The Legal Pad

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"...People who mean to be their own Governors must arm themselves with the power which knowledge gives."
9 Writings of James Madison 103 (G. Hunt ed 1910).

In This Issue:

Coming Soon:

- ✓ Banishment by a Thousand Laws
- ✓ Looking at the Good Lives Model.
- ✓ Remorse Bias — What's THAT?
- ✓ Being Chipped Means Never Having to Say You're Free.
- ✓ Risk Assessment – Categorical Report Format Yields Distortion
- ✓ SAPROF's Inaccuracy
- ✓ Diagnostic Unreliability. Surprise! Alan Frances Sounds Off.
- ✓ Ignorance, Animus, Political Pressure & Gaming Dictate SO Policy, in Opposition to Science
- ✓ SO Residence Restrictions & Registration Convolutions
- ✓ A Little History Yields Deja Vu
- ✓ Othering and Resistance. Huh?
- ✓ 'New' SORN Laws Are Punitive
- ✓ The Latest on Anti-SO Vigilantism
- ✓ Beware the Deepfake
- ✓ Janus Speaks Out on the Preventive State Threat
- ✓ COMPAS Illustrates Guessing at Risk
- ✓ Schrodinger Redux: If You Look, It's CP - What *Dost* They Do?
- ✓ Legislators' Pandering to Fear & Hate Make SO Registry Laws Insane
- ✓ Pics = 1,000 Words, but Quotes re SOCC: Priceless
- ✓ NARSOL: Too Polite?
- ✓ Hold the PPG: More Evidence of Missing the Mark
- ✓ Blanket Exclusions: Redlining against SOs
- ✓ Levine Explains Harmful to Minors
- ✓ Desistance: Harris' Interviews

↻ And it just never stops!

Feedback? News? Write!

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An Era Starts to Draw to a Close:

Washington State, Where Modern SOCC All Began, Will Close Its Infamous McNeil Island SOCC Facility and Wind Down Its SOCC System to Its End.

The State of Washington was the very first U.S. state to enact legislation, starting in 1990, to create a sex offender commitment system. It did so in the wake of two heinous recidivistic sex-crime sprees by separate sex offenders. This option was not well thought out. It involved vast costs for Washington State, and yet had very little, if any discernible impact at staunching the occurrence of sex crimes.

Nonetheless, because this claimed problem of out-of-control sex offenders supposedly lurking everywhere made for lurid crime theater and allowed legislators to play Ranger-like heroes riding to the rescue in melodramatic manner, this notion was quickly seized upon by legislators in certain other states, eventually bringing the total to 20 states in all with such sex-offender civil commitment ("SOCC") laws.

Now, many of those states have either quietly shuttered projected commitment facilities before they ever got opened in earnest, complained loudly about their cost and hacked SOCC operating budgets, consolidated facilities, and/or ultimately opened the gates, releasing large portions of their populations, or even entertained proposals to end their SOCC systems. But to date, only the State of Washington has taken serious actions avowed expressly to be the beginning of the end of SOCC in its state. The irony of the first to start becoming the first to end SOCC cannot be missed.

The following is a letter excerpt, written by Richard Scott, spokesperson activist confinee in the State of Washington's SOCC system, dated 3-9-21 and addressed to another SOCC victim, "Jacob," tersely but profoundly reports this start of a turnabout trend"

Excerpt: "No one has ever reoffended who was at a LRA [less-restrictive alternative while under commitment – the typical path to discharge, somewhat like "provisional discharge here in MN].

...Our SVP Act is being 'phased out.' At least that is the term being promoted. We had 284 guys here. We will be down to just 140 real soon.

The plan is to relocate off this pretty isolated island [McNeil Island, in Puget Sound]. But first we have to get down to just 90 guys."

From time to time, TLP will continue to periodically report Washington's progress toward ending its SOCC.

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TLP's Report, 2nd Installment, to Virginia, as It Contemplates SOCC Repeal:

Everything Once Advanced as Supporting Reasons for SOCC Has Since Been Debunked.

Editor's Note: What follows is the second in a series of excerpts from the *Report to the Virginia State Crime Commission on So-Called "Sex Offender Civil Commitment," Related to Senate Bill 1244 (Session 2021) Proposing Repeal of Virginia Statutes Authorizing Same*, prepared and submitted by Cyrus Gladden, TLP Editor.

Initial reaction by professional readers of this *Report* have been overwhelmingly favorable (e.g., "terrific", "very impressive"). A page image version of the whole report can be downloaded now from http://ajustfuture.org/wp-content/uploads/ 2021/03/Cyrus-Gladden-Report-to-Virginia-State-Crime-Commission-21-03-15-original-scanned.pdf. In due course, a text version will be made available.

It is reproduced in serial form in TLP for the enlightenment of those without access to the internet. It is your right to know: (a) how utterly baseless and fraudulent your commitments are; (b) that it has been condemned *in toto* by organized psychiatry; (c) the myth that "treatment" in confinement is necessary to prevent recidivism, against the reality that desistance from sexual offending is a widely observed natural phenomenon; and (d) the many true facts showing that SOCC inherently deprives you of your constitutional rights and even your human rights recognized everywhere in the world.

Without further ado, let us pick up where we left off in the last TLP edition, to delve deeply in earnest into this compendium of anti-scientific and immoral wrongs.

"II. SOCC LAWS SERVE NO CONSTITUTIONALLY VALID INTEREST AND HAVE NO BASIS IN PSYCHOLOGICAL SCIENCE, BUT INSTEAD ARE PUNITIVE IN INTENT AND EFFECT.

A. *SOCC Statutes Inherently Do Not Fulfill The Interest Claimed To Support Their Enactment, Establishing Unconstitutionality on Their Face.*

1. No Valid Ground Arises from Diagnosis or "Abnormality" to Support SOCC Laws.

Eric S. Janus & Wayne Logan, "Substantive Due Process and the Involuntary Confinement of Sexually Violent Predators," 35 *Conn. L. Rev.* 319 (Winter, 2003), explain the constitutional requirement of treatment as a main justification for sex offender commitment thus:

(at p. 346):"'...*Hendricks* made no effort to distinguish 'mental illness' from mere 'disorders.' The latter are simply declared by unscientific fiat and are highly controversial. ...[I]n the absence of any scientific basis for such fiat-decreed 'disorders,' the rationale for treatment that exists in patently disabling mental illness simply does not exist; at best those committed due to such claimed 'disorders,' whose only symptom' is commission of a crime/crimes, are merely 'politically ill.' Thus ...all that is left is the claim that the State has an interest in protecting the public from 'dangerous' individuals by confining them. This, of course, is pure preventive detention, simply proceeding under a false rubric of 'commitment.''

Mary Prescott, "Invasion of the Body Snatchers: Civil Commitment after Adam Walsh," 71 *U. Pitt L. Rev.* 839, 847-49 (Summer 2010), observes,

"By limiting his concurrence to the specific facts of the case, Kennedy essentially provided a potential limit to a state's power of commitment. Despite a presumed remedial intent, an SVP statute authorizing civil commitment may nonetheless have punitive effects or unconstitutionally vague standards of application (that is, if practice illustrates the unconstitutional imprecision of the term 'mental abnormality'). "...In effect, the 'mental abnormality' language is 'circularly defined ... collapsing all badness into madness'; it 'is neither medicine nor science; it is legislative legerdemain,'" (quoting *Stephen J. Morse*, "Fear of Change, Flight from Culpability," 4 *Psychol. Pub. Pol'y & L.* 250, 261 (1998)) and noting, at p. 861: "...the circularity of the term 'mental abnormality,' because the 'abnormality' is derived from the sexual behavior which in turn is used to establish the predisposition to other sexual behavior." At

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footnote 70, Prescott explains further thus: "...Because the goals of sex offender civil commitment legislation are grounded in both medicine and law, it is unhelpful to base a statute's reasonableness solely on language, when the reasonableness of the **language** necessarily depends on the quantity and quality of its medicinal counterpart. ...Critics tend to lament the circularity of the term "mental abnormality," since "the abnormality is derived from the sexual behavior which in turn is used to establish the predisposition to other sexual behavior." *Robert M. Wetstein*, "A Psychiatric Perspective on Washington's Sexually Violent Predators Statute," 15 *Puget Sound L. Rev.* 597, 602 (1992)."

