the Legal Pad — tLP Volume 10, Issue 8 — August 1, 2026
"Live your life as if you will have to come around another time to clean up after yourself." – AJO

# Batting Cleanup

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## *Janus Reports:*

## Minnesota has spent $1.3 billion on an illusion of safety.

*Eric Janus*, Opinion: "Since 2012, Minnesota Has Spent $1.3 Billion on an Illusion of Safety," *Minnesota Reformer*, May 27, 2026, https://minnesotareformer.com/2026/05/27/since-2012-minnesota-has-spent-1-3-billion-on-an-illusion-of-safety/.

Text Excerpts: "The Minnesota Sex Offender Program is expensive. In the last 14 years, it has cost us $1.3 billion. For that price tag, taxpayers should expect robust public safety benefits, but that's not what we've gotten.

MSOP is a civil commitment program designed to provide treatment, behind double razor wire, after people convicted of sex offenses have finished their prison sentences. It is supposed to rehabilitate. But in its more than 30-year history, nearly 1,000 people have been locked up, and only 37 have ever been fully discharged.

The program was meant to prevent sexual violence, but thirty of fifty states have rejected this approach. Comparing states with and without civil commitment, empirical research demonstrates that civil commitment delivers no discernible impact on rates of rape and sexual assault. Yet we will spend a whopping $124 million this year to confine about 750 people at MSOP.

There is also the opportunity cost. We lavish funds on MSOP while evidence-based programs to prevent sexual violence and services to support victims are starved for resources.

...I don't believe Minnesota should civilly commit people to MSOP, but so long as it does, we owe it to taxpayers to learn from other states.

Take Wisconsin. Drive three hours east of St. Paul, and you will find a program similar to MSOP, with a significantly smaller price tag. Wisconsin spends $79 million annually – about $45 million less than Minnesota.

One reason is due to Wisconsin releasing and reintegrating more than 10 times the number of people as Minnesota. Since 1994, Wisconsin has fully discharged nearly 400 people, and its secure facility currently has a population of 150 residents. You might be wondering whether this huge disparity in releases has made Wisconsin more dangerous than Minnesota. It hasn't. In 2024, Minnesota and Wisconsin had almost the same rates of rape per capita, with Wisconsin's being slightly lower. Minnesota taxpayers should ask policymakers why Wisconsin can do this for less.

So how do we get there?

We can start by preventing millions of dollars being spent every year locking up people who can safely be reintegrated into the community. The system needs to reduce the bureaucratic delay in processing release petitions. Incredibly, it takes about three years to process a petition for release. Each delayed release costs us almost half a million dollars, which is money that could be spent on effective sexual violence prevention. That's the definition of waste.

We need to be proactive in identifying people who don't belong behind the double razor wire. For example, research tells us that the risk of future assaults decreases as people age. People who are sixty or older – about one-third of MSOP residents – pose a particularly low risk. Yet Minnesota doesn't regularly assess which detainees are ready for release. Most states mandate an assessment for each detainee annually, but Minnesota does not. The result? Many people are likely languishing at MSOP who could be released to less expensive community alternatives.

Imagine what the $1.3 billion spent on MSOP in the past 14 years could accomplish if directed toward evidence-based programs that serve victims, intervene early, and stop harm before it happens.

That is what keeping communities safe looks like.

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## Cicero Institute Declares Its Aim to Imprison Committed Sex Offender to Make Room for the Millions of the Homeless, Drunks, Drug Addicts, Those with Poor Judgment, and Maybe Political Foes That It Wants to Lock Away Incommunicado in Commitment Facilities. That Means You. With That Enormous Cost, How Long Before the Gas Chambers?

by Cyrus Gladden, reviewing:
*Devon Kurtz*, Addressing Psychiatric Capacity through Trans-Institutionalization of Involuntarily Committed Sex Offenders, *Cicero Institute* (Jan. 2026).

The last edition (June) of *the Legal Pad* (*tLP*) covered an announcement by the "Cicero Institute" ("Cicero"), an entity proposing a massive expansion of the role of civil commitment in the United States, a role not assigned to commitment by any other known countries not under totalitarian rule. As an example, this newly proposed role is absolutely forbidden by the European Convention on Human Rights, effective throughout the European Union.

Cicero proposes civil commitment of anyone who is homeless or, through alcoholism, drug addiction, or otherwise, has "impaired judgment" or simply just poor judgment. What would constitute poor judgment or would stand as evidence of it is not stated by Cicero – a disturbing observation. It is universally accepted that, in most scenarios, what might strike one person as an act of poor judgment might strike someone else as an act of foresight, or a carefully weighed decision in a scenario of facts not yet clear, but demanding immediate action one way or another (usually referred to as a "judgment call").

It is often acknowledged that people who are homeless at some point may have wound up in that state through bad luck or investments of wealth, skills or knowledge that simply did not pan out, even though such choices may have seemed at the time a quite reasonable chance to take. Just visit any shelter and ask anyone willing to share their tale of woe.

Although it is true that some people moving through the shelter system may have serious mental problems, those people will be filtered out for referral to the mental health system under current laws. Those existing laws already allow civil commitment of those who are simply unable through a confused mental state to take care of themselves in an existential sense, such as forgetting about the need to eat, or believing that they can remain outside indefinitely in the coldest heart of wintertime in northern or mountainous parts of the country with temperatures constantly well below freezing without any winter outer clothing.

Police in towns and cities and county deputies in the countryside are constantly on the lookout

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compassionately to discover such unfortunates whose mental states have taken a severe downward dive, to corral them for warmth and care before they would be found as corpses otherwise.

This may not be a perfect system, but it works pretty well on most occasions to prevent personal tragedy and at least to point troubled individuals toward help and (hopefully) a truly beneficial turnaround in life. Such "parens patriae" commitment (the government as beneficent guardian of all people in the state or, in the case of the feds, the entire country), seeks to ensure care and assistance to those not then able to care for themselves or to stay out of violence or trouble without ready guidance and counseling and, in many cases, needing effective psychotherapy or other forms of mental health treatment. I know this need all too well.

My brother, rest his soul, was a lifelong schizophrenic from adolescence forward, at a time when little was known about that disabling condition and when treatment included the barbaric and drugs were historically yet to come to his aid. Commitment es, and most crucially to prevent them, in some hallucination or distortion of perception of reality, from wandering into a situation where their affliction may cause them to harm someone else or themselves soon. So I can say with strong assurance that the longstanding civil commitment system in our country has heroically filled these roles of compassion and aid, most often bringing deeply disturbed people back from the brink of irretrievable loss of contact with reality to be able to fill some niche, even if somewhat limited, in supervised freedom.

So imagine my surprise when I learned of this Cicero proposal to fill mental hospitals to bursting with a massive, un-quantified number of people (potentially millions) that you would probably never see as less capable than yourself of conducting their daily lives, who, for the most part, are capable of caring for themselves and who, even if they can benefit from some level of personal supervision and counseling as they live their lives, cannot remotely be described as crazy or in danger of loss of self-control (unlike the violent outbursts by some schizophrenics in their worst delusions).

The most curious thing about the Cicero proposal is that Devon Kurtz implicitly admits that the current mental health commitment system is already densely populated by the seriously mentally ill. Looking only at 16 states which Cicero apparently has figures for, the overall number of psychiatric beds in those 16 states overall was 23,000. Reasoning that this one-third of all 50 states probably is very close to an average that also holds true in the other 34 states as well, it is likely that the overall total occupied psych beds in the United States is about 70,000 –not the 40,000 Kurtz claims.

Kurtz explains that the Cicero proposal includes removing sex offenders committed at the end of their prison sentences from the mental health treatment facilities they were then sent to. This would be to make room for those not crazy but meeting the poor-judgment criteria Cicero wants to be enacted.

Throwing all 6,500 committed sex offenders into prison would only free up about 6,500 of those 70,000 psych beds. Given the enormous number of people (easily over one million) who would qualify for commitment to such confined facilities under the Cicero proposal, this forced exodus of committed sex offenders would not fill even 1/143rd of the needed number of additional beds required (conservatively calculated at only exactly one million). This would be such a trivial fraction of that total need as to amount to no significant reduction of that need at all.

Furthermore, Kurtz cites an estimate that "between three and five times" the 40,000 existing beds he claims are necessary to care for the number of people currently suffering from major mental illness yet not receiving the care they need. Numerically, even just the bottom end of that estimate (40,000 times 3) equals 120,000). With these kinds of needed beds just to handle those with maior mental illness, this is no tioning on some level. And it certainly would be wrong to top that off by hustling off to 'commitmentland' people who function just fine, but who simply disagree with Cicero's undisclosed political platform (whom it would claim do so because of "poor judgment"). Presumably, Cicero would leave the severely mentally ill people who wait for psych beds wandering around in public for lack of same while this misappropriation of psychiatric resources is carried out....

So the Cicero proposal, now illuminated by its claimed method of addressing feasibility, is a catastrophic failure at birth. The massive construction of new residential psychiatric facilities nationwide would easily take over a decade to effect, even if carried out on a national-emergency-priority basis. Further, the cost of that construction, plus the further costs of hiring all the psychiatrists and other clinical staff and administrators required, plus several times as many support staff, from security through housekeeping staff, for each new facility, and the aggregate legal and law enforcement costs of rounding up and committing (in contested proceedings and appeals therefrom) all qualified candidates would singlehandedly submerge the entire budgets of all state governments in the U.S. for at least twenty years, if not indefinitely going forward into the future.

Even if the Cicero proposal were a good idea, let alone an imperative necessity, it simply is not feasible, and for that reason alone, should not be attempted.

Distinctly, the 'economies of scale' Kurtz claims are possible if committed sex offenders are tossed into prison instead of remaining in SOCC facilities can only be achieved by reducing all confinement conditions for these former offenders to the austere, sometimes downright stark conditions which prevail in prisons. That is the punitive hallmark of prisons and is the inexorable constitutional reason why sex offenders who completed their prison terms cannot be returned to prisons without a new offense or violation of some condition of their parole, if still continuing while they are under commitment. To do so otherwise would be further punishment and hence, double jeopardy.

Now, of course, metaphorically tacked onto the mental health system like an ill-fitting wing added later to a building, built in haste and of unbelievably shoddy and poorly designed construction, there is the sex offender civil commitment (SOCC) system adopted by 20 states. Unlike the rest of the mental health system, this unique, separate commitment system is not based on people losing contact with reality or recently doing acts with no comprehensible motivation.

Instead, people committed in SOCC have committed crimes (sexual in nature, although typically decades ago), a fact used to evoke fear in the minds of judges or jurors in SOCC proceedings that such crimes might be repeated in the future. This scare tactic is used notwithstanding that sex crimes are tied for last place for relative jected to this unique type of commitment are entirely capable of self-control over all their actions, including sexual actions.

Numerous myths govern these commitment cases, but the most glaringly obvious and obviously false of all such myths is the notion that because someone has committed a sex crime in the past, they are inexorably destined to do so again in the future. However, studies of such crime repetition (known as "recidivism") have long debunked this myth by showing that the average likelihood of all sex offenders to commit another sex crime is not high, but instead has always been very low.

