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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— Part 2 of 2
- ✓ MSOP Media Censorship vs. Disconnect between Imagery & 'Hands-on' Sex Crimes
- ✓ Equal Protection - Strict Scrutiny Can Strike Down SO Commitment As Quasi-Criminal
- ✓ Polygraphs for the Defense
- ✓ For Effective Defense Assistance, SO Commitment Appointed Attorneys Must Be Educated Specialists
- ✓ Internet Access for Prisoners is Advocated: Why Not Us?
- ✓ Is Coaling Our Future? — & Tons More!

The Status of Karsjens, Gladden & Wage Cases:

The status of the Wage Case is reported in the lead article stating at left. The Karsjens case is now in the early stage of a second appeal based on an argument that Minnesota SPP/SDP commitment is effectively punitive in nature. Judge Frank thought this argument was sunk by the 8th Circuit's reversal of his original ruling. However, a 2015 Supreme Court case (*Kingsley*, discussed in an earlier TLP edition), raises some doubt about that, and may breathe new life into Karsjens, even at this late date. How the second appeal is handled by the 8th Circuit and possibly SCOTUS will decide this question with finality. Meanwhile, since the Gladden case also will be largely affected by this, it remains on hold until that appellate decision.

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Wage Case News:

Wage Court to Allow Collective Plaintiff Signup

Editor's Note: The purpose of this article is to state clearly the most recent court action in the "Wage Case" (officially, *David Le Roy Gamble, Jr. Cyrus Patrick Gladden II, David James Jannetta, Jerrad William Wailand, and Clarence Antonia Washington, et al. v. Minnesota State-Operated Services, et al.*). I also aim to dispel rumors about the status of the case that are inaccurate or highly premature. Lastly, I hope to layout a clear description of where the Wage Case will go from here.

The latest judicial action in the case is procedural in nature. That means that it does not either dispose of the case or grant us judgment in our favor. To understand this ruling by the magistrate judge in the case, first, you must understand the exact kind of case this is.

From the long-pending *Karsjens* case, everyone knows what a "class action" is — generally. However, in wage-recovery cases by many persons, a similar, but not identical form of a case is used. This type is known as a "collective action."

The most important difference between the two types is that in a class action, the class is simply described. When a court accepts that class, everyone who meets that description of the situation of members of the class is automatically included in the class.

However, in a collective action, in order to become part of the plaintiffs in the case, everyone other than the originally named plaintiffs (the five named above) must sign a form given to them saying that they agree to be an additional plaintiff (a "collective plaintiff") in the case.

You will probably recall that, before we had representation by an attorney, we had MSOP inmates who had worked sign a "consent form" seeking to join in as such plaintiffs. However, the court ruled that we could not go forward as a collective action without an attorney. This is a requirement always applied to a class action, but its applicability to a collective action was not in case reports available to us.

This ruling forced me to scramble to see if we could find counsel who would represent us, thereby allowing the case to proceed on behalf of all impacted MSOP workers. After some diligent investigation and a number of exploratory conferences, I settled on the firm that presented the most expertise and experience in similar wage-recovery cases and that also showed energy and the most enthusiasm for our case in particular.

With this introduction out of the way, the magistrate judge's *Report and Recommendation* that I recently received recommended to the presiding district judge that:

"1. The plaintiffs' Motion to Certify Conditional Class, Proposed Notice and Opt-in Period be GRANTED with the following modifications:

a. Plaintiffs' version of the *Notice of Right to Participate in Collective Action* and attached *Consent to Become Party Plaintiff* ("Notice" and "Consents"), at Exhibit A to the affidavit of [Attorney] Charlie Alden, ECF No. 175, is the court-approved notice, with the alteration of the date as described above.

b. Consistent with the Parties' Stipulation attached as Exhibit B to the affidavit of Charlie Alden, ECF No. 175, within 15 days of an Order adopting this *Report and Recommendation*, Defendant shall provide Plaintiffs' counsel with a list of the names and addresses of all participants in MSOP's Patient Pay Program who have participated in the program since August 12, 2013.

c. Within 15 days of having been provided with the list of names, Plaintiffs' counsel will mail out the court-approved Notice to all potential class members.

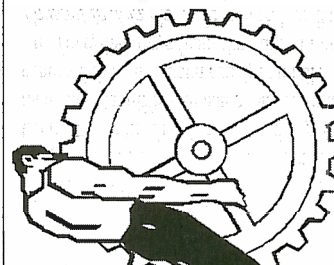
d. Consents to join the conditionally certified collective action shall be effective if dated and postmarked by the opt-in class member 90 days from the date they are mailed by Plaintiffs' counsel. Plaintiffs' counsel shall promptly file all received Consents upon receipt on ECF.

e. Forty-five days from the date of mailing the *Consent to Join*, Plaintiffs' counsel shall send the agreed-upon *Reminder Letter* to all potential class members who have not already returned their Consents to Plaintiffs' counsel.

f. Within ten days after the Presiding Judge's Order on this *Report and Recommendation*, the Parties shall revise and submit a *Stipulation and Proposed Order* reflecting all other matters agreed-to by the parties set forth in the stipulation attached at Exhibit B to the Affidavit of Plaintiffs' counsel, reflecting the dates set forth in this *Report and Recommendation*, or *Order on Report and Recommendation*, and all other matters agreed to by the parties. Date: November 14, 2018."

At present, that's where we stand. This R & R has yet to be accepted, but no difficulty is expected there, and hence, that approval is expected very soon.

Now allow me to squash some rumors that are making the rounds about the Wage Case as this is written.



First, the case is not yet won. Way back before we secured counsel, the Defendants moved for dismissal. The outcome was a 'split-decision' of a sort. Our first *Complaint* included a number of claims of constitutional violations as well as the 'main event' claim of Defendants' violation of the federal minimum wage requirement in the federal *Fair Labor Standards Act* ("FLSA"). That dismissal motion was successful as to those constitutional claims but unsuccessful as to the FLSA claim. Hence, that is the claim that we are still rolling forward upon in the Wage Case.

However, the court's denial of dismissal on that claim was not final. The District Judge indicated that the issue of whether the 2012 *Martin v Benson* case bars our FLSA claim can be revisited if Defendants raise that argument again on a motion for summary judgment at the close of discovery in the case (that is, before trial).

The circumstance in which this renewed argument by Defendants might occur is if discovery in the case produces further evidence supporting Defendants' contention that we are being provided all of our needs by MSOP regardless whether we work, such that we have no need to be paid the federal minimum wage.

We Named Plaintiffs can't imagine what more they could say to support that contention beyond facts mentioned in that dismissal motion itself. Indeed, it seems likely that discovery will blow holes in that contention in at least several meaningful ways.

Most obviously, we are being billed for our care, and, regardless of the amount that they bill us now, we remain legally responsible to pay the total cost of care. The partial-wages they have taken from us have never been deducted from that total cost-liability amount, and no administrative process exists for such reduction.

Therefore, it would seem very clear that MSOP is not truly giving us all of our needs, only advancing them to us. At least in the somewhat theoretical likelihood that we might eventually be released and gain significant wealth, we would be expected to pay for all costs of our care, including the cost of everything provided (and all other costs of MSOP operation, divided among us in that *per diem* fashion).

Finally on this point, case law under the minimum wage sections of the FLSA has consistently held that charges an employer bills an employee for as to goods or services that the employee had no choice about whether to accept such items cannot be deducted from the federal minimum wage as paid to such employees. This often comes up as to meals and lodging provided by employers, for instance.

This principle of law appears to apply to us with

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similar full effect. Hence, I seriously doubt that such deduction is supported. It seems illogical in the extreme that an employer (here MN-SDS and MSDP) would be allowed to totally avoid the very requirement for payment of the federal minimum wage merely because it claims that it provided such items that we, as involuntary residents here, have no choice as to whether or not to accept such items, and for which an employer cannot setoff against our minimum wage at all.

Hence, I do not believe that the Defendants will prevail on a summary judgment motion before trial. I do believe that we will win at trial, if not by a summary judgment motion of our own.

While Defendants can then appeal, this kind of case is absolutely not subject to the same "shocks the conscience" standard that was applied by the 8th Circuit to the *Karsjens* case. In general, unlike the issues in *Karsjens*, there is almost no 'waffle room' for a reversal by the 8th Circuit in an FLSA case for minimum wage recovery.

While the 8th Circuit federal appellate court has shown itself to be subject to bias against sex offenders, if it reversed a favorable judgment in the Wage Case, I think the 'cut and dried' nature of applicable FLSA law would probably cause SCOTUS to accept the case at that point and then grant summary reversal of that 8th Circuit ruling, effectively restoring our favorable district court judgment for the confiscated portion of our wages below that federal minimum wage level.

We may also get an award of attorney's fees and an additional amount known as statutory liquidated damages. However, these aspects are not certain and may be governed by discretionary equitable factors that could be subject to some interpretation by the federal district court.

On the downside, the current court ruling limits the period for wage recovery to wages received from August 12, 2013 to the present. That is, earlier wages taken by MSDP from 2009 to early August 2013 are not recoverable.



We thought we had a good argument for wages in that first part of MSDP's wage confiscation policy, but the magistrate judge pointed out that such unlimited recovery is almost unheard of and is only allowed in more extreme circumstances than our case presents. We have no practical choice but to abide by this ruling.

There is another limitation on our recovery, and this one is based on the very nature of the differing minimum wage standards under federal law and Minnesota law. We have no claim under Minnesota minimum wage law because the applicable Minnesota statute says we don't.

For its own purposes, Minnesota law can make this exclusion; that's the nature of our 'federalism' form of government in this country. You might keep this lesson in mind the next time you get to vote and some conservative yahoo is asking for your vote by blathering on about the benefits of 'states' rights.'

Just remember then that states' rights are why you can't get your whole amount of confiscated wages back. In my view, some things should be left for the national government to set for the whole country, and the minimum wage is one of them.

Still, just by relying on the federal minimum wage law, we stand to recoup quite a lot in wages that were taken. And that is far better than getting zero, which is where we stand at the moment.

Overall, I think that our chances of ultimately prevailing in the Wage Case are strong. However, as in all federal cases these days, the timeline stretches long until we can see actual cash recovery coming our way.

While trial was originally scheduled for January, that is no longer doable. Discovery must be had first. The discovery process will take at least four months. Then, as mentioned above, there is a pre-trial opportunity for summary judgment motions. This will likely consume another three to four months. Hence, in all, trial will most likely not take place until late summer of 2019 at the earliest.

