The Legal Pad
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"Fear has always been freedom's greatest enemy."
– Stewart "Buz" Eisenberg, "Reflections of a Child of the Sixties [etc.]," 38 W. New Eng. L. Rev. 163, 167 (2016)

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Coming Soon:

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- ✓ 'Stranger Danger' Debunked
- ✓ MSOP Media Censorship vs. Disconnect between Imagery & 'Hands-on' Sex Crimes
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↳ And of course, much, much more!

First Amendment Case to Proceed Separately

The massive complaint citing a vast array of First Amendment violations here in MSOP was, as you'll recall, the subject of a motion to intervene in the longstanding federal case by Charley Stone.

The Stone case challenges the gradual attempted 'erasure' by MSOP of the settlement of a case by Clark Kruger attacking the 2004 Minnesota statute allowing austere censorship by MSOP. That settlement called for institution of an MSOP policy relaxing such censorship standards. After Clark Kruger died, MSOP pretended that the settlement of that lawsuit died with him.

On that pretense, MSOP began claiming that the 2004 statute was reinstated automatically in the wake of Kruger's death. In reliance on that statute, MSOP embarked on a course of many successive modifications and rewrites of its 'Media Policy,' each more restrictive than the last.

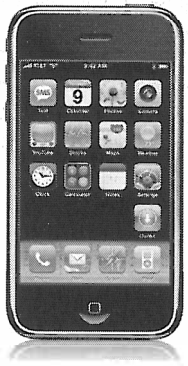
In 2011, still early in this process, Stone filed his lawsuit seeking to reverse that restrictive trend as violating the Kruger Settlement and also violating the First Amendment's guarantee of freedom of access to media which are protected by the First Amendment. Shortly afterward, the *Karsjens* case was filed. In its wake, all cases deemed related in the slightest way were placed on stay by court order. In Stone's case, this stay was briefly dissolved, but then soon reinstated, and then finally dissolved again. The upshot is that the *Stone* case has now only been able to proceed forward for less than one year since 2011! Nonetheless, that pending case is currently deep into its discovery phase.

Now please indulge a necessary digression. For our purposes here in MSOP, nearly the only media not under First Amendment protection are either "obscenity" or "child pornography."

As you no doubt are aware, while the MSOP Media Policy fairly describes each of these two categories as forbidden here, that policy now goes far beyond the confines of those exceptions from First Amendment protection, banning a host of additional categories of media treated as "prohibited" here.

In addition, many items claimed to be individually prohibited following "review" were never actually reviewed, but instead were banned only on the strength of what some website reported about the claimed contents of the video in question. Other videos have recently been categorically banned only because they lack MPAA or Canadian ratings. This sweeping category bars all foreign movies other than those made in Canada.

Finally, within the past year, another amendment to MSOP policies changed the role of the Clinical Department in this censorship. Previously, a therapist could declare a video that you were otherwise cleared to receive to be "counter-therapeutic." Back then, the only effect of such a decision was that the recipient's treatment file would bear a note to that effect, and the recipient would eventually be expected to talk about the video in his core group.



However, under this amendment, whenever a therapist declares a video, picture(s), or a book or magazine counter-therapeutic, the item or items immediately becomes contraband, and must be sent out without being seen by the would-be recipient. Worse yet, every item treated in this way is also added to the "Prohibited" list, barring everyone from receiving them thereafter.

Because so many of these harsh changes came after Stone filed his lawsuit, they needed to be challenged additionally. Meanwhile, numerous other MSOP rule changes restricted other aspects of our First Amendment rights, each of them requiring distinct challenges as well. The article in Volume 3, Issue 3 of *TLP* (March 2019) on the First Amendment complaint that resulted from all this lists these additional restrictions and outright denials of our First Amendment rights. There is no need to reiterate that list here.

However, of special note, a previous lawsuit (also 2011) challenged the total denial of internet access to us, but was dismissed. However, since then, the indispensable – role of the internet in everyday life has very quickly become undeniable and unavoidable. We live in a different world now.

For example, Amazon.com (specifically barred here as a vendor) has become so ubiquitous that 65% of all books and videos are now purchased through it. In addition, many others ordered from other firms are shipped from Amazon warehouses. In many cases, even though another vendor may present a book for sale, the transaction paperwork in the end reveals that the order was then merely sold to Amazon. Amazon then acted as an assignee of the sale, fulfilling the order from its vast warehouses of books and videos – or, in the case of videos, much the same as by Oldies.com, contracting with an "on demand" video disc producing firm. That firm then creates just one disk to fill that order in a factory that records many thousands of such custom-ordered discs per day.

On this same topic, many periodicals, books, and movies are now being sold only as digital downloads. This trend has accelerated swiftly in recent years as the high costs of production and mailing/shipment of 'hard copy' versions of these media has driven many firms wedded to that method of commerce out of business – outcompeted by online-only firms without such costs. This means that those without access to the internet to buy and receive such digital-only media now find themselves without any access to books, movies, and magazines previously available to them through hard-copy subscription or mail-order. WE in MSOP are now in this rapidly shrinking and soon-extinct marketplace.

However, this is far from the only example of inaccessibility that total denial of the internet forces us into.

MSOP refuses access to the internet for any purpose, including for example, each of the following uses: receiving education; employment; performing factual research into scholarly texts, articles, and other resource materials; communicating with those not confined by economical and efficient means of exchange of text messages and/or email, and/or alternatively, of real-time dialog via video or audio-only telephony, as well as other means of digital communication; reading and listening to various matters of opinion on important and current issues and, conversely, placing opinions in various Internet fora designed for the purpose, including illustratively, but without limitation, weblog posts and participation in 'open mic' "podcasts" and other forms of online conference participation (whether generally or as specific to a given issue or category of issues); watching and listening to various forms of entertainment offered for real-time viewing or for download (either for free or for pay); and participating in commerce through the selection and purchase of goods allowed to be purchased and received for use within MSOP.

In sum, just the denial of internet access presents the most overwhelming and constricting restriction by MSOP on our First Amendment rights. Worst of all, given current, accelerating trends, it is a restriction that will continue to inexorably get tighter and tighter each year, until very soon, we will have no practical ways left to effectively use those rights at all.

For these reasons, the most important role of the First Amendment complaint we have created is to seek judicial declaration and enforcement by injunction of our First Amendment rights (exempting religious rights due to their singularity and complexity). We decided to seek inclusion of our complaint in the Stone case by a motion to "intervene." However, the federal court denied that motion recently, citing, among other factors, the long pendency of Stone's own claims, their comparative simplicity, and their near-readiness for trial.

Effectively, the court was telling us, 'get your own case.' We had thought that getting into the Stone case would allow us to more rapidly get to a judgment acknowledging and enforcing all of our First Amendment rights. However, were we to appeal that denial of intervention, doing so would actually create a drag on our progress.

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Accordingly, we have decided to take up the federal magistrate judge on that suggestion. We are now in a phase of revamping that complaint in numerous ways to make it more inclusive than it already is, and yet present its various claimed violations in a 'leaner and meaner' way, thereby drastically shortening its previous sprawling, 170-page length.

We are also re-evaluating whether to forgo claims we originally included beyond the comprehensive single First Amendment count (which consolidates all restrictions due to their total, synergistic impact upon all MSOP residents). Those additional counts based on other constitutional provisions may actually only serve to confuse and distract attention from that First Amendment count.

Also, now relieved of the intense haste we were forced to employ in the effort to latch onto the rapidly moving Stone case, we can – and will – take the time to solicit suggestions from anyone here as to possible added aspects of our First Amendment rights that are now being denied or restricted, but which we have overlooked.

We also want to hear from any MSOP residents who have been doing their own legal or factual research into this topic. Your participation and contribution of any such research results will be very helpful and greatly appreciated. So let us hear from you today, while there is still time to add whatever may be impactful toward a great outcome.

We have not lost sight of the 'main event' of trying to gain release of everyone through judicial action. However, it appears that we will still be here for at least several more years. Hence, while other actions are proceeding toward that end of release, we might as well seek enforcement of the First Amendment rights that make our lives in MSOP endurable.

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Packingham Revisited

Editor's Note: The following three excerpts convey important information to the First Amendment case we now project filing separately from the *Stone* case. Particularly, even though *Packingham* itself concerned a sex offender who was not on parole or probation, the precepts it enunciated would appear to have global effect, even on those still on that status, or even confined in non-prison civil confinement settings such as MSOP. My comments to the observations made by each of these articles will appear as bracketed material at the place in the excerpt where pertinent.

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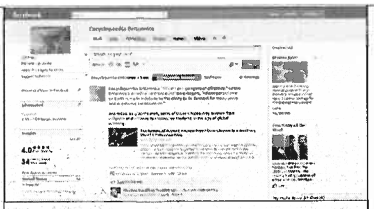

Miller, Katie, "Constitutional Law – Sex Offenses and Free Speech: Constitutionality of Ban on Sex Offenders' Use of Social Media: Impact on States with Similar Restrictions" 93 *N. Dak. L. Rev.* 129 (2018)

p. 129, Abstract: "In *Packingham v. North Carolina*, the United States Supreme Court held that a North Carolina Statute, which barred registered sex offenders from accessing a myriad of websites, including social networking websites, impermissibly restricts lawful speech in violation of the First Amendment's Free Speech Clause, applicable to the States under the Due Process Clause of the Fourteenth Amendment. ...In reaching its decision, the Court noted two main reasons for the statute's impermissibility. First, the statute's broad wording not only restricts access to social media websites, but due to the statute's elements, it encompasses many and varying websites. Second, the Court found that this far reaching restriction on speech is unprecedented in the range of speech that it is abridging: essentially resulting in a total ban on the exercise of First Amendment speech on social networking sites that are imperative to participating in modern society."

