

Mrs. Rowell: Dr. Franklin, what have you given us - a monarchy or a republic?
Benjamin Franklin: A republic, if you can keep it. (upon emerging from signing the U.S. Constitution)

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Yearning for Learning? You've Come to the Right Place!

Coming Soon:

- ✓ 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
- ✓ 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
- ✓ Impact of *Doe v Snyder* on the Role of Scientific Evidence in Constitutional Law - & Tons More!

The Status of *Karsiens, 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.

Victim of the Month

The suspension of this column continues for the time being in light of the large volume of other material to cover.

How It Is That You Are a 'Precriminal,' and Always Will Be.

The Insidious Limitlessness of 'PRECRIME'

Editor's Note: The following article excerpt is from an incessant stream of such articles earnestly advocating that a 'precrime' mode of preventive detention be instituted in various contexts in an effort to supposedly 'make America safer.' We who are confined involuntarily in so-called "civil commitment" (really just supplemental imprisonment) of sex offenders know this trend toward preventive detention all too well - and we have warned you about it for years.

The problem is that in this fear-driven, panicked stampede to such 'lock 'em up' solutions applied to those not for what they have done but for what they are feared to do in the future, we destroy the very nature of America that makes the country special and righteous among all the nations of the world.

Simply eradicating the right to liberty of others because you fear them is contrary to the very notion of a personal right to liberty upon which this country was founded.

The ability to simply round up people for any reasons of dangerousness is next door to locking up those who meet with majoritarian disfavor. It is the end of liberty and thus, the end of our constitutional rights altogether.

Before you climb onto this shocking bandwagon, be aware that today's oppressors may easily become tomorrow's oppressed. When freedom is denied to some, it is effectively extinguished as to all.

The right to walk the street without being hustled away by secret police cannot survive in such legal circumstances.

Do not bargain away your right to liberty for some illusory promise of 'safety.' Perfect safety is never attainable.

Despite the over-publicized infrequent acts of insanity, misdeeds by wing nuts or the seriously criminally inclined are just that: rare. You only *think* they happen everywhere all the time because you hear so much about them.

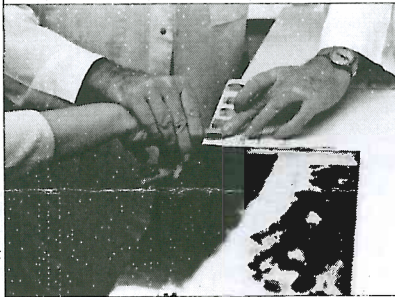


This, however, is not reality, only a form of stereotypical bias formally known as the "availability heuristic."

Nonetheless, not as advocacy, but simply so you may behold the nonchalant banality with which some propose such a descent into totalitarianism, without further ado, I give you this example of

such police-state proposals.

As you read it, however, remember this: "Fear has always been freedom's greatest enemy." (*Stewart "Buz" Eisenberg, "Reflections of a Child of the Sixties [etc.]," 38 W. New Eng. L. Rev. 163, 167 (2016).*)



Jackson Polanski & Henry F. Fradella, "Does 'Precrime' Mesh with the Ideals of U.S. Justice?: Implications for the Future of Predictive Policing," 15 Cardozo Public Law Policy & Ethics Journal 253 (Spring 2017)

Text excerpts:

pp. 293-94: "...[I]t is clear that the civil detention of potentially dangerous people to prevent them from committing criminal offense in the future serves the ends of social utility within the boundaries of the U.S. Constitution as the preventative detention of dangerous, mentally ill people illustrates.

Might temporary civil detentions effectuated by pre-crime units upon showings of data-driven probable cause similarly serve the goals of social utility and due process? After all, law enforcement officers are empowered to temporarily detain people who appear mentally ill and dangerous for periods of 48 to 72 hours in order for mental health professionals to make a determination about whether the state should seek involuntary civil commitment of such individuals.

Of course, mental illness is the key to such temporary holds, but there is nothing magical about mental illness and the constitutionality of preventative detention. As previously discussed, statutory law also authorizes the preventative detention of suspected terrorists and the pretrial detention of those facing criminal charges, but not yet convicted of any offense.

Additionally, the law permits immigration detentions of those awaiting deportation hearings, and even the detention of material witnesses who are not facing any charges. Indeed, laws at the federal, state, and local levels provide broad authority to place people in protective custody, ranging from the quarantine of people who have communicable diseases to the short-term detention of 'the intoxicated, alcoholics, drug addicts, the homeless, and pregnant drug users.'" (emphases supplied).

Editor's End-Note:

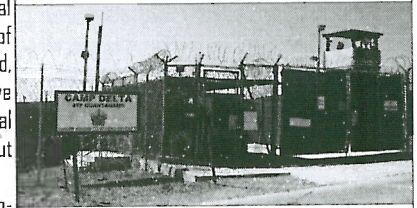
The authors of the foregoing excerpt justify their proposal on the fact of various forms of preventive detention already enacted in law. The rejoinder is that such laws have already gone too far and have departed from the very narrow, permissible range of addressing an emergency of the moment.

With the sole exception of sex offender commitment, mental health commitments are aimed at averting violent acts believed to be *nearly certain* to occur, if at all, *imminently*. As soon as the psychosis or other mental-delusion state has been brought under control, the detainee is released - usually within 3-6 months of his/her commitment.

This is no justification for far broader lockups based on the idea that the one detained may commit a crime or other misdeed *someday*. This is the plight of committed sex offenders. Without even so much as a mention of sex offenders, these authors are in fact relying on this peculiar (indeed unique) type of commitment. But the premises of this kind of commitment have now been thoroughly debunked.

That is, with only rare exception, sex offenders *are* in control of their decisional process (known as "volitional control"). They are *not* actually driven uncontrollably by impulse of the moment. Instead, they, like every other kind of criminal, simply choose to act in a criminal manner. This is not insanity; it is criminality. It is already dealt with by the criminal law and the prodigious law enforcement machinery in place in the United States.

Further, the notion that sex offenders engage in nonstop crime sprees representing high rates of recidivism (sometimes cited in past propaganda as close to 80-100% likelihood of repeated crimes) is now scientifically known to be a *pure myth* - again with only truly rare exceptions.



In actual fact, sex offenders are now known to recidivate, on average, only about 3% of the time. This is tied with the same recidivism rate of murderers and is massively below the recidivism rates for all other crimes. Like sex offenders, murderers eventually get released from prison, yet no one cries out for their commitment. Even recidivistic sex offenders only recidivate later yet again at single-digit rates only slightly above that

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base rate.

Further, in most cases, the long criminal sentences applied to sex offenders ensure that they are not released until well into middle-age, if not as senior citizens. It is now known that current recidivism in this age range of former offenders is infinitesimal (far less than 1%).

Yet the sex offender age range most commonly committed is from age 50 up — with half of these over age 60. Commitment of sex offenders in their 70s and beyond are common. Every sex offender is considered to present a danger of another sex crime until they die of old age — *in complete defiance of the preceding statistics*. In light of this, the authors' claim that the preventive detention they have in mind is "data driven" is particularly clueless of reality.

The other instances cited by these authors of detention apart from conviction are equally inapposite as justifications for general laws finding people to be 'dangerous' for some reason or another.

Bail is denied, for instance, when a criminal defendant is deemed too high a "flight risk" or when there is probable cause to believe that release will result in attempts to murder victims or witnesses or in a crime spree in contemplation of an inevitable long prison sentence.

Terrorists subject to detention without charge are foreigners and are mostly accosted outside the United States and brought here for the purpose of interrogation and for the exceptional purpose of convincing their confederates still at large that they either have died or have abandoned the cause. In any case, the existential threat posed to national security of the nation provides a singular justification for such terrorist detention not shared with any typical criminal case.

Analogously, detention pending deportation is applied to those who have violated some aspect of the immigration laws of the United States, whether by illegal entry, overstaying the term of a visa, failure to comply with a visa's limits and/or requirements. Hence, these individuals could be (and often are) simultaneously held on criminal charges of such felony violations. The mere fact that some of them are effectively 'given a pass' by only being subjected to deportation does not delegitimize their temporary detention during a deportation case to ensure that they do not simply disappear into the great mass of humanity within our borders. Again: none of this justifies detention on considerations of general criminal dangerousness.

Distinctly, detaining "material witnesses" is itself constitutionally suspect, especially if the detention is for a substantial time period and is involuntary. It is even more likely to be constitutionally invalid when misused by a prosecutor to force testimony from one who

claims to be an exonerative witness or asserts lack of knowledge or memory, or who simply refuses to testify against a defendant. To the extent that allowing general 'precrime' detention would, *a fortiori*, legitimize material witness detention as a matter of course, it actually serves as an argument against such precrime detention.

Lastly, short-term temporary protective detention and short quarantines are justified only as the exercise of the government's role as protector of its populace. Those who are intoxicated are deemed incompetent to fend for themselves and to make decisions concerning their welfare. Likewise, a quarantine is invoked only in the most extreme public health emergency, and never lasts longer than that emergency. None of this is based on a claim of danger allegedly posed by the ill intent of the one detained on the presumption that, given a prior criminal record, one should be presumed to be simply waiting for an opportunity to repeat their prior offense. (This is a non sequitur in any event, given the foregoing sex-crime recidivism statistics.)

In sum, there are no valid justifications for imposing 'precrime' detention. Even were group recidivism statistics actually as high as the fearsome false claims of many years ago, it is always impossible to predict the behavior of any individual human being.

Human behavior is the product of many varied inputs from day to day, each interacting with mental frames in that moment. These mental frames themselves are totally malleable from time to time based on other unpredictable inputs interacting with varied and varying internal mental processes.

Thus, even sheer intent itself cannot be predicted. It follows that actual behavior executing such intent is even more unpredictable, given that many (really most) intents in life are abandoned without any action to realize them (and meanwhile, the underlying intent itself is likely to change).

In sum, the necessary justification of precrime detention, viz., that a crime is *imminent* and *certain*, can never be derived with any accuracy at all, much less certainty — regardless of the large quantum of data inputs comprising the prediction.

Worse, this unresolvable uncertainty soars geometrically as the time period expands from imminent to merely 'sometime soon' and ultimately to 'sooner or later.' In short, lacking any certainty that an individual will commit a crime within days, a prediction that he or she will do so within a year is a sheer-chance guess, and a prediction of such crime commission within several years — or a lifetime — will inherently always be far less accurate than flipping the proverbial coin.

Hence, for the sake of science and the sake of justice, and most of all for the sake of the Founders' proposition that one should not be

subjected to loss of liberty except as punishment for a crime committed (not merely feared), the proposal for 'precrime detention' must be abandoned.

Not incidentally, it follows that all legislation of this type currently in place, specifically including sex offender 'commitment,' must be repealed. Articles such as the one quoted here show that this cancer of totalitarian confiscation of liberty inevitably will spread unless cut away completely and with full effect and without equivocation.

Gladden Complaint Excerpt The MCCTA Attacks "Attainted" Groups and Hence Is a Bill of Attainder



Accusation, à la Salem, MA, ca. 1690 C.E.

A. The Act's Description of Attainted Groups, for Bill of Attainder Purposes

Article I, Section 10 of the United States Constitution prohibits states from creating "bills of attainder" inflicting any punishment, including any deprivation of liberty, on either named nor described persons or groups, and including for the purpose of preventing future crimes or misconduct, where a targeted person cannot escape application of that act by modifying his/her present or future conduct, thereby depriving or failing to guarantee such person(s) or group(s) of the protections afforded by judicial process normally attendant to infliction of punishment for commission of a crime. *Nixon v. Adm'r of General Services*, 433 U.S. 425, 473 (1977) Recognition that a prohibited bill of attainder may be directed against a whole described class dates as far back as *Cummings v. Missouri*, 71 U.S. 277, 4 Wall 277, 18 L.Ed. 356 (1867).

