

In This Issue:

1. Sex Offender Policies Must Change	1
2. Rumors Must Die!	1
3. Ruling Nixes Delaying Prison Releases for SOs With No Approved Housing	2
4. 7th Circuit Vetoes Indiana Prison SO Treatment Demands to Admit Uncharged Sex Allegations	2
5. Downstate Revisited: Insiders Talk	2-3
6. Turns Out, SO Recidivism Rates Are Low — REAL Low. NOW What?	3
7. Manufactured Panic — What? You Didn't Know?	3-4
8. Gladden Excerpt: Equal Protection, Part 1	4-7
9. Professional Judgment Standard Makes It Possible (Striking Down Commitment, That Is)	7-8
10. Assessment of Recidivism Risk Is a Failure	8-9
11. What Are The Chances? Statisticians Lie, but Not Bayes' Theorem	9-10

Coming Soon:

- ✓ The Math Behind the MnSOST-3.1 Pushed Pencil-Whipping into a Whole New Dimension
- ✓ 'Stranger Danger' Debunked
- ✓ Equal Protection May Rise Again — A Double-Header: (1) Animus against Us: Sufficient Alone?; (2) Strict Scrutiny Can Strike Down SO Commitment As Quasi-Criminal
- ✓ For Effective Defense Assistance, SO Commitment Appointed Attorneys Must Be Educated Specialists
- ✓ Janus—Everyone Has Difficulty Controlling Behavior, So Everybody Should Be Locked Up.
- ✓ Interesting Factoids & Implications from 2018 SOCCPN Annual Survey of Commitment Facilities
- ✓ Colorado Sex Offender Registration Law Unconstitutional
- ✓ Adversarial Allegiance in Static-99R Norm Selection
- ✓ LSI Inaccuracy as to US Offenders
- ✓ Doren's Weldschauing - Quotes from *Evaluating Sex Offenders*
- ✓ Faigman Speaks Out on Sex Offender Commitment Issues
- ✓ Sex Offender Registration: Useless & Counterproductive
- ✓ Subsequent Punishment - Clear and Present Danger and Other 1st Amendment Tests
- ✓ Treatment as Not Affecting Recidivism Likelihood Later
- ✓ Prescribing Child Sex Dolls to Prevent Sex with Real Children
- ✓ MnSOST-3 — Retrospective Review of Predictive Accuracy
- ✓ Fusion Between Nursing Homes & Prisons?
- ✓ Big Data, Automated Suspicion, & Policing
- ✓ Inmates rights under 1st Amdment to mail etc
- ✓ Paraphilia (NOS) — Nonconsent ("Rapism") — Junk Science — Zander
- ✓ SO Treatment Advocate CURE Concedes Grave Problems with It.
- ✓ Treatment Fatigue
- ✓ Untouchable — A documentary about the sex offender registry — Film synopsis

And (always) much, much more!

Sex Offender Policies Must Change!

Guest Editorial — "Are We All Sex Offenders?"

by Galen Baughman, of "A Just Future"

"We hold people accountable for what they have done, and we restore them to our communities after they have repaid their debt to society. Our system of justice is built on proportionality between crime and punishment. These new systems of indefinite detention rely on circular reasoning and reimagine a legal system where we no longer punish someone for what they have done, we've begun to punish people for who they are.

There is a power in naming things. The sex offender identity is arguably the most hated identity in America. People labeled sex offenders are banished from entire communities through residency restrictions, publicly shamed through registration and notification laws, restricted from all kinds of employment, barred from colleges, even banned from using social media.

Facebook bars people labeled sex offenders from the social network, making us digital pariahs — in some states it would be a felony punishable by prison time for me to have a LinkedIn account, or send a tweet.

Sex offenders are imagined to be an exceptional category of criminal deserving of exceptional policies — our approach to child safety over the last thirty years has been defined by the containment, incapacitation, and banish-

ment of this category of people we've labeled sex offenders.

We aren't just doing a bad job of deciding who should be labeled a sex offender. The term itself is a mistake.

The label sex offender has made us fundamentally confused about how to protect children from sexual abuse. Sex Offender Registries only make sense if they identify threats in the community and help parents keep their children safe. But registration laws don't do that because the danger isn't external — ninety-three percent of child sexual abuse is committed by a family member or close family friend.

These are people who don't have a previous conviction. By definition, they aren't people who would be on the list.

And consider for a moment the people on that list. Did you know that 95 percent of them won't reoffend? The United States Department of Justice says 95 percent.

The sex offender registry assumes that crimes are committed by strangers. Stranger danger is a myth. All of our policies are built on this myth.

There are 100 high-risk child abductions every year in the United States — in a country of 320 million people. That risk is comparable to a child's chance of being struck by lightning.

This summer the Department of Justice admitted to something that researchers have

been saying for a long time — laws that make people we've labeled sex offenders register with the police have, and I quote, "no impact on sexual recidivism rates."

Simply put, that means the registry isn't doing anything to protect anyone's kid. In fact, because our laws are so overly broad and because so few people commit a new crime after release, your child is more likely to be labeled a sex offender that they are to ever be abused by someone on the list.

Imagine a world where child abuse is understood as a public health problem. Where we invest in preventing harm to children before it occurs and make mental health treatment available to persons struggling with sexual feelings toward children to help them avoid harmful behavior. The Netherlands, Germany, and Japan already do this.

America still favors persecution over meaningful interventions to promote child welfare. Lawmakers have brandished the label sex offender as a weapon, using shame and fear to convince the public they're protecting our children. To prove our commitment to child safety, we condemn people labeled sex offenders to a life of social death, marked by banishment from belonging to our communities.

Rumors Must Die!

If You're Not ABSOLUTELY CERTAIN, Why Waste Everyone's Time and Focus??

By Cyrus Gladden

Today (July 21, 2019), I wasted time watching a TV show claimed by a rumor to include a segment about MSOP. Well, guess what! No such segment was included. I'm sure you'll understand when I say that I have plenty to do without chasing down baseless rumors. I'm sure you do too. It seems that some persons here have no skills at critical listening or reading and are far too excitable. These individuals hear one thing, but immediately, subconsciously jump to an unjustified conclusion.

I realize that they can't help this tendency, but I have a message for all who do so: "SHUT UP!!" If you want to ask someone you think will know what actually happened or is going on, that's fine. — Just don't boldly assert something as fact when you aren't certain of it; you will only destroy your credibility when it turns out not to be true. There is a time-honored piece of advice I urge you to follow: "It's better to keep your mouth shut and be thought a fool than to open it and remove all doubt."

Now I turn to another incident of this kind to show how serious the misinformation conveyed by these untrue statements can be.

