they will receive a BER for possession of contraband.

Upset that this new policy appears to be an attempt by MSOP to 'end-run' his pending lawsuit, Stone decided to file a motion seeking two reliefs for the time being.

The main relief is a "preliminary injunction." In a standard lawsuit, grant of a preliminary injunction bars the opposing party from taking any action that could make a judgment at the conclusion of the case less capable of granting truly effective relief.

The other relief, known as a "temporary restraining order" or simply a "TRO," operates to prevent such conduct by the opposing party from the time a judge signs it until the hearing on the preliminary injunction motion.

As of press time for this TLP edition, it is not known whether the judge will grant a TRO or how the motion seeking the longer-lasting

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preliminary injunction ("PI") will turn out.

Meanwhile, in conjunction with Ray Semler and Cyrus Gladden, Stone agreed to take advantage of a court offer to allow him to move to amend his *Complaint*. The general terms of that projected amendment will extensively change the *Complaint* and add numerous claims to it.

First, the amendment will seek class action status, making these three MSOP residents representative "named plaintiffs." However, the important aspect of this move (if approved by the court) will be to make all confined in MSOP members of a class of plaintiffs. This means that everyone in MSOP can gain the benefit of any judgment in plaintiffs' favor.

Second, many in MSOP still remain under the parole terms of their sentences (typically, "ISR", followed by "conditional release"). In the standard conditions of both of these forms of parole release for sex offenders, there is a prohibition on possession of "sexually explicit" images in any medium (whether print or digital stills or video). The term "sexually explicit" is not defined in these prohibitions. Because of that lack, that term is unconstitutionally vague, capable of meaning whatever corrections parole agents claim it means. First Amendment rights cannot be curtailed and punished based on such vagueness. Therefore, it will be necessary to add MN Dept. of Corrections officials and parole agents as defendants.

Third, we will contest the continued application of the prison-based *Turner v. Safley* standard to us here in MSOP. Since we are not prisoners being subjected to prison sentences as punishment for crime, the *Turner v. Safley* standard applicable to curtailed First Amendment rights in prisons does not apply to us here.

Further, the claimed comparability of our status here in MSOP to the status of criminal pre-trial detainees is not actually correct. Unlike pretrial detainees, we are not subject to any claims of current criminality pending resolution via criminal trial.

Moreover, unlike pretrial detainees, we are relegated to MSOP for what are periods of time indefinite and invariably well in excess of a decade or more, and potentially permanent, until death. This also separates us from those under involuntary commitment for being mentally ill and violently dangerous. People in that status most often are kept confined only for comparatively short periods, typically ranging from a single month to several months.

Internet Users, Wuhu, China

As a confined population, we are the most mild-mannered and easily managed of all confined people. We do not present a threat of violence or sexual assault upon staff to any significant degree. No data exists to support notions that exposure to media content of certain types, such as sexual conduct display or nude depictions, would cause us to act in any criminal, or simply generally sexual or hostile way, whether while confined or in some future years after some theorized eventual release (even if probable, contrary to reality).

This has been nothing more than a myth perpetuated by our captors as an excuse to deny us Internet access, in order to avoid political flack by those in the general public who believe such mythology about sex offenders. For these reasons, there is no justification for any of the restrictions on our First Amendment rights imposed upon us by MSOP or its administrative overlord, the MN DHS.

Therefore, our general theory of the case will aim to strike down all MSOP and DOC interference with free exercise of our First Amendment rights to freedom of speech and press, free receipt of information and entertainment in all media forms, and freedom of thought and emotion.

This Amended Complaint will challenge a vast range of such interference, from denial of Internet access and personal computing equipment, to all media restrictions, to all other restrictions upon means of communication with loved ones, friends, and the outside world in general, to visiting restrictions, and to restrictions on all print media items, including newspaper subscriptions, and mail, and to monitoring and recording of phone conversations, and all 'tier restrictions' on First amendment items and access to communication. The following list will provide a sample of specifics we will challenge and the rationales for each:

1. In the current modern age, complete denial of access to the Internet works such a total deprivation of access to information, to communication, to entertainment, to education, and to permitted commerce that it is an unqualified denial of the First Amendment rights of all class members in both subclasses.

2. MSOP restriction to only PG-13 and lesser -rated movies, and requiring review and case-by-case approval of all R-rated movies and even selected movies of lesser ratings, using criteria far more expansive than simply the criminal bans universally applicable on illegal pornography (including child pornography) and on "obscenity" violates our First Amendment rights to view and possess such movies.

3. MSOP has forbidden outright creation, printing, and distribution of newsletters by MSOP inmates. Sometimes alternatively, it has imposed limits and various harassing, unnecessary procedural requirements on such newsletters or their preparation/distribution. This imposes such unreasonable and onerous burdens that, in the aggregate, it deprives us of our First Amendment right to communicate by print with an audience of readers, as opposed to one-to-one letter-writing.

4. MSOP also bars purchase and use of personal computing equipment, thereby confining us to use of MSOP-owned PCs furnished at a rate of six for 98 inmates. This limit and this ban on personal PC ownership and use so restricts our ability to use computing equipment to facilitate communication with each other and the outside world and to contain our thoughts and information we locate capable of digital storage, as well as access to useful application software, all of which combines to deprive us of our First Amendment rights.

5. MSOP restriction of printed media to only such items reviewed and decided not to transgress any of the same broadly expansive standards violates our First Amendment rights to view, read, and possess such printed matter, whether comprised of verbiage, images, or both.

6. Cumulative censorship of printed matter for its content based on completely unrealistic claims of threats to institutional security or safety of the public, with no set decisional standards whatsoever, violates our First Amendment rights to view, read, think about, and possess such printed matter.

7. As to any form of either printed or video matter, imposition of a second, cumulative censorship system operated by Clinical Department personnel on a completely undefined standard of whether some item of any media is 'countertherapeutic' allows denial to us of media items in complete conformity to all such media restriction rules, thereby denying our First Amendment rights to receive such items simply due to displeasure by Clinical staff or their supervisors. This 'second censorship' has been applied to just for content, but also alternatively to innocuous content objected to only as to topic.

8. Restrictions on visiting hours and circumstances/conditions, plus rejection of various visiting applicants, whether on vague grounds of claimed 'countertherapeutic' effect of visits by a given applicant, or of adult visitors who were, or who are claimed to have been 'victims' of the given MSOP inmate sought to be visited violates both our First Amendment rights, plus rights of all such potential visitors. This also challenges restrictions or censorship of visits between MSOP inmates and any media representatives. Note: such denied applicants could be invited to join as plaintiffs as well.