Text:

p. 133: "A content-neutral time, place, manner regulation on speech may be upheld if it is 'narrowly tailored to serve a significant government interest and ...[it] leave[s] open ample alternative channels for communication of the information.'[34]"

p. 134: "...In *Reno v. American Civil Liberties Union*, the First Amendment was introduced to the modern Internet.[41] ...[T]he Court determined that 'the growth of the Internet has been and continues to be phenomenal.'[44] As such, the Court stressed the importance of the freedom of expression in a democratic society – in 'the vast democratic fora of the Internet.'[45] For these reasons, the Court found the law unconstitutional.[46]

p. 135: [The Court cited the] "...utility of social media in today's modern culture to depict how individuals take to his or her social media account to 'engage in a wide array of protected First Amendment activity.'[50] Facebook serves as an outlet to discuss religion and politics with friends, as well as a forum to share other personal thoughts and images.[51] LinkedIn can be used as a tool to network with professionals in an individual's field of work, or to receive employment openings or advice.[52] Twitter is a forum to follow political leaders, where an individual could petition the same, and engage in a myriad of activity.[53] [These functions, especially the forum function, is something completely inaccessible to MSOP residents through any other means.] pp. 135-6: ...[T]he statute's broad wording not only barred registered sex offenders from social media websites, but also encompassed a vast array of unrelated websites.[57] This far reaching restriction on protected speech, which is unprecedented in its scope, could not satisfy even intermediate scrutiny.[58] [This key point points up the likelihood of success in a case like ours, since it is not even necessary to resort to "strict scrutiny" to prevail.]

p. 138: ...[I]f that access [to social media] was denied, the Court stated that it would be comparable to denying that same individual the right to speak in public streets or parks.[83] [Another key reference to the forum function. Obviously, we cannot go to a park to speak. Hence, in our case, the indispensability of internet access is greater than for others.]

Notes:

34 *Ward*, 109 S.Ct. at 2753 (quoting *Clark v. Community for Creative Non-Violence*, 468 U.S. 288, 293 (1984)

41 *Reno v. Am. Civil Liberties Union*, 117 S.Ct. 2329, 2334 (1997).

44 *Id.* at 2351

45 *Id.* at 2343

46 *Id.* at 2351

50 *Packingham v. North Carolina*, 137 S.Ct. 1730, 1735-36 (2017)

51 *Id.* at 1735

52 *Id.*

53 *Id.*

54 *Id.* at 1736

57 *Id.*

58 *Id.* at 1736

83 *Packingham*, 137 S.Ct. at 1735 (emphases supplied)

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Note: "First Amendment – Freedom of Speech – Public Forum Doctrine – *Packingham v. North Carolina*," 131 *Harvard Law Rev.* 233 (November 2017)

p. 233: "...[In *Packingham v. North Carolina*,] ...[i]n denominating the internet – with pride of place for social media[8] like Facebook and Twitter – as 'the modern public square,'[9]

pp. 235-36: "...The Court reiterated the 'fundamental' First Amendment principle 'that all persons have access to places where they can speak and listen, and then after reflection, speak and listen once more.'[39] ...With respect to 'identifying the most important places (in a spatial sense) for the exchange of views,' the Court described that task as relatively easier nowadays than it was in the past, for 'today the answer is clear: it is cyberspace writ large, and social media in particular.'[41] ..."

pp. 236-37: "...A statute ostracizing sex offenders from this 'modern public square' – where they might learn about current events, view job postings, or merely 'speak[] and listen[]' – must founder.'[56]"

Notes:

8 Although the Packingham decision did not offer a definition of "social media", Merriam-Webster defines it as "forms of electronic communication (such as web sites for social networking and microblogging) through which users create online communities to share information, ideas, personal messages, and other content (such as videos)." Social Media, Merriam-Webster RR, https://www.merriam-webster.com/dictionary/social%20media.

9 *Packingham*, 137 S. Ct. at 1737.

39 *Id.* at 1735

41 *Id.* (citing *Reno v. ACLU*, 521 U.S. 844, 868 (1997)

56 *Id.*

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Clay Calvert, "Beyond Headlines & Holdings: Exploring Some Less Obvious Ramifications of the Supreme Court's 2017 Free-Speech Rulings," 26 *William & Mary Bill of Rights Jour.* 899 (Issue 4, 2018)

p. 935: "...[A] different facet of Justice Kennedy's dicta in *Packingham* already was used by one federal district court. Specifically, Kennedy parenthetically wrote that 'of importance, the troubling fact that the law imposes severe restrictions on persons who already have served their sentence and are no longer subject to the supervision of the criminal justice system is also not an issue before the Court.'[353]"

[My Note: (Which is to say that the across-the-board restriction would also apply to those still under active criminal sentences (with no distinction as to prisoners). *A fortiori*, civil detainees are also covered by *Packingham*.]

p. 937: "...*Packingham* already has been cited by one federal appellate court for the proposition that '[s]ex offenders have free-speech rights.'[364]"

Notes:

353 *Packingham*, 137 S. Ct. at 1737

364 *United States v. Cox*, 871 F.3d 479, 494 (6th Cir. 2017) (Sutton,J. concurring), cert denied, 138 S.Ct. 754 (2018)

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GG Reports on *Karsjens* Status, Renews Vows to Drive the *Gladden* Case.

I conferred briefly with David Goodwin of Gustafson Gluek on April 23rd. He reported

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that in the *Karsjens* second appeal to the 8th Circuit, oral argument has been requested and is expected to be granted. He projects that it will be held sometime this summer.

While nothing is to be done with the *Gladden* case while *Karsjens* remains pending, he reconfirmed that the Gustafson Gluek firm remains completely "onboard" as to the *Gladden* case.

This was all the news from that call. However, I think the last point about the *Gladden* case will reassure those who were getting somewhat concerned about the lack of progress and contact with the GG firm lately about that case.

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Wage Case Update

The Named Plaintiffs conferred with Attorney Charley Alden two weeks ago. On that occasion, Named Plaintiffs Cyrus Gladden and David Jannetta and Attorney Alden agreed that all MSOP-Moose Lake forms to request inclusion as "collective plaintiffs" in the Wage Case have been accounted for.

A small number of them remain outstanding. However, these mostly reflect individuals intentionally choosing not to be part of the case. MSOP-St. Peter has had difficulty communicating with those in CPS and especially the small number who have been released. However, Named Plaintiffs Gamble, Wailand, and Washington report that all in the secured perimeter of MSOP-St. Peter who wish to join as collective plaintiffs have already returned their forms for that purpose.

In sum, except for stragglers and those who change their mind and join between now and the deadline, the list of collective plaintiffs is now complete. For this reason, except for the clerical detail of sending the forms and the full list in to the federal court on the deadline, Attorney Alden and the Named Plaintiffs will now turn their attention to the topic of discovery needed in the case.

As you'll recall, "discovery" in a lawsuit is the pre-trial process of obtaining information from the other side. This phase of the case will include sworn depositions, formal, summary-style questions known as "interrogatories," requests for admissions (to rule out non-issues), and requests for production of documents and things related to the case. The discovery phase will begin officially after the collective plaintiff forms have ben received by the court.

Just to refresh your memory, trial is tentatively set for the end of this year. However, delays may well intervene. Also, as the Karsjens case showed us, there are appeals and procedures after the trial that usually tend to drag everything out. Hence, as Attorney Alden projected previously, assuming that we ultimately win (bear in mind there is no guarantee), it can very easily be late 2021 before any monetary recovery will be seen. A settlement might speed things up somewhat, but would very likely pay out significantly less than the net amounts for each named and collective plaintiff that could be expected after a favorable verdict. On the other hand, beyond the net amount based on actual unpaid portions of wages, other potential recovery items are completely within the judge's discretion. Hence, whether by settlement or verdict, the ultimate net amount of any given plaintiff's recovery is inherently unknowable until it is in hand. The good news, however, is that something is better than nothing. So, have faith and patience. Rest assured, we are doing whatever can be done to gain a favorable verdict, both on liability of the defendants and to maximize damages and other recovery items.

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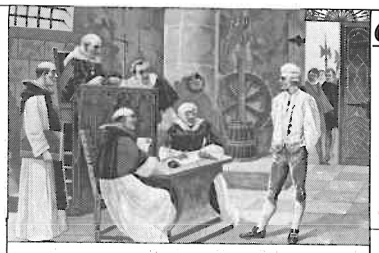
Indiana Rules Prison Sex Offender Treatment Demanding Accounts of Past Actions Inflicts Self-Incrimination.

Marilyn Odendahl, "7th Circuit rules DOC sex offender program violates Constitution," *The Indiana Lawyer*, April 26, 2019 (www.theindianalawyer.com/articles/print/540120-7th-circuit-rules-doc-sex-offender-program-violates-constitution):

"Finding the disclosures provide information that any law enforcement agent would love to have," the 7th Circuit Court of Appeals has ruled Indiana's requirement that sex offender inmates give detailed accounts of their past actions violates the Constitution's protections against self-incrimination.

Donald Lacy, a sex offender inmate in the Indiana Department of Correction, filed a class action on behalf of all inmates who lost good-time credits and a demotion in credit class because they failed to meet the requirements of the Indiana Sex Offender Management and Monitoring program. Lacy argued the disclosures required and the penalties imposed for non-participation constituted a violation of his Fifth Amendment right to be free from compelled self-incrimination.

The U.S. District Court for the Southern District of Indiana agreed. It ordered the inmates' lost good-time credits to be restored and vacated all disciplinary actions and sanctions for failure to participate in INSOMM.



Following a Time-Honored Tradition

On appeal, Indiana countered that the INSOMM program does not carry any sufficiently serious risk of incrimination to trigger the protections of the Fifth Amendment. Moreover, even if it did, the state continued, the revocation of credit time and the demotion of credit class do not add up to unconstitutional compulsion.

The 7th Circuit found the INSOMM workbooks asked for detailed and specific information. Offenders are required to reveal the names and ages of their victims, what parts of the body were touched, where and when the abuse occurred, and how the victims were selected and groomed.

Based on their answers, the offenders may then be given a polygraph examination. There, they will be asked such things as how many children they have molested and how many times they made child pornography.

Indiana's contention that the answers are so general they are not able to be used in an investigation or count as an admission at trial did not convince the circuit panel.

'Saying so does not make it so,' Chief Judge Diane Wood wrote for the court. 'This ipse dixit does not explain why granular descriptions of the circumstances surrounding specific sex crimes and patterns of criminal sexual behavior would prove useless to investigators or prosecutors. ...The questions posed to an INSOMM participant would yield answers that any competent sex-crimes investigator or prosecutor would love to have.'

Citing *McKune v. Lile*, 536 U.S. 24 (2002), the 7th Circuit ruled Indiana's denial of good-time credit as a means of inducing offenders to furnish information is an impermissible compulsion to self-incriminate.

'The decision to decline participation in INSOMM is not merely a trigger for a later stage in which the state takes a more holistic view of an inmate's progress toward rehabilitation,' Wood wrote. 'Instead, a prisoner's choice to invoke his privilege against self-incrimination is the direct cause of his loss of credits – credits that otherwise would be statutorily guaranteed...'

