The Legal Pad

Volume 5, Issue 8

August 1, 2021

"Facts do not cease to exist because they are ignored." – Aldous Huxley

In This Issue:

Our Patron Saint: Gonzo Journalist Hunter S. Thompson

Coming Soon:

- ✓ Banishment by a Thousand Laws
- ✓ Looking at the Good Lives Model.
- ✓ Remorse Bias — What's THAT?
- ✓ Risk Assessment – Categorical Report Format Yields Distortion
- ✓ SAPROF's Inaccuracy
- ✓ 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
- ✓ Hold the PPG: More Evidence of Missing the Mark
- ✓ Blanket Exclusions: Redlining against SOs
- ✓ Levine Explains *Harmful to Minors*
- ✓ What Is E-Carceration?
- ✓ Male Chronophilias: EU: 1; US:0
- ✓ And the torrent is endless!

Feedback? News? Write!

TLP Editor Address

Cyrus P. Gladden II
1111 Highway 73
Moose Lake, MN 55767-9452

A Tale of Two Demos — Activists, Experts, Community Members Honk-In, Speak & Confront Governor.

With Shake It Up as Their Theme, Protesters Deliver Message Loud and Clear:

This Can't Continue!

(1) The MSOP-ML Protest July 11th:

(Excerpted and edited from: (1) *Teri Cadeau*, "Officials Dispute Numbers after Moose Lake Protest," *Duluth News Tribune*, Weds., July 14, 2021, page A6; and (2) *Chris Serres*, "Hunger Strikers Land in Hospital," *Star Tribune*, July 13, 2021, p. B1)

"Loud honks were heard Sunday as protesters gathered outside of the Minnesota Sex Offender Program Moose Lake facility to support the residents in a hunger strike.

About 25 people gathered at the MacDonald's restaurant near the facility to make signs and prepare for the honk-in. Family members piled into cars with bright signs and lined up to drive into the facility around 2:30 p.m. After about an hour of honking, the protesters dispersed when more law enforcement arrived and asked them to leave.

According to members of organizing groups Ocean and End MSOP, around 40 clients inside the facility started a hunger strike July 4 to call for an end to 'an indefinite detention program they believe is an unconstitutional death sentence.' The strikers have put out calls for an executive order from Gov. Tim Walz or a sponsored bill to close the program....

'Our goal here today is to head over to the facility to honk and make some noise to let people know that we care about them,' said David Boehnke, organizer from End MSOP. 'We're well into a hunger strike by the men in there and they're calling for action to end this kind of detainment.'

Nothing as Hostile as Brandenburg

The hunger strike marks the second time this year that detainees at the center have gone without nourishment and it was organized to protest the historically low rate of release from the Minnesota Sex Offender Program (MSOP), which confines more than 740 men at prisonlike detention centers in Moose Lake and St. Peter. Some men have been held at the MSOP treatment centers for years or even decades after completing their prison terms – effectively turning the program into what detainees describe as a life sentence.

In 2015, U.S. District Judge Donovan Frank in St. Paul declared the sex offender program unconstitutional, concluding that a program designed to treat offenders for sexual disorders had become punitive in nature, wrongly detaining people who could be treated in less-restrictive community settings.

The program has been controversial since its inception in 1994, with courts granting only 14 full discharges and an additional 31 provisional discharges over that time.

'This place is a due process catastrophe and needs to be shut down,' said Daniel A. Wilson, a participant in the hunger strike and co-founder of OCEAN, a detainee advocacy group from inside the facility.

Hunger strikers say their primary demand – that Minnesota put detainees on a 'clear pathway' toward release – has not been addressed. Now they are calling for the program to be shut down. 'Millions of dollars are being spent on this program that's sucking the life out of people being forced to live here,' said Russell Hatton, a hunger striker who was the first to be hospitalized last week for dehydration.

More Like This: Respectful, but Adamant

In a major study on recidivism, the U.S. Department of Justice analyzed the offending patterns of more than 20,000 prisoners who had been released from state prisons in 2005 after serving sentences for rape or assault. The study found that 8% of these ex-prisoners were arrested for rape or sexual assault during the nine years after their release.

According to protesters, three of the hunger strikers were hospitalized as of Saturday and 28 remain on strike. 'We've already had four men on strike collapse, and two of them are still in the hospital,' Boehnke said."

---

(2) The State Capitol/Governor's Mansion Protest July 18th:

Personal accounts:

Minnesota's State Capitol

On July 18, 2021 at 1:00 PM, OCEAN and the End MSOP Coalition hosted the first OCEAN Community Conference and Rally at the State Capitol and the Governor's Mansion.

The event began with Domino's Pizza delivering 100 pizzas. There were about 30 pizzas left over and they were donated to the local homeless shelter down the street.

About 200 brochures were handed out. These brochures share the key points of the truth about MSOP. Politicians, the Montana Chapter of Women Against the Registry (WAR), OnceFallen (a national website-based organization against all forms of oppressive and persecutory legislation against former sex offenders), and others from out of state all came to support the cause of ending sex offender civil commitment (SOCC) in Minnesota and shutting down MSOP.

According to one of these out-of-state advocates, this was "the best turn out for sex offender advocacy to date.' Dan Wilson gave a thoughtful response to this later, reprinted in a sidebar box (next page).

Many family members of those confined in MSOP and some ex-employees of MSOP were also present, sharing startling stories of mistreatment of confinees and harsh criticisms of SOCC generally and MSOP particularly.

David Boehnke, the OCEAN Outside Resource Coordinator reported that the event brought unity and that everyone was "energized and determined." Many leading advocates, attorneys, and legislators attended the event. Fifteen people gave brief speeches or made short, less formal comments. Attorney Michelle MacDonald of West St., Paul, a strong spokesperson against Minnesota's so-called sex offender "civil" commitment ("SOCC") spoke eloquently and impactfully against SOCC and MSOP. The most powerful part of the Conference was when participants read off the list of 88 men who have died while trying to complete this "treatment" program. David said, "We can't save those who have already died, but we can save the others." David went on to say, "This event was a big success. Thanks to the hunger strike, the movement has grown

(Continued on page 2)

(Continued from page 1)

Dan Wilson's Response

"We're not sex offenders at all. Those imprisoned by the Department of Corrections, serving sentences for sex crimes, are 'sex offenders.' Civil detainees under the jurisdiction of the Department of Human Services are not 'sex offenders' — they are preventive detention detainees, plain and simple. We are just regular men and women who have been labeled as 'sex offenders' for the sole purpose of misdiagnosing, indefinitely confining and killing us.

This is how we promoted our event because it is the most accurate narrative to tell. This is why we had a better turn out than those who wish to abolish the sex offender registry for instance. The two issues are similar — but not the same.

What OCEAN is doing has nothing to do with 'sex offenders' being punished at all because civil commitment in Minnesota has nothing to do with 'sex offenders' — apart from the fact that a demographic merely labeled that way happens to be targeted for commitment.

However, minority groups, especially the African American community and the LGBTQ+ community, are targeted for this commitment as well. But the common denominator among those committed is the initial claim that the person considered for commitment *might* commit a crime.

Those who are interested in advocating for the abolition of civil commitment in Minnesota need to understand that 12% of this population have clean records.

The common denominator is NOT a criminal conviction — it is a claim by state employees that the detainees have what they call a 'mental abnormality' — which is a strategy to relegate to, and detain human beings in a work camp.

At this work camp, millions of dollars are generated by their sign shop, using labor at a sub-minimum-wage rate for 8 hours a day, 5 days per week, while no one goes to 'treatment' for more than 4 hours a week. It's modern-day slavery through and through.

In addition, it is a work program for the town of Moose Lake and surrounding communities. More people from this area are employed by MSOP-Moose Lake than are detained there. Careers at very comfy salaries are being made on our backs.

outside. We hope more will begin to join the fight."

At both locations and along the way between on foot, supporters chanted and also sang a song based on "Imagine," by John Lennon, with lyrics set forth below.

They also read poems written by Russell Norton. (Read: *The Smoke Screen*, by Russ Norton, next column). They played Daniel Larsen's video twice, showing the aggressive viciousness of SOCC for political purposes, many of the failures of MSOP over the years, and Larsen's personal plight. (Daniel Larsen was committed straight from years of juvenile confinement. He has not seen the streets in freedom since he was 16 years old. He is now age 60, having spent his whole adult life in civil commitment simply for a crime when he was a teen.)

88 balloons — representing each of those who have passed away since MSOP opened more than 26 years ago at a recent average rate of approximately one every two months — were tied by protesters to a poster bearing their names and were brought to the Governor's Mansion on Summit Avenue in St. Paul, a distance of over a mile from the State Capitol, where the protest began.

Many more are dying annually than before due to the increased population within MSOP facilities and the fact that many have been here so long that they have become aged.

Yet MSOP stubbornly refuses to let even these old men go, hysterically claiming that even they (some in wheel chairs or bedridden), are a current danger to society if released. Criminologists and other researchers have uniformly found that less than 1% of former sex offenders, once past age 60, ever reoffend. They decry the waste and cruelty of continuing to confine such senior citizens.

OCEAN's Webmaster brought friends to the event. One protester reported, "This was a great experience. We learned a lot and we are looking forward to the next event. The word got out to a lot of new people."