9. MSOP also claims that it reserves the right to make a parallel decision to deny either mail or phone contact or both with any specific correspondent(s)/conversant (s) it chooses on the same claimed, vague contention of said person having a 'countertherapeutic' influence. This also deprives us of our First Amendment right to communicate with those we choose.

10. Deprivation of contact via 'Skype-style,' Internet-carried video and audio communication also violates our First amendment right to effective communication with outsiders who choose to communicate with us in that way.

11. Limitless retention of recorded phone conversations, and scanned incoming and outgoing correspondence deprives us of the privacy of our communication, in violation of both First and Fourth Amendment rights.

12. The media review policy as practiced by MSOP Clinical Dept. personnel holds media items for unreasonably long periods, and thus effectively is tantamount to confiscation and deprivation for protracted periods as retaliation for suspected possession of media items that either violate any media restrictive rule or displease said personnel as supposedly 'countertherapeutic,' thereby infringing on our First Amendment right to possess and view/read same.

13. The new policy structure of "Tiers" authorizes, and will result in confiscation of both media and devices for viewing or listening to and of said media items, as punishment for trivial violations of various rules unrelated to permissible media or Property Dept. restrictions upon or requirements of such media playing devices. This misuse of such confiscations of First Amendment equipment and materials also violates our First Amendment rights.

14. No legal mail status for mail to/from courts.

15. Stamping all mail as "from a secure treatment facility" as a HIPPA violation.

16. Exclusion of all "Mail-a-Book" library loan service (including all books and videos).

Additionally, we are open to considering further claims. If you have had your First Amendment rights of free speech and related matters as described here violated by any actions or failures to act by either MSOP or the DOC while confined in MSOP, feel free to contact us to describe such mistreatment so that we can document it. Thanks in advance!

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Moral Vigilantism: How to Erase Sex Offender Rights and Dehumanize Them to Others (Part 2 of 3).

Editor's Note: The last TLP edition printed the first part of the excerpts from the article on this topic. This continues these excerpts.

Paul H. Robinson, The Moral Vigilante and Her Cousins in the Shadows," 2015 *U. Ill. L. Rev.* 401 (2015):

pp. 461-66: "B. Manipulating the System to Compel the Justice It Seems Reluctant to Impose

"The classic vigilantes in the cases above are doing what we have seen throughout Part II: taking the law into their own hands when they see gross failures of justice. The new element here is the conduct of the neighbors in protecting the classic vigilantes from prosecution. These 'shadow vigilantes,' as they might be called, are not going out into the streets to break the law, as the classic vigilantes do. Their conduct, or omission, however, is designed to subvert the law, if not break it. Their motivation is likely the same as that of the classic vigilantes: the sense of moral justification arising from the system's willful failures. I put 'shadow vigilantes' in quotes above because they are not technically 'vigilantes' as I have defined and used the term earlier in this Article. Depending on the circumstances, the shadow vigilantes' conduct might be criminal or it might be only unethical. It shares a motivation with classic vigilantism: to force the criminal justice system to impose the justice that the system has up to that point failed to enact. The shadow vigilantes' actions might or might not be morally justified (under Part II.B.'s rules), but no doubt these people probably think they are justified.471 They likely see themselves similarly to how civil disobedience protesters see themselves: they know that what they are doing is inconsistent with the law, in spirit, if not the letter, but they see the violation as morally justified by the law's own immorality in its indifference to doing justice.

Shadow vigilantism is in fact more damaging than classic vigilantism for several reasons. First, while less dramatic, it is more pervasive. Shadow vigilantism appeals not just to the unusual person or group willing to be a classic vigilante by openly breaking the law in serious ways. Rather, it appeals to the ordinary people who cannot bring themselves to such explicit lawlessness, but who can bring themselves to undermine and subvert, through noncooperation, lying, or other lower-level misconduct, a system they see as immorally indifferent to serious wrongdoing. Consider all the neighbors in the Section A cases that refused to help authorities pursue the classic vigilantes. If those neighbors were sitting on a jury for those vigilantes, would they be likely to vote to acquit? If they were the grand jurors or prosecutor in the case, would they want to avoid bringing charges? If they were voting on a proposal to change the rules that led to the failure of justice, would they vote for the change and for a politician who supported the change? It seems highly likely that they would easily do all of the above. The fact that an entire neighborhood can show its willingness to succumb to a shadow vigilante impulse shows the potential sweep of the problem.

Further, shadow vigilantism is more problematic than the classic form because the criminal justice system cannot effectively deter it in the way it can classic vigilantism. The failure to report a crime or to assist investigators often is not considered a crime in the United States472 and other low-level shadow vigilantism misconduct, even if it is criminal, cannot be effectively prosecuted. More on the specific kinds of shadow vigilantism is discussed below.

But shadow vigilantism is also more damaging because it operates in the shadows. The classic vigilantes, by operating openly, serve as a public protest against the system's failures of justice – a call to the system to correct itself. Shadow vigilantism is generally unseen. Jury nullification, improper exercise of discretion in charging, sentencing and other criminal justice decisions, and support in the voting booth for unjust punishment policies go unseen.

Further, the level of shadow vigilante action in any given case is unpredictable, dependent as it is on a wide variety of factors, such as publicity and public reaction. That introduces arbitrariness and disparity among cases that can only contribute in the long run to the system's reputation as being less predictable, more arbitrary, more unreliable, and thus less just. In other words, shadow vigilantism only serves to exacerbate the system's moral credibility problem that triggered it.

Thus, as Section C below explains, the system's insensitivity to the importance of doing justice invites a downward spiral. The system's poor reputation prompts shadow vigilantism, which further degrades the system's consistency and predictability, which further undermines its reputation, making it that much easier for people to be provoked to undermine and subvert it.

How Much Humiliation and Dehumanization Will Satiate the Crazed Political Patrons of MSOP?
(*Waiting for the Barbarians* - Philip Glass opera)

Consider the many ways in which shadow vigilantism can manifest itself.