The case is *Donald Lacy v. Keith Butts*, 17-3256." (Decided April 25, 2019; regional reporter citation not yet available.)

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Gladden Excerpt

Motivational Analysis Shows S.O. Commitment Is a Bill of Attainder. (Part 2)

2. Disproportionate Commitment of Those Ages 50 and Above, Contrary to Reduced Recidivism in that Age Bracket, Shows the Punitive Function and Intent of That Act.

R. Karl Hanson, the founder of the Static-99 and 99R risk assessment instruments, candidly admitted that the factor of increasing age, by itself, outweighs the impact of all known factors that suggest a likelihood to recidivate. This well-known and undeniable scientifically studied phenomenon of 'aging-out' is best understood as the year-by-year reduction of sex-crime recidivism from age 30 on, such that recidivism approaches zero percent from age 60 on. *R. Karl Hanson, The Validity of Static-99 with Older Sexual Offenders*, 2005-01 (*Public Safety and Emergency Preparedness Canada*) quantifies this clearly:

(p. 5): "...Less than 5% of the offenders over 60 were detected committing a sexual offence compared to over 20% for offenders in their twenties. *Hanson* concluded that the decline was linear for rapists and curvilinear for extrafamilial child molesters....."

(p. 10, reporting statistical findings): "The average recidivism rates steadily declined from 14.8% in the offenders less than 40, to 8.8% for the offenders in their forties, 7.5% for offenders in their fifties, and 2.0% for offenders greater than 60."

(p. 11): "...[T]he age-related decline should be expected for low, moderate, and high risk offenders as defined by Static-99."

(p. 13): "*Hanson* (2020b) has argued that older offenders are lower risk because of declining sexual drive, increased self-control and decreased access to victims. Age related declines in sexual drive are supported by decreased sexual activity among older men in the general population (*Langstrom & Hanson, in press*) and by decreased arousal in older sexual offenders (*Barbaree, Blanchard, & Langton*, 203); *Blanchard & Barbaree, in press*)."

"...[A]ll of the evidence indicates that the risk of sexual recidivism declines with age. ...[F]or individuals convicted of multiple sex offenses the risk of recidivism dramatically declines at age sixty and the consensus in the learned literature is that people over age sixty do not commit sexual offenses." *United States v. Wilkinson*, 646 F.Supp.2d 194, 208 (D. Mass. 2009).

Aging-out was also the subject of extensive statistical analysis by *Richard Wollert* in

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"Low Base-Rates Limit Expert Certainty When Current Actuarials Are Used....." 12 *Psychology, Public Policy and Law* 56, at 61 et seq., and is summarized more conversationally by *Lawyer X, Deviant Justice – The American Gulag* (In Depth Media, 2014), pp. 49-53.

"After considering the testimony and the reports of the experts in this case, the Court finds more credible the opinion of Dr. Plaud with regard to this step of the inquiry. Dr. Plaud relied heavily in his testimony on the age of Respondent, who at the time of the hearing was 64 years old, and noted in his report that 'so few [men in their sixties, even those with histories of multiple sexual offenses, including offenses committed in their forties,] re-offend as to make the recidivism rate of this group of men approach zero statistically.' Resp't Ex. 1 at 2." (*United States v. Hamelin*, 2012 US Dist LEXIS 54790201 2 U.S. Dist. LEXIS 54790 (E.D. N.C. 2012))

"Among other states with [sex offender] commitment laws, Minnesota disproportionately commits the most older sex offenders – the group with by far the lowest statistical likelihood of committing any further sex offenses after prison release. Over a third of all sex offenders committed are over 50 years old, and nearly half of those were in their 60s or older yet." (*Lawyer X, supra*, at 107).

Under the SPP/SDP law, Defendants vastly disproportionately commit middle-age and old-age former sex offenders. Yet, if one is at least age 50, one's chances of recidivism have already fallen so low statistically that one absolutely should not be committed. If one is at least age 60, one's statistical likelihood of recidivism is less than 1 %. All recidivism statistics establish beyond any quibble that those in that upper-age range have a vastly reduced, virtually extinguished rate of recidivism (at 60 and beyond), regardless of extensiveness of their prior record of sex crimes.

Because of the crucial materiality of the issue of the impact herein of Plaintiffs' aging on the question of level of probability of future recidivism, the following excerpt from *R.A. Prentky, E.Janus, M. Barbaree, B.K. Schwartz & M.P. Kafka*, "Sexually Violent Predators in the Courtroom: Science on Trial," 12 *Psychology, Public Policy & Law* 357, 377-78 (2006), is well worth the space here as a valuable orientation and primer:

"...[T]here are particularly good reasons to question the notion that sexually motivated behaviors of any type, deviant or conventional, would continue at the same levels throughout a man's middle years and into old age. Such an expectation is at variance with the known facts of human endocrinology and sexuality. Specifically, empirical studies

When is there an endpoint?

indicate that bio-available testosterone, which is necessary or at least important in maintaining libido, peaks in early adulthood and thereafter decreases through the remainder of the lifespan (e.g., *Denti, et al.*, 2000). There is also evidence that testosterone receptor sites may become less sensitive with age, so that the threshold concentration of testosterone necessary to maintain libido may increase with age (e.g., *Baker & Hudson*, 1983). Furthermore, there is a general decline in male sexual behavior through the lifespan, including intercourse and masturbation (e.g., *Rowland, Greenleaf, Dorfman & Davidson*, 1993); and sex offenders show substantial reductions in the strength of sexual arousal through the lifespan, from the mid-teens to old age (*Barbaree, Blanchard & Langton*, 2003; *Blanchard & Barbaree*, 2005; *Kaemingk, Koselka, Becker & Kaplan*, 1995).

"Accordingly, we would expect to see reductions in recidivism in sex offenders as they age. There are four scientific studies that have specifically examined changes in recidivism rates in sex offenders over a large range of age-at-release, and these studies confirm substantial reductions in recidivism over the lifespan (*Barbaree, et al.*, 2003; *Fazel, Sjostedt, Langstrom & Grann*, in press; *Hanson*, 2002; *Thornton*, in press).

"The samples of sex offenders that have been used in the development and validation of the actuarial risk assessment instruments have included a preponderance of younger offenders. The average years of age at release in these samples are in the mid-30s. Therefore, it could be reasonably argued that the use of the actuarial instruments is inappropriate in estimating risk in the aging sexual offender. Professional standards guiding the use of psychological tests warn against the use of tests if such use may be discriminatory on the basis of age, race, culture, and so forth. Clearly, if recidivism risk decreases with age and if the actuarial instruments estimating risk were developed with young sex offenders, then the use of these instruments with older offenders could be considered to be discriminatory. On this basis, it could be argued that actuarial instruments should not be used with older offenders and to do so might be considered to be a breach of the standards of professional practice.

"In response to these concerns, *Hanson* (2005) studied the validity of the Static-99 (*Hanson & Thornton*, 1999) with older sex offenders, using data from eight samples (N=3,425) drawn from Canada, the United States, and the United Kingdom, and followed them after release from prison for an average of 7 years. Results indicated that when controlling for Static-99 scores, recidivism risk increased slightly between ages 18 and 30 years, then declined thereafter with further increases in age. Average recidivism rates steadily declined from 14.8% in offenders under age 40, to 8.8% for offenders in their 40s, 7.5% for offenders in their 50s and 2% for offenders age 60 or older. Among offenders age 60 or older, the sexual recidivism rates were low even for those who scored in the moderate-high range (4.8%) and the high range (9.1% on the Static-99. The amount of age-related decrease in risk was the same for all levels of risk. ...[I]t is clear that the risk levels (% likelihood) suggested by the Static-99 are too high for older offenders. For offenders over age 60, *Hanson* acknowledged that the Static-99 substantially overstated expected risk." (emphases supplied)

In fact, *P. Lussier & J. Healey*, "Rediscovering Quetelet, Again: The 'Aging' Offender and the Prediction of Reoffending in a Sample of Adult Sex Offenders," 26 *Justice Quarterly*, No. 4, p. 827, at 827 (2009), flatly declare, "by itself, age at release showed a predictive accuracy comparable to that of the [entirety of all factors of the Static-99]." In their independent study, these authors found that, past age 40, "after adjusting for the scores on Static-99, for every one-year increase in age, recidivism rates dropped ...4% for violent/sexual reoffending." (*Id.*, p. 849), finding zero percent (0%) recidivism at age 60 and older (Table 3, p. 840).

This well-known and undeniable scientifically studied phenomenon of 'aging-out' (i.e., year-by-year reduction of sex-crime recidivism from age 30 on, such that recidivism approaches zero percent from age 60 on) was also the subject of extensive statistical analysis by *Richard Wollert* in "Low Base-Rates Limit Expert Certainty When Current Actuarials Are Used....." 12 *Psychology, Public Policy and Law* 56, at 61 *et seq.*, and is summarized more conversationally by *Lawyer X, Deviant Justice – The American Gulag* (*In Depth Media*, 2014), pp. 49-53.

Overall, Wollert's meta-analysis of Hanson's data showed that average sexual recidivism rates among released sex offenders declined precipitously past age 40. See Table 1, Wollert's Findings of Reduced Sex-Crime Recidivism Past Age 40, next page, *infra*. As *Wollert* proved, data unequivocally show that sexual re-offense rates after age 60 are, and have always been statistically insignificant. More particularly, Wollert found that, by age 60, recidivism for molestation dropped to less than 4% (including "extra-familial" molesters) and that no significant elevation beyond that rate existed notwithstanding extensive prior records of molestations. (*Wollert*, at 62). This shows the contrary testimony relied upon in *In re Gorden*, 2006 WL 1806464, at *5 (Minn. App. 2006) to have been a blatant lie.

By the same token, it also puts the lie to the assertion in *In re Poole*, 2000 Minn. App. LEXIS 624 (2000): "[M]olesters abuse after age 70." But in fact, *Wollert* found no recidivism at age 70. As to age 60, while the fact that 4% is not zero percent implies that there is always some statistical outlier somewhere at some time who has reoffended in defiance of statistical improbability, the common experience at 4% reflects that such instances are rare. See Chart 1, next page infra.

