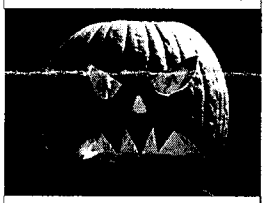
The Legal Pad
Volume 5, Issue 11
November 1, 2021

"Have the courage to use your own reason – that is the motto of the Enlightenment."
– Immanuel Kant, 1785

In This Issue:

1. Repeal, Repeal, Repeal! 1-2
2. *Howe* May Impact SOCC Systems in All States. 2-5
3. Virginia Report Continues! 5-7
4. First: Wollert's Found Error. Now, "Machine Bias" Found to Be Inherent & Incurable. 7-8
5. Resisting Gulags That Have No End 8-9
6. High-Tech Ends Need for SOCC. 9
7. Residential Restrictions Aren't Needed & Actually Increase Recidivism. 9-10
8. Frank Joseph Can Help! 10



What's so "happy" about it? All I got was a carved up face and a stupid candle!

**Correction – to 1st article in Oct. TLP**

Russell J. Hatton, OCEAN Co-Founder, provides the following corrections to the front-page article in the October 2021 edition (#5:10) of TLP.

"We did not seek 'approval' to peacefully assemble 'protest' from MOP-ML Admin – We just did it. We did tell them the dates & times and asked them to post the flyer – which they refused."

"We did not 'work-out' a schedule w/MSOP-ML Admin. We asked them to post the flyer with dates & times – denied.

[Referring to passage (¶8): "The escort person leading that tour radioed for security squad....":] "The escort person leading that tour, Meg McCauley, did not radio A-team. The A-Team did not break up or 'terminate' the peaceful assembly/'protest'. The peaceful assembly being conducted had ended according schedule.

[¶15: "Such privileges," mentioning TV possession:] Hatton urges the editor and readers to focus instead on Paragraph18's punitive sanctions, particularly "immediate movement restrictions, confining each to their respective living units for seven days except for specifically assigned treatment meetings and work shifts."

Feedback? News? Write!

*TLP* Editor Address (Exactly & **Only** as Below):

Cyrus P. Gladden II
1111 Highway 73

# EndMSOP Mulls Submitting a Bill to Repeal SPP-SDP Law

by Cyrus Gladden

For the last few months, EndMSOP has been considering preparing a draft of a bill to submit to some unknown legislator for filing for legislative consideration in the upcoming legislative session. Now things in that regard appear to have taken a turn from mere contemplation to actual planning.

EndMSOP has made available to this reporter minutes and notes from recent internal conference sessions at which the desired contents of this projected bill have been discussed in more than a little detail. The following summary from these minutes and notes sets forth a number of bill provisions that MSOP seeks to include:

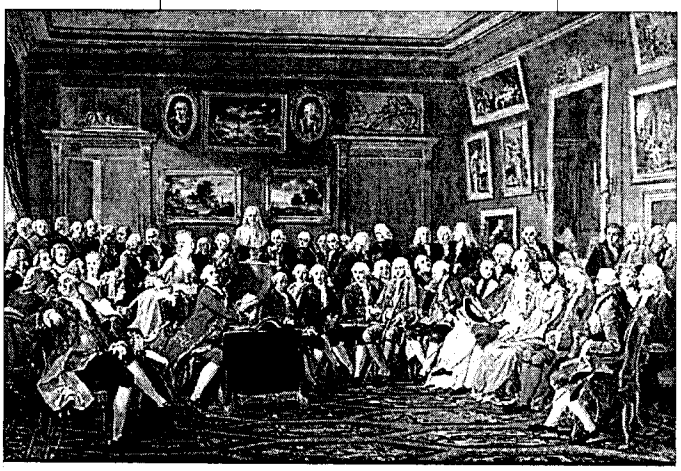
The bill calls for repeal of all of *Minnesota Statutes*, Chapter 253D (the chapter that establishes SPP and SDP commitments, setting forth their respective criteria, and also sets procedures to be followed by MSOP and related agencies, such as the actions of the Special Review Board and the Commitment Appeal Panel (as they address requests for release and for end of a given commitment).

While not visible in these EndMSOP notes, it can be assumed that the projected bill will also call for withdrawal by the State Supreme Court of the "Special Rules Of Procedure Governing Proceedings Under The Minnesota Commitment And Treatment Acts With Amendments Effective Through October 1, 2016," insofar as those rules apply to *Minn. Stat.* Ch. 253D, the "Minnesota Commitment and Treatment Act: Sexually Dangerous Persons and Sexual Psychopathic Personalities."

Further, these notes provide that no new commitments or MSOP admissions would be legal from the date of enactment, that all earlier commitments still in effect would be immediately terminated, and that all commitments, past or still in effect, would henceforth be regarded as not ever having had any legal validity or effect from the moment of their adjudication. Effectively, this would restore us all to the same legal status as if we had never been committed, effectively removing all legal bars, restrictions, and obligations that stem from the existence of a commitment of each of us, respectively, again from the time when each such bar, restriction or obligation took legal effect. Most notably, for instance, this would include repeal of the obligation to register for life simply because each of us, respectively, had ever been under commitment as an SPP or SDP or both.

Under one possible variant, the projected bill would allow MSOP to take up to 18 months to release all current confinees. Whether with or without this alternative, the notes do not mention ending provisional discharges and barring placing anyone on provisional discharge after the date of enactment. This omission should be fixed.

Importantly under any form and schedule of final closure of MSOP, the projected bill calls for reinvestment of the savings by disbursing the amount of the former MSOP budget to programs actually helping the public. More specifically in this respect, the bill will call for creating an overall "public health approach to ending sexual violence," rather than the current case-by-case after-the-fact response that includes the potential for post-imprisonment commitment of a past offender.



A contemporaneous convention discusses the Enlightenment. Now if only we could have this crew decide repeal!

After a large amount of research by many different noted academics, this current model of after-the-fact response focusing on a specific offender has been found to be virtually without any positive effect toward eliminating or even merely reducing the incidence of sex crimes. Even ardent champions of such sex offender civil commitment ("SOCC") have been forced to concede that such commitment has not produced any crime-reducing effect when compared to the majority of states that do not have SOCC laws. Professor Eric Janus has written extensively on this futility of SOCC laws and has advocated for replacement of commitment by exactly such a public health approach that centers on educating potential victims of sexual assault or abuse, as well as the general public, who might someday find themselves witnessing what they suspect may be a prelude to a sex crime, on how to prevent sex crimes.

Pilot programs of this type have had surprisingly strong effect toward sex crime prevention. However, that positive impact has been drastically limited by the very small level of governmental funding given to such pilot programs, much less to planning for a centralized, comprehensive program of sex crime prevention. In large measure, this failure to fund this approach having known success has in large part been due to spending vast sums of money on programs such as MSOP and on the court and other legal budgets required to commit and to confine the committed for decades.

EndMSOP advocates having survivors of sexual assault/abuse join together to create a "Blueprint to End Sexual Violence."

Most often (given their middle-age or senior-citizen age range at time of completion of their term of imprisonment) this represents a time in the lives of those subjected to SOCC when, as they age and die, they present no probability of sexual re-offense (that is, thought to be far less than 1% -- far less than the average probability of prison releases, at about 3%. This contrasts sharply with those still young who simply exit from prison without commitment (after a first offense, for instance) and reoffend when no one is paying attention to them later, since they are fallaciously believed to be at low risk of re-offense because of their first-timer status.

One possible slogan for this proposed shift from post-imprisonment commitment to the "public health" approach could be, "To stop commitment from stopping the end to sexual violence." Surely, by its useless consumption of resources, commitment is currently stopping the public health measures that can stop sex crimes once and for all.

The EndMSOP notes cite the following bullet points about why MSOP cannot be allowed to remain in operation:

- Its immorality/unconstitutionality
  - *SOCC and MSOP are just a way around the limits of the criminal law, dishonestly turning crimes into alleged mental health diagnoses.
  - *Minnesota SOCC discriminates against people of color and LGBQT+ people: African-American: 2x likely to be committed; LGBQT: 5x overrepresented
  - *There is no periodic reevaluation and release by any independent forensic specialists (bearing in mind the self-interest of 'internal evaluators' in claiming confinees "not ready" for release
- In the 30 states without SOCC, sex-crime rates are just as low as states that spends $100 million each and more on SOCC.

*(Continued on page 2)*

(Continued from page 1)

♦The enormous cost: in Minnesota, $96 million -- just for the internal operating cost of MSOP every year (not counting construction costs still being paid off, plus legal costs (including lawyers for the Minnesota Dept. of Human Services and the Minnesota Attorney General's Office, plus county attorney services, and courts in every county, plus appellate courts and the specialized courts established to regulate the release process), and other costs distributed to related agencies, such as Minnesota State Operated Services, Minnesota State Industries, the Mn IT agency, the State Department of Health (for 'inspector general'-style oversight and investigation) and the "Direct Care and Treatment" division of the State's Department of Human Services, plus oversight costs by that Department's administration itself – just to name a few 'rabbit holes' down which the money drains.

♦Inadequate treatment and unqualified staff of MSOP make meaningful treatment impossible.

*In 26 years, the MSOP treatment program has spent $1.5 billion. The results: 15 full releases (out of over 880 committed) and 88 needless deaths in confinement.

EndMSOP cites these alternatives as being far more cost effective at preventing sexual recidivism:

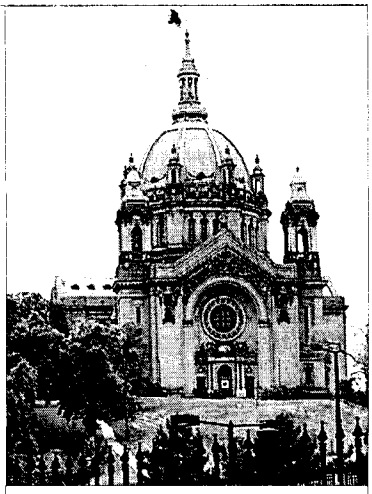
♦Intensive Supervised Release ("ISR"), a Dept. of Corrections program for sex offenders thought to be highest risk. So far, those released sex offenders going through ISR have a long-term sex-crime recidivism rate of only 1%. The cost: only $28/day (including GPS monitoring) – compared to MSOP's per diem cost rate of $394 per confinee.

♦Participation in Minnesota Circles of Support and Accountability (MnCOSA). MnCOSA claims an 88% reduction in sexual recidivism among prison releases who participate in it.

Recent notes of EndMSOP meetings also note that MSOP has barred protest access to all yards, effectively barring protesting.

These notes also indicate EndMSOP's awareness of the *Howe v. Godinez* case from the Big Muddy, IL SOCC program, ordering reevaluation of plaintiffs in that case toward release. *Howe* is not yet a class action case, and hence technically is a small victory, but it is an inspiring one, thanks to the sweeping legal points relied upon by the judge. This makes it more likely that the *Howe* outcome might be applied in Minnesota as well and in fact in all states using SOCC.