Whichever side wins, an appeal can be expected. That process can easily take up to nine months in the 8th Circuit alone, bringing us up to sometime around March 2020. Again, a certiorari petition to SCOTUS will probably be filed by the appellate loser at that point. Grant or denial of these petitions usually takes about six months; this could happen around September 2020. If denied, the case is over, with the 8th Circuit ruling controlling what happens to the case.

On the other hand, if SCOTUS takes the case (and does not summarily reverse the 8th Circuit ruling), briefing will ensue and an oral argument date will be set. This SCOTUS hearing could happen anytime between six months to one year later (March 2021 to October/November 2021), with SCOTUS decision likely about four to six months later (perhaps as late as May 2022). However, SCOTUS review is fairly rare and hence unlikely.

Actually, however, in all reasonable likeli-



hood, if Defendants fail to win summary judgment, they will likely seek to settle the case. This could occur as early as September of next year. Obviously, arriving at a settlement precludes an appeal and ends the case quickly at that point.

In sum, this encompasses the range of possibilities as to how things may go in the Wage Case.

For now, the most important thing to remember is that, if you received any wages for work in MSDP from August 12, 2013 on forward to the present, you should receive a letter from our attorney, Charlie Alden, around two months from now. If you don't receive it within three months, mention that fact to me personally so you can get that letter immediately.

That letter will ask if you wish to join in our lawsuit to recover wages. A response form will be enclosed for you to use. Fill out the form and mail it back to Attorney Alden ASAP.

Since I am not a practicing attorney, I can only give you my advice as just another non-attorney. Here is that advice:

If you had wages in that period, I think you can get such wages in this case by agreeing to join us as such a "collective plaintiff." Let me stress that I believe that joining in this case in that capacity is your only practical way to recover any wages that were taken from you over the years through the wage-confiscation policy of MSDP.

Therefore, I strongly urge you to return that form agreeing to join in with us.

If you don't join with us in this case, even after we win (assuming we do), I heavily doubt that you could ever find a lawyer willing to represent you on your solo claim only for your own amount of confiscated damages. Even if so, such individual representation would probably cost you at least nearly as much as the wages you could recover.

Therefore, once you get this letter, move quickly and decisively to promptly mail that completed form back to Attorney Alden. I believe you will ultimately thank yourself for doing so.

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## The Dubious History of the Ongoing War on Sex Offenders

Emily Horowitz, "Timeline of a Panic: A Brief History of Our Ongoing Sex Offense War," 47 *Southwestern Law Review* 33 (2017)

Text excerpts:

p. 33: "Introduction

"This paper addresses the origins of our irrational and draconian sex-offense legal regime. Our current sex offense policies are rooted in public opinion and emotion, not sound social science research, data, or evidence. There are nearly 900,000 people now listed on public sex offense registries, suffering from profound consequences including public humiliation and effective banishment. Many more are affected, including partners, parents, and children. These laws impact the rest of us by changing the way we raise our children and interact with our neighbors and communities. This paper seeks to unravel the bifurcation of sex offense realities and sex offense policies, by using a brief timeline of key political events, legal milestones, and research findings. I argue that politicized research was misused by political opportunists to develop laws based on the flawed but pervasive idea that those convicted of sex offenses became incurable and predatory monsters requiring - and deserving - lifetime punishment.

**Today (2017): Sex-Offense Panic in Everyday Life**

pp. 33-34: "In May 2017, an 'Ask the Pediatrician' column published on a website run by the American Academy of Pediatrics advised parents that children of 'any age' should never use a public restroom alone, citing the National Center for Missing and Exploited Children.<sup>2</sup> Lenore Skenazy, a longtime and noted observer of our ongoing panic about sex offenses and child safety, correctly branded this advice as 'not just hilarious and ridiculous [but] also insane.'<sup>3</sup> She outlines how this is part of the continuous effort to sow fear and teach children that sexual predators are lying in wait around every corner.<sup>4</sup> This despite the fact that sexual abuse by strangers in bathrooms is exceedingly rare and almost all child sexual abuse is perpetrated by non-strangers.<sup>5</sup>

There are nearly 900,000 people now listed on public sex offense registries...

"The perception that children are in constant danger of sexual abuse by random adults is widespread.<sup>6</sup> Even Cub Scouts hoping to earn promotion badges have to demonstrate awareness about the dangers of sexual abuse.<sup>7</sup> They must answer a set of

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questions about prevention, such as 'What if you are playing in your yard and your neighbor asks you to help carry groceries into his house? What would you do?'<sup>8</sup> (Correct response: 'Check first with a parent or other trusted adult before you change plans, go anywhere, or accept anything from anyone.'<sup>9</sup>) Likewise, they are asked what to do if they are in the bathroom and someone tries to touch their 'private parts.'<sup>10</sup> (Correct response: 'Yell "STOP THAT" as loudly as you can and run out of the room as quickly as possible. (It's your body and you have the right to say no to anyone who tries to touch you in places covered by your swimming suit or to do things that you think are wrong.))<sup>11</sup>

pp. 34-35: "In the early part of the 20th century, however, boy scouts were taught skills to help them survive, such as how to sharpen an axe, build a fire, and do good deeds for the sake of others. A handbook from 1911 notes, 'A scout is helpful. He must be prepared at any time to save life, help injured persons, and share the home duties. He must do at least one good turn to somebody every day.'<sup>12</sup> Compare this to today, when scouts are taught to report a neighbor asking for help with groceries.<sup>13</sup> The 1911 handbook also notes,



Helicopter Parenting

'Besides woodcraft one must know something of camp life. One of the chief characteristics of the scout is to be able to live in the open, know how to put up tents, build huts, throw up a lean-to for shelter, or make a dugout in the ground, how to build a fire, how to procure and cook food, how to bind logs together so as to construct bridges and rafts, and how to find his way by night as well as by day in a strange country.'<sup>14</sup>

Compare this also to today, where scouts are warned about the dangers of entering public bathrooms - even when attentive parents are waiting outside!<sup>15</sup>

There are numerous examples of parental panic about stranger sexual abuse, which has been an ongoing theme in our culture since

the early 1990s.<sup>16</sup> The danger of public bathrooms is only one recent manifestation of this pervasive hysteria, possibly due, in part, to opposition to gender-neutral bathrooms for transgendered persons on the grounds that young girls will be victimized by men posing as women.

### J. Edgar Hoover (1937) and the Early Politics of Sex Offense Panic

pp. 35-36: "We can look back almost a century to see the origins of this panic. In the 1930s, J. Edgar Hoover stirred up fears about the 'sex fiend,' characterizing him as a danger to women and children, and a 'dangerous, predatory animal.'<sup>17</sup> Hoover, as head of the FBI, issues a memo in 1937 warning of the pervasive threat posed by sexual criminals, warning that treating their crimes as 'petty' sex offenses was a mistake, and that 'their every action was a blazing signpost to a future of torture, rape, mutilation and murder.'<sup>18</sup> In his analysis of the 'sex-crime panic' due to Hoover, scholar Charles Morris (2002) argues that the FBI director sought to hide his own sexuality during a panic about homosexual men by whipping up fears about them: 'a man dedicated to this scourge of degenerates certainly could not be one.'<sup>19</sup>

While this 1937 treatise by Hoover is not the sole or primary origin of the sex panic, it does reveal that there has been a longstanding effort made by political and government figures to do two things: first, to claim that efforts to prosecute and punish those convicted of sex offenses is explicitly an effort to protect women and children (Hoover explicitly refers to 'little girls,' 'childhood,' and 'womanhood' as under attack), and, second, that evildoers of this kind are different from 'ordinary' offenders and are destined to reoffend, their crimes invariably growing in seriousness.<sup>20</sup>

Rhetoric today about the sex-offense registry and related laws focuses on the same themes raised by Hoover in 1937: child protection, a pervasive and 'predatory' threat, and the idea that those convicted of sex offenses are unlike 'ordinary' offenders in terms of recidivism.<sup>21</sup> As of today, though, there was little evidence that extreme punishment was a rational or effective response, or that re-offense was inevitable.

At the same time, sex crime and sexual abuse are problems that have always existed. In the 1930s, even as Hoover was stirring up fears of monstrous and incurable 'sex fiends,' there was already a tension between political rhetoric and true research. For instance, social scientists began publishing studies that demonstrate that sex offense treatment is effective and that rates of reoccurrence are low.<sup>22</sup> A 1939 article by Frosch and Bromberg advocates 'individualized treatment' and psychotherapy for offenders; the authors suggest that

punishing offenders is not a way of decreasing rates of offense.<sup>23</sup> They quote sexologist Norman Haire (1934) to advance their argument that those who commit sex offenses need help and therapy: 'To punish these unfortunate people as criminal would be just as iniquitous as to allow them to give full swing to their morbid tendencies at the expense of their neighbors.'<sup>24</sup>



J. Edgar Hoover (when not secretly in drag)

pp. 36-37: "Other studies echo this moderate and reasoned approach. For instance, a 1943 book about boys charged with sex offenses asserts that none of the 256 minors studied ever committed sex offenses as adults.<sup>25</sup> Another study from that year echoed the finding that treatment of juvenile sex offenders is particularly successful when treated, with very low recidivism rates.<sup>26</sup> In retrospect, the panic driven by Hoover and others seems quaint, as do the studies advocating for treatment and compassion because today, with the public registry and decades-long sentences, the stakes are far more grave.

Today, ...scouts are taught to report a neighbor asking for help with groceries.