Wollert is hardly alone. The co-creator of the Static-99, *R. Karl Hanson*, in "Recidivism and Age: Follow-Up Data from 4,673 Sexual Offenders," 17 *J. Interpersonal Violence* 1046, 1053 (2002), found that, out of that whole data set, only two extrafamilial child molesters released after age 60 recidivated. *Wollert*, in a follow-up article, "Recent Research (N=9,305) Underscores the Importance of Age-stratified Actuarial Tables in Sex Offender Risk Assessments," 22 *Sexual Abuse: J. of Research & Treatment* 471, 484 (2010), concluded that "evaluators should report recidivism estimates from age-stratified tables or equivalent tables when they are assessing sexual recidivism risk, particularly when evaluating the aging sex offender."

Indeed, Wollert's study involved all original data used to construct the Static-99. This data set was culled from prison releases in the roughly 20-year span ending in the early 1990s – a period, as noted supra, of vastly higher sex-crime recidivism at all age tiers. Considering the massive reduction in base-rate recidivism (averaging all ages) since then from 17.6% to 3.2%, both in Minnesota and with roughly matching figures in other states, it is reasonable to conclude that current recidivism percentages for those ages 60-69 are now roughly one-half of 1%.

Montaldi, in his studies of recidivism among Florida sex offenders recommended for commitment but nonetheless later released, found that "[t]he most dramatic difference comes from offenders who were age sixty or older at time of recommendation (ninety-three). Out of this group, no one obtained a new charge or conviction for either rape or child molestation (0%)", adding, at 861:

"[I]nstruments not yet properly accounting for age will have higher scoring categories

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(by virtue of history) showing much lower recidivism rates and rates not much different from rates for lower scoring categories. No rate will be anywhere near 50%. In contrast, instruments properly accounting for age will now have few offenders getting higher scores at all, either because they lack history or they are too old. Rates for lower scores will be low and almost all offenders will fall into low score categories. Age may be cancelling out history as a risk discriminator....

"...[E]specially when criminal history is far in the past, even "bad" people may not be currently dangerous. Recent data are showing this. No doubt, history-dominated evaluations will continue to be done. Juries at least will continue hearing the message of a "bad guy" deserving commitment. This is the inherently punitive element of forced hospitalization for criminal offenders that the Supreme Court did not consider."

"The significance of the protective value of age in recidivating cannot be underestimated in the sexually violent predator context. Since accused SVPs must have completed their custodial sentence before the state can begin commitment proceedings, they are likely to be older and thus at lower risk of reoffending. As a result, states and the federal government may be initiating civil commitment proceedings against individuals who have simply aged out of being dangerous.

"The facts are crystal clear. The DOJ study and other studies show that sex offenders have a low rate of recidivism and that they are less likely than non-sex offenders to commit additional non-sex related crimes. In addition, because accused sexually violent predators are older, their risk of reoffending has diminished.

Accordingly, it is crucial to provide extensive procedural protections as to prevent people from being locked up indefinitely – most of whom in fact pose no further threat to society." Tamara Rice Lave, "Throwing Away the Key: Has the Adam Walsh Act Lowered the Threshold for Sexually Violent Predator Commitments Too Far?", 14 U. Pa. Jour. Of Constitutional Law 391, 398 (December 2011).

Despite this drastic "aging-out" recidivism reduction, no RAI in use today has any meaningful age-adjustment factor. For example, the MnSOST-3-series merely avoids one 'penalty point' for anyone over age 30, implicitly equating recidivism for those in their early 30s with that for those in their 60s. Consequently, each current RAI vastly overstates recidivism probability for those ages 50 and up (a "90%" error-rate as to those aged 60-69, per Wollert, at p. 71).

In light of such aging-out -- reducing recidivism probability to low single digit percentages if not less at age 60 and beyond, committing Plaintiffs at and beyond age 60 or continuing to detain them after that age so defies known science as to deprive Plaintiffs of both substantive and procedural due process.

The *Prentky, Janus, Barbaree, Schwartz & Kafka* quote, supra ("Sexually Violent Predators in the Courtroom:...") described the *Hanson* (2005) study of the validity of the Static-99 with older sex offenders, concluding that recidivism was a mere 2% for offenders age 60 or older. Statisticians studying that data could not find any instances of sex-crime recidivism past age 69. Yet instances of SPP/SDP commitments of senior citizens abound – two at ages 84 and 88. The implication that commitment is pure additional retribution for past crimes is clear and undeniable from this particular aspect.

This aging-out phenomenon is so universal and massive in recidivism-curtailment effect that Wollert urges new trials for all those beyond age 50, since any "high likelihood" of recidivism in that overall bracket is simply mathematically impossible.

The overwhelming aging factor that inherently reduces the tendency for recidivism over the years is well-known and beyond any debate. This aging factor (also known as "aging out") is thoroughly addressed in the briefing on the substantive due process claim filed in support of the original Gladden Complaint. That thorough treatment will not be reprised here. The following two cases (Hamelin and Lieberman) demonstrate that the federal courts are well aware of this overarching limitation on, and eventual extinction of the tendency to recidivate.

In United States v. Hamelin, 2012 US Dist LEXIS 54790201 2 U.S. Dist. LEXIS 54790 (E.D. N.C. 2012), the court declared:

"After considering the testimony and the reports of the experts in this case, the Court finds more credible the opinion of Dr. Plaud with regard to this step of the inquiry. Dr. Plaud relied heavily in his testimony on the age of Respondent, who at the time of the hearing was 64 years old, and noted in his report that 'so few [men in their sixties, even those with histories of multiple sexual offenses, including offenses committed in their forties,] re-offend as to make the recidivism rate of this group of men approach zero statistically.' Resp't Ex. 1 at 2."

More generally, Lieberman v. Kirby, 2011 U.S. Dist. LEXIS 140927(N.D. Ill. 2011), observed:

"Dr. Lytton testified that actuarial instruments were inappropriate to predict the risk that a person will sexually reoffend and that they do not account for the most dynamic risk factor -- a person's age. [In Petitioner's] case, his age equated to a low risk of recidivism.... Based on Dr. Lytton's analysis of those risk factors, including [Petitioner's] age and the low base rate of recidivism for sexual offenders, she concluded that [Petitioner] was not substantially likely to commit a future act of sexual violence."

See also, illustratively, Haggard v. Curry, 732 F. Supp. 2d 1003, 1013; 2010 U.S. Dist. LEXIS 91882 (N.D. Cal. 2010), quoted above, noting that "the creator of the PCL-R test 'specifically notes that his tests should never be used on inmates over the age of 40, as his test is attempting to assess psychopathy, which is a characteristic that decreases with age.'" Psychopathy is a "construct" for modeling purposes, not a diagnostic mental illness or disorder under the DSM-5. As such, it is a label arrived at merely upon behavioral observation of the offender.

In the same way, according to the definition in DSM-5, pedophilia is evinced by sexual acts with children, or at the very least, urges for such acts so strong that the self-perceived inability to decline to act upon such urges causes the individual substantial emotional distress. As a pedophile ages, just as for anyone else, the urge for sexual conduct of the type of one's orientation simply naturally wanes. Probably due to the problematic nature of such conduct (morally and legally), the rate of decline in such motivation for actual 'hands-on' pedophilic crimes is far steeper than for those with socially accepted sexual orientations.

Thus, in *Belleau v. Wall et al.*, 2015 U.S. Dist. LEXIS 125909 (E.D. Wis. 2015), Belleau was sixty-seven years old at the time of his assessment. The court in that case observed that while he had been cited as having risk elevated due to the presence of a number of dynamic risk factors, such as Belleau's failure to complete treatment and his earlier expressed attitude toward his offenses, it was concluded that these did not "substantially alter the low to moderate risk indicated by the static factors" including his age.

Ancillary motivations prompting continuing sexual conduct at and beyond age 60 by those with accepted sexual attractions, such as the desire to please a spouse or significant other, and thus to preserve and enhance that relationship, do not apply to pedophiles, who have no such relationship. Far beyond any unrealistic residual fantasies of sex with children, aging pedophiles simply want peace and to be left governmentally un-persecuted and socially unharassed. This accounts for why the downward curve of diminishing recidivism statistics is steeper for pedophiles than for rapists in the age bracket of ages 50-59.

Most of all, however, by age 60, the natural reduction in systemic testosterone and in its associated hormones and endocrine chemicals (most notably adrenaline -- the unsung delivery mechanism of strong urge and unrestrained impulse) has become so extreme that the combination of both testosterone and adrenaline that provides both strong attraction and the tendency to act upon it simply no longer exists to any appreciable degree.

Hence, at and beyond that watershed age, all sex offenders, whether pedophiles or

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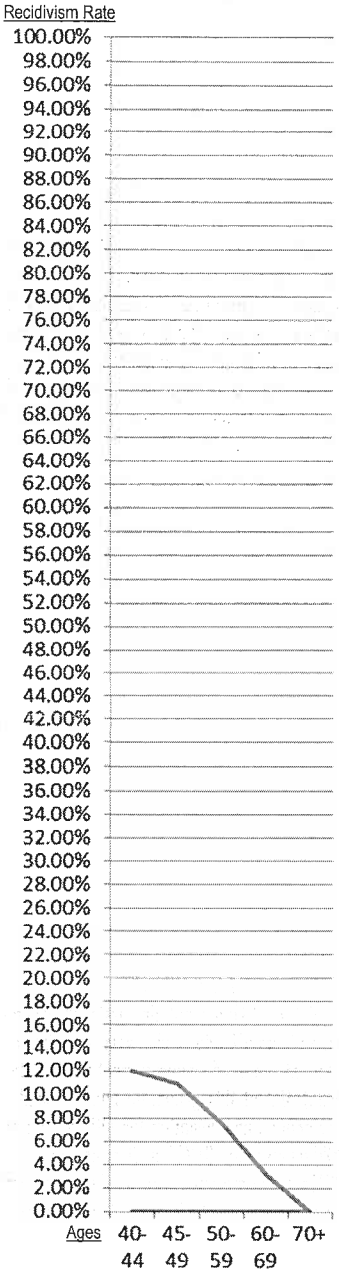
Table 1: Wollert's Findings of Reduced Recidivism Past Age 40

Ages	Recidivism
40-44	12.0%
45-49	10.9%
50-59	7.6%
60-69	3.2%
70+	0.0%

Chart 1
Recidivism Decline From Age 40 On



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rapists or those with various paraphilias -- even those from any of these categories who still may not have any compensatory heightened self-control -- have simply 'retired' from sexual offending because of such loss of physical drive mechanism. This analysis does not even include the effect of various prostate and other urinary symptoms that by age 60 impact more than 25% of all men. Those subject to such conditions find their physical sexual ability and their libido sharply curtailed thereby.

