The Legal Pad

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"If the government becomes a lawbreaker, it breeds contempt for law; it invites every man to become a law unto himself; it invites anarchy."
Olmstead v. United States, 277 U.S. 438, 485 (1928) (Justice Brandeis, dissenting)

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Feedback? News? Write!

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11th Circuit Rules Substantive Due Process Standard Applicable to SOCC Confinees Is Professional Judgment – Differing from 8th Circuit's Karsjens Ruling That Conscience Must Be Shocked.

Editor's Note: At the same time that the Eighth Circuit was winding up its deliberation case on the application of substantive due process to a parallel sex-offender civil commitment system in Florida.

In diametric opposition to the result reached in the first *Karsjens* appeal, and even inconsistent with the Eighth Circuit's opinion in the second *Karsjens* appeal, the 11th Circuit ruled that the far easier to satisfy "professional judgment" standard governs issues of the conduct of staff in such facilities even when such conduct was authorized under facility or program rules.

This inconsistency between federal circuits is one of the strongest arguments for Supreme Court review of either or both rulings. Could that happen here? Read on, and judge for yourself.

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by Cyrus Gladden

In *Jamaal Ali Bilal v. Geo Care, LLC et al.*, No. 16-11722 (Nov 9, 2020), the federal Eleventh Circuit Court of Appeals ruled on a claim by a confinee of the Florida civil commitment center for sex offenders (FLCC), run by Geo Care, LLC, of substantive due process violations alleged to have been committed by transport officers of that facility while transporting Plaintiff (Bilal) to a court appearance at a distance of about 600 miles from that FLCC facility.

Specifically, Bilal complained that his request to stop and be allowed to defecate was denied, forcing him to defecate within the jumpsuit he was wearing, and that his subsequent request to be allowed to stop to clean himself, or alternatively to be cleaned by a nurse and be provided an adult diaper for the remainder of the trip were also denied. He also complained that, upon arrival at the city of his destination, he was forced to stay in a local jail. Given his status as a civil detainee, he asserted that this also deprived him of his substantive due process rights. The district court dismissed Bilal's complaint for failure to state a claim.

The Eleventh Circuit reversed that dismissal and reinstated the case for further proceedings. In doing so, that federal appellate court found that the manner in which Defendant Geo Care's transport officers handled these transport issues was inconsistent with the standard of professional judgment. Determining that the professional judgment standard governed substantive due process claims by those confined in civil commitment, the Eleventh Circuit declined to 'carve out' any exception from this standard for those committed civilly due to past sexual crimes and deter-74 F.3d 1027, 1041, (11th Cir. 1996), the same court in *Bilal* applied *Youngberg v. Romeo*, 457 U.S. 307 (1982), specifically acknowledging the professional judgment standard enunciated in *Romeo*. At 457 U.S. 323, *Romeo* had held that "a substantial departure from accepted professional judgment, practice, or standards" shows that an employee of a civil commitment facility does not make a decision based on sound professional judgment, thereby becoming liable for the deprivation of a plaintiff's substantive due process rights.

It should be noted that *Romeo*, at 457 U.S. 322, held that civilly committed individuals are "entitled to more considerate treatment and conditions of confinement than criminals whose conditions of confinement are designed to punish."

The *Bilal* appellate court ascertained that the governmental interest involved is one of security, and hence analyzed the decisions of Bilal's transport officers under professional standards applicable to such security matters, but specifically held that such security standards are different for the civilly committed – including committed sex offenders – than for prisoners or those who have been jailed awaiting trial or sentencing.

Noting an earlier successful case by a Florida prisoner also alleging being refused a defecation break during a long transport (*Brooks v. Warden*, 800 F.3d 1295 (11th Cir. 2015), the Bilal appellate decision held that the nearly identical refusal by transport officers violated Bilal's substantive due process right to sanitary circumstances of such a transport.

Importantly, the Eleventh Circuit went on to also rule that Bilal's complaint about being housed in a jail at the city of his destination for the court proceeding also validly stated a claim of deprivation of Bilal's substantive due process rights. The court distinguished *Meachum v. Fano*, 427 U.S. 215 (1976), which had rejected a similar claim, but one raised by a transported prisoner, not a civilly committed person.

Citing *Lynch v. Baxley*, 744 F.2d 1452, 1458 (11th Cir. 1984), in which a similar claim by a one awaiting civil commitment proceedings was upheld, the *Bilal* court acknowledged that "those awaiting involuntary civil commitment proceedings have a liberty interest in not being housed unnecessarily in jails." *Bilal* further clarified: "[E]ven if the mentally ill represent a danger to themselves or others, they may not be housed in jails if less restric-Most significantly, *Bilal* expressly stated:

"We reject Defendants' suggestion that those who have been civilly committed under Florida's Jimmy Ryce Act somehow do not enjoy the same protections from punishment as those who have otherwise been civilly committed. As we explained in *Pesci*, although the civilly committed under the Jimmy Ryce Act have previously been convicted of crimes, they have served their time; they are not prisoners, and the FCCC is not a prison. 739 F.3d at 1292, 1297. So the State may not justify a restraint on a civil committee's constitutional rights 'for reasons related to punitive conditions of confinement.' *Id.* at 1298.

...Under *Lynch*, the State bore the burden of achieving public security in housing Bilal by the least restrictive means – meaning it could not house Bilal at the jail unless no mental-health facility was both secure and within a reasonable distance of the Escanaba County courthouse. Because Bilal was housed in a jail instead, he has sufficiently stated a Fourteenth Amendment claim for purposes of surviving a motion to dismiss."

In sum, the *Bilal* decision by the Eleventh Circuit demonstrates once again that the Eight Circuit's decision in the first appeal of *Karsjens* is exceptional and out of step with accepted understanding of substantive due process as applied to mental health confinees, including those committed on records of former sex crimes after completion of their prison terms.

Newgate Prison, London. Any punishing conditions on civil confinees are too much.

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Running Out of Gas: Commitments without Current: (a) Disorder/Abnormality; (b) Volitional Impairment AND (c) Dangerousness Must End.

Editor's Note: Recently, the *Karsjens* remand discussed in the Extra Edition (Vol. 5, No. 3A) has prompted discussion of the impact of *Foucha* to committed sex offenders who remain confined, and whose original 'diagnoses' of sexual/personality disorder(s) or original guesstimations of dangerousness may no longer apply, if only due to advancing age. This memo template sketches out how this argument for termination of commitment can be made. Although specific to Minnesota law, both *Foucha* itself and in interesting federal case out of North Dakota (*Ireland v. Anderson*) make it clear that, with only some modification to reflect state law elsewhere, this argument can be made anywhere.

Foucha v. Louisiana Applies Herein, Requiring Petitioner's Release and the End of His Commitment Because He No Longer Presents a Danger to the Public to the Standard Required for Commitment under Either SPP or SDP Formulations of the *MCCTA of 1994*.

1. The Standard Set by *Foucha v. Louisiana* for Release from Civil Commitment in Order to Comport with Substantive due Process.

Foucha v Louisiana, 504 U.S. 71, 112 S. Ct. 1780, 118 L. Ed. 2d 437 (1992), concerned a former criminal defendant ruled not guilty by reason of insanity and sent to a mental hospital. However, he was later assessed by a psychiatrist who concluded that he was no longer mentally ill (if indeed he had ever been). Based on that assessment, Mr. Foucha sought release. The prosecutor objected on the grounds that he still represented a danger of violence to members of the public.

The Supreme Court observed that *Jones v United States*, 463 US 354, 103 S. Ct. 3043, 77 L. Ed. 2d 694 (1983), had

> "...acknowledged that an insanity acquittee could be committed, but held that, as a matter of due process, he is entitled to release when he has recovered his sanity or is no longer dangerous, *id.*, at 368, 77 L Ed 2d 694, 103 S Ct 3043, i. e., he may be held as long as he is both mentally ill and dangerous, but no longer. Here [*Foucha*], since the State does not contend that Foucha was mentally ill at the time of the trial court's hearing, the basis for holding him in a psychiatric facility as an insanity acquittee has disappeared, and the State is no longer entitled to hold him on that basis." *Foucha*, at 504 U.Ss 73, 118 L. Ed. 2d 437....[K]eeping [Foucha] against his will in a mental institution is improper absent a determination in civil commitment proceedings of current mental illness and dangerousness. *Vitek v Jones*, 445 US 480, 492, 63 L Ed 2d 552, 100 S Ct 1254 (1980)."

2. *Kansas v. Hendricks* Did Not Overule Foucha, but Implicitly Held It Applicable to Sex Offender Civil Commitments.

In establishing the requisite elements of a civil commitment of a sex offender , the Supreme Court, in *Kansas v. Hendricks*, 521 U.S. 346, 117 S.Ct. 2072, 138 L. Ed 2d 501 (1997), declared: "Hendricks focuses on his confinement's potentially indefinite duration as evidence of the State's punitive intent. That focus, however, is misplaced. Far from any punitive objective, the confinement's duration is instead linked to the stated purposes of the commitment, namely, to hold the person until his **mental abnormality** no longer causes him to be a **threat to others**. *Id.* at 521 US 363.

3. *Karsjens v. Jesson* Acknowledged Applicability of the *Jones-Foucha* Standard to Sex Offender Commitment Specifically.

The District Court ruling in *Karsjens v. Jesson*, 109 F. Supp. 3d 1139, 2015 U.S. Dist. LEXIS 78171 (D. Minn., June 15, 2015), at 2015 U.S. Dist. LEXIS 37, stated:

> "With respect to the duration of a civil commitment, "the Constitution permits the Government . . . to confine [an individual] to a mental institution until such time as he has regained his sanity or is no longer a danger to himself or society." *Jones [v. United States]*, 463 U.S. at 370. Accordingly, a civilly committed individual is entitled to release when he is *no longer mentally ill or dangerous*. See *Foucha*, 504 U.S. at 77-78 (stating that under the Supreme Court's ruling in *Jones*, a "committed acquittee may be held as along as he is both mentally ill and dangerous, but no longer"). As a matter of due process, it is "unconstitutional for a State to continue to confine a harmless, mentally ill person." *Id.* at 77 (citing *O'Connor v. Donaldson*, 422 U.S. 563, 95 S. Ct. 2486, 45 L. Ed. 2d 396 (1975)). "Even if the initial commitment was permissible," a civil commitment may not "constitutionally continue after that basis no longer exist[s]." *Foucha*, 504 U.S. at 77 (citing *O'Connor*, 422 U.S. at 565). Under that reasoning, an individual who no longer meets the criteria for commitment should be entitled to release."