About two weeks ago, a rumor began to

circulate here that the Illinois sex offender commitment program had been shut down by a ruling by the federal Seventh Circuit Court of Appeals. This claim understandably incited a great deal of excitement here on the reasoning that, since Minnesota's sex offender commitment system is at least as unconstitutional as the one in Illinois, the rumored holding there surely augured a swift end to MSOP.

Unfortunately, this rumor turned out to be untrue. When this truth finally emerged after



If you didn't see it, don't say it.

much needless checking, the end-results were: (1) simply a lot of wasted time (most notably, on the part of those earnestly working tirelessly in the effort to win our collective just freedom); and (2) a lot of bitter disappointment on the part of many who, as wishful thinkers, were all set to pack their bags. No one needed this.

It's human nature to want to be the bearer of good news. But please do not be swept up by this urge to the point where any unconfirmed tidbit of news gets misunderstood and blown up in your mind into something so large that it is no longer connected to reality. I'm only asking you to employ a little skepticism and, again, *just ask someone* whose knowledge you respect.

Some rumors start in false conflation of two different things into one. I suspect that this 'Illinois rumor' started in exactly this way. The following two articles (the second one reprinted here from TLP Issue 3-5, May 2019, page 3) show in a classical example how this can happen when two somewhat related things get garbled together. I hope this improves your skepticism.

(Continued on page 2)

(Continued from page 1)

Illinois Ruling Bars Holding SOs Past Prison Release Date for Lack of Approved Housing.

Max Green, "Federal Judge Finds Illinois Rules on Sex Offenders Unconstitutional," (WBEZ News, 2018 [date unknown], quoted in Titus House Newsletter, Feb. 2019)

[Broadcast Text]

"A federal judge in Chicago has found the Illinois Department of Corrections is violating the constitutional rights of prisoners convicted of certain sex crimes by making the restrictions on where they can live so stringent that inmates are often locked up long beyond the end of their sentences.

In a ruling issued Sunday, Judge Virginia Kendall wrote that hundreds of offenders in the state prison system successfully complete their entire court-ordered sentences yet remain behind bars indefinitely. Kendall found the corrections department is depriving them of fundamental rights, and if they had money and support, they'd be able to leave and begin serving out what's called "mandatory supervised release."

Mark Weinberg, an attorney for the plaintiffs, said the decision could mean relief for hundreds of people who have been in prison even though they've served their time.

"A plaintiff of mine called me [today] to say it's the talk of the prison," he said. "There are ways to protect public safety but holding people in prison long after their sentences are over isn't the proper way to do it."

In 2017, WBEZ visited and spoke with J.D. Lindenmeier, one of the plaintiffs in the case. At that time, Lindenmeier had been behind bars six years past his court-ordered release date. But he's still in prison today, a total of eight years beyond his sentence because he can't find a place to live that complies with the state's requirements.

Prisoners call the time they serve beyond their sentences – often many years – "dead time."

In the 2017 interview, Lindenmeier said he couldn't afford his own apartment, so he turned to his family for help. But their living situations disqualified them under state law. He said his father lived too close to a park, his mother had a computer and smartphone with internet access, his sister had small children, and his dad's girlfriend's home was too close to a day care center – all violations of the state's housing rules for offenders like Lindenmeier."

7th Circuit Rules Indiana Prison Sex Offender Treatment Demands for Accounts of Past Actions Infringe Self-Incrimination.

Marilyn Odendahl, "7th Circuit rules DOC sex offender program violates Constitution," *The Indiana Lawyer*, April 26, 2019 (www.theindianalawyer.com/articles/print/540120-7th-circuit-rules-doc-sex-offender-program-violates-constitution):

"Finding the disclosures provide information that any law enforcement agent would love to have," the 7th Circuit Court of Appeals has ruled Indiana's requirement that sex offender inmates give detailed accounts of their past actions violates the Constitution's protections against self-incrimination.

Donald Lacy, a sex offender inmate in the Indiana Department of Correction, filed a class action on behalf of all inmates who lost good-time credits and a demotion in credit class because they failed to meet the requirements of the Indiana Sex Offender Management and Monitoring program. Lacy argued the disclosures required and the penalties imposed for non-participation constituted a violation of his Fifth Amendment right to be free from compelled self-incrimination.

The U.S. District Court for the Southern District of Indiana agreed. It ordered the inmates' lost good-time credits to be restored and vacated all disciplinary actions and sanctions for failure to participate in INSOMM.

On appeal, Indiana countered that the INSOMM program does not carry any sufficiently serious risk of incrimination to trigger the protections of the Fifth Amendment. Moreover, even if it did, the state continued, the revocation of credit time and the demotion of credit class do not add up to unconstitutional compulsion.

The 7th Circuit found the INSOMM workbooks asked for detailed and specific information. Offenders are required to reveal the names and ages of their victims, what parts of the body were touched, where and when the abuse occurred, and how the victims were selected and groomed.

Based on their answers, the offenders may then be given a polygraph examination. There, they will be asked such things as how many children they have molested and how many times they made child pornography.

Indiana's contention that the answers are so general they are not able to be used in an investigation or count as an admission at trial did not convince the circuit panel.

"Saying so does not make it so," Chief Judge Diane Wood wrote for the court. "This ipse dixit does not explain why granular descriptions of the circumstanc-



The Confessional

es surrounding specific sex crimes and patterns of criminal sexual behavior would prove useless to investigators or prosecutors. ...The questions posed to an INSOMM participant would yield answers that any competent sex-crimes investigator or prosecutor would love to have.'

Citing *McKune v. Lile*, 536 U.S. 24 (2002), the 7th Circuit ruled Indiana's denial of good-time credit as a means of inducing offenders to furnish information is an impermissible compulsion to self-incriminate.

'The decision to decline participation in INSOMM is not merely a trigger for a later stage in which the state takes a more holistic view of an inmate's progress toward rehabilitation,' Wood wrote. 'Instead, a prisoner's choice to invoke his privilege against self-incrimination is the direct cause of his loss of credits – credits that otherwise would be statutorily guaranteed...'

The case is *Donald Lacy v. Keith Butts*, 17-3256." (Decided April 25, 2019; regional reporter citation not yet available.)

Downstate Revisited: The More You Learn, the Harder the Impact of This Blunt, Yet Insightful Play About Hardships and Confrontations Faced by Released Sex Offenders.

Editor's Note: In the last issue, TLP printed commentary by Roger Lancaster written for the British premier of the play "Downstate," about a small group of ex-sex offenders after their releases from prison, struggling to make new lives while residing in a halfway house. As a publicity document for the play explains the scenario, "In downstate Illinois, four men convicted of sex crimes against minors share a group home where they live out their lives in the shadow of the offenses

they committed. A man shows up to confront his childhood abuser – but does he want closure or retribution?"

That commentary by Roger Lancaster raised curiosity here immensely about this very under-noticed play. In an effort to answer some of the many questions about it, we now print some observations by two key individuals who created and presented this play.