1. Refusing to Report an Offense, Assist an Investigation, or Bring a Prosecution

One form of shadow vigilantism has already been illustrated: the refusal to report offenses, assist investigators, or to testify in court. The three Section A cases above show such lack of cooperation in the prosecution of classic vigilantes. But the same refusal to cooperate may be seen in cases beyond those of protecting vigilantes. Consider, for example, cases in which the offender is seen by the community as using defensive force in trying to protect himself or the neighborhood. The shadow vigilante may believe that authorities ought to be providing the protection and, if they fail, at the very least, the law should do everything to help the victims who are forced to defend themselves.473

Empirical studies show strong support among laypersons for the use of defensive force against aggressors and for the excuse of defenders who make mistakes in using defensive force.474 The community views on this point are dramatically more liberal than the legal rules. For example, a summary of studies found that in all of these studies, the community judges that these [defensive force] justifications are more compelling than the legal codes are willing to grant. Respondents frequently assign no liability in cases to which the code attaches liability. Even when respondents assign liability, they typically assign considerably less punishment than would be suggested by codes.475

The same phenomenon is seen in local prosecutors' charging decisions. Recall, for example, the recent case of George Zimmerman's killing of unarmed teenager Trayvon Martin. Zimmerman, the neighborhood watch coordinator, suspected unfamiliar Martin of being a trespasser in the gated community.476. He followed Martin and claimed he shot the unarmed Martin in self-defense.477 The local authorities filed no charges until national press focusing on the racial aspect of the case compelled a prosecution.478

The same dynamic was probably at work in the famous case of the New York 'subway vigilante,' Berhard Goetz, who shot four young African-American men after he claimed they sought to rob him.479 After a first round of shots that scattered the four, Goetz approached Darrell Cabey, who was grasping a seat by the conductor's cab, and said, 'You seem to be doing alright. Here's another.'480 He then shot Cabey, severing his spine.481 When first presented the case, the grand jury refused to indict.482

2. Jury Nullification to Counter the Law's Apparent Indifference to Punishing Unlawful Aggressors

The same shadow vigilantism operates later in the system as well, when cases go to trial. When Zimmerman was finally charged with the killing of Martin, an all-woman jury acquitted him of all homicide charges.483 In the Goetz case, publicity centering on the racial component of the case eventually brought a resubmission to the grand jury and a trial.484 While it seems difficult to see how a jury could conclude that Goetz could 'reasonably believe' shooting Cabey was necessary to protect himself, as the self-defense statute required, the jury acquitted Goetz of all assault charges.485 The law has its rules, but shadow vigilantes with the power of jury nullification have their own.

In a Minot, North Dakota case, four men

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came to Jeremiah Tallman's home to complain of a theft they claimed occurred earlier in the day.486 They exchanged angry words with Tallman while standing in the entryway.487 They were told to leave, and did when Tallman cocked the slide of his gun.488 As they walked away, one pounded on the trailer and another broke a window.489 Tallman then shot one of the men in the back several times, killing him.490 He was acquitted of all homicide and assault charges.491

According to one study, if self-defense is raised at trial, it succeeds much more often than any other kind of defense.492 The survey respondents, consisting of judges, prosecutors, and defense attorneys, estimated that the defense succeeded seventy six percent, forty-seven percent, and forty-six percent of the time, respectively.493

The same dynamic can apply to not just defensive force cases but also to cases in which the police are using aggressive force. Recall the 1991 case in which the police stopped an under-the-influence Rodney King after a long car chase and seriously beat him to subdue him.494 The gruesome and excessive beating was caught on videotape, yet the Ventura County jury acquitted the officers.495 Some of the jurors may well have thought that the police conduct was in violation of existing law. These jurors may have felt morally justified in acquitting the officers because they lacked confidence that existing law took proper account of the need for the use of force or gave sufficient deference to the ease of error in such situations.496

According to a Cato Institute study, prosecution, imprisonment, and other sanctions of police officers occur at a much lower rate than for civilians facing similar charges.497 In some cases, according to the Cato data, officers were acquitted even in the face of clear evidence, such as multiple witnesses or videotape.498 For example, in September 2009, a Spokane, Washington, jury acquitted an officer of assault for kicking a suspect in the face, though other officers present confirmed that he had done so.499 In another Washington State incident in 2010, an officer was acquitted after he was videotaped striking a fifteen-year-old girl who, when told to remove her basketball shoes, kicked toward a fellow deputy.500 The first trial resulted in a hung jury, while the second resulted in an acquittal.501....

pp. 467-68: *4. Morally Justifying Police 'Testilying'*

Another form of shadow vigilantism is police officers morally justifying their lying in court to compensate for what they see as improper rules that regularly lead to failures of justice – complex rules that have 'metastasized into a dizzying array of formalistic doctrines and subdoctrines.'506 Even police officials concede that police lying in court, especially to justify improper searches, is not uncommon.507 It has earned its own label, 'testilying.' The term was coined by New York City police officers, apparently to help them justify in their own minds why it was different from normal lying under oath – even if not legal, it was morally justified.508 'When an officer is deceptive in court, the rationale goes, he is 'not quite lying' but 'not quite testifying truthfully and completely' either. Testilying is seen as a middle ground between pure honesty and pure dishonesty.'509

Most famous among the examinations of police perjury is the 1994 Mollen Commission Report on the New York Police Department: 'Police perjury and falsification is a serious problem facing the Department and the criminal justice system.510 Such perjury was 'probably the most common form of police corruption ...particularly in connection with arrests for possession of narcotics and guns.'511 An empirical study by Orfield in Chicago concluded that 'virtually all the officers admit that the police commit perjury, if infrequently, at suppression hearings.'512 The study claimed that up to seventy-six percent of the officers surveyed had 'shaded' the facts in order to establish probable cause.513

The Mollen Comission Report spoke to the reasons for the officers' willingness to lie: 'In their view, regardless of the legality of the arrest, the defendant is in fact guilty and ought to be arrested.'514 It explained that the officers were frustrated with the legal rules that protected criminals from search and seizure, because the rules were perceived as 'unrealistic rules of law.'515 Officers also expressed frustration in their 'inability to stem the crime in their precinct through legal means.516 They have a strong belief that perjury was acceptable because it was necessary to stem the tide of crime, and such was 'doing God's work; -- doing whatever it takes to get a suspected criminal off the streets.517

Other writers have made the same point: 'Police view perjury as a necessary means to achieve the ends of justice. Constitutional rules – particularly the Exclusionary Rule – are viewed as technicalities that 'let the criminal ...go free because the constable has blundered.'518 One study found that testilying began soon after cases were dismissed under the 1961 exclusionary rule holding in *Mapp v. Ohio*.519 To police, 'there is a deep-seated disregard for what they consider to be silly little laws made by a silly little Supreme Court in a backroom far removed from the dangerous streets that they are trying to bring into order.'520