Kimberly Kessler Ferzan, writing in "Beyond Crime and Commitment: Justifying Liberty Deprivations of the Dangerous and Responsible," 96 *Minn. L. Rev.* 141 (November 2011), offers these thoughts:

pp. 141-42: "...With respect to responsible actors, the State can use the criminal law. It can punish the deserving for the commission of a crime. For a responsible agent, the State should not intervene in any substantial liberty-depriving way prior to his commission of an offense for fear of denying his autonomy. The State must respect that a responsible agent may choose not to commit an offense. It cannot detain an actor for who he is. It must wait to see what he will do. Thus, to the extent that we have preventive practices that do not fit either model, these mechanisms are typically condemned as unjust.

pp. 143-44: "...'[I]mpaired self-control is not a "diagnosis" or a "mental disorder" that makes sex offenders different from other criminals -- it is precisely what makes them similar to other criminals.' And Stephen Morse denounces the 'mental abnormality' criterion approved by the Supreme Court in *Kansas v. Crane* and *Kansas v. Hendricks* as 'obscure, circular, and mostly incoherent.' (*Stephen J. Morse*, "Preventive Confinement of Dangerous Offenders," 32 *J. L. Med. & Ethics* 56, 56 (2004).) The message scholars are sending is clear: prevention and punishment are two distinct practices, but in both instances, the State is failing to maintain the clear boundaries between the two."

pp. 153-55: "...[T]he mental abnormality condition does no distinguishing work. Kansas's definition for mental abnormality is a 'congenital or acquired condition affecting the emotional or volitional capacity which predisposes the person to commit sexually violent offenses,' but as Stephen Morse notes, 'the definition is simply a (partial) generic description of all behavior and it is not a limiting definition of abnormality.' [*Morse, supra* note 3, at 62.] Moreover, with respect to the lack of control criteria, there is a significant injustice at work here. The detainees in *Crane* and *Hendricks* were sex offenders who had already been punished. If they could not control their conduct, then, as a normative matter, they should have been excused. The question of rationality should remain the same -- if these actors are sufficiently rational to choose to act, then they can be punished, but they cannot be detained. If they are sufficiently irrational that they ought to be detained, then they cannot be punished. The State should not be able to inconsistently maintain that these actors are responsible so it can punish them, and then based on the same facts, also maintain that they are non-responsible so it can detain them post-punishment. The State should be required to pick one view: either responsible and punishable or non-responsible and detainable."

2. "Undeterability," Even Were It True, Does Not Support the Necessity or Constitutionality of SOCC Laws.

Ferzan, ibid., continues" "...Christopher Slobogin offers a criterion of 'undeterability' for the pure prevention model. This model includes not only those who truly do not understand the nature of their acts but also those who know they will be punished but act anyway. The latter category includes everyone from those who kill abortion clinic doctors to terrorists – 'they know they will either be caught or die, but are convinced their ideological agenda justifies their actions and glorifies their punishment or death.' ...As Michael Corrado notes, 'Every criminal takes a chance that he will be apprehended and punished. How great must the chance be before he moves from the category of the punishable into the category of the detainable?' Indeed, Alec Walen adds, 'it is simply false that those who cannot be deterred because they are more dedicated to committing a crime than to avoiding punishment are outside the reach of the criminal law.'"

3. Statistics Cannot Provide a Prediction of Recidivism Specific to Any Individual.

Continuing the Ferzan quote, at pp. 156 -57: "The use of 'naked statistical evidence' may also be normatively problematic. 'A piece of evidence is nakedly statistical when it applies to an individual case by affiliating that case to a general category of cases.' [*Alex Stein*, Foundations of Evidence Law 43 (2005).] The sort of evidence presented against a criminal defendant points to facts – the defendant can dispute those facts by, for example, pointing to evidence that raises doubt as to whether he was present, or had the mental state, or lacked a justification. On the other hand, naked statistical evidence does not point to anything that a detainee can disprove. An eighteen-year -old African American man who is unmarried and unemployed is statistically more likely to offend than a forty-five-year-old, married soccer mom. The man cannot

What do you see? The bars? The cell? The uniform? Other than these biasing contextual suggestions, what do you *really* know of this man?

disprove that he falls within this class – the statistics do it all. The evidence is nakedly statistical because it is 'information about a category of people or events not evidencing anything relevant in relation to any person or event individually.' [Ibid.] ...If all that the status or condition does is make it somewhat more likely that the individual will commit the offense, then the State is still relying on statistical evidence. Either way, it is an impersonal prediction...." (emphases supplied)

4. The Claimed Alternative Purpose of Treatment Toward Release from SOCC Is Illusory.

Eric S. Janus & Wayne Logan, "Substantive Due Process and the Involuntary Confinement of Sexually Violent Predators," *supra*, states:

(at p. 347): "The 'no punishment' principle emanates directly from the central command that 'civil' commitment not be 'punitive.' To ensure compliance with this command, the Court has historically employed the test first enunciated in *Kennedy v. Mendoza-Martinez* [372 U.S. 144 (1963), where the Court invalidated a federal law because it deprived an individual of citizenship as punishment, but did so without providing the strict procedural protections of the criminal law. [Id. at 183-84] The Court identified a variety of factors to be considered in judging whether a non-criminal sanction betrays a forbidden punitive purpose. Two of those factors are especially relevant here: '[W]hether an alternative purpose to which it may rationally be connected is assignable to it, and whether it appears excessive in relation to the alternative purpose assigned.' [*Id.* at 168-69]"

(at p. 348): "The 'alternative purpose' in civil commitment (in addition to incapacitation) is treatment. Treatment is the alternative purpose the state must pursue to establish the bona fides of its non-punitive commitment regime. For instance, in *Allen v. Illinois* [478 U.S. 364 (1969)], the Court addressed a 'first generation' SVP law..., and emphasized that 'the State serves its purpose of treating rather than punishing sexually dangerous persons by committing them to an institution expressly designed to provide psychiatric care and treatment.' [*Id.* at 373] *Hendricks* is quite consistent with this view, and lower courts consistently cite 'treatment' as the purpose that redeems the constitutionality of SVP laws. [See *Kansas v. Hendricks*, 521 U.S. 346, 367, noting the state's "obligation to provide treatment for committed persons."); see also *id.* at 371 (Kennedy concurring) (denominating the absence of treatment as an "indication of the forbidden purpose to punish"); *id.* at 383 (Breyer, J., dissenting) (asserting that a "statutory scheme that provides confinement that does not reasonably fit a practically available, medically oriented treatment objective, more likely reflects a primarily punitive legislative purpose"). Also see: *State v. Post*, 541 N.W.2d 115, 128 (Wis. 1995) (holding that treatment for paraphilias provides the "medical justification" for Wisconsin's SVP law); *West v. Macht*, 614 N.W.2d 34, 40 (Wis. App. 2000) ("To be lawful, the restriction on the involuntary committee's constitutional rights must be reasonably related to legitimate therapeutic and institutional interests."); see also *Ohlinger v. Watson*, 652 F.2d 775, 777-78 (9th Cir. 1981) (holding, with respect to sex offenders incarcerated under a "rehabilitative rationale," that "adequate and effective treatment is constitutionally required because, absent treatment, appellants could be held indefinitely....")]

(at 348-49): "In *Foucha*, the Court made clear that 'mental illness' (along with dangerousness) was a constitutional predicate for police power civil commitments. [*Id.* at 80-81] Justice O'Connor, who in concurring, provided the key fifth vote for the majority in *Foucha*, averred that involuntary civil commitments must have a 'medical justification.' [*Id.* at 88] Otherwise, she concluded, 'the necessary connection between the nature and purposes of confinement would be absent.' [*Ibid.*]

(at 349): "In *Hendricks*, while the Court disavowed the necessity of a 'mental illness' requirement per se, instead condoning the statutory criteria of 'mental abnormality' [*Hendricks*, 521 U.S. at 358-59], the Court insisted that the Kansas SVP law employ some mental impairment requirement.

"Describing the required, mental impairment alternately as a 'special and serious lack of ability to control behavior,' and 'proof of serious difficulty in controlling behavior,' [*Kansas v. Crane*, 534 U.S. 407 at 413 (2002)]....

"In sum, the requirement that SVP committees have a mental impairment serves to substantiate the police power right to treatment...."

Ostensibly, the non-punitive interest claimed in support of the MCCTA of 1994 is treatment of the sex offenders covered by that statute. However, as explained by *Jessica Morak*, "Resident Evil: A

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Reformation of U.S. Civil Confinement Law," 22 *Cardozo J. Int'l & Comp. Law* 665 (Spring 2014):

pp. 695-97: "The punitive nature of sexually violent predator statutes is readily visible when examining the common requirement that offenders must first serve out a criminal sentence before ever being evaluated as a candidate for civil confinement. [citing *State v. Post, supra*, Abrahamson, J., dissenting, at 140 ("Furthermore, because chapter 980 requires that convicted sex offenders serve their criminal sentences before being committed under its auspices, the statute is inextricably linked to a punitive purpose and effect, notwithstanding its remedial features.")] This practice purposely delays the imposition of specialized treatment until the offender's criminal sentence is nearly complete. There is no non-punitive justification for first initiating civil confinement proceedings, and the imposition of allegedly necessary treatment, years after the criminal act period of incarceration first advances the interest in treatment in any tangible way, since prison is generally considered a poor environment for rehabilitation. [*Hendricks*, 521 U.S. at 386 (Breyer, J., dissenting) (the Kansas statute specifically states that "prognosis for rehabilitating ...in a prison setting is poor."); *Post, ibid.*] This purposeful delay seems intentional. [*Hendricks, supra*, at 385 (Breyer, J., dissenting) ("time-related circumstance seems deliberate."). See also *In re Young*, 857 P.2d at 1025 (Johnson, J., dissenting) ("The timing alone is a strong indication that the Legislature was less interested in treatment than in confinement.")] It enables the more punitive interest in total and indefinite incapacitation to overpower and dominate the civil interest in treatment. [*Hendricks, ibid.* ("An act that simply seeks confinement ... would not need to begin civil commitment proceedings sooner."); *In re Young, ibid.* (""Although the Statute provides for treatment, this goal is completely subordinated to punishment.")] In this perspective, the practice begins to look more like a statutory scheme simply seeking to confine certain offenders when those offenders become eligible for release. [*Young v. Weston*, 898 F. Supp. 744, 753 (W.D. Wash. 1995) (holding that the punishment interest is advanced when the "[s]tatute forecloses the possibility that offenders will be evaluated and treated until after they have been punished."); *In re Young*, 857 P.2d at 1025 (Johnson, J., dissenting) ("An individual's need for diagnosis and treatment is never sufficiently compelling under the Statute until the individual is nearing the end of his or her criminal sentence.")]