Bruce Norris [Downstate playwright], "Bruce Norris on Downstate," www.steppenwolf.org/articles/norris-on-downstate/ (2019)

Interview Text Excerpts:

Patrick Zakem: "Can you talk a little bit about the genesis of this play?"

Bruce Norris [Downstate playwright]: "Well I know a lot of people (myself included) who, over the course of their lives, have been in sexual situations of questionable wisdom. Some have been the 'victims' in these situations and others 'perpetrators.' And a few years ago, I started doing a lot of reading about the things paroled sex offenders increasingly face – registries, residency restrictions, neighborhood watches, self-appointed vigilante groups, etc. These are post-incarceration punishments, that don't exist for any other category of criminal. And I also started thinking about how having a common enemy – a universally despised class of criminal (namely the pedophile) – helps the rest of us feel more virtuous about ourselves. And because social media inflames every group response, we can now all anonymously call for their violent deaths, or endorse some gruesome form of retributive justice, often wildly incommensurate to the crime that's been committed. I think we're living through an era of 'payback.' The entire 2016 election was apparently one massive act of collective psychological revenge by one group against another, elevating a man pathologically obsessed with avenging himself against his perceived enemies. And – I want to be careful how I say this – even positive social movements like #MeToo run the risk of flipping over into vengeance as those of us on the left attempt to purge ourselves of any stain of ideological impurity. And I fear that what gets left out of the current national conversation is any mention of ...forgiveness. We'd prefer to luxuriate in our righteous hatred for each other right now, in a way that feels cruel and grotesque and tribal. So, with all of that, the thought occurred to me – how do we tamp down our retaliatory, visceral responses to these people we so easily despise? After all, pedophiles have to go on with their lives somehow, somewhere, right? And, I thought, to simply observe them going about their lives, living with the consequences of what they've done...that would require a pretty radical amount of compassion on

(Continued on page 3)

(Continued from page 2)

Societies are not remembered for how they treat their most honored – they are judged by how they treat their most loathed.

Anna D. Shapiro

Steppenwolf Theatre Artistic Director

the part of an audience."

PZ: "How do you contextualize this play alongside the rest of your work?"

BN: "I have a brother who lives in New York and when he sees the plays I write he often asks me, 'how come you never write about cool people?' I always say 'because it wouldn't be interesting.' But it did get me thinking about, you know, how often I tend to satirize a particular class of people – the privileged – that I often find despicable. And I thought, 'well, who do I extend my sympathy to?' And I thought, 'well I extend it to anyone to whom the world would deny sympathy.' I'm not just trying to be contrary or perverse. Because if we're going to conclude that there's one group or class of people that is wholly disposable, then I think that someone ought to be speaking up, a tiny bit, on their behalf. I guess I feel that way because, for some reason, I instinctively dislike consensus. Consensus makes me uncomfortable because it feels like a civilized form of bullying, since it's never perfect and always manages to marginalize some dissenting voice. In the case of this play, the voice are those of ex-convicts who've done terrible things about which they have various levels of regret or defiance. And I want to extend compassion to them as well."

Anna D. Shapiro [Steppenwolf Theatre Artistic Director], "Welcome to Downstate," www.steppenwolf.org/articles/welcome-to-downstate/ (2019)

[Text Excerpts:]

"...Bruce [Norris, Downstate playwright] and I both experienced that directly when we produced *The Pain and the Itch* over a decade ago. So incendiary was the topic of a child and sexuality that written opinions about the play referenced in detail (and with fury) an event in the play that never even took place.

This is how powerful and suggestive these conversations can be: they can make us believe we are seeing something that isn't even there.

...Downstate walks directly into the path of the storm and is asking us to recognize that societies are not remembered for how they treat their most honored – they are judged by how they treat their most loathed. And Bruce, for all his satirical darkness, understands that how we answer this question has a ripple effect of its own: on our culture, on our own hearts and, ironically, on the world we leave our children."

For Years We Were Told Sex Offenders Were Certain Recidivists. Now We Learn: SO Recidivism Rates Are Low — REAL Low. Now What?

Will Bassler, "The Importations of Reconviction Rates," *Sex Offender Solutions & Education Network (SOSEN) website* (<http://sosen.org/blog/2019/02/24/the-importations-of-reconviction-rates.html>)

[Text Excerpts:]

"...[T]wo issues related to re-offense rate ...must be dealt with. The first one is: of the people ...on the registry, what is the percentage that are involved in new sexually related crimes, and the second question is, what is the percentage of the people on the registry that are involved in a new sexually related crime in comparison to the ordinary citizen who has never been convicted of a sexually related crime? If in either case, there is a high re-offense rate for people on the registry, then the justification for the [registration] law could exist, if not, then the justification evaporates.

The problem is government has done its best to hide the truth, thereby taking away the possible challenges to the laws. The legislators suppose victims' advocates and special interest groups that financially benefit from the myth of high re-offense rates have promoted these biased laws. But even their own studies that only look at selected groups and not the entire registry, have continually shown low reconviction rates in new sex crimes for people with prior sex crimes. Two studies have recently come to light that have actually looked at all the people on the registry. One is the Nebraska sex offender registry study completed July 31st, 2013 which was actually commissioned by the Nebraska Legislature, where it shows that the re-offense rate for people on the Nebraska registry is 6/10 of one percent. The second one was done in Ohio where they tracked 21,750 people that were on their registry for 10 years in any given year. The re-offense rate was less than 3/10 of one percent. 'Note: Re-offense rates in one year. There are more RSO registered than shown above, for this data is only for the ten years from 2000 to 2010. Ohio has had their registry since 1996. During the following four to five years, there has been an additional 5000 RSOs who have now been on the registry from 10 to 15 years and they only add about 1 re-offense a year at the most. The re-offense rates for each year after release is based from the information found in ODRC Ten-Year Recidivism Follow-Up of 1989 Sex Offender Released, by Paul Konicek, Ohio Department of Rehabilitation and Corrections, Office of Policy,

Bureau of Planning and Evaluation'; at the end of the study comparing the people who did not reoffend against the people who did. They came up with the re-offense rate of 1/100 of 1% so there doesn't seem to be a high reoffense rate for people who are on the registry as biased government officials and special interest groups would have us believe.

The second part of it is to aid law enforcement when new sex crimes happen. First of all, most of that reasoning has disappeared simply because there is no high re-offense rate, so there is no need to aid law enforcement. Many people point to the Department of Justice study done in 1997 on prisoners released in 1994 and followed for three years. A graph has surfaced, that was supposed to be in this study that was removed before it was printed. The primary reason this was done is that it shows information that is not in this study, and one would assume that this information was also removed from the study, that is, the number of people in the last two years during this study that were involved in new sex crimes within those states that were in the study. That total according to the FBI statistics showed that there were 187,132 new convictions for sex crimes related to this time, in the states within this study. (The last two years of the study) only 50 people who had prior sexual convictions were involved and that means that of the new sex crimes committed in 1995 and 1996, 99.973% were done by people not on the registry...."