Legislation which inflicts any deprivation on

described persons or groups constitutes a bill of attainder regardless whether its aim is retributive, punishing past acts, or preventive, by discouraging future conduct. *Crain v. Mountain Home*, 811 F.2d 726 (8th Cir. 1979).

The following primer excerpted from Note: "Making Outcasts Out of Outlaws: The Unconstitutionality of Sex Offender Registration and Criminal Alien Detention," 117 *Harv. L. Rev.* 2731 (June 2004), aptly sets the stage for the instant analysis.

p. 2745: "*In United States v. Brown* [381 U.S. 437 (1965)], the leading modern case on attainder, the Court held that a federal statute prohibiting current and former members of the Communist Party from serving as union officers was an unconstitutional bill of attainder. [*id.* at 438-40] Although the purpose of the statute was 'to protect the national economy by minimizing the danger of political strikes,' the Court nevertheless found that the statute operated as punishment. [*id.* at 438-39] The Court observed that punishment does not always require a retributive purpose, as 'punishment serves several purposes: retributive, rehabilitative, deterrent — and preventive. One of the reasons society imprisons those convicted of crimes is to keep them from inflicting future harm, but that does not make imprisonment any the less punishment.' [*id.* at 458] The Court focused instead on the fact that Congress had decided for itself that Communists were likely to incite political strikes and therefore excluded them from union office in order to prevent them from inflicting future harm. [*id.* at 449 n. 23 ("The vice of attainder is that the legislature has decided for itself that certain persons possess certain characteristics and are therefore deserving of sanction..."); *id.* at 458-59 ("A number of English bills of attainder were enacted for preventive purposes -- that is, the legislature made a judgment...that a given person or group was likely to cause trouble...and therefore inflicted deprivations upon that person or group in order to keep it from bringing about the feared event.")]. Thus, *Brown* suggests that the punitive nature of a statute stems not from legislative desire to harm the targeted group, but rather from the legislative determination that members of that group possess some 'taint' or 'guilt' that warrants the statute's preventive sanction.¹⁰² [Note 102: "Guilt" in this context does not mean criminal liability. In *Brown*, the "taint" or "guilt" was the penchant for inciting political strikes, not the past commission of illegal union activities. See *id.* at 440 ("It was neither charged nor proven that respondent at any time advocated or suggested illegal activity by the union, or proposed a political strike.") In *Korematsu*, the "racial guilt" was the "dangerous tendency to commit sabotage and espionage," not the past commission of sabotage and espionage. *Korematsu v. United*

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Ostracism, ala Philip Glass, Waiting for the Barbarians

States, 323 U.S. 214, 235 (Murphy, J., dissenting). Likewise, in *Doe* and *Kim*, the "taint" or "guilt" was the propensity to commit future crimes, not the past commission of sex offenses or aggravated felonies.]

p. 2746-47: "The Bill of Attainder Clause also echoes the Equal Protection Clause's suspicion of legislative classification. In *Brown*, the Court emphasized that the legislative class - Communists - was both overinclusive and underinclusive in relation to the taint - likelihood of inciting political strikes. [See *Brown*, 381 U.S. at 449 n. 23, 456.] In a later attainder case, *Nixon v. Administrator of General Services*, [433 U.S. 425 (1977),] the Court similarly suggested that an incongruous fit between the deprivation of liberty and the asserted regulatory purpose would indicate that a statute was actually punitive rather than regulatory. [*Id.* at 473, 475-76] Indeed, the *Nixon* Court suggested that "in determining whether a legislature sought to inflict punishment on an individual, it is often useful to inquire into the existence of less burdensome alternatives by which [the] legislature ...could have achieved its legitimate nonpunitive objectives."¹⁰⁹ [Note 109: *Id.* at 482. Ultimately, the *Nixon* Court found that the statute in question, which required former President Nixon to surrender his personal papers for screening and archiving, was not punitive, because it was not based on "aspersions on [his] personal conduct [or] condemnation of his behavior as meriting the infliction of punishment." *Id.* at 479. In contrast, the Court noted, the statute invalidated as a bill of attainder in *United States v. Lovett*, 328 U.S. 303 (1946), had "expressly characterized individuals as 'subversive ... and unfit ...to continue in Government employment.'" *Nixon*, 433 U.S. at 480 (omissions in original) (citing *Lovett*, 328 U.S. at 312 (quoting H.R. Rep. No. 78-448, at 6 (1943))).

"The vice of attainder is that the legislature has decided for itself that certain persons possess certain characteristics and are therefore deserving of sanction...." *United States v. Brown*, at 458-59.

Likewise, the statute in *Brown* explicitly characterized members of the Communist Party as likely to incite political strikes, and the statutes in *Doe* and *Kim* explicitly characterized the targeted groups of felons as dangerous to society.] Thus, just as the Court's equal protection jurisprudence suggests that a classification's overinclusiveness and underinclusiveness with respect to the regulatory goal raises an inference of invidious discrimination, the Court's bill of attainder jurisprudence suggests that a classification's overinclusiveness and underinclusiveness with respect to the regulatory goal raises an inference of invidious punishment - an inference that is bolstered by an explicit legislative determination of class guilt." (Cf. *Smith v. Doe*, 123 S.Ct. 1140, 1155-56 (2003) (Souter, J. concurring in the judgment). ("The fact that the Act uses past crime as the touchstone, probably sweeping in a significant number of people who pose no real threat to the community, serves to feed suspicion that something more than regulation of safety is going on; when a legislature uses prior convictions to impose burdens that outpace the law's stated civil aims, there is room for serious argument that the ulterior purpose is to revisit past crimes, not prevent future ones."); *id.* at 1160 (Ginsburg, J. dissenting) (arguing that Alaska's Megan's Law is punitive because its scope exceeds the regulatory purpose of protecting the public from dangerous sex offenders). But see *Smith*, 123 S.Ct. at 1152 ("A statute is not deemed punitive simply because it lacks a close or perfect fit with the nonpunitive aims it seeks to advance.")

As to the second element above (i.e., infliction of penalties), "The punitive nature of a legislative enactment can be found according to one of three tests: historical, functional, or motivational." *J.A. Sherwin*, "Are Bills of Attainder the New Currency?...", 37 *Pepperdine L. Rev.* 1301, 1333 (2009-10)

Sherwin, at Footnote 190, explains that the "motivational" test "is an inquiry into the legislative record (including legislative committee hearings and debates) to see if there is evidence of a legislative intent to punish." In this connection, *Sherwin* noted "the importance of the surrounding context and circumstances to the analysis of punitive intent of the legislative act at issue." *Reserve Mining Company v. State of Minnesota et al.*, 310 N.W.2d 487, 1981 Minn LEXIS 1436 (Minn. 1981), the Supreme Court of Minnesota, addressing both the federal and state constitutional prohibitions upon attainder, held, "The Supreme Court of the United States has permitted inquiry into legislative motive for the limited purpose of determining 'whether the statutes under review were punitive in nature.' *United States v. O'Brien*, 391 U.S. 367, 383-84, 20 L. Ed. 2d 672, 88 S. Ct. 1673, n. 30 (1968). That court has found certain

evidence to be appropriate in establishing legislative intent generally. Official journals and reports of the legislature may be consulted. *Nixon*, 433 U.S. at 478; *Commissioner of Internal Revenue v. Acker*, 361 U.S. 87, 4 L. Ed. 2d 127, 80 S. Ct. 144 (1959). The sponsors of a bill, the floor manager, committee chairmen, or other members of the legislature who are knowledgeable may be called as witnesses...."

Where a legislature declares a disfavored class by past conduct of members of that class, or identifies individuals by description based upon their past conduct, an attainder class is created. *WMX Technologies, Inc. v. Gasconade County, Mo.*, 105 F.3d 1195 (8th Cir. 1997); *Lee v. City of Villa Rica*, 449 S.E.2d 295 (Ga. 1994); *Berry v. Lucas County Board of Commissioners*, 2010 WL 480981 (N.D. Ohio 2010). Definitions by past conduct operate only as designations of persons rather than as a present prohibition and hence establish an attained class.

The current case law-based definition of a bill of attainder is: (1) whether a legislative act either specifically identifies a person, persons, or group by name or identifies such persons or group by a sufficiently specific description; and (2) whether the act inflicts penalties within the meaning of the bill of attainder prohibition. See: *Nixon v. Administrator of General Services*, 433 U.S. 425, 473 (1977). A third 'pseudo-element' is often tacked onto this formulation, viz.: "...without provision of the protections of a judicial trial." See, e.g.: *State v. Whitaker*, 700 S.E.2d 215 (N.C. 2010). However, where a legislative act defines a class and inflicts deprivation of liberty upon those within the definition, the mere formality of a trial to confirm the fact of such inclusion within a defined class does not erase the attainder nature of the act. Rather, the focus of this third element is that the act must not deprive an accused of protection afforded by judicial process. *State v. Swartz*, 601 N.W.2d 348 (Iowa 1999). Hence, where the nature of the legislative act is to define the 'guilt' of the party as belonging to the "attainted" group, it deprives that party of the meaningful protection of a trial. *Longmoor v. Nilson*, 285 F.Supp.2d 132 (D. Conn. 2003).

"In determining whether punitive or nonpunitive objectives underlie a law, *United States v. Brown* established that punishment is not restricted purely to retribution for past events, but may include inflicting deprivations on some blameworthy or tainted individual in order to prevent his future misconduct. 381 U.S. at 458-459, 14 L.Ed.2d 484, 85 S.Ct. 1707. This view is consistent with the traditional purposes of criminal punishment, which also include a preventive aspect. See, e.g., *H. Packer, The Limits of the Criminal Sanction* 46-61 (1968)." *Nixon v. Administrator of General Services*, 433 U.S. 425, 53

L.Ed.2d 867, 97 S.Ct. 2777 (1977), n. 40 (emphases supplied).

"Where a legislature declares a disfavored class by past conduct of members of that class, or identifies individuals by description based upon their past conduct, an attainder class is created. *WMX Technologies, Inc. v. Gasconade County, Mo.*, 105 F.3d 1195 (8th Cir. 1997)

Enactment by the Minnesota Legislature in "Special Session 1" on August 31, 1994, of the *Minnesota Civil Commitment Act of 1994* ("MCCTA", hereinafter the "Act"), with its creation of the Sexually Dangerous Persons ("SDP") and Sexually Psychopathic Personality ("SPP") categories, codified in *Minn. Stat.* § 253B.02, Subd. 18b and Subd. 18c, described two groups for purposes of the prohibition on bills of attainder.

The three elements of Minnesota's SDP law are simply that a person:

(1) "has engaged in a course of harmful sexual conduct";

(2) "has manifested a sexual, personality, or other mental disorder or dysfunction"; and

(3) "as a result, is likely to engage in acts of harmful sexual conduct."

Elements (1) and (2) are plainly retrospective. Element (1) refers specifically to past conduct, while Element (2) refers to having "manifested" (in the past-tense) any such disorder or dysfunction. Typically, proof of such past manifestation redundantly uses the commission (or alleged commission) of past sexual acts as evidence of such manifestation. Element (3) is simply the purported logical conclusion from Elements (1) and (2), and hence does not alter the class-definition-by-past-conduct nature of identification of the attainted SDP group.

Similarly, the SPP law requires a "habitual course of misconduct in sexual matters" - again, definition of a class by past conduct.

