The Legal Pad Volume 5, Issue 3A February 25, 2021

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Karsjens Case 2nd Appeal Finally Resolved; Case Remanded to Judge Frank

3 Counts of *Karsjens* Complaint Will Be Factually Reexamined.

by Cyrus Gladden, Dateline: February 25. 2021: Yesterday Thursday, February 24, 2021, the federal Eighth Circuit Court of Appeals ruled at last on the very-long-pending appeal in the case, *Karsjens et al. v. Lourey et al.* (Appeal No. 18-3343), in a surprisingly terse opinion. Details follow.

The summary and what it means to MSOP confinees:

1. The 8th Circuit reversed Judge Frank's dismissal of what remained of the Karsjens case after the first appeal. It sent the case back to him to make factual findings about things in MSOP that are "punitive" as to MSOP confinees or, in the case of medical care are so deficient that they show a "deliberate indifference" as to our health.
2. It remains certain that no one here can gain dismissal of his commitment through the Karsjens case. The 8th Circuit's new opinion confirms that its earlier reversal of Judge Frank's judgment that would have allowed that result was correct (in the view of the 8th Circuit).
3. The outcome in the current remand is uncertain. In brief, the possibilities include these: (a) Judge Frank could rule against us on the issues of punitive conditions of confinement and deliberately indifferent medical care; (b) he could rule in our favor on either or both of these two issues; (c) after either (a) or (b), an appeal could reverse the outcome at the District Court or could result remand for further proceedings yet again.
4. The issue of punitive conditions could be decided narrowly, focusing only on the illustrative conditions cited in the Karsjens 3rd Amended Complaint. Alternatively, Judge Frank might allow further conditions claimed to be punitive to be proved in court. Whether with or without such extra punitive conditions, Judge Frank could either address each condition separately to determine its distinct punitiveness, or treat all conditions proven in court as a collective whole, to determine whether everything together is punitive.
5. The new 8th Circuit opinion seems to leave open the issue of whether a lack of less restrictive alternative to remaining confined is punitive, whether on its own or as part of such collective considerations. If the 'collective' path is chosen by Judge Frank, the realm of possible relief is opened somewhat. But the question of what forms of relief by Judge Frank the 8th Circuit would let stand on appeal is wide open and cannot be predicted to any degree at least until all new evidence is presented.

For those unfamiliar with this case and as a memory refresher for others, this "*Karsjens* Case" was originally filed in 2011. Kevin Karsjens and 13 other confinees then held in the Moose Lake, MN facility of the "Minnesota Sex Offender Program" served as "Named Plaintiffs" for what was later certified by the federal District Court (District Judge Donovan Frank presiding) as a class action. A class action was used to provide the same kinds of relief that might be won in the case to all MSOP confinees.

The case survived a hotly-contested dismissal motion by its defendants: officials and employees of MSOP. A customary, but very lengthy and elaborate discovery phase ensued in the case. After that, a summary judgment motion advanced by the defendants was ultimately denied. A long trial to the judge followed, culminating in judgment for the plaintiffs in 2015.

The defendants appealed to the 8th Circuit. That appellate court announced its ruling in 2017. An attempt by the plaintiffs to interest the United States Supreme Court (SCOTUS) in the appeal was turned down by that High Court. For clarity, I refer to that appeal as "*Karsjens I*" (opinion: 845 F.3d 394).

The result of that first appeal was that the District Court's judgment for the plaintiffs on Counts 1 and 2 was overturned. Had those counts survived, these counts could have resulted in the release of most if not all MSOP confinees. The Court of Appeals rejected the trial court's analysis of the application of the substantive due process guarantee to those counts. Instead, the Court of Appeals ruled that an extremely restrictive standard (from plaintiffs' perspective) required plaintiffs to present evidence that would "shock the conscience" of the court, and concluded that the plaintiffs in *Karsjens* had failed to do so.

In a 2015 SCOTUS case, *Kingsley v. Hendrickson*, that standard had previously been limited in applicability to discretionary decisions by officials or staff of a governmental entity and specifically barred its use where serious personal rights (in *Kingsley*, to be free of assault by jailers) are involved. It had never been thought by courts to be applicable to cases where human liberty was at stake, such as cases involving failure to release individuals from captivity due to involuntary civil commitment.

This was such an obvious point of law rooted in SCOTUS jurisprudence about civilly committed persons rights that the *Karsjens* plaintiffs did not bother to cite *Kingsley* to the 8th Circuit during *Karsjens I*.

In that first appeal, that appellate court relied upon a pre-*Kingsley* case (*County of Sacramento v. Lewis*, 1998) involving a police chase that accidentally ran down an innocent pedestrian. Unlike the deliberate actions in *Kingsley* and *Karsjens*, police conduct in the *Lewis* chase was merely negligent, certainly not more than reckless (deliberately indifferent). Hence, *Karsjens I* should have been controlled by the *Kingsley* holding. However, the 8th Circuit did not even mention *Kingsley* in its opinion in that first *Karsjens* appeal.

The pernicious flaw of modern American judicial decision-making is that it clings to an early-19th century notion of importance of projecting (albeit falsely) an infallibility of judicial decisions, as if the law were always in existence, simply waiting to be discovered in a particular case, rather than being invented *ad hoc* for the circumstance at hand.

That notion is an unspoken part of why courts are reluctant to reexamine their decisions and to correct doctrinal errors, even where death or permanent incarceration is at stake. This reluctance forces later decisions to follow a tortuous path, rather than an unobstructed superhighway (so to speak), in an often-stymied quest for something approximating justice.

In the process of retracing through past false steps, the lodestar of fundamental justice and respect for the importance of constitutional guarantees, such as freedom, except in punishment for crime or insane loss of contact with reality with the prospect of imminent harm nearly certain, has faded to near disappearance.

We ourselves know this all too well, from *Kansas v. Hendricks*, where emotions of fear and hatred carried away the reasoning power of even members of SCOTUS itself, and justice became merely a matter of a gesture of a thumb, as at the end of some gory Coliseum contest.

In the wake of *Hendricks* and as some semi-conscious imitation of *Minority Report*, proposals have sprung up like noxious weeds to spread the evil gospel of Hendricks to other contexts. Such contexts include indefinite confinement with treatment for drunks, drug addicts, and spouse beaters — echoing the same contention that those who present any "danger" to some imagined potential future victims or to society in some attenuated way have no right to freedom. The 8th Circuit, in both *Karsjens I* and *II*, effectively approved this.

Now, nearly a quarter-century after *Hendricks*, the 8th Circuit continues to turn its back on a mountain of scientific research findings since then rolling back all the myths and false urban legends of that time of the *Hendricks* decision. Taking the *Hendricks* result as its permanent ticket to absolution for turning its back on the 182 highly particularized findings of Judge Frank's decision of the case (109 F. Supp. 3d 1139) before the *Karsjens I* appeal, the 8th Circuit continues its self-blindered, stumbling meanderings over and around impediments of its own unwitting creation along that twisted path through a dense forest with virtually no light. This is not due process.

This flawed notion and a refusal to admit even obvious mistakes, if persistent, will eventually push judicial decision-making into disrepute, ending justice as we know it and permanently relegating the rule of law to contempt and abandonment.

In *Karsjens*, the 8th Circuit should have admitted their erroneous oversight of *Kingsley*, and reinstated Judge Frank's judgment for the *Karsjens* plaintiffs. But the 8th Circuit did not.

Instead, in *Karsjens II*, just decided, the 8th circuit chose to confirm its reversal of that judgment, with implicit approval of its faulty reliance on *County of Sacramento v. Lewis*, in rejecting Counts 1 and 2 of the *Karsjens* 3rd Amended Complaint that addressed plaintiffs' liberty interest in a process with a reasonable, timely opportunity for release.

Now relying on earlier SCOTUS cases about the rights of the committed, the 8th Circuit has effectively held that, even though the nearly impossible-to-satisfy "shock the conscience" standard controls the issue of plaintiffs' liberty-interest right to a path to release, the far easier standard of a showing of punitiveness applies to plaintiffs' conditions-of-confinement claims in Counts 5-7, where the reliefs available are mere 'fixes' of such punitive conditions, rather than ending a program with such myriad punitive and unnecessarily restrictive con-

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ditions and restoring its victims to their freedom.

Am I the only one who sees that applying that higher and utterly subjective standard (shocking the conscience) to regain one's freedom claimed to be unjust, when a lesser standard of punitiveness needed to gain such distinctly lesser (and potentially meaningless and easily evaded) reliefs from petty internal rules and circumstances within the facility of their unjust confinement is a complete flip of the priorities of consideration that any court should afford to claims of unjust supplemental pseudo-incarceration under this disguise of a "need" for decades-long 'treatment' not recognized by any scientists as valid or effective beyond the impact of sheer natural maturing and aging?

Is it not blatantly clear that the real intent behind this standing of the ordering of such standards on their heads by one of the twelve courts of appeal right below SCOTUS in terms of responsibility for protecting the rights of the people is a shameful, venomously spiteful, tacitly avowed intent to block all committed past sex offenders, having long completed their prison sentences, from ever regaining their freedom by any means whatsoever, effectively condemning them to such continued pseudo-imprisonment for the rest of their lives?

Does this not bother anyone, at least for the implication that this impermissible departure from all concepts of constitutionally guaranteed liberty can be applied to any group of persons declared in future to be 'unworthy' or too 'risky' to be allowed to enjoy such otherwise universal freedom?

In taking this oxymoronic stance in *Karsjens II* the 8th Circuit further ignored the impact of *Foucha v. Louisiana* (SCOTUS, 1992 — decided before enactment of Minnesota's sex offender civil commitment [SOCC] law). *Foucha* flatly held that an individual cannot continue to be confined under civil commitment after either the mental illness or the dangerousness subsides).

Thus, in *Karsjens*, which partly complained that MSOP confinees had no means to gain release by showing that the indispensable elements of their commitment (or any one of them) no longer exist or no longer have any practical effect over the particular confinee, confinees surely have the right (in the interplay between *Foucha* on one hand, and *Hendricks* and *Kansas v. Crane* [SCOTUS, 2003] on the other), to seek their release through a process that MSOP must allow and respect.

This is more than complaining of punitive aspects of internal MSOP operations over confinees' daily lives. Yet, *a fortiori*, the right to seek release on the basis of that interplay, confirmed through the analogy from *Kingsley*, must be acknowledged and applied. To fail to do so is the ultimate kind of punitiveness in action.

In an attempt to justify allowing claims about meals, double-bunking, harsh punishments for petty rule violations, etc., but not for denial of freedom or even just the opportunity to prove a right to release, the 8th Circuit noted that the difference, bluntly, was that, as to Counts 5, 6, and 7 (upheld by *Karsjens II*), " Appellants do not challenge their inability to be released from the facility but rather the conditions within the facility," Of course, The Karsjens plaintiffs did raise that challenge, but the 8th Circuit struck it down in *Karsjens I*, as discussed above.

This is tantamount to a declaration that MSOP confinees will never be allowed to win release no matter how clear a violation of substantive due process is shown. That court should be ashamed by such predetermined refusal to afford basic constitutional rights to committed individuals. Bias runs rampant!

So where does the *Karsjens II* decision leave us, and what can we do to best avail ourselves of the opportunity (limited though it may be) presented by the remand to Judge Frank for further proceedings?

First, we need to carefully note that the *Karsjens II* opinion observes that a claim of punitiveness of double-bunking was previously rejected by the *pro se* case, *Beaulieu v. Ludeman*, 690 F.3d 1017 (8th Cir. 2012). Hence, it is doubtful that any claim of double bunking as being punitive can succeed on remand to Judge Frank.

The *Karsjens II* opinion repeats a number of times the assertion that civil confinees are entitled to the same scrutiny of conditions of confinement as "pretrial detainees." However, the malevolent intent of this contention is shown by the absolutely inhuman, draconian nature of conditions of such pretrial detainees previously tolerated by the 8th Circuit, as cited in *Karsjens II*: forced to endure raw sewage in his cell for four days (*Smith*, 87 F.3d 265, 268); deprivation of clothing (*Green*, 879 F.2d 305, 310). This is no argument for imposition of equally inhuman conditions upon those confined in so-called civil commitment; it is in fact a cry for massive reform of all conditions of pretrial detention.