However, much more effective and sweeping arguments exist that can result in far more comprehensive relief. (See separate article on the *Howe* case in this edition.) Further, the *Howe* decision raises a troubling adverse possibility: Courts following *Howe*'s lead might conclude that simply increasing/improving SOCC treatment is sufficient as a 'fix,' leaving SOCC facilities still in operation. Despite 'better treatment,' there is no guarantee that this would mean any significant, permanent increase in even just the rate of releases for SOCC. Without a massive increase in release rates, all the treatment in the world would be mere window dressing for the slow-motion death camps that SOCC facilities currently are.



Appeal to the Legislature or to "Higher Authority"?
Well, they both do have domes....

*******

## A Fed Case in IL - *Howe v Godinez* – Provides One Way Toward Release.

Editor's Note: Comments follow excerpted text. Superscripted letters appearing in text refer to matching specific notes/comments by editor. For maximum clarity, it is suggested that all notes/comments be read after reading all excerpted text.

*Howe v Godinez*, No. 14-CV-844-SMY (S.D. Ill. Sept. 6. 2021), *Memorandum and Order Following Bench Trial* https://leagle.com/decision/infdc20210908779

Excerpts:

"Plaintiffs are civil detainees classified as 'sexually dangerous persons' under the [Illinois] Sexually Dangerous Persons Act ('SDPA')..... The Act permits the State to involuntarily commit and indefinitely confine individuals who have not been convicted of a crime, but who have been determined likely to commit acts of sexual violence in the future.

[The *Memorandum* notes that, because the plaintiffs are proceeding *pro se*, no class certification motion could be entertained at the time in the case, nor could the court grant such class certification status at the time.]

**FINDINGS OF FACT**

**Parties**

[In this section, it is worth noting that among the Defendants, Dr. Thomas Holt, was the former Administrator of the SDPP, holding that position from 2013 to 2019. The Memorandum adds:] He obtained his Ph.D. from Cappella University in 2005 and is a Licensed Clinical Professional Counselor ('LCPC'), a licensed Sex Offender Treatment Provider, and a Licensed Sex Offender Evaluator. Dr. Holt created the SDPP [Sexually Dangerous Persons Program] and modified it into its current form.

**Civil Commitment**

...Illinois has enacted two sexual commitment statutes – the Sexually Dangerous Persons Act ('SDPA') and the Sexually Violent Persons Act ('SVPA').... Individuals under the SVPA have been criminally convicted and complete treatment at the Rushville Treatment & Detention Center, which is operated by the Illinois Department of Human Services. Those committed under the SDPA have not been convicted of a sexual offense and are housed at Big Muddy under the operation of the Illinois Department of Corrections.

[The *Memorandum* notes that, under the SDPA, anyone "charged with a criminal offense" (apparently any kind of crime) can be committed within that prosecution and apparently as a substitute for conviction of the crime(s) charged upon a petition by the prosecutor. The statutory elements that must be found are that (1) the person has had a "mental disorder" for at least a year; (2) that he have "criminal **propensities** to the commission of sex offenses", and (3) that he "ha[s] demonstrated **propensities** toward acts of sexual assault or acts of sexual molestation of children."[A] An SDP may petition the committing court in writing to be released. This request invokes an evaluation of the SDP by an evaluator employed by Wexford Health Sources, Inc., the "contracted medical provider" for the Illinois Department of Corrections." If the applicant is found no longer to be an SDP, the court must release the applicant. However, if it is found that, even if no longer dangerous, it is "impossible to determine with certainty under conditions of institutional care that the person has fully recovered," the court must order him to submit to conditional/supervised release.[B]]

...The program utilizes cognitive behavioral therapy on the containment model[C] and offers three categories of therapy: general group therapy, offense specific group therapy, and didactic (psycho-educational group therapy.

...SDPs that do not admit to committing their index offense are prohibited from participating in sexual offense specific and didactic groups....[D]

**Plaintiffs' Expert – Dr. Dean R. Cauley**

...Dr. Cauley offered the following opinions at trial: The SDPP falls far below the generally accepted standards in the field of civilly committed sex offender treatment... The inherent flaws in the SDP result in treatment that is slow, repetitive, and not catered to the mission of treating the men and returning them to the community as quickly as possible.

...The SDPP's lack of clear guidelines for treatment completion or projected timeframes for phase progression impedes the motivation of individuals....

With respect to the Wexford recovery/release evaluations, 'tests were presented as having "considerable predictive validity" when they actually have very little. Indicators of risk were underscored as predicting future sexual violence when these items have shown minimal research outcomes as being predictive.' Important topics such as age or the passage of time are not given any attention in the evaluations. The Wexford evaluations are based largely on past acts to assess the current condition of the SDP. 'Both sexual recidivism risk as well [as] antisocial traits decline beginning at age 40, and rapidly decline after age 60. These reviews do not provide an accurate conception of current or future risk.' The Wexford evaluations 'do not adhere to generally accepted practice or evidence-based decision making.'....

**LEGAL STANDARDS**

...In the context of civil commitment, due process requires that the nature and duration of commitment bear some reasonable relation to the purpose for which the individual is committed. *Kansas v. Hendricks*, 521 U.S. 346, 356 (1997). 'If the object or purpose of the [state] law [is] to provide treatment but the treatment provisions were adopted as a sham or mere pretext, there would [be] an indication of the forbidden purpose to punish. ...[I]f civil commitment were to become a mechanism for retribution or general deterrence ...[Supreme Court] precedents would not suffice to validate it.' *Hendricks*, at 371-73; see also *Bell v. Wolfish*, 441 U.S. 520, 535 (1979) (the purpose must not be punitive, as punishment is reserved for the criminal justice system). Thus, the Fourteenth Amendment mandates that civil detainees receive treatment for the disorders that led to their confinement and be released when they have improved enough to no longer be dangerous. (*Hughes v., Dimas*, 837 F.3d 807, 808 (7th Cir 2016)....

The subjective element of the deliberate indifference standard was recently rejected by the Supreme Court in *Kingsley v. Hendrickson*, 135 S.Ct. 2466, 192 L.Ed.2d 416 (2015) ('The question before us is whether, to prove an excessive force claim, a pretrial detainee must show that the officers were *subjectively* aware

(Continued on page 3)

(Continued from page 2)

that their use of force was unreasonable, or only that the officers' use of that force was *objectively* unreasonable. We conclude that the latter standard is the correct one.') ...The rationale of *Kingsley* ... extends to *Youngberg [v. Romeo*, 457 U.S. 307 (1982)]'s 'substantial departure from accepted professional judgment' standard – an objective inquiry into prevailing medical standards and whether a reasonable professional, applying those standards, would have made the same decision considering the facts in a case....

**CONCLUSIONS OF LAW**

**Counts 1 and II – Failure to Provide Adequate Treatment**

Actual *treatment* of the civilly confined is what separates commitment from punishment and incarceration.[9] Without adequate treatment designed to effectuate ultimate release, a civil commitment program is nothing more than a *de facto* prison disguised as a mental health facility. The Constitution clearly dictates that a civil detainee cannot simply be warehoused and put out of sight; they are not prisoners and must be afforded adequate treatment. Specifically, they are entitled by law to 'more considerate treatment and conditions of confinement than criminals whose conditions of confinement are designed to punish.' *Youngberg*, 457 U.S. at 322; see also *Allen v. Illinois*, 478 U.S. 364, 370 (1986) ("In short, the State has disavowed any interest in punishment, provided for the treatment of those it commits, and established a system under which committed persons may be released after the **briefest** time in confinement.') The Big Muddy SDPP operates contrary to these important principles.

Treatment must be more than mere window dressing to comply with the SDPA – it must enable a true path to release. But the Big Muddy SDPP as constituted affords Plaintiffs no realistic opportunity to be cured or to improve their mental conditions. Instead, it has transformed civil confinement into a punitive and **potentially lifetime** detention, which violates Plaintiffs' due process rights....

In sum, with respect to the claims asserted in Counts I and II, the Court concludes that Defendants have failed in their obligation to provide Plaintiffs with statutorily required rehabilitative treatment. Consequently, the SDPP, as currently structured and implemented, fails to meet generally acceptable professional standards and violates Plaintiffs' right to due process as guaranteed by the Fourteenth Amendment.

**DISPOSITION**

The Due Process Clause of the United States Constitution requires that the nature and duration of the confinement bear some reasonable relation to the confinement's non-punitive civil purpose. Thus, the State must ensure that it civilly confines individuals only so long as they are **both** mentally ill and dangerous to the public. Confinement beyond that point or confinement which imposes restrictions that are so excessive as to indicate the purpose is punitive rather than rehabilitative in nature is unconstitutional.

The evidence in this case establishes that the Sexually Dangerous Persons Program at Big Muddy Correctional Center suffers from systemic failures which has resulted in Plaintiffs being detained indefinitely with no real hope of being released. This Court therefor finds that Defendants have deprived Plaintiffs due process in violation of the Fourteenth Amendment.

The Court further finds the Plaintiffs have established by a preponderance of the evidence that the issuance of a permanent injunction is warranted and necessary. The evidence establishes that there are systemic and gross deficiencies in the provision of therapy services, ... and recovery evaluation which place the plaintiffs at a significant risk of harm. As such, the Court specifically concludes Plaintiffs have suffered or will suffer irreparable injury if a permanent injunction is not issued given the significant deficiencies in the delivery of mental health services via the SDPP.

The Court further finds that there are no adequate remedies available at law to compensate Plaintiffs for their injuries. Plaintiffs are confined within the IDOC; Defendants are required to provide adequate mental care and treatment. Thus, the balance of hardships and public interest weighs heavily in Plaintiffs' favor.

For the foregoing reasons, Plaintiffs ... Request for a Permanent Injunction with respect to the claims asserted in Counts I and II ...is GRANTED.

The Court simply cannot allow Plaintiffs' Constitutional rights to continue to be so blatantly disregarded and violated. While the Court recognizes that correcting systemic and structural deficiencies to comply with a court-imposed order to provide specific relief to the Plaintiffs herein may pose a significant challenge to Defendants, the Constitution mandates that they meet the challenge and do so expeditiously.

Accordingly, the following permanent injunctive relief is ORDERED:...[11]

Within 6 months from the entry of this Order, recovery/release evaluations shall be conducted of the plaintiffs herein by independent psychologists or psychiatrists (not employed by IDOC or Wexford). No later than 30 days from the entry of this Order, Defendants shall provide Plaintiffs and the Court with a list of proposed independent psychologists/psychiatrists to conduct said evaluations. Plaintiffs shall file any objections to the proposed providers within 30 days thereafter.

Defendants are further ORDERED to file a status report under seal regarding their compliance with the Instant Order within 60 days of its entry."

Pertinent Footnotes by the Court:

"5. See *Arielle W. Tolman*, "Sex Offender Civil Commitment to Prison Post-Kingsley," 113 *Nw. U. L. Rev.* 155 (2018)

9. Given this obvious distinction in purpose, the Court finds the fact that convicted SVPAs complete treatment at the Rushville Treatment & Detention Center while non-convicted SDPs are committed under the auspices of the Department of Corrections to be curious at best.

11. Absent class certification, the Court may not order injunctive relief for SDPs other than the plaintiffs herein. Obviously, however, Defendants' task would be made easier by addressing and correcting the program deficiencies across the board rather than in a piecemeal fashion."