In so defining the classes established by the new SDP law and the revised SPP law, the 1994 Minnesota Legislature effectively decided the issue of preventive detention (under rubric of 'commitment') before the 'trial' of any individual thus included in either defined class. Enactment by the Minnesota



Japanese Families at Manzanar Relocation Center

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Legislature of the SPP and SDP categories describes two groups based on past crimes of sexual misconduct.

The SPP category is further described as consisting of those deemed "dangerous to others." The SDP category is further described as consisting of those deemed "likely to engage in acts of harmful sexual conduct..." The final descriptor of the SDP category is having "manifested a sexual, personality, or other mental disorder or dysfunction," which in turn can be established, *inter alia*, purely by such past commission of sex crimes. The final descriptor of the SPP category is having "such conditions or emotional instability, or impulsiveness of behavior, or lack of customary standards of good judgment, or failure to appreciate the consequences of personal acts, or a combination of any of these conditions, which render the person irresponsible for personal conduct with respect to sexual matters..."

At the moment of commitment pursuant to either of these categories, no person asserted to be within either of said groups can escape application of that enactment by modifying his/her present or future conduct. Where inclusion in an attainted class cannot be avoided by modifying one's present/future conduct, an attainer penalty is imposed. *Cummings, supra*, cf.: *American Communications Ass'n. v. Douds*, 339 U.S. 382 (1950).

Under the SDP and SPP categories of said Act, commitment does not turn on any current criminal sexual conduct charge or follow immediately in the wake of any conviction of such charge, but rather only on belief in an asserted 'tendency' ("high likelihood") of future sex offenses.

This tendency/likelihood is based in large part under both SPP and SDP definitions on a person's past offenses, a fact that the person, at the time of such commitment petition and trial, can do nothing to 'undo.' Hence, both said definitions in said Act single out certain sub-groups of sex offenders for such history-based conclusions as to their personal characteristics, rather than as a means of prohibiting present or future sex offenses. It is also clear that, "unlike members of a political party, who could, if desired, escape the detriments of party affiliation, a sex offender cannot escape his or her classification"-by-description by refraining from doing, or by doing any particular thing.

By defining the classes established by the new SDP law and the revised SPP law in the aforesaid Act in terms of past conduct, that Act operates only as a designation of particular persons.

By then exercising the "police power" to

commit individuals thus defined as within either such status for society's protection, the MCCTA effectively inflicts "preventive detention" upon all who are judicially cited as falling within either such status -- a 'penalty' for attainer purposes.

It is important to note here that for attainer purposes, the "punishment" (penalty) aspect (see further argument, *infra*) includes any deprivation levied to serve any of several purposes: "retributive, rehabilitative, deterrent - and preventative." (*United States v. Brown*, at 381 U.S. 437, 458 (1965; emphases supplied). In so holding, the Supreme Court relied on historical considerations that many bills of attainer were imposed for preventive purposes. (*Brown*, at 458-59: a legislative "judgment...that a given person or group was likely to cause trouble...and therefore inflicted deprivations upon that person or group in order to keep it from bringing about the feared event." (emphasis supplied)).

As noted in the preceding section, Minnesota's SDP definition boils down to the prediction comprising its third, conclusory element: "as a result, is likely to engage in acts of harmful sexual conduct." (emphasis supplied). This is definition-by-feared-future-potential-misconduct -- again, a classic attainer identification of a group. Likewise, the statutory definition of SPP sums up by describing persons in that class as being "dangerous to other persons" -- again, effectively a prediction of potential future harm.

The protection of the Bill of Attainder Clause is quite broad, barring not only deprivations of liberty and of property, but also deprivations of political and civil rights, such as the right to vote, to equal treatment by law, and to practice professions, operate a business, hold public office, advocate political causes, etc. *Cummings v. Missouri*, 71 U.S. 277 (1867); accord: *Nixon*, 433 U.S. at 474-75: "a legislative enactment barring designated individuals or groups from...specific employments or vocations..."

It is not necessary that there be a legislative announcement of punishment as an aim in order to constitute a bill of attainder. *Nixon v. Adm'r of General Svcs.*, 433 U.S. 425 (1970). The punitive nature of a legislative enactment, within the meaning of the prohibition on bills of attainder, can be found in any of three tests: historical, functional, or motivational, as comparatively matched by the enactment in question.

Sex Offender Commitment Issues

David L. Faigman, "Where Law and Science (and Religion?) Meet." 93 *Tex. L. Rev.* 1659 (June 2015)



Welding the Door Shut

Text excerpts:

p. 1672: "...Concepts such as 'volitional control,' and 'insanity' ...have no direct corresponding meaning in science"⁹³ ..."

p. 1677: "As Sir William Blackstone wrote, 'It is better that ten guilty persons escape than that one innocent suffer.'¹¹⁷

pp. 1677-78: "...The Court found that commitment hearings, which pose 'a significant deprivation of liberty,' require a standard greater than a preponderance of the evidence, which is typically employed in 'monetary dispute[s] between private parties.'¹²² At the same time, however, the Court refused to require proof beyond a reasonable doubt.¹²³ The Court offered a variety of reasons for choosing this lighter burden. First, following an involuntary commitment, the continuing involvement of professionals, family, and friends in the person's treatment provides opportunities for errors to be corrected.¹²⁴ Second, making an error that permits a mentally ill person to live in the general community is not necessarily good for that person: 'it cannot be said...that it is much better for a mentally ill person to 'go free' than for a mentally normal person to be committed.'¹²⁵ Finally, the Court observed, 'given the lack of certainty and the fallibility of psychiatric diagnosis, there is a serious question as to whether a state could ever prove beyond a reasonable doubt that an individual is both mentally ill and likely to be dangerous.'¹²⁶



In one area of civil commitment, however, the clear and convincing evidence standard might be inappropriate given the reasoning of *Addington*. That area is the ever-expanding category of sexually violent predators.¹²⁷ There are important differences between sexual offender commitments and ordinary commitments. Primary among these differences is that, in the ordinary civil-commitment context, treatment is a key

component of the incarceration, whereas with sexual predators protection of society appears paramount.¹²⁸ In contrast, in the case of sexual offenders the role and even availability of treatment is much more ambiguous. While treatment is often cited as an avowed goal of sexual-offender civil commitments, it is not constitutionally mandated.¹²⁹ Compounding the lack of treatment for sexual offenders is the fact that many are held under what are essentially prison-like conditions and the vast majority are never released.¹³⁰ The decision rule in this, as is true in all other legal contexts, ought to reflect the costs of making an error either of the false-positive or false-negative variety."



Notes:

93 See *Joshua W. Buckholz & David L. Faigman*, Promises, Promises for Neuroscience and Law, 24 *Current Biology* 861, 864 (2014) ("To a cognitive neuroscientist, legal standards like 'volitional capacity' ...are inherently meaningless. They do not map on to specific mental processes or discrete brain circuits.")

117 4 *William Blackstone, Commentaries* *358

122 441 U.S. 418, at 423, 425.

123 *Id.* At 431.

124 *Id.* at 428-29.

125 *Id.* at 429.

126 *Id.*

127 *John Matthew Fabian*, "To Catch a Predator, and Then Commit Him for Life: Sexual Offender Risk Assessment - Part Two," *Champion*, March 2009, at 32 ("Nearly 20 states have laws addressing the civil commitment of sexually violent predators."); *Eric S. Janus*, Closing Pandora's Box: Sexual Predators and the Politics of Sexual Violence, 34 *Seton Hall L. Rev.* 1233, 1233-50 (2004) (discussing the public uproar against crimes of sexual violence and how it fuels the expansion of sexually violent predator laws.)

128 See *Aruanno v. Hayman*, 384 F. App'x 144, 152 (3d Cir. 2010) "[The Act] serves a regulatory...purpose, because it seeks to protect the public from possible future harm..."

129 For example, in *Hubbert v. Superior Court*, 969 P.2d 584, 601 (Cal. 1999), the court rejected the 'suggestion that the Legislature cannot constitutionally provide

(Continued on page 5)

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for the civil commitment of dangerous mentally impaired sexual predators unless the statutory scheme guarantees and provides 'effective treatment.' See generally *Eric S. Janus & Wayne A. Logan*, Substantive Due Process and the Involuntary Confinement of Sexually Violent Predators, 35 *Conn. L. Rev.* 319, 342 (2003) (discussing a substantive due process right to treatment); *Jeslyn A. Miller*, Sex Offender Civil Commitment: The Treatment Paradox, 98 *Calif. L. Rev.* 2093, 2103 (2010) ("Although the Supreme Court has never confirmed a constitutional right to treatment, the right for individuals to participate meaningfully in treatment is implicit in the involuntary (implicating substantive due process concerns) and purportedly civil (implicating *ex post facto* and double jeopardy concerns) nature of the civil commitment system."

130 See, e.g., *Karsjens v. Jesson*, 6 F. Supp. 3d 916, 916 (D. Minn. 2014) noting that plaintiffs alleged 'that commitment to [the Minnesota Sex Offender Treatment Program] essentially amounted to lifelong confinement, equivalent to [a] lifetime of criminal incarceration in [a] facility resembling, and run like, [a] medium to high security prison."



Off with Their Heads!

Unscientific Prediction of Risk of Violence or Sex Crimes

Gregory DeClue, "Years of Predicting Dangerously," 5 *S. Cal. Interdisc. L.J.* 179 (Winter 2016)

(p. 16, Abstract): "...[T]he data thus far show that clinical adjustments or overrides reduce the accuracy of actuarial-based risk prediction."

(Text): (pp. 20-1): "2009

"...Three studies examined the difference between actuarial scores and adjusted actuarial risk ratings (*Gore* 2007; *Hanson*, 2007; *Vrana, Sraga & Guzzo*, 2008). In these studies, evaluators were required to complete an actuarial risk tool and then were allowed to adjust the final risk rating on the basis of factors external to the actuarial tool. All three studies were prospective, and evaluators completed the ratings as part of their routine procedures. In two studies, the raters were probation officers (*Hanson*, 2007; *Vrana et al.* 2008), and in the other study, the raters were either psychologists or correctional staff (*Gore*, 2007). For all three measures, for all types of raters, and for all outcomes, the adjusted scores showed lower predictive accuracy than did the unadjusted actuarial scores."

(pp. 21-2): "2010 How do adjustments or overrides to actuarial risk assessments dilute accuracy? One example is found in *Gore's* (2007) dissertation. She found that clinical overrides that increased predicted risk resulted in 4 more true positives (people rated high risk, who actually sexually recidivated) but at the cost of 75 fewer true negatives (people rated as low risk, who actually did not sexually recidivate).⁸

2011 *Montaldi* (2011) mentioned, 'Given decreased base-rates over the past 20 years, the most accurate method now may be to just use the overall (low) reconviction base-rate and predict non-reconviction for every offender. We would have false negative errors but perhaps fewer errors overall.'

2012 "Two more studies have addressed the accuracy of pure-actuarial risk assessment versus adjusted-actuarial risk assessment for sexual recidivism. In one study, *Storey, Watt, Jackson, and Hart* (2012) found that clinical adjustments or overrides of the Static-99 decreased the accuracy of risk prediction: 'In 30 cases, clinicians used discretion to 'override' or adjust the Static-99 ratings when making final risk judgments, but the predictive validity of the clinical adjusted ratings was worse than that of the original Static-99 ratings made by clinicians' (p.1). The clinical override scores were less predictive of sexual recidivism than the scores without overrides.... Examinations of the Hazard Ratios for the two sets of ratings indicated that the ratings with overrides predicted recidivism in the wrong direction - that is, clinical overrides of increased risk were actually associated with lower recidivism rates and vice versa.' (p. 8)

"...[O]ther studies have also found that clinical overrides made to actuarial scores decrease predictive validity (*Gore*, 2007; *Hanson*, 2007; *Vrana, Sraga, & Guzzo*,

2008)' (p. 9). See also *Hanson, Harris, Scott, & Helmus* (2007)." (p. 23): "...In spite of Hanson and Thornton's guidelines (be prudent, make only minor adjustments or none at all, only make adjustments in the face of special features such as debilitating disease or stated intentions to offend), clinicians have sometimes chosen not to rely on the results of the actuarial instrument, even in the absence of special circumstances. The result has been a decrease in accuracy. Available research does not support the use of professional judgment to adjust or override actuarial-based risk assessment of sexual recidivism.