Nonetheless, a more basic distinction applies to all confined under sex offender commitment, and most especially to MSOP. In MSOP, only a micro-percentage (one-half of 1%) of those committed have ever been released even only to "provisional" discharge (a kind of intensive supervised release lasting about five years).

Almost all of those committed more than 20 years ago remain confined in MSOP's facilities (except for those who have died in that confinement). Most of those have participated in MSOP's "treatment" for more than a decade. Those who are not still currently in treatment simply gave up on treatment after years of participation as showing no promise of a realistic opportunity for release.

In essence then, in all practical terms, we are in a form of incarceration, with 'treatment' served up only as a rubric for our confinement, but with no serious aim to release more than a handful per each several-year period.

In light of these realities of our prolonged confinement, we are not equivalent to those detained for only comparatively short terms awaiting a criminal trial. The very conditions allowed under the foregoing decisions would not be tolerated for even such pre-trial detainees if held for twenty years or more. Surely, they cannot be legally tolerated for those in civil confinement, not under arrest for any accusation of crime or pending imposition of sentence.

There is probably near-zero probability that any single condition of our confinement will be found to be punitive to an extent that would be upheld on a third appeal to the 8th Circuit.

However, the *Karsjens II* opinion observes that we have contended "that, considered as a whole, [our] conditions of confinement amount to punishment...." That opinion (slip op., page 9) quotes *Morris v. Zefferi*, 601 F.3d 805, 810 (8th Cir. 2010): "'In considering whether the conditions ...are unconstitutionally punitive,' the court must review the totality of the circumstances of [Appellants'] confinement.'"

Therefore, if we are to have any chance of prevailing upon this final remand, we must seek to amend our complaint yet again, to engage in further (reopened) discovery, and to proceed to trial to more expansively show every circumstance of our confinement that restricts us in any way or that imposes requirements and/or punishments upon us harshly or in any way simply not warranted by the sheer fact of our confinement.

If we can show the overall welter and burden of all of these, taken collectively, we can prevail. To that end, everyone who has any knowledge of any of such unwarranted restrictions of any kind or burdensome requirements or harsh punishments should describe each of same in a letter to the Gustafson Gluek firm (our attorneys) with as much detail as can be documented. (See address below.)

One final point: the *Karsjens II* opinion also acknowledges that Count 6 includes a claim of denial of the possibility of less restrictive confinement, and that such denial is "tantamount to punishment" (page 2), and further quotes (at p. 6) *Jackson v. Indiana*, 406 U.S. 715, 738 (1972) that, "[a]t the least, due process requires that the nature and duration of commitment bear some reasonable relation to the purpose for which the individual is committed."

Therefore, it would appear possible to argue that, such extreme duration (most likely natural life) of MSOP commitment lacks such "reasonable relation" to the purpose of sex offender commitment, which has constantly been claimed to be for treatment toward release, once the probability of future prime commission is substantially reduced from elevated levels beyond the norm for those released directly from prison after terms for one or more sex crimes.

Even without treatment and viewed strictly as internment as a preventative measure against future crime, the known facts of sex crime commission show that those over age 70 never commit recidivistic sex crimes and that those age 60 and up commit them only rarely. Hence, confinement stretching into these decades of life are inherently and presumptively lacking in relation to prevention of such crimes.

Finally, research within the latest decade has repeatedly shown that desistance (although previously presumed to have no recidivism-reducing effect starting any time prior to release) is now known to have substantial effects while the offender is imprisoned for the prior sex crime.

In other words, taking the example of a sex offender caught at age twenty five and imprisoned, upon his release at age 40 will have a recidivism rate of only about half of what it was at age 25. After age 40, the decline continues at increasing steepness of the curve, such that a man age 50 has half the probability of a man at age 40. At age 60, a man (but now supposed to be released at age 60) has less than a third the probability of recidivism of the man age 50 at release, and that, sometime in the age range of 60-69, the probability simply becomes extinguished. Such extinction by that age occurs just the same for those with extensive sex-crimes records as for those with only one sex crime in their past.

All of this is due to factors that contribute to cause desistance from sex crime, but completely apart from the impact of sex-offender treatment. The upshot is that desistance alone (again, without treatment) will reduce the recidivism probability to that of one who has only one lifetime sex crime by about age 45. Hence, surely by that time, there is no further argument that that man must be confined, since he represents no danger of future crimes beyond that of a non-recidivist. It should be noted that the average age at commitment to MSOP is currently 48.

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"MSOP detainees are categorically beyond the reach of the FLSA because they are essentially prisoners." – MN Attorney General's brief unsuccessfully arguing for dismissal of *Gamble et al. v. MSI et al.*

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- ✓ Looking at the Good Lives Model.
- ✓ Remorse Bias — What's THAT?
- ✓ Being Chipped Means Never Having to Say You're Free.
- ✓ Risk Assessment – Categorical Report Format Yields Distortion
- ✓ SAPROF's Inaccuracy
- ✓ Diagnostic Unreliability. Surprise! Alan Frances Sounds Off.
- ✓ Science or Myth in SCOTUS Briefing: Informing or Lying?
- ✓ Is Null Just a Hypothesis or a Fact as to SO Treatment?
- ✓ Ignorance, Animus, Political Pressure & Gaming Dictate SO Policy, in Opposition to Science
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- ✓ Pics = 1,000 Words, but Quotes re SOCC: Priceless
- ✓ NARSOL: Too Polite?

↪ And it just keeps coming!

Feedback? News? Write!

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Covid-19 Vaccinations Underway in MSOP.

by Cyrus Gladden

As covered in the last edition of The Legal Pad (TLP), three confinees at MSOP-Moose Lake died in the closing days of 2020, underscoring the reality and potentially lethal consequences of a Covid-19 infection. The death of the last of these, an apparently healthy man before that infection, shows the rapid, lethal impact possible from that virus.

Immediately upon its availability to this facility, MSOP-ML confinees received their first injection of a two-shot series of the Moderna vaccine against Covid-19 on January 28, 2021. The following day staff at the facility were also given their first dose of that vaccine. At this writing, the second shot is due to be delivered to confinees on February 25th. And again, staff will receive it the next day.

Consistent with results elsewhere, physical reactions to the first shot are infrequent and typically mild. Reactions to the second shot have been reportedly a little more common and some reactions have been somewhat more pronounced. However, in all, severe reactions have been truly rare and limited only to those with some underlying condition. There have been no reported deaths from receiving this injection.

While there are no guarantees in the matter of the novel corona virus (Covid-19), the results of a number of trials elsewhere in the world agree that this two-shot series is at least 90% effective in preventing Covid-19 infection in the face of exposure to the actual virus. Even in cases where the injected person contracted a case of Covid-19 from such later exposure, the infection was comparatively mild – approximating a standard bout with the flu.

In light of the deaths of a half-million Americans from Covid-19 to date, there is every reason to take the Moderna shots against catching that disease and no reason not to do so, only with the possible exception of a personal medical condition. The latter can be discussed in advance with those administering the shots. However, in our case, if you did not get any serious reaction to the first shot of the series, odds strongly suggest you won't after the second (final) shot in the series either.

The current vaccination drive is reminiscent of the first polio vaccination drive of 1955. Polio is an extraordinarily infectious virus capable of being contracted from the natural environment, as well as from infected individuals. It fiercely attacked children, often in local outbreaks of epidemic proportion. Tens of thousands died from it, especially over the two decades preceding creation of that vaccine by the tireless Dr. Jonas Salk.

Early trials of that vaccine resulted in the deaths of an infinitesimal percentage of those who took it -- somewhere on the order of between one out a hundred thousand to one out of a million. Yet parents, knowing of the deaths and the far more common lifetime paralysis and often early deaths faced by initial survivors of polio, resolutely marched their young children down to the mass-vaccination sites to receive that inoculation and thereby prevent that horrific disease. Today, polio infection is a rarity in the civilized world, and that disease appears to be on the short list for extinction in the world -- just as smallpox has been eradicated through a similar inoculation campaign worldwide.

All vaccines against Covid-19 are of a new type. Rather than being comprised of dead or inactivated actual virus samples themselves as in vaccines of the past against other diseases, the Covid-19 vaccine consists only of an excerpt from the RNA that comprises the core of the virus. This technique has been found to be just as effective as those former vaccine techniques at creating the necessary immune response within the human body that bestows immunity against Covid-19. The new RNA technique makes manufacture of the immense number of shots required much faster. Even more important, it is overwhelmingly safer, especially when dealing with a virus against which no humans had natural immunity at the start of the pandemic. Receiving the vaccine *cannot* give you Covid-19; it is scientifically impossible.

Some have declined the vaccination, citing hope of development of "herd immunity" among even those who reject vaccination. However, latest estimates point to a probable need for 90% of humanity to have contracted the actual virus (not the vaccine) before herd immunity would ever develop. Meanwhile, untold hundreds of millions could die from Covid-19 – not counting the impact of new variants of the virus now surfacing across the globe. Even though the vaccine was developed to prevent its recipients from developing the actual Covid-19 disease, it is not possible to prevent the virus from being passed along to some un-vaccinated person.

On the other end of that scenario, you, as that unvaccinated person, stand a huge chance of catching the disease and suffering from it -- potentially dying from it, long before herd immunity might finally develop in a number of years from now. Only a fool would take that chance. Covid-19 is a resolute killer. It is a horrible, lingering way to die, fighting for literally every breath, right up to your last.

If you received the first dose, take the second to maximize your immunity. If you declined the shot, notify Health Services that you wish to take the shot series after all. You will thank yourself years from now.

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"No Clear Path" Out

MSOP Hunger Strike Protests Commitments with No 'Roadmap' to Release; Strike Ends in Talks.

Editor's Note: The following articles/excerpts recount a recent hunger strike at MSOP-Moose Lake.

Chris Serres, "Sex Offenders Refusing to Eat; Hunger Strike at Moose Lake Facility Is a Protest Over Long Commitments," *Star Tribune*, Wed. January 27, 2021, p. B1

Text excerpts:

"At least 10 sex offenders held for years at a northern Minnesota treatment center have launched a hunger strike to protest conditions at the facility and a law that enables the state to detain them indefinitely beyond their prison terms.

A few of the men said they were prepared to be hospitalized from starvation if their demands are not met for a clear legal pathway for release from the Minnesota Sex Offender Program (MSOP), which confines nearly 740 convicted rapists, child abusers and other offenders in prisonlike treatment centers in Moose Lake and St. Peter.

The hunger strike entered its sixth day Tuesday and is the latest action by offenders seeking to call attention to a state-operated civil commitment system that has long been criticized for detaining too many offenders for too long.

In 2015, a federal judge declared the program unconstitutional, saying it had become more focused on punishing people than treating them. Though later reversed, the ruling galvanized many detainees and their

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lawyers, who have been pushing back against the indefinite confinements.

'We want a clear pathway home,' said Lawrence Cooper, 37, who has been held at the Moose Lake center for seven years. 'A lot of us are watching our friends die, and we don't want to end up as another statistic in the books.'

Officials at the Minnesota Department of Human Services (DHS), which oversees the MSOP, disputed the hunger strikers' assertion that they do not have a pathway out of the program, pointing to figures showing that record numbers of clients are being approved for release by judicial panels. Last year, 11 clients were conditionally discharged from the program after they petitioned for a reduction in custody – the most since the program's inception, according to the DHS.

Thirty clients who have been granted provisional discharge by the court are living in communities under MSOP supervision.

'It all goes in steps, and I understand the frustration because they can be fairly long steps to move through, but the program is working, Deputy Human Services Commissioner Chuck Johnson said in an interview. 'And we can see it working for a lot of clients who are engaging in treatment and able to successfully reintegrate themselves into the community.'

