The Legal Pad
Volume 4, Issue 2
February 10, 2020

"The freedom of Speech may be taken away – and, dumb and silent we may be led, like sheep, to the Slaughter."
— George Washington

In This Issue:

Coming Soon:

- ✓ What does the SMART Office do, and why should you care?
- ✓ 2019 SOCCPN Conference Participants: Anyone you know?
- ✓ Interesting Factoids & Implications from 2018 SOCCPN Annual Survey of Commitment Facilities
- ✓ Incapacitation as a 'Core' Criminal Sentencing Consideration
- ✓ Subsequent Punishment - Clear and Present Danger and Other 1st Amendment Tests
- ✓ MnSOST-3 – Retrospective Review of Predictive Accuracy
- ✓ SO Treatment Advocate CURE Concedes Grave Problems with It.
- ✓ Any Lockup is a Prison Sentence
- ✓ The Secret: Forbidden Purpose of Sex Offender Commitment
- ✓ Court Use of Incorrect/Irrelevant Statistics & Unverified Prosecutorial Claims in SO Commitment Cases
- ✓ Why a Sex Offender Demanding a Jury Could Backfire Badly
- ✓ Sex Offender Commitment as a Lever to Eliminate Human Rights

↳ And (always) much, much more!

Is your situation as clear as S.F. fog? Clarification available here.

The Nexus

Your Humble Editor Earnestly Answers Questions about The Function of TLP and Its Tangential Juxtaposition to Treatment in MSOP

Editor's Comment: Recently, my "primary therapist" posed two closely interrelated questions to me about the connection of this newsletter to treatment in MSOP. Rather than confining my response to her eyes and the ears of other members of my "core group," I felt the matter to hold significance to all in treatment as past sex offenders. Herewith that response. See if you agree about that connection.

The Questions:

1. How does the TLP newsletter benefit you, in treatment and otherwise?
2. How does the TLP newsletter support/benefit others in treatment?

The Response:

After quite some thought, I have decided that rather than trying to handle each of these questions separately, I should address them both at the same time. This makes sense from two perspectives. The first is that there is an identity of interest and concern that unites me and all others in MSOP, and this includes the subset of all who are in treatment now or who may be later. Hence, the benefits of the *TLP* newsletter extend to all, albeit in differing ways. Second, attempting to tease out such varying ways and discuss them in individual detail would only create a false impression of difference of interests.

Allow one more initial point: because in responding to these questions I am talking here about facts, not feelings, and also because many statements herein must be stated collectively, there will be departures from "I statements" below. This is not an attempt to depersonalize or to intellectualize. The sheer nature of these two questions calls for rational analysis. I simply offer up my sharpest thoughts here to provide the clearest collective answer that is most cogent.

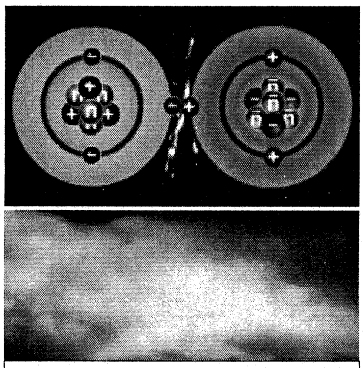
I should also state up front that the main aim of *The Legal Pad* has been and remains to show the completely anti-scientific nature of every item of so-called expert testimony and claimed scientific evidence submitted in support of sex offender commitment. It has sometimes addressed assessment for SRB-CAP hearings, notably including "dynamic factors" assessment with the same theme of exposing the anti-scientific nature of such additional claimed measures of dangerousness. It has also addressed MSOP's ignoring of the undeniable reducing and eventually extinguishing of all likelihood of recidivism caused by natural progression of age for purposes of such hearings requesting either release or CPS placement.

The Legal Pad has not focused on MSOP treatment in any comprehensive sense. Hence, it is a little difficult to answer any question about benefit to me or others as to MSOP treatment as it is presently structured. The question of benefit also necessarily involves sub-questions of how constructive criticism is to be defined, and questions of whether, in what ways, and to what extent *The Legal Pad* tries to provide constructive criticism via food for thought. However, the sheer depth of these topics as well as their tendency to evoke some debate rules out their inclusion in this simple overview.

One last thing: This document will not take long to read. Please reserve your feedback until I finish. At that point we can take the discussion anywhere you need to take it.

First, to compose a unified answer for these questions, I took a look at past issues of *TLP* as well as the one just distributed, at article excerpts I have already gathered but which are waiting for insertion into future *TLP* editions, and at a substantial list of requests for materials I am either making right now, or will make in the near future, in the hope of garnering further usable excerpt material for *TLP* issues to come. I also looked at the so-called "Master Document" from the *Gladden* case, portions of which have already appeared in *TLP* and which will continue to appear in future editions.

The first benefit to me is that I have gained an incredible education about sexual offending, about those who have perpetrated sex crimes, about matters thought to prompt sex crimes or at least to presage such crimes (both first convictions and recidivistic sex crimes), as well as about protective matters that either quench or simply augur against future recidivism. In addition, I have learned an immense amount about all forms of so-called assessment of probability of later sexual re-offense. Further, I have learned a lot about the goals and approaches of different treatment modalities which sex offenders may undergo. Although somewhat attenuated, I have also learned much about related procedures sometimes used in connection to sex offender treatment, notably polygraphy and tests of sexual arousal/arousability, and about circumstances of the confinement aspect of sex offender commitment.



Science & Antiscience in contact (conflict), causing destruction of knowledge.

There is an old quotation about truth being able to set one free. On a physical level, that is obviously not true in the context of commitment. However, truth is a priceless commodity toward enlightening me, all others confined here in MSOP, MSOP clinical personnel and all *TLP* readers everywhere outside these fences, and toward furnishing a familiarization with governing or at last crucially significant facts that alleviates confusion and misconception. All this I have gained from my experience in the research, the dialogs, and the sheer editorial process of constructing every *TLP* edition.

Let me get back to the overall effect of this education, enlightenment, and orientation a little later, since it is something that is communally shared with all earnest *TLP* readers, especially in connection to treatment.

However, for the moment, consider that *TLP* is not just a personal exercise in education, shared with others here in MSOP. It is surprisingly widely read outside by many individuals. Some of these are lawyers and law professors, professors and other academicians in psychology and other relevant fields, a growing number of correspondents in other facilities of this type elsewhere, and a wide array of activists, both directly in opposition to sex offender commitment and in opposition to other, but related aspects of the so-called "war on sex offenders."

In this connection, *TLP* serves the same educational function, providing a common informational base from which all can extend outreach in ways that will improve our futures in everything from bringing such commitment to an end to creating a life afterward that hopefully will equate the opportunities available to all.

The point of all this most centrally involves judicial challenges to our plight as persons subjected to additional incarceration, creating a wide and impacted media awareness of this plight and a motivation by those in media to use their media outlets to speak to this matter in ways compassionate to and supportive of all of us. I would be remiss if I didn't say at this point that I am aware that *TLP* is making a difference in this struggle to impart education and enlightenment to many outside.

I bear no shame in stating that I fervently hope that *TLP* will help bring about legal and political change, as well as a sea change of public views of those who at some time in the past committed sexual crimes, but now seek only the chance to start life anew, in whatever varying ways as may be available to us. In part this is the rehabilitative model, but it is also the model of forgiveness and compassion.

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I seek this end not just for our collective benefit as those subjected to massive bias and exceeding hate, but just as much for the benefit of society itself. Any society torn and distrusting from the impact of all of that negative emotionality and excessively suspicious thinking will eventually inevitably fly apart, like a fractured wheel. By dispelling many myths about sex offenders, I deeply hope that *TLP* will help turn society to attunement to this model of forgiveness and compassion for the benefit of all.

For many years MSOP has counseled all of its involuntary residents to focus exclusively on its form of treatment as a sole realistic means of exit from commitment. Some, although only a very small minority, have achieved provisional release and a few have reached full discharge. Yet it remains to be seen whether at some point in the near future this will accelerate into an opening of the floodgates to freedom.

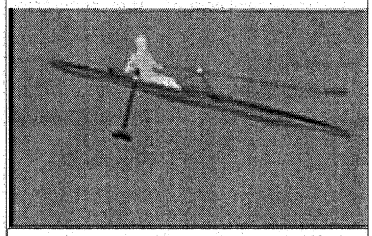
However, in my own view at least, there is nothing wrong with participating in treatment with open ears, minds and hearts. At the very least, one can receive perspectives and insights that previously may have escaped one. I know I have. But all the treatment in the world becomes rather pointless if one is simply going to continue to be detained for the rest of one's days. An expeditious way forward must be found that includes freedom at some time soon.

Even if freedom were the only issue, in the current circumstances, those who seek information that may instead lead to a judicial victory – whether just personal or applicable to all – can hardly be faulted. In this perspective, such effort, and dissemination of the information necessary to fuel them, amount to another oar in the water, so to speak, in pursuit of liberation.

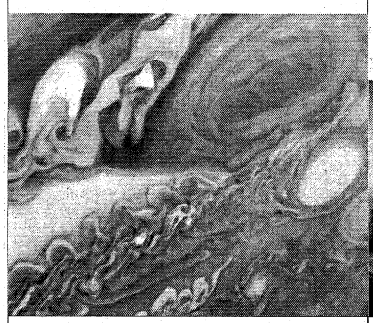
But beyond this, if one seeks insight, one must not just bring one's mind to the table, as it were. One must build a mental frame of reference that has a sound foundation in clear facts. Treatment that serves up only foggy confusion and muddying of the factual waters cannot have a lasting effect. These swirls and vortices leave only a weak and fragile uncertainty. Treatment that inculcates precepts contrary to, or in cover-up of known or knowable facts will eventually fall out of the minds of its participants.

Thus, a significant part of my aim in presenting *TLP* excerpts is simply to provide a primer of underlying facts. These can provide both treatment participants and clinical staff a strong base from which revised treatment approaches can be devised and by which all treatment recipients can sift through for many useful kernels of abiding truths around which to organize their thinking.

It cannot be reasonably denied that improving, even reconstructing treatment to shorten the length of confinement and to pragmatically improve the life-prospects of the former offenders now dumped into MSOP by an uncaring and retributive state would be a very good outcome. More significantly still to all in MSOP treatment, such improvements in treatment will, in my view, greatly improve the attitudes, the receptivity, the engagement, and the emotional and cognitive openness of all treatment participants. What more MSOP could want I can't imagine. Among other goals, this outcome is part of what *TLP* serves by discussions that address, directly or tangentially, treatment matters.