What Then Must We Do?

In their 1989 *Science* article, *Dawes, Faust, and Meehl* noted that, in spite of an increasingly massive and consistent body of evidence, few practitioners seemed to have changed their practice habits (see also *Grove*, 2005). My experience in SVP cases over the past 14 years is similar. In their reports and testimony, SVP evaluators routinely use an actuarial instrument (typically the Static-99R these days) and then use their judgment to consider additional factors before offering a 'professional opinion' regarding the person's likelihood to sexually reoffend. In doing so, evaluators typically fail to mention that they are using an approach to risk assessment that has been shown to decrease the accuracy of risk predictions, has no known reliability, and fails to produce a probability of re-offense with an associated confidence interval (making it impossible to know the certainty of the risk prediction).

Note from Excerpt:

⁸ "When psychologists' overrides were attempted to in only one direction (e.g., upward overrides) and ignored the other direction (i.e., downward overrides), the adjusted risk levels were significantly more accurate in the direction in which overrides were permitted (e.g., identification of true positives). However, this improvement in accuracy was achieved at a statistically significant and extreme cost: zero accuracy in the other direction (e.g., identification of true negatives)" (*Gore*, 2007, pp. 51-52).

"Given decreased base-rates over the past 20 years, the most accurate method now may be to just use the overall (low) reconviction base-rate and predict non-reconviction for every offender." *Montaldi*, 2011.

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Storey, J.E., Watt, K.A., Jackson, K.J., and Hart, S.D., "Utilization and Implications of the Static-99 in Practice," *Sexual Abuse: A Jour. Of Research and Treatment*, <http://sax.sagepub.com/content/early/2012/02/16/107906321423943> (pub'd online Feb. 17, 2012)
Vrana, G.C., Sraga, M., & Guzzo, L., "Predictive Validity of the LSI-DR among a Sample of Adult Male Sexual Assaulters," Unpub. Manuscript, Nipissing University, North Bay, Ont., Canada (2008)

Percy Foundation Survey Report on Imprisoned and Committed Sex Offenders

(*James Hunter*; 2018)

Text excerpts:

p. 4: DISCUSSION

The Impact of Prison Life on Self-Esteem
"Beyond the stigma that pervades our society, and that is concentrated with an even greater intensity in prisons, the treatment program itself adds another level to the stigma. Social research has not been able to establish a profile of the typical sex offender. Except that they have broken a law, there is nothing that reliably distinguishes members of this group from a random selection of people in the population. They are not more stupid, more insensitive, or more anything than anybody else. Nevertheless, the treatment techniques at Butner, as in most sex-offender programs, are clearly based on the assumptions that members of this group lack empathy, are incapable of love, are manipulative, are dishonest, lack insight, and are highly sociopathic. And they are treated accordingly. So this negative view of who sex offenders are is added

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to the already overwhelming stigma that the offenders live with. This is hardly helpful to men who are drowning in socially induced self-hatred.

The Impact of Prison Life on Self-Efficacy

"A prison environment constitutes a massive attack on both the prisoner's locus of control and his self-efficacy. This is so self-evident that it would not seem to merit extensive discussion. Most of the decisions about what happens to prisoners on a daily basis are made by the program and by staff rather than by the prisoners, and the range of free activity is extremely constricted. Thus, the locus of control is largely external to the individual and the opportunities for self-efficacy are very limited. While this is largely external to the individual and the opportunities for self-efficacy are very limited. While this much is obvious, civil commitment programs have gone to a new level in denying the autonomy of the individual.

"Autonomy comes in three flavors: behavioral, emotional and cognitive. Prisons have always restricted behavioral autonomy. They were invented specifically for that purpose. But, until fairly recently, an incarcerated person in the United States could say, with some accuracy, 'Well, they can deny me my freedom of movement but I still own my mind,' or something along that line. For some, this is no longer the case. Offenders in treatment are subjected to a powerful attack on the autonomy of the mind.

"The rationale of the treatment program is that if a person has violated one of society's sexual laws, this justifies denying the person's cognitive and emotional autonomy as well as his behavioral autonomy. The sex offender must be forced to think and feel correctly or be punished severely.

"Except that they have broken a law, there is nothing that reliably distinguishes [sex offenders] from a random selection of people in the population. They are not more stupid, more insensitive, or more anything than anybody else."
Hunter.

"In the Butner facility, joining the treatment program is not required. The carrot that is held out to the prisoner for choosing to participate in the treatment program is the hope for eventual release. That most participants never get to eat this carrot is one of the cruelest and most cynical aspects of the program. Respondent #64 states that 'Joining the program, one's only way of achieving freedom, simply means one might be out in another 4, 5, 6 or more years by



B.F. Skinner (Founder of "Behaviorism")

which time one is totally brainwashed.' For reasons totally outside one's control or knowledge, one might remain in therapy forever.

"The comment by Respondent #64 raises an important question. Is the 'cognitive' therapy that is imposed on people in sex offender treatment programs actually brainwashing - the term he uses - and not cognitive therapy at all. In order to answer this question we must begin with clear definitions of brainwashing and cognitive therapy.

Merriam Webster <https://www.merriam-webster.com/dictionary/brainwashing> provides this definition of brainwashing:

'A forcible indoctrination to induce someone to give up basic political, social, or religious beliefs and attitudes and to accept contrasting regimented ideas.'

The American Institute for Cognitive Therapy <https://www.cognitivetherapynyc.com/What-Is-Cognitive-Therapy.aspx> provides this definition of cognitive therapy:

'Cognitive-behavioral therapy is a relatively short-term, focused psychotherapy for a wide range of psychological problems including depression, anxiety, anger, marital conflict, loneliness, panic fears, eating disorders, substance abuse, alcohol abuse and dependence, and personality problems. The focus of therapy is on how you are thinking, behaving, and communicating today rather than on your early childhood experiences. The therapist assists the patient in identifying specific distortions (using cognitive assessment) and biases in thinking and provides guidance on how to change this thinking.'

There is a superficial similarity between the two techniques. Both deal with an assessment of a client's cognition, and both focus on efforts to eliminate cognitions that are believed to be dysfunctional and to replace them with those that are functional. So it is easy to see how the two interventions might be confused. However, there are significant differences. The most important difference has to do with the issue of coercion. With brainwashing, we have a 'forcible indoctrination,' while cognitive therapy

endeavors to 'guide' the patient. Brainwashing also attempts to protect the client from wrong-think and social influences that are deemed negative. So far as I know, techniques aimed at protecting the client from normal social contacts for fear they might be exposed to negative cognitions is not part of any valid cognitive therapy. Nor are clients punished for negative cognitions. With the so-called 'cognitive techniques' used in sex offender treatment, and this cannot be emphasized enough, wrong-think is punished with continuing imprisonment. Only physical torture would be more coercive. Finally, cognitive therapy is typically a short-term intervention. It cannot possibly take years to teach the few tenets that are the target of the therapy. In sex-offender treatment the beliefs that treatment leaders consider relevant could be listed on a single page. Why, then, does it take years to teach these simple ideas to the program participants?

"All of this does not even touch on the issue of whether the beliefs that are forced upon the program participants are actually supported by science. To evaluate all of the beliefs targeted in the sex-offender treatment program as it is implemented in Federal Civil Commitment program in Butner would be beyond the scope of this paper. However, looking at one such belief might be instructive. Clearly the participants in the program are expected to believe that any sexual activity between an adult and a child - as defined by the sex offender laws in this country - is always profoundly damaging to the younger partner. This has been shown to be factually untrue by extensive research. The specifics are detailed below in the section entitled 'The justification of radical measures.'

In a free society, legal interventions must be limited to behavior.

"In a free society, the legal system is concerned with whether the behavior of its citizens conforms to the law. Laws that dictate acceptable beliefs or feelings and that allow for the punishment of individuals that deviate from these beliefs and feelings are acceptable only in totalitarian societies. Even if one assumes that sex-offender treatment has a limited but legitimate concern for beliefs that might lead to re-offending, reasons for not re-offending might be quite varied. A person who has committed a sexual offense need not believe any of the 'correct' beliefs in order to decide not to 're-offend.' Let me illustrate this. Four of the 'correct' beliefs that are taught in treatment programs are as follows:

1. Sexual activity between adults and minors is always damaging - profoundly and intrinsically so.
2. To allow a relationship between oneself and a minor to become sexual is motivated by a desire for power, not love.
3. Someone must be 'blamed' for allowing a relationship to become sexual, and this

must always be the adult.

4. To allow sexual activity to occur between an adult and a person who is defined as a child in this society is a symptom of a mental disorder, which must be aggressively treated.

"The assumption of the treatment provider is that unless an offender comes to believe these assertions (among others), he will continue to be at risk of re-offending. Is this true? Obviously not. A person who has broken one of society's sexual laws might reject all of the above treatment premises, and simply come to the conclusion that inter-generational sexual behavior, in this society, entails too many risks for both himself and the child, and on the basis of that, he could resolve to not violate the law again. It happens every day.

"The law is about behavior - not about either feelings or cognitions. This is as it should be. You can hate me. You can think I am a despicable person. You can even want to punch me in the face. But you cannot actually punch me in the face. If we are to maintain a free society these distinctions between feeling, thinking, and doing must be maintained.

"Furthermore, in a free society even with people who are convicted of crimes, it is not permissible to deny them their freedom of thought and expression. To establish a set of beliefs to which one must subscribe if he is to avoid being incarcerated is a violation of the constitution. This is precisely what sex-offender treatment does. It doesn't matter if you call it 'hospitalization.' Imprisonment is imprisonment. In civil commitment people are imprisoned for what they feel, for what they believe, for what they dream and for what they might do. The primary thing that a person must do in order to have any hope of release is to convince a group of treatment providers what the providers can never know for sure - that the prisoner now believes and feels what he is supposed to believe and feel, and is not just faking it.

"With the so-called 'cognitive techniques' used in sex offender treatment, and this cannot be emphasized enough, wrong-think is punished with continuing imprisonment. Only physical torture would be more coercive."
Hunter.

"A word needs to be said about faking it. People are not able to simply change their beliefs at will. To demand that they do so is therefore unfair, especially if the consequence for the failure is continuing imprisonment. Suppose that I believe that my car is red, but you want me to believe that it is

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blue. I cannot change my belief that it is red, even if you threaten to kill me unless I do. The best I can do is fake it - which of course, is what I would do if you held a gun at my head. That is precisely the situation with sex-offender treatment. Everybody who hasn't given up on ever having a life outside of prison owns a blue car, whatever color it is.

"Another factor that assures that the locus of control will remain outside the prisoner, and that he will have little or no control over his life, is the lack of objective and clear criteria that specify when treatment is successfully completed, and when release from the program can therefore reasonably be expected. A contract specifying not only what is expected from the prisoner, but what the prisoner can expect as a result of living up to the program's expectations is lacking. A so-called 'contract' saying what is expected from the prisoner, and not what he can expect from compliance is not a contract at all. It's just a set of orders. A real contract would allow the locus of control to shift back into the prisoner, and would thereby grant him some capacity for control over what happens to him. If I do A, B, C, and D, as the program demands, then I can reasonably expect that consequences E, F, G, and H will follow. Such criteria are totally lacking in the program.

