

"There lies before us, if we choose, continual progress in happiness, knowledge, and wisdom. Shall we, instead, choose death, because we cannot forget our quarrels? We appeal as human beings to human beings: Remember your humanity, and forget the rest." – Bertrand Russell, *The Bertrand-Einstein Manifesto*

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Oops! Retraction:

Clarifying Partial Retraction
 On page 1 of the August 2024 edition of *the Legal Pad*, the following material appeared in an overarching Headline: "Conference of 175 Experts, Stakeholders & Decision-Makers Resets the Bar of Seriousness of Deliberating When & How to End MSOP." The sub-headline appearing immediately below the foregoing expands on this theme thus: "SOLPRC-MnCASA Conference on the Importance of Sunsetting MSOP and Reinvesting its Exorbitant Cost to Prevent Sex Crimes: the Participants and the Program Materials Say It All" (emphasis added here to focus on the mistake). In a letter dated August 2, 2024 addressed to Governor Tim Walz, this Editor of *the Legal Pad* wrote that MNCASA was involved

in the publication of SOLPRC's April 2024 report on MSOP and Minnesota's sex offense civil commitment scheme that recommended sunset-reinvest as a policy as to MSOP.
 Subsequently, the undersigned tLP Editor received joint correspondence from Prof. Eric S. Janus, Director of the Sex Offense Litigation and Policy Resource Center (SOLPRC) at Mitchell Hamline School of Law and Kate Hannaher, Director of Policy and Law for the Minnesota Coalition Against Sexual Assault (MNCASA). That letter objected to the implications from each of these two headlines that MNCASA supports the sunset-reinvest proposal held by SOLPRC and other organizations such as the \$100 Million Committee and to the foregoing passage in the

letter of August 2, 2024 by me to Governor Walz.
 Upon review of the matter, MNCASA was not involved on the publication of SOLPRC's April 2024 report, nor did MNCASA recommend sunset-reinvest as a policy regarding MSOP. Further, the implications from those two headlines of MNCASA endorsement of the SOLPRC proposal of "sunset-reinvest" are similarly untrue. My apologies to both MNCASA and to SOLPRC for this misunderstanding on my part and the foregoing resulting incorrect statements and implications. All of same are hereby retracted.
 Cyrus P. Gladden II,
 Editor, *the Legal Pad*

Prisoner to-Public Communication: A First Amendment Right

Text excerpts:
 [pp 134-36:] "Prison Regulations Involving Prisoner-to-Public Communication Should Be Subject to the *Procurier v. Martinez* Standard of Review."

The Supreme Court impliedly established the standard of review for all outgoing prisoner communication to the public when it decided *Procurier v. Martinez*.¹¹³ *Procurier v. Martinez* was a prisoner class action lawsuit challenging prison mail censorship rules in California state prisons in the midst of the prisoner rights movement.¹¹⁴ The Court's primary task was resolving the question of the appropriate standard of review for prison regulations limiting prisoner communication with the public.¹¹⁵ The Court held that a prison's regulations or practices restricting free citizen's access to prisoner speech must (1) "further an important or substantial governmental interest unrelated to the suppression of expression; and (2) 'must be no greater than is necessary or essential to the protection of the particular governmental interest involved.'"¹¹⁶

Martinez established a right on behalf of free citizens to access prisoner speech, impliedly granting prisoners a right to communicate with the public.¹¹⁷ In doing so, the Court recognized the tension between prison administration and the need to protect prisoner-public-communication, finding the Court's traditional hands-off approach inappropriate.¹¹⁸ The Court held that the restrictions unconstitutionally interfered with the rights of free citizens, who sought to maintain contact with people housed at the correctional facility.¹¹⁹ Under the *Martinez* standard's second factor, the Court held that the California regulation which might exclude material that would 'unduly complain' or 'magnify grievances' was overbroad.¹²⁰

Although the Court did not state it explicitly, the bilateral nature of the *Martinez* Court's recogni[tion] that any regulation interfering with prisoner-to-public communication right must be examined under the *Martinez* standard.¹²¹ By acknowledging the free citizen's right to prisoner communication, the Court impliedly recognized a right on

prisoner communication cannot exist, or is meaningless, unless prisoners also have the right to provide speech to the public.¹²³ As noted by the Court:

'Communication by letter is not accomplished by the act of writing words on paper. Rather, it is effected only when the letter is read by the addressee. Both parties to the correspondence have an interest in securing that result, and censorship of the communication between them necessarily impinges on the interest of each. Whatever the status of a prisoner's claim to uncensored correspondence with an outsider, it is plain that the latter's interest is grounded in the First Amendment's guarantee of freedom of speech.'¹²⁴

[These significant notes between excerpts appear in overall numerical order with notes from excerpts below: ^{143, 168.}]

pp. 144-145: As noted above, restrictions that place limitations on most prisoner outgoing speech are subject to the more rigorous *Martinez* standard.¹⁶⁹

[These significant notes between excerpts appear in overall numerical order with notes from excerpts below: ^{193, 196.}]

pp. 150-151: **IV. Rationales Supporting The Right of Prisoner-to-Public Communication**
Prisoner Rehabilitation and Public Safety

The prisoner perspective is important to providing dignity to prisoners, which is necessary in meeting prison rehabilitative goals and reducing prison populations. The meaning of being a prisoner is highly censored by correctional facility authorities, and, as a result, disregarded by the public. This disassociation from prisoners and society creates a dehumanizing effect and the true stories of incarcerated people, their daily lives, and family dynamics are missing from the daily lives of those on the outside.²⁰⁵ As noted by Justice Thurgood Marshall's concurring opinion in *Procurier v. Martinez*:

'When the prison gates slam behind an inmate, he does not lose his human quality; his mind does not become closed to ideas; his

self-respect does not end; nor is his quest for self-realization concluded. If anything, the needs for identity and self-respect are more compelling in the dehumanizing prison environment. ...[A] prisoner needs a medium for self-expression.'²⁰⁶

Additionally, once a person is convicted of a crime and incarcerated, he or she is under the care of the corrections system until the end of his prison term.²⁰⁷ Although some monetary assistance from prisoner families is possible through commissary accounts,²⁰⁸ the corrections institution must meet all prisoner basic needs. Because prisoners' complete dependence on correctional facilities is inevitable, it is important to hold corrections to several layers of institutional accountability, including to the public.²⁰⁹ Prisoner communications with the public is especially important, because without it, other serious human rights violations could occur at the hands of prison officials. Courts and corrections institutions should be especially reluctant to erode prisoner free speech rights in light of the suppressive impact on a disadvantaged demographical group and communities of color.

Given the broad range of potential prison objectives – including deterrence, incapacitation, rehabilitation, retribution, and restitution – prisoners should be provided ample opportunity to inform the public of the prison's success at meeting these objectives.²¹¹ Moreover, rehabilitation is not solely on behalf of the prisoner; it is also vital to public safety.²¹² Nevertheless, the justice system does not regulate prisons for effectiveness in rehabilitation, and in fact, several prison system regulatory difficulties make effective prisoner rehabilitation unlikely.

pp. 162-163: **C. Difficulties Regulating Prisons**
 — **The United States Department of Justice & Civil Rights of Institutionalized Persons Act**

The United States Department of Justice's authority under Civil Rights of Institutionalized Persons Act (CRIPA) has also not been effective in addressing mass incarceration and the resulting conditions. CRIPA was passed in 1980 to protect the rights of prisoners and individuals at

other state residential institutions.²⁶⁶ CRIPA authorizes the Department of Justice (DOJ), at the attorney general's request, to investigate conditions at correctional facilities run by state or local governments to determine whether violations of the Constitution or federal law exist.²⁶⁷ Under CRIPA, the DOJ may file a lawsuit against the state if a DOJ investigation reveals that the facility has demonstrated a 'pattern or practice' of denying civil rights and the conditions are so 'egregious or flagrant,' prisoners have been subjected to 'grievous harm.'²⁶⁸

The DOJ's resources and capacity to handle the influx of complaints and inquiries it receives about the thousands of prisons, jails, and other facilities to which CRIPA applies is one of the biggest limitations of the DOJ addressing reform. In 2016, for example, the DOJ received over seven thousand CRIPA-related citizen complaint letters, emails, and inquiries from the White House and Congress;²⁶⁹ only four of the nation's 1,821 prison facilities were under monitoring by the DOJ.²⁷⁰ Additionally, only two investigations were opened against prisons in the DOJ under CRIPA: one a statewide investigation of the Georgia Department of Corrections and the other an investigation of the Fishkill Correctional Facility in New York.²⁷¹ The DOJ issued no findings letters in reference to any of these prison facilities.²⁷²

Notes:

113 *Procurier v. Martinez*, 416 U.S. 396, 413-14 (1974). Note that the Supreme Court later limited the holding in *Martinez* finding the standard of review unsuitable for regulations that involve speech directed inside the prison. See *Thornburgh*, 490 U.S. at 409-14. This limit to the *Martinez* holding by *Thornburgh* is entirely consistent with this analysis because the prisoner-to-public communication right proposal only seeks application of the *Martinez* standard for outgoing prisoner communication, consistent with the holding in *Thornburgh*.

114 *Martinez*, 416 U.S. at 396, 413-14 (1974). The prison regulations challenged in *Martinez* authorized officials to open and read all incoming and outgoing mail, and to censor any mail considered to 'unduly complain' or 'magnify grievances' by prisoners. *Id.* at 399-400. Additionally, prisoner mail could be withheld if it expressed 'inflammatory political, racial, [or] religious' views or was 'lewd, obscene or defamatory.' *Id.* at 399-400.

115 *Id.* at 406.

116 *Id.* at 413. Applying the fairly rigorous *Martinez* two-step standard of review, the Court first found that the prison regulations at issue were unnecessarily broad and that the state failed to show a substantial government interest that the regulations were necessary to preserve order in the facility or rehabilitate inmates. *Id.* at 415-16. As to the second part, the court found the regulations were 'not narrowly drawn to reach only material that might be thought to encourage violence nor is its application limited to incoming letters.' *Id.* at 416.