Presumably, judges, like others in the system, are well aware of the 'testilying.' Yet some may share the shadow vigilante sympathy, and thus, while no doubt unhappy about perjury in their court, play along with the game and accept the testimony as sufficient to justify the search or the arrest. As Alan Dershowitz reports, when officers offer perjured testimony, the judge 'shakes his head in knowing frustration, but accepts the officers' account as credible.'521

This is a sad state of affairs. But, in some ways it is a predictable development as the collection of outrageous results from the law's 'technicalities' accumulate (as in Eyler, Ignatow, Healy, and other cases in Part IV.). As the law increasingly loses moral credibility with the community, it becomes increasingly easier for shadow vigilantes to justify the subversion of what they see as an immoral system. It is probably no coincidence that 'testilying' is most frequently associated with satisfying the technicalities of search and seizure law. The same officer who feels comfortable lying about which side of a house's threshold he was on when he saw drugs in plain sight might think it abhorrent to lie about a matter related to the actual guilt or innocence of the defendant."

pp. 469-71: *5. Prosecutorial Overcharging*

Another instance of shadow vigilantism, in which participants feel morally justified in subverting the system in order to do justice, is the now common practice of prosecutorial overcharging. The overcharging is of two sorts: vertical overcharging, in which the prosecutor charges offenses for which he has insufficient proof to convict, and horizontal overcharging, in which he charges a series of overlapping offenses arising from the same criminal act.522 In the latter type, prosecutors charge every offense for which a defendant might theoretically satisfy the offense definition, no matter how overlapping the offenses may be. Thus, a prosecutor might take a standard rape case – using force to compel intercourse – and add on 'assault, kidnapping, gross sexual imposition, etc.'523 This is made possible because most U.S. criminal codes, even those recodified in the Model Penal Code wave, now have a vast collection of overlapping offenses,524 as legislatures have been constantly adding new offenses, sometimes making the code seven or eight times longer than its original Model-Penal-Code-based form, but without substantially expanding its coverage.525

The forest of overlapping offences exists in large part because prosecutors have politically promoted them. They do so by supporting a constant stream of new offenses that typically are just added on top of the old, and by opposing criminal code reforms that would streamline codes and eliminate unnecessary overlaps. For example, the political opposition of prosecutors effectively blocked attempts at a new criminal law codification in Illinois in 2003.526 One of the primary aims of this new codification was the consolidation of overlapping offenses.527 In turn, Illinois prosecutors sponsored a new reform commission that would keep the redundancies in the current code.528

Prosecutors' moral justification for such excessive charging might rest on any or all of several different claims, analogous to the sorts of claims heard from police to justify their testilying. First, the criminal justice process has so many barriers to an offender getting the liability and punishment he deserves that such excess is needed just to end up with some punishment that approximates what is really deserved.529 Further, to some it may make sense to try to get more liability and punishment than an offender deserves for the case at hand because, given the gross ineffectiveness of the system, the offense at hand is probably just the tip of the iceberg of the offenses he has actually committed.530

Finally, even if the overcharging generates liability that is undeserved for both present and unpunished past offenses, it is not something that ought to be a concern to prosecutors because the criminal justice system is no longer about justice. It is simply a system of mutual combat between defense counsel and prosecutors, with winners and losers, the goal of which is always to win and never to lose. Just as defense counsel see their job as always getting the least punishment possible for their guilty clients, the prosecutors, in a symmetrical fashion, see their job as getting as much punishment as they can for guilty defendants.531

To those unfamiliar with the system, strategic overcharging might seem to unethical to be done openly. But the increasing game-like features of the system have dulled participants' sensibilities. Indeed, one need only look at similar manipulative conduct by esteemed federal judges before the Sentencing Reform Act of 1984 stopped the practice. Existing federal law at the time required that all offenses be eligible for release by the U.S. Parole Commission immediately upon arrival at prison, but federal judges were authorized by statutes to delay eligibility until an offender had served one-third of his sentence.532 But judges who bridled at this early release could, and did, short-circuit the system by simply determining the sentence they really wanted, then tripling it.533 Thus, the offender would become eligible for release only after serving the full term the judge thought appropriate. Prosecutors may be taking similar sorts of strategic manipulations when they overcharge.534"

pp. 471-74: *6. Voting for Disproportionate Criminal Penalties*

The impulse to subvert or manipulate a

system that is thought to have lost sight of the importance of doing justice manifests itself in the many ways described above. It is also seen in an even larger form: providing popular support for criminal justice reforms that would force justice from a sometimes reluctant system. Unfortunately, these sorts of jury-rigged attempts can produce their own problems and complications.

Consider, for example, the public dissatisfaction with the kind of improperly lenient sentencing illustrated in Part IV.A., such as the fine and community service for a shopkeeper who shot the customer in the back after wrongly accusing her of shoplifting, and a fine for the men who hunted down their victim after a bar confrontation and beat him to death with a baseball bat.535

Dissatisfaction with unduly lenient sentencing helped nurture the mandatory minimum movement. It took hold during the 1960s, when drug use and crime rates were rising,536 yet sentencing discretion remained unrestrained.537 Once begun, it took on substantial momentum. For example, from 1991 to 2011, the number of the mandatory minimum penalties in the federal code nearly doubled.538 More than two-thirds of the states now have mandatory minimums for drug offenses.539 'More than eighty percent of the increase in prison population between 1985 and 1995 was due to drug convictions that triggered statutory mandatory minimum sentences.540

The problem is that the shift to mandatory minimums essentially guarantees the regular and predictable imposition of sentences that are unjust, some grossly so. For example, one recent study of laypersons' shared intentions of justice showed the dramatic conflict between the law's application in real cases and the average person's judgments about those cases.541 In one 'three strikes' case, the subjects gave 3.1 years; in reality, the court was required to give life imprisonment.542 In a cocaine case, subjects gave 4.2 years, while the court was obliged to give life without parole.543 In a marijuana case, the subjects gave 1.9 years, while the court was compelled to give eight years.544 The unfortunate irony here is that even the lay public – who were elected the politicians who put the sentencing rules in place – sees these cases as grossly unjust.545

Everyone – offenders and public alike – would have been better off if this sentencing war had never begun, if sentencing judges had restrained themselves from giving sentences that seriously conflicted with community notions of justice, or if the system had restrained the lenient-sentencing judges in more thoughtful ways, as with sentencing guidelines.