"Additionally, it is suspicious that the offender contracts a newly discovered mental abnormality, which is now in dire need of treatment, upon the imminent expiration of the current method of incapacitation. [citing Breyer dissent in *Hendricks*, 521 U.S. at 381]. It is an utter fallacy to claim that mental abnormalities, which cause uncontrollable propensities to commit future sexual offenses, are identifiable only at the completion of a criminal sentence. [citing *Weston*, 898 F. Supp. at 753]. Are these mental abnormalities, which will propel an offender to commit future sexual offenses, absent when these sexual offenses actually occurred in the past? [*Weston*, 898 F. Supp. at 753 ("Common sense suggests that such mental conditions, if they are indeed the cause of sexual violence, are present at the time the offense is committed.")] The reliance on this circular logic by sexually violent predator statutes supports the idea that the interest in effectuating treatment is minimal, if not nonexistent. Rather, a stated interest in treatment enables the statutes to be characterized as 'civil,' and therefore isolated from the procedural safeguards of ex post facto and double jeopardy."

pp. 700-701: "2. The Therapeutic Disadvantages of the 'Delayed Treatment' Scheme

"As mentioned in the dissenting opinion of *Hendricks*, delayed treatment could potentially harm the goal of administering effective rehabilitation. According to Dr. Robert Wettstein [fn. 289: "...an Assistant Professor of Psychiatry at the University of Pittsburgh School of Medicine. Additionally, Dr. Wettstein serves as co-director of the Law and Psychiatry Program at the Western Psychiatric Institute and Clinic."], it is much more difficult to begin treatment for the sexual offense years after its commission than when treatment occurs soon thereafter. [*Robert M. Wettstein*, "A Psychiatric Perspective on Washington's Sexually Violent Predators Statute," '15 *U. Puget Sound L. Rev.* 597 (1992), at 617] The longer the period between the commission of the offense and the beginning of treatment, the more opportunities for the offender to distort the facts and circumstances surrounding the offense, which can serve as a hindrance to the offender's ability to take responsibility. [*Ibid.*] Additionally, this lapse in time gives the offender ample opportunity to formulate justifications, excuses, and defenses for his or her action. [*Ibid.*] The prison environment has been viewed, in general, as non-conducive to therapeutic purposes. [*Hendricks, supra*, at 385 (Breyer, J., dissenting); *Wettstein, supra*, at 617 ("Few, if any, correctional institutions are designed to function as therapeutic environments, much less actually do so.")] A prisoner faces stigmatization and possible violence from other inmates, by exhibiting any form of 'weakness,' such as engaging in therapy, or simply disclosing his status as a sexual offender. [Ibid.] Therefore, an inmate has no real incentive to discuss or take responsibility for his offense. [*Ibid.*] If there is a real and tangible treatment aim embedded in the sexually violent predator statutes, its mission is not being effectively achieved by first processing individuals through the corrections system."

Why would a legislature with a principal interest in treatment create a statute deliberately delaying the promised treatment and thereby exacerbating the alleged ills which it is designed to cure?

Additional important footnote:

129 *Weston*, 898 F.Supp. at 750; *In re Young*, 857 P.2d at 1021 (holding that the definition for mental abnormality is "merely circular"); See also *Hendricks*, 912 P.2d at 138 (citing *Weston*, 898 F. Supp. at 750) ("The only observed characteristic of the [mental abnormality or personality] disorder is the predisposition to commit sex crimes.").

5. SOCC Laws Do Not Reduce the Incidence of Sex Crimes.

Even as to the claim that incapacitation through commitment is required and is served by commitment under the MCCTA of 1994, that claim as well has been soundly factually disproved. *Tamara Rice Lave & Justin McCrary*, "Do Sexually Violent Predator Laws Violate Double Jeopardy or Substantive Due Process?," 78 *Brook. L. Rev.* 1391, 1392 (Summer 2013) undertook to "...question a core empirical foundation for the Court's holding in [*Kansas v.] Hendricks*: that SVPs are so dangerous that they will commit repeat acts of sexual violence if they are not confined. Our findings suggest that SVP laws have had no discernible impact on the incidence of sex crimes. These results challenge the only constitutionally permissible justification for SVP legislation,...."

At p. 1396, *Lave and McCrary* continue:

"In our analysis, we use original data gathered directly from SVP states to review commitments across the country. Next, using panel data for the last few decades, we examine the impact of SVP laws on the incidence of sex-related homicide and forcible rape. We also use data collected in the National Child Abuse and Neglect Data System (NCANDS) [See *Nat'l Data Archive on Child Abuse & Neglect, National Child Abuse and Neglect Data System (NCANDS)*, Detailed Case Data Component (DCDC), *NDACAN*, http://www.ndacan.cornell.edu/ndacan/Datasets/Abstracts/DatasetAbstract_NCANDS_General.html -- hereinafter *NCANDS Data*] to examine the impact of SVP legislation on the incidence of non-fatal child sexual abuse. Finally, since underreporting poses problems in accurately measuring the incidence of sex crimes, we also examine gonorrhea rates, a common proxy for the prevalence of sexual abuse."

In their Conclusion (at p. 1436), *Lave and McCrary* report: "In this article, we analyzed that theory from three different perspectives. First, we ran a difference-in-differences regression. We found that there is no statistically significant change in the incidence of sex homicide, forcible rape, or child sexual abuse post passage. We then ran a disparate impact analysis and once again found that SVP laws have had no noticeable effect on the rate of sex killing, forcible rape, or child sexual abuse. Finally, we analyzed whether SVP laws have had an impact on the incidence of gonorrhea, and we find that they have not."

Based on these findings, *Lave and McCrary*, at: 1402, conclude: "...Overall, ...our estimates are consistent with SVP laws having no discernible deterrent or incapacitation effects." They add these further statements on this conclusion:

p. 1414: "...[T]here is little evidence SVP passage had a discernible effect on sex crimes."

p. 1419: "...The decline is statistically indistinguishable from zero,.... ...[T]he data indicate that SVP laws have had no discernible deterrent or incapacitation effects on the rate of forcible rape [or] ... of child sexual abuse."

p. 1422: "...Either there are no preventive benefits associated with these laws, or the benefits are too small to measure with these methods."

pp. 1422-23: "Although our findings may seem surprising, the results are to be expected when the advanced age of SVPs is taken in to account. Studies show that, like other types of offenders, as sex offenders age, their recidivism rate drops. ...Interestingly, advancing age seems to affect sex offenders at different rates. Hanson found that the recidivism rate of both incest offenders and rapists declined steadily over time, and neither type of offender released after age 60 recidivated. Although the recidivism rate of extra-familial child molesters also declined with age, the drop was much less dramatic until the offender reached age 49, when recidivism dropped dramatically."

p. 1425: "We have shown that SVP laws had no discernible impact of the incidence of sexual homicide, forcible rape, child sexual abuse, or gonorrhea."

pp. 1435-36: "Our findings show that this threshold for dangerousness has not been met. If the state was successfully locking up only those who had a difficult if not impossible time refraining from committing violent sex crimes, then there should be an incapacitation effect. The lack of such an effect as demonstrated by our data suggests that the state is locking up people who are equally or even less dangerous than the typical recidivist.

pp. 1434-35: "...[O]ur findings show that locking up adjudicated SVPs is not

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(Continued from page 3)

'narrowly tailored' to meet this goal. The lack of an incapacitation effect means that we are indefinitely confining many people who are at low risk of committing a violent sexual offense if released. Our findings show that SVP legislation is neither 'carefully limited' regarding the circumstance under which detention is allowed, nor 'sharply focused' on the problem of preventing violent sex crimes. Instead, we show that SVP legislation is just a 'scattershot attempt' at addressing a serious problem that results from the indefinite commitment of many people who would not reoffend."

6. The Virginia Legislature Should Abandon Any Legislative Findings Offered in Support of Its SOCC Enactment, and Should, to the Contrary, Embrace Current Science, as Described infra, as Justification for SOCC Repeal.

Changing the subject somewhat, at pp. 1427-28, *Lave and McCrary* state:

"...When constitutional rights are at stake, however, the Court should maintain a more detached and critical perspective,.... The Court retains an independent constitutional duty to review factual findings where constitutional rights are at stake." [See, e.g., *Caitlin E. Borgmann*, "Rethinking Judicial Deference to Legislative Fact-Finding," 34 *Ind. L.J.* 1 (2009) (arguing that legislatures are poorly suited for gathering and evaluating facts impartially, especially when considering legislation restricting controversial or minority rights and thus advocating that courts should independently review the factual foundation of legislation that curtails basic individual rights, regardless of whether those rights are subject to heightened scrutiny).

See, e.g., *Brown v. Bd. Of Education of Topeka, Kan.*, 347 U.S. 483 (1954) (where the Court held that segregated public school education violated the Equal Protection Clause). In coming to this conclusion, the Court contradicted specific findings to the contrary by state legislatures and courts. Indeed, in *Plessy v. Ferguson*, 163 U.S. 537 (1896), the Court had held that "separate but equal" did not violate equal protection. Key to the Court's decision in *Brown* were psychological studies that showed the detrimental impact of segregated education on minority children. The Court held that these studies were relevant regardless of whether they had existed at the time *Plessy* was decided. "Whatever may have been the extent of psychological knowledge at the time of *Plessy v. Ferguson*, this finding is amply supported by modern authority. Any language in *Plessy v. Ferguson* contrary to this finding is rejected." *Brown*, 347 U.S. at 494-95.]