WDIO, KSTP, WCCO, and KARE 11 news crews were there. Unfortunately, they seem to be protecting MSOP, as nothing about this protest event appeared on these TV channels' news broadcasts. However, the Duluth News Tribune covered the event with a story in their print edition, excerpted below.

State Representative Tina Liebling is a staunch opponent of SOCC who has discussed introducing a legislative bill to repeal Minnesota's SOCC legislation and to close MSOP. She, along with Rep. Jennifer Schultz, will hold an informational meeting, billed as an "MSOP Update," on August 2, 2021 at 1:00 p.m. (probable broadcast live on MSOP Channel 8-4: PBS "MN Chan" Minnesota State Legislature Channel) in support of that projected proposal. This will be a joint meeting between the House Human Service Finance and Policy Committee, the Senate Health and Human Services Finance and Policy Committee and possibly the Senate Human Services Reform Finance and Policy Committee.

Andee Erickson, "Hunger Strike Ends at Moose Lake Facility," *Duluth News Tribune*, Weds., July 21, 2021, page A6, excerpts:

"Those detained at the Minnesota Sex Offender Program Moose Lake facility protesting the treatment center's low release rate ended their two-week hunger strike after two seizures and four hospitalizations.

The strike ended Sunday, when dozens gathered at the Minnesota Capitol and Governor's Mansion to carry out the protest.

'We have done our part, for now,' hunger striker Russell Hatton said in a news release from the organizing groups, OCEAN and End MSOP Coalition. 'It is time for families, legislators, and the public to do what anyone who has looked into this program knows is right -- end preventive detention, end MSOP.'

Family members, advocates, and legislators gathered on the Capitol lawn before rallying at the Governor's Mansion.

Hatton said in an audio recording shared in a news release that he suffered two seizures after 10 days of no water and food while protesting what he characterized as 'human deprivation' and 'violation of our human rights' in the facility. He was transported to Essentia Health – Moose Lake for a few hours before he was returned to the facility.

'Hopefully, Senators and Representatives and Gov. Walz understand how serious this issue is,' Hatton said. 'It's frustrating when people don't actually see what's going on here. We're trying to get the public to be aware.'

About 740 people are detained in the Minnesota Sex Offender Program, with about 450 in Moose Lake and nearly 300 in St. Peter. The program started in 1994 as a treatment center and often houses people who have completed their prison sentences for an 'unspecified period of time,' according to the program's website.

Because of that, many remain detained with no hope of ever graduating from the program.

'We're fed up. Guys are starting to hurt themselves as a result of not eating or drinking water in some cases,' hunger striker Dan Wilson said. 'The reason for this is because the facility is killing us ..people are dropping like flies, so this is our last chance to survive this institution.'

The program, which has operated for 26 years, has seen 88 deaths, and 14 releases, according to OCEAN and End MSOP. This is the second hunger strike Moose Lake MSOP residents have held this year as they have demanded that Minnesota legislators come together to abolish preventive detention.

Wilson has been held at the Moose

(Continued on page 3)

The Smoke Screen
by Russell Norton

It's hard to write a poem under so much stress
Once they've got you flinching at every noise.
This constant state of worry leaves my thoughts a mess
But I think that's just another one of their ploys.
Hearing sounds I peek out from where I'm caged
Only to see another getting verbally abused.
Once they belittle him and leave him enraged
They retire to their office comfortably amused.
With experiments being some of their funding perks
They get to do what they want not what they should.
The truth may hurt but that's how it works
You're only alive because the money's so good.
Seeing people of authority deliberately acting wrong
Hoping that one day soon justice will prevail.
Trying as hard as I can to keep my mind strong
While I'm anxious to see what it will entail.
Though politics and public safety are their main tool
I'm wise to the inner workings of their scheme.
As long as society never discovers they're the fools
They can continue on forever the smoke screen.

"*Imagine*"

"Imagine there's no MSOP.
It's easy if you try,
No hell to live in,
The truth and not lies.
Imagine all the people living for today, yu-huuu.
Imagine there's no punishment.
It isn't hard to do.
Nothing to worry or stress over,
And no 'treatment' too.
Imagine all the people living life in peace, yu-huuu.
You may say I'm a dreamer,
But I'm not the only one.
I hope someday you'll join OCEAN,
And the world will live as one.
Imagine no more hopelessness.
I wonder if you can.
No need to cry yourself to sleep,
A civil commitment ban.
Imagine all the people going home today, yu-huuu
You may say I'm a dreamer,
But I'm not the only one.
I hope someday you'll join OCEAN,
And the world will live as one." (x2)

(Continued from page 2)

Lake facility for four years.

'There's no health care here,' Wilson said. 'There's no treatment. There's no hope.'

The Minnesota House of Representatives has scheduled a hearing on the issues for Aug. 2.

'We believe education is the key to this issue,' Wilson said. 'If people knew that preventive detention makes no one safer and causes incredible costs to taxpayers, families, and detainees, we believe they would choose to end this program.'

Since the January hunger strike, detainees have had four monthly meetings with MSOP administration, Wilson said."

Let Freedom Ring!

****

Karsjens Update:

Judge Nixes Amended Complaint, Rules Out Less Restrictive Alternative Claim; Only MSOP Internal Conditions and Bad Medical Care Claims Survive; Briefing Schedule Set w/o Further Discovery or Trial. Plaintiffs Try SCOTUS Appeal.

by Cyrus Gladden

On June 30, 2021, in the *Karsjens* case (now known as *Karsjens v. Harpstead*), Judge Donovan Frank denied the Plaintiffs' motion to replace the longstanding Third Amended Complaint with a Fourth Amended Complaint. In a court case, the "complaint" is the document spelling out what the plaintiff(s) think that the defendants did or failed to do that violated some provision of law in a way that the court, if it so believes in the end, can redress, whether by awarding damages, issuing an injunction, or simply officially stating what the plaintiffs' rights are going forward.

The differences between the existing and proposed replacement versions of the *Karsjens* Complaint appear to be minor. However, the impact of the changes (actually, mostly additions) on the case would have been substantial. Conversely, Judge Frank's refusal to allow that amendment has worked a substantial change in the Plaintiff's expectations of what can happen in what remains of the case. To understand this statement, we have to recount a little of the history of the case, from Judge Frank's 2015 order for injunctive relief for the Plaintiffs to date.

The Defendants immediately appealed that injunction to the Eighth Circuit Court of Appeals. That appellate court reversed and sent the case back to Judge Frank for further proceedings in light of its decision that the Plaintiffs had failed to "shock the conscience" of the 8th Circuit. Judge Frank wrestled with what could still be done in the case and issued a replacement judgment that dismissed most of the counts of the Third Amended Complaint, including Counts 5, 6, and 7.

Go ahead, Shock Our Conscience!

The Plaintiffs appealed that second judgment. The 8th Circuit reversed this one too, now stating, as to the conditions of confinement claims made in those three counts, that the standard the trial court must apply instead is whether such conditions present a punitive environment (which is impermissible). The 8th Circuit's remand order this time also stated that, as to the medical failures within MSOP, the applicable standard is one of "deliberate indifference."

With that background in mind, it is important to note that Count 6 mostly concerns the fact that MSOP has not created any accessible "less restrictive alternatives" to confinement within its two high-security and mostly prison-like facilities, for those who do not need to be confined so austerely. The proposed Fourth Amended Complaint would have added certain verbiage to more clearly emphasize that Count 6 is seeking redress specifically for that failing of MSOP.

However, in practical fact, MSOP and the law under which it was created deem even just placement in a special small building just outside of the secure perimeter of the MSOP facility in St. Peter, MN known as "Community Preparation Services" ("CPS") to be a limited form of "reduction of custody."

Hence, it is subject to potentially strenuous debate whether there can be any "less restrictive alternative" that does not involve at least a limited form of release. That underlying state law has never specified what it means by that term.

No Access to Less-Restrictive Alternatives

Judge Frank's denial of that motion to amend is based on his view of the meaning of the 8th Circuit's second reversal and remand. That reversing opinion spoke in somewhat self-contradictory terms about that particular matter. Mainly, it confirmed that, under its first reversal, there still is no way that Judge Frank can proceed in any way that effectively forces MSOP to release any of its confinees. His denial of the proposed amendment is based on the fundamental importance of this confirmation to the 8th Circuit's second reversal.

The Plaintiffs, on the other hand, argued that the 8th Circuit would not have specified that Count 6 remained viable after remand if they had meant such a sweeping bar on anything that might work even so much as a minimal form of release – such as ordering MSOP to establish one or more forms of "lesser restrictive alternatives."

Now here's the crucial ramification of Judge Frank's denial of the 4th Amended Complaint. It functions to slam the door forcefully once and for all on any possibility that anything within the *Karsjens* case from here on out can create a means for liberation of any of MSOP's confinees.

One may quibble that this was a predestined outcome after the first reversal by the 8th Circuit with its unattainable standard of being "conscience shocking", given the stony indifference of that court to the post-sentence continued pseudo-incarceration of MSOP detainees, some of whom have been locked up in MSOP for its entire 27-year history. Regardless of that quibble, the new denial of amendment by Judge Frank clearly implies that no liberation is possible within the *Karsjens* case, and that he will take no action that might give a false impression to the contrary. The comparative terseness of that denial conveys that Judge Frank sees his hands as being tied in this matter.