To be fair to the judges of that period, some of the improperly lenient sentencing was a product of theories of rehabilitation or other nondesert goals that were influential at the time. The sentencing policy landscape has changed. In the only amendment to the Model Penal Code since its enactment in 1962, the American Law Institute in 2007 dramatically altered the sentencing purposes provision of the Model Code to set desert as the dominant purpose, which can never be violated.546 That new clarity of purpose, together with the use of carefully constructed sentencing guidelines, can avoid the problem of improperly lenient sentences and thereby eliminate the need for mandatory minimum sentences.

The problem is, however, that we now have mandatory minimums and, as unnecessary as they may be, getting rid of them will not be easy. We will for some time be paying for past sins of doctrines that produced predictable failures of justice. At very least, we can stop making things worse and begin to repair the system's moral credibility by having the system publicly and persuasively commit itself to doing justice and forsaking trading it away unnecessarily for minor benefits.

Some people may argue that the outrageous justice-failures illustrated in Part IV do not happen frequently enough to have significant effect on public perceptions. But this misunderstands the dynamic at work. First, in many instances, failures of justice do not occur specifically because shadow vigilantes are subverting the system. For example, the rampant 'testilying by police, with the common acquiescence of judges, is aimed at and presumably successful in avoiding failures where the shadow vigilante impulse will be at its greatest. Interestingly then, it is shadow vigilantism that in some ways may be saving some of these doctrines from themselves, by taking the edge off the credibility loss that the system would otherwise suffer were they not subverted.

Second, it is worth repeating social psychology's insight that motivation is everything in setting a reputation.547 All that is needed to provoke the shadow vigilante's conclusion that the system is indifferent to the importance of doing justice is an occasional headline case in which such apparent indifference is shown. The outrageous failure occurs, yet there is no indication that the judge or some other official is to be sanctioned for causing it. Thus, it becomes clear that the outrageous result is authorized and approved – it is how the system is supposed to work. With the system's apparent indifference established, the observer can then easily assume that the same indifference motivates the system's decisions in the many other cases about which the observer never hears the details.

Finally, and most importantly, it is not the failure of justice itself that does the most serious damage, but rather the threat of it, for this is what creates the shadow vigilante impulse. That is, the potential of a doctrine to produce gross failures that calls for its subversion. The police would still engage in testilying to avoid a failure of justice even if they had been successful in avoiding such a failure in every instance in the past. It is not the frequency of an outrage that is relevant – each is just an instance of the failure to prevent it through subversion – but rather the perceived threat of the outrage. If the threat exists, so will the impulse to prevent it."

Footnotes:

471 Diana Reese, Reissued Book Recalls the Time Law Failed Skidmore, Mo., Wash. Post Blog (July 10, 2012), http://www.washingtonpost.com/blogs/she-the-people/post/law-fails-skidmore-mo/2012/07/10/gJQAV7L7aW_blog.html.

472 Almost by definition, the shadow vigilante cannot meet the rules for the moral vigilante as laid out in Part I.B.: they typically do not give prior warnings, as Rule 7 requires; typically do not report afterwards want they have done and why, as Rule 8 requires; and also commonly are each acting alone, as Rule 3 forbids. However, a group might be formed to coordinate activities in ways that might come closer to meeting the rules. An organization might publish guidelines and advice about what shadow vigilante actions people should take and why, and to report what is done anonymously and why.

473 It can be a crime to lie to police or to refuse to answer questions before a grand jury. See, e.g., Brown v. United States, 359 U.S. 41, 50-51 (1959). But see ...Harris v. United States, 382 U.S. 162, 164 (1965) (identifying a similar scenario where criminal contempt was not appropriate). But shadow vigilantes can usually avoid committing such offenses simply by saying nothing to investigators in the first place and never drawing attention to themselves that might put them before a grand jury.

474 Paul H. Robinson, Intuitions of Justice and the Utility of Desert (2013), at 280.

475 See, e.g. for anecdotes of refusals by prosecutors to press charges: Joe Palazzolo & Rob Barry, More killings Called Self-Defense, Wall St. J., Apr. 2, 2012, http://online.wsj.com/article/SB10001424052702303404704577318732144574.

476 Greg Henderson & Scott Neuman, Jury Acquits Zimmerman of All Charges, NPR (July 13, 2013), http://www.npr.org/blogs/thetwo-way/2013/07/13/201744637/jury-in-zimmerman-trial-enters-second-day-of-deliberation.

477 Greg Botelho, What Happened the Night Trayvon Martin Died, CNN (May 23, 2012), http:// www.cnn.com/2012/05/18/justice/florida-teen-shooting-details.

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479 People v. Goetz, 497 N.E.2d 41 (N.Y. 1986).

480 Id. At 43; Jack Strickland, Bernard Goetz: 'You Seem To Be Doing Alright, Here's Another." YouTuibe.com (July 3, 2014), www.youtube.com/watch?v=xXtEle8JM2w.

481 Goetz, 497 N.E.2d at 43.

482 Grand Jury Refuses to Indict Goetz for Attempted Murder, Gadsden Times, Jan. 26, 1985, at A8.

483 Henderson & Neuman, supra note 476.

484 Goetz, 497 N.E.2d at 45.

485 Jon Beeman & Evan Lange, The Bernhard Goetz Trial: A Chronology, Univ. Mo. Kan. City Law School, http://law2.umkc.edu/faculty/projects/ftrials/goetz/goetzchrono.html

486 Dave Caldwell, Jury Decides Minot Man's Actions Were Self-Defense, Minot Daily News, May 254, 2011, http://www.minotdailynews.com/page/content/detail/id/555056/Jury-decides-Minot-man-s-actions-were-self-defense.html?nav=5010

487 Id.

488 Id.

489 Id.

490 Minot Murder Suspect Jeremiah Tallman Pleads Not Guilty, Bismarck Tribune, Aug. 26, 2010, http://bismarck tribune.com/news/state-and-regional/minot-murder-suspect –jeremiah-tallman-pleads-not-guity/articled_a45f7f0c-b11f-11df-bb5d-001cc4c03286.html

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493 Id. At 975 tbl. 4.

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495 Akhil Reed Amar & Jonathan L. Marcus, Double Jeopardy Law After Rodney King, 95 Columbia L. Rev. 1, 2 (1995).

496 The empirical studies similarly suggest great leniency toward citizens exercising

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law enforcement authority, even when they make mistakes in the use of force. Robinson, Intuitions of Justice, supra note 474, at 293-99.

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498 David Packman, The Problem with Prosecuting Police in Washington State, Cato Institute (Feb. 27, 2011)) www.policemisconduct.net/the-problem-with-prosecuting-police-in-washington-state/

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Editor's Note: This set of excerpts will conclude in the next TLP issue, followed by some concluding thoughts from the editor.