"Autonomy is at the very core of what we mean by 'person-hood.' To be a person is to be a free agent. If a person is a danger to others, it may be necessary to limit his or her behavioral autonomy. But when, in addition, we deny a person the right to feel, think, and dream as he will, we attack his personhood - and we violate his soul.

"The law is about behavior - not about either feelings or cognitions. This is as it should be. You can hate me. You can think I am a despicable person. You can even want to punch me in the face. But you cannot actually punch me in the face. If we are to maintain a free society these distinctions between feeling, thinking, and doing must be maintained." Hunter.

Belonging

"Men who have been outed as MAPs (minor attracted persons) experience the loss of significant relationships. Without any exceptions that I know of, incarcerated MAPs have been abandoned by many if not all of their friends, family, and significant others. The stigma associated with the social identity of being a 'pedophile' is enormous, and it tends

to rub off on significant others who refuse to distance themselves from any MAP with whom they have been on friendly terms. Friends, after all, might be a part of a sex ring and spouses who do not divorce their offending husbands are probably enablers. In self-defense the MAP must be abandoned....

"The MAP, like the scapegoats of old, is driven out of the community and, in many cases, is subjected to a condition of almost complete social isolation. He can be found under bridges or in programs that have specifically been set up to prevent the MAP from being in the community by extending his incarceration indefinitely. Whether this social isolation of the MAP protects future victims is a debatable point. Whether increasing his social isolation is harmful to the MAP is not debatable. Simply being placed in a civil commitment program radically constricts a person's social network, and is harmful to that person.

"To whom might an incarcerated MAP reach out, and who might be inclined to respond, after family and friends have mostly abandoned him? I would suggest that it is those who have one or both of two characteristics. First, s/he might simply be a person who does not have a mainstream perception of the MAP - one who does not see him as a monster. Second, s/he might be someone who has actually been through the experience him or (rarely, her) self, and who is therefore sympathetic to what the incarcerated MAP is going through. Once you have blocked contact with people with these characteristics you have forced the MAP into a deeper level of psycho/social/spiritual isolation. Let me illustrate how this attack on any meaningful social network operates with an example from my own experience. Not long ago I received the following communication as part of a larger e-mail from an inmate at the Butner Civil Treatment Center:

'On a very somber and sobering note, which you will no doubt take very hard, but you need to be aware of for future reference... They REALLY beat me up over your books in my possession and my personal communications with you and B.C. [a man who provides helpful, and very non-radical materials to incarcerated sex offenders]. You might pass this message along to him just so he knows. I haven't actually been in contact with him since I've been here, but that didn't matter a bit. When I get transcripts of the whole debacle I'll send them to you and you can take whatever precautions you feel you might need to make for anyone else in this position. I told them I wasn't giving up the one person who had befriended me and been a decent person to me in the last 11 years. Then I asked her to set me a euthanasia

date. Of course, she refused, but it's in the record now.'

By 'beat me up' he was referring, of course, to verbal attack. But it is important to understand the significance of this. The message that was given to him was clear: These people do not support our point of view. Therefore, if you want to ever have a chance of leaving this facility, you must discontinue your contact with them. Notice that the issue here is clearly one of wrong-think and wrong-association. One must question whether it is permissible to use psychotherapy as an excuse for denying people their constitutionally protected rights of freedom of thought, freedom of expression, and freedom of association. Perhaps that needs to be debated in legal journals. Here we are simply making the point that the Civil Commitment Program at Butner does actively press the incarcerated person into an even deeper social isolation than he previously experienced, and is harmful to the person's well-being for that reason.

"In a free society even with people who are convicted of crimes, it is not permissible to deny them their freedom of thought and expression. To establish a set of beliefs to which one must subscribe if he is to avoid being incarcerated is a violation of the constitution. This is precisely what sex-offender treatment does. It doesn't matter if you call it 'hospitalization.' Imprisonment is imprisonment..." Hunter.

The issue of social isolation was one of the concerns that was frequently mentioned in the comments section of the questionnaire. Respondent #26 summarized some of the procedures used by staff on the unit to enforce and even increase social isolation:

'Our mail is often restricted and heavily scrutinized. We are told who we can and cannot associate with. We are locked down in our housing unit most of the day. Our cells/rooms are often shut down by psychology staff and our property taken away from us without any good reason, and intimate relations between two inmates is heavily prohibited in this unit.'

Respondent #32 provided a similar list of socially constricting policies that are enforced on the unit:

'It is much harder [to live in the civil commitment unit]. I have contact with only those who live in this unit. We are not allowed to associate with anyone on the lower compound or in the general population. Our mail, both incoming and outgoing, is read and copied - except legal. Anything like magazines, books, or newspapers are screened for inappropriate content whether

you are in the [treatment] program or not. We're subjected to more shakedowns, where property is taken but we can't find who took it or why. Pictures of family members are taken or mutilated. TV programs are monitored to see who is watching what. Programmed or not, our freedoms are restricted more than as an inmate.'

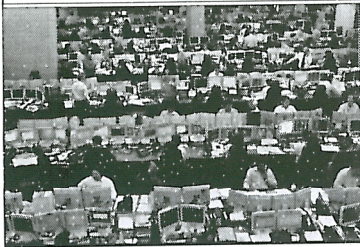
CONCLUSION

"The notion of death has become somewhat problematic in modern life. For example, is a person still 'alive' if there is no brain activity, but all the major organ systems - with the aid of technological devices - continue to function? Perhaps we could gain an enhanced understanding of what it means to 'be alive' if we expanded our frame of reference a step further. From a phenomenological point of view we function on a variety of levels. These can be designated as the biological, psychological, social, and spiritual. I would suggest that the primary indication of psychological life is agency. We feel alive when we believe that the locus of control of our decisions and actions is, at least to a significant extent, within oneself. We feel ourselves to be socially alive when we exist as a valued member of a social group. We feel spiritually alive when we feel that we are making a contribution to life that goes beyond our limited selves.

"The treatment of the sex offender in 'treatment' centers is a logical extension of the manner in which the offender is treated by the larger society. He is a member of the most hated, vilified, and shunned group in American society. He is ruthlessly attacked psychologically, socially, and spiritually. He is allowed to continue living biologically but only as a burned out shell with the road to a meaningful existence effectively blocked at multiple points. All of the prejudices and hatred that one finds in the larger society are brought, unmodified by professional insight, into the treatment facility. Effectively, the psychological, social, and spiritual life of the individual is terminated by treatment. One has to ask whether the broad attack on the personhood of sex offenders can be defended as 'best practice' by psychiatry, psychology, social work, or any other component of the mental health movement. If not, how is it justified? Is an individual who has been crushed psychologically, socially, and spiritually less likely to re-offend should he be released? And given the high level of improbability that he will be released from civil commitment in any case, what exactly is the point of forcing any regime of therapy on him?

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Indiana Invalidates Complete Ban on SO Internet Use Without PO Permission



Ubiquity of computers in the workplace

Indiana 'Boilerplate' Probation Condition Barring Internet Use Without P.O. Permission Struck Down, State Supreme Court Says

[The Indiana Supreme Court struck down an across-the-board ban on Internet use by an SO probationer (Kristopher L. Weida) without express permission by his probation agent. The ruling forced the probation condition ("Condition 26") to be changed. As changed, Condition 26 now reads: "You are prohibited from accessing, viewing, or using internet websites and computer applications that depict obscene matter ... or child pornography.... You shall not possess or use any data encryption technique or program to conceal your internet activity."]

Indiana Supreme Court Justice Christopher Goff wrote in the unanimous decision, "As we increasingly live our lives in cyberspace, probation conditions limiting internet use must meet the same criteria as conditions that restrict other conduct.

"...Because probation conditions restricting a probationer's internet access prohibit what would otherwise be lawful conduct, they cannot be vague," Goff wrote.



The Specially Designed 'Indiana Keyboard' for Paroled Sex Offenders

Punishing Sexual Fantasy

Andrew Gilden, "Punishing Sexual Fantasy," 58 *Wm. & Mary L. Rev.* 419 (Nov. 2016).

Text excerpts:

pp. 425-26: "...[T]here is an important distinction between sexual fantasy and harmful sexual conduct.²⁰ In many contexts, extensive discussions of taboo sexual topics are celebrated by popular culture and

squarely protected by the First Amendment – for example, books like *Lolita*²¹ or *Fifty Shades of Grey*,²² television shows like *Game of Thrones*,²³ or video games like *Grand Theft Auto*.²⁴ Even though the underage sex, sado-masochism, incest, rape, and prostitution present in the works would absolutely be criminal if acted out in real life, there is widely understood to be social value – and constitutionally protected expression – in airing and openly discussing the dark side of the human psyche.²⁵ Reading, writing, and reflecting on sexuality – whether taboo or otherwise – allows individuals to understand their own desires and pursue a range of socially desirable ends; they might 'come out,' seek treatment, channel the fantasy into a consensual offline form, openly question the wisdom of underlying taboo, or use the fictional account to cathartically let off steam and aggression.²⁶"



The Dream Police

p. 459: "...As Judge Kleinfeld observed in *Curtin*, however, 'Good prosecution proves that the defendant committed the crime. Bad prosecution proves that the defendant is so repulsive he ought to be convicted whether he committed it or not.'²⁰⁶

pp. 470-71: "...Law enforcement justifies its use of virtual minors/adult decoys by emphasizing the difficulty of investigating sexual abuse and the importance of ensuring that virtual pedophiles do not become actual sex offenders.²⁷² This is, however, precisely the type of fantasy-as-proxy justification that the Court rejected in *Ashcroft*.²⁷³ Even in the face of difficult, blurry line drawing, the government cannot simply throw up its hands and speculate about some future fantasy spillover."

Notes:

20 See *Ashcroft v. Free Speech Coalition*, 535 U.S. 234, 253 (2002) ("[T]he Court's First Amendment cases draw vital distinctions between words and deeds, between ideas and conduct.").

"A man's thoughts are his own; he may sit in his armchair and think salacious thoughts, murderous thoughts, discriminatory thoughts, whatever thoughts he chooses, free from the 'thought police.' It is only when the man gets out of his armchair and acts upon his thoughts that the law may intervene." *Ex parte Lo*, 424 S.W.3d 10, at 26 (Tex. Crim. App. 2013).

21 *Vladimir Nabokov, Lolita* (1955).

22 *E.L. James, Fifty Shades of Grey* (2011).

23 *Game of Thrones* (HBO, 2011-present).

24 *Grand Theft Auto* (BMG Interactive 1997).

25 See *Ashcroft*, 535 U.S. at 247-48 ("Both themes – teenage sexual activity and the sexual abuse of children – have inspired countless literary works ... Our society, like other cultures, has empathy and enduring fascination with the lives and destinies of the young. Art and literature express the vital interest we all have in the formative years we ourselves once knew, when wounds can be so grievous, disappointment so profound, and mistaken choices so tragic, but when moral acts and self-fulfillment are still in reach."); *Stanley v. Georgia*, 394 U.S. 557, 565 (1969) ("If the First Amendment means anything, it means that a State has no business telling a man, sitting alone in his own house, what books he may read or what films he may watch. Our whole constitutional heritage rebels at the thought of giving government the power to control men's minds.").

26 [...]

206 *United States v. Curtin*, 489 F.3d 935 at 963 (9th Cir. 2007 en banc, Kleinfeld, J., concurring)

272 [...]