Another oar in the water



Swirls & vortices

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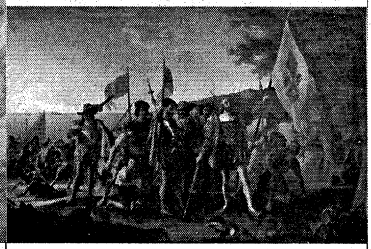
What's The Status?

The Latest Updates on Litigation by MSOP Confinees

The Wage Case Currently, this one is in the discovery phase. Most significant in this phase, each party will take depositions of parties and witnesses for the other side and anyone else who may know any significant facts about the case. This will take awhile, as it does in most other cases with lawyer representation in other federal cases.

Overall, the bad news: It could easily take until the end of 2021 to wrap up the case, possibly longer. The good news: As long as you keep working or go back to work in the meantime, if we win, you can collect your personal damages that will keep increasing with each paycheck until then. (And of course, a permanent injunction will then keep the higher rate going forward, plus any federal legislative increase(s) to it between now and then.)

Now remember: there are no guarantees in court cases. But I would say the odds lean toward us winning.



Not that kind of discovery!

The *Stone* Media Case All that can be determined rights now is that the case awaits the judge's decision on a motion for reconsideration.

The Internet Access Case This case by Chris Ivey seeks a federal court ruling that we have a First Amendment right to at least some mode of access to the internet. Chief Judge John Tunheim of Minnesota's U.S. District Court upheld a *Report and Recommendation* urging denial of the defendants' motion to dismiss.

That R&R can be found in the recent case materials placed on our Client Network by Professor Eric Janus of the Sex Offender Law & Policy Research Center (SOLPRC) at Mitchell Hamline College of Law in St. Paul. (Note: Your Editor has just asked for further materials to be added to this collection. Please do not bother Prof. Janus just to reiterate this request.)

Chief Judge Tunheim's order upholding that recommendation is not among those materials. However, it can be obtained direct from Minnesota's U.S. District Court. Ivey's case is currently in the discovery phase. Given the overcrowded docket in that court, a decision likely will not come until the last part of this year (not counting any possible appeal). Your editor will seek amicus curiae input in the case by request to other commitment facilities in the country.

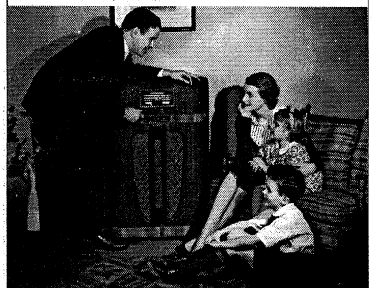
The *Karsjens* Case As known to all, this case remains on its second appeal to the 8th Circuit federal Court of Appeals. It has been awaiting an order setting a date for oral argument. In a recent conversation, Attorney David Goodwin of Gustafson Gluek PLLC, the law firm representing the plaintiff class (us) in that case, the delay in setting that oral argument date is extraordinary, and the reason for that delay is unknown. In the Editor's understanding, there are only two actions that can be taken to try to prompt court action to move that case to oral argument. However, neither of them has any guarantee of success. Moreover, each of them involve embarrassing the assigned panel and to some degree the entire 8th Circuit court. The outfall from such moves could easily irritate court members to the point where any ensuing ruling might be weighted against us by the resulting bias. This, then presents a dilemma that has understandably caused inaction by our attorneys. It is also possible that the reason might actually be the 8th Circuit waiting for a decision in some other case unknown to us that the 8th Circuit judges believe may shed light on the current state of jurisprudence on the "shocks the conscience" standard of *County of Sacramento v. Lewis* versus the later *Kingsley* ruling that that standard does not apply to those not in prisons.

The *Gladden* Case This case has always been behind the *Karsjens* case, with Gustafson Gluek holding it in reserve to avoid court confusion of issues in one, but not the other, and of evidence in one not germane to the other. Frankly, expert and other expenses in both cases at the same time would also have posed an unworkable burden to both the court and to that law firm.

Finally, the hope was that *Karsjens* would result in such a sweeping outcome as to obviate any need to pursue the *Gladden* case. That hope now appears to be fading fast, however. Nevertheless, it still appears that *Gladden* simply can't be activated while *Karsjens* remains pending.

What may happen in *Karsjens* and the entwinement of *Karsjens* and *Gladden* may prove to be very dynamic questions, however, with developments possible in any week. Stay tuned!

The "Complex Lawsuit" (*Branson v. Johnston*) This case claims that the Complex building in MSOP-Moose Lake did not comply with requirements when built and denies accommodations previously given in other housing buildings for MSOP and also buildings for the mentally ill and dangerous at St. Peter. Notably, the equal protection count in this lawsuit survived a motion to dismiss. Then guess what happened: the case was put on "abeyance" (stay) pending the outcome in the current (second) *Karsjens* appeal.



Stay tuned!

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Some other pending cases have been mentioned to me, but without sufficient detail for this list. If you have a pending case not mentioned here, either challenging all or most of our commitments to MSOP, or challenging any confinement condition, prohibition to us, or any other rule/policy of serious significance to all MSOP confines, and you want that case to receive wide notice, both within MSOP and among others in the free world, discuss it with me and it can be added to a supplementary list in a later *TLP* edition.

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Murderers Getting Away with It While Cops Stakeout Suspected Perverts

Rene Chun, "Are Serial Killers More Common Than We Think?," *The Atlantic*, Oct. 2019, pp. 30-31

Excerpted Text:

p. 30: "...[H]ere's a curious fact. ...[T]he rate of murder cases solved – or 'cleared,' in detective lingo [has fallen]. In 1965, the U.S. homicide clearance rate was 91 percent. By 2017, it had dropped to 61.4 percent, one of the lowest rates in the Western world. In other words, about 40 percent of the time, murderers get away with murder.

pp. 30-1: "...[W]hy aren't more killers getting caught? Take Samuel Little. He isn't a household name, yet the California inmate's confessed death toll, across 14 states and four decades, appears to be triple [Ted] Bundy's. Since 2012, police have linked him to at least 60 homicides, and he claims 33 more. According to [Michael] Arntfield [retired police detective and author], killers like Little have benefitted from the falling clearance rate, which he in turn attributes to a handful of factors: [including] constrained resources (thanks to stagnant salaries, detectives in some areas may be less qualified than their predecessors)...."

Editor's Comment: In the same period of the last 50 years, a vast amount of total resources of every law enforcement agency have been diverted to investigating sex crimes, and those thought to have committed them or to be currently committing them, even when no one complains of any such crime. This simple lack of resources still available to homicide investigation, where the fact of a crime is clear from the corpse left behind (unlike open-ended investigations of individuals suspected of simply being the 'type' likely to commit sex crimes, in the absence of any evidence or accusation of any victim) is undeniably largely responsible for the current state of killers getting away with it.

During this same fifty-year period, the emotionality attached to the mere general subject of sex crimes against women and children has applied political pressure which has brought about this shift. But, as this article shows, this single-minded obsession about sex crimes has caused police success to flag in every other area of police work. And now it has become apparent that even the very worst of crimes, first-degree murder, has joined the vast list of crimes that criminals are getting away with constantly – all while every available police officer is skulking around behind every registered former sex offender and a long list of those simply suspected of either being sexually attracted to kids or having a hostile attitude toward women.

No one will wave a flag for sex criminals, to be sure. But every society must decide where the necessarily limited resources of police work must be applied. Focusing all such resources on just one kind of crime leaves the streets and citizenry completely vulnerable to all other kinds of crime in the meantime. Many criminals sense this state of 'nobody minding the store' and they plot and strike to seize that opportunity. And we are now approaching fifty full years of meantime. It is time to reexamine this obsession.

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Expectation-Biased Overperception of Mental Pathology (Disorders): If They Do It to Children, What Do You Think They Do to Sex Offenders?

David L. Faigman, Edward K. Cheng, Jennifer Mnookin, Erin Murphy, Joseph Sanders, Christopher Slobogin, 2 *Modern Scientific Evidence: The Law and Science of Expert Testimony* (2019-2020 Edition, § 11:12, "Overperception of Psychopathology" (Nov. 2019 Update):

Text excerpts:

"Psychologists sometimes perceive psychopathology where none exists. To prevent this from happening, test developers frequently collect normative data. The data are collected by administering a test to relatively normal individuals in the community. When a psychologist gives the test to a client, the client's responses can be compared with the normative data. If they are similar to the normative data, then one should be very cautious about inferring the presence of psychopathology.

The overperception of psychopathology can have grave consequences in forensic settings....

...[R]ecent research indicates that this problem has not been alleviated. ...This is true for both children and adults. For example, *Hamel et al.* administered the Rorschach to 100 relatively normal children.[7] Children were excluded if they had: (a) a history of being suspended from school; (b) received psychotherapy for emotional or behavioral disorders; or (c) been evaluated or treated for attention deficit hyperactivity disorder. When the children took the Rorschach, they appeared to have severe psychopathology. Hamel et al. concluded that:

'If we were writing a Rorschach-based, collective psychological evaluation for this sample, the clinical descriptors would command attention. In the main, these children may be described as grossly misperceiving and misinterpreting their surroundings and having unconventional ideation and significant cognitive impairment. Their distortion of reality and faulty reasoning approach psychosis. These children would also likely be described as having significant problems establishing and maintaining interpersonal relationships and coping within a social context. They apparently suffer from an affective disorder that includes many of the markers found in clinical depression.'[8]

Yet these were basically healthy children. In fact, when the children were evaluated using a well-validated independent measure, the *Conners Parent Rating Scale-93*, they demonstrated healthier than average behaviors.[9]"

Notes:

7 *Hamel et al.*, "A Study of Nonpatient Preadolescent Rorschach Protocols," 75 *J. Personality Assessment* 280 (2000).

8 *Hamel et al.*, "A Study of Preadolescent Rorschach Protocols," 75 *J. Personality Assessment* 280, 291 (2000).

9 *Conners, Manual for Conners' Rating Scales* (1989).

They're all crazy, right?

Editor's Closing Comment: The preceding book excerpt recounts a key experiment in which psychologists were tasked with interpreting Rorschach test results from completely normal children who were sent to them without explanation. The Rorschach test has been condemned as being, not a test of the mental health of the test subject, but instead simply of the imaginings of pathology projected by the test interpreter onto the test subject.

The panel of psychologists who gave that test to the children and interpreted the results declared that all of them had serious mental maladies (even though none existed). The outcome of this experiment confirmed that condemnation unquestionably.

More generally, however, this outcome also points up a broader problem in psychological assessment. The expectation of the psychological assessor can greatly bias the declared result of the assessment. In an earlier article about such assessment bias, a leading expert on bias formation lamented that, despite the psychologist's care and high confidence that he/she was not subject to bias, experiments proved that bias affected their conclusions badly, just like the conclusions of those lacking such confidence. (See TLP, #3-5, p. 10: "The 'Bias Blind Spot' in Assessment.")