**Editor's Closing Comments:**

Superscripted notes:

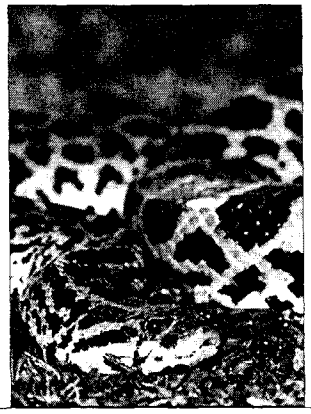
A. It is not known why this standard (somewhat comparable to Minnesota's Sexually Psychopathic Personality "predisposition" criterion), long rejected as a basis for civil commitment, was not challenged directly by the *Howe* plaintiffs. See *David Gottlieb*, "Preventive Detention of Sex Offenders," 50 *U. Kan. L. Rev.* 1031, 1041 (June 2002); *Mary Prescott*, "Invasion of the Body Snatchers: Civil Commitment after Adam Walsh," 71 *U. Pitt L. Rev.* 839, 847-49 & fn. 70 (Summer 2010). Neither mere predisposition nor predicted likelihood of a future sex crime with a child can support an inference of volitional impairment. *J. Jason*, "Beyond No-Man's Land:..." (etc.), 83 *S. Cal. L. Rev.* 1314, 1350-51 (2010) (a prerequisite for commitment under *Hendricks* and *Crane*); to like effect, see also: *Michael Maizel*, "Confining Control: Narrowing the 'Control' Standard under New York's Mental Hygiene Law Article 10," 37 *Cardozo L. Rev.* 713 at 739 (2015-16). Sexually Violent Predator Commitment Cases," 39 *Jour. Am. Acad. Psychiatry & Law* 443, 450 (2008; emphasis added). Cf. *State v. Rosado*, 889 N.Y.S. 2d 369, 382-83 (NY. Sup. Ct. 2009) ("The two concepts of predisposition and volition are separate and distinct, like apples and oranges.' A disorder, like pedophilia, might predispose someone to the commission of sex offenses, but the offender might have a great degree of control over the predisposition."); *Janine Pierson*, Comment, "Construing Crane: Examining How State Courts Have Applied Its Lack-of-Control Standard," 160 *U. Pa. L. Rev.* 1527, at 1537, 1541-42 (2012).

B. Probability (likelihood/dangerousness) is another absolute requirement under *Kansas v. Hendricks*, 521 U.S. 346 (1997). Therefore, this addition of a 'parole' from commitment in the absence of "dangerousness" is yet another way in which Illinois' SDP statute falls short of the *Hendricks* substantive due process standard.

C. As reported by *Judith Levine & Erica R. Meiners*, "Uncivil Commitment", *n+1*, Issue 37, 59-67 (online only, Spring 2020), https://nplusonemag.com, the "containment model" is "based on the same false notion that justifies decades-long registration: that 'sexual offending' is a unique, incurable psychiatric disorder that must be kept perpetually under control, lest it compel the person to harm again..." At p. 62, *Levine & Meiners* explain further: "...[C]ontainment is typically described as 'victim centered': its priority is the safety and healing of the harmed person. In practice, this often means an aggressive disregard for the needs of the patient – the 'offender' – most significantly, for the honesty, mutual trust, and confidentiality that most therapists believe are the prerequisites of a productive therapeutic relationship. In sex offender commitment, this "containment model" is most often regarded as simply a justification for presumptive lifetime confinement, putting the burden on the confined person to 'prove a negative,' i.e., that if released, he would be absolutely certain to never reoffend. Given the acknowledged, inherent uncertainty in predictions of probability of sexual re-offense and the fact that no actuarial instrument has any category with a zero percent likelihood of re-offense, this is an impossibility to prove, and hence just an irrefutable excuse for lifetime detention on baseless fear alone.

D. The scientific reality is that "...Contrary to what is commonly assumed, those sexual offenders who denied their offenses were no higher risk [of sexual re-offense] than other offenders." *R. Karl Hanson*, Predictors of Sexual Offender Recidivism: A Meta-Analysis, 1996-04 (Public Safety and Emergency Preparedness Canada), p. 12. Indeed, recent research shows, counterintuitively, that deniers of index and other adjudicated offenses actually have a lower risk

(Continued on page 4)



In-House Assessment?

(Continued from page 3)

of re-offense than those who admit such offenses. See, e.g., *Jayson Ware, W.L. Marshall & L.E. Marshall*, "Categorical Denial in Convicted Sex Offenders: The Concept, Its Meaning, and Its Implication for Risk and Treatment," *Aggression and Violent Behavior* (Aug. 2015; 12 pages). Nor does denial make effective treatment of sex offenders impossible or even merely more difficult or less successful. *Jayson Ware*, "Therapeutic Climate Within a Treatment Program for Categorical Deniers," 62 *Int'l Jour. Of Offender Therapy & Comparative Criminology* 2216-2235 (Issue 8, June 2018). Therefore, this insistence upon admission of either "index" or other convicted offenses in the SDPP or any other sex offender treatment program is scientifically baseless. Moreover, it cannot be overlooked that commitment to the SDPP does not occur due to any conviction; indeed, commitment is effectively a substitute for the criminal process as to any given criminal charge (which itself is not limited to a charge of a sex crime). Hence, exactly what an "index offense" could really be for SDPP purposes is unclear and potentially without limit. Although it is not known whether an SDPP commitment includes a judicial dismissal of the underlying criminal charge with prejudice, anything less could expose the committed person to later re-prosecution based on the demanded admission of perpetration of that offense. Therefore, the right against self-incrimination is clearly implicated. The exercise of that Fifth Amendment right is not limited to the context of a criminal prosecution, and 'civil' demands that one relinquish that right equally violate that Fifth Amendment right. See *United States v. Von Behren*, 822 F. 3d 1139, 2016 US App LEXIS 8567 (10th Cir. 2016, involving exactly such a demand in the context of sex offender treatment, rejected by the court as a Fifth Amendment violation).

Observations at Large:

Overall, it appears that the Big Muddy plaintiffs may have passed up on some potential claims of much greater impact than the inadequate treatment approach they took. Most fundamental among these would seem to be the entire notion of using commitment as a substitute for criminal conviction, thereby forcing those subject to commitment petitions to forfeit their criminal procedural rights on the underlying criminal charge(s). This surely must be a procedural due process violation of watershed proportion. Given the overall lack of a significant number of releases in the time of existence of the SDPP, it is entirely unclear what those committed to it gained by way of 'tradeoff' against loss of this profoundly important set of procedural rights and guarantees.

Following closely on the heels of the foregoing observation, Illinois' SDP law's use of a standard of mere "propensity" to commit crimes cannot satisfy the demands of substantive due process over civil commitments. "We do not allow incarceration for the propensity to commit a crime." *Eric Janus*, *Failure to Protect: America's Sexual Predator Laws and the Rise of the Preventive State* (Cornell Univ. Press, 2006), pp. 4-5. See *Bruce J. Winick*, The Right to Refuse Mental Health Treatment, (Am. Psychol. Ass'n., Washington, DC, 1997), p. 319: "Neither sexual psychopathy, the label once given to the propensity to commit sex offenses, nor antisocial personality disorder, the condition rejected as a basis for involuntary hospitalization in *Foucha*, are medical conditions for which psychiatric hospitalization or intrusive treatment would be therapeutically justified." *Kansas v. Crane*, 534 US 407, 151 L Ed 2d 856, 122 S Ct 867 (2002; court's syllabus), clarified *Hendricks*, declaring: "...[T]he Constitution does not permit commitment ...without any lack-of-control determination. *Hendricks* referred to the Act as requiring an abnormality or disorder that makes it 'difficult, if not impossible, for the [dangerous] person to control his dangerous behavior.' *Id.*, at 358, 138 L Ed 2d 501, 117 S Ct 2072."

In effect, *Hendricks* and *Crane* require satisfaction of each if these three elements: (1) a finding of a mental disorder or other recognized abnormality; (2) likely future commission of acts of harmful sexual conduct caused by such disorder/abnormality, not merely from a general "propensity"; (3) a finding of inability to control one's sexual behavior (known to psychologists as "volitional impairment" and loosely thought of as being subject to irresistible impulse in a moment of criminal opportunity, not to be confused with making a decision to commit a crime; *Crane* clarified this factor to "serious difficulty" controlling one's sexual behavior – again, not about deliberately choosing to commit a crime). A mere "propensity" without these *Hendricks* requirements is unquestionably a deprivation of substantive due process. Apparently the legislators who created the Illinois SDP law believed that, by avoiding conviction, they could avoid the technical holding of *Hendricks*, concerning double jeopardy, and ex post facto rejection. However, the minimal standard set forth (above) by *Hendricks* has long since become the reigning standard for attacks on SOCC based on deprivation of substantive due process. Therefore, unless read by subsequent Illinois judicial decisions as limiting SDP commitment to these constitutional criteria (unknown to this writer), it appears that the SDP law is blatantly unconstitutional on this fundamental basis alone.

This ruling makes it far more likely that volunteer counsel can be attracted to represent a class of all SDPP confines to repeat the successful constitutional claim (Count II). Further, this ruling also increases the probability of success on similar claims in other states' systems of SOCC (including increasing the ability of attracting volunteer counsel in those other states).

Finally, whether at Big Muddy, Rushville, or in any other states with SOCC systems, beyond the details of specific ways in which sex offender treatment may be found to be inadequate, the fundamental observation that makes virtually all such SOCC systems unconstitutional is that no psychological treatment regimen can legitimately require several years, much less a decade or more to complete. There is no treatment program apart from sex offender commitment facilities that demands this length of treatment participation. There is no academic or professional rationale for such insane length of treatment that is defensible on scientific grounds. By effective definition therefore: any treatment program of such over-the-top length and dizzying complexity as SOCC 'treatment' is not actual treatment at all, but simply an excuse to keep treatment participants in captivity for many years on the contention that they remain "dangerous."

For example, *Suggs et al. v. Maxymillian, et al.*, No. 9:13-CV-00359 (NAM/TWD), 2015 US Dist LEXIS 133443 (N.D. N.Y. September 14, 2015): noted that the petitioner in that case, confined in the CNYPC SOCC facility, after years of treatment within that facility, was "clearly suffering from treatment fatigue, a concept that the OMH Chief Psychiatric Examiner refused to acknowledge even existed." *Id.* at 22. After decades of treatment of individuals, the near-uniform conclusion by treatment administrators in any SOCC facility is that each individual remains 'too dangerous to release' (even despite advancing age). *D.M. Doren*, "The Model for Considering Release of Civilly Committed Sexual Offenders," in A. Schlank & F. Cohen (eds.), *The Sexual Predator: Law and Public Policy, Clinical Practice, Vol. III* (Kingston, N.J., Civic Research Institute, Inc. 2006), points out that sex offender commitment programs that use a treatment-completion standard for release have a near-zero release rate. Thus, for example, as to pedosexuals, SOCC treatment administrators will almost always say in excusing its refusal to release same, even after a decade or more of its treatment, that such detainee continue to have pedophilic attractions, and therefore present some level of risk of re-offense – and hence do not possess a "guarantee" of public safety.