117 *Id.* at 418.

118 *Id.* at 404-06.

119 *Id.* at 408-09. ("Censorship of prisoner

mail works a consequential restriction on the First and Fourteenth Amendment rights of those who are not prisoners.").

120 *Id.* at 415 (Moreover, the court explained that the regulation was overbroad because it "invited prison officials and employees to apply their own personal prejudices and opinions as standards for prisoner mail censorship," and were not "necessary to the furtherance of a government interest, unrelated to the suppression of expression.").

121 *Id.* at 408.

122 *Id.* at 408-09.

123 *Id.* at 408-09.

124 *Id.* at 408. As noted by the Court, for example, "the wife of a prison inmate who is not permitted to read all that her husband wanted to say to her has suffered an abridgement of her interest in communicating with him as plain as that which results from censorship of her letter to him." *Id.* at 409.

143 *Id.* at 426. Citing the Second Circuit, Marshall noted in his *Martinez* concurrence:

'Letter writing keeps the inmate in contact with the outside world, helps to hold in check some of the morbidity and hopelessness produced by prison life and isolation, stimulates his more natural and human impulses, and otherwise may make contributions to better mental attitudes and reformation.'

And:

'The harm censorship does to rehabilitation ... cannot be gainsaid. Inmates lose contact with the outside world and become wary of placing intimate thoughts or criticisms of the prison in letters. This artificial increase of alienation from society is ill advised.' *Id.* (quoting *Sostre v. McGinnis*, 442 F.2d 178, 199 (2d Cir. 1971) (en banc)).

168 Telecommunication companies such as American Prison Data Systems, Edovo, and JPay are beginning to develop software and other technology that attempts to close the digital divide between prisoners and the public when accessing such forums. These companies claim that "offering educational and entertainment content ... can help improve prisoner behavior and reduce the chances of recidivism" on release. See *Dan Tynan*, "Online Behind Bars: If Internet Access Is a Human Right, Should Prisoners Have It?," *Guardian* (Oct. 3, 2016), <https://www.theguardian.com/us-news/2016/oct/03/prison-internet-access-tablets-edovo-jpay> [<https://perma.cc/A6SP-4UY9>]; see also *Aysha Kerr & Matthew Willis*, "Trends and Issues in Crime and Criminal Justice: Prisoner Use of Information and Communications Technology," *Australian Inst. Of Criminology* 1-2, 14 (Oct. 2018), <https://aic.gov.au/publications/tandi/tandi560> [<https://perma.cc/3Y2C-VZ9Z>].

169 See *supra* Section III.A.1

193 *Id.* at 827-28. The Court however took note that "under some circumstances the right of free speech includes a right to communicate a person's views to any willing listener, including a willing representative of the press for the purpose of publication by a willing publisher." *Id.* at 822.

196 See *Saxbe* 417 U.S. at 824-26

(majority opinion. The Court also suggested that the prisoner's "unrestricted opportunity to communicate with the press or any other member of the public through their families, friends, clergy, or attorneys who are permitted to visit them at the prison," was an additional means of communicating with the media. *Pell*, 417 U.S. at 825. The dissenting Justices were unimpressed by the alternative form of communication available between media and prisoners, stating, "This reason for abridgement strikes me as being on a par with holding that governmental suppression of a newspaper in a city would not violate the First Amendment because there continue to be radio and television stations." *Id.* at 838 (Douglas, J., dissenting) (citing *NLRB v. Fruit Packers*, 377 U.S. 58, 79-80 (Black, J., concurring)).

205 *Titia A. Holtz*, Note, "Reaching Out from Behind Bars: The Constitutionality of Laws Barring Prisoners from the Internet," 67 *Brook. L. Rev.* 855, 857 (2002) (Prisoners have the capacity to progress or degenerate in response to their environment and "it is undeniable that since approximately ninety percent of all inmates will one day be released, allowing prisoners to communicate with the outside world has important consequences."

206 *Martinez*, 416 U.S. at 428.

207 *Estelle v. Gamble*, 429 U.S. 97, 103 (1976) ("An inmate must rely on prison authorities to treat his medical needs; if the authorities fail to do so, those needs will not be met.").

208 28 C.F.R. §§ 506.1-506.2 (2018).

209 See Note, "Mastering" Intervention in Prison," 88 *Yale L. J.* 1062, 1067 (1979) ("The larger political community provides prison officials with little incentive to take the risks inherent in changing the current structure. Individual citizens rarely have a stake in prison conditions, so prison officials often have no external constituency to demand accountability or provide political support. Administrators are often evaluated by their superiors in terms of their success in maintaining low-visibility and low-cost prison conditions. Because public officials are often unwilling to allocate funds necessary to provide adequate resources, existing problems are intensified by shortages of staff, space, and other resources."

211 See *Pell v. Procurier*, 417 U.S. 817, 822-23 (1974) ("An important function of the correctional system is the deterrence of crime. ... This isolation, of course, also serves a protective function by quarantining criminal offenders for a given period of time while, it is hoped, the rehabilitative processes of the corrections system work to correct the offender's demonstrated criminal proclivity ... Since most offenders will eventually return to society, another paramount objective of the corrections system is the rehabilitation of those committed to its custody.").

212 *Nat'l Research Council, The Growth Of Incarceration In The United States: Exploring Causes And Consequences* (Jeremy Travis, et al., eds., 2014) at 150 ("The formerly incarcerated may be more involved in crime after prison because incarceration has damaged them psycho-

logically in ways that make them more rather than less crime prone ... has exposed them to violent or other risky contexts, or has placed them at risk of crime because of imprisonment's negative social effects on earnings and family life.").

266 *Civil Rights of Institutionalized Persons Act*, Pub. L. No. 96-247, 94 Stat. 349 (1980) (codified as amended at 42 U.S.C. § 1997 (2012)) (stating that CRIPA applies to juvenile justice facilities, adult jails and prisons, nursing facilities, and facilities for individuals with psychiatric or intellectual and developmental disabilities).

267 *Id.* at § 3, 94 Stat. 350 (codified as amended at 42 U.S.C. § 1997a (2012)).

268 *Id.*

269 See U.S. Dept. of Justice, *Activities Under the Civil Rights of Institutionalized Persons Act Fiscal Year 2016*, 10 (2016), <https://www.justice.gov/crt/page/file/1019881/download> [perma.cc/LT43-UPEY].

270 *Id.* at 7.

271 *Id.* at 8.

272 *Id.* at 8. A findings letter generally sets out all problematic conditions, practices, and policies of a facility following initial and subsequent investigations by the Department of Justice. See *id.*, at 2, 8.

Further Background on the Littlefield, TX 'Shadow Prison'

Georgia Longstreet-Joseph, "Texas Uses Failed Private Prison To Hold Civilly Committed Sex Offenders," 29(10) *Prison Legal News* (Oct. 2018), avail at <https://nationinside.org/campaign/just-future-project/storybank/texas-uses-failed-private-prison-to-hold-civilly-committed-sex-offenders/>.

[Full text:] "In 2015, Texas converted its outpatient program for civilly committed sex offenders into a 'tiered' treatment program, in which participants start out in a 'total confinement facility' at twice the cost of the original program. The state awarded Correct Care Solutions a \$ 24 million contract to provide housing and treatment at the Texas Civil Commitment Center (TCCC) in Littlefield, formerly a failed private prison known as the Bill Clayton Detention facility. "Correct Care had just acquired GEO Care, a subsidiary of the GEO group – a for-profit prison firm whose 2009 abandonment of the Littlefield facility had almost forced the city into default on its bonds. [See *PLN*, Oct. 2013, p. 45]. GEO Care had a poor reputation, having been sued multiple times for providing inadequate health care. The company was known for having cooked alive a Florida psychiatric hospital patient who was left in a scalding hot bath, and for providing such abysmal care at a Texas immigration detention center that it sparked a riot.

"The state's contract with Correct Care required it to hire about 100 employees to provide treatment and housing for 277 civilly committed sex offenders at TCCC, which it

rented from Littlefield. The contract was extended in 2017.

"The intersection of the Texas Civil Commitment Office (a state agency not known for respecting offenders' civil rights), a private prison spinoff with a questionable history, and a desperate small Texas city with a huge debt load and an empty prison is an example of one development in what has been called the 'treatment industrial complex' – when for-profit companies take over correctional treatment programs. [See: *PLN*, March 2018, p. 1].

"As part of that trend, Correct Care is making a play for the civil commitment market. In addition to TCCC, it runs a civil commitment center in Florida and has a contract to build a new \$36.4 million, 268-bed facility in South Carolina.

"Since it opened, over 139 TCCC employees, including eight clinical therapists, have left their positions. Most resigned. One licensed vocational nurse, hired as a 'therapeutic security technician,' quit after 18 months because she was appalled at the conditions at the civil commitment facility – especially the lack of medical care.

"A lot of these guys were really old,' she said. 'The clinic was always running out of medications or never had the right ones. It was all very unorganized.'

"The staff turnover at TCCC has had a detrimental effect on the offenders housed there. Therapy is required for offenders to advance through the four-tiered program and eventually be released on GPS-monitoring as outpatients. If a therapist resigns, offenders receiving treatment from that therapist must start over at the beginning of their tier. Thus, some are faced with the prospect of having to repeat the same tier over and over.

"In its 19-year history, no one has ever been fully released from Texas' civil commitment program. Only five have been released from confinement since TCCC opened – four to go to hospices before they died. Roughly half the offenders in the tions.

"To be constitutional, it has to be a therapeutic program,' said Conroe attorney Scott Pawgan, who represents one of the offenders held at TCCC. 'It's got to be the worst therapeutic program in the history of sex offender treatment, far and away.'

"Meanwhile, civilly committed sex offenders are required to wear GPS monitors while imprisoned at TCCC. They are told to call their living quarters 'rooms,' not cells, and informed the facility is not a 'prison' – though the conditions of their confinement, which may include placement in segregation, are similar to those in prison. Participants are called 'residents,' not inmates. Texas law allows TCCC to take one-third of any money offenders receive to defray the cost of their treatment and housing. Yet none know when, or if, they will ever be released.