Nothing in the appellate opinion of the Eighth Circuit that followed overturned that substantive due process principle. *Karsjens v. Jesson*, 845 F.3d 394; 2017 US App LEXIS 92017 U.S. App. LEXIS 9 (January 3, 2017). At 845 F.3d 409, that opinion cited *Call v. Gomez*, 535 N.W.2d

A Closer Look....

312 (Minn. 1995), but only to what it determined to be procedural adequacy of review of release petitions as established by statute. As to the requirement of *substantive* due process, Call v. Gomez (discussed immediately *infra*) speaks for itself.

4. *Call v. Gomez* Accepted That *Foucha*'s Substantive Due Process Standard Applies to the Right to Release from a Minnesota Sex Offender Commitment.

In *Call v. Gomez*, 535 NW2d 312, at 318-19 (Minn. Supr. 1995), the Minnesota Supreme Court had this to say definitively about the standard of substantive due process applicable to commitments of either type under the MCCTA of 1994:

> "We believe that so long as application of the statutory criteria comports with the basic constitutional requirement that "the nature of commitment bear some reasonable relation to the purpose for which the individual [was originally] committed," the statutory discharge criteria set forth in section 253B.18, subdivision 15, should apply to persons committed as psychopathic personalities. *Foucha v. Louisiana*, 504 U.S. 71, 79, 118 L. Ed. 2d 437, 112 S. Ct. 1780 (1992); 4 see also *Jackson v. Indiana*, 406 U.S. 715, 738, 32 L. Ed. 2d 435, 92 S. Ct. 1845 (1972); *Lidberg v. Steffen*, 514 N.W.2d 779, 783 (Minn. 1994)....
>
> In *Blodgett*, ...we stated:
>
> 'In *Foucha* the confinement was for insanity and, when the insanity was shown to be in remission, the United States Supreme Court said Foucha had to be released. Here, if there is a remission of Blodgett's sexual disorder, if his deviant sexual assaultive conduct is brought under control, he, too, is entitled to be released.' *Id.* at 918 (footnotes omitted)."

5. *In re Fugelseth* Clarified Post-*Karsjens* That the *Call*-Acknowledged *Foucha* Standard Still Applies to MCCTA of 1994 Sex Offender Commitments.

In re Fugelseth, 907 NW2d 248, at 252-3 (Minn. Ct. App. 2018), put the matter this way:

> "...[I]n light of *Call*, the first paragraph of section 253D.31 must be applied in a manner that ensures that an SDP or an SPP is "discharged if no reasonable relation exists between the original reason for commitment and the continued confinement.' See *id.* at 319. To fulfill that principle, the *Call* court held as follows:
>
> So long as the statutory discharge criteria are applied in a way that the person subject to commitment ...is confined for only so long as he or she continues both [1] to need further inpatient treatment and supervision for his sexual disorder and [2] to pose a danger to the public, continued commitment is justified. *Id.* The commissioner notes that, in essence, the *Call* court held that the first requirement in the first paragraph of section 253D.31 (that the committed person be 'capable of making an acceptable adjustment to open society') no longer applies. See *id.* Accordingly, under *Call*, a person committed as an SDP or an SPP must be fully discharged from his civil commitment unless he '[1] continues to need inpatient treatment and supervision . . . and [2] continues to be a danger to the public.' See *id.*"

6. *Ireland v Anderson* Illustrates the General Applicability of the *Foucha* Standard to Sex Offender Civil Commitment Terminations of Commitment.

A case in federal court in North Dakota concerning that state's sex offender civil commitment regime, *Ireland v Anderson*, illustrates the continued general applicability of the *Foucha* substantive due process standard as governing termination of commitment of a sex offender under legislation highly similar to the MCCTA of 1994. At 2016 U.S. Dist. LEXIS 185331 (September 22, 2016), the Report and Recommendation in *Ireland* stated:

> {2016 U.S. Dist. LEXIS 44} "...There is no question that a civilly committed individual "may be held as long as he is both mentally ill and dangerous, but no longer." *Foucha*, 504 U.S. at 77 (emphasis added). The state "has no interest in confining individuals involuntarily if they are not mentally ill or if they do not pose some danger to themselves or others." *Addington v. Texas*, 441 U.S. 418, 426, 99 S. Ct. 1804, 60 L. Ed. 2d 323 (1979).
>
> ...The plaintiffs cite statutes of thirteen other states that mandate governmental action if a civilly committed sex offender no longer meets criteria for civil commitment. (Doc. #393, p. 4 n.1).
>
> ...The North Dakota courts, however, have not specifically construed chapter 25-03.3 to include an affirmative duty to initiate discharge of those who no longer meet SDI criteria. The defendants ask this court to consider the statutory interpretation they advance in their motion as if it were authoritative state case law. But, it is not authoritative case law; rather,{2016 U.S. Dist. LEXIS 51} it is the

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defendants' assertion that they apply chapter 25-03.3 so as to satisfy substantive due process. The plaintiffs vigorously contest that assertion.

...Thus, the focus of this court's inquiry is on SDIs who no longer meet criteria as to whom DHS has not initiated release, rather than on SDIs who no longer meet criteria as to whom DHS has initiated release. If an SDI no longer meets criteria, due process requires that he be discharged. But, if he has had a discharge hearing within the preceding twelve months, chapter 25-03.3 does not allow him to petition the court for discharge until the twelve month period ends. Thus, he could be discharged only if DHS initiates the process with the state court. Whether DHS does that through filing an annual examination report or through filing a document labeled a "petition," is not the critical question. The critical question is when that filing is made with the state court. On its face, chapter 25-03.3 does not require that DHS file anything{2016 U.S. Dist. LEXIS 54} with the court between annual examination reports. Thus, on its face chapter 25-03.3 allows a person to continue to be confined as an SDI, for up to one year, even though he no longer meets statutory criteria. In this court's opinion, chapter 25 -03.3, on its face, violates substantive due process rights in that respect, because it is not reasonably related to the purposes of chapter 25-03.3. The plaintiffs' cross-motion for partial summary judgment on that issue should be granted....

At 2016 U.S. Dist. LEXIS 61, the District Court adopted that Report and Recommendation, stating with particular pertinence:

"...Further, this court recommends that the plaintiffs' cross-motion for partial summary judgment be granted insofar as it concerns a claim that chapter 25-03.3 is unconstitutional on its face because it does not require that the defendants initiate court proceedings for release of individuals who no longer meet SDI criteria."

From this, it is clear that North Dakota's [illegible] sex offender civil commitment [illegible]

In sum as to this point of substantive due process, there appears to be no room for doubt that the *Foucha* standard applies to termination of commitments under sex offender commitment legislation.

If any SOCC confinees who read this are confident that there is no proof (and, on current facts, probably cannot be) that they now: (a) have a disorder or abnormality; (b) have "serious difficulty" controlling their sexual actions (the *Kansas v. Crane* requirement); AND (c) present a danger to the public of sexual crimes if released substantially beyond that posed by an 'ordinary' sex offender upon release from prison, each one should seek out attorney representation for a petition for immediate termination of his commitment.

Will the fat lady sing this time?

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Patients or Prisoners?

SOCC Casts Punishment & Detention as Treatment. How Long Will Courts Buy THAT?

Jacob Sullum, "Civil Commitment of Sex Offenders Pretends Prisoners Are Patients: The Practice Evades Constitutional Restraints by Casting Punishment and Preventive Detention as Treatment," *Reason*, Feb. 10, 2021.

Text:

"It was my understanding that I was to do the treatment, then be released," says Mike Whipple, who recently participated in a 14-day hunger strike at the Minnesota Sex Offender Program's facility in Moose Lake. "Twelve years later, I'm still here, doing the same thing, over and over, and over."

So far the civil commitment program has incarcerated Whipple three times longer than the prison sentence he served. The hunger strike, which involved a dozen of the program's 737 'clients,' ended last week after state officials promised meetings where protesters could air their concerns—but those meetings surely will not resolve the fundamental problem with programs like this, which evade constitutional constraints by pretending that prisoners are patients.

Twenty states, the District of Columbia, and the federal government have laws that authorize civil commitment of sex offenders who would otherwise be released after serving their prison terms. The Supreme Court upheld the practice in 1997, saying it was appropriate for people who 'suffer from a volitional impairment rendering them dangerous beyond their control.'

That logic is puzzling. The state punishes people who commit sex crimes based on the assumption that they could and should have controlled themselves. But when it is time for them to be released, after completing the punishment prescribed by law, the state says that was not actually true; now they must be locked up precisely because they can't control themselves.

If the government decided to retroactively increase an offender's penalty, it would be clearly unconstitutional, amounting to double jeopardy or an ex post facto law. The trick is to cast continued confinement as treatment rather than punishment.

But what if treatment almost never produces a cure that allows a detainee's release? In Minnesota, only 13 detainees have been unconditionally released since the program was established in 1994; more than six times as many have died in custody.

Back in 2015, when not a single 'client' had been certified as fully cured, U.S. District Judge Donovan Frank concluded that Minnesota's 'treatment' was a sham designed to conceal 'a punitive system that segregates and indefinitely detains a class of potentially dangerous individuals without the safeguards of the criminal justice system.' In the United States, he said, 'we do not imprison citizens because we fear that they might commit a crime in the future.'

Yet that is manifestly what laws like Minnesota's do, confining more than 6,000 people nationwide -- not for what they did but for what they might do. Even if that rationale were constitutionally valid, studies from across the country indicate that recidivism among sex offenders, including those who qualify for civil commitment, is far less common than the Supreme Court assumed.

While condemning Frank's ruling, then-Gov. Mark Dayton conceded that civil commitment decisions are no better than guesswork, because 'it's really impossible to predict whether or not [sex offenders] are at risk to reoffend.' That did not faze the U.S. Court of Appeals for the 8th Circuit, which overturned Frank's decision on the ground that people 'who pose [illegible]

[Ed.: On this, see the next two articles.]

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Virginia Bill to Repeal SOCC Law There Is Mulled by Crime Commission.