Originally, so-called "assessment" of recidivism potential of sex offenders was judged by "clinical judgment" alone (a totally subjective impression). The sheer fact that a sex offender (like the children in the excerpt above) had been sent to that assessor inherently created the same bias — in such cases completely unbridled by any objective standards.

Time and again, these so-called assessors, knowing full well that their livelihoods depended on pleasing prosecutors (who consistently pay more than can be derived from the scrawny budgets allowed to appointed defense attorneys), correctly perceived their role as confirming the court's worse fears about the sex offender under consideration for commitment — regardless of the baselessness of those fears in reality.

When this practice became too much of a public scandal to conceal, such assessors began to resort to "guided" clinical assessment, which falsely implied that certain rules governed such subjective impressions. However, in reality, such tools only set forth vague guidelines, that were subject to override by the assessor or, more often, allowed the assessor to make a series of judgment calls in stretched interpretation of those guidelines that, taken altogether, completely failed to accurately describe the examinee at all. The PCL-R comes to mind in this connection.

When this too became so widely recognized as just a justification device for unwarranted impressions, assessors began to rely in part upon so-called "actuarial instruments." However, again because of the continuing need to please

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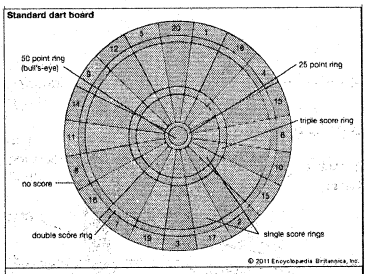
prosecutors, assessors gravitated to choosing to use specific actuarial tools that reported the highest percentages of predicted recidivism, no matter how inconsistent with statistics reported by researchers or other more reasonable predictive tools.

Thus, for instance, the MnSOST-R (later, versions 3 and now 4) became popular to present in a commitment court as to an offender who just happens to match the narrow band of offenders selected as exemplars by the creators of those versions, because the very unusual statistical math those creators used makes such offenders falsely appear to be nearly certain to reoffend. This was based on such peculiarities as disorderly conduct convictions and counting each count of any conviction, including counting of convictions as to the same victim in neighboring counties, and creating double-and triple-counting of offenses by recounting each sex crime as a felony and additionally as a "predatory offense." The MnSOST scoring form counts it yet again if it involves a male victim (up to four male victims).

Finally, the MnSOST instructions countenancing the optional "rule of thumb" (with no supporting science) of doubling the stated percentage for recidivism likelihood over a a set number of future years to derive a claimed "lifetime" future percentage. This ignores the fact that most sex offenders subject to commitment are then in or beyond their fifties, a fact reducing recidivism to nearly nil percentages — all while failing to account for any such age-based reduced recidivism past a single yes-no small reduction factor based on current age pre-or post age 30.

In order to 'keep up' with this 'armaments race' of trying to 'one-up the competition' by stating ever more exaggerated predictions of recidivism likelihood, the Static-99, when reissued as the Static-99R, suddenly provided "non-routine" percentage tables that made those likely to face a commitment attempt appear to be more likely to recidivate purely because of the assessor's personal choice in how to categorize that (for instance, as someone more likely to be "high-risk" or have a "high need" for treatment). This was simply thinly-disguised personal impression masquerading as an actuarial approach.

Finally, as all these manipulations soured judicial respect for actuarial approaches, "dynamic factors" claimed to reflect likely future recidivism were invented out of whole cloth, purely as impressionistic categories, and again without any regard to the diminution of cumulative effect on recidivism due to probably repetitive overlap between the effect of any one factor and any other dynamic factor.



Like a blind man throwing darts.

This is the present state of affairs, with assessors now more than ever before playing the role of paid character assassins purveying claims of science that in reality amount to nothing more than a sham to support a preconceived outcome, all simply for cash and prospective contractual advantage.

So the next time you are asked to participate in any so-called "assessment," recall the children 'assessed' on the Rorschach and simply decline to participate, and the next time any assessment, past or future, is used against you, be ready to sue the assessor.

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The Truth of Treatment Fatigue Gets a Judicial Nod.

Suggs et al. v. Maxymillian, et al., No. 9:13-CV-00359 (NAM/TWD), 2015 US Dist LEXIS 133443 (N.D. N.Y. September 14, 2015):

"Based upon the evidentiary record, Justice Tormey made numerous critical observations and findings about treatment in SOTP [the New York sex offender commitment program] at CNYPC [Central New York Psychiatric Center]. Id. at 7-8. Judge Tormey referenced an expert opinion that "the programs at CNYPC have good ideas," but that the treatment program for the petitioner did not necessarily "adhere to the program parameters," *id.* at 19; the treatment program submitted for the petitioner did not have "program integrity," *id.*; and that the petitioner was clearly suffering from treatment fatigue, a concept that the OMH Chief Psychiatric Examiner refused to acknowledge even existed. *Id.* at 22."

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Higher Impression Management Scores Turn Out to Reflect Lower Recidivism Risk Levels

Editor's Note: In assessment and treatment, impression management is often used against sex offenders. Maybe it shouldn't, this article suggests.

Nicola L. Mathie & Helen C. Wakeling, "Assessing Socially Desirable Responding and Its Impact on Self-Report Measures among Sexual Offenders," 17(3) *Psychology, Crime & Law*, 215-237 (2011)

[Abstract Excerpt:]

"It is often assumed that offenders employ socially desirable responding when completing self-report questionnaires, thereby invalidating such measures. The aim of this study is to examine the extent that sexual offenders employ socially desirable responding and the impact that socially desirable responding ...has on self -report measures. ...The results indicate that the extent of socially desirable responding is smaller than assumed, and its impact on a number of self-report measures is lower than expected. Furthermore, lower levels of risk of sexual reoffending were significantly associated with higher scores on the impression management subscale...."

[Text Excerpts:]

p. 216: "...Most frequently, dynamic risk factors are assessed using self-report psychometric measures, and/or clinical judgment."

p. 218: "...*Nugent and Kroner* (1996) found a child molester group had greater scores on impression management than rapists...."

p. 231: "...[T]hose in the present sample are all *incarcerated* offenders who have been *convicted* of a sexual offense. In this situation, it might be harder for individuals to answer questions regarding their offending untruthfully, thereby weakening any association between responding in a socially desirable way and measures which include questions regarding their offending."

References:

Kroner, D.G. & Weekes, J.R. (1996). Balanced inventory of desirable responding: Factor structure, reliability, and validity with an offender sample. *Personality and Individual Differences, 21*, 323-333.

Mills, J.F. & Kroner, D.G. (2006). Impression Management and self-report among violent offenders. *Jour. Of Interpersonal Violence, 21*, 178-192.

Nugent, P.M. & Kroner, D.G. (1996). Denial, response styles, and admittance of offenses among child molesters and rapists. *Jour. Of Interpersonal Violence, 11*, 475-486

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The Internet Is Everywhere — Except in MSOP.

Philip N. Howard, Pax Technica: How the Internet of Things May Set Us Free Or Lock Us Up (New Haven, CT: Yale Univ. Press, 2015).

Book Excerpts:

pp. 8-9: "...The technology trends are well known but still impressive. By 2015 more than a billion people are on Facebook, and

Fatal Farenheit 451 Error
You are not permitted to access the internet – ever. Forget it. Burn after reading.

every day a half-million more join. YouTube has 500 million unique visitors every month who view 95 billion videos. Every minute, users upload more than 3,000 images to Flickr, to say nothing of the other kinds of multimedia content that visitors upload to other variations of blogs, feed, and websites. Twitter handles 500 million tweets per day, and 12 new accounts appear every second. When new social-media technologies are developed, they can attract millions of users in a blink of an eye. It took Google+ less than three weeks to attract 10 million users."

p. 46: "...[M]ore and more people are online. By 2020 everyone will effectively be online. Most people will have direct internet access through mobile phones and the internet, but everyone will be immersed in a world of devices that are constantly connected to the internet. Already people who don't have direct access are tracked and monitored through government and corporate databases. Their economic, political, and cultural opportunities are still shaped by digital media. This means that for the first time in history, virtually everybody can connect to virtually everyone else. Most countries have upwards of 80 percent internet penetration. And this is only the internet of mobile phones and computers. The internet of things will keep everyone networked constantly."

pp. 67-8: "...Our crowd-sourced maps of social problems, produced by many people using many kinds of devices, help people find solutions. Increasingly the internet of things is structuring our political lives, and we can already see how people use device networks to create new maps that link civic groups with one another and with people in need. This internet can make people aware of their behaviors and relationships. It allows people to trade stories of political success and failure, and to build and maintain their own networks of family and friends. Sometimes, these networks evolve into powerful political movements. People use social media to make new maps and new movements, and to construct new institutions for themselves...."

pp. 150-1: "...In 1989, most internet users were found in the United States, and there were around 900,000 of them. By 2015, around 900,000 new citizens from around the world were joining *each day* and almost all of the 4.3 billion existing internet addresses had been given to devices. Fortunately, in this scenario, by 2020, a new addressing system will allow every human-made object to have an address.["IPv6," *Wikipedia*]".

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Free Speech: A Primer on Judicial Review Standards Applicable to Censorship and Restrictions on Modes of Communication

Editors Note: With free speech cases underway (including media censorship challenges and internet access demands) and more possible in the near future, it's necessary to gain a little understanding of legal doctrine and illustrative case law about how the various rights included in the First Amendment's guarantees of free speech and press are applied. Current and prospective litigants among us especially need to give "strict scrutiny" (grin) to this overview.

