

"Falsehood flies, and the truth comes limping after it." Jonathan Swift, quoted in *The Telegraph* (U.K.)

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Coming Soon:

- ✓ Are Effective Counsel/No Counsel Your Rights in SOCC Cases?
- ✓ Community Notification: A Shock-Show That Harms Its Audience?
- ✓ Sex Offender Residence and Employment
- ✓ What Does Barring Inter-SO Associations Actually Result in?
- ✓ Remorse Bias — What's THAT?
- ✓ Banishment by 1000 Laws
- ✓ Levenson on Needs-Preferences of Clients of SO Treatment
- ✓ 'New' SORN Laws Are Punitive
- ✓ SO Reintegration - Environmental Factors Must Be Considered
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- ✓ PPG Test Results — Inadmissible
- ✓ What IS Rehabilitation When It Is Said to Differ for Sex Offenders?
- ✓ Moral vs. Clinical Decisions
- ✓ Guessing the Number of Unreported Sex Crimes Is Not Science.
- ✓ Why the AI Black Box Doesn't Know Why It Condemns You.
- ✓ Pedophiles in UK Communities
- & Many more to come!

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iLP Editor Address
 (Exactly & Only as Below):

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

SO Commitment Poses an Ominous Threat to Individual Liberty

John Q. LaFond, "Sexually Violent Predator Laws and the Liberal State: An Ominous Threat to Individual Liberty," 31 Int'l J. L. & Psychiatry 158 (2008), excerpts provided by <https://www.sciencedirect.com/sciencwe/article/abs/pii/S160252708000216?via%3Dihub>.
Abstract Excerpt: "No other country has taken the idea of the liberal state – a government that relies on the rule of law to limit state power and maximize individual liberty – as seriously as the United States. But now [20] states are manipulating the government's civil commitment authority to indefinitely confine sex offenders who have served their criminal sentences and are entitled to their freedom in the community. This new system of preventive detention masquerading as civil commitment poses an ominous threat to individual liberty...."
Text Excerpts: [p. 1283:] "...[N]ow, many states are manipulating the state's authority to involun-

tarily hospitalize persons with mental illness for treatment and control to establish broad schemes of preventive detention. Rather than punishing persons for what they have done, states are now confining persons ...indefinitely for what they might do. ...This new system of preventive detention masquerading as civil commitment poses an ominous threat to individual liberty in the United States...."
 Washington State enacted the first [sex offender commitment] law. It went into effect in 1990. Since then, ...19 states have enacted [such] laws.
 ...The public assumes that sex offenders are exceptionally dangerous and will remain so for their entire lives. [However, this assumption has been thoroughly scientifically debunked over the last quarter century.]
 The most disturbing implication of this strategy is the threat it poses to basic American values,

including individual liberty. In our society, a responsible person is entitled to his freedom until and unless he commits a crime. Once he has served his sentence, the offender is entitled to rejoin the community. This deliberate misuse of the therapeutic state raises the distinct possibility that the United States will abandon its traditional [guarantee] to rely principally on the criminal law....
 [If] this practice becomes widespread in the United States, the fundamental nature of the liberal state, including its fierce protection of individual liberty and the rule of law, will be irreparably damaged. The state will rely less on the criminal justice system, which punishes people for harmful acts they have actually committed. Instead, it will implement the emerging jurisprudence of dangerousness and prevention...."

'It's Not Treatment, I Wish It Was'

Florida Action Committee, "Client Evaluations of Sex-Offender Therapy," Texas Tea Newsletter, #20, p. 3 (July 2023).
Text excerpts: "Most research dealing with the effectiveness of sex-offender therapy has been quantitative, mainly looking at the sexual recidivism rates 'as the primary measure of successful outcomes in criminal rehabilitation, while other indicators of client improvement and well-being have been ignored' (Levenson et al., 2020; National Academies of Sciences & Medicine, 2022). Much of the qualitative research on sex-offender treatment appears to be conducted outside of the United States.

In Learning from Consumers of Mandated Sex-Offending Programs: 'It's Not Treatment, I Wish It Was,' by Jill S. Levenson, Melissa D. Grady, Heike Lasoski, and Kyle T. Collins, a qualitative study was done to 'explore clients' perceptions of sex-offending treatment.'
 'People required to register as sex offenders and their family members were recruited with assistance from several registry reform advocacy groups in the United States.' The survey was anonymous and confidential....
 Individuals felt their therapy was more of a negative experience when the following techniques were used:

- Felt coerced to make certain statements, whether true or not
- Being treated disrespectfully by therapists
- Feeling their particular therapist was unqualified
- Use of outdated methods that were not research-based or individualized

This study should be read by all stakeholders. Hopefully the findings of this study will be incorporated into future sex offender therapy programs everywhere."

Restrictions on Community Supervision (Part 1 of 2)

Robin J. Wilson & Jeffery C. Sandler, "What Works (or Does Not) in Community Risk Management for Persons Convicted of Sexual Offenses? A Contemporary Perspective," 65(12) Int'l Jour. Of Offender Therapy & Comparative Criminology 1282 (Sept. 2021).
Abstract Excerpt: "...This article reviews current policies and perspectives, with a specific focus on what happens when offenders are released to the community (e.g., how public policies intended to track offenders and/or restrict their movements can negatively affect community reintegration)...."
Text Excerpts: [p. 1283:] "**Introduction**
 Despite the existence of credible evidence that a majority of persons who have sexually offended can be safely managed in the community (Carr, Schlank, & Parker, 2013; Wilson, Cortoni, Picheca, Stirpe, & Nunes, 2009), a perspective remains that 'once a sex offender, always a sex offender' and that they are all at high risk to reoffend. There are several possible reasons for the intractability of community views about the management of persons convicted of sexual offenses, including fear, lack of education, and a failure on the part of experts to impart knowledge

in an accessible and understandable manner. The latter is highlighted in results published by the Center for Sex Offender Management (CSOM, 2010), and in spite of a stated preference for more comprehensive explanations from researchers and experts. Although some prominent experts have attempted to share research findings in op-eds or other pieces in popular media (see Cantor in Canadian Broadcasting Corporation [CBC], 2016; Letourneau, 2014), the reality is that most scientifically informed viewpoints are reserved for scholarly journals, textbooks, and other media generally inaccessible to ordinary citizens. Indeed, we are mindful that even this article is being published in a similar fashion.
 Misinformation has clouded both public and legislative understandings of the nature of sexual deviance and the supposed high likelihood that those who engage in sexually inappropriate conduct will continue to do so unabated despite treatment or other attempts to intervene. A good example of this is found in the Nothing Works perspective (Martinson, 1974), which asserts that correctional programming does not reduce rates of reoffending. This belief continues to persist for

many policymakers regardless of the fact that the research underpinning this perspective was later retracted (Martinson, 1979) and meta-analytic research has consistently shown that programming does, indeed, reduce reoffending (see Aos, Miller, & Drake, 2006; Smith, Goggin, & Gendreau, 2002).
 Another example of misinformation and sexual violence risk, this time regarding re-offense rates, emanates from a 1988 U.S. Dept. of Justice publication (Schwartz & Cellini, 1988) that ultimately informed a perspective (including the U.S. Supreme Court) that the likelihood of new sexual offending by known offenders is 'frightening and high' (*Smith v. Doe*, 2003). This perspective was, in turn, informed by a 1986 article in *Psychology Today* (Freeman-Longo & Wall, 1986) in which the authors suggested that rates of sexual reoffending could be as high as 80% – offered without evidence or elaboration. Longo has since publicly admitted that that figure is 'very high' (Vaughn, 2016).
 Whatever the reasons may be that the 'once a sex offender, always a sex offender' perspective endures, numerous studies have shown it to be incorrect. Two recent articles published by Karl

Hanson (formerly of Public Safety Canada) and his research group are of particular relevance to our discussions in this article: (a) 'High-risk sex offenders may not be high risk forever' (Hanson, Harris, Helmus, & Thornton, 2014) and (b) 'Reductions in risk based on time offense free in the community: Once a sexual offender, not always a sexual offender' (Hanson, Harris, Letourneau, Helmus, & Thornton, 2017). In each of these articles, Hanson and his colleagues provide compelling data showing that persons convicted of sexual offenses – even those regarded as high risk – can and do desist from engaging in sexual violence.

[p. 1284:] Indeed, these two studies with large samples (N > 7,000) and long follow-up periods (20+ years) demonstrate quite clearly that among individuals of all age groups and risk levels, the longer someone convicted of a sexual offense can remain offense-free in the community, the more likely it is that they will stay that way. Although the re-offense trajectories of low-, moderate-, and high-risk offenders are initially divergent, after 10 years of offense-free community reintegration, that separation erodes: "After 10 to 15 years, most individuals with a history of sexual offenses were no more likely to commit a new sexual offense than individuals with a criminal history that did not include sexual offenses" (Hanson, et al., 2017).

[p. 1285:] Risk Assessment

Risk assessment in criminal justice has something of a troubled history. Not long ago, predictions of reoffending were accomplished by 'experts' employing what amounted to unstructured clinical judgment fraught with subjectivity and bias. Monahan (1981, 2008; see Meehl, 1954/1996) ably show that simply asking experts for their opinions as to re-offense risk demonstrated predictive validity not much higher than a coin toss.

[p. 1286:] Ensuring Attention to Responsibility

...For many years, sex offender programming was marked by confrontational approaches that stressed dogmatic adherence to full disclosure and rigid accountability structures (see Salter, 2003). Subsequent research (see Marshall, 2005; Marshall, Marshall, Serran, & O'Brien, 2011) has suggested that confrontational approaches are less likely to achieve positive outcomes than those that are Warm, Empathic, Rewarding, and Directive (WERD). In such frameworks, clients are treated as collaborators in community safety by ensuring attention to reduced victimization and greater client reintegration potential. We are mindful that some readers may see these types of approaches as being soft on crime, or somehow apologetic of the harm done by sex offenders. We should counter this by saying that reduced victimization is our primary goal. If the science tells us that being WERD is more likely to reduce victimization than being confrontational (see Marshall, 2005; Prescott & Miller, 2015) then that is what we must do.