In sum, sexual recidivism at age 60 is, on the whole, rare. How rare? Consider the following: That brief in *Gladden v. Swanson* et al. on substantive due process pointed out that even under the earlier period (ending in the early 1990s) of higher recidivism among sex offenders generally (average recidivism: 17.5%), recidivism among sex offenders in their sixties was then about 3.5%.

Most recent statistics reflect a stunning plummet in sex-crime recidivism generally (now down to roughly 3.2%, both nationwide and in Minnesota) – a drop to about 2/11ths of that former percentage. This appears to be primarily due to both leaping advances in sex-crime detection and offender identification, and vastly heightened criminal penalties serving as a harshly effective deterrent, as well as a public education campaign on the harms from sex crimes. That campaign has both struck some chords of moral recognition previously absent in offenders, and simultaneously has raised public wariness and lessened circumstances of opportunity for undetected sex crimes. These factors apply to sex criminals of all ages.

Formal studies of the comparative recidivism statistics for the age bracket of 60-69 are not yet complete, but there is no reason to believe that the same 2/11th ratio of reduction should not apply to sex crimes in that advanced age bracket. Thus, arithmetically, the current rate of sex crime recidivism that can reasonably be expected in the ages 60-69 bracket should be somewhere very close to one-half of one percent.

In readily conceivable terms, this means that in a large auditorium containing 1,000 sex offenders in this age bracket, only five will commit another sex crime before they die. Given the lack of scientific validity to any known means to make a prediction beyond pure chance, it is impossible to know who those five will be.

Asserted indicators that have been advanced, such as an interest in child pornography, have been debunked recently as a predictor of any later 'hands-on' sex offenses. To the contrary, at least in statistically significant samplings of younger pedophiles, use of child pornography has now emerged as reducing the tendency toward 'hands-on' sex offenses.

In sum, commitment of sex offenders confines those in their 40s and beyond, almost always to death by old-age causes in ages 70s and beyond. Effectively then, that current system is blind to the fact that this confines those least likely to ever recidivate in the future. This more than anything else shows the folly of, and unwarranted, draconian, and patently supplementally punitive true nature of such commitments.

Under said Act, Defendants greatly disproportionately commit middle-age and old-age former sex offenders. Those age 50 and up account for one-third of all sex offender commitments in Minnesota. This is in defiance of all known recidivism data for sex offenders in that age range. That data establishes that sex offense recidivism of prior sex offenders not in that age arrange, including those with two or more prior sex offense incarcerations, is very low, even when compared to first-time younger sex offenders. Even expert witnesses in Minnesota sex offender commitment cases, when pressed, acknowledge this: "Dr. Alsdurf also agreed that the recidivism rate for sex offenses diminishes with age, ...and that age 60 appears to be a 'fairly significant point of shifting.'" Stone v. Johnson Piper, 2012 Minn. App. Unpub. 1056 (2012). Further data shows sexual re-offense rates after age 60 are statistically de minimis. Statisticians could not find any instances of sex crime past age 69. Under said Act, illustratively, Defendants have committed two senior individuals, age 84 and 88, respectively, at time of commitment. This practice supports the inference that a secret subtext of pure additional retribution for past crimes is at work, rendering said Act, as interpreted, construed, implemented, and applied, purely political and entirely punitive.

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'Aging Out,' Desistance, & Time in Community Reduces Re-Offense Risk. So Why Aren't You Out There?

Editor's Note: Thirteen years ago, Richard Wollert, Ph.D., a Washington State psychologist, performed research on the same subject-pool used to create the original Static-99. In a seismic-event article ("Low Base Rates Limit Expert Certainty When Current Actuarials Are Used to Identify Sexually Violent Predators," 12 *Psychology, Public Policy, and Law* 56 [2006]) discussing this research, he proved three myth-shattering findings:

(1) Rather than the traditional actuarial method for assessment involving trying to jam an assessed individual into statistical risk categories, an application of a mathematics method known as "Bayes's Theorem" creates far more accurate predictions of recidivism risk. Sadly, to date, because of the massive installed base of actuarial instruments sticking to the traditional method, only a few isolated risk assessment instruments use the Bayes method yet.

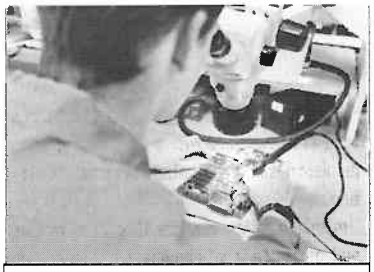
(2)When using the traditional method of risk assessment, as the departure upward from low base rates of average recidivism increases, an inherent mathematical error multiplies, rendering all predictions of high risk of recidivism less accurate than throwing dice or flipping coins. Again, rather than change their ways to avoid this non-correctible problem, publishers of traditional tests have simply acted as if this certain, damning problem does not exist.

(3) Wollert also discovered undeniable proof of such great reduction in recidivism potential over time that those in middle age, regardless of their prior sex-crime records, become very UNlikely to ever commit another sex crime, and that small chance of recidivism completely disappears by age 70. (To be clear, while there always may be a rare exceptional individual, the incidence is so low that no statistics can be compiled for such crimes past age 70. The next best technique, extrapolation from the increasingly steep downward curve toward extinction of any such chance, predicts that even by age 60, the current recidivism rate must be no higher than about 6/10ths of 1%.

Since then, many additional findings have added further profound impact to Wollert's findings. First, base rates for sex crimes, including recidivistic ones, have fallen through the floor. Many causes for this have been explored, but the clearest cause of all is simply ordinary deterrence, taking ever greater effect as sex-crime sentences have escalated astronomically in the last forty years.

Thus, most locally, *Grant Duwe, Ph.D.*, MN DOC psychologist, in "Better Practices in the Development and Validation of Recidivism Risk Assessments: The Minnesota Sex Offender Screening Tool-4," (July 13, 2017) *Criminal Justice Policy Review* (2017; hard-copy citation still unavailable), reported the result of a vast statistical survey of fifteen recent years of releases of sex offenders: "...Using sex offense conviction rates within 4 years of release from prison as the failure criterion, the data showed that 130 (2.3%) offenders in the overall sample were recidivists...." This finding parallels those in other states in the last ten years.

Obviously, this compounds the inherent inaccuracy problem discussed above in attempting to predict high recidivism probability as to some recidivistic sex offenders. And, more direct to the theme of this examination of topics of aging-out and post-sentence desistance, when the *base* rate for recidivism has dropped as low as *Duwe* reported, the recidivism rate for those over 50 is obviously necessarily drastically reduced, even below the tiny number cited above.



With a little training, could you do this?

In earlier editions of TLP, I have discussed the nearly total elimination of recidivism by those in this higher age-echelon. Dr. Montaldi, while serving as head of Florida's commitment program, reported in 2015 that recidivists released from prison even though forensic assessors insisted they presented higher-than 50% likelihood of recidivism turned out not to recidivate at all (that is, those in this scenario who were at least age 60 had 0% recidivism).

Now, with these facts in mind, let's turn to the two latest articles to come to my attention.

Joy Radice, "The Reintegrative State," 66 *Emory L.J.* 1315 (2017)

Text Excerpt:

pp. 1338-39: "...This research [into recidivism and desistance] finds that the vast majority of people with records stop committing crimes, that factors like age and employment matter, and that the vast majority of people with convictions are no more likely to commit a crime than those who have no criminal history. Those findings suggest that treating all convictions and all defendants the same imposes significant social costs without any corresponding benefit.

A virtually undisputed finding in criminology is that people age out of crime.[121] Experts who study desistance,[122] the process by which people stop committing crime,[123] calculate that 85% of people will age out of criminal behavior by the time they are 28 years old.[124]....

In one line of desistance research, criminologists argue that the 'age-crime curve' drives most of desistance, and it has been 'unchanged for at least 150 years.'[126] Looking at crime trajectories of delinquent boys followed from age seven to seventy, Sampson and Laub showed that 'crime declines with age even for active offenders,' refuting

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arguments in the literature that repeat offenders never desist from crime.[127] In fact, new evidence shows that a significant number desist quickly after their last conviction.[128]

In addition, life changes, like employment and marriage, are significant predictors of desisting from crime.[129] In fact, research supports that desistance and the 'successful reintegration of these (mostly) men depends in part on their ability to find and maintain gainful employment.'[130] One study showed that people 27 years old or older with criminal records were less likely to be rearrested and reconvicted 'when provided with marginal employment opportunities' than similarly situated people with prior convictions who were not employed.[131]

Recent studies about the impact of employment reentry programs show that participants who enroll within three months of release from prison present a decline in recidivism.[132] Another recent study compared people with extensive criminal histories who completed a job reentry program, Center for Employment Opportunities (CEO), in New York City with people who dropped out.[133] The evidence showed that completers had 'much better employment outcomes than CEO noncompleters in years two and three of the follow-up period.'[134] The researchers concluded that employers could use program completion as a signal of desistance.[135]"

Selected Footnotes:

121 See, e.g., *Shadd Maruna, Making Good: How Ex-Convicts Reform and Rebuild Their Lives* (2001) at 20

122 *Shawn D. Bushway et al.*, "An Empirical Framework for Studying Desistance as a Process," 39 *Criminology* 491, 492 (2001) (describing desistance as the process by which people arrive at a state of non-offending); see also *Maruna, supra* note 121, at 6-7 (explaining that desistance from crime is "the process by which stigmatized, former offenders are able to 'make good' and create new lives for themselves.").

123 See *Tony Ward & Shadd Maruna, Rehabilitation: Beyond the Risk Paradigm* (2007), at 4

124 *Id.* at 13; see also *Alfred Blumstein & Kiminori Nakamura*, "Redemption in the Presence of Widespread Criminal Background Checks," 47 *Criminology* 327, 351 (2009).

126 *Maruna*, note 121, at 20; see also *Michael Gottfredson & Travis Hirschi*, "The True Value of Lambda Would Appear to Be Zero: An Essay on Career Criminals, Criminal Careers, Selective Incapacitation, Cohort Studies, and Related Topics," 24 *Criminology* 213 (1986) (arguing that even people with extensive criminal histories desist as they age).