Therefore, such facilities are simply thinly disguised, artificially 'treatment justified' permanent (natural-life) preventive detention schemes. Worse, *Judith Levine & Erica R. Meiners*, in their insightful book, *The Feminist and the Sex Offender: Confronting Sexual Harm, Ending State Violence* [Verso, 2020]), explain at pp. 74-5: "Treatment, the ostensible reason for which these people are locked up, is one of the main sources of their frustration and demoralization, some to the point of suicidal depression. Year after year, they climb a downward escalator of repetitive sessions, almost reaching the top only to earn demotions for such Kafkaesque infractions as 'treatment fatigue.' Questioning the value of these exercises or protesting confinement is self-defeating, since an entry on the basis of 'resistance' or 'defiance' is evidence that the complainer is not only crazy, but also refusing to get better."

As an example of how SOCC facilities really think about the role of treatment, Minnesota's SOCC system (Minnesota Sex Offender Program – "MSOP"), in its 2011 report to the Minnesota Legislature: "Options for Managing the Growth and Cost of [MSOP]: Facility Study" (hereinafter, the "MSOP Report"), boasts that it offers "the longest treatment durations," apparently as a goal in and of itself. (*Id.*, p. 9). This supports the inference that, as its goal and that of the legislature to which it addressed that statement, MSOP intends to keep its detainees confined for as long as possible.

In contrast, that MSOP Report, at p. 14, concedes that the length of the SOTP program of sex offender treatment in MCF-Lino Lakes and MCF-Rush City is only 20 months. Nowhere does that report truly explain this disparity or justify it, other than suggesting that those committed, purely because of that commitment, supposedly present such a certain probability of recidivism that long-term detention is necessitated.

Any clinical psychologist not involved in sex offender treatment will readily concede that the limits of clinical psychology are such that any desired outcome not capable of being accomplished within a year of treatment is simply not achievable through psychological therapy at all. What so-called 'containment model treatment' of sex offenders amounts to instead is simply the longest running experiment-by-subterfuge ever designed of a form of brainwashing. This consists of drubbing with endless repetition into the heads of sex offenders for many years and regurgitation by them of a litany/mantra of precepts of general regard for the feelings and rights of others and of specific measures asserted to offenders to be necessary to constantly bear in mind less they 'relapse' into sexual offending (as if it were an addiction, although it is not).

The sheer facts that: (a) clinicians' declarations of success by given treatment participants border on rare in SOCC; and (b) that such 'graduations' from treatment, where they exist, remain something pronounced after often only

(Continued on page 5)

(Continued from page 4)

the passage typically of nearly two decades of treatment (rather than on an ever-shortening timeframe since the inception of this experiment), show that this experiment has failed, completely and abysmally. This has been confirmed countless times from coast to coast by the very pronouncements of clinicians and 'assessors' themselves of their 'clients' failure to reduce their "risk" of re-offense. In light of the court's comments, above, this last contention by clinicians and assessors itself is indefensible, given the well-known tendency toward desistance from sex crimes and the (understated by Judge Yandle here) diminishing and eventual certain extinction of recidivism wrought by advancing age of former sex offenders.

In sum, it is clear from the foregoing notes and observations that, while these Big Muddy plaintiffs have gained a victory, there are far more fundamental grounds for attack upon the Illinois SDP law than the *Howe* challenge. It would seem probable that these same fundamental grounds for attack also apply to every, or at least nearly every SOCC system in the states that have them.

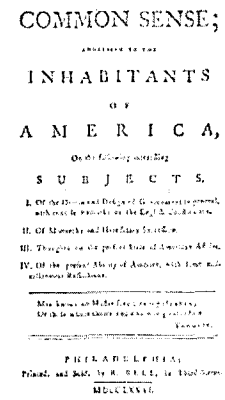
*******

# Return of Son of Virginia Report (Segment 7)

Even Were Pedophilia a Scientifically Identifiable Mental Malady of Any Kind, It Is No Predictor of Sex Crime Recidivism and Has No Relationship to Volitional Impairment, and Hence It Cannot Support Civil Commitment of Any Individual.

As a second point distinct from the foregoing, "[n]or is a DSM diagnosis of pedophilia correlated with sexual recidivism." *Melissa Hamilton*, "Adjudicating Sex Crimes as Mental Disease," 33 *Pace L. Rev.* 536 (2013), at 579-80. *Margo Kaplan*, "Taking Pedophilia Seriously," 72 *Wash. & Lee L. Rev.* 75 (Winter 2015), at 86-87, declares: "Pedophilia need not entail any behavior; one may be a celibate pedophile, similar to how one may have sexual desires for adults while remaining celibate." Thus, in *Belleau v. Wall et al.*, 2015 U.S. Dist. LEXIS 125909 (E.D. Wis. 2015), the court declared,

"...[P]edophilia does not cause a person to sexually assault a child. If it did, Belleau and those like him would be able to avoid their convictions by pleading not guilty by reason of mental disease or defect." Cf.: "...[D]ata analyses that eliminate intermediate data points will generate inflated estimates of correlation coefficients, base rates, and the discriminative capacity of predictor variables. This principle is also relevant for understanding the flaws in previous research that led *Hanson and Bussiere* to conclude that sexual recidivism was correlated with 'sexual interest in children as measured by phallometric assessment.'" *Richard Wollert & Elliott Cramer*, "Sampling Extreme Groups Invalidates Research on the Paraphilias: Implications for DSM-5 and Sex Offender Risk Assessments," 29 *Behav. Sci. Law* 554, at 554 (2011).



COMMON SENSE;

addressed to the

INHABITANTS

OF

A M E R I C A,

On the following interesting

S U B J E C T S.

I. Of the Origin and Design of Government in general, with concise Remarks on the English Constitution.

II. Of Monarchy and Hereditary Succession.

III. Thoughts on the present State of American Affairs.

IV. Of the present Ability of America, with some miscellaneous Reflections.

Man knows no Master save creating Heaven,
Or those his Subjects by unjust Decree.

PHILADELPHIA:

Printed, and Sold, by R. BELL, in Third-Street.

M DCC LXXVI.

A Little Common Sense Would Help...

"...The fact that 70% to 85% of offenses against children are premeditated speaks against a lack of perpetrator control." *Ryan C.W. Hall & Richard C.W. Hall*, "A Profile of Pedophilia: Definition, Characteristics of Offenders, Recidivism, Treatment Outcomes, and Forensic Issues," *Mayo Clin. Proc.* 2007: 82(4): 457-471 (2007) [emphasis supplied]. "Similarly, MRI studies have found no evidence to suggest any differences in the parts of the brain that relate to self-control or impulsivity." (*Margo Kaplan*, "Taking Pedophilia Seriously," 72 *Wash. & Lee L. Rev.* 75, at 91 (Winter 2015): [citing: James M. Cantor, "Understanding MRI Research on Pedophilia, http://individual.Utoronto.ca/james_cantor/blog2.html]. [So: volitional impairment can be ascertained; if brain parts are intact, no impulsivity or volitional control problem.]).

*Sam Newman*, "Missouri's SVP Law: Time for a Change?", 60 *St. Louis U. L.J.* 711 (Summer 2016), observes thus:

p. 721: "In *Kansas v. Hendricks*, ...the Court added that the mental condition must cause the individual to have difficulty controlling his or her behavior.[93]

As a result of the Supreme Court's decision in *Hendricks*, the clinical condition actually causing a loss of 'volitional impairment' is essential to SVP statutes.[94]"

p. 722: "...[A]ccurately determin[ing] when ...a 'mental abnormality' is actually causing volitional impairment ...is such a difficult task that the American Bar Association (ABA) considers it nearly impossible.[97] In fact, ...'there is still no accurate scientific basis for measuring one's capacity for self-control or for calibrating the impairment of such capacity.'[98]" (emphasis supplied)

Notes:

93 *R. Rogers & R. L. Jackson*, "Sexually Violent Predators, The Risky Enterprise of Risk Assessment, 33 *J. Am. Acad. Psychiatry & L.* 523, 525 (2005)

94 *Id.* at 525

97 *Id.*

98 *Id.*

*Deirdre M. Smith*, "Dangerous Diagnoses, Risky Assumptions, and the Failed Experiment of 'Sexually Violent Predator' Commitment," 67 *Oklahoma Law Rev.* 619, 674 (No. 4, Summer 2015), agrees and expands on this theme thus:

"Of particular significance for SVP commitments is the fact that a diagnosis of pedophilia or other paraphilia, in addition to not being strongly correlated with acts of sexual violence, does not necessarily involve a lack of 'volition' or forms of compulsion, as required under the *Hendricks-Crane* analysis. As First and Halon write, a 'diagnosis of a paraphilia does not imply that the person also has difficulty controlling his behavior.'[352] The defining feature of the paraphilias is a particular source of 'deviant' sexual arousal (not conduct), and as noted above, many people with such sexual interests, urges, or fantasies never act on them.[353] As a result, some researchers 'liken [a paraphilia] to an addiction, others to sexual orientation.'[354]

"Indeed," Smith adds, "the DSM-IV-TR's introductory language makes clear that none of the diagnoses in the manual imply an assessment of volitional control." (*Id.*).

Pedophilia is classified by the DSM-5 as a particular type of paraphilia. *Michael B. First & Robert L. Halon*, "Use of DSM Paraphilia Diagnoses in Sexually Violent Predator Commitment Cases," 36 *Jour. Am. Acad. Psychiatry & Law* 443-54 (2008), examined in depth the role of a paraphilia diagnosis and concluded that no such diagnosis comprises a predictor of probable sexual recidivism, explaining that "fantasies" and "urges" as used in that portion of the DSM, refer to the present, and are not established by inference from past conduct or statements, and that "urges" means urges "to act on the fantasies," rather than some mere sexual interest in children. *First & Halon* continue:

p. 444: "Of all the disorders included in the DSM-IV-TR, certain of the paraphilias come closest to the type of sexual psychopathology defined in the SVP laws, even though none has the requisite predisposition to act on the paraphilic fantasies and urges nor do they involve volitional impairment in doing so.

