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At Last: The Straight Story on Dynamic Risk Factors & RNR, Part 1

by Cyrus Gladden

Dynamic Risk Factors

"Dynamic factors" in sex offender assessment are typically limited by assessors only to negative factors (e.g., "criminogenic needs"). More often than not, such "dynamic" factors have no basis in science, but have been adopted by assessors simply because, on a purely intuitive, heuristic level, they seem like they should make a difference. However, almost all dynamic factors that have been subjected to statistical research have been proved to have only incremental predictive significance, and then only about 50% of the time. In the rest of the cases examined, the dynamic factor under scrutiny turns out to have significance in the contrary direction. This is not science at all. In particular, the "Stable-2007" and the "VRS-SO" risk prediction tools (both used by MSOP) heavily rely on dynamic factors, including subjective decision-making by the assessor.

Worse, more than half of risk assessors using a risk assessment instrument (RAI) will 'adjust' the percentage of likelihood of recidivism based on either personal impression of inaccuracy of certain aspects of the RAI in question or subjective impressions of the offender scrutinized. Such 'adjustments,' typically not divulged to the court, convert the actuarial risk assessment (ARA) process to a clinical risk assessment (CRA) process, with its subjective impressions and even lower accuracy.

Gregory DeClue, "Avoiding Garbage 2: Assessment of Risk for Sexual Violence after Long-Term Treatment," 33 *Jour. Of Psychiatry & Law* 179 (Summer 2005), presents these points about use of "dynamic factors" to divine a tendency toward sex-crime recidivism:

p. 179 (abstract): "...[T]here are considerably less empirical data regarding dynamic factors than static factors. Therefore evaluators should use considerable caution in using dynamic factors to adjust risk assessments based on static factors, and we should clearly communicate the lack of empirical base for risk-assessment adjustments based on dynamic factors."

p. 187: "...I know of no data suggesting that assessment of such factors during long-term confinement assists in prediction of sexual recidivism after release."

p. 197: "...Show me a peer-reviewed journal article that shows cross-validated evidence that certain dynamic risk factors add incrementally to the accuracy of actuarial risk assessments and I will show you evaluators who are likely to agree about when it is reasonably safe to release a person from long-term sex-offender treatment. Problem: no such research. Result: disagreement."

p. 198: "For our purposes, the key findings are that the mean effect sizes for risk assessment instruments are relatively high (above the 'medium' range) and the mean effect sizes for dynamic variables associated with treatment success are relatively low (often below the 'small' range). ...The mean effect sizes for lack

of victim empathy, denial of sexual crime, minimizing culpability, low motivation for treatment at intake, and poor prognosis in treatment (post) are -.08, .02, .06, -.08, and .14, respectively."

"...[W]e should not pretend that what we know about the importance of dynamic risk factors is comparable to what we know about the importance of static risk factors...."

Many matters have been cited in Minnesota appellate opinions upholding commitments as indicating a high likelihood of future sex-offense recidivism. Yet many such supposed 'factors' have been scientifically debunked. For instance, A.J.R. Harris & R.K. Hanson, "Clinical, Actuarial and Dynamic Risk-Assessment of Sexual Offenders: Why Do Things Keep Changing?", 16 *Jour. Of Sexual Aggression*, No. 3, pp. 296-310 (Nov. 2010), at p. 298, reveals that "many evaluators had assumed that having been sexually abused as a child, not displaying victim empathy, and having low esteem would be related to sexual recidivism; this turned out not to be the case." Further, at 302-03, they add that, based on results of one large Canadian study (Dynamic Supervision Project), three attitude items (namely, "the offender's acceptance of attitudes supportive of sexual entitlement, rape and sexual activity with children") were dropped from a revision of one "dynamic" RAI ("Stable-2007"), due to lack of association with sexual recidivism." Last, from the same study, those authors found that "...emotional collapse, collapse of social support, and substance abuse were not related consistently to sexual or violent recidivism." Accord: Gregory DeClue, "Avoiding Garbage 2: Assessment of Risk for Sexual Violence after Long-Term Treatment," 33 *Jour. Of Psychiatry & Law* 179 (Summer 2005), also adding "two other claimed factors, denial and hostility to treatment, have been repeatedly determined by forensic experts as having no link to future sex crimes. Laura Mansnerus, "Unfinished Sentences: Keeping Prisoners as Patients," *N.Y. Times*, Nov. 17, 2003, at A1; accord: Prentky, Janus, et al., "Sexually Violent Predators in the Courtroom," at 12 *Psychol., Pub. Pol'y, & Law* (2006). In this article, these authors also note that claimed factors of "negative clinical presentation," "low motivation for treatment," "poor progress in treatment", and "minimization" have all been debunked as having no risk-relevance.. *Id.* at 385. R. Karl Hanson, "Predictors of Sexual Offender Recidivism: A Meta-Analysis," 1996-04 (Public Safety and Emergency Preparedness Canada), p. 12, debunks offense denial as a dynamic risk factor thus: "...Contrary to what is commonly assumed, those sexual offenders who denied their offenses were no higher risk than other offenders." Finally, Hanson, R.K. & Busisiere, M.T., "Predicting Relapse: a Meta-Analysis of Sexual Offender Recidivism Studies," 66 *Jour. Of Consulting and Clinical Psychology* 348-362 (1998), cite these additional claimed dynamic factors as having no predictive value as to later recidivism: general psychological problems, low social skills; length of treatment; Antisocial Personality Disorder; deviant sexual preferences or

attitudes; anger problems; marital status; prior nonviolent offenses; history of juvenile delinquency; developmental history of family problems; negative relationship with mother; and negative relationship with father.

The range of such supposedly extraneous matters proposed by clinically oriented evaluators as further factors, upon which to justify inflating the RAI-derived recidivism probability is endless. Dennis M. Doren, *Evaluating Sex Offenders: A Manual for Civil Commitments and Beyond* (Sage Publ'ns. 2002), at pp. 167-68, cites these, for instance, as among such matters lacking in scientific confirmation:

"insulting, teasing, and obnoxious verbal behaviors; lack of consideration of others; unconventional attitudes; criminal attitudes; shallow affect, superficiality; tension; medication non-compliance; problems with housekeeping or cooking; poor self-care and personal hygiene; substance abuse; physical self-abuse; suggestive and easily led; problems with money management; ...firestarting; criminal associates; inappropriate dependency).... "excitement, anxiety, mania, anger, ...depression, guilt feelings.... "poor use of leisure time, unpopular, social withdrawal, inactivity, excessive shyness, ...poor assertion, lack of family support).... "violent lifestyle, criminal personality, ...weapon use, substance abuse...."

Lawyer X, *Deviant Justice: The American Gulag*, (In *Depth Media*, 2014, avail.: www.amazon.com), at pp. 83-84, adds these further "dynamic factors": "poor social support, antisocial peers, antisocial/impulsive lifestyles, ... hostility, ...anxiety, poor coping mechanisms, ... intimacy deficits, ...unemployment, ...poor grooming." All of these matters are amorphous and subject to extremely subjective judgment. Moreover, none of them has any clearly demonstrated causal or indicative relationship to sex crime commission.

In particular, the dynamic risk factors under the name of "self-regulation" actually refers to inability to resist impulse. However, as the following excerpt shows, often it is utterly transfigured to behaviors that are clearly highly planned and carefully calculated and shrewdly carried out with circumspection, such as sexual grooming of prospective child sexual abuse victims.

Ian A. Elliott, "A Self-Regulation Model of Sexual Grooming," 18(1) *Trauma, Violence & Abuse* 83-97 (2017)

Text Excerpts:

p. 83: "A preparatory process has been widely accepted to be a common feature in the sexual offending process (Beauregard, Proulx, Rossmo, Leclerc, & Allaire, 2007; Finkelhor, 1984; Kaufman, Hilliker, & Daleiden, 1996; Smallbone & Wortley, 2000; Wolf, 1984). Although not all sex offenses involve preparatory processes, it has been said that sexual assaults rarely occur spontaneously, and many studies have found that a majority of sexual offenders self-report engaging in behaviors designed to develop a relationship with their victim prior to the initiation of sexual contact (see table 1 in Leclerc, Proulx, & Beauregard, 2009). Further-

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

more, sex offenders may attempt (or may be required) to engage in the same type of behavior to develop relationships with caregivers, guardians, and others in the wider community in order to gain access to children (McAlinden, 2006; Ost, 2004)."

p. 85: "O'Connell's model of cybersex-exploitation. O'Connell (2003) was among the first to examine Internet sexual grooming strategies, using observation methods involving undercover researchers posing as young, isolated females, and created a model of 'cyberexploitation.' O'Connell's model appears to contain three phrases that, for the purpose of this review, are labeled as targeting, grooming, and exploitation. Focusing on the grooming phase, O'Connell (2003) outlines seven stages that typically occur in sequence: (1) friendship forming, (2) relationship forming, (3) risk assessment, (4) exclusivity, (5) sexual, (6) fantasy reenactment, and (7) damage limitation.

In Stages 1 and 2, the protagonist seeks information about the target as a means of assessing aspects of their circumstances that may make them more amenable to manipulation as well as gaining insight into the target's life (in order to relate to them). In Stages 3 and 4, the protagonist builds this relationship, establishing secretiveness and assessing the potential for detection (e.g., the whereabouts of caregivers, or surveillance over computer use). After establishing that it is safe to do so, the protagonist seeks to isolate the target and create exclusivity between themselves and the target. The protagonist seeks constant feedback from the target allowing them to assess the levels of trust. Once the protagonist feels they have gained the child's trust, Stages 5, 6, and 7 involve introducing sexual topics into conversation and gauging the target's responses. Three tactics are hypothesized for introducing sexual topics: (1) gentle boundary pressing; (2) reducing inhibitions through exposing the child to pornography or sending/requesting sexual images, and (3) fantasy reenactment, either through mutuality (encouraging the child to participate in fantasy) or through coercion."

Clearly, there is nothing at all that is impulsive about this process. Hence, attaching the self-regulating, problem dynamic risk factor to a grooming offender would simply be in factual error. Yet the vagueness and lack of limits to dynamic risk factors allow innumerable errors arising from misunderstanding the nature of the respective dynamic factors.

An even larger difficulty concerns so-called dynamic factors altogether, which, as Table 1, below (from Bourgon and Bonta, immediately *infra*) shows, almost always intermingles static factors with those which are supposed to be purely dynamic.

.....

Guy Bourgon, James Bonta & Public Safety Canada, "Reconsidering the Responsibility Principle: A Way to Move Forward," 78(2) *Federal Probation* 3- (Sept. 2014), discusses this confusion and improper intermingling:

Text Excerpts:

"Table 1. Static/Dynamic Factors to Which

<u>Criminal History (Purely Static)</u>
Antisocial Personality Pattern (early onset of antisocial behavior, pro-criminal attitudes, previous failure on parole/probation, history of violent behavior) (Purely Static)
Procriminal Attitudes (Dynamic)
Procriminal Companions (Dynamic)
Family/Marital (generalized family dysfunction, marital strife) (Purely Static)
Education/Employment (level of education, unemployed, conflict at work) (Purely Static)
Substance abuse (alcohol and/or drugs) (Nearly Purely Static)
Leisure/recreation (lack of prosocial activities) (Nearly Purely Static)

Re-Arrest During Supervision Attributed

(p. 4): "...[A]n assessment of dynamic risk factors, particularly those factors that Andrews and Bonta (2010a) refer to as part of the Central Eight risk/need factors [Table 1, appearing immediately *supra*], is crucial for effective rehabilitation programming."