[Ed., compiled from these sources: "Civil Commitment," 9(2) *The Broadcast*, Winter 2021, p. 2; D. LaVoie, Assoc'd Press (Jan. 19 & 28, 2021); personal letters & conversations]

Two Virginia Democratic lawmakers are spearheading a push to repeal a law activated in 2003 permitting indefinite detention of selected sex offenders after their sentences end at a gulag-like facility under rubric of commitment. Sen. Joe Morrissey (a defense attorney) and "Delegate" Patrick Hope have co-sponsored the bill. The practice of SOCC, said Morrissey, "is as archaic and as Neanderthal a process as I can imagine. We don't sentence people because of what they might do," he said. "That's abhorrent to everything that our democracy and our criminal justice system believes in."

Critics of the law say the process of deciding who will be committed is rife with speculation by state-hired experts. These engage in what are almost universally regarded by academics as merely junk-science methods of analysis. Peer-reviewed articles by such academic experts conclude that this process amounts only to mere guessing on no better odds than chance about who might commit crimes in the future. (See article following.)

Supporters of the repeal proposal have said that sex offenders should be given psychological treatment while they are in prison serving their criminal sentences and not be forced to remain locked up after they complete their prison terms.

Galen Baughman, a gay man, is a classic victim of the bias pervading this commitment process. Galen spent 6 1/2 years in prison after pleading guilty to nonviolent sexual misconduct involving dubious 'offenses' alleged to have occurred when he was 14 and 19.

As he was completing that sentence, the state moved for commitment under the law in question, and he was held for another 2 1/2 years while awaiting trial on that commitment attempt. In Virginia, such commitments are decided by jury (which often does not favor the 'accused'). Nonetheless, the jury on that occasion found that Galen was not a "sexually violent predator" (a term designed to strike unreasoning terror in the minds of jurors and the public). [illegible] "parole," as it is commonly called elsewhere). Galen spent the ensuing years advocating for repeal of such laws in all 20 states (and the federal government) that have them.

Gov. Mark Dayton conceded that civil commitment decisions are no better than guesswork, because "It's really impossible to predict whether or not [sex offenders] are at risk to reoffend."

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technical probation violation after he exchanged text messages with a 16-year -old straight teen male he met at the funeral of a mutual friend. Baughman states that there was no sexual content or innuendo in those short messages. The judge revoked Galen's probation, sentencing him to an additional 21 months in jail.

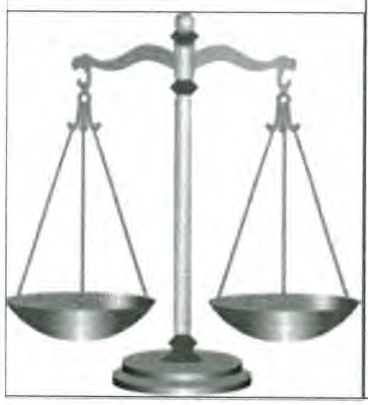
When the state tried a second time at the end of this extra jail term to commit Baughman under that law, a psychologist hired by the state found Galen was not a sexually violent predator. Nonetheless, Attorney General Mark Herring then retained another psychologist who said that Galen met the vague and vastly expansive statutory criteria for such commitment.

In 2019, the case went to trial, wherein the jury was not allowed to hear testimony from two defense psychiatrists or from the first expert (above), all of which found Galen not dangerous, much less afflicted with any condition that could have hampered his ability to control his sexual actions.

Bauman is now 36 years old, with no crimes since age 19. At this writing, he has asked the Virginia Supreme Court to hear his appeal. "This is anyone's worst nightmare — getting locked up, with no exit, with the government claiming it's 'treating' you," he said. The state is trying to punish you for what you might do in the future. This turns the Constitution upside down."

Through October 2020, Virginia committed 689 individuals under that law, but released many of them to a harshly restrictive "conditional release" parole.

Among these releases, recidivism has been only 2%, This is no higher than the recidivism rate for sex offenders not selected for commitment, but instead released straight from prison. This has called into serious question whether their confinement after their prison terms was ever actually necessary at all. Studies in other states, notably Florida and California, have noted similar low recidivism and concluded that such commitment is needless.



About 405 people are now held in that called (unshamingly) "Virginia opponents). However, a 258-bed expansion is currently underway, indicating that such massive retention, rather than release, is the future plan, despite that low-recidivism record.

The suggestion appears quite clear that political creation of hysterical fears on the part of the public and then pandering to such fears by this unreasoning detention is responsible for this planned mass denial of release. Critics say that facility is a place where prison releasees with sex-crime records are forced to serve a second, potentially natural-life term.

If passed, the repeal bill will free all those currently held there and would end the interminable, extremely harsh 'parole' most of those released so far have been forced to undergo. The bill will also remove all labels applied to them under the law and will remove the legal basis for committing anyone in the future based solely on the fear of future recidivism without diagnosis of an actual mental illness, as any other civil commitment requires, rather than mysteriously vague claims of "abnormality" or "disorder."

Sen. Morrissey, the lead patron of the bill, argued that the current law is unfair and punishes offenders twice for the same crime.

The bill was sent to the Virginia Senate Judiciary Committee, which voted to send the bill to the Virginia State Crime Commission for a study, ending its chances of being passed this year.

However, Morrissey says he knew that the bill was a late-coming longshot this year. He hopes to get a favorable recommendation from the crime commission after the group studies the current system.

Morrissey plans to advance the law again for consideration after that, at next year's legislative session. "I do believe people will come around eventually," he says.

Let's hope he's right. Repeal by a state as influential as Virginia could easily start a 'domino effect' of repeal among the other states with similar laws.

In many of those other states, critics have complained of the law's costs, and the fact that it has no effect on the rate of incidence of sex crimes. And, of course, moral commentators everywhere object to its needless life-destroying impact upon those committed.

(In this last connection, see the last article, *post*, comprised of an open letter to a Minnesota legislator who has suggested such repeal and who may introduce a similar bill in the Minnesota legislature soon.)

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A Series of Report

Virginia's Crime Commission of the Inconvenient Scientific Truths Revealing Why Its SOCC Law Inflicts Anti-Scientific Savagery Upon Ex-Offenders Just Seeking Return to Society and to Prove Their Desistance from Crime.

Editor's Note: This begins a series in sequence, *in toto* comprising all of my *Report* to the Virginia Crime Commission advocating repeal of that state's SOCC law. I include this series in TLP because the contents of this *Report*, taken as a whole, offer a profoundly impactful, universally applicable argument for repeal of such laws in every state which has one. So, get ready to either transcribe this first of many installments for this purpose or to scrapbook this and all following editions necessary to fully comprise this *Report* (219 pages long in its submitted edition).

Installment 1:

INTRODUCTION

By way of self-introduction, I am a 69-year-old former lawyer and a citizen of the State of Minnesota. I am also its involuntary guest at the Minnesota Sex Offender Program's Moose Lake, MN facility, a parallel program to the sex offender "civil" commitment program in place in Virginia. My presence in this facility was prompted by a false accusation against me I 1995, ripened into wrongful conviction. Frankly, this perspective makes the horrific folly of this "commitment" a personal matter.

Nonetheless, from the beginning, I have made my investigation into this topic as impartial and as complete as facts allow. The facts comprising this Report are not a 'slant' on this issue, but simply the facts I encountered. I conclude that there really is no valid defense of such so-called commitment.

I write and submit this *Report* to the Virginia Crime Commission on the occasion, and in support of the recent introduction of a bill in the Virginia Legislature by Senator Joe Morrissey proposing an end to that Virginia commitment program via repeal of the statute authorizing it. It is my understanding that this bill has been referred to the Commission for its study and report to the Legislature. I hope this *Report* will provide great illumination to the Commission on the anti-scientific outrage presented by such so-called commitment.

For any technical shortcomings that may appear in the following pages, I willingness to receive input from those, myself included, with no invitation seven days ago. Putting this Report together in that time frame has been a frantic process not permitting close inspection of every jot and tittle.

More to the substance included, this Report had to be pieced together from previous writings in order to make the deadline for its receipt. This is unfortunate because, subsequent to those earlier writings, I have received mountains of research dwarfing the previous amount reflected herein. That misfortune is doubled by the fact that the overwhelming portion of such subsequently received items not only completely confirms the points made herein, but in fact paints a much more harshly clear, damning picture of all of the misdoings that comprise sex offender "commitment." As to this regrettable situation, I can only offer, upon request, further (new) support for any point herein and/or in response to any question peripheral to the content hereof, but which is of interest to the Commission in this study.

I confine this *Report* to matters addressing the defiance of science by sex offender "commitment" regimes in our country (the only place on the planet where such commitment is practiced). I pass by issues concerning the massively burdensome cost of operating such systems, which saps away dollars that could instead be put toward financing amazingly effective sex-crime prevention programs. States which have opted to follow the latter path rather than pouring funds down the rat hole of sex offender commitment have pleasantly discovered that their sex-crime incidence rates have plummeted, while 'commitment states' have struggled to make headway against such rates. The moral is that sex offender commitment does not work to reduce sex crime rates and hence is a massive and reckless waste.

I also choose to pass by the very troubling issue of the human tragedy posed by infliction of long-term involuntary confinement under title of so-called commitment of one with a history of one or more sex offenses committed decades ago. Others, I am sure, can and will present that description, with its issues of ethics and the morals of public governance, to the Commission. While I am a real-time witness to much of this aspect of the 'commitment' under examination, I am confident that others in great numbers can testify to such horrors and mistreatment, as well as simply to the 'retroactive death penalty in slow motion' which confinement under rubric

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of 'commitment' until death comprises.

Instead of these matters, I confine myself herein to a subject that very few in such commitment have more than a dim awareness of (beyond the experience of personal victimization by such commitment itself). I bring to the Commission the knowledge I have amassed on the impact of science — real science, not the junk science constantly advanced in fraudulent seeming support of such commitment.

Since 2011, I have been engaged in extensive and in-depth research into all legal and scientific issues concerning this type of commitment. The more I discovered about the scientific aspects involved in such commitments, the more I became convinced that such so-called "civil commitment," intended to reduce the incidence of sex crimes, does not in fact do so, and is such a wildly anti-scientific process as to warrant the revocation of the professional licenses of all expert

I wrote a book on my findings, sub nom. "Lawyer X," titled *Deviant Justice – The American Gulag* (Yonkers, NY: In Depth Media imprint, MindGlow Media, 2014). While hardly a best-seller and although it focuses on judicial decisions in Minnesota, it nonetheless is a good place to start for those utterly unfamiliar with the monstrosity that this supplemental incarceration comprises under mere rubric of commitment. However, while that book was aimed at laypersons and was conversational in approach, this document focuses exclusively on the science involved and is aimed at professionals familiar with the basics of the problem presented by such commitment. I am confident that the Commission has great, collective knowledge, certainly in the field of criminology and even in the role of mental health issues sometimes involved in criminal cases.