"We contend that, during the process of adjudication of SVP commitment trials, profound and avoidable errors are made by some mental health professionals who invalidly diagnose paraphilia, assert that there is volitional impairment based solely on the fact that the offender has a paraphilia diagnosis, and thus wrongly claim that the statutorily defined SVP commitment criteria are adequately addressed by the clinical diagnoses. In such cases, mental health experts have made a DSM-IV-TR diagnosis of paraphilia without providing valid evidence to justify the diagnosis. Instead, they infer from the criminal sexual behavior the existence in the offender of the requisite 'deviant sexual arousal pattern' (i.e., recurrent, intense, sexually arousing fantasies and urges) that is the defining feature of paraphilia."

p. 445: "...We propose the following three-step process to assist in those diagnostic efforts. First, establish whether a paraphilia is present; that is, provide reasonable evidence of the existence in the offender of the recurrent, intense, sexually arousing fantasies (i.e., mental imagery, that the individual considers to be erotic) and urges (i.e., to act on the fantasies) that are the *sine qua non* in paraphilic diagnosis. Second, if a paraphilia is present, establish whether the offender's sexually violent crimes occurred as a direct consequence of that paraphilia. Third, rather than assuming that a diagnosis of paraphilia implies volitional impairment, present positive evidence suggesting whether the offender is, or is not, volitionally impaired with regard to committing sex crimes. We acknowledge that this third step in the process – differentiating those offenders who legitimately lose control from those who simply choose to violate social rules – may be difficult, if not impossible, to accomplish. [citing: *R. Rogers, R. Jackson*, "Sexually Violent Predators: The Risky Enterprise of Risk Assessment," 33 *J. Am. Acad. Psychiatry & Law* 523-28 (2005); *C.G. Mercado, B.H. Bornstein & R.F. Schopp*, "Decision-Making About Volitional Impairment in Sexually Violent Predators," 30 *Law & Human Behavior* 587-602 (2006); *B.D. Grinage*, "Volitional Impairment and the Sexually Violent Predator," 48 *Jour. Forensic Sci.* 861-68 (2003)] It is a conclusion to which, we believe, no expert witness can testify with any degree of certainty and that fact must be plainly stated to triers of fact."

p. 447: [Referring to the overall definition requirements ("criteria" for any paraphilia diagnosis.] "...The Criterion A wording, however, was not restored to that used in the DSM-III-R. It had never been anticipated that any clinician would interpret the addition of 'or behaviors' in Criterion A as indicating that the deviant behavior, in the absence of evidence of the presence of fantasies and urges causing the behavior, would justify a diagnosis of a paraphilia.

"The fact that some experts would use a literal interpretation of Criterion A to

(Continued on page 6)

(Continued from page 5)

justify making the paraphilia diagnosis based entirely on criminal sexual behavior goes against both the spirit of the DSM-IV and the requirements of the SVP commitment statutes in which the prior criminal sexual behavior alone is insufficient for finding that the offender is a sexually violent predator. The introduction to DSM-IV-TR states clearly that 'the specific diagnostic criteria included in DSM-IV are meant to serve as guidelines to be informed by clinical judgment and are not meant to be used in a cookbook fashion' (Ref. 5, p. xxxii). The core construct of a paraphilia, which involves a deviant focus for sexual arousal, is the historical sine qua non of the diagnosis, and is so well established as to be irrefutable. The fact that a valid diagnosis of paraphilia cannot be made on the sole basis of criminal sexual behavior is clearly stated in the 'Diagnostic Features' section for the paraphilias: 'For Pedophilia, Voyeurism, Exhibitionism, and Frotteurism, the diagnosis is made if the [the fact that the] person has acted on theses urges or the urges or sexual fantasies cause marked distress or interpersonal difficulty' (emphasis added by authors; Ref. 5, p. 566). Were the criminal sexual behavior itself sufficient for making the diagnosis of paraphilia there would be no need for input from mental health professionals in making the diagnosis."

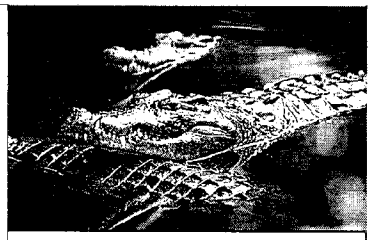
p. 450: Step 3: Providing Evidence of Volitional Impairment

"Do not assume that diagnosis of a paraphilia implies volitional impairment.... It is important to understand that having a diagnosis of paraphilia does not imply that the person also has difficulty controlling his behavior.

"...While it is true that some individuals with paraphilia have difficulty controlling behavior associated with it, many do not....

"...[T]here are no established, validated scientific methods for measuring impairment in an individual's ability to control his behavior [citing *C.G. Mercado, B.H. Bornstein & R.F. Schopp, supra*] ....

pp. 450-51: "...In lieu of a direct assessment of volitional capacity, many SVP evaluations have instead focused on the presence of risk factors that predict future sexual violence, on the assumption that those who are scored as being at high risk of sexually reoffending do so because of difficulty controlling their behavior. The validity of this approach has been justifiably criticized [citing: *R. Rogers, R. Jackson, supra*].... ...[H]aving a high risk of reoffending according to one of these instruments does not also imply that there is a mental abnormality causing this high risk or that, even if caused by a mental abnormality, there also exists



Our assessors can't wait to sink their teeth into your problem!

in the offender the requisite volitional impairment in reference to committing the offenses.

"...[E]xpert witnesses testifying in SVP commitment trials must clearly inform triers that there is no professional-consensus in the field of mental health concerning what constitutes volitional impairment nor even what constitutes adequate psychiatric or psychological evidence of it..... ...[T]he expert should also inform triers of fact that even information yielded by scientifically generated actuarial risk-assessment instruments cannot resolve the question of volitional impairment."

Even where a diagnosis of pedophilia is possible, the indispensable volitional impairment (*Kansas v. Crane, supra*: "serious difficulty" in controlling "impulses/"behavior") cannot be assumed from that diagnosis. *First & Halon* at 450. Neither mere predisposition nor predicted likelihood of a future sex crime with a child can support an inference of volitional impairment. *J. Jason*, "Beyond No-Man's Land:..." (etc.), 83 *S. Cal. L. Rev.* 1314, 1350-51 (2010).

*Michael Maizel*, "Confining Control: Narrowing the 'Control' Standard under New York's Mental Hygiene Law Article 10," 37 *Cardozo L. Rev.* 713 (2015-16), addresses the distinction between lack of control over sexual behavior, and simple choice to commit sex crimes thus:

p. 735: "Additionally. this holding [citing *Donald DD.*, 21 N.E.3d at 248.] carries a further, implied restraint on the 'control' element by creating a distinction between an individual that has difficulty controlling his behavior, and one that simply does not control his behavior. The court explained that the facts underlying particular offenses, and the fact that those offenses occurred in the face of increased risk of arrest, were by themselves insufficient to show that the acts were the result of impaired control, as opposed to a conscious decision." (emphases supplied)

p. 739 a. The DSM Does Not Implicate the Control Issue

"... If an individual is diagnosed with pedophilia, for instance, it means only that he has met a series of behavioral criteria, including experiencing certain sexual urges and fantasies. While such diagnosis may be causally connected to past offenses if the offenses themselves correspond with the behavior justifying the diagnosis, to say that an individual's sexual urges and fantasies caused his offending behavior is not to say that the individual has difficulty controlling that behavior. In other words, a DSM diagnosis might implicate predisposition by explaining what causes an individual's behavior, but it does not provide information regarding whether an individual is able to control that behavior. To use a DSM diagnosis to implicate control is to therefore confuse the predisposition and control elements." (emphases supplied)

p. 740: "...Beyond the fact that there is no relationship between the disorders listed in the DSM and volitional control, there is simply no agreed-upon means of psychologically assessing volitional control, no less distinguishing between an inability and an unwillingness to control behavior. It is therefore not clear that an expert is in a privileged position to provide a reliable opinion on whether, and to what extent, an individual is exercising volitional control, regardless of the basis for such opinion."

Distinctly, a study using a regression analysis method indicates that a DSM diagnosis of pedophilia is not even a significant predictor of sexual recidivism." *Hamilton*, at 580, citing *Heather M. Moulden, et al.*, "Recidivism in Pedophiles: An Investigation Using Different Diagnostic Methods," 20 *J. Forensic Psychiatry & Psychol.* 680, 693 (2009) (finding no difference in violent, sexual, or general recidivism rates for extra-familial child molesters diagnosed with pedophilia or not, and in fact, finding a DSM pedophilia diagnosis was negatively correlated with recidivism). The following excerpts from the *Moulden et al.* article are especially worthy of close consideration:

pp. 680: "The relationship between pedophilia and recidivism was examined in a sample of 206 extra-familial child molesters assessed ...between 1982 and 1992.... No differences were found between pedophiles and nonpedophiles with respect to recidivism rates."

p. 692: "DSM [pedophilia] diagnosis actually decreased the likelihood of recidivism,...."

p. 695: "No differences existed between individuals diagnosed as pedophiles and nonpedophiles with respect to recidivism rates."

p. 696: "...[N]o differences were observed between pedophiles and nonpedophiles with respect to time to first sexual, violent, and any criminal re-offense regardless of how pedophilia was defined. These results suggest that meaningful differences may not exist between pedophilic and nonpedophilic offenders in terms of their risk to reoffend, and actual re-offense rates. This finding has implications for practice, given that pedophiles are often considered to be at greater risk for sexual recidivism compared to nonpedophilic offenders."

p. 698: "...[T]hose individuals determined to be pedophiles, regardless of definitions, do not recidivate more often or more quickly than nonpedophiles." (emphases supplied)

Accord: *Marcus A. Galeste, Henry F. Fradella & Brenda Vogel*, "Sex Offender Myths in Print Media: Separating Fact from Fiction in U.S. Newspapers," 13 *Western Criminology Review* 4-24 (2012) (http://wcr.sonoma.edu/v13n2/Galeste.pdf ), at p. 6 ("Offenders who commit sexual acts against adults recidivate at higher rates than child molesters do [*Margaret A. Alexander*, "Sexual Offender Treatment Efficacy Revisited," 11 *Sexual Abuse: A Jour. Of Research and Treatment* 101-116 (1999); *Terrence D. Miethe et al.*, "Specialization and Persistence in the Arrest Histories of Sex Offenders: A Comparative Analysis of Alternative Measures and Offense Types," 43 *Jour. Of Research in Crime and Delinquency* 204-229 (No. 3, 2006); *Vernon L. Quinsey, Arunima Khanna & P. Bruce Malcom*, "A Retrospective Evaluation of the Regional Centre Sex Offender Treatment Program," 13 *Jour. Of Interpersonal Violence* 621-644 (No. 5, 1998)....]"); *Michael B. First & Allen Frances*, "Issues for DSM-V: Unintended Consequences of Small Changes: The Case of Paraphilias," 115 *Am. J. Psychiatry* 1240, 1240 (2008). See also: *Robin J. Wilson, et al.*, "Pedophilia: An Evaluation of Diagnostic and Risk Prediction Methods," 23 *Sexual Abuse* 260, 268, 270 (2011) ("Experts likewise note that multiple studies show such low statistics for the reliability and validity of DSM diagnoses of pedophilia that it should be seriously questioned and construed to be of limited utility for practitioners, and even more inappropriate for legal proceedings." (citing *Moulden, supra*, at 698; *Drew A. Kingston, et al.*, "Comparing Indicators of Sexual Sadism as Predictors of Recidivism among Adult Male Sexual Offenders," 78 *J. Consulting & Clinical Psychol.* 574, 575 (2010); *W.L. Marshall*, "Diagnostic Issues, Multiple Paraphilias, and Comorbid Disorders in Sexual Offenders: Their Incidence and Treatment," 12 *Aggression & Violent Behavior* 16, at 16 (2007)).

*Hamilton, id.*, at 580, concludes:

"These results undermine the prevailing risk-based model presumption that a diagnosis of pedophilia is an appropriate proxy for risk assessment supporting legal decisions. Experts likewise note that multiple studies show such low statistics for the reliability and validity of DSM diagnoses of pedophilia that it should be seriously questioned and construed to hold limited utility for practitioners, and even more inappropriate for legal proceedings."