[Appendix Excerpts:]

"State studies that look only at released prisoners, not the state entire registry, and still show low rates:

...CA: 00.8% The California Department of Corrections and Rehabilitation (CDCR) '2014 Outcome Evaluation Report'. <http://californiarisolsol.org/2015/08/new-cdcr-report-reduces-rate-of-re-offense-to-less-than-1-percent>.

...CT: page 9: 01.7%. And prisoners with no prior sex crime are six times more likely to be involved in a new sex crime. Recidivism among Sex Offenders in Connecticut, State of Connecticut Office of Policy and Management, Criminal Justice Policy & Planning Division, February 15, 2012'

...IA: page 7, #4: 'With the overall recidivism for sex offenses as low as 2%....' Iowa Sex Offender Research Council Report to the Iowa General Assembly, January 22, 2009. <https://onedrive.live.com/view.aspx?resid=A754C96E86E37F71!8618&cid=a754c96e86e37f71&app=WordPdf>

...IN, bottom of page: '1.05% of identified sex offenders recidivated for a new sex crime within 3 years.' "Indiana Department of Correction Recidivism Rates Decrease for 3rd Consecutive Year." <https://onedrive.live.com/view.aspx?resid=A754C96E86E37F71!8935&cid=a754c96e86e37f71&app=WordPdf>

...MI: 8/10 of 1%. Three year study has come out of Michigan looking at the number of people on parole that were returned to prison for new crimes. They found that of the sex offenders who were released from prison and found that they were involved in new sexually related crime at 8/10 of 1%, or in other words, that 99.2% DID NOT reoffend in a new sex crime. And that they had the lowest reoffense rate of all the criminal classes released. <http://nationalrisol.org/wp-content/uploads/2014/12/CAPPS.pdf>"

NOW What??

Manufactured Panic: How Political Operatives Create and Manipulate the Illusion of Spontaneous Mass Sex Panics.

Janice M. Irvine, "Emotional Scripts of Sex Panics," 3(3) *Sexuality Research and Social Policy: Journal of NSRC* 82-94 (2006)

[Abstract:]

"This article examines the emotional dynamics of local sex panics over sex education. It argues that local sex panics are not spontaneous eruptions of community outrage; they are political events with a strikingly scripted quality. Sex panics are fueled by emotional scripts – rhetoric strategically crafted to produce volatile emotional responses. In turn, these emotional scripts produce heated emotions – anger and disgust – displayed in ritualized ways in public arenas. In local sex panics we see that emotions are neither irrational nor simply spontaneous; rather they are norm-bound behavior and often meaningful forms of social and political communication produced in response to emotional scripts. The emotions of sex panics represent a means by which moral entrepreneurs attempt to reinforce conservative sexual morality."

Janice M. Irvine, "Transient Feelings: Sex Panics and the Politics of Emotions," 14(1) *GLQ, A Journal of Lesbian and Gay Studies* 1 (Jan. 2008)

[Text Excerpts:]

pp. 2-3: "...In contrast to scholars who view the emotions of sex panics as irrational, moral conservatives cast them as authentic moral outrage. Because of its cultural authority, public emotion can pressure politicians, police, media, and

(Continued on page 4)



other regulatory agents to respond to fierce community battles. As a result, laws and policies that restrict sexual rights may be hastily enacted yet exert a pernicious influence for decades. Moreover, the legitimizing power or emotions naturalizes sexual hierarchies, establishing some sexualities as normal and others as disgusting or unspeakable. Affective conventions of sexuality – in particular, sexual shame, stigma, fear, disgust – enforce and reinforce this regulatory system and are therefore political. In its wake, the *panic* of moral panics legitimizes enhanced state power through fostering the illusion of a singular public mobilized in support of traditional values.”

p. 5: “Starting in the 1960s, leaders of the early Christian right wing recognized that sexuality could be exploited to agitate citizens, recruit constituents, raise money, and ultimately consolidate political power. They captured the terms of debate about sex education through emotionally powerful rhetoric used nationally and also locally at school board sessions and town meetings. Rather than epiphenomenal, intense emotional reactions were strategically produced through a discourse of sexual danger and depravity that shaped how citizens throughout the United States spoke and felt about sex education. Thus local confusion about sex education programs morphed into sex panics. In what follows, I use examples from these conflicts to speculate about the transient feelings of moral/sex panics.”

p. 7: “Finally, moral/sex panics may leave repressive measures of sweeping scope. The historian James Morone writes that even ‘passing panics’ lead to enhanced state powers in the form of new legislation, reinterpretations of the Constitution, and the establishment of public regulatory agencies.²¹ The sexual psychopath laws, obscenity crackdowns, and restrictions on public AIDS and sexuality information are compelling examples of this. Additionally, in separate studies, Duggan and Vance have mapped the restrictive measures enacted

by conservatives in the wake of sex panics sparked, paradoxically, by feminists. Duggan shows how anti-pornography feminists fostered and reinforced a climate supportive of conservative initiatives to eliminate public funding of erotic art and ban information on childhood sexuality.²² In her discussion of sex panic at the Bernard sexuality conference, Vance not only describes the sexual scapegoating of conference speakers by anti-porn feminist protesters, but also shows how the university administration mobilized to increase surveillance of the women’s center and seized and attempted to censor the conference diary.²³ In addition to provoking punitive measures, sex panics can generate enough fear to exert a widespread chilling effect on art, academic scholarship, political activism, and journalism.”

Gladden Excerpt:

Equal Protection, Part 1

Allegations of Special Significance to Count II (Governmental Animus as Deprivation of Equal Protection)

The following allegations of this Section XI of the “Facts” portion of this Complaint, although applicable to all Counts hereof, have special significance to Count II hereof, relating to the allegation of infliction of legislative and related other governmental animus upon Plaintiffs as deprivation of equal protection to Plaintiffs, under the doctrine of *United States v. Windsor*, 133 S.Ct. 2675 (2013).

Plaintiffs reallege and republish in this Section XI of the Facts of this Third Amended Complaint as if fully set forth herein the following paragraphs appearing elsewhere within said Complaint: Section II, Paragraphs 36-38; Section III, Paragraphs 36-44; Section IV, Paragraphs 38-73; Section V, Paragraphs 74-82; Section VI, Paragraphs 83-208a; Section VII, Paragraphs 209-214; Section VIII, Paragraphs 215-217; Section IX, Paragraphs 218-252; Section X, Paragraphs 230-242, 246-251, 253-265, 271-363, Section XII, Paragraphs 396-965; Section XIII, Paragraphs 984-1106; and Section XIV, Paragraphs 1107-1109, 1118-1125, 1369-1380.