However, the field of psychological knowledge related to sex offender commitment is quite esoteric, even insular. Indeed, those practicing in that field, in my perception, frequently hide its details behind that insularity to avoid scrutiny by scientific investigators and to thwart their investigations. A good example discussed herein is a 'checklist' of supposed "psychopathy" (a classic junk-science concept without valid application to the question of sex-crime recidivism). The creator of that checklist has steadfastly refused to divulge any of the research he claims to have conducted in that creation process and has even litigated against those who have revealed any of the text of, or even summarized the manual he provides only to those he selects to use that checklist in so-called sex-offender assessments.

I fervently hope this book-length report, consisting mostly of the words of noted academic figures in psychology and allied

fields, appearing in peer-reviewed academic articles and academic-press books, will turn over the rocks and cast light on the scientifically corrupt, alarming practices in this charade at commitment. I urge the Commission to attend to it closely and thoroughly. Doing so should convince you abundantly that this practice has no basis in science, and pointlessly and needlessly inflicts long, often offenders whose prison sentences, long as they were, have already expired.

It is a study in the artificially heightened fear and loathing experience by the public merely to create a 'demand' for this full-employment act at public expense of a vast army of participants in this commitment system. This is a corruption of what civil commitment should be. It simply cannot be allowed to stand. I hope that, when you have finished studying this Report and following through with further investigation into each of its points, you will join me in concluding that the statute authorizing this system to exist must, as an immediate, urgent need, be repealed.

I. THE BARELY-DISGUISED REAL MOTIVATIONS FOR ENACTMENT OF SEX OFFENDER CIVIL COMMITMENT LAWS IN THE 20 STATES HAVING THEM DEMONSTRATE THEIR UNETHICAL, EVEN IMMORAL NATURE, CASTING A PALL ON THE LEGISLATURES THAT ENACTED THEM AND FAIL TO REPEAL THEM WHEN CONFRONTED WITH THE TRUE FACTS CONTROLLING THE MATTER.

A. Sex Offender Civil Commitment ("SOCC") Is Part of the "War on Sex Offenders" Relying on Preventive Detention Disguised as Civil Commitment, and Hence Is a War Against Constitutional Liberty for All, with Fear its Weapon of Mass Destruction and Universal Tyranny Its Goal.

Preeminent scholars on the subject of sex-offender civil commitment, *Eric S. Janus & Wayne Logan*, writing in "Substantive Due Process and the Involuntary Confinement of Sexually Violent Predators," 35 *Conn. L. Rev.* 319 (Winter, 2003), observe at p. 320 that civil commitment of sexually violent predators is a "cornerstone of what has been aptly called America's emerging 'preventive state,' which, rather than achieving social control by means of avowed penal regimes behind prison walls, seeks to 'identify and neutralize dangerous individuals before they commit crimes by restricting their liberty in a variety of ways'" (quoting *Carol S. Steiker*, "The Limits of the Preventive State," 88 *J. Crim. L. & Criminology* 771, 774 [1998]).

Thus, illustratively, in *Belleau v. Wall et al.*, 2015 U.S. Dist. LEXIS 125909 (E.D. Wis. 2015), the court stated:

"...[A] psychologist's opinion that a particular person is more likely than others to commit a serious crime has never in our nation's past been held a sufficient justification for the State to restrain one's liberty in such a fashion. The problem with such an argument is that there is no reason to limit its application to individuals who we believe are more likely than others to commit crimes of child sexual assault. As horrifying as [illegible] assault, armed robbery, murder, or terrorism. To accept the argument that the unquestionably good end of preventing despicable crimes against children justifies the State imposing such restraint upon those it thinks more likely to commit such crimes in the future has dangerous implications for the liberty of all. It is the kind of reasoning that can turn a nation with a limited government into a police state." (emphasis added).

David Gottlieb, "Preventive Detention of Sex Offenders," 50 *U. Kan. L. Rev.* 1031 (June 2002), expounds upon the perils of substituting preventive detention for the criminal law thus:

p. 1032: "While [sex offender commitment] Acts are politically popular, they carry with them significant potential for abuse. The suspension of the 'great safeguards which the law adopts in the punishment of crime and the upholding of justice' and the use of civil commitment against criminally responsible individuals is an assumption of power that ought to concern us greatly. As much potential for abuse as there is in the awesome power of the government to punish crime, there is perhaps even more in government deprivations of liberty for 'preventive' purposes."

p. 1040: ...Mental abnormalities include such conditions such as alcoholism, insomnia, learning disorders, eating disorders, and other psychological conditions possessed by individuals we have always thought of as sane. More importantly, perhaps, personality disorders include 'antisocial personality disorder,' a condition possessed by anywhere from 40% to 75% of convicted criminals. Under the literal terms of the SVP Act, indefinite confinement of individuals possessing this 'chronic condition' characterized by 'a pervasive pattern of disregard for, and violation of, the rights of others' is permissible, so long as the other requirements of the Act are met."

p. 1041: "Of course, the SVP Act does not purport to incarcerate all individuals with a mental disorder that predisposes them toward crime, but rather convicted criminals (primarily) with a predisposition to commit sex crimes. But neither of these restrictions is of any constitutional significance. Therefore, there would be no additional basis for attacking a civil commitment law targeting individuals predisposed to commit crimes of violence or crimes against property, as well as sex crimes. Nor is there any constitutional requirement that a state limit a commitment law to convicted criminals. If the Act is truly civil, it should be applicable to any members of the population who are 'likely' to commit future acts of criminal violence. Thus, the SVP Act at least threatens a regime of civil detention for individuals who possess a statistical

longest sex offender treatment programs were designed to be completed within three years. Congruent to this is the assertion in *Cory Rayburn Yung*, "Sex Offender Exceptionalism and Preventive Detention," 101 *J. Crim. L. & Criminology* 969, 983 (Summer, 2011), that there is no reason to think that such treatment "could not be done during an offender's time in prison." *Yung* concludes: "The end result of these new [sex offender commitment] programs hardly seems to be medical treatment, but instead is large-scale preventive detention." (*Id.*, p. 984).

Stepping back, *Yung*, at 997-98, observes:

"The distinction between those who commit sex offenses and other criminals is not so much substantive as it is political. America has begun what can only be described as a criminal war on sex offenders akin to the War on Drugs that has continued for nearly forty years. And as in any war, domestic or foreign, the normal rules protecting liberty are suspended and significant exceptions are made to allow for wartime governmental action. In the case of the drug war, the changes to constitutional doctrine and policing in general have been substantial. Once these exceptions are made, they are rarely, if ever, removed. A criminal war is marked by three elements: myth creation, exception-making, and a marshaling of resources.

A psychologist's opinion that a particular person is more likely than others to commit a serious crime has never in our nation's past been held a sufficient justification for the State to restrain one's liberty

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"A highly salient point throughout this article has been the way in which precedents have enormous staying power. And when an exception is created for sex offenders, it becomes a rationale for another vulnerable group to be targeted. Ultimately, the exception stops being exceptional and instead becomes the rule. This has been a particularly negative aspect of the War on Drugs. Police forces have become militarized in areas beyond drug-fueled gang violence. The doctrines of the First, Second, Fourth, Fifth, Sixth, Eighth, Ninth, Tenth, and Fourteenth Amendments have all been changed because of certain aspects of the drug war. As the War on Sex Offenders is still in its early stages, it is too early to tell what the long-term implications of ongoing exception-making will be." (*Id.*, at 1001-02).

Yung is specifically discussing sex offender commitment-as-preventive-detention. By design, an SOCC law is vague, overbroad, and it allows proof of commitment elements by a combination of unwarranted presumptions and utterly unscientific testimony by so-called experts. That combination essentially reduces to scientifically impossible prediction of future recidivism by the sheer innuendo of "risk."

In sum, an SOCC law is a deliberate violation, *ab initio* in any given case, of the 'limited duration' principle, as being, by design and performance, in reality a 'permanent duration' detention.

This is no small matter, even to others who have never had any connection to sex crimes. There has been a small, but persistent undercurrent advocating this more general 'tyranny of fear.' Consider, for example, this assertion by *Edward P. Richards*, "The Jurisprudence of Prevention: The Right of Societal Self-Defense Against Dangerous Individuals," 16 *Hastings Const. L. Q.* 329, 329 (1989): "As America moves into the twenty-first century, we must determine to what extent individual liberties must be sacrificed for the common good." See also *Adam Klein & Benjamin Wittes*, "Preventive Detention in American Theory and Practice," 2 *Harv. Nat'l Sec. J.* 85, 191 (2011) (claiming, with approval, that "government has many preventive detention powers ...to protect the public from serious harms" by "the truly dangerous").

Isaac D. Buck, "The Indefinite Quarantine: A Public Health Review of Chronic Inconsistencies in Sexually Violent Predator Statutes," 87 *St. John's L. Rev.* 847, note 50 (Fall 2013), states:

"For a compelling thesis on why society is becoming more comfortable with 'preventive' action, and more generally, preventive detention – from sexually violent predator statutes to the detention of suspected terrorists, see *Joseph Margulies*, 'Deviance, Risk, and Law: Reflections on the Demand for the Preventive Detention of Suspected Terrorists,' 101 *J. Crim. L. & Criminology* 729, 731 (2011). *Margulies* argues that a triumvirate of movements: (1) society's increased desire to 'purge the community of the undesirable elements by dramatically increasing the government's power to monitor, exclude, restrain, and imprison those considered a threat,' (2) a refinement of 'security' which seeks an elimination of risk, and (3) an increased call in criminal procedure for protection by the state, have resulted in increased preventive detention. *Id.* Some scholars have begun to argue for an extension by preventive detention regimes that would establish commitment without requiring a showing of mental illness. See, e.g., *Adam Lamparello*, "Why Wait Until the Crime Happens? Providing for the Involuntary Commitment of Dangerous Individuals Without Requiring a Showing of Mental Illness," 41 *Seton Hall L. Rev.* 875 (2011)."