What is left of *Karsjens*, then, you may ask? Simply put, just two issues:

1. Whether the totality of the conditions of confinement complained about in the Third Amended Complaint render the overall circumstance of confinement in MSOP punitive. If so, it has long been held that a punitive nature of any civil confinement renders it unacceptably equivalent to criminal punishment, and therefore a violation of confinees' rights under the substantive due process guarantee emanating from the Fourteenth Amendment to the U.S. Constitution. However, the almost invariable response to such punitive conditions is not to close the offending facility/ies, but instead to judicially order such conditions to be remediated (fixed) to eliminate that punitive character. In past decisions, only in recalcitrant refusal by the government agencies operating such facilities to fix those problems has closure and release of confinees ever been employed by the courts. There is nothing in the particulars complained of by Plaintiffs in that Complaint that cannot be remedied by MSOP without working the releases that the 8th Circuit seems so adamant about barring – even if at substantial extra annual cost.

See? We're Fixing It Now.

2. Whether the medical care provided by MSOP (overall or at either facility) is so abysmally deficient as to reflect a "deliberate indifference" to our lives or health. This can be indifference on the part of base-level nurses directly providing care, or high-level administrators (such as by their decision not to provide any actively on-site physician for MSOP confinees' diagnosis and treatment, leaving even diagnosis in the hands of nurses), and/or all levels from bottom to top, inclusive, as to medical care. Any confinee of MSOP, especially those at MSOP-Moose Lake can fully attest to the shortcomings of medical care in MSOP – a problem which, as you may expect, is endemic throughout other SOCC facilities in other states that

(Continued on page 4)

(Continued from page 3)

have such laws. Again, the reaction of courts when such shortcomings have been proven is to order their prompt and full remediation. However, once again, freeing confinees or closing facilities is not ever ordered by courts, agency has chosen to ignore such orders or to engage in only trivial gestures where instead major redesign is required.

Will This Be the MSOP Response to a Covid-Variant Resurgence?

In sum, *Karsjens* will likely continue to creak along in pursuit of remediation of punitive conditions of confinement and of bringing medical care into the modern age and compliant with all ethically and morally incumbent requirements of care for those in MSOP's custody. But except for the extremely unlikely scenario of MSOP either openly defying or simply ignoring orders dictated by Judge Frank, no scenario of mass release emanating from the *Karsjens* case is even merely rationally imaginable. The strategy of attaining such mass release by decrying post-commitment matters within MSOP has now clearly failed.

On a third appeal, the chances either of (a) a complete turnabout by the 8th Circuit, or (b) Supreme Court acceptance of review and subsequent reversal of the coldhearted, incorrect approach of demanding a shock-to-the-court's-conscience under *County of Sacramento v. Lewis* (1998), disregarding the later precedent from *Kingsley v. Hendrickson* (2015) departing from that standard, are highly unlikely.

Hence, the only avenue open toward closing MSOP and sending everyone home is through litigation arguing that the underlying Act allowing SOCC in Minnesota (the MCCTA of 1994) has itself all along been a violation of our substantive due process right not to be subjected to confinement under what amounts to a scheme of 'precrime' preventive detention of those **merely feared** to be future recidivists, especially when the limits of *Kansas v. Hendricks* and *Kansas v. Crane* are effectively disregarded by that law.

Those requirements of commitment are that the person to be committed must: (1) suffer from some scientifically accepted condition (whether a "disorder" or "abnormality"); (2) have a substantially elevated probability of such recidivism over that of otherwise-comparable sex offenders due to that condition; and (3) have at least "serious difficulty" controlling his own sexual actions.

Note that this last element refers to impulse which, in the moment, compels the person to act immediately with no power to reflect, much less to deliberate about whether to act. It is NOT to be confused with deciding to commit a sex crime; that decision is exclusively the province of the criminal law, rather than civil commitment.

Sex offender civil commitment (SOCC) laws, including the MCCTA of 1994, both pander to and are structured to invite commitment decisions based upon a mythology of baseless and extremely unrealistic fears and based on disguised repulsion and loathing, i.e., manifestations of the newly identified emotion of "disgust." These emotional impacts are routinely allowed by appellate decisions to trump, or simply to permit ignoring the vast store of science showing that:

1. prediction of future individual human behavior is effectively impossible;
2. claimed methods of attempting to make probabilistic predictions about future re-offense are uniformly based on manipulations of data and junk science concepts and methods so preposterous that they constitute anti-science, as opposed to science;
3. even sex offenders with extensive past criminal records are very unlikely to recidivate after an extensive prison term;
4. desistance from crime after prison release is not just the norm for sex offenders, but in fact is far more likely for sex offenders than for any other class of criminal offender;
5. the notion that "treatment" – especially as conceived of as coupled with confinement — is necessary or even merely conducive to a greater likelihood of non-reoffense later -- is utterly without any underlying science; and
6. all attempts to create SOCC laws have been infected with such universal vagueness and overbreadth that any past sex offender can be argued to fit within such sets of criteria

— just to name a few critical points out of many that are violated by the concept of SOCC.

Therefore, what is needed is another case that can advance all such points to show the federal district court that SOCC is just a logical house of cards without any real validity. – In short, to show that each of us has been subjected all these years to this supplemental pseudo-imprisonment under mere ruse of accomplishing some supposedly important goal that is utterly, fraudulently false.

Fortunately, there already is such a case available. It is called the *Gladden* case, and it does request class action treatment. As its architect and chief researcher, I recommend that it be brought now. I do not know of any other case or projected case that is based on any amount of thoroughly researched science that closely

I realize that it is difficult to accept that an approach that we have been trying for years in *Karsjens* simply will not work to accomplish the liberation we hoped for. But with all due respect, it is time to try something new. In the absence of anything I know of that can compete with the *Gladden* case for sound legal logic and immense scientific support, I recommend fervently that we all now advocate for that approach.

Unless you have a spare twenty years or so to hang around in MSOP waiting on the 'grace and beneficence' of MSOP officials and two successive tribunals populated by those with overwhelming bias against us and with heads filled to bursting with junk science as fervently embraced as gospel to decide to let you out (on a very short leash), you should realize that the *Gladden* approach is the only way out. Govern yourselves accordingly.

Postscript #1: On July 21, 2021, Judge Frank issued a Scheduling Order in the *Karsjens* case pursuant to a stipulation between the parties. This Order sets a briefing schedule in the case including submission of proposed findings of fact and conclusions of law. Both these proposals and the parties main briefs are due on August 13th. Responsive briefs by both parties are due on August 27th.

The Order directs that these briefs are to address the issues recently remanded by the Eighth Circuit, that is, not merely procedural matters, but the substantive dispute remaining between the parties, as discussed *supra* in this article.

Of note, by implication this method of advocacy is in substitution for any renewed discovery or a second trial. Since the trial in 2015 for the most part did not address shortcomings of MSOP's health care or internal conditions of confinement as alleged in the complaint, both parties will be forced to argue from a relatively slim fact-base.

This would seem to reflect an attitude on Judge Frank's part of wanting to wrap up the *Karsjens* case as quickly as possible. In turn, this suggests that a final decision by the trial court could be released before the end of this year.

Postscript #2: On July 22, 2021, Plaintiffs' counsel filed a petition for writ of certiorari in the United States Supreme Court seeking review of the 8th Circuit's decision in the second *Karsjens* appeal. The question Plaintiffs are asking SCOTUS to decide is whether an involuntarily committed individual whose end of his commitment depends on treatment progression has a constitutional right to treatment?

The Supreme Court of the United States (SCOTUS)

Plaintiffs contend that the 8th Circuit's ruling effectively denies Plaintiffs that right to treatment by tolerating MSOP treatment practices which almost invariably stymie and delay treatment progression to treatment participants. Noting that many MSOP treatment participants never advance past Phase I of a three Phase system, the Petition calls such 'treatment' "fundamentally worthless."

This petition for SCOTUS review seeks a ruling that a fundamental right to treatment must be recognized in order to affords Plaintiffs a meaningful opportunity to complete treatment, thereby providing a reasonable path to discharge from involuntary commitment.

Given the extreme caseload in SCOTUS, it is uncertain whether that Court will accept this request for review. That decision itself can take anywhere from days to a year or more. Stay tuned.

****

The Wage Case: Judge Rules Against MSOP Patient-Workers. Appeal Already Begun.

by Cyrus Gladden

Also on June 30, 2021, in *Gamble et al. v. MN SOS et al.* (better known as the "Wage case"), Judge John Tunheim of the federal District Court of Minnesota issued his ruling on the 'dueling summary judgment motions' of the parties.

To the great surprise and dismay of Plaintiffs, Judge Tunheim denied Plaintiffs' summary judgment motion and granted the summary judgment that Defendants requested. This article will recount the rationale employed by the judge, with commentary interjected where appropriate in criticism of certain elements of his reasoning. Afterward, it will report on what is already happening

(Continued on page 5)

(Continued from page 4)

next in the course of this case.

Judge Tunheim took two independent paths to conclude that judgment had to be granted to the Defendants. As will be shown *infra*, neither of these paths really have any sound basis in law.

