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The Truth Will Set You Free.

Coming This Year:

- ✓ The Routine & Nonroutine of the Static-99R: The Good, the Bad, & the Very Ugly Got Much Worse in 2015.
- ✓ The Math behind the MnSOST-3.1 Pushed Pencil-Whipping into a Whole New Dimension
- ✓ Far More from the Gladden Complaint
- ✓ Denial of Internet Access to Hold You Incommunicado Meets Legal Challenge
- ✓ 3 Profs Named Mud: The High Cost of Telling a Very Inconvenient Truth
- ✓ 'Stranger Danger' Debunked
- ✓ Moral Vigilantism - Tool to Deprive Sex Offenders of Their Rights and to Dehumanize Them
- ✓ Commitment as 'Predictive Policing' - 'Precrime'
- ✓ MSOP Media Censorship vs. Disconnect between Imagery & 'Hands-on' Sex Crimes — & Tons More!

The Status of Karsjens, Gladden & Wage Cases:

There simply is no news on any of these three cases since the last issue of TLP. However, things are developing behind the scenes as this is written. Expect a report in the next issue.

Note on Victim of the Month Column:

Due to the wetter of material that has recently poured in requiring coverage, the regular TLP feature, Victim of the Month, must be suspended this month. Do not be discouraged. To all those who wish to have their tales of woe included: Please continue to submit your brief articles on that topic to me (in person), or if uncertain, please speak with me about it. This column will resume ASAP.

Lafayette Is Here!:

Two New Entities, Plus an Old One Repurposed, Are Coming to Our Aid with Materials & Networking.



M.J. du Motier, The Marquis de Lafayette

Since the last TLP edition, the editor has learned of two entities that now stand ready to provide substantial assistance to our effort to regain our freedom, whether through judicial or political means. The assistance they offer will center on two types: (1) provision of materials (primarily, legal and psychological, but also including general materials from the popular press and/or the internet) many of which you will read or learn about through these pages; and (2) referral or citation to other organizations and individuals who are equally dedicated to that same goal or at least some related aim that will help us in that regard. By dialoging with these other sources, a potentially huge network of advocacy and support can be built up, ideally allowing us to arrange for coordinated cooperation in various legal and political actions. Hence, these two entities will serve as 'hubs' to such information and advocacy. In sum, this dual discovery is a watershed in our quest for freedom. Without further introduction, here is a little information about each of these organizations:

Sex Offense Litigation and Policy Resource Center states that its mission is to, "collect and disseminate information about cases on issues of sexual violence policy, and facilitates communication, sharing, and the development of strategies among the lawyers, advocates and academics who seek a more sensible and effective public policy on sexual violence prevention."

This organization goes on to explain the background of this struggle thus: "The past two decades have seen an explosive growth in new and aggressive forms of social control laws aimed at sex offenders. The goal of these laws - prevention of recidivist sexual violence - is

salutary, [but] strong critiques question their efficacy, fairness, and wisdom. Yet the laws continue in force, expanding in key areas, with little evidence that legislatures or other policymakers will have the political courage for important course corrections.

"As a result, litigation provides a significant potential source for redirection of public policy in this area. In the past couple of years, a handful of courts have issued significant decisions finding aspects of these laws unconstitutional or otherwise illegal. The Sex Offense Litigation and Policy Resource Center hopes to be a resource for collecting information about these lawsuits and for developing a set of best practices, litigation strategies, and litigation support."

Center Activities

"(1) **Outreach and Networking:** We will seek to establish connections with lawyers, advocates, and academics who are involved with or knowledgeable about litigation about sex offender regulation laws, as well as academics in the social sciences who are involved with research and writing on the efficacy of these laws.

"(2) **Collection:** We will establish a case tracking system for cases in the United States (and possibly other jurisdictions) dealing with sex offender policy and laws. The project will actively identify and then track cases in state and federal courts that implicate important sex offender-related laws including those that deal with civil commitment, registries, zoning restrictions, ex post facto issues, and privacy issues. We will collect pleadings, briefs, discovery information, and court decisions. Scope: we will seek out all currently pending and recently decided (within the past two years) lawsuits raising constitutional or other systemic (e.g., pre-emption) challenges to sex offender regulation laws.

"3. **Dissemination:** We will establish means for making the collected information available to attorneys and advocates on a timely and accessible basis.

"4. **Capacity and strategy development:** We will develop and strengthen a national capacity and strategy for effective litigation approaches to redirecting sexual violence policy in the United States. We will identify certain cases to support via communications work, amicus briefs, or direct support to lawyers on the case. We will seek litigation strategies and capacity that integrate the social science findings on the efficacy and consequences of these policies."

[Editor's Note: This entity cited the intriguing case *Ireland v. Anderson* (U.S. Dist. Ct. N.Dak.



Gen. Washington accepts the Surrender of British Lord Cornwallis after the Siege of Yorktown (1781) Made Possible by French Forces brought and Led by Marquis de Lafayette.

2017) discussed elsewhere in this TLP issue. Additionally, it cited this law review article opposing sprawling legislative grants of sex-offender commitment power as subject to strict scrutiny for due process purposes and as violating due process under that standard: "Beyond Strict Scrutiny: Forbidden Purpose and the 'Civil Commitment' Power" (now on request). It also provided the compelling short article "The Endless Punishment of Civil Commitment" quoted in full in this issue.]

Just Future Project is militantly anti-sex offender commitment in purpose. It describes that aim thus:

"Our vision for a Just Future.

Abolish pre-crime preventative detention laws. Free our friends and loved ones from dehumanizing labels. Realign our justice system with the values of restoration and reintegration.

"The Just Future Project is a new project focused on challenging pre-crime preventative detention laws. We are a people-driven grassroots advocacy campaign dedicated to building a movement of community members demanding an end to indefinite detention regimes.

"Why Is This Important?"

"We believe in justice, that persons who have caused harm may be held accountable for their actions. But justice also demands proportionality and due process, elements essential to distinguish justice from mere vengeance. The goal of any true system of justice must be restoration and re-integration, not the perpetual containment and incapacitation that have come to define the U.S. criminal legal system.

"Pre-crime preventative detention systems are a dangerous departure from the traditional values of our legal system."

"How We Plan to Create Change

By Georgia Longstreet-Joseph

(Continued on page 2)

"Indefinite detention laws may seem entrenched and unmovable, but in reality they remain a relatively new area of law that continues to be deeply controversial and vulnerable to attack. The American Psychiatric Association has categorically opposed so-called 'sex offender civil commitment' programs since 1999, calling them a 'misuse of psychiatry' and a subversion of the 'medical model of civil commitment.' Even the Association for the Treatment of Sexual Abusers (ATSA submitted an *amicus brief* in support of cert. before the Supreme Court of the United States (SCOTUS) in *Karsjens v. Piper* recognizing the extremity to which these laws have been abused.

"Most states have chosen not to create indefinite detention laws and no new state has created a pre-crime preventative detention system in over a decade. These laws are not popular with lawmakers. They create a massive drain on already tight state budgets with virtually no return on investment for taxpayers, diverting resources from victim services and legitimate mental health programs. Yet legislators are afraid to correct their mistake because of the perceived potential of political fallout.

"Just Future Project is helping to create the space for states to rethink their approach to police on sex-related crime. So-called 'sexually violent predator' statutes were a triumph of fear over reason. It's time for our elected officials to hear from a movement standing up for reason.

"Here are the basic principles we're using to build momentum and create change.

"There is strength in numbers. We are starting by building on the informal networks of regular people who have struggled for years under the injustice of these systems and inviting others to join the resistance. Conservative estimates place the number of indefinitely detained persons in the U.S. at more than 5,400 individuals, not counting those under the control of these systems, but allowed to live in the community under intensive indefinite supervision, or those held past their release dates in legal limbo, but not yet civilly committed. For every individual confined to a prison masquerading as a treatment facility across the U.S. there are dozens of people who are connected to them, who care about them, and who are willing to stand up for a reason. Sometimes those free world supporters will be family and friends, but there are also people who aren't fortunate enough to have loved ones in their corner on the outside. For those without support systems, Just Future Project will work to recruit free world allies from faith communities, civil rights groups, and other populations whose values drive them to recognize the inherent injustice of these

indefinite detention systems and advocate for the welfare of everyone harmed by pre-crime preventative detention laws.

"There is strength in unity. We believe we're all in this together. The problem is pre-crime preventative detention. The problem is consistent across all twenty states and the federal system, with minor exceptions. Because the statutes are so similar, the systems share similar vulnerabilities from state to state. We plan to solidify the networks of people challenging these systems, to share information and learn from both successful and unsuccessful advocacy efforts in various states, to produce advocacy materials that can be used against all twenty-one pre-crime preventative detention systems. We believe that a rising tide lifts all boats. Successful challenges to one of these systems weaken the systems for everyone.

"Your story is powerful. We believe that the people closest to the problem are often closest to the solution, but farthest from resources and opportunity. Just Future Project will empower people directly impacted by these laws by helping them learn to tell their story. People who have been convicted of a sex-related crime are arguably the most marginalized people in our society. Their voices are silenced by the state or broken after years subjected to abusive law enforcement information-gathering and control systems thinly disguised as 'treatment'. The fact that this group has been singled out for indefinite detention outside the normal protections of the constitution is illustrative of how truly marginalized and 'othered' this group has become.

"Together we will reframe the debate around pre-crime preventative detention systems. For too long the other side has been allowed to control the narrative. Their goal has been to dehumanize people living with a conviction for a sex-related crime. Specialized prosecution units have become highly adept at railroading prisoners to erase their release dates, in putatively civil proceedings, stripped of the traditional safeguards of the criminal system, without meaningful due process, invoking circular logic with hysteria.

"Just Future Project believes in the power of our stories to fight the fear-mongering, hysteria, and pseudo-science trafficked in by 21st century witch hunters. Right now, very few people even have any idea these laws exist, that the state can imprison someone prospectively for what they might do in the future. We have the opportunity to educate them, building on the growing awareness that the criminal justice system is deeply unjust and challenging common

myths about the people labeled 'sex offenders.' The movement to abolish pre-crime preventative detention systems will be driven by people whose stories put a human face on this injustice and demand change.

"We are committed to creating lasting change. We are always going to be on the lookout for potential opportunities for impact litigation to challenge unjust or unconstitutional practices. (We have already clearly identified some.) We will also be exploring openings to work with our elected officials on ways to begin amending these statutes to reduce the harm they are causing our loved ones right now, with the ultimate goal of ending them entirely. We may even find a chance to work with the executive branch on immediate administrative steps they could take to be less evil.

"But before we can hope to change laws, we need to lay a solid foundation for our advocacy. Our initial steps are designed to give our movement a voice - creating a network, coordinating our efforts, increasing our numbers, sharing information amongst our community to build intelligence, testing our message, leveraging our personal stories. The stronger our foundation as a movement, the more powerful our voice and the more those in government will have to listen to us when we demand change."