[NOTE: For the confined, 6 of these 8 factors are purely or nearly purely static in nature, given that little or nothing in confinement allows one to better them. Only Items 3 and 4 apply to current matters and are therefore dynamic.]

Melissa Hamilton, "Risk-Needs Assessment: Constitutional and Ethical Challenges," 52 *American Criminal Law Review* 231 (Spring 2015), at 240-42, succinctly summarizes this assessment technique thus:

"...[S]cholars and practitioners are debating the appropriateness of using risk-needs tools for criminal justice-oriented decisions due to the presence of potentially objectionable variables within them. Risk-needs tools incorporate a host of factors that are demographic in nature, score on measures involving personal and social functioning, increase risk predictions based on the presence of mental conditions and drug addictions, and rate attitudes indicative of an antisocial outlook. Consequently, a variety of the items scored in risk-needs assessments raise constitutional, ethical and normative issues.... [citing Michael Tonry, "Legal and Ethical Issues in the Prediction of Recidivism," 26 *Fed Sent'g Report* at 167, 169 (2014).]

"Risk-needs tools normally score at least several demographic characteristics of the individuals evaluated. Among various instruments, these entail age, gender, citizenship, and marital status. ...Risk-needs tools orient toward rating demographic variable regarding various aspects of family of origin, including having lived with both biological parents until age sixteen, a criminal family, parental alcohol problem, and current family situation. Ratings are commonly provided relative to the individual's personal history, namely criminal background, educational attain-

ment, and employment stability; see also: Joanna Amirault & Patrick Lussier, "Population Heterogeneity, State Dependence and Sexual Offender Recidivism: The Aging Process and the Lost Predictive Impact of Prior Criminal Charges over Time," 39(4) *Jour. of Criminal Justice* 344-354 (July-Aug. 2011), Abstract [subsection:] Highlights: "...Prior offending in early adulthood loses its predictive value with the passage of time. ... Offender age at release and educational achievement were associated with non-recidivism. Risk assessment should consider both the age and the passage of time to assess risk of reoffending.]. The instruments often contain measures implicating socioeconomic status, such as financial condition, ownership of home, residential stability, and living in a neighborhood with high crime or illegal drug activity; see also Edward Latessa et al., "Creation and Validation of the Ohio Risk Assessment System, Final Report," 49 app A & note 84 (2009), available at http://www.ocjs.ohio.gov/ORAS_FinalReport.pdf (describing the Ohio Risk Assessment System: Pretrial Assessment Tool).

"Some risk-needs tools compile and rate various aspects of personal and social functioning. Examples consist of elementary school maladjustment and problems with personal support, in addition to factors focused on reliance on social services or public assistance, which may suggest deficits in personal responsibility. Various measures rate relationship issues involving family, consisting of relationship with parents and marital/family problems, and social functioning, such as a history of problems with relationships, social adjustment problems, lack of pro-social support, and maintaining criminal acquaintances.

"Addictions and mental conditions are commonly integrated therein. These include problems with alcohol or drugs, a history of a mental disorder, personality disorder, psychopathy, or of mental health treatment. Several of the instruments judge attitudes, such as temperament towards supervision and change, lack of insight, personal instability, and problems with stress and coping.

"...[R]eliance upon risk-needs assessments when they incorporate potentially problematic factors in the important arena of criminal justice decisions incites constitutional and moralistic concerns. ...The moral issues involve political unease when decisions are based on immutable characteristics over which individuals have no personal control or that may serve directly or by proxy to replicate discriminatory practices."

Each of the underlined words/phrases in this quote refer to matters that are either historical, beyond the control of the individual in question or otherwise immutable, concern one's freedom of thought (e.g., "attitude"), or simply blame the individual for the mental/emotional shortcomings or problems that hamper him. When MSOP applies these claimed recidivism factors under guise of "dynamic" considerations, it is actually simply claiming such immutable

factors, such matters of personal choice and freedom of thought, and mental and emotional states besetting the individual, which the individual either cannot change or which are not legal subject of a demand for change or relinquishment. Penalizing the individual deprives the individual of substantive due process and distinctly, also comprises class identification and its punitive impact.

MSOP uses each of the following dynamic risk factors in conjunction with its "Matrix Factor" system of treatment (not recognized in treatment elsewhere):

- resistance to rules/supervision;
- negative social influences;
- poor self-regulation
- general hostility
- hostility toward women
- offense supportive attitudes
- antisocial attitudes and behavior
- impulsivity
- sexual preoccupation
- sexually deviant interests
- sexualized coping
- emotional congruence with children
- poor adult attachment
- unstable work history

No peer-reviewed published scientific studies have validated any of these factors.

Beyond the lack of any causative or indicative connection between a sex offender's "attitude" and later reoffending, all matters of mentation, whether cognitive or emotional, are protected by the freedom of thought and conscience: inherently implicit in the First Amendment of the United States Constitution. To acknowledge that freedom of thought, but then to permit detention on account of its exercise is in reality a total disembowelment of that right.

Lawyer X, *supra*; at 90-91, cites Prentky, Janus, et al, "Sexually Violent Predators...," *supra*, at 12 *Psychol. Pub. Pol'y & Law* 378 as explaining that use of these claimed factors is done in an adverse, 'cherry-picking' manner, seeking to confirm *a priori* opinion that the offender remains dangerous. In other words, merely any criticism whatsoever that can be laid against a given sex offender, regardless how far removed from sex offending, can be claimed, with no scientific accountability, to justify increasing the asserted level of sex-crime recidivism probability. This is the end of science.

Lawyer X, *ibid.*, states that the aforementioned MSOP Report admits use of such "negative dynamic risk factors." In this context especially, it is neither accurate nor fair to confine someone for decades or for natural life merely because some RAI rater thought he resembled certain factors ascribed to others, or even more uncertainly, just because he was assigned the same total RAI scores as some others. This only illustrates that all prediction of sexual re-offense is ultimately based on group 'membership.' But an average outcome over that group cannot be a valid prediction of outcome of any individual in that group

who simply does not conform to that average.

Conceding that the 'static' actuarial approaches of ARA had proven inaccurate, the *MSOP Report* trumpets a more recent emphasis on dynamic risk assessment techniques. However, this discussion ignores the aforementioned "protective factors that reduce recidivism likelihood." Instead, it only refers (at p. 10) to negative dynamic risk factors that "are associated with risk for reoffending," redefining such factors as being comprised of "psychological vulnerabilities or mechanics" that "significantly increase risk for reoffending." This contravenes the actual forensic literature, which describes "dynamic" risk factors as all things, whether internal or external, or whether deliberately altered by an individual offender or instead simply either spontaneous or inexorable (such as the effects of middle- or old-age on libido).

MSOP's emphasis on a mis-definition of "dynamic risk factors" as being on an individual's purported "criminogenic needs" is a desperate attempt at reinventing the rationale for commitment in a way that returns the focus to 'clinical impressions' without any accountability. Now MSOP thus spins dynamic factors as being evils particular to each sex offender, such that something terrible and ominous can be said against each one both in commitment cases and in petitions by any committed sex offender for release/discharge.

Sharon Casey, "Dynamic Risk and Sexual Offending: The Conundrum of Assessment," *Psychology, Crime & Law* (published online: Dec. 23, 2015) (<http://dx.doi.org/10.1080/1068316X.2015.1111366>), reveals conceptual questions about the nature of dynamic risk factors and explains the problems with attempting to identify and assess these so-called dynamic risk factors, thus:

[Citing Mann, Hanson & Thornton, 2010], Casey states:] "...the authors offered no explanation regarding the causal nature of these risk factors,..."

"...[E]vidence for a definite link between changes in dynamic risk and reduced recidivism remains limited. (citing, *inter alia*, Hanson & Morton-Bourgon, 2005; Oliver & Wang, 2011). This clearly raises questions about the RNR paradigm and, as a corollary, the assessments based on its framework and how these assessments are interpreted."

"...[A] lack of clarity remains about how we understand the very notion of dynamic risk (see Ward & Beech, 2015)."

"Dynamic Risk Assessment
The dominant RNR paradigm (Andrews & Bonta, 2010) conceptualises dynamic risk as enduring psychological or behavioral features shown not only to correlate with recidivism but, due to their variability, amenable to change following intervention (Bonta, 1996; Hanson & Bussiere, 1998; Hanson & Harris, 2001; Proulx, Perreault & Ouimet, 1999; Thornton, 2002)."

The main dynamic risk tool used by MSOP, the Stable-2007, is widely criticized for its subjective and open-ended criteria judgment standards. Dynamic risk factor

application in general is open to a vast sea of differing interpretations. Further, the statistics behind use of each specific dynamic risk factor are notoriously unstable; different researchers have reached opposing results about almost all such dynamic factors. Dr. Pascucci (formerly of MSOP) conceded: "...[T]here's some qualitative assessment, so I guess some subjectivity." (*Karsjens Trial Tr.*, v. 8, p. 1676).

Among the vague and subjectively assessed factors in the Stable-2007 are these: lack of concern for others, impulsivity, poor problem solving, hostility towards women, and negative emotionality. (*Id.*, p. 1677). *State v. Michael Regan*, Opinion, No. 10-E-64, 2011 N.H. Super. LEXIS 110 (New Hampshire Superior Court, N. Dist. Of Hillsborough County, Apr. 12, 2011), at p. 12, adds mention of these additional factors on the Stable-2007: absence of significant social influences, a lack of capacity for relationship stability, emotional identification with children, feelings of general social rejection, sex drive/preoccupation, sex as a coping device, deviant sexual preference, and the extent of cooperation with supervision. In addition to the uncertainty as to the presence of each of these factors, just what, if any, relationship exists between most of them and sexual offending is utterly unclear and completely unproven. It is simply a list of 'guesses' at recidivism factors. While some might apply to rapists of adult women, it seems intuitively clear that those same factors (e.g., hostility toward women) have nothing to do with sexual recidivism as to pedophiles. Dr. Pascucci admitted that the Department of Human Services had never conducted a study of application of the Stable-2007 as to inter-rater reliability. (*Id.*, p. 1678).

Moreover, this list is open-ended, and other matters may be imported into the instrument by the rater on an *ad hoc* basis in any given case. In *Regan*, for instance, the court observed: "...Because Dr. Jensen merely borrowed factors and employed them out of context, the value that Stable-2007 would ascribe to the factors is not considered. The result is the items are used in an idiosyncratic manner and without empirical support."

In *Regan* (*ibid.*), Dr. Abbott also questioned whether the items overlap or are redundant with items on the actuarials used by the MDT. For example, "Capacity for Relationship Stability" on the Stable-2007 appears to duplicate the "Intimacy Deficits" factor on the Static-99R...

"The result is that it is unclear whether applying the Stable-2007 risk items in this manner creates an artificial increase in the risk of recidivism through the use of duplicative or invalid factors. Accordingly, testimony regarding the Stable-2007 dynamic risk factors is inadmissible." (*ibid.*)

"The Stable-2007 as an instrument has only been standardized on community samples, meaning that use of this tool in an institutional setting will require some modification along with a degree of caution and interpretation. This is not currently happening at MSOP." (*Karsjens 706 Experts' Re-*

port, p. 40, quoted at *Trial Tr.*, pp. 542-43; accord: Dr. Pascucci, *Trial Tr.*, v. 8, 1679; the Stable 2007 hasn't been validated on an institutionalized population). On this, Dr. Caldwell testified, "The Stable-2007 was developed and normed with community samples. And many of the items have to do with the selection of peers, an association of other individuals, things that are essentially meaningless in a confined setting where the individual is only allowed to interact with certain individuals under certain limited circumstances. And so, that is really not an appropriate scoring risk scale for an individual that has been confined. It's really not an appropriate scale to be using. I would not expect those -- I don't think there is any basis to expect that those scores would be valid." (*Karsjens Trial Tr.*, v. 11, p. 2508).