Kurtz attempts to use scare tactics to gain support for the Cicero proposal, focusing on the small number of people who are under civil commitment for committing sex crimes. In so doing, he tips his hand: He believes using psychiatric facilities for crime prevention is a good idea. It is not. First, the sentences imposed by a judge for the crimes committed reflect a very careful weighing of both probability of later recidivism by the offender in question and the probable severity of the anticipated future crimes by that offender. In this way, sentencing has always been the appropriate place for prevention of likely future crimes, recognized as the "incapacitation" sentencing factor long addressed in academic journal treatments of sentencing aims. If, despite the upwardly spiraling sentences and mandatory minimum sentencing laws to date, Kurtz seeks longer "incapacitation," he should advocate for longer sentence options, rather than categorically suggesting that all sex offenders are so "dangerous" (the scare tactic) that they should all be locked up after their sentences are over (a classic application of constitutionally forbidden double jeopardy).

Kurtz attempts to duck this obvious response to the Cicero proposal by saying that only those under commitment should be confined indefinitely (probably, one gathers, for the rest of their lives) in prisons. Yet this ignores several fundamental facts with no dispute: First, sexual recidivism inherently diminishes by the year following an offender's latest crime, regardless whether he is in prison or commitment or living in freedom. Criminologists know this; apparently Kurtz does not.

Secondly (and importantly: cumulatively to the foregoing general reduction over time), recidivism is further reduced by the offender's advancing age. This effect accelerates dramatically as one enters middle age and beyond. Simply put, it has long been known that fifty-year-olds recidivate at rates less than half of rates by 30-year-olds, and 60-year-olds by rates half of those at 50. By this time, rates are so infinitesimally low that recidivism then disappears entirely.

Among the 20 states with SOCC laws, nearly two-thirds of those confined in such facilities are age 60 or above. This ratio would be higher except for the fact that since so very few are ever released from these facilities, those above that age keep dying while confined. While this may psy-hospitalization are being spent on the wrong thing here: This aged cadre of former offenders are almost certain (99-point-something percent) never to sexually reoffend again – if only through the biology of loss of testosterone and consequent ending of significant libido. In the *Montaldi* study cited above, none of the former sex-offenders age 60 or above, either committed or under scrutiny for commitment, reoffended after being released. Keeping people locked up decades after a sex crime and long after their sentences have expired for such crimes while they enter and live out their senior years is just a classic case of locking up the wrong people, whether in SOCC facilities or in prison. By that time, they represent no danger to the public whatsoever—fear tactics notwithstanding.

Moreover, as criminal sentences for sex crimes have spirated upward, even these already-low rates of sexual re-offense have collapsed to even more minuscule percentages (currently as low as 1-3%-- even for young offenders). This proves that criminal deterrence by penalties has worked admirably to prevent sex crimes, while in contrast, recidivism rates for crimes motivated by drug addiction (such as armed robbery) have remained very high despite similarly upwardly spiraling penalties. The first thing this shows is that sex-crime recidivism is not high. Further, there have been countless attempts to identify sub-populations of sex offenders that can be assessed as more likely to reoffend than that overall average. Yet the aggregate result from all of these experiments in statistical studies does not validly and reliably point to any specific subpopulation that will, with certainty, reoffend sexually at a higher probability than that low "base rate" average. This demolishes the *sine qua non* requirement

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for SOCC of a high danger of sexual reoffending if not confined.

This comparison to crimes arising from addiction shows that sex crimes are not compelled by any irresistible impulse or drive to experience deviant sex through sexual abuse or sexual assault. This is in sharp contrast to the irresistibly addiction-driven neuro-physical urge to buy and consume more of the drug of addiction (such as crack, methamphetamine, fentanyl, oxycontin, or heroin). If sex crimes were similarly irresistible reactions to impulse, those addiction-based crimes. But they are not. Therefore, the equally required element for SOCC of "volitional impairment" simply does not exist either.

In short, sexual crimes are always crimes of choice, not compulsion. In fact, they are almost always carefully deliberated and plotted in advance, often over an extended period before the crime is actually committed. Further, the crime is prepared sometimes quite painstakingly, as in 'casing' the place and situation of planned rape of an adult victim, or as in the process (called "grooming") of gradually drawing close to a child intended-victim in the case of planned child sexual abuse. While these deliberations and preparations can strike one as repulsive, they are in fact antithetical to the notion of sudden impulse and crime perpetration in the moment without any significant forethought. This again confirms that there is no irresistible impulse at work, i.e., no lack of volitional control.

The other element required for SOCC is a sexual disorder or at least an "abnormality" as the Kansas legislature called it in *Kansas v. Hendricks* (1997), the seminal U.S. Supreme Court case permitting this divergent use/misuse of civil commitment. However, psychiatric "disorders", including sexual disorders are described by the Diagnostic Manual are simply set by committee agreement within the American Psychiatric Association, upon merely a collective sense of committee members as to what should be regarded as outside of the norm in society. Some, such as Pedophilic Disorder, are described in terms of whether a crime has been committed or whether, if not, the individual diagnosed simply has anxiety or some other uncomfortable emotion about their feeling of sexual arousal of a given kind. In all categories of disorders described, words or phrases are included which introduce vagueness into the definition to maximize its reach, but in the process create room for uncertainty. This, in turn allows the diagnosing psychiatrist (or forensic psychologist) broad discretion as to whether or not to pronounce the individual as suffering from a specific named disorder.

Although the Kansas SOCC statute speaks instead only of an "abnormality," there is no qualifying/limiting language from which any certainty of the presence of a mental malaise can be deduced. Therefore, any forensic psychologist who employs this finding has stepped outside the bounds of organized psychiatry and is effectively making up declarations of such malaise as he/she goes along in examining a claimed sexual "deviant" (another phase with no scientifically accepted definition).

Hence, in sum, whether in accordance with the DSM-5-TR or simply by *ipse dixit* without limit allowed under the Kansas statute, such diagnosis is subject to the contention that, in the absence of any specific science to support such a diagnosis, it is extremely doubtful that any truly "expert" testimony should be allowed in court. For "dangerousness" (as, in practice, an elevated probability of re-offense) and a "serious difficulty" on the part of the commitment respondent in controlling criminal sexual impulses (*Kansas v. Crane*, 2002), can be the basis of an SOCC commitment alone. As discussed elsewhere in this edition, there is so little likelihood of re-offense by former sex offenders after their release from prison, and there is no way to determine what, if any level of "difficulty" that individual may experience in controlling any criminal sexual impulses he/she may have, that it cannot be said – even only to the applicable standard of "clear and convincing evidence," that he or she would have "serious difficulty" in such control. Hence, SOCC inexorably has no evidentiary foundation it can rely on in any given case.

Even Kurtz, writing in the article cited *supra*, admits that "mental abnormality" is "a vague standard that falls outside of the Diagnostic and Statistical Manual of Mental Disorders (DSM) and essentially allows for confinement of sexual offenders who would otherwise not meet commitment criteria." (*Id.*, p. 4.) Of course, if one does not have an actual mental disorder, it is not possible to treat what does not exist. Treatment is the leading justification for SOCC. Therefore, as Kurtz admits, SOCC laws and [illegible] simply throw all committed sex offenders into prison – where the same defect prevails.

Instead, the answer is to abandon the faux treatment in use and replace it with some intense psychosocial education and individual counseling and virtual practice at social inter-relationships. This will prepare the client for interactions he will encounter in open society. This kind of curriculum can be easily and quickly constructed. This modality invokes the best enlightenment that the "desistance" movement and the "Good Lives" modality have to offer.

I outlined one about nine years ago, but it was just ignored. This is not surprising, since those employed in current risk-need-responsivity/dynamic-risk-factor-focused treatment modalities make good livings and have long careers doing the same thing repetitively for decades.

Incidentally, Kurtz is in error on this point about the education of those conducting treatment or even performing assessments of those confined in SOCC facilities. He asserted that 19 of the 20 states with such facilities offer "care primarily by psychiatrists." In fact, almost none of these SOCC facilities even have a psychiatrist; for instance, MSOP has none.

Many of the 20 SOCC systems have at least a few psychologists. However, these do not have "Ph.D." degrees in psychology. They hold only a "Psy.D." degree, typically issued by a degree-by-mail or night school that simply prepares attendees to pass the stripped-down basics of a the licensing exam to practice as a psychologist in the state in question. This has produced a glut in the fact that such failed treatment has no impact on recidivism and no preparation for a good life in free society. Those performing that failed treatment and their bosses have no interest in relinquishing the 'forever treatment' they have been up to for all those years. Most would have difficulty finding other positions in psychology.

That old treatment model lasts forever because it demands an impossible fundamental "change" of one's psyche (notably, that one no longer have the sexual orientation he has had ever since puberty). Orientation does not dictate behavior (in this case, the behavior referenced is sexual offending). The orientation most salient in this regard is pedophilia (more accurately, "pedosexuality").

The stunning finding all researchers have discovered is that approximately 98% of those with a total or partial pedosexual orientation never sexually offend in their entire life. Hence, those that have offended can be counseled, and can attend psychoeducational courses and training sessions that simply guide the way to a non–offending lifestyle. This regimen is comparatively very brief, from one to two years in all of part-time sessions, eliminating the need for endless confinement and impossible-to-finish 'treatment.'

Here's a link to a recap of one article Cicero June *tLP* on this proposal:

First, it is an attempt lock people up, not for what they have done, but for what people fear they may do in the future. This it shares in common with SOCC. However, it goes far beyond SOCC in two very important respects: (a) It is not limited to those who have done anything criminal or otherwise provably harmful to anyone else, only that their behaviors, or even merely just their claimed attitudes ("judgments") are found objectionable to those seeking their commitment. These, it seems are simply anything not confined within the extremely arch-conservative views of those proposed to be making such liberty/pseudo-incarceration decisions through such limitlessly expanded commitment. (b) In contrast to the about 6,500 people now confined under SOCC, the vast and limitless categories who are subject to commitment under the Cicero proposal could easily result in millions being committed for nothing more than attitudes that narrow-minded officials might find personally objectionable.

Remember: even in cases of past criminal behaviors, including those motivated by addictions, there is simply no way to tell what anyone will do in the future. This is especially true as soon as the future behavior is predicted to occur more than a few days in the future from the date of prediction. This principle of non-predictability of personal behavior has been proven numerous times past the point of refutability by widely respected academic researchers in works and articles reviewed in past *tLP* editions. This article does not have the space to recite these sources (or any on [illegible] the webpage cited on the front page of every edition of tLP. On that webpage, the reader will find that string-searching can be performed to find every instance of mention of every subject ever discussed in *tLP*. This will allow the reader to efficiently find support on this principle and all others discussed in this article.

Cicero claims that its commitment proposal can prevent random, unpredictable violence. However, that is impossible because random, unpredictable violence is exactly that. Random. Unpredictable. Cicero's notion is that, absent some startlingly irrational act or statement of violent intent, a probability (not a certainty) of violent or mindlessly reckless action can still be detected, even long in advance.

Cicero would say this can be predicted -- perhaps even before the alleged future actor even becomes aware of that prospect, much less engages in such foreshadowing actions or statements. But this comes straight out of crystal ball gazing. Under current commitment law as to those deemed crazy and dangerous, predicted violence must be imminent because any action not imminent and not capable of strong proof of a "clear and convincing nature" is just a guess.

Even worse is the fact that, in a newly stirred up societal obsession, we would all suspecting that they are on some hitherto undetected slow-roll toward eventual violence or wild recklessness. How would you like to be the victim of all of this surveillance and suspicion just for your personal quirks and foibles?