Lave and McCrary add these thoughts on this issue:

p. 1429: "...[T]here is precedent for using empirical studies to challenge the constitutionality of a particular law, even when it requires overturning legislative findings of fact."

"...[T]here is a robust debate in legal academia regarding the extent to which courts should defer to legislative findings. We hope that our article will lend support to the importance of independent fact-finding, especially when fundamental rights of unpopular groups are at stake."

In sum from the *Lave & McCrary* article, not only does the MCCTA of 1994 fail to fulfill its aim of providing treatment to rehabilitate those committed, on a more basic level, it fails at the elemental aim of preventing sex crimes because those it incapacitates through detention would not be any more likely to commit crimes than those not detained, and since sex crimes have not been significantly reduced by reason of passage of the MCCTA or similar laws elsewhere.

The old are always suspect. Isn't that what you've always been told? — By who, by the way?

7. The Padilla Study Disproves the Claimed Need for SOCC Laws.

Paul Demko, "Throwing Away the Key," *City Pages* (Mpls.-St. Paul, MN), March 31, 2002, at 15, notes that between 1994 and 2002 only one Minnesota SOCC confinee was released even conditionally. Demko quotes then-Ramsey County [MN] Attorney Susan Gaertner as characterizing the lack of SVP discharges as a sign that the system is working properly!

Tamara Rice Lave & Franklin E. Zimring, writing in "Assessing the Real Risk of Sexually Violent Predators: Doctor Padilla's Dangerous Data" 55 *Am. Crim. L. Rev.* 705 (2018), examined results of a study performed on sex offenders released from mental health facilities in California under commitments pursuant to its SOCC law. The Abstract to that article summarizes thus:

"p. 705, "This Article uses internal memoranda and emails to describe the efforts of the California Department of Mental Health to suppress a serious and well-designed study that showed just 6.5% of untreated sexually violent predators were arrested for a new sex crime within 4.8 years of release from a locked mental facility. ...The Article ...explains how the U.S. Supreme Court and the highest state courts have allowed these laws to exist without requiring any proof of actual danger. It then describes the California study.... Finally the Article explains how these results undermine the justification for indeterminate lifetime commitment of sex offenders."

The following excerpts from that article's text expand usefully on this overview:

Text: p. 705: "Introduction

This Article on sexually violent predator (SVP) laws ...is ...a narrative of legal and political events that help capture what we consider our legal system's egregious mishandling of the SVP issue, and, as we will elaborate below, the narrative will center on one great unresolved mystery: why a crucial piece of empirical research that could have corrected the system's misapprehension of the dangers of SVPs was suppressed."

p. 707: "In *Kansas v. Hendricks*, ...[t]he Court accepted as true the legislature's empirical claims about SVPs: they are 'extremely dangerous'[14]; their 'likelihood of engaging in repeated acts of predatory sexual violence is high'[15]; 'the prognosis for rehabilitating [them] in a prison setting is poor'[16]; and their treatment needs are 'very long term.'[17] The Court did not offer any proof for these assertions, and even though there was a wide body of research studying the recidivism rate of sex offenders, none of it was cited. ...Whatever the reason, ...the Court never asked for proof of the central justifying premise for the law – that an identifiable group of sex offenders is highly likely to commit new predatory sex crimes if released into the community."

p. 708: "The Court's holding in *Hendricks* has been criticized for a number of reasons.[19] One such criticism focuses on the distinction between civil and criminal law, and whether the SVP law is actually criminal, which would make it an unconstitutional second punishment. *Rollman* argued that various factors show the law is really criminal, including 'the fact that implementation of the Act is delayed until the "anticipated release" of a prisoner, thereby lessening the effect of any treatment while simultaneously maximizing punishment.'[20] Campbell criticized the majority for allowing states to 'merely redefine any [punitive] measure ...as "regulation," and magically, the Constitution no longer prohibits its imposition.'[21] Janus argued that by inappropriately blurring the line between punishment and civil commitment, SVP laws undermine the Constitution's due process protections.[22] Carlsmith, Monahan, and Evans conducted experiments to determine how the law should be classified and found that civil commitment of sexually violent predators was primarily motivated by retributive goals, thus demonstrating that it is impermissibly criminal in effect.

"Others have focused attention on the nebulous quality of a 'mental abnormality.' Morse argued that 'the term "mental abnormality" is circularly defined ...collaps[ing] all badness into madness,'[23] and Winick contended that the definition of mental abnormality is so broad that it can apply to any behavior.[24] In 1999, the American Psychiatric Association created a task force to evaluate SVP laws and concluded, 'sexual predator commitment laws represent a serious assault on the integrity of psychiatry, particularly with regard to defining mental illness and the clinical conditions for compulsory treatment.'[25]"

pp. 708-09: "Still another line of inquiry focuses on the use of actuarial instruments to prove dangerousness. ...Wollert[27] and Lave[28] contended that we simply do not have the ability to accurately predict future dangerousness. This means that due to the low base rate of recidivism, we are locking away people who would not reoffend if released...."

p. 709: "Others have explicitly questioned the laws' empirical justification. Lave and McCrary used panel data on U.S. states for the last few decades to examine the impact of SVP laws on the incidence of sex-related homicide, forcible rape, non-fatal child sexual abuse, and gonorrhea, a common proxy for the prevalence of sexual abuse.[32] They found that SVP laws had no discernible impact on the incidence of sex crimes or gonorrhea, the exact opposite of what would be expected if SVP laws were locking away violent sex offenders. In a related inquiry, Ellman and Ellman[33] showed how the Supreme Court relied on misleading and unsubstantiated statements about sex offender danger in upholding what would otherwise be an unconstitutional second punishment[34] or an unconstitutional ex post facto law.[35] Although Justice Kennedy described sex offender recidivism as 'frightening and high,'[36] Ellman and Ellman pointed to multiple studies that have shown the opposite to be true.[37]"

pp. 709-10: "We expand on these criticisms by telling the story of a serious and well-designed study, the Padilla study, which the California Department of Mental Health quashed after the study showed that untreated sex offenders with all of the risk factors of committed SVPs had just a 6.5% rate of contact sex crimes during an almost five-year exposure in the community.[38] Such a low recidivism rate undermines the state's authority to confine these persons under the rationale that they are too dangerous to be released."

p. 719:...[T]he 2003 DOJ [U.S. Dept. of Justice] study found that sex offenders were among the least likely to be rearrested for the same crime. Bureau of Justice Statisticians Langan and Levin found that 2.5% of rapists were

(Continued on page 5)

rearrested for rape within three years of release from prison,[105] and the DOJ found that 3.3% of child molesters were arrested for another sex crime against a child during that same period.[106]"

The MCCTA of 1994 fails at the elemental aim of preventing sex crimes because those it incapacitates through detention would not be any more likely to commit crimes than those not detained, and since sex crimes have not been significantly reduced by reason of passage of the MCCTA or similar laws elsewhere.

pp. 720-21: "III. The Padilla Study

"In 2000, Dr. Jesus Padilla was hired as a clinical psychologist at Atascadero State Hospital.[114] The institution held all committed California SVPs from the inception of the program in 1995 until September 2005 when they were moved to a new facility. ...Padilla soon began working with ...a social worker named Kabe Russell – on a long-range study of how SVPs who had completed treatment fared in the community as compared with SVPs who had not.

"...Padilla was ...able to study released, untreated SVPs -because at the time, California was the only state in the country that limited SVP commitment to two-year periods.[121] This meant that every two years, the state had to go through the entire SVP commitment process again for each offender.... The recommitment process meant that there were multiple opportunities for people to fall out of the system.

"Padilla collected detailed data on each individual who was released without treatment including their age, criminal history, and where the subject went after leaving the program's control.[123]"

p. 722: "Padilla also collected data where available on each individual's Static-99 score.[131],..."

p. 723: "A total of 121 persons left Atascadero without significant exposure to its treatment program. Of these 121 persons, Padilla was able to obtain clear records of extensive time in the community and detailed criminal record information for 93, with an average documented time of 4.71 years living in community settings. ...[J]ust 6.5% were arrested for a contact sex crime. ...This was despite the fact that their average Static-99 score was a six, which the scoring manual equates to a high risk of recidivating.[134]

"A person with a score of six on the Static-99 was estimated as having a 36% chance of being convicted of a new sexually violent offense within five years of release.[136].... That means that the released SVPs performed much better than expected based on their Static-99 score. The difference is that much more striking considering that Padilla used arrests to many arrests do not result in a conviction, the disparity would have been even greater if they had both used arrests as their basis of measurement."

pp. 724-26: [The article describes in detail the long-lasting efforts by officials of the Atascadero program and its administrative 'parent' agency to quash the Padilla study. These efforts included falsely claiming that Padilla had illegally obtained the records of the offenders in the study, terminating that study without cause and denying any further access to the documents already compiled by the study, including all Excel-based spreadsheets calculating the percentages of recidivism, ultimately destroying such documents and deliberately mangling the Excel files containing such recidivism statistics, refusing to honor formal requests per law for access to state data, and finally, falsely denying that any such study had ever been approved and undertaken.]