Frustrations reached a boiling point in recent months following a large outbreak of the novel coronavirus, which has killed three detainees at Moose Lake since December 2 and sickened scores of clients and staff. Some offenders maintain the state-operated program did not move quick enough to mandate mask-wearing among clients, and strict lockdown measures that followed the outbreak were inhumane, they maintain.

There are no active cases of Covid-19 among clients at any MSOP location, and just one active case among staff, the DHS said.

The recent deaths have heightened a sense of despair at the Moose Lake facility and fears among some men that they will never make it out of the program.

Only 13 offenders have been fully released – without conditions mandating supervision –from the MSOP in its 27-year history, while Moose Lake clients have counted at least 86 people who have died there.

Some of the men who have been confined there for years or decades say they have exhausted their treatment options and their legal avenues for release.

'I feel like I'm caught in a washing machine being turned around and around,' said Jacob Flom, 26, a Moose Lake client and hunger strike participant. 'There is this crippling hopelessness and despair.'

Minnesota is among 20 states with civil commitment laws that allow people convicted of violent sex crimes – such as rape or child molestation – to be held in custody indefinitely past the end of their criminal sentences.

Under Minnesota's statute, offenders have a right to petition for release and state judicial panels have the sole authority to approve or reject them. No one at the DHS has the authority to discharge clients into the community, the agency notes.

'DHS is not the decision-maker' on who is released from the program, Johnson said. 'The courts have the final decision.'

In theory, a civilly committed offender is treated and eventually released to less-restrictive community settings, like halfway houses. In practice, however, many remain locked up for decades and are never released.

Last week, five offenders said they notified staff that they were refusing meals and water. By Tuesday afternoon, the strike had grown to nearly a dozen detainees as word of the action spread through the sprawling complex surrounded by razor wire.

In interviews, several men participating in the strike said they were starting to suffer from dehydration, fatigue, muscle soreness, and occasional lightheadedness. A few said they were prepared to go without nourishment until they lost consciousness or had to be hospitalized.

The exact number of clients participating in the strike has been fluid, as new people joined while others have resumed eating.

'I'm willing to go all the way with this,' said Russell Hatton, 40, who has been held at Moose Lake for 14 years and co-founded an internal newsletter. 'Everything else has been tried.'

Charles M. Geiger, 45, a Moose Lake client, said he was about to give up on the hunger strike Monday when he learned his primary therapist had left the program, which made him despondent. Geiger said he has been giving his meal trays to other detainees.

'I'm ready to die,' Geiger said. I truthfully don't see a way out of here.'

In a written statement, the DHS said clients who 'have the mental capacity to make such decisions may refuse to eat or drink, even when doing so may injure their health or endanger their lives.'

Nursing staff at the MSOP are monitoring the vital signs of the strikers and making daily reports to the treatment team and medical staff. Each client participating in the hunger strike has also received a leaflet from MSOP describing the physical effects of going without nourishment.

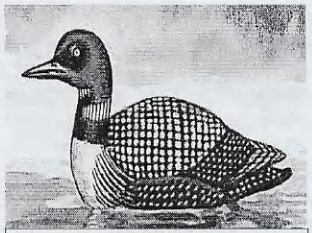
These include increased susceptibility to infection and the possibility of death after 30 days, or 'much sooner' if one goes without fluids, the handout states.

'We want everyone to stay healthy and hope they will reengage and not put their health at risk, and so we're going to continue to monitor that,' Johnson said.

Minnesota has the largest number of civilly committed sex offenders per capita among states with commitment laws, and is third behind California and Florida in the total number of committed offenders, according to a 2019 survey of such programs.

The cost of operating the MSOP, including treating, housing and proving medical care for offenders at the two facilities, totaled $93.2 million in the 2020 fiscal year, according to a legislative report. About 450 of the 737 clients in the program are held at the Moose Lake facility.

'The pandemic has exposed under a bright light the number of problems with this program that were pre-existing and perhaps exacerbated them," said Eric Janus, a professor at Mitchell Hamline School of Law and author of a book on sex offender laws and policy."



State Bird of MN: The Loon

Other Voices -- Tony Difronzo comments 210209 -- Excerpt from letter to Chris Serres:

"...How many decades did it take the 13 offenders [who achieved final discharge from MSOP custody]? My guess is that it took 1 to 3 decades. Does anybody even realize how abusive that is? On top of that, MSOP didn't want anyone of them released. MSOP fought and appealed release decisions to keep those 13 offenders locked up, because MSOP deemed each of them dangerously near-certain to reoffend if released. Now: out of those 13 offenders that the court overrode MSOP on, how many of them actually reoffended? The answer is zero. So, how can they be so dangerous that they'll reoffend again when none of them did?"

Florida Action Committee, "FAC Weekly Update for 2021-01-28," info@floridaactioncommittee.org Jan. 28, (2019)

Text excerpts:

"Occasionally, I ask you to put yourself in the shoes of someone else. Imagine yourself one of the 100+ registrants who are currently living transient in a Miami-Dade homeless encampment because residence restrictions leave you nowhere to live. Imagine you are one of the 30+ registrants who are being held in a Highlands County jail after a recent registration round-up for failure to report things they didn't know they were supposed to (or as hopefully will come out) things they were not required to. Imagine yourself the family member of a registrant, having to live in perpetual fear of having your house egged, tires slashed or getting shot because you live with someone on the registry.

This week, in solidarity with the 'clients' held at the Minnesota Sex Offender Program at Moose Lake who are entering the second week of a hunger strike in protest of their indefinite confinement, I ask you to think of them. Minnesota is one of 20 states with Civil Commitment statutes, which allow the state to involuntarily confine people required to register as sex offenders beyond their sentences. Seven hundred forty (if 740 sounds like a high number, Florida is higher) individuals are confined at Moose Lake [and St Peter facilities] and in the twenty seven years that the program has existed only 13 have been unconditionally released; during that same time [] 86 people died there.

Imagine what it must be like to fully serve the court-ordered sentence for your crime, only to discover that you won't be going home to your family, but you will instead be going 'someplace else.' It's not a prison, but you are confined in a facility surrounded by a barbed wire fence ... oh, and you can't leave. You are just held there indefinitely and have a far greater likelihood of dying there than ever getting out. Can you imagine the desperation? After years of fighting and getting nowhere, the 'clients' have had enough. As one told the [Minneapolis] Star Tribune, 'Everything else has been tried.' And as another said, 'I'm ready to die. I truthfully don't see a way out of here.'

If human beings are willing to risk their lives to draw attention to a tragic injustice, let's consider what we can do to help drive some attention towards their effort. Civil Commitment programs, where people are involuntarily confined not because of what they did (they already served that sentence) but for what they *might* do, have no place in a civilized society. At the bare minimum, offer these people a road map to complete their 'treatment' and earn their release. Like other aspects of registration, this practice needs to end."

[eds.], "Hunger Strike at Minnesota Civil Commitment Gulag as COVID Deaths Mount," *William A. Percy Foundation Update*, Winter 2021, p. 15

Text:

"Inmates at Minnesota's civil commitment 'forever internment' facility at Moose Lake have launched a hunger strike, refusing food and water, to protesting COVID-19 deaths among their brethren, jailors lax infection-containment protocols, and the failure to provide any

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roadmap to release despite one federal court declaring the program unconstitutionally punitive. As of late January, some 11 inmates have joined the hunger strike. I'm ready to die," Charles M. Geiger, 45, told the Minneapolis *Star Tribune* in a January 26th story. 'I truthfully don't see a way out of here.'

In the nearly 740-strong inmate population, only 13 inmates have been released unconditionally in the facility's 27-year history. With three residents of the facility dead from COVID since early December, protestors are variously wearing black and refusing to attend 'therapy' sessions.

The protest first received coverage in the *Star Tribune* in a January 18, 2021, story by reporter Chris Serres, 'Sex offenders at Moose Lake protest harsh conditions after deaths from COVID-19,' noting 'growing unrest after three men housed there died and scores more were sickened by the novel coronavirus.

'Since the start of the pandemic, 101 staff members and 88 clients at the Minnesota Sex Offender Program (MSOP) have had confirmed COVID-19 infections,' Serres wrote. 'At least three clients have died at the Moose Lake center since early December, and periodic lockdowns have been imposed to prevent the virus' spread in the sprawling complex.' Serres goes on to quote resident Matthew Feeney, 51, who came down with COVID last fall. 'It was a catastrophe waiting to happen, and it did.... MSOP had nine months to see and watch the rest of the world prepare, yet their plan didn't isolate people who had contact with known infectious people.'

'There is a sense of hopelessness stemming from the fact that there are more than 700 people locked up and only glacial movement to release them,' Serres quoted Mitchell Hamline School of Law professor Eric Janus, who writes regularly on sex law policy.

New York City-based attorney Bill Dobbs (Twitter.com/TheDobbsWire) tips his hat to the Moose Lake protestors: 'It's huge to have organized resistance.'"

Chris Serres, "Moose Lake Sex Offenders End 14-Day Hunger Strike – DHS agrees to discuss a 'clear pathway' for release from treatment center," *Star Tribune*, Fri., Feb. 5, 2021, p. B1

Text:

"A group of men held at a sex offender treatment center in Moose Lake, Minn., have ended a two-week hunger strike, after state officials agreed to discuss possible changes to the program that holds offenders indefinitely past the end of their criminal sentences.

A dozen men who had stopped eating called off the hunger strike Wednesday night after Human Services Commissioner Jodi Harpstead offered to hold monthly meetings between the strikers and the leaders of the state sex offender program.

The purpose of the meetings will be to discuss the strikers' primary complaint: They have no 'clear pathway' for release from the program and its prisonlike treatment centers in Moose Lake and St. Peter.

The strike was organized to protest Minnesota's civil commitment system, which confines hundreds of rapists and other sexual offenders long after their prison terms. Some men have been held at the Moose Lake facility for years or even decades, effectively turning civil commitment into what they describe as a life sentence.

The strikers and other detainees maintain that the state program is more focused on warehousing offenders than treating them, and they have demanded that officials increase the program's historically low rate of release.

The protest organizers have been refusing food since January 21. Several of the men said in interviews that they were prepared to be hospitalized or starve to death if the state did not respond to their demands.

By early this week, the strikers reported feeling muscle pains, dizziness, nausea and rapid weight loss from lack of nourishment, according to organizers.

The men finally called off the protest and resumed eating after Harpstead offered to hold the monthly listening sessions, which are expected to begin this month and last through May.

Under the agreement the Department of Human Services (DHS) will develop a report on the sex offender program at the end of the discussions and produce recommendations. The agency has not made any commitments to specific changes.

'I am relieved that no one was seriously hurt or died, but this system of indefinite confinement has gone on for far too long,' said Merry Schoon of Appleton, Minn., whose 33-year old son, Daniel A. Wilson, is being held at Moose Lake. 'These men have families and they deserve a second chance to be productive members of society just like everyone else.'

Starting a Dialog

Tensions have been building for years over the prolonged confinements at the Minnesota Sex Offender Program (MSOP) treatment centers, but frustrations reached a boiling point in recent months following a large outbreak of COVID-19 at the Moose Lake facility.

Three men have died at the Moose Lake center since early December, and dozens more clients and staff were sickened. Some men maintain the program did not move fast enough to mandate mask-wearing, and complained that strict lockdown measures kept them confined in their rooms for nearly 24 hours a day.

As of Thursday [Feb. 4th], no active cases of COVID-19 were reported among clients at any MSOP location.

Last Sunday, about 20 relatives of the hunger strikers and other supporters took the unusual step of showing up at Harpstead's home. Two days later, she met with members of the group via Zoom and listened to their concerns.

In a written statement, Harpstead said she agreed to the discussions 'out of concern that some of the strikers would cause themselves serious harm,' and because she believed that 'no harm will come from us listening' to the men and their families.

'The strikers have asked for a clearer pathway to release,' Harpstead said. 'In the meantime, we continue to believe that the most persuasive argument that any MSOP client can make when petitioning the court for discharge is meaningful, engagement participation in treatment'

Only 13 offenders have been fully released without conditions mandating supervision, in the 27-year history of Minnesota's sex offender program. By comparison, participants in the hunger strikes said they have counted at least 86 men who have died while in custody.