The end result that Cicero really advocates is that we must all conduct ourselves in rigid lockstep to whatever they and other social neo-puritans would declare to be the only "safe" actions and expressions, like a country of automatons. No thanks!

The Cicero proposal reduces the current commitment standard to one of mere poor "judgment." It also reduces the need for proof of "clear and convincing" likelihood of such harm to a mere "preponderance of the evidence" – and then only to merely prove the current state (such as poor judgment), not of a high likelihood of ultimate harm at some unknown future time. (Note that there is no certain way in psychology to identify what poor judgment is, much less at what point it passes a threshold of a severe likelihood of personal injury or death or

*(Continued on page 4)*

other unspecified harm.)

Moreover, under the Cicero proposal, how much risk would be too much? There apparently is no requirement even of as little as a 50% probability of harm at some unknowable, distant future time. That's essentially just the odds of a coin flip. Here: I've got a coin. Flip it to see if the target of this commitment effort will be relegated to spend potentially the rest of his life in a 'shadow prison.'

This is social tyranny run riot — a form of "purge" using lock-up rather than murder. Even just having a few beers with friends can put you in peril of being 'disappeared' into some secret civil incarceration. (Remember that current HIPAA law will deny even your loved ones of any information of what these mental "health" Nazis have done with you. All of this anti-scientific extremism has simply gone way too far — and if Cicero has its way, would put you in "mental health" jail for simply partaking in social gatherings at a nearby pub.

There is no actual treatment for merely using bad judgment. This is because anyone can use poor judgment at some point (and everyone does sometime in life). This is just not a mental illness or disorder of any kind. For this reason, there is no judicial "oversight" that could effectively restrain such claims of a need for treatment. Hence, the standard of commitment law urged by Cicero is so amorphous and capable of being claimed by anyone that no one can be safe from such an accusation.

And don't overlook that Cicero's proposal appears custom-tailored for use by planners behind Project 2025 to scare potential political foes into silent submission or to incarcerate them if they remain fearless. Cicero's web announcement of its proposal lacks any mention of your rights, and for some fear or freedom-lover even of your freedom of thought. It would be a deep hole from which society — and YOU — can never escape.

Now, on to further criticism of the title article cited *supra* and its explanation and defense of the Cicero proposal:

This article starts by noting that in 20 states, "public policies ...permit[] 'a civil commitment procedure for a subset of sex offenders deemed 'sexually violent predators' ['SVPs'].'" *Barbara Koeppel*, "Special Report: Modern-Day Gulags in the Golden State," 45(6) *The Washington Spectator*, 1-8, at 1 (2019), describing the emptiness of that deliberately inflammatory phrase, explains: "Melvin Hunter, then [1996] director of Atascadero State Hospital, where the SVPs were sent, was elated. 'Whoever came up with the term "sexually violent predator" was a marketing genius.'

-- Not just that, but a slick social manipulator as well. Only a minority of sex crimes include physical violence or threats of it, and use of a weapon is even less common. Far more often, the word "violent," modified transgression of one's zone of privacy without consent are conceptualized as a violent invasion of that zone, even if little or no force is involved. Further, the notion of all who have committed a sexual crime as being "predators" upon stranger victims seized randomly simply as a matter of availability -- as if animal prey of a carnivore -- only applies to a very small percentage of sex offenders. Roughly 90 percent of sex crimes are committed by a person either related or at least known to the victim. Use of the term "predator" is therefore inaccurate in nearly all cases and is used as a propagandistic tool to cast all sex offenders and inhuman, animalistic monsters.

This is not to suggest that sex crimes are acceptable or that sex offenders do not deserve punishment. But prisoners nowadays serve sentences for such crimes that typically start at 20 years and often rise to twice that duration or even longer.

Hence, the notion that further punishment is required under guise of mental commitment is simply inapplicable. And, despite judicial rulings that punishment can never be used as a basis for civil commitment and would constitute double jeopardy in any event, the further notion that civil commitment as punishment is 'just' is simply a form of emotionally inflamed extremism long after the crime itself has faded into history.

For these reasons, this article uses the phrase "sexually violent predator" or its "SVP" acronym only when quoting the Kurtz article or discussing such language and instead will use the less inflammatory term "sex offender civil commitment" ("SOCC") to bring this response from high emotionality down to the level of rational discourse and to encourage thinking pragmatically in reasonable terms.

As presaged above, the article by Devon Kurtz defending the Cicero proposal states that government employees attempt to seek out sex offenders who have a "mental abnormality" after serving their incarceration sentence. Of course, the lack of any scientifically accepted definition of a "mental abnormality" and the rejection by forensic psychology and psychiatry of that term as not reflecting any science whatsoever, leave that meaningless term open for application by any hired psychologist to try to justify commitment of the person at issue.

Further, such "assessors" also try to assert that the person, if freed, would be likely to reoffend. Kurtz throws out an extreme and undeniably false assertion: "half of sex offenders ... recidivate within five years [of release]..." However, this has been refuted time and again by the findings of numerous expert researchers: even those thought to present such a high danger of re-offense but not committed almost never reoffended later.

This means that their average rate of re-offense as an aggregate group was either the same as, or only trivially higher than other sex offenders not pursued for commitment. See, e.g.: *Prof. Wayne A. Logan, New England Journal on Criminal and Civil Confinement* 3, at 15 (Winter 2008) ("...[T]he perception repeatedly parroted in legislative findings ... [is] that sex offenders recidivate at a far greater rate than other subpopulations.... [W]e now know this to be untrue."); *Prof. Ira Ellman & Tara Ellman*, "'Frightening and High': The Supreme Court's Crucial Mistake about Sex Crime Statistics," 30 *Constitutional Commentary* 495 (2015); 567; *Radley Balko*, "The Big Lie about Sex Offenders," *Washington Post*, The Watch, March 9, 2017), www.washingtonpost.com/news/the-watch/wp/2017/03/09/the-big-lie-about-sex-offenders; *Adam Liptak*, "Did the Supreme Court Base a Ruling on a Myth?", *New York Times*, March 6, 2017, https://nyti.ms/2mvdQOd.

Indeed, large, long-term studies in both California and Minnesota discovered that sex offender recidivism most recently was at a mere 3.2% level for all released sex offenders." ("Sex Offenders Unlikely to Commit Second Crime," 18(26) New Scientist, Vol. 18, Issue 26, pp. 6-6 (7/5/2008); see: Minnesota Department of Corrections, "Sex Offender Recidivism in Minnesota" (April 2007) – hereinafter, "MN DOC Sex Offender Recidivism Report"); Ed., "Let the Figures Speak for Themselves: Extremely Low — & Shrinking(!) — Recidivism of Paroled CA Sex Offenders over 10 Years Belies the Myth," *the Legal Pad*, Vol. 2, #7, pp. 2-3 (July 30, 2018). In the California CDCR study of thousands of sex offenders, the total recidivism in the first ten years post-release was only 2.3%. Of this, two-thirds of the recidivism happened in the first year, with similar large fractional reductions each ensuing year, such that by year five post-release, the rate was reduced to only 0.04% -- that's four one-hundredths of one percent: truth saved by numbers. This makes it entirely understandable why sex-crime parole post-release typically focuses on just those first five years. Sex offenders released in 1994 from prisons in 15 states, only 5.3% were rearrested for another sex crime within three years. Of the convicted child molesters in this group, only 3.3% were rearrested for another sex crime against a child. *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), found that, even as to sex offenders considered for commitment in Florida but not ultimately committed, only 1.88% were subsequently re-convicted of a new sex charge within an average release time of six years. Even among those recommended for commitment, but released, the reconviction rate totaled only about 3.6% (*id.*), even though most of this cadre had only minimal supervision (*Id.*, p 819).

So even though the article by Kurtz claims that civil commitment of sex offenders is "an essential tool for public safety," the foregoing evidence establishes that there is no high likelihood of those released from prison after sexual offense sentences. In fact, one may as well select any past sex offend- therefore not at liberty), the same rate of sex crimes would still be committed by those not committed after prison release. We know this because the sex offense rates in the 30 states without sex-offender commitment laws are no higher than for those states with such laws. *Barbara Koeppel, Ibid.*, quoting Prof Eric Janus: "'I've never seen numbers that show there are fewer sex offenses or re-offenses in the 20 states that have the SVP laws than in the other 30 states that don't,' Janus says."

Kurtz echoes assertions by others that "only one in five [sexual crimes] was reported to the police." (p.8) However, this just assumes that such crimes actually occurred. There is no convincing reason to believe this categorical claim. It is just a fearful belief that one charged with a sexual crime must have done it before." However, being charged with a sex crime brings out all sorts of these claims, typically set in the distant past. Police are well aware of this phenomenon, almost always based on efforts by such extremely tardy accusers to buttress the believability of the current accusation in an attempt to ensure conviction (right or wrong). Yet police are ethically tasked to investigate even such dubious narratives.

Typically, the lack of any evidence whatsoever of such ancient alleged crimes, of any contemporary corroborative averments by any witnesses, and of any cogent, corroborated and compelling explanation for the often decades-long delay in advancing such accusations shows their extremely doubtful nature and entirely justifies why prosecutors usually cannot invest limited time and resources into prosecuting such unsupported stories. Against such collective rejection by law enforcement officials, it is foolish and purely panic-driven to believe them.

Nonetheless, in modern decades, sex crime allegations made without such ex- are referred for prosecution. Further, in light of high publicity for such accusations nowadays, such prosecutions are given maximum attention by district attorneys. The conviction rate on such charges now is more than nineteen out of twenty cases. Despite Kurtz's overheated contentions, there is no reason to believe that sex offenders 'get away with' sex crimes; in fact, the much larger probability now is wrongful conviction on false charges brought for ulterior motives. I should know; I'm one of those cases.

About half of the 20 states with SOCC require a prosecutor to produce proof beyond a reasonable doubt – just like in a criminal case – to civilly commit a former sex offender. Considering that SOCC cases often are based in part on allegations of sexual misconduct beyond those that culminated in a criminal conviction, this is only fair. The other half of the 20 states use a lesser proof requirement: only "clear and convincing evidence" is required.

In countless SOCC cases, the printed where the only reason this was the result is

that the often decades-old nature of the claim of sexual assault or abuse is so ancient that there is no ability to document an alibi or to disprove with records, because they were tossed out as too old to retain years ago.

Although Cicero cites the "clear and convincing" standard, this is no reason to throw all committed sex offenders into prison; it is actually good reason to ask the U.S. Supreme Court to overturn commitments under that standard of proof. The same standard has been applicable to the types of commitment since the beginning. However, that was because those other commitments were aimed at restoring the ability of those individuals to function successfully in open society, and the duration of most such commitments were measured in months.

To the contrary, SOCC commitments typically last at least over ten years, and often exceed two decades – or simply become lifetime when a committed individual dies while still confined, often long after the 20-year mark. In light of this life-destroying completed a prison sentence that often equalled or exceeded that 20 year mark, only applying the "beyond a reasonable doubt" standard of proof can be justified.

Yet Cicero has contended that the standard for SOCC commitments should be even further reduced: to a mere requirement of a "preponderance of evidence" – the same standard applied to auto-accident and small -claims cases. And Cicero says nothing about reducing a committed sex offender's own proof requirement to be granted release or an end to commitment. In most of the 20 states with SOCC, amounts to convincing the judge in his/her discretion to find that the offender will "adjust" successfully to life in open society. However, without any restriction on what the judge may consider, – whatever the judge may take "adjust" to mean, discretion can be a horror.