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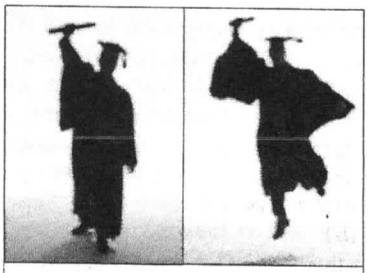
MSOP Report:
The Two Latest Graduates

Once again, we have a graduation report — this time by two MSOP clients since our last edition went to press.

Turn page sideways to read the facts and to appreciate the irony of being dragged back to lockup to effect 'graduation'.

Last Name	First Name	Birth Year	Graduation Date	Graduation Means
Stem	Randy	ca. 1963	12/14/2018	complications from diabetes
Tucker	Delbert	ca. 1951	01/10/2019	returned from community to St. Peter MSH security forensic hospital for treatment, where he died of undisclosed cause



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Kingsley Argument Supplied to Law Firm for *Karsjens 2* Appeal.

Everyone already knows that the reason the first appeal in *Karsjens* was lost was that the 8th Circuit panel unexpectedly relied on a 1998 SCOTUS ruling in *County of Sacramento v. Lewis*. That case had ruled that the as-applied substantive due process claim in that case could not succeed because the facts presented by the plaintiff did not "shock the conscience" of the court.

However, at just about the same time that Judge Frank was ruling in our favor, the Supreme Court revisited the question of applicability of the "shock the conscience" standard in *Kingsley v. Hendrickson* (2015). *Kingsley* dispelled certain misunderstandings by various federal appellate courts about the meaning and application of that standard.

Most crucially, *Kingsley* clarified that there is no need for a plaintiff to prove that the defendant(s) acted from motivations of "malice" and/or "sadism" in things they wrongfully did or things they should have done but recklessly or intentionally failed to do.

Further, although SCOTUS confirmed in *Kingsley* that a plaintiff must prove that the subjective state of mind of the defendant was that he or she or they knew the nature of what they were doing or choosing not to do, there is no need to prove a subjective state of mind as to any improper motive to harm the plaintiff.

Nor, added *Kingsley*, is there any need to combine a claim of violation of "one or more fundamental rights that are 'deeply rooted in this Nation's history and tradition, and implicit in the concept of ordered liberty',..." with proof of any such subjective sadistic or malicious motivation on defendant's part to harm the plaintiff, or even merely of any lesser standard of shocking the court's conscience. *Kingsley* confirmed the holding in the pre-*Lewis* case of *United States v. Salerno*, at 481 U.S. 746 (1987) disavowing any such need to combine both scenarios, effectively declaring that either one alone will suffice: "'So-called substantive due

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process' prevents the government from engaging in conduct that 'shocks the conscience,' . . . or interferes with rights 'implicit in the concept of ordered liberty') (quoting *Rochin v California*, 342 U.S. 165 at 172).

Thus, *Kingsley* also confirmed the vitality of *Bell v. Wolfish* (1979) as establishing that only "objective evidence that the challenged governmental action was not rationally related to a legitimate governmental objective or that it was excessive in relation to that purpose" (441 U.S., at 541-543) was needed. Hence, *Bell* held that, in the absence of an expressed intent to punish, a pretrial detainee can nevertheless prevail by showing that the actions are not 'rationally related to a legitimate non-punitive governmental purpose' or that the actions 'appear excessive in relation to that purpose.'" (441 U.S., at 561, quoted with approval in *Kingsley* at 192 L. Ed. 2d at 427).

Following from this, Kingsley also endorsed the concept in *Bell* that the condition of confinement being challenged "is not reasonably related to a legitimate goal if it is arbitrary or purposeless; a court permissibly may infer that the purpose of the governmental action is punishment." (*Id.*)

Thus, a noted legal scholar, *Rosalie Berger Levinson*, in "*Kingsley* Breathes New Life into Substantive Due Process as a Check on Abuse of Government Power," 93 *Notre Dame L. Rev.* 357, 377 (Nov. 2017) concludes:

> "After *Kingsley*, ...failure to meet the nebulous shocks-the-conscience standard should no longer provide a rationale for subjecting detainees to conditions that are not reasonably related to legitimate governmental objectives."

An even more specific conclusion is reached by *Arielle W. Tolman*, "Sex Offender Civil Commitment to Prison Post-*Kingsley*," 113(1) *Nw. U. L. Rev.* 155, at 188 (2018):

> "*Kingsley*'s doctrinal turn opens up a new avenue for sex offender civil commitment litigation and an opportunity to bolster ongoing cases in two main ways. First, *Kingsley*'s emphasis on analyzing the 'challenged governmental action' primarily, rather than on the existence of a state 'intent' to punish, suggests that courts could sidestep the issue of the legislature's intent entirely. The logic of *Kingsley* instructs courts to instead focus directly on the question of whether the actual conditions of confinement are so restrictive as to be 'excessive' in light of their nonpenological purpose as to render the detainment scheme unconstitutional. In other words, *Kingsley*'s logic dictates that conditions of confinement are no longer only relevant to the extent that they shed light on a hidden legislative punitive purpose; rather, conditions may simply be so punitive as to themselves be unconstitutional."

Therefore, although unknown to the Gustafson Gluek firm (or anyone else, for that matter) at the time, the 8th Circuit's reliance on *County of Sacramento v. Lewis* was misplaced, in apparent utter ignorance of *Kingsley*, which, in the meantime, had restored the legal landscape on as-applied substantive due process claims to what it had been before the *Lewis* case. Under the pre-*Lewis* cases, *Bell* and *Salerno, supra*, it turns out that the *Karsjens* claims are quite viable indeed. In particular, the adverse ruling by Judge Frank after remand from the 8th Circuit after the first *Karsjens* appeal, again in ignorance of *Kingsley*, was to pessimistic.

Even though I provided a copy of *Kingsley* and of the *Levinson* law review article to Gustafson Gluek before they submitted their appellate main brief in the second appeal (*Karsjens* 2), no argument appeared in that main brief. After a call to David Goodwin at that law firm, I prepared and sent to him a detailed memorandum and a shorter proposed argument to *Kingsley*'s impact on our situation, suggesting that the latter document be considered for inclusion in their reply brief in the current appeal. We shall have to wait to see if this occurs.