"Facts

The first modern 'sexually violent predator' law (SVP) was implemented in 1990 by Washington State. A total of 20 states and the federal government created similar laws between 1990 and 2007. However, the current model of 'sex offender civil commitment' is actually a reincarnation of an earlier system widely used in the '30s, '40s, and '50s known as 'sexual psychopath' statutes. While there are key differences between our current SVP laws and their mid-century precursors, there is hope to be taken from the slow demise of those earlier 'sexual psychopath' laws amidst a broader de-institutionalization movement during the '60s and '70s and with the support of psychiatrists who vocally opposed the involuntary commitment of a population that was marginalized but not mentally ill. Unlike the notoriously ubiquitous spread of registration and notification laws targeting persons convicted of (or adjudicated for) a sexual-related crime, most states have chosen not to adopt so called 'sex offender civil commitment laws.'

"Press Coverage

"A Prison by Any Other Name"

Michael Barajas (Texas Observer), Feb. 12, 2018

"Sex Crimes and Criminal Justice"

Barbara Koeppel (Washington Spectator), May 4, 2018

"Phone Conferences Curtailed for Sex Of-

fenders"

Rick Karlin (Times Union), July 12, 2017

"Why Sex Criminals Get Locked Up Forever"

Aviva Stahl (Vice), April 13, 2016

"Why Some Young Sex Offenders Are Held Indefinitely"

George Steptoe and Antoine Goldet (The Marshall Project), January 27, 2016

"Indefinite Imprisonment on a Hunch"

Editorial Board (The New York Times), August 15, 2015

"The Prison-Like Public Hospital Systems Disproportionately Packed with Gay Men"

Toshio Meronek and Erica Meiners (Advocate), May 23, 2018

"Beyond the Carceral Logic of Civil Commitment"

Toshio Meronek and Erica Meiners (Advocate), November 10, 2017"

[Editor's Note: This entity provided the meaningful article originating with the Cato Institute (dedicated to defending individual liberties in the U.S.) "Questionable Commitments" by Galen Baughman, quoted in full in this issue.

Together, these two entities, combined with *CURE-SORT* (which in recent years has become stridently anti-sex-offender commitment), represent the vast range of opposition now gathering against sex offender commitment. The first entity mentioned above illustrates the professional/academic power that is now rising to our defense, while the latter organization serves as the collecting point for grass roots commitment opposition. As the attachment to this TLP issue reflects, we in MSDP are the junction point, attacking the SPP/SDP law in Minnesota (rated as the "most draconian" of all such laws anywhere), and for that effort gathering a prodigious store of academic authority showing such commitment to be junk science of the rankest and most vicious sort. At the same point, we are seeking to gather together our own 'ground-level' support from our own relatives, friends, and all who are rightly alarmed by this political play to end all individual freedoms by playing to hysterical fears and base hatred. This year it is sex offenders, but who will be next?

As defenders of human rights and of individual liberty, it is no secret that, like the ragtag but valiant American Revolutionaries in the early years of that war, we have been struggling against mighty opposition, but have been accomplishing much with little. Now, having located strong allies -- just like Ben Franklin's successful entreaties to the French Court, including appealing to the freedom-loving moral conscience of M.J. du Motier (Marquis de Lafayette), we finally have the expertise, the strength, and the coordination to position fight our own British-like forces of oppression on equal terms. Lafayette has arrived with the mighty French Army and

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Navy. To quote Brother Bob: "Things have changed." And that is great news!]

Committed SOs in North Dakota Land 2 Hard Blows Toward Freedom



Ireland et al. v. Anderson, Executive Director, N. Dakota Dept. of Human Services et al., 2017 US Dist LEXIS 43474 (D. N.D. March 22, 2017, District Judge Ralph R. Erickson)
"ORDER ADOPTING REPORTS AND RECOMMENDATIONS (DOCS. #403 & #449)

...In summary, the court hereby adopts the magistrate judge's Report and Recommendation and Supplemental Report and Recommendation in their entirety and hereby incorporates the analyses by reference in this order. Upon de novo review, the undersigned is not persuaded by any of the evidence submitted or arguments advanced for reversing the magistrate judge's analysis set forth in the Report and Recommendation or Supplemental Report and Recommendation. For the reasons stated therein, summary judgment is GRANTED in favor of all defendants as to the following claims:

- (1) all claims based on allegations that Rodney J. Ireland, Matthew Graham, Christopher Simon, John Westlie, Michael Kruk, and Robert Lilley were minors during their SDI commitment proceedings;
- (2) plaintiffs' equal protection claim based on the plaintiffs being similarly situated to persons incarcerated because of criminal convictions;
- (3) plaintiffs' equal protection claim based on plaintiffs being similarly situated to persons requiring treatment under chapter 25-03.1;
- (4) plaintiffs' claim that chapter 25-03.3 is unconstitutional on its face because it does not include a right to a jury trial in SDI commitment proceedings; and
- (5) allegations in the Sixth Amended Complaint that chapter 25-03.3's allowing for indefinite commitment; allowing for commitment without a criminal conviction; or allowing for commitment based on clear and convincing evidence violates substantive due process on its face.

Summary judgment is GRANTED in favor of

plaintiffs as to the following claim:

(1) Chapter 25-03.3 is unconstitutional on its face because it does not require that the defendants initiate court proceedings for release of individuals who no longer meet SDI criteria...."

Rodney J. Ireland et al. v. State of North Dakota, et al., 2017 US Dist LEXIS 151998 (D. N.D. July 31, 2017, Magistrate Judge Alice R. Senechal)

"REPORT AND RECOMMENDATION ON MOTION TO SET ASIDE DISMISSAL AND ON RECONSIDERATION OF MOTION TO ADD A PARTY

In this class action, the plaintiffs challenge certain aspects of North Dakota's system for civil commitment of persons who have been found to be sexually dangerous individuals (SDIs). Defendants are the North Dakota Department of Human Services (DHS), the North Dakota State Hospital (NDSH), the heads of both entities, and the State of North Dakota.

The North Dakota Department of Corrections and Rehabilitation (DCCR) and the director of that agency were dismissed from the litigation on May 23, 2017, based on a stipulation of the parties. (Doc. #543). The plaintiffs now move to set aside that dismissal because of newly discovered facts. (Doc. #549). If the dismissal is set aside, the plaintiffs seek reconsideration of an order which denied their motion to add Jeffrey Wright as a plaintiff. Though not explicitly stated, if Wright were added as a party, it appears the plaintiffs would then seek reconsideration of an order which denied certification of a proposed DCCR Class.

Summary of Recommendation

...The Sixth Amended Complaint includes claims that policies and practices of DCCR deprive certain DCCR inmates of procedural and substantive due process rights. Those claims center on DCCR actions prior to referral of inmates for evaluation for civil commitment as SDIs. An earlier order discussed the factual basis of the claims against DCCR and its director (hereinafter collectively, DCCR claims):

The procedural due process claim alleged by the plaintiffs concerns DCCR's pre-petition process...

The plaintiffs maintain that this process unconstitutionally deprives them of liberty without notice because the DCCR does not inform an inmate of possible detention for commitment proceedings until immediately before the scheduled release date from DCCR custody. The lack of notice, according to plaintiffs, results in few contested probable cause hearings. Tied into this claim is plaintiffs' claim that the defendants have violated substantive due process rights because DCCR's referral process lacks a rational basis for utilizing "discredited actuarial instruments" in the selection of inmates

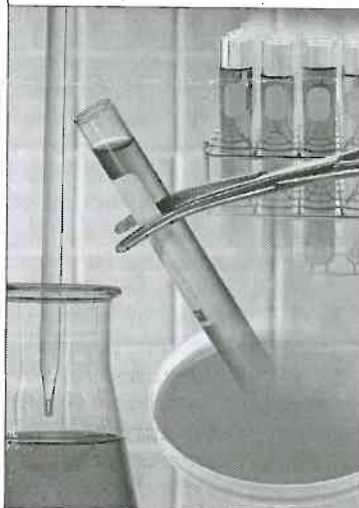
to be referred for SDI proceedings.

[The Magistrate Judge Recommended reopening dismissal and adding Wright as a plaintiff.]

[The following adopted that R&R, reopening dismissal & adding Wright as Plaintiff.]

Rodney J. Ireland et al. v. State of North Dakota et al., 2017 US Dist LEXIS 150890 (D. N.D. September 18, 2017, District Judge Ralph R. Erickson)

The Impact of Doe v. Snyder on the Role of Scientific Evidence in Constitutional Law



Melissa Hamilton, "Constitutional Law and the Role of Scientific Evidence: The Transformative Potential of Doe v. Snyder," 58 Boston College Law Rev. F-Supplement 34 (2017)

Text excerpts:

p. 35: "...[T]he Sixth Circuit expressly recognizes scientific studies showing that sex offenders as a group do not pose a significant risk of recidivism.

...*Snyder* makes a contemporary case for the relevance in constitutional decision-making of data gathered from interdisciplinary scientific fields, particularly where such data conflict with legislative assumptions"

p. 36: "...A foundational principle underlying these policies is the assumption that sex offenders pose a uniquely high risk of recidivism. In enacting such laws, policymakers baldly assert that the need to protect the public justifies the special treatment of sex offenders.⁶ Courts have mostly rubberstamped this assertion without paying much heed to whether the presumption of future dangerousness is factually accurate.⁷

These decisions align with the perceptions of politicians, the media, and the public who have simply taken it on faith that sex offenders pose an extreme risk to the public, one

that criminal sanctions fail to sufficiently thwart.⁸

This presumption, however, has little basis in legitimate scientific study. In fact, the relevant statistics consistently support just the opposite - i.e., that sex offenders are not a singular and exceptional group that poses more than a negligible likelihood of sexually reoffending. Judges who ignore this evidence are complicit in perpetuating the unnecessary, unfair, and arbitrary laws that negatively impede upon the lives of individuals to whom they apply. The Sixth Circuit's decision in *Snyder* therefore represents a transformative venture, opening the door for judges to decide important constitutional issues by examining relevant interdisciplinary research findings, to the benefit of defendants and the judiciary alike."

p. 38: "...In *Doe v. Snyder*, the United States Court of Appeals for the Sixth Circuit was not so convinced that the scientific evidence supported this assertion. Instead, the court determined that empirical research failed to establish that Michigan's SORA law was rationally related to the purpose of protecting public safety. The court looked to a statistical study indicating that sex offenders are actually less likely to recidivate than other types of criminals.^{22a}

p. 39: "...In the end, the foregoing factors led the Sixth Circuit to conclude SORA is punitive in nature.

pp. 41-2: "CONCLUSION

Several commentators have noted the importance of *Doe v. Snyder* for challenging 'civil' sex offender legal regimes. Professor Doug Berman, a well-known sentencing law and policy blogger, labels the Sixth Circuit's ruling 'significant.'⁴⁹ A *Slate* report calls it a 'vitaly important' decision that rightfully conceptualized such laws as 'unconstitutional monstrosities.'⁵⁰ Similarly, a commentator at Reason magazine indicates that the opinion reasonably recognizes that these sex offender laws are simply 'stupid' and that 'the court offered a scathing assessment that suggests such laws make little sense.'⁵¹

Snyder is a shining example of a court actually engaging with scientific evidence that refutes moralized judgments about a particularly disfavored group. Equally important, a reasonable interpretation of the Sixth Circuit's opinion by many is that more of Michigan's civil sex offender law, and other state laws like it, are now subject to a broader invalidation.⁵² Time will soon tell whether this specific case attracts the attention of the Supreme Court and its willingness to revisit its mistaken assumptions about the dangerousness of sex offenders collectively. Yet, whether or not the Supreme Court does so in the near future, the effect of the *Snyder* decision on the

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engagement of scientific data in constitutional law analysis has already been influential.