### Treatment and Compassion for Sex Offenses in the 1950s and 1960s

pp. 37-38: "Looking back at the research from the 1950s and 1960s, we see a growing interest in psychiatric approaches to sex offense and treatment rooted in compassion and cure. In 1950, The Journal Federal Probation devoted an entire issue to sex offenses.<sup>27</sup> The introduction notes the aim was partly to promote an 'informed and enlightened approach to the preventive and treatment phases of the problem' and emphasizes that the matter requires 'rational handling of situations involving deviate sexual behavior.'<sup>28</sup> The articles in the issue examine the psychological origins of most sex offenses and why treatment is superior to simply enacting punitive laws.<sup>29</sup> The latter argument is advanced in a piece written by a

police officer.<sup>30</sup> A judge notes that those sentenced for sex offenses must have access to psychiatric treatment in a 'therapeutic' facility, and maintains that the court can serve as a 'balance wheel' to counteract the 'near hysteria fomented by J. Edgar Hoover and the media, while mitigating overly liberal tendencies of mental health professionals.<sup>31</sup> Another essay by a magistrate also asserts that laws and courts fail when psychiatry is not utilized in the criminal justice process.<sup>32</sup> An article by a female police captain emphasizes the need to be aware of the harm that is done to both the offender and the victim during court proceedings and in cases covered by the media, and emphasizes the need to seek treatment for both parties.<sup>33</sup> She notes that the handling of victims in the courts creates additional trauma, and expresses sympathy for the accused, observing that even those acquitted of sex crimes suffer humiliation and hostility.<sup>34</sup> A study of offenders at Sing Sing finds prison is not the appropriate setting for this population, and argues that psychiatric help is the only way to treat offenders so that they can return to communities; the author, Dr. Abrahamsen, urges the development of a special institute to study and treat sex offenses.<sup>35</sup>

In the 1930s, J. Edgar Hoover stirred up fears about the 'sex fiend,'

In the 1950s, we thus start to see a growing faith in psychiatry as the answer to sex offenses, a belief common to its practitioners, the courts and the police. For instance, in a 1952 study in a criminology journal, the author focuses on the motivation of those who commit sex crimes, and argues that the sole treatment is psychoanalysis.<sup>36</sup> The writer notes, '[t]he only method for the successful amelioration of this vast social problem, is the psychiatric understanding of the motives behind the sexual offense and the imparting to the offender of this insight in a manner convincing to him.'<sup>37</sup> There is an emphasis on compassion for the perpetrator, and the author also notes that the reasons for offenses include a lack of self-esteem and fulfillment.<sup>38</sup> Other studies point to the possibility that offenders themselves have been victimized or harmed, and focus on understanding childhood trauma, which they have possibly experienced and has resulted in their insecurity and immaturity.<sup>39</sup>

pp. 39-40: "The 1970s - Late 1980s: The Emergence of Sex Offense Professionals and Experts

"...In 1971, we even find an analysis arguing that exposure to pornography is not associated with sexual offenses.<sup>46</sup>

...In the 1970s, sex offenses began to be  
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addressed in a range of specialized journals, a tendency that demonstrates not only growing concern over sex offenses, but also an increased number of academics and experts in the fields of abuse and child welfare.<sup>47</sup> Professionals also start moving towards more punitive approaches, linking studies of prevalence and treatment to the need for legislative responses.<sup>48</sup> The most visible manifestation of this shift is the campaign by feminist activists to criminalize rape and augment penalties against those who commit it; they often utilized research as a way to demonstrate not only the prevalence of sexual violence, but also the long-term impact of sexual crimes.<sup>49</sup>

Additionally, a spate of new journals emerged focusing largely on sexual offenses, abuse and violence in the fields of criminology, psychology journals, and laws. Relevant academic reviews include Archives of Sexual Behavior (founded in 1971), Child Abuse and Neglect (1977), Behavioral Sciences and the Law (1983), The Journal of Interpersonal Violence (1986), Journal of Child Sex Abuse (1992) and the Annals of Sex Research (founded in 1988 and renamed Sexual Abuse: A Journal of Research and Treatment in 1993).

In 1974, a piece titled 'Rape Trauma Syndrome' is published in the American Journal of Psychiatry by Ann Burgess and Lynda Holmstrom.<sup>50</sup> They outline a specific psychological set of symptoms resulting from rape, which they see as the primary cause of a range of profound and negative long-term effects.<sup>51</sup> The concept of 'rape trauma syndrome' had a meaningful impact on the popular consciousness, especially the idea that the trauma resulting from sexual violence is one-dimensional and universal, regardless of the nature or specifics of the experience.<sup>52</sup> While scientific studies have since largely debunked the rape trauma syndrome due to methodological flaws in the research, the idea of a rape 'syndrome' in the early 1970s resonated with a public that was only starting to recognize rape as a social problem and a court system just beginning to take rape seriously.<sup>53</sup>

In 1979, in one of the first articles in Child Abuse and Neglect on child sexual abuse, an author (Paula Jorné) discussed the need to be compassionate to both offenders and victims.<sup>54</sup> Jorné writes something that would be inconceivable today: compassion 'is very important if we are to facilitate the growth of self-esteem in individuals who have already shown themselves to feel inadequate in coping with problems in appropriate ways. Thus, both child and offender need to be reassured that they are not "bad people."<sup>55</sup> Similarly, a 1977 article in the

same journal was called 'Humanistic Treatment of Father-Daughter Incest.'<sup>56</sup> From our current perspective, this title seems jarring.

pp. 40-41: "In 1983, in Behavioral Sciences and the Law, Burgess published an update on her co-authored 1974 study, which she once again titled 'Rape Trauma Syndrome.'<sup>57</sup> In her 1983 version, Burgess explicitly addresses the value of rape trauma syndrome in criminal and civil legal cases and emphasizes that the concept is a valid one useful in court proceedings.<sup>58</sup> Burgess writes, 'As concern is more visibly focused on the rights of the victim, legal reform is having an impact on improving the conviction rate for rapists.'<sup>59</sup> Here we have an example of the shift in the tone of research and the politicization of scholarship in this area, which have gone from therapeutic to legal. In 1974, Burgess and Holmstrom defined the syndrome in a psychiatric journal; in 1983, Burgess outlines the way the syndrome can increase conviction rates.<sup>60</sup>

**T**he Theravada system of dhammas is ...a delineation of the psychosomatic components of the human personality. Moreover, Theravadins believe that an awareness of the interrelation and operation of these components, as well as the ability to manipulate them, is necessary for an individual to attain the exalted state of an arhat (Pali: *arahant*, "worthy one"). Through the classification of dhammas, a person is defined as an aggregate of many interrelated elements governed by the law of karma—thus destined to suffer good or bad consequences. All of this presupposes that there is ...a psychosomatic aggregate situated in time. This aggregate has freedom of choice and can perform acts that may generate consequences. (*Encyclopedia Britannica*, 2013, "Buddhism")

— So the question comes down to: "Between MSOP Matrix: psychotheory and the Buddhist dhammas, above, "Quo Vadis?"

A recent study shows that while there is scientific consensus that the 'rape trauma syndrome' is deeply flawed, it is still used in courts.<sup>61</sup> In the 1983 article, 'The Child Sexual Abuse Accommodation Syndrome' published in Child Abuse and Neglect, author Roland Summit argues that sexually abused children rarely lie about abuse, and, in fact, retracting allegations of abuse is 'normal' and should not be viewed as undermining veracity.<sup>62</sup> Summit writes, 'Unless there is special support for the child and immediate intervention to force responsibility on the father, the girl will follow the "normal" course and retract her complaint'<sup>63</sup> This study helped lead to some horrific outcomes, including the wrongful convictions of dozens of men and women falsely accused in the 1980s daycare hysteria.<sup>64</sup>

Not only were they found guilty on the spurious grounds that children rarely, if ever, lie about sexual abuse, even when improperly questioned;<sup>65</sup> it was even argued that retraction is actually evidence that a child was telling the truth!<sup>66</sup>



Extremists View of How Sex Offenders Should Be Tried, Punished, and Committed

Other research, though, continues to emphasize the extent to which punishment and involuntary confinement are failed policy.<sup>67</sup> In 1985, Federal Probation publishes a recidivism study that shows that those convicted of sex offenses have an 11.3% recidivism rate.<sup>68</sup>

p. 42: "In 1986, Browne and Finkelhor publishes a piece in Psychological Bulletin that as of July 2017 has been cited over 3400 times.<sup>69</sup> This study, on the impact of child sexual abuse, is significant because it focuses on long-term psychological effects, including 'depression and self-destructive behavior, anxiety, feelings of isolation and stigma, poor self-esteem, difficulty in trusting others, a tendency toward revictimization, substance abuse, and sexual maladjustment.'<sup>70</sup> One justification for current laws that punish offenders for life, even in the most draconian ways, is that victims themselves can never recover. In 1987, Finkelhor put out another study with similar arguments.<sup>71</sup>

Studies examining the impact of sexual abuse and rape, such as those by Finkelhor and Burgess, are useful for treatment providers and also for those who might dismiss the psychological impact of abuse and harm. They had a major impact, coming when our culture was only beginning to take sexual crimes seriously after having long dismissed or ignored women and children who alleged sexual violence or asserted they had suffered long-term harm. However, the emotional and psychological harm to victims was often uncritically translated into justifications for increasing punishment of perpetrators.<sup>72</sup> While sometimes the researchers themselves engaged in this logic (as Burgess

**B**urgess explicitly addresses the value of rape trauma syndrome in criminal and civil legal cases and emphasizes that the concept is a valid one useful in court proceedings.

does in her 1983 article), it is often others, such as prosecutors and legislators, who claim that new laws and longer punishments are needed because of evidence of long-term damage to victims – though there is no evidence that severity of sentencing mitigates the impact on victims.<sup>73</sup>

### From Victims' Rights to 1996 Megan's Law: The Stakes Go Through the Roof

pp. 42-43: "In 1988, a conference titled, 'When the Victim Is a Child,' was sponsored by the Governor's Council on Victims and the Utah Commission on Criminal and Juvenile Justice.<sup>74</sup> This same year, Roland Summit published another book, Hidden Victims, Hidden Pain: Societal Avoidance of Child Sexual Abuse, warning that child sex abuse is an epidemic problem of which caring adults and professionals must take notice.<sup>75</sup> In the keynote address by law professor John E.B. Myers at this conference about child victimization, Myers states, 'We must shake off the complacency that grips us. Ignoring the warning signs of the backlash will have tragic consequences. Thousands, and eventually millions, of defenseless children are at risk. They plead with us to open our eyes and take action. No one else can help them.'<sup>76</sup>

In the keynote address, Myers also notes that child sex abuse is a 'hot topic' in the media and that the scholarly attention to the subject has increased.<sup>77</sup> He argues, 'It is naive to think that long mandatory prison terms will contribute materially to the solution of child sexual abuse. Eventually, people react negatively to disproportionately cruel punishment, and when that happens the backlash is fueled.'<sup>78</sup> Interestingly, we see today that there is little backlash to long prison terms, and even less awareness that the causes of child sexual abuse cannot be addressed by increasing punishment.

**A**uthor Roland Summit argues that sexually abused children rarely lie about abuse, and, in fact, retracting allegations of abuse is 'normal' and should not be viewed as undermining veracity.