273 *C. B. Hessick*, "Disentangling Child Pornography from Child Sexual Abuse," 88 *Wash. U. L. Rev.* 853, at 884 (2011)

Other Significant Notes:

201 *Gerald Dworkin & David Blumenfeld*, "Punishment for Intentions," 75 *Mind* 396, 396 (1966) ("[N]o person should be punished unless he is guilty of having committed some wrong act. We punish a man for attempted murder but not for wanting to murder."). See *People v. Walter*, 810 N.E.2d 626, 631 (Ill. Ct. App. 2004) ("Hope and fantasy do not equal intent, even if they lead to actions that could make the fantasy come true.")

304 *David L. Riegel*, Letter to the Editor, "Effects of Boy-Attracted Pedosexual Males of Viewing Boy Erotica," 33 *Archives Sexual Behav.* 321, 322 (2004) ("Respondents who wrote comments almost invariably stated that such viewing actually sublimated and redirected their sexual energies

away from attempted or actual sexual contact with boys and, as a result, they felt less rather than more inclined to seek out boys for sexual gratification.")

PPG Testing: Fake-able, Unscientific & Not Proving Future Recidivism

Max B. Bernstein, "Supervised Release, Sex-Offender Treatment Programs, and Substantive Due Process," 85 *Fordham L. Rev.* 261 (Oct. 2016)

Abstract excerpt:

p. 261: "...[T]he Second Circuit has held, any condition of supervised release that infringes on a constitutionally protected right may be mandated only where it is narrowly tailored to serve a compelling government interest. Because there are a number of viable, less intrusive alternatives, PPG testing as it stands today is not narrowly tailored enough to serve a compelling government interest..."



Which of these men popped a woody when contemplating dandling small children on his knee? How would you know? When nothing sexual ever happened, what would it matter?

Text excerpt:

p. 273: "...Indeed, the selection of stimuli has such a great impact on the erectile response measures that 'an experimenter could construct stimulus materials for use in a study in which any desired result could be obtained.'⁴⁹⁷

p.274: "...Without training and without stand-

and procedural guidelines, the following aspects of PPG testing vary greatly from [treatment] center to center:

- (1) Type of gauge used (mechanical, mercury) and transducer placement
- (2) Type of stimuli used (audiotapes, slides, videotapes)
- (3) Content of stimuli used (differences in models)
- (4) Duration of stimulus presentation (2 sec. to > 4 min.)
- (5) Length of interstimulus (detumescence) intervals (fixed times vs. return to baseline)
- (6) Nature of stimulus categories sampled...
- (7) Number of categories and of stimuli used for each category
- (8) Instructions to subjects (imagine a sexual behavior with target vs. no instructions)
- (9) Whether a warm-up was used and number of assessment sessions
- (10) Type of recording instrumentation used
- (11) Whether calibration was used to correct for any nonlinear characteristics of recording
- (12) Data sampling rate (every 5 sec. vs. every min.)
- (13) Whether methods were used to attempt to assess for faking
- (14) Gender and other characteristics of the evaluator
- (15) Type of data transformation (Z-score vs. a deviance index)
- (16) Characteristics of the laboratory... [and]
- (17) Type of sample and setting (outpatient, prison).¹⁰⁸

p. 275: "Howes concluded that such incon-

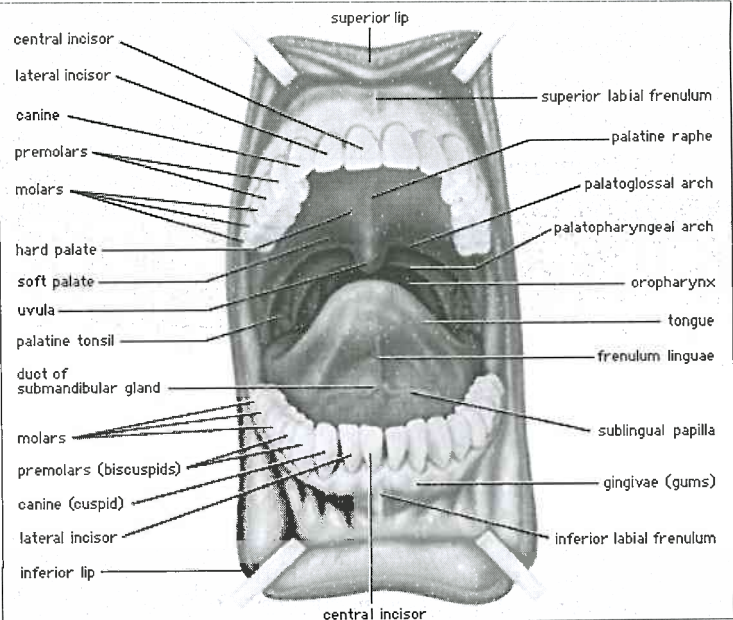
supporters and critics of PPG testing agree, those subjects who wish to trick the PPG will likely be successful.¹¹¹ Individuals may fake responses by fantasizing about deviant sexual scenes while being presented with nondeviant stimuli or may try to distract themselves while deviant stimuli are presented.¹¹² Even tests designed to ensure that the subject is paying attention to the stimuli are not foolproof, as many studies have shown that men can exert control over their erectile response or suppress their response entirely.¹¹³

p. 276: PPG test results have meaningfully distinguished rapists from nonrapists when the patients themselves identify as forced-oriented in their behavior toward women.¹²⁸ Those findings are representative of many other studies that have found that, in general, those who admit their conduct are much more likely to be correctly classified as an offender than those who deny their deviant arousal. One study found that 90 percent of 'admitters' were correctly classified as sex offenders using a PPG, while only 55 percent of 'non-admitters' were correctly classified.¹²⁹ ..."

p. 277: "2. What Do PPG Test Results Say about the Risk of Recidivism?

"Understanding that PPG testing can measure deviant sexual arousal does not answer what may prove to be an even more important question: What is the relationship between PPG results and recidivism?¹³⁴ It is, after all, the behavior that is the crime, not the arousal..."¹³⁵

"When a man engages in sexually deviant behavior, it may or may not be based on his



PPG researchers have now moved to the question of whether some sensory apparatus could be fitted into a male's mouth to determine whether the tongue may have a propensity to engage in illegal oral sex or to spew out repulsive language ("potty-mouth syndrome").

activity because he is aware of social and penal sanctions that come with acting on his deviant arousal.¹³⁸ Such concerns, among others, leave PPG testing's ability to predict the risk of recidivism largely unsettled.¹³⁹ pp. 277-78: "...[P]redicting who is at risk to commit a sexual crime and who is likely to recidivate cannot be predicted with even a moderate level of confidence.¹⁴⁵ Due to issues with the standardization of PPG testing, the test's lack of reliability, and the potential for faking, PPG testing's ability to predict the 'likelihood of reoffending is beyond the scope of the test's validity.¹⁴⁶

"Critics of the PPG find it problematic that some researchers have been content to use erectile response data without conducting meaningful inquiries into issues that implicate the test's validity.¹⁴⁷ The lack of standardization across the administration and scoring of the PPG makes any data derived from the procedure 'idiosyncratic, unamenable to normative comparisons, if not impossible to interpret from a traditional psychometric perspective.¹⁴⁸ Moreover, there may be significant biases resulting from studies that exclude data from nonresponders or low responders, an exceedingly common practice among PPG practitioners.¹⁴⁹ The sheer lack of evaluations of the test's validity regarding the biases associated with the exclusion of nonresponders suggests that PPG test results cannot be trusted to predict recidivism.¹⁵⁰

"Further, just as the risk of faking casts doubt on the reliability of PPG testing, it also is usually defined as the most significant hurdle to using test results to forecast recidivism.¹⁵¹ As one study found, '[s]erious

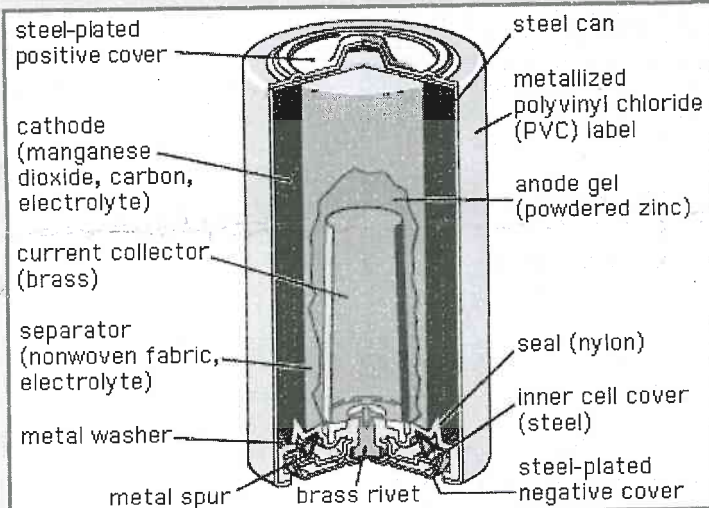
as [standardization] problems are, they are secondary to a more fundamental problem: the utility of the plethysmograph with offenders is severely handicapped by the subjects' ability to distort their responses.¹⁵² The consensus that fakers will be successful in faking¹⁵³ casts significant doubt on any predictive value of the PPG.¹⁵⁴

p. 279: "...Subjects who fail to produce erectile responses present 'noninterpretable' data, even though such failure could be due to a number of factors, including faking or a real lack of sexual arousal to the stimuli.¹⁵⁵ Rapists and incestuous child sex offenders often provide ambiguous sexual arousal results and have similar responses to nonoffending populations.¹⁵⁶ It is nonfamilial child molesters whose erectile data appear most deviant, but even within that subgroup, 'no more than 50 [percent] of those who admit to offending and who have multiple victims display deviant arousal.'¹⁵⁷

Notes:

- 97 H.E. Barbaree, "Stimulus Control of Sexual Arousal: Its Role in Sexual Assault," in *Handbook of Sexual Assault*, at 120 (W.L. Marshall et al., eds., 1990).
- 108 D. Richard Laws, "Penile Plethysmography: Will We Ever Get It Right?," in *Sexual Deviance: Issues and Controversies*, at 87-88 (Tony Ward et al., eds., 2003).
- 109 Richard J. Howes, "A Survey of Plethysmographic Assessment in North America," 7 *Sexual Abuse* 9, at 22 (1995).
- 110 William D. Murphy & Howard E. Barbaree, *Assessments of Sex Offenders by Measures of Erectile Response: Psycho-*

(Continued on page 10)



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The PPG Concept of the Human Male Penis

sistencies across treatment facilities 'discredit' PPG testing and cast serious doubt on its results.¹⁰⁹ "Further, there are numerous documented issues that arise from 'faking.'¹¹⁰ As both

preference for sexually deviant activity.¹³⁵ Nondeviant activity simply may have been unavailable to the offender.¹³⁷ By contrast, a man may be aroused by sexually deviant stimuli, but engage in exclusively nondeviant

(Continued from page 9)

metric Properties and Decision Making at 70-72.