*Kaplan, supra*, at explains at p. 91:

"It is commonly assumed that individuals living with pedophilia simply 'can't help themselves' and are unable to control their impulses to molest children.

(Continued on page 7)

(Continued from page 6)

[citing: *Ryan C.W. Hall & Richard C.W. Hall*, "A Profile of Pedophilia: Definition, Characteristics of Offenders, Recidivism, Treatment Outcomes, and Forensic Issues, 82 *Mayo Clinic Proc.* 457 (2007), at 462 (noting that, although people with pedophilia often report difficulty controlling their behavior, it is rare for them to spontaneously molest a child.); "Six Misconceptions about Pedophiles," *Discovery News* (Nov. 18, 2011, 3:00 AM), http://news.dicovery.com/human/psychology/misconceptions-pedophilia-111118.htm (dispelling the misconception that people with pedophilia cannot help attempting to molest a child whenever the opportunity arises)] Yet individuals with pedophilia rarely spontaneously molest children, and the vast majority of sexual abuse of children is premeditated. [citing *Hall & Hall, supra*, at 462 (arguing that, because 70% to 80% of sex offenses against children are premeditated, the notion that people with pedophilia lack self-control is untenable)] A recent study found no connection between pedophilia and impulse-aggressive traits and in fact found more evidence of inhibition, passive-aggression, and harm avoidance. [citing: *Lisa J. Cohen et al.*, "Impulsive Personality Traits in Male Pedophiles Versus Healthy Controls: Is Pedophilia an Impulsive-Aggressive Disorder?," 43 *Comprehensive Psychiatry* 127, 132-33 (2002)]. ...Similarly, MRI studies have found no evidence to suggest any differences in the parts of the brain that relate to self-control or impulsivity." [citing: *James M. Cantor*, "Understanding MRI Research on Pedophilia," http://individual.Utoronto.ca/james_cantor/blog2.html]."

*James M. Cantor*, "MRI Research on Pedophilia: What ATSA Members Should Know," *ATSA Forum* (Fall 2008) (available at: http://individual.utoronto.ca/james_cantor/blog2.html), explains:

"...We did not find any group differences in the parts of the brain that are known to relate to self-control or impulsivity. That is, we found no evidence to suggest that pedophilic men have a neurological reason to be less capable of controlling their behaviors than are men who commit nonsexual crimes. Although it is never possible to completely rule out the possibility that pedophiles suffer from an impulsivity problem, our project used very large samples (relative to most MRI research) and powerful statistical techniques. So, if pedophilic men do suffer from a neurological problem in self-control, it is likely to be either small or a type of problem that is invisible to conventional MRI." (emphases supplied)

Implicit from this research, volitional impairment can be ascertained by such MRI studies; if brain parts are intact, there is no impulsivity or volitional control problem. This disproves any general link between pedosexuality and any impulsivity or lack of volitional control.

Therefore, the editors of the DSM-V have warned against assuming volitional impairment merely because of a pedophilia diagnosis. *First & Halon. supra*, at 450.

Hence, a claimed diagnosis of pedophilia will have no causative or indicative relation to any claimed future probability of re-offense. For this reason, there is no 'inherent' 'inadequate control' of sexual behavior that can be inferred, and any such inference or presumption therefore violates Respondents' right to due process.

---

Editor's Note: The conclusion of this subsection will appear in the next TLP edition.

*******

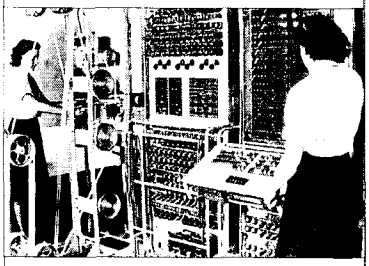
## *Beyond Wollert's Discoveries of Unavoidable Actuarial Errors:*

# Machine Bias in Recidivism Risk Scores Is Inherent and Incurable.

*Julia Angwin & Jeff Larson*. "Bias in Criminal Risk Scores Is Mathematically Inevitable, Researchers Say," *Pro Publica* (Dec. 30, 2016)

Text excerpts:

"...When we looked at the people who did not go on to be arrested for new crimes but were dubbed higher risk by the [COMPAS] formula, we found racial disparity. The data showed that black defendants were twice as likely to be incorrectly labeled as higher risk than white defendants. Conversely, white defendants labeled low risk were far more likely to end up being charged with new offenses than blacks with comparably low COMPAS risk scores.



Northpointe, the company that sells COMPAS, said in response that the test was racially neutral. To support that assertion, company officials pointed to another of our findings, which was that the rate of accuracy for COMPAS scores – about 60 percent – was the same for black and white defendants. The company said it had devised the algorithm to achieve this goal. A test that is correct in equal proportions for all groups cannot be biased, the company said.

This question of how an algorithm could simultaneously be fair and unfair intrigued some of the nation's top researchers at Stanford University, Cornell University, Harvard University, Carnegie Mellon University, University of Chicago and Google.

The scholars set out to address this question: Since blacks are re-arrested more often than whites, is it possible to create a formula that is equally predictive for all races without disparities in who suffers the harm of incorrect predictions?

Working separately and using different methodologies, four groups of scholars all reached the same conclusion. It's not.

Revealing their findings in a Washington Post blog, a group of Stanford researchers wrote: 'It's actually impossible for a risk score to satisfy both fairness criteria at the same time.'

The problem, several said in interviews, arises from the characteristic that criminologists have used as the cornerstone for creating fair algorithms, which is that formulae must generate equally accurate forecasts for all racial groups.

The researchers found that an algorithm crafted to achieve that goal, known as 'predictive parity,' inevitably leads to disparities in what sorts of people are incorrectly classified as high risk when two groups have different arrest rates.

'"Predictive parity" actually corresponds to "optimal discrimination,"' said Nathan Srebro, associate professor of computer science at the University of Chicago and the Toyota Technological Institute at Chicago. That's because predictive parity results in a higher proportion of black defendants being wrongly rated as high-risk.

Srebro's research paper, 'Equality of Opportunity in Supervised Learning,' was co-authored with Google research scientist Moritz Hardt and University of Texas at Austin computer science professor Eric Price in October. Their paper proposed as definition of 'nondiscrimination' that requires the error rates between groups be equalized. Otherwise, Srebro said, one group ends up 'paying the price for the uncertainty' of the algorithm.

The need to look at the harms that arise when a test is inaccurate arises frequently in statistics, particularly in fields like health care. When researchers weight the merits of exams like mammograms, they want to know both how often they correctly detect breast cancer and how often they falsely indicate that patients have the disease.

False findings are significant in medicine because they can cause patients to unnecessarily undergo painful procedures like breast biopsies. It's entirely possible that a test could correctly identify most breast cancers, showing what's known as 'positive predictive value,' and yet make so many mistakes that it is viewed as unusable.

When he first heard about the COMPAS debate, Jon Kleinberg, a computer science professor at Cornell University, hoped he could figure out a way to reduce false findings while keeping the positive predictive value intact. 'We thought, can we fix it?' he said.

But after he, his graduate student Manish Raghavan and Harvard economics professor Sendhil Mullainathan downloaded and crunched ProPublica's data, they realized that the problem was not resolvable. A risk score, they found, could either be equally predictive or equally wrong for all races – but not both.

The reason was the difference in the frequency with which blacks and whites were charged with new crimes. 'If you have two populations that have unequal base rates' Kleinberg said, 'then you can't satisfy both definitions of fairness at the same time.'

In the criminal justice context, false findings can have far-reaching effects on the lives of people charged with crimes. Judges, prosecutors and parole boards use the scores to help decide whether defendants can be sent to rehab programs instead of prison or be given shorter sentences.

Defendants inaccurately classed as 'high risk' and deemed more likely to be arrested in the future may be treated more harshly than is just or necessary, said Alexandra Chouldechova, Assistant Professor of Statistics and Public Policy at Carnegie Mellon University, who also studied Pro Publica's COMPAS findings."

---

Editor's Comment:

The findings reported here are another dimension of perspective on problems first brought to light by Dr. Richard Wollert in connection to sex offender "risk evaluation." See: *Richard Wollert*, "Low Base Rates Limit Expert Certainty When Current Actuarials Are Used to Identify Sexually Violent Predators," 12 *Psychology, Public Policy and Law*, 56 (February 2006). In the study reported in that article, Wollert first considered the error margin and the statistical "confidence interval" ("C.I."). He discovered that the error margin became vastly larger when the overall base rate of recidivism was low. This is of profound importance now that true average recidivism rates for sex crimes have been found to be less than 5%. At such rates, Wollert discovered, the error margin massively outstripped the actual recidivism rate, such that no scientific statement could be made about an expected recidivism rate for any given

(Continued on page 8)

(Continued from page 7)
cohort of sex offenders.

Of greatest interest to us here, Wollert looked at the reduced recidivism rates in sex offenders as they gradually got older (all the way to age 70). In that seminal study, Wollert was the first to prove with certainty (even based on decades-old obsolete figures of high average recidivism) that offenders at age 60 had recidivism rates no higher than about 3.4% (if even mathematically ascertainable at all).

Now, average rates of sex-crime recidivism for all ages have dropped to even lower rates than that figure. Hence, the current implications of Wollert's mathematical work are even more powerful by age 60. For that age and above, that same calculation now shows recidivism rates are no higher than about 6/10ths of 1%!

Wollert applied the time-honored Bayes Theorem to derive re-offense probability rates. In doing so, he found that "[t]hese results ...indicate that experts who rely on actuarial tests for predicting likely recidivists for all but the youngest age group will be wrong most of the time. For a population similar to [R.K.] Hanson's (2002) sample, this error rate will vary from about 52% for offenders in the 25-29 age range to almost 90% for those in the 60-69 range. [Actuarial tests were wrong 9 out of 10 times when predicting recidivism for sex offenders over age 60!] ...[A]ll tests appear to be somewhat efficient when applied to the youngest group, which is characterized by a relatively high recidivism rate, but lose this efficiency when they are applied to older groups with lower recidivism rates."

As to all age groups taken together, Wollert separately found that the Static-99 actuarial tool for prediction of probability of later recidivistic sex crimes would have missed an enormous number of recidivistic offenders, while unjustly detaining a number 2.5 times as large of those who, in all probability, would never commit a future sex crime. (*Id.*) This eerily presaged the finding by Angwin and Larson (discussed above) of errors in both directions (i.e., over- and under-prediction). Both in their work and in the earlier work by Wollert, there is no way to correct for either error without increasing the error in the other direction.

The surprising thing is that the work of Angwin and Larson derived from different mathematical principles of statistics than those from which Wollert proceeded. In short, the unresolvable statistical error that makes discrimination in predictive probabilities hopelessly unfair applies to all minorities -- including minorities of all kinds with sex offense records. This not only can be used against racial and orientation minorities, but also against any selected smaller group with sex-offense records (such as older former offenders). This mathematical earthquake reduces the very notion of being

Solidarity Gets the Job Done!

able to accurately and equally predict future sex-crime probability to rubble.

Nonetheless, because Wollert was looking at a different, but equally basic mathematical flaw, the flaw later discovered by Angwin and Larson escaped Wollert.