127 *Robert J. Samson & John H. Laub*, "Life-Course Desisters" Trajectories of Crime Among Delinquent Boys Followed to Age 70," 41 *Criminology* 555, 585 (2003).

128 *Shawn D. Bushway & Robert Apel*, "A Signaling Perspective on Employment-Based Reentry Programming," 11 *Criminology & Pub. Pol'y* 21, 39 (2012).

129 *Bushway & Apel, supra* note 128; *Christopher Uggen, Sara Wakefield & Bruce Western, Work and Family Perspectives on Reentry, in Prisoner Reentry and Crime in America* 209 (Jeremy Travis & Christy Visher eds., 2005), at 215-16.

130 *Michael A. Stoll & Shawn D. Bushway*, "The Effect of Criminal Background Checks on Hiring Ex-Offenders," 7 *Criminology & Pub. Policy* 371, 372 (2008); see also *Jeremy Travis et al.*, Urban Inst., *From Prison to Home: The Dimensions and Consequences of Prisoner Reentry* 31-34 (2001), http://research.urban.org/UploadedPDF/from_prison_to_home.pdf; *Shawn Bushway & Peter Reuter*, "Labor Markets and Crime Risk Factors," in *Preventing Crime: What Works, What Doesn't, What's Promising* 6-1, 6-3 (1997).

131 *Uggen, supra* note 129, at 529, 542.

132 *Bushway & Apel, supra* note 128, at 38.

133 *Id.* at 36.

134 *Id.* at 23.

135 *Id.* at 36.

R. Karl Hanson et al., "Reductions in Risk Based on Time Offense-Free in the Community: Once a Sexual Offender, Not Always a Sexual Offender," 24 *Psychology, Public Policy & Law* 48 (Feb. 2018).

Abstract excerpts:

"...This article examines the testable assumption that individuals with a history of sexual crime present an enduring risk for sexual recidivism. We modeled the long-term (25-year) risk of sexual recidivism in a large, combined sample (N > 7,000). We found that the likelihood of new sexual offenses declined the longer individuals with a history of sexual offending remained sexual offense-free in the community. This effect was found for all age groups and all initial risk levels. ...After 10 to 15 years, most individuals with a history of sexual offenses were no more likely to commit a new sexual offense than individuals with a criminal history that did not include sexual offenses...."

Text excerpts:

p. 49: "For sexual offenders, a plausible threshold for desistance is when their risk for a new sexual offense is no different than the risk of a spontaneous sexual offense among individuals who have no prior sexual offense history but who have a history of nonsexual crime. If we are going to manage the risk of an individual with a history of sexual crime differently from an individual with a history of nonsexual crime, then their risk of sexual offending should be perceptibly different. A recent review of 11 studies from diverse jurisdictions (n=543,024) found a rate of spontaneous sexual offenses among nonsexual offenders to be in the 1% to 2% range after 5 years (*Kahn, Ambroziak, Hanson, & Thornton*, 2017). This is meaningfully lower than the sexual recidivism rate of adults who have already been convicted of a sexual offense. However, it is not zero. A sexual recidivism rate of less than 2% after 5 years is also a defensible threshold below which individuals with a history of sexual crime should be released from conditions associated with the sexual offender label. From a risk management perspective, resources that may be spent on these very low risk sexual offenders would be better spent on higher risk offenders, prevention of sexual crime, and victim services."

p. 57: "We expect that part of the effect is attributable to individuals with the greatest propensity for sexual crime reoffending shortly after release (and often), making them, consequently, most likely to be caught and removed from the follow-up sample (the effect of frailty in survival analysis [Aalen et al., 2008]). Notice, however, that the declines in risk based on time offense-free applied to individuals at all risk levels, and was only slightly reduced after controlling for the risk measure used in this study, Static-99R. ...[F]railty is unlikely to explain all of the statistical effect of time free on risk. At least part of the decline should be attributed to change within individuals.

p. 58: "...Treatment effects, however, should have been most apparent early in the follow-up period. Treatment effects are not a natural explanation for the gradual decline in risk over decades. Similarly, although aging may explain some of the effects, the time free declines were much larger than would be expected from aging alone. The large cross-sectional study of the statistical effect of age at release by *Helmus, Thornton, et al.* (2012) found that the average statistical effect of a year of aging was a decline to 0.98 of the previous year's hazard (B = -.02) for sexual recidivism. In comparison, the average effect of a year spent offense-free in the community was six times larger (.88, B = -.13).

"Something more than frailty, aging, and the effect of treatment is needed to explain the observed time free effects. One simple explanation is that many individuals eventually learned how to make a prosocial lifestyle rewarding (*Andrews & Bonta*, 2010; *Thornton*, 2016). Each time individuals expend energy seeking to make life better in prosocial ways,

Toyota Training Facility

and they succeed, they accumulate skills, knowledge, and social resources that make it easier to do so again in the future. Each prosocial choice may be uncertain, depending on fluctuating motivation and opportunities; nevertheless, the cumulative effect of successful prosocial choices will make future choices of this kind easier, more self-congruent, and more attractive.

"In support of this view, there is some evidence that individuals with a history of sexual crime are less likely to reoffend when they have workable, prosocial options available. In a series of studies, Willis and colleagues (*Scoones; Willis & Grace*, 2012; *Willis & Grace*, 2008, 2009) have shown that reduced recidivism is associated with high-quality release plans that support accommodation, positive social connections, employment, and prosocial, personally meaningful goals. Furthermore, the effect of good release plans was found to be incremental to static and dynamic risk factors (Scoones *et al.*, 2012). Relatedly, McGrath and colleagues (*Lasher & McGrath*, 2017; *McGrath, Lasher & Cumming*, 2012) have found that those who avoided sexual recidivism while under community supervision showed improvements in employment, residence and social influences. Consequently, it is quite plausible that the gradual, multiyear declines in hazard rates documented in the current study are linked to individuals developing increasingly effective, prosocial ways of achieving a satisfying life."

"There is strong evidence that (a) there is wide variability in recidivism risk for individuals with a history of sexual crime; (b) risk predictably declines over time; and (c) risk can be very low – so low, in fact, that it becomes indistinguishable from the rate of spontaneous sexual offenses for individuals with no history of sexual crime but who have a history of nonsexual crime. These findings have clear implications for constructing effective public protection policies for sexual offenders."

pp. 58-59: "...The results of the current study, in particular, justify automatically lowering risk based on the number of years sexual offense-free in the community. The diminishing importance of sexual offense history over time is particularly relevant

when considering whether civil, public protection measures should be applied retroactively. To paraphrase *Kurlychek et al.* (2012), any public protection policy that does not allow for diminished risk over time should be immediately suspect.

"...[T]here should be an upper limit to the absolute duration of public protection measures. In the current study, there were few individuals who presented more than a negligible risk after 15 years, and none after 20 years. Although there was one sexual recidivist after 20 years in our dataset, we could not reliably identify a class of individuals whose likelihood of a new sexual offense remained meaningfully greater than the desistance threshold after 20 years. Nor have other researchers [identified such a class] (e.g., *Blokland & van der Geest*, 2015, Figure 12.2b; *Hargreaves & Francis*, 2014). Consequently, lifetime restrictions seem to be designed for a category of individuals that do not exist."

Editor's Closing Note: This last article is too conservative in observing that, by 15 years post release, recidivism is nil. See, e.g., The article in *TLP* Issue 2-7,p. 2, "Let the Figures Speak for Themselves: Extremely Low – & Shrinking(!) – Recidivism of Paroled CA Sex Offenders over 10 Years Belies the Myth," reporting research on 3,777 California sex offenders followed for ten years after release. Recidivism was 2.21% in the first year, but immediately began dropping to one-third, year-upon-year on average, such that recidivism in year 3 was 0.27%, in year 5 was 0.04%, and by year 10 was 0.005% – all infinitesimal figures. In those years, California had virtually no support structure for released sex offenders, yet the almost unanimous lot of them avoided recidivism almost entirely on their own and led productive lives. The moral: Desistance is mostly a matter of spontaneous resolve and personal determination, not of some 'persona makeover' taking many years or even decades. Rather than pouring countless millions into preserving a system of sex-offender interminable treatment, government should heed such studies on how and why desistance is chosen and how it is effected, and then put those resources instead into supporting such choices and efforts.

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Big Data, Mass Surveillance, Automated Suspicion & TVs that Listen. Oh, My!

Editor's Note: In view of the fact that most here in MSOP have never even been online at all and are generally clueless about life in the modern age, it behooves us all to learn what we can about such matters now. Not everything is roses out there, as the following excerpts will illustrate. If we do succeed in our quest to gain at least some access to the internet, we will doubtless be protected by the measures that will be put in place here to prevent us from getting into serious trouble. However, never forget that you must think for yourself to avoid getting in over your head. If you ever get out, you will have to face the internet and all the current, invasive high tech that's out there. You'll need all the prep you can get. Consider that as starting here:

Michiko Kakutani, "Watched by the Web: Surveillance Is Reborn," 'Big Data,' by *Viktor Mayer-Schonberger & Kenneth Cukier* (book review, "Books of the Times" column), *Big Data: A Revolution that Will Transform How We Live, Work, and Think* (2013), *New York Times*, June 11, 2013:

Text Excerpts:

"The National Security Agency, ...is collecting the phone records of millions of American customers of Verizon – "indiscriminately and in bulk" and "regardless of whether they are suspected of any wrongdoing" – under a secret court order. Under another surveillance program called Prism, the Guardian and The Washington Post reported, the agency has been collecting data from emails, audio and video chats, photos, documents and logins, from leading Internet companies like Microsoft, Yahoo, Google, Facebook and Apple, to track foreign targets."

"The second danger Mr. Cukier and Mr. Mayer-Schonberger worry about sounds like a scenario from the sci-fi movie "Minority Report," in which predictions seem so accurate that people can be arrested for crimes before they are committed. In the real near future, the authors suggest, big data analysis (instead of the clairvoyant Pre-Cogs in that movie) may bring about a situation "in which judgments of culpability are based on individualized predictions of future behavior.

"Already, insurance companies and parole boards use predictive analytics to help tabulate risk, and a growing number of places in the Unites States, the authors of "Big Data" say, employ "predictive policing," crunching data "to select what streets, groups and individuals to subject to extra scrutiny, simply because an algorithm pointed to them as more likely to commit crime."