First, he ruled that MSOP's Vocational program is not employment as defined in the FLSA.

Second, said the judge, even if it were, a federal piece of legislation called the Portal-to-Portal Act grants the Defendants an immunity from all liability in the case, including both to damages and to injunctive/declaratory reliefs. We now examine each of these sub-rulings in sequence.

First, this decision lumps the sign shop together with the horticultural program and a "warehouse and distribution for government agencies" (as to forms printed for the State). These endeavors are under the administrative umbrella of "Minnesota State Industries" ("MSI"). This portion of the deciding "Memorandum Opinion and Order" (herein, the "Memo") states incorrectly that "MSI shops do not provide goods or services to the private sector, and the cost to operate the programs exceeds sales." In fact, MSI does so; moreover, whether or not it makes a profit is irrelevant under federal minimum wage law. Further, case law says that any "commerce activity" (even if all customers are governmental units) is covered for FLSA minimum wage purposes. Indeed, when a governmental unit such as MSOP partly engages in commerce activities, all of its activities are covered under the FLSA. MSI only operates within MSOP and its profits, if any, must go to MSOP. Thus, effectively, it is just a sub-unit of MSOP.

The Memo quotes a state statute at this point to the effect that any profits of MSI "Must be used for the benefit of the civilly committed sex offenders as it relates to building education and self-sufficient skills." However, MSI has never shown an annual profit in any years of operation. Accordingly, it has never cut any checks to MSOP for this purpose. The Memo also notes that the Covid pandemic caused MSI to reduce its staffing and to "decrease" its placements of MSOP patient-workers. However, in fact, it laid off almost all of its patient workers in that period, continuing operations but at a radically reduced pace, forcing it to forgo some orders that its customers placed. Almost all work was then being performed by staff.

The judge then turned to treatment in MSOP, noting that "MSOP's Vocational Committee places detainees in the VWP according to their treatment needs, not their qualifications," further noting varying weekly hour limits for MSOP patient-workers depending on their treatment "Phase" and increased age rates for patient workers in Phase III and in the "CPS" pre-release unit. The judge apparently accepted as true an averment by Defendants that "Detainees can be suspended but not terminated from their placements." Again accepting Defendants' claims at face value, the Memo states that Vocational staff are "trained to assist detainees in their treatment goals." No detail is provided as to this claim. However, in fact, Vocational staff do not perform any treatment work with patient workers. Their only connection with such workers is as their work supervisors and in turn their superiors who administrate the Vocational program. This is simply not treatment at all.

Mi Therapy Es Tu Therapy....

The judge made a number of references to a standard of "economic reality" and tried to use that standard to justify not applying the federal minimum wage to Plaintiffs herein by comparing MSOP to a prison system.

However, the actual reference of the "economic reality" standard is solely to determining whether one is an employee or instead an independent contractor. Defendants never made any serious claim that MSOP confinees are independent contractors with regard to their work for MSOP or for MSI.

The case law is very clear that no one in the position of MSOP confinees can be deemed an independent contractor. Therefore, the judge was simply incorrect in misapplying that standard herein.

Apparently, the judge became confused between that inapplicable standard and the actually applicable standard known as the "consequential economic benefit" test, which states that as long as the employer gains any economic benefit through the work performed by its employees, the federal minimum wage governs. Clearly that was the case here; see *infra*.

According to the judge, MSOP is only required to provide "a basic standard of living" to MSOP confinees (whether or not they work). The judge states that this includes "three meals a day, beds, bedding, linens, and laundry services" and "dental and optometry care...." (although noting that MSOP requires each confinee to "apply for government-funded health insurance"). Effectively then, the great percentage of all medical costs is paid for by other government agencies, such as Medicare and Medical Assistance and contractors of theirs; MSOP pays only a very small sliver of these costs, thus artificially causing the overall cost of the MSPOP program to appear far smaller than it actually is. In political terms, this is just "cost shifting."

The Memo adds that, although not required by law, these additional items and services are provided to MSOP confinees: "access to televisions, computers, a library, and a gym, recreational options, spiritual services, and degree and certification programs." The TVs and computers are communal and very few. All of these items are provided identically in Minnesota DOC prisons. The Memo observes that MSOP confinees may be required to "pay all or a part of the cost of their board, room, clothing, medical, dental, and other correctional services," but this is a mistaken quote from a statute governing only the Dept. of Corrections.

Interestingly, the judge notes the billing to MSOP confinees by Minnesota's Dept. of Human Services of up to the full cost of care per diem, effectively equating over $143,000 per year. This money, the judge concedes, goes toward "reducing state costs associated with operating [MSOP]." Under another statute, the DHS Commissioner has the discretion to sue any confinee or, if deceased, from his estate or from a relative for payment of these costs.

The federal Fair Labor Standards Act (FLSA) statutes are clear about who should get minimum wage, and define "employee" so broadly that only a few specific categories are exempted. MSOP confinees are not in any of those specified categories exempt from minimum wage, and hence, clearly qualify to receive it.

A longstanding and universally applicable rule of statutory construction says that, where a statute is clear on its face, it is not subject to judicial interpretation. This includes resort to legislative statements about intent in enacting the law. Yet the judge here, following the suggestion by defense counsel, engages in a close scrutiny of a Congressional statement of its goal in enacting the FLSA.

That statement describes the legislative goal as being to provide a "minimum standard of living necessary for health, efficiency, and general well-being." Since that general societal standard is immensely beyond the pittance wages paid to patient workers by MSOP, there can be no doubt that such confinees are in sore need of that minimum age. Nor does the FLSA allow any exception for those in mental health facilities; inmates of every other kind of mental health care facility qualify for and receive the federal minimum wage. Therefore, so too should MSOP confinees.

However, the judge felt bound by precedent from a 2011 case in the same court that was filed by James Martin without a lawyer. In that case, defendants contended that MSOP was like a prison, and its confinees effectively are like prisoners. Hence, they argued, like prisoners, they should be deemed ineligible for federal minimum wage. A different judge in that *Martin* case agreed with that proposition, overlooking the most important fact: MSOP confinees are under civil commitment for treatment, not in any prison for punishment.

The summary judgment order in the present case cited three cases from other parts of the country that did not grant minimum wage coverage to committed sex offenders. However, in two of them, the confinees were housed within a prison. In the third of those cases, that court made the same mistake of equating civilly committed sex offenders to prisoners.

In our case, the judge called the case we raised from California "unpersuasive." That case clearly held that the federal minimum wage is required for committed sex offenders. According to the judge, that case was unpersuasive because California exercised its sovereign immunity, thereby getting off the hook from damages despite that holding that it was obligated to pay the minimum wage.

But Minnesota has a specific statute waiving sovereign immunity from minimum wage claims. Hence, the California holding is persuasive here, since Minnesota must pay same under that express waiver.

In an even greater legal gaffe, the judge relied upon the "Portal-to-Portal Act" (29 U.S.C. § 259) as supposedly making it impossible for Plaintiffs to prevail in our case. Apparently, he seized upon a single word in that statute, "interpretation" as an assumed signal to judges that they could simply 'interpret' the FLSA out of coverage over this employment of MSOP confinees.

However, a full reading of that statute's actual full verbiage in the subject clearly shows that the only "interpretation" it was referring to was administrative – not judicial – interpretation: Subsection 259 (a) clearly states that an employer's action in not paying minimum wage is exempted from liability only where it was "in conformity with and in reliance on any written administrative regulation, order, ruling, approval, or interpretation, of the **agency** of the United States specified in subsection (b) of this section." For FLSA matters, Subsection (b) identifies the

(Continued on page 6)

(Continued from page 5)
relevant agency as "the Administrator of the Wage and Hour Division of the Department of Labor [Secretary of Labor]."

Thus, it is beyond legal question that this exemption from damages applies only to an employer's reliance on such actions or "interpretation" by that agency, NOT by a court. Hence, there is no bar on this lawsuit or on damages stemming from it. This is clearly confirmed by the lack of any reference to any such administrative action or act of "interpretation" by that administrative agency.

Perhaps the greatest absurdity in the judge's opinion is his claim that work performed by MSOP confinees confers "no benefit" upon MSOP. Work that we perform here is not 'make-work', it is necessary work. If we chose not to accept the jobs held out to us, MSOP would have to hire civilian workers from the surrounding area to perform that work. MSOP would have to pay them going rates for such workers, with the state benefits required by law. All told, such pay and that benefits package amount to at least 4-5 times a minimum wage rate if paid to Plaintiffs.

The judge in our case applied the same prisoner rationale that the only thing that MSOP should be required to give us is our "basic needs," thereby choosing to ignore the FLSA. This is known as a 'carve out' and it is a blatant judge-created exception despite a clear statutory right and with no real reason other than anti-sex offender bias.

Our attorney is stunned by this blatant act of discrimination contrary to clear law. He vows to appeal that decision. That appeal should be commenced by time you read this. Our hope is to gain a reversal of this decision, thereby re-railing our case. Future articles will keep you abreast of progress in this legal action. Stay tuned.

Fifth Segment:

TLP Report to Virginia Debunks Junk Science Behind All SOCC, Presses Repeal of Its SOCC Law.

Editor's Note: This is the fifth segment of the Report submitted to the State of Virginia in support of the currently pending proposal to end SOCC and to repeal the SOCC law of that state permitting it.