Notes:

- 6 See *Cal. Penal Code* Sec. 290-03(a)(1) (2016); *Neb. Rev. Stat. Sec.* 29-4002 (2002).
- 7 See, e.g., *Gautier v. Jones*, 2009 WL 1444533, at *8 (W.D. Okla. May 20, 2009); *Wallace v. State*, 905 N.E.2d 371, 383 (Ind. 2009).
- 8 See, e.g., *Parker v. King*, 2008 WL 901087, at *4 (N.D. Ala. Mar. 31, 2008); *State v. Truscclair*, 89 So. 3d 340, 351 (La. 2012).
- 22 See *Does #1-5 v. Snyder*, 834 F.3d 696, 704 (6th Cir. 2016) (citing *Lawrence A. Greenfield, Recidivism of Sex Offenders Released from Prison in 1994* (2003)).
- 49 See *Douglas A. Berman*, "Sixth Circuit Panel Concludes Michigan Sex Offender Registration Amendments 'Imposes Punishment' and Thus Are Ex Post Unconstitutional for Retroactive Application," *Sent'g L. & Pol'y* (Aug. 25, 2016).
- 50 See *Mark Joseph Stern*, "Appeals Court Issues Scathing Ruling Against Michigan Sex Offender Penalties," *Slate* (Aug. 26, 2016).
- 51 *Jacob Sullum*, "6th Circuit Says Mich. Sex Offender Registry Is Punitive and, Not Incidentally, Stupid," *Reason* (Aug. 26, 2016).
- 52 See, e.g., *Jack Lessenberry*, "Michigan's Sex Offender Law Is Unfair and Probably Unconstitutional," *Mich. Radio* (Aug. 26, 2016); *David Post*, "Sex Offender Laws and the 6th Circuit's Ex Post Facto Clause Ruling," *Wash. Post* (Sept. 7, 2016).

Missouri SO Commitment Complaints Focus on "Abnormality," Volitional Impairment & 'Assessment'



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

2016)

Text excerpts:

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

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

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

pp. 722-23: "Documents generated during treatment can be used in court in an effort to lengthen the confinement of the participating patient."¹⁰² According to the SORTS website, their treatment practices mandate an offender, among other things, admit he or she is a sex offender in need of treatment, disclose prior offenses, and discuss past unhealthy relationships.¹⁰³ Moreover, the Missouri statute grants the court the authority to order the offender be subject to certain conditions 'as deemed necessary,' including '[submitting] to a polygraph, plethysmograph, or other electronic or behavioral monitoring assessment; and [authorizing] the department of mental health to access and obtain copies of confidential records pertaining to evaluation, counseling, treatment, and other such records and provide the consent necessary for the release of any such records."¹⁰⁴ Thus, anything that a patient admits to having done, during any and all phases of the treatment process, is discoverable.

Prosecutors are certainly aware of such statutory requirements, and, in fact, many prosecuting attorneys have a practice of obtaining treatment data that would otherwise be private as part of the pre-petition review to determine whether to continue confinement.¹⁰⁵ As a result, defense attorneys have advised offenders that it may be better not to participate in treatment, as they may actually increase their chances of being released since nonparticipation may be viewed more favorably than 'failing' the treatment process.¹⁰⁶ Offenders have even been quoted as saying they refused treatment because 'their attorney advise[d] them not to,' and 'if they enroll, their written treatment assignments, assessments, and progress notes will be subpoenaed by courts and used to prove they continue to need inpatient detainment and treatment."¹⁰⁷

Notes:

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

94 *Id.* at 525

97 *Id.*

98 *Id.*

102 *Anita Schlink & Rick Harry*, "The Treatment of the Civilly Committed Sex Offender in Minnesota: A Review of the Past Ten Years," 29 *Wm. Mitchell L. Rev.* 1221, 1223-24 (2003)

103 *Program Structure*, Mo. Dept. of Mental Health, http://dmh.mo.gov/smmhc/sots_programs.html

104 *Mo. Rev. Stat.* § 632.505.3 (2015)

105 *Eric S. Janus*, "Minnesota's Sex Offender Commitment Program: Would an Empirically-Based Prevention Policy be More Effective?," 29 *Wm. Mitchell L. Rev.* 1083, 1125 (2003).

106 *Deirdre M. D'Urazio et al.*, "The California Sexually Violent Predator Statute: History, Description & Areas for Improvement," *Cal. Coalition on Sexual Offending* 27 (Jan. 2009)

107 *Id.*

Questionable Commitments



Atticus Finch (Gregory Peck, *To Kill a Mockingbird*) Will Get to the Truth.

By Galen Baughman, Cato Institute website
Forward by Georgia Longstreet-Joseph:

"Civil commitment is the legal practice of holding individuals who suffer from severe mental illness so that they may receive treatment. Even within its traditional bounds, civil commitment was problematic enough. But in recent years, civil commitment has expanded significantly. Now, young people who commit a sexual offense early in their lives stand to be stigmatized, and detained, indefinitely. Crucially, this is not because they have violated a law with a particularly harsh penalty attached. It's because the state believes that they might break the law again. In this essay, Galen Baughman challenges the practice of civil

commitment, and particularly its extension to sex offenders, as an unwarranted *de facto* extension of our criminal justice system - one with far too few protections for the accused."

Essay text:

"There is a young man in Virginia sitting behind tall fences and razor wire, guarded by men with guns, and never allowed to leave. According to the state, he isn't in prison, and he is not being punished for a crime. Instead, he's being held because the government says he *might* commit a crime in the future.

Against a backdrop of mass incarceration in America and a growing public understanding that the land of the free locks up more people than any other nation in the world, little attention has been paid to the evolving civil mechanisms that allow the state to deprive individuals of their liberty - often forever - under the guise of treatment. These systems represent a growing medicalization of crime, where criminal behavior is supposed to be caused by a mental problem rather than the person's free will. If we commit crime because we are sick, then it would make sense for society to help make us better. This is dangerous thinking: it opens a door to a world in which we start to punish the *criminal* instead of the crime; a world in which the government is justified in imprisoning people because of *who* they are - and what they *might* do in the future - instead of only punishing crimes that we can prove they have committed beyond a reasonable doubt. In many ways, that world is already here.

Civil commitment is the legal practice of detaining individuals who are suffering from acute symptoms of severe mental illness so that they can be treated, often in a secure environment. In this model, the state is providing care for individuals who are unable to care for themselves, while protecting the public from individuals who are dangerous due to their psychiatric condition. Sounds reasonable, right? Over the past 25 years, however, new laws have been created, designed to use the traditional model of civil commitment as a way to create secondary prison sentences for people who have already paid their debt to society, dramatically expanding the power of the state and blurring the lines between civil and criminal law.

Historically, the model of civil commitment (sometimes referred to as *involuntary commitment*) has been subject to gross abuse by the state. During the 17th century, members of the public were invited into these institutions for a penny a piece to view the ravings of the insane, chained to walls in their cells, through small windows in the doors. By one account in England 96,000

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people paid their penny for the entertainment at a single institution in one year. Women were subject to commitment in insane asylums for 'hysteria' during the 19th century, which was on occasion used by husbands as a way to get rid of their wives. Throughout the first half of the 20th century it was not uncommon for those suffering from Downs Syndrome or persons on the autism spectrum to be institutionalized by their families, often for life. Today, the guise of treatment is being used to segregate a new category of socially undesirable people: sex offenders.

It's important to start these discussions, as they always begin, with the 'worst of the worst.' Bad laws often come from bad cases, and the worst cases are used to justify expanding the government's power. And there is no group, class, or category more maligned and feared in our society today than those convicted of sexual offenses.

In Virginia, a nightmare began in 1973 for a 13-year-old boy named Paul Martin Andrews who was abducted by a man who lured him into his van with the offer of making a little extra money helping him move. Instead, Andrews was kidnapped, locked in a box underground, repeatedly raped over the course of a week, and left for dead. He was rescued by rabbit hunters who heard his screams from the box in the woods, and his assailant was sent to prison.

When Andrews learned that his kidnapper would soon be released from prison, he began to lobby Virginia to fund a civil commitment program that would divert the person who assaulted him into a secondary prison sentence - a legislative scheme designed to circumvent our constitutional protections against double jeopardy, allowing the person to be in effect punished twice for the same crime. Ironically, the man who brutalized Andrews would never be subject to civil commitment: He was murdered in his cell by another prisoner before his release.

A New Model

Twenty states and the federal government have laws that allow some people to be indefinitely detained based on government projections that they might commit a crime in the future, after they have completed their prison sentences. To be clear, there does not need to be any imminent intent or actionable plot to break the law - the assertion made by the government here is that these individuals are merely at risk to commit these offenses due to a psychological condition, which inhibits their ability to control their predatory behavior. Mostly, these statutes require the person to have been previously convicted of a similar crime, but that is not always necessary - nor is it true

that they must have established a pattern of such behavior.

These laws grew from a backlash to the truth-in-sentencing movement during the 1980s and '90s. State legislatures around the country had moved to abolish parole and create determinate sentencing structures - sentences that do not include a range, but call instead for a definite term of imprisonment and/or probation. Before this shift, the criminal justice system included mechanisms to hold those perceived to represent a greater risk to the public for longer. A person sentenced to 3-20 years for rape might be released soon after they had completed their minimum sentence, or they might be held for the full 20-year term, depending on the judgment of the parole board.

In response to certain high profile, horrific crimes committed by persons who had been released from prison under these new sentencing models, lawmakers sought a way to impose a new term of imprisonment for those who were completing their sentences and would be released back into the community. Their answer was civil commitment.

In order to be committed after the completion of their prison sentence, the government must demonstrate three essential components about the person in order to justify their preventative detention:

- 1) You suffer from some kind of psychological problem - often defined as a 'mental abnormality or personality disorder.'
- 2) As a result, you experience difficulty controlling your predatory behavior.
- 3) And, due to that difficulty, you are likely to engage in future crimes.

Like a pyramid, these qualities must build on one another - the government cannot say that you are likely to engage in future criminal behavior unless it is caused by some difficulty controlling your behavior, and that difficulty is (in turn) based on a defined psychological problem. That is a significant barrier for prosecutors to be able to reach in theory. In practice, however, these laws have begun to reach far beyond their written scope.