The end result of these new [sex offender commitment] programs hardly seems to be medical treatment, but instead is large-scale preventive detention.

Justin Engel, Comment: "Constitutional Limitations on the Expansion of Involuntary Civil Commitment for Violent and Dangerous Offenders," 8 *U. Pa. J. Const. L.* 841 (Aug. 2006), at p. 873), bluntly concludes: "...[T]here is little standing in the way of a massive expansion of civil commitment," explaining at footnote 46:

"See also *Fred Cohen*, "The Law and Sexually Violent Predators – Through the *Hendricks* Looking Glass," in: *The Sexual Predator: Law, Policy, Evaluation and Treatment* 1-8 (Anita Schlank & Fred Cohen eds., 1999) (suggesting that, under *Hendricks*, it would be doctrinally feasible to enact a statute that provides for the involuntary civil commitment of pathological gamblers); *John Kip Cornwell*, "Understanding the Role of the Police and *Parens Patriae* Powers in Involuntary Civil Commitment Before and After *Hendricks*," 4 *Psychol., Pub. Pol'y & L.* 377, 400-01 (1998) (suggesting that arsonists and women suffering from acute "premenstrual dysphoric disorder" could be committed based on a mental abnormality formulation similar to that approved in *Hendricks*);...."

Forbidden Purpose

In a generally darker time and place, homosexuality was declared illegal in Nazi Germany in 1933 – not just homosexual acts, but the very nature of being a homosexual. The leading spokesman of the German homosexual segment, Rudolf Brazda, "was arrested a second time under Section 175A [that statute] in 1941. By that time, the official line from the Reich Main Security Office was that 'all homosexuals who have seduced more than one partner are, after their release from prison, to be placed in preventive custody.' Yet another instance of Nazi double-speak, 'preventive custody' was code for internment in a concentration camp, which had been taking place since the fall of 1933." (*Alistair Newton*, "Children of a Lesser Holocaust," *The Gay and Lesbian Review/Worldwide* [Jan./Feb. 2012]). Thus, the current post-incarceration persecution of sex offenders is not the first instance of such identity-based persecution. This modern sex offender "commitment" is just "preventive custody" by another name.

To prevent this trend from changing our nation into a totalitarian nightmare along the lines of *1984* and *Minority Report*, this vanguard of such a return to the tyranny of unrestrained and unrestrainable bills of attainder must be struck down. Nor is this merely a 'fringe' alarmist view. Prof. Eric S. Janus, in his provocative, yet rigorously analytical book, *Failure to Protect: America's Sexual Predator Laws and the Rise of the Preventive State* (Cornell Univ. Press, 2006), expands upon this very real prospect thus:

pp. 4-5: "...[Sexual predator] laws allow the establishment of an expansive alternate system of justice, in which radical prevention prevails at the expense of liberty. Sexual predator laws do this by reintroducing and re-legitimizing the concept of the degraded other. Membership in this outsider group is then used to rationalize a diminished system of justice, in which the normal protections of the Constitution do not apply....

"Here is the cause for alarm: the predator laws ...may jump from the relatively narrow realm of sexual violence to the radically broader universe of providing protection from the risk of crime – and terrorism – in general."

"The preventive state claims the right to deprive people of liberty before criminal action is afoot. Under this approach, it is enough that there is a potential for harm, that the individual's psychological makeup – or political inclinations – poses a grave risk. This attitude rips a large hole in the fabric of our American concepts of justice....

"If the government can lock up sexual predators in advance of their (predicted) crimes, why not other criminals? Why not terrorists? Why not political subversives? What is to stop the state from assessing all of us for 'risk' and locking up prophylactically those whose RQ – risk quotient – is assessed above an arbitrary threshold?" [emphasis added. All following emphases are also editorially supplied, but without notation as such.]

"We do not allow incarceration for the propensity to commit a crime. ...The predator laws pick out a group of people and place them in a specially degraded legal status that allows the state to treat them in ways that no other person can be treated."

p. 41: "...[I]n the technical details of the legal system, as the broad principles of limitation are interpreted and applied in individual cases, these hopeful principles of constitutional limitation are largely eviscerated. The rhetoric is preserved; the evisceration is nearly invisible ...in the silent findings of fact of hundreds of local courts.

"If we are honest, we know that the constitutional pronouncements are a fig leaf, designed to cover the embarrassment of a law that plainly breaks from fundamental American principles of freedom."

pp. 94-5: "We are at risk of becoming a 'preventive state,' in which the paradigm of governmental societal control has shifted from solving and punishing crimes that have been committed to identifying 'dangerous' people and depriving them of their liberty before they can do harm. The impulse for prevention has taken its strongest form in two disparate areas: the anti-terrorism efforts since 9/11 and the sexual predator laws. In both areas, the government has erected an 'alternate system of justice' in which the normal protections of our civil liberties are substantially degraded in order to make room for an aggressive preventive agenda."

Thus, the fundamental question that is inherently implicated in the issue of sex offender commitment is that of governmental powers versus individual liberties. It cannot and should not be ignored in a tunnel-visioned focus solely on the current context itself. It is the question the answer to which will pass down to posterity and will, in large part, determine the fate of our American Republic and the future preservation of the very concept of the rights of the individual. And it is the question that must be faced in resolving this issue.

This not only violates the aforesaid duration principle, it reveals the SOCC system for what it is: a usurpation of the primacy of the criminal law, and natural-life prevention as a political act of raw fear-based incapacitation, deterrence, and group-retribution – effectively, mob-rule by governmental fiat. Thus, for example, *Peter C. Pfaffenroth*, writing in "The Need for Coherence: States' Civil

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Commitment of Sex Offenders in the Wake of Kansas v. Crane," 55 *Stan. L. Rev.* 2229 (June 2003), at 2257, states: "Civil commitment changes the nature of punishment from a system based on conviction for past offenses beyond a reasonable doubt, to one based on preventive detention justified by qualitative estimates of future dangerousness. It erects a 'shadow criminal law.'"

In short, 20 states, including Virginia, have, through SOCC laws, signed onto *Yung*'s "War on Sex Offenders." All of *Yung*'s three indicia of such a "criminal war" are present herein:

(1) "Myth creation," especially by the Act's presumption that a past record of offenses, plus a "disorder," inherently equate both serious difficulty" in controlling one's sexual behavior and a "high likelihood" of recidivism;

(2) "Exception-making," in that, despite the incontrovertible fact that all other crimes have higher recidivism rates than that of sex crimes, and despite that a majority of prison inmates in general have "antisocial personality disorder" and that one in five of them are patently obvious psychopaths, it is sex offenders who have been singled out for such post-prison-term detention; and

(3) "Marshaling of resources," in that combined costs of the commitment process, of the amortized facility construction costs, and of the annual cost of confinement and 'treatment' of MSOP, are staggering -- in all amounting to several times the annual cost of prison confinement, and approximately ten times the entire cost of ISR surveillance, monitoring, and treatment of sex offenders in the community.

As *Yung* aptly points out, the violence done to bedrock individual rights of the Bill of Rights in sole service of the perfectly transparent, monstrously totalitarian judicial decision-making just to keep on relegating sex offenders to SOCC facilities is enormous, devastating, and irreparable short of a new Constitution. *Yung* is too tactful.

"The very concept of mental illness – which can provide the 'plus something' that justifies detention – is both fluid and deeply contingent. Over the past century, new mental illnesses have been created and definitions of existing mental illnesses have been expanded. The process of medicalization of any deviant behavior is relentless, and it is ongoing." (*Ted Sampsell-Jones*, "Preventive Detention, Character Evidence, and the New Criminal Law," *2010 Utah L. Rev.* 723, 742 (2010), citing *Peter Conrad*, The Medicalization of Society: On the Transformation of Human Conditions into Treatable Disorders 3-4 (2007). "The expanding scope of recognized mental disorders means that nearly all people who are highly dangerous are also likely to be disordered in some way." *Id.*, at 743).

Jack M. Balkin, in "The Constitution in the National Surveillance State, 93 *Minn. L. Rev.* 1, 15-16 (2008), predicts that, concomitant to the rise of the National Surveillance State, the "government will create a parallel track of preventative law enforcement that routes around the traditional guarantees of the Bill of Rights,...." See also: *Christopher Slobogin*, "A Jurisprudence of Dangerousness," 98 *Nw U. L. Rev.* 1, 103 (2003); Paul H. Robinson, "Punishing Dangerousness: Cloaking Preventive Detention as Criminal Justice, 114 *Harv. L. Rev.* 1429, 1429 (2001).

What has happened here as to sex offenders under the SOCC law can and will happen elsewhere, and to other groups of what *Janus* calls "degraded others," in ever-larger and widening circles of applicability, until the entire country has become the "preventive state," in which only those deemed 'perfectly safe' are left unrestricted by the government. This is the aim of totalitarian states such as the Nazi regime of the German Third Reich. It is a surreptitious means of deliberately creating a two-class society, enforced by law that benefits only the privileged ruling class at the expense of the liberty of everyone else.

This is intolerable tyranny writ large. Because this end cannot be countenanced in a liberty-loving land, and because SOCC laws are a deeply disturbing, but profoundly precedential first step toward that nightmarish end, they must be repealed.

B. Claimed 'Facts' Underlying And Prompting, And Manipulated To Provide Seeming Support For Enactment Of SOCC Statutes Are Patent Falsehoods.

1. *Selective Media Attention to Sex Crimes and Sex Offenders, Wildly Distorting the Actual Facts, Deliberately Created a 'Moral Panic' in the Populace of States Where SOCC Was Proposed, Suggesting That Only Permanent Confinement Could Prevent a 'Sex Crime Wave.'*

Heather Ellis Cucolo & Michael L. Perlin, "'They're Planting Stories in the Press': The Impact of Media Distortions on Sex Offender Law and Policy," 3 *U. Denver Crim. L. Rev.* 185 (Spring 2013), points out that police have often made false and unsupportable assertions to the media concerning sex crimes and sex offenders.

Illustratively, *Cucolo & Perlin* (at p. 191) cite the case of Earl Shriner, an extremely unusual sex offender in Washington State whose violent sexual attacks included sexual mutilation of a small boy. The investigating police sergeant took the occasion to claim to a reporter that "Sex Offenders always reoffend," (*Assoc. Press*, "Tacoma Sex Offender Faces Latest Charges in Mutilation of Boy," *The Spokesman-Review*, May 23, 1989 -- an assertion diametrically opposite from the truth, as will be demonstrated in a later section, *infra*.