Effectively, this requires the committed offender to "prove a negative" on absolutely every possible consideration that he can think of, lest that one unaddressed consideration be the one that the judge decides prevents such successful "adjustment" to open society. But in the absence of any definition and limitation of lack of "adjustment" to tie to a probable future repeat sex crime, all of this adjustment talk is simply excuse making to deny release – and it is that excuse-making that most often results exactly in such denial of release even without any such connection to probable future recidivism.

Altogether, this whole matter of minimizing proof to support commitment, but maximizing proof needed to gain release and an end to commitment utterly trivializes the humanity of former sex offenders. The last political force that treated any loathed sector of humanity in that way was the Nazis – and we all know where that ended.

But don't feel that Cicero is being unfair only to sex offenders. Bear in mind that SOCC is law in only 20 of the 50 states. Yet Cicero urges that all 50 states adopt its "model law." So its sub-proposal that all former sex offenders now confined in SOCC facilities after the end of their prison terms be placed in prison even when their total sentences have been completed (including parole) has no effect in the other 30 states without SOCC laws.

Remember from the previous article that Cicero seeks to make room to accommodate long-term, indefinite and potentially lifetime confinement of the potentially millions who could qualify (just for instance) as alcoholics, drug addicts, the homeless, and all those with "poor judgment" (presumably including all with political views opposing Cicero's as-yet undisclosed political aims).

Cicero's prosecutorial minions will accomplish this mass lockup with ease on the "preponderance of evidence" standard. Of course, there is no treatment for simply having what Cicero deems to be "poor judgment." Hence, as Cicero will argue soon, those 'endangering society' with such poor judgment will simply be kept locked up to prevent that danger.

Could this be you? Go ahead: try to prove have "poor judgment" could well require you to defend the entire course of every decision you have ever made in your life. In the face of a judge possibly strongly biased against you on your political views, this could be a steep proof requirement.

But don't worry; it's all for a good cause: Cicero only wants to 'clean up society.' Will Cicero deem you 'clean enough'?

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## SOs as Scapegoats, Cast as the Monstrous Other

*John Douard*, "Sex Offenders as Scapegoat: The Monstrous Other Within," 53(1) *New York Law School Law Review* Issue 1: The Perspectives on Mental Disability, Article 2, pp. 31-52 (Jan. 2008).

[Quote:] "No Wilder No. You've got to listen to me. People like fear. We all want to be frightened and we all want somebody to tell us how to live and who to fuck and why we should do this and think that. And that's the Devil's job.' That's why I'm important to them, Wilder, because if you can make up a terrorist youve given people the Devil. They love the Devil. They need the Devil. That's my job. You get me?" – *Richard Flanagan, The Unknown Terrorist*.

[Text Excerpts (p. 32):] **"I. Introduction**

In this paper, I will argue that sex offenders in the United States are scapegoats, and for that reason are subjected to social violence far in excess of the dangers they pose. The media and the law frame certain sexual behavior as *monstrous*, and those who engage in such behavior as *monsters*. Putative experts on deviance – psychologists and psychiatrists – generally do not directly refer to sex offender as monsters, but instead create categorizations of mental disorders which perform a similar function: they brand sex offenders as persons who are unable to control their impulses. The result of such frameworks is the creation of a class of persons who are not simply unsympathetic, but are regarded as undeserving of certain legal and moral rights.

The metaphor of the monster is telling: a monster triggers fear and loathing because it is a creature with certain human characteristics. Humans branded as monsters are convenient scapegoats that society can blame for social disorder. Individuals who have committed sex offenses are framed as monsters and considered not entirely human. Society can then justify depriving them of liberty beyond the constitutional constraints of the criminal code on the ground that incarceration is necessary to protect the public.[1] Convicted sex offenders, after they serve their criminal terms, may be civilly committed for life under so-called sexually violent predator (or person) acts....

Modern psychiatric diagnoses, and the experts who make them, play crucial roles in both criminal and civil commitment proceedings. These diagnoses incorporate the framework of sexual offender as monster, in part, because psychiatry carries remnants chanted age, the psychopath, the person with an anti-social personality disorder, and the sex offender.[4] The media's and lawmakers' framing of sex offenders as monsters, and the incorporation of the monster framework into legal proceedings through the use of psychiatric testimony and diagnoses, results in a nearly invisible, unjust deprivation of liberty.

In section II of this paper, I will provide a brief analysis of what I mean by framing, and apply that analysis to the role of the monster in modern culture. I show that when we pay attention to the ways sex offenders are reframed as monsters, their social role as scapegoats becomes apparent. In Section III, I argue that the retributive response to sex offenses is far more severe than the risks sex offenders pose to society. I argue, further, that this extreme response is best understood as a reaction not simply to the risks posed by sex offenders, but to our fear of acknowledging that acts we criminalize and condemn as monstrous sex offenses are nonetheless acts of persons with very human, if often deviant, desires. I conclude by suggesting that the same strategies that are used to control sex offenders may be deployed to control other classes of violent offenders with similar consequences for justice.

[pp. 33-42:] **"II. Framing, Reframing, and the Creation of Monsters**

Sex offenders are, of course, persons. However, they have been framed as monsters by media, politicians, and academics. ...I argue that legal strategies for depriving sex offenders of their liberties are unjust, albeit nearly invisible.

*Frames and the Organization of Experience*

[p.34:] This notion of framing has been applied to morality. I may frame an act as an act of robbery, and you may frame the *same* act as a necessary stage in feeding your children. The legend of Robin Hood, a hero who steals from the rich and gives to the poor, suggests that reframing robbery as a courageous act of compassion is an example of moral framing. A foe of abortion will frame her opponents as pro-abortion; an opponent of legal prohibition on abortion will frame her opponents as anti-choice. In both cases, a frame organizes experience.[10]

[p. 38:] B. The Monstrous Other: A Long Tradition

...Most scholars, have not examined people who are stigmatized because they engaged in conduct dangerous to themselves or others. In the United States, sanism is as virulent as, but more rarely noticed than, racism and sexism; discrimination against violent offenders is virtually invisible, because their criminal conduct creates a pretext to isolate them as sources of contamination.[34] Dangerously violent offenders may, of course, harm us, but to treat them as contaminants requiring isolation is a classic example of scapegoating.[35]

Fear and loathing of violent offenders, however, are also social and psychological responses to difference. The criminal justice system in the United States has created together in holding in contempt people who have committed such crimes as sex offenses, selling drugs to children, serial or mass killings , and, newest upon the stage, Islamic terrorism. The defining feature of such monstrous crimes is that those who commit them have no advocates, apart from a small group of criminal defense attorneys, forensic experts, and legal scholars who recognize that categories of monstrous crimes cam lead to deeply immoral and unconstitutional discrimination.[36]

[p. 39:] *C. Scapegoats and the Social Utility of Outsiders.*

The media describes certain categories of crime, such as serial murders and sex offenses, as monstrous, and the perpetrators of such crimes as monsters. Our current monsters serve the same role as they have always served: as scapegoats. A sign that men who commit sex offenses are scapegoats is that, contrary to common belief, sex offending recidivism rates are relatively low, while strategies for preventing recidivism are designed to permanently banish the offender from society...

As noted above, society has historically created and defeated monsters to restore and affirm the morality of normal people. When certain persons are reframed as monsters, a line is drawn between us and them, a demarcation that lends itself to scapegoating them. Targeting scapegoats typically occurs during periods of social and cultural crisis. As law professor Joseph Kennedy observes:

The essence of scapegoating lies in the attribution of an internal problem to an external source. In the contemporary child abuse scare, the violent sexual predator of children, whose sexual appetites and violent tendencies are so deviant from social norms as to place them outside of normal society, is that external source. The violent sexual predator becomes a scapegoat, however, when the scope of social suffering laid at his feet is far great-

*(Continued on page 6)*

er than the facts merit, when a problem that is actually internal to society is projected onto someone who is clearly outside of society in an important sense of the word.[38]

[p. 40:] Kennedy argues forcefully that monstrous crimes, including sex offenses, create solidarity in an increasingly fragmented social life in the United States.

Kennedy suggests that the sex offender becomes a scapegoat when the scope of social suffering attributed to him is far greater than the facts merit. Kennedy is correct for two reasons. First, the overwhelming legal response to sex offenders is disproportionate to their recidivism rate, which recent studies report as being relatively low. According to a United States Justice Department study that tracked 9,691 male sex offenders for the three years following their release from prison and reported on findings related to their recidivism, 3.2% of released rapists were re-convicted for another rape, and of all sex offenders released in 1994, only 3.5% were re-convicted of another sex crime within the three-year follow-up period. The study further reports that of this group of offenders , the percentage rearrested for a sex crime against a child was only 2.2%. Of those, 1.4% were rapists and 2.5% were sexual assaulters.[39] Other studies place the recidivism rate at about 13.4%.[40] Interestingly, the press rarely discusses the disagreement about the recidivism rate, but rather chooses to focus on the more aggressive numbers supporting the societal misconception that sex offenders are inherently repeat offenders.

[p. 41:] Kirkegaard and Nothey identify four characteristics of scapegoating:

1. It emerges when society is in a period of crisis.

2. Acts that blatantly offend societal standards and threaten a sense of proper hierarchy are widely regarded as legitimate targets.

3. The target has stigmata of the victim.

4. The target is subjected to violence, including legal violence.[44]

The scapegoating of sex offenders has all four characteristics, and in the United States sex offenders are widely regarded as extraordinarily harmful to the social fabric as a whole.

[pp. 41-2:] *D. Scapegoats and Moral Panic*[45]

In the United States, sex offenders are the targets of 'moral; panic.' During a period of moral panic,

> [a] person or persons emerges to become defined as a threat to societal values and interests; its nature is presented in a stylized and stereotypical fashion by the mass media; the moral barricades are manned by editors, bishops, politicians and other right-thinking people; socially accredited experts pronounce their diagnoses and solutions; ways of coping are evolved or (more often) resorted to...[46]

Sex offenders have been targets of moral panics more than once in the history of the United States.[47]

...In the 1970s and 1980s, determinate sentencing , such as mandatory minimum sentences and mandatory extended sentences, seemed to be a solution both to the racial disparities in sentencing And to growing anxieties about violent criminal behavior. Breakdown of a sense of social solidarity after the 1960s upheavals seemed to require both less judicial sentencing discretion and more severe penalties. Anxiety about child sexual abuse emerged in this context.[50]

[pp. 42-3:] Sex offenders are clearly being subjected to legal violence, if we understand violence to include long periods of imprisonment. As Yale law professor Robert Cover argues, courts enact violence whenever they impose punishments that result in prison terms, not to mention the most severe punishment: the death penalty.[53] Moreover, incarceration does not end with the termination of a sex offender's prison term, because he is often civilly committed under punitive circumstances.[54] When released into the community, the movements of sex offenders are subject to severe constraints by Megan's Laws.[55] Furthermore, whereas criminal offenders released from prison are generally described as ex-offenders, sex offenders are called sex offenders even after they are released from prison.

[p. 44:] ...In modern Western culture, laws that are the subject of media attention and television shows may perform the same function for the sources of moral panic.