These new civil commitment laws differ from the traditional model of involuntary commitment in several key ways. First, traditionally the person subjected to civil commitment is not targeted after the completion of their prison sentence as a means to tack on additional incarceration to that which the court had already meted out - instead, the person who has committed an offense is either considered culpable for a crime and therefore punished in our criminal justice system or found to be in need of treatment and diverted to the civil system. The new civil-criminal hybridized version of civil commitment is designed to imprison the person again under a civil 'sentence' after

completing their criminal sentence.

Second, traditional civil commitment involves the medical diagnosis of a clear psychiatric illness accompanied by acute and severe symptoms, along with a finding that the individual would pose a danger to self or otherwise - some jurisdictions require that danger to be imminent. By comparison, those targeted under this new category of civil detention laws are not individuals experiencing psychiatric distress or manifesting any inability to care for themselves. Rather, this new category focuses on individuals the state would merely prefer to segregate from society. This use harkens back to the origins of civil commitment during the middle ages when people suffering from mental illness were lumped in with all kinds of other individuals considered 'undesirable' by society (beggars, the homeless, the unemployed) and institutionalized together.

Third, under traditional civil commitment as a response to an acute psychiatric emergency, it is common for patients to be hospitalized for up to 72 hours for treatment and observation; any longer period of institutionalization is subject to judicial review and due process in a court of law. But those held under these new laws are often held for years in jail after the completion of their prison sentences without a trial and before they are committed. After they have been formally committed by a court, it is almost always a *de facto* life sentence.

The Worst of the Worst

I opened this article by describing a young man sitting behind bars in Virginia. He isn't a monster, and he isn't insane. Alex is 25 now. He sits in the Virginia Center for Behavioral Rehabilitation, receiving treatment in a secured setting - a prison masquerading as a treatment facility - because when he was 14 he had sex with his girlfriend, who was age 12. The state prosecuted Alex in adult court after he shared with his therapist that he had had his first sexual experience with another kid at his school, a crime under Virginia law because of the age of the younger party. Alex was in foster care at the time. He went to a prison for youth and was released 4 years later, shortly after his 18th birthday. Since he was now on the public sex offender registry and ineligible for any services because he had aged out of the foster care system, Alex found himself homeless and unable to keep a job. In Virginia, those required to register as a sex offender must also list their employers, and the address of their place of work is also displayed on the public sex offender registry, which effectively means no one would hire him. Alex's probation officer violated him for not having suitable housing, his probation was revoked by a court, and he was sent back to prison - this time an adult prison - for 2.5 years. At the end of his sentence, the Attorney General's office in Virginia filed a petition

to civilly commit Alex as a *sexually violent predator*.

Alex's story isn't unique. At a federal district trial in Minnesota recently, Judge Donovan Frank heard testimony from four psychological experts who went into the civil commitment facilities in that state and interviewed the prisoner/patients, reviewed their files, and questioned staff. One of those court-appointed experts, Dr. Michael Miner, a clinician, forensic evaluator and researcher on human sexuality at the University of Minnesota and president-elect of the Association for the Treatment of Sexual Abusers (ATSA), testified that there were 62 individuals at the state's civil commitment program who were committed based on behaviors that occurred while they were juveniles - that represents almost 10 percent of the population committed in that state, which has the highest per capita rate of civil commitment in the country. The experts sent a report to the judge highlighting these youth who have never been convicted of sexual crimes committed as adults, asserting that they 'should never have been committed' and citing the extensive evidence that youth convicted of sexual offenses rarely reoffend as adults.

The court-appointed experts who testified also spoke of a 'climate of despair' and pervasive sense of 'hopelessness' at the 'treatment facility.' The reason was simple: It's very easy to be committed, and it's almost impossible to get out. In the history of the program in Minnesota, no one has ever been fully released, and only three individuals have been allowed to transfer to halfway houses where they are subjected to less restrictive conditions. In Kansas, nine times as many individuals have died while imprisoned in the treatment facility as have ever been released.

In 1997, the American Psychiatric Association (APA) concluded a 5-year study of the problem of sexually dangerous individuals. The official conclusion of the American Psychiatric Association was that there should be no such thing as the civil commitment of sex offenders. The report written by the APA's Task Force on Sexually Dangerous Offenders found that psychiatrists should vigorously oppose these legislative schemes, 'to preserve the moral authority of the profession and ensure continuing societal confidence in the medical model of civil commitment.'

Paul Applebaum, M.D., chair of the APA's Council for Psychiatry and the Law (of which the Task Force was a part) described the origins of the extensive study of these laws: 'We were concerned that psychiatry was being used to preventively detain a class of people for whom, confinement rather than treatment was the real goal. This struck

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many people as a misuse of psychiatry.'

The Task Force report describes the ways in which these statutes pervert the traditional model of civil commitment by defining those subject to preventative detention (the *sexually violent predator*) based on 'a vague and circular determination that an offender has a "mental abnormality" that has led to repeat criminal behavior. Thus, these statutes have the effect of defining mental illness in terms of criminal behavior. This is a misuse of psychiatry, because legislators have used psychiatric commitment to effect nonmedical societal ends.'

No one wants to allow a child to be hurt, and laws that create mechanisms to 'keep bad men away' are seductive because they make us feel safer - but that safety is an illusion that comes at a great price. As a society we are not capable of predicting who will or will not reoffend, and we must not punish someone for imaginary future crimes. When we begin to define individuals as criminals for who they are or what they think, instead of holding them accountable for specific acts, we rob them of their constitutional right to due process and dangerously erode the barriers that are meant to keep the awesome power of the state, to take away our lives and our liberty, at bay.

Soon a federal judge in St. Paul will have the opportunity to revisit the indefinite detention of 62 young people who should have been helped instead of warehoused in a hopeless situation. I believe he will make the right decision and, in doing so, begin to dismantle a system that has been designed to imprison people unjustly under the banner of 'treatment.'

Bring It to an End!



The Endless Punishment of Civil Commitment, by Guy Hamilton-Smith, <https://>

theappeal.org

"Prosecutors can subject those convicted of sexual offenses - and sometimes, those with no conviction at all - to an indefinite period of civil punishment at the end of their criminal sentence.

In January [2018], Los Angeles County Superior Court Judge James Bianco ruled that after spending nearly two decades detained by the State of California without trial, George Vasquez was a free man.

Unlike the 536,000 people held pretrial in the criminal justice system in America, Vasquez, 44, was not being held because he was accused of a crime.

Instead, Vasquez was locked up for 17 years out of fear that he might commit a crime.

Shortly before Vasquez was released after six years in prison for sex crimes in 2000, California prosecutors invoked a little-known, lesser-understood practice called civil commitment.

Used in at least twenty states, civil commitment allows a prosecutor to subject those convicted sexual offenses (and sometimes, those with no conviction at all) to an indefinite period of civil punishment at the end of their criminal sentence. Civil commitment can mean years of additional detention under the guise of psychiatric treatment meant to reduce a person's risk of committing another crime, with an often-illusory promise of freedom.

Statutes that constrain the power of authorities to civilly commit people who have served their sentences are broad and ambiguous. For example, the Kansas statutes targets 'any person who has been convicted of or charged with a sexually violent offense and who suffers from a mental abnormality or personality disorder that makes the person likely to engage in repeat acts of sexual violence.' Standards of proof are often lower than in the criminal system, and judges whom decide these cases often side with prosecutors. While civil commitment is supposed to be reserved for people who are likely to commit additional offenses, a research study from a commitment facility in California suggests that rates of reoffending are far lower than would be believed - potentially imperiling the justification for civil commitment itself.

Through open records requests, The Appeal obtained and reviewed documents that showed the number of people held on similar 'probable cause' grounds and found that cases like Vasquez's were not rare. In California, there were 345 people trapped in civil, 'pretrial' detention for more than three years. More than a quarter of those have been held without trial since 2006 or earlier. In Florida, meanwhile, 89 of the 489 detainees at their civil commitment center are pretrial. Fourteen have been held for more

than a decade; five for nearly 20 years. In Washington State, Jesse McReynolds spent nine years civilly detained on McNeil Island without trial before a judge ordered his release. Records from the Washington State Department of Social and Health Services indicate that McReynolds's case was also not an anomaly, and that multiple people have been civilly detained pending trial, sometimes for decades.

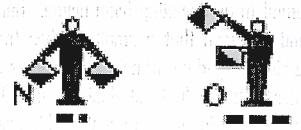
Civil commitment centers are also often the targets of civil rights lawsuits. McNeil Island detainees are embroiled in a lawsuit alleging that the drinking water provided to them is unfit for consumption and has resulted in unexplained deaths and high cancer rates at the facility. A trial on their claims is set for next year. In Texas' for-profit civil commitment facility, there are a host of reported problems, including medical care. A recent Journal News report outlined many problems in New York's civil commitment facility that are much like those in the nation's jails and prisons: rapes, beatings, illicit drug use.

Like the prison and jail system, which generally enjoys little scrutiny and broad immunity for its actions, civil commitment facilities exist largely outside of meaningful mechanisms for judicial review and accountability.

In 2017, the Supreme Court declined the opportunity to hear a challenge to Minnesota's civil commitment facility which was brought by a group of residents alleging that their detention violated their constitutional rights. In the facility's over 20 years of operation, it had fully released only one person. While a federal trial court found that the commitment program was unconstitutional, the Eight Circuit Court of Appeals reversed the decision and, in doing so, applied a legal standard that essentially foreclosed any finding of unlawfulness. The Supreme Court denied the petition for review, leaving the Eighth Circuit opinion in place, and thus left little doubt of the wide discretion afforded government officials who run such programs.

Back in Los Angeles, county prosecutors filed an appeal to keep George Vasquez detained. The 2nd Circuit District Court of Appeal heard oral Arguments in Vasquez's case on July 17, and a final decision is expected sometime this year. But Vasquez is just one of hundreds of people in California - and across the country who, despite having done their time, still await their day in court.

Gladden Complaint Excerpt: Further Support for Desistance as a Decision, Regardless of Treatment



So Many Ways to Say, "No, Thanks."

Following up from the article on the same topic in the last TLP edition, *Farmer, Mark, McAlinden, A.M., & Maruna, S.*, "Understanding Desistance from Sexual Offending: A Thematic Review of Research Findings," 62(4) *Probation Journal* 320-35 (2015), provides these confirmatory, insightful excerpts:

"There is no longer any debate in the field... that criminality is a pattern of behavior from which most individuals eventually desist. For non-sexual offenders this is illustrated by the 'age/crime curve' (e.g., Farrington, 1986; Sampson and Laub, 2003), which broadly demonstrates that crime is mainly committed by people in their teens and twenties, after which offending rates decrease with age.