Blowing a lot of smoke

In a study of media manipulation of this panic, *Marcus A. Galeste, Henry F. Fradella & Brenda Vogel*, "Sex Offender Myths in Print Media: Separating Fact from Fiction in U.S. Newspapers," 13 *Western Criminology Review* 4-24 (2012) (http://wcr.sonoma.edu/v13n2/Galeste.pdf), at pp. 4-5, explain:

"...This exploratory study ...examin[es] the presentation of sex offender myths in newspaper articles. Employing content analysis, this study evaluated a sample of 334 articles published in 2009 in newspapers across the United States for the presence of sex offender myths. ...Myths were ...significantly associated with articles reporting on various types of sex offender policies, often in a manner which runs contrary to empirical research...."

"When a social problem is legitimated by the media, policy makers often respond with crime control strategies that address the socially constructed reality vis-à-vis the moral panic, rather than creating policies that are responsive to empirical data. (*Lisa L. Sample & Colleen Kadleck*, "Sex Offender Laws: Legislators' Accounts of the Need for Policy," 19 *Criminal Justice Policy Review* 40-62 (No.1, 2008)). *Timothy Griffin & Monica K. Miller*, "Child Abduction, AMBER Alert, and Crime Control Theater," 33 *Criminal Justice Review* 159-176 (2008), at 160, describe this process as crime control theater – a public response or set of responses to crime which generate the appearance, but not the fact, of crime control.' ...[A]s *Terry Thomas*, "The Sex Offender Register, Community Notification and Some Reflections on Privacy," in *Managing High-Risk Sex Offenders in the Community*, 61-80, ed. Karen Harrison (Cullompton, UK: Willan, 2010) pointed out, basing policy on high profile cases is a flawed approach."

Accord: "Counterfactual Thinking About Crime Control Theater:...." 22 *Psychology, Public Policy and Law* 349 [Nov. 2016]: "Crime control theater refers to policies enacted as a response to a moral panic, based on folk beliefs about crime; such policies are perceived as more effective than they really are."

In 1996, as Congress deliberated nationalizing the sex offender registration requirement, "[t]he media's coverage ...reported on statements from ...Rep. Charles Schumer, D-N.Y. – 'Sex offenders are different ...No matter what we do, the minute they get back on the street, many of them resume their hunt for victims, beginning a restless and unrelenting prowl for children, innocent children, to molest, abuse, and in the worst cases, to kill.'" (*Carolyn Skorneck*, "House Considers Tougher Version of 'Megan's Law,'" *Associated Press*, May 7, 1996; see also "Remembering Megan," *N.Y. Times*, Nov. 5, 1994 ["Children are more apt to be sexually abused in the home than outside it. Even so, the threat posed by an unknown predator terrifies American families the most."].) This illustrates manipulation of language and lurid imagery to cast a deliberately inflammatory picture and to apply it to all sex offenders, again completely contrary to known statistical facts, in an effort to enlist the media to disseminate such hate- and fear-inciting propaganda.

Cucolo & Perlin (at p. 207-08) explain the impact of such news coverage and propaganda thus:

"The media-driven panic over sex offenders has directly influenced judicial decisions – both at the trial and appellate levels – in this area of the law, especially in jurisdictions with elected judges....

"Regularly reviled as 'monsters' by district attorneys in jury summations, by judges at sentencings, by elected representatives at legislative hearings (*Daniel M. Filler*, "Making the Case for Megan's: A Study in Legislative Rhetoric," 76 *Ind. L. J.* 315, 339 (2001) [quoting Sen. Hutchison]) and by the media (see, e.g., *John G. Winder*, The Monster Next Door: The Plague of American Sex Offenders, *Cypress Times*, Nov. 20, 2010: "'There's no such thing as monsters.' We tell our kids that. The truth is that monsters are real.... These monsters are called 'Sex Offenders....'" The demonization of this population has helped create a 'moral panic' [see, e.g., *Filler, supra*, at 317-18; *Eric Fink*, "Liars and Terrorists and Judges, Oh My: Moral Panic and the Symbolic Politics of Appellate Review in Asylum Cases," 83 *Notre Dame L. Rev.* 2019, 2038-39 (2008); *Eamonn Carrabine*, "Media, Crime and Culture: Simulating Identities, Constructing Realities," in *The Routledge Handbook of International*

What is to stop the state from assessing all of us for 'risk' and locking up prophylactically those whose RQ - risk quotient - is assessed above an arbitrary threshold?

Crime and Justice Studies (Bruce Arrigo & Heather Bersot, eds.) (2013, in press) ("International Crime"). See generally, *Stanley Cohen*, Folk Devils and Moral Panics 1-2 (3d ed. 2002)], that has driven the passage of legislation, [on "legislative panic" in this context, see *Wayne Logan*, "Megan's Laws as a Case Study in Political Stasis," 61 *Syracuse L. Rev.* 371, 371 (2011); *Deborah W. Denno*, "Life Before the Modern Sex Offender Statutes,"92 *Nw. U. L. Rev.* 1317 (1998) at 1320], much of which has been found by valid and reliable research to be counterproductive and engendering a more dangerous set of conditions – and judicial decisions, at the trial, intermediate appellate and Supreme Court levels, all reflecting the 'anger and hostility the public feels' about this population. The public is thus devoted to a 'predator icon' that drives all our law and policy in this area [see, e.g., *Ray Surette*, "Predator Criminals as Media Icons," in Media, Process, and the Social Constriction of Crime, 131, 140, 147 (Gregg Barak, ed.1995); see id. at 132 (discussing how the media has raised the specter of the predator criminal to that of an "ever-present image"); see also, *Ray Surette*, Media, Crime and Criminal Justice: Images, Realities, and Policies (1992), at 45.], a devotion that is augmented by the media's 'obsession' on criminal justice issues. The term 'sexually violent predator' in itself is an emotionally charged one that conjures up many misleading or inaccurate images. [*Heather E. Cucolo & Michael L. Perlin*, "Preventing Sex-Offender Recidivism through Therapeutic Jurisprudence Approaches and Specialized Community Integration," 22 *Temp. Pol. & Civ. Rts. L. Rev.* 1 (2012), at 5-7.]

Norman J. Finkel, "Moral Monsters and Patriot Acts: Rights and Duties in the Worst of Times, 12 *Psychol., Pub. Pol'y & L.* 242 (2006), at 260, adds this hopeful counterpoint:

"…[I]t was predominantly the scholarly and scientific press, through law reviews and empirical articles, that took a serious look at what are complex psychological, empirical, normative, and constitutional issues (e.g., Slobogin, 1996). Additionally, these articles examined the validity of the factual assumptions that propelled the enactments (e.g., Freeman-Longo, 1996; Hafemeister, 2001; Hanson, 2003; Petrosino & Petrosino, 1999; Winick & La Fond, 2003; Zevitz & Farkas, 2000), the limits of forensic assessment (e.g., Grisso & Vincent, 2005), and the consequential and therapeutic jurisprudence effects that followed (e.g., Winick, 1998). Although this growing literature has yet to counter the prevailing myths, time favors facts over fictions."

This is intolerable tyranny writ large. Because this end cannot be countenanced in a liberty-loving land, and because SOCC laws are a deeply disturbing, but profoundly precedential first step toward that nightmarish end, they must be repealed.

2. The Surreptitiously Pernicious Psychological Power of Heuristics Was Deliberately Employed to Manipulate Citizens to Back Passage of the SOCC Laws.

Cucolo & Perlin, supra, at 212-214, explain thus:

"'Heuristics' is a cognitive psychology construct that refers to the implicit thinking devices that individuals use to simplify complex, information-processing tasks, [see generally *Michael Saks& Robert Kidd*, "Human Information Processing and Adjudication: Trial by Heuristics," 15 *Law & Society Rev.* 123 (1980-81); the use of which frequently leads to distorted and systematically erroneous decisions [see, e.g., *Saks & Kidd, supra*; *Michael L. Perlin*, "Are Courts Competent to Decide Questions of Competency? Stripping the Façade from *United States v. Charters*," 38 *U. Kan. L. Rev.* 957 (1990) [*Perlin*, "Façade"] (arguing that courts' use of heuristic reasoning has led to irrational and erroneous decisions)' [*Michael L. Perlin*, "Fatal Assumption: A Critical Evaluation of the Role of Counsel in Mental Disability Cases," 16 *Law & Human Behav.* 39, 57 n. 115 (1992) [*Perlin*, "Fatal Assumption"] (Heuristics are "simplifying cognitive devices that frequently lead to …systematically erroneous decisions through ignoring or misusing rationally useful information'). For a comprehensive overview, see *Donald Bersoff*, "Judicial Deference to Nonlegal Decisionmakers: Imposing Simplistic Solutions on Problems of Cognitive Complexity in Mental Disability Law," 46 *SMU L. Rev.* 329 (1992); see also *Philip Gould & Patricia Murrell*, "Therapeutic Jurisprudence and Cognitive Complexity: An Overview," 29 *Fordham Urb. L. J.* 2117 (2002).] One single vivid, memorable case overwhelms mountains of abstract, colorless data upon which rational choices should be made. [See generally, *David Rosenhan*, Psychological Realities and Judicial Policy," 19 *Stan. L. Rev.* 10, 13 (1984). President Reagan's famous "welfare queen" anecdote is thus a textbook example of heuristic behavior. On the failures of the vividness heuristic as a cognitive device, see *Amitai Aviram*, "The Placebo Effect of Law: Law's Role in Manipulating Perceptions, 75 *Geo. Wash. L. Rev.* 54, 73-74 (2006).] Empirical studies reveal jurors' susceptibility to the use of these devices. [See, e.g., *Jonathon Koehler & Daniel Shaviro*, Veridical Verdicts: Increasing Verdict Accuracy Through the Use of Overtly Probabilistic Evidence and Methods, 75 *Cornell L. Rev.* 247, 264-65 (1990).