This segment begins an exploration of the history, science (or the lack thereof), and political personal-bias origins of claimed paraphilic 'disorders', in the context of laws calling for commitment of individuals for having paraphilias.

The Junk Science Concept of Paraphilias as a Category of Disorders

On the topic of the historical pathologizing of sexual deviance of all kinds, *Andreas De Block & Pieter R. Adriaens*, "Pathologizing Sexual Deviance: A History," 50 *Jour. Of Sex Research* 276-298 (2013, No. 3-4), write:

(p. 277): [Referring to views of Havelock Ellis & Magnus Hirschfeld] "In their view the sexual instincts did not change much over time, but what did change were the social reactions to the expression of these instincts."...[W]hat is accepted as normal and healthy sexuality is not determined by nature but changes with the values and norms of a particular society at a particular place and time (*Crawford*, 2006)."

"...[C]ontemporary historians often fault Foucault for being obsessed with social control (e.g., *Foucault*, 1975), as if disorder categories were unilaterally imposed by psychiatrists or bourgeois society (*Halperin*, 2002, *Sedgwick*, 1990)."

"...In the first section [of this article], we discuss how paraphilias were conceived and explained in the early decades of modern psychiatry up until the publication of the first edition of the DSM in 1952. The second section deals with the general changes in the nosology of sexual deviance in the second half of the twentieth century, from DSM to DSM-5. Both sections reveal that the history of psychiatry's dealings with sexual deviance is a constant wavering between two opposing viewpoints: the view that sexual abnormality constitutes a disease (the pathological approach; Gijs, 20008) and variants of sexual variation (the normality theory approach; *Gijs*, 2008).

Depictions of Oddity and Instillation of Fears of the Unknown

"Early Modern Psychiatry and the Perversions

"...Until 1850, the definition of sexual deviance was based primarily on moral, legal, and theological considerations. From then onward, the increasing popularity and authority of psychiatry resulted in a new conceptualization of certain forms of sexual deviance as medical or psychological problems. Given that the birth of modern psychiatry is usually dated around the beginning of the 19th century (*Shorter*, 1997), it took psychiatry only a couple of decades to throw its light on the study of deviant sexuality.

> What is accepted as normal and healthy sexuality is not determined by nature but changes with the values and norms of a particular society at a particular place and time

(p. 278): "...Replacing the clergy as authorities in the sexual domain, 19th- and early 20th-century French psychiatrists were even paid by the government to take care of the supposedly declining mental hygiene of the French population. (*Oosterhuis*, 2000). Such public esteem obviously granted psychiatrists the license to study and treat all sorts of problems, including sexual deviance."

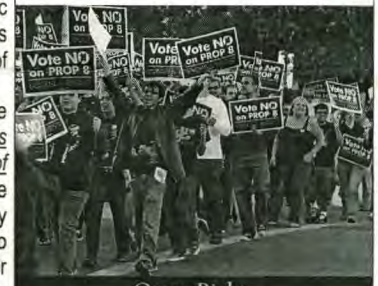
"...As *Peakman* (2009) noted: "One example is *Ambroise Tardieu's* Crimes Against Morals from the Viewpoint of Forensic Medicine (1857) listing the inward and outward signs of pederasty in order to both help the law, and to ensure the state's better control over private morality – the 'feminized' appearance of these men was criticized' (p. 42). Throughout the 19th century, physicians were often called upon by police forces for guidance on how to deal with sex offenders (*Hill*, 2005).... With regard to the theological influence on psychiatry, it is noteworthy that many medical authorities in the field of sexual pathology continued to use the term and the notion of perversion. During the Middle Ages and the Renaissance, this term was used to denote an aberration or a deviation from a divine norm: any act that violated the laws of God was considered a perversion."

19th century, and especially the publication of *Richard von Krafft-Ebing's* Psychopathia Sexualis in 1886, marked a real turning point in the understanding and medicalization of sexual deviance."

(p. 281): "With the opportunity for the natural satisfaction of the sexual instinct, every expression of it that does not correspond with the purpose of nature – i.e., propagation – must be regarded as perverse." (*Krafft-Ebing*, 1886, pp. 52-53).

(p. 287):"Homosexuality: A Crucial Controversy

(p. 288): "...In the midst of this dispute between activists and psychoanalysts, psychiatrist Robert Spitzer stepped up as a go-between. As a technical consultant to the DSM-II Committee on Nomenclature and Statistics, he had already been praised for his contribution to 'the articulation of Committee consensus as it proceeded from one draft formulation to the next' (*APA*, 1968, p. x). Spitzer was originally convinced that homosexuality did belong in the DSM. Various events, however, including his attending an informal meeting of the 'Gay-PA' – a secret group of homosexual APA members later known as the Association of Gay and Lesbian Psychiatrists – made him realize that many homosexuals were actually healthy and high-functioning individuals who were often satisfied with their sexuality (*Bayer*, 1987; see also *Bayer*, 1981, p. 126). Soon afterward Spitzer drafted a first compromise: Homosexuality as such was to be removed from the DSM and to be replaced by sexual orientation disturbance, which included those individuals troubled by their own sexual orientation."



Queer Rights

"According to some commentators, the referendum was a public relations disaster for the APA. Devising a psychiatric nomenclature turned out to be a matter of politics rather than science. As Shorter put it:

'Once it became known how easily the APA's Nomenclature Committee had given way on homosexuality, it was clear that the psychiatrists could be rolled.... [Sexual orientation, stress, or women's menses] could all apparently be pathologized and de-pathologized at the will of the majority, or following point the way emphasized the extent to which DSM-III and its successors, designed to lead psychiatry from the swamp of psychoanalysis, was in fact guiding it into the wilderness.' (pp. 304-05)"

(p. 289): "In an interview from early 2007, [Spitzer] conceded that the DSM-III task force did not always rely on research evidence. When asked about how new disease categories were included in the nomenclature, the following conversation ensued:

Spitzer: You have to have a lobby, that's how. You have to have troops.

Fink [one of the interviewers]: So it's not a matter of....

Spitzer: Having the data? No.

Fink: It's nothing to do with science then, and nothing to do with evidence?

Spitzer: [nodded]."

pp. 289-90): "It is possible that these

(Continued on page 7)

(Continued from page 6)

reservations led [Spitzer] to conclude the DSM-III's definition of mental disorder with the following caveat: 'When the disturbance is limited to a conflict between an individual and society, this may represent social deviance, which may or may not be commendable, but it is not by itself a mental disorder.' (*APA*, 1980, p. 6; the same statement was repeated nearly verbatim in all subsequent editions of the DSM). In short, deviant sexual behavior is not always a (symptom of a) mental disorder."

Sexual orientation, stress, or women's menses could all apparently be pathologized and de-pathologized at the will of the majority, or following campaigns of insistent pressure groups.

(p. 290): "Given that 'individuals with these [paraphilia] disorders tend not to regard themselves as ill'; that 'frequently, these individuals assert that the behavior causes them no distress' (*APA*, 1980, p. 267), and that at least some of them appeared to function well, both socially and professionally, it seemed that some paraphilias did not fulfill the criteria set out in the introduction to the manual. Perhaps they could be considered as instances of social deviance, but deviance, as Spitzer stressed, 'is not by itself a mental disorder.' (*APA*, 1980, p. 6)."

(p. 291): "Failing distress or impairment, unusual sexual fantasies, urges, or behaviors were considered non-pathological. Either they were normal – 'a stimulus for sexual excitement in individuals without a paraphilia' (*APA*, 1994, p. 525) – or they should be understood as ordinary criminality."

(pp. 291-92): "DSM-IV indeed stipulated that the child offenders should not pairment in functioning. Yet *First and Frances* explicitly spoke of a 'misinterpretation ' of DSM-IV (*Spitzer*, 2005, p. 115, even called it a 'public relations disaster'), which led them to revert, in DSM-IV-TR, to the DSM-III-R's diagnostic criteria for paraphilia. For those paraphilias that may involve nonconsenting victims – pedophilia, voyeurism, exhibitionism, frotteurism, and sexual sadism – the authors simply

Pseudoscience: Life Imitating Art?

reintroduced DSM-III-R's Criterion B, which required either acting on unusual sexual urges or fantasies, or experiencing distress about these urges or fantasies (*APA*, 2000, p. 566)...."

(p. 292): "In their editorial, First and Frances also emphasized, however, that sexual offenders should not be considered mentally ill simply because they have committed sexual offenses (see also *Moser & Kleinplatz*, 2005; Moser, 2009).... Still, according to First and Frances, some forensic psychiatrists deliberately misinterpreted this criterion 'to justify making a paraphilia diagnosis based solely on a history of repeated acts of sexual violence' (*First & Frances*, 2008, p. 1240). The problem with this interpretation, they concluded, is that 'defining paraphilia based on acts alone blurs the distinction between mental disorder and ordinary criminality' (see also *Gert & Culver*, 2009)."

"*Wakefield* (1992, p. 384) then defined dysfunction as 'the inability of some internal mechanism to perform its naturally selected function.' Spitzer attempted to apply this concept of dysfunction to the paraphilias in a book devoted to a critique of the sexual and gender diagnoses of the DSM (*Karasic & Drescher*, 2005). There he argued that sexual arousal has a specific evolutionary function, which consisted of 'facilitating pair bonding which is facilitated by reciprocal affectionate relationships.' (*Spitzer*, 2005, p. 114).