Despite this fundamental criticism, Dr. Wilson observed that MSOP uses the Stable-2007 "as part of the treatment progress review. I think it's also used if there is an evaluation for the SRB. So if someone is going forward to the SRB -- and actually, that's where we observed it most. We had the opportunity to observe two or three SRB hearings, and in those, there was reference to the Stable-2007." (*Karsjens Trial Tr.*, v. 3, pp. 548-49). Dr. Freeman stated flatly that MSOP use of the Stable-2007 "is not appropriate for an inpatient population." (*Id.*, v. 4, p. 769). See also: *Gregory DeClue*, "Avoiding Garbage 2: Assessment of Risk for Sexual Violence after Long-Term Treatment," 33 *J. Psychiatry & L.* 179, 198 (2005) (advising caution in the use of dynamic risk factors in determining whether offenders continue to meet commitment criteria).

Dr. Vietanen explained the impact of this procedure:

"Q. What would a higher score on the Stable mean?"

"A. A higher scoring increases risk. So I can give you an example.

"Q. Please.

"A. On the Stable, these are dynamic risk factors. I may read someone's finding of fact and not see impulsivity, for instance, in their offending pattern. So I may have scored it a 1 in the middle, because they are getting a 0, 1 or a 2. So until we get to know them better, we don't know, are they a 0, you know, with really not an impulsivity problem, or are they a 2 with a huge impulsivity problem and I just didn't see it? And Dr. Allen explained to me that until we get to know them better, we will assume it is higher. So there were multiple times that they went to 2s when I would have scored them 1s until we got a better handle on the client." (*Trial Tr.*, *Id.*, pp. 2299-2300). Dr. Vietanen stated that this happened "regularly." (*Id.*, p. 2364).

Thus, in essence, Dr. Vietanen was being told by her superiors to err on the side of assuming greater danger than any known facts would warrant, and often contrary to known facts (such as those in the findings of fact in her example), and to continue to do so until some contrary information disproved the factor in question.

Even more troubling, Dr. Vietanen testified that group therapy notes are sometimes written in deliberately adverse ways in a deliberate effort to thwart a given treatment participant's progress in treatment simply because he is disliked, citing this example:

"...[T]he staff was told to document every single thing Mr. Karsjens did in group. That seemed inappropriate. Part of what Mr. Karsjens was asking was how are we supposed to feel safe in a treatment group when we have persons who were security personnel now in our treatment group. And that was a real sticking point for him. My question to our clinical supervisor on the unit was, are you asking us to target Mr. Karsjens in documentation for his behavior more than anybody else? I didn't get a response. I got a look." (*Id.*, p. 2308).

Currently, MSOP uses a second dynamic risk assessment tool as well: "SAPROF." *Dahlhym Yoon et al.*, "Factors Predicting Distance from Reoffending: A Validation Study of the SAPROF in Sexual Offenders," 62 *Int'l Jour. of Offender Therapy & Comparative Criminology* 697-716 (Issue 3, Feb. 2018), provides this stark review of the relative uselessness of the SAPROF tool:

Abstract excerpt:

"...[P]redictive validity [of the SAPROF] for various types of recidivism was rather small to moderate. There was a clear negative relationship between the SAPROF and the SVR-20 risk factors.

Whereas the SAPROF revealed itself as a significant predictor for various recidivism categories, it did not add any predictive value beyond the SVR-20. Although the SAPROF itself can predict distance from recidivism, it seems to contribute to the risk assessment in convicted sexual offenders only to a limited extent, once customary risk assessment tools have been applied."

Because SAPROF takes a dynamic approach, yet it adds nothing to static assessment results through tools such as the SVR-20, its failure serves as a condemnation of the entire notion of dynamic factors as purported recidivism risk indicators.

By our very nature, humans are not only changeable, we are constantly changing, even when we don't want to and when we are unaware of such personal change. Even firm intent to recidivate can, and usually does melt away over time as individuals experience and witness numerous events, learn of myriad things, and have discourse with any number of other individuals. Life is full of advance repentance of such temptations to do evil deeds, whether petty or enormous. As surely as each of us has experienced some such abandoned temptation, it is unfair to treat others as incapable of such abandonment of temptation. To commit someone to lifetime detention engages exactly that presumption, and then puts the seal of judicial condemnation, not upon the deed, but upon the man. Editor's Closing Note: Part 2 of this series examines Risk-Need-Responsivity (RNR)

(Continued on page 4)

theory with close scrutiny. Concluding this series, Part 2 then summarizes the actual facts and scientific conclusions about both Dynamic Risk Factors and RNR in assessment and treatment of sex offenders.

Franklin Explains Junk-Science Paraphilias

Karen Franklin, Ph.D., "Junk Science Paraphilias Remain Popular Despite Official Rejection, Study Finds." <https://forensicpsychologist.blogspot.com/2024/10/junk-science-paraphilias-remain-popular.html> (Oct. 4, 2024)

Text: "Sometimes, you can't win for losing.

Just over a decade ago, opponents of junk science in court won a hard-fought battle when they succeeded in keeping two unreliable sexual-deviance diagnoses from debuting in the fifth edition of the American Psychiatric Association's Diagnostic and Statistical Manual of Mental Disorders (DSM).

Now, a new study finds that the rejection did nothing to stop the introduction of these diagnoses in court. Rather, they are being snuck into forensic reports and testimony through the back door, via two vague catchall labels inserted into the DSM manual in 2013. And although proponents had argued at the time that these residual labels would reduce confusion and improve diagnostic reliability, the study suggests that the opposite has occurred.

Long-time readers of this blog may recall the brouhaha over the two novel conditions of 'hebephilia' and 'nonconsent.' Both were considered but rejected for the sexual disorders ('paraphilias') section of the 2013 DSM. Their rejection owed to their lack of proven reliability or scientific validity. Neither condition has a standard definition, which is a basic precursor to accurate scientific measurement. Hebephilia generally references a sexual attraction to youths in the pubertal stage of development, while nonconsent refers to attraction to sexual coercion.

A Single Niche

The single niche where the two labels are in widespread use is a forensic one: Sexually violent predator (SVP) litigation. That's because the indefinite civil confinement of serial sex offenders has been ruled unconstitutional except in cases where an offender poses a substantial future danger to the public due to a formal mental disorder. The lobby to create the new disorders of nonconsent and hebephilia was led by forensic psychologists working in the SVP trenches, along with psychologists at a Canadian clinic with outsized influence over the paraphilias section of the 2013 DSM manual. The American Psychiatric Association's refusal to label rapists as mentally ill has encouraged some evaluators to 'bend the language of the DSM' to make it work.

The current researchers found that 'nonconsent' and 'hebephilia' are the two most common bases for invoking an idio-

syncratic catchall label of 'Other Specified Paraphilic Disorder' (OSPD). Their findings are consistent with a recent review of U.S. legal cases that found that large proportions of civilly committed sex offenders – including about half in California and 43% in Washington – are diagnosed with 'OSPD – nonconsent.'

The study, published in the journal *Sexual Abuse*, is the first to systematically analyze the prevalence and patterns of use of OSPD and another vaguely defined label, 'Unspecified Paraphilic Disorder' (UPD), in sexually violent predator litigation. It analyzed SVP evaluations in Florida over a four-year period. Because the researchers aimed to calculate the reliability of the disputed labels, only cases in which a convicted sex offender was evaluated by two different psychologists were included. In all, 190 separate cases involving 380 forensic reports were analyzed.

At least one paraphilia was diagnosed in four out of five cases reviewed. Pedophilia was the most invoked, followed by the catchall categories of QSPD and UPD.

OSPD's reliability – or the agreement among two psychologists evaluating the same man – was abysmal. In cases where one evaluator assigned a diagnosis of OSPD, there was a less-than-chance likelihood that a second evaluator would agree. The kappa reliability statistic was a very poor .21, far below chance agreement. Kappas of below 0.4 are generally considered to be below the minimum reliability threshold in the forensic arena.

Evaluator disagreement was even more profound with Unspecified Paraphilic Disorder, with two psychologists agreeing about its presence only 30% of the time. That comes as no surprise. That label, as critics have long pointed out, is inherently unreliable, in that it is designed to be used in circumstances in which there is not enough information to make a specific diagnosis, or a clinician chooses not to specify the reason why it is being assigned, according to the manual's instructions.

One of forensic psychology's dirty little secrets is that the assignment of controversial labels often hinges as much on evaluator whims as on the facts of the case. For example, research has found that some evaluators routinely assign higher scores than others on measures of psychopathy, an especially prejudicial label. The current research showed this same problematic pattern with diagnoses of OSPD. Two of the 21 psychologists under study proffered that catchall diagnosis in most of their cases, whereas 38% of the clinicians assigned it in fewer than one out of four cases; one evaluator never used it at all. This suggests that case outcomes are being influenced not only by offender characteristics but by which psychologist happens to be assigned to the case.

Similar evaluator variability was evident when the researchers zoomed in on OSPD diagnoses in which either hebephilia or nonconsent were proffered as its basis. Three evaluators used the term 'hebephilia' in half of their OSPD diagnoses, while nine evaluators never used hebephilia-related

terminology at all. And evaluators agreed on the hebephilia label in only about one out of four instances. Regarding nonconsent, 13 evaluators invoked it in at least half of their evaluations, whereas five evaluators never used that specifier.

The study's authors theorized that the widely ranging rates of use of the OSPD and UPD labels likely reflect hesitancy by some psychologists to proffer diagnoses 'with vague diagnostic criteria and debatable level of empirical support.'

What all this suggests is that whether an offender is said to have a mental disorder pertaining to an attraction to pubescent minors and/or rape hinges in large part on the luck of the draw as to whether they are assigned to Dr. Jones versus Dr. Smith.

The large variance among evaluators is especially remarkable in that 'adversarial allegiance' was not in play. This forensic bias becomes an issue when evaluators' opinions are influenced by whether they were retained by the prosecution or the defense. Here, all of the evaluators were members of the same ostensibly neutral panel of contracted psychologists. If adversarial allegiance had come into play, the divergences in diagnoses likely would have been even more profound.

Highlighting the higgledy-piggledy nature of any ad-hoc diagnosis, the researchers found that the so-called 'specifiers' – or specific rationales – attached to OSPD diagnoses were highly idiosyncratic. Examples included descriptions of behaviors that are illegal but not necessarily evidence of mental disorder, such as 'OSPD-Non-Consensual Sexual Activity with Adolescent,' 'OSPD-Attraction to Adolescent Females' and an even more bizarre: 'OSPD-Sexting.'

Custom-Tailored Labels

One may be particularly concerned that several of the labels appear custom to the facts of the specific case rather than resting on any empirically derived diagnosis, the study's authors noted.

I witnessed this first-hand last month, when a psychologist testified in federal court that a sex offender the government was aiming to civilly commit had a novel combination of sexual interests that cumulatively rose to the level of a unique mental disorder called 'OSPD-deviant sexual interests in hebephilic, sadistic, exhibitionistic and voyeuristic behavior.'

Fortunately, the federal judge at this particular trial was skeptical. Pointing out that 'OSPD-hebephilia' was rejected from the DSM and remains controversial in the psychological community, he wrote in his opinion that he was 'troubled by the combination of multiple insufficient specifiers, which does not appear to have been contemplated by the DSM-5-TR.'

No matter how nonconsent or hebephilia were defined in the specific psychological reports, the interrater agreement – or concordance between evaluators – remained poor across the board, and far below recommended reliability for diagnoses in routine clinical practice, much less the forensic arena in which precision is especially criti-

cal.