"It seems like a prison by any other name is still a prison – or something even worse in this case."

NJ SOCC Inmate Reports on Confinement Conditions There.

By Joseph Aruanno

Editor's Introduction: Mr. Aruanno is one of the confinees in the New Jersey Special Treatment Unit ("STU") in Avenel, NJ. He wrote the following in response to questions that I posed to confinees in various SOCC facilities, to determine the state of conditions of confinement in each such facility. Passages in brackets are paraphrases or comments by this editor.

Text: "You ask about legal assistance and legal document preparation, etc. ...[W]e do not have any access to a law library, with typewriters, etc., where they are given legal supplies such as envelopes, pens, etc., as they do in all of the state prisons [in NJ] except this one.

But what we do have is a Lexus Nexus disc that is very limited, which includes researching favorable cases against the STU that are not on it, or were at one time but have been deleted, etc., and which does not amount to anything.

Where there have been times when they have not had a photocopy program for over a year. And when they do, they say it is broke or out of ink, etc.

And there was a time when they assigned a resident to work as their alleged law clerk who not only could [not] read or write, but he had never used a computer. And when he refused the job for those reasons, they sanctioned him, including denying him any future job and placing him on group restrictions, etc....

Or the fact that there have been certain residents here assigned to the law clerk position who will not help you unless we pay them. And other who simply are not qualified for the job, which includes the state having declared them as retarded, etc., but needing to buy their own typewriters, envelopes, legal books, etc., they will then deny us a job for any reason which prevents us from being able to afford such necessities. And which includes in retaliation for litigating against them!

As well as in my case where since I declare my innocence of the crime I am accused of and do not go to group and admit things that are not true that is also used to deny us a job.

And as to the food issue, in New Jersey we are in the custody of the Department of Corrections, which simply does not work, where the staff are trained in punishment through fear and violence, etc., and the facility is designed and built to punish through lack of space and privacy, etc., and where we were placed in the state's worst facility which was not only condemned but is the only one in the state without a gym or any type of library at all, etc....

And where nearly ninety percent of the time there are no doctors, etc. here, and/or therapy staff, just correctional guards.

And where this applies to the food as well, for which we are being served food made for prisoners which is cheap and bland, etc.

And where there is a large number of residents with cholesterol problems, diabetes, etc., because of the salt, fat and grease they force on us. And many deaths as a result. And which includes a high rate of cancers.

And again those who are denied a job are forced to eat the punitive meals they serve us. Though we are allowed to order limited food and limited types of food from Walmart, but they are going to make certain restrictions there starting in August.

And then with that they provide us with substandard medical care, or the prison's health care system, which is as full of hate and contempt for us as the guards who work here!

And with that, though the U.S. Supreme Court agreed on this alleged civil scheme, though in a five-to-four margin, that would be a win going back would start with the fact that you simply cannot just leave prisoners in prison after they complete their sentence and suggest it is now civil in nature, as they pretend!

As to your question about privatization, about fifteen years ago during our class action lawsuit the state understood the dilemma with being kept in a prison, etc., and pretended to us and the Federal Court that they were looking for a private company to house us, etc., but after the court made clear they did not care either about the severe harm-injury being inflicted on our rights, etc., the privatization hoax came to an end.

And where these guards have been permitted to continue to murder us with the beatings that take place, where many have died, or the drugs that have killed many such as the pure heroin, the fentanyl, etc., that they sell us, or the many rapes such as staff on residents or resident on resident.

Where they sell us contraband cell download child pornography, etc., and when they get caught with them it is used to further incarcerate us.

And worse the mental health staff who work here allow these to take place despite our many cries for help admitting this is not their facility!?"

Washington's SOCC on McNeil Island It Might as Well Be Alcatraz.

E. Gillespie, "On Washington's McNeil Island, the Only Residents Are 214 Dangerous Sex Offenders," *The Guardian*, <https://www.theguardian.com/us-news/2018/oct/03/dangerous-sex-offenders-mcneil-island-commitment-center> (Oct. 3, 2018).

...Text excerpts: "A small island in the state of Washington houses a group of unlikely residents: they are all men the state consid-

ers its most dangerous sex offenders.

McNeil Island, nestled in Puget Sound, is unpopulated except for the 214 people who live at the special commitment center, a facility for former prison inmates. All men have served their sentences and yet, due to a controversial legal mandate, they remain confined indefinitely.

The only way on and off the island is a passenger-only ferry, which makes the 15-minute trip every two hours. The ferry docks at a defunct prison on the island and a bus takes employees and visitors to the facility a few miles inland. Along the way, the bus passes an overgrown baseball field and boarded-up houses, remnants of the prison employees and their families who called the island home until the prison closed in 2011.

Few people who live in the region know about the island and its unusual residents, and even fewer know about the equally unusual law that put them there.

Kelly Canary, an attorney who represents some of the men confined to the commitment center, said people are often shocked when they discover that 'even after [offenders have] served their time and get out of prison, they can be civilly committed and detained for the rest of their life.'

Each of the residents has previously been convicted of at least one sex crime – including sexual assault, rape, and child molestation. A court has then found them to meet the legal definition of a 'sexually violent predator,' meaning they have a mental abnormality or personality disorder that makes them likely to engage in repeat sexual violence....

Criminal justice reform advocates fear the implications of predicting future risk and basing confinement on what someone might do.

On top of that, these costly facilities also have low release numbers, making little known about whether they're doing anything to keep communities safer.

The people sent to the special commitment to distinguish the facility from a prison. Rows of barbed-wire fences pen the grounds and counselors check residents every hour to make sure they are adhering to the facility's rules.

'In most ways, it's worse because the illusion is it's not prison,' Calvin Malone, one of the residents, told me.

During the 1970s and 1980s, Malone worked as a Boy Scout troop leader in various states across the country, as well as with an organization that works with at-risk youth. In those roles, he molested numerous boys and was convicted of sex crimes in California, Oregon, and Washington....

During his sentence he also underwent sex offender therapy and he said that the combination of Buddhist teachings and treatment helped him gain perspective on who he was and what he'd done.

... '[Treatment and meditation] raised my level of empathy to a point where I understood the impact of my offending behavior

(Continued on page 4)

and the ultimate damage that was done.'

Malone said he doesn't like talking about how he feels in terms of shame and guilt. Those emotions, he said, have more to do with how he feels about himself. Instead, he feels regret

'To regret is to understand what you've done and the losses that have occurred because of your actions and it allows you the space to move forward so that you're not wallowing,' he said. 'I have a tremendous amount of regret.'

...Many of the sexually violent predator evaluations for men convicted of rape are diagnosed with paraphilia – not otherwise specified.' The controversy lies in the fact that the Diagnostic and Statistical Manual of Mental Disorders does not have a specific classification for adults who are sexually aroused by those who don't consent.

Fundamentally, these laws are about predicting a person's future risk, which comes with its own moral and philosophical dilemmas.

To do this, states use actuarial scales, which predict an offender's risk... A widely used tool, the Static-99R, produces a score based on a number of mostly unchangeable things including criminal and relationship history.

The results, along with other evidence such as expert testimony from psychologists, is presented to a judge or jury, who determine whether the offender meets the criteria.

But [the Sex Offender Civil Commitment Programs Network (SOCCPN)] concedes that current research and actuarial tools are not designed to predict individual risk. 'To some extent the criminal justice system is requiring opinions to be made, decisions to be made, that go somewhat beyond the knowledge base that we have, Dr. Michael Miner, a professor of human sexuality at the University of Minnesota and past president of the Association for the Treatment of Sexual Abusers (ATSA) told me.

Miner said that aside from the problems with risk assessment, he questions the entire civil commitment process.

'You either have a mental defect that makes it unlikely that you can control your behavior and therefore you're not guilty by reason of insanity, or you're responsible for your behavior, he said.

'It seems to me that a more honest system would, at the front end, say, 'we just think you're a high risk individual, let's let us for sex offenders, but that seems like a more honest route.'

Miner points out that sex offenders have a relatively low re-offense rate. Of the offenders convicted of rape and sexual assault who were released from prison in 30 states in 2005, an estimated 5.6% were rearrested for rape or sexual assault five years later, according to a 2016 study by the US Department of Justice. The same statistics for other types of crimes were much higher. Fifty four percent of property offenders were rearrested for a property crime and 33% of drug offenders were rearrested for a drug crime.

'There is a moral panic around sexual crimes and [the public believes] that these people pose an extraordinarily high level of danger,' Miner said. 'To the frustration of me and a lot of other people who are trying to come up with common sense ways of preventing sexual violence, the message that most of these people are not really all that risky isn't something that people seem to listen to.'

...Once someone is labeled a sexually violent predator and committed to a civil commitment center, it can be difficult for them to get released.

In most states, a person who is civilly committed has the right to an annual review, in which a court goes over each offender's history and treatment progress to consider release.

...[A]rguing that a sex offender should be released to the community can be an uphill battle.

'The state gets to say, at the beginning of trial, he is a sexually violent predator,' [Attorney] Canary said. 'Getting the jury to be onboard with [the idea that he might not be any more] is pretty difficult.'

Though offenders are encouraged to disclose everything in treatment, they sign away their confidentiality and everything revealed to a clinician can be used as evidence. Much like an alcoholic is encouraged to admit that they're always in recovery, offenders are taught that treatment is ongoing and that consistent self-monitoring is key. Canary said that many of her clients readily admit the fact that they're always a risk to the community, a line of thinking that helps them stay self-aware.

'But then the jury hears that,' Canary said. 'You have your client saying, "Well, sure, I'm a risk to reoffend." It's something that jurors just don't want to hear.... Once they hear that from your client, it's kind of hard to put that into perspective.'

Through the Washington court process, a civilly committed person can be released to less restrictive alternatives, which typically include outpatient treatment and tight restrictions, or they can be released without conditions.