(p. 293):"A paraphilia whose satisfaction has entailed personal harm, or risk of harm, to others in the past' is a paraphilic disorder. Hence, in some cases of pedophilia, sadism, voyeurism, exhibitionism, and frotteurism, the only difference between a non-disordered individual with a paraphilia and an individual with a paraphilic disorder is that the latter has had victims. The amount to more than merely immoral or criminal behavior."

(Note 8 on p. 293): "It is interesting to note that the DSM-5 work group on 'sexual and gender identity disorders' contains more non-psychiatrists than any of the other work groups."

(p. 294): "Still, even in the non-theoretical psychiatric approaches to sexual abnormality, a theory is needed to distinguish normal from abnormal varieties. Why is a stable and exclusive sexual desire for blond women not considered to be pathological, while a similarly stable and exclusive sexual desire for prepubescent children tends to be seen as a disease? This question is not easy to answer, and the present review shows how different canonical authors, associations, and publications have tried to solve the issue. Some of them, most notably Kinsey, straightforwardly argued that sexual perversions were not diseases, a position that is now held by such scholars as Charles Moser. By contrast, Krafft-Ebing and Kraepelin argued that paraphilias are biologically abnormal and hence diseases. Today, Blanchard and many other sexologists defend an updated version of this biomedical view, by arguing that genetic or brain defects cause paraphilias (*Gijs*, 2008)."

For comprehensive accounts on the historical emergence of 'sexual pathology' as a conceptual category, the medicalization of sexual deviance, the influence of psychiatry on the legislative response to sex crimes and sex criminals, and the three waves of 'sexual psychopath' and sex offender laws enacted in the United States (the late 1930s, the postwar era, and the 1990s-present), see *Deborah W. Denno*, 'Life Before the Modern Sex Offender Statutes,' 92 *Nw. U. L. Rev.* 1317 (1998); *Philip Jenkins*, *Moral Panic: Changing Concepts of the Child Molester in Modern America* 49, 189 (1998).

Jeffrey Abracen & Jan Looman, "Evaluation of Civil Commitment Criteria in a High Risk Sample of Sexual Offenders," 1 *Jour. of Sexual Offender Commitment: Science and the Law*, 124-140 (2006), at 136, flatly declare:

"..."For both rapists and child molesters DSM-based diagnoses were not related to increased risk of recidivism. ...[I]n no case did the recidivism rate exceed 25%. ...[I]n the current study sexual deviance was not associated with sexual recidivism."

"...[W]e cannot justify conceptualizing the paraphilias as mental disorder by asserting that illegal paraphilic behavior is more amenable to treatment than other criminal behavior unrelated to mental disorder.. Given that amenability to treatment does not clearly distinponents may have a difficult time proving that 'the severity of the mental abnormality itself ...[is] sufficient to distinguish the dangerous sexual offender ...from the dangerous but typical recidivist convicted in an ordinary criminal case,' (p. 413) -- a form of diagnostic validity required as a matter of substantive due process by *Kansas v. Crane* (2002).

"*Polascheck* (2003) has questioned the conceptual validity of the diagnostic category of paraphilias in the DSM,.... He added:

'...There is no evidence that those with the paraphilia are more or less likely to reoffend than those without.' (p. 157)." (*Thomas K. Zander*, "Civil Commitment without Psychosis: The Law's Reliance on the Weakest Links in Psychodiagnosis," 1 *Jour. Of Sexual Offender Civil Commitment: Science and the Law* 17, at 35 [2005]).

"Nevertheless, the paraphilias are commonly the diagnostic basis for the 'mental abnormality' or 'mental disorder' that is alleged as part of SVP commitment proceedings. Of these, ...the ones most commonly used in SVP commitment cases are: pedophilia and paraphilia-NOS (*Becker, Stinson, Tromp, & Messer, 2003; Levenson*, 2004a)...." (*Thomas K. Zander, supra*, at 36).

Yet, "...when *Levenson* collapsed all of the data for any diagnosis of a paraphilia, i.e., pedophilia, paraphilia-NOS, exhibitionism, or sexual sadism, into one broad category in order to boost the reliability coefficient, it still was only 0.47 – still well into the 'poor' category of reliability." (*Zander, supra*, at 50). Such poor reliability indicates that there is essentially no consensus among psychiatrists and clinical psychologists of what (if anything) truly constitutes an actual "paraphilia." This disagreement renders this diagnostic category unscientific and useless. Moreover, although requiring that disability, distress or some other form of dysfunction must be presented to comprise a paraphilia diagnosis, "[t]he APA (American Psychiatric Association] has not made clear how the paraphilias that are included [in the DSM-5] are inherently dysfunctional to the individual other than the disabling consequences that may be imposed by societal or legal reactions." (*Melissa Hamilton*, "Adjudicating Sex Crimes as Mental Disease," *supra* at 562). "All of this strongly suggests that the strong focus on 'normality,' while eschewing the pathological element, means that paraphilias are more of a value-laden social construct than primarily a medical or scientific concept." (*Ibid.*)

In some cases of pedophilia, sadism, voyeurism, exhibitionism, and frotteur- an individual with a paraphilic disorder is that the latter has had victims.

Charles Moser, "Paraphilia: A Critique of a Confused Concept," Chapter 5 in: *New Directions in Sex Therapy: Innovations and Alternatives* 91-108 (Peggy J. Kleinplatz, ed. 2001); separately available at: http://tempik.webzdarma.cz/literatura/parmoser, expands on this misuse of psychiatric terminology to satisfy social contructs and to augment the criminal law goal of public safety by pseudo-incarceration as pure preventive detention:

pp. 92-93: "Creation of the diagnostic category of paraphilia, the medicalization of nonstandard sexual behaviors, is a pseudoscientific attempt to regulate sexuality. The use of the diagnostic process to maintain and to conform to

(Continued on page 8)

(Continued from page 7)

social conventions is relatively transparent. The diagnostic criteria have been written to pathologize those behaviors our society deems sexually unacceptable;.... Individuals who have nonstandard sexual interests continue to be pathologized, despite a lack of research establishing a difference in functioning between those so diagnosed and 'normal' individuals. There is little evidence that they experience any distress or dysfunction except as a result of societal condemnation of their sexual desires."

p. 97: "...If a law was passed in the United States criminalizing heterosexual behavior, how many previously law-abiding citizens would be able to comply? How many people would find happiness engaging in the now mandated homosexual interactions? How many individuals would engage surreptitiously in criminal heterosexual acts? Would these criminals be seen as dangerous to children and lose their parental rights? The diagnosis of paraphilia has been intertwined with social judgments of normalcy and used to deny civil rights."

p. 98: "The belief that a given sexual interest is the result of childhood trauma remains a popular but unproven assumption, without benefit of substantiating data."

p. 105: "Removal of pedophilia from the DSM would imply that those who violate the law should be punished in the criminal justice system. If someone sexually abuses a child, that person belongs in the criminal justice system, whether or not strong preferential sexual interest in children exists. We do not care about sexual interest; we care about acts.

"Conversely, 'just' being a pedophile – meaning that one has a sexual interest in prepubescent children but does not ever act on it – is not necessarily a problem. Acting on it is a problem. When individuals who are neither dysfunctional nor distressed by their behavior engage in sexual activity with minors, their behavior should not be construed as evidence of mental illness. Such individuals are criminals. They have engaged in a crime....

"Although society has a responsibility and a duty to protect individuals from all types of attack, we do not include bank robbers, bigamists, and those who commit libel in the list of psychiatric diagnoses. Criminals are dealt with by the justice system; those who suffer from a mental illness should be dealt with by the mental health system."

The diagnostic criteria have been written to pathologize those behaviors our society deems sexually unacceptable.

Searching for Deviance....

The Junk Science Concept of Hebephilia as a Disorder

Allen Frances, The Essentials of Psychiatric Diagnosis, in the section discussing "Paraphilic Disorders" (pp. 169-74), notes that the DSM-5 has explicitly rejected the concept of Hebephilia (i.e., the proposition that it is a sexual disorder to have sexual attraction to post-pubescent minors. *Frances* flatly states that it "is important to restrict the Pedophilic Disorder diagnosis to men who have a ...need for prepubescent children as objects of sexual excitement." In other words, those attracted to pubescent or post-pubescent minors cannot be diagnosed as pedophiles.

"...[R]esearch shows that sexual attraction to adolescent girls is displayed by one-third of nonoffending adult men (*Barbaree & Marshall*, 1989).

"Second, there is no professional consensus that the adult-adolescent sexual behavior that *Doren* diagnoses as paraphilia-NOS-hebephilia is a paraphilia at all..... ...[T]he classic textbook, *Sexual Deviance: Theory, Assessment, and Treatment*, edited by *D. Richard Laws and William O'Donohue* (1997), and authored by 36 of the leading experts on paraphilias, has 500 pages of detailed discussion of every paraphilia identified in DSM-IV-TR, but there is no mention of either hebephilia or what *Doren* (2002) referred to as 'sexually attracted to adolescents' (p. 80) being a basis for a diagnosis of paraphilia-NOS or any other diagnosis." (*Zander, supra*, at pp. 47-48)

The belief that a given sexual interest is the result of childhood trauma remains a popular but unproven assumption, without benefit of substantiating data.