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Gladden Excerpt:

Viewed Functionally, the Punitive Nature of the SPP/SDP Law Shows Its Attainder Nature.

Foretich v. United States, 351 F3d 1198(DC App. 2003), provides the following useful guidance to the bill of attainder analysis:

p. 1218: "...[T]he second factor – the so-called 'functional test' – 'invariably appears to be "the most important of the three"'" (citations omitted)

p. 1221: "Under this functional test, the nonpunitive aims must be 'sufficiently clear and convincing' before a court will uphold a disputed statute against a bill of attainder challenge."

p. 1222: "....[A] court must weigh the purported nonpunitive purpose of a statute against the magnitude of the burden it inflicts....

"A grave imbalance or disproportion between the burden and the purported nonpunitive purpose suggests punitiveness, even where the statute bears some minimal relation to nonpunitive ends.

"Moreover, the selectivity or scope of a statute may indicate punitiveness where the differential treatment of the affected party or parties cannot be explained 'without resort to inferences of punitive purpose.'

"Finally, the availability of less burdensome alternatives [which are not utilized] can also cast doubt on purported nonpunitive purposes."

Sex crimes are ordinarily suppressed and punished through criminal law and its procedures, including prosecution, conviction, and imposition and execution of punishment. Sex offender commitment, as practiced by the application of said Act, provides for adjunctive incarceration of convicted sex offenders, and applies this at the end of the particular sex offender's prison term, in order to serve as consecutive incarceration, without any of the procedural constraints and defendant's rights circumscribing the criminal justice system. This is simply a retroactive substitute for harsher criminal penalties for sex offenses, especially as applied to those deemed recidivists, indeed effecting implicit life sentences without the right to parole decision-making, and thus serving to date as implicit natural-life sentences. As candidly admitted in *In re Lingl*, 2012 Minn. App. Unpub. LEXIS 1014 (2012): "Civil commitment as an SDP is essentially a life sentence with little hope of release."

As a matter of the prohibition on bills of attainder, it is impermissible for sex-offender commitment laws to threaten the primacy of criminal law as society's chosen means for dealing with anti-social behavior. Minnesota's sex offender commitment program, embodied in said Act as judicially interpreted, construed, implemented, and applied, does threaten such primacy of the criminal law as to dealing with sex offenses and sex offenders. For this reason, this evasion of the limitations and guarantees in the criminal justice system is punitive for bill of attainder purposes, and is also fundamentally unfair to those thus subjected to sex offender commitment in Minnesota, as a deprivation of substantive due process.

Thus, it is held that, even though the terms "clinical psychopath" and "sexual psychopathic personality" may sound alike, they are not the same. *In re Whitley*, 2010 WL 1192307, at *6-7 (Minn. App. 2010). Effectively, Whitley thereby concedes that Minnesota's so-called Sexually Psychopathic Personality law has nothing to do with mental/emotional pathology. Instead, that statute is simply a deliberately broad, vague dragnet of a legislatively invented standard. In other words, it simply identifies a disfavored class of individuals for permanent preventive detention as a hallmark of a bill of attainder.

In a classic case illustrating this, *Stone v. Johnson Piper*, 2012 Minn. App. Unpub. LEXIS 1056 (2012), the Minnesota Court of Appeals acknowledged that, even though Mr. Stone had been committed as a sexual psychopathic personality, he had "received a score of 15 on the PCL-R test, which suggests that Stone's sexual offenses 'do not flow from psychopathy'...." Mr. Stone, as many others, was committed purely under a definition of utterly political invention, not any psychopathy or other mental illness. Even worse, despite that Stone had recently "'flatlined' (that is, not reacted at all to) his PPG test," thereby causing the examiner to concede that "'our concern about sexual deviance has essentially been remitted'," that examiner insisted that Stone's "risk level remained sufficiently high" to require continued commitment. Really? In the absence of psychopathy or deviance, whatever for? Mr. Stone remains committed to date as a clear example of political refusal to release anyone from MSOP, regardless of lack of present mental illness.

The rate of commitment of sex offenders pursuant to said Act is ten times per capita the average among all other of the 20 states with sex-offender commitment laws. If Minnesota's commitment laws were truly applied by its trial and appellate courts to reflect dangerousness, no scientific rationale could explain this disparity. Instead, this reflects a rampant drive on Defendants' part toward preventive detention on a mass scale of everyone thought to be somewhat likely to be capable of committing a sex crime at some unknown point during the rest of their life.

If instead of detention, the goal of sex offender commitment under said Act is to prevent sex crimes, that law is a failure and counterproductive by diversion. Most sex crimes are committed by those who have not yet been charged with, much less convicted of any sex crime. *Eric S. Janus, Failure to Protect: America's Sexual Predator Laws and the Rise of the Preventive State*, (Cornell University Press, Ithaca, N.Y., 2006), p. 43 Unsolved rapes by unknown strangers still occur, as do molestations by every category of individual, from parents to teachers, to priests, to athletic coaches, etc. "Based on police-recorded incident data, in 90 percent of the rapes of children younger than age twelve, the child knew the offender...." *Janus, Failure to Protect* (etc.), at 46 Meanwhile, tens of millions of dollars are spent to commit each person committed under said Act and to keep him committed. Those per-person costs are multiplied by the ever-growing population of those detained in MSOP. This enormous collective cost has, still is, and will continue to divert more funds per year which otherwise would be available to allocate to other, more dollar-cost-effective sexual violence prevention pro-

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(Continued from page 11)

grams, including detection and apprehension of sex offenders currently unknown. So if the aim of sex offender commitment legislation were not to politically detain certain categories of sex offenders after their prison terms have ended, it fails at the claimed larger goal of sex-crime prevention by inaccurate, unwise misallocation of irreplaceable monetary resources. This again confirms that its true function is purely permanent detention.

Under the "functional" test, because the primary aim of the Act is incapacitation by unlimited preventive detention of probable lifetime duration – effectively a renewed incarceration turning on past crimes, punishment is inflicted for attainder purposes. As to the fact that "treatment" is offered in such detention, the parallel fact that treatment is typically offered to (if not required of) sex offenders in prison does not change the character of imprisonment to anything other than incarceration.

MSOP operates parallel sex-offender treatment programs, both in the Minnesota Department of Corrections prison system and also under the aegis of the Minnesota Department of Human Services. Thus, the 'DHS side' of MSOP (to which sex offenders are "committed") is the equivalent of further correctional incarceration, and hence "punishment," within the meaning of case law as to bills of attainder.