R. Kendall Kelso, "The Structure of Modern Free Speech Doctrine: Strict Scrutiny, Intermediate Review, and 'Reasonableness' Balancing," 8 *Elon L. Rev.* 291 (2016)

[Introduction Excerpt, pp. 291-2:]

"...Because free speech doctrine involves the 'fundamental' right of speech, modern free speech doctrine does not use minimum rationality review, applicable to cases of social or economic regulation not involving fundamental rights under the Equal Protection or Due Process Clauses.[3] Instead, for the lowest level of free speech protection, the Court uses a 'reasonableness' balancing test similar to the 'reasonableness' balancing test used under the Due Process Clause for less than substantial burdens on unenumerated fundamental rights, such as the right to vote involved in ballot access cases, the right to marry, the right to travel, the right of access to courts, and reproductive rights cases involving contraception and abortion.[4] As discussed in Part II, for regulations of free speech in a public forum or on individual private property, the Court uses strict scrutiny for content-based regulations and intermediate review for content-neutral regulations.[5] As discussed in Part III, for regulations of speech in a government-owned non-public forum, or speech supported by government grants or subsidies, the Court uses strict scrutiny for viewpoint discrimination, and 'reasonableness' balancing for subject-matter and content-neutral regulations.[6] In some cases, certain kinds of speech do not trigger free speech protection at all. As discussed in Part IV, this includes cases of government speech or regulations of alleged symbolic speech that are viewed as involving conduct only.[7] Other kinds of speech, like advocacy of illegal conduct, fighting words, or obscenity, get limited free speech protection: strict scrutiny for viewpoint discrimination, but otherwise no free speech review, as discussed in Part V.[8] As discussed in Part VI, content-based regulations of certain kinds of speech in a public forum trigger less than strict scrutiny review. This can involve regulations of commercial speech, speech by government employees on matters of public concern, or alleged tortious speech, such as defamation or invasion of privacy, among others.[9] Free speech doctrines involving prior restraints, injunctions, vagueness, substantial overbreadth, and other such matters are discussed in Part VII.[10]"

[Text Excerpts:]

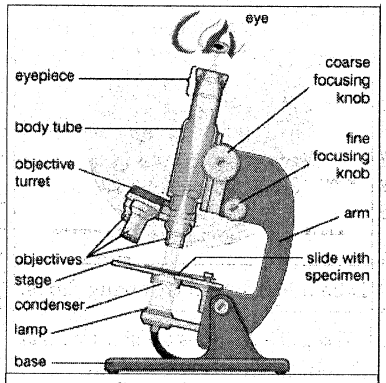
pp. 292-5:

II. Free Speech Doctrine in Public Forums or on Individual Private Property

A. Introduction to Standard Free Speech Doctrine

Regulations of speech that involve viewpoint discrimination are given strict scrutiny review no matter where the speech occurs.[11] Strict scrutiny also applies in a public forum or on private property for content-based, subject matter regulations of speech not involving viewpoint discrimination.[12] In contrast, regulations of speech in a public forum or on private property that are content-neutral are given intermediate review This intermediate standard was stated in Ward v. Rock Against Racism,[13] where Justice Kennedy said for the Court, 'Our cases make clear, however, that even in a public forum the government may impose reasonable restrictions on the time, place, or manner of protected speech, provided the restrictions "are justified without reference to the content of the regulated speech, that they are narrowly tailored to serve a significant governmental interest, and that they leave open ample alternative channels for communication of information."'

These standards track strict scrutiny and intermediate review under Equal Protection and Due Process Clause doctrine. Under intermediate review, the government must prove the government action: (1) advances important/significant/substantial government ends; (2) is substantially related to advancing those ends; and (3) is not substantially more burdensome than necessary to advance those ends.[14] Under strict scrutiny, the statute must: (1) advance compelling/overriding government ends; (2) be directly and substantially related to advancing those ends; and (3) be the least restrictive effective means to advance the ends.[15] The Court often phrases the last two parts of strict scrutiny as requiring the statute or regulation be 'precisely tailored' or 'necessary'; for intermediate review, the last two prongs are often phrased as the statute or regulation must be 'narrowly drawn.'[16] But sometimes the Court uses the phrase 'narrowly drawn' even under



Strict Scrutiny

strict scrutiny.[17] Predictability would be aided, of course, if the Court would reserve the term 'narrowly drawn' for intermediate review, and consistently use the term 'necessary' or 'precisely tailored' for strict scrutiny....

B. Strict Scrutiny and Intermediate Review in Public Forum or Private Property Regulation

In 1991, in *Simon & Schuster, Inc. v. Members of the New York State Crime Victims Board*,[18] the Court adopted a strict scrutiny approach to content-based regulations of speech. As the Court stated in *Simon & Schuster*, to justify its 'content-based' regulation of speech 'the State must show that its regulation is necessary to serve a compelling state interest and is narrowly drawn to achieve that end.' Concurring in the case, Justice Kennedy noted that this adoption of the Equal Protection strict scrutiny approach in a First amendment case was not required by prior precedents, and that while 'the compelling interest inquiry has found its way into our First Amendment jurisprudence of late ...the Court appears to have adopted this formulation in First amendment cases by accident rather than as the result of a considered judgment.' In contrast to this approach, Justice Kennedy preferred Justice Black's absolutist approach, which would prevent the state from any content-based regulation of fully-protected speech, without regard to a compelling governmental interest analysis.[19] The majority of the Court in the modern era has consistently rejected Justice Kennedy's views,[20] and applied a strict scrutiny analysis to content-based regulations of speech."

p. 298: "...[T]he better approach is to recognize that the discussion in the Court's 'dual motive' cases regarding the content-neutral aspect of the regulation is focused on whether the content-neutral reason is an actual or plausible purpose of the government action, or merely a pretext to justify content-based discrimination.[33] If it is a pretext, then only strict scrutiny will be applied to the content-based reason for regulating. If the content-neutral reason is an actual or plausible purpose, then intermediate review will be applied to that content-neutral reason for regulating, while strict scrutiny will be applied to the content-based reason. As with all constitutional cases, if the government has one reason to act that makes the government action constitutional – in these cases typically the content-neutral reason – the act is constitutional, even if the content-based reason cannot survive constitutional scrutiny.

A famous example of a 'dual motive' case is *Texas v. Johnson*.[34] In this case, the majority held that a state flag desecration statute was invalid as applied to defendant, who had burned a flag as part of a political protest. The majority noted that the state's interest in banning flag burning to prevent breaches of the peace was a content-neutral reason for the regulation. It thus triggered the *O'Brien* standard of intermediate review. Since no breach of the peace was imminent, there was no substantial interest involved in the case, and thus intermediate review was not met.[35] The state's second interest was an interest in preserving the flag as a symbol of nationhood and national unity. The majority said that this interest was related to the suppression of expression and, thus, was content-based. Therefore, strict scrutiny was applied to the consideration of that interest, and the ban on flag burning was unconstitutional because 'the government may not prohibit the expression of an idea simply because society finds the idea itself offensive'[36]; the proper less burdensome effective alternative would be counterspeech to support the flag as a symbol of national unity."

p. 299: "...[T]he majority in *Reed* adopted a rigid rule that if a regulation is content-based 'on its face,' then strict scrutiny is automatically triggered.[40]..."

pp. 300-01: "In applying strict scrutiny and intermediate review in First Amendment free speech cases, it is useful to note that there are four questions regarding benefits and burdens that can be asked about any statute. Two relate to Equal Protection Clause issues (underinclusiveness and overinclusiveness) and two relate to Due Process Clause issues (service and oppressiveness/restrictiveness). Because First Amendment scrutiny does the jobs of both Equal Protection and Due Process concerns when applied to free speech issues, both questions of benefits (underinclusiveness and service) and both questions of burdens (overinclusiveness and oppressiveness) are necessary for free speech analysis.

More precisely, in analyzing how the government is advancing its interests under the second prong of strict scrutiny and intermediate review, the Court considers both the Equal Protection Clause question of the extent to which the government action fails to regulate all individuals who are part of some problem (underinclusiveness inquiry),[45] and the Due Process Clause question of how the government action serves to achieve its

(Continued on page 6)

(Continued from page 5)

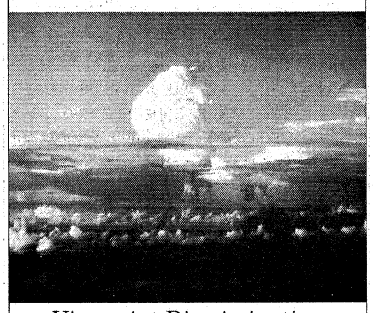
benefits on those whom the action does regulate (service inquiry).[46] Similarly, under the third prong of strict scrutiny and intermediate review, the Court considers both the Equal Protection question of the extent to which the government action burdens individuals not intended to be regulated (overinclusiveness inquiry),[47] and the Due Process question of the amount of burden on individuals who are the focus of the action (oppressiveness inquiry).[48] For example, as the Court noted in *City of Ladue v. Gilleo*,[49] 'The notion that a regulation of speech may be impermissibly underinclusive is firmly grounded in basic First Amendment principles.' As Justice Kennedy noted in *Ward v. Rock Against Racism*,[50] a content-neutral regulation of speech cannot burden substantially more speech than necessary to further the interest (the overinclusiveness inquiry), nor can it place a substantial burden on speech that fails to leave open ample alternative channels for communication (the oppressiveness inquiry) or that do not serve to advance its goals (the service inquiry). Thus, in *City of Los Angeles v. Alameda Books*, Inc.,[51] Justice Kennedy correctly observed that free speech analysis must consider both benefits and burdens on the speech. Justice Kennedy noted, 'The necessary rationale for applying intermediate is the premise that zoning ordinances like this one may reduce the costs of secondary effects [the service inquiry] without substantially reducing speech [the oppressiveness inquiry].'[52]"

III. Free Speech Doctrine in Government-Owned Non-Public Fora

A. Distinguishing Public Fora from Non-Public Fora

pp. 301-02: "...[W]ith regard to non-public forum property owned by the government, the state can impose time, place, or manner restrictions, and also may reserve the forum for its intended purposes, as long as the regulation on speech is 'reasonable in light of the purpose which the forum at issue serves' and not an effort to suppress speech because the public officials oppose the speaker's view, i.e., viewpoint discrimination.[54]

The decision in *Perry [Education Association v. Perry Local Educators' Association]*[53] was based on earlier decisions involving property owned by the government not dedicated to expressive activity...."



Viewpoint Discrimination

p. 304: "...[A] mass transit agency's acceptance of advertisements on a wide range of topics under contracts for display in its stations and vehicles, for the purpose of raising revenue, made such areas designated public fora, triggering public forum review.[66]"

B. Standard of Review for Non-Viewpoint-Based Discrimination in a Non-Public Forum

pp. 305-06:"Under reasonableness balancing, the challenger still has the burden to prove the regulation is unconstitutional.[72] But the Court makes its own 'independent judgment' on the strengths of the government's legitimate interests and the burden on the individual, and then weighs the two to determine if the burden, even if not irrational, is nevertheless 'unreasonable' or 'excessive' because the burden is too great given the minimal interests supporting the regulation. As phrased in the context of a less than substantial or less than severe burden on the fundamental right to vote, the Court said in *Burdick v. Takushi*:

> 'A court ...must weigh "the character and magnitude of the asserted injury to the rights protected by the First and Fourteenth Amendments that the plaintiff seeks to vindicate" against "the precise interests put forward by the State as justifications for the burden imposed by its rule," taking into consideration "the extent to which those interests make it necessary to burden the plaintiff's rights."[73]'

pp. 306-7: "In *Beard v. Banks*,[78] a majority of the Supreme Court extended the reasonableness balancing test used in *Thornburgh v. Abbott* and *Turner v. Safley*, to a case involving burdening a prisoner's access to newspapers, magazines, and photographs while in the prison's long-term segregation unit. Such reasonableness review involved standard means/end reasoning balancing: (1) the government's legitimate interest in effective prison management (*Turner* factor one); (2) the manner in which the regulation achieved its benefits for prison guards and other inmates, including considering less burdensome alternatives (*Turner* factors three and four), and (3) the burdens imposed on the prisoner, including alternative means of exercising First Amendment rights (*Turner* factor two) , with the burden placed on the prisoner to establish that the government's regulation was unreasonable...."[79]"

Notes for this section:

3 See *Heller v. Doe*, 509 U.S. 312, 320-21 (1993), and cases cited therein. A similar standard of minimum rationality review applies for non-fundamental right social or economic regulation involving the Due Process. Clause. See, e.g., *United States v. Carolene Products Co.*, 304 U.S. 144, 154 (1936); *Williamson v. Lee Optical of Oklahoma, Inc.*, 548 U.S. 483,489 (1955) (regulation must only be rationally related to advancing legitimate interests (the *service* inquiry), and not impose irrational burdens (the *oppressiveness* inquiry)). For discussion of the underinclusiveness, overinclusiveness, service, and oppressiveness inquires under Equal Protection and Due Process Clause Doctrine, see text at notes 45-48, *supra*.