A. Frances, "Going for Wins in Sexually Violent Predator Cases," *Psychiatric Times*, July 8, 2011, available at www.psychiatrictimes.com/blog/cpuchincrisis/content/article/10168/1900563 declares:

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

"The history of psychiatry and of medicine is littered by the rapid emergence then the equally rapid disappearance of silly fad diagnoses. This will undoubtedly be the well-deserved fate of 'Paraphilia NOS, nonconsent and 'Paraphilia NOS, Hebephilia.' Sooner or later bad ideas are condemned to be found out or to die of their own foolishness. ...The miscarriage of justice occasioned by misdiagnosis in SVP cases is a grave embarrassment to both psychiatry and to the law, as well as being a violation of the civil rights of the people subjected to it. Every SVP case that is based on a misdiagnosis of 'Paraphilia NOS' should be vigorously challenged until this bogus diagnosis is no longer considered permissible as expert testimony."

Karen Franklin, "Hebephilia: Quintessence of Diagnostic Pretextuality," 28 *Behavioral Sciences and the Law* 751 (2010), declares, at 764-65:

"Intentionally or not, expanding the definition of pedophilia – a diagnosis with already poor inter-rater reliability (*Marshall*, 1997) – into a broader construct of pedohebephilia has the potential to dramatically increase the scope and power of the sex offender civil commitment industry. The inherent vagueness of the construct, in turn, will invite arbitrary application, bias, or pretexuality.

"Law professor *Michael Perlin* defines pretextuality as courts' acceptance and/or encouragement of testimonial dishonesty, especially when expert witnesses 'purportedly distort their testimony to achieve desired ends.' *Perlin* asserts that the mental disorder requirement in SVP civil commitment proceedings insidiously encourages pretextual testimony and decision-making, corroding the entire system:

'This pretextuality is poisonous; it infects all participants in the judicial system, breeds cynicism and disrespect for the law, demeans participants, and reinforces shoddy lawyering, blasé judging, and, at times, perjurious and/or corrupt testifying. (*Perlin*, 2007, p. 341, see also *Perlin*, 1998.)'"

Sooner or later bad ideas are condemned to be found out or to die of their own foolishness.

****

Final Segment:
Dr. Harris Sums Up Why and How Desistance *Will Be* Your Future. Now That You Know, What Will You Do?

Editor's Note: This is the last segment of excerpts from this book by Darlene A. Harris reporting on her research into desistance by former sex offenders from committing such crimes. These excerpts provide a surprising picture of the humanity of those undergoing the process of desistance through means mostly of their own creation or synthesis. Perhaps the most surprising thing Harris has discovered is the broad array of radically differing approaches to desistance taken by her subjects, who all succeeded at the very least at permanently refraining from criminality altogether, and many who ultimately succeeded in living personally satisfying lives. In this final installment, Harris summarizes her findings and draws some revealing conclusions that should result in extensive overhaul of the approaches of those working with sex offenders to foster such permanent desistance.

Danielle Arlanda Harris, Desistance from Sexual Offending: Narratives of Retirement, Regulation and Recovery, Palgrave MacMillan (2019), excerpts, final segment:

"p. 251: **Part IV: Conclusion**
p. 253: *Chapter 9: What's Next*
p 254: In no particular order, we recommend:

- Accepting desistance as a modal and natural outcome;
- Changing our therapeutic emphasis from sexual deviance to a focus on more general life skills, recovery from trauma, more broadly, and pursuing good lives;
- Honoring the passage of time by considering conviction expiry dates and reducing risk scores over time;
- Generating a tiered system that recognizes heterogeneity of people and behaviors;
- Repealing the publicly available sex offender registry; and
- Educating the public and the press on the empirical realities of sexual abuse.

p. 256: Accepting Desistance as a Modal and Natural Outcome

...I hope that this book contributes to

(Continued on page 9)

(Continued from page 8)

this first and most important recommendation – the simple acceptance that desistance from sexual offending, and indeed, crime in general, is a natural human process and an empirical reality. Fully accepting this as a normal outcome for our clients, participants, and fellow citizens will require a paradigmatic shift for the field away from a focus on risk and recidivism and toward the pursuit of full and offense-free lives. I believe this is an achievable goal.

It Doesn't Have to Be — and Probably Won't Be All That, but....

To change the paradigm, we must first change the language we use. It is time to reframe our knowledge of sexual offending within the language of desistance. This means a commitment to not using labeling language and adopting the more integrative, person-first approach of referring to 'sex offenders' instead as individuals convicted of sexual offenses. ...If the treatment industry has any faith in its effectiveness, the individual must be able to come out the other side and become a 'survivor' or be 'in remission,' or at least bear a risk that can be managed.

p. 261: Changing Our Therapeutic Emphasis from Sexual Deviance to General Life Skills and Pursuing Good Lives

A strong majority of the sample expressed a need for much more basic life skills than those provided during their group therapy.

'Treatment really needs to focus on re-entry. Instead of shunning, shaming, and preventing them from being fully participated.' (Jesse).

'There's no preparedness. There's, y'know? It's a computer world and there are no computers in prison, there's no cell phones. When I got out and bought my first cell phone, I had to ask somebody how to use it.' (Derek).

p. 262: The digitalization of so many products and processes while they were banking or submitting a resume online – modern conveniences the rest of us now take for granted.

'...People are there for decades and you don't realize how the world has moved on and kind of left you behind. When I got out here, there was no such thing when I went in as personal computers or cell phones or any of the stuff that's out here now. So it was like going to a new, a different planet almost.' (Derek).

p. 263: I have noted in earlier chapters that many of my interviewees were frustrated by the relentless emphasis in treatment on understanding the etiology of their offending behaviors or on pathologizing their alleged sexual deviance. After years of treatment, many of them expressed a strong desire to be able to leave it behind them, move on, and focus on their future.

Desistance from sexual offending, and indeed, crime in general, is a natural human process and an empirical reality.

pp. 264-65: Educating the Public and the Press on the Empirical Realities of Sexual Abuse

Whereas [the interviewees] might share similar background characteristics or personality traits, or rap sheets, they were unique individuals with different experiences, expectations, and abilities:

One of the things that would be most beneficial is to let people know out there that there are people on the other side who are dedicated to changing their lives, and to helping others change their lives, so that, you know, sexual offenses don't happen. They will always happen. There will always be people who don't want to look in the mirror, y'know? But my, um, my view is that there are a lot more people who understand it and who want to change, and you know, it's not just the guy who lays sewer pipe. I mean, there are guys at the treatment center who are doctors, lawyers, who are captains of the fire department, people they trusted in their community, dentists, y'know? The hockey coach or the girls' softball coach, y'know? The boy scout leader. It, um, deviancy does not have social boundaries. (Freddy).

There's no preparedness. ...It's a computer world and there are no computers in prison, there's no cell phones. When I got out and bought my first cell phone, I had to ask somebody how to use it.

pp. 265-66: As Travis proposes below, what if we (the public, the media, and the field) focused on success?

'The politicians and the media drive the public, okay? What they say people will hear and they fear it, okay? You know, out of the 60 people that have come my way since they've come out only two or three of them are back in. They [the media] don't point to the 60 people that got out that are still out here doing well. They point and focus and drive home those three that messed up. Oh, that's terrible, they're terrible, they're terrible. What if they, the 60 were as important? Not more important, but *as* important, okay? Then we'd have an opportunity to create lifestyles that could support ourselves.' (Travis).

pp. 266-67: Conclusions

Most of the men that I interviewed shared some version of what they thought to be detailed and elaborate strategies to best ensure society's safety. They argued how we could best end sexual violence, they had strong positions on how best to reduce recidivism, and they seemed to know how to identify those who were truly at high risk. They often made reasoned recommendations on what punishments, interventions, and therapies might be most successful, and they did so from an incredibly rich and, so far, underutilized perspective of lived experience....

We can learn so much from the voices and experiences of these men. At the most basic level, the recurring lesson for me was that we can learn from our shared humanity."

pp. 269-71: **Appendix: Life History Interview Protocol**

Life Chapters: I would like to begin by few different chapters. Describe *briefly* the contents of each chapter. As a storyteller here, think of yourself as giving a plot summary for each chapter.

Critical Events: I would like you to concentrate on a few key events that may stand out in bold print in the story. A key event should be a specific happening, a critical incident, or a significant episode in your past set in a particular time and place. It is helpful to think of such an event as a specific moment in your life story which stands out for some reason. For each event, describe in detail what happened, where you were, who was involved, what you did, and what you were thinking and feeling. Also try to say what impact this event has had in your life story and what this event says about who you are or were as a person. Be specific.

High Point: This would stand out in your memory as one of the best, highest, and most wonderful *scenes or moments* in your life story. Please describe in some detail a high point, or something like it, that you have experienced some time in your past.

Low Point: Thinking back over your life, try to remember a specific experience I which you felt extremely negative emotions, such as despair, disillusionment, terror, guilt, and so on. You should consider this experience as one of the low points in your life story. Even though this memory is unpleasant, be as honest and detailed as you can be.