For that matter, sex offender treatment is also provided in a non-detention setting in any event. "Treatment" in MSOP detention under said Act is openly proclaimed by its administrators to take a minimum of "many" years. Despite the facts that a substantial percentage have been detained for twenty years or more, and that most MSOP detainees participate in such treatment in said detention, only a relative handful of detainees "committed" under said Act have been released to date (and all of these but a few on "provisional" release). In light of these facts, it must be concluded that rehabilitation and attaining release through treatment are, at most, a secondary aim of such detention and at best, of a substantially lesser concern than the preventive character itself of such detention.

If it be surmised (strictly *arguendo*) that a non-punitive purpose of the Act is to treat those committed, there is a significant imbalance between the deprivation of liberty as preventive detention compared to that surmised treatment purpose. As alleged supra, sex offender treatment is already offered, and indeed, required of sex offenders in Minnesota Department of Corrections prisons, making treatment in later commitment redundant.

Also as alleged supra, community-based treatment of sex offenders is also offered to sex offenders released from prison. As to those released sex offenders who did not successfully complete treatment while incarcerated, such post-release treatment is mandatory, on pain of revocation of release. As to released sex offenders who did successfully complete sex offender treatment during their imprisonment, continuous aftercare is still mandatory.

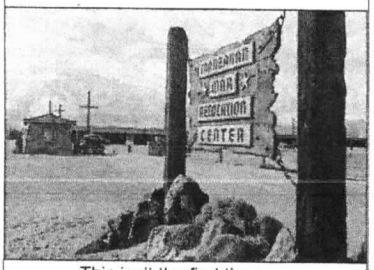
Studies of such community-based post-release sex offender treatment show at least some reduced recidivism among participants in such treatment, probably due exclusively to the additional accountability such community-based treatment programs demand, beyond the already-intense monitoring and surveillance by ISR agents of released sex offenders. This contrasts with the negligible impact of sex offender treatment in prison on recidivism. Therefore, contrary to the rationale offered up by MSOP administrators, there is no validity to the proposition that treatment of sex offenders must be conducted in an incarcerated/detained setting to be effective.

Minnesota has the lowest discharge rate in the country from sex offender commitment. (*Karsjens*; PX 184 at 16-18, PEXB1348-140; Doc. 658 ay 74-76). Minnesota's huge population of committed sex offenders does not result from an inability to treat and safely release sex offenders because the undisputed evidence in *Karsjens* demonstrated that other states have safely reintegrated hundreds of sex offenders in recent years. *Karsjens*; Tr. 54:4-6, 16-19, PA695 (Wisconsin has fully discharged 118 individuals and placed approximately 135 individuals on supervised release since 1994); Tr. 704:6-7, PA721; Tr. 773: 18-19, P.A.732; Tr. 778: 1-13, PA 733 (in New York, since 2007, 125 offenders were initially placed in less restrictive alternatives, 64 have been transferred from a secure facility to less restrictive alternatives and 30 have been fully discharged).

In the *Karsjens* trial, Dennis Benson testified that the whole discharge process is deliberately set up in a way that cannot work to discharge Plaintiffs due to the political influences. (*Karsjens* Doc. 917 at 68: 5 - 70: 16, PA556-558).

The lack of discharges of sex offenders committed pursuant to said Act from MSOP demonstrates the true preventive-detention nature of such "commitment."

Nothing apparently exists to date in constitutional decisional law to prevent any state from creating an entire corpus of "dangerous persons" statutes to shadow its criminal code. Indeterminate commitment would derive from proven violations of criminal statutes, combined with findings of mental disorders, and 'criminal propensities,' and constitutional protections for criminal defendants would be simply inapplicable. The goal would be "treatment"; the result would be evisceration of criminal law and its accompanying protections.



This isn't the first time.....

Editor's End Note: A number of topics also support this proposition that functional aspects of Minnesota's SPP/SDP schema of sex offender commitment, including post-commitment maters, illustrate its essential nature as a modern-day Bill of Attainder. These will be discussed in further quotes from the *Gladden* case draft of a Third Amended Complaint in the next issue of *TLP*.

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TLP Distribution: Why & How It Has Changed

This issue marks the first issue of Volume 3 of *The Legal Pad*. For just a little more than the last two years I (Cyrus Gladden) have sought to bring interested MSOP resident-detainees pertinent news and information to enlighten and provide context to the politically driven sex-offender commitment process that has ensnared us.

I am committed to continuing this work and in fact to doubling my effort to provide more and better quality information. While the truth may not singlehandedly make us free, swinging blindly in pitch dark will never win our freedom. Hence the crucial need to keep TLP going.

It has also been an even more critical need to send out copies of *The Legal Pad* to interested entities and individuals in the real world in an ongoing effort to spread such awareness of the truth about sex offender commitment, and thereby to foster development of a thriving and strong movement to repeal the statutes upon which such 'commitment' is based. This latter external distribution has been costly, and will continue to be, but this outreach effort is proving to be worth its proverbial weight in gold.

However, simply appealing to national organizations and individuals elsewhere in the country is not sufficient to bring this monstrosity to an end in Minnesota. We simply must have a Minnesota-based support organization willing to step up to the plate publicly and resolutely knock the ball out of the park, as it were, by contacting media and legislators on our behalf, providing issue education and demanding reform.

Such a support organization can do this and much more. However, it will take willing volunteers to make this happen. Yet, because of the controversial nature of the issue, we need to contact many potential prospects to find the comparatively few who will resolutely, assertively helm this projected support organization.

We cannot contact such potential entity founders and volunteers without having names of those interested in our welfare. I refer here to our families and friends, of course. Because of their concern for our welfare and our fate, these are the most likely individuals to approach with this request.

Hence, all such names are invaluable to us. It is not inaccurate to say that our fate, whether to regain our freedom or to die in this unjust confinement, will turn upon our success or failure at this.

Because the costs of creating and mailing TLP have mushroomed as distribution efforts have increased, the suggested minimum annual donation to support TLP must now inevitably increase.

Before this issue is distributed, I will personally contact each current patron with details on this.

Others who wish to join in this effort and to be added to the distribution list are urged to take the initiative to contact me directly.

However, as an incentive to prompt the contribution of name(s) and contact information for those who may be willing to listen to why their help in this support entity will be invaluable to the cause of our regained liberty, the minimum donation will be waived, and an annual subscription to TLP will be provided *gratis* to each individual who supplies at least one name and contact information for someone willing to listen to our outreach effort. I ask each one who can possibly supply at least one name in lieu of a donation to do so. Thank you!

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