4 See text at notes 72-82, *infra*; *R. Randall Kelso*, The Structure of *Planned Parenthood v. Casey* Abortion Rights Law: 'Strict Scrutiny' for 'Substantial Obstacles' on Abortion Choice and Otherwise 'Reasonableness Balancing'," 34 *Quinnipiac L. Rev.* No. 2 (2016) (Part III, abortion Rights; Part IV, other fundamental rights cases) (forthcoming).

5 See text at notes 11-52.

6 See text at notes 53-110.

7 See text at notes 111-40, discussing *Rust v. Sullivan*, 500 U.S. 173 (1991) (government speech); *Dallas v. Stanglin*, 490 U.S. 19 (1989) (conduct only).

8 See text at notes 141-290, discussing *R.A. v. City of St. Paul*, 505 U.S. 377 (1992) (viewpoint discrimination); *Brandenburg v. Ohio*, 395 U.S. 444 (1969) (advocacy of illegal conduct); *Chaplinsky v. New Hampshire*, 315 U.S. 568 (1942) (fighting words); *Miller v. California*, 413 U.S. 15 (1973) (obscene speech).

9 See text at notes 291-400, discussing *Central Hudson Gas & Electric Corp. v. Public Service Comm'n*, 447 U.S. 557 (1980) (commercial speech); *Pickering v. Board of Educ., of Will County, Ill.*, 391 U.S. 563 (1968) (government workers); *New York Times Co. v. Sullivan*, 376 U.S. 254 (1964) (defamation); *Bartnicki v. Vopper*, 532 U.S. 514 (2001) (invasion of privacy).

10 See text at notes 401-58.

11 See *Lamb's Chapel v. Center Moriches Union Free School Dist.*, 508 U.S. 384, 393-94 (1993) (strict scrutiny in limited public forum opened to public); *Perry Educ. Ass'n v. Perry Local Educators' Ass'n*, 460 U.S. 37, 48-9 (1983) (strict scrutiny for viewpoint discrimination even in a non-public forum); *R.A.V. v. City of St. Paul*, 505 U.S. 377, 385-92 (1992) (viewpoint discrimination triggers strict scrutiny even in a case involving regulation of fighting words).

12 See *United States v. Alvarez*, 132 S. Ct. 2537, 2548 (2012) (Stolen Valor Act case).

13 491 U.S. 781, 791 (1989).

14 *Erwin Chemerinsky*, Constitutional Law: Principles and Policies 695 (4th ed. 2011) ("Under intermediate scrutiny, a law is upheld if it is substantially related to an important government purpose. ...The means used need not be necessary, but must have a 'substantial relationship' to the end being sought.") See also *Charles D. Kelso & R. Randall Kelso*, American Constitutional Law: An E-Coursebook, Volumes 1 and 2, at § 20.1 nn. 12-15, 22-24, 28 (2015 Orig. Ed. 2014)

For the requirement of an "important/significant/substantial" interest at intermediate review, higher than a mere "legitimate/permissible" interest at minimum rationality review or reasonableness balancing, see *United States v. Virginia*, 518 U.S. 515, 533 (1996) (in discussing intermediate review used for gender discrimination, the Court noted: "The State must show 'at least that the [challenged] classification serves "*important* governmental objectives and that the discriminatory means employed" are "substantially related to the achievement of those objectives"'") (emphasis added); *Clark v. Community for Creative Non-Violence*, 468 U.S. 288, 293 (1984) (in discussing intermediate review applicable to content-neutral time, place, or manner regulations under the First Amendment free speech doctrine, the Court noted: "Restrictions of this kind are valid provided they are justified without reference to the content of the regulated speech, that they are narrowly tailored to serve a *significant* governmental interest, and that they leave open ample alternative channels for communication of the information.") (emphasis added); id. At 294 ("Symbolic expression of this kind may be forbidden or regulated if the conduct itself may constitutionally be regulated, if the regulation is narrowly drawn to further a *substantial* governmental interest, and if the interest is unrelated to suppression of free speech.") (emphasis added); *Central Hudson Gas & Electric Co. v. Public Service Comm'n*, 447 U.S. 557, 566 (1980) (in discussing the intermediate review level of interest necessary in commercial speech cases, the Court stated, "We ask whether the asserted government interest is *substantial*.") (emphasis supplied)

15 See *Chemerinsky*, *supra* note 14, at 695 ("Under strict scrutiny a law is upheld if it is proved necessary to achieve a compelling government interest. The government ...must show that it cannot achieve its objective through any less discriminatory alternative."). See also *Kelso & Kelso*, *supra* note 14, at § 20.1 nn. 1-11, 15-22, 25-28. For discussion of the strict scrutiny requirement of a "compelling/overriding interest to regulate, see *Fisher v. Univ. of Texas at Austin*, 133 S.Ct. 2411, 2419 (2012) ("Strict scrutiny is a searching examination, and it is

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the government that bears the burden to prove ...[its] classifications are constitutional only if they are narrowly tailored to further compelling governmental interest.'"); *Loving v. Virginia*, 388 U.S. 1, 11 (1967) (in applying strict scrutiny to a ban on interracial marriage, the Court noted: "There is patently no legitimate overriding purpose independent of invidious racial discrimination which justifies this classification.")

Because the regulation must be "necessary" to advance the government's ends under strict scrutiny, this means "unnecessary" underinclusiveness will render the regulation unconstitutional. Phrased in the affirmative, the regulation must adopt, to the extent possible, means that "directly advance" the government ends, not merely "substantially advance' those ends, as at intermediate review. Otherwise, the regulation is not "precisely tailored" enough. It is clear that this requirement of a "direct relationship" exists at strict scrutiny. Commercial speech cases involve a less rigorous form of scrutiny than strict scrutiny, as discussed *infra* text accompanying notes 342-50. Yet the Court has stated that for commercial speech regulation, under *Central Hudson Gas & Electric Co. v. Public Service Comm'n*, 447 U.S. 557, 566 (1980, the regulation must "directly advance the government's interest." Since a "direct relationship" is required in commercial speech cases, a fortiori such a requirement exists at strict scrutiny. See generally *United States v. Alvarez*, 132 S.Ct 2537, 2549 (12012) (Kennedy, J., plurality opinion ("The First Amendment requires that the government's chosen restriction on the speech at issue ne "actually necessary": to achieve its interest. There must be a direct causal link between the restriction imposed and the injury to be prevented.")

16 Compare *Austin v. Michigan Chamber of Commerce*, 494 U.S. 652, 666 (1990) ("precisely tailored to serve [a] compelling state interest"); *Palmore v. Sidoti*, 466 U.S 429, 432 (1984) ("necessary"); *Regents of the Univ. of Cal. v. Bakke*, 438 U.S. 265, 299 (1978) (Powell, J. announcing the judgment of the Court ("precisely tailored") with *Board of Trustees of the State Univ. of New York v. Fox*, 492 U.S. 469, 480 (1989) ("narrowly drawn" at intermediate review)

17 See *Adarand Constructors, Inc. v. Pena*, 515 U.S. 200, 235 (1995) ("narrowly drawn"); *Boos v. Barry*, 485 U.S. 312, 317 (1988) (same); *United States v. Grace*, 461 U.S. 171, 177 (1983) (same).

18 U.S. 105, 117-18 (1991).

19 *Id.* at 124-25 (Kennedy, concurring).

20 *Republican Party of Minnesota v. White*, 536 U.S. 765, 774-75 (2002) (strict scrutiny applied); *id.* at 793 (Kennedy, concurring) ("I adhere to my view, however, that content-based speech restrictions that do not fall within any traditional exception should be invalidated without any inquiry into narrow tailoring or compelling governmental interests.").

33 *Hill v. Colorado*, 530 U.S. 703, 719-25 (2000), citing *Ward v. Rock Against Racism*, 491 U.S. 781, 791 (1989) ("principal inquiry" is whether the regulation was adopted "because of disagreement with the message it conveys"). See also *Reed v. Town of Gilbert, Arizona*, 1345 S.Ct. 2218, 2237 (Kagan, J. joined by Ginsburg & Breyer, JJ, concurring in the judgment) ("This Court's decisions articulate tow important and related reasons for subjecting content-based regulations to the most exacting standard of review. The first is 'to preserve An uninhibited marketplace of ideas in which the truth will ultimately prevail.' *McCullen v. Coakley*, 134 S.Ct. 2518, 2529 (2014). The second is to ensure that the government has not regulated speech 'based on hostility – or favoritism – towards the underlying message expressed.' *R.A.V. v. St. Paul*, 505 U.S. 377, 386 (1992).").

34 491 U.S. 397, 399 (1989).

35 *Id.* at 407-10.

36 *Id.* at 410-12.

40 135 S. Ct. 2218 at 2228 (2015).

45 *Kelso & Kelso, supra* note 14, at § 26.1.1.1 nn. 25-27.

46 *Id.* at 27.1.2 nn. 43, 45.

47 *Id.* at 26.1.1.1 nn. 28-31.

48 *Id.* at 27.1.2 nn. 44-45. On each of these four inquiries, see generally *R. Randall Kelso*, "Considerations of Legislative Fit Under Equal Protection, Substantive Due Process, and Free Speech Doctrine: Separating Questions of Advancement, Relationship, and Burden," 28 *U. Richmond L. Rev.* 1279 (1994).

49 512 U.S. 43, 51 (1994).

50 491 U.S. 781, 798-99 (1989).

51 535 U.S. 425, 440-50 (2002) (Kennedy, J., concurring).