As an initial matter, *Rachel Constantino-Wallace*, “Constitutional Infirmity in Washington State’s Sexually Violent Predator Statute,” 50 *Willamette L. Rev.* 329 (2014), explains how, as an equal protection violation, strict scrutiny examination can strike down a sex offender commitment because such commitments are quasi-criminal, thus:

“pp. 365-66: “Federal Equal Protection Clause doctrine recognizes several rights that are fundamental for equal protection purposes and trigger strict scrutiny review. The rights considered

fundamental for equal protection purposes are voting,¹²⁰ access to courts,¹²¹ and interstate migration.¹²² In civil proceedings, access to courts is generally not fundamental for the purposes of equal protection.¹²³ But, where a civil proceeding is ‘quasi-criminal’ in nature, a defendant’s fundamental right to equal access of the court system is implicated and strict scrutiny is applied.¹²⁴ While both the Washington State Supreme Court and the United States Supreme Court have determined that sexually violent predator laws are civil in nature and thus do not violate the prohibitions on ex post facto law or double jeopardy,¹²⁵ the Statute is quasi-criminal.¹²⁶ Civil commitment proceedings have been categorized as quasi-criminal.¹²⁷

“The United States Supreme Court has determined that actions to terminate a person’s parental rights are quasi-criminal in nature.¹²⁸ In this context, the quasi-criminality is still recognized even though the objective of the proceeding is not to punish the parent, but to reflect the court’s determination that the parent is no longer acting in the best interest of the child and allow the court to act for the child’s benefit.¹²⁹ Similarly, the stated purpose of the Statute is not to punish SVPs, but to protect the public.¹³⁰

“Further support for the assertion that the Statute should be considered, at the very least, quasi-criminal appears in *Young v. Weston*.¹³¹ In *Weston*, the court restated the nonexhaustive *Mendoza-Martinez* factors¹³² for determining whether the Statute is primarily criminal or civil.¹³³ The court determined that the Statute indisputably involves an affirmative restraint, which has historically been regarded as promoting the traditional aims of punishment, and applies only to criminal behavior. Accordingly, the court concluded that the Statute was primarily criminal rather than civil.¹³⁴ Although the United States Supreme Court effectively overruled this particular finding two years later in *Kansas v. Hendricks*,¹³⁵ the spirit of this analysis shows the logical impossibility of failing to consider the Statute at least quasi-criminal.”

Notes:

¹²⁰ *Harper v. Va. State Bd. of Elections*, 383 U.S. 663, 666 (1966); see also *Reynolds v. Sims*, 377 U.S. 533, 556 (1964).

¹²¹ *Griffin v. Illinois*, 351 U.S. 12, 16-17 (1956) (striking down a monetary condition on a criminal’s right of appeal); see also *M.L.B. v. S.L.J.*, 519 U.S. 102 (1996) (holding an appeal of termination of parental rights was quasi-criminal and invalidating a records fee required to access the court); *Boddie v. Connecticut*, 401 U.S. 371 (1971) (holding a fee required to insti-

tute a divorce action violated a person’s fundamental right to marriage).

¹²² *Shapiro v. Thompson*, 394 U.S. 618, 641-42 (1969); see also *Saenz v. Roe*, 526 U.S. 489 (1999).

¹²³ See *M.L.B.*, 519 U.S. at 114-16.

¹²⁴ *Id.*

¹²⁵ *Kansas v. Hendricks*, 521 U.S. 346, 371 (1997); *In re Pers. Restraint of Young*, 857 P.2d 989 (Wash. 1993).

¹²⁶ See *In re Det. Of Thorell*, 72 P.;3d 708, 720 (2003) (finding the quantum of evidence in an SVP trial is properly weighed against a criminal standard).

¹²⁷ Gary B. Melton et al., *Psychological Evaluations for the Courts: A Handbook for Mental Health Professionals and Lawyers* 38 (2007).

¹²⁸ *M.L.B.*, 519 U.S. at 124-25.

¹²⁹ Donald T. Kramer, *Legal Rights of Children* § 28:2 (2d ed. 2005).

¹³⁰ *Wash. Rev. Code Ann.* § 71.09.010

¹³¹ *Young v. Weston*, 898 F. Supp. 744, 752 (W.D. Wash. 1995), *aff’d* in part, *rev’d* in part, 176 F.3d 1196 (9th Cir. 1999), *rev’d* sub nom. *Seling v. Young*, 531 U.S. 250 (2001).

¹³² *Kennedy v. Mendoza-Martinez*, 372 U.S. 144, 168-69 (1963) (articulating the following seven non-exhaustive factors: “(1) whether the sanction involves an affirmative disability or restraint; (2) whether it has historically been regarded as a punishment; (3) whether it comes into play only on a finding of scienter, (4) whether its operation will promote the traditional aims of punishment-retribution and deterrence, (5) whether the behavior to which it applies is already a crime, (6) whether an alternative purpose to which it may rationally be connected is assignable for it; and (7) whether it appears excessive in relation to the alternative purpose assigned.”) (numbers added).

¹³³ *Young*, 898 F. Supp. at 752.

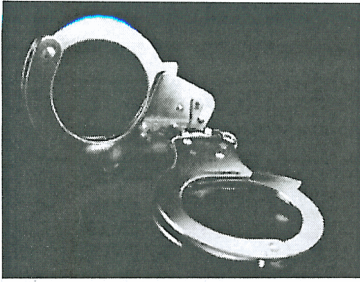
¹³⁴ *Id.*

¹³⁵ 521 U.S. 346 (1997).”

The Fourteenth Amendment to the United States Constitution, insofar as pertinent to this Complaint, guarantees equal protection of the laws to Plaintiffs. The anti-animus principle forbids legislatures and other governmental officials to act maliciously toward any person or group of people. (*John Hart Ely, Democracy and Distrust: A Theory of Judicial Review* 76 [Harvard, 1980] at 157). A law that purposefully inflicts injury on its targets out of sheer disdain for them is the classic case of malice that comprises forbidden animus.

The anti-animus doctrine examines the reasons for governmental action. The government acts in animus when, to a material degree, it aims to ‘disparage and to injure’ a person or group of people. (*Windsor*, 133 S.Ct. at 2696). If animus was present, moreover, it taints the law.

(Continued on page 5)



(Continued from page 4)

The act is unconstitutional even if legitimate reasons might now be offered to justify it. (*Dale Carpenter, "Windsor Products: Equal Protection from Animus,"* 2013 *Sup. Ct. Rev.* 183, 186 [2013].)