...I suggest that the sex offender, while certainly not innocent, is also being used as a scapegoat for our anxieties about the sexualized role of children in American society, and our fear that sexual desires, including harmful sexual desires, are part of the human condition.

Sex offenders are scapegoated but does scapegoating sex offenders effectively combat the crimes they commit or merely assuage our guilt? Undeniably, child sexual abuse is a stigmatizing crime for good reasons, as it results in the violence of the weakest, most vulnerable members of a society. Nonetheless, the value of stigmatizing the crime does not warrant stigmatizing the offenders through disgust, humiliation, isolation, and exclusion, because in doing so, we undermine efforts to understand and treat sex offenders. Scapegoating does not identify and operationalize a social problem; it increases the likelihood we will avoid the problem.

**III. Sex Offender As Monster: The Legal Response**

*Statutes and the Courts Banish Sex Offenders from Social Participation*

[p. 45:] Both statutory and common law banishes sex offenders from participation in common social networks, marking them as acceptable targets of scapegoating. A recent example of legal efforts to isolate, if not banish, sex offenders is the Georgia sex offender residency statute that would prohibit former sex offenders currently registered under that state's Megan's Law from living within 1,000 feet of 'areas where minors congregate,'[64] including 'all public and private parks and recreation facilities, playgrounds, skating rinks, neighborhood centers, gymnasiums, *school bus stops*, and public swimming pools.'[65] Such residency restrictions are being implemented in several states, but Georgia's is instructive. Not only are sex offenders prohibited from living within 1,000 feet of schools or public parks, as is the case in most residency restriction laws, but they are prohibited from living within 1,000 feet of *school bus stops*. In effect, released sex offenders can live nowhere.

The most extensive deprivation of the liberty of sex offenders is not imprisonment or Megan's Law registration, but involuntary civil commitment statutes; sexually violent predator acts ('SVPAs'). Once criminal incarceration of sex offenders has reached its constitutional limits, SVPAs allow for the indefinite incarceration of sex offenders in civil commitment facilities based on vague diagnoses of 'mental abnormality or personality disorder.'[66] During these indefinite commitments, individuals are often provided with only rudimentary cognitive behavioral treatment, the efficacy of which is unknown.[67]

[pp. 47-8:] ...The resemblance to treatment for alcohol or drug abuse is not accidental: cognitive behavioral treatment incorporates the twelve steps of Alcoholics Anonymous.[79] And like all addicts, treatment theoretically provides a form of reentry into society.[80]

However, in practice, no such hope is realized because the civil committees are rarely, if ever, released. The basis for commitment is the attribution to sex offenders of an essential trait that differentiates us from them. The trait may be antisocial personality disorder, paraphilia, impulse control disorder, or some combination of disorders. What these disorders have in common is that the criteria used to diagnose a person include the claim that these characteristics are relatively stable, if not permanent, qualities.[81]

*Scapegoating the Monsters Among Us: A Test Case for the Preventive State?*

While sanism results in discrimination against the mentally ill, a therapeutic culture has developed in the United States that seems antithetical to construing psychiatric patients as monsters....

[p. 49:] ...As Pamela Schultz, who has interviewed incarcerated child molesters and found them to be 'not monsters,' points out, despite studies that indicate sex offenders are far less likely to reoffend than non-sex offenders, 'the myth remains that child molesters have a vastly higher recidivism rate than any other type of offender.'[84]

The United States Supreme Court has encouraged the myth of future dangerousness, particularly with respect to sex offenders. In *Barefoot v. Estelle*, the Court held admissible psychiatric predictions of future dangerousness, despite the demurrer by the American Psychiatric Association that psychiatrists possess no special expertise entitling them to predict future dangerousness.85 A few years later, the Court in *Kansas v. Hendricks* found that sexual predator statutes that rely on such predictions do not violate due process, despite noting evidence that 'it was not possible to predict with any degree of accuracy the future dangerousness of a sex offender.'[86]

[p. 51:] Law professor Eric Janus has argued that sex offender commitment statutes may serve as a template for intrusive government on a massive scale.[96] A preventive state may be the result of what appears to be the application of preventive detention to a limited, and despised population. From the point of view of those who believe a preventive state is an effective way to protect the public, security seems more important than liberty. Creating classes of outsiders – and framing them as monsters – who warrant not simply heightened surveillance, but virtual exclusion from civilized society, may seem limited today to sex offenders, but on the horizon looms a far more extensive use of these strategies of social control.[97] [Editor's note: This passage in this article now seems quite prescient, given the advocacy by the Cicero Foundation, covered in the June *tLP* edition and this one, *supra*.]

[pp. 51-2:] ...The Supreme Court did hold, in 1962, that a person cannot be punished for having a certain status, such as being a drug addict,[99] but the sexually violent predator statutes open the possibility that mental disorder, even when not strictly speaking mental illness, will be used in the future to civilly commit people who are diagnosed by psychiatrists as antisocial personality disordered, if they also can be demonstrated to be dangerous (e.g., by committing a violent crime). However, as Janus points out, 'The predator template for radical prevention poses a threat to maintaining a sound balance between liberty and security.'[100] The danger is that the appearance of treating rather than punishing can mask severe constraints on liberty. The public may not find that result disturbing, but it would be a radical restructuring of the criminal justice system with vast constitutional implications. [Editor's Note: To say the very least! The Cicero Institute proposal demonstrates this conversion to a totalitarian government, with individual rights of all tossed to the winds. Beware!]

[p. 52:] **IV. Conclusion**

I have argued that sex offenders in the United States are scapegoats, and for that reason are subjected to social violence far in excess of the dangers they pose. The media and the law frame certain sexually deviant behavior as *monstrous*, and those who engage in such behavior as *monsters*. Putative experts on deviance – psychologists and psychiatrists – generally do not refer to sex offenders as monsters, but certain categories of mental disorder perform a similar function: they mark off a domain of persons who are unable to control their impulses, and therefore ought to be treated as outsiders. The results of such frameworks is the creation of a class of scapegoats who are not simply unsympathetic, but are regarded as undeserving of legal and moral rights. The sex offender may seem to be the prototype of a criminal from whom society needs protection, but sex offender laws may also be templates for a far more extensive preventive approach to criminal conduct."

*(Continued on page 7)*

Notes:

1 As I argue in section II, such crimes include sex offenses, especially against children, certain drug offenses, especially where children are victimized, and murder aggravated by virtue of being especially heinous.

3 In a recent interview, psychiatrist Thomas Szasz pointed out:

"Three hundred years ago, every human predicament was seen as a religious problem – sickness, poverty, suicide, war. Now they are all seen as medical problems -- as psychiatric problems, as caused by genes and curable with 'therapy.' In the past, the criminal law was imbued with theology; now, it's imbued with psychiatry.

*Randall C. Wyatt*, An Interview with Thomas Szasz, M.D.: Liberty & the Practice of Psychotherapy, Psychotherapy.net, Dec. 2000, http://psychotherapy.net/interview/Thomas_Szasz.

4 *Max Weber*, *From Max Weber: Essays in Sociology* 155 (H.H. Gerth & C. Wright Mills, eds. & trans. Routledge 1991) (1946) ("The fate of our times is characterized by rationalization and intellectualization and, above all, by the 'disenchantment of the world.'").

10 *George Lakoff*, *Moral Politics: How Liberals and Conservatives Think* 372-73 (2d ed. Univ. of Chicago Press 2002) [hereinafter *Lakoff*, *Moral Politics*] (arguing that political thinking is a cognitive activity shot through with framing, reframing, and categories that refer to prohibitions, permissions, and other moral judgments).

34 *Michael L Perlin*, "On 'Sanism'," 46 *SMU L. Rev.* 373 (1992) (defining sanism as an irrational prejudice toward mentally ill persons, similar to other irrational prejudices).

35 *Mona Lynch*, "Pedophiles and Cyber-Predators as Contaminating Forces: The Language of Disgust, Pollution, and Boundary Invasions in Federal Debates on Sex Offender Legislation, 27 *Law & Soc. Inquiry* 529, 540 (2002).

36 That these advocates are themselves stigmatized – "How could you represent (treat) such monsters?" – was recently pointed out to me by social worker Stacey Caraballo, who is analyzing this important, but largely unnoticed, phenomenon.

38 *Joseph E. Kennedy*, "Monstrous Offenders and the Search for Solidarity Through Modern Punishment," 51 *Hastings L.J.* 829, 882 (2000).

39 *Patrick A. Langan et al.*, Recidivism of Sex Offenders Released from Prison in 1994, U.S. Dep't of Justice, 30-36 (2003), available at http://www.ojp.usdoj.gov/bjs/pub/pdf/raorp94.pdf.

40 *R. Karl Hanson & Monique T. Bussiere*, "Predicting Relapse: Meta-analysis of Sexual Offender Recidivism Studies," 66 *J. of Consulting & Clinical Psychol.* 348 (1998). But see *Marnie E. Rice & Grant T. Harris*, "What Population and What Question?" 48 *Canadian J. of Criminology & Crim. Just.* 95, 97 (2006) (placing recidivism risk at 24% or higher).

44 *Hugh Kirkegaard & Wayne Nothey*, The Sex Offender as Scapegoat: Vigilante Violence and a Faith Community Response, *Colloquium on Violence and Religions* (1999), http://www.helping-people.info/articles/scapegoat_text.htm.

46 *Stanley Cohen*, *Folk Devils and Moral Panics* i (3d ed. 2002).

47 See generally *Phillip Jenkins*, *Moral Panic: Changing Concepts of the Child Molester in Modern America* (1998) (analyzing the periodic emergence of moral panic over child sex abuse since the 1930s).

50 *Kennedy*, *supra* note 38, at 852-55.

53 *Robert Cover*, "Violence and the Word," 95 *Yale L.J.* 1601, 1601-07 (1986).

54 For example, N.J. Stat. Ann. § 30.4—27.25 (West 2008), which civilly commits sex offenders indefinitely after expiration of their criminal terms. Civil committees have annual review hearings, but since the statute's inception in 1999, only about 85 out of approximately 400 have been released.

55 New Jersey's Megan's Law, N.J. Stat. Ann. § 2C:7-1 (West 2005), is long and complex, but it includes three levels of registration requirements, placement of names on the internet, and GPS bracelet for the second and third levels of registration.

64 Ga. Code Ann. § 41-1-15 (West 2006) (repealed 2008).

65 Ga. Code Ann. § 41-1-12 (West 2006) (emphasis added) (repealed 2008).

66 N.J. Stat. Ann. § 30.4—24.25 (West 1999).

67 See *Ctr. For Sex Offender Mgmt.*, Dep't of Justice, Recidivism of Sex Offenders (2001), available at http://www.csom.org/pubs/recidsexof.html. This authoritative assessment indicates the paucity of information on treatment effects.

79 Cognitive behavioral therapy ("CBT") explores ways for people with psychological problems to change their thought processes. A similar approach to developing coping skills is implicit in twelve-step programs, which focus on addiction. Cognitive patterns that lead to drinking or drug use are identified in twelve-step programs, and CBT techniques are employed in treatment programs. A similar linking of twelve-step programs to CBT is found in sex offender treatment. See *Henry Tarkington*, *Cognitive Behavioral Therapy in Substance Abuse Treatment*, *First-Step Services, L.L.C.*, http://www.firststepgarner.com/cognitive.html.