52 *Id.* at 450. For further discussion of the proper inquiry applying intermediate and strict scrutiny review in free speech cases, see generally *Kelso & Kelso, supra* n. 14, at § 2.4.4

54 460 U.S. 37, at 45-54.

53 460 U.S. 37, 38-39.

66 *United Church of Christ v. Gateway Econ. Dev. Corp.*, 383 F.3d 449, 451-53 (6th Cir. 2004) (sports arena case); *Christ's Bride Ministries, Inc. v. Southeastern Pennsylvania Transit Auth.*, 148 F.3d 242, 247-55 (3rd Cir. 1998).

72 *Burdick v. Takashi*, 504 U.S. 428, 441-42, 437-38 (1992) (burden of proof on challenger, as Court "rejected the petitioner's argument."). For similar use of this reasonableness balancing test in cases involving less than substantial burdens on the fundamental right to marry, right to travel, and right to access to courts, see *Kelso, supra* note 4, at Part IV; id., at Part III (reasonableness balancing used for less than "substantial obstacles" on the fundamental right to abortion in *Planned Parenthood v. Casey* and *Gonzales v. Carhart*).

73 504 U.S. at 433-34, quoting *Anderson v, Celebrezze*, 460 U.S. 780, 788-89 (1983).

78 548 U.S. 521, 524-30 (2006) (plurality opinion of Breyer, J. joined by Roberts, C.J. and Kennedy & Souter, JJ.), citing *Turner v. Safley*, 482 U.S. 78,79 (1987); id. at 542-43 (Stevens, J. Joined by Ginsburg, J. dissenting); *Thornburgh v. Abbott*, 490 U.S, 401, 412-419 (1989).

79 *Beard*, 126 S.Ct. at 2575-76. Of course, if the concern is with outgoing correspondence, and thus First Amendment rights of non-prisoners are involved, the Court will apply public forum standards, typically intermediate review, based on a content-neutral concern with security and public safety, as was applied in *Procunier v. Martinez*, 416 U.S. 396 (1974).

[To Be Continued in Next Edition....]

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Gladden Excerpt: Vagueness & Overbreadth of MN SO Commitment Law as Judicially Expanded Defies Science & Denies Substantive Due Process.

Editor's Note: Continuing from the last *TLP* edition, this excerpt is the first of two examining the role of the vagueness and overbreadth of Minnesota's sex offender commitment law as it stands now.

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1. Vagueness of Terms of the Act on Its Face

The definitions in said *Act* upon which sex offender commitment rests are themselves, as written, filled with vagueness and ambiguity, e.g.: "irresponsible for personal conduct with respect to sexual matters," "habitual course of misconduct in sexual matters," "lack of customary standards of good judgment," "failure to appreciate the consequences of personal acts," "utter lack of power to control the person's sexual impulses" (which itself presumes the existence of "impulses"), "manifested a sexual, personality, or other mental disorder or dysfunction," and "likely to engage." Such vagueness itself violates the substantive due process protection of the Fourteenth Amendment. However, the meaning of each of these terms, through varying applications in different cases, has been stretched to utter meaninglessness.

2. The Vagueness Is Exacerbated, Not Cured, by Appellate Judicial Interpretation, Construction, and Application of Said Terms.

Writing on this topic, *Warren J. Maas*, "Erosion of Constitutional Rights in Commitment of Sex Offenders," 29 *William Mitchell Law Review* 1241, 1248 (2003), observed, "...[Since the] early '90s,.... [the law has] been changed in two ways, both of which erode the due process protections of people committed as sexual predators. First, the standard was bypassed by the passage of the SDP statute. Second, the definition of 'utter lack of power to control' has become quite vague." (emphasis supplied). (At p. 1249): "The question remaining is whether the new statutory standard has a limit.", adding at p. 1251:

"The SPP statute continues to be used,[84] but the standard of "utter lack of power to control sexual impulses" has lost its force. The definition of the standard has gone through such a metamorphosis that its plain English meaning no longer applies. Several cases have attached qualifiers to the definition that have nothing to do with volitional control, including the following: the offender's relationship, or lack thereof, to the victim,[85] refusal of treatment and lack of relapse prevention plan, [86] and exhibition of grooming behavior.[87] The significant aspect of these cases is that it has distorted the common sense definition of "utter lack of power to control"[88] and has created a non-clinical definition of a clinical concept.[89] The courts have attempted to construe the phrase "utter lack of power to control," and in so doing, have lowered the substantive due process standard that it once stood for."

[pp. 1252-53:] "In addition, there is a blurring of the line between an expert witness and a finder of fact in the determination of 'utter lack of power to control sexual impulses.' Civil commitment requires the input of experts in mental health. Clearly, experts in human behavior are needed in SPP and SDP cases to answer questions related to issues of dangerousness, victim impact, and likeliness of re-offending. However, there are elements of the commitment that appear to be of a psychological or psychiatric nature, but are in fact legal in nature.

"In *In re Blodgett*, *In re Pirkl*, *In re Irwin*, and *In re Bieganowski*, the Minnesota appellate courts have listed a number of factors which the trial courts

(Continued on page 8)

consider in deciding if an 'utter lack of power to control sexual impulses' exists. These include: the nature and frequency of the party's sexual assaults, degree of violence involved, relationship, or lack thereof between the party and his victims, the party's attitude and mood, the party's medical and family history, results of psychological and psychiatric testing and evaluation; refusal of treatment and lack of relapse prevention plan; nature and frequency of sexual assaults; and, pattern of habitual sex offenses involving multiple victims over an extended period of time, exhibited classic pedophilic grooming behavior, and failing to remove himself from situations that provided the opportunity for similar offenses. These factors are legal factors, most of which contain elements from behavioral sciences. Courts should determine if the legal standard has been met by asking experts in psychology or psychiatry if any one of the factors has been exhibited in a way that would affect the subject's ability to control his sexual impulses."

Notes:

84 In 2002, six petitions for SPP were filed in Hennepin County. Contrary to the perceptions of many, both statutes are used for commitment. In an Information Brief by the Research Department of the Minnesota House of Representatives, Legislative Analyst Judith Zollar stated, "Minnesota law contains a second civil commitment law applicable to sexually dangerous persons, known as the 'psychopathic personality' commitment law. It was enacted in the 1930s and has been replaced, from a practical standpoint, by the sexually dangerous persons civil commitment law. It remains on the books, however, because there are individuals in the state treatment facilities who were originally committed pursuant to the older law and remain subject to that commitment." Judith Zollar, Minn. House of Representatives Research Department, Sex Offenders and Predatory Offenders: Minnesota Criminal and Civil Regulatory Laws, 2001-2002 Sess. at 22 n. 5 (2002) available at http://www.house.leg.state.mn.us/hrd/pubs/sexofdr.pdf

85 See *In re Blodgett*, 510 N.W.2d 910, 915 (Minn. 1994), cert denied, 513 U.S. 849 (1994) (considering the nature and frequency of party's sexual assaults, degree of violence involved, relationship, or lack thereof, between party and his victims. Party's attitude and mood, party's medical and family history, results of psychological and psychiatric testing and evaluation, and such other factors as bear on party's predatory sexual impulse and lack of power to control it).

86 See *In re Pirkl*, 531 N.W/.2d 902, 907 (Minn. Ct. App. 1995) (stating that refusal of treatment and lack of relapse prevention plan can show utter lack of control necessary for involuntary commitment under psychopathic personality statute). See also, *In re Irwin*, 529 N.W.2d 366, 375 (Minn. Ct. App. 1995) (explaining how the court, in applying test to determine existence of psychopathic personality, will consider the nature and frequency of sexual assaults, degree of violence, relationship between offender and victims, offender's attitude, mood, medical history, testing results, and other facts which weigh on predatory sexual impulse and lack of power to control it).

87 See *In re Bieganowski*, 520 N.W.2d 525, 527 (Minn. Ct. App. 1994). Evidence that patient lacked control over sexual impulses supported his commitment as psychopathic personality; patient had manifested pattern of habitual sex offenses involving multiple victims over extended period of time, exhibited classic pedophilic grooming behavior, and failed to remove himself from situations that provided opportunity for similar offenses. *Id.*

88 A literal rendering of "utter lack of power to control" would never control his behavior. See *American Heritage Dictionary* (3d ed. 1992) (defining "utter" as "complete, absolute, entirely"). But see *Linehan I*, 518 N.W.2d 609 (Minn. 1994). The factors used in deciding "utter lack of power to control" modify a literal definition. Id.

89 "Power to control" or "volitional control" are subjects of psychological and psychiatric science.

For instance, *In re Alverson*, 2007 WL 447159 at *6, 9 (Minn. App. 2007, unpub.) held that contacting minors by Internet, using alcohol, and accessing and possessing legal pornography to comprise "habitual course" of "misconduct," even though not illegal. Even just two sex crimes separated from each other by decades have been held to comprise such a "habitual course" of misconduct. *In re Rask*, 2009 WL 511943 at *2 (Minn. App. 2009, unpub.); *In re Fisher*, 2005 WL 2209079 at *8 (Minn. App. 2005, unpub.). Even charges of which the defendant was acquitted have been held permissible to be used to establish this "habitual course" of misconduct. *In re Jasmer*, 447 N.W.2d 192, 195 (Minn. 1989).

Acquitted? Committed!

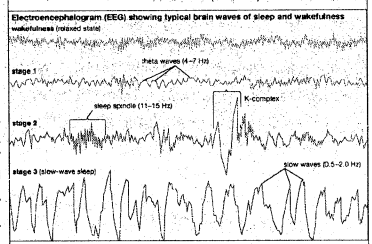
As to the requisite "utter lack of power to control the person's sexual impulses," in recent decades Minnesota case law has essentially eradicated the need to establish the existence of any "impulse" at all. Thus, under *In re Pirkl*, 531 N.W.2d 902, 905 (Minn. App. 1995), if one commits a sex crime of any kind, the sheer fact of such commission is deemed to have been the result of a momentary "impulse." Cf.: *In re Blodgett*, 510 N.W.2d 910 (Minn. 1995); *In re Linehan*, 2007 WL 2417341 at *4-5 (Min. App. 2007, unpub.). That is obviously a non sequitur, but is reigning case law in Minnesota.

Other decisions (e.g., *In re Bieganowski*, 520 N.W.2d 525 [Minn. App. 1994]; *In re Adolphson*, 1995 WL 434386 [Minn. App. 1995]), attempt to redefine a lifelong or very long-term attraction to children as a "sexual impulse." This fiction that any sex crime necessarily results from an "impulse" is used to justify an inference of an "utter lack of power to control" "sexual impulses." However, it ignores that each such crime could have been decided upon in advance, carefully planned, and carried out in organized, step-wise fashion.