p. 727: "Once Padilla testified, DMH [CA's Dept. Of Mental Health] may have realized the study had to be stopped because it threatened the legitimacy of the entire SVP program. As explained earlier, the only constitutionally acceptable rationale for SVP commitment is that offenders are so dangerous that they must be locked away, and this study showed otherwise. If the SVP law were to be declared unconstitutional, it would threaten the $147.3 million annual budget DMH (and now Department of State Hospitals) receives for the civil commitment program. People have done far worse than bury a study for a hundred million dollars."

p. 728: "A. General Data on Sex Offender Recidivism

"Although the Padilla results seem surprising, they are actually consistent with other studies of sex offender recidivism. The largest U.S. follow-up study of released sex offenders was published by the DOJ in 2016.[180] It analyzed the recidivism of 20,422 persons released from prison in 2005 from 30 states after conviction for rape or sexual assault.[181]"

p. 729: "...In 2003, the DOJ published what was then the largest study of American sex offenders.[184] [Both studies reported sexual assault/rape/sex contact crime re-arrests as less than 6%.] Just as with the 2016 study, the measure of possible recidivism is re-arrest rather than reconviction, a much looser standard than proven guilt.[186]"

p. 730-31: "...[O]lder age at release in the 2003 DOJ report cuts the re-arrest rate for sex crime almost in half, with 3.3% of the 45-and-over persons released re-arrested for a sex crime versus 5.8% for the three youngest groups.[194]

p. 731: "Wilson, Looman, Abracen, and Pake were able to study the recidivism of 31 SVPs who were released into the (5.8%) was about the same as that in the Padilla study (6), but the mean age at release (45.72) was lower than in the Padilla study (50).[201] Wilson et al. found that 3.2% (1/31) of the SVPs committed a new sexual offense within 2.54 years of release from the Florida Civil Commitment Center.[202] These recidivism rates were 'considerably below' the 26.2% projected by the Static-99.[203] 'This suggests,' Wilson et al. wrote, 'that even though these two programs may provide treatment to offenders substantively meeting the "high-risk/needs" standard, the attendant actuarial normative data may not apply.'[204] In other words, the offenders may meet the criteria associated with being high risk, but the risk of reoffending associated with that criteria may not apply to them."

pp. 737-8: "IV. Why the Padilla Study Matters

"It would be hard to ignore a study showing that the vast majority of recently released individuals committed under the current SVP regime did not recidivate. The range of sexual danger found in the Padilla study is not substantial enough to justify permanent confinement, and this finding threatens the entire SVP apparatus. If SVPs are no different than the 'dangerous but typical recidivist convicted in an ordinary criminal case,'[237] then the state has no constitutionally permissible reason to continue locking them away.

"Even more remarkable is that the Padilla subjects had two characteristics that should have placed them at higher risk of reoffending than currently committed SVPs. First, California law at the time required that a person have two or more sexually violent predatory prior offenses in order to be committed as an SVP. Now every state, including California, requires just one. This difference matters because increased criminal history is correlated with higher risk of recidivating. In addition, the average Static-99 score of currently committed SVPs across the country is actually lower than in Padilla's sample. According to the Static-99 and 2016 SOCCPN annual report, the average Static-99 score across programs was 4.69,[245] which is below the average score from Padilla's study. According to the scoring manual for the Static-99R, a score of five would actually place those individuals at moderate-high risk of reoffending.[246] As previously noted, the average score in the Padilla study was six, which equates to a high risk of reoffending. That means that SVPs across the country would be expected to do even better than Padilla's sample if released into the community.

"CONCLUSION

"SVP laws are premised on the fact that they are incapacitating dangerous sex offenders who would be committing sexually violent crimes if released into the serve to be punished because they committed reprehensible crimes – would violate the Constitution's double jeopardy prohibition.[247] Thus, prevention is not merely the most important objective of SVP strategy; it is the only legitimate legal objective.

p. 740: "Despite the critical importance of dangerousness, the Supreme Court upheld the constitutionality of Kansas' SVP law without requiring any actual proof that SVPs would commit predatory sex crimes if released. If the justices had looked for empirical proof instead of simply deferring to the assertions of the Kansas legislature, they would have seen that sex offenders actually have a low recidivism rate. Indeed, the DOJ has published three major studies – in 1997, 2003, and 2016 – that have shown that the vast majority of convicted sex offenders do not recidivate once released from prison. Of particular note is the 2016 DOJ study, which found just 5.6% of 20,422 convicted sex offenders were rearrested for rape or sexual assault within five years of release from prison.[248]

"And yet sexually violent predator laws are necessarily premised on the idea that SVPs are different than run-of-the-mill sex offenders, which means the DOJ studies may be irrelevant in assessing their danger. What we really need then are studies that look specifically at how released SVPs perform in the community, but conducting such a study is difficult because most SVPs are never released. Indeed, we know of only two studies that have examined how released SVPs fare in the community. The Padilla study was shut down after it showed a 6.5% recidivism rate for 4.8 years at risk in the community. The Washington State Institute study, which initially appeared to support the notion that SVPs are extremely dangerous, ended up being consistent with the Padilla results once attention was focused on the offenders' age.

"Padilla's study and the statistics in table 2 from the Washington study undermine any theory of fixed levels of sexual violence risk. The men in Washington who were 50 or older when eligible for SVP status had historical records of sex offending that were almost certainly as long as the younger group. When had they become so low risk that no member of the population re-offended? It can't have been that a treatment program succeeded, because they weren't treated. Age alone seems to have diminished the propensity to sexually offend. If so, the notion of fixed and immutable danger requires reconsideration.

"Even though most of the SVPs that California locks up are over 50 now, it is unlikely that they will ever be released. Like all other SVP states, California now makes commitment indeterminate[249] – in effect presuming that the risk a person dilla study demonstrates why states

(Continued on page 6)

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should be required at the very least to prove recidivism danger at regular intervals, as California used to do. Putting the burden on the committed person to prove he is no longer dangerous is not a legitimate alternative. The politics of crime and fear of sex offenders mean that someone like Mr. Hendricks, who is now 83-years-old and confined to a wheelchair, will never prevail.

Notes:

14 *Kansas v. Hendricks*, 521 U.S. at 351

15 *Id.*

16 *Id.*

17 *Id.*

19 *Robert A. Prentky et al.*, *Sexual Predators: Society, Risk, and the Law* (2015)

20 *Eli M. Rollman*, "'Mental Illness': A Sexually Violent Predator Is Punished Twice for One Crime," 88 *J. Crim. L. & Criminology* 985, 1013 (1998)

21 *Andrew D. Campbell* Note, "Kansas ... Violate Double Jeopardy Clause," 30 *Loyola U. Chi. L.J.* 124-129 (1998)

22 *Eric S. Janus*, *Failure to Protect: America's Sexual Violent Predator Laws and the Rise of the Preventive State* 21-22 (2006)

23 *Stephen J. Morse*, "Fear of Danger, Flight from Culpability," 4 *Psychol., Pub. Pol'y & L.* 250, 261 (1998)

24 *Bruce J. Winick*, "Sex Offender Law in the 1990s: A Therapeutic Jurisprudence Analysis," 4 *Psychol., Pub. Pol'y & L.* 505, 525-30 (1998)

25 *Am. Psychiatric Ass'n, Dangerous Sex Offenders: A Task Force Report of the American Psychiatric Ass'n* 173 (1999)

27 *Richard Wollert*, "Low Base Rates Limit Expert Certainty When Current Actuarials Are Used to Identify Sexually Violent Predators: An Application of Bayes's Theorem," 12 *Psychol., Pub. Pol'y & L.* 56, 72 (2006)

28 *Tamara Rice Lave*, "Controlling Sexually Violent Predators: Continued Incarceration at What Cost?" 14 *New Crim. L. Rev.* 213, 217 (2011).

32 *Tamara Rice Lave & Justin McCrary*, "Do Sexually Violent Predator Laws Violate Double Jeopardy or Substantive Due Process?: An Empirical Inquiry," 78 *Brook. L. Rev.* 1391, 1396 (2013).

33 *Ira Mark Ellman & Tara Ellman*, "'Frightening and High': The Supreme Court's Crucial Mistake about Sex Crime Statistics," 30 *Const. Comment.* 495, 496 -97, 499 (2015)

34 *McKune v. Lile*, 536 U.S. 24, 29, 35-38 (2002)

35 *Smith v. Doe*, 538 U.S. 84, 103-04 (2003)

36 *McKune*, at 34; *Smith*, at 103

37 *Ellman & Ellman, supra*, note 33, at 501-05

38 Deposition of Jesus Padilla at 57-58, *People v. Tighe*, No. MH100903 (Cal. Sup. Nov. 23, 2009) (on file with authors)

105 *Patrick Langan & David J. Levin*, Bureau of Justice Statistics, NCJ 193427, "Recidivism of Prisoners Released in 1994" 9 (2002)

106 *Id.* at 1

114 Padilla Deposition, *supra* Note 38, at ll. 22-23

121 Ballot Pamp., Gen. Election (Nov. 7, 2006), text of Prop. 83, 127

123 Padilla Deposition, *supra* Note 38

131 Memorandum, from Jesus Padilla and Kabe Russell to Janice Marques 1 (Han. 5, 2004)

134 According to the scoring manual for the Static-99, a score of 6 is equal to a high risk of reoffending.

136 Memorandum, from Jesus Padilla to Jim McEntee, Oct. 10, 2008

180 *Matthew R. Durose et al.*, Bureau of Justice Statistics, NCJ 244205, "Recidivism of Prisoners Released in 30