- 111 Telephone interviews with Dr. D. Richard Laws, Dir., Pac. Behavioural Assessment (Nov. 9, 2015) & with Dr. William Murphy, Professor of Psychiatry, Univ. Tenn. Ctr. Health Sci. in Memphis (Nov. 2, 2015).
- 112 *Dean Tong*, "The Penile Plethysmograph, Abel Assessment for Sexual Interest, and MSI-II: Are They Speaking the Same Language?," 35 *Am. J. Fam. Therapy* 187, at 190 (2007).
- 113 Telephone interview with Dr. D. Richard Laws, supra note 111; see also *James G. Barker & Robert J. Howell*, "The Plethysmograph: A Review of Recent Literature," 20 *Bull. Am. Acad. Psychiatry L.* 13, at 23 (1992).
- 128 *Murphy & Barbaree*, supra note 110, at 49-50; see also *Quinsey et al.*, "Actuarial Prediction of Sexual Recidivism," 10 *J. Interpersonal Violence* 85, at 101-02 (1995).
- 129 *Murphy & Barbaree*, supra note 110, at 40
- 134 See *Richard J. Howes*, "A Survey of Plethysmographic Assessment in North America," 7 *Sexual Abuse* 9, at 12 (1995).
- 135 *David M. Friedman*, *A Mind of Its Own*, at 233 (2001).
- 136 *Murphy & Barbaree*, supra note 110, at 13, 15.
- 137 *Id.* at 16.
- 138 *Id.*
- 139 See *Laws*, supra note 108, at 93.
- 145 *Barker & Howell*, supra note 113, at 22.
- 146 *Id.*
- 147 See *Walter T. Simon & Peter G.W. Schouten*, "The Plethysmograph Reconsidered: Comments on *Barker and Howell*," 21 *Bull. Am. Acad. Psychiatry L.* 505, at 511 (1993).
- 148 *Id.* at 510-11.
- 149 See *id.* at 511.
- 150 See *id.*
- 151 See *id.*; see also telephone interview with Dr. D. Richard Laws, supra note 111
- 152 *Simon & Schouten*, supra note 147, at 511.
- 153 Telephone interviews with Dr. D. Richard Laws, supra note 111 & with Dr. William Murphy, supra note 111.
- 154 *Simon & Schouten*, supra note 147, at 511.
- 165 *Murphy & Barbaree*, supra note 110, at 85.
- 166 *W.L. Marshall & Y.M. Fernandez*, "Sexual Preferences: Are They Useful in the Assessment and Treatment of Sexual Offenders?," 8 *Aggression & Violent Behav.* 131, at 139 (2003).
- 167 *Id.*

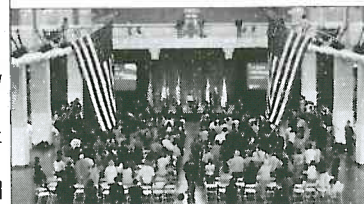
Risk-Needs Assessment - Constitutional & Ethical Challenges

Melissa Hamilton, "Risk-Needs Assessment: Constitutional and Ethical Challenges," 52 *American Criminal Law Review* 231 (Spring 2015)

Text excerpt: p. 240-42: "III. Critical Observations of Risk-Needs Assessments"

The philosophy underlying evidence-based practices, along with its goal of informing a host of correctional decisions, certainly are laudable. Policymakers and justice officials should be praised for seeking out progressive ideas and engaging alternative options, as opposed to the frequent presumption of incarceration that has burdened their corrections systems over the last thirty years.⁶⁹ However, scholars and practitioners are debating the appropriateness of using risk-needs tools for criminal justice-oriented decisions due to the presence of potentially objectionable variables within them. Risk-needs tools incorporate a host of factors that are demographic in nature, score on measures involving personal and social functioning, increase risk predictions based on the presence of mental conditions and drug addictions, and rate attitudes indicative of an antisocial outlook. Consequently, a variety of the items scored in risk-needs assessments raise constitutional, ethical and normative issues.⁷⁰ For reference, Appendix A contains a summary list of the factors and measures used in some of the most popular risk-needs instruments, sorted by generation.

Risk-needs tools normally score at least several demographic characteristics of the individuals evaluated. Among various instruments, these entail age,⁷¹ gender,⁷² citizen-



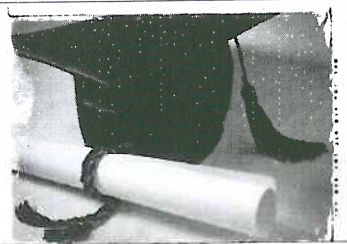
Swearing-In Ceremony for New Citizens



Marital Status

ship,⁷³ and marital status.⁷⁴ Risk-needs tools orient toward rating demographic variables regarding various aspects of family of origin, including having lived with both biological

parents until age sixteen,⁷⁵ a criminal family,⁷⁶ parental alcohol problem,⁷⁷ and current family situation.⁷⁸ Ratings are commonly provided relative to the individual's personal history, namely criminal background,⁷⁹ educational attainment,⁸⁰ and employment stability.⁸¹ The instruments often contain



Educational Attainment



Stability of Employment

measures implicating socioeconomic status, such as financial condition,⁸² ownership of home,⁸³ residential stability,⁸⁴ and living in a neighborhood with high crime⁸⁵ or illegal drug activity.⁸⁶



Home Ownership



High Crime Neighborhood

Some risk-need tools compile and rate various aspects of personal and social functioning. Examples consist of elementary school adjustment⁸⁷ and problems with personal support,⁸⁸ in addition to factors focused on reliance on social services or public assistance,⁸⁹ which may suggest deficits in personal responsibility. Various measures rate relationship issues involving family, consisting of relationship with parents⁹⁰ and marital/family problems,⁹¹ and

social functioning, such as a history of problems with relationships,⁹² social adjustment problems,⁹³ lack of pro social support,⁹⁴ and maintaining criminal acquaintances.⁹⁵

Addictions and mental conditions are commonly integrated therein. These include problems with alcohol⁹⁶ or drugs,⁹⁷ a history of a mental disorder,⁹⁸ personality disorder,⁹⁹ psychopathy,¹⁰⁰ or of mental health treatment.¹⁰¹ Several of the instruments judge attitudes, such as temperament towards supervision and change,¹⁰² lack of insight,¹⁰³ personal instability,¹⁰⁴ and problems with stress and coping.¹⁰⁵

Upon reviewing the foregoing summary, and the list of variables contained in Appendix A, one might well be both comforted that many of the factors appear perfectly suited to assessing risk and criminogenic needs, yet likewise concerned that more than a few implicate - directly or by proxy - characteristics for which we are sensitive in terms of exploiting certain attributes to rate and classify individuals, perhaps even to punish. Therefore, reliance upon risk-needs assessments when they incorporate potentially problematic factors in the important arena of criminal justice decisions incites constitutional and moralistic concerns. The constitutional doctrines on point include equal protection, prisoners' rights, and sentencing law. The moral issues involve political unease when decisions are based on immutable characteristics over which individuals have no personal control or that may serve directly or by proxy to replicate discriminatory practices."

pp. 277-78: "B. Ethical and Normative Concerns

In addition to voices claiming that certain aspects of risk-needs tools are illegal, many contend that they contain a host of factors that should be deemed unethical - regardless of their unconstitutionality - to use in a criminal justice context. One concern is that risk-needs tools may serve to punish normative lifestyle choices that individuals in a free society are otherwise at liberty to make, such as whether to marry, pursue an education, remain unemployed, or purchase a home.³³⁶ The ethics-based complaints most often center around the idea that immutable characteristics should be excluded, such as race, ethnicity, religion, gender, and perhaps age.³³⁷ A scholar cites generalized human rights legislation that prohibits the use of age, sex, race, and disability in discriminatory ways.³³⁸ Another believes that the idea of "[p]aying a penalty justified only by an immutable personal characteristic runs counter to nationwide trends in equity and imposes serious societal costs' including detaching punishment from the culpable act, unfortunately segregating individuals within predic-

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tive groups, and suffering many false positives.³³⁹

Other commentators are likewise concerned with the idea of culpability. It may appear unethical and immoral to base decisions that impact liberty interests on immutable characteristics considering individuals bear no responsibility for them,³⁴⁰ or on any other characteristic for which the individual has little control, such as mental or physical health status.³⁴¹ A quotation from the Supreme Court may support this idea, whereby equal protection law is at times concerned with a classification based on an immutable characteristic which its possessors are powerless to escape or set aside. While a classification is not *per se* invalid because it divides classes on the basis of an immutable characteristic, it is nevertheless true that such divisions are contrary to our deep belief that 'legal burdens should bear some relationship to individual responsibility or wrongdoing,' and that advancement sanctioned, sponsored, or approved by the State should ideally be based on individual merit or achievement, or at the least on factors within the control of an individual.³⁴²

Notes:

69 *Melissa Hamilton*, "Prison-by-Default: Challenging the Federal Sentencing Policy's Presumption of Incarceration," 51 *Hous. L. Rev.* 1271, 1272-74 (2014) (noting that the United States earns world's highest incarceration rate).

70 *Michael Tonry*, "Legal and Ethical Issues in the Prediction of Recidivism," 26 *Fed Sent'g Report* at 167, 169 (2014).

71 PCRA; PTRR; VRAG; Static-99; COMPAS. See *infra* App. A (summarizing risk assessment tools); *Northpointe*, Practitioner's Guide to COMPAS, at 20, 27 (2013); see also *Minn. Dept. of Corr.*, The Minnesota Sex Offender Screening Tool-3.1 (MnSOST-3.1): An Update to the MnSOST-3, at 33 (2012).

72 COMPAS. See *infra* App. A (summarizing risk assessment tools); see also *Sanja B. Starr*, "Evidence-Based Sentencing and the Scientific Rationalization of Discrimination," 66 *Stan. L. Rev.* 803, 823 n. 76 (2014) (listing instruments that incorporate gender). PCRA includes the Psychological Inventory of Criminal Thinking Styles (PICTS) with a gender-based scoring system.

73 PTRR. See *infra* App. A (summarizing risk assessment tools).

74 PCRA; VRAG. See *infra* App. A (summarizing risk assessment tools).

75 VRAG. See *infra* App. A (summarizing risk assessment tools).

76 LSI-R; COMPAS. See *infra* App. A (summarizing risk assessment tools).

77 VRAG. See *infra* App. A (summarizing risk assessment tools).

78 PCRA; LSI-R. See *infra* App. A (summarizing risk assessment tools).

79 PCRA; PTRR; VRAG; Static-99; LSI-R. See *infra* App. A (summarizing risk assessment tools).

80 PCRA; PTRR; LSI-R; COMPAS. See *infra* App. A (summarizing risk assessment tools).

81 PCRA; PTRR; HCR-20; LSI-R; COMPAS. See *infra* App. A (summarizing risk assessment tools).

82 LSI-R; COMPAS. See *infra* App. A (summarizing risk assessment tools).

83 PTRR. See *infra* App. A (summarizing risk assessment tools).

84 LSI-R; COMPAS. See *infra* App. A (summarizing risk assessment tools); see also *Edward Latessa et al.*, Creation and Validation of the Ohio Risk Assessment System, Final Report, 49, App. A (2009).

85 LSI-R. See *infra* App. A (summarizing risk assessment tools).

86 *Latessa et al.* (note 84) at 49.

87 VRAG. See *infra* App. A (summarizing risk assessment tools); see also LSI-R (rating school suspensions and level of participation in school activities). *Id.*

88 HCR-20. See *infra* App. A (summarizing risk assessment tools).

89 LSI-R. See *infra* App. A (summarizing risk assessment tools).

90 PCRA; LSI-R. See *infra* App. A (summarizing risk assessment tools).

91 *Id.*

92 LSI-R; HCR-20. See *infra* App. A (summarizing risk assessment tools).

93 LSI-R; HCR-20; COMPAS. See *infra* App. A (summarizing risk assessment tools).

94 PCRA; LSI-R; COMPAS. See *infra* App. A (summarizing risk assessment tools).

95 LSI-R; COMPAS. See *infra* App. A (summarizing risk assessment tools).

96 PCRA; VRAG; LSI-R. See *infra* App. A (summarizing risk assessment tools).

97 PTRR; LSI-R; HCR-20; COMPAS. See *infra* App. A (summarizing risk assessment tools).

98 HCR-20; LSI-R. See *infra* App. A (summarizing risk assessment tools).

99 VRAG; HCR-20. See *infra* App. A (summarizing risk assessment tools).

100 *Id.*

101 LSI-R; HCR-20. See *infra* App. A (summarizing risk assessment tools).

102 PCRA; LSI-R; HCR-20. See *infra* App. A (summarizing risk assessment tools).

103 HCR-20. See *infra* App. A (summarizing risk assessment tools).

104 LSI-R; HCR-20. See *infra* App. A (summarizing risk assessment tools).

105 *Id.*

336 *Tonry*, *supra* note 70, at 171.