"One problem with relying on predictions based on probabilities of behavior, Mr. Mayer-Schonberger and Mr. Cukier argue, is that it can negate "the very idea of the presumption of innocence.

"'If we hold people responsible for predicted future acts, ones they may never commit,' they write, 'we also deny that humans have a capacity for moral choice.'

"At the same time, they observe, big data exacerbates 'a very old problem: relying in the numbers when they are far more fallible than we think.' They point to escalation of the Vietnam War under Robert S. McNamara (who served as the secretary of defense to Presidents John F. Kennedy and Lyndon B. Johnson) as a case study in 'data analysis gone awry': a fierce advocate of statistical analysis, McNamara relied on metrics like the body count to measure the progress of the war, even though it became clear that Vietnam was more a war of wills than of territory or numbers.

"More recent failures of data analysis include the Wall Street crash of 2008, which was accelerated by hugely complicated trading schemes based upon mathematical algorithms. In his best-selling 2012 book, "The Signal and the Noise," the statistician Nate Silver, who writes the Five Thirty Eight blog for The New York Times, pointed to failures in areas like earthquake science, finance and biomedical research, arguing that 'prediction in the era of Big Data ' has not been 'going very well' (despite his own successful forecasts in the fields of politics and baseball).

"Also, the computer scientist and musician Jaron Lanier points out in his brilliant new book, "Who Owns the Future?," there is a huge difference between 'scientific bog data, like data about galaxy formation, weather or flu outbreaks,' which with lots of hard work can be gathered and mined, and 'big data about people,' which, like all things human, remains protean, contradictory and often unreliable.

"To their credit, Mr. Cukier and Mr. Mayer-Schonberger recognize the limitations of numbers. Though their book leaves the reader with a keen appreciation of the tools that big data can provide in helping us 'quantify and understand the world,' it also warns us about falling prey to the 'dictatorship of data.'"

Paul Breer, Comment: "When the Television Listens: Fourth Amendment Protection Is Not Keeping Up with New Technology," 85 *UMKC L. Rev.* 255 (Fall 2016)

Text Excerpts:

p. 255: "...[I]n 2015 a major manufacturer released a smart television with a built-in voice recognition system that operates by continually listening for voice commands while transmitting all the personal information spoken within the commands to a third party to be converted into text.[2]"

pp. 261-62: "...The Defense Advanced Research Projects Agency's (DARPA) Memex program combs the Dark Web to help find sex traffickers and other illegal activity.[76]"

Selected Notes:

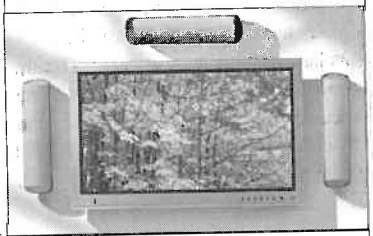
Eyder Peralta, "Samsung's Privacy Policy Warns Customers Their Smart TVs Are Listening," *NPR* (Feb. 9, 2015), http://www.npr.org/blogs/thetwo-way/2015/02/09/385001258/samsungs-privacy-policy-warns-customers-their-smart-tvs-are-listening.

Nick Wingfield, "Samsung Tweaks Television Policy Over Privacy Concerns," *N.Y. Times* (Feb. 10, 2015), http://bits.blogs.nytimes.com/2015/02/10/samsung-tweaks-television-policy-over-privacy-concerns/ .

Wade Shen, "Memex (Domain-Specific Search)," *DARPA*, http://www.darpa.mil/program/memex .

Catherine Crump & Matthew Harwood, "Big Brother Is Coming: Google, Mass Surveillance, and the Rise of the 'Internet of Things'," *Salon* (Mar. 26, 2014), http://www.salon.com/2014/03/26/big_brother_is_here_google_mass_surveillance_and_the_rise_of_the_internet_of_things_partner/.

Ty Pendlebury, "Smart TV: What You Need to Know," *CNET* (July 11, 2011), http://www.cnet.com/news/smart-tv-what-you-need-to-know/ .



Big Brother Is Watching You.

Matthew Harwood & Catherine Crump, "Big Brother Is Coming: Google, Mass Surveillance, and the Rise of the 'Internet of Things'," *Salon*, March 26, 2014, http://www.salon.com/2014/03/26/big_brother_is_here_google_mass_surveillance_and_the_rise_of_the_interent_of_things_partner/

Text Excerpts:

"Estimates vary, but by 2020 there could be over 30 billion devices connected to the Internet. Once dumb, they will have smartened up thanks to sensors and other technologies embedded in them and, thanks to your machines, your life will quite literally have gone online....

Techno-evangelists have a nice catchphrase for this future utopia of machines and the never-ending stream of information, known as Big Data, it produces: the Internet of Things. So abstract. So inoffensive. Ultimately, so meaningless.

...[I]n cyberspace it is at least theoretically possible to log off. In your own well-wired

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home, there will be no 'opt out.'

...Welcome to a world where everything you do is collected, stored, analyzed, and, more often than not, packaged and sold to strangers – including government agencies.

As more and more household devices – your television, your thermostat, your refrigerator – connect to the Internet, device manufacturers will undoubtedly follow a model of comprehensive data collection and possibly infinite storage. (And don't count on them offering you an opt-out either.) They have seen the giants of the online world – the Googles, the Facebooks – make money off their users' personal data and they want a cut of the spoils. Your home will know your secrets, and chances are it will have loose lips.

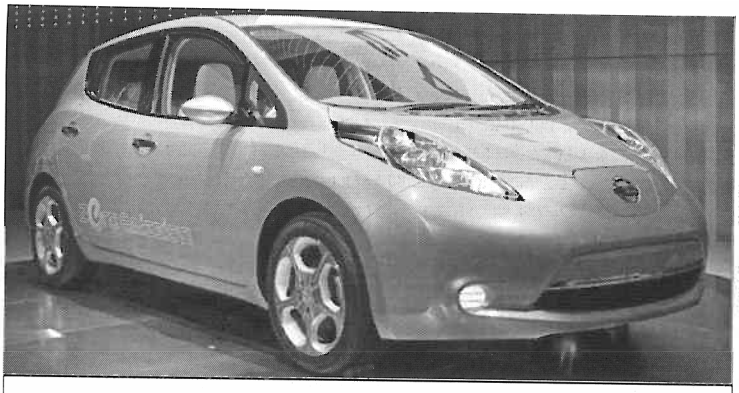
Keep in mind that when such data flows are being scrutinized, you'll no longer be able to pull down the shades, not when the Peeping Toms of the 21st century come packaged in glossy, alluring boxes. Many people will just be doing what Americans have always done – upgrading their appliances. It may not initially dawn on them that they are also installing surveillance equipment targeted at them. And companies have obvious incentives to obscure this fact as much as possible.

As the 'conscious home' becomes a reality, we will all have to make a crucial and conscious choice for ourselves: Will I let this device into my home? Renters may not have that option. And eventually there may be only internet-enabled appliances.

...Apple introduced iBeacon last year. It's a service based on transmitters that employ Bluetooth technology to track where Apple users are in stores and restaurants. (The company conveniently turned on Bluetooth by default via a software update it delivered to Apple iPhone owners). Apps that use iBeacon harvest a user's data, including his or her location, and sometime can even turn on a device's microphone to listen in on what's going on.

Another company, Turnstyle Solutions, Inc., has placed sensors around Toronto that surreptitiously record signals emitted by WiFi-enabled devices and can track users' movements. Turnstyle can tell, for instance, when a person who visited a restaurant goes to a bar or a hotel. When people log-on to WiFi networks Turnstyle has installed at area restaurants or coffee shops and check Facebook, the company can go far beyond location, collecting 'names, ages, genders, and social media profiles,' according to the Wall Street Journal....

Not so surprisingly, however, such handy technology has already led to discriminatory behavior by retailers. About a year ago, an investigation by the Wall Street Journal found that prices quoted by online retailers like Staples and Home Depot changed based on who the customer was. People who lived in higher-income areas generally received the best deals, which is a form of digital redlining. In the future, count on brick and mortar stores to do the same thing by identifying your phone, picking up data about you, and pricing items according to just how juicy a customer they think you may be.



Will your vehicle be collecting your secrets — for sale by someone else?

To be able to do this, retailers need companies that can provide rich data about our lives. That's where a group of pioneering companies in the new universe of customer surveillance called data aggregators come in. Already a multibillion-dollar industry, aggregators like Acxiom, Experian, and Datalogix buy customer data from wherever they can – banks, travel websites, retailers – and turn it into Big Data. Then they analyze, package, and sell it to third parties. 'Our digital reach,' said Scott Howe, CEO of the largest data aggregator, Acxiom, 'will soon approach nearly every Internet user in the U.S.'

Last December, the Senate Commerce Committee investigated the business practices of the nine largest data aggregators: what information they collect, how they obtain it, their invasiveness, and who they sell it to. The committee found that these companies collect information ranging from the relatively mundane to the incredibly sensitive, including names and addresses, income levels, and medical histories. They then sell it off without giving serious consideration to what the buyers might do with it.

In the process, you could find yourself categorized as part of a group of 'Mid-Life Strugglers: Families' or 'Meager Metro Means' or 'Oldies but Goodies,' which aggregator InfoUSA described as 'gullible' people who 'want to believe their luck can change.' Think of it as high-tech commercial profiling of the most exploitative sort....

Paul Ohm, a policy advisor to the Federal Trade Commission, calls these immense troves of personal information 'databases of ruin.' He worries that, over time, these databases will include new waves of data – maybe from your conscious home or location information from commercial sensors – and so become ever more consolidated. Soon, he fears, 'these databases will grow to connect every individual to at least one closely guarded secret. This might be a secret about a medical condition, family history, or personal preference. It is a secret that, if revealed, would cause more than embarrassment or shame; it would lead to serious, concrete, devastating harm.'...

The Great Outdoors

Recently, Newark Liberty International Airport upgraded lighting fixtures at one of its terminals to a more eco-friendly alternative known as LEDs. It turns out, however, that energy efficiency wasn't the only benefit of the purchase. The fixtures also double as a surveillance system of cameras and sensors that the Port Authority of New York and New Jersey is using to watch for long lines, identify license plates, and –its officials claim – spot suspicious behavior.

With all the spying going on these days, this may not seem particularly invasive, but don't worry, the manufacturers of such systems are thinking much bigger. 'We see outdoor lighting as the perfect infrastructure to build a brand new network,' said Hugh Martin, CEO of Sensity Systems, a Sunnyvale, California-based company interested in making lighting smart. 'We felt what you'd want to use this network for is to gather information about people and the planet.'