[pp. 1286-87:] The Community, When Feasible and Safe, Is the Best Place to Conduct Treatment

...[C]orrectional interventions should be offered in the least restrictive environment – preferably the community – as long as safety concerns can be managed. ...[O] utpatient services allow for an *in vivo* component that is very difficult to realize in prisons, secure treatment facilities, and other closed custody environments. ... Research has shown that preparation for community release is a critically important process (Willis & Grace, 2008, 2009); especially regarding identification of appropriate housing, opportunities for employment, and access to aftercare services.

[p. 1289:] Research into the public safety impact of registration and community notification of persons convicted of sexual offenses has generated somewhat mixed results, but most studies on the policies have failed to find that they increase public safety (e.g., Jennings, Zgoba, & Tewksbury, 2012; Sandler, Freeman, and Socia, 2008; Zgoba, Veysey, & Dalessandro, 2010). One possible reason for the lack of an observed increase in public safety could be that many methods of sorting offenders into risk-based tiers (including the method based solely on crime of adjudication proposed by the Adam Walsh Act) are inaccurate (Freeman & Sandler, 2010; Zgoba et al., 2016). As such, some persons at low risk to reoffend are likely being subjected to the most stringent registration and community notification requirements, while other persons best described as high risk are being subjected to the least stringent requirements. In RNR terms, therefore, such inaccurate sorting systems violate the principle of risk.

[p. 1290:] Research into the use of GPS monitoring with persons convicted of sexual

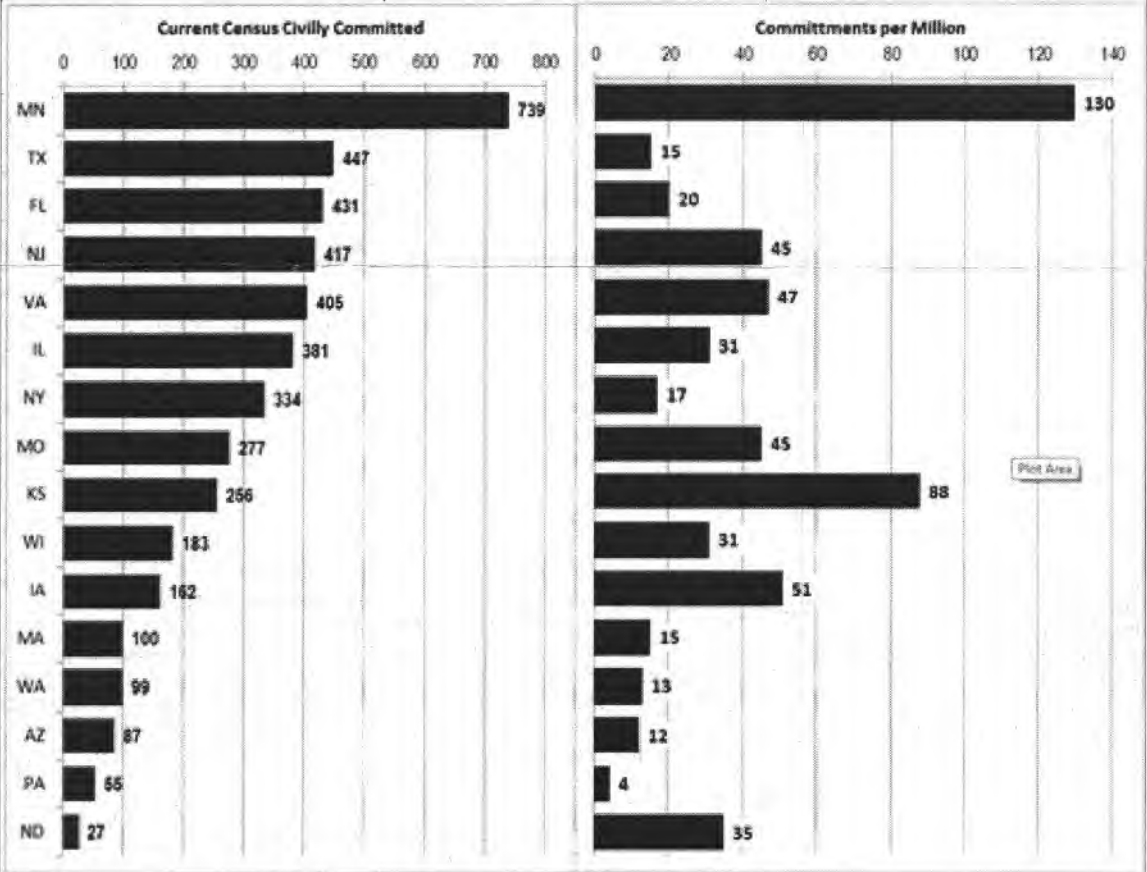
offenses has generally failed to find that GPS use has reduced rates of sexual recidivism (e.g., New Jersey State Parole Board, 2007; Turner et al., 2007), prompting Meloy and Coleman (2009) to conclude, 'at best it appears that GPS surveillance for sex offenders has a null effect on sex offender recidivism' (p. 263). A common criticism of GPS usage with persons convicted of sexual offenses (indeed, persons convicted of all types of offenses) is that a GPS unit can only tell authorities where someone is, not what they are doing there (Meloy & Coleman, 2009).

[p. 1291:] To date, research into the impact of these laws has found little to no evidence that they affect rates of sexual offending, particularly sexual recidivism against children (e.g., Blood, Watson, & Stageberg, 2008; Huebner et al., 2013; Minnesota Dept. of Corrections, 2003; Nobles, Levenson, & Youstin, 2012; Socia, 2012, 2015). One possible reason for this finding of no effect could be that the main assumption underlying residence restrictions (i.e., that residential proximity to places where children congregate facilitates sexual recidivism) may not be true. For example, Duwe, Donnay, and Tewksbury (2008) studied 224 instances of sexual recidivism with child victims and found that none of the sexual recidivists contacted their victims near places commonly included in residence restrictions, and most recidivists contacted their victims over a mile from their home (see also Zandbergen, Levenson, & Hart, 2010).

Exclusion Zones. Although residence restrictions prohibit where offenders can live, exclusion zones (sometimes refer to as buffer zones or spatial restriction zones)

prohibit where offenders can go. These laws are, therefore, more restrictive than residence restrictions, in that a residence restriction by itself would allow an offender to work near a school or travel across school grounds to get to work, but an exclusion zone would not (see Does 1-5 v. Snyder, 2016). Exclusion zones have often been criticized for being overly restrictive to the point of being punitive or for being worded in a too vague manner, ...leading to several exclusion zone laws having been ruled unconstitutional, such as those in Georgia (Whitaker v. Perdue, 2006) and Michigan (Does 1-5 v. Snyder, 2016). To date, no research has specifically investigated the impact that sex offender exclusion zones (independent of a residence restriction) have had on sexual recidivism.

Internet restrictions. As opposed to residence restrictions and exclusion zones, which are attempts to keep persons convicted of sexual offenses away from potential victims in the physical world, Internet restrictions are attempts to keep them away from potential victims in the online world. Some of these Internet prohibitions are broadly worded to include all or almost all Internet use, such as the Internet restriction being challenged in New Jersey. (Porter, 2017). Others specifically prohibit persons convicted of sexual offenses from using social media sites that allow minor children to join (e.g., Facebook, Twitter), such as the North Carolina statute recently struck down as an unconstitutional violation of First Amendment rights (*Packingham v. North Carolina*, 2017). To date, no research has specifically investigated the impact that Internet restrictions for persons convicted of sexual offenses have had on sexual recidi-



vism.
[p. 1292:] ...the results of several studies fail to support the assumptions underlying the laws. For example, Chaffin et al. (2009) found no evidence of increased sexual victimization of children on or immediately before Halloween, while Duwe et al. (2008) found less than 5% of sexual recidivists to have victimized their neighbors."
[Editor's Note: References follow Part 2.]

Reports from Shadow Prisons in Selected States

New Jersey

1. Shadow Prison in Avenel, NJ - Report from Leading NJ News Site

...The results of several studies fail to support the assumptions underlying the laws. For example, Chaffin et al. (2009) found no evidence of increased sexual victimization of children on or immediately before Halloween, while Duwe et al. (2008) found less than 5% of sexual recidivists to have victimized their neighbors."
[Editor's Note: References follow Part 2.]

Editor's Introduction:

Text excerpts: "...Though his prison sentence ended in 2003, Derrick Baldwin is one of 416 men currently civilly committed in New Jersey under a law created in the 1990s.

While they are no longer technically prisoners, detainees are held in the Special Treatment Unit, located next to East Jersey State Prison in the Avenel section of Woodbridge. The men, called 'residents,' wear their own clothes and can vote in elections, but they're guarded by corrections officers and can't leave.

Some expect to die there.

[Inset:] Sex Offender Civil Commitment [SOCC] Programs

The Offender Civil Commitment Programs Network [SOCCPN] conducted its 2023 survey of sex offender civil commitment programs around the nation and received population data from 16 programs, including New Jersey. Included here are the number of people civilly committed [i.e., only actually confined] in each state's program, and a breakdown of commitments per one million residents of that state.

[Note: 4 States, including CA, not reporting]

New Jersey's Sexually Violent Predator Act allows the state to indefinitely detain sex offenders who complete their prison sentences but are deemed to be too dangerous to release. Advocates say the system is keeping the state safe. But, some detainees say they spend years, or even decades, in a Byzantine-like system with a convoluted therapy program and no clearly-defined rules for getting out.

The process is vague from the start. There is no clearly-stated criteria for who gets put in the Special Treatment Unit or exactly what detainees need to do to be released, advocates say.

For some detainees, there may never be a

way out, said Dr. Steven Simring, a veteran New Jersey psychiatrist who has testified in sex offender civil commitment proceedings.

"The end result was always the same," Simring said. "The individual did not get out and they stayed there - until they got out feet first."

NJ Advance Media spent more than six months interviewing more than 40 people - including 14 current and former detainees - along with family members, psychiatrists, psychologists, lawyers and lawmakers. May describe a civil commitment program that they say has little accountability, violates basic human rights, and forces detainees to live in squalid conditions with a once-a-year chance to be evaluated for release.

Several researchers, along with the former president of the American Psychiatric Association, say this might all be a costly waste of time and taxpayer money. Some studies suggest the number of sex offenders who would commit new crimes after their release from prison would be very low even without treatment....

Twenty states, the District of Columbia and the federal government have civil commitment health Department and Corrections Department - is one of the largest in the nation. Only Minnesota, Texas and Florida reported more detainees, according to a survey last year of 17 of the state civil commitment programs.