'Bad Science'

'Relying upon diagnoses with poor empirical support can perpetuate the use of bad science in the courtroom,' the authors concluded. 'While it is certainly true that there are high-risk individuals who are likely to sexually recidivate upon their release from prison, providing makeshift diagnoses to satisfy civil commitment criteria significantly questions the ethical practice of psychological decision making.'

A survey of legal cases found a smattering of successful challenges to these controversial diagnoses. These *Daubert* and *Frye* evidentiary challenges focused on definitional problems, an absence of substantial research support, and a lack of general acceptance. In *State of New York v. Jason C.*, for example, the court wrote:

'This Court cannot help but ask, if this disorder exists, why isn't there convincing evidence that it exists outside of the realm of civil commitment? If this disorder is a matter of the human condition, then shouldn't this paraphilia be seen outside of SVP proceedings?'

The diagnosis was similarly excluded in a Missouri case, *In re: Stanley Williams*, on the basis of a high error rate, a dearth of peer-reviewed publications, poor validity, and lack of general acceptance. The judge in that case wrote:

'Using diagnostic language which has been rejected from inclusion in the DSM does not indicate general acceptance by the relevant community, but rather an unwillingness to accept the given methods and language in question.'

The study, 'Other Specified Paraphilic Disorder: Patterns of Use in Sexually Violent Predator Evaluations,' is authored by Nicole Graham, Cynthia Calkins and Elizabeth Jeglic of the John Jay College of Criminal Justice in New York.

Related Reading:

Behavioral Sciences and the Law published an overview of the evidentiary shortcomings of the nonconsent diagnosis, 'The admissibility of other specified paraphilic disorder (non-consent) in sexually violent predator proceedings,' in 2020. The peer-reviewed article by forensic psychiatrist Brian Holoyda gives a blueprint of how a *Daubert* evidentiary admissibility challenge to OSPD-nonconsent might be raised due to the purported construct's weak interrater reliability, limited research support and lack of established diagnostic criteria. The same analysis easily applies to hebephilia.

Interested readers can find more background on the history of the term 'hebephilia' in a 2010 article by this blogger, 'Hebephilia: Quintessence of Diagnostic Pretentiousness,' also published in *Behavioral Sciences and the Law*.

About the Blogger: Karen Franklin, Ph.D. is a forensic psychologist and former adjunct professor of forensic psychology at Alliant University in Northern California. She is a former criminal investigator and legal affairs reporter.

(Continued on page 5)

Thus Spoke Berlin: Pedophilia Is a Sexual Orientation, and Child Porn Use Does Not Predict Hands-On Child Sexual Abuse.

Fred S. Berlin, M.D., Ph.D., "Pedophilia and DSM-5: The Importance of Clearly Defining the Nature of a Pedophilic Disorder," *42 Jour. Am. Acad. Of Psychiatry and the Law* 404-407 (2014)

Text Excerpts: [p. 404:] "Psychiatric terminology should convey information in as clear and unambiguous a manner as possible. In light of the associated stigma, that is especially so of the terms Pedophilia and Pedophilic Disorder. Although from a psychiatric perspective the term pedophilia is intended to define a recognized clinical entity, in the collective consciousness of contemporary society, the term has become a demonizing pejorative.

Many in society are likely to equate Pedophilia with child molestation. They are not the same. The Diagnostic and Statistical Manual of Mental Disorders, Fifth Edition (DSM-5) may be contributing inadvertently to the misconception that they are the same, for the following reasons:

First, the DSM-5 states that an indicator of a Pedophilic Disorder would be that an individual has 'acted on' his sexual urges (Ref 1, p. 697). 'Acted on' could mean that he has actually molested a child. On the other hand, it could also mean that he has masturbated to pedophilic fantasies or that he has viewed child pornography. The current criteria for diagnosing a Pedophilic Disorder place some persons who have never molested a child into the same diagnostic category as those who have done so.

As a consequence, the distinction between being sexually attracted to children in some fashion (e.g., experiencing urges to view child pornography) and experiencing urges to act on that attraction with a child can easily be lost.

Second, at present, in discussing pedophilia, DSM-5 makes reference to the term Pedophilic Sexual Orientation. Sexual Orientation is ordinarily used to designate the category or categories of persons whom a given individual finds to be sexually appealing. Those who are heterosexually oriented are sexually attracted to adults of the opposite sex; those who are homosexual, to adults of the same sex; men with a heterosexual pedophilic orientation, to prepubescent females; and men with a homosexual pedophilic orientation, to prepubescent boys.

In the face of significant criticism of its inclusion in the DSM-5, the American Psychiatric Association (APA) has stated its intention to remove the term Pedophilic Sexual Orientation from the diagnostic manual.² Removing that term in response to public criticism would be a mistake. Experiencing ongoing sexual attractions to prepubescent children is, in essence, a form

of sexual orientation, and acknowledging that reality can help to distinguish the mental makeup that is inherent to Pedophilia, from acts of child sexual abuse.

Third, in discussing the nature of a Pedophilic Disorder, DSM-5 has done little to characterize the multitude of psychiatric burdens associated with the condition, burdens that are frequently present, even in the absence of any acts of sexual abuse.

[p. 405:] "Viewing Child Pornography...From both a clinical and an actuarial statistical perspective, an early retrospective study conducted at a Federal Civil Commitment Facility in Butner, North Carolina, inferred an association between accessing child pornography and hands-on sexual offending.³ That study has been criticized regarding its methodology and lack of scientific rigor.⁴ More recent prospective data have questioned the contention that there is a correlation between accessing child pornography and hands-on offending.⁵ For example, one such study found that less than one percent of 231 men who had viewed child pornography (but with no evidence of a prior hands-on sexual offense) had gone on to commit a hands-on sexual offense.⁶...

Clinically (as opposed to forensically), making distinctions between fantasies (e.g., voyeuristic fantasies) and real-life intentions is frequently not difficult. Many men in therapy have acknowledged feeling sexually aroused by images depicting rape, and some women have acknowledged being sexually aroused by fantasies of being raped. That does not mean that most such men are likely to become rapists or that most such women actually want to become rape victims. With the advent of the internet, distinguishing between private fantasies and public intentions constitutes an ongoing forensic concern.⁷ Even though viewing sexualized images of children is illegal, privately viewing such images and fantasizing about them does not necessarily reflect a real-life intent or interest in being sexual with a child.

[p. 406:] "Pedophilia as a Sexual Orientation

DSM-5 did not err in referring to Pedophilia as a sexual orientation. The term sexual orientation ordinarily reflects an individual's subjective awareness of the category (or categories) of persons toward whom he or she is erotically attracted. Clinically, there are individuals (many of whom are described as having Pedophilia) who report a subjective awareness of being erotically attracted (either exclusively or in part) toward a category of individuals comprised of prepubescent children. Many report experiencing those attractions as unchosen in a fashion that seems very much like an orientation. That such attractions are often unwanted does not alter their resemblance to an orientation."

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B4QR Book Review -- A Long, Dark Shadow -- MAPs Seeking Dignity

Review: Walker, A., A Long, Dark Shadow: Minor Attracted People and Their Pursuit of Dignity. University of California Press (2021), reviewed at 1(4) *B4U-Act Quarterly Review* 4-12 (Autumn 2021)

Review excerpts:

[p. 4:] "In *A Long, Dark Shadow: Minor Attracted People and Their Pursuit of Dignity*, researcher Allyn Walker provides a nuanced, thoughtful discussion of people attracted to children, including the myths and misconceptions about this population, and the issues they face trying to navigate this stigmatized identity, their experiences with social support, and their resilience and coping strategies. Walker provides illustrative quotes from participant interviews that highlight various themes relevant to MAP research, including identity formation for MAPs; staying closeted and coming out; strategies for coping with attraction to children; resilience to sexual offending for MAPs; and mental health problems and care-seeking experiences. The final chapter, titled, "You are not a monster," describes the need to shift our stigma away from attraction to children itself and focus it only on the behavior of child sexual abuse...."

[p. 5:] Walker discusses the misconception that stigmatizing MAPs protects children. They describe the experiences that and other researchers in this area often face -- being told they aren't prioritizing protecting children. Walker says it is standard to treat empathy toward MAPs and the safety of children as if the two concepts oppose each other so profoundly that they cannot both exist." Walker makes this an important point in a way that is accessible to someone with little background knowledge in this area, who may already be bristling at the focus

Walker's book places on MAP well-being and the need for stigma reduction. Walker also tackles the nuanced and sensitive issue of attraction to children being characterized as a sexual orientation. They describe the reasons people have for hesitating to make this characterization, emphasizing that these reservations are likely rooted in the mistaken equation of attraction and behavior. They are transparent about their positionality as a queer person; they understand and even empathize with the hesitation people feel about comparing these populations, but they also describe a 'meaningful understanding of others who are treated with suspicion and stigma based upon a sexual orientation that cannot be changed.'

[p. 6:] Walker draws from the work of sociologist Richard Troiden, who described stages of identity formation among members of sexual minority groups. Walker states that not all members of sexual minority groups go through all the stages; rather, the stages reflect general patterns seen in research with gay and lesbian individuals as well as Walker's own research with MAPs. These stages include sensitization, in which the person perceives they are different in some way from their peers but does not yet connect these differences to their sexuality; identity confusion, in which a person begins to connect these differences to their sexuality but experiences dissonance in assuming the label (e.g., 'gay,' or in this case, 'attracted to children'); identity assumption, in which a person begins to self-identify with the label; and commitment, in which a person becomes comfortable with the label and synthesizes their sexual identity with other parts of their identity. Walker describes how their research with MAPs reflected these stages, drawing apt comparisons to research with sexual minorities, but they also thoughtfully discuss the unique challenges and considerations associated with navigating the identity of being attracted to children.

In the chapter titled 'Leading a double life,' Walker describes their participants' experiences with revealing their attraction to family and friends as well as their reasons for disclosing or choosing not to disclose their attraction. Walker describes that for their participants, and many other MAPs, being attracted to children meant having a secret from almost everyone important in their lives. Walker describes 'coming out' as a continuum -- a process in which people come out to the people in their lives in different stages and must continually come out to new acquaintances. Like other sexual minorities, MAPs must carefully balance the risks and benefits of coming out against the risks and benefits of staying closeted. Walker describes how their participants weighed these considerations, saying that staying closeted did not mean an absence of hardships but merely a different set of hardships.

[p. 6-7:] Participants experienced mental health and social problems as a result of staying closeted, including anxiety, depression, social isolation, inability to seek care,

(Continued on page 6)

and avoidance of social connections. Participants wanted to feel that they would still be loved and accepted if they were to disclose their attraction, but they also feared suspicion, judgment, disownment, and threats to their livelihood, housing, or personal safety if they were to come out to the important people in their lives. Many participants feared being immediately mistaken for a 'sex offender,' a threat to children, or a generally dangerous or evil person. The decision to come out, therefore, for Walker's participants and for other MAPs, involves a deeply personal and delicate balance of these perceived risks and benefits.

[pp. 7-8:] Walker details the stressors faced by MAPs, including societal rejection (or fear of it), exposure to and internalization of hateful and stigmatizing messaging about attraction to children, and loneliness and grief over the inability to have a romantic relationship (at least, for exclusive MAPs). Walker describes the strategies their participants used to cope with these stressors, dividing them into disengagement and engagement strategies. Participants' disengagement strategies, which Walker defines as attempts to disengage with the stress resulting from stigma, included denial or wishful thinking, secrecy and selective disclosure, substance use, and social withdrawal. Walker argues that engagement strategies, or those aimed at actively working through a given stressor, are more beneficial for well-being than disengagement strategies. Participants described several engagement strategies, such as involvement in MAP communities, seeking out information about attraction to children, activism related to MAP issues, and involvement in religious communities.