In 2015, a federal judge in St. Paul declared the program unconstitutional, concluding it was holding offenders who had completed treatment and no longer met the state's criteria for commitment. Though later reversed, the ruling gave hope to offenders seeking a way out of confinement, and more of them began petitioning for release or reduction in custody.

DHS officials have repeatedly stressed that the agency has limited control over who is released from the program. Under Minnesota's civil commitment law, offenders have a right to petition state judicial panels for release or reduction in custody.

'Only the courts have the authority to decide when a client may be provisionally or fully discharged from the program,' Harpstead said. 'The only promise I can make is that we will engage in conversation with clients and their families.

State officials also have disputed the hunger strikers' assertion that they do not have a clear pathway out of the program, pointing to figures showing that record numbers of clients have been approved for release by judicial panels.

Last year, 11 men were conditionally discharged from the program after they petitioned for a reduction in custody –the most since the program's inception, according to DHS officials.

All told, 30 MSOP clients who have been granted provisional discharge by the court are living in communities under the state's supervision.

Even so, Minnesota detains more offenders per capita than any [other] of the 20 states that have civil commitment laws, and is third behind California and Florida in the total number of committed offenders, according to a 2019 national survey of such programs.

The cost of operating Minnesota's sex offender program – including treating, housing, and providing medical care for offenders at the two facilities – totaled $93.2 million in fiscal year 2020, according to a legislative report."

Editor's End Note: It is interesting that MSOP touts having recently managed to release 11 MSOP confinees per year. Given that approximately 750 are now confined by MSOP, at that rate, all current confinees could be released in, say, 68 years or so. Of course, given average longevity, in about half that time, about half of those 750 will die. Effectively, this means that MSOP does at least as well at reducing its population by deaths as it plans to by releases.

Moreover, the recent rate of new commitments is at least the same (if not more) than the number of releases. At the bottom line, this means that, even with releases and deaths, MSOP will continue just as now, and with roughly the same population — forever. If the current "talks" are only aimed at tutoring the particular confinees involved in that small strike on how to maximize their chances to be among that tiny-sliver minority who will reach release, rather than die in MSOP confinement, then whether this measures as 'success' turns on one's perspective.

The projected monthly talks will end in May. Let's hope they produce something more than a big question mark.

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The "Wage Case" Advances to a Critical Decision Point.

by Cyrus P. Gladden II

Memo re February 12, 2021 Conference Call with Attorney Charlie Alden and St. Peter Named Plaintiffs (David Gamble, Clarence Washington, and Jerrad Wailand.)

In this case, the issue is whether all Named and "Collective" Plaintiffs, as civilly committed individuals who are also working or have worked within MSOP facilities, must be paid at least the federally mandated minimum hourly wage – a substantially higher figure than the currently paid $5.00 per hour.

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Procedurally, this case has completed the discovery phase. During discovery each side may demand certain answers from the opposing party and production of documents that may have bearing on the issue(s) in the case, and may depose witnesses under oath. These witnesses may include the parties and anyone else with pertinent information about anything related to the case). In that phase in our case, 18 Named or Collective Plaintiffs were deposed. Each of them answered questions posed by defense counsel consistently with the factual allegations of the Amended Complaint, thereby supporting the integrity of those allegations. Conversely, Attorney Alden deposed a number of MSOP employees and others on our behalf. Overall, Attorney Alden notes, discovery revealed a number of helpful surprises supporting our case.

An expert retained by the defense filed a report and testified in deposition. However, both that report and her testimony were controverted by an earlier report in an unconnected matter that contained a statement directly opposed to the core theme of her report and testimony in our case.

Contrary to defense expectations, another expert in the case admitted that paying Plaintiff workers in MSOP's Industry sign shop lower wages allowed the state entity (MSI) operating that sign shop to sell its signs at rates far less than that expert's own sign business could possibly match. This was a key admission, since the federal Fair Labor Standards Act (FLSA) establishing the minimum wage requirement was enacted in part to prevent such unfair competition through taking advantage of pools of labor not able to freely and fairly market their hourly labor. In other words, at least as to MSOP's Industry component, this shows that Plaintiff's claim for minimum wage coverage is one of the very paradigms that the FLSA sought to cover. In short, the defense attempt to gain traction through expert testimony resulted only in a big face-plant.

Following the discovery phase of the case, both Plaintiffs and Defendants filed respective motions for summary judgment on the issue of liability. Briefs were filed and a hearing was scheduled for oral argument. However, in part due to the Civid-19 pandemic, that hearing was postponed. Attorney Charlie Alden informed us in this phone conference that the postponed summary judgment hearing will finally be held next Tuesday (February 16th).

Attorney Alden remains very optimistic about our chances of prevailing in the case, even more so than earlier in the case. In essence, Defendants' entire position is based on an argument that we are supposedly merely a different kind of prisoner. That is a contention the state will regret in later litigation seeking our liberation and an end to MSOP and Minnesota's sex offender commitment statute.

However, that contention ignores the profound constitutional distinction between prisoners and those confined under civil commitment: Under the Thirteenth Amendment, prisoners are the only category of persons who may be subjected to involuntary servitude. The theory underlying that exception is that prisoners, as part of their punishment, lose the right to the value of their labor.

We, on the other hand, are not prisoners, and we have the right to the value of our labor. The FLSA recognizes this as to all workers. Further, cases under the FLSA involving work by those civilly committed in and for their respective commitment facilities have uniformly held that those workers must be paid at least the federal minimum wage. Despite the earlier *Martin v. Benson* case, this closer examination of case law (not within Mr. Martin's wherewithal to find and present) will force a reexamination of the outcome in that case and overruling of that *Martin* result.

Indeed, one fundamental controlling point is that, again with reference to the enactment of the FLSA, the standard is not (as the State had claimed in *Martin*) whether the State provides us "basic needs" for daily life, but quite to the contrary, whether our labor provides MSOP with a "consequential economic benefit." The labor provided to such manufacturing endeavors as sign-making and creation of wood products (now including furniture) obviously helps create more product sales and greater profit from our lesser wages. This in turn bestows a substantial monetary benefit upon MSOP, lowering its cost of operation. Additionally, however, simply the labor provided to make and serve food, to clean all areas of the facility, to keep the walks clean and clear of snow and ice, and to perform upkeep and beautification of the grounds, etc., all provide economic benefit to MSOP. This eliminates the need to hire even more workers from the surrounding community at greatly higher wage rates (plus state employment benefits which we do not get) to perform each of these necessary tasks. If we did not provide these underpaid services, the annual cost of operation of MSOP would be substantially higher, creating greater legislative resistance to continuing MSOP's existence.

Even if the standard were to provide us only "basic needs," the facts presented by plaintiffs in this case show that we ourselves buy or otherwise privately obtain (often, by gifts from family or friends) many things we need. Further, the minimum wage requirement of federal law should not be viewed as a piece of statuary, frozen for all time in the Depression context in which it was created. To the contrary, what now must be deemed to comprise -- not "basic needs", but under the FLSA, a standard of living to provide "general well-being of workers," has escalated over time with technological innovation and the availability of things and modes of daily living not even dreamed of in that historical time of the Depression. Hence, the claim by Defendants that we can be subjected to a life (even though not prisoners) as stripped down as life in prison is specious and out of keeping with the aim and character of the federal minimum wage requirement.

In short, we have every reason to believe that the liability issue in the case will be decided in our favor. Given that essentially nothing further remains to be factually clarified or further buttressed at any trial, a trial appears unnecessary in this case. Accordingly, we expect to win this summary judgment motion on liability. It follows that the Defendants' opposing motion for summary judgment should be denied by the same pen stroke.

Attorney Alden rightly observes that, in order for the Defendants to win instead, the court would have to agree with their uniquely peculiar argument that a specific 'carve out' be judicially created as an exception against application of the federal minimum wage requirement herein. This 'carve-out' would only apply to sex offender commitment facilities (as opposed to all other kinds of mental health confinement facilities) solely because of our loathed status as sex offenders. Such a decision would be unheard of, and would create a deep and potentially irremediable tear in the entire fabric of the rule of law based on equal justice. There simply is no practical distinction that could justify such a 'carve-out' in blatant discrimination against us.

As it happens, again as an outfall of the ongoing pandemic, trials are not currently being conducted by the federal court (even state courts are holding only Zoom-appearance-based simple motion hearings and the like pending the end of the pandemic. This makes the ability to resolve our case by summary judgment doubly fortunate.

Nonetheless, especially due to the judicial backlog caused by the pandemic, it must be conceded that even summary judgment motion decision can take as long as 7 to 8 months. However, the lack of trials at this time may accelerate this schedule significantly. The legal importance of our case may also hasten its resolution. However, conversely, a perceived need on the judge's part to be very careful in his decision simply in light of such case importance may actually consume more time for that painstaking approach.

In closing, giving credit where credit is clearly due to our fallen brother, David Jannetta, Attorney Alden praised Dave for his "masterful" setting of the stage for our minimum wage claim long before the case was ever conceived of by a letter-writing campaign to numerous officials of MSOP, MSI, and State Operated Services ("SOS"), as well as to DHS officials and others. Replies to those inquiries confirmed many important aspects of the case, most notably the vicious aim of the reduction in 2009 of our wages and the refusal to continue to treat us as "employees" under federal law. Evidently, out of overconfidence in those years, the replies Jannetta garnered then clearly show a frank intent by Defendants and their predecessors to simply ignore federal law provisions that they knew, or certainly should have known had direct and undeniable application to us. This case will likely be decided our way in substantial part because of those blunt admissions of bad intent by pertinent officials on the other side.

Postscript: The hearing was held on February 16th. Attorney Alden reports that it went "pretty well." Both sides presented their arguments, consistent with prior briefing. As expected, the judge did not make a ruling from the bench, instead taking the matter under advisement.

The bad news: Alden estimates it may take roughly a half year for the court to issue its ruling on these 'dueling' summary judgment motions. The good news: Alden remains highly optimistic about prevailing.

Please do not bother Attorney Alden by seeking nonexistent updates. Nothing more can happen until that ruling. We will notify you as soon as that ruling is announced. Likewise, do not call or write the court. Due to Covid-19, Minnesota's federal courts are clogged with cases and buried in backlogged work. Such nagging will only irritate our judge (not a good idea). Thanks for your patience!

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An Open Letter by Guy H-S re Suicide, Shame, etc.

Editor's Note: The empathic insights by this author, whom TLP has featured previously, never fail to offer epiphanies and to leave a lump in your throat.

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Neither will this one.

Guy Hamilton-Smith, "Dear Gay," *Medium* (May 17, 2018), https://medium.com/@guy.hamilton.smith/dear-gay-3f1e779293c4

Text:

"Ryan is the hardest part of my story to explain.

We have never met, nor will we, and yet he radically changed the course of my life.

The path that I've walked since law school was not one that I intended. I did not go to law school to advocate for people on sex offense registries. I went to hide. I went for lack of better ideas. I went because it interested me. I went because, while I was fortunate to have parents who put up money to retain counsel, I saw many who did not have adequate representation, nor families standing by their side.

The day after my arrest, I told my professors at school what had happened. I withdrew from graduate school at the end of that semester, where I studied psychology. Law school had never been on my radar. I asked my own lawyer one day after a pre-trial hearing if you could go to law school with a felony conviction.

And so I went.

I pled guilty to a count of possession of child pornography in 2007, I was 22. I pled guilty because I was guilty. I was a lonely, awkward, bullied teen who was amongst the first generation to grow up with high-speed internet (or, indeed, the internet at all). Without delay, I encountered what writer Sage Webb refers to as 'pixelated novocaine' – internet porn. For anyone curious enough about the particulars of my crime, I did a Reddit AMA last October....

But what I'm writing here is not really about my offense, although it impossible to talk about him without talking about it.