The "Matrix" in use by MSOP includes a factor of 'antisocial attitudes and behavior.' Similarly, "'In applying the *Pearson* test, the court considers ...the offender's attitude.'" *In In re Blodgett*, 510 N.W.2d at 915. In the particular case of crimes with minor victims, simply holding an intellectual belief that acts of oral sex upon volunteering victims is morally acceptable has been held to establish an "utter lack of control" of "sexual impulses," despite long advance deliberation of the sexual crime, and equally long advance 'grooming' of the victim. (*Adolphson*, *supra*). See also: *In re Preston*, 629 N.W.2d 104 (Minn. App. 2001), in which, despite massive advance planning, extensive grooming that preceded the sex crime, and waiting by the perpetrator for the most opportune occasion to commit the sex crime, he was held to have been uncontrollably impulsive. Yet an offender's attitudes supportive of sexual entitlement, rape, and sexual activity with children have all been found to have no relationship to sexual or violent recidivism. *A.J.R. Harris & R.K. Hanson*, "Clinical, Actuarial and Dynamic Risk Assessment of Sexual Offenders: Why Do Things Keep Changing?," 16 *Jour. Of Sexual Aggression*, No. 3, p. 296-310 (November 2010), at 302-303. More generally, *Dennis M. Doren, Evaluating Sex Offenders: A Manual for Civil Commitments and Beyond* (Sage Publ'ns. 2002), at pp. 167-68, cites, as among such matters lacking in scientific confirmation: "unconventional attitudes; criminal attitudes."

Beyond the lack of any causative or indicative connection between a sex offender's "attitudes" and later reoffending, all matters of mentation, whether cognitive or emotional, are protected by the freedom of thought and conscience inherently implicit in the First Amendment of the United States Constitution. To acknowledge that freedom of thought, but then to permit detention on account of its exercise is in reality a total disembowelment of that right. Moreover, Standard 1.09 of the *Ethical Standards of the American Psychological Association* requires all psychologists to "respect the rights of others to hold values, attitudes, and opinions that differ from their own." Composing and proclaiming a psychological opinion as to any individual based in any part on his/her "attitudes" blatantly violates this ethical restriction.

United States v. McLaurin, 731 F.3d. 258, 263 (2d Cir, 2013), states, "...the goal of correctional treatment during supervised release is properly directed at conduct, not at daydreaming. See *Stanley v. Georgia*, 394 U.S. 557, 565, 89 S. Ct. 1243, 22 L. Ed. 2d 542 (1969) ("Our whole constitutional heritage rebels at the thought of giving government the power to control men's minds."); cf. *Kansas v. Crane*, 534 U.S. 407, 412, 122 S. Ct. 867, 151 L. Ed. 2d 856 (2002).



Mind Control: Is it coming?

"'...[U]nacted-upon prurient sexual thoughts, just like 'a defendant's abstract beliefs, however obnoxious to most people, may not be taken into {731 F.3d 264} consideration by a sentencing judge.' *Wisconsin v. Mitchell*, 508 U.S. 476, 485-86, 113 S. Ct. 2194, 124 L. Ed. 2d 436 (1993) (citing *Dawson v. Delaware*, 503 U.S. 159, 112 S. Ct. 1093, 117 L. Ed. 2d 309 (1992)); see also *Lawrence v. Texas*, 539 U.S. 558, 562, 123 S. Ct. 2472, 156 L. Ed. 2d 508 (2003) ('Liberty presumes an autonomy of self that includes freedom of thought ....')."

Because of this lack of scientific connection between thoughts or statements, on one hand, and criminal action on the other, and because both thoughts and statements are constitutionally protected, any RAI or 'tool' that scores points toward claimed recidivism probability on account of attitudes, beliefs, opinions, or statements of a given sex offender must be banned.

(Continued on page 9)

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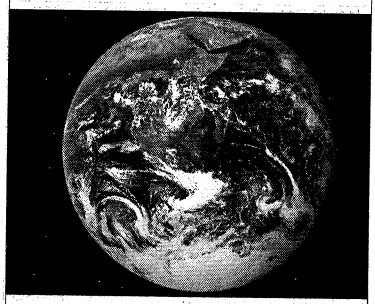
3. The Lack of Any Meaningful Limit Against Impermissibly Boundless Application of the Act's SDP Law

Addressing this point, *Eric S. Janus*, in his book *Failure to Protect: America's Sexual Predator Laws and the Rise of the Preventive State* (Cornell University Press, Ithaca, N.Y., 2006), at p. 27, observes, "The limitations of inability to control, of mental disorder, and of dangerousness have proved so permeable that they are no boundary at all."

In Minnesota sex-offender commitment trials, prosecution expert witnesses and those retained as "examiners" by trial courts often opine that a sex offender must be committed lest he return to an environment where the offender would have renewed "access to his victim pool." Trial and appellate courts in Minnesota regularly rely on this type of testimony in committing Plaintiffs. However, regardless whether a given offender's victims were women or children, both women and children are ubiquitous in all rural and urban areas of Minnesota. Therefore, this makeweight argument amounts to nothing more than a surreptitious plea for preventive detention as incapacitation. In basing commitment upon this contention, Defendants deprive Plaintiffs of substantive due process.



Your victim pool, say MN courts.

Trial courts in Minnesota-sex offender commitment cases also often rely on findings as to the commitment defendant's gender, lower socio-economic status, and limited work history as factors claimed to support commitment. However, these matters have nothing to do with commission of sex crimes except as to the inherent, immutable matter of one's gender. Use of the latter is discrimination by gender and distinctly, is something shared by every male non-sex offender, thus negating any probative value. Trial and appellate court reliance on these and any other similar "factors" deprives Plaintiffs of substantive due process.

In support of sex offender commitment, trial courts in Minnesota often rely on the fact that the commitment defendant would find himself subject to "stress" if released. To reach this conclusion, those courts typically cite the fact that the mandatory sex offender registration would cause difficulty to the offender in obtaining housing and employment. Of course, every sex offender released from prison is subject to that stress, yet average sex-offender recidivism, as stated supra, currently remains at an extremely low 3.2%. Hence, this "stress" argument is a baseless makeweight for commitment, depriving Plaintiffs of substantive due process.

In a similar vein, in *In re Oscar Adams*, 2012 Minn. App. Unpub. LEXIS 1180 (2012), Department of Corrections disciplinary records and a list of lawsuits Adams had brought against various officials of that department were admitted into evidence in Adams' commitment trial on the theory that these "tended to show Adams' long-term conflict with authority, his resistance to rules, his low likelihood of following community supervision, and behavior that is consistent with a personality disorder" and purportedly tended to show a higher likelihood of sex-crime recidivism. As to the last point, there is no personality disorder in the DSM-5 that is marked by either litigiousness or simple disobedience to petty administrative rules. Assuming that everything in that quote was scientifically valid, nonetheless, absolutely none of it has the slightest nexus to potential for sex-crime re-offense. This is pure junk-science offered up in support of the preconceived goal of commitment through any excuse.

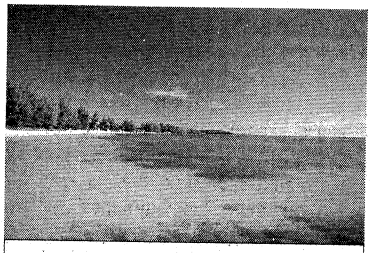
Even more phenomenally, in *In re Wills*, 2010 Minn. App. Unpub. LEXIS 510 (2010), "Dr. Wilson further noted that appellant's courtroom behavior exhibited chronic impulsivity, poor judgment, and failure to appreciate consequences of his behavior. The record shows that appellant was often argumentative with the court. Appellant waived his appearance at one hearing. ...Appellant also stated that he was 'done with the trial,' and declared that he was 'gone' because he and his attorney disagreed on trial strategy. When given an opportunity to return to the courtroom, appellant stated that if he returned, he was going to raise some hell.' At one point, appellant told the district court: 'If you can't do your job right, then step down and let somebody else do it.'" These comments and behavior are not outside the anger that can be expected from anyone being subjected to what one sees as an unjust, kangaroo court proceeding to relegate one to the functional equivalent of a natural-life resentencing. Dr. Wilson would effectively demand the coolness of a detached judicial temperament under this circumstance, notwithstanding, *inter alia*, Dr. Wilson's own effort at such character assassination and fraudulently misrepresented pathologizing of Wills' every word and deed in court. When such can be relied upon for commitment under said Act, the Act has no limit.

As they are interpreted, construed, implemented, and applied by Minnesota appellate court rulings, these case law factors have limitless potential application to any sex offender, and thus the SDP law deprives all Plaintiffs of substantive due process.

In their Report, the Rule 706 Experts recommended "that changes be made to the Minnesota Civil Commitment statute in order to ensure that [sex offender commitment] is reserved for those people who have sexually offended who are truly the most dangerous and are at highest risk to reoffend." However, recall that the 1994 Minnesota Legislature drafted the SPP/SDP Act claiming that it was needed to confine just that limited subset. They proceeded to pass that Act, which is unparalleled in its overbreadth and without any meaningful limit due to its deliberate vagueness. Because of that overbreadth and limitless vagueness, today 750 sex offenders are incarcerated in MSOP for fear of their claimed "dangerousness," not counting at least 78 who have already died in such preventive detention.

No one has a crystal ball. Even the MSOP detainees one might suspect as having the most likely recidivistic tendencies could just as well ultimately never commit another sex crime again once released. No matter how shrewd a judge of character anyone may deem him/herself to be, no one can read minds. Even if someone could accurately read someone's mind, people change their minds all the time and repent of, or at least relent from even the most resolute intent. This includes intended future crimes. See on this, e.g., *Erica Beecher-Monas*, "The Epistemology of Prediction," 60 *Wash. & Lee L. Rev.* 353, fn. 293, discussed in *Lawyer X*, *Deviant Justice – The American Gulag* (In Depth Media 2014).

In Minnesota, the pattern of appellate decisions upholding SPP/SDP commitments clearly show that, even though Minnesota's stated standard is one of "high likelihood" of future sexual re-offense, judges (including those of the Minnesota Court of Appeals) regularly claim such a "high likelihood" based on facts that actually go only to the severity of past offense or of projected future offenses, rather than addressing any actual scientifically based estimate of actual likelihood. In cases where a relatively low projection of a statistical probability is made, Minnesota courts regularly disregard or discount that low probability estimate, citing either extreme facts of given past sexual crimes or the number of sex crimes in the past record of that commitment defendant (even though extreme facts of specific past crimes have nothing to do with future recidivism likelihood, and even though the length of one's past record is typically already taken into account in that actuarial estimate). Thus, Minnesota judges are



Overbreadth

regularly reacting to the perceived severity of harm that would be inflicted if that offender reoffended in the future. This reaction is obviously emotionally clouding their analysis of whether the standard of "high likelihood" has been met

Thus, it was bad enough that, in any given sex offender's sentencing for his crime, the sentencing judge engaged in the presumption of believing that he/she could determine how likely that offender would be to commit another crime when released, and then added more time to the sentence to avert that predicted recidivism. However, the point here is that this calculus was already figured, and each sex offender, including every member of the *Karsjens* Plaintiff Class was already confined by sentence for that exact reason and to that exact calculated extent of extra time.