Conversely, Wollert's discovery of the impact of increasing error rates of probability prediction when base rates are lower (as they are now) was not under study by Angwin and Larson. That was because the overall criminal recidivism base rates they studied (largely based on the current glut of property crimes motivated by drug addiction) dwarf base rates for recidivistic sex crimes. (As discussed above, these sex-crime recidivism rates have dwindled to very low levels in recent decades).

The upshot of all this is that **both** of these different kinds of incurable statistical error pervade and ruin attempts at probability prediction when it comes to assertions of future sex-crime recidivism.

But this is no merely group-based error. While not discussed here, other work by Wollert on the application of Bayes' Theorem to sex-crime recidivism proves a third error: that there is no scientific way to judge the probability of a given individual to recidivate in the future simply from the past recidivism of any group into which some "actuarial" approach has placed him. Bayes tells us that it is impossible to know whether he will be like the percentage in that group who did reoffend later, or more like those in that same group who did not. (And this is entirely apart from the impact of the historical trend of reduced sex-crime recidivism overall).

In short, between the changing tilt of the ever-moving statistics of sex-crime occurrence and these three areas of mathematical error, prediction of any level of likelihood of re-offense by any former sex offender is simply impossible. It is time that professionals concerned with sex offenders 'fess up' to this in order to avoid ruining by worsening deception what could otherwise be the 'helping profession' it started out as being.

The notion that prediction of individual human behavior – even over the very near term – has been recognized as being conceptually impossible for quite a while now. People are simply too malleable and subject to external influences and internal changes. These happen so quickly that prediction of behavior over future years involves all kinds of unknown and unknowable matters. This is simply why no one can predict the future, whether from past or present facts.

Instead of all these attempts to try to see the future from an obsidian ball, what we all should focus on is taking whatever actions we can that are likely to have a present helpful impact very likely to steer the future in a positive direction. Surely this is far better than simply crunching a few numbers and then tossing up our hands in unreasoning fear at some dire possibility that our noodling has convinced us is more likely than we would like. My suggestion: Start by seeing the film *Tomorrowland* (Disney Studios, 2015) on this topic. The future is, and will always be, what we make it. So be sure to feed the right wolf! (This will make sense after you see it.)

*******

# Resisting the Endless Gulag

*Jayson Hawkins & Panagioti Tsolkas*, "Resisting a Prison Without End," 32(8) *Prison Legal News* 28 (August 2021)

Text excerpts:

p. 28: "...Organizers of the hunger strike [at MSOP-ML] reported feeling muscle pains, dizziness, nausea and rapid weight loss from lack of nourishment after the two weeks without food. Merry Schoon of Appleton, MN has a 33-year-old son, Daniel A. Wilson, held at Moose Lake. In response to the hunger strike, she said, 'I am relieved that no one was seriously hurt or died, but this system of indefinite confinement has gone on far too long.'

She continued, 'These men have families and they deserve a second chance to be productive members of society just like everyone else.'

...These [sex-offender commitment] programs emerged in the 1990s from the fabricated premise that some sex offenders suffer from mental illnesses that make them more likely than other people with felony convictions to commit additional crimes after release....

In the 27 years that the [Minnesota] statute [of this type] has been in place, a mere 13 individuals have been fully let go from the program. This is in stark contrast to the [88] deaths.

The state currently detains more offenders per capita than [19] other states that have similar laws. It is third behind California and Florida for total number of committed offenders, according to a 2019 survey of civil commitment programs....

A 2015 ruling in a U.S. District Court found that [the Minnesota sex offender commitment-and-detention system, known as "MSOP"] was 'a punitive system that segregates and indefinitely detains a class of potentially dangerous individuals without the safeguards of the criminal justice system.' *Karsjens v. Jesson*, 109 F.Supp.3d 1139 (2015).

That ruling was later overturned on appeal and nothing changed. See: *Karsjens v. Piper*, 845 F.3d 394 (8th Cir. 2017 [PLN, Nov. 2017].

But in February of this year, according to reporting from Reason.com, 'the United States Court of Appeals for the Eighth Circuit gave the green light to a lawsuit challenging Minnesota's civil commitment program for sex offenders. Importantly, the court allowed the plaintiffs to argue that civil commitment as practiced in the state is punitive in nature – something that's not permitted of a supposedly therapeutic program.' The new legal challenge surfaced as *Karsjens v. Lourey*, 988 F.3d 1047 (2021), Tony Lourey being the DHS official who replaced Emily Johnson Piper as the defendant named in the case brought by the same appellant class from MSOP.

The path to release, which was criticized by the initial court ruling, remains the main point of contention for MSOP prisoners. Commissioner Harpstead has stressed, 'only the courts have the authority to decide when a client may be provisionally or fully discharged.' But hunger striker Russell Hatton called the mental health diagnoses central to those proceedings 'fraudulent' and pointed out that the American [Psychiatric] Association has come down strongly against civil commitment by noting there is no such recognized mental health condition as being a 'sexually violent predator.'

...Research from the mid-2000s by clinical psychologist Dr. Jesus Padilla undermined the premise that sex offenders were more likely to recidivate. Among the 93 sex offenders that he and a colleague tracked over five years, only six were arrested for another sexual crime – a rate of 6.5%. [Editor's Note: These authors have the numbers wrong: 121, not 93, offenders were followed, and the reconviction rate for sex crimes among them was only 4.3%. See *TLP*, #3-7, p. 4.]

According to a 2018 Bureau of Justice Statistics study, the recidivism rate for all prisoners rearrested for the same crime within five years was 49%.

... When asked about the reason for refusing food again, Daniel A. Wilson, a participant in both hunger strikes and co-founder of OCEAN, stated, 'This place is a due process catastrophe and needs to be shut down.' The situation continues to develop as we go to press."

*******

(Continued on page 9)

## High-Tech Surveillance Makes SOCC Confinement Needless.

*Mirko Bagaric et al.*, "Introducing Disruptive Technology to Criminal Sanctions: Punishment by Computer Monitoring to Enhance Sentencing Fairness and Efficiency," 84 *Brook. L. Rev.* 1227 (Summer 2019)

Text excerpts:

p. 1227: "The United States has the most punitive criminal justice system on Earth.

p 1231: In previous writings, we have recommended that most prison terms should be replaced with a new sanction, which in essence consists of technological incarceration.[31] The solution proposed in this article builds on this proposal and expands it to include the full range of criminal sanctions that are imposed for serious offenses.

p. 1269: The broad thrust of the proposed new sanction is that the location of the offender would be ascertainable at every point in time. In addition to this, every movement that an offender makes would be monitored in real-time by sensor equipment. If the movement involves suspicious activity, a camera is automatically activated which enables a corrections officer to gain a more accurate assessment of the relevant event. Suspicious activities include fast movements which could involve the application of force to another person or picking up an implement which could be used as a weapon.

C. ***The Technological Aspects of the Sanction***

1. Electronic Monitoring of Offender's Locations

The most established aspect of our technological monitoring proposal is the use of radio frequency or Global Positioning System (GPS) monitoring.

pp. 1272-73: 2. Computer Surveillance of Offender's Actions

Aside from monitoring offenders' location, we propose monitoring of an offender's actions. The technology now exists to monitor, in real-time, whether an offender is behaving in a criminal, aggressive, threatening, or problematic way. By using artificial intelligence-based monitoring of offenders' behavior, we believe we can deter offenders from committing a crime....

An old-fashioned way of monitoring offenders' actions would be to confine them to one location, overseen by closed circuit televisions in offenders' residences and employing people to watch the footage from several residences on two or three screens simultaneously. This surveillance, however, is impractical for a range of reasons, most notably because it is unrealistic to confine an offender to a small number of locations, and it would be prohibitively expensive to hire correctional officers to monitor [many] prisoners in real-time in numerous environments in any event. More than this, human monitoring is laborious, difficult, and prone to human error.[291] As Georgakopoulos et al. notes:

> Video surveillance solutions relying on human operators require humans to try to discover occurrences of complex events by continuously reasoning about patterns of simple video events distributed in time and possibly occurring in different locations in a facility. This is very hard to do and is impossible for humans to sustain even for a modest period of time (e.g., a few hours).[292]
>
> ...Sensors now exist that can detect all human movement and simultaneously monitor the geographical whereabouts of people wearing the sensors. This can be readily completed by equipment that can visually and aurally record the actions of the person. Machine learning systems then analyze the sensor data to detect anomalous, dangerous, or criminal behavior. In broad terms, the technology can detect suspicious movement. ...The data from the technology ...would always be stored to record the actions and locations of the offender. Moreover, the sensor can be made tamper-proof so that it cannot be removed by an offender (similarly to the technology described above for electronic ankle bracelet monitors). If an attempt is made to remove the bracelet, an alarm is triggered, and police would be notified to the last location of the offender.

pp. 1273-75: The first requirement is a sensor harness that can capture video and audio signals from an offender's environment[293] These types of units are already being produced in the form of body cameras that police departments are introducing across the United States in order to lower complaints, provide evidence where police officers' use of force results in fatalities, and improve the transparency and accountability of police officers' activities.[294] Although these systems have come under various types of criticism, there are now a variety of sophisticated and customizable body cameras on the market, and their efficacy is extremely high. Some of these cameras have night vision, built-in flashlights, twelve-hour batteries,[295] high definition video recording that incorporates date and time information into recorded footage, capacity to restrict access to the footage to designated computers, GPS technology, and 150 degree fields of view. [296] They are durable, fire-resistant, water-proof, and light-weight.[297] Current models cost between $300-$800, depending on the specifications and manufacturers, and this figure is certain to drop as the technology becomes ubiquitous.[298]....

The second requirement of his part of our proposal is a reliable and secure communications infrastructure that would allow transmission of video and audio streams to a remote location.

A Practice Protest?

Finally, the transmitted video and audio stream would need to be analyzed by a remote signal processing architecture. This system would analyze the signals in real time and trigger an alarm in the event that offenders are attempting to commit crimes or engaging in unauthorized activity, or where their sensor harnesses have been deactivated or removed. This is the most technologically sophisticated requirement of our proposal. Nonetheless, it is perfectly feasible these days."

Notes:

31 *Mirko Bagaric et al.*, "Technological Incarceration and the End of the Prison Crisis," 108 *J. Crim. L. & Criminology* 73, 77-78 (2018).

291 *M. Sivarathinabala & S. Abirami*, "An Intelligent Video Surveillance Framework for Remote Monitoring," 2 *Int'l J. Eng'g Sci & Innovative Tech.* 297, 297 (2013).

292 *Dimitiros Georgakopoulos et al.*, "Event-Driven Video Awareness Providing Physical Security," 10 *World Wide Web J.* 86, 86 (2007).

293 For the sake of simplicity, we call this a "sensor harness" throughout this Article, but as cameras and sensors increase in the size, the harness will probably end up being the size of a matchbox, and able to be clipped to the upper part of the prisoner's clothing. Already police body cameras that include high-definition video, dual audio channels, Wi-Fi and Bluetooth connection, and a 12-hour battery are the size of a pack of playing cards. See Axon Body 2, Axon AU, https://au.axon.com/products/body-2.