"Very few people know whether the huge public investment in civilly committing so many people in New Jersey is actually effective or whether it's just a name for another way of achieving indefinite incarceration," said Jenny-Brooke Condon, professor of law at Seton Hall Law School and director of the school's Equal Justice Clinic.

Eight of the current 416 detainees were originally committed 25 years ago, state records show. A total of 96 detainees have died or been released to hospice care since the unit opened in 1999.

"It is, from my view, a prison in all but name," Condon said.

In New Jersey, few of the people who crafted the state's civil commitment plan in the late 1990s want to talk about it. Most either didn't respond to requests for comment or declined to speak.

The state agencies responsible for operating the Special Treatment Unit also declined to make officials available for interviews or allow reporters or photographers to see where detainees are held...

It's unclear how many people have been screened for possible civil commitment since the program began. However, the Attorney General's office has reviewed 3,265 people for possible civil commitment since 2005, state officials said.

Those currently in the unit range in age from 18 - including some who committed their crimes as juveniles - to 80....

Civilly committed offenders live in two buildings. 'The Main,' a three-story, concrete edifice with narrow, slit windows, is a former prison building with cells once used for solitary confinement.

Next door, 'The Annex' is a one-story brick

structure holding detainees in dorm-like rooms. ...Each dormitory in the annex houses about 60 detainees, with blankets and partitions separating pods of three or four people each. ...Personal belongings and furniture are jumbled in the warehouse-like spaces....

Unlike inmates, names of treatment unit detainees aren't public. Their identities are shielded by federal protections against release of patient health information....

Victories are rare for sex offenders trying to argue against being civilly committed, said attorney Michael Mangels, who leads the team of public defenders representing most detainees at hearings.

"I counsel my attorneys to be as upfront as possible with the likelihood of success, which is tell your clients there's a near-zero chance of success every time you go into court," Mangels said. "Expect to lose. If you do win, great, but that's a miracle and treat it as such."

Detainees attend annual court hearings to determine if they must remain detained, according to Department of Health spokeswoman Nancy Kearney....

Conditions for New Jersey from 2000 to 2002, alleged doctors generally do a poor job of predicting whether someone will commit a sexually violent crime in the future.

"We're trying to predict something that occurs infrequently," he said. "And our biases are towards the over-prediction of an event which occurs rarely. So we're terrible at it."

He recalled feeling an 'institutional pressure' to side with the state when he conducted evaluations in New Jersey....

"It's fair to say that many psychiatrists, and for that matter, the American Psychiatric Association, looks on these sex offender commitment programs with a great deal of skepticism," said Dr. Paul Appelbaum, past president of the American Psychiatric Association and director of Columbia University's Division of Law, Ethics and Psychiatry.

[Sidebar:] Spending at the Special Treatment Unit has grown more than 1900% since 2001, while the number of people committed has increased 184%....

There is a 'fairly profound' lack of evidence civil commitment programs work, he said.

"What they seem to be designed for is long-term incapacitation incarceration of people about whom the general public has extreme fears," Appelbaum said.

New Jersey has been sued for allegedly not offering adequate treatment to those being held in the Special Treatment Unit and detainees signed a petition a few years ago claiming unhealthy living conditions....

For those who do participate, detainees are eventually encouraged to apply for admission to the facility's most intensive therapy - called the therapeutic community - where detainees who are considered advanced in their treatment are encouraged to both praise and challenge one another in group therapy. The treatment includes 'pull-ups,' a term for constructive criticism for detainees' dysfunctional behavior.

Though participation in the therapeutic

community is necessary for release, several detainees called it emotionally abusive and claimed it pits people against each other.

The pull-up process can be weaponized by detainees, said Public Defender Alfred A. Egenhofer.

"It's a tool that they can use to gain leverage over other residents," Egenhofer said. "If the group is angry at a particular person for either a valid cause or, for example, discovering that they're getting considered for discharge, they can all start to write posts about one particular person."

The process cause some detainees to drop out of the therapeutic community, he said.

"They have signed themselves out because they said the stress that it created was too great," Egenhofer said.

...Other detainees say they've run into barriers in treatment over what crimes they've been willing to admit.

Detainee Thermond Williams said he served time for two rapes in the 1970s and was accused of two more rapes in the 1980s, but he was sentenced on a robbery

Those dropped charges still come up in treatment, said Williams, who has been in the unit for more than 20 years.

"They say, even though you wasn't convicted of these crimes, could you talk about it hypothetically? I know I'm kind of slow, but I ain't that goddamn slow," he said. "If I tell you I wasn't convicted of it and the judge saw fit to dismiss it, and you want me to talk about it hypothetically?"

Requiring detainees to 'fess up' to acts for which they weren't convicted or even charged is a disincentive to participate in treatment, according to Appelbaum, past president of the American Psychiatric Association

"And yet, they're in this Catch-22 where in order to make progress from the perspective of the program, that's exactly what they need to do," he said. "They conclude that they're never going to get out and simply withdraw and refuse to participate."

...Some critics of civil commitment programs also question whether holding sex offenders after their prison sentences makes sense at all. Studies show convicted sex offenders are less likely than other types of offenders to commit new crimes and most charged with sex crimes are first-time offenders....

Dr. Cynthia Calkins, a licensed clinical forensic psychologist and associate professor at John Jay College of Criminal Justice, co-authored a 2020 study of recidivism rates for New Jersey sex offenders.

The study, which included around 3,000 offenders released from New Jersey prisons over an 11-year period, found that of those not screened for civil commitment, the recidivism rate for new sex offenses was 5%....

"If you were to conduct a survey asking what percent of sex offenders are going to reoffend with a new sex offense, people would probably say 80 to 90%," Calkins

(Continued on page 4)

said.

Appelbaum questioned why other criminal offenses don't draw similar demands for post-prison detention.

"In general, people who are released from a prison term have an average probability of recidivism of roughly 60%. If you look at studies of many categories of sex offenders, they have much lower rates of recidivism...which suggests that there's something other than the risk of future recurrence that motivates all this," Appelbaum said. "Otherwise, we'd come up with a parallel civil commitment process for felons in general."

2. NJ SOCC Class-Action Settlement Criticized

Joseph Aruanno, "Avenel Inmate Says Class Action Settlement Fails to Address Systemic Problems", 211 *New Jersey Law Journal*

17 (Jan. 7, 2013)

[Editor's Note: A dozen years ago, the NJ SOCC inmate writing this letter to the editor complained that a federal class action settlement failed to solve the underlying problem of committed people finding it very difficult, if not impossible to gain release. Twelve years later, that extreme difficulty continues.]

[Text Excerpts:] "I write in reaction to the recent settlement of the class-action suit in federal court involving alleged sexually violent predators, which recently was on the front page of the Law Journal...."

As an alleged sexually violent predator who is civilly committed at Avenel, and one of numerous persons who was able to submit objections to the court about this settlement, I can say that one of the major flaws is that, whereas in high school or college you graduate after completing a four-year course, the settlement omits such a procedure or guarantee. That leaves those committed here with no such goal or expectancy - as well as with no hope, which is critical in motivating.

Being expected to go to group therapy without being considered for release makes absolutely no sense, other than to give us false hope. This is one reason why most patients here have no faith or belief in the program, the civil-commitment court or now the federal court after such a 'charade' of a settlement. That was the word used by Justice Barry Albin of the N.J. Supreme Court about being denied treatment in prison only to 'need' it after completion of the sentence. The federal court avoided this due process concern in approving the settlement, since it narrowed down numerous issues into only one: treatment.

I can say for a fact that two patients here have been told that they will never leave but are expected to go to group therapy - logic that is circular and thus flawed. As for myself, a person who was sent to prison for the first time in my life at age 36 for a crime I did not commit, the therapy and settlement

does not apply to me, since I have appeals of the conviction pending. Despite this, I was forced into consolidation with an issue that does not apply to me.

The most absurd part of the settlement is that the court avoided issues such as the housing of civil detainees for treatment in a prison that was designed and built for punishment - lacking in space and privacy and under the watch of the Department of Corrections, an organization that is focused on punishment through fear, violence and terror in a most repressive manner. That clearly is not just counterproductive and anti-therapeutic but harmful, to say the least.

Ironically, Judge Dennis Cavanaugh had us moved into the DOC's worst facility, an administrative segregation building, and dismissed as a defendant a health-care provider - CMS, which was a DOC contractor - without objection from our court-appointed lawyers, and then stated in his opinion that the DOC issues were not part of this case. Once again, the logic is circular and thus flawed. Clearly, common sense dictates that you cannot even begin to address therapeutic needs or mental health while living under such repressive and deplorable conditions.

Over the years, the Appellate Division has stated that the judges who hear Sexually Violent Predator Act cases here, such as Recall Judge Philip Freedman, are the 'experts' in this field, but that begs a question. How, after almost 14 years, could they not see how deficient and unconstitutional the program here is?"

3. Action needed after NJ's 'gulag' is exposed

Harvey Weissbard, "Action Needed after N.J.'s Correctional 'Gulag' Is Exposed," *NJ.com*, June 23, 2024

Text excerpts: "...Kudos to Matt Gray for his investigative report, 'Shadow prison,' an insightful, in-depth look at the euphemistically named 'Special Treatment Unit' (STU) in New Jersey's corrections system that was published in May.

A more honest name for the unit would be 'Gulag,' which would acknowledge that the unit - and the deplorable conditions outside that Gray describes - are unworthy of a civilized and humane society. While it's technically not a prison, the STU is simply a slightly dressed up jail...."

It seems antithetical to all the protection afforded by our constitutionally based justice system that individuals who have completed their prison sentences for sexual offenses should, based on the opinion of one or two medical practitioners, lose their liberty and remain confined for decades. In some cases, this translates into life sentences.

It is no answer that this bizarre setup has been sanctioned by our courts on the basis that it constitutes civil, rather than criminal confinement. To the person confined, the distinction must be elusive. A criminal sentence has an end date, marked either by service of the full term or by release on

parole. The civil commitment has no definite end; it ends only when a judge determines that it should, based on testimony of a psychiatrist and/or psychologist. Of course, in the cases Gray cited, and most others, the testimony of state witnesses usually favors continued confinement.