This article by Carpenter is so important to a proper and complete understanding of the doctrine of animus that several passages from it deserve to be reprinted here with their footnotes:

pp. 183-84: "Across four decades, the concept of animus has emerged from equal protection doctrine as an independent constitutional force. In four decisions – an animus quadrilogy – the Supreme Court has struck down state and federal acts that it concluded were driven by animus toward a group of people.¹ The roots of anti-animus doctrine go even deeper, reaching back to political-process concerns famously articulated more than seventy years ago in *United States v. Carolene Products* about how 'prejudice against discrete and insular minorities ... tends seriously to curtail the operation of those political processes ordinarily to be relied upon to protect minorities.'² As a matter of constitutional law, a legislative process impelled by animus is a poisoned and poisonous one....

pp. 185-86: "Animus doctrine ... asserts that just as individuals have a moral and sometimes legal duty not to act maliciously toward others, the group of people elected as representatives (or acting in some other official governmental capacity) in a liberal democracy has a moral and sometimes constitutional duty not to act maliciously toward a person or group of people.⁶

"Under the anti-animus principle, the Constitution's Equal Protection guarantee is understood to 'guard one part of the society against the injustice of the other part'⁷ by checking the tendency of legislative majorities to be vindictive. The anti-animus doctrine addresses this systemic problem by scrutinizing the reasons for government action. The government acts on animus when, to a material degree, it aims 'to disparage and to injure' a person or group of people.⁸ ... If animus was present, moreover, it taints the law. The act is unconstitutional even if legitimate reasons might now be offered to justify it.¹⁰" pp. 187-88: "The animus quadrilogy overlaps a gay-rights trilogy that has

charted the remarkable rise of respect for the dignity and rights of homosexuals. On May 20, 1996, just as Congress was beginning the process of passing the Defense of Marriage Act (DOMA) to ban any federal recognition of the nonexistent same-sex marriages,¹² Justice Scalia cut to the heart of the question of homosexuality and the Constitution in his dissent in *Romer*. He asked, incredulously: is "the perceived social harm of homosexuality" no longer a "legitimate concern of government?"¹³ Striking down a state constitutional amendment barring specific protections from anti-gay discrimination, the Court answered "yes" by concluding that Amendment 2 reflected impermissible animus against homosexuals.¹⁴ In 2003 the Court confirmed the answer in *Lawrence v. Texas*¹⁵, striking down a state "Homosexual Conduct" law because the state cannot "demean [the] existence" of homosexuals. It rejected the state interest in expressing moral disapproval of homosexuality.¹⁶ Then came *United States v. Windsor*¹⁷ striking down DOMA because the Court thought that by denying any federal recognition to otherwise valid same-sex marriages Congress exhibited animus against the targeted couples and their children.

"... There must be some reasoned public-policy purpose beyond moral disapproval if state-imposed restrictions on gays are to survive antianimism review."¹⁹

pp. 188-89: "... [I]n *Windsor*, the opinion confirmed that legislation driven by animus denies the equal protection of the law guaranteed by the Constitution to every person. This constitutional principle is uncontroversial. Chief Justice Roberts, in dissent, implicitly agreed that it is unconstitutional to 'codify malice,' even though he thought there needed to be 'more convincing evidence' of that than the Court presented.²⁰ Nor did Justice Scalia or Justice Alito, in their separate dissents, challenge the basic premise that animus is an impermissible basis for legislation.²¹ Scalia, like Roberts, simply thought a finding of animus should require 'the most extraordinary evidence,' which he did not think could be found in DOMA.²²....

pp. 189-90: "... Animus is not merely an illegitimate purpose; it taints the government's action. The sometimes far-fetched and hypothesized rationalizations that suffice to sustain a law in ordinary rational-basis cases don't suffice once animus is detected."

p. 200: "After discussing [in *Windsor*] the interests of the states in controlling family law, Justice Kennedy expressly stated that the Court was not relying strictly on federalism. 'Despite these considerations,' he wrote, 'it is unnecessary to decide whether this federal

“A law that purposefully inflicts injury on its targets out of sheer disdain for them is the classic case of malice that comprises forbidden animus.”

intrusion on state power is a violation of the Constitution because it disrupts the federal balance.⁶³

pp. 201-202: "*Windsor* arose only because the states themselves decided to recognize a substantive liberty to marry, not because the federal government had an independent constitutional obligation to recognize a fundamental right to marry.⁶⁸ If the states themselves did not recognize same-sex marriages, the federal government would not be required by *Windsor* to issue federal marriage licenses to same-sex couples. Marital recognition starts in the states, and it's hard to argue that *Windsor* held otherwise, though one could say that some liberty principle in *Windsor* (perhaps 'dignity') is available for future litigation to force state recognition of such marriages.⁶⁹"

"3. The heightened-scrutiny reading of *Windsor*.

In *SmithKline Beecham Corporation v. Abbott Laboratories*,⁷⁰ an otherwise unremarkable antitrust and unfair-trade-practices case, the Ninth Circuit concluded that heightened scrutiny should apply to classifications based on sexual orientation because *Windsor* 'requires' it.⁷¹.... Among other reasons for that interpretation of *Windsor*, the panel noted that the Court had not hypothesized possible rational bases for DOMA, as it would do in most rational-basis cases. Instead, the Court had evaluated only Congress's actual justifications.⁷³ *Reinhardt* also described *Windsor* as having required Congress to justify its unequal treatment of gays rather than indulging in the usual presumption of constitutionality for congressional acts.⁷⁴

p. 208: "Quoting *Moreno*, the Court held that 'some objectives – such as "a bare ... desire to harm a politically unpopular group" – are not legitimate state interests."¹⁰⁰

p. 211: "On the real harm this extensive enactment visited on gay people alone, the Court observed that for homosexuals, antidiscrimination protections are not mere 'special rights.' This put gay people in a different position from people who do not need specific protections (like blue-eyed people or lawyers) or already have such protection (like women, people of color, and religious minorities). Far from privileging gay men and lesbians, Justice Kennedy noted, antidiscrimination laws put them on an equal footing in 'an almost limitless number of transactions and endeavors that constitute ordinary civic life in a free society.'¹¹¹"

p. 213: "... [D]uring floor 'debate' – as the prepared speeches that members of Congress delivered is called – numerous supporters made clear that they saw DOMA as a way to express disdain for homosexuals.¹¹⁹

p. 217: "Section IV of *Windsor* suggest several indicia of animus. The first, drawn from *Romer*, is that "discriminations of an unusual character" especially require careful consideration."¹³⁶

p. 218: "Second, the Court argued that the legislative history and text of DOMA demonstrated the *congressional desire to interfere with the 'equal dignity' of same-sex marriages' conferred by the states.*"

p. 219: "Third, the Court noted that in practice and in principal effect the act reflected animus because of its *Romer*-like scope. It was a system-wide enactment with no identified connection to any particular area of federal law."