80 See *Hollida Wakefield & Ralph Underwager*, Sex Offender Treatment, *Inst. Psych. Therap. J.* (1991), available at http://www.ipt-forensics.com/journal/volume3/j312.htm (explaining that treatment programs should encourage social behavior).

81 See *Eric S. Janus*, *Failure to Protect: America's Sexual Predator Laws and the Rise of the Preventive State*, at 101-05 (2006) (hereinafter *Janus*, *Failure to Protect*).

84 *Pamela D. Schultz*, *Not Monsters: Analyzing the Stories of Child Molesters* 184 (2005).

86 521 U.S. at 355 n. 2; id at 357-61; see also *Addington v. Texas*, 441 u.S. 418, 429 (1979) ("Given the lack of certainty and the fallibility of psychiatric diagnosis, there is a serious question as to whether a state could ever prove beyond a reasonable doubt that an individual is both mentally ill and likely to be dangerous.")

96 *Janus*, *Failure to Protect*, *supra* note 81, at 93-109.

97 *Id.*

99 *Robinson v. California*, 370 U.S. 660, 82 S. Ct. 1417, 8 L. Ed. 2d 758, 1962 U.S. LEXIS 850 (1962) (It is cruel and unusual to punish person for merely being ill; it constituted cruel and unusual punishment to imprison person merely because he was addicted to use of narcotics.).

100 *Janus*, *Failure to Protect*, *supra* note 81, at 102.

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# Static-99R Criticisms More Recently - with Bayes materials -- Part 4

Actuarial Recidivism Risk Guessing – Bayes, Monahan, Chaos, Uncertainty, etc.

*Robert A. Prentky, Howard E. Barbaree, & Eric S. Janus*, eds., *Sexual Predators: Society, Risk, and the Law* (New York: Routledge, 2015).

Text Excerpts:

p. 178: "In science, as in all of life, a chain of events can reach a crisis point in which very small changes become magnified, producing outcomes far in excess of the original events. In the world of science, this phenomenon is occasionally referred to as the butterfly effect, a term originating with Edward Lorenz, a mathematician and meteorologist who developed mathematical models of weather using a set of differential equations. A serendipitous discovery that very small changes in input can rapidly produce enormous changes in output led Lorenz to discover the phenomenon of 'sensitive dependence on initial conditions,' referred to more colloquially as the butterfly effect. The term itself comes from the title of an academic paper that Professor Lorenz gave in 1972, entitled: 'Predictability: Does the Flap of a Butterfly's Wings in Brazil Set Off a Tornado in Texas?'

p. 179: ...James Gleick (1987) expressed in his marvelous book *Chaos*, 'Errors and uncertainties multiply, cascading upward through a chain of turbulent features, from dust devils and squalls to continent-size eddies that only satellites can see' (p. 20) ....

'Chaos Theory, with its many applications, from predicting weather to predicting the stock market, provides a model for attempting to understand an underlying order of highly complex systems (or patterns) that appear 'chaotic' (i.e., without order). Fundamental precepts of Chaos Theory can be successfully applied to the awesome complexity of human behavior, and perhaps provide some insight into the demands and challenges of predicting sequences of events leading to atypical, often low frequency criminal offenses. Highly imperfect prediction results from a simple A/B pattern: A (prior) to B (index) to C (predicted outcome). In classic Chaos Theory, criminal behavior is often both dynamic and nonlinear.

p. 180: Judgments of Risk Under Uncertainty

We augur judgments of risk against a backdrop of uncertainty....

As Hastie and Dawes (2010) commented, '...[W]e are ...prone to illusions of consistency, reliability and certainty about the world inside our own heads. There can be little doubt that we think we are more logical, rational, and consistent than we really are.' (p. 325). ...In the realm of risk analysis, ...uncertainty must be regarded as the ever-present impediment to our reckoning....

...Uncertainty is an incontrovertible fact for 'all forms of life' and 'at all levels of biological complexity' (p. 509). (Kahneman & Tversky, 1982). ...Uncertainty, simply stated, reflects the unavoidable condition of partial information about the likelihood or odds of some risk. When it comes to evaluating criminals, the extant information ...is not merely partial; it is of unknown quality.

p. 181: ...Silver (2012) noted that: "... Although climatologists might think carefully about uncertainty, there is uncertainty about how much uncertainty there is. (pp. 389-90, author's italics).

pp. 189-90: Rare Events Under Scrutiny in the Courtroom

...Extreme criminal 'events' are statistically negligible, but the perceived consequences of being 'wrong' are so profound we override all rational appreciation of the probability of the event. In so doing, predicting statistically rare (but extreme) criminal offenses end up, more often than not, false positives. Parenthetically, our use of the word dread was not hyperbole. Slovic (2000) introduced a factor that he referred to as 'dread risk.' The higher the score of a hazard on 'dread risk,' the higher its perceived risk, and 'the more people want to see its current risks reduced, and the more they want to see strict regulation employed to achieve the desired reduction in risk' (p. 226). Camerer & Kunreuther (1989) also noted that events that are perceived as most risky are those that 'evoke dread' (p. 578).

p. 191: Lancaster (2011) provided comparisons of probabilistic outcomes (based on frequency estimates) for many events resulting in death or serious injury to children. He noted that there are 'about one hundred high-risk abductions of children by strangers every year, and about half end in murder' (p. 77). He then went on to compare these 100 abductions, or 50 child abduction/murders with child fatalities, resulting from: (a) disease or congenital illness (n = 36,180), (b) motor vehicle accidents (n = 7,981), (c) drowning (n = 1,158), (d) accidental suffocation or strangulation (n = 953), (e) fire (n = 606), (f) firearm accidents (n = 167), or (g) death at the hands of a family member (n = 1,500). (Nat'l Maternal and Child Health Center for Child Death Review, 'United States Child Mortality, 2002,' n.d., www.childdeathreview.org/Nat<#213>1%data%20Webpage%202002_files/US2002.pdf; U.S. Department of Health and

Human Services, Child Maltreatment Annual Reports: www.acf.hhs.gov/programs/cb/stats_research; and U.S. Department of Health and Human Services , Child Abuse and Neglect Fatalities: Statistics and Interventions, Child Welfare Information Gateway. April 30, 2010. www.childwelfare.gov/pubs/factsheets/fatality.cfm.)

Lancaster (2011) concluded that, 'In real terms, a child's risk of being killed by a sexually predatory stranger is comparable to his or her being struck by lightning (1 in 1,000,000 versus 1 in 1,200,000)' (p. 77). Or, according to these estimates, 30 times as many children are killed by family members as by stranger child predators. (Statistical Assessment Service, 'Phony numbers on child abductions,' STATS.org, Aug. 1, 2002, www.stats.org/stories/2002/phony_augpol_02.htm (accessed Oct/ 5, 2009); John D. Whitaker (June 1986), 'Evaluation of Acceptable Risk,' Jour. Of the Operational Research Society, 37(6), 542.)

p. 197: *Heuristics*

Representative Heuristic

Kahneman and Tversky hypothesized ... that event A will be judged more probable than event B if A appears more representative than B. The representative heuristic, in the simplest terms, is 'latching onto a single salient variable' while ignoring other important variables (Posner, 2010, p. 69).

Determining what is and what is not representative can be highly subjective. These subjective determinations are often reasonably accurate (i.e., some representative-based predictions of outcomes are in fact more likely than other outcomes). Kahneman and Tversky (1972) noted, however, that this is not always the case,

'because there are factors (e.g., the prior probabilities of outcomes and the reliability of the evidence) which affect the likelihood of outcomes but not their representativeness. Because these factors are ignored, intuitive predictions violate the statistical rules of prediction in systematic and fundamental ways.' (p. 238)

pp. 197-98: Davis and Follette (2002) noted that

cide their verdicts. 'Attorneys argue, "This person has all the characteristics of a murderer/bad parent/thief, therefore (s)he must (will) be one!' It is in this sense that we use the term "intuitive profiling".' (p. 134)

Davis and Follette (2002) further clarified their use of 'intuitive profiling':

'The use of intuitive profiling to assess guilt relies on the following logic: "If persons who commit embezzlement are likely to be in debt, then persons who are in debt are likely to be embezzlers," or "If most A's are B's, then most B's are A's." Logically, of course, these conclusions are erroneous.' (p. 134)

One (of many) examples in the evaluation of sex offenders that readily come to mind is the relation of victim gender to risk among child molesters. Prevailing wisdom tells us, though the empirical evidence is somewhat inconclusive, that child molesters with same-sex (male) victims pose the greatest risk for re-offense while child molesters with opposite-sex (female) pose the lowest risk, with child molesters having mixed-gender victims falling somewhere in between. When evaluating a child molester with only boy victims, victim gender becomes representative of high risk....

One of the most indisputably high-risk child molesters that I (R.A. Prentky) ever encountered was a 63-year-old man with a lifelong record of sexually offending against girls. ...This man hardly required an evaluation. He exemplified what professionals – as well as lay people – would regard as the highest risk of all child molesters. Child molesters with a preference for opposite sex victims can be as recidivistic and dangerous as child molesters with a preference for same-sex victims.

p. 199: ...As Kahneman and Tversky (1972) long ago noted, 'The biasing effects of representativeness are not limited to naïve subjects. They are also found (Tversky and Kahneman, 1971) in the intuitive judgments of sophisticated psychologists' (p. 433)

pp. 200-01: Availability Heuristic

The availability heuristic was first described by Tversky and Kahneman (1973, 1974) as a method by which decision-makers 'assess the frequency of a class or the probability of an event by the ease with which instances or occurrences can be brought to mind' ((1974, p. 1127). The availability heuristic can simply be understood as the tendency to magnify the likelihood of events that are distantly removed. The more easily thoughts, images, and fantasies come to mind, the more 'probable' they are. That is, the more that something is a 'headline grabber' (Plous, 1993, p. 122), the more 'available' it will be. As such, airplane crashes are far more 'available' than car crashes, despite the dramatic difference in frequency.

When we employ the availability heuristic, we are effectively assessing the degree of risk according to the possibilities that easily come to mind (Tversky and Kahneman, 1972, 1973). As Sunstein (2005) and numerous others have pointed out, the availa- fear and base rate neglect, serious risk as

p. 201: ...[H]ow 'available' our thoughts are about risk-related possibilities is partly a function of our familiarity with those possibilities as well as the salience of those possibilities. All three constructs were sewn together by Plous (1993):

'(1) The more available an event is, the more frequent or probable it will seem; (2) the more vivid a piece of information is, the more easily recalled and convincing it will be; and (3) the more salient something is, the more likely it will be to appear causal.' (p. 178)

pp. 201-02: Vividness

'Vividness' is how 'imaginable' something is (e.g., the clarity of the image or the ease with which the image comes to mind). Vividness, 'a close cousin of availability' (Plous, 1993), can be a powerful tool in influencing opinion: 'The power of vivid information is widely appreciated by advertising executives, politicians, and many other 'professional persuaders.'

p. 202: In one of the earliest demonstrations of the potential power of vividness in the courtroom, Reyes, Thompson and Bower (1980) examined the influence of vivid vs. pallid information on mock jury decisions. In a controlled study, Reyes, Thomson, and Bower manipulated evidence in a drunk driving case such that the facts of the case were either vivid or more pallid. The side – either defense or prosecution -- that used the vivid evidence prevailed in mock jury verdicts. Moreover, the advantage of vividness was even more pronounced when the verdicts were reported 48 hours after the evidence had been presented – when the vivid evidence would remain more clearly in the minds of the jurors than the pallid evidence."