Desistance from Sexual Offending

A similar phenomenon appears to be the case for sexual offenders as well, despite widespread beliefs about the nature of sexual offending. Although the age-sex crime curve peaks later and tails off less dramatically than the age-crime curve for non-sexual crime, sex offending also decreases with age, contradicting the perception that sex offenders' risk levels are high, stable, and linear (Lussier et al., 2010). Indeed, numerous studies now show that recidivism rates amongst sexual offenders are low (e.g., Kruttschnitt et al., 2000; Harris and Hanson, 2004; Thornton, 2007; Barnett et al., 2010), in fact lower than recidivism rates for other forms of non-sexual crime. Most people who have committed sexual offenses, therefore, appear to desist from further sexual offending.

Despite this consistent finding in the literature, there has been little published research into how and why people desist from sexual crime. Kruttschnitt et al. (2000) conducted a retrospective study of 556 sexual offenders, looking at whether informal social controls, specifically employment and marriage, predicted desistance, and whether such bonds are conditioned by formal social controls such as probation and treatment. They found that job stability

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significantly reduced the probability of re-offending, but marital status had no significant effect...

More recently, Harris (2014) conducted a qualitative investigation into desistance amongst a group of 21 sexual offenders deemed to be desisting from crime. Harris found evidence that a small number (n=3) had simply aged out of crime, a process she referred to as 'natural desistance.' This group of individuals had considerable criminal histories, including sexual offending and other types of offending. The biggest group of desisting offenders (n=18), however, attributed their desistance to cognitive transformations, ranging from a simple recognition that the offender had caused harm, through to a full creation of a new, non-offending identity, combined in some cases with a desire to assist others to avoid crime.

Methodology

In our own research, we have sought to explore both the structural and the cognitive changes associated with desistance from sexual offending against children. For the purposes of this research, this is defined as those who have at least one conviction for sexual offences against children. The sample group is described in more detail below; it includes offences ranging from rape and indecent assault of minors to indecent exposure and engaging in sexual activity in the presence of a child. Individuals convicted of sexual assaults with adult victims were not included in the research as the literature considers these two types of sexual offending to be qualitatively different enough as to require separate treatment (see e.g., Blumenthal et al., 1999; Hanson, 2001). A sample of 32 individuals were interviewed, all of whom had in the past been convicted of such offences. Our goal was to better understand how they were able to desist from re-offending, exploring both the social context of their post-conviction lives and, in particular, their cognitive framing of this context.

...[A]s previous research (e.g. Hanson et al, 2014) has shown that sexual recidivism rates approximately halve after 5 years crime free in the community, and halve again after 10 years....

A Re-Appraisal of the Pros and Cons of Offending

Participants said that in the early stages of desistance they made a rational choice about their behavior based on a growing realization of the disadvantages of persistence. For some, this arose from concerns about the likelihood of being caught, for others it was related to a growing realization of the harm they were causing. Simplistic versions of rational choice theory as an explanation for crime and desistance have

been criticized (e.g., Farrall, et al. 2014) for assuming that people can simply decide to stop crime and then stop, without any further process taking place. However, the desisting narrators' accounts in this research shared considerable themes with these rational choice accounts. Indeed, such a theme is largely consistent with the other aspects of the desistance narratives we heard. For example, when motivation is situational, when offending is not part of a general antisocial lifestyle, and when the stakes and consequences for detection are high, then a rational choice to desist may indeed carry much more weight than in other circumstances.

This self-narrative is consistent with Paternoster and Bushway's (2009) distinction between an individual's 'working identity' as a person who will commit criminal acts, and their 'future possible self.' In this model, the start of the desistance process occurs when the identity of offender becomes less satisfying and fears of a bleak and unsatisfying future arise. Thus it is a rational choice, of sorts, when the individual is forced to contemplate between two, possible futures: that of the positive possible self and that of the feared possible self (Paternoster and Bushway, 2009: 1103). Where our participants' self-narratives differed from Paternoster and Bushway's theory is in the degree of change required. Paternoster and Bushway argue in favour of substantial cognitive change preceding desistance. In the current research study interviewees said they reverted to a previous, non-offending and conventional lifestyle.

Moreover, detection and conviction appear to have carried with them a significant deterrent effect, sufficient to start the process of cognitive transformation necessary for desistance. Interviewees repeatedly said that they were "shocked" into changing not just their behaviors but also their views about the abuse they were perpetrating and precipitated an end to any consideration of further abuse. A number of participants vividly described their shock at being arrested. Several said that arrest acted as a turning point after which they ceased offending.

Rehabilitation

The narratives of desisting offenders were also pro-rehabilitation. Desisting offenders were likely to describe how they took advantage of rehabilitative efforts provided for them. This manifested itself in several sub-themes in the research, and is probably related to a willingness to change and an ability to make use of formal 'turning points' provided by the criminal justice system (see Giordano et al., 2002). Many of the desisting group talked generally about the usefulness of probation; in particular they seems appre-

ciative of probation officers who were concerned about them but firm and realistic. Indeed, the personal characteristics of the probation officer seemed to be important, unsurprisingly those who showed a personal interest in the individual were perceived as particularly helpful. Others talked in a positive way about what they had learned in prison. Some participants described using prison as a 'college' to obtain qualifications and knowledge they would not otherwise have had access to. This can be seen as a form of a 'redemption script' (Maruna 2001) in which the individual seeks to make the most of a bad situation, cognitively turning it to their advantage.

Many of the desisting group talked about the usefulness of sex offender treatment programmes, sometimes provided in prison but mostly the men referred to those provided by probation. This may have been because the programmes provided by probation were more recent, and so easier to bring to mind, or it may be a reflection of the relative utility of community programmes compared to those run in prisons. They particularly appreciated the skills they learned from such programmes. One man who had undertaken his programme some time ago was nevertheless able to recall the tactics he had learned on the course. However, others talked about learning or being reminded of values, and understanding the perspectives of other people. A small number of the group reported disliking having to attend sex offender programmes, one stating he found hearing other men talking about their crimes to be "repulsive."

It is of note that participants talked, on the whole, of the advantages of probation at this stage. In some ways this appears at odds with the findings of Farrall et al. (2014). In their study, participants were not able to identify the usefulness of probation until some years after their initial desistance. Farrall et al. attribute this to a readiness to be receptive to the advice of probation officers - some individuals, who are not ready to receive this advice, nevertheless mentally 'store' such advice until they are more receptive to change. For our group, the stakes associated with reoffending were particularly high, and to reoffend would be contrary to the positive self-image they were trying to develop and maintain. It could be that the shock associated with conviction described above led to a desire to conform to rehabilitation efforts that were offered to the individuals.

Planning for the Future

One feature of the desisting sexual offenders' stories was that they nearly all contained substantial evidence that the participant had a clear sense of their future lives, where they wanted to be and what they wanted to do. In many cases, these aspirations and the ex-

pression of tangible goals related to finding employment or maintaining existing or building new relationships. In a way there was a sense of optimism similar to that of Maruna's (2001) desisting offenders. Although optimistic, most of the narratives contained plans for the future that were reasonably achievable and consistent with the individual's abilities and social capital. There was a sense of hope for the future that seemed to be related to desistance. Further support for this idea that planning contributes to desistance comes from the work of Willis and Grace (2009), who found worse recidivism outcomes for a group of prison leavers who did not have firm plans for the future, compared with those who did. This suggests that the ability to form plans and maintain optimism is an important part of desisting from sexual crime.

The Importance of Work

Research into desistance from non-sexual offending has consistently pointed to the importance of work in the initial stages of desistance (Farrington et al., 1986; Sampson and Laub, 1993; May, 1999). Work is said to help provide meaning to individual lives and give individuals "Something to lose" by getting in trouble with the law again. Employment also involves new forms of new routine activities, informal social controls, social supports and the possibility of meeting role models who are not involved in crime.

Indeed, employment and careers did play a highly important role in the narratives of the desisting men in this study (and the potentially active ones as well). Almost all of them described lives that revolved around work of various forms. Some of them had built substantial careers from which they gained considerable satisfaction and financial gain. Others had a series of jobs, and seemed to recover from redundancy easily. In all cases, though, work seemed to be of primary importance to the men in the sample. Indeed, when asked to describe their lives, many of the group described little more than their work lives, as though they hardly existed outside of their work.

Overall most of the desisting group related employment to happiness and life satisfaction - they pointed to job satisfaction and occupying their time as key factors in this sense of satisfaction, but others also mentioned the social aspects of work and opportunities for advancement. One common theme was the importance of keeping busy, and the relationship between this and the earlier themes relating to the situational nature of the sexual offending, in that keeping one's self busy could be an important part of desistance for some. This seemed to be particularly the case for men who had offended over the internet. These men were aware

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that if they were sitting at home doing nothing there would be temptation to access the internet in unhelpful ways.

Most of the desisting men in the study, therefore, wished to be seen as active people, not willing to waste their lives, and wanting to engage in a lifetime of work. Surprisingly, though, gaining employment did not seem to be related to desistance from crime in a direct way for most of the group. First, most of them had careers prior to and during their sexual offending. Second, several described desisting from further criminal activity despite losing their jobs as part of their convictions. Consistent with the literature (Brown et al., 2007), a number of participants reported the difficulties they had in obtaining work following their conviction. Some of them reported how employers would reject them when they learned of their conviction, and some had a resigned helplessness that they would never work again. However, this did not seem to affect the fact that they were desisting, and some men described quite innovative forms of self-employment they had devised in order to compensate for not being able to obtain formal work. Third and most importantly, comparison group (non-desisting) interviewees also described considerable attachment to employment in their self-understandings. Therefore as central as work was in their personal narratives, it is not clear that work played a necessary and sufficient role in the explanation of their ability to desist from crime.

The Role of Relationships

In the same way that employment has been found to be significant in promoting desistance from non-sexual crime, so have relationships with significant others (e.g. Laub et al., 1998; Maruna, 2001). The factors underlying the importance of relationships for non-sexual offenders are thought to be similar to those described above for work-relationships give people a sense of meaning in their lives, and an emotional investment that they do not wish to lose. New relationships can disrupt routine activities and provide a form of informal control (as in "if you do that again, I'll leave").

It is not surprising that relationships featured heavily in the narrative accounts of the men in the study. Most of the desisting group described lengthy relationship histories, which clearly had great significance for them and their life stories. However, the relevance of these relationship histories for desistance was by no means clear, and was certainly not as clear-cut as the linear relationships between forming a relationship and desisting as suggested by some of the research into non-sexual crime. The preponderance of desistance research suggests that forming new and meaningful relation-

ships can be the start of the desistance process, giving individuals the social capital they need to begin a crime free life. This did not seem to be the case for the desisting offenders in this study. Their offences were committed alone, not as part of organized crime involving others, therefore the idea that severing links with criminogenic relationships assisted desistance was not relevant. Furthermore, the crime and subsequent detection for some men resulted in the ending of relationships that otherwise might have acted as a protective factor. Overall many of the men in the desisting group had lengthy relationship histories but also seemed to have experienced relationship breakdown on at least one, and sometimes numerous occasions. On the other hand, where relationships had continued (that is, where significant others had "stuck by them"), this seemed to have been of great importance to the individual. Several participants were concerned with the impact of their offending, and the stigma associated with it, on their family, principally their wife or partner. This apparent concern with the well-being and reactions of intimates may lend tentative support to Braithwaite's (1989) "reintegrative shaming" theory which emphasizes the role of "significant others" in the process of reintegration and desistance. This is an area we intend to explore further.