The 1990s start a long-term decrease in rates of child sexual abuse; ultimately there is a 62% decline during that decade.<sup>79</sup> A recidivism study published in 1990 in Annals of Sex Research finds treatment is effective and recidivism rate is low (this study claims the rate is under 4%).<sup>80</sup> Yet that decade offers ever more research on the impact and extent of child sexual abuse.

pp. 43-44: "In the very first issue of the Journal of Child Sexual Abuse (1992) an article appears that claims 50 to 75% of women in counseling 'have histories of sexual abuse that have gone unrecognized, unreported, and undiagnosed.'<sup>81</sup> The idea

(Continued on page 5)

(Continued from page 4)

that women have long-term effects from sexual abuse and that half or more women seeking therapy have been sexually mistreated feeds into the growing notion that the impact of such incidents is permanent and thus the punishment should also be everlasting. The other theme that we see here is the purported extent of the phenomenon. Not only is it claimed that nearly all women who seek therapy have been sexually abused; startlingly, it is alleged that such abuse is at the root of their problems.<sup>82</sup> An article from 1994 that appeared in the *Journal of Consulting and Clinical Psychology* and has been cited over 1200 times since goes even further.<sup>83</sup> It asserts that earlier estimates of sexual abuse were 'gross underestimates,' that 1/5 to 1/3 of all women experienced child sexual abuse, even though 38% of women did not recall their experience of sexual abuse.<sup>84</sup> The author advises therapists to be mindful that even women who claim that they have not undergone abuse might have been victims.<sup>85</sup> A year later, in 1995, the journal *Sexual Abuse: A Journal of Research and Treatment* begins publication.<sup>86</sup>

The 1990s start a long-term decrease in rates of child sexual abuse; ultimately there is a 62% decline during that decade.

In 1994, Congress passes the Wetterling Act, the first federal law to track those convicted of sex offenses.<sup>87</sup> While registration for sex offenses had existed at the state level in various forms since as early as 1930, the new measure marks the first time federal legislation targets this population.<sup>88</sup> In 1990, Washington State passes the first law requiring community notification of sex offenses.<sup>89</sup> This is a significant moment: never before had a state required that communities be notified of residents with criminal histories.<sup>90</sup> The Washington law was based on the false notion that such offenders have a high rate of recidivism and that the 'reduced expectation of privacy because of the public's interest in public safety...will further the governmental interests of public safety and public scrutiny of the criminal and mental health systems.'<sup>91</sup>

p. 45: "When President Clinton signed Megan's law to much fanfare in 1996, he justified the clear violation of civil liberties inherent in public registration by heralding, 'We respect people's rights, but today America proclaims there is no greater right than a parent's right to raise a child in safety and love.'<sup>92</sup> Moreover, Clinton restated a myth: 'Study after study has shown us that sex offenders commit crime after crime.'<sup>93</sup>

### 1996 - Present: Institutionalizing the Sex Offense Legal Regime



"The shift that takes place with community notification and public registry laws represents the extent to which sex-offense law and policy result from popularly held belief and not from evidence. Soon after Megan's Law is passed, *Child Abuse and Neglect* publishes an editorial by a treatment provider warning against the public notification of those convicted of sex offenses.<sup>94</sup> Since the passage of Megan's Law and the implementation of a sex-offense 'legal regime' - an apt term coined by civil liberties activist Bill Dobbs - hundreds of studies have appeared evaluating the effectiveness and unintended consequences of draconian punishment-based responses to sex crimes.<sup>95</sup> There is still no evidence that these laws have any meaningful effect on recidivism or curbing sex offenses.<sup>96</sup> Recidivism studies continue to document the low rearrest rates for those with sex-offense convictions.<sup>97</sup> Rates of child sexual abuse continue to decline.<sup>98</sup> Yet a decade after the passage of Megan's Law the U.S. Congress passes the Adam Walsh Act, which adds further penalties for sex offenses - even requiring those convicted as minors to register.<sup>99</sup>

p. 46: "In 2006, in a study on the decline in rates of child sexual abuse, authors Finkelhor and Jones cite economic and social factors, as well as advances in psychiatric pharmacology as reasons for the decline - not the registry or other harsh sex-offense laws.<sup>100</sup> Nevertheless, an article published in the journal *Sex Abuse* in 2007 is telling in terms of the careful language used even to suggest that those convicted of sex offenses deserve 'human rights': "[I]t is certainly appropriate to punish sex offenders but punishment should be implemented in a way that respects their moral status as human rights holders and holds out the possibility of reentry into the human community if their potential for inflicting harm on others has been effectively reduced.<sup>101</sup> In an equally cautious introduction to the piece, the author avers that 'restrictions of sex offender's liberty and privacy rights are done in the interests of preserving the safety of the public,' but then wonders in a tentative tone: 'In a climate of increasing restrictions placed on sex offenders, do we need to worry that such restrictions eventually become abusive to the offender?'<sup>102</sup>

"In 2008, a study found that Megan's Law had no effect on reducing the number of sex-offense victims; yet this key study, and the many others just like it, seems to have no effect on public or legislative enthusiasm for creating new laws based on flawed premises.<sup>103</sup>

In a 2012 article about the 60% decline in child sexual abuse since 1992, the *New York Times* notes that those in the field of sex-abuse treatment and advocacy are hesitant to acknowledge the decrease - partly due to the fear that the government funding on which they rely could be reduced as a result.<sup>104</sup> As law professor Marci Hamilton points out in the article, 'It is very risky to suggest that the problem you're involved with has gotten smaller'; and she adds that sex abuse has 'lifelong dangerous effects.'<sup>105</sup>

### DISCUSSION AND CONCLUSIONS

P. 47: "The world recognizes that U.S. sex-offense laws violate human rights. In 2016, the UK refused to extradite a man wanted on sexual charges because the possibility of civil commitment would be 'flagrant denial' of the European Convention of human rights.<sup>106</sup> The widespread registration laws were based largely on the kidnapping and murder of white middle-class children by strangers; in addition to Megan Kanka and 'Megan's Law,' there are also similar federal laws named after Adam Walsh (abducted and murdered by a stranger in 1981) and Jacob Wetterling (abducted and murdered by a stranger in 1989).<sup>107</sup> While stranger kidnappings are exceptionally rare, numbering about 100 in each of the past 20 years, abductions ending in murders are decreasing; further, about half of these kidnappings involved adolescent girls, not young children.<sup>108</sup> Nevertheless, the specter of these awful cases is so powerful and so embedded in our collective cultural consciousness that it not only drives the way we raise our children, but also ensures support for any law that appears to address this problem.<sup>109</sup>

pp. 47-48: Sex-offense laws such as registration and community notification, motivated by political opportunism, high-profile crimes, and misleading research about the extent and impact of sexual abuse are not the only measures to have emerged out of emotion rather than evidence. In general, as Jeremy Travis and Bruce Western observe in their analysis of mass incarceration, 'social science evidence has had strikingly little influence on deliberations about sentencing policy over the past quarter century.'<sup>110</sup> An examination of the implementation of the public registry highlights this tension. Politicians from both sides of the spectrum jump on the bandwagon of these laws, on the grounds that they protect children.<sup>111</sup> Of course, no one, politicians or not, wants to be perceived as opposing protection of children; likewise, no one will get elected for criticizing overly

severe punishment of those with sex offense convictions. While there are a number of reasons for the growth in mass incarceration, one factor is the time served in prison for all crimes.<sup>112</sup> A report by the Sentencing Project (2017) notes the 'historic rise' in the use of life sentences, including those without possibility of parole, and argues that about half of the growth in state prisons is due to increasing sentences across the board.<sup>113</sup>

Clinton restated a myth: 'Study after study has shown us that sex offenders commit crime after crime.'

"What I argue in my book, *Protecting Our Kids?: How Sex Offender Laws Are Failing Us* (2015) is known far too well by most of those whose lives are being destroyed by these laws: these measures fail to address the commonest forms of sexual abuse of children, which in the vast majority of cases are committed by non-stranger perpetrators or those not on the registry.<sup>114</sup> Further, data shows that all kinds of child abuse, including sexual abuse, are highly correlated with poverty.<sup>115</sup> A recent article found that rates of the most severe forms of child abuse are correlated with job losses.<sup>116</sup> Reason and sanity have been removed from the political and public debate about sex offense law and policy, even as research piles up showing the ineffectiveness and devastation these laws leave in their wake. Sex offense laws are rooted in misperceptions about recidivism as well as a small number of flawed research studies that had a disproportionate impact on public perceptions of sexual abuse, and political opportunism. A rational approach to sex offenses is important in the name of justice, human rights, and public safety, and so our children grow and thrive without irrational anxiety about sex and sex offenders."

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## Gay Sex Offenders Disproportionately Committed



Gay: You Have the Right to Get Married — and Committed

Tashia Meronek & Erica R. Mainers, "Post-Prison Purgatory" (May 23, 2018) <https://www.theinvestigativefund.org/investigation/2018/05/23/post-prison-purgatory/> (Last visited: 10/15/2018)

Text:

"At Coalinga State Hospital, located in a desolate, dusty part of California's Central Valley, 200 miles north of Los Angeles....

...[M]ore troubling is the overrepresentation of people like [Cory] Hoch - gay, bisexual, and queer men - who are trapped in this system.

...An [ ] article references 'conservative estimates by social workers and psycholo-

gists pegging Coalinga's population as 55 to 65 percent gay or bisexual, and 1 percent transgender.

"A 2013 article in the Star Tribune of Minneapolis, about the imminent marriage of two male couples at the Moose Lake Treatment Facility of the Minnesota Sex Offender Program, quoted one resident who estimated '30 to 35 percent' of residents were in relationships with each other. Enough residents identify as LGBT, that in June 2017, Moose Lake held a Pride celebration.

At Larned State Hospital in Kansas, Mark (last name withheld to protect his privacy) estimates that 75 percent of the people at his facility identify as gay or bisexual. Taphata Stricker, a therapist who worked at Larned between 2012 and 2014, agrees that 'homosexuals are overrepresented' at the facility, which she compares to a supermax prison.

Michael Bass, until recently confined at the Central New York Psychiatric Center in central New York, said that 'well over 50 percent' of CNYPC's population is out as gay or bisexual. 'The library is almost like a gay club,' he says...

Anecdotal evidence from civilly committed men, institutional medical staff, and advocates for prison reform suggests an overwhelming bias: Nearly 40 percent are men who have sex with other men (MSM), whether or not they self-identify as gay, bi, or same-gender loving. Compare those numbers to a 2016 Gallup poll, which indicates that only 3.7 percent of American men replied yes when asked, 'Do you personally identify as lesbian, gay, bisexual, or transgender?' making the vast numbers of gay and bisexual men in civil commitment even more disproportionate.

...[T]here is no clear evidence these costly programs are even effective. No research exists to suggest the 20 states with civil commitment laws have lower rates of sexual violence or recidivism, compared to rates in the 30 states without such laws...

Shan Jumper is clinical director at both the Illinois Department of Human Services Treatment and Detention facility, a civil commitment facility in Rushville, Ill., and at Liberty Healthcare Corporation, a private medical contractor for U.S. prisons. In 2012, Jumper and two colleagues published a profile of the 377 men detained or committed under Illinois's [commitment program for sex offenders].