181 *Id.* at tbl. 1

184 2003 DOJ Study: *Patrick Langan et al.*, Bureau of Justice Statistics, NCJ 198281, "Recidivism of Sex Offenders Released from Prison in 1994" at 1 (2002)

186 *Id.* at 102

194 *Id.* at 25 tbl. 25

196 We computed the age as of May 13, 2014, which was the date that the Dept. of Hospitals generated the data.

200 *Robin J. Wilson et al.*, "Comparing Sexual Offenders at the Region al Treatment Centre (Ontario) and the Florida Civil Commitment Center," 57 *Int'l J. Offender Therapy and Comp. Criminology* 377, 390 (2012)

201 *Id.* at 385

202 *Id.* at 385

203 *Id.* at 390

204 *Id.*

210 *Grant Duwe*, "To What Extent Does Civil Commitment Reduce Sexual Recidivism? Examining the Selective Incapacitation Effects in Minnesota," 42 *J. Crim. Just.* 193, 194 (2014)

211 *Id.* at 194

212 *Id.* at 196-7

213 *Id.* at 197

225 *Donna Schram & Cheryl D. Milloy*, Wash State Inst. For Pub. Pol'y, "Sexually Violent Predators and Civil Commitment: A Study of the Characteristics and Recidivism of Sex Offenders Considered for Civil Commitment but for Whom Proceedings Were Declined" 1 (1998)

226 *Cheryl Milloy*, Wash State Inst. For Pub. Pol'y, "Six-Year Follow-Up of Released Sex Offenders Recommended for Commitment under Washington's Sexually Violent Predator Law, Where No Petition Was Filed" 1 (June 2003)

228 *Cheryl Milloy*, Wash State Inst. For Pub. Pol'y, "Six-Year Follow-Up of 135 Released Sex Offenders Recommended for Commitment under Washington's Sexually Violent Predator Law, Where No Petition Was Filed" at 6-7 (June 2007)

231 Email from Kabe Russell to mlispcomb@flacc.com, cc. Diane Inrem, Jesus Padilla, rbriody@flacc.com (Mar. 3, 2004)

232 *Id.*

237 *Kansas v. Crane*, 534 U.S. 407, 413 (2002)

239 *Kathy Gookin*, Wash. State Inst. For Pub. Pol'y, "Comparison of State Laws Authorizing Involuntary Commitment of Sexually Violent Predators: 2006 Update, Revised" 5 (2007)

240 According to the California Sex Offender Management Board, the inpatient cost to the state of treating SVPs is about $200,000 per person. Cal. Sex Offender Mgmt. Bd. Annual Report 2016 39 (2016). After serving a FOIA request on the Dept. of State Hospitals, we were provided with an Excel file giving us information about the currently committed SVPs in California ... According to that SVPs at a cost of $200,000 per person would cost $266.8 million per year.

242 Under Pennsylvania's program, a determination is made as to whether a juvenile can be released into the community upon turning 21 or whether he should be committed to the state's inpatient civil commitment program. "Frequently Asked Questions," Pa. Sexual Offenders Assessment Bd.

243 *Jennifer E. Schneider et al.*, SOCCPN Annual Survey of Sex Offender Civil Commitment Programs (2016)

244 Email from Jennifer Schneider

245 2016 SOCCPN Annual Survey, *supra* Note 243

246 *L. Helmus et al.*, "Static-99R: Revised Age Weights" (2009), http://static99.org/pdfdocs/static-99randage200981005.pdf. The creators of the instrument recommend that evaluators switch from the Static-99 to the Static -99R. Regardless of which instrument they choose, they should use the coding rules for the Static-99R. However, the age weights are different between the two instruments. *Amy Phenix et al.*, "Static-909R Coding Rules, Revised-2016" at 4. http://static99.org/pdfdocs/Coding_manual_2016_InPRESS.pdf. The Static-99 instrument was criticized for failing to adequately take into account how advancing age lowers the risk of recidivism. See *Sophie G. Reeves et al.*, "The Predictive Validity of the Static-99, Static-99R, and the Static-2002/R: Which One to Use? *Sexual Abuse* 1, at 4 (2017). In 2009, Helmus et al. modified the Static-99 to try and address this problem. The Static-99 asks evaluators to score someone on whether they are older or younger than 25, but the Static-99R breaks age into four sub-categories. Evaluators are instructed to add one point to a person's risk score if they are between the ages of 18-34.9, add zero points if they are between the ages of 35-49.9, subtract one point if they are between the ages of 40-59.9, and subtract three points if they are over the age of 60. See *Helmus et al. supra* note 134 at Static-99R Coding Form. The Static-99R does not address the problems raised by this article for two major reasons. First, many evaluators have not switched from the Static-99 to the Static-99R. Even if they have switched, the Static-99R has only been in existence since 2009, and so many SVPs could only have been committed using the Static-99. Second, the Static-99R has been criticized within the research literature on a number of serious grounds, which calls into question its accuracy in predicting risk. See *Reeves et al. supra* (this note).

247 *Jones v. United States*, 463 U.S. 354, 374 (1983) (Brennan, dissenting)

248 *DuRose et al., supra* note 94, at tbl. 2

Deirdre M. D'Orazio et al. Cal. Coal. ... scription, & Areas for Improvement" 17 (2009), https://ccoso.org/sites/default/files/CCOSO%SVP%20Paper.pdf.

Daniel Montaldi, "A Study Of The Efficacy Of The Sexually Violent Predator Act In Florida," 41 *Wm. Mitchell Law Rev.* 780 -865 at p. 811, 818 (2015), concludes from similar data, "...No basis whatsoever exists for thinking that commitment has prevented 'thousands' of sexual crimes. Given how low this number probably is, no evidence to date suggests that commitment has prevented more sexual offenses than what would have been possible with different policies. It may have prevented fewer.""

Even though most of the SVPs that California locks up are over 50 now, it is unlikely that they will ever be released. Like all other SVP states, California now makes commitment indeterminate – in effect presuming that the risk a person poses at the age of 40 remains the same when he is 50, 60, or even 90.

Segment 3 will appear in the June *TLP* edition (Ed.).

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A Presumption of Dangerousness

Scurich, N. & Krauss, D., "The Presumption of Dangerousness in Sexual Violent Predator Commitment Hearings," 13 *Law, Probability and Risk*, 91-104 (March 2014).

Abstract Excerpt: "...Although most who are convicted of a sexual offense will not be subject to SVP commitment, a burgeoning body of research indicates that commitment is highly likely once the decision is placed in the hands of the jury. The high rate of commitment suggests that there might be a presumption of dangerousness in these proceedings, possibly stemming from the previous conviction requirement. This potential explanation was tested in the current experiment. Jury-eligible participants (n = 190) were provided with varying degrees of information pertaining to the SVP commitment criteria. Some participants were told only that a person had been referred for an SVP commitment proceeding, whereas others were given information relevant to some of all three of the legal criteria. The rate of commitment did not vary as a function of the information provided. The mere fact that a respondent had been referred for an SVP proceeding was sufficient for a majority of participants to authorize commitment...."

Text excerpts:

(p. 92): "...Boccaccini et al.(in press) examined 26 SVP commitment proceedings in Texas from 17 August 2008 to 30 June 2010, and noted that, 'All but one of the hearings ended in commitment, with the other ending in a hung jury (that respondent was eventually committed in a subsequent hearing)....At the time this study began, only one SVP hearing [in Texas] had ever ended with the jury unanimously agreeing that the respondent did not qualify for commitment. (p. 3)'. There are several potential explanations for the uniform commitment rate. Perhaps Texas is extremely selective in whom it refers for commitment proceedings and as a result, only the most dangerous offenders come before a jury. Indeed, research suggests that the general public believes over 75% of sexual offenders will recidivate (Levenson et al., 2007). If Texas SVP jurors believe that the recidivism rate among sexual offenders is similarly high, a high rate of commitment would be expected. It is also possible that jurors do not attend to the legal criteria. As hypothesized by one group of renowned legal scholars, 'We suspect that, in fact, only one criterion is doing all the work in these cases, and that is prior conviction of a sexual offense. If so, this raises substantial constitutional concerns (Faigman et al., 2012, p. 189, FN 13)'. Relatedly, it is possible that jurors begin their consideration of the case with a presumption that the respondent is dangerous and thus, *ipso facto*, satisfies the commitment criteria. This later possibility speaks to an intricate interaction between the burden of production and the standard of proof, which collectively are referred to as 'the presumption of innocence' in criminal trials.

p. 93: ...[T]raditional civil commitment requires proof of dangerousness by clear and convincing evidence – a less demanding standard than beyond a reasonable doubt – in order to justify commitment (*Addington v. Texas*, 1979). Confusingly, however, a slight majority of states require that the elements of SVP statutes be proven beyond a reasonable doubt (Woodworth and Kadane, 2004), the standard mandated in all criminal trials (*In re Winship*, 1970).

p. 95: Participants thought it was more likely than not (mean = 59%) that the respondent would recidivate based solely on the fact that the case was referred for a commitment proceeding. The mean estimate increased to 88.5% among participants in the 'previous conviction' condition who learned of the respondent's previous conviction. The mean estimate dropped to 78.3% when participants [instead] learned of the respondent's pedophilia diagnosis in the 'mental abnormality' condition, and the estimate dropped to 73.6% when participants were [instead] provided with the risk assessment indicating moderate risk, as in the 'dangerousness' condition.