I say that I went to law school to hide. Though I was open with my employer and my friends about my story, I was worried what others would think of me if they knew. I wanted armor. I wasn't a felon. I wasn't a sex offender. I was an attorney. The Honorable. Esquire.

Ironic that I sought a profession held in such ill repute. I joked that I wasn't sure which would make people hate me more, that I was an attorney, or that I was a sex offender. I did not, as I said, go to law school to advocate for people on the registry. I burned with a mission to fight for people who lacked fighters, but not *them*. My best friend in law school suggested to me in our 2L year that I would be very effective at it. I quickly discarded the idea. It terrified me.

Were I to advocate for sex offenders, I would betray my own secret shame.

I went to school. I took finals. I went to work. I saw friends and my parents. I dated. I complied with the registration laws. I finished my probation. I lived small. I valued the privacy that I had.

I did that for years.

Until Ryan.

In late 2013, the receptionist buzzed my office. It was an AP reporter on line 1. Was I the same Guy Hamilton-Smith that the Kentucky Supreme Court just ruled was ineligible to take the bar exam, and if so, did I have a comment? I don't remember what I said, but that was how I learned that the last several years of my life and hundred thousand dollars in student loans were wasted, that a court battle I'd fought with my attorney (who offered me his services *pro bono*) for years ended in the worst way possible.

Compounding my terror, the reporter wrote a story about it, which was picked up widely. At first it was a trickle. Friends letting me know that I was in the local news. Then a deluge. The next day I was on the front page of every paper in Kentucky. National outlets ran with the story. I got mail. Mostly good, some bad. I slept with a knife.

I was out.

I wanted to die.

This was when I first heard Ryan's name. By any other account, we had nothing in common. We moved in very different circles. He was a political operative in D.C., where he worked as the chief of staff for a United States Senator. Bright, charismatic, hard-working. Ryan was a rising star in conservative political circles. His future was bright.

Until his arrest on federal child pornography charges in December of 2013.

The following month he decided to end his life in his parent's home.

His family, in what I can still only conceive of a decision in equal measures astonishingly brave and agonizing, published the note that Ryan left behind....

Ryan's story was, in many ways, my own story, but for one tragic difference. Ryan, like, me, had suffered childhood abuse. Ryan, like me, had parents who loved him very much. Ryan, like me, had at first encountered child pornography inadvertently. I sobbed into the autumn air from seventeen stories up on a balcony in 2006 when I was told the police were on the way. I was pushed up on the railing and I looked at the pavement so far away. Jumping seemed like the only way out. I came back inside. Ryan didn't. I still don't know why.

Reading Ryan's last words, I was compelled to do something I was dimly aware was insane. I needed to find out how to get in touch with Ryan's parents. I needed to write them a letter, to try, if I could, to offer them some kind of meager comfort from a stranger.

And so I did.

Dear Mr. & Mrs. Loskarn,

I do not know whether or not it is appropriate for me to send you this letter, and if it is not I hope that you can forgive me with the knowledge that it is with the best of intentions that I write to you.

Some time later, I received a response in the mail.

Thus began what I would call an unlikely friendship. We've written letters. They've sent me books. I invited them to my wedding. We've talked about pain, and loss, and grief, and God, and purpose.

Ultimately, they've given me something much greater than friendship.

What follows is a letter I wrote to Ryan's mother, Gay, on the eve of a presentation that I was to give on the topic of the sex offender registry.

Dear Gay,

I have been working on putting my presentation together for the prison ministry conference and trying to figure out what it is exactly that I want to say. I know that I want to educate people about these issues – and I've got all that. The facts and the figures aren't too hard to present. They're not that hard to understand. It's not tough to figure out that the biggest problem that people on the registry face when re-entering society are housing and jobs.

I ran through my presentation yesterday, and it all just seemed so ...clinical. Which I guess that's part of it. It's hard to make statistics and statutes all that appealing. Then I got to Ryan, and how I'm going to talk about his story.

A passage from the note that he left behind keeps sticking out to me. That, because of his fall from grace, and the enormous amount of attention that was put on the same, that the details of his shame would be forever preserved. That there would be no escape.

In looking at the timeline of it, I realized that we were both struggling with that same notion at the same time, as it was in January of 2014 that I got the media attention I received over the KY bar, then, googling myself, realized that there was no escape from it. It would be a forever sort of thing. And it will be.

Honestly, had I had to confront that same realization at the time of my arrest, I'm not sure I can say whether I would have come back in from the balcony.

So I'm thinking about how to talk about re-integration and re-entry for something like this. What does that mean? What does it *really* mean? We talk about housing and jobs and being a law-abiding member of society, and I had a nice little spiel all worked up about how these things are important.

But it's all bullshit. Or, it's not bullshit, it's just missing the point.

It's shame.

So I'm thinking about Ryan. I'm thinking about how, circa 2013, I was living a very small life, worried about how what would happen if people found out about me, about my past. Society tells me, and told Ryan, that we have no choice in the matter. That we have to be ashamed and afraid, and that we're going to carry a brand to prove it. An indelible brand for the information age.

And I believed it. As Ryan did. As, I'd surmise, most people in this situation do. How can you not?

So then I read of Ryan's passing, and had my crazy idea to send you a letter. Then, when we started communicating, I had the opportunity to take part in a documentary. The opportunity to initiate a lawsuit. The opportunity to give that talk to those high school kids. The opportunity to give this presentation. Once we win the lawsuit, I'm planning on being a lot more public via social media. I had high-minded ideals – that, perhaps, if I step out of my shell, perhaps I can do something for the next person who is sent into the fire. Perhaps I can do something for the numberless, nameless people who trudge in present day the same dark and anonymous paths that Ryan and I shared, and all those whom our actions caused harm to.

I'm going to save lives, I told myself, egotist that I am. And I guess I told myself that in part to combat the fear. Part of my presentation is going to be talking about a 2014 case where a couple of neo-nazis murdered a person on the registry and his wife and then, at sentencing, stated that child molesters don't deserve to live (never mind that this person was convicted decades previous of having sex with an adult woman who was mentally disabled). I think about that, and I think to myself 'Gosh, I'm probably not doing any favors to my lifespan by being out and open about this.'

And maybe that's true. I've never been very good at predicting the future.

But, I'm trying to write about what it is I really wanted to say – about re-integration, about Ryan, and about me. This idea of shame keeps popping up, and the words from Ryan's letter. He used the word – shame.

And so I wrote out 'shame kills' and looked at it for a while, writing and re-writing what it is I'm trying to get at. And something occurred to me that I never expected, that shot me through the heart ...and that's the reason for this long, rambly letter.

I'm thinking about how shame can kill so fast – faster than bullets, because it can move at the speed of 24-hour news cycles and tweets and internet searches. That it can become so overwhelming to a person, all at once, that – like Ryan – one feels that there is no way out by to take your own life.

But it kills slowly, too. And when it does kill you in such a fashion, in a way, it's much more insidious, because you find that despite being dead, you're still

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walking around. You're still talking to people and going to the store and laying in bed at night. You're still alive, but not living. You're cut off from everyone, and even the very light of the soul is threatened to be snuffed out by it. You're a husk, managing to fake it, until, perhaps mercifully, your body gives out.

Me, I've known shame so long that it's presence was assumed to be normal, in whatever form it took. From being mercilessly taunted as a young buy, to trying to numb everything out with porn and sex and video games, to the fallout from my arrest and conviction and media attention from the bar. It's something I would wake up with in the morning, and go to bed with at night.

I sobbed into the autumn air from seventeen stories up on a balcony in 2006 when I was told the police were on the way. I was pushed up on the railing and I looked at the pavement so far away. Jumping seemed like the only way out.

OK. let that sigh out. Relax for a minute. Then read on...

So I'm finding something. That, slowly, as I begin to step out onto this stage, to show up, to commit to telling the truth, to being open, and honest ...that these scales of shame are slowly falling away. That I am beginning to not care that this is a forever thing, and beginning to wrap my arms around it. To turn this place of low-light that society expects me to reside in and turn it into a garden. To take this toxic shame that's supposed to number my days, and turn it into grace.

I started on this path of being open because I saw it as a duty to others, a duty that Ryan and you and your family showed me that I had. That, I should try, if I could, to not let shame claim another life.

But shame had claimed mine from the start. The last life I expected to be saving was my own.

So I wanted you to know it, to know that, as I wrote in my first letter to you, that Ryan's death was not in vain. And what he and you and your family have given and left is playing out for me on a personal level in ways in which I never could have anticipated, and which I am only beginning to understand the enormity of.

Thank you for everything."

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"Murder by State": Making Vigilante Killings Easy by Posting Addresses of Past Sex Offenders Online

Karen Franklin, Ph.D.: "Vigilantes: Coming Soon to a Community Near You," *In the News: Forensic Psychology, Criminology, and Psychology-Law*, http://forensicpsychologist.blogspot.com/2007/10/vigilanteism-coming-soon-to-communit... (October 18, 2007)

"Facing global environmental catastrophe, economic decline, and war without end, who can resist strapping on a nine millimeter and blasting bad guys? Viewers are flocking to "The Brave One," which remains on the top 10 list with $35 million in gross sales so far. Women, especially, are loving Jodie Foster as Erica Bain, a liberal-turned-vigilante killer on the mean streets of New York. It's "a pro-lynching movie that even liberals can love," says the *New York Times*. Americans have always loved a good vigilante yarn. But the allure increases in times of uncertainty and perceived powerlessness. And people are more fearful of crime than ever, despite dramatic drops in crime since Charles Bronson ("Death Wish") blasted a path through the same city more than 20 years ago. Especially, these days, our collective fear and hatred turns to "terrorists" and criminal predators. (For a great analysis of the history and allure of the vigilante film, see Eric Lichtenfeld's piece in *Slate*.) Nothing wrong with letting off a little steam.

But recent news events cause me to doubt that the vigilante mood is shut off when people leave the theater. Last month, two men in a small Tennessee town torched the residence of a man convicted of a child pornography charge. The man's hapless wife died in the fire. A month earlier, in a scene reminiscent of the Salem witch trial days, a crowd of angry neighbors descended on a New Hampshire home, taunting the woman resident as a "molester" and "skinner" (prison lingo for a child molester) before tossing a burning scarecrow on her front porch. These incidents are not isolated. Other vigilante attacks on sex offenders, the most vilified pariahs in modern society, include the following:

- A vigilante killed two sex offenders and visited the homes of another four in Maine. He had gotten their addresses from an online sex offender registry. (He then shot himself to death.)
- A vigilante in Bellingham, Washington killed two recently released sex offenders. He too had found their names through an online sex offender registry.
- A drunken father and son broke into the house of a paroled sex offender in New Jersey and began beating another man whom they mistakenly took as the sex offender. Yet again, the vigilantes had found their victim through a "Megan's Law" community notification law.
- In Bakersfield, California, a knife-wielding vigilante tried to break down the door of a sex offender whose name, photograph and address had been distributed in the neighborhood by police. Police shot the vigilante dead.

Are you picking up on a common theme here? Something to do with community notification laws?

Publishing the names and addresses of people who are villainized as "sex offenders" is almost like handing out murder licenses to violent and unstable people. As law scholar John LaFond put it: "These [community notification] laws are almost a confession by the state that we have done all that we can, you must now take the defense of your family into your own hands." Even those who believe all sex offenders deserve to die might not feel so strongly if they knew how some people got onto the sex offender registries, which fail to distinguish based on the severity of the offense. For example, what about the middle-aged family man convicted of statutory rape at age 16 for his consensual relationship with his 15-year-old girlfriend? That man is no more of a threat to children than is any other randomly selected man on the street. He is certainly less of a threat to public safety than the vigilantes who are gunning for him."

[About the author: Dr. Franklin is a forensic psychologist in Northern California and an adjunct professor at Alliant International University. She is a former criminal investigator and legal affairs reporter. This blog highlights news and commentary relevant to forensic psychology, criminology, and psychology-law. If you find the information useful, you are invited to subscribe to the daily email newsletter.]