**C**onservative estimates by social workers and psychologists peg Coalinga's population as 55 to 65 percent gay or bisexual....

While having a male victim doesn't necessarily mean the person identifies as gay or bisexual, Jumper's study found that almost

40% of the civilly committed in Illinois have male victims. (The vast majority of people in civil commitment are male; out of the nearly 1,000 patients in California, only one is female.) The researchers compared these findings with similar studies in Texas, Florida, Wisconsin, Washington, California, Arizona, and Minnesota. Across these states, at least 30 percent and as high as 47 percent of men in civil commitment had at least one male victim.

The American Psychiatric Association came out firmly against civil commitment laws, finding the to be a 'serious assault on the integrity of psychiatry.

Some critics argue that outdated assessments and scientifically inaccurate testing could be to blame. The civilly committed, as well as mental health professionals, believe the specialists and the tests they use can be 'profoundly homophobic,' in the words of forensic psychologist and evaluator Karen Franklin.

Based in California, Franklin has worked as a civil commitment evaluator in her home state, plus in Iowa, in Washington, and at the federal level. Her belief -- which five other evaluators we spoke to shared -- is that there is widespread 'implicit bias' and 'subjectivity built into every single step of the process.'

...[P]rofessional associations, academics, and practitioners have grave reservations regarding its accuracy and effectiveness.

**T**he American Psychiatric Association came out firmly against civil commitment laws, finding the to be a 'serious assault on the integrity of psychiatry.

For instance, admitting to having a male victim nets the respondents more points, which reportedly increase their risk of reoffending. Another question asks: 'Ever lived with a lover for at least two years?' An inmate is considered less risky if they have had a two-year live-in relationship prior to imprisonment. Living with a same-sex lover used to be and sometimes still is risky in the U.S.

In the over two decades since California's civil commitment program started in 1996, out of a population of more than 1,000, only 272 were ultimately unconditionally released.

Hoch describes treatment as a 'useless pipe dream,' and he's not the only one. Approximately two-thirds of Coalinga's population refuses to participate in treatment, according to a 2009 report by the California Coalition on Sexual Offending, a group of doctors and law enforcement officials that advises California agencies on sexual abuse.

Other reasons offered for the low buy-in from inmates: a revolving door of therapists; that disclosures made in therapy may be

used in arguments against the mean's release; an environment that resemble a prison more than a hospital; the vague criteria for release; and the tiny number of people released - even after being treated for years, or decades.

...It's easy to understand why a resident at Kansas' civil commitment facility told us: 'The only way to get out is with a tag on your toe.'

### No one Watches the Watchers

Jon Brandt is a Minnesota-based clinician who has assessed and worked with those convicted of sexual violence as well as their victims since the 1980s. He feels for the men who he believes pose no threat but exist in the limbo of an unjust system. A hundred years from now, Brandt says, 'we're going to look back at the turn of the century and realize how wrong - how wrong - we've had it.

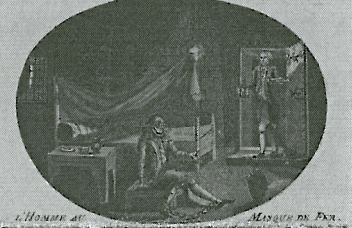
### Exit Signs

Brandt reports that clinicians he speaks with at gatherings such as the Association for the Treatment of Sexual Abusers' annual conference insist that '20 to 80 percent' of people in civil commitment across the nation shouldn't be there.' The men inside wait on the rest of us to notice.

...Hoch's story illustrates a hidden, queer niche of the prison industrial complex where government resources feed a destructive system that isn't helping to end sexual abuse."

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## The Real Resident Evil



Are we all just the Man in the Iron Mask, confined for political convenience?

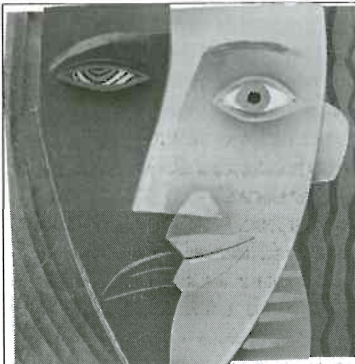
Jessica Morak, "Resident Evil: A Reformation of U.S. Civil Confinement Law," 22 Cardozo J. Int'l & Comp. Law 665 (Spring 2014)

Text Excerpts:

p. 667: "...Ingrained in the concept of dangerousness is the assumption that these [sex] offenders are driven to commit these heinous acts by uncontrollable sexual desires and impulses." [citing Michael Petrunik et al., "American and Canadian Approaches to Sex Offenders: A Study of the Politics of Dangerousness," 21 Fed. Sent'g Rep. 111, at 111 (2008)]

p. 684: "Considering the severe consequenc-

(Continued on page 8)



No Matter How Unrealistic, Some Will Always Believe That Being Committed as a Sex Offender Means That We Are Insane.

es the finding of a present mental abnormality can bring about the examination of whether or not it comports with constitutional standards should be given the highest level of scrutiny. ...As it stands, however, the definition's malleability enables it to stand for 'whatever a state claims it means.' An inevitable consequence of this danger is the transformation of 'a constitutionally required threshold for deprivation of liberty ... into a meaningless standard signifying whatever state legislatures want it to signify.'" (citing: *State v. Post*, 541 N.W.2d 115, 142-43 (Wis. 1995, Abrahamson, J. dissenting) p. 686: "Since, by definition, sexually violent predators suffer from a lack of control over their behavior, the Court speculated that the Act's threat of indefinite confinement was not likely to function as a deterrent." [citing *Hendricks* at 521 U.S. 2362 - BUT see: *Grant Duwe* article.] pp. 695-97: "The punitive nature of sexually violent predator statutes is readily visible when examining the common requirement that offenders must first serve out a criminal sentence before ever being evaluated as a candidate for civil confinement. [citing *State v. Post*, *supra*, Abrahamson, J., dissenting, at 140 ("Furthermore, because chapter 980 requires that convicted sex offenders serve their criminal sentences before being committed under its auspices, the statute is inextricably linked to a punitive purpose and effect, notwithstanding its remedial features.")]) This practice purposefully delays the imposition of specialized treatment until the offender's criminal sentence is nearly complete. There is no non-punitive justification for first initiating civil confinement proceedings, and the imposition of allegedly necessary treatment, years after the criminal act requiring it occurred. [Again citing *Post*, *ibid*. ("Why would a legislature with a principal interest in treatment create a statute deliberately delaying the promised treatment and thereby exacerbating the alleged ills which it is designed to cure?")]) It is difficult to imagine that requiring a period of incarceration first advances the interest

in treatment in any tangible way, since prison is generally considered a poor environment for rehabilitation. [Hendricks, 521 U.S. at 386 (Breyer, J., dissenting) (the Kansas statute specifically states that "prognosis for rehabilitating ... in a prison setting is poor."); *Post*, *ibid*.] This purposeful delay seems intentional. [Hendricks, *supra*, at 385 (Breyer, J., dissenting) ("time-related circumstance seems deliberate."). See also *In re Young*, 857 P.2d at 1025 (Johnson, J., dissenting) ("The timing alone is a strong indication that the Legislature was less interested in treatment than in confinement.")]) It enables the more punitive interest in total and indefinite incapacitation to overpower and dominate the civil interest in treatment. [Hendricks, *ibid*. ("An act that simply seeks confinement ... would not need to begin civil commitment proceedings sooner."); *In re Young*, *ibid*. ("Although the Statute provides for treatment, this goal is completely subordinated to punishment.")]) In this perspective, the practice begins to look more like a statutory scheme simply seeking to confine certain offenders when those offenders become eligible for release. [Young v. Weston, 898 F.Supp. 744, 753 (W.D. Wash. 1995) (holding that the punishment interest is advanced when the "[s]tatute forecloses the possibility that offenders will be evaluated and treated until after they have been punished."); *In re Young*, 857 P.2d at 1025 (Johnson, J., dissenting) ("An individual's need for diagnosis and treatment is never sufficiently compelling under the Statute until the individual is nearing the end of his or her criminal sentence.")]) "Additionally, it is suspicious that the offender contracts a newly discovered mental abnormality, which is now in dire need of treatment, upon the imminent expiration of the current method of incapacitation. [citing Breyer dissent in Hendricks, 521 U.S. at 381] It is an utter fallacy to claim that mental abnormalities, which cause uncontrollable propensities to commit future sexual offenses, are identifiable only at the completion of a criminal sentence. [citing *Weston*, 898 F.Supp at 753]. Are these mental abnormalities, which will propel an offender to commit future sexual offenses, absent when these sexual offenses actually occurred in the past? [Weston, 898 F.Supp. at 753 ("Common sense suggests that such mental conditions, if they are indeed the cause of sexual violence, are present at the time the offense is committed.")]) The reliance on this circular logic by sexually violent predator statutes supports the idea that the interest in effectuating treatment is minimal, if not nonexistent. Rather, a stated interest in treatment enables the statutes to be characterized as 'civil,' and therefore isolated from the procedural safeguards of ex post facto

and double jeopardy." There is no non-punitive justification for first initiating civil confinement proceedings, and the imposition of allegedly necessary treatment, years after the criminal act requiring it occurred. [Again citing *Post*, *ibid*. ("Why would a legislature with a principal interest in treatment create a statute deliberately delaying the promised treatment and thereby exacerbating the alleged ills which it is designed to cure?")]) pp. 700-701: "2. The Therapeutic Disadvantages of the 'Delayed Treatment' Scheme "As mentioned in the dissenting opinion of *Hendricks*, delayed treatment could potentially harm the goal of administering effective rehabilitation. According to Dr. Robert Wettstein (fn. 289: "an Assistant Professor of Psychiatry at the University of Pittsburgh School of Medicine. Additionally, Dr. Wettstein serves as co-director of the Law and Psychiatry Program at the Western Psychiatric Institute and Clinic."), it is much more difficult to begin treatment for the sexual offense years after its commission than when treatment occurs soon thereafter. [Robert M. Wettstein, "A Psychiatric Perspective on Washington's Sexually Violent Predators Statute," 15 *U. Puget Sound L. Rev.* 597 (1992), at 617]: The longer the period between the commission of the offense and the beginning of treatment, the more opportunities for the offender to distort the facts and circumstances surrounding the offense, which can serve as a hindrance to the offender's ability to take responsibility. [*Ibid*.] Additionally, this lapse in time gives the offender ample opportunity to formulate justifications, excuses, and defenses for his or her action. [*Ibid*.] The prison environment has been viewed, in general, as non-conducive to therapeutic purposes. [Hendricks, *supra*, at 385 (Breyer, J., dissenting); *Wettstein*, *supra*, at 617 ("Few, if any, correctional institutions are designed to function as therapeutic environments, much less actually do so.")]) A prisoner faces stigmatization and possible violence from other inmates, by exhibiting any form of 'weakness,' such as engaging in therapy, or simply disclosing his status as a sexual offender. [*Ibid*.] Therefore, an inmate has no real incentive to discuss or take responsibility for his offense. [*Ibid*.] If there is a real and tangible treatment aim embedded in the sexually violent predator statutes, its mission is not being effectively achieved by first processing individuals through the corrections system."