294 *Dana Goodyear*, "Can the Manufacturer of Tasers Provide the Answer to Police Abuse?", *New Yorker*, Aug 20, 2018; *Damien Gayle*, "Police with Body Cameras Receive Fewer Complaints – Study," *Guardian* (Sept. 29, 2016; *Danny Shaw*, "Police Body Cameras Cut Complaints Against Officers," *BBC News* (Sept. 29, 2016); *Robinson Meyer*, "Body Cameras Are Betraying Their Promise," *Atlantic* (Sept. 30, 2016).

295 BodyCam: Body-Worn Cameras, Bodycameras.com.

296 Body Cameras, In-Car Video & Evidence Management Solutions, *Wolfcom*, https://wolfcomusa.com/.

297 Wolfcom Body Cameras, *supra* note 296, ; BodyCamby Provision, *supra* n. 295; Reveal, https://revealmedia. com/products/d-series; *Axon*, *supra* n. 293.

298 *Eric Markowitz*, "Police Departments Face a Crucial Question: How to Pay for Body Cameras?," *Int'l Bus. Times* (May 12, 2016); *Alfred Ng*, "How Police Body Cameras Became a Budget Battlefield," *CNET* (Oct. 25, 2016).

---

Editor's Note: Modern tools of intensive monitoring and surveillance make imprisonment obsolete to incapacitate from committing crimes. They have the same impact on confinement as a result of commitment. Virtually everyone remains subject to high-tech parole or the like when committed to SOCC facilities. This makes commitment itself unnecessary. Even if SOCC laws continue to exist, it is highly doubtful that anyone, after at least a few years crime-free under such surveillance, would present the element of recidivism risk needed to support such a commitment. This is why prosecutors choose to petition for SOCC commitment prior to a sex offender's release from prison: to deprive that releasee the opportunity to show that he can live crime free and thus to avoid commitment.

*******

## 'Zone Exclusions' & Bans on SOs Living Together Not Needed & May Actually *Increase* Already Extremely Low SO Recidivism.

Colorado Corrections Report, "Do Residency Restrictions Help Prevent Sex Crimes?, http://dcj.state.co.us/ors/pdf/docs/Crime%20and%20Justice%202006%20Report%20Files/CJ07_s6_final.pdf (2007)

Text Excerpt

Approximately 22 states and hundreds of municipalities have passed statutes or ordinances prohibiting convicted sex offenders from living within specified distances of schools, daycare centers, and other places where children congregate. But there is no evidence that residency restrictions prevent repeat sex crimes.27 There is evidence, however, that these laws encourage sex offenders to "disappear."28 In fact, those who originally advocated for the law are now actively working to rescind it. Several studies on the topic are described below.

- The Colorado Division of Criminal Justice evaluated the impact of residency restrictions implemented in some cities in the state.29 The study stemmed from the fact that, for twenty years, a few sex offender treatment programs required higher risk program participants to live together and actively use treatment principles during their interactions as housemates. In approximately 2003, four of-

(Continued from page 9)
fenders in the same treatment program went together to register with local law enforcement. This registration effort alerted the clerk that four offenders were living at the same address and alarm followed. Eventually this resulted in many cities passing "one-sex-offender-to-a-household" ordinances. The General Assembly requested that the Sex Offender Management Board undertake a study of these shared living arrangements (SLAs) to better understand this local issue. The study found the following:

* Four out of five offenders living in the SLAs were considered high-risk.30

* A case study of 100 offenders revealed that the location of their residence was not linked to the location of their sex crime.

* The SLAs offered crime control equal to work release at the county jail.31

* Those living in these SLAs were significantly less likely to have revocations filed or to be rearrested for a new crime.

* When they did violate conditions of supervision, the time to detection was significantly shorter.

* The Minnesota Department of Corrections (2007) studied the potential deterrent effect of residency restrictions by analyzing the sexual re-offense patterns of all 224 recidivists released between 1990 and 2002 who were reincarcerated for a sex crime prior to 2006.32

* None of 224 sex offenses would likely have been deterred by a residency restrictions law. Two-thirds (65 percent) of the offenders knew their victim in advance of the crime (family member, coworker, spouse, friend, acquaintance). The other 35 percent of sex offenders met their victims by approaching them on the street, meeting them in a bar, or breaking into the victim's home; 15 of these victims were children.

* Twenty-eight offenders initiated victim contact within one mile of their own residence, 21 within 0.5 miles (2,500 feet), and 16 within 0.2 miles (1,000 feet). A juvenile was the victim in 16 of the 28 cases. But none of the 16 cases involved offenders who established victim contact near a school, park, or other prohibited area. Instead, the 16 (57 percent) of the offenders against children typically used a ruse to gain access to their victims, who were often their neighbors.

* Boundary or buffer zones around schools, parks or similar areas would have had little impact on the 224 sex offenses examined by Minnesota researchers. The results indicated that what matters with respect to sexual recidivism was most often social or relationship proximity. A little more than half (N = 113) of the 224 cases were "collateral contact" offenses in that they involved offenders who gained access to their victims through another person, typically an adult.

* Second, even when offenders established direct contact with victims, they were unlikely to do so close to where they lived. This may be due mostly to the fact that offenders are more likely to be recognized within their own neighborhoods.

• The Minnesota Department of Corrections (2003) also studied sex offender living arrangements in relation to reoffense with the highest risk offenders. Similar to Colorado's 2004 study reviewed above, they found the following:

* No negative effects from high-risk sex offenders living with another sex offender.

* This arrangement appeared to increase the supervising officer's ability to closely supervise the offenders.

* No evidence that proximity to parks or schools had played a role in any of the known reoffenses.

Further, probation and parole officers in Colorado monitor the offender's residential location. In fact, Colorado Probation's Guidelines for Adult Sex Offender Management (SOISP, Non-SOISP, and Presentence) clearly state that the supervising officer has the final authority to approve residence, employment, or school. Individualized case management and monitoring is more likely to protect the public than broad residence restriction policies.

In sum, boundary zones and residency restrictions are unlikely to increase public safety."

Footnotes:

27 *Nieto, M., & Jung, D.* (2006). *The Impact of Residency Restrictions on Sex Offenders and Correctional Management Practices: A Literature Review* (Report No. CRB06-008). *California Research Bureau*, Sacramento, CA; *Levenson, J. & Cotter, L.* (2005). The impact of sex offender residence restrictions: 1,000 feet from danger or one step from absurd? *International Journal of Offender Therapy and Comparative Criminology* 49(2), 168-178.

28 Sheriff Don Zeller, Linn County, Iowa reported that his county had 435 sex offenders registered in 2002 when the state residency restriction law first went into effect. The sheriff knew the location of about 90 percent from the registration requirement, but after the residency law was enacted, he said nearly half went underground. "We know where 50 to 55 percent of them are now...the law created an atmosphere that these individuals can't find a place to live." National Public Radio broadcast, April 25, 2006, as cited in Neito and Jung (2006).

29 *Colorado Division of Criminal Justice* (2004). Report on safety issues raised by living arrangements for and location of sex offenders in the community. *Colorado Division of Criminal Justice, Department of Public Safety*. Denver, Colorado.

30 Risk was measured by the probation/parole supervision level instrument.

31 Available at http://dcj.state.co.us/odvsom/Sex_Offender/SO_Pdfs/FullSLAFinal01.pdf.

32 *Minnesota Department of Corrections*. (2007). Residential Proximity and Sex Offense Recidivism in Minnesota. MNDOC, St. Paul, MN. Available at http://www.doc.state.mn.

33 *Bureau of Justice Statistics*. (2007). Criminal Victimization in the United States, 2005 Statistical Tables. U.S. Dept. of Justice, available at http://www.ojp.usdoj.gov/bjs/pub/pdf/cvus05.pdf.

*******

# Letter from Frank Joseph Offers Help, Encouragement in Fight against SOCC.

Excerpts from letter by Frank Joseph, Saginaw MI, dated Sept. 12, 2021 to Eliseo Padron et al.

"The July 18th rally was clearly a success. Around 80 people circulated through during the event and about 40 to 50 people stayed for the whole event. The single most important part of the event was having Michelle MacDonald as a speaker. She is very persistent.... Everyone in MSOP should be grateful to whoever acquired her as a speaker at the rally. Michelle MacDonald could be the person to put the plug on MSOP.

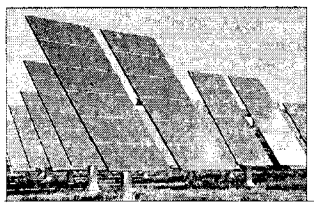
The July 18th rally, 'client' protests, and honk-ins are having an effect with MSOP. Inmates in MSOP are feeling the effects of the retaliation by MSOP. It appears that MSOP changed some signage due to these events. I wouldn't be surprised if MSOP puts up a gate at the entrance [to the parking lot]. These are all good signs. They show that EndMSOP and OCEAN have struck a nerve and are becoming effective in their efforts.

I served in the army. There are two things that the army doesn't teach its soldiers: how to retreat and how to surrender. Your only option in battle is to keep moving forward. You and everyone else who have participated in these protests are now in the center of the greatest battle of your lives, your battle for your freedom. You cannot retreat and you cannot surrender. Your only option is to keep moving forward.

My whole family are soldiers and many have been on the battlefield. There is no joy on the battlefield. Only pain and sorrow. Yet soldiers press on, often against incredible odds and always at great peril to their lives. You cannot win a war by sitting on the sidelines. You will not regain your freedom sitting on the sidelines. You must keep moving forward no matter what you feel your odds are or what perils you face. MSOP can retaliate against you for your and your families' activities, but they cannot retaliate against you forever. You have the law and justice on your side. It is only a matter of time before MSOP is called to account in an open courtroom.

You have to tell everyone to keep the honk-ins going. If MSOP keeps them so far away that you can't hear them, tell your family members to buy air horns at the auto parts store (they cost about $30.) You will hear them when they sound an airhorn. MSOP is responding to the honk-ins. They are writing you guys up and moving you guys around. We won in the Civil War but first it had to go through Chancellorsville and Gettysburg to get to that victory. We won in the Second World War but first had to go through Guadalcanal and Normandy to get to that victory. Victory can be attained at Moose Lake, but first you must go through the write-ups to get there.

Freedom isn't free. Thomas Jefferson said that the tree of liberty must be replenished from time to time with the blood of patriots and the blood of tyrants. Soldiers who have been in battle know the true price of freedom. Everyone protesting at Moose Lake and their families know the true price of freedom.



Get Charged Up!

This is just the beginning. EndMSOP is expanding. OCEAN must expand as well. You have to get everyone on board with these efforts. As EndMSOP and OCEAN gain traction, there will be many more write-ups and transfers. They can separate you, but they cannot stop you. Each time they transfer someone from OCEAN to a different unit, this gives them the opportunity to proselytize and recruit new members. You have to get their family members on board as well.

Change is coming. I will be challenging civil commitment in court. As of yet, I don't know which state I will be challenging civil commitment in. But whichever state I choose, it will have an effect on MSOP. If I get sufficient interest from the 'clients' of Moose Lake and their families, I can assist you in asserting your rights to protest, challenging your conditions of confinement, and perhaps even gaining your release. Rest assured, I am very good at what I do.

Tell everyone to stay strong and stay in the fight."

*******