Conclusion

...These emerging findings have a number of potential implications for current frameworks around sex offender risk assessment, management and treatment, and in particular for how professionals perceive of and respond to "risks" posed by sex offenders. While the preponderance of current work has centered on "risk" factors and examining why sex offenders re-offend, this study has inverted the risk paradigm by seeking to draw out why is it that they don't. As noted at the outset of the paper, the relevance of these research findings on desistance from sexual crime relate to the determination of the best and most effective means of working with people convicted of sexual offences. ...[T]he desisting narratives in this study which appear to be shaped by conventional lifestyles and planning for the future, ...tend to support a move away from confessional, backward-looking approaches towards future-focused therapeutic interventions with sex offenders with an emphasis on optimism and hope."

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Aging: The Failsafe End to Sex-Crime Recidivism



Victor Sjöström, in Bergman's acclaimed meditation on old age, *Wild Strawberries*

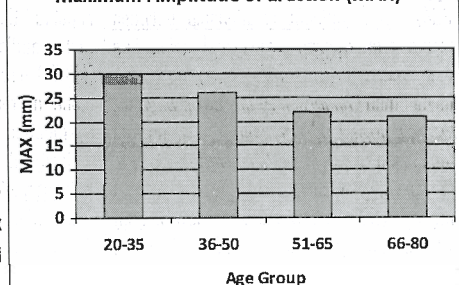
Howard E. Barbaree & Ray Blanchard, "Sexual Deviance over the Lifespan: Reductions in Deviant Sexual Behavior in the Aging Sex Offender."

p. 37: "...[A]lthough some individual traits and predispositions underlying sexual deviance, such as sexual preferences or antisocial traits, may persist to the end of life, the expression or performance of sexually deviant behavior decreases with age."

p. 39: "The Role of the Male Sex Hormone Testosterone"

"Mammalian gonads and adrenals secrete several male sex hormones called 'androgens.' All are steroid hormones produced primarily in the Leydig cells in the male testes, although some small amounts of these hormones are produced in the adrenals in both males and females. Testosterone is the most potent and abundant androgen (Seidman, 2005). Close to 98% of testosterone molecules are protein-bound, with approximately one-third of these weakly bound to albumin and the remainder strongly bound to sex-hormone-binding globulin (SHBG). Because the testosterone molecules that are bound with SHBG cannot bind with receptor cells, this component of testosterone has no behavioral effect. Only the non-SHBG-bound testosterone is biologically

Maximum Amplitude of Erection (MAX)



active ('bioavailable'), including free testosterone and testosterone that is loosely bound to albumin (Seidman, 2005). Free testosterone diffuses into target cells where it is converted to dihydrotestosterone and estradiol. Testosterone and dihydrotestosterone bind to androgen receptor cells mediating the effects of sexual behavior (Seidman, 2005)."

pp. 39-40: "When men exhibit low levels of total testosterone in their blood (below 300 ng/dl) due to the malfunctioning of their hypothalamic-pituitary-gonadal axis, they are referred to as 'hypogonadal.' Hypogonadism is characterized by a loss of libido and a loss of both sleep-associated and spontaneous erections (Anderson, Bancroft, & Wu, 1992). Davidson, Kwan & Greenleaf (1982) utilized a within-subject design to study the effects of injected doses of exogenous testosterone on sexual behavior in six hypogonadal men. These patients received (1) 100 mg. of testosterone, (2) 400 mg. of testosterone, or (3) placebo. Each patient received each treatment with a gap of 6 weeks between treatments, and the order of treatment was varied among patients to control for treatment order effects. Results indicated that injections of testosterone increased plasma testosterone levels. The effect was temporary (with peak effects 7 days after injection) and dose-dependent (with larger doses producing larger increases in blood levels). The hypogonadal men kept daily diaries of the sexual behavior and penile erections. The largest behavioral effects of testosterone injections were reported 1 week after injection, corresponding to the time of peak effect on plasma testosterone level. Dose-dependent effects of testosterone injections were observed for total erections, nocturnal erections, coital attempts, masturbation, and orgasm, with larger doses producing larger increases in sexual behavior (Davidson et al., 1982).

"Testosterone is necessary or at least important in maintaining libido. Increasing plasma androgens at puberty is correlated with the onset of nocturnal emissions, masturbation, dating, and infatuation (Kemper, 1990). The level of bioavailable testosterone is correlated with sexual thoughts (Maston & Frohlich, 2000). Males with an early onset of androgen secretion develop an early interest in sexuality and erotic fantasies (Feder, 1984). A significant relationship between serum testosterone levels and libido has been found in the following populations: normal men (Anderson et al., 1992); Bagatell, Heiman, Rivier, & Bremner, 1994), normal adolescent boys (Udry, Billy, Morris, Graff, & Raj, 1985), men complaining of loss of sexual interest (O'Carroll & Bancroft, 1984), men with erectile dysfunction (Schiavi, White,

Mandeli, & Levine, 1997), and hypogonadal men (Davidson, Camargo, & Smith, 1979; Kwan, Greenleaf, Mann, Grapo, & Davidson, 1983; Luis & Franchi, 1980; O'Carroll, Shapiro, & Bancroft, 1985)."

p. 40: "The Effects of Aging on testosterone and Sexual Behavior

"...Testosterone levels decline through both central (pituitary) and peripheral (testicular) mechanisms, and there is an age-related loss of circadian rhythm (Seidman, 2005; Swerdloff & Wang, 1993). Numerous studies have established that levels of both total and bioavailable testosterone peak in early adulthood and thereafter decrease with age through the remainder of the lifespan (e.g., Baker et al., 1976; Denti et al., 2000; Harman, Metter, Tobin, Pearson & Blackman, 2001); Jankowska, Rogucka, Madras & Welan, 2000; Doi et al., 1998; Vermeulen, Goemaere & Kaufman, 1999).

"...[W]hen study methodology has employed appropriate controls for extraneous factors, the relationship between aging and testosterone blood levels indicate a significant effect of age."

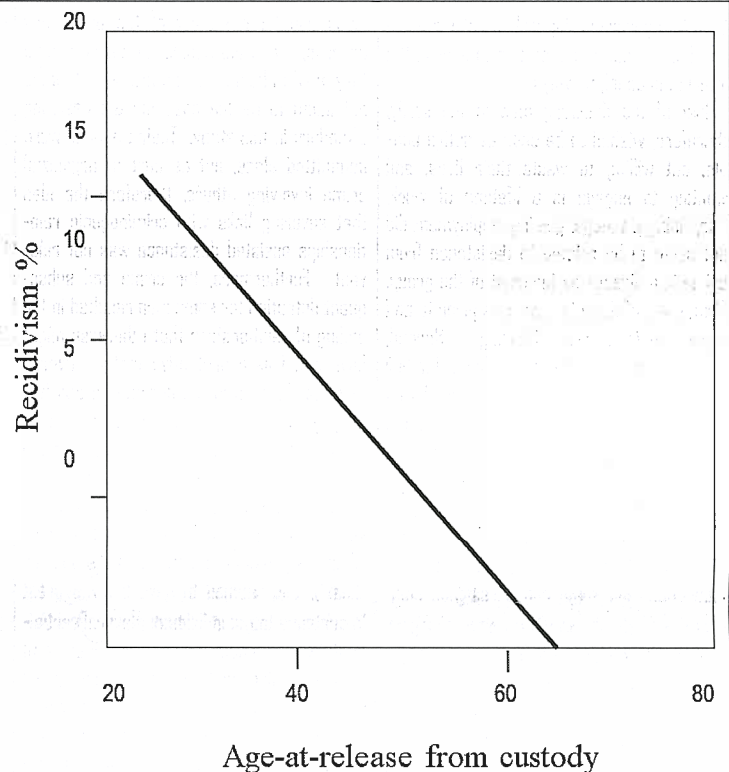
p. 41: "...[L]evels of both total and bioavailable testosterone were seen to decrease in a linear function from age 30 to age 90.

"In the same study, significant numbers of older men could be diagnosed as hypogonadal, in the sense that their blood levels of testosterone had declined below the diagnostic criteria (Harman et al., 2001). Figure 3.2 presents the proportion of different-age samples who met diagnostic criteria for hypogonadism, based on both total and bioavailable testosterone (free T index). As can be seen, the proportion increased significantly with age. Testosterone deficiency in elderly men could be considered a normal aging phenomenon. ...This condition in older men has been referred to as 'andropause,' and it is considered to be the male equivalent of menopause in women."

p. 42: "...A few authors have suggested that testosterone receptor sites may become less sensitive with age, so that the threshold concentration of testosterone necessary to maintain libido may increase with age (e.g., Baker & Hudson, 1983); Schiavi, 1999, pp. 52-53; Tsitouras et al., 1982)."

p. 43: "...Feldman, Goldstein, Hatzichristou, Krane & McKinlay (1994) studied erectile function over different age cohorts and reported that while the prevalence of minimal erectile difficulties remained constant (<20%) from age 40 to age 80, the prevalence of moderate and complete erectile dysfunction increased so that by age 60, the majority of research participants reported at least minimal erectile dysfunction.

"...In men, lack of interest in sex, erectile difficulties, and inability to achieve orgasm



were more prevalent in older men; the older the respondents, the more prevalent these problems became."

p. 44: [My note: Note the relatively small decrease in erection amplitude with age. Also note that age brackets of ages 51-65 and 66-80 are virtually the same. This is true even though recidivism rates plummet sharply past age 50 and are statistically insignificant past age 60. Hence, erection girth or volume as measured by the PPG is not really predictive of recidivism.]

p. 45: The Effects of Aging on Sexual Arousal in the Sex Offender

"The current literature supports the notion that sexual arousal decreases with age in sex offenders.... [A]rousability was inversely related to age. This reduction in sex offender arousability seems to begin at an early age."

p. 49: Figure 3.9 Replotted recidivism as a function of age at release from custody corrected to 5 years' time at risk (data from Barbaree et al., 2003) [N=468; correlation: .99]

"Based on the data reviewed above, it would be reasonable to conclude that when sex offenders are released from custody at different ages, they show age-related decreases in recidivism. The best description of the age function is a gradual linear decrease in recidivism rates from age 25 to age 70, at which point the estimated recidivism rate is near zero. This age function is similar to that described earlier in this chapter for blood levels of testosterone, for

sexual arousal in normal men, and for sexual arousal in sex offenders. Additionally, these reductions in sexual recidivism are very similar to reductions in nonsexual recidivism (both violent and nonviolent) among nonsexual criminals (Hirschi & Gottfredson, 1993; Sampson & Laub, 2003, 2005).