[p. 9:] In terms of specific strategies to avoid acting sexually with children, Walker reminds the reader that 75% of their participants did not feel at risk of acting on their attraction and therefore did not need to develop avoidance strategies. For the remaining participants, strategies to avoid engaging with sexual behavior with children were varied and complex. Some limited interactions with children and others interacted with children in prosocial ways. Some participants sought support from MAPs or others. Some described using illegal images of children as a way to avoid contact offenses against a child. Others described simply making the choice not to offend.

[p. 11:] Walker closes the book by describing the most common response among participants to the question, 'What would you say to a MAP who was just beginning to realize they were attracted to minors?' Most participants said they would share this simple but essential message: 'You are not a monster.'

A Simple Primer on SOCC from the Williams Institute

Trevor Hoppe, Ian H. Meyer, Scott De Orio,

Stefan Vogler, & Megan Armstrong, *Civil Commitment of People Convicted of Sex Offenses in the United States*, Williams Institute, UCLA School of Law (October 2018)

Text excerpts:

[p. 1:] **EXECUTIVE SUMMARY:**

...There are over 6,300 people detained in the 20 state and federal civil commitment programs [specific to sex offenders].

...Black residents [of the United States] faced a rate of SVP [so-called "Sexual Violent Predator"] detention [in such special commitment facilities] more than twice that of White residents: 7.72 per 100,000 Black residents as compared with 3.11 per 100,000 White residents aged 16 or older.

Sexual minority men are disproportionately detained in sex offense civil commitment facilities. In the two states with reliable data about the sex of the victim, New York and Texas, men who had victims who were male were 2 to 3 times as likely to be civilly committed than men with only female victims. This trend was consistent for Black men, White men, and Hispanic men. These patterns suggest that gay/bisexual and other men who have sex with men (MSM) are seen as more violent, more dangerous or mentally ill, and more deserving commitment under SVP statutes as compared with heterosexuals.

[pp. 2-3:] **INTRODUCTION**

Unlike incarceration ordered under the criminal law, 'Sexually Violent Person' or 'Sexually Violent Predator' (SVP) [or, in Minnesota, 'Sexually Dangerous Person' ('SDP')] or 'Sexually Psychopathic Personality' civil detentions are indefinite in nature, meaning that they are not bound by any time limitations. Courts can extend SVP confinement for decades, even for life. To commit a person under SVP statutes, courts must find that they suffer from a 'mental abnormality' – a term that has no medical meaning – or, in some states, a personality disorder. These terms are typically not clearly defined in the statutes.

[T]he American Psychiatric Association issued a report in 1999 in opposition to involuntary SVP civil commitment.² In that report, the authors wrote that 'sexual predator commitment laws represent a serious assault on the integrity of psychiatry.'³ They concluded that 'psychiatry must vigorously oppose these statutes in order to preserve the moral authority of the profession and to ensure continuing societal confidence in the medical model of civil commitment.'

Critics... argue that civil commitment [after imprisonment for sexual offense(s)] is essentially a double punishment for the same underlying offense(s). Courts have generally rejected this argument...

Researchers and advocates... have raised three key concerns with SVP laws that prompted this investigation. First, critics have raised concerns that the evaluation instrument used to screen potential SVP civil commitment candidates may be intrinsically biased against gay and bisexual men and men who have sex with men (MSM). 'STATIC-99' and 'STATIC-99R' instruments are used to evaluate the dangerousness of an offender along a series of ten measures

– higher scores can designate a person SVP and provide a basis for recommending civil commitment.⁶ One of the ten measures used on these instruments asks whether the offender had 'any male victims.' If a man was convicted of a sex crime with a male victim, he is assigned one point; if not, he is assigned zero points. In addition to normalizing violence against women, this *a priori* assigns gay, bisexual, and MSM, who are more likely to have a male victim, a higher score, marking them as more dangerous than men who have female victims regardless of any other characteristics of the offense. [Note: The Minnesota Department of Corrections commissioned the creation of a locally researched instrument to estimate the likelihood of recidivism by a prison-released former sex offender. That instrument, known in its current version as the Minnesota Sex Offender Screening Tool, version 4 (MnSOST-4) allows assessment of a point for each of up to four male victims, thus radically escalating the claimed probability of later re-offense.]

Second, critics have also noted the potential misuse of paraphilic disorders, a group of psychiatric diagnoses related to 'atypical sexual interest.' This category is extremely broad and includes pedophilic disorder as well as consensual, 'kinky' behaviors such as sexual masochism and sadism.⁷ The critique is that such diagnoses can be used as justification for civil commitment for a wide range of offenders.⁸ Paraphilic disorders diagnoses are so broad that they could be used to characterize as mentally ill many practitioners of kink, bondage, sadomasochism, or any sexual practice perceived to be deviant.⁹ This may have important implications for gay and bisexual men and MSM, whose sexual cultures may be viewed as kinky or otherwise nonnormative due to stigma and prejudice.¹⁰

Third, racist ideologies have denigrated and stigmatized Black sexualities for centuries. Racist ideologies portray Black people as over-sexualized and less refined than White people to justify their oppression. Racism and homophobia also intersect...

[pp. 3-4:] **HISTORICAL CONTEXT: THE EARLY 'SEXUAL PSYCHOPATH' LAWS, 1930s-1980s**

Modern SVP laws do not represent the first attempt in American history to use civil commitment to confine people accused of sex offenses. Between 1935 and 1955, lawmakers in 26 states and D.C. passed a similar set of statutes, usually using the language of the 'sexual psychopath' or 'mentally disordered' sex offender.¹²

Like today's SVP laws, sexual psychopath laws allowed for the indefinite confinement of persons labeled as 'sexual psychopaths' – a term that also did not refer to a specific psychological or sexual condition verified by psychiatrists. Lawmakers invented the category to include persons accused of a wide range of sex offenses, including rape, sodomy, (anal and oral sex, same- or different-sex), indecent exposure, exhibitionism, or sex between adults and children or teenagers.¹³

Historians argue that the economic impact of the Great Depression partially explains

the rise of sexual psychopath laws.¹⁴ In a period of such significant economic unrest, contemporary critics blamed the decline of the White male breadwinner on the rise of 'deviant' male sexuality – particularly homosexuals.

Sexual psychopath laws were often condemned by experts at the time for being overly broad in nature. However, liberal politicians viewed civil commitment favorably because it treated the problem of sex offending as a medical problem. Many on the left believed that a medical solution would be a more humane alternative to criminalization.

In practice, the state-run medical facilities housing sexual psychopath programs more closely resembled conventional jails and prisons than hospitals. Little to no treatment was offered. Moreover, some facilities experimented with controversial practices such as chemical castration.¹⁵

A 1953 report on California's sexual psychopath law found that the 86% of 'mentally disordered sex offenders' held under the program were White.¹⁶ White men who had had sexual contact with a child or teenager of any gender accounted for 92% of the cases in the study; 30% of those cases involved sex between White man and underage boys, suggesting that police disproportionately targeted male same-sex sexual incidents involving minors. That same report also found that 11% of detainees were Hispanic, despite making up only 2% of the state's population.¹⁷ Black men represented only 3% of all convicted sexual psychopaths, usually committed based on rape accusations. Instead of commitment, Black men often faced elevated rates of criminalization and harsh punishment. To this point, while Black men made up just 4.4% of California's population at the time, 10% of all convicted sex offenders and 14.6% of convicted rapists in the state were Black men.¹⁸

[pp. 4-5:] Designation as sexual psychopath did not require a sex offense conviction. Indeed, about ten percent of the people who were deemed to be sexual psychopaths during the early 1950s in Indiana were implicated for crimes that were not sexual, including burglary, breaking and entering, arson, and petty larceny.²⁰ In addition, in a 1954 case in Sioux City, Iowa, twenty men were baselessly committed as sexual psychopaths in the wake of the brutal murder of two children of which they were not accused.²¹

By 1989, 13 states and the District of Columbia still had psychopath laws on their books. However, these statutes have largely fallen into disuse.²⁷ Illinois appears to be the only state that continues to actively use a law from this previous era.²⁸

[pp. 6-7:] **SVP STATUTES IN THE UNITED STATES AND SELECTED CASE LAW**

What Does the State Need to Prove to Commit Someone? Typically, three elements must be proven by the state in order to confine a person under an SVP law: (a) the defendant must have been charged with a sexual offense; (b) the defendant must have a 'mental disorder' or 'abnormality'; (c)

(Continued on page 7)

the defendant is likely to commit sexually violent acts in the future.³²

What Is a 'Mental Abnormality'? Statutory definitions of mental abnormality are important in determining whether the SVP statute is constitutional. The statute must include a provision for a 'lack of control' on the part of the individual being committed.³³

This is why most jurisdictions include in their definition of mental abnormality (or condition/disorder) that the abnormality predisposes a person to commit sexual offenses with an inability to refrain.³⁴ Many states model their definition of mental abnormality after Kansas' SVP statute, which has been upheld by the Supreme Court.³⁵ Kansas defines mental abnormality as 'a congenital or acquired condition affecting the emotional or volitional capacity which predisposes the person to commit sexually violent offenses in a degree constituting such person a menace to the health and safety of others.'³⁶ Other states use more clinical definitions.³⁷ A major critique is that state definitions of mental abnormality are too vague or circular to be useful in narrowing the class targeted by SVP laws.³⁸

What Is a 'Personality Disorder'? Most states also include personality disorders in their SVP laws.³⁹ Two states (AZ, VA) include personality disorders in their definition of mental abnormality.⁴⁰ Ten states (FL, IA, KS, MA, MN, NH, NJ, PA, SC, WA) require that the individual being committed has either a mental abnormality or personality disorder.⁴¹ The criteria for some personality disorders are quite broad. For example, estimates suggest that between 40% and 80% of all imprisoned males would meet the criteria for Antisocial Personality Disorder. Critics have therefore raised concerns that the inclusion of personality disorders in SVP criteria significantly widens the class of persons targeted.⁴²

How Do States Define a 'Likelihood of Engaging in Sexual Violence'? For SVP commitment to be constitutional, the individual must be likely to reoffend and therefore pose a danger to the public.⁴³ To define a 'likelihood' of reoffending, some states (IA, MO, WA, WI) have a 'more likely than not' standard.⁴⁴ Some states use broader language, and some statutes are silent and rely on case law.⁴⁵ Generally, statutes allow for fairly arbitrary determinations by the judge or jury of what 'likely' means.⁴⁶ Even defining 'likely' as 'more likely than not' is not particularly helpful in narrowing the class of individuals targeted by SVP laws, since it is not easily determinable what counts as more than a 50% chance of reoffending.⁴⁷

What Is the Burden of Proof for Commitment and Release? Different jurisdictions have different levels of proof needed to civilly commit someone. Ten states (FL, MO, MN, NE, NH, NJ, NY, ND, PA, VA) and the federal statute use a 'clear and convincing' standard, meaning that the evidence must show that it is more probable than not that the individual meets the necessary standards to be committed.⁴⁸ Ten states (AZ, CA, IL, IA, KS, MA, SC, TX, WA, WI) use the highest standard of 'beyond a reasonable doubt,' meaning that there must be

no reasonable doubt the individual meets the standards necessary to be committed.⁴⁹ It is unclear how the standard of proof actually impacts the decision-making of jurors.⁵⁰