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Collective SO Identity Is Fostered by SO Registration & Notification Laws

But shame kills slowly, too. And when it does kill you in such a fashion, in a way, it's much more insidious, because you find that despite being dead, you're still walking around. You're still talking to people and going to the store and laying in bed at night. You're still alive, but not living. You're cut off from everyone, and even the very light of the soul is threatened to be snuffed out by it. You're a husk, managing to fake it, until, perhaps mercifully, your body gives out.

Editor's Note: As the last two articles, above, illustrate so impactfully, just the sheer emotional wrenching of having been a sex offender and being by turns vilified and shunned is enough of an argument why sex offenders need to stick together. That there are crazed people out there hunting us down drives home with undeniable force that there is no other alternative to achieving solidarity in mutual protection, counseling, advocacy, and simply finding ways to gain and maintain a livable life, with employment and a passable place to live, and friendly support. The article that follows points up that the governmentally-inflicted further punishments (fictionally called 'collateral consequences') themselves have forced this issue and its inevitable resolution.

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Tusty ten Bensel & Lisa L. Sample, "The Influence of Sex Offender Registration and Notification Laws on Fostering Collective Identity among Offenders," 40 *Jour. Of Crime & Justice* 497-511 (Issue 4, Dec. 2017)

Abstract excerpt: "...We conducted interviews with 112 sex offenders and found that they did see themselves part of a collective group, one that was formed over time, exhibited a group level consciousness, and practiced negotiations within the group to change the thoughts and daily lives of members."

Text excerpts:

p. 498: "For sex offenders, being members of this marginalized group may have affected their 'person' identities, or the 'set of meanings that define [them] as a unique individual' (Burke & Stets, 2009, 124). As labeling theory suggested, person and collective identity are important concepts to consider when understanding repeat offending and addressing public safety concerns (Lofland, 1969; Tittle, 1975; Matsueda, 1992; Morris & Piquero, 2013). The way others see us can shape the way we see ourselves, which can affect the way we act (Mead, 1918). If enough people interacted with us as if we are dangerous, violent criminals, labeling theory would suggest that eventually we would come to see ourselves as such and act accordingly. It is then important to determine if sex offend-

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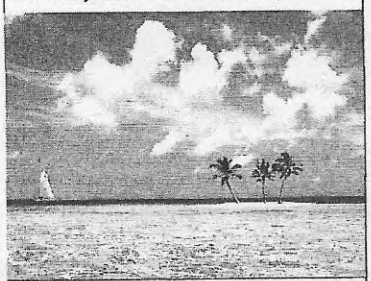
ers accept the structurally and culturally ascribed collective identity placed upon them by citizens and law and what, if any, methods they have found to mitigate the negative social consequences of this identity.

With this in mind, we conducted qualitative interviews with 112 sex offenders in Nebraska. All those who were interviewed self-reported that they have not sexually reoffended and have not been rearrested for another sex crime. We wanted to explore if and how the consequences of registration and notification (RN) laws affect notions of person and perhaps created a collective identity among sex offenders. Also, we explored how registrants and offenders cope with the consequences of the shared identity placed upon them.

p. 504: **RESULTS**

Evidence of Collective Identity

We found that all 112 sex offenders embraced a collective identity with other sex offenders that made them feel part of a group, albeit a persecuted group, but still members of a group nonetheless. All 36 family members also shared this collective identity. As each registrant or family member related his/her experiences with sex offender laws and, at some point, they all defaulted to using the term 'we.' For instance, as Jackson (registrant) stated, 'we have all these extra rules that no one else has, and we just have to keep fighting to get them to see we are least likely to reoffend.' Brick (registrant) expressed, 'when you need a place to live and food which if you can't get the job you can't get any of the other stuff. The guys end up, we end up back on the street, we end up in transitional facilities, we end up committing other crimes.' Clearly, both Jackson and Brick saw themselves as part of a persecuted group in which members share similar experiences and goals. Marie (a spouse) explained, 'we haven't committed a crime but we still get treated as pariahs because we chose to stay with our husbands,' thus demonstrating the diffusion of the legally and culturally ascribed collective identity to family members of registrants. One comment by Joseph (registrant) seems to exemplify the notion that sex offenders and their family members may see themselves as part of a collective, or part of a group as he explains, 'what we need to do is reform law.'....



Nice Place for a Picnic, but You Can't Live There.

Interestingly, about one-third of our registrant sample rejected the sex offender label placed upon them by conviction and continued to deny their behavior as criminal. These individuals and their family members, however, have embraced a collective identity and saw themselves as sharing 'in-group' membership with others who have similar experiences, common interests and goals. As Aaron (registrant) notes, 'all of us who were railroaded by these laws feel the same. We are ostracized whether we looked at the stuff (child pornography) on our computer or not.' Although RN laws have alienated sex offenders from conventional society, some rejected the collective identity ascribed to them by RN laws and societal members.

pp. 504-05: Some registrants and their family members still refused to see themselves or loved ones as sex offenders, but have accepted that society saw them as such, which helped to engender a new collective identity among sex offenders that made them feel part of a group – a group of people with shared experiences, interests, and goals that provides them with social integration and acceptance. Their comments also suggested that culturally driven sex offender laws have played a large role not only in ascribing a negative collective identity to sex offenders, but also in forming a collective identity registrants and their family members have adopted themselves to adapt to and countermand the negative legal, social, and cultural perceptions others hold for them. In this way, it seemed sex offenders could either accept the label placed upon them by RN laws (as some in our sample did) or reject its influence on their person identities, but they still experienced negative emotions and feelings of marginalization that allowed them to participate in a group-shared collective identity. In this sample, unlike what labeling theory would suggest, few came to see themselves as societal members saw them – as highly dangerous and repeat offenders. Rather the label from RN laws cultivated a process of social selection in which sex offenders and family members sought out others like themselves to find acceptance, share emotions, commiserate on experiences, and work toward a common goal of legal reform.

p. 505: ***The formation of an adopted collective identity among sex offenders***

Identification with a group or collective is often based on self-election (Howell & Egley, 2005). Self-categorization, self-esteem, and commitment toward group cohesion all influence people's willingness to adopt collective identity (Van Stekelenburg, 2013), which was evident among the registrants and family members in this study. Regardless of taking responsibility for their crimes, all registrants and families denied self-categorization into the broader sex offender group, yet they all accepted they were part of such. As Veronica (spouse) explains, 'Anytime a registrant's address is on a public registry all who live there are in danger. ...We are against sex offender registries due to their proven ineffectiveness and the collateral damage suffered by well over 2,000,000 wives, children, mothers, grandmothers, and other loved ones of the 760,000 men, women, and child registrants across the states.' Joseph (registrant) notes, 'we [registrants] are all in the same boat.' In the case of sex offenders, structural categorization, through registration and notification laws rather than self-categorization, involuntarily labeled not only registrants, but also their spouses and families, as 'sex offenders.' To some degree, however, social selection allowed many registrants and their families to mitigate this ascribed identity by creating a different collective identity in which they can gain self-esteem and commitment to other 'in-group' members.

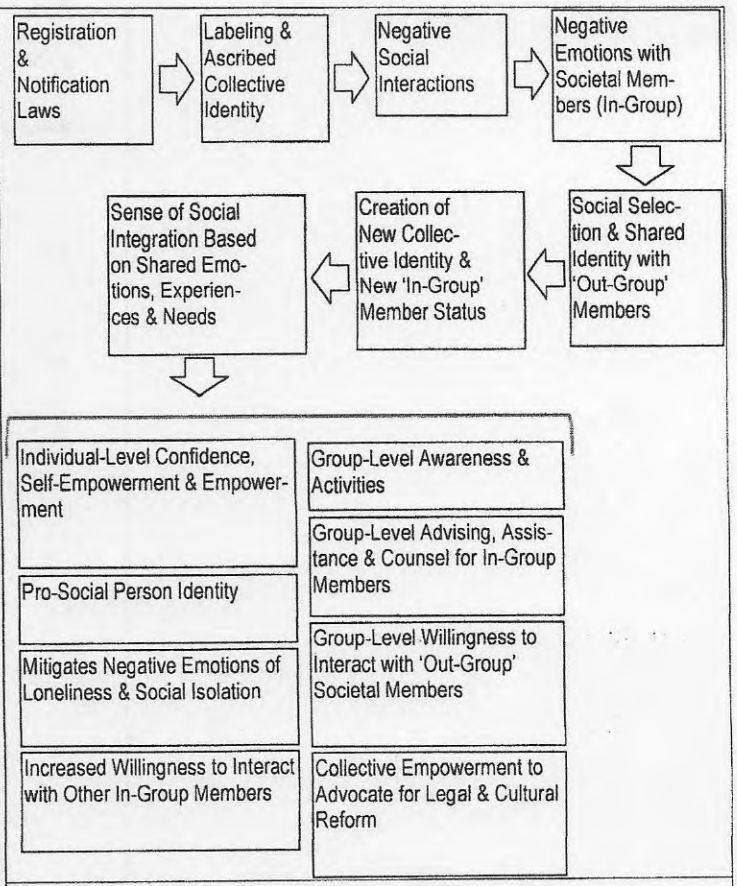


Figure 1. Path to creation of collective identity among sex offenders and their family members and consequences thereof.

Although not often noted in prior literature, legitimization mechanisms used to cope with 'out-group' status may include activities such as joining a group with people who share experiences, interests, and goals. As Gadd (2006) suggests, the way people see themselves can change despite continuity in their lives through engagement in social groups. We found this can occur among sex offenders as they form collective identities with other sex offenders to combat those culturally ascribed by law.

pp. 505-06: ***Consequences of adopting a collective identity beyond the one legally ascribed***

All subjects in this study offered language to suggest they collectively identified with other registrants and their family members, and perception of in-group status was reaffirmed by many of the comments above. All subjects, even those that readily admitted to sex crimes and self-reported struggles with continued opportunities and temptations, eventually came to adopt pro-social identities that arose from realizing their status as 'in-group' members among other registrants and family members. For instance, Jack (registrant) explains, 'Without them [other registrants], I would have no friends at all. They get me and what I am going through.'

pp. 506-07: **Discussion**

Additionally, participation in collective identity activities such as promotion and education strategies of the group, and the formal and informal rules governing group interactions influenced the emotions of individual group members, moving them

from anger and sadness toward confidence and hopefulness (Faddegon, Scheepers, & Ellerners, 2008). Over time, collective memories were formed that more fully ingrained the collective identification of the group (Gongaware, 2012). In our study, many registered citizens and family members began reaching out to others through social media sites and blogging. Once subjects learned others' shared similar experiences and emotions, they created in-person meetings and social media blogging to facilitate sharing among 'in-group' members, or those of a marginalized group shunned by society. For example, Nebraskans Unafraid (NU and FACTS (Families Affirming Community Treatment and Safety) are internet-based groups formed by registrants before this research began. When members of these organizations were queried about how and why these groups were formed, we were told, 'They formed as a way to help other registered citizens find information about the laws, changes in them, court decisions, and to offer lists of resources others could use -- like attorneys, therapists, and employment opportunities' (Bert, registrant). During interviews with members of these groups, we observed the pride each member took in being party of these groups. These types of 'in-group' activities allowed for the formation and adoption of a collective identity, along with registered individuals and family members knowing that others like them are out there -- discoveries made through social media sites and blogs.

pp. 507-08: Although all participants noted they had benefitted in some way from feeling a part of this shared collective identity, the degree to which subjects (registrants and family members) recognized benefits varied depending on the intensity and duration of participation in group-level functions and adherence to informal and formal group-level rules and regulations governing 'in-group' interactions (Faddegon, Scheepers, & Ellemers, 2008). Even those who simply and passively read internet-based materials without participating in it still felt part of the kinship established between those people who were legally ascribed a collective identity of 'sex offender', which gave them some individual level of confidence to interact with 'in-group members and researchers as 'out-group' members. Those more active in group-level activities reported more feelings of empowerment, higher levels of self-esteem, and more willingness to interact with societal 'out-group' members, which is needed to facilitate employment, parenting, and kinships."