The number of people released nationally from these facilities through either avenue is historically low. On average, these facilities house about 260 people. Of the 16 states that provided release numbers to a 2017 survey of civil commitment centers [for sex offenders], less than 10% released less than one person per year.

The low number of people released from these facilities makes it hard to research the effectiveness of these laws and these facilities.

As for Malone, he doesn't participate in treatment. Now in his 60s, he said he has benefitted from treatment in prison and prefers to focus on other things to make life on McNeil Island better. He has led a few lawsuits aimed at improvements, one dealing with tobacco use and another calling into question the facility's water quality....

'I've accepted the fact that this could be my last stop. I could die here,' he said.

'The only thing I would love to do is have the opportunity to talk more about what my future would be rather than to constantly revisit something that occurred decades ago ...It make it difficult to do rehabilitation work on yourself when you're still stuck in that experience.'

RFID Microchip Implants in SOs for Life Proposed

Alex Rutgers, "Tracking Predators: Microchip Implants, a Constitutional Alternative to GPS Tracking for North Carolina?," 20 *North Carolina Jour. Of Law & Tech.*, Online 149 (Dec. 2018)

Text excerpts:

p. 155: "II. Microchip Implant Technology

A microchip implant is a small, rice-sized, copper antenna wire coil encased in a glass cylinder inserted under the skin.²⁶ It does not have a battery and operates using Radio-Frequency Identification (RFID) which does not transmit information until coming into contact with a magnetic field generated by a reader.²⁷

p. 156: [RFID implants] ...can be designed to be permanent by inserting it under the triceps muscle, requiring surgery to remove³⁵ [implying surgery is necessary to implant the chip in the first place].

pp. 157-59: [In this section, the author discusses a previous, Satellite-Based Monitoring ("SBM") GPS tracking requirement in a way clearly implying that, at least for all sex offenders with child victims, that requirement was as a 'collateral consequence' for offenders as a mandatory, lifetime part of their post-sentence registration requirement (not as a part of, or limited by, their sentence). (Other sex offenders could apply to a judge, upon findings of suitable rehabilitation and elimination of dangerousness, to end that GPS requirement.)

It is unclear from the article whether under the terms of that 'collateral consequence' statute the GPS requirement was applicable to any sex offenders whose convictions were in another state and who moved into, or merely visited North Carolina.

That GPS requirement was held by North Carolina's own Court of Appeals to be a violation of one's rights against warrantless have some sort of electronic monitoring legislation for criminals.⁵⁵ Over forty states currently implement GPS monitoring of convicted sex offenders, up from twenty in 2006.⁵⁶ [The author does not mention, however, that, with only a few, at most exceptions, such monitoring ends with the end of the offender's sentence.

p. 162: In 2012, the Supreme Court of the United States decided in *United States v. Jones*⁷³ that 'the Government's installation of a GPS device on a target's vehicle, and its use of that device to monitor the vehicle's movements, constitutes a "search"⁷⁴ within the meaning of the Fourth Amend-

ment.⁷⁵ [The Court noted that] 'the Fourth Amendment protects people – and not simply 'areas' – against unreasonable searches and seizures...'

p. 164: [In a case arising from the ankle-attached GPS requirement in North Carolina, the U.S. Supreme Court took the case, *Grady v. North Carolina*, 135 S. Ct. 1368, 1371 (2015).] Looking at the attachment of a GPS ankle monitor to a sex offender, in a unanimous opinion, the Supreme Court ruled that 'in light of these decisions, it follows that a State also conducts a search when it attaches a device to a person's body, without consent, for the purposes of tracking that individual's movements.'⁹³

pp. 164-65: [Of note, that Supreme Court opinion stated,] 'It is well settled, however, that the Fourth Amendment's protection extends beyond the sphere of criminal investigations, and the government's purpose in collecting information does not control whether the method of collecting constitutes a search.'⁹⁴ This holding eliminated the distinction between a Fourth Amendment search in a criminal proceeding compared to a civil context. ...[However, as with all 4th Amendment searches,] ...the Supreme Court sent the case back to the trial court for a *Grady* hearing on SBM's reasonableness.

p. 166: [On remand, the North Carolina Court of Appeals reversed a trial court decision of reasonableness, holding that] the SBM program interfered with *Grady's* reasonable expectation of privacy in two ways: '(1) the compelled attachment of the ankle monitor, and (2) the continuous GPS tracking it effects.'¹⁰²

pp. 166-71: [However, the North Carolina Court of Appeals ruled that the first interference – the attachment – was not unreasonably obtrusive.¹⁰⁴ This, however, seems to deliberately ignore the thrust of the U.S. Supreme Court holding, which focused on the nonconsensual, compulsory intrusion into one's bodily privacy. Nonetheless, that court held only that the mandatory lifetime requirement for child-victim sex offender made the North Carolina statute unconstitutional. It therefore let the requirement stand, simply forcing the state to entertain petitions (as by other sex offenders) to be relieved from that SBM requirement.]

pp. 172-73: [The author concedes the obvious: that] an implant is more physically intrusive than a GPS ankle monitor. [Further, even]... the North Carolina Court give' [but, shockingly, basing this in part on a 'defendant's diminished expectation of privacy as a convicted sex offender.'¹²⁹ [In other words, as a kind of 'bootstrap' argument, because sex offender registration has already been upheld against claims of Fourth Amendment violation – then the government is or should be allowed to go further without constitutional violation. The author argues that the technological distinction between GPS and RFID, by which the latter causes a response only when the RFID carrying person leaves (as in shoplift-

(Continued on page 5)

ing) or enters (as in wandering into a 'forbidden area' under sex offender legislation) means that the warrantless search is not "continuous", and hence supposedly not "unreasonable." However, there is no Supreme Court precedent that would require searches to be continuously ongoing to be unreasonable. Further, this ignores that the hallmark of Fourth Amendment law is that all warrantless searches are presumptively unreasonable. Even a house search, regardless of only short, or even momentary, is unreasonable without a warrant. If a man's house is his castle, as the late Justice Scalia stated, then surely his body is his sanctum sanctorum, violable by nonconsensual search without warrant. Further, it is highly unlikely that the government will install a special set of RFID query-transmitter units at several-feet intervals around every 'no-go' perimeter established by the many laws for countless locations throughout North Carolina (or any state having such legislation). Therefore, in actual practice, it is obvious that such an RFID system would have to rely on existing RFID query transmitter units already emplaced commercially and for other purposes. Hence, in practice, 'ping' reports of a RFID-carrying person's location would constantly be coming in 24/7 with any movement anywhere by a given sex offender 'off-paper.' This is tantamount to constant tracking.]

p. 174: [The author here cites the very few exceptional cases that have allowed momentary bodily intrusions upheld by the U.S. Supreme Court. These include a blood sample taken from railway workers acknowledged to be a special case, due to the potential for mass casualty disaster if such a worker is intoxicated (*Skinner v. Ry. Labor Excs. Ass'n*, 489 U.S. 602, 616 (1989)); and oral cheek-swab DNA identification procedures upon criminal conviction (*Maryland v. King*, 569 U.S. 435 (2013)). However, no Supreme Court decision has ever permitted any indwelling artificial device to be implanted permanently (or for indeterminately) into a human body nonconsensually without a warrant. Indeed, no such warrant has apparently ever been sought.]

p.178: [The author advocates deep implantation of the RFID chip under the triceps muscle near the armpit in order to thwart unauthorized efforts to remove the chip. He also concedes that] ...there are additionally some health concerns with implantable microchips¹⁶⁰. [These points escalate the intrusion factor of Fourth Amendment analysis geometrically.]

[Distinctly, the author also concedes that] ...states that have passed anti-chipping statutes have cited a slippery slope argument, that when involuntary insertion of microchips are legal for sex offenders, 'technology can be introduced for one purpose... but evolve to permit other uses, like sub-dermal implants used to track our actions wherever we go.'¹⁶²

[Overall, the banal approach taken by this author is shocking in its subordination of basic bodily integrity – everywhere regarded as a fundamental human right – to a

claimed necessity to know where sex offenders are at every moment – even those whose sentences have long expired. This is exacerbated by the known fact (mentioned nowhere by this author) that recidivism by convicted sex offenders (including those with convictions of crimes against children – apparently the special, emotionally driven concern of this author – is very low upon prison release to start with (average of current statistics nationwide: 3%), and dwindles to micro-percentages (less than 1/20th of one percent, according to a very large sample-based study in California following the first five years after such release). Such hysterical insanity and political grandstanding as a form of lynch-mob legislation simply must cease, lest all principles of liberty on which our country was founded be quietly killed with our implicit permission.]

PPG Practices & Rulings

Lisa Murphy, Emily Gottfried et al., "Use of Penile Plethysmography in the Court: A Review of Practices in Canada, the United Kingdom and the United States," 38 *Behav. Sci. & L.* 79-99 (2020)

Text excerpts:

p. 90: "Use of PPG in US Law
5.1 PPG Admissibility Based on Evidentiary Standards

...Some courts have noted that the PPG fails to meet *Daubert* [v. Merrell Dow Pharmaceuticals, Inc. (1993)] standards as it has no accepted standards in the scientific community; it is susceptible to errors and manipulation and lacks standardization; and it subjects a defendant to be engaged in the 'possession, use and distribution of child pornography' (U.S. v. Cheever, 2016, p. 13). In that case the condition of supervised release which required Cheever to submit to PPG testing was rejected by the court. ...[D]ue to U.S. law, no child pornography is used as PPG stimuli.

In *U.S. v. Powers* (1995), the Fourth Circuit Court of Appeals held that a district court did not abuse its discretion in ruling that the PPG failed to meet scientific validity requirements for admissibility. Specifically, the Court noted that the Government provided 'evidence that the scientific literature addressing penile plethysmography does not regard the test as a valid diagnostic tool because, although useful for treatment of sex offenders, it has no accepted standards in the scientific community' and that 'such false negatives render the test unreliable' (US v. Powers, 1995, p. 1471).