[pp. 7-8:] **Can Juveniles Be Committed Under SVP Laws?** The majority of state statutes, as well as the federal statute, are silent as to whether juveniles may be civilly committed under their SVP laws.⁵¹ However, some states (PA, IL, MA, WI) explicitly allow for SVP commitment of juveniles.⁵²

How Do States Show Probable Cause? Most states require a hearing to determine whether there is probable cause to believe that a person is sexually violent, but some jurisdictions (PA, TX, Fed. Gov.) are silent on probable cause.⁵³

Who Decides if a Person Should Be Designated as an SVP - a Judge or a Jury? Under most SVP statutes, civil commitment proceedings are initiated when a State/County Attorney and/or the Attorney General files a petition for SVP commitment - typically after written notice from the agency with jurisdiction over the individual (often the state Department of Corrections). Most states require a pre-trial hearing in order to determine whether there is probable cause to believe that the individual is sexually violent.⁵⁴ This usually means that if a judge determines that there is probable cause to believe that the individual is sexually violent, that individual will remain in custody until a trial to determine whether the individual will be civilly committed is held. The majority of jurisdictions allow either party, or the judge, to request a jury trial as an alternative to the judge making the determination as to whether SVP standards are met.⁵⁵ Only North Dakota explicitly denies a jury trial.⁵⁶

Do States Psychologically Evaluate Potential SVP Detainees? Some states require testing as a method for screening individuals for SVP consideration.⁵⁷ For example, Virginia requires that a Static-99 be completed for sexual offenders before they are released from prison, and if certain scores are met the individual is referred to determine whether they meet SVP definitions.⁵⁸ Some states use testing in determining whether an individual meets the requirements for mental abnormality.⁵⁹ For example, Texas requires 'testing for psychopathy' but does not specify which test.⁶⁰ [pp. 8-9:] **What Is the Static-99 or Static-99R?** Static-99 was developed in 1999 and quickly became the default risk assessment tool used on sex offenders.⁶¹ Although early studies indicated it was a better predictor of recidivism than other similar tools, even the most optimistic studies put the Static-99's accuracy at only about 70%.⁶² Notably, selection of the variables for the Static-99 was not guided by any theory, but rather on the basis of observed correlations with recidivism. Hanson has acknowledged this possible shortcoming, writing that 'none of the items were intended to measure psychologically meaningful constructs; they were selected purely on the basis of empirical relationships with recidivism and ease of administration.'⁶³ In 2008-09, both the Static-99 and a revised 2002 version were

re-normed using new and much larger samples of offenders, including four samples from the United States. Then in 2012, both the Static-99 and 2002 became the Static-99R and Static-2002R (for 'revised') with changes to the weighting of the age variable that allowed risk scores to decrease as offenders aged, in line with data suggesting that the likelihood of sexual recidivism significantly decreases with age. However, even as it has been revised, the instrument continues to assign a point to offenders with a history of male victims - thus resulting in higher scores for gay/bisexual men and MSM.

Have Courts Evaluated the Constitutionality of SVP Detention? The Supreme Court and lower courts have consistently upheld SVP laws. In *Kansas v. Hendricks*, the Supreme Court ruled that Kansas' statute was constitutional.⁶⁴ The Court explained that the right to freedom from physical restraint under the Constitution's Due Process Clause is not an absolute right.⁶⁵ States may protect the public from dangerous people through civil commitment, as long as, constitutional procedures and standards are followed.⁶⁶ State SVP statutes must couple a proof of future dangerousness with proof of 'personality disorder' or 'mental abnormality' that makes it difficult for an individual to control their behavior.⁶⁷ In *Kansas v. Crane*, the Court clarified that the Constitution requires a determination that the individual lacks control over their actions, but a complete lack of control is not necessary.⁶⁸ In *Hendricks*, the Court also held that Kansas' SVP commitment proceedings did not involve 'double jeopardy,' which refers to an individual's constitutional right not to be prosecuted twice for the same offense.⁶⁹ This is because SVP proceedings are civil as opposed to criminal in nature.⁷⁰

Notes:

- 1 American Psychiatric Association, Dangerous Sex Offenders: A Task Force Report of the American Psychiatric Association (1999).
- 2 *Id.*, at 173.
- 3 *Id.*, at 173.
- 4 Stefan Vogler, "Constituting the 'Sexually Violent Predator': Law, Forensic Psychology, and the Adjudication of Risk," 23 *Theoretical Criminology* 509 (2018).
- 5 American Psychiatric Association, Diagnostic and Statistical Manual of Mental Disorders (5th ed. 2013).
- 6 Thomas K. Zander, "Commentary: Inventing Diagnosis for Civil Commitment of Rapist," 36 *Jour. Am. Acad. Psychiatry & Law* 459, 464.
- 7 Patrick Singy, "How to Be a Pervert: A Modest Philosophical Critique of the Diagnostic and Statistical Manual of Mental Disorders," 43 *Revista de Estudios Sociales* 139, 144 (2012).
- 8 Rusi Jaspal.
- 9 Tamara Rice Lave, "Only Yesterday: The Rise and Fall of Twentieth Century Sexual Psychopath Laws," 69 *La. L. Rev.* 549, 549 (2009).
- 10 Committee on Psychiatry and Law, Group for the Advancement of Psychiatry, Psychiatry and Sex Psychopath Legislation: The 30s to the 80s 840 (1977), <https://perma.cc/GGN8-ZXHZ>.

perma.cc/GGN8-ZXHZ. Marie-Amelie George, "The Harmless Psychopath: Legal Debates Promoting the Decriminalization of Sodomy in the United States," 24 *J. Hist. Sexuality* 225, 233 (2015). Edwin Sutherland, "The Sexual Psychopath Laws," 40 *J. Crim. L. & Criminology* 543, 544 (1950).

14 Estelle B. Freedman, "Uncontrolled Desires: The Response to the Sexual Psychopath, 1920-1960," 74 *J. Am. Hist.* 83, 89 (1987).

15 Regina Kunzel, "Sex Panic, Psychiatry, and the Expansion of the Carceral State," in *The War on Sex* 229, (David M. Halperin & Trevor Hoppe, eds., 2017).

Tamara R. Lave, "Only Yesterday: The Rise and Fall of Twentieth Century Sexual Psychopath Laws," 69 *La. L. Rev.* 549 (2009).

16 Langley Porter Neuropsychiatric Institute, Final Report on California Sexual Deviation Research (1954), 101-102, 139.

17 Final Report on California Sexual Deviation Research, 139.

18 Final Report on California Sexual Deviation Research, 139, 101-102.

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21 Neil Miller, Sex-Crime Panic: A Journey to the Paranoid Heart of the 1950s (2002).

27 Gary Gleb, "Washington's Sexually Violent Predator Law: The Need to Bar Unreliable Psychiatric Predictions of Dangerousness from Civil Commitment Proceedings," 39 *UCLA L. Rev.* 213, 215 (1991).

28 Ross A. Brennan, "Keeping the Dangerous Behind Bar: Redefining What a Sexually Violent Person Is in Illinois," 45 *Val. U. L. Rev.* 551, 558 (2011), s."

32 *Id.*

33 *Kansas v. Crane*, 534 U.S. 407, 412 (2002).

34 David DeMatteo et al., "A National Survey of United States Sexually Violent Person Legislation: Policy, Procedures, and Practice," 14 *Int'l J. Forensic Mental Health* 245, 250 (2015).

35 *Id.* at 249.

36 *Kan. Stat. Ann.* 59-29a02(b) (2019).

37 DeMatteo, *supra* note 34, at 253.

38 *Id.*

39 *Id.* at 250.

40 *Id.*

41 *Id.*

42 *Id.* at 253.

43 *Kansas v. Hendricks*, 521 U.S. 346, 358 (1997).

44 DeMatteo, *supra* note 34, at 251.

45 *Id.*

46 *Id.* at 253.

47 *Id.* at 253.

48 *Id.* at 251.

49 *Id.*

50 *Id.* at 254.

51 *Id.* at 252.

52 *Id.*

53 *Id.* at 252.

54 *Id.*

55 *Id.*

56 *Id.*

57 *Id.* at 254.

58 *Id.* at 252-53.

(Continued on page 8)

59 *Id.* at 254.

60 *Id.*

61 R. Karl Hanson & David Thornton, "Improving Risk Assessments for Sex Offenders: A Comparison of Three Actuarial Scales," 24 *Law & Hum. Behav.* 119, 122 (2000).

62 Howard Barbaree, Michael Seto et al., "Evaluating the Predictive Accuracy of Six Risk Assessment Actuarial Instruments for Adult Sex Offenders," 28 *Crim. Just. & Behav.* 490, 493-94 (2001). Some studies have suggested that other instruments may be more accurate, but these tools require more information and a higher administrative burden than the Static-99 and have not been widely adopted. See Grant T. Harris, Mamie E. Rice, et al., "A Multisite Comparison of Actuarial Risk Instruments for Sex Offenders," 15 *Psychol. Assessment* 413, 420-23 (2003).

63 R. Karl Hanson & Kelly E. Morton-Bourgon, "The Accuracy of Recidivism Risk for Sexual Offenders: A Meta-Analysis of 118 Prediction Studies," 21 *Psychol. Assessment* 1, 1 (2009).

64 *Kansas v. Hendricks*, 521 U.S. 346, 371 (1997).

65 *Id.* at 356.

66 *Id.* at 356-57.

67 *Id.* at 358.

68 *Kansas v. Crane*, 534 U.S. 407, 412-13 (2002).

69 *Hendricks*, 521 U.S. at 370.

70 *Id.*

MSOP Makes No Impact on Sex Crime

[Editors], "Minnesota's \$100 Million-per-Year Civil Commitment Program Has No Discernible Impact on Sex Crime," *Prison Legal News (PLN)* (October 2024), p. 48

Text: "A report released on April, 16, 2024 concluded that Minnesota's Sex Offender Civil Commitment (SOCC) program, which is operated by the state Department of Human Services at a cost of over \$100 million per year, has no discernible impact on reducing sexual violence. Released by the Sex-Offense Litigation and Policy Resource Center (SOLPRC) at Mitchell Hamline University of Law, the report concluded that Minnesota is wasting huge sums of money annually locking up a handful of people for political gain, rather than expending resources on methods proven to reduce [the number of] incidents of sexual violence before they happen.

Minnesota is one of a handful of states that detain a small group of convicted sex offenders after their criminal sentences are completed. Under that state's Sexually Dangerous Persons Act, a court may determine that the offender is likely to commit another sex offense if released due to a mental disorder or dysfunction — at which point he or she is transferred to SOCC after release from prison. These commitments are reserved for a small fraction of sex offenders deemed the 'worst of the worst.' In fact, only 747 people are confined within secure facilities.

Unlike other states that permit civil commitment of sex offenders, Minnesota's SOCC program does not regularly review detainee risk levels to assess the feasibility of transfer to less restrictive confinement. Even when a detainee is lucky enough to obtain the rare court order authorizing a less restrictive placement, it often takes years for a transfer from the secure facility to community-based detention. These factors combine to ensure that the state continues to spend large sums of money detaining a small group of offenders on the most restrictive, and therefore, most expensive preventive detention resource — total and indefinite confinement.

But sex offenders have an extremely low overall rate of recidivism. According to a 2019 survey conducted by the U.S. Department of Justice, only 7.7% of sex offenders committed another sex offense within nine years of release from prison. Minnesota's recidivism rate is even lower — only 2.8% reoffend within four years of release. Other studies have found similarly low rates for both 'low risk' and 'high risk' offenders, meaning civil commitment provides only small reductions in already low recidivism rates.