Turning Point: It is often possible to identify certain key turning points—events in which a person experiences important change. I am especially interested in a turning point *in your understanding of yourself*. If you feel that your life story contains no turning points, then describe a particular event in your life that comes closer than any other to [being] a turning point.

Earliest Memory: Think back now to your childhood, as far back as you can go. The memory doesn't have to be important in your life today, What makes it important is that it is the first or one of the first memories you have, one of the first scenes in your life story. These should be detailed enough to qualify as an event.

Mastery or Competence as a Child: Try to recall a relatively early experience I which you felt a real sense of mastery or competence in doing something. What did you do which led to this feeling? Did anybody remark on your accomplishment? (Who?)

Important Childhood Scene: Describe an event from your teen-aged years that stands out as being especially important.

Important Adult Scene: Describe an event from your adult years [age 21 and

(Continued on page 10)

(Continued from page 9)
developed criminal lifestyle?

Mastery or Competence as an Adult: Try to recall a time in your adult life in which you felt a real sense of mastery or competence in doing something. What did you do which led to this feeling? Did anybody remark on your accomplishment? (Who?)

Outside Commitments: Please describe any participation in organizations, clubs, hobbies, or pastimes (outside your work or family) which give your life a good deal of meaning or at least satisfaction. Why are they so important to you?

Life Challenge: Looking back over the various chapters and scenes in your life story, describe the single greatest challenge that you have faced in your life. How have you faced, handled, or dealt with this? How has this had an impact on your life story?

Influences on the Life Story

Positive. Looking back over your life story, please identify the single person, group of persons, or organization/ institution that has or have had the greatest positive influence on your story. Please describe the way these have had a positive impact.

Negative. Please identify the single person, group of persons, or organization/institution that has had the greatest negative influence on your story. Explain the negative impact.

Alternative Futures. I would like you to imagine two different futures for your life story. Let's start with the negative, so we can end on a positive note.

Negative. Please describe a highly undesirable future for yourself, one that you think could happen to you but you hope does not happen. Again, try to be pretty realistic.

Positive. Please describe what you would like to happen in the future for your life story, including what goals and dreams you might accomplish or realize in the future. Please try to be realistic.

Personal Ideology. Please describe in a nutshell your *religious beliefs* or the ways [that] you approach life in a spiritual sense. Have they changed over time? (If *of view?* Are there *particular issues* or causes about which you feel strongly?

Role Models. Do you have, or have you ever had a hero or role model to whom you have looked up? How have they influenced you?

Life Theme. Looking back over your entire life story, do you see a central theme, message, or idea that runs throughout the story? What is that major theme? What is your philosophy of life? In general, what most provides your life with meaning, happiness, or fulfillment?

Other. What else do I need to know to understand your life story?

What if we (the public, the media, and the field) focused on success?

References:

Calhoun, L.G., & Tedeschi, R.G. (2006). *Handbook of Posttraumatic Growth: Research and Practice*. New York, NY: Psychology Press, Taylor & Francis Group

Cann, J., Falshaw, L., & Friendship, C. (2004). "Sexual Offenders Discharged from Prison in England and Wales: A 21-Year Reconviction Study," *Legal and Criminological Psychology, 9(1)*, 1 -10.

Farmer, M., Beech, A.R., & Ward, T. (2011). "Assessing Desistance in Child Molesters: A Qualitative Analysis," *Jour. of Interpersonal Violence, 27*, 1-21

Farrall, S., & Calverley, A. (2006). *Understanding Desistance from Crime: Theoretical Directions in Resettlement and Rehabilitation*. Maidenhead, UK: Open University Press.

Farrell, S. (2010). "A Short History of the Investigation into the Ending of the Criminal Career," *Safer Communities, 9*, 9-16.

Giordano, P., Cernkovich, S., & Rudolph, J. (2002). "Gender, Crime and Desistance: Toward a Theory of Cognitive Transformation," *American Jour. of Sociology, 107(4)*, 990-1064.

Göbbels, S., Ward, T., & Willis, G. (2012). "An Integrative Theory of Desistance from Sex Offending." *Aggression and Violent Behavior, 17*, 453-462.

Gottfredson, M., & Hirschi, T. (1990). *A General Theory of Crime*. Stanford, CA: Stanford University Press.

Graham, J., & Bowling, B. (1995). Young People in Crime. Home Office Research Study No. 145. London: Home Office.

Hanson, R.K., Helmus, L., Harris, A.J., & Thornton, D. (2014). "High Risk Sex Offenders May Not Be High Risk Forever," *Jour. of Interpersonal Violence*, 29(154), 2792-2813.

Harris, D.A. (2014). "Desistance from personal Violence, *29(9)*, 1554-1578.

Harris, D.A. (2015). , "Desistance from Sexual Offending: Behavioral Change without Cognitive Transformation," *Jour. of Interpersonal Violence*, 1-22, Online first.

Harris, D.A. (2016). "A Descriptive Model of Desistance from Sexual Offending: Examining the Narrative of Men Released from Custody," *Int'l Jour. of Offender Therapy and Comparative Criminology*.

Harris, D.A., & Cudmore, R. (2015). "Desistance from Sexual Offending" [chapter], *Oxford Handbook of Criminology and Criminal Justice*, New York, NY: Oxford University Press.

Healy, D (2010). *The Dynamics of Desistance: Charting Pathways through Change*. Portland, OR: Willan Publishing.

Laws, D.R. (2016). *Social Control of Sex Offenders: A Cultural History*. London: Palgrave Macmillan.

Laws, R., & Ward, T. (2011). *Desistance from Sex Offending: Alternatives to Throwing Away the Keys*. New York, NY: The Guilford Press.

Maruna, S. (2001). *Making Good: How Ex-Convicts Reform and Rebuild Their Lives*. Washington, DC: American Psychological Association.

Presser, L. (2008). *Been a Heavy Life: Stories of Violent Men*. Chicago, IL: University of Illinois Press.

****

Labeled to Death: The Frightening Condemnatory Power of Merely Calling Someone a "Pedophile"

Roland Imhoff, "Punitive Attitudes against Pedophiles or Persons with Sexual Interest in Children: Does the Label Matter?", 44 *Arch. Of Sexual Behavior* 354-44 (2015)

Text Excerpts:

"...The negative label pedophilia increased punitive attitudes and (ironically) at the same time decreased punitive attitudes as potentially blameworthy actions were not attributed to intentional decisions but to a psycho-medical condition outside of control. Independent of this suppression effect and the effect of the pedophilia label, we observed quite remarkable degrees of punitive attitudes against targets merely defined by their deviant sexual inclination without any mention of actually committed sexual abuse....

(potentially less stigmatized) hebephilia by explicitly marking the targets of sexual interests *prepubescent* children, results showed the expected effect of the pedophilia label on punitive attitudes in that 'pedophilia' provoked even harsher negative attitudes than individuals with a 'sexual interest in prepubescent children,' Cohen's d = .29 (Table 3). Different from Study 1, this labeling effect was not concealed by a suppression effect of reduced ascribed intentionality....

We also included a brief measure of social desirability to control for its effect on our results. Remarkably, high concerns for social desirability were associated with more (not less) punitive attitudes. This stands in marked contrast to the commonly observed dampening role of social desirability concerns on expressing stigmatizing views.

Discussion

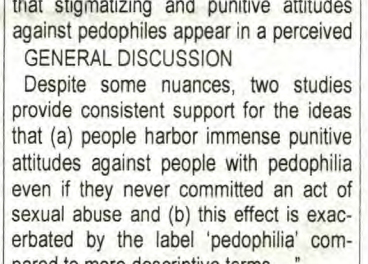
Study 2 provided further support for the notion that the label pedophilia bears additional negative connotation compared to a more descriptive naming of the sexual interest. Although a target group of people with a sexual interest in prepubescent children provoked punitive attitudes (in the absence of any mention of sexually abusive behavior), this was even more pronounced if the group was labeled as pedophiles....

An overall comparison of the two studies suggests that although the principal effect of the pedophilic label is virtually identical in both samples, the US sample has even more pronounced negative associations with pedophiles....

One of the most remarkable findings of Study 2 – although not at the center of the current paper – is the correlation between punitive attitudes against sexual minorities and social desirability. It is a common finding in stigma research that individual social desirability or experimental manipulations of allowing social desirable responding are associated with less negative and less stigmatizing responses, suggesting that respondents perceive it as socially desirable and normatively expected to express positive views about other groups. In the present study we find the exact opposite: social desirable responding was associated with greater punitive attitudes suggesting that respondents saw it as socially endorsed to express particularly negative views about individuals who have a sexual interest in children. On an individual items level, we can see that social desirability positively predicted the endorsement of sentencing known pedophiles to death (r = .23, p = .021) despite the fact that there is no mention of any criminal action they have ever committed. Taken together, these findings suggest that stigmatizing and punitive attitudes against pedophiles appear in a perceived

GENERAL DISCUSSION

Despite some nuances, two studies provide consistent support for the ideas that (a) people harbor immense punitive attitudes against people with pedophilia even if they never committed an act of sexual abuse and (b) this effect is exacerbated by the label 'pedophilia' compared to more descriptive terms...."



****