...[A]n Appeals Court of Massachusetts ruled that PPG tests 'are not expressly made admissible by statute' and the court had 'no basis from the record or case law to determine whether PPG tests constitute a permissible basis for an expert to consider in formulating an opinion' (In re Gammell, 2014, p. 415). In *People v. Maynez*, 2019, a California court of appeals noted that 'No published decision in California has found PPG testing to be reliable and admissible

under the Kelly/Frye [evidence] test' (p. 7). They noted that the experts in *Maynez's* case 'acknowledged the PPG test is subject to manipulation by the subject and is of limited use for that reason' (*People v. Maynez*, 2019, p. 7). A legal scholar noted, 'The extensive scientific research on the physiological response [e.g., PPG] to stimuli and connection to recidivism suggest some general acceptance of such evidence in the scientific community. ...However, major concerns arise when considering the methodological testing, rate of error, and existence of an analytical gap between the data and the opinion provided' (Poland, 2019, p. 377).

pp. 90-91: 5.2 PPG and Supervised Release

...[T]he Ninth Circuit Court [of Appeals] heard a case in which it was argued that having to submit to PPG testing as a requirement for conditional release should be vacated because 'such testing (1) is not reasonably related to the purposes of deterrence, rehabilitation, or protection of the public, and (2) even if it does satisfy one of the above purposes, the testing requirement results in a greater deprivation of liberty than is reasonably necessary' (US v. Weber, 2006, p. 561). The Court noted 'the accuracy and reliability of penile plethysmograph testing have been severely questioned' and represented a 'significant liberty interest' (p. 564). In light of this, the Court held, 'The requirement that [Mr.] Weber submit to plethysmograph testing as part of his sex offender treatment program was imposed without the necessary evidentiary record, justification, and findings we now hold are required' (p. 570). This holding has been cited in numerous similar cases in other jurisdictions.

In the US Court of Appeals, Second Circuit, it was held that mandating PPG testing as a condition of supervised release was an 'extraordinary invasive condition [that is] unjustified, is not reasonably related to the statutory goals of sentencing and violated [Mr.] McLaurin's right to substantive due process' (U.S. v. McLaurin, 2013, p. 260). The US Court of Appeals in the First Circuit held that the supervised release condition of requiring PPG testing was a 'miscarriage of justice' and that the district court committed 'plain error' in imposing supervised release condition that required defendant to undergo PPG testing (U.S. v. Velez-Luciano, 2016, p. 731). Another US Court of Appeals held that requiring a defendant to undergo PPG testing as a term of his sentence that was 'imposed without any explanation by the district court, should be vacated' (U.S. v. Berrios-Cruz, 2016, p. 731). In 2015, the First Circuit US Court of Appeals held that 'any decision to reimpose the PPG testing condition [of supervised release] would require further factual development to show its reasonableness' (U.S. v. Medina, 2015, p.73).

...[A] Fourth Circuit court held in *U.S. v. Music* (2002) that 'Although there is no blanket rule that plethysmograph evidence is inadmissible, the test 'lacks accepted standards in the scientific community and that the test is prone to producing false

negatives.'

Panic in the Herd Never Leads to a Good Future — Just Ask Any Lemming.

Catherine L. Carpenter, "Panicked Legislation," 49 *Notre Dame J. Leg.* 1 (2023)

Text Excerpts:

[slip] pp. 1-2: "We are in the throes of a moral panic. It is not the first time, nor will it be the last,³ but it is among the most enduring.⁴ Dubbed the sex panic,⁵ it has bred widespread and ever-escalating legislation,⁶ impacted the lives of more than a million people and their families,⁷ and caused public hysteria and violence.⁸

p. 3: ...[U]nbridled fear propels the response. Eula Biss summed it up well, 'Risk perception may not be about unquantifiable risk so much as it is about immeasurable fear.'

pp. 3-4: ...Our perception of a situation – not the truth of it — determines our actions. The public's fear that 'sex offenders' live among us in plain sight to prowl our streets and assault our children has hardened into a reality of sorts.¹⁶ Professor Sunstein, in his theory on 'probability neglect' argues that 'when intense emotions are engaged, people tend to focus on the adverse outcome, not on its likelihood.

pp. 4-5: This is the intersection at which we find ourselves: intense fear that motivates punitive legislation against those who commit sex offenses despite the unlikelihood that the event will happen. It is a framed reality based on a 'mythical narrative,' a story founded on false assumptions that generates the disproportionate response and fuels the moral panic.²⁰ Like moral panics before it, the sex panic is premised on its own two-fold mythical narrative: first, that our communities are filled with strangers who are poised to kidnap and assault our children – what has been called 'stranger danger';²² and second, that those who commit sex offenses recidivate at alarmingly high rates, and thus, they portend unceasing future dangerousness.²³ Not only are these assumptions false based on decades of extensive empirical study,²⁴ the legislative regime upon which they are built demands universal application and fidelity to this false narrative.

pp. 5-6: ...[S]tates have passed a cascade of largely symbolic laws targeting those who have committed sex crimes that only seem to address public safety.²⁷ Laws, which this article describes as 'panicked legislation' – hastily-crafted and not driven by empirically sound data or reason. Indeed, the panicked legislation that has resulted from the sex panic has been thoroughly criticized on all fronts as a failed experiment,²⁹ extremely ineffective,³⁰ and worse, damaging.³¹

When the symbolism of a law or regula-

(Continued on page 6)

tion outweighs its pragmatic value, it has been dubbed cynically as 'Crime Control Theater.'³²

p. 7: And herein lies the question: how to address a registration and notification scheme that the public has embraced overwhelmingly,³⁷ but which has been heralded as Crime Control Theater?³⁸

pp. 8-9: ...Article after article described in significant detail the false assumptions upon which the sex panic was built and the accurate data that rebuffed them.⁴⁶ But, we have come to learn that falsely embedded assumptions are not easily recast, even when people are presented with contrary accurate data.⁴⁷ It is not only the public who has difficulty absorbing contrary evidence; those in the academic world sometimes reject empirical analysis when it does not contribute to the false narrative they have accepted. Psychologists call this 'confirmation bias.'

pp. 11-12: ...[T]his article urges a new tactic to combat panicked legislation. It argues for judicial intervention in the form of the Irrebuttable Presumption Doctrine. Employed primarily in the 1970s by the United States Supreme Court, the doctrine stands for the proposition that a statute cannot confer or deny a right based on presumption that is not universally accepted as true. If a presumption is intended to support a classification scheme, such as registration and notification legislation, the factual basis for the regime must be accepted as universally true to survive constitutional challenge. If the state is unable to support the claim, the classification scheme cannot survive constitutional challenge because of the inadequate fit between the assumptions made and the policy the law is designed to serve.⁶¹

Where a false assumption is impervious to change based on empiricism and logic, the Irrebuttable Presumption Doctrine offers an opportunity to directly counter the falsity of the assumption. In challenging the registration and notification scheme, the doctrine serves to rebuff the false factual predicate of high recidivism rates that underlies the assumption that those who commit sex offenses portend future danger.

pp. 12-13: I urge the application of the Irrebuttable Presumption Doctrine for the purpose it was initially intended – to combat false presumptions in legislation that masquerade as universal truths. It offers the opportunity to overturn panicked legislation that is based on firmly held, but wildly incorrect, assumptions that target those who have committed sex offenses.

p. 16: 1. From Cultivation through Dissipation

...Brian Klocke and Glenn Muschert reveal that all moral panics sport the same cyclical arc: cultivation, operation, and dissipation.⁹⁰

Cultivation: 'Saying something is true does not make it so. And saying it louder does not make it truer.'⁹⁴

For a message to induce a moral panic it must be 'sticky.'

pp. 16-17: To have lasting impact, messages must be easily understood and able to be repeated, they must have emotional appeal, and they must come from credible

messengers.⁹⁶ 'Stop the Steal' (The Big Lie), 'Stranger Danger' (fear of unknown people) or 'Frightening and High' (the sex panic) are examples of sticky messaging: snappy phrases that have emotional appeal and are amplified through various mediums by key messengers to cement the message.⁹⁹

pp. 17-18: *Operation:*

...We have witnessed social movements that sprung from the tragic and unspeakable deaths of children, deaths which galvanized the nation to act.¹⁰³ Consider the passage of Three Strikes Laws arising from the horrific kidnapping and murder of Polly Klass by Richard Allen Davis, a man with numerous prior arrests and convictions.¹⁰⁴ ...[R]egistration and notification schemes were passed because of the murders of Jacob Wetterling and Megan Kanka, and in Megan's case, at the hand of a prior offender.¹⁰⁶

p. 20: *Think panicked legislation that is never overturned.*

During the operation of a moral panic, it is not only the legislature that feels compelled to act. The public also assumes a personal sense of responsibility to remain vigilant against the imposing threat. Through acts of condemnation,¹¹⁷ the public assumes an outsized obligation to partner with the government to protect the community.¹¹⁸ ...Not surprisingly, incidents of violence and vigilantism against the targeted group rise during the period of operation.¹²⁰

Dissipation: Post cultivation and operation, the last phase in the arc, dissipation, refers to the 'receding of a [moral panic] from the public limelight.'¹²¹ ...True, dissipation could result from successful challenges by experts, investigative journalists, or a successful counter-social movement,¹²³ but in the case of the sex panic, this has not occurred.