In a 2013 study Grant Duwe, Director of Research at the Minnesota Department of Corrections, estimated that civil commitment of sex offenders reduced the four-year sex offense recidivism rate from 3.2 to 2.8%. Thus, Minnesota spends \$100 million per year to achieve a reduction in sexual offense recidivism of less than one-half of one percent.

The vast majority of sex offenses are committed by offenders with no criminal records, at least for conduct. Minnesota would do far better diverting money spent on SOCC to more effective evidence-based sexual violence interventions, the report declared, such as primary prevention, adequate services for victims of sexual violence, and practice improved perpetrator accountability. The report concluded with a recommendation for Minnesota lawmakers to repeal SOCC and implement procedures to safely sunset all indefinite civil detention of sex offenders. However, the report's authors acknowledged that this type of reform is extremely unlikely because lawmakers are unwilling to touch 'a political third rail.' See: Sex Offense Civil Commitment: Minnesota's Failed Investment and the \$100 Million Opportunity to Stop Sexual Violence, SOLPRC (April 2024).

PPI Says: Inmate Welfare Funds Are Actually Treated as Slush Funds for Facilities and Employee. (Part 1)

Brian Nam-Sonenstein, "Shadow Budgets: How Mass Incarceration Steals from the Poor to Give to the Prison," Whitepaper,

How prison systems build up welfare funds — and get away with spending other people's money as they please:

Revenue policies	Expenditure policies
39 prison systems draw revenue from commissary purchases.	9 prison systems can spend the money on capital projects, such as construction, improvement, and maintenance of facilities.
19 prison systems draw revenue from communications kickbacks, like telephone, email, and video calling user fees.	16 prison systems can spend the money on educational programming and related supplies (but whose education?).
14 prison systems draw revenue from confiscated funds, including contraband or the accounts of people who escape prison.	25 prison systems allow wide discretion for the use of funds by using language like 'primarily' or 'including but not limited to' in expenditure policies.
16 prison systems have vague language that permits wide discretion for identifying revenue sources.	9 prison systems allow the money to be spent on self-help programs like Alcoholics or Narcotics Anonymous, or on expenses related to treatment programs.
17 of the 49 prison systems with welfare funds we could identify did not have language specific to fiscal reporting or audits of their funds.	

Prison Policy Initiative (May 6, 2024)

• Revenues from communication fees, commissary purchases, disciplinary fines, and more flow into 'Inmate Welfare Funds' meant to benefit incarcerated populations. However, our analysis of prison systems across the U.S. reveals that they are used more like slush funds that, in many cases, make society's most vulnerable people pay for prison operations, staff salaries, benefits, and more.

Prisons and jails generate billions of dollars each year by charging incarcerated people and their communities steep prices for phone calls, video calls, e-messaging, money transfers, and commissary purchases.¹ A lot of that money goes back to corrections agencies in the form of kickbacks. But what happens to it from there? As it turns out, much of this money flows into special accounts called 'Inmate Welfare Funds.'² These welfare funds are supposed to be used for non-essential purchases that collectively benefit the incarcerated population. In reality, poorly written policies and lax oversight make welfare funds an irresistible target for corruption in jails and prisons: in many cases corrections officials have wide discretion to use welfare funds as shadow budgets for subsidized essential facility operations, staff salaries, vehicles, weapons, and more, instead of paying for such things out of their department's more transparent and accountable general budget.

How do welfare funds get funded? How is the money used, and who gets to decide? We analyzed laws and policies governing welfare funds in all 50 state prison systems and the federal Bureau of Prisons to find out. We identified at least 49 prison systems that have some form of welfare fund, though it's likely that every system has one.³ In most cases, they are funded through communications fees and store purchases, as we mentioned, as well as interest accrued on individual trust accounts.⁷ Some prison systems also fund them with sums of money confiscated from

people who escape custody, contraband, or disciplinary fines.

Although welfare funds are generally meant to be used for recreation equipment, entertainment, social and educational opportunities, and other non-essential benefits for the incarcerated population as a whole, prison policies frequently allow them to pay for facility construction and maintenance, hygiene products for indigent people, release-related costs⁸ and other goods and services that are supposed to come out of a department's general budget. Our analysis reveals that most policies are so vague that prison officials enjoy wide discretion to spend incarcerated people's money as they please — sometimes spending it on luxury perks for staff.

(Appendix B contains a sample list of specific revenue sources, expenditures, prohibitions, and vague language drawn from different welfare fund policies.)

Only 12 prison systems (24%) explicitly prohibit certain kinds of spending, while roughly one-third do not specify any transparency or oversight measures for these accounts.¹⁰ In states like Iowa, North Carolina, and West Virginia, funds can be used on expenses relating to victims' compensation or reimbursing victims' travel expenses. Meanwhile, journalists have uncovered multiple instances in which millions of dollars were extracted from incarcerated populations and not spent at all despite the extraordinary needs of people on the inside: prisons will sometimes sit on heaps of money while jails treat themselves to shopping sprees for bullets, break room supplies, and gift cards for honey-baked hams. These corrupt practices¹¹ shift essential costs — historically the responsibility of governments — to incarcerated people and their support networks and, in the process, often force women, low-income families, and communities of color to subsidize mass incarceration."

(Continued on page 9)

Are welfare funds helpful or exploitative?

The rationale behind these welfare funds is complicated, controversial, and contested among advocates and incarcerated people.¹² Some believe it's useful for incarcerated people to have a pool of money that can be used for their collective benefit.¹³ and argue that, if these funds are going to exist, incarcerated people should have greater decision-making power over how their money is spent, and officials should be more accountable in terms of their use. Others argue welfare funds should be abolished on the principle that fees and fines should not be extracted from incarcerated people and their communities, and state and local governments should bear the full burden of incarceration. Notably, in some places, incarcerated people seem unaware these funds even exist because their balances and expenditures are not shared with the population.

The widespread lack of oversight and accountability plays a role in all three of these positions. Roughly one-third (17 out of 49) of prison policies do not mention any form of oversight or transparency measures for their welfare funds.¹⁴ Among the 32 other prison systems with welfare funds, policies mandate a range of annual or biannual audits and reports that summarize revenues and expenditures. These audits and reports are variously required to be submitted internally – to wardens, department fiscal offices, or deputy directors, for example – or externally to controllers, comptrollers, governors, legislators, or other bodies. In some cases, there is no clearly defined schedule for reporting: Indiana, for example, specifies that 'periodic audits' be conducted by the State Board of Accounts. In Georgia, reporting is necessary only upon suspicion of fraud, changes in personnel managing the fund, or extensive funding shortages. Meanwhile, just five states – California, Kentucky, Maryland, Nevada, and Washington state – require that prisons post audits publicly with-in view of the incarcerated population.

Who exactly administers these funds, and how they go about doing that, is also unclear in many of the policies we reviewed. Typically, welfare funds are run by higher-ranking corrections officials, such as a warden, deputy warden, chief administrative officer, superintendent, director, commissioner, or one of their designees. Fourteen prison systems have some form of board or committee that governs the welfare funds, but only three – California, Minnesota, and Vermont – explicitly permit incarcerated representatives to participate. Mississippi, meanwhile, permits a relative of an incarcerated person to serve as a representative. Generally, the fund administrator is in charge of approving or denying expenditures and keeping track of the funds entering and leaving the account. Few policies explain how often these committees are supposed to meet, nor do they go into very much detail about their specific responsibilities – and whether a committee exists in policy is a separate matter from whether it operates in practice.

Given this context, incarcerated people and their support networks should not be forced to subsidize government responsibilities through welfare funds. Given the general state of (un)accountability in U.S. corrections, it will be a tall order to secure meaningful oversight and decision-making power over these funds. These piles of money seem irresistible to corrections agencies, and the potential for abuse and corruption is high. But in recognition of the lack of consensus about their place in corrections – including among incarcerated people – as well as the wide variation in welfare fund policy, practice, and political context, we offer several policy recommendations to help advocates and lawmakers mitigate their harms. Explained in greater detail in the Recommendations section below, these include:

Ending exploitative pricing schemes in communications and commissaries;

Revising policies on permitted uses and prohibitions to be more explicit;

Implementing independent oversight and granting incarcerated people greater decision-making power; and

Reducing the need to supplement corrections budgets through decarceration.

How welfare funds subsidize mass incarceration

...Attorney and researcher Stephen Raheer, who has fought the financial exploitation of incarcerated people and their communities for many years, coined the term 'prison retailing' to distill how vendors like phone companies and commissary contractors transform state responsibilities into sources of revenue for themselves and their correctional agency partners. For example, when a prison system takes one of its responsibilities – like providing incarcerated people with 'phone services' – and sells it off to a telecommunications company, it creates a new market. That market operates by charging fees to service users (incarcerated people and their communities), which enriches both the telecom company (in the form of profit) and the prison system (in the form of kickbacks). Prison systems deposit their kickbacks into opaque, unaccountable, and ill-defined funds allegedly intended for the 'general welfare' of the imprisoned population, but which prison administrators can use on practically whatever they want. This carceral sleight of hand displaces the financial responsibilities of jails and prisons onto impacted communities and rebrands it as the selfless goodwill of corrections agencies. And though it may not seem like corrections staff directly pocket revenues from prison retailing, the reality is that subsidizing jail and prison operations contributes to their job security, if not directly funding their actual salaries and benefits.

Herein lies a vicious cycle of exploitation in the form of an arms race for higher commissions: contractors make their money through commissions, and they ensure their future profits by rewarding corrections agencies with kickbacks that will entice them to renew their contracts. But bigger kickbacks require vendors to continuously raise prices to keep their profits growing.

At the same time, corrections agencies come to rely on kickbacks to supplement costs that should be paid for out of their legislatively appropriated budgets.

Though welfare funds represent a comparatively small proportion of corrections budgets, the millions of dollars sapped from incarcerated people are nonetheless significant sums of money that jails and prisons do not need to secure from lawmakers. Without a transparent public budgeting process, corrections agencies can grow this shadow budget free from scrutiny and oversight. In the end, mass incarceration is to some degree supported by an inversion of welfare for the poor: as scholars Mary Fainsod Katzenstein and Maureen R. Waller explain, 'Instead of serving as a source of support and protection for poor families, the state saps resources from indigent families of loved ones in the criminal justice system in order to fund the state's project of poverty governance' [by incarceration].

Bodycams, bullets, and new jails: Shifting state responsibilities onto incarcerated communities

How do prisons and jails use these funds if not for the 'general welfare' of incarcerated people? And how do they get away with spending the money in these ways? Our analysis shows that, while some policies permit welfare fund dollars to be spent on things that should clearly be funded through a department's general budget, others are written with language so broad that essentially nothing is off limits. For example, some policies will declare that the funds must be 'overall' or 'primarily' used for the general welfare of the population, or can be spent on goods and services including but not limited to specific uses. These few words provide significant wiggle room that correction s agencies readily exploit in the absence of meaningful oversight.

In some cases, money collected in the name of the 'general welfare' of jailed populations is actually spent on staff. The Dauphin County (Harrisburg) jail in Pennsylvania, for example, collected \$3.4 million between 2019 and 2023. A review of spending records by journalist Joshua Vaughn for PennLive found that the vast majority of welfare fund expenditures directly benefitted staff, not incarcerated people:

How did the county jail spend incarcerated people's money?

Examples of expenditures from the Dauphin County, Pa., jail's Inmate Welfare Fund from 2019 to 2023:

\$45,000.00: Things that benefit incarcerated people

\$835,000.00: Facility maintenance (including heating system repair & courthouse & other non-jail facilities upgrades)

\$1,639,000.00: Things that benefit staff only (including staff of other county departments; expenditures for: Bodycams, gun range memberships, Consultant fees, new staff uniforms, new vehicles, employee appreciation meals, new fridge for staff break room, & fitness trackers for officers.)