Author's Important Footnote:  
"Weston, 898 F.Supp. at 750; *In re Young*, 857 P.2d at 1021 (holding that the definition for mental abnormality is "merely circular"); See also *Hendricks*, 521 P.2d at 138 (citing *Weston*, 898 F.Supp. at 750) ("The only observed characteristic of the [mental abnormality or personality] disorder is the predisposition to commit sex crimes.")



Have you seen this man? Rumored to be handing out candy and gifts to children and inviting them to sit on his lap. Beware!

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**Gladden Excerpt:  
Viewed Historically,  
the Punitive Nature of  
the SPP/SDP Law  
Spells Attainder.**

"The other necessary element of a bill of attainder is the infliction of some penal measure. The punitive nature of a legislative enactment to comprise a bill of attainder can be found by satisfaction of any of said three tests: historical, functional, or motivational. All three "tests" in controlling U.S. Supreme Court precedent to determine the existence of "punishment" and hence of the attainder nature of a given enactment confirm that such punishment is inflicted upon Plaintiffs herein by said Act. Under the "historical" test, detention for any period, depriving one of liberty, has always been viewed as inherently punitive. Such detention/confinement, as a deprivation of one's physical liberty, is a classic, well-recognized "punishment" for attainder purposes. Comparatively, even lesser rights and the lesser harms of their deprivation are included, such as the right to vote, the right to equal treatment under the law, and the right to operate a business, to practice a profession, or to advocate a political cause; all of those rights are likewise protected against attainder penalties. *Cumming v. Missouri*, 71 U.S. 277 (1867). Effectively, the preventive detention under

sex offender commitment under said Act is a form of banishment – not just from one's community, a state, or even the country, but also from all non-incarcerated environments in the world. Banishment is also a long-recognized attainer "punishment."

It is impossible to name a more severe deprivation than such lifetime loss of liberty, save only for enactment of a retroactive death penalty for sex offenses.

In all probability (as alleged *supra*), the preventive detention under rubric of commitment worked under said Act amounts to a deprivation of personal physical liberty for the rest of that person's life. Because of this, it is impossible to name a more severe deprivation than such lifetime loss of liberty, save only for enactment of a retroactive death penalty for sex offenses.

Considering that each person subjected to commitment under said Act was previously sentenced in part on consideration of propensity for recidivism; that SPP/SDP commitments are requested by prosecutors only at the end of an offender's prison sentence; that older offenders (statistically, least likely to reoffend) are disproportionately committed (1/3 of all SPP/SDP commitments); that, despite continued aging (with even greater reductions in recidivism likelihood) and decades of treatment, almost no one is declared 'safe enough' to release, the only function of SPP/SDP commitment actually achieved is natural-life preventive detention. As candidly admitted in *In re Lingl*, 2012 Minn. App. Unpub. LEXIS 1014: "Civil commitment as an SDP is essentially a life sentence with little hope of release." Such natural-life deprivation of liberty after that sentence has been served is inherently disproportionately severe and inappropriate to non-punitive needs, particularly in light of the allegation elsewhere herein of radically diminishing recidivism accompanying middle- and old-age.

Almost invariably, sex offender commitment under said Act takes place at the time of a Plaintiff's release from prison, almost always to what would, but for commitment, be an extended term of years under extremely restrictive rules of "intensive supervised release." As allegations, *supra*, point out, the requirements (including mandatory treatment or aftercare, depending on whether the person successfully completed treatment while in prison), the controls, and the restrictions imposed upon sex offenders by the Minnesota Department of Corrections as a condition of their release and of the non-revocation of such release from prison are wholly adequate to prevent recidivism during the balance of their sentences. This alone

shows that preventive detention by commitment under said Act is both disproportionately severe and so inappropriate to non-punitive needs that the historical test is amply fulfilled."

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## Paraphilia Critiqued: A Confused Concept



Impressionism is a technique of art, not of science.

*Charles Moser*, "Paraphilia: A Critique of a Confused Concept," Chapter 5 in: *New Directions in Sex Therapy: Innovations and Alternatives* 91-108 (Peggy J. Kleinplatz, ed. 2001); separately available at: <http://tempik.webzdarma.cz/literatura/parmoser>

### Text Excerpts:

pp. 92-93: "Creation of the diagnostic category of paraphilia, the medicalization of nonstandard sexual behaviors, is a pseudo-scientific attempt to regulate sexuality. The use of the diagnostic process to maintain and to conform to social conventions is relatively transparent. The diagnostic criteria have been written to pathologize those behaviors our society deems sexually unacceptable.... Individuals who have non-standard sexual interests continue to be pathologized, despite a lack of research establishing a difference in functioning between those so diagnosed and 'normal' individuals. There is little evidence that they experience any distress or dysfunction except as a result of societal condemnation of their sexual desires."

p. 97: "...If a law was passed in the United States criminalizing *heterosexual* behavior, how many previously law-abiding citizens would be able to comply? How many people would find happiness engaging in the now mandated homosexual interactions? How many individuals would engage surreptitiously in criminal heterosexual acts? Would these criminals be seen as dangerous to children and lose their parental rights? The diagnosis of paraphilia has been intertwined with social judgments of normalcy and used to deny civil rights."

p. 98: "The belief that a given sexual inter-

est is the result of childhood trauma remains a popular but unproven assumption, without benefit of substantiating data."

p. 105: "Removal of pedophilia from the DSM would imply that those who violate the law should be punished in the criminal justice system." If someone sexually abuses a child, that person belongs in the criminal justice system, whether or not strong preferential sexual interest in children exists. We do not care about sexual interest; we care about acts.

"Conversely, 'just' being a pedophile – meaning that one has a sexual interest in prepubescent children but does not ever act on it – is not necessarily a problem. Acting on it is a problem. When individuals who are neither dysfunctional nor distressed by their behavior engage in sexual activity with minors, their behavior should not be construed as evidence of mental illness. Such individuals are criminals. They have engaged in a crime...."

The diagnosis of paraphilia has been intertwined with social judgments of normalcy and used to deny civil rights.

"Although society has a responsibility and a duty to protect individuals from all types of attack, we do not include bank robbers, bigamists, and those who commit libel in the list of psychiatric diagnoses. Criminals are dealt with by the justice system; those who suffer from a mental illness should be dealt with by the mental health system."

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## Moral Vigilantism: A Tool to Defeat Rights of Sex Offenders and to Dehumanize Them in Others' Eyes

*Paul H. Robinson*, *The Moral Vigilante and Her Cousins in the Shadows*, 2015 *U. Ill. L. Rev.* 401 (2015):

Abstract excerpts, p. 401: "...[M]oral vigilantism is detrimental to society and ought to be avoided.

"...[D]octrines of disillusionment with [the criminal justice system have] the tendency to provoke what might be called 'shadow vigilantism, in which civilians and officials feel morally justified in manipulating or subverting the criminal justice system to compel the system to deliver the justice that it appears reluctant to impose. Unfortunately, shadow vigilantism can be widespread and impossible to effectively prosecute, leaving the system's justness seriously distorted. This in turn can provoke a damaging antisys-

tem response, as in the 'Stop Snitching' movement, that further degrades the system's reputation for doing justice, producing a downward spiral of lost credibility and deference. We would all be better off – citizens and offenders alike – if this dirty war had never started."

Text excerpts, p. 404: "There is real danger in what might be called 'shadow vigilantism,' in which both civilians and officials disillusioned by the criminal justice system's apparently intentional failures of justice feel morally justified in manipulating or subverting the system to compel the justice that the system seems reluctant to impose. Shadow vigilantism is more dangerous than the classic sort because it can be pervasive and because the system has no effective means of countering it."

pp. 409-10: "2. *Lavender Panthers*

"Well-motivated vigilantism exists outside of Wild West history. A century after the Vigilance Committee's [of San Francisco, 1851-55] battle with an ineffective criminal justice system, San Francisco was still seeing vigilante action, this time by gays being regularly bashed by homophobes as police stood by. Three hundred gay harassment cases were logged in 1973 alone, and many more than this went unreported to the unsympathetic police."

"In on typical incident, Reverend Ray Broshears called police when young men were harassing people leaving his Helping Hands Gay Community Service Center.<sup>18</sup> The police came but did nothing except tell the harassers that it was Broshears who had called them and that it was he who planned to file a complaint against them.<sup>19</sup> As soon as



Vigilante Morals: Premeditated killing is not murder when I do it.

police left, the young men beat Broshears severely.<sup>20</sup>

"Broshears was a Pentecostal evangelical minister who raised money for gay causes, helped homeless teenagers find shelter, and helped found the Gay Alliance.<sup>21</sup> He picketed large companies to protest discriminatory hiring practices and helped organize San Francisco's first Gay Pride Parade.<sup>22</sup> He had watched the growing power of the Black Panthers in nearby Oakland and after his beating he decided that his helping hand was not enough.<sup>23</sup> What was needed was an organization that would aggressively defend

(Continued on page 10)

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the rights of gays by providing the protection and justice that the system had shown itself unwilling to do.

"In July 1973, he formed a new activist group that called itself the Lavender Panthers.<sup>24</sup> Its members did not carry guns, but were trained in various martial arts and patrolled areas known for a high incidence of gay bashing. Typically, harassers would wait outside a known gay bar, and then begin shoving the patrons as they left in order to provoke a response that could be used as an excuse to escalate their attack to a full-scale beating.<sup>25</sup> With the advent of the Lavender Panthers, however, the pattern changed. In one typical incident, when gay bashers began shoving and beating patrons outside the Naked Grape, a well-known gay bar, the Lavender Panthers pulled up in their trademark gray Volkswagen bus, grabbed pool cues, and began beating the harassers who quickly fled.<sup>26</sup> In this particular incident, the gay bashers made a tactical error in retreating without their car and were forced to return to the bar later to try to negotiate

**S**hadow vigilantism is more dangerous than the classic sort because it can be pervasive and because the system has no effective means of countering it.

its return.