Nor should it provide comfort that these individuals unlikely to elicit our compassions have been convicted of inexcusable sexual crimes, some of which were especially brutal. It has long been said that our society should be judged by how we deal with the most contemptible among us.

While I have experienced considerable discomfort at the entire STU process, established by the Sexually Violent Predator Act, I gave little thought to the conditions of confinement which, I believe, were hospital-like, similar to treatment facilities for generalized mental illnesses, Gray's report has exposed the fallacy in that belief.

One would think, indeed hope, that the immediate impact of this article would be an outcry for better conditions at the STU; whose current conditions would not be tolerated even in 'regular' prisons. Yet where are the voices demanding more funds to remedy this disgraceful situation? Just silence.

The only advocates for these people are the dedicated public defenders who labor on, despite near certainty of defeat at every turn. Their adversaries are not just the courts and the medical profession but, as it now appears, politicians who would fear for their political lives if they voted to increase spending to restore the STU to livable condition.

Again, thanks for the diligent reporting which has revealed this ugly secret hiding in plain sight."

4. NJ Judge Says Over 100 SOCC Confines There Can Be Safely Released.

Matt Gray, "More Than 100 Sex Offenders Could Be Safely Freed from Controversial N.J. Lockup, Ex-Judge Says," *NJ.com*, Dec. 10, 2024 (<https://www.nj.com/news/2024/12/more-than-100-sex-offenders-could-be-safely-freed-from-controversial-nj-lockup-ex-judge-says.html>).

[Text Excerpts:] "Superior Court Judge Bradford Bury couldn't believe what was happening in his courtroom.

The judge was overseeing a hearing to decide if a man should remain locked up in New Jersey's civil commitment system, the controversial program that holds sex offenders long after their prison sentence are done if they are deemed too dangerous to reenter society.

The state brought a psychiatrist into Bury's courtroom to help argue that the man, whose prison sentence ended two decades ago, should remain detained.

But, Bury soon learned the same psychiatrist testified 20 years earlier when the man was first committed - for the defense. That time, the doctor argued the offender should not be committed.

The judge suggested lawyers for the Attorney General's office find a new psychiatrist. But, after speaking with their supervisor, the state's lawyers said they didn't need to switch doctors. They didn't see a problem and were ready to move ahead.

Bury was stunned.

'I almost fell off my chair,' he said.

That 2020 case was one of many examples of what Bury believes are deep problems with how New Jersey's civil commitment program is administered.

The 71-year-old former judge - who was the primary judge presiding over the sex offender civil commitment cases in New Jersey for two years - said he sent the Attorney General's office a lengthy report last year about severe problems with how its staff administered and enforced the state's Sexually Violent Predator Act, or SVPA, that detains convicted sex offenders.

Bury said he is now ready to go public with his concerns following NJ Advance Media's investigative report, 'Shadow Prison,' published in May that detailed numerous allegations of problems within New Jersey's Special Treatment Unit for civilly committed sex offenders.

...Bury has a stunning assessment of the program. A third of the roughly 400 civilly committed sex offenders in New Jersey could be safely released if changes are made to how the system is administered.

The state Attorney General's office and administration at the Special Treatment Unit are unnecessarily holding some who could qualify for release and frequently try to derail court-ordered discharges, Bury Alleges.

Before he retired last year, Bury sent the state Attorney General's office a 35-page documents outlining his concerns. He said he was told his allegations triggered a review, but he received no other response....

Annual hearings before a judge are held to determine if detainees should remain locked up another year or begin their discharge process.

...He attributes delays to a 'one-size-fits-all' approach to treatment and an overwhelming fear of criticism if a released sex offender were to commit another crime....

'We can't say as a society that we're going to prevent all risk by letting no one out or nearly no one out,' Bury said. There are a group of individuals who do get rehabilitated and are capable of being discharged into the community safely, with conditions and continual supervision, and living productive lives.'

Of the more than 830 people ever detained at the treatment unit since the late 1990s, more than 300 have been released.

Nearly 100 more have either died while detained or been released to hospice care.

Of the 420 men currently in the unit, eight have remained locked up under civil commitment for at least 25 years each, according to state records....

Bury cited ethics and competency issues, referencing specific examples from multiple cases. The judge recommended firing two deputy attorneys and corrective actions for a third office member.

'It's about ignorance and apathy,' Bury said. 'It's about lack of competence and a lack of intellectual integrity.'

In another case that raised ethical concerns, Bury said the state sought to recommit a sex offender living in a nursing home.

The disabled ex-detainee allegedly had consensual sexual contact with another nursing home resident and attempted unsuccessfully to view child porn on a fellow nursing home resident's phone, Bury said.

The State argued the ex-detainee, then in his 60s and using a walker, posed a threat to the community and to children.

'The case was so weak,' said Bury, who granted the defense's motion to dismiss the matter. He was shocked by what happened next.

The Attorney General's office appealed his decision, misrepresenting details of the case from the court record and inaccurately claiming the ex-detainee had access to children in the nursing home, Bury alleged.

The public defender on that case filed a response to the court saying she was astonished by the document filed by the state's attorney.

'In counsel's thirty-seven years of practicing law in New Jersey, I have never seen an adversary misrepresent a trial record in such a blatant fashion as the State does here,' she wrote.

The state later withdrew the appeal, Bury said."

Kansas

'Career Suicide' to Recommend Shadow Prison Confinee to Be Released, No Matter How Safe He Would Be

[Anonymous], Excerpts from narrative from SOCC facility in Larned, KS dated July 9, 2024

Text Excerpts: "...The water tower of LSH [Larned State Hospital] states, 'Be the one.'" Given the comparative rarity of releases from the SOCC facility at the LSH, this seems to be a taunt suggesting that one might be the sole releasee in a period of many months. Currently, this program (called SPTP for short) costs 30 million to house, care for, and treat 330 residents. This suggests that treatment and other services administered are minimal at best. The philosophy at SPTP appears to be very conservative in determining whether or not to release someone – not from genuine concern about risk of sexual re-offense, but instead over public reaction to releases. The then-Secretary of SRS, Donna Whiteman testified, "It would be career suicide for a Mental Health professional to state that a sexually violent predator is safe to be at large."

The writer (one of those confined in the SPTP facility) complains that "when I file a grievance, receive a rights restriction, or

notification, I am not given any due process. There are no hearings, no opportunity for me to present evidence, testimony, or witnesses like I can in prison...."

The 'therapists' are social workers and the Kansas Behavioral Sciences Regulatory Board knows this but still sends them our way. Mr. David Fye, the Executive Director states, 'There are no standards or qualifications for sexual offender or sexual predator treatment in the State of Kansas.'

So I have been here [since March 2019] with no due process, no therapy or treatment, worse conditions of confinement than my criminal counterparts and those others civilly committed and I can prove that the legislative intent of SPTP is continued confinement and punishment." For the immediately preceding ten years the writer was imprisoned for sex crimes. He writes, "I don't have a sexual disorder or diagnosis pursuant to [Kansas statutes]." He does note that he has been diagnosed with Bipolar II Disorder and Other Specified Personality Disorder with Paranoid and Narcissistic Features. However, these disorders do not cause sex crimes to be committed. Moreover, at the time of the Bipolar II Disorder diagnosis, the writer was found not to meet the criteria for commitment as a sexually violent predator. Unlike most sex offenders who have been committed, the writer states that he was first paroled, and was committed only later from that status. He contends that he is now serving an indefinite sentence due to this commitment.

Despite the fact that the writer works 14 hours per week and makes \$7.40 per hour, the State take a substantial part, and in some occasions, all that pay to defray the cost of his care and treatment, sometimes, contending that he owes the state still more even after that total confiscation of wages."

Texas

Littlefield Love Story

Sandy Rozek, "A Prison by Any Other Name Is Still a Prison," 17(6) NARSOL Digest 2. 19 (Dec. 2024-Jan., 2025)

[Text] They were married in a Texas County jail with a bulletproof pane of glass between them. The paths that took them to that point were twisted and tortuous, and the paths leading from it are even more so.

He was convicted of two sexual offenses many years ago and served two prison terms for them with the Texas Department of Corrections. In 2009, he was transferred to a halfway house and put in the Texas Civil Commitment program, which at that time was an out-patient program. In 2015, the Texas Civil Commitment Center (TCCC) in Littlefield Texas opened, a facility – and a program – with a history and performance inspiring anything but confidence and success. He was taken there, grabbed up in a sweep across Texas by the state D.O.C. that could have been inspired by the pogroms in Nazi Germany that rounded up and removed Jews to concentration camps. (<https://bit.ly/3UTTeunA>)

His wife Mandi sounds very matter-of-fact as she speaks about that time. She has told this story often. Mandi was employed from 2018 to 2021 at the Texas Civil Commitment Center – often simply called Littlefield – with a security company that contracted to TCCC. There they met, talked, and eventually the feelings of illicit friendship deepened into romantic ones. Mandi knew that they were breaking the rules, and she was terminated in 2021 on that charge.

New charges were brought against him for possession of contraband – a cell phone – and for failure to report internet identifiers, and he was returned to prison on the contraband conviction. Mandi visited him often there as well as having telephone conversations, and the relationship grew into love. It was while he was being held at a county jail awaiting transfer yet again back to prison for the internet charges that they married in April of 2022. That was the least time Mandi saw her husband, and the few telephone calls she has been allowed with him since have been with a Littlefield employee on the line and precipitated by her having a serious medical condition.

Detainees at Littlefield – they are not allowed to be called prisoners—are permitted contacts through a laborious and potentially arbitrary process. The detainee initiates the procedure with a request and fills out a form; the next step is an interview with the requested person. The treatment team reviews the request and the recorded interview, and then the head of the treatment team decides the level of contact that will be allowed – mail, phone, or/and in-person visits.

Mandi's application was stalled at the interview stage. She was not – and still has never been granted an interview. Instead, her application was denied on the basis of her not being a 'pro-social collateral contact' due to her willingness to break the 'no fraternization' rule while she was working at Littlefield and her failure to report his illicit cell phone.

She was told in a telephone meeting with Littlefield employees that she would first need to take classes from an approved, licensed, sex offender treatment provider. So she did, twelve different times, at her own expense. She still was not approved.

In an interesting sidenote, information about the requirements of an approved sex offender treatment provider in Texas appears to be swathed in secrecy.