Are People Going to Make Decisions About You for the Rest of Your Life, or Are You Going to Be Able to Make Decisions for Yourself?

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Editor's Closing Comment:

Everyone who has left prison bearing the burden of a sex-crime record knows of the shunning that takes place — some of it in-your-face, but most of it behind your back: job applications quietly discarded minutes after you leave them at the counter for consideration; rental denials rejected without any callback; service calls ignored; dinner, hotel, even airline reservations mysteriously lost; frivolously astronomical estimates for car repair; being banned from business establishments altogether, etc. Then there is the range of social reactions, from passive-aggressive to outright hostility; assaults are all too common.

Various 'treatment' businesses holding contracts with correctional or social-service-empire entities force us to undergo unneeded further treatment (after receiving years-worth in prison or commitment), predatorily misusing that pseudo-authority over us to bleed us white for high fees for further years, in a vicious abuse of its own.

Lack of livable housing, or even any housing at all, lack of an ability to find work or being forced by dire circumstance to accept work under inhuman, sometimes dangerous conditions at sub-minimum-wage rates leave us destitute and under extreme stress. In their desperation and with no alternatives, some resort to non-sexual petty crimes to provide for basic needs. Banding together can reduce and perhaps completely solve these problems.

Given all of this, there is no alternative to banding together for our own protection, our own advocacy, our own system of mutual commerce and finance, of housing, of employment and job referrals, and emotional support, as well as networking among ourselves to facilitate all of the above.

In addition, we must seize and hold our self-determination right to decide what treatment/counseling is required and when. This includes accountability to the group as a whole, since one's actions will inevitably reflect upon the group. And we ourselves must provide whatever is required as treatment/counseling, ascertaining needs and streamlined protocols of treatment for ourselves, in light of our own collective experience, as opposed to the jaundiced and highly inaccurate opinions-taken as 'facts' by self-proclaimed therapists whose only 'knowledge' of us amounts to indoctrination of the ignorant and biased by the ignorant and biased.

In all these ways, in addition to the emotional support and social interaction among ourselves and fostering means of thriving in life, labeling can be eliminated within the group, and labeling by those outside can be minimized and held at distance, minimizing its social impact. This is not a debate. We must make it so.

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Appointed Attorney Incompetence & Disinterest in Commitment Cases

Michael L. Perlin, "'Who Will Judge the Many When the Game is Through?': Considering the Profound Differences between Mental Health Courts and 'Traditional' Involuntary Civil Commitment Courts," 41 *Seattle U. L. Rev.* 937 (Spring 2018)

Text excerpts:

pp. 937-38: "**Introduction**

For forty years, we have known that involuntary civil commitment hearings are – in most jurisdictions –'charades.'[1] ...The characterization of such hearings as being a 'greased runway' to a state institution has never been disputed.[4] Lawyers representing these individuals were bored or contemptuous,[5] judges simply wanted to get cases moving, opposing counsel looked at their wrist watches to see when the cases would be done.[6]

pp. 939-41: **I. Quality of Counsel at Traditional Civil Commitment Hearings**

If there has been *any* constant in modern mental disability law, 'it is the near-universal reality that counsel assigned to represent individuals at involuntary civil commitment cases is likely to be ineffective.[10] ...We knew it when the first empirical research showed that most lawyers prepared much less for civil commitment cases than for other cases, many did not speak to clients before the hearing.....[16] And importantly, we knew it when it became clear that only in those jurisdictions that had dedicated counsel programs was there any coherent body of reported civil commitment case law.[17]

Sadly, 'the quality of counsel assigned to represent individuals who face involuntary civil commitment to psychiatric hospitals is, in most United States jurisdictions, mediocre or worse.'[19] The data tells us that, in many jurisdictions, counsel is 'woefully inadequate, disinterested, uninformed, roleless, and often hostile.'[20]

pp. 942-43: Judges typically defer to the judgments of state experts[32] without any acknowledgement of the robust, valid, and reliable evidence that tells us how imprecise clinical predictions of dangerousness often are.[33] By doing so, they allow 'psychiatrist experts [to] actually become the decision-makers in the civil commitment process,'[34] serving as 'rubber stamps of psychiatrists' testimony.'[35]"

Notes: [Read these textual notes.]

1 *Michael L. Perlin*, "'Half-Wracked Prejudice Leaped Forth': Sanism, Pretextuality, and Why and How Mental Disability Law Developed as It Did," 10 J. *Contemp. Legal Issues* 3, 7 (1999).

4 *Leslie Scallet*, "The Realities of Mental Health Advocacy: *State ex rel. Memmel v. Mundy*," in *Mental Health Advocacy, An Emerging Force in Consumer Rights* 79, 81 (Louis E. Kopolow & Helene Bloom eds. (1977); *Alan Schoenberger*, "'Voluntary;' Commitment of Mentally Ill or Retarded Children: Child Abuse by the Supreme Court, 7 *U. Dayton L. Rev.* 1, 30-31 (1981).

5 *Michael L. Perlin & Alison J. Lynch*, "'Mr. Bad Example': Why Lawyers Need to Embrace Therapeutic Jurisprudence to Root Out Sanism in the Representation of Individuals with Mental Disabilities," 16 *Wyoming L. Rev.* 2399, 314 n. 96 (2016) [hereinafter *Perlin & Lynch*, "Mr. Bad Example"].

The author had occasion to speak with private counsel who had been assigned

(Continued on page 9)

Research on ex-prisoners who have been able successfully to desist from crime finds these active responsibility themes to be far more prevalent than internal, stable and intentional attributions for one's past crimes. — The Legal Pad, # 5-2, p. 8

(Continued from page 8)

to represent a patient in a county in which the New Jersey Division of Mental Health Advocacy ...did not represent patients. The assigned counsel asked [the author], "Why is the State wasting money to pay me to do this bullshit?" *Id.*

6 *Michael L. Perlin & Heather Ellis Cucolo*, Mental Disability Law, § 2-6.3.3, at 2-74 n. 458 (3d ed. 2017) ("Mental disability law generally regulates powerless individuals represented by passive counsel in invisible court proceedings conducted by bored or irritated judges.") Judges for such cases are frequently retired judges called back into service on "recall." The State of New Jersey's Official policy requires judges seeking recall work to be willing to hear involuntary civil commitment cases.. N.J, State Judiciary, Policy Governing Recall for Temporary Service Within the Judicial System § 11 (b) (July 19, 2001), https://www.judiciary.state.nj.us/attormneyus/assets/directives/dir_12_01.pdf. "Priority for approving requests for recall service will be based on the following factors: ... b. Willingness to serve on a designated statewide priority for recall judges, e.g., civil commitment hearings, ISP, sexually violent predator cases.' *Id.*

10 *Michael L Perlin*, "'I Might Need a Good Lawyer: Could Be Your Funeral, My Trial': Global Perspectives on the Right to Counsel in Civil Commitment Cases," 28 *Wash. U. J.L. & Pol'y* 241, 241 (2008) [hereinafter, *Perlin*, Could Be Your Funeral]. On the passivity of counsel in such cases, see *Michael L. Perlin*, "Fatal Assumption: A Critical Evaluation of the Role of Counsel in Mental Disability Cases," 16 *Law & Human Behav.* 39, 43 (1992). This, of course, presumes that counsel is available to represent these individuals. *Alison J. Lynch & Michael L. Perlin*, "'Life's Hurried, Tangled Road': A Therapeutic Jurisprudence Analysis of Why Dedicated Counsel Must Be Assigned to Represent Persons with Mental Disabilities in Community Settings," 35 *Behav. Sci. & :L.* 353, 355-57 (2017). Professor Heather Campbell has reminded me that in Canada, such representation is not mandatory in all provinces. It is also not mandatory in all states in Australia. *Michael L. Perlin*, Three Kinds of Therapeutic Jurisprudence (and One Kind of Not-TJ), *Int'l Soc'y for Therapeutic Juris.* (Aug. 3, 2017), https://mainstreamtj.wordpress.com/2017/08/03/three-kinds-of-therapeutic-jurisprudence-and-one-kind-of-not-tj/ (discussing *Eleanor Fritze, The Jack Brockhoff Found.*, Shining a Light Behind Closed Doors 28-31 (Dec. 2015), http://churchilltrust.com/.au/media/fe;llows/Fritze_E_Shining_a_light_behind_closed_doors.pdf . Chicago found that a single public defender was assigned to handle all civil commitment cases in the City of Chicago – a prohibitive case load of 40 to 60 cases per week and 2,000-3,000 cases per year. See *Eliott Andalman & David L. Chambers*, "Effective Counsel for Persons Facing Civil Commitment: A Survey , A Polemic, and a Proposal," 45 *Miss. L. J.* 43, 61 (1974). When that study was replicated 20 years later, it found a caseload of 2,000 per year in another county (presumably in Florida). *Sumner J. Sydeman, et al.*, "Procedural Justice in the Context of Civil Commitment: A Critique of Tyler's Analysis," 3 *Psychol., Pub., Pol'y & L.* 207, 216 n. 49 (1997). The American Bar Association takes the position that the maximum caseload should be 200, one-tenth of this number. *Megan Annitto*, "Juvenile Justice on Appeal," 66 *U. Miami L. Rev.* 671, 674 n. 9 (2012) (citing and quoting *Am. Bar Ass'n*, Standing Committee on Legal Aid & Indigent Defendants, Ten Principles of a Public Defense Delivery System 1, 5 n 18 (2002).

Beyond the scope of this paper is a consideration of an important collateral issue: that there are often not the community support services in place (e.g., housing and less restrictive alternative treatment facilities) that should be available to all who are subject to the involuntary civil commitment process. *Naomi M. Weinstein & Michael L. Perlin*, "'Who's Pretending to Care for Him?': How the Endless Jail-to-Hospital-to-Street-Repeat Cycle Deprives Person s with Mental Disabilities the Right to Continuity of Care," 8 *Wake Forest J.L. & Pol'y* 455 (2018) (manuscript at 13-14) [hereinafter *Weinstein & Perlin*, Who's Pretending to Care for Him?].

16 *Virginia Aldige Hiday*, "Are Lawyers Enemies of Psychiatrists? A Survey of Civil Commitment Counsel and Judges,' 140 *Am. J. Psychiatry* 323, 326 (1983).

17 *Michael L. Perlin*, "'You Have Discussed Lepers and Crooks': Sanism in Clinical Teaching, 9 *Clinical L. Rev.* 683, 708-09 (2003).

19 *Perlin*, Could Be Your Funeral, *supra* note 10, at 243. In a white paper that I prepared for the American University School of Public Affairs' Justice Programs Office on the question of the quality of representation of criminal defendants with mental disabilities, I focused on several issues that required attention in determining adequacy of counsel in cases involving this population: the "fear of faking," the likelihood of undiagnosed or misdiagnosed disabilities and the impact of prescribed medications on mental functioning. *Michael L. Perlin*, Am. Univ. Justice Programs Office, Representing Clients with Mental Health and/or Cognitive Impairments in Treatment Courts 3 (2016), http://www.ameriucan.edu.spa/jpo/initiatives,drug-court/upload/Pertlin-Mental-Impairments-7-8-16.pdf. Certainly, the vast majority of lawyers appointed episodically or randomly to represent persons with mental disabilities at civil commitment hearings invariably miss these issues.

20 *Michael L. Perlin*, "'And My Best Friend, My Doctor, Won't Even Say What It Is I've Got': The Role and Significance of Counsel in Right to Refuse Treatment Cases," 42 *San Diego L. Rev.* 735, 738 (2005). See also *Henry A. Dlugacz & Christopher Wimmer*, "The Ethics of Representing Clients with Limited Competency to Guardianship Proceedings," 4 *St. Louis U. J. Health L. & Pol'y* 331, 353-54 (2011).