"Another common strategy of the Lavender Panthers was to tag the harassers with red spray paint and use whistles to call attention to their harassment.<sup>27</sup> Within a year, the right of homosexuals to live openly in the community had gained sufficient acceptance, and the incidents of harassment had been sufficiently reduced, that the Lavender Panthers determined they were no longer



Is Orchestrating Lying Propaganda to Socially Destroy and to Provoke Unjust Legislation to Indefinitely Incarcerate Under Rubric of "Commitment" People You Loathe Just Another Form of Amoral, Lawless Vigilantism? Will Your Answer Be the Same When That Tactic Is Welded Against You?

needed and voluntarily disbanded their group.<sup>28</sup>

"The Lavender Panthers had probably never heard of the original San Francisco Vigilance Committee, but both organizations were spawned by a belief that failures of justice could not simply be tolerated, that it was sometimes both necessary and moral to take up the task that the criminal justice system was refusing to do. The social contract - by which citizens give up their right to use force and rely upon the criminal justice system for protection and justice - had been breached. Both the 1851 Vigilance Committee and the 1973 Lavender Panthers saw little choice, and complete legitimacy, in taking up their natural right to protect themselves and do the justice that the official system had forsaken.

"These are two examples of vigilante groups that can lay some colorable claim to moral, if not legal, justification. But, there are a wide variety of vigilante groups for which one might have some sympathy and understanding."

#### pp. 416-18: "B. A Vigilante Code

"In the face of the system's gross insensitivity to the importance of doing justice, what are people to do? Is it possible to define what would and would not constitute legitimate vigilante action - to define a *vigilante code* that sets the preconditions to and limits of moral action? If a group were contemplating vigilante action, here are ten rules one could suggest to them so that they can reconsider their plan and stay within more morally defensible bounds.<sup>90</sup>

1. *Do not act unless there is a serious failure of justice.* Any vigilante action will be disruptive. It cannot justify itself unless it produces more benefit than the disruption costs. For example, even if the police are lazy and indifferent and could solve the problem if they chose to, a pattern of petty thefts by youngsters in a market place is not likely to justify the social disruption of vigilante action unless that vigilante action is itself of little or no disruption.
2. *Do not act unless there is no lawful way to solve the problem.* The law allows citizens to use force in defense of unlawful aggression against self, others, or property. Stay strictly within the requirements of this legally authorized force if that will provide the needed protection against lawlessness.
3. *Do not act alone.* The vigilante is one who acts for the community, not herself; vengeance is not vigilance. If your conduct is to reflect community views, that fact must be advertised by having the vigilante action be group action. The larger and more-broadly-based the group, the better. Open membership

would be ideal. There may be practical limits on how public some discussions can be, but the guiding principles, such as the adoption of rules (such as these rules as a charter), ought to be sought and approved by as large a group as possible.

4. *Do not cause more harm than is necessary and just, and avoid injury to innocent bystanders.* Part of doing justice means recognizing the societal interest in minimizing damage to all, even unlawful aggressors. If a person's safety and property can be protected with a punch, it ought not be defended with a shot. And, obviously, harm to innocent bystanders ought to be avoided at all costs.
5. *Before acting, be sure of the facts and take full account of all relevant mitigations and excuses.* Understand that this is a credibility contest with the official criminal justice system. To win the battle for hearts and minds, the vigilante must do it better, not worse. The point is to do justice, and justice requires taking account of the mitigations, as well as the aggravations, in a case. A vigilance committee can as easily discredit itself by showing an indifference to mitigation and excuses as the criminal justice system disgraces itself by showing indifference to doing justice.
6. *Show restraint and temperance, not arrogance or vindictiveness.* The goal is to be responsible, even if the government is not. Vigilante groups cannot exert themselves as the wrath of God, but just as a means of shaming the government into doing what it ought to do - take justice seriously. A vigilante group must do more than just adhere to the moral-vigilante rules, it must make it clear that it is adhering.
7. *Give the government warning beforehand that it is in breach of its social contract, and give it the opportunity to fix the problem, unless it is clear that the warning would be useless.* Ideally, this means laying out the specifics of the government's failures of justice and how these failures can be avoided, as well as giving the government the time and opportunity to make things right. It is always preferable to have the official criminal justice system do justice, no matter how well-respected a vigilance committee may be. Admittedly, in some instances, the problem may be overwhelmingly obvious to all and a special notification would be senseless.
8. *Publicly report afterwards what you have done and why.* Failure to publicly take responsibility for your actions simply adds to the problem of perceived lawlessness. The community cannot judge the justness and reasonableness of a vigilance committee's actions unless it is given the details of what has been done and why it needed to be done.

9. *Respect the full society's norms of what is condemnable conduct.* Do not act in pursuit of justice for an offense unless it is clear that the larger society sees the offender's conduct as truly condemnable. A peculiar, perverted view of the world lacks the basis for moral vigilante action.
10. *If it becomes clear that the problem cannot be fixed through vigilante action, then withdraw from further action.* If it becomes clear that the criminal justice system literally cannot be changed, then further action toward that goal cannot achieve its purpose. Vigilante action must be a temporary and transitional state that moves the system to fix itself, not a permanent substitute for official conduct.

"...Vigilante action is never legally justified - if it were, by definition it would not be vigilant action - but if a group follows these ten rules, it might at least be morally justified.

#### pp. 423-24: "B. Legitimizing Law-Breaking and Inspiring Extremists

"Another problematic aspect of even moral vigilantism is its effect in legitimizing law-breaking. Once a group takes the law into its own hands, especially when the action is seen and accepted by the community as morally justified, it creates a dangerous precedent. This precedent makes it much easier for others, perhaps not so devoted to staying within moral bounds, to take the law into their hands, too. Indeed, the open acceptance of law-breaking may inspire others with quite extreme views toward vigilante acts that the community would consider as seriously condemnable. Consider a few examples.

#### Project Perverted Justice

"In 2003, a group of computer-savvy volunteers, led by a man adopting the nom de guerre of Xavier von Erck, formed Perverted Justice in the belief that pedophiles were using the expanding web technologies to better lure children for abuse.<sup>105</sup> Consisting of former abuse victims, retired law enforcement officers, and civilian volunteers, the group would find and monitor online chat

(Continued on page 11)

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rooms where pedophiles were trying to make connections with teenagers.<sup>137</sup> Once they identified a predator trolling, the group would embarrass him to his spouse, significant others, employers, or the community by posting his chats with the teenage girls.<sup>138</sup> More aggressive forms of action included arranging to meet the man and filming his embarrassment when they, rather than a young teen, appeared for the meeting.<sup>139</sup> As of 2014, the group claims to have assisted 587 chat-based convictions, and claims it has information-sharing agreements with hundreds of local police agencies, as well as the Dept. of Homeland Security.<sup>140</sup>

"But, by elevating the public's emotional level of outrage against child sex-abuse and showing that individual citizens could be as effective, if not more effective than law enforcement, the group may have inspired other individuals to emulate their efforts in less justifiable ways. For instance, by legitimizing such citizen conduct, the project also may have inspired harassment or abuse of suspected child molesters with little proof behind the suspicion. For example, in 2006, Michael Anthony Mullen, incensed by a recent case he had heard about, pretended to be an F.B.I. agent and arranged to 'interview' two sex offenders living together in Whatcom County, Washington.<sup>141</sup> When a third roommate left the apartment, Mullen shot and killed the two offenders.<sup>142</sup>

"Whenever a group is very public in drawing attention to a law enforcement failure, there are always risks that the attention may inspire others to act, and perhaps in a way far beyond what the group would support. When a vigilante group acts, the danger is even greater - because part of the message of vigilante action is to suggest to citizens that they really can, and perhaps should, act where the criminal justice system has failed. That message makes it much easier for the extremist to act by himself."

**Notes:**

17 The Sexes: The Lavender Panthers, Time (Oct. 8, 1973) <http://www.time.com/time/magazine/article/0,9171,908008,00.html>.

18 *Id.*

19 *Id.*

20 *Id.*

21 *Id.*

22 Lavender Panthers Essay, Google Sites, <https://sites.google.com/site/psabrittanybrock/the-lavender-panthers>.

23 The Sexes: The Lavender Panther's, *supra* note 17.

24 *Id.*

25 *Id.*

26 *Id.*

27 *Id.*

28 Lavender Panthers Essay, *supra* note 22.  
90 See authorities collected at Paul H. Robinson et al., Empirical Desert, Individual Prevention, and Limiting Retributivism: A Reply, 17 New Crim. L. Rev. 312, 315-19, 326 (2014) [hereinafter, Robinson et al., Empirical Desert].

136 For sources on the facts of this case, see, e.g., Allen Salkin, Web Site Hunts Pedophiles, and TV Goes Along, N.Y. Times, Dec. 13, 2006, at A1; Marisa Schultz, Online Vigilantes Hunt Down Pedophiles, USA Today, Mar. 16, 2004, <http://usatoday30.usatoday.com/tech/news/internetprivacy/2004-03-16-online-vigilantes-x.htm>; Jason Trahan & Chris Colgin, Campaign Against Child Sex Predators Draws Critics, Ball. Morning News, Sept. 11, 2006, available at 2006 WLNR 15877034; Eric Zorn, Did Vigilante Catch Pedophile, or Wreck a Life? Chi. Trib., May 9, 2004, at 4C.1, available at 2004 WLNR 19814047. NBC's wildly successful show "To Catch a Predator" was in partnership with the group.

137 Trahan & Colgin, *supra* note 136.

138 *Id.*

139 *Id.*

140 Info for Police, Perverted Justice, <http://www.perverted-justice.com/index.php?pg=police> info.

141 The Michael Mullen killings of the two sex offenders was similar in this respect to the killing by Scott Roeder of George Tiller, the abortion doctor. *Donna Blankinship*, Man Turns Himself in for Killing 2 Child Rapists: Police Say They Believe Man's Claim and That He Was Able to Locate the victims Through a County Sheriff Website That Lists Addresses of Sex Offenders, *Vancouver Sun*, Sept. 7, 2005, at A3, avail. at 2005 WLNR 27929411; Sharon Cohen, "Grim Reaper" Confesses; Another Remains Jailed, *Amarillo Globe-News*, Dec. 26, 2000, [http://amarillo.com/stories/2000/12/26/usn\\_grom.shtml](http://amarillo.com/stories/2000/12/26/usn_grom.shtml); David Krajicek, Michael Mullen, Sex Offender Vigilante, Crime Library 3, [http://www.crimelibrary.com/criminal\\_mind/sexual\\_assault/duncan\\_and\\_mullen/4.html](http://www.crimelibrary.com/criminal_mind/sexual_assault/duncan_and_mullen/4.html).