p. 21: 2. Key Actors

Essential to a moral panic are the messengers who shape the story, and who have access to the public with a platform to spread the word.¹²⁶ It takes more than the moral entrepreneurs like Professor Dilulio, to promote a panic. In the sex panic, key actors including the media, politicians, and judiciary have all been instrumental in propagating the panic. With nearly identical messaging, they reinforce one another in an escalating and disproportionate concern over a perceived social threat.¹²⁷

pp. 21-22: The sex panic ...has had more than its share of messengers to spread false assumptions of stranger danger and high recidivism rates.¹²⁹ Those intent on provocation draw upon what Klocke and Muschert call 'atrocious tales' to portray the behavior of the perpetrators as something that is innately evil and immutable.¹³⁰

p. 22: Political actors also understand that fear sells.¹³³ ...But as noted by one critic, 'Despite child sexual abuse declining by 60% between 1992 and 2010, states continue[d] to legislate as if lenient sex offender laws are a national emergency.'¹³⁵

pp. 22-23: In 1922, H.L. Mencken mused, 'The whole aim of practical politics is to keep the populace alarmed (and hence clamorous to be led to safety) by an endless

series of hobgoblins, most of them imaginary.'¹³⁶

Supporting populist legislation through an inflated sense of risk is beneficial to the political actor. ...'The politicians, bolstered by what is taken to be nearly universal public support [or registration laws], compete to propose ever more severe responses to criminal behavior.'¹³⁷ And compete they do, as communities are pitted against each other to create increasingly harsher registration and residency laws to chill registrants from moving to their jurisdiction.¹³⁸

pp. 23-24: Although politicians play a significant role, it is the media that dominates since Stanley Cohen first began to study panics.¹⁴⁰ Its pervasive presence – instantaneous messaging and twenty-four-hour news cycle – lends special weight to the public's receipt of its message and messaging.¹⁴¹ In this way, Klocke and Muschert recognized that the 'complexities and intensity of the interaction of news media production and audience reception dynamics have increased.'¹⁴² Lawmakers, as well, have acknowledged that the actions they take against those who commit sex offenses have been greatly informed by media reports.¹⁴³

pp. 24-25: The media's role in stoking the sex panic can be traced back to its showcase of high-profile sexual assault cases by strangers.¹⁴⁵

Concentrations on stranger sexual assault distorts the true data where most sexual harm is committed by someone known to the victim. But, as we have come to appreciate, these images have been burned into our memories. ...Under a theory of 'availability heuristics,' which causes people to overestimate the frequency of an event,¹⁴⁸ media saturation of these events leads the public to believe erroneously that stranger sexual harm is pervasive and inescapable.¹⁴⁹ Good lawmaking suffers as well, as risks are inflated by false notions of recurrence.¹⁵⁰

Television plays an important role as well in fixing these images. As Daniel LaChance and Paul Kaplan report, reality shows have played an instrumental role in cementing the image of the irredeemable offender.¹⁵¹

pp. 25-26: 3. Language and Labels

If messaging matters, then inflammatory language plays a starring role in the operation of a panic. ...Language like 'pond scum predators,'¹⁵⁴ 'monsters,'¹⁵⁵ 'animals'¹⁵⁶ and 'sick predators'¹⁵⁷ fill congressional and state records.

And where provocative language is used to vilify a targeted group, labels do the heavy lifting.

pp. 26-27: ...[O]nly in sex crimes is there a 'shift from being persons convicted of certain acts to becoming permanent carriers of an inherently degraded status.'¹⁵⁹

...Harmful labels like 'sex offender,'¹⁶⁰ 'sexual predator,'¹⁶¹ and 'sexually violent predator,'¹⁶² stick like crazy glue – their adherence permanent, *no matter the [il] legitimacy of the label.*¹⁶³

pp. 27-28: ...[T]he term 'sex offender,' or in this case 'sexual predator,' implies a homogeneity of factors that is neither appro-

priate nor applicable.¹⁷⁰

p. 28: It is the inability to engage in nuanced language and reasoning that offends the rule of law.

...The roughly drawn grouping of all who commit sex offenses into one category invites criticism that the registration regime is overinclusive – a one-size-fits-all approach that is not rationally connected to its legislative goals.¹⁷³

Painting all who commit sex offenses as dangerous, no matter their crime, circumstances, or age also leads to policies that bar registrants from the opportunity to reintegrate successfully or be afforded the same opportunities as other felons.

The impact is real, and it is deleterious.

p. 34: 2. The Mythical Narrative of the Sex Panic

Not all narratives are mythical. What makes a narrative 'mythical,' and therefore a flash point for a moral panic, is best characterized by the falsity and exaggeration of its claims against a subset of the community.²⁰⁷

The Real Data on Recidivism Rates

More than twenty years of data gathering also concludes that recidivism rates for both adults and children who have committed sex offenses are much lower than claimed. Registration regimes are built on the premise that those who commit sex offenses portend future danger, yet as researchers have concluded, '[Registration schemes] assume that past offenders will be future offenders, but when it comes to sexual offending, several decades of research prove otherwise.'²⁰⁸

p. 35: In 1995, the Bureau of Justice Statistics reported: 'Of the 9,691 male sex offenders released from prison in 15 States in 1994, 5.3% were rearrested for a new sex crime within 3 years of release.'²¹¹ ... New York, Arizona, and Ohio all reported similar findings, with rates between 2.1 and 8%.²¹³ A study in 2005 analyzed 746 men convicted of sexual offenses, finding that in a five-year period, only 3.6% were arrested and charged with a new crime and 2.7% were convicted.²¹⁴ Other modern studies confirm these numbers, as the Michigan Supreme Court recognized in *People v. Betts* when it detailed the 'growing body of research' to support low recidivism rates.²¹⁵

Data reveals that children who have committed sex offenses have similarly low recidivism rates.²¹⁷

p.39: ...There has been a noticeable shift in a court's willingness to entertain the empirical research that reports low recidivism rates.²³⁸ Until recently, courts generally rebuffed the studies, signaling instead clear support for legislative deference for the view that recidivism rates were high.²³⁹ It was, therefore, significant that the Sixth Circuit in 2016 endorsed the validity of these studies.²⁴⁰ No federal court to that point had signaled its receptivity to these findings.²⁴¹ The Sixth Circuit wrote, 'The record below gives a thorough accounting of the significant doubt cast by recent empirical studies on the pronouncement that "[t]he risk of recidivism posed by sex offenders is "frightening and high"²⁴²

(Continued on page 7)

pp. 39-40: *b. The Myths of 'Stranger Danger'*

Stranger-danger. A sticky message²⁴³ that has been popularized to explain safety rules to children to protect themselves from strangers.²⁴⁴ It is a byproduct of the sex panic's description of the world as fraught with danger from those we do not know.

The emergence of 'stranger danger' beginning in the 1980s is not surprising considering the high profile abduction cases that captured national attention.²⁴⁵ As one author write, 'The visibility and salience' [of these reports were seemingly supported by] 'skewed statistics, sensational reporting, and a tense political climate.'²⁴⁶

p. 41: 'Stranger-danger' is not a phrase without other consequences. Unfortunately, it inaccurately masks true danger, including that: most children are not abused by a stranger, most abductions occur by family members, not strangers; and most unwanted online solicitations do not come from trolling Internet predators but from their peers.²⁵⁴ Worried by the message, Callahan Walsh, child advocate with the National Center of Missing and Exploited Children, cautioned, 'We want parents to rethink stranger danger because we have been able to do the analysis of these attempted abductions ...[S]tranger Danger just doesn't fit the model.'²⁵⁵

p. 42: Knowing that people are most likely to be victimized by a family member, intimate partner, or acquaintance,²⁵⁸ the question must be asked: is the registration and notification scheme worth the financial and human cost to placate a fearful public?

p. 44: Registration and notification schemes come with a hefty price tag, and one that is hard to sustain.²⁷² Lave, Prescott, and Bridges urged reallocation of resources, when they wrote, 'The vast majority of sexual offenses are committed by individuals who are not potential recidivists, and ...recidivism numbers are sufficiently low that it makes little public-safety sense to focus so much effort and so many resources on what is a relatively small population.'²⁷⁴

pp. 48-49: III. Employing The Rebuttable Presumption Doctrine To Combat False Assumptions

...An outgrowth of early pronouncements on conclusive presumptions,²⁹⁹ the Irrebuttable Presumption Doctrine serves as the guardrails in its recognition of two diametrically opposed points: deference to a legislative body's classifications, and the use of empirical evidence to demonstrate that the determination is unreasonable.

Sitting at the juncture between substantive and procedural due process, the doctrine demands that legislative line drawing be based on factual bases that are universally true. Thus, the doctrine asks an important question: does the law constitute 'an attempt by legislative fiat, to enact into existence a fact ...which cannot be made to exist in actuality?'³⁰⁰

p. 49: A. The History of the Irrebuttable Presumption Doctrine

The Irrebuttable Presumption Doctrine came to prominence in a line of cases heard by the Supreme Court during the

1970s....

The cases came to stand for the proposition that a statute cannot confer or deny a right based on presumption that is not universally accepted as true, unless the State provides a means of rebutting the presumption with competent evidence.³⁰³

pp. 52-53: B. The Modern Application of the Doctrine

Of particular note is the argument that certain statutory classifications are vulnerable to constitutional challenge because they have been designed with a 'procedure-avoidance objective.'³²⁶ Where impermissible reasons have driven the decision to avoid individualized assessment, courts are more likely to look behind the statutory classification to examine its constitutionality.³²⁷ This was true of the legislation that precluded bail for those who had entered the country illegally, and this article argues it is equally true for the offense-based registration scheme. Both rely on irrebuttable but false assumptions to avoid procedural due process and both employ false assumptions that are not universally true.

p. 55: B. Sex Offense Regimes

Under what has been colloquially called 'the stigma plus' test, challengers in federal court must prove that in addition to their loss of reputation, they have also suffered loss of a tangible interest.³⁴²

p. 56: Although narrowed, a path remains for challengers to employ the Irrebuttable Doctrine under state law. Until such time as courts acknowledge the cognizable loss of liberty facing those who have committed sex offenses, reputation alone can serve as the liberty interest in a state court challenge providing that reputation is a protected interest in the state constitution.³⁴⁴

So focused are we on the federal constitution and its jurisprudence, that we sometimes forget the independent and robust jurisprudence pertaining to state constitutions. We overlook the important liberty interests that are protected separately within them. As one article rightly noted, 'Powerful liberty protections sit latent from disregard.'³⁴⁵

Notes:

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8 *Millard v. Rankin*, at 1117-21.

16 162 Cong. Rec. H387-01 (statement of Rep. Wagner); 152 Cong. Rec. S8012-02 (statement of Sen. Grassley).