<https://tinyurl.com/bskhca9y>

She was then told she had to take approved chaperone classes. She has. Twice. She was still denied.

<https://tinyurl.com/2w6wsfrf>

Then she was told she needed to prepare and submit a "treatment plan." She has. Several. Everyone has been rejected, and she was denied any assistance in what to include or what she was doing wrong. In a telephone meeting early in December of 2023, Mandi was berated and belittled to the extent that she gave up and stopped trying. She would later file suit against the Texas Civil Commitment Office, its executive director, the head of its treatment program, and her husband's case manager.

Before the end of 2023, Mandi was told by her doctor that tests showed she had a cluster of malignant cervical cells.

She was granted a very short, monitored telephone conversation with her husband to inform him of her diagnosis and the medical procedures she would be undergoing. None of those surgical procedures were successful in eradicating her cancer, and she was told she would need a total hysterectomy. This time, the request for a telephone call to inform her husband of her impending major surgery was initially denied – the lawsuit had now been served – and then was reluctantly granted, but only on the basis of her being her husband's legal power of attorney. Permission for the call came with a litany of demands. Only legal matters could be discussed, nothing medical, nothing about her upcoming surgery.

The call would, as the previous few calls about her surgical procedures had done, include a Littlefield employee.

The call could be 'absolutely' no longer than five minutes.

They were forbidden to include any personal references or to say 'I love you' to each other.

They were forbidden to pray.

Mandi's surgery is now behind her. And she has fully recovered. There still has been no contact whatsoever allowed with her husband. Her voice is restrained yet firm and articulate as she speaks. She readily agreed to this interview; she is eager to tell her story to anyone willing to listen.

I asked if she believed the refusal to approve her as a contact for her husband was a result of her fraternization with him when she worked at Littlefield. 'At first, yes,' she replied. 'I believe that now it's because of my advocacy.' Her voice was still matter-of-fact while she spoke about the facility itself, its top administrative staff, and the level of care and treatment it provides.

<https://tinyurl.com/y8sebt8>

She spoke of food shortage. 'I have been told by the wives and mothers of other men that they are fighting for scraps left on trays and are digging in the trash cans.'

Other issues she answered not only by what she has been told but also from what she knows from when she worked there. 'Medical care?' I asked. 'Inadequate, neglectful; medicines not given. During Covid it was horrible.'

'Special needs?' After a pause, her voice was, this time, washed over with emotion. 'No. One gentleman, Mr. [name withheld] is almost blind; no accommodations are made for him; he gets no help from any employees at all. Wheelchairs are broken and not replaced. Many of the men are elderly. More bottom bunks are needed for those who are unable to climb up; more handicapped pods are needed.'

Forced civil commitment for persons who have completed court-ordered punishment for a criminal conviction is applicable to no classification of crime other than sexual. Currently, twenty states have such provisions.

(Continued on page 6)

sions.

<https://tinyurl.com/2tu82m8d>

Littlefield staff and administration insist that the men in their facility be called patients or residents, not prisoners or inmates, but they are involuntarily confined, locked in cells behind high walls topped with razor wire, unable to make a telephone call or receive a letter until the person calling or writing has been put through the full contact vetting process and gained the approval of the head of their specific treatment team.

The focus of such confinement is supposed to be therapeutic, but little evidence exists that Littlefield offers an acceptable level of therapy or treatment. According to the Just Future project, at Littlefield, '...thirteen people have been fully released from civil commitment from 2016 to present,' and they were released by the courts, not by completing the program.

Complaints against the facility and TCCC are longstanding and have been made by former employees as well as family members of those incarcerated there.

<https://tinyurl.com/5n8sdeu8>

<https://tinyurl.com/5f5ghav2>

Mandi's suit, filed *pro se*, moves slowly through the system. She gave a presentation at NARSOL's 2023 conference in Houston. She is a past member of TACC, Texas Against Civil Commitment. She helped in starting a current petition calling for an investigation into TCCC.

<https://tinyurl.com/5be62j4j>

<https://tinyurl.com/4rtu5vwh>

<https://tinyurl.com/2zfxcxrb>

Now she waits. No visits. No phone calls. No letters. No one helping her.

She waits.

"At What Cost?" — Preventive Detention Criticized

Dr. Mark D. Kielsgard & John Khatini Vinod, "Trending toward Precaution at What Cost? Reconsidering Positive and Negative Human Rights Obligations in the Use of Neuro-Intervention for Sex Offenders," 18 *Conn. Pub. Int. L.J.* 391 (Summer 2019).

[Text Excerpts:] [pp. 394-95]: "[Some] see these measures as incompatible with human rights negative obligations and argue that the character of mainstream penal theory is shifting from retroactive fact-based adjudications and sentencing to preventative state rationales.

Rainey and Harrison highlight this tension between the shifts in penal policy from welfarism to public protection.⁴ They analyze how this shift in policy has affected the treatment and management of sex offenders in the United Kingdom and further articulate that this shift is incompatible to the human rights discourse.⁵ They claim that the rights-based model has influenced professionals' model of intervention, making it more inclusive and respectful of the offender's dignity⁶ and thus anticipate the tensions between this risk penology and the rights-based model of intervention. They argue that a public protection agenda shifts

the subjective view of the offender who can be transformed and instead objectifies the offender by focusing on the assessment of risk as a reason for treatment and control in the community.⁷ They reference the ideas of the German sociologist, Ulrich Beck. Beck posits that in a 'risk society,' members are increasingly preoccupied with risks and this compels regulators to adopt a precautionary approach to deal with such uncertainties.⁸ This principle is prevalent and has its roots in Environmental Law.⁹ The principle is grounded in risk management of subjects that are seen to pose a risk of harm to the public and/or environment and, in the absence of scientific proof, the burden of proof that these subjects are not harmful falls on the subject.¹⁰

[pp. 395-96:] Predicting future risk to society is a speculative process when compared to judging past actions. Therefore, precaution as the litmus for punishment provides an inadequate justification....

With regard to the development of positive obligations in which states are obligated to take an active approach to safeguarding the rights of its citizens against non-state offenders, precautionary policies are displacing conventional understanding of states' negative obligations in an evolving culture of risk society or preventative state.¹⁶ ...In modern society, the right to security has taken on the role of an absolute or meta-right, and correspondingly led to the priority of positive rights over negative rights.

...[T]he proactive risk-based approach, and incumbent precautionary principle, defeat states' negative obligations by intruding on fundamental concepts of human dignity and autonomy, which invites greater breaches. It elevates security as a meta-right in the human rights regime, displacing liberty, human dignity and non-discrimination.

[pp. 412-13:] III. The Preventative State Model

...C. Actuarial Justice

Beck characterized the risk society as becoming increasingly reliant on scientific data and observed, 'As risk becomes dominant in the arrangement of society, so science comes to play a central defining role in the way that society is governed.'¹³⁴ Malcolm Feeley and Jonathon Simon use the term 'actuarial justice'¹³⁵ to mean scientific data used by the government that includes 'techniques for identifying, classifying and managing groups assorted by levels of dangerousness.'¹³⁶ They argue that the government is increasingly reliant on actuarial data, such as it amounts to a 'new penalty'¹³⁷ predicated not on what the offender has done but what they might do. Accordingly, criminal justice has witnessed a shift in priorities.¹³⁸ This new perspective objectifies the individual offender as a means of scientifically controlling future risk and inures to a form of 'status offenders,'¹³⁹ sounding in actuarial data and bases decision making on the actions of broad categories of offenders sharing [some] common attributes. This can be accomplished either in the investigation stage with use of so-called 'profiling' techniques, or at sentencing in assessing future dangerousness.

[pp. 413-14:] Actuarial data used for sentencing protocols can be conceptualized as consisting of two types: *general offender data* and *offender specific data*. General offender data predicts future dangerousness (when assessed for sentencing of specific offenders) based on general criminology information such as the collection of general recidivism rates. Such tools are blunt instruments as specific predictive measures of future conduct for specific offenders or classes of offenses. Overreliance on such data tends to create 'status offenders' based on the conduct of other members of the class and fuels assumptions that may be ungrounded or simply false. It also inures to a form of collective punishment¹⁴⁰ whereby the quantum of coercive state measures offenders who have committed like-kind offenses. Thus, precautionary measures are taken against specific offenders predicated on the misconduct of the group. This predictive enterprise is rationalized by the legitimacy of (social) science and empirical studies. Yet, even assuming the propriety of this action, the data can and often is used in a purely anecdotal, misleading or self-serving way. For instance, many decision-makers, including judges, subscribe to the [falsely claimed] high recidivism rates pedophile sex offenders¹⁴¹ and take sometimes extreme precautionary sentencing steps to manage future risk.¹⁴² Yet, studies have repeatedly shown that pedophiles have among the lowest recidivism rates of any criminal actors.¹⁴³ Studies have shown that these low [actual] rates [of pedophilic re-offense] are fairly consistent throughout the (common law) world.¹⁴⁴ Some have argued that this innum of decision-making is politically or policy driven such that judges forego careful scrutiny of empirical data to harmonize their decisions with public misconceptions.¹⁴⁵ Thus, the use of actuarial data as a litmus test not only fails to rationally guard against future risk, but is subject to community myth-driven and counterintuitive applications.¹⁴⁶ Additionally, flaws in design models for many recidivism studies tend to overstate future dangerousness such that many are predicated on future arrests instead of convictions,¹⁴⁷ arrests for minor probation violations¹⁴⁸ or other non-serious violations like traffic offenses.¹⁴⁹

[pp. 414-15:] First, the offender specific data is or may be considered in light of general offender data such that punishment will be predicated on studies of general offenders with the same specific characteristics as the offender. This again defaults to group punishment. Moreover, there are no guidelines on which type of data is applied or emphasized, leaving that to the proclivities of individual judges. Second, diagnosing mental health conditions and making predictions on future dangerousness therefrom, is also subject to the differing expert medical opinions, is not an exact science and is subject to the proclivities of individual mental health professionals. The danger of reliance on these opinions are that they are imbued with a sheen of reliability that does not comport with the legitimacy attached to them as applied to the dubious predictive

enterprise of future dangerousness. Mental health professionals also have motivations to err on the side of precaution as they run the risk of backlash if an optimistic diagnosis does not ultimately comport with the future actions of the offender. In the end, precaution foreseeably is operationalized as neither judges nor mental health professionals seek to assume responsibility for the future conduct of convicted offenders. In this way, framing the decision-making process predicated on future dangerousness and risk inevitably defaults to precaution and therefore more coercive state measures.