"Fourth, there was no legitimate congressional purpose that 'overcomes the purpose and effect [of DOMA] to disparage and to injure' married same-sex couples 'whom the State, by its marriage laws, sought to protect in personhood and dignity.'¹⁴⁴"

p. 221: "Animus is inconsistent with the premises of a well-functioning representative democracy, and violates the basic constitutional precept that every person is entitled to equal protection of the laws. Animus disserves the liberal and democratic values that undergird our constitutional system."

p. 223: "A law that purposefully inflicts injury on its targets out of sheer disdain for them is the classic case of malice."

p. 224: "Felons, including sex offenders and terrorists, are an unpopular and even hated group, but they are justifiably treated differently from others."¹⁵⁹

p. 225: "[A] law prohibiting sex offenders who have paid their debt to society from ever holding a job or marrying would seem to fit this description [of non-justification by rational penal concerns]. These are very broad disabilities that would be poorly connected to reasoned, public-regarding rationales. They seem based on disgust. We are grossed out by some people. We loathe them and want to lash out against them. Such laws would seem to violate the anti-animus doctrine, which is rooted in the idea that the state may not deny equal protection of the law to any person and instructs us that hating others, no matter how badly they've behaved, is not a legitimate reason by itself to legislate against them."

p. 232: "... [I]t should be enough to show that animus materially influenced the outcome¹⁶⁵ That means that an impermissible degree of animus would be found when it was a substantial

(Continued on page 6)

(Continued from page 5)

factor in passage, rather than the sole factor."

pp. 245-46: "The inference that animus was a material influence in the government's decision is drawn from a totality of the evidence rather than from a mechanical rule. A number of factors should be considered in making this inference. The animus decisions, especially *Windsor*, taken together with the racial-purpose decisions, suggest that these factors include consideration of:

1. the statutory text (textual);²²⁶
2. the political and legal context of passage, including a historical background demonstrating past discriminatory acts, and a departure from the usual substantive considerations governing the decision, especially if the considerations usually relied upon by the decision maker strongly favor a decision contrary to the one reached (contextual);²²⁷
3. the legislative proceedings, including evidence of animus that can be gleaned from the sequence of events that led to passage, the legislative procedure, and the legislative history accompanying passage (procedural);²²⁸
4. the law's harsh real-world impact or effects, including injury to the tangible or dignitary interests of the disadvantaged group (effectual);²²⁹ and
5. the utter failure of alternative explanations to offer legitimate ends along with means that really advance those ends (pretextual).²³⁰

pp. 253-54: "...A 1911 Massachusetts law allowed the state to incarcerate 'degenerates' (including homosexuals) and other 'mental defectives' for indefinite periods of time in state mental institutions. More commonly, state laws called for sterilization or castration of moral degenerates and sexual perverts, usually for homosexual behavior. In an effort to 'treat' homosexuals, hospitals performed prefrontal lobotomies, injected massive doses of male hormones, and administered electric shock and other aversion therapy."²⁵⁸

Notes:

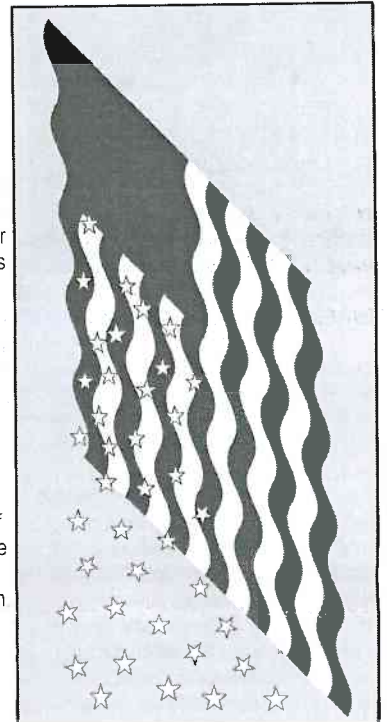
1 *United States v. Windsor*, 133 S.Ct. 2675 (2013) (striking down a federal law defining marriage as the union of one man and one woman); *Romer v. Evans*, 517 U.S. 620 (1996) (striking down a state constitutional amendment barring specific legal protection from anti-gay discrimination); *City of Cleburne v. Cleburne Living Center*, 473 U.S. 432 (1985) (striking down a city's denial of a special zoning permit for housing the cognitively disabled); *Department of Agriculture v. Moreno*, 413 U.S. 528 (1973) (striking down a federal law denying food stamps to

unrelated persons living in a household). This article deals with the anti-animus principle as it has developed in equal protection jurisprudence. The underlying constitutional concern about animus can also be found in other parts of the Constitution, like the First Amendment's protection of religious freedom, *Locke v. Davey*, 540 U.S. 712, 725 (2004) ('animus' against religion would be grounds to invalidate a law under the First Amendment's Free Exercise Clause), and the Constitution's clauses forbidding federal and state Bills of Attainder, see U.S. Const., Art. I, §§ 9 and 10, which prevent legislatures from declaring a person guilty of a crime and stripping him of all procedural rights.

- 2 *United States v. Carolene Products Co.*, 304 U.S. 144, 152-53 n 4 (1938) (emphasis added). See also John Hart Ely, *Democracy and Distrust: A Theory of Judicial Review* 76 (Harvard, 1980) (the Court should 'concern itself with what majorities do to minorities').
- 6 Ely, *Democracy and Distrust* at 157 (cited in note 2) ("To disadvantage a group essentially out of dislike is surely to deny its members equal concern and respect, specifically by valuing their welfare negatively.").
- 7 *Federalist 51* (Madison) in Jacob E. Cooke, ed, *The Federalist Papers* 347 (Wesleyan, 1961).
- 8 *Windsor*, 133 S.Ct. at 2696
- 10 This raises the prospect, dreaded by some, that a law enacted for an impermissible animus-based purpose might later be reenacted for a legitimate purpose and subsequently upheld. For a response to this criticism of purpose inquiry in constitutional law, see Section II.C.3., *infra*.
- 12 Pub. L. No. 104-199, 110 Stat. 2419 (1996).
- 13 *Romer*, 517 U.S. at 651 (Scalia, dissenting).
- 14 *Id.* at 635-36
- 15 539 U.S. 558 (2003).
- 16 *Id.* at 564, 578 (2003)
- 17 133 S.Ct. 2675, 2693 (2013). When I refer in this article to "DOMA," I mean that as shorthand only for Section 3 of DOMA, the federal definition of marriage. I do not mean to refer to Section 2, which purported to follow the states to disregard otherwise valid same-sex marriages from outside the state. The Constitutional analysis of Section 2 would involve different considerations and justifications, like a claimed desire to prevent the "nationalization" of same-sex marriage after a single state like Hawaii recognized it. Whether Section 2 might also be unconstitutional on animus (or other constitutional) grounds is beyond the scope of the article.
- 19 The anti-animus principle is not solely concerned with protecting gay men and lesbians from malice. As discussed below, see Section II, it has