Now each *Karsjens* class member is again being further confined simply because a different set of people were granted the statutory right to again calculate that same likelihood and to extend that confinement simply because they think the judge was wrong in sentencing a given class member. That is not the way the law is supposed to work. This case now seeks to rectify the situation.

Consider all of the following:

- the judge who never met an SPP/SDP commitment defendant before his commitment proceeding;
- the prosecutor who decided to try to commit you without even meeting that defendant; and
- the so-called "examiner(s)," having been approved and listed by the State Attorney General (often representing the commitment petitioner) as the *de facto* exclusively available experts – even for commitment defendant use, who, for money, ,met with the defendant only for a maximum of 2 ½ hours, wrote up an adverse report about the defendant before the commitment trial and testified against the defendant -- mostly on a mere review of papers (indiscriminately containing both true and false assertions) in a file, and merely by looking at groups of other sex offenders from many years ago (not including the defendant), and merely on personal "impressions" of the defendant based on all manner of junk-science and personal biases against 'his type.'

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None of these had the slightest idea of who the defendant truly is; not one of them could rightfully and correctly stand in judgment of him as a person. Indeed, no one has that right.

Because there is no way ever to tell by any standard beyond a sheer guess who will commit another sex crime if released, there simply is no way to draft a statute that actually does commit only the "truly" most dangerous, with highest risk of re-offense. What limited science actually exists is by no means certain enough to justify an honest verdict on actually "clear and convincing evidence" (1) of the constitutionally required "serious difficulty" in controlling any momentary impulse to commit a sex crime, or (2) even just of a "high likelihood" of eventual, albeit deliberate, non-impulsive re-offense. ...This is why the SPP/SDP statute was written in non-scientific terms. It conveniently allows a judge to commit one for political reasons or simply because of his raging hatred of one's crimes and of one's deviance.

4. "Disorders" Involve Boundless Vagueness and in One Instance, Simply Restate a Type of Sex Crime.

By precedential authority, to be constitutionally valid as a general matter, sex offender laws must require that a commitment defendant be seriously mentally disordered, dangerous to others, provided with treatment, and committed no longer than is reasonably necessary. In the case of Minnesota sex offender commitment pursuant to said Act, in the regular judicial application of such commitments, each of these four requisite elements are illusory and pose no true guarantee of substantive due process.

In contrast to sex offender commitment under said Act, 'traditional' commitment of the "mentally ill and dangerous" under *Minn. Stat.* Chapter 253B requires a finding of a specific "mental illness," as that term is defined with enumeration of specific types in the *Diagnostic and Statistical Manual* (currently, Version 5, hereinafter, "*DSM*-5") of the American Psychiatric Association, and such traditional commitment also focuses, in the specific instances of the commitment defendant, on that particular illness' causation of the "dangerous to others" status claimed by the prosecution to exist.

However, in the case of sex offender commitment under said Act, no mental illness is required. In fact, partly to facilitate such commitments, psychiatrists have invented definitions of mental states and dynamics called "disordered." At least one of these (sexual abuse of a child) merely restates the fact of a sex offender's particular crime. A related one (pedophilia) simply states the motivational basis for such a crime. Other such declared "disorders" lapse into boundless vagueness (e.g., "antisocial personality disorder," often panned as nothing more than being a selfish jerk). So-called disorders such as "antisocial personality" and "narcissistic personality" are prevalent in any group of criminals. "Using that standard, you could commit a lot of bank robbers," observed Dr. Fred Berlin, of Johns Hopkins University. These "disorders" do not describe mental/emotional states of impulse, much less irresistible impulse, only of attractions and motivations thought reprehensible or which may, if acted upon in ways comprising crimes, result in harm to a victim.

Prentky, R.A., Janus, E. Barbaree, H, Schwartz, B. & Kafka, M., "Sexually Violent Predators in the Courtroom: Science on Trial," 12 *Psychology, Public Policy & Law* 357-393 (2006), at 382, bluntly conclude, "the mental disorder prong [which] plays a central role in legitimizing SVP commitments ...lacks legitimacy."

Sexual attractions, no matter how repellant to contemplate, are simply orientations, not disorders. Thus, e.g., *Ryan C.W. Hall & Richard C.W. Hall*, "A Profile of Pedophilia: Definition, Characteristics of Offenders, Recidivism, Treatment Outcomes, and Forensic Issues," *Mayo Clin. Proc.* 2007: 82(4): 457-471 (2007), at 462, bluntly declares, "...Pedophilia, especially the exclusive type, may be best thought of as its own category of sexual orientation,...." (emphasis supplied)

Fred S. Berlin, "Pedophilia and DSM-5: The Importance of Clearly Defining the Nature of a Pedophilic Disorder," 42 *Jour. Am. Acad. Of Psychiatry and the Law* 404 -407 (2014) usefully explains at p. 406:

"Pedophilia as a Sexual Orientation

"DSM-5 did not err in referring to Pedophilia as a sexual orientation. ...The term sexual orientation ordinarily reflects an individual's subjective awareness of the category (or categories) of persons toward whom he or she is erotically attracted. Clinically, there are individuals (many of whom are described as having Pedophilia) who report a subjective awareness of being erotically attracted (either exclusively or in part) toward a category of individuals comprised of prepubescent children. Many report experiencing those attractions as unchosen in a fashion that seems very much like an orientation. That such attractions are often unwanted does not alter their resemblance to an orientation.

"...Publicly acknowledging Pedophilia as a sexual orientation that can be distinguished from a criminal mindset might ...have been useful.

"...DSM-5 has properly concluded that experiencing a recurrent sexual attraction toward children does not by itself constitute evidence of a disorder, unless those attractions also cause distress or some other significant difficulties."

Even if deemed to the contrary as a "criminal mindset," such predispositions are not psychiatric disorders. The "significant difficulties" mentioned by Dr. Berlin are internal, not externally imposed, as in criminal prosecution. It would be oxymoronic to claim that the fortuity of such a prosecution would instantly transform what had previously been an orientation into a "disorder."

In sum, "pedophilia," of itself, is simply a sexual orientation, a longstanding sexual attraction; it is not a "disorder" as defined by the DSM-5.

The words "or dysfunction" were included in the Act's definition to address the situation where a person does not fill all of the diagnostic criteria for the disorder in the DSM-5. The DSM-5 allows an evaluator to use 'clinical judgment' to apply a diagnosis to a person even where all criteria for a given disorder are not met as to that person. For purposes of the aforesaid Act, this creates an impermissible vagueness and inherent uncertainty as to the requisite element of a "disorder or dysfunction," since any evaluator can subjectively decide that any single, or even multiple, lacking element(s) of the definition can be omitted and still call it a "disorder," and since different evaluators may disagree, cumulatively thus finding many different elements missing, and yet such may still find that disorder present.

By precedential authority, the sex offender targeted for commitment must exhibit a constitutionally adequate mental disorder or abnormality that must produce an inability on the offender's part to control his behavior, at least to a degree sufficient to distinguish him "from other dangerous persons who are perhaps more properly dealt with exclusively through criminal proceedings." As shown through the preceding allegations, in the case of Minnesota sex offender commitment pursuant to said Act in the regular judicial application of such commitments, this requirement is regularly disregarded by Commitment Case Defendants or is deemed fulfilled by testimony with no scientifically valid basis, and hence no true guarantee of substantive due process.

The element of a "disorder or dysfunction" can also be applied nearly universally. The claimed "disorder" need not be sexual in nature or have anything to do with sexual conduct or inclinations. (*In re Krych*, 2008 WL 180140 at *3([Minn. App. 2008, unpub.]) Yet, inconsistently, the sheer fact that one suffers from a disorder (even if diagnosed only as a 'definitional stretch') is held to be sufficient evidence that one is unable to adequately control sexual 'impulses.' (*In re Fugelseth*, 2004 WL 422695 at *9 [Minn. App. 2004]). This is unscientific non sequitur.

Conceptually, sex crimes can be divided into two categories, (a) those involving children (below or at puberty); and (b) those not. As to the first of these categories, appellate commitment decisions under said Act universally find that such a sex crime involving a child victim inherently bespeaks "pedophilia," denoting the particular definition of same in the DSM-5 of a "sexual disorder" (not a "mental illness"). Another such "disorder" in the DSM-5 simply turns on an act of "sexual abuse of a child." Effectively, between the unscientific definition-by-fiat of these two disorders and the operation of this element, any sex offender with a crime involving children qualifies for commitment under this element. (In re Fugelseth, supra).

Those whose sex crimes did not involve a child victim can also be deemed to fulfill this element of "disorder or dysfunction." The SDP law's reference to "... personality ...disorder" is a buzz-phrase invoking the aforesaid alternative "diagnosis" of an "antisocial personality disorder." Thus, in cases of rape of an adult, the hazy definitional terms of that DSM-declared "disorder" are sufficiently vague as to support such a diagnosis based on such acts alone. As stated in the preceding major section of this Complaint, *Allen Frances, The Essentials of Psychiatric Diagnosis*, in the section discussing "Paraphilic Disorders" (pp. 169-74), declares flatly that rape is a crime, not a mental disorder. Crimes of deliberately shocking sexual effrontery, such as 'flashing' one's genitals, can also be said to be similarly antisocial by their very nature as well.

In sum, the element of a "disorder or dysfunction" in the SDP law is almost inherently applicable in every sex offender commitment petition by the nature of the sexual misconduct itself. Because such "disorders" are then inherently accepted as proof of "inadequate control" of presumed "impulses," the SDP ground for commitment collapses to nothing more to qualify any Plaintiff for such SDP commitment than the sheer fact of a past record of sex crimes. This deprives Plaintiffs of substantive due process.

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States with Sex Offender Commitment Laws

1 - Arizona¶	12-New·Jersey¶
2 - California¶	13-New·York¶
3 - Florida¶	14-North·Dakota¶
4 - Illinois¶	15-Pennsylvania¶
5 - Iowa¶	16-South·Carolina¶
6 - Kansas¶	17-Texas¶
7 - Massachusetts¶	18-Virginia¶
8 - Minnesota¶	19-Washington¶
9 - Missouri¶	20-Wisconsin¶
10-Nebraska¶	- - plus·Dist.·Col.¶
11-New·Hampshire¤	- - plus·Fed.·BOP¤

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