...[L]earning that the respondent has a mental abnormality did not increase participants' estimates that he would recidivate over and above knowing that he had a previous conviction. Additionally, there was not a significant difference between the 'mental abnormality' and 'dangerousness' conditions. The risk assessment indicating moderate risk did not decrease participants' estimates of the respondent's risk compared to when no risk estimate was provided.

p. 96: ...A recent study by Knighton et al. (in press) asked a sample of jurors (n = 151) in Texas who just adjudicated an SVP commitment proceeding what level of risk corresponded to the 'likely to reoffend' criterion. Over half of the jurors indicated that 1% chance of recidivism sufficed for commitment.

p. 98: DISCUSSION

The findings suggest that, on average, not much evidence is required to obtain an SVP commitment verdict. Indeed, roughly three out of four jurors voted to commit the respondent as an SVP before any evidence was adduced. Furthermore, these same jurors believed that there was a 59% chance that the respondent would recidivate based solely on the fact that he was referred for a commitment proceeding. These estimates are remarkably similar to those found in community surveys that examine public perceptions of sexual offenders. (e.g., Levenson et al., 2007). The implicit threshold analysis revealed that jurors are not willing to tolerate much risk when it comes to the risk of sexual recidivism, as evidenced by their preference of false positives relative to false negatives. Such risk aversion could be the manifestation of jurors' latent desire to impose additional punishment on sex offenders (Cairns and Koehler, in press; Carlsmith et al., 2007). Jurors' high estimates of recidivism coupled with their low implicit threshold for commitment carries the implication that the majority of SVP respondents are fore-doomed once the decision to pursue commitment is made by the district attorney.

p. 99: CONCLUDING THOUGHTS

...[N]early all SVP respondents who have a previous sexual offense (at least for child molestation) are committed. It is difficult to reconcile these findings with the premise that such laws would apply only to a select group of sexual aggressors. Moreover, because jurors begin their consideration of the case with an assumption that a respondent is dangerous, the legal criteria that are supposed to discern SVPs from run-of-the-mill sex offenders are rendered largely superfluous.

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In re Winship, 397 U.S. 358 (U.S. Supreme Court 1970)

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Impressionism is a technique of art, not of science.

The *Futility* of Postconviction SO Polygraphy

Jeffrey W. Rosky, "The Futility of Post-Conviction Polygraph Testing," 25(3) *Sexual Abuse: A Journal of Research and Treatment* 259-281 (Apr. 2013)

Abstract: The apparent utility of the polygraph to work both as a treatment and supervision aid and as a deterrent for future offending is cited as ample justification for its use. This article examines these claims to demonstrate that although post-conviction polygraph testing may have some utility by increasing disclosures of prior offending and, with specific

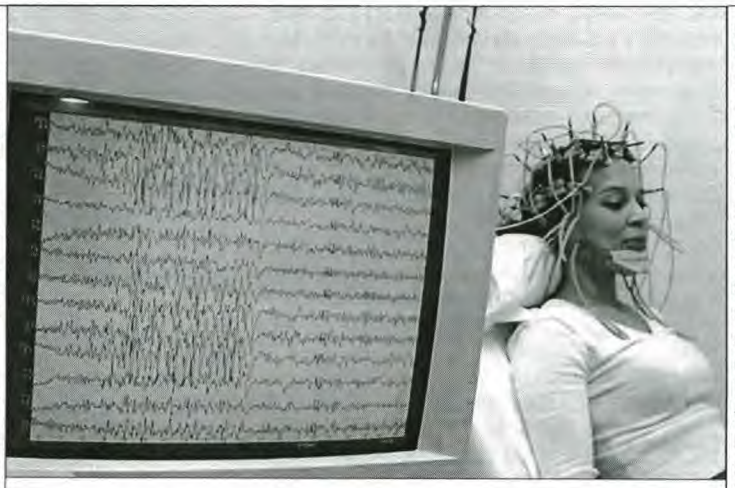
cases, admissions of treatment and supervision violations, the limited evidence accumulated thus far does not adequately ascertain its accuracy nor support its efficacy or effectiveness as a deterrent. The article concludes with recommendations for creating a real evidentiary base beyond polygraph testing's apparent ability to elicit more information from offenders to evidence that can determine whether it is efficacious and effective in reducing criminality and deviance.

Text excerpts:

p. 280: "The Validity of Polygraph Testing

The basic assumption of any good test or measure is that it has construct validity, that is it is actually measuring the phenomena it was designed to capture (Maxfield & Babbie, 2011). There is no argument that the instrumentation used in polygraph testing is actually measuring blood pressure, breathing, heart rate, and perspiration; rather, it is the assumption within polygraph testing that if a subject shows some physiological response assumed to be related to deception during the polygraph examination, then the subject is deceptive. As many authors (Crosse & Saxe, 1992; Crosse & Saxe, 2001; Faigman et al. 2003; Fienberg & Stern, 2005; Iacono, 2001; Lykken, 1998; Seto, 2004) have noted, it requires a logical leap to assume that the response is due solely to deception because this response can also be attributed to fear, anxiety, anger, and many medical or mental conditions. If we cannot establish definite construct validity that polygraph testing detects deception, this undermines any scientific or practical usage. Largely, this construct validity criticism is not discussed in the post-conviction polygraph literature with most proponents assuming that the test is measuring deceit. Hence, it is hard to ascertain whether there is construct validity in post-conviction polygraph testing.

pp. 280-81: Moreover, the problems with polygraph testing were highlighted by the U.S. National Research Council (NRC, reliability, and its utility in screening employees engaged in governmental defense and classified work for whether these employees were engaged in espionage. The NRC (2003) found that certain polygraph testing techniques including similar tests used in post-conviction applications lacked sufficient scientific validity and most importantly, they found no support for the use of the polygraph in screening situations (i.e., individuals are tested on general questions about crimes and actions that may have happened) rather than specific incident testing (i.e., individuals are tested about crimes and actions that have actually occurred).



Can Claims of Mind-Reading Be Far Behind?

Moreover, the NRC (2003) concluded that overconfidence in polygraph testing created a significant risk to national security because it had no validity in screening employees for espionage and would not catch spies. As we will see, this same logic in overconfidence extends to post-conviction use.

p. 281: The Accuracy of Polygraph Testing

...Iacono and Lykken (1997) have shown similarly to the NRC conclusions that most of the studies cited in support of polygraph testing lacked sufficient peer review and were methodologically flawed. Faigman et al. (2003, p. 348) noted that with regard to estimates of the accuracy for post-conviction use of the polygraph that they could not find 'a single controlled randomized trial or field trial in connection with polygraph testing with anything approaching credibility.'

...[T]he NRC (2003) concluded that no credible estimate of polygraph accuracy could be determined beyond the appearance that the polygraph seemed to detect deception at rates greater than chance for incident-specific tests only and that increases in the reliability and accuracy of the polygraph were unlikely. Hence, any number that is reported in the literature supporting post-conviction also could find nothing approaching scientific credibility for estimates of polygraph testing accuracy in screening applications, under which most post-conviction polygraph testing situations fall.

p. 262: Grubin and Madsen (2006), with values of 48% and 53%, essentially reported a coin flip whether the offender was really being deceptive.

p. 263: The Base Rate Problem

...In addition to concerns about the lack of scientific validity and reliability of the polygraph, the NRC (2003) determined that security was compromised by the low base rate of espionage and government employees were at a high risk of being labeled deceptive when in fact they were telling the truth. Within the context of post-conviction polygraph testing, false positives do not pose a threat to public safety. However, they errantly increase supervision and incarceration costs and they are constitutionally troubling in that these offenders are being punished for offenses and violations they did not commit.

p. 264: With an unknown base rate of deception within the context of these tests, we have no way, beyond scenarios, of measuring the false negative or positive rates of these tests or adequately assessing their real impact. In other words, how many offenders are we needlessly revoking to prison or higher custody levels due to false positives and therefore incurring higher but unnecessary costs in tight budget times? Indeed, recent research has shown the fiscal pressures correctional agencies are under with expanding prison population and these agencies can ill afford to erroneously add more inmates (Austin 2010).

Habituation and Sensitization

Given the regularity with which post-conviction polygraph tests are administered, there is concern that repeated administration of polygraph tests may habituate (Iacono, 2005) are correct, a prior test could influence the accuracy of the current test. [A]]ny impact of a prior test, even a minor impact, can negatively and significantly affect polygraph accuracy. ...[I]t is an uncontested fact that the subject being polygraphed is unchanged from test to test and presumably remembers the outcome of his or her prior tests, it is an untenable assumption that current tests are independent of prior tests regardless of who is administering the test.

p. 265: Other Threats to Accuracy

In addition, no research in the post-conviction polygraph testing literature was found, which discusses the effect of polygraph accuracy by certain diseases or conditions that impact physiological measures used in polygraph testing such as metabolic syndrome, hypertension, thyroid disease, or early stage obstructive pulmonary disease. ...[I]t has been well established that changes in blood pressure occur with changes in blood sugar levels, even in normal populations (Rebello, Hodges, & Smith, 1983), so if someone has a spike or drop in blood sugar, they will also have a concomitant spike or drop in blood pressure, which can easily happen after baseline has been established, possibly leading to a false positive or false negative result. Hence, diseases directly related to the measures used in polygraph testing introduce variability in these measures and can decrease accuracy. In addition, given the prevalence of any of these conditions in the general and offender populations, not knowing these potential impacts on accuracy is a severe limitation.