[p. 417:] The rise of new technologies – neuro-interventions¹⁶⁸ like 'chemical castration' used to combat the risks posed by sex offenders – are only one of the new trends of risk management.¹⁶⁹ Typically they are employed as sentencing measures¹⁷⁰ or voluntarily,¹⁷¹ but come with an implied or express promise of early release.¹⁷² Thus, their voluntariness has raised grave ethical questions.¹⁷³

p.420:] IV. Critiquing the Precautionary Approach

A. The Right to Security as a Meta-Right

...Crawford observes 'we may become preoccupied with the quest for security as the precondition to liberty to such an extent that we end up with enhanced security but with meager liberty.'¹⁸⁶ Crawford identifies two types of balancing exercises, intra-personal tradeoffs and interpersonal tradeoffs:

[Intra-personal is] where individuals accept certain constraints on their own liberty in order to render themselves (and possibly others) more safe and secure; where each of us bears the costs of security whilst simultaneously each of us reaps the benefits. By contrast, interpersonal trade-offs – more problematically – occur where we sacrifice not our own liberty but the liberty of others in order that the rest of us may be (or feel) more safe.¹⁸⁷

[p. 420-421:] Lazarus reasons that the evolving positive obligation judgments from the ECtHR reinforces states' use of security to incorporate into the political rhetoric in order to further the state's coercive powers.¹⁸⁹ Thus, the right to security must be construed narrowly.¹⁹⁰ Lazarus observes:

The rhetorical and political appeal of security and rights has within it a potentially explosive combination, not only to erode the protections of competing rights such as liberty, but also to undermine accepted understandings of the foundations of fundamental rights reasoning.¹⁹¹

Drawing upon this scholarship, the expansion of the positive obligations to include 'collective' security is subject to rationally foreseeable abuse for uneven use against non-elite society members and the predictable manipulation of ever increasing security initiatives by states to further unrelated paternalistic agendas, sacrificing negative obligations such as the use of torture techniques against terrorism suspects. As the dialog of risk increasingly gains traction, greater acceptance by majoritarian popula-

(Continued on page 7)

tions to forego essential human rights increases, particularly if those reversals are perceived as targeting minority populations. Functionally, this inures to a utilitarian tactic providing the greatest security and access to human rights to the minority, upposes negative state obligations, human rights anti-majoritarian character, and the basic precepts of human rights ideology against discrimination with its mandate of equal distribution of rights to all.¹⁹²

[p. 423:] **B. Objectification, Uncertainty and the Slippery Slope of Precautionary Logic**

One critique of precautionary logic in criminology claim that state coercive measures objectify the offender,¹⁹³ dehumanizing them by placing them in a distinct and separate category which fuels discriminatory treatment particularly regarding the methods and justifications for state coercion applied against them. Critics also focus on the uncertainty of precautionary logic methodology. They argue that risk assessment models are unreliable indicators of future conduct and thus are unethical if used for future punishment,²⁰⁰ weakens individual rights, contradicts traditional assumptions grounded in constitutionality and rule of law,²⁰¹ and that non-judicial measures may be employed in communities steeped in precautionary logic that sidestep normal judicial constraints.²⁰² It inevitably leads to a slippery slope to an extent that the endpoint of the preventive state takes criminology to a point of no return, characterized by authoritarian politics and punitive measures long abandoned by basic precepts of human dignity."

Notes:

4 Bernadette Rainey & Karen Harrison, "Consent, Compulsion, and Sex Offenders: An Ethical and Rights Based Approach to the Treatment and Management of Sex Offenders," in *Legal Perspectives on State Power: Consent and Control* (Chris Ashford et al. eds, 2016).

5 Tony Ward & Gwenda Wills, "Ethical Issues in Sex Offender Research, in *The Wiley Blackwell Handbook of Legal and Ethical Aspects of Sex Offender Treatment and Management* (Karen Harrison & Bernadette Rainey, eds., Wiley-Blackwell, 2013).

6 *Id.*

7 Rainey & Harrison, *supra* note 4

8 Ulrich Beck, *World at Risk* (2009).

9 Bernadette McSherry, *Managing Fear: The Law and Ethics of Preventative Detention and Risk Management* (2014).

10 *Id.* Peter Ramsey found the precautionary principle at work behind the English legislation under the Criminal Justice Act of 2002. As amended by the Criminal Justice and Immigration Act of 2008. Under the legislation, any offender convicted of a number of violent and/or sexual offenses would receive an "imprisonment for publication order" against them. See Peter Ramsey, "Imprisonment Under the Precautionary Principle," in *Seeking Security: Pre-empting Commission of Criminal Harms* (G.,R. Sullivan & Ian Dennis, eds., 2012).

16 Carol S. Steiker, "Foreword: The

Limits of the Preventive State," 88 *J. Crim. L. & Criminology* 771 (1998).

134 Ulrich Beck, *Risk Society: Towards a New Modernity* (Mark Ritter trans., 1992).

135 Malcolm Feeley & Jonathan Simon, *Actuarial Justice: The Emergence of*

136 *Id.* at 173

137 *Id.*

138 *Id.*

139 "Status Offender" refers to one who commits a status offense, which is defined as "a conduct that is unlawful only because the offender is a minor." See generally Patricia J. Arthur & Regina Waugh, "Status Offenses and the Juvenile Justice and Delinquency Prevention Act: The Exception That Swallowed the Rule," 7 *Seattle J. for Soc. Just.* 555 (2008). In this context the status of the offender, in sentencing orders, is defined by their similarity to other offenders with similar attributes as determined by actuarial data.

140 "Collective punishment," also known as "collective sanctions," occurs when a single member of a group is found to have violated a rule and is punished alongside the members of the group collectively by an external agent. See generally Douglas D. Heckathorn, "Collective Sanctions and the Creation of Prisoner's Dilemma Norms," 94 *Am. J. Soc.* 535 (1998).

141 Mark D. Kielsgard, "Myth-Driven State Policy: An International Perspective of Recidivism and Incurability of Pedophile Offenders," 47 *Creighton L. Rev.* 247, 259 (2013).

142 Examples include: 'tougher sentencing, open-access sex offender registers, mandatory chemical castration, and indefinite (post incarceration) mental commitment' *Id.* at 247.

143 According to the finding of a large 2003 U.S. Department of Justice study, sex offenders had a very low recidivism rate of 3.5% when calculated on re-conviction for sex offenders. See Patrick A. Langan et al., *Recidivism of Sex Offenders Released from Prison in 1994*, U.S. Department of Justice (Nov. 2003), <http://bjs.gov/content/pub/pdf/rsorp94.pdf>.

144 Low recidivism rates for non-U.S. jurisdictions for sex offenders reconvicted for sex crimes is consistent with the U.S. DOJ study. Similar studies conducted in Australia by the New South Wales Department of Corrective Services found an 11% re-arrest rate with approximately half of them being technical parole violations. See Karen Gelb, *Recidivism of Sex Offenders Research Paper*, *Sentencing Advisory Council* 22 (2007), available at <https://sentencingcouncil.vic.gov.au/sites/default/files/publicationdocuments/Recidivism%20of%20Sex%20Offenders%20Research%20Paper.pdf>. Denise Lievore, "Recidivism of Sexual Assault Offenders: Rates, Risk Factors and Treatment Efficacy," *Austl. Inst. of Criminology* 29 (May 2004); see also Mark D. Kielsgard & Jack Burke, "Post-Incarceration Supervision of Pedophile Offenders: An International Comparative Study," 51 *Crim. L. Bull.* 1, 3-9 (2015).

145 *Id.*

146 *Id.*

147 Kielsgard, *supra* note 141, at 257.

148 Several common special provisions for probation for sex offenders, particularly for probation violations, written further lead to perceived higher recidivism rates for sex offenders. *Id.* at 9-11.

149 Gelb, *supra* note 144, at 22.

168 "Neuro interventions" like chemical castration can be defined as "interventions that exert a direct biological effect on the brain," while some other possible interventions include "deep brain stimulation," "transcranial magnetic stimulation," and "neuro feedback." Jonathan Pugh & Thomas Douglas, "Neuro Interventions as Criminal Rehabilitation: An Ethical Review," in *The Routledge Handbook of Criminal Justice Ethics* 95 (Routledge, 2017).

169 Kielsgard & Burke, *supra* note 144, at 27-31,

170 *Id.*

171 *Id.*

172 *Id.*

173 Among the critiques of voluntary chemical castration is the voluntariness of the offender and whether their choice is the product of coercion. See William Green, "Depo-Provera, Castration, and the Probation of Rape Offenders: Statutory and Constitutional Issues," 12 *U. Dayton L. Rev.* 1 (1986); Kari A. Vanderzyl, "Castration as an Alternative to Incarceration: An Impotent Approach to the Punishment of Sex Offenders," 15 *N. Ill. U. L. Rev.* 107 (1994).

186 *Id.*

187 *Id.*

189 *Id.*

190 *Id.*

191 *Id.* at 344,

192 Andrew Ashworth, *Human Rights, Serious Crime and Criminal Procedure* 42 (2002). See also Klaus Gunther, "Responsibility to Protect and Preventive Justice," in *Prevention and the Limits of the Criminal Law* 69, 89-90 Andrew Ashworth, et al., eds. OUP Oxford 2013).

199 Rainey & Harrison, *supra* note 4.

200 David Cole, "The Difference Prevention Makes: Regulating Preventive Justice," 9 *Crim. L. & Phil.* 501 (2015); see McSherry, *supra* note 9.

201 Richard L. Lippke, "No Easy Way Out: Dangerous Offenders and Preventive Detention," 27 *L. & Phil.* 383 (2008).

202 J.Q. La Fond, "Sexually Violent Predator Laws and the Liberal State: An Ominous Threat to Individual Liberty," 31 *Int'l J. L. & Psychiatry* 158 (2008). La Fond discusses how various states have manipulated the civil commitment process in order to indefinitely detain sex offenders.