[Editor's Note: Part 5 will appear in the next tLP issue.

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## Cases on PPG use cited by SC S Ct In *In re Hyman*

1. *United States v. Medina*, 779 F.3d 55, 65, 71 (1st Cir. 2015) ("The testing is controversial, both as to whether it is effective and as to whether it is unduly invasive and thus degrading ... [W]e acknowledged in each case the unusually invasive nature of such testing and the debate over its reliability. ... We also remarked on the lack of evidence regarding [] 'the procedure's reliability....": (citations omitted);

2. *United States v. McLaurin*, 731 F.3d 258, 263 (2nd Cir. 2013) ("The Government, however, cannot point to any consensus on the reliability of plethysmographic data.";

3. *United States v. Powers*, 59 F.3d 1460, 1471 & n. 13 (4th Cir. 1995) ("[t]he scientific literature addressing penile plethysmography does not regard the test as a valid diagnostic tool because, although useful for treatment of sex offenders, it has no accepted standards in the scientific community. Penalty of the use of penile or abuse penile plethysmography other than in the treatment and monitoring of sex offenders.");

4. *United States v. Rhodes*, 552 F.3d 624, 626 (7th Cir. 2009) ("Though the use of PPG is not uncommon, experts disagree as to tis effectiveness.");

5. *United States v. Weber*, 451 F.3d 552, 565 (9th Cir. 2006) ("Plethysmographic testing has also been sharply criticized as lacking 'uniform administration and scoring guidelines.' One researcher noted well over a dozen potential sources of variation among different assessments, including the type of measuring device and stimuli that are used, the characteristics of the test, and the setting in which it is conducted. The lack of standard procedures governing plethysmograph testing has led one pair of commentators to conclude that 'research data as well as individual findings derived by plethysmograph must be considered idiosyncratic [and] unamenable to normative comparisons, if not impossible to interpret from a traditional psychometric perspective.'" [cleaned up]);

6. *Rudy-Glanzer ex rel. Doe v. Glanzer*, 232 F.3d 1258, 1266 (9th Cir. 2000) ("In fact, courts are uniform in their assertion that the results of penile plethysmographs are inadmissible as evidence because there are no accepted standards for this testing in the scientific community.... Therefore, even though courts have accepted that penile plethysmographs can help in the treatment and monitoring of sex offenders, these tests have no indicia of reliability in evidence at trial.");

7. *United States v. White Horse*, 177 F. Supp. 2d 973, 976 (D.S.D. 2001) ("[T]he PPG is not accepted by the medical profession as a reliable or valid diagnostic tool. *DSM-IV-TR*, 569 (2000). The PPG is also not accepted by courts as admissible evidence.");

8. *Galindo c. State*, 481 P.3d 686, 691 (Alaska Ct. App. 2021) (noting the court had repeatedly vacated PPG testing as a condition of probation because of due process implications);

9. *Nelson v. Jones*, 781 P.2d 964, 967-68 (Alaska 1989) ("As the trial court remarked in discussing the penile plethysmograph, 'tests often give false results, both positive and negative.' Cases from other jurisdictions suggest that the court's doubts were well founded.' (collecting cases); noting an expert 'testified that the plethysmograph was useful in the treatment, but not in the assessment of sexual deviance");

10. *In re Mark C.*, 8 Cal. Rptr. 2d 856, 863 (Ct. App. 1992) ("First, there is authority that the arousal test (penile plethysmograph) is not yet accepted in the scientific community as a reliable means of diagnosing sexual deviancy.");

11. *People v. John W.*, 229 Cal. Rptr. 783, 785 (Ct. App. 1986) ("Based upon these standards, there was clearly no acceptable showing in this case that the physical test was a reliable means of diagnosing sexual deviancy.");

12. *Gentry v. State*, 443 S.E.2d 662, 669 by no means established. No scholarly works discussing it were introduced. No national guidelines have been adopted for its use. Given the rejection of penile plethysmograph evidence by other states, and particularly the uncertainty within the scientific community of its reliability, we hold that it is inadmissible in Georgia.");

13. *Cooke v. Naylor*, 573 A.2d 376, 379 (Me. 1990) (Me. 1990) ("Naylor's own expert testified that the test offers only 'probabilities and similarities to pedophilic profiles,' and other experts testified that these tests are of questionable reliability even in establishing a correct pedophilic or non-pedophilic profile for the individual undergoing evaluation. In the absence of any proof that this evidence is scientifically reliable or could be of benefit to the trier of fact, we find no error in the court's decision not to admit it.")

*(Continued on page 9)*

14. *Commonwealth v. Ortiz*, 100 N.E.3d 790, 796, 797 (Mass. App. Ct. 2018) ("First, we discern no error in the judge's finding that, although the PPG appears to be commonly used as a tool in the treatment of sex offenders, it is not generally accepted in the clinical community for use in diagnosis.... For a test such as this, the stimuli used are by definition intrinsic to the result produced. With no standardized guidelines for either the content or even the mechanism of stimulus (audio or visual), the reliability of the procedure appears inherently dubious.");

15. *In re Care & Treatment of Kirk*, 520 S.W.3d 443, 462-63 (Mo. 2017) (en banc) (noting the expert who was advancing the reliability of the PPG testified "That the test suffered from a number of problems, including standardization, accuracy, reliability, knowledge, the PPG had not been standardized or cross-validated and the majority of professionals in his field would agree that the PPG should only be used for treatment");

16. *Dutchess Cnty. Dep't of Soc. Servs. v. Mr. G.*, 534 N.Y.S.2d 64, 71 (Fam. Ct. 1988) ("Moreover, the results of the plethysmograph as a predictor of human behavior cannot be considered. The proof established that it is not only a device with, at best, questionable professional recognition, but one whose conceded margin of error is too great to reliably forecast [a child's] safety.");

17. *State v. Spencer*, 459 S.E.2d. 812, 815-16 (N.C. Ct. App. 1995) (459 S.E.2d 812, 815-16 (N.C. Ct. App. 19995) ("[T]here is substantial disagreement as to the extent to which the penile response is subject to voluntary control and as to whether the penile response as measured by the plethysmograph can then be generalized to anything else pertaining to sexual behavior. ... [T]he forensic validity of the instrument is highly suspect, and the utility of what the plethysmograph shows is highly questionable and the possibility of misleading the trier of fact or the jury is very high, dangerously high. We agree with the trial court that the evidence before it by no means established the reliability of the plethysmograph; there is a substantial difference of opinion within the scientific community regarding the plethysmograph's reliability to measure sexual deviancy. See, e.g., *Barker and Howell*, "The Plethysmograph: A Review of Recent Literature," 20 *Bull. Am. Acad. of Psychiatry and Law* 13 (1992) (identifying several problems with the reliability of the plethysmograph, including lack of norms and standardization and susceptibility of the data to false negatives and false positives,' and concluding that 'despite the sophistication of the current equipment technology, a question remains whether the information emitted is a valid and reliable means of assessing sexual preference'); see also *Myers, et al.*, "Expert Testimony in Child Sexual Abuse Litigation," 68 *Neb. L. Rev.* 1, 134-35 (1989) (stating that a problem with the reliability of penile plethysmograph testing is that penile response is subject to voluntary control, and the test should not be used to determine whether or not an individual has engaged in deviant behavior)... In view of the lack of general acceptance of the plethysmograph's validity and utility and therefore, its reliability for forensic purposes in the scientific community in which it is employed, we hold that the trial court did not abuse its discretion in finding defendant's testing data insufficiently reliable to [be admitted]." [cleaned up]);

18. *In re Care & Treatment of Bilton*, 432 S.C. 157, 162, 851 S.E.2d 442, 444 (Ct. App. 2020) ("The test is controversial and has been criticized for a lack of standardization and for being subject to manipulation.");

19. *In re A.V.*, 849 S.W.2d 393, 399 (Tex. App. 1993) ("In the instant case, we have grave reservations whether appellee has al deviancy, and whether such a test is generally accepted in the scientific community as a valid indicator of sexual preferences or disorders. There was no medical testimony presented on the issue of reliability, and [the expert witness] himself admitted that a person of high intelligence who does some reading can easily manipulate the results of the penile plethysmograph. Based on the record before us, we are unable to conclude that appellee has established the reliability of the penile plethysmograph.");

20. *Billips v. Commonwealth*, 652 S.E.2d 99, 102 (Va. 2007) ("The record is devoid of any evidence of the reliability of plethysmograph testing....").

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## PPG Got the Boot in the 2nd Circuit.

*Erin Fuchs*, "Second Circuit Rejects Penile Plethysmography," *Business Insider* (Oct 3, 2013), https://busnessinsider.com/second-circuit-rejects-penile-plethysmography...

*Text excerpts*: "A federal appeals court in New York issued a scathing ruling Thursday in a case brought by a sex offender who was forced to undergo a Medieval-sounding procedure known as penile plethysmography.

The Second Circuit Court of Appeals attacked the procedure as 'extraordinarily invasive' and unjustified, finding sex offender David McLaurin shouldn't be forced to undergo it. Here is how the appeals court describes penile plethysmography, which 'This examination involves the use of a device known as a plethysmograph which is attached to a subject's penis. In some cases, the subject apparently may be required, prior to the start of the test, to masturbate so that the machine can be 'properly calibrated.' The subject is then required to view pornographic images or videos while the device measures blood flow to the penis and measures the [erection in response.]

The Second Circuit didn't describe the nature of the porn that McLaurin would have been forced to watch, but presumably it was illegal. He was accused in 2011 of taking topless photos of his 13-year-old daughter in Alabama. When he moved to Vermont for work in 2011, he failed to register as a sex offender.

He got 15 months in prison and five years of supervised release for violating the Sex Offender Registration and Notification Act. A judge ruled the plethysmograph 'may' be part of that supervised release. The appeals court rejected the method, though, in part because 'it inflicts the obviously substantial humiliation of having the size and rigidity of one's penis measured and monitored by the government.'

While this procedure sounds unbelievably odd and barbaric, it has not just been used in Vermont. The Council on Sex Offender reoffend.

'Sex offenders, especially highly compulsive offenders, have been found to ruminate over sexual fantasies involving the offense pattern,' the Council said in an informational document, 'and phallometric assessments have been among the most successful at discriminating between groups of sex offenders and non-sex offenders.'"

Editor's Closing Comment: I draw the reader's attention to the last clause of the last sentence in the preceding quote. There is no scientific research that has ever undertaken to differentiate between sexual deviants who achieve erections faster, longer, or more rigidly, from those who do not so achieve, as to whether the 'more erect' cohort have previously (or, alternatively, later) criminally sexually offended more prevalently than the 'less erect' cohort.

Whether the polygraph or any test can successfully discriminate between sexual deviants of any particular attraction, on one hand, and those who can be described as teleiophilic 'normophiles,' on the other hand, is irrelevant, because sexual deviance does not inherently equate to sex offending. In fact, surveys of those admitting to pedophilia and other attractions called "deviant" have found that only the tiniest minority – roughly one percent or less -- ever offended. In most basal terms, what this means is that deviants are no more likely than 'normophiles' to ever sexually offend.