32 Grant H. Morris, "'Let's Do the Time Warp Again': Assessing the Competence of Counsel in Mental Health Conservatorship Proceedings, 46 *San Diego L. Rev.* 283.at 314-15 (2009) ("Despite the fallibility of psychiatric testimony, judges and juries, serving as fact finders in civil commitment and conservatorship proceedings, typically defer to psychiatric judgments that the person has a mental disorder and that the mental disorder meets the statutory standard for commitment or a conservatorship."). The only two studies of judges' views on this question found that judges consider expert testimony to be the most important factor in their commitment decisions. See *Stephanie Evans and Karen Salekin*, Involuntary Civil Commitment: Communicating with the Court Regarding 'Danger to Other'," 38 *Law & Hum. Behav.* 325, 326 (2014). Most courts that have considered the question have agreed that constitutional due process in a civil commitment hearing "includes the right to an independent psychiatric examination." *In re Gannon*, 301 A.2d 493, 494 (N.J. Super. Ct. 1973). See *Scott F. Uhler*, "The Constitutional Right of the Indigent Facing Involuntary Civil Commitment to an Independent Psychiatric Examination, 20 *Akron L. Rev.* 71, 72 (1986). See generally *Michael L. Perlin & Heather Ellis Cucolo*, *Mental Disability Law* § 6-9, at 6-104 to 6-106-1 (3d ed. 2017). But see *Goetz v. Crosson*, 967 F.2d 29, 36-37 (2d Cir. 1992) (affirming a trial court opinion holding that the Due Process Clause does not confer an absolute right to state-provided psychiatric assistance at involuntary civil commitment hearings and mandating such a right only when the hearing judge determines that expert opinion testimony "is necessary to a reliable assessment of a parent"). There are no statistics available, but the forty years I have spent litigating these cases and observing them in multiple jurisdictions has made it clear to me that in most venues, such expert witnesses are virtually never engaged. But see *Stafan Sjostrom, Martha Jacobsson & Anna Hollander*, Collegiality: Therapy and Mediation – The Contribution of Experts in Swedish Mental Health Law, 6 *Laws*, no. 1, 2017, at 1, http://www.mdpi.com/2075-471X/6/1/2/htm(criticizing lack of independence on part of court-appointed psychiatrists in Swedish civil commitment cases.).

33 See, e.g., *Heller v. Doe*, 509 U.S. 312, 323-24 (1993). There are "difficulties inherent in diagnosis of mental illness. It is thus no surprise that many psychiatric predictions of future violent behavior by the mentally ill are inaccurate." *Id.* This has been known for decades. See, e.g., *John Monahan*, *Predicting Violent Behavior: An Assessment of Clinical Techniques* 92 (1981) (two out of three predictions of dangerousness by psychiatrists and psychologists are inaccurate); *Joseph J. Cocozza & Henry Steadman*, "The Failure of Psychiatric Predictions of Dangerousness: Clear and Convincing Evidence," 29 *Rutgers L. Rev.* 1084, 1096-97 (1976). Clinicians have been found to be no better than chance when it comes to predicting violence among female patients. *John Monahan, Nat'l Inst. Of Justice*, Mental Illness and Violent Crime 1-2 (Oct. 1996).

34 *William M. Brooks*, "The Tail Still wags the Dog: The Pervasive and Inappropriate Influence by the Psychiatric Profession on the Civil Commitment Process," 86 *N.D. L. Rev.* 259, 285 (2010); see also *Robert Brooks*, "Psychiatrists' Opinions About Involuntary Civil Commitment: Results of a National Survey," 35 *J. Am. Acad. Psychiatry L.* 219, 219 (2007).

35 *Brooks*, Psychiatrists' Opinions, *supra* note 34, at 220.

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Allen Francis Tells Prosecutors and Their Expert Witnesses: "Going for Wins" in SOCC Cases Is Unethical.

Allen Francis, MD, "Going For Wins in Sexually Violent Predator Cases," *Psychiatric Times*, July 8, 2011, http://

(Continued on page 10)

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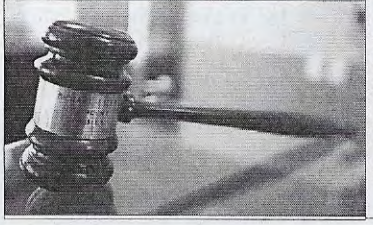
"During the past year, I have been involved as an expert witness for the defense in 14 SVP cases (tried in California, Washington and Iowa). My role has been to clarify what is meant by the wording of the Paraphilia section in DSM-IV and it certainly does badly need explaining. The DSM-IV paraphilia section is written far too imprecisely to meet the high standard of precision needed in a legal context. This is because DSM-IV was written primarily for clinicians- not for lawyers, judges, forensic evaluators and juries.

I wish we had done a much better job of providing an explicit definition of Paraphilia. Had DSM-IV been written with SVP laws in mind, we could have made crystal clear that rape was not meant to be considered a mental disorder. Rape as a psychiatric disorder has been soundly rejected by DSM-III (in 1980), by DSM-IIIR (in 1987), by DSM-IV (in 1994), and recently by DSM-5. With clearer writing, we could have precluded the subsequent rampant over-diagnosis of Paraphilia (based on a fundamental misunderstanding of the intent of DSM-IV) that has led to the unjustifiable psychiatric commitment of rapists whose acts are a manifestation of simple criminality, not of a mental disorder.

Unfortunately, we were completely unaware of SVP laws when we wrote DSM-IV and did not anticipate that rape (misconstrued as mental disorder) would ever be used as an excuse for Psychiatric preventive detention.

The misguided diagnoses trigger a serious erosion of the constitutional protections that should be enjoyed by the individuals involved, resulting in a misuse of often life-long psychiatric commitment as a form of extended preventive detention. But the grave consequences of our poor wording (and the evaluator's misunderstanding of it) stretch far beyond the violation of the individual civil rights of those unfairly committed. The widespread practice of allowing SVP commitments based on inaccurate diagnosis gravely impairs the integrity both of psychiatry and of the constitution.

Feeling badly about my failure to anticipate and prevent the misunderstandings of DSM-IV, I have tried to correct them by writing a series of papers, by giving talks to the evaluators who participate in SVP hearings, and in these blogs. I already knew from my conversations and readings of the literature that the misuse of



DSM-IV was serious and widespread. But my recent experience of reviewing so many real cases has been quite an unpleasant eye opener - revealing that diagnostic errors are far more prevalent and egregious than even I had previously thought possible.

So far I have read close to 100 reports prepared by state evaluators (all psychologists). This is, of course, a very small sample, but the results are unanimous enough to draw some interesting and very troubling early inference:

One: In not one case did the sexual offender qualify for anything remotely resembling a DSM-IV diagnosis of paraphilia. Thus, my base rate of real Paraphilia in SVP cases so far is 0%, and this is in an enriched sample of offenders who have been carefully screened and are presumed to have paraphilia. Certainly state evaluators are wildly over-diagnosing Paraphilia and the courts are sanctioning unjust psychiatric incarceration based on their misguided opinions. Two: The evaluators all misinterpreted DSM-IV in just the same way. They routinely equate the act of committing a sex crime with having a mental disorder. Their reports gave remarkably detailed descriptions of the offender's criminal behavior, but provide little or no rationale or justification for a diagnosis of paraphilia. The write-ups are all long and thorough - but completely off point and generic. Although written by dozens of different evaluators, they have a rote quality and all repeated exactly the same mistakes.

Three: The most common error was to assume that a behavior alone (the act of rape) can by itself somehow qualify someone for mental disorder diagnosis of Paraphilia. As noted, rape as a mental disorder has been rejected by psychiatry 4 times in over 35 years and by now should have no place in expert testimony. The Supreme Court had accepted the constitutionality of SVP statutes only if the offender has a mental disorder that can distinguish him from the common criminal. This standard was not even approached in any of the 14 cases. There was little (and always unconvincing) attempt to establish grounds for paraphilia beyond the fact that a sex crime had been committed.

Four: The second most common mistake was to declare idiosyncratically that sex with a postpubescent teenager indicates paraphilia. Statutory rape is a crime. It is not included anywhere in DSM -IV as a mental disorder and should not be considered grounds for diagnosing one.

Five: The third mistake was to assume that any act of sex with a child represents pedophilia – even in cases where it is clearly no more than an opportunistic or disinherited exploitation that is not at all representative of the individual's preferred or obligatory pattern of typical sexual arousal.

Six: The defense prevailed in 3 of 4 cases that have been settled so far (1 won and 1 lost at jury trial,2 were dropped by prosecutors, and 10 are still pending). My sample is very small, but does suggest that prosecutors and juries can at least sometimes be brought to understand that psychiatric diagnosis and hospitalization is not an appropriate disposition for simple criminals who have no real mental disorder.

Seven: public defenders face an uphill struggle defending unappealing clients against incorrect diagnoses made by a community of blithely self-assured but completely misguided state evaluators. Not surprisingly, they are sometimes demoralized and uncertain of their chances of success. I do hope that the momentum is now turning given the recent rejection by DSM-5 of the proposal for "coercive paraphilia." Public defenders can now feel more hopeful.

Eight: The history of psychiatry and of medicine is littered by the rapid emergence and then the equally rapid disappearance of silly fad diagnosis. This will undoubtedly eventually be the well-deserved fate of "Paraphilia NOS, nonconsent" and "Paraphilia NOS, hebephilia." Sooner or later, bad ideas are condemned to be found out or to die of their own foolishness. But this is not the situation that allows for the passive hope that all will come out well in the end. The miscarriage of justice occasioned by misdiagnosis in SVP cases is a grave embarrassment to both psychiatry and to the law, as well as being a violation of the civil rights of the people subjected to it. Every SVP case that is based on a misdiagnosis of "Paraphilia NOS" should be vigorously challenged until this bogus diagnosis is no longer considered permissible as expert testimony.

Conclusions: I am not at all against application of SVP statutes to allow for the psychiatric commitment of properly diagnosed offenders. My opposition is to the use of fake psychiatric diagnosis in a very flawed psychiatric and legal process. This is a wrong that must be corrected and soon. Psychiatric commitment under the SVP statutes should require the presence of a real DSM-IV diagnosis - not an idiosyncratic, unreliable, and incorrect NOS diagnosis.

Which of the official DSM-IV diagnosis are legitimate grounds to justify a commitment under SCP statutes? Pedophilia and sexual sadism are official DSM-IV categories and do count if properly diagnosed (in my experience, a very big if). Individuals with schizophrenic, bipolar disorder, dementia, and mental retardation may commit violent sexual offenses because of delusions or severe deficits in cognition and judgment. In my view, antisocial personality disorder and substance dependence probably should not qualify because these are so ubiquitous in offenders-but I will take up in more detail in my next blog.

Keeping ordinary criminal sexual offenders locked up in a psychiatric hospital after their prison time has been served is a violation of sacred constitutional rights and a dangerous abuse of psychiatry. Our constitution explicitly prohibits double jeopardy and preventive detention - even for potentially dangerous criminals. This is not meant as a kindness to them but rather as a protection of the civil rights of the rest of us. Public defenders should feel encouraged in their defense of constitutional rights - hopefully the tide is turning away from bogus diagnosis and back to good sense (both psychiatric and legal)."

An Oldie but a Goodie

W.A. Percy Foundation Praises TLP.

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[eds.], "Confronting New York's Inhumane Civil Commitment Regime," *William A. Percy Foundation Update*, Winter 2021, p. 10, at 12

Text Excerpt:

"...The one other person who may know civil commitment as well as Galen [Baughman] is Cyrus P. Gladden II, a former attorney who is himself caught in the recesses of Minnesota's infamous Cave of No Return, from which he sends out a monthly legal newsletter on developments in civil commitment law and sex offender research, named *The Legal Pad*. We are proud to host its full run of issues up to the present, along with an index, on the Foundation's website at Wapercyfoundation.org/?page_id=245.

Read the December 2020 issue, where Cyrus tells the long saga of his own case, in which he was framed by an [] couple who ...manipulated their 5-year-old son into accusing Cyrus, who was an easy scapegoat because of a previous conviction for involvement with older boys."

[Editor: Thanks, W.A. Percy Foundation!]

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