20 Daniel A. Kraus et al., "The Public's Perception of Crime Control Theater: It's

Complicated," 27 *Psych., Pub. Pol'y & L.* 316, 325 (2021).

22 Michael Hobbes, "Sex Offender Registries Don't Keep Kids Safe, But Politicians Keep Expanding Them Anyway," *HuffPost* (July 16, 2019), https://www.huffpost.com/entry/sex-offender-laws-dont-make-children-safer-politicians-keep-passing-them-anyway_n_5d2c8571e4b0-2a5a5d5e96d1.

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32 Kelly M. Socia & Andrew J. Harris, "Evaluating Public Perceptions of the Risk Presented by Registered Sex Offenders: Evidence of Crime Control Theater?," 22 *Psych., Pub. Pol'y & L.* 375 (2016).

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Prof. Janus Tells Us Why We Must Hold Our Sexual Violence Policy Accountable.

Eric S. Janus, "Holding Our Sexual Violence Policy Accountable," Chapter 16 in: Sexual Violence: Evidence-Based Policy

and Prevention (Eliz. L. Jeglic & Cynthia Calkins, eds., 2016).

Text Excerpts: [p. 285:] **"Introduction**

Public policy and law addressing sexual violence in the United States reflect fateful choices. Created reflexively – with little thought about the complexity of sexual violence, the interrelatedness of policies, and the risk of unintended consequences – the choices we have made fall short of our potential for preventing sexual violence. But it is not simply that our policies are not the best they could be; there is good evidence that many of our programs may actually worsen the problem. Our policies are characterized by a willful and intentional turning away from empiricism. The politics producing sexual violence policy is maladaptive, perversely and persistently keeping us from doing the right thing

The choices we make in designing sexual violence policy are consequential. These choices are rooted deeply in the way we structure our thinking about the problem, what I refer to as our 'frames' (Janus 2007). Our frames shape the questions we ask about how to prevent sexual violence and the assumptions we make about the nature of sexual violence and sex offenders. If we get the frames wrong, we will ask the wrong questions and get the wrong answers. Once we begin asking the right questions, we have a much better chance of designing the most effective prevention policies.

We need to change our frames for thinking about sexual violence policy. We need to demote the search for the 'most dangerous' offenders, and promote the drive to eliminate the most harm. We need to broaden our focus beyond incapacitating the individual offender to a more comprehensive search to address the root causes of sexual violence, identifying not only the psychological or biological predispositions, but also the societal values and practices that allow and even encourage sexual violence to flourish.

[p. 286:] There is perhaps one frame that is most harmful: it is the notion that there can be no excess in this area of policy; that over-breadth and overzealousness are not harmful.... We need to understand the two flaws with this approach: first, there is a very real possibility that some of our policies actually worsen the problem, increasing rather than decreasing sexual violence. Second, and perhaps more important, there is a strong possibility that our current allocation of scarce prevention resources means we are failing to prevent as much harm as we could with other choices.

...[W]e need to change our frames, to ask different and better questions about sexual violence prevention, to base our policies more on science than on intuitions and fear-based stereotypes. There is solid evidence that some of the current approaches cause adverse changes in the efficacy of the criminal justice system and an increase in sexual violence recidivism. There is also strong evidence that other approaches – tried and true supervision and treatment, primary prevention strategies – can have a much greater impact on decreasing sexual violence (Janus 2006; Lobanov-Rostovsky

2015). In contrast, our current approaches have limited success in their stated purpose of protecting against recidivistic sexual violence.

Our prevailing frames are depressing our ability to address sexual violence in the most optimal way.

An Overview of the Major Characteristics of US Policy on Sexual Violence

Our subject is a series of approaches to sexual violence, all of which had their genesis in the 1990s (Janus 2006). These initiatives include sexually violent predator (SVP) laws, registration and community notification laws (SORN or RCNLL), and a variety of residential and spatial restrictions. SVP programs, which are adopted in twenty US jurisdictions, use 'civil commitment' to continue to confine (or, in a couple of instances, supervise) sex offenders who are being released from prison. These laws require proof of a likelihood of future sexual dangerousness as well as some vaguely defined form of 'mental abnormality' that impairs the individual's ability to control his sexual misconduct. Theoretically, states are required to release individuals from SVP confinement as soon as they can be appropriately managed in less secure community settings (Indiana 1972; Hendricks 1997). ...Since SVP programs' inception, very few have been released (Lohn 2010). [pp. 286-87:] Registration and community notification laws (RCNL) are mandated by federal law, and therefore have been adopted in all states. Though details differ, these laws require convicted sex offenders to register with law enforcement, often for many decades or for life (Ellman and Ellman 2015). They also provide public access to information about offenders. Some states provide open access to information about all offenders (Prescott and Rockoff 2011). Other states tailor the degree of access by the risk level of the offender. Residential restrictions, which can be state-wide or local, impose spatial restrictions on where offenders can live or go. [p. 287:] What these all have in common is that they are addressed at recidivistic sexual offenders, meaning offenders whose identity is already known to law enforcement. These policies have been overlaid on changes to the criminal law that have broadened the definitions of criminal sexual conduct, attempted to make the criminal justice system more responsive to victims of sexual violence, increased average sentences for sexual offenses, and imposed automatic, long sentences on repeat sexual violence, particularly child sexual abuse (Janus 2006).

These laws all rest on the underlying assumption that sexual violence is stranger violence. The policies all seek prevention through separation. Directly through geographic separation, or indirectly through the identification of known offenders, these laws seek to keep 'them' away from 'us.' They are all based on the archetype of the 'sexual predator,' the stranger rapist who, undeterred by punishment, is almost certain to reoffend. Ellman and Ellman (2015) trace the legislative and judicial genealogy

(Continued on page 9)

of these laws, crystallized in a phrase adopted by the Supreme Court, parroted by numerous other courts, but without any empirical support: the recidivism of sex offenders is 'frightening and high.'

The legislative adoption of these laws was rushed, unencumbered by the complexities of scientific evidence. Registration and public notification laws arose and spread rapidly throughout the United States in the 1990s, culminating in the passage of the Adam Walsh Act at the federal level that mandated broad registration and community notification laws (RCNL) as a condition of receiving federal funds, SVP laws spread more slowly, often in response to horrific crimes. Residential restrictions have spread widely, but their reach has not matched the universality of RCNL laws.

Framing Our Approaches to Sexual Violence

[p. 288:] Of course, any sensible theory of sexual violence would inclusively examine the interaction between social determinants and bio-psychological determinants. But our public policy has taken a decidedly different pathway. It has rejected, for the most part, inquiry into the societal causes of sexual violence. It has focused on identifying dangerous individuals, rather than dangerous values, myths, attitudes, or practices.

In several writings, I have advanced the theory that the strength of this frame ties directly into the 'culture wars' that have raged since the 1980s. A persistent fault line has been the contest between social conservatives and feminists. Feminists claim that the 'patriarchy,' the embodiment of male power, is what allows rape and sexual assault to flourish, whereas social conservatives see traditional social structures (the family) as the best bulwark against rape (Janus 2006). The individualistic frame mandates that our focus be turned away from social structures like patriarchy, instead highlighting the abnormal constitution (psychological or biological) of the individual. The individualistic frame absolves us (as a society) from responsibility for sexual violence, giving us a relatively easy and pain-free way to address our obligations to prevent sexual violence. We need not reform our core values. All we have to do is identify the individuals who possess the aberrational sexually violent predisposition and separate them from us. This frame is fundamentally limiting. As Donna Dunn says, 'The absence of critical thinking about the larger social context ... short circuits strategies that could address this problem at its roots.' (Dunn., 2015, p. 876).

...This allows society to design policies that are based on differences in kind – with the underlying assumption that those individual characteristics never change, and justify categorical differences in the law, such as the creation of 'reduced rights' zones in which normal protections of the law are foregone. It allows us to disregard or devalue the rights – and pain – of the 'other' (Janus 2006).

There are several other highly consequential choices that have framed the questions

we ask, and therefore the solutions we find. One is an almost exclusive focus on recidivist violence, a small sliver of all sexual violence. The other is a set of memes that focus our attention on zero tolerance, and sparing no expense in preventing the 'next' horrific sex crime.

Perhaps the most influential, yet most invisible, choice we have made is to frame our sexual violence policy almost exclusively in terms of recidivistic sexual violence. Policy-makers and courts consistently justified these laws based on the unquestioned (but mistaken) assertion that all sex offenders have extremely high rates of recidivism, and that the central aim of prevention could be accomplished by addressing only recidivistic violence (Ellman and Ellman 2015).

[p. 289:] The exclusivity of this frame dangerously misdirects our attention. The relatively low rate of sexual recidivism – especially as compared to public perceptions – is one reason the focus on recidivism is harmful. Invasive policies, justified by generalizations about high rates of recidivism, cause needless harm to individuals; they are of flawed design and therefore of doubtful efficacy (Ellman and Ellman 2015).

But there is a greater distortion that is harder to see. Recidivist violence is a small sliver of all sexual violence. Most sexual assaults are committed by non-recidivists – that is, by individuals who have not been previously convicted of a sex crime. Of those sex crimes that are in the criminal justice system, somewhere between one in seven and one in twenty is committed by an individual previously convicted of sex crime – i.e., by a recidivist. (Janus 2006; Zgoba et al. 2012). The recidivism frame obscures the great majority of sexual violence....

Bierie (2015) characterizes this framework as asking whether these laws 'can ever help – whether there is any tangible examples in which a case was assisted or a victimization prevented' (p. 6). This approach – which I will refer to as the 'at least some benefit' frame – truncates our ability to evaluate the success of our public policy. Since spatial separation seems intuitively to produce 'at least some' benefit, we feel no need to look at unintended adverse effects, lost opportunities for prevention due to resource allocation choices, or the enormous harm caused to offenders and their families. It is in this way that these frames entail that sex offenders are viewed as the 'other,' a degraded class whose rights need not be respected, who have forfeited the right to a full place in society. There is no other way to understand the utility calculus underlying the 'at least some' benefit frame. It must mean that any benefit, no matter how isolated, outweighs the harms to offenders and their families, *a priori*. This frame corresponds to research findings that the underlying motivations for these laws are retributive (Carlsmith et al. 2007 as cited in Calkins et al. 2014).