Therefore, penile plethysmography cannot ascertain who has already sexually offended or who is highly likely to sexually offend in the future. In short, for this reason it has whether one is "compulsive" or not. Further, experiencing sexual fantasies, deviant or otherwise, is no valid predictor of future sexual offenses either. Nor does plethysmography actually identify those who have active sexual fantasy experience, whether constantly or only rarely.

In sum there is no scientific excuse to justify use of plethysmographic usage. It is just an opportunity to force one to undergo sexual traumatization. This is not how you improve one's sexual health. It is barbarism at its worst.

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## SO Residency Restrictions – A Harmful Response

*Sandy Rozek*, "Sex Offender Residency Restrictions -- A Harmful Response," *the NARSOL Digest*, Vol. 19, No. 3 (June/July 26), p 10.

[Text:] "Residency restrictions for persons required to register as sexual offenders are often enacted for no reason other than neighboring towns have implemented them. They spread like wildfire, and like that destructive force, they wreak their own form of havoc, making it more and more difficult for registrants to find decent housing for them-create the stability they need to become productive citizens, which, according to research, is what drives down recidivism.

https://tiunyurl.com/4kk8ccmxz

What with adding more people to the registry and some cases making the laws retroactive, the number of individuals caught up on this maelstrom of flame grows exponentially each year.

https://tinyurl.com/3new9x27
https://tinyurl.com/3w84fma8

The spark that starts the blaze is one we all share, the drive to keep our children safe. Residency restrictions, however, are an *inappropriate* and *contraindicated* response to that desire. They are based on three assumptions that are contradicted by evidence:

***Residency restrictions assume most child sexual abuse is committed by persons unknown or barely known to their random victims when in reality 93% or higher of cases involves someone well known to the children who have been specifically chosen.***

The percentage of situations in which a prior relationship exist between an abuser and a child victim varies dependent on the age of the victim. A study done by the Office of Juvenile Justice found that for very young children, family members and very close acquaintances comprise close to 100% of their offenders, while for teens those categories make up 94.3%. The U.S. Dept. of Justice in a mega study, found that overall, 93% of the offenders of children and teens were either family members or trusted acquaintances (p. 10).

https://tinyurl.com/mr39d3fe

***victims based on residential proximity, which is not supported by research.***

Residency restrictions create zones around schools, daycare facilities, and often parks. These laws and policies, once begun, spread throughout a state with unstoppable ferocity. A two-state study, Michigan and Missouri, did not support the mistaken theory that living close to one of these was a factor in repeat sexual offenses against children. Another study examining several

states found, "...proximity to schools and daycares, with other risk factors being comparable, does not appear to contribute to sexual recidivism. These data do not support the widespread enactment of residential restrictions for sexual offenders' (introduction).

https://tinyurl.com/5n6p3x2y
https://tinyurl.com/3vew9nxd

***Residency restrictions assume that most sexual abuse is committed by repeat offenders, which research shows to be inaccurate.***

On average, a significant majority of registered sex offenders are one-time, first-time-convicted offenders. A study in New York found that '...over 95% of all sexual offense arrests were committed by first-time sex offenders, casting doubt on the ability of laws that target repeat offenders to meaningfully reduce sexual offending' (abstract), and a study from the University of Tennessee had very similar findings. They report, 'Another factor constraining [sex offender registries'] effectiveness is that past studies have shown that ..."94.1 [%] of those arrested for child molestation were first-time sex offenders"' (conclusion of major findings).

https://tinyurl.com/mrye4asr
https://tinyurl.com/bp6f6vr3

Restrictions often force offenders away from support systems, treatment, stable housing, and employment opportunities, which are crucial for successful reintegration. These are the elements associated with remaining offense-free. Some areas are so encompassed by residency restrictions that homelessness has escalated, especially in states where residency restrictions are aggressively implemented, states as diverse as Wisconsin, Florida, North Carolina, Illinois and many more.

https://tinyurl.com/3utmkytz
https://tinyurl.com/mt9ddyfc
https://tinyurl.com/yc36dfs4
https://tinyurl.com/ycyyrmpp

On the opposite end of the spectrum is the state of Kansas, which actually has a page on its DOC website about why residency restrictions do not work and passed legislation in 2006 prohibiting its jurisdictions from implementing them.

https://tinyurl.com/52cstfwk
https://tinyurl.com/mr3hpyna

*What drives down re-offense? Housing and employment stability, access to evidence-based treatment, and family and community connectedness. What makes those things difficult, sometimes impossible? Residency restrictions.*

Are these individuals for whom restrictions from a specific type of place appropriate? Almost assuredly, and they should be handled on an *individualized* basis.

Creating 'umbrella' laws that indiscriminately restrict everyone listed on a state's registry, or everyone of a certain classification or tier, thus creating pockets of homeless registrants and acting as a barrier between registrant and rehabilitation is more than just *inappropriate* and *contraindicated*.

It is unrestrained madness."

Editor's Comment: In the last two paragraphs above, the author reverts to use of two of the 'smog words' infesting psychological literature these days that have no specific meaning, but simply seek to enshrine as "science" the personal opinions of writers in peer-reviewed literature. Of such meaningless terms that could be applied to anyone the writer dislikes or fears, individually or by category, junk science is built, and spreads by quiet creeping.

The actual scientific research about residential restrictions is this: None of the nearly countless metrics which have been tried to define: what categories of people are to be restricted and from areas around what kinds of places and by how far from them, have succeeded at identifying any geographically related scenario for sexual offending. This is true no matter what category of people or what attributes of individuals are under scrutiny. The blunt, universal truth is simply that residency restrictions do not work to prevent sex crimes. Let's repeat that just once to fully absorb its significance: **RESIDENCY RESTRICTIONS DO NOT WORK TO PREVENT SEX CRIMES**. There are NO circumstances that change or reverse this universal finding.

Likewise, since this is an absolutely true statement under absolutely all circumstances, no circumstances exist in which residency restrictions would be "appropriate" or "indicated," and there are no "individualized" individuals upon whom such restrictions can be accurately imposed: NONE of the research results from these often large samples of people have ever identified any "outlier" individuals who ever committed sexual crimes of any kind on any kind of victim because of any 'cues' arising from presence of such victims in the area or any other circumstances of opportunity based on geographical proximity1.

Further, no characteristics of any individuals or groups of individuals have ever been identified as a way of successfully predicting who will commit a sex crime based on proximity to any would-be victim. To the extent that even any 'experts' in the field have ever tried to set forth any such descriptors, the terms ultimately used in these attempts (after failure of narrower terms) always mushroom out to the vague and sometimes universally complete applicability to all past sex offenders so as to be totally unusable as "individualizing" limiters of applicability of such residency restrictions. This is one of the commonest examples of the "creeping coverage" of such laws: they creep from covering no one to covering everyone without cause, with no accurate middle-ground possible.

While it may surprise uninformed readers, this is connected to the larger principle of sexual crime perpetration, viz., that such crimes are never crimes of opportunity; on the contrary, they are always long-contemplated and carefully plotted out for maximum chance of not being identified and apprehended. A related point of settled science is that only the rarest of sex offenders ever act on momentary 'irresistible' impulse in committing a sex crime. (That's the advance-plotting thing again.) Just one iota of common sense should convince the reader that accosting a victim-to-be who is a neighbor or someone attending a nearby school or public recreation center or park would be a guarantee of being so identified then or later and promptly being arrested at that point. So, curiously enough, the safest child or adult 'pretty young thing' is the one living next door to the sex offender subject to such 'proximity fear.'

In sum, not only are these laws junk, they are based on the most baseless fears and hatreds of those in society most subject to these panics. They also are, inherently, the best way to destroy effective societal reintegration and rehabilitation of people who sexually offended long ago. While thus provoking sex crimes is not a likely outcome, it is well-known that imposing destitution and homelessness on people is probably the best way to tempt such targeted individuals to desperately engage in petty crime to stay alive. A judge sentencing a homeless former sex offender is likely to mete out a maximal sentence for even the smallest of thefts. So now that targeting law has filled a prison cell for a long time with someone whose only criminal intent was alleviation of hunger. The unrestrained madness continues to mushroom....

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## Surveillance High-Tech & AI Observing Humans in Confinement.

*Jennifer A. Brost*, "The Metal Eye: Ethical Regulation of the State's Use of Surveillance Technology and Artificial Intelligence to Observe Humans in Confinement,"55(1) *California Western Law Rev.* 1 (Fall 2018)

Text excerpts:

p. 6: "...In South Korea, the world's first autonomous robotic prison guards, with AI capabilities that include use of surveillance technology and facial recognition software designed to assess a prisoner's mental state, are being tested in facilities.[10]

p. 8: Google's contract with the U.S. Dept. of Defense reportedly 'worked extensively to develop machine learning algorithms for the Pentagon, with the goal of creating a sophisticated system that could surveil entire cities.'[17]

p. 10: ...As Justice Douglas observed, 'privacy involves the choice of the individual to disclose or to reveal what he believes, what he thinks, what he possesses.'[27]

p. 11: Surveillance technology, including AI applications, presents new opportunities to undermine humanity's basic need for autonomy, human social interaction, and privacy. It is not a disruptive technology, a technology which inadvertently happens to cause social disruption, but rather it is a technology designed to disrupt.[29] From a cynical perspective, commercial and governmental interests seek to convince the public that loss of privacy is inevitable because technology too easily invades our privacy or because this invasion is needed to protect society from unseen attacks. They do so to financially profit from the sale and development of security technology or to better monitor and control individual behavior for political purposes.

p. 12: ...In the 1800s, when privacy of written communications was not practically assured, public approval for the innovations of envelopes and locks on mail bags compelled Congress to enact statutory protections for the privacy of the postal service.[35] Such efforts resulted in paper mail receiving greater legal privacy protections today than digital information.[36] Technological innovation and legal privacy protections can be and have been compatible. For this to occur, however, the American legal system must fulfill its obligation to enforce existing protections of the autonomy rights of individuals in the face of commercial and governmental interests intent on overreaching.

p. 12: Note 554: *State v. Loomis*, 881 N.W.2d 749, 757 (Wis. 2016) (noting that the COMPAS risk assessment was one of several factors considered by the trial court, which had declined to give weight to expert testimony explaining that COMPAS was not designed to be used in sentencing and therefore bore a "tremendous risk of overestimating an individual's risk.").

Notes:

10 See "World's First Robot Prison Guard," *YouTube: CBS* (April 13, 2012), https://www.youtube.com/watch?v=dM9BjjjLIJ9U&feature=player_https://www.correctionsone.com/corrections/videos/7591864-Worlds-first-robot-CO/.

17 *Jack Schofield*, Pentagon Delays Disputed JEDI Cloud Contract," *ZDNet* (May 31, 2018). https://www.zfnet.com/article/pentagpon-dalays-disputed-jedi-cloud-contract/

27 *Warden*, 387 U.S. at 323 (Douglas, J., dissenting).

29 *Cyrus Farivar*, Habeas Data: Privacy vs. the Rise of Surveillance Tech (2018) (addressing the legal history of increasing state surveillance on private citizens).

35 *Priscilla M. Regan*, Legislating Privacy, at 46-47 (1995)

36 *Matthew J. Tokson*, "The Content/Envelope Distinction in Internet Law," 50 *Wm. & Mary L. Rev.* 2105, 2112 (2009).

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