142 Krajicek, *supra* note 141, at 4.

In 2006, Michael Anthony Mullen, incensed by a recent case he had heard about, pretended to be an F.B.I. agent and arranged to 'interview' two sex offenders living together in Whatcom County, Washington.<sup>141</sup> When a third roommate left the apartment, Mullen shot and killed the two offenders.

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## Impact of *Doe v Snyder* on Role of Scientific Evidence in Constitutional Law

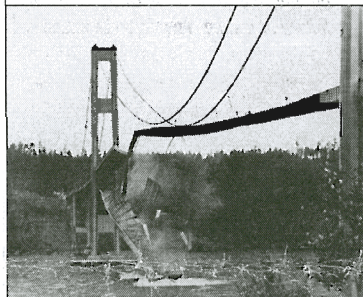
Melissa Hamilton, "Constitutional Law and the Role of Scientific Evidence: The Transformative Potential of *Doe v. Snyder*," 58 *Boston College Law Rev. E-Supplement* 34 (2017)

**Text excerpts:**

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

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

p. 36: "...A foundational principle underlying these policies is the assumption that sex offenders pose a uniquely high risk of recidivism. In enacting such laws, policymakers boldly assert that the need to protect the public justifies the special treatment of sex offenders.<sup>6</sup> Courts have mostly rubberstamped this assertion without paying much heed to whether the presumption of future dangerousness is factually accurate.<sup>7</sup> These decisions align with the perceptions of politicians, the media, and the public who have simply taken it on faith that sex offenders pose an extreme risk to the public, one that criminal sanctions fail to sufficiently thwart.<sup>8</sup>



Disastrous Consequences Follow When Junk-Science Masquerades as Real Science.

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

issues by examining relevant interdisciplinary research findings, to the benefit of defendants and the judiciary alike."

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

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

pp. 41-2: "**CONCLUSION**

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

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

**Notes:**

6 See *Cal. Penal Code* Sec. 290-03(a)(1) (2016); *Neb. Rev. Stat.* Sec. 29-4002 (2002).

7 See, e.g., *Gautier v. Jones*, 2009 WL 1444533, at \*8 (W.D. Okla. May 20, 2009); *Wallace v. State*, 805 N.E.2d 371, 383 (Ind. 2009).

8 See, e.g., *Parker v. King*, 2008 WL 901087, at \*4 (N.D. Ala. Mar. 31, 2008); *State v. Trascair*, 89 So. 3d 340, 351 (La. 2012).

22 See *Does #1-5 v. Snyder*, 834 F.3d 696, 704 (6<sup>th</sup> Cir. 2016) (citing *Lawrence A.*

(Continued on page 12)

(Continued from page 11)

*Greenfield, Recidivism of Sex Offenders Released from Prison in 1994* (2003).

- 49 See *Douglas A. Berman*, "Sixth Circuit Panel Concludes Michigan Sex Offender Registration Amendments 'Imposes Punishment' and Thus Are Ex Post Unconstitutional for Retroactive Application," *Sent'g L. & Pol'y* (Aug. 25, 2016).
- 50 See *Mark Joseph Stern*, "Appeals Court Issues Scathing Ruling Against Michigan Sex Offender Penalties," *Slate* (Aug. 26, 2016).
- 51 *Jacob Sullum*, "6th Circuit Says Mich. Sex Offender Registry Is Punitive and, Not Incidentally, Stupid," *Reason* (Aug. 26, 2016).
- 52 See, e.g., *Jack Lessenberry*, "Michigan's Sex Offender Law Is Unfair and Probably Unconstitutional," *Mich. Radio* (Aug. 26, 2016); *David Post*, "Sex Offender Laws and the 6th Circuit's Ex Post Facto Clause Ruling," *Wash. Post* (Sept. 7, 2016).

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### A Reasoned Insistence on the Beyond-Reasonable-Doubt Standard for Sex Offender Commitment

*Elizabeth Burke*, Note: "Only as Strong as the Missing Link: The Unsteady Constitutionality of the Adam Walsh Act," 45 *Suffolk U. L. Rev.* 427 (2012)

Text Excerpt:

p. 451: "Courts ruling that a heightened burden of proof was necessary to comport with the requirements of the Due Process Clause reasoned that, based on the fact that defendants faced loss of a fundamental right, due process required that the beyond a reasonable doubt standard apply to the factual determination prong." [Citing: *United States v. Shields*, 522 F.Supp.2d 317, 330 (D. Mass. 2007) (finding *Winship* requires reasonable doubt standard for past-acts determination); *Comstock* 507 F.Supp.2d at 552 (holding absence of reasonable doubt standard ignores rule of *Winship*).]

Especially Pertinent Footnotes:

- 19: *United States v. Carta*, 592 F.3d 34, 42-44 (1st Cir. 2010)
- 135: *Carta*, at 43 (declining to address due process issue as defendant conceded prior acts of child molestation; *United States v. Abregana*, 574 F.Supp.2d 1123, 1136 (D. Haw. 20087) (declining to address due process question because defendant had federal and state convictions for sex crimes against minors); *United States v. Dowell*, No. CIV-06-216

207 WL 5361304, at \*8 (W.D., Okla. Dec. 5, 20097) (declining to address due process challenge because past conviction not disputed issue of fact).

- 170: Compare *Comstock* 627 F.3d at 524 (denying Adam Walsh standard of proof inconsistent with Due Process Clause); with *United States v. Shields*, 522 F.Supp.2d 317, 328-32 (D. Mass. 2007) (arguing past-act determination requires higher standard of [proof to satisfy due process])
- 202: *In re Winship*, 397 U.S. 358, 362 (1970) (requiring proof beyond reasonable doubt for unlawful criminal act); *United States v. Comstock* 507 F.Supp.2d 522, 552 (E.D.N.C. 2007) (requiring beyond reasonable doubt standard), aff'd, 551 F.3d 274 (4th Cir. 2009), rev'd, 130 S.Ct. 1949 (2010). The court in *Shields* reasoned, "*Winship* not only establishes that a reasonable doubt standard can be constitutionally required in a civil proceeding, but also 'supports the proposition that where factual findings of criminal acts must precede the taking of an individual's liberty, those findings must be made beyond a reasonable doubt.'" 522 F.Supp.2d at 329 (quoting *Comstock*, 507 F.Supp.2d at 552).

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### In Treatment, Mental Hardiness under Adversity Is Key.



Practicing for Rescue from MSOP. If you were trapped with no certainty of getting out alive, how would your mental state fare?

[Editor's Note: This book excerpt, discussing mental hardiness as a product of how one approaches challenges and problems in life, can be of considerable help to all under the nightmare of civil commitment of past sex offenders. However, in reading this article, bear in mind that this excerpt was written for those facing challenges and problems of many different kinds. Hence, its use of the word "commitment" does not refer to civil commitment, but instead to "dedication" (as, to a cause) or steadfastness (as, to a project or a task).

Regardless, if you focus, not on all that you are prevented or barred from doing here, but instead on discovering and then doing the

things that you can do to help liberate us all from this outrageous supplemental incarceration invoked solely on the hates and claimed (but insanely unreasonable) fears of a few self-appointed vigilantes masquerading as psychological professionals, you will come to feel much better about yourself and you will be amazed by what you, in careful orchestration with the efforts of others, can accomplish.

*Tomasz Witkowski & Maciej Zatanski, Psychology Gone Wrong, The Dark Sides of Science and Therapy* (book, Boca Raton, Florida, Brown Walker Press, 2015, ISBN: 978-1-62734-528-6)

Text Excerpts:

#### Chapter 14:

#### WITH WHAT CAN WE REPLACE PSYCHOTHERAPY?

Page 204:

...Understanding what pushes us into psychotherapists' offices and the conscious control of our own lives is far more important than never-ending therapies.

... Antonovsky focused on former World War II concentration camp prisoners. He wondered why some of them quickly adapted to the new reality after regaining their freedom, while others were completely broken down and depressed, developed psychiatric disorders or even died.

... Based on his work, Antonovsky announced his theory of coherence in 1979.

... Susan C. Kobasa independently announced her theory of hardiness in the same year. Hardiness, understood as mental strength or invulnerability, is composed of three elements.

The first one is commitment - a tendency to consciously get involved in everyday personal and professional life activities and involves curiosity about the surrounding world, regardless of what kind of involvement or activity it is or of what problems or difficulties are associated with it. Committed individuals have a general feeling of purposefulness that allows them to perceive their own life as important and identify themselves with events and people in their surroundings. They are hard to put pressure on, as they have significant impact on their environment. Committed individuals prefer activity over avoidance. They usually have a clear path to follow, often even a sense of life duty or a mission. They plan to realize their concepts, therefore they focus on the present moment (as it allows them to fully engage in current activity) and on the future (as this is where the goals are). They rarely think about the past, almost never re-analyze defeats, but they reinforce past successes. On the other

side of commitment is alienation, apathy, and withdrawal from active life.

The second disposition is control, defined as a tendency to believe and act as if one can influence events taking place around oneself through one's active efforts. It is not a naive belief in an ability to fully control external events, rather, an ability to identify and understand real opportunities for leverage. A sense of control strengthens resistance to stress because events are perceived and evaluated as natural consequences of someone's activities, not as random, external, uncontrollable, sudden or overwhelming events. A sense of control allows the inclusion of all difficult events into an individual's life plan. Treating them from this perspective lessens their importance. It also provides individuals with broader and more varied array of tools at their disposal to deal with and control stress, especially when facing particularly difficult situations.

The last element is challenge disposition, defined as the belief and perception that change, not stability, is a natural and obvious element of everyday reality. These people follow the motto: The only thing sure in life is change. People with high challenge disposition try to predict the change and get motivated by the opportunities that changes present for personal growth. They do not consider a change as a threat to their security. Those are individuals with "appetite for life." People with low readiness to accept challenges see every change as a threat to the own existence and are looking for ways to secure themselves from it. Individuals with high challenge disposition are persistently trying to understand what has happened to them and why.... In contrast are those who [blame] ...fate and ...bad luck.

Hardiness, seen through the prism of commitment, control and challenge, influences the retention of a good mental condition and prevents psychological or psychiatric disorders from developing, despite confronting events generally considered stressful or traumatic. Such individuals are coherent, have high levels of integrity, and are convinced that their lives are meaningful (are understandable), can be controlled (can be shaped by an individual), and are not a burden (but rather something pleasant). Many research studies point to the connection between hardiness and better physical and mental health, as well as to a higher resistance to life's adversities.

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*May Your Holidays Be as Happy as Possible!*