The Junk Science Concept of Hebephilia as a Disorder

Allen Frances, *The Essentials of Psychiat-*

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

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

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

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

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

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

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

"Intentionally or not, expanding the definition of pedophilia – a diagnosis with already poor inter-rater reliability (Marshall, 1997) – into a broader construct

(Continued on page 8)

of pedohebephilia has the potential to dramatically increase the scope and power of the sex offender civil commitment industry. The inherent vagueness of the construct, in turn, will invite arbitrary application, bias, or pretextuality.

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

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

Karen Franklin Reports:

Hebephilia & Nonconsent, Rejected by DSM, Are Still Snuck into SOCC Cases Under OSPD Label.

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

Text excerpts: "...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 idiosyncratic catchall label of 'Other Specified Paraphilic Disorder' (OSPD). Their findings are consistent with a recent review of U.S. legal cases that found 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 most invoked, followed by the catchall categories of OSPD 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 real 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 as-

signed, 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 diagnosis 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.

This 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 or 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....

Custom-tailored labels

"[O]ne 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.

'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 these 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.'

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*' 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 Pretextuality*,' also published in *Behavioral Sciences and the Law*.

When Science Changes, the Law Must Respond

by Cyrus Gladden

According to a recent note in the MI-CURE News Newsletter for February, 2025, simply headlined "Inertia,"

"Stephen Bright and James Kwak recently wrote the book *The Fear of Too Much Justice*. [Radley] Balko describes its premise as follows: 'Our criminal legal system has become so reliant on systemic injustice that any real attempt to ensure truly just outcomes would grind it all to a halt. Put another way, politicians, attorneys, and public officials have become inured to the cruelty and unfairness of this system because it's just too difficult to do anything about it. It's a slog just to get the courts to acknowledge error in an individual case. It's all but impossible to get them to acknowledge bigger, more consequential, more systemic problems.'

Bright and Kwak use examples concerning the death penalty where junk science caused an innocent person to be executed or at least put him on death row or under a life without parole sentence. These authors should know: Bright is a death penalty lawyer and Kwak is a legal scholar. But their book ranges as far as citing poor people squeezed for cash by private probation companies because of trivial violations.

Although this quote does not mention it, a substantial problem in trying to gain justice is the courts' reliance on "junk science," particularly in being unwilling to revisit purported principles of junk science when later scientific research reveals the lack of actual scientific grounds for such

(Continued on page 9)

earlier junk-science claims of scientific principles or the purported applicability of scientific principles which later turn out not to have any actual application to a given circumstance under litigation.

A recent *Scientific American* article discusses this problem generally. (David Faigman and Jeff Kukucka, "The Law Must Respond When Science Changes," *Scientific American*, Nov. 4, 2024. Balko points out that "Every state in the country applies one of two standards to assess expert testimony [the "Frye" test and the *Daubert* test]. Under both standards, expert testimony must be generally accepted within the "relevant scientific community." The court defines the "relevant scientific community" and too often that is the practitioners of the field being challenged. Naturally, someone who makes a living in the particular field under question is going to defend the profession -- even if it has become apparent as being without scientific basis. Faigman and Kukucka, in that *Scientific American* article, argue that the law must become a "sophisticated consumer of science."

They point out that the Supreme Court in *Daubert v. Merrell Dow Pharmaceuticals* (1993) noted that judges are supposed to be "gatekeepers" against bad science in the courtroom. The two argue that current judges need to do more to address this obligation, especially given the recently accelerating pace of scientific discoveries, many of which upend previous scientific thought on a given subject. They also argue that "the law must provide mechanisms for post-conviction relief based on changed understanding of science which of course includes when the courts got it wrong the first time around." This can be met by either judicial interpretation or legislative action to define a rationale for reconsidering a conviction. They conclude, "American law has traditionally provided mechanisms to ensure that everyone has their day in court. Fairness requires the opportunity to have their cases tried in light of the best science available in the moment."

Steve Kennedy, in "Junk Science and Judicial Arrogance Are Killing Us," an article without known citation (November 26, 2024), argues that judicial arrogance contributes to the continued use of junk science. "Contrary to our mythology around the judiciary, judges are not objective observers and often struggle to remove personal and societal biases from their analyses of the cases before them." The lack of uniform standards relative to science is also a problem. Federal legislation could result in more uniformity of scientific standards. Without that, "judges should make independent determinations about which techniques are scientifically sound rather than relying on other courts' precedents alone, which allows for mistakes by even a single judge to proliferate across the court system."

The sword of justice, if unguided by truth, is just a dangerous weapon being blindly flailed around. When it comes to application of science to facts, it is not a sword that

is called for, but instead a scalpel, guided by a highly skilled hand and a mind armed with up-to-the minute, 100% accurate information of unquestionable scientific veracity. More fundamentally, bias must be utterly eradicated from the decisional process in any judicial contest. Justice that is not evenly applied regardless of controversial or emotionally upsetting context and without animus or prejudice against the individual who requests the righting of a wrong is instead inherently an injustice that shames the tribunal applying it.

Since its inception, the *Legal Pad* has striven and will always strive to reveal junk science wherever it is found, and to expose the injustices (in no short supply) that have been wreaked upon the defenseless without competent legal representation and ability to procure expert witnesses to lay bare the damning facts that discern such junk science from the applicable truth. Those in confinement in shadow prisons due to false claims of science asserted to 'prove' their "dangerousness" to public safety, based only on shoddy, often even shady, unscientific and sometimes even anti-scientific procedures are a prototypical paradigm of just such victims: attractive targets of bias and animus, tagged with custom-tailored dispensations for willful abandonment of true current science to ensure the predetermined aim of continued lifetime detention under rubric of "public safety," but in reality simply an exercise of rage.

In future editions, the *Legal Pad* will continue to provide examples of junk science and how it has been wielded to seal away the useful lives of people whose only current crime is being such tempting targets of such inhuman treatment. In any enlightened society, such outrages must cease, for no society can long endure that knowingly countenances such atrocity.

Dr. James Poole, Age 86, Dies after MSOP Refused Provisional Discharge.

by Cyrus Gladden

Dr. James Robinson Poole, housed for many years in MSOP-Moose Lake, died on March 10, 2025. At the time of his death, he was 86 years old.

Before his death, Dr. Poole reported to family and friends that he had recently been told that his heart arteries were clogged. He was waiting for an operation scheduled for March 23, 2025 to alleviate this condition. This condition probably caused his death.

Dr. Poole practiced medicine for many decades. His practice ended in 1991 when he was arrested for sexual abuse of female teenagers. On that conviction Dr. Poole served eight years imprisonment. When that prison term ended in 1999, he was committed under laws regarding those having sex offenses.

While committed, Dr. Poole was found in

2010 to have an advanced, aggressive form of prostate cancer. That medical emergency required immediate complete removal of his prostate. Since then, he reported never being able to function sexually. That operation also left him unable to control his urine outflow, forcing him to wear adult diapers for the rest of his life.

Over a year ago, Dr. Poole suffered an acute heart incident resembling a heart attack. One of his heart valves had malfunctioned. That nearly killed him but was caught and fixed just in time. Meanwhile, he had developed mental foginess. About a year ago specialists discovered that he had suffered a stroke some time recently.

Dr. Poole remained committed when he died, twenty-six years later after that court order. In his last months, having further grave heart symptoms very likely due to those plugged arteries, he was held in a high-security nursing/hospice care facility within the St. Peter Regional Treatment Center, rather than in MSOP.

Before and during those last days in that hospice, Dr. Poole sought judicial relief from his commitment and its high-security confinement. MSOP supported this request insofar as it sought provisional discharge providing that he be placed in a specific secured hospice/skilled nursing facility in Duluth. But at some later time, MSOP withdrew its support. Yet he pressed forward in the CAP court. Over the objection of MSOP, that tribunal granted Dr. Poole provisional discharge, on that proviso requiring his residence in that Duluth facility.

Under court rules, MSOP had 60 days to file its appeal. I have to believe that he, like others who have been granted provisional discharge by the CAP court, then waited tensely, counting the hours that dragged by until that appeal period would expire with no appeal filed.

On the 60th day, however, the county/state attorney filed that appeal to the Court of Appeals, crushing Dr. Poole's dreams of finally gaining release from confinement without further delay. That appeal could drag on for a year or more, while the waning hours of his life would likely run out. It seem likely this was planned all along per MSOP wishes. I believe the appeal was held to the last minute purely for spite, in the unstated hope that Dr. Poole would die while still confined in that St. Peter facility. As it happened, Dr. Poole died soon afterward, fulfilling that apparent hope.

But Dr. Poole was not a young man with recently apparent uncontrollable, raging sexual impulses. He was an 86-year-old man who had a seriously permanently damaged heart in the wake of a major, nearly fatal heart event. Partly because of that condition, and also due to his stroke, he was a profoundly debilitated individual who needed help performing most of his daily self-care activities. Separate from this, he also was a man with no prostate, no ability to control urine outflow, and no sexual function left as an irreparable, absolutely permanent physical matter.

In known science, even completely apart from Dr. Poole's personal medical condition, no cohort of sex offenders commits recidi-

vistic sex crimes of any kind from age 70 on.¹ No former sex offenders do so in that advanced age. I freely concede one can "never say never," since human experience is so varied that there may be an extremely rare outlier of that age who may actually have done so at some point in the records of past cases.

But this does not present a probability, but instead, an extreme improbability. Statistical charts show the accelerating decline in sexual recidivism before former sex offenders reach age 60, creating the inexorable inference that, by age 70 if not slightly before, there is simply no figure above absolute zero percent likelihood of re-offense left.² This is just a matter of undisputed science.

All conceivable arguments based on claims of "dynamic risk factors," suggested as pure speculation that someone somewhere may commit a recidivistic sex crime after age 70, fail under science lacking any statistically measurable actual instances of such re-offense. In Dr. Poole's case, there was not even any indication that he had ever engaged in any sexual impropriety at any time during his imprisonment or his commitment. The controlling fact remains that any calculable statistic of sex crimes in this final age group would approach absolute zero. In turn, this means no likelihood of sexual re-offense whatsoever.

This is the conclusion that applies to healthy, reasonably robust individuals who have made it into their seventies. But beyond such circumstances, MSOP refused to apply this scientific conclusion even to one as ailing and near death as Dr. Poole became. This shows that MSOP does not really have a scientifically valid standard about who does not present any realistic likelihood of re-offense.