"…[T]hrough the 'availability' heuristic, we judge the probability of an event based upon the ease with which we recall it. [On the availability heuristic in general, see *Rachlinski, supra* note 242, at 399-401. On the availability heuristic's "potential for exploitation," see *id.* at 405.] Through the 'typification' heuristic, we characterize a current experience via reference to past stereotypic behavior; [*Michael L. Perlin*, "Power Imbalances in Therapeutic and Forensic Relationships," 9 *Behav. Sci. & L.* 111, 125 (1991) (use of the typification heuristic by which a treating doctor slots "patients into certain categories, and prescribes a similar regimen for all.")] through the 'attribution' heuristic, we interpret a wide variety of additional information to reinforce pre-existing stereotypes. Through the heuristic of the 'hindsight bias,' we exaggerate how easily we could have predicted an event beforehand. Through the heuristic of 'outcome bias,' we base our evaluation of a decision on our evaluation of an outcome. [Judgment Under Uncertainty: Heuristics and Biases (*Daniel Kahneman et al.* eds., 1982) [Judgment]. Through the 'representative heuristic,' we extrapolate, overconfidently, based upon a small sample size of which we happen to be aware. [See, e.g., *Amos Tversky & Daniel Kahneman*, "Belief in the Law of Small Numbers," in Judgment, *supra* note 262, at 23, 24-25, as discussed in *Perlin, supra* note 252, at 898 n. 89]. Through the heuristic of 'confirmation bias,' people tend to favor 'information that confirms their theory over disconfirming information. [*Alafair S. Burke*, "Improving Prosecutorial Decision Making: Some Lessons of Cognitive Science," 47 *Wm. & Mary L. Rev.* 1587, 1594 (2006), as discussed in *Covey, supra*, note 256, at 1381 n. 22.]

Jeffrey J. Rachlinski, "Selling Heuristics," 64 *Alabama L. Rev.* 389 (2012), explains how crafty politicians use heuristics to ensnare public thought, particularly in emotional contexts:

(p. 391): "…An understanding of how the public thinks …enables savvy interest groups to take advantage of people's simplistic ways of thinking to subvert the political agenda." [Note 13: See *Timur Kuran & Cass R. Sunstein*, "Availability Cascades and Risk Regulation," 51 *Stan L. Rev.* 683, 733-35 (1999) (discussing how to use the availability heuristic to affect public opinion).]

(p. 392): "…Politicians and interest groups help promote mental shortcuts – or 'sell heuristics' – as a way of furthering public support for their positions and mobilizing public support."

(p. 398): "Reliance on heuristics thus has a paradoxical effect on judgment. Even though heuristics can lead to errors, people tend to be more confident when they rely on heuristics than when they rely on deliberation."

(p. 405): "To the extent that the public makes widespread use of availability, experienced political actors can spin issues so as to exploit these heuristics to drive the public to embrace particular attitudes or beliefs. [Note 108: *Kuran & Sunstein, supra* note 13, at 713 ("Skillful availability entrepreneurs have insights into the sorts of events to which relevant segments of society are receptive.").] *Kuran and Sunstein* have argued that 'availability entrepreneurs' can work to make examples salient so as to move public opinion in a particular direction. [Note 109: *Id.*]"

Cucolo & Perlin, supra, at 215, apply the principle of heuristics to sex-offender commitment law thus:

"Research confirms that heuristic thinking dominates all aspects of the mental disability law process whether the question is one of involuntary civil commitment law, violence assessment, [*Jennifer Murray & Mary E. Thomson*, "Applying Decision Making Theory to Clinical Judgments in Violence Risk Assessment," 2 *Eur. J. Psychol.* 150 (2010)]. It similarly dominates the public's view of criminal justice policy (animated by a media-driven fear of crime). [See, e.g., *David A. Singleton*, "Sex Offender Residency Statutes and the Culture of Fear: The Case for More Meaningful Rational Basis Review of Fear-Driven Public Safety Laws," 3 *U. St. Thomas L. J.* 600 (2006), at 603-4 (discussing the vividness heuristic and the availability heuristic in this context).] Additionally, judges – 'embedded in the cultural presuppositions that engulf us all' [*Michael L. Perlin*, The Hidden Prejudice: Mental Disability on Trial 47 (2000) (quoting *Anthony D'Amato*, "Harmful Speech and the Culture of Indeterminacy," 32 *Wm. & Mary L. Rev.* 329, 332 (1991)).] – are as susceptible to heuristics as are all other citizens. [See, e.g., *Chris Guthrie et al.*, "Inside the Judicial Mind," 86 *Cornell L. Rev.*

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777, 784 (2001) (discussing judicial susceptibility to heuristics and biases when making decisions)."

At pp. 215-16, *Cucolo & Perlin* continue:

"So it is with the development of sex offender law and policy. The media's intense focus on the most heinous sex offenders – making it appear that all persons charged with 'sex crimes' share these characteristics – triggers the availability heuristic and the representativeness heuristic, 'causing the public to perceive most or all so-called sex offenders as extremely threatening and intractably deviant.' [*Julie T. Rickert*, "Denying Defendants the Benefit of a Reasonable Doubt: Federal Rule of Evidence 609 and Past Sex Crime Convictions," 100 *J. Crim. L. & Criminology* 213, 228 (2010) (citing *Robert Paul Doyle & Craig Haney*, Proposition 83, Framing and Public Attitudes Toward Sex Offenders: An Application of Heuristic Models of Social Judgment (working paper), available at http://papers.ssrn.com/sol3/papers.cfm/Abstract_id=1444688, at 3 ("In modern times, the focus on criminal justice borders on an obsession.").] By way of example, Daniel Filler has argued that the availability heuristic was significantly responsible for the passage of Megan's Law. [*Filler, supra*, at 346.] James Billings and Crystal Bulges explain comprehensively:

'[T]he representativeness heuristic theory hypothesizes that people judge the likelihood of events by how well they match any previously formed representations of such an event. For example, individuals are more likely to believe all sex offenders are similar to those sex offenders they have already seen. Because most people's readily accessible memories of sex offenders are derived from violent and outrageous media depictions, they are more likely to believe that all sex offenders are like those they see on TV... [O]ne of the great dangers of the representativeness heuristic is that it encourages maintenance of these beliefs to the exclusion of other reliable information. Thus, people who come to believe sex offenders are violent predators in this way are very likely to ignore more accurate information that advises toward more realistic beliefs.

'[Another] example of psychological theory demonstrating the power of media to portray false images is the availability heuristic. The availability heuristic states that individuals judge the likelihood of events by the availability of similar occurrences in their memory. Under this theory, therefore, if instances of violent sexual offense readily come to mind, individuals will presume their occurrence to be more frequent than it really is. The available memories may also include fiction; if someone has just seen a movie about a sex offender, he is more likely to inflate the rate of sex offense he believes to be accurate. The media contribute to this theory by providing the prior instances of sex offense with which to compare current events. This is especially true if the media are presenting more violent sex crime information than nonviolent sex crime information; people will thus overestimate the rate of sex offense in general as well as the incidence of violent sex offense.'

Reliance on heuristics thus has a paradoxical effect on judgment. Even though heuristics can lead to errors, people tend to be more confident when they rely on heuristics than when they rely on deliberation.

Because most sex offenses are nonviolent, these media portrayals of violent sex offenses cause people to increase their belief in the prevalence of such crimes. [*James A. Billings & Crystal Bulges*, "Maine's Sex Offender Registration and Notification Act: Wise or Wicked?," 52 *Me L. Rev.* 175, 242 (2000) (footnotes omitted). See also *Michael L. Perlin*, "'Equality, I Spoke the Word/As if a Wedding Vow': Mental Disability Law and How We Treat Marginalized Persons," 53 *N.Y.U. Sch. L. Rev.* 9, 20 (2008-09) ("Every Time Detective Benson or Stabler – on NBC's popular Law and Order: SVU program – says, 'There's no cure. And they all do it again,' that speaks to society's [false ordinary common sense] about this topic.").]

We believe it is impossible to understand the thrall in which the 'sex offender story' has captured the public without understanding the pernicious power of these cognitive-simplifying heuristics."....

"There can no longer be any question that sex offender laws were enacted without any consideration being given to the valid and reliable research available to (and accessible by) the lawmakers at the time of enactment, and that, frequently, legislators were never asked questions that would have been 'essential to understand whether such legislation would be effective in its goal of community protection.' [*Karen Terry*, "Sex Offenders: Editorial Introduction," 3 *Criminology & Pub. Pol'y* 57, 57 (2003). On the frequent disconnect between research findings and adopted legislative policies, see *Michael Tonry & David Green*, "Criminology and Public Policy in the USA and UK," in *The Criminological Foundations of Public Policy: Essays in Honour of Roger Hood* 485, 508-10 (Roger G. Hood et al., eds. 2003). On how reliable research is often consciously ignored, see *Joan Petersilia*, "Policy Relevance and the Future of Criminology," 29 *Criminology* 1 (1991).] This failure to consider such data calls into question the legitimacy of all such legislation. Sexual offender registration laws were enacted 'without any systematic study of their consequences' or of the diagnostic accuracy involved in the classification of such offenders. [See *Robert Prentky et al.*, "Sexually Violent Predators in the Courtroom: Science on Trial," 12 *Psychology, Pub. Pol'y & L.* 357, 361 (2006) (citing twin concerns that "good science" will be unrecognized or misunderstood by the law, and that the pressures of the law will not only use but encourage "bad science.")] These diagnostic tools that support confinement and containment continue to be flawed...." [*John Matthew Fabian*, "The Risky Business of Conducting Risk Assessments for Those Already Civilly Committed as Sexually Violent Predators," 32 *Wm. Mitchell L. Rev.* 81 (2005).]

At p. 222, *Cucolo & Perlin* conclude thus:

"...[U]ntil we take stock of the realities that we have sketched out in this section of the article – the impact of media distortions on legislative policies, the lack of a factual basis for the public's obsessive fears (fears based on 'biased recall and unrealistic crime stereotypes') [*Doyle & Haney, supra* note 216, manuscript at 24], the ways that such media distortion and public pressures affect judicial decision-making – we are doomed to endlessly play out a 'pathological' morality drama. [See *William J. Stuntz*, "The Pathological Politics of Criminal Law," 100 *Mich. L. Rev.* 505, 511 (2001).] And we do this in spite of the overwhelming empirical evidence that shows that the laws in question have little or no effect on sexual offending rates and recidivism." [*Elizabeth LeTourneau et al.*, "Effects of South Carolina's Sex Offender Registration and Notification Policy on Deterrence of Adult Sex Crimes," 37 *Crim. Just. and Behav.* 537, 550 (2010); *Richard Tewksbury & Wesley G. Jennings*, Assessing the Impact of Sex Offender Registration and Community Notification on Sex Offending Trajectories," 37 *Crim. Just. & Behav.* 570, 572 (2010)]."