More significant though is the assertion by Heil and English (2009) that examiner skill may affect accuracy. ...[In addition] what sort of appeals process do offenders have if they feel they have been wrongly judged deceitful by an inept or neophyte examiner? Who are treatment providers or field personnel going to believe? The incorrect polygraph test result or the innocent protesting offender?

p. 266: ...[S]ome polygraph examiners resort to accusing subjects of counter measures without any proof (Maschke & Scalabrini, 2005).

p. 267: Does Accuracy Really Matter?

...Buschman et al. (2009) bely their claim that polygraph testing is not used to help with prediction because they note the tests are incorporated into '[p]ost conviction decision making in probation and prison settings' (p. 12). As these decisions are based on risk level and risk level is about predicting and preventing future behavior, it seems that results from the polygraph test do help (or potentially hurt) risk prediction. Therefore, when these results are inaccurate and incorrect on faulty information result in either increased costs to the system by needlessly increasing the supervision level or incarcerating offenders, or, most importantly, allowing further criminality and victimization to occur. In addition, the information gleaned for polygraph testing is used in determining types and levels of treatment or therapy; if the information is flawed, then they undermine any effectiveness because these interventions target the wrong people. Hence, accuracy is very important, polygraph test information informs decision making, and is therefore related to risk prediction. No

(Continued on page 9)

(Continued from page 8)

substantial argument can be made otherwise.

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...[A]lthough polygraph testing does elicit confessions at a higher rate than other forms of interrogation, it is questioned whether this is due to the test or the ability of the test to serve as an interrogation prop that tricks some into confessing. Some authors (Crosse & Saxe, 2001; Ford, 1996; Gannon, 2006; Gannon, Keown, & Polaschek, 2007) have drawn comparisons to the bogus pipeline effect where it has been shown that subjects attached to a nonfunctioning apparatus will make admissions if they believe the apparatus can detect what the machine is purported to measure. These authors argue that the utility of the polygraph lies only in its placebo effect. Indeed, in the 2004 Iowa court case discussed earlier, this placebo effect was noted by the testimony of a staff member who admitted that 'it is more important for patients to believe the polygraph is valid than for then test actually to be valid' (*Willis v. Smith et al.*, 2004, pg. 8). From this testimony, the judge concluded that 'the polygraphs act similarly to a placebo for some patients, in that if the patient is worried about being caught in a deception, the patient may admit things before the test is administered' [*ibid.*]. However, few polygraph proponents refer to this placebo effect in their reviews of the literature. Lastly, this case provides evidence that the utility of the polygraph to elicit higher disclosure of prior criminal history or disclosure of new crimes or field violations may be compromised if offenders are aware of the placebo effect.

pp. 269-70: So Is Post-Conviction Polygraph Testing Useful?

Most of the literature that supports post-conviction polygraph testing spends an inordinate amount of time assessing whether offenders, treatment providers, and community supervision officers find it a useful component of a treatment program (Grubin, 2008; Grubin, 2010; Heil et al. 2003). However, the real question is why would it matter whether an offender or provider find polygraph testing useful without evidence of changed behavior? For instance, research has shown that more expensive placebos are perceived to work better than cheaper placebos (Weber, Shiv, Carmon, & Ariely, 2008). The fact remains that both are placebos, so neither the expensive or cheaper variety are useful in treating any condition. Hence, opinions of individuals involved with polygraph testing, be they offenders or providers, do not provide an adequate measure of usefulness or utility beyond the fact that people perceive them to be useful or utile. *The real measure of usefulness or utility of any correctional treatment or program is whether it delivers the desired change in whatever behavior it is trying to affect.* One can argue against this position, but ultimately, this is how correctional treatment programs and interventions are and should be judged. And indeed, the literature on 'what works' in correctional treatment stress these behavioral change outcomes as indicative of program effectiveness (Gendreau, 1996; Gendreau, Goggin, Cullen, & Paprozzi, 2002; Gendreau, Smith, & French, 2006; Lowenkamp, Latessa, & Smith, 2006; MacKenzie, 2000, 2005, 2007; Polizzi, MacKenzie, & Hickman, 1999).

Faigman et al. (2003, p. 348) noted that with regard to estimates of the accuracy for post-conviction use of the polygraph that they could not find 'a single controlled randomized trial or field trial in connection with polygraph testing with anything approaching credibility.'

Which brings us to the main thrust of this article: Does post-conviction polygraph testing reduce further offending? Discussions of increased disclosures, accuracy, habituation, sensitization, and deterrence aside, when the rubber meets the road, does polygraph testing deliver on its promise to reduce criminality and deviance?

p. 271: [Discussing the only study since the millennium cited by the author (McGrath, Cumming, Hoke, and Bonn-Miller, 2007), which examined 104 sex offenders on post-conviction polygraph testing, versus 104 sex offenders not on such testing, the author observes:] ... [A]lthough no statistical differences were found between the polygraph and non-polygraph groups for any new offense, field violations or prison returns, rates were higher in the polygraph group for any new offense (39.4% vs. 34.6%), field violations (54% vs. 47%) and prison returns (47% vs. 39%). Moreover, these differences are practically important[7] as the promise of post-conviction polygraph testing is that increases in disclosure of prior offending will allow for better treatment that will reduce risk of future offending and that the polygraph will also serve as a deterrent for field violations and new offending. Even if this sample was too small to find a difference, shouldn't the nonpolygraph group have higher rates of new offenses, field violations and prison returns? Instead, the evidence goes in the opposite direction. Indeed, the conclusion from McGrath et al. (2007) is:

> The results of this study support research findings cited earlier indicating that individuals who have committed sexual offenses and who undergo polygraph compliance testing admit to engaging in previously withheld high risk behaviors and that providers find this information relevant for improving treatment and supervision services. *Although it seems logical that these outcomes would lead to lower recidivism rates, the present results do not provide much support for this hypothesis.* (p. 389, emphasis added).

pp. 272-73: Discussion

...[T]he widespread adoption of polygraph testing in sex offender treatment despite [the lack of] any evidence that it works to reduce offending (McGrath et al. 2010) is an all too common event seen within correctional systems (Latessa, Cullen, & Gendreau, 2002). Indeed, Latessa and colleagues (Cullen & Gendreau, 2001; Gendreau, 2000; Gendreau, Smith, & Theriault, 2009; Latessa et al. 2002) use the term 'correctional quackery' to label programs and treatments empirical and theoretical support, or substantial evidence that such programs do not work at all to reduce offending.

In summary, beyond two studies using convenient samples and self-reports, no adequate assessment or measure of accuracy across a variety of conditions, offenders, and examiner skill level has been performed and verified by independent researchers within the post-conviction polygraph test literature. Nor has any study measured or verified the impact of habituation and sensitization or common diseases on accuracy. Without better understanding of the impact of these conditions on polygraph testing's ability to render a deceptive or nondeceptive finding, the true accuracy of post-conviction polygraph testing remains a mystery. Lastly, we do not know how information provided by polygraph is synthesized within decision making by practitioners. What happens when contradictory information is obtained [by] the polygraph? Do practitioners ignore the result? Does it overwhelm all other evidence? There are opportunity costs involved in all decisions but we need better information to understand both the benefit and harm with using information obtained in post-conviction polygraph. We can ill afford to use programs such as post-conviction polygraph testing without establishing that they actually reduce offending because we do not have the time or money to waste on ineffective correctional programs nor can we accept the very real potential they pose for increased victimization.

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Time to Wake Up & Smell the Coffee!!

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Quotes as Food for Thought

"[T]he rigor and methodical efficiency with which the Psychopathic Personality Statute is presently being enforced is creating a system of wholesale preventive detention, a concept foreign to our jurisprudence. *In re Blodgett*, 510 N.W.2d 910, 918 (Minn. 1994)" (Wahl, J., dissenting)....

"Virtually the clearest argument the PP/SDP is for punishment and confinement, and not for treatment, is that we devised a civil commitment statute only for sex offenders. If sexual offenders are truly deserving of medical treatment, then why not all other felons who commit dangerous acts?" -- Judge Randall, dissenting in *In re Linehan, 544 N.W.2d 308, 326 (Minn. App. 1996) (Linehan II)* (Minn. Ct. App. 1996)

"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?" -- *Prof. Eric S. Janus, Failure to Protect: America's Sexual Predator Laws and the Rise of the Preventive State* (Cornell Univ. Press, 2006), pp. 4-5

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. -- *Belleau v. Wall et al.*, 2015 U.S. Dist. LEXIS 125909 (E.D. Wis. 2015)

"...Historically, traditional civil commitment statutes have been applied only to 'individuals with the most serious psychiatric disorders,' and even then patients are usually 'stabilized and released after approximately thirty days.' If a thirty-day treatment is common practice for traditional civil commitment, the indefinite time period used in SVP commitment statutes suggests the confinement is much more akin to a criminal sentence imposed to remove the individual from society rather than to treat and release him." *Tyler Quanbeck*, "Preventing Partisan Commitment: Applying Brady Protection to the Civil Commitment of Sex Offenders," 65 *Case W. Res. L. Rev.* 209, 230 (Fall 2014).

"First we stigmatize a group ...then we restrict that group's rights ...then we take their persons ...then we try to eliminate them through lack of care in hopes they die ...then we kill them all. That is the final step. That is the only step left for those accused ...of sex offenses. That is genocide." – *Earl Yarington, Ph.D.* "Part 1: Civil Commitment and the Destruction of Human Rights" (December 2019).

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