"...In the current discussion of risk factors, static risk factors are those characteristics of offenders related to recidivism that do not change over time. Dynamic risk factors are those that may change over time. In contrast to both of these factors, maturation is a risk factor that exhibits changes over time; however, unlike dynamic risk, the change is predictable and inexorable, and once maturational changes occur, they are not reversed under normal circumstances."

p. 56: "Professional standards guiding the use of psychological tests warn against the use of tests if such use may be discriminatory on the basis of age, race, culture, or other factors. ...The current chapter makes the point that direct application of current actuarial instruments to elderly sex offenders is potentially discriminatory."

pp. 56-57: "The implications of the aging effects reviewed in this chapter are profound. Current policy and legislation in most Western jurisdictions target sex offenders for civil commitment or long-term incapacitation when the offenders are in their middle years. Current practice is to continue the detention of many of these offenders on into old age. Incarceration of these offenders is grossly expensive and seems unjustified if

(Continued on page 10)

risk is generally lower in the aged sex offender. One solution is the revamping of the current risk assessment methodologies to accommodate reductions in the performance of sexually deviant behavior in the older sex offender."

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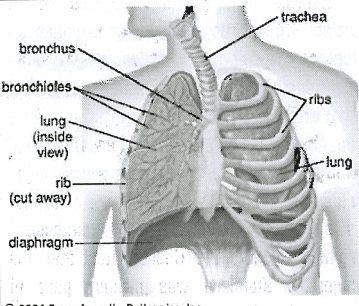
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Can Kingsley (an Overlooked SCOTUS Case) Breathe New Life into Substantive Due Process for Karsjens or Gladden Cases?



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[Editor's Note: The *Karsjens* case is now about to embark on a second appeal — this time by the Plaintiffs from dismissal ordered by Judge Frank in the wake of the reversal by the 8th Circuit Court of Appeals of his original order for relief in Plaintiffs' favor.

Overlooked by *Karsjens* Plaintiffs and by both Judge Frank and the 8th Circuit, in 2015 SCOTUS decided a case involving application of the substantive due process guarantee in favor of a pretrial detainee suing jail personnel for physical abuse.

Significantly, SCOTUS declined to apply the *Lewis* requirement that the court's conscience must be shocked by the government officials' misconduct (including that it must be malicious and sadistic).

Even more significantly (to us), those confined under commitment to mental health facilities are held to be entitled to greater deference than those held in jails on pretrial detention.

The following article excerpts discuss the limiting effect of Kingsley upon the 'shocks-the-conscience' requirement applicable to other kinds of substantive due process claims, and in particular discusses *Kingsley's* applicability to lawsuits by committed persons against their custodian-captors based on substantive due process. No SCOTUS case has yet advanced this contention, but

this article appears to support the strength of such a claim in avoidance of the *Lewis* requirement of shocking a court's conscience.]

Rosalie Berger Levinson, "Kingsley Breathes New Life into Substantive Due Process as a Check on Abuse of Government Power," 93 *Notre Dame L. Rev.* 357 (Nov. 2017)

Text excerpts: pp. 360-61: "[T]he Supreme court has recognized that those civilly committed to state mental institutions have a 'historic liberty interest' in personal security that is 'protected substantively by the Due Process Clause.'⁴⁴ Further, involuntarily committed patients 'are entitled to more considerate treatment and conditions of confinement than criminals whose conditions of confinement are designed to punish.'⁴⁵ Although reasoning that the decisions of qualified medical professionals should be deemed presumptively valid, the Court nonetheless acknowledged that the constitutionally protected liberty interest required the state 'to provide minimally adequate or reasonable training to ensure safety and freedom from undue restraint.'⁴⁶ After balancing the competing concerns, the Court held that substantive due process is violated if decisions by doctors and nurses constitute 'such a substantial departure from accepted professional judgment, practice, or standards' as to demonstrate that the person responsible actually did not base the decision on such a judgment.⁴⁷

...[Referring to *County of Sacramento v. Lewis*] The majority cautioned, however, that the 'criteria to identify what is fatally arbitrary differ depending on whether it is legislation or a specific act of a government officer that is at issue.'²²

pp. 365-66: "11. *Kingsley Resolves Circuit Conflict in Favor of an Objective Reasonableness Test.*

Michael Kingsley was a pretrial detainee who claimed he was subjected to excessive force after he refused to remove a piece of paper covering a light above his bed.⁵¹ Although there were conflicting accounts as to whether Kingsley continued to resist the officers after he was handcuffed and moved to a receiving cell, it was uncontested that officers applied a Taser to Kingsley's back for approximately five seconds.⁵² He was then left handcuffed in the receiving cell for fifteen minutes, after which the officers returned and removed the handcuffs.⁵³

After Kingsley filed a pro se complaint under 42 U.S.C. § 1983 alleging excessive use of force, the four jail officers moved for summary judgment.⁵⁴ The district court followed Seventh Circuit precedent, which applied Eighth Amendment standards to

pretrial detainees, requiring them to prove that defendants acted with malicious and sadistic intent for the purpose of causing them harm.⁵⁵ The trial court denied summary judgment, but in its jury instructions it asserted that (1) 'excessive force means force applied recklessly that is unreasonable in light of the facts and circumstances of the time,' and that (2) the plaintiff must prove that the 'defendants knew that using force presented a risk of harm to plaintiff, but they recklessly disregarded plaintiff's safety.'⁵⁶

On appeal to the Seventh Circuit, Kingsley asserted that these instructions wrongfully conflated the standard for excessive force claims under the Eighth Amendment and the Due Process Clause by requiring him to show that the defendants acted with reckless disregard for his rights.⁵⁷ The Seventh Circuit rejected this argument and held instead that a pretrial detainee, like a convicted inmate, must show 'an actual intent to violate [the plaintiff's] rights or reckless disregard for his rights,' and thus a subjective inquiry into the officer's state of mind is necessary.⁵⁸

In dissent, Judge Hamilton opined that the appropriate standard for excessive use of force against a pretrial detainee should be an objective reasonableness test, similar to the Fourth Amendment.⁵⁹ He expressed his concern that pretrial detainees who cannot post bail may remain in jail for weeks or months, and, citing earlier Seventh Circuit precedent, he asserted that 'the transition from arrest to pretrial detention does not give officers "greater ability to assault and batter" the detainees.'⁶⁰

pp. 366-67: In a five-four decision, the Supreme Court agreed with Judge Hamilton that the relevant culpability standard is objective, not subjective, deliberate indifference. Thus, the jury instruction suggesting that Kingsley had to prove the defendant's subjective state of mind (recklessness) in using excessive force was error.⁶¹ Justice Breyer, in his majority opinion, explained that the lower courts had conflated two separate state-of-mind questions. 'The first concerns the defendant's state of mind with respect to his physical acts,' and here there was no dispute that the officers deliberately intended to restrain and tase Kingsley.⁶² The second question addresses 'the defendant's state of mind with respect to whether his use of force was "excessive,"' and, as to this question, the Court resolved the circuit split by adopting an objective reasonableness standard for substantive due process excessive force claims.⁶³ If the officers intentionally, rather than accidentally or negligently, used a certain level of force, their subjective state of mind when doing so was irrelevant,

and the only question was whether their actions were reasonable under the circumstances.⁶⁴ Detainees need not demonstrate that officials subjectively intended to punish them or to 'maliciously and sadistically' injure them.⁶⁵

The Court explained that the Due Process Clause, unlike the Eighth Amendment that applies to convicted criminals, protects pretrial detainees from the use of 'force that amounts to punishment.'⁶⁶ Further, even absent an express intent to punish, a pretrial detainee may prevail by producing 'objective evidence that the challenged governmental action is not rationally related to a legitimate government objective or that it is excessive in relation to that purpose.'⁶⁷

In justifying its rejection of subjective deliberate indifference, the Court asserted that an objective standard comported with the training already provided to officers who interact with detainees.⁶⁸ In addition, it sufficiently protected officers who act in good faith because 'a court must judge the reasonableness of the force used from the perspective and with the knowledge of the defendant officer.'⁶⁹ The use of force will be actionable only where it was 'an intentional and knowing act,' and officers will enjoy qualified immunity unless the use of excessive force violated a clearly established right.⁷⁰ Further, the Court noted that the objective standard was already part of pattern jury instructions in several circuits,⁷¹ and in those circuits there was no evidence of frivolous filings by pretrial detainees.⁷²

pp. 368-69: "It is noteworthy that the majority did not mention the rigorous shocks-the-conscience standard in adjudicating the substantive due process claim. Nor did it discuss the need to identify a 'fundamental right' or the difference between acts and failure to act - all theories relied upon by appellate courts to restrict substantive due process claims.⁸⁰ Instead, the majority based its analysis on the 1979 decision in *Bell v. Wolfish* where the Supreme Court adopted an objective standard to evaluate the detainees' substantive due process challenge to prison conditions, including a prison's practice of double-bunking.⁸¹ The *Bell* Court did not examine the prison officials' subjective beliefs about the policy, but rather, looked only to objective evidence to assess whether the conditions were reasonably related to the legitimate purpose of holding detainees for trial and whether they were excessive in relation to that purpose.⁸²

p. 377: "[After *Kingsley*]...failure to meet the nebulous shocks-the-conscience standard should no longer provide a rationale for subjecting detainees to conditions that are not reasonably related to legitimate governmental objectives."⁸²

pp. 387-88: "IV. *Kingsley's* Impact on

Substantive Due Process Claims Brought by the Civilly Committed and Students

"...In a unanimous decision, the Court held that when medically trained government officials make decisions that constitute a substantial departure from professional judgment, they violate the substantive due process guarantee of the Fifth and Fourteenth Amendments."⁷⁵

Despite the Supreme Court's admonition that those who are civilly committed in state institutions do not lose their core liberty interests and that they enjoy greater protection than convicted criminals, appellate courts have seriously eroded the substantive due process protection recognized in *Youngberg*.⁷⁷ Many of these courts have relied on language in *Lewis* that 'only the most egregious official conduct can be said to be "arbitrary in the constitutional sense."⁷⁸ Although the Supreme Court in *Lewis* did not overturn *Youngberg*, and in fact cited it as valid authority,⁷⁹ some federal courts have ruled that the shocks-the-conscience test superseded the *Youngberg* standard.⁸⁰

Further, most of these courts have held that this 'new' test required that the civilly committed satisfy the rigorous Eighth Amendment standard, which *Youngberg* specifically rejected.⁸¹ Other courts acknowledge that *Youngberg's* 'professional judgment standard...is at least as demanding as the Eighth Amendment "deliberate indifference" standard,' but they have then rejected the notion that the *Youngberg* standard is more demanding.⁸²

pp. 388-89: "These courts have misconstrued *Lewis* as having displaced or weakened *Youngberg's* protection of the rights of the civilly committed. *Lewis* in fact recognized *Youngberg's* holding that, in the context of civil commitment, substantive due process is violated when state medical personnel fail to exercise professional judgment.⁸³ Further, those courts that have equated the professional judgment standard with the Eighth Amendment's criminal recklessness standard have ignored *Youngberg's* core holding that the rights of the involuntarily committed are greater than the rights of convicted inmates.⁸⁴ Those who are in state custody due to mental incapacity arguably enjoy even greater rights to adequate care and treatment than pretrial detainees who are taken into custody because the state has reasonable cause to believe they have committed a crime.⁸⁵ Further, although pretrial detainees are housed in jails or prisons that law enforcement officials supervise, those in state institutions are often housed in hospitals staffed by medical professionals. Because those committed in state institutions for mental incapacity often face lengthy and even lifelong confinement, the Court in *Youngberg* protected their rights by requir-

ing that professional decisions exhibit professional concern and judgment.⁸⁶

"Further, as to nonmedical personnel, *Bell's* holding, now reinvigorated by *Kingsley*, mandates that the deliberate misconduct of those assigned to care for the civilly committed be assessed under an objective reasonableness standard.⁸⁷ *Kingsley* confirmed that using an Eighth Amendment criminal recklessness standard for those who have not been convicted of a crime provides insufficient protection from abuse of power.⁸⁸ Some courts have acknowledged that where the claim involves excessive force, the substantive due process analysis is the same for pretrial detainees and the civilly committed, and thus *Kingsley's* objective standard governs.⁸⁹ Further, as explained in Part III, *Kingsley* should not be restricted to excessive force claims, but rather, should be interpreted as a general rejection of the Eighth Amendment's criminal recklessness mens rea for all claims brought by detainees as well as the civilly committed."