[p. 290:] The public health approach entails a systematic method of analysis, a way of seeing the problem in a larger, more

contextualized framework. It uses systematic and empirically based information for deciding how best to attack a public health problem like sexual violence. It consciously looks beyond individual characteristics of offenders to identify causes that exist at a societal or community level. These classic steps that enabled public health to conquer infectious disease aim to address sexual violence comprehensively. The first step is 'ongoing systematic collection, analysis, and interpretation of data on the incidence, prevalence, and risk factors.' The second step is 'identifying causes' through research. The third step is the 'development and evaluation of programs.' Finally, the public health model engages in 'dissemination and implementation ... communicating which preventive programs work based on evaluation of data and putting these programs into practice' (Basile 2003) (Janus 2006, pp. 116-17).

The public health approach helps us understand the difference between thinking about a problem like sexual violence at the scale of individuals, and thinking about it from the perspective of the population as a whole. The public health approach allows us to see that there is 'collective' risk as well as individual risk, and that recidivistic violence accounts for only a fraction of the collective risk posed by sexual violence (Janus 2006, p. 117). Unlike the conventional narrow and politicized approach informing our current laws, public health advocates understand the need for a 'comprehensive approach addressing all levels of prevention' (Kaufman et al. 2002 as cited in Janus 2006, p. 117).

A report from the Minnesota Department of Health summarizes this approach: 'Most often, perpetrators are known by the victims. A sustained effort must occur to change the social norms and conditions that support male violence' (Minnesota Department of Health 2009, p. 8). The National Alliance to End Sexual Violence urges policies that are designed to hold offenders accountable, yet are 'grounded in research and assessed critically and routinely to ensure their effectiveness' and 'support primary prevention policies and practices' (Tabachnick and Klein 2011, p. 10).

Evaluating Our Legislative Approaches to Sexual Violence

[p. 291:] I argue ...that the burden has shifted to the proponents of these laws, for four reasons: first, the evidence is strong that the direct benefit from these laws is quite small; second, there is now convincing evidence that these laws, or at least some of them, actually increase sexual offending. There is also some evidence, less convincing, that these laws may impair the reporting and prosecution of sexual abuse. Third, there is strong evidence that other approaches to prevention are highly effective and underfunded. Finally, the persistent popularity of laws that are clearly counterproductive ought to dilute the deference customarily given to legislative action.

SVP Laws

[p. 295:] ...Calkins et al. conclude, 'Even among those highly considered for SVP commitment, detected rates of sexual recid-

ivism were still quite low' Mercado et al. 2011).

The selection procedures for SVP programs have been broadly shown to be suboptimal for choosing only the most dangerous for commitment. For example, several studies have shown that offenders who are actually committed are older than those who are not committed, despite the fact that research shows that aging diminishes risk (Ackerman et al. 2012; Lu et al. 2015; Lucken and Bales 2008). Further, in some states, these programs lack ongoing procedures to monitor the risk of committed individuals, in order to identify individuals whose risk could be reasonably managed in the community (Karsjens v. Jesson 2015; Van Orden v. Schafer 2015). Thus, factors like risk reduction through aging and treatment-induced change are not recognized, and there may be no system for identifying non-high-risk individuals who have been misidentified on the commitment process (Duwe 2013). This is significant given the research that show juries have little regard for actuarial risk assessments (Krauss and Sales 2001 as cited in Lu et al. 2015), and have very low risk thresholds for judging dangerousness (Boccaccini et al. 2013).

A recently published study by Minnesota Department of Corrections researcher Grant Duwe concluded that the recidivism rates of civilly committed individuals were only slightly higher than the likely recidivism rate for offenders who were not civilly committed (Duwe 2013). Similarly, McLawsen et al. (2012) report that average actuarial risk assessment levels for Nebraska's committed population 'are best described as moderate to medium' (p. 461).

[pp. 295-96:] Studies of two of the biggest SVP programs concluded that 'individuals are being over-selected for commitment (Florida Department of Children and Families 2013, p.24,' and 'There is broad consensus that the current system of civil commitment of sex offenders in Minnesota captures too many people and keeps many of them too long' (Minnesota Sex Offender Civil Commitment Advisory Task Force 2013 p. 1).

[p. 296:] Research from several perspectives shows that SVP programs have a very small impact on sexual offending. ...Lave and McCrary (2013) used historical forcible rape, sex-related homicides, and non-fatal child sexual abuse rates to determine whether a state's passage of an SVP law had an effect on the rates of these crimes; their results 'are consistent with SVP laws having no discernible deterrent or incapacitation effects' (p. 1402)....

The empirical data challenge the rationale for the high cost and drastic liberty deprivation of SVP programs. SVP programs consume a huge share of the prevention resources (Lohn 2010). SVP laws consume about a half billion dollars to confine about 5000 individuals in two-fifths of the states. The estimated expenditure in the US from registration and notification schemes in all 50 states is less: \$400 million (Biere 2015, p. 7). The per capita cost for confining a person in an SVP program, about \$97,000 (Continued on page 10)

per year, is 'nearly four times that of the \$26,000 per offender annual rate of general correctional costs (Gookin 2007)' (Mercado et al 2011, p. 12). The budget for the nationwide 'Sexual Assault Services Program' under the federal Violence Against Women Act (VAWA 2014) was \$27 million for FY2015.

[p. 298-99:] Opportunities Lost

In my book, *Failure to Protect* (Janus 2006), I suggested a number of thought experiments evaluating whether transferring money from SVP programs to broader interventions, such as intensive probation and parole supervision and primary prevention programs, might produce more effective prevention. I concluded these alternative approaches probably provide greater protection by preventing more sexually violent assaults. DeGue et al. (2014) confirm that this is a general principle of the public health approach: 'If a strategy is widely implemented, even a small effect on perpetration behavior may have a large impact' (p. 359).

[pp. 299-300:] While SVP programs consume increasing budgets, other forms of prevention, such as domestic violence services, child protection services, sexual violence education, police services, parole and probation, and victim services, are starved for funding (Potter, 2010; Shoenmann 2009; Washington State Strategic Plan for Victim Services 2005: 5). In Virginia, legislative leaders indicated that funding that state's SVP program will 'force [them] to take money from other programs, many of which received dramatic cuts last winter when legislators trimmed billions in core services such as education and health care to balance the state's budget' (Potter 2010).

...In Minnesota, '77% of sex offenders are released from prison without treatment,' due to a shortage of treatment beds (Palmer 2010). Yet spending on Minnesota's SVP program is rarely reined in. 'We have to cut something else to pay for it,' said a prominent state legislator (Lohn 2010).

This critique is not only the work of civil liberties critics. ATSA says 'Victim advocacy organizations have questioned the large expenditure of funds on sex offender management tools that may not really protect communities, while resources and services for victims are being cut' (Tabachnick and Klein 2011, p. 9).

Commenting on a federal court decision holding that Minnesota's SVP program is unconstitutional, the Minnesota Coalition Against Sexual Assault (2015, p. 30) said 'Minnesota's leading network of advocates for victims of sexual assault agrees with Federal Court Judge Donovan Frank's Order declaring the Minnesota Sex Offender Program unconstitutional. ...Public safety is served by prevention and true rehabilitation. A dysfunctional system does not help victims, and it does not help public safety.'

[p. 300:] Conclusion

We must change our framework so that it is focused on addressing the most danger, not simply the most dangerous. Such an approach demands systematic and comprehensive interventions that are based on

evidence of effectiveness. Resources need to be devoted to evaluating approaches, and implementing the effective approaches. Defiant rejection of empiricism sounds tough on sexual violence, but it willfully ignores approaches that could prevent more crimes.

We have the resources for prevention. We are spending them on programs that at best have modest returns, and at their worst, increase the problem. Yet we know there are programs that could increase prevention by orders of magnitude....'

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Could CA Reduce SO Tier for 1,000s?

RH, *Alliance for Constitutional Sex Offense Laws*, "CA: CASOMB Issues Report Proposing Changes to Tiered Registry Law" *Texas Tea Newsletter*, Issue 22 (January 12, 2024).

Text: "The California Sex Offender Management Board (CASOMB) has issued a report which recommends to the state legislature several changes to the Tiered Registry Law. If the legislature adopts these changes, thousands of individuals required to register who are currently ineligible to petition for removal from the registry will become eligible. However, no one will be automatically removed from the registry if the legislature adopts these changes. The largest group of registrants who would

be helped by these changes are those convicted of felony possession of child pornography. The members of this group are currently assigned to Tier 3, which requires lifetime registration. In the report, CASOMB has recommended that the members of this group be assigned to Tier 1, which requires 10 years of registration.

'The benefits of this recommendation would help those convicted in a state court as well as a federal court,' states ACSOL Executive Director Janice Bellucci. 'Therefore, we estimate that more than 10,000 people will become eligible to petition for removal from the registry after they register for 10 years.'

Another group of registrants who would be helped by these changes are those convicted of Penal Code Section 288(c)(1), lewd or lascivious acts with a minor whose age was 14 or 15. Registrants in this group are currently assigned to Tier 3, which requires lifetime registration. In the report, CASOMB has recommended that members of this group be assigned to Tier 2, which requires 20 years of registration.

The third group of registrants who would be helped by these changes are those convicted of Penal Code Section 288.2, 299.3 or 288.4. Those individuals are currently assigned to Tier 3, which requires lifetime registration. In the report, CASOMB has recommended that members of this group be assigned to Tier 1, which requires 10 years of registration.

'All of these proposed changes are important steps toward an improved Tiered Registry Law,' stated Bellucci. 'That is why ACSOL supports the proposed changes. Please know, however, that ACSOL will continue to advocate additional changes to that law including the creation of an off-ramp for those assigned to Tier 3.'..."

the Legal Pad

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