Prison, or Sex-Offender Commitment Facility?

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Will There Be an SOCC Repeal Bill in MN? An Open Letter to a Potential Bill Sponsor

Editor's Note: Rep. Tina Liebling (D., Rochester) has suggested repeal of Minnesota's "MCCTA of 1994," which created SOCC in Minnesota. I recently wrote to urge her to submit a bill to do so.

Dear Representative Liebling:

As an involuntary indefinite guest of the Minnesota Sex Offender Program (MSOP), Moose Lake facility, I have been informed recently that you are extremely critical of MSOP, and seek legislatively to force termination of that agency and the sex offender civil commitment (SOCC) program that it administers. I assume that this includes repeal of the underlying statutes authorizing commitments of the "sexually psychopathic person" (SPP) and "sexually dangerous person" (SDP) type.

Congratulations, you are on the right track! As a former attorney and a scholar I have closely studied for the last ten years the field of forensic psychology as applied to those who have committed sex crimes. I agree with your attitude toward MSOP, and in particular, toward what passes here for a treatment program claimed to 'prepare' one for release – perhaps in 20 to 30 years or so -- if ever.

This, and indeed the entire scheme of civil commitment of sex offenders in Minnesota under the law passed in Special Session on August 31, 1994, is based on the myth that those who can be subjected to such commitment are 'scary monsters' who pose a supposedly certain prospect of further sex crimes immediately upon release. Nothing could be further from the truth, and I can prove it.

The harsh truth is that politicians in 1994 seized a moment of consternation over release of two notorious sex offenders to propagandize, foment, and manipulate public opinion through emotional appeals to fear and hatred to create a commitment response out of any sense of proportion to actual circumstances. Every fact that has emerged from science since then has proven this time and time again.

Presently, SOCC and MSOP roll on only by virtue of the addiction of highly paid state employees to their paychecks and 'permanent employment plans' based on unnecessary and inhuman imposition of permanent supplemental incarceration beyond terms of imprisonment, and long eclipsing even post-imprisonment periods of parole.

Most fundamentally, the judicial act of

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Every Time Detective Benson or Stabler - on NBC's popular Law and Order: SVU program - says, 'There's no cure. And they all do it again,' that speaks to society's [false ordinary common sense] about this topic.

sex offender civil commitment (SOCC) of sex offenders under statutes of the State of Minnesota involves a complete departure from and negation of all known scientific principles applicable to sex offenders. SOCC cases invariably ignore controlling points of forensic science, most especially from actuarial and statistical principles, or accept false assertions about them that are dead wrong.

I have constructed a "Master Document" more than 900 pages in length examining all relevant points of science and law. It provides an in-depth analysis of applicable constitutional law and concludes that at least four major constitutional violations are perpetrated in every such commitment here in Minnesota.

We must rely here on printing services by this facility. Staff here complain and threaten to curtail the printing of any confinee who undertakes to print a document of that length. Hence, I cannot immediately print and send to you that whole Master Document at once.

However, I enclose a copy of its detailed, nine-page Table of Contents to enable you to get a clear idea of the gravamen of these arguments of unconstitutionality. Please note that Section XIV of that Table of Contents discusses problems of treatment within MSOP that impact those arguments.

I can assure you that what passes for a treatment program claimed to 'prepare' one for release – perhaps in 20 to 30 years or so – is utter anti-scientific manure. It is an open secret that MSOP is in the business of disguised permanent confinement of those politically disfavored as feared or simply loathed.

Despite earnest treatment participation by the large majority of MSOP confinees, after 25 years of MSOP experimentation as to how to better cast a false impression of "therapy," release from MSOP confinement remains only a distant wistful dream to almost everyone confined in MSOP.

This lack of releases has resulted in massive growth of the population in MSOP – to about 750 at this moment. Because the rate of new commitments exceeds releases, MSOP will never self-amortize out of existence, despite having been proclaimed by 1994 Minnesota legislators as a temporary measure. Instead, MSOP will steadily continue to grow in population and budgetary 'footprint.'

These facts remain the controlling reality in MSOP:

(1) No one has been released from MSOP confinement in less than 12 years of treatment participation, with the sole exception of the very few individuals whom judges have ordered MSOP to release.

Nationwide, sex offender treatment in a confined setting averages about 2.5 years in length. Even the longest programs only rarely exceed 4 years. Even those lengths can be fairly described as massive overkill; psychiatric and other therapists in all other forms of therapy readily agree that any form of therapy not capable of effecting the desired personal change within a year at most is simply incapable of doing so.

In fact, recent research into desistance from sexual offending points up that such 'persona change' is not just impossible, it is completely unnecessary to fostering such desistance. An educational and counseling program of six to twelve months is quite sufficient to impart knowledge and moral responsibility sufficient to eliminate recidivistic sex crimes.

Further, notions of lack of volitional control on the part of sex offenders are yet another myth capitalized upon by those, such as MSOP administrators and clinical supervisors, to advance a faux justification for perpetual pseudo-incarceration for those whose confined status provides their annual salaries. (This is addressed by the aforementioned Master Document.)

(2) MSOP treatment does not mirror, or even approximate the treatment regimen in use in any other program of sex offender treatment, whether in confinement (euphemistically called "inpatient treatment") or treatment elsewhere, whether compelled or voluntary.

Instead, MSOP has cumulated treatment modalities used elsewhere (at some point in time) into what it calls its treatment "matrix." Thus, MSOP effectively insists that treatment participants fulfill all requirements of each other treatment program in use in all other sex offender commitment facilities.

Thus, it is no wonder that fulfilling all those treatment requirements, and retaining all the myriad points inculcated in each, so as to be able to demonstrate daily application of each such point, is an incessant, Sisyphean task for any treatment participant.

(3) In contrast to the 30 or so total releasees to date from MSOP confinement, 86 confinees have died in MSOP confinement since inception of the program.

Most of those confined by MSOP for double-decades are now near or past age 70. (I am age 69.) The outrageous practice of prosecutors and judges – themselves acting as political animals – has often focused on committing those at or above age 60.

Given these facts, the rate of such deaths from old-age-related causes, complicated by the malignant medical neglect by MSOP (no doctor present), can only be expected to rise sharply over the next several years. (This is quite apart from the current Covid-19 pandemic.) It thus appears likely that the rate of such deaths will meet or exceed the rate of releases.

(4) Meanwhile, all forensic studies confirm and re-confirm that those over age 60 represent only an infinitesimal probability of sexual re-offense when released. No recidivism rate at all can be derived from those ages 70, since no instances of recidivism by those at or above that age have ever been discovered.

(5) Recently, MSOP claims to have ramped-up its rates of releases, apparently to a new average of 20 or so inmates per year (onto a status known as "provisional discharge," which it admits involve five phases taking five more years post-release).

Nevertheless and worst of all, given a current inmate population of MSOP (both facilities) of about 750, at 20 inmate releases per year, and ignoring such deaths, it would still take approximately 37.5 years to drain MSOP of all current confinees.

However, the current rate of new commitments actually exceeds that claimed (but dubious) new rate of annual releases. Hence, even that long into the future, MSOP would remain a permanent institution.

In addition to constantly updating the aforesaid "Master Document," I also edit and publish a monthly newsletter on this subject, titled *The Legal Pad* ("*TLP*"). I enclose copies of the most recent two editions of *TLP*, for your general information.

I also enclose excerpts from certain previous editions for their revelations: (1) busting the total myth of supposed rampant sex offender recidivism (a huge California study shows the truth on this); and (2) an article, "Survey by SOCCPN Reveals Unflattering, Disturbing State of MN & Other SO Commitment Systems." The charts on page 3 of that article accurately compare the utter failure of MSOP to average rates of release in other states also having SOCC.

By itself, this comparative failure by MSOP to release should shock you (let alone, the chart on that same page showing that Minnesota has a per-capita rate of SOCC well over 3 times the average rate of other states with SOCC systems).

I also enclose a table of contents to all earlier editions of TLP (now in its fourth year), as well as the previously mentioned table of contents to a "Master Document" setting forth in detail the many reasons why Minnesota's form of SOCC violates at least four provisions of the United States Constitution. These tables should guide you in formulating any specific inquiries to me to help you more quickly achieve certainty that my assertions herein are accurate and damning.

I can prove to your satisfaction that the so-called forensic reports and testimony used to procure these commitments are anti-scientific bunk and outright fraud by those involved (most especially prosecutors and their hired-gun 'experts,' with the complicity of incompetent appointed defense attorneys simply looking for quick and easy fees to allow that travesty of justice to continue without challenge.

I can also prove to your satisfaction that MSOP focuses on writing disparaging notes and reports on each of its confinees. Through this, the in-house 'assessments' offered up by MSOP to the "Special Review Board" and thence to the "Commitment Appeal Panel" ("CAP"), are based on claimed "dynamic risk factors" and supposed residual "needs" for further treatment (which, according to MSOP, never end).

However, all of these claimed "dynamic risk factors" and "needs" are conveniently amorphous and utterly open-ended, simply comprising an excuse-making machine to provide purported justifications to refuse to release the confinee seeking it.

In sum, materials I can send you will convince you that Minnesota's sex-offender commitment statute comprises the biggest boondoggle in the history of Minnesota, as well as an inhuman, punitive system of post-prison-sentence supplemental-incarceration ever devised by politicians of this state for personal political gain through fraudulent terrorization of the populace of this state.

But my question to you, Representative Liebling, is whether, assuming you become convinced that all I say here is true, you will become a staunch advocate for repeal of Minnesota Statutes Chapter 253D, and for legislative relief dissolving all commitments under the so-called "Sexual Psychopathic Personality" and "Sexually Dangerous Persons" definitions of that 1994 Act?

Whether with or without any materials I can furnish, I urge you to get on the right side of history on this issue and become an advocate for that cause.

Whatever your reaction to this letter, please reply, stating clearly whether you have an earnest interest in learning more toward realizing that Minnesota's SOCC is an utter abomination, legally and morally, and is utterly unnecessary to public safety, in fact consuming precious dollars that could otherwise be applied to programs of known success at protecting the public from sex crimes. Thank you.

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