Notes:

14 *Youngberg v. Romeo*, 457 U.S. 307, 315 (1982) (quoting *Ingraham*, 430 U.S. at 673).

15 *Id.* At 321-22.

16 *Id.* At 319.

17 *Id.* At 323.

22 *Lewis*, 523 U.S. at 846.

51 *Kingsley v. Hendrickson*, 135 S.Ct. 2466, 2470 (2015).

52 *Id.*

53 *Id.*

54 *Id.* At 2471.

55 *Kingsley v. Hendrickson*, 744 F.3d 443, 447 (7th Cir. 2014), rev'd 135 S.Ct. 2466 (2015).

56 *Kingsley*, 135 S.Ct. at 2471 (second emphasis added).

57 *Kingsley*, 744 F.3d at 448.

58 *Id.* At 451 (alteration in original) (quoting *Wilson v. Williams*, 83 F.3d 870, 875 (7th Cir. 1996)).

59 *Id.* At 460-62 (Hamilton, J. dissenting).

60 *Id.* at 460 (quoting *Titran v. Ackman*, 893 F.2d 145, 147 (7th Cir. 1990)).

61 *Kingsley*, 135 S.Ct. at 2472.

62 *Id.* The Court did not rule out the possibility that reckless, as opposed to purposeful actions, were also actionable. *Id.*

63 *Id.* at 2472-73.

64 *Id.*

65 *Id.* At 2475-76 (explaining how this language, which stemmed from the Second Circuit's decision in *Johnson v. Gick*, was never intended to be "a necessary condition for liability"). Compare *Hudson v. McMillian*, 503 U.S. 1, 7 (1992) (holding that subjective intent to cause malicious and sadistic harm is required to prove a

violation of the Eighth Amendment), with *Graham v. Connor*, 490 U.S. 386, 397 (1989) (holding that an officer's "underlying intent and motivation" is not a determinative factor in deciding whether the officer violated the Fourth Amendment).

66 *Kingsley*, 135 S.Ct. at 2473 (quoting *Graham*, 490 U.S. at 395 n.10).

67 *Id.* At 2473-74.

68 *Id.* At 2474

69 *Id.*

70 *Id.* For a discussion of qualified immunity in the context of substantive due process claims brought by pretrial detainees, see *Ivan E. Badenstainer & Rosalie Berger Levinson*, 2 *State and Local Government Civil Rights Liability* § 2:13 (2017).

71 *Kingsley*, 135 S.Ct. at 2474; see also *Kingsley v. Hendrickson*, 744 F.3d 443, 458 (7th Cir. 2014) (Hamilton, J., dissenting) (explaining that the Committee on Pattern Civil Jury Instructions of the Seventh Circuit approved use of this objective reasonableness standard for excessive force claims by pretrial detainees as well as arrestees in 2009).

72 *Kingsley*, 135 S.Ct. at 2476.

80 *Rosalie Berger Levinson*, Time to Bury the Shocks the Conscience Test, 13 *Chap. L. Rev.* 307, 334-47 (2010) (presenting several arguments for overturning Lewis' restrictive 'shocks the conscience' standard), at 322 (critiquing appellate court decisions that have imposed this requirement), (discussing Justice Scalia's reliance on the absence of a fundamental right to reject *Kingsley's* substantive due process claim).

81 *Bell v. Wolfish*, 441 U.S. 520, 541-43 (1979).

82 *Id.* at 539-43.

122 Cf. *Steele*, 855 F.3d at 502-03 (holding that pretrial detainee who claimed his substantive due process rights were violated by officials' failure to provide him unlimited, nonlegal phone privileges during his administrative segregation could not show that this "shocked the conscience," as required to support claim, even though detainee argued that this prevented him from finding a cosigner for his bail and exercising his bail option); *Baribeau v. City of Minneapolis*, 596 F.3d 465, 483-84 (8th Cir. 2010) (per curiam) (finding that confiscation of a detainee's prosthetic leg was not arbitrary or conscience-shocking in a constitutional sense).

175 *Youngberg*, 457 U.S. at 324.

177 See *Rosalie Berger Levinson*, "Wherefore Art Thou Romeo: Revitalizing *Youngberg's* Protection of Liberty for the Civilly Committed, 54 *B.C. L. Rev.* 535, 553 (2013)

(tracing and critiquing this demise).

178 *County of Sacramento v. Lewis*, 523 U.S. 833, 846 (1998) (quoting *Collins v. City of Harker Heights*, 503 U.S. 115, 129 (1992)).

179 *Id.* At 852 n.12.

180 See *Montin v. Gibson*, 718 F.3d 752, 755 (8th Cir. 2013) (reasoning that even if an involuntarily committed mental patient who was denied unsupervised access to unsecured grounds was subjected to a bodily restraint within the meaning of substantive due process, officials satisfied the professional judgment standard because a substantive due process claim may be maintained only if the contested state action is "so egregious or outrageous that it is conscience-shocking" (quoting *Burton v. Richmond*, 370 F.3d 723, 729 (8th Cir. 2004)); *J.R. v. Gloria*, 593 F.3d 73, 79-81 (1st Cir. 2010) (holding that a civilly committed patient must prove that official misconduct rose to a conscience-shocking level, which requires "stunning" evidence of 'arbitrariness and caprice'" (quoting *DePoutot v. Raffaelly*, 424 F.3d 112, 119 (1st Cir. 2005)); *Benn v. Universal Health Sys., Inc.*, 371 F.3d 165, 174-75 (3d Cir. 2004) (noting that even if a professional decision falls substantially below medical standards, it will not be found to violate substantive due process unless it is also "conscience-shocking").

181 See *Battista v. Clarke*, 645 F.3d 449, 453 (1st Cir. 2011) (explaining that "both the *Farmer* and *Youngberg* tests leave ample room for professional judgment, constraints presented by the institutional setting, and the need to give latitude to administrators who have to make difficult trade-offs as to risks and resources"); *Sain v. Wood*, 512 F.3d 886, 894-95 (7th Cir. 2008) (holding that the professional judgment standard is the same as *Farmer's* subjective deliberate indifference standard); *Lavender v. Kearney*, 206 F. App'x 860, 863 (11th Cir. 2006) (per curiam) ("Relevant case law in the Eighth Amendment context also serves to set forth the contours of the due process rights of the civilly committed." (quoting *Dilhite v. Maughan ex rel. Videon*, 74 F.3d 1027, 1041 (11th Cir. 1996)); *Moore ex rel. Moore v. Briggs*, 381 F.3d 771, 773-74 (8th Cir. 2004) (reasoning that the *Lewis* Court "equated deliberate indifference for substantive due process and Eighth Amendment purposes," and thus, an intellectually disabled state home resident had to meet a criminal recklessness standard to recover on his substantive due process claim).

182 See, e.g., *Collignon v. Milwaukee Cty*, 163 F.3d 982, 988-89 (7th Cir. 1998) (conceding that the Eighth Amendment

subjective deliberate indifference standard assesses whether conduct amounts to unlawful punishment for convicted persons, while reasoning that "there is minimal difference in what the two standards require of state actors," because "only the criminal recklessness standard provides adequate notice of what conduct is or is not permitted.").

183 *Lewis*, 523 U.S. at 852 n.12.

184 See *Rodriguez v. City of New York*, 72 F.3d 1051, 1063 (2d Cir. 1995); see also *Bolmer v. Oliveira*, 594 F.3d 134, 142-45 (2d Cir. 2010) (holding that a substantive due process violation will be found where the decision is made based on substantive or procedural criteria that are substantially below the standards generally accepted in the medical community). In *Bolmer*, the court held that the district court did not err in applying this test despite *Lewis*: because a physician's decision that departs from accepted standards meets the shocks-the-conscience test, and post-*Lewis* case law does not indicate that the professional medical standards test has been overruled. *Id.*

185 See *Davis v. Rennie*, 264 F.3d 86, 99-100 (1st Cir. 2001) (reasoning that the district court did not err in failing to give a shocks the conscience jury instruction in a case challenging whether mental health personnel violated substantive due process by failing to intervene to protect an involuntarily committed mental health patient who was being beaten by another mental health worker). The plaintiff in *Davis* was being held in state custody not due to culpable conduct, but because of mental illness, and mental health workers are held to a more exacting standard than police officers chasing a fleeing car; therefore, the court determined that the proper question is whether the force used was "objectively reasonable" under all the circumstances. See *id.*

186 For a full discussion of the rights of the

civilly committed, challenging courts that have viewed *Lewis* as altering *Youngberg*, and criticizing the use of Eighth Amendment standards, see *Levinson, supra*, note 177, at 566-69.

187 See *supra* note 82.

188 *Kingsley v. Hendrickson*, 135 S.Ct. 2466, 2473 (2015).

189 *Carter v. Huterson*, 831 F.3d 1104, 1109 (8th Cir. 2016) (holding that an objective standard governed a civilly committed plaintiff's claim that defendant officials "physically assaulted and attacked him"); *Clay v. Emmi*, 797 F.3d 364, 369 (6th Cir. 2015) (explaining that after *Kingsley*, a plaintiff's claim that officers used excessive force while restraining him during a mental health commitment "is subject to the same objective standard as an excessive force claim brought under the Fourth Amendment"); *Perez v. Wicker*, No. 2:14-cv-558, 2016 WL 3543502, at *4 (M.D. Fla. June 29, 2016) (holding that *Kingsley's* objective standard applies equally to civilly committed detainees); *Madison v. Scott*, No. 13-3317, 2015 WL 5734874, at *3 (C.D. Ill. Sept. 29, 2015) (applying *Kingsley's* objective standard to excessive force claims by civilly committed detainee, but finding officials acted reasonably in light of plaintiff's noncompliance with their orders).



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