...[O]nly a small fraction of welfare fund expenditures from 2019 to 2023 directly benefitted people incarcerated in the jail.

The PennLive article goes on to mention

that a county spokesperson defended spending welfare funds on these staff perks, arguing that 'the current job market makes it difficult to retain employees.'

California provides further examples of corrections agencies using welfare funds to subsidize carceral infrastructure and personnel. The Butte County (Chico) Board of Supervisors attempted to use \$650,000 from their jail's welfare fund to build a new jail before the ACLU sued to stop them in 2016. Meanwhile, a 2021 investigation revealed that Sacramento's sheriff spent more than \$15 million in welfare fund dollars on staff salaries, \$1.45 million to purchase a camera system; \$1 million for parking lot improvements; \$900,000 for radio leases, surveillance cameras, and software to track incarcerated people; and \$150,000 for perimeter fences.

News reports and audits have uncovered other questionable uses of welfare funds. ...Arizona's Pinal County (Florence) Sheriff spent over \$4 million of welfare fund money between 2018 and 2023 – at least \$217,000 (or 5.5%) of which was spent on guns, bullets, and vests for law enforcement while less than \$900 (or 0.02%) was spent on books for people detained at the jail. In Colorado, the El Paso (Colorado Springs) County jail's largest expenditure from their fund in 2012 was \$664,000 to 'MH Medical Services' (the sheriff declined to elaborate to reporters what exactly that was). And in Los Angeles, California, a 2021 audit of the jail's welfare fund (which had a balance of nearly \$26 million) noted that the 'historical practice is to annually allocate and spend at least 51% [of welfare fund revenue] on inmate programs and up to 49% on jail maintenance....

Excerpt Notes:

1 Estimates of total annual revenues for telecommunications, money transfers, and commissary purchases are hard to come by, but we estimate a low-end range of at least \$2.7 billion to \$3 billion per year. This figure notably does not include revenues from video calling and e-messaging, which are typically bundled with phone contracts and are thus difficult to disaggregate. To calculate our rough estimate, we added together \$99 million in revenue from money transfers, 1 billion in phone revenues, \$1.6 billion in commissary revenues, and \$17.8 million in video revenues that we could ascertain from GTL and Jpay Tel's 2019 financial statements. Unfortunately, other vendors like Aventiv (which owns Jpay and Securus) do not disaggregate video revenues from phone revenues. This gave us the \$2.7 billion figure. The \$3 billion figure comes from Worth Rises' 2020 report *The Prison Industry*, which found annual revenues of around \$1.4 billion for phones (excluding video calls and e-messaging) and \$1.6 billion from commissaries. We opted not to include their figures for money transfers, which reflected market value rather than revenues.

2 "Inmate Welfare Funds" go by many different names, such as Prisoner Benefit Funds, Institution Contingency Funds, The Trust Fund, Client Benefit Welfare Ac-

(Continued on page 10)

counts, Resident Welfare Funds, Department Assistance Funds, Canteen Funds, and others. In some systems, they are not named at all but are described in laws and policies. While we do not condone the use of the term "inmate," we are using it sparingly since "Inmate Welfare Fund" is the most common title in policies and available research. We use the term "welfare funds" elsewhere in the piece. Please note that in all cases we are specifically referring to funds for incarcerated people, not employees, as some prison systems have employee welfare funds as well....

6 We could not locate welfare fund policies in two prison systems, Rhode Island and South Dakota.

7 Individual trust accounts are essentially bank accounts for incarcerated people. When a person earns money from a job or receives deposits from loved ones, that money goes into their trust account. These accounts can accrue interest, though whether the incarcerated person can keep the interest depends on the laws and jurisprudence where they are incarcerated.

8 Mississippi, for example, uses welfare funds to contribute to their "Discharged Offenders Revolving Fund," which provides money to people leaving prison.

9 Some prisons have policies regarding the provision of loans from welfare funds to incarcerated people. Michigan, for example, allows welfare funds to facilitate loans to help incarcerated people pay for notary services, while Vermont prison policy allows for the establishment of a lending fund that uses welfare fund proceeds to help people obtain housing after release. Washington State, on the other hand, explicitly bans the lending of welfare fund dollars.

10 In their excellent 2015 article, *Taxing the Poor: Incarceration, Poverty Governance, and the Seizure of Family Resources*, Mary Fainsod Katzenstein and Maureen R. Waller, describe this practice as "an invisible system of revenue and taxation that exploits the ties of family dependency." The article goes on to quote a parent of an incarcerated person in Washington, who notes that they pay taxes on the funds they deposit into their son's trust account, which are then subject to a 35% deduction. John Koster, a Washington State representative who introduced a bill to end these garnishments (which died in committee), astutely described this practice as "double taxation." Katzenstein and Waller end the article by asking whether this constitutes "a system of welfare socialism for the better-off that is dependent on the predation by the state of the poor."

11 In some cases, policies specifically authorize the use of welfare fund for certain essential expenses, such as building construction or maintenance. Whether authorized by law or policy or simply through omission, we argue that the use of funds meant for the general welfare of incarcerated people in this manner is unethical and exploitative departments have general budgets that are appropriated by a public legislative process to fund their operations. They should under no circumstances be

extracting dollars from people impacted by incarceration to run their facilities.

12 In addition to reading prison policies, financial audits, legislative testimony, and news reports, our research for this report included gathering perspectives from a small group of incarcerated people and advocates, via informal conversations. While this was by no means a robust survey, our conversations did yield some insight into awareness of and opinions on welfare funds.

13 In 2021, for example, Olland Reese testified to the Maine state legislature about the value of welfare funds in promoting mental health, pointing to their use in paying program facilitators and purchasing stress relief items like equipment for fitness and organized sports, board and card games, items for the music program, and more. This testimony was accompanied by the signatures of "over half the prison population" at Maine State Prison.

14 Somewhat alarmingly, when we requested access to fiscal policies governing North Carolina's "Correction Inmate Welfare Fund" (also known as the "Central Welfare Fund"), we were told by the department that there were "currently no fiscal policies in place for the North Carolina prison system." An official said that "the prison system's [fiscal policy section on the website] has some old policies from more than a decade ago, when the agency was known as the Department of Correction," that they were "working on updating them for consideration/approval by leadership," and that "those old policies have not been in place for several years." For these reasons, we were unable to obtain accurate up-to-date welfare fund policies for North Carolina's prison system.

15 In Pennsylvania, for example, the committee that oversees the fund must give approval to the following requests:

- Pads or similar over \$5,000
- Maintenance or upgrades over \$5,000
- Buildings/sheds for incarcerated people's activities/equipment
- Education software
- Computers/printers, WIFI
- Permanent fixtures
- Staff overtime for all staff

16 Read our blog post and visit PrisonOversight.org for detailed information on the state of oversight and accountability in U.S. corrections, including prison oversight profiles for each state, information on reform efforts, news, and legislative updates.

17 As scholars Mary Fainsod Katzenstein, Nolan Bennet, and Jacob Swanson write, "Few sheriff and prison administrators may be buying beach houses, but corporate commissions/kickbacks are financing their occupational livelihoods. Jails, prisons, and even general county operations are subsidized with monies levied on services provided to the incarcerated population and paid for by incarcerated men, women and their families."

18 To be more precise, we calculate that \$19,971.35 is approximately the median annual income prior to incarceration for people in 2024. This is an adjusted figure from our report *Detaining the Poor* using the

Bureau of Labor Statistics' [CPI Inflation Calculator](#). That report found that people in jail had a median annual income of \$15,109 in 2015 dollars prior to their incarceration – less than half (48%) of the median for non-incarcerated people of similar ages.

20 Scholars Mary Fainsod Katzenstein, Nolan Bennet, and Jacob Swanson describe this use of vague language as a "legal heist" than conceals many of the unaccountable uses of these funds.

21 In this case, welfare money from people detained at the jail was actually used to purchase items for an entirely separate county department.

22 In this case, the county was trying to use welfare funds generated from incarcerated people's families toward the 10% cash-match required to receive \$40 million in state financing for a new jail.

Editor's Closing Note: The concluding segment of this important article will appear in the next edition of *ILP*.

Feeny on Successful MSOP Data Challenges

"Memo

TO: My fellow patients at MSOP
 FROM: Matthew Feeny
 DATE: 11/22/2024
 RE: Data Challenges

MN Statute § 13.04 and MSOP policy *Accuracy and Completeness Data Challenges* (#135-5160) ensure your rights to records that are both accurate and complete. If you discover data in your MSOP records that is inaccurate or incomplete, the first step is to request the author make corrections. If they don't, you then file a Data Challenge with Executive Director Nancy Johnston who must respond within 30 days. If she can't correct the inaccurate or incomplete data, then your last step is filing a Data Challenge Appeal with the Data Practices Office (DPO), who will schedule you for a contested-case hearing in front of an Administrative Law Judge.

This is a lengthy process, but it *does* work. A year after my issue was reported, on 9/10/24 I finally had my first Data Challenge Appeal in court. The Attorney General's office represented MSOP, therapists were called as witnesses and the hearing lasted over 4 hours. I received notice on 11/15/24 that the Administrative Law Judge found in my favor and the Commissioner of Administration will be issuing a corrective order to MSOP to add the missing information to my records. I have 6 additional Appeals pending at the DPO, but it's essential to ensure my CAP Assessors are reading accurate and complete records. If you have an accuracy or completeness concern with something in your own records, start by reading the above policy and statutes, then talk to me for further assistance. V for Victory!"

Judge Tunheim Gives Warning in *Miles v Harpstead* to MSOP Policy-Makers

Gordon Miles v. Jodi Harpstead et al. (No. 23-2848 (JRT/JFD), [Memorandum Opinion and Order Adopting Report and Recommendation](#) (Sept 30, 2024))

Editor's Introductor: In this federal constitutional action, MSOP confinee Gordon Miles withdrew the surviving First-Amendment part of his complaint, while the Fourteenth Amendment claim against conditions of confinement claimed to comprise punishment was dismissed with precedent under the precedent created by the *Karsjens* case in the Eighth Circuit federal Court of Appeals. Nonetheless, Judge John Tunheim offered this warning about MSOP:

Text excerpt:
 [p. 7:] "See *Karsjens v. Harpstead*, No. 11-3659, 2022 WL 542467, at *18 (D. Minn. Feb. 23, 2022)" [Findings of Fact, Conclusions of Law, and Order, Doc. 1197, p. 40: text: "...[T]he confinement of the elderly, individuals with substantive physical or intellectual disabilities, and juveniles, who might never succeed in the MSOP's treatment program or who are otherwise unlikely to reoffend, remains of serious concern for the Court and should be for the parties as well." (Footnote 17: "The Court continues to receive numerous letters from civilly committed individuals and their family members agonizing over the incessant nature of confinement. Moreover, for multiple individuals, civil commitment has proven to be a life sentence.")]

[p. 12:] "...The Court notes that it is dismissing these claims because the Eighth Circuit significantly narrowed the scope of a Fourteenth Amendment claim for confinement conditions at MSOP in the *Karsjens* litigation. However, the Court feels compelled to note that the policymakers who have allowed MSOP to persist in its current state should not take this Order as a sign to rest on their laurels. This court has been inundated with claims over the last decade from MSOP patients who have meticulously documented what it feels like to live in the shadow of hopelessness. Having served their time behind bars, these individuals have now been involuntarily committed to a program that many of them have slowly begun to realize is temporary in name only. They now seek to bring out of the shadows and into the light serious allegations about the state of their treatment services at the Moose Lake facility. Their pleas should no longer be ignored – a policy solution is long past due."

the Legal Pad

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