337 *Brian Metter*, "Using Group Statistics to Sentence Individual Criminals: An Ethical and Statistical Critique of the Virginia Risk Assessment Program," 97 *Crim. L. & Criminology* 699, at 716-17 (2007).

338 *Ivan Zinger*, "Actuarial Risk Assessments and Human Rights: A Commentary," 46 *Canadian J. Criminology & Crim. Just.* 607, 611 (2004).

339 *Metter*; note 337, at 728.

340 *Tonry*; note 336, at 171.

341 *Christopher Slabagin*, *Proving the Unprovable: The Role of Law, Science, and Speculation in Adjudicating Culpability and Dangerousness* 113 (2007); *Thomas Nilsson et al.*, "The Precarious Practice of Forensic Psychiatric Risk Assessments," 32 *Int'l J. L. & Psychiatry* 400, 406 (2009) ("A basic demand on just legislation is that all offenders are to be treated equally and fairly, which is hardly the case judging from the way society has singled out the category of mentally disordered subjects as especially perilous. They are supposed to be extensively scrutinized and, when there is a risk for relapse into criminality, they are handed over to an unlimited form of detention with considerably reduced individual rights.').

342 *Regents of the Univ. of California v. Bakke*, 438 U.S. 265, 360-61 (1978) (citation omitted) (quoting *Weber v. Aetna Casualty & Surety Co.*, 406 U.S. 164, 175 (1972)).

Reform First, Then Treat — An Open Letter-Excerpt to an Organizer Against Sex Offender Commitment

by Cyrus Gladden

Your Oct. 6th letter mentioned that "The Legal Pad September 25th article has been sent to over 100 individuals." Thank you BTW - Please don't think of me as a "hero" (your term). I'm just a guy trying to do what I can to bring sex offender commitment to an end and to remediate various legal requirements of, and prohibitions upon released sex offenders.

I am a hard worker at these tasks, and I do try to bring my brains to the table, so to speak. I just fervently hope that all those who admire my efforts in their behalf as well as my own will put on their own superhero outfits and jump into the fray with me. Everyone can do something helpful.

Tell the motivated not to be shy. They should contact you or me and volunteer, listing their skills and the resources to which they have access. Don't forget: the American

Revolution was carried on the backs of devoted Minutemen and volunteer soldiers who had little but did much. Sheer grit, determination, and creativity can stretch the thinnest of resources into great victories.

I do hope to bring together others I hope to find, so that they can form a grass-roots Minnesota entity in active opposition to sex offender commitment and other forms of abuse of past sex offenders.

From my perspective here in Minnesota ("land of 10,000 treatment centers"), I have seen many abuses by entities and organizations holding themselves out as therapists for sex offenders, but which ultimately were revealed as opportunists making a career off the trapped circumstances of sex offenders. This has been shown to be the case, whether it be in prison, on probation or parole, or in commitment.

MSOP itself is a prime example of these abuses, as illustrated by its therapists and their bosses, who assert with straight faces that we supposedly require an average of 15 to 20 years of treatment before they would even consider supporting a request by any of us to be placed on "provisional discharge." (And bear in mind that "provisional" is so over-surveilled that its agents insist on staying with the releasee at his workplace. What firm do you know that would ever put up with such nonsense?)

I have also researched the question of what difference treatment of sex offenders actually makes in recidivism. The answer that emerges time and again is that there is no significant evidence that even the most extreme treatment modalities and durations make any statistically significant difference in recidivism outcome.

Further, the entire panoply of "dynamic" so-called "needs" are all just 'sounds logical' claims not backed by any reliable science.

"Don't forget: the American Revolution was carried on the backs of devoted Minutemen and volunteer soldiers who had little but did much. Sheer grit, determination, and creativity can stretch the thinnest of resources into great victories."

For instance: I have no problem with a treatment program that, for the properly short period of an apt treatment program for sex offenders, some attention might be paid to checking for one's level of empathy, and then trying to some degree to develop in the offender some level of basic empathy during that limited term of therapy. (And I say this even though R.K. Hanson - creator of the Static series of ARAs - found that the "dynamic factor" of victim empathy has no

(Continued on page 12)

(Continued from page 11)

perceptible impact on recidivism.)

But taking the average sex offender post-lengthy incarceration (currently, most sex sentences result in about 20 years of imprisonment) and, fresh from that hellish environment of violence, rape, toughest-man-wins, weakest-is-extorted, all-else-suffer-substantial-injury, overseen by the most vicious anti-social guards you could imagine (start with *Shawshank Redemption*, then multiply by ten), and trying to inculcate a level of empathy seldom seen outside of Emily Post etiquette books is a recipe for failure under the best of circumstances.

Insisting on success on pain of not being released by therapists who effectively have the power to decide between such release from commitment and death from old age incarcerated is not just asking the impossible, it is a coercive environment so reflective of where such inmates just came from that the likely outcome is not just treatment collapse, but chaos and violence.

Further, the entire notion that one can 'treat' sex offenders under such coercion, even extending to insisting that they not only listen to its childish smarm, feminist theory, and rank paraphobia, but then parrot it back and somehow fool/convince such therapists that one embraces it so deeply that one practices such philosophies on a daily basis in order to 'earn' release is an attempt at brainwashing of those who are simply doing their best to stuff their true feelings of deepest resentment for having thoughts involuntarily jammed down their throats.

Taking the average sex offender post-lengthy incarceration (currently, most sex sentences result in about 20 years of imprisonment) and, fresh from that hellish environment of violence, rape, toughest-man-wins, weakest-is-extorted, all-else-suffer-substantial-injury, overseen by the most vicious anti-social guards you could imagine (start with *Shawshank Redemption*, then multiply by ten), then trying to inculcate a level of empathy seldom seen outside of Emily Post etiquette books is a recipe for failure under the best of circumstances."

'Treatment' really can't succeed at making people over again - something that virtually every so-called sex offender treatment program in the country tries to do - AND insists that their captive audience demonstrate that they have "changed" to that level of remake. This is why the statistics reso-

lutely fail to show any significant difference in outcome between those who attend treatment and those who don't.

This is not to say that there is no hope for sex offenders to not recidivate. Au contraire, very few do recidivate. Even among those who recidivate once, the odds that they will recidivate again thereafter dwindle more than they did for the first recidivistic crime, and the odds of yet another recidivistic sex crime after that are exceedingly rare. For the most part, if not entirely, two phenomena are responsible for this: (1) simple maturation/aging, and (2) desistance for other reasons.

Yet so-called sex offender treatment, rather than capitalizing on these well-known, undeniable phenomena, tries to act as if they don't exist, and as if the only way that one will avoid a life of lathering craving for their next sex crime is through 'embracing the faith' of treatment.

I don't know who these charlatans think they're fooling - apparently officials and members of the public subject to excessive disgust and hysteria, but this sure doesn't sell among those who have actually committed sex crimes.

The entire notion that one can 'treat' sex offenders under such coercion, even extending to insisting that they not only listen to its childish smarm, feminist theory, and rank paraphobia, but then parrot it back and somehow fool/convince such therapists that one embraces it so deeply that one practices such philosophies on a daily basis in order to 'earn' release is an attempt at brainwashing of those who are simply doing their best to stuff their true feelings of deepest resentment for having thoughts involuntarily jammed down their throats.."

Pragmatism should rule the day. Most sex offenders secretly resolve not to offend again. Those who seek to prevent sex-crime recidivism would do well to simply ask sex offenders, one-on-one, why they aren't going to do so and, depending on the content of that starting point, seek to foster and build upon that resolve with all sorts of cognitive buttressing.

Some of this, as stated above, should focus on realizing the victim's perspective to create an understanding of the horror of the experience inflicted and/or the revulsion created (i.e., empathy, as it applies to notions of sex crimes).

The rest should simply cognitively aim to convince the offender of the non-starter futility of the notion of being able to get away

with committing a sex crime, and to create the realization that recidivism will very likely result in life imprisonment without parole.

This part is capable of being imparted through seminars with law enforcement personnel. Most sex offenders simply have deluded themselves into thinking that law enforcement is 'asleep at the switch' when it comes to sex crimes. In fact, police efforts to prevent, interdict, and investigate sex crimes to apprehension of the offender are every bit as intense these days as murder investigations. Given current crime scene and other forensic tools and nearly foolproof methods of identification of suspects, most sex crimes are now solved within three days, often much less.

I would be happy to advocate for reform of sex offender treatment to strip itself down to the basics I am talking about here: (1) victim understanding/empathy; (2) realization of the tragic futility of further sex offending; (3) understanding of where the offender fits within the various modes of desistance; and (4) finding satisfying sexual outlets not involving sex crimes. All of this is not rocket science; it easily can be accomplished within one year (if not less) of treatment (mostly seminars and one-to-one sessions - not 'group therapy' (almost always a 'shit show' of posturing and 'chewing the scenery' in emotional dishonesty).

In my view, any treatment professional unwilling to convert to this mode should be fired and expelled from the field: as they are just leeches.

No advocacy organization should be in the business of directing sex offenders into endless treatment.

Thanks for considering these points.

Important Subscription Notice!

A request (on a blue half-sheet stapled to the last issue of *The Legal Patch*) sought names of MSOP residents' family members and/or friends who may be willing to take part in a support organization.

The dual mission of this projected organization is: (1) to do everything possible to bring MSOP and sex offender commitment in Minnesota to an end; and (2) meanwhile, to demand that we be consistently given dignity and respect, and be accorded every right we would have if not under such commitment, subject only to the security needs of preventing escapes, violence, and criminal receipt and possession of statutory contraband.

While this 'supporter drive' has been modestly successful so far, we need many more supporters to form and operate the advocacy and action organization that we

need to accomplish anything worthwhile.

Separately, the costs of producing the newsletter and mailing it to leading outside supporters and to advocacy organizations at the nationwide level that are providing/will provide significant aid and support have mushroomed several-fold since TLP was founded.

This latest function of the newsletter is vital and is already having substantial persuasive effect in the free world, most significantly among media outlets and the academic world. In part thanks to TLP and other media presences inspired by it, the light of truth is finally beginning to dawn. We must keep this effort going strong.

In light of these needs, the donation requested for TLP subscription service during 2019 must increase.

However, to reflect the importance and urgency of everyone here responding to the drive for supporters who will come forward and help our cause for freedom in meaningful, organized ways, there will be a two-rate structure for 2019 suggested donations.

The suggested donation rate for those who have already provided, or who provide at or before subscribing at least one name with valid contact information of an outsider who is willing to at least join (or help lead) the projected organization will be less.

Conversely, the rate for those who have not and do not provide such a name and contact information will be substantially more.

This two-tier system applies equally to renewals of existing subscriptions. As a reminder: All subscriptions end on December 31st. Late subscriptions/renewals will be honored with past 2019 issues provided.



May your Thanksgiving be thankful!

Request

If anyone reading this has received the *Prison Legal News* edition containing the article, "New Rules Spark Uprising at California Pre-Crime Facility," or words to similar effect), please allow me to read that article so I can report on it. This refers to the sex offender commitment facility in California, which currently houses over 1500 committed individuals. Among other intriguing questions needing answers is whether there is a nationwide trend toward such tougher rules under-way nationwide in analogous facilities.