...Other surveillance technologies are heading for the heavens. Persistent Surveillance Systems has developed a surveillance camera on steroids. When attached to small aircraft, the 192-megapixel cameras record the patterns of the planetary life they fly over for hours at a time. According to the Washington Post, this will give the police and other customers a 'time machine' they can simply rewind when they need it. Placed strategically at the highest points of any town or city, these cameras could provide the sort of blanket surveillance that's hard to avoid....

Private surveillance technology is also destroying one of America's iconic freedoms: the open road. License plate readers are proliferating across America. These devices snap a picture of every passing car. One company, Vigilant Solutions, already hold 1.8 billion license plate records in its data warehouse, known as the National Vehicle Location Service (NLVS). Anyone with access to this information could easily find out where a person has driven simply by connecting the plate to the car owner. And keep in mind that it's up to the companies gathering them to determine just who can access the information – data of immense interest to private investigators and anyone else curious to track another person's movements.

Like many businesses that trade in Big Data or construct massive databases, Vigilant is in regular contact with government agencies craving access to its meaty stores of information.

If You Build It, They Will Come

In February, the Department of Homeland Security's Immigration and Customs Enforcement (ICE) put out a solicitation to obtain access to a private license plate reader database for the purpose of 'locating criminal aliens and absconders.' ICE claims that it wants to enhance officer safety by making it easier to arrest suspects away from their homes. When mainstream media took notice and privacy advocates like the ACLU objected, new Homeland Security head Jeh Johnson pulled the plug on the project.

A big win? Don't count on it, because police departments already have easy access to commercial license plate repositories. In the past, Vigilant has, for instance, allowed ICE to test its service free of charge. Police often pony up the cash to access such databases. As a quick experiment, go to Vigilant's NVLS registration page, click on the drop-down menu beside "Agency name," and scroll down. Trust us, you'll get bored by the staggering list of police departments before you reach the bottom.

Which brings us to an axiom of our digital age: law enforcement will exploit any database built, if it makes it easier to figure out what the rest of us are up to. Lucky for them, there's a wealth of data out there and available. Experian, one of the largest data aggregators, told the Senate Commerce Committee that 'government agencies' regularly purchase information from them.

Often, those agencies don't even have to pay for the privilege of accessing our data. In many cases, such an agency can simply issue its own subpoena (not seen by a judge) and compel companies to turn over our sensitive data. The culprit here is known as the ;third party doctrine,' which some courts have aggressively (and wrongly) interpreted to mean that any information disclosed to a third party isn't really private.

The danger of the rise of Big Data and the

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Internet of Things is straightforward enough. Whenever data is perpetually generated, collected, and stored, the result is going to be a virtual ATM of user information that government agencies can withdraw from with ease. Last year, for instance, local, state, and federal authorities issued 164,000 subpoenas to Verizon and more than 248,000 subpoenas to AT&T for user information, while issuing nearly 7,500 subpoenas to Google, during the first half of 2013....

In the future, even going all Jeremiah Johnson might not have the effect intended, since law enforcement could interpret your lack of solid digital footprint as inherently suspicious. This would be like a police officer growing suspicious of a home just because it was all dark and locked up tight.

When everything is increasingly tracked and viewed through the lens of technological omniscience, what will the effect be on dissent and protest? Will security companies with risk assessment software troll through our data and crunch it to identify people they believe have the propensity to become criminals or troublemakers – and then share that with law enforcement? (Something like that already seems to be happening in Chicago, where police are using computer analytic programs to identify people at a greater risk of violent behavior.)

There's simply no way to forecast how these immense powers – disproportionately accumulating in the hands of corporations seeking financial advantage and governments craving ever more control – will be used. Chances are Big Data and the Internet of Things will make it harder for us to control our own lives, as we grow increasingly transparent to powerful corporations and government institutions that are becoming more opaque to us."

Michael L. Rich, "Machine Learning, Automated Suspicion Algorithms, and the Fourth Amendment," 164 *U. Pa. L. Rev.* 871 (2016)

[Text Excerpt:]

p. 873: "...[S]oon a computer may spit out a person's name, address, and social security number along with the probability that the person is engaged in a certain criminal activity, with no further explanation.[8]"

Selected Footnote:

8 See *Tal Z. Zarsky*, "Transparent Predictions," 2013 *U. Ill. L. Rev.* 1503, 1519-20 (explaining how automated predictions can be generated in processes "which [are] not explainable in human language," such that "[i]t would be difficult for the government to provide a detailed response when asked why an individual was singled out to receive differentiated treatment by an automated recommendation system"). As a side note, this impending capability has captured the imagination of popular culture. Three current television series feature analogous technologies. See *Minority Report* (Fox); *Person of Interest* (CBS); *The Player* (NBC).

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The 'Bias Blind Spot' in Assessment

Patricia A. Zapf et al., "Cognitive Bias in Forensic Mental Health Assessment: Evaluator Beliefs About Its Nature and Scope," *Psychology, Pub. Pol'y & L.* (Nov. 2017)

[Abstract Excerpt:]

"...To formally assess beliefs about the scope and nature of cognitive bias, we surveyed 1099 mental health professionals who conduct forensic evaluations for the courts or other tribunals (and compared these results to a companion survey of 403 forensic examiners, reported in *Kukucka, Kassin, Zapf, & Dror*, in press). Most evaluators expressed concern over cognitive bias *but* held an incorrect view that mere willpower can reduce bias. Evidence was also found for a *bias blind spot* (*Pronin et al.*, 2002), with more evaluators acknowledging bias in their peers' judgments than in their own. Evaluators who had received training about bias were more likely to acknowledge cognitive bias as a cause for concern, whereas evaluators with more experience were less likely to acknowledge cognitive bias as a cause for concern in forensic evaluation as well as in their own judgments. Training efforts should highlight the bias blind spot and the fallibility of introspection or conscious effort as a means of reducing bias. In addition, policies and procedural guidance should be developed in regard to best cognitive practices in forensic evaluations."

[Text Excerpts:]

"...Forensic psychology has yet to fully examine the issue of bias ability, as distinct from reliability; research has already demonstrated its existence (see *Dror & Murrie*, 2017 for a review of the relevant forensic assessment research on expert performance regarding reliability and bias ability).

Murrie, Boccaccini, Johnson, et al. (2008) examined inter-rater agreement on Psychopathy Checklist-Revised (PCL-R; *Hare*, 2003) scores in 23 real-world cases where both defense and prosecution experts administered the PCL-R to the same defendant. Surprisingly, prosecution experts assigned higher PCL-R scores than defense experts for the same defendant, and the difference between the defense and prosecution PCL-R scores were greater than the reported standard error of measurement for the instrument (*Murrie, Boccaccini, Johnson, & Janke*, 2008). This demonstrates that variability was not solely attributable to a lack of reliability, but was also a function of a bias in favor of the side for which the experts worked.

Murrie et al. (2009) later found this same pattern of bias using actuarial risk assessment tools – namely, the STATIC-99 (*Hanson & Thornton*, 1999) and the Minnesota Sex Offender Screening Tool – Revised (MnSOST-R; *Epperson et al.*, 1998). These tools have demonstrated strong psychometric properties, such as inter-rater agreement, that should increase reliability and reduce subjectivity in forensic evaluation. However, when scores on these instruments were compared between opposing experts in sexually violent predator cases, prosecution experts assigned higher scores (i.e., scores indicative of higher risk) than defense experts for the same defendant. Along these same lines, *Chevalier, Boccaccini, Murrie, and Varela* (2015) recently found that defense and prosecution experts also differed in their norm selection and reporting, providing additional evidence of an adversarial bias in score reporting and biased interpretation practices among forensic mental health professionals.

The biasing effects within forensic psychology have also been demonstrated in an experimental study where 108 forensic evaluators were led to believe that they were retained by either the prosecution or the defense and then asked to consider the same case information to score the PCL-R and the STATIC-99R. Evaluators who believed they were retained by the prosecution assigned higher scores on these instruments (indicative of higher levels of risk) than those who believed they were working for the defense; in essence, demonstrating an allegiance effect (*Murrie, Boccaccini, Guarnera, & Rufino*, 2013). In sum, mounting evidence suggests that there is at least some risk for bias to impact forensic evaluations, either with respect to outcome (i.e., the ultimate opinion) or with respect to the interpretation of specific instruments or measures used in the evaluation (see *Zapf & Dror*, 2017 for a discussion of the various ways in which bias can arise and impact decision making in forensic evaluation)....

"...[T]he phenomenon is known as the 'bias blind spot,' wherein people perceive themselves as less vulnerable to bias than others (*Pronin, Lin, & Ross*, 2002; *Pronin & Kugler*, 2007). Even when individuals acknowledged the existence of bias and the strategies they used to reach their conclusions, they still believed that they were able to overcome these biases and reach objective conclusions (*Hansen, [et al.]*, 2014).

"Discussion [of results]

....Decades of research overwhelmingly suggest that cognitive bias operates automatically (*Klayman & Ha*, 1997) and without awareness (*Nisbett & Wilson*, 1977), and cannot be eliminated through willpower alone (*Wilson & Brekke*, 1994)....

Our data also revealed that more experienced evaluators were less likely to acknowledge cognitive bias as a cause for concern both in forensic evaluation and with respect to their own judgments.... Interestingly, some literature on ethical transgressions appears to indicate that these typically occur when clinicians are more than a decade post-licensure, as opposed to newly licensed (see *Grenyer & Lewis*, 2011), so it is possible that this reduced capacity to see one's self [sic] as vulnerable to bias may be related to a more general trend to be somewhat less careful mid-career....

"Conclusions

[Cites] "...the potential for biased opinions and conclusions to cross-contaminate other evidence or testimony (*Dror, Morgan, Rando, & Nakhaeizadeh*, 2017)."

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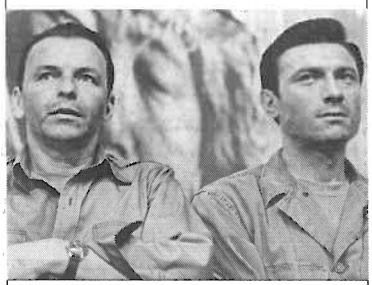

Sinatra & Harvey in *The Manchurian Candidate*: Brainwashed?