In its place, MSOP applies a political bias and rankly hateful emotionality to prevent release -- even just "release" to the 24/7 watchful surveillance of provisional discharge for anyone MSOP deems as simply not deserving real freedom. This is simply politically tolerated vigilantism -- overriding the sentence imposed by a court of law -- to enforce an effective second sentence of natural-life confinement secretly imposed by MSOP.

And the most disgusting fact of all about this silent corruption of the system of criminal justice in Minnesota is that MSOP has successfully enlisted the services of county attorneys and even the state Attorney General's office to ensure the enforcement of this vigilantism by perpetuating the long-debunked mythology of former sex offenders as scary monsters.³ By this, the implication is tacitly conveyed that the political careers of those who refuse to act in accordance with that debunked mythology may end at their next reelection attempt.

Well, not to worry: Scary Monster Dr. Poole, age 86, infirm, incontinent and impotent, mostly bedridden, and hanging onto life by a slender thread, has died. Your job is done -- this time.

Notes:

1 Richard Wollert, "Low Base-Rates Limit
(Continued on page 10)

Expert Certainty When Current Actuarials Are Used...." 12 *Psychology, Public Policy and Law* 56-85, at 61 et seq. (2006) (*Wollert I*); *Richard Wollert*, "Recent Research (N=9,305) Underscores the Importance of Age-stratified Actuarial Tables in Sex Offender Risk Assessments," 22 *Sexual Abuse: J. of Research & Treatment* 471, 484 (2010) (*Wollert II*); *R. Karl Hanson*, in "Recidivism and Age: Follow-Up Data from 4,673 Sexual Offenders," 17 *J. Interpersonal Violence* 1046, 1053 (2002); *Howard E. Barbaree et al.*, "Aging Versus Stable Enduring Traits as Explanatory Constructs in Sex Offender Recidivism: Partitioning Actuarial Prediction into Conceptually Meaningful Components," 36(5) *Criminal Justice and Behavior* 443-465 (2009); *Daniel Montaldi*, "A Study Of The Efficacy Of The Sexually Violent Predator Act In Florida," 41 *Wm. Mitchell Law Rev.* 780-865 at p. 811, 818 (2015) (applying this aging-out to those exiting sex-offender commitment at/above age 60, finding no recidivists in this cohort at all); *R.A. Prentky, E. Janus, H. Barbaree, B.K. Schwartz & M.P. Kafka*, "Sexually Violent Predators in the Courtroom: Science on Trial," 12 *Psychology, Public Policy & Law* 357, 377-78 (2006) (concluding that recidivism was a mere 2% for offenders age 60 or older. Statisticians studying that data could not find any instances of sex-crime recidivism past age 69).

2 *Wollert I; Wollert II; Montaldi; & Prentky et al.*, all *supra*, note 1.

3 *Norman J. Finkel*, "Moral Monsters and Patriot Acts: Rights and Duties in the Worst of Times," 12(2) *Psychology, Public Policy, and Law* 242-277, at 255 (2006); *Rasmus Rosenberg Larsen, Jarkko Jalava & Stephanie Griffiths*, "Are Psychopathy Checklist (PCL) Psychopaths Dangerous, Untreatable, and without Conscience?," 26(3) *Psychol., Pub. Pol'y & L.* 297 (Aug. 2020); *Marcus A. Galeste, Henry F. Fradella & Brenda Vogel*, "Sex Offender Myths in Print Media: Separating Fact from Fiction in U.S. Newspapers," 13 *Western Criminology Review* 4-24 (2012); *Heather Ellis Cucolo & Michael L. Perlin*, "They're Planting Stories in the Press: The Impact of Media Distortions on Sex Offender Law and Policy," 3 *U. Denver Crim. L. Rev.* 185 (Spring 2013).

Confinee Deaths – Getting Access to Death Data Despite HIPAA Privacy Bars

Wanda Bertram, "What can Journalists Do When Prisons and Jails Cite HIPAA to Withhold Information about Deaths in Custody?" *Text Excerpts:* "Prisons and jails often claim that the Health Information Portability and Accountability Act (HIPAA) privacy rule prevents them from sharing information about in-custody deaths with the press, or even with families of people who have died. Since these agencies have also been known to invoke HIPAA in denying infor-

mation not remotely related to health, one might assume that many of these denials have no clear legal basis. But because prison oversight is abysmally weak – and because most people impacted by prisons' lack of transparency are too poor to fight back – not a lot of legal precedent exists around what prisons and jails must or must not share.

The good news is that despite the grey area around health privacy law, HIPAA obstacles don't have to spell the end of an investigation into deaths behind bars. This briefing lays out the HIPAA-related challenges for journalists investigating deaths in custody, offers tips for overcoming those challenges, and suggests ways to strengthen your stories against information denials.

HIPAA and common questions about in-custody deaths

HIPAA is a federal law passed in 1996 to set legal standards around healthcare coverage, efficiency in sharing of healthcare information, and processes for preventing healthcare fraud and data theft. Its Title II 'privacy rule' prohibits healthcare providers – implicitly including confinement facilities – from sharing their patients' 'Protected Health Information' (or PHI) with anyone other than approved family members and sometimes healthcare authorities.

When information requests remotely involve issues related to health, prisons and jails tend to default to denying journalists access to information. But journalists have the power to push corrections agencies to be more transparent about in-custody deaths.

Here are some of the obstacles you might encounter when asking common questions about deaths – and tips for getting around them:

1. 'Did someone die in this prison recently?'

While you might be denied even this most basic information, it's worth pointing out that HIPAA applies only to someone's personally identifiable health information, which generally does not include the fact that someone died. Furthermore, a jail or prison refusing to release this information upon request is a red flag, given that at least 15 prison systems proactively make this information public.

2. 'What was the deceased person's name?'

Many prison systems post the names of the deceased as a matter of policy [regrettably, this does not include Minnesota]. If a prison or jail refuses to provide names, you may want to point out to them that other prison systems have done so without running afoul of the law. [States that either publish the names of deceased prisoners/detainees and/or maintain a public list of deaths in custody include: Alaska, Arizona, Arkansas, California, Delaware, Florida, Hawaii, Illinois, Iowa, Montana, Nebraska, Nevada, Oregon, Pennsylvania, South Dakota.] When Hawaii's Department of Public Safety refused to release the names of people who die during COVID-19, the Honolulu Civil Beat sued the department and won, with a Hawaii Circuit Court ordering the Department to release the names of people who die in custody going forward.

3. 'What was the cause of death?'

It's common for officials to deny reporters information related to the cause of someone's death, often citing HIPAA as the reason – and in many cases, this may be a legitimate claim. However, you're wise to remember that several different documents are created when someone dies behind bars. There may be a death certificate, coroner's report, medical examiner's report, 'death review' or incident reports, and/or an autopsy. While not every death triggers an autopsy, autopsies are public records in many states, so they are typically easier to obtain.

Journalists should also keep in mind that if a prison or jail refuses to release information and vaguely cites 'health privacy law,' it's worthwhile to clarify which law. Most often, the answer will be HIPAA, but some states have their own laws that go beyond HIPAA's prohibitions to exclude additional information from public records disclosure.

Making the most of your public records request

Here are a few ways to maximize your chances of a fruitful records request and to fight back against stonewalling:

- Review the basics about public records laws concerning the criminal legal system in your state before you file. (We wrote a 50-state guide to filing public records requests to criminal legal agencies.)

- Call the public records official at the DOC or jail before you file to get an idea of what records exist and in what format. Ask them what kinds of records and reports the agency craves around deaths in custody, including any records of internal investigations of deaths.

- Find out what kind of reporting about healthcare is made between the correctional agency and other parties. If the jail or prison uses a private healthcare provider, what kinds of reports does the company have to make to the agency regularly? The prison/jail may also make reports to hospitals it partners with and to any state or local oversight bodies. Reports that aggregate data without personally identifiable information may be easier to release than records pertaining to individuals.

- If possible, clarify in your records request that you do not intend to seek personally identifiable health information and ask for the agency to redact any such information.

- Appeal denials to your Attorney General's public records ombudsman, whose job it is to determine if denials of public records requests were legitimate. If you think a prison or jail is denying you information that is not necessarily protected by HIPAA, it's worth at least telling the ombudsman what is going on. (You may also want to alert prison Tip: If your public records requests are denied or delayed, you can also try searching the jail or DOC's website for the records you're looking for. Occasionally, correctional agencies store sensitive documents on their web server without strong security.

Privacy law obstacles can be the beginning, not the end, of a good story.

Being stonewalled is frustrating, but if getting the information you want is impossible, broadening or adjusting the focus of your story can allow you to hold the prison (or jail) system accountable even in the face of information denials. We suggest that you:

- **Look for patterns of medical neglect rather than individual cases.** There may already be public evidence of neglect in the prison or jail system you're investigating. States and large counties often audit correctional facilities' healthcare systems, and the auditor/comptroller, Inspector General, and Attorney General's office may have information about prior medical issues in the facility. (For an example of a story that uses evidence from local audits, see Arizona Luminaria's reporting on jail death's in Tucson.) You can also search legal databases like PACER for the name of the facility you're investigating, or the names of any healthcare companies contracting with the facility, to find evidence of prior healthcare issues, which could put the deaths you're investigating into context.

- **Connect with families.** If you're having trouble getting the basic facts about in-custody deaths, chances are that families are too. Ask the families of people who died in the facility about their experiences with the prison or jail after their loved ones' deaths. Journalists have written powerful stories about correctional agencies stonewalling families who ask for information, or waiting hours or days to tell them about deaths or injuries.

Conversely, it's also possible that the jail or prison will release medical records to the family that they wouldn't release to the media. Building strong relationships with impacted communities and working with them to pressure the facility to release records may help you overcome HIPAA-related obstacles.

Beyond the story: pushing for systemic change

Obstacles to transparency around prison conditions often go beyond a single story, revealing a larger problem with corrections agencies stonewalling journalists who are working in the public interest. News organizations, particularly in partnership with impacted communities, have the power to change that. In Massachusetts, for example, news organizations campaigned successfully for public records reform.

Remember: Journalists do critical work to bring deaths behind bars to light, but they're far from the only ones fighting the lack of 'sunlight' in jails and prisons. The more creative you can be with your investigations, the greater the chances that family members, oversight officials, and even corrections officers will come forward to strengthen your story – and, hopefully, help you build

the Legal Pad

Editor: Cyrus P. Gladden II

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