also been used to strike down specific instances of discrimination against the cognitively disabled, see *Cleburne*, 473 US at 450, and "hippies," see *Moreno*, 413 U.S. at 537, even though neither classification merited formal heightened scrutiny. As the Sixth Circuit noted in a case involving the selective arrest and prosecution of a lesbian for driving under the influence, the anti-animus principle is broader than a concern with sexual orientation. "The principle would be the same if Stemler had been arrested discriminately based on her hair color, her college bumper sticker (perhaps supporting an out-of-state rival) or her affiliation with a disfavored sorority or company." *Stemler*, 126 F.3d at 874. In this article, I will focus on the antiterrorism principle as applied in the context of sexual orientation, but that should not be taken to mean that the animus doctrine is limited to a concern for anti-gay action by government. On the other hand, as discussed below in Section III.B.2.b., state action aimed at homosexuals has historically been unusually likely to reflect animus.

- 20 *Windsor*, 133 S.Ct. at 2696 (Roberts, CJ, dissenting).
- 21 *Id.* at 2697-711 (Scalia, J, dissenting); *id.* at 2711-20 (Alito, J, dissenting). Justices Scalia and Alito also didn't explicitly endorse the anti-animus principle. For his part, Justice Scalia denounced the Court for suggesting that Congress and the President had "hateful hearts" in supporting DOMA. "Laying such a charge against them," he declared, "should require the most extraordinary evidence." *Id.* at 2707 (Scalia, J., dissenting).
- 22 *Id.* at 2707 (Scalia, J, dissenting). For a discussion of the indicia supporting the animus holding, see Section III.B. Justice Alito criticized the Court for "casting all those who cling to traditional beliefs about the nature of marriage in the role of bigots or superstitious fools." *Id.* at 2718 (Alito, J., dissenting). For a discussion of the objection that *Windsor* is constitutional name-calling, see Section II.C.4.
- 63 *Windsor*, 133 S.Ct. at 2692.
- 68 "In *Windsor*," the Supreme Court did not clearly state that the non-recognition of marriages under Section 3 of DOMA implicated a fundamental right, much less significantly interfered with one." *Bourke v. Beshear*, 2014 WL 556729, *5 (W.D. Ky.)
- 69 But see Douglas Nejaime, "Windsor's Right to Marry," 123 *Yale L. J. Online* 219, 237-47 (2013) (arguing that principles advanced by gay-marriage advocates for a fundamental right to marry influenced the Court's decision, and may eventually lead to a successful equal protection claim against the exclusion of same-sex couples from state marriage laws).
- 70 *SmithKline Beacham Corp. v. Abbott*



Laboratories, No. 11-17357 & 11-17373, slip op. (Jan. 21, 2014), online at <http://cdn.ca9.uscourts.gov/datastore/opinions/2014/01/24/11-17357.pdf>).

71 *Id.* at 20.

73 *Ibid.*

74 *SmithKline Beacham Corp.*, No. 11-17357 & 11-17373, slip op. at 20.

100 *City of Cleburne v. Cleburne Living Center*, 473 U.S. 432, at 446-47 (1985)

111 *Romer v. Evans*, 517 U.S. 620, at 631 (1996).

119 See, for example, Section III.C.3

136 *Windsor*, 133 S.Ct. at 2693, quoting *Romer*, 517 U.S. at 633.

141-144 *Windsor*, 133 S.Ct. 2693-94, 2697

159 *Inmates of Suffolk County Jail v. Rouse*, 129 F.3d 649, 660-61 (1st Cir. 1997)

186 The "material influence" standard is suggested by John Hart Ely. *Ely, Democracy and Distrust* (supra note 2) at 138. Under this standard, animus does not have to be the sole or primary purpose of the law to violate the anti-animus principle. It's enough that animus was a substantial factor in the outcome.

226 See *Romer*, 517 U.S. at 624; *Windsor*, 133 S.Ct. at 2693.

227 See *Moreno*, 413 U.S. at 537-38; *Cleburne*, 473 U.S. at 448; *Romer*, 517 U.S. at 623-24; *Windsor*, 133 S.Ct. at 2693-94; see also *Arlington Heights v. Metropolitan Housing Corp.*, 429 U.S. 252, at 257-59 (1977).

228 See *Moreno*, 413 U.S. at 536-57; *Windsor*, 133 S.Ct. at 2694-95. Citing *Windsor* and the other animus decisions, a Michigan district court relied on legislative history to conclude that the state's denial of benefits to same-sex

(Continued on page 7)

(Continued from page 6)

partners was rooted in animus. *Bassett v. Snyder*, 951 F.Supp.2d 939, 968 (E.D. Mich. 2013) ("The historical background and legislative history of the Act demonstrate that it was motivated by animus against gay men and lesbians."). See also *Arlington Heights*, 429 U.S. at 268 (inquiring into legislative history to find racial purpose).
229 See *Romer*, 517 U.S. at 627-28; *Windsor*, 133 S.Ct. at 2693-95. See also *Washington*, 426 U.S. at 242 (consideration of law's disparate impact). The Court has not explained why a law's harmful impact is a sign that animus motivated its passage. It may be that the Court believes the Congress is likely to have intended the tangible and dignitary damage the law actually inflicted. This may or may not be true in a given case. Congress might not have foreseen or given any thought to the negative impact. But in the case of *DOMA*, which purposefully affected thousands of provisions in the United States Code, the idea that Congress couldn't have foreseen any consequences is hard to credit. Congress at the very least had constructive knowledge of the consequences. In the case of *DOMA*, evidence of impact is thus the kind of evidence from which an inference about purpose and motivation can be drawn.

230 See *Moreno*, 413 U.S. at 537; *Cleburne*, 473 U.S. at 449-50; *Romer*, 517 U.S. at 635; *Windsor*, 133 S.Ct. at 2693-94. Concern about using pretext to justify an unconstitutional act is as old as *McCulloch v. Maryland*, 17 U.S. 316, 423 (1819) (Congress may not accomplish an unconstitutional objective under the pretext of using its constitutional powers.).

258 *Wm. N. Eskridge, Jr., Gaylaw: Challenging the Apartheid of the Closet*, at 42 (Harvard 1999)

Use of a 'Professional Judgment Standard' Undermines Sex Offender Commitment Laws.

David W. Nordsieck, "How the Professional Judgment Standard Could Undermine the Validity of Sexually Violent Predator Laws," 88 Wash. U. L. Rev. 1281 (2011)

[Text Excerpts:]

pp. 1283-84: "...[W]hat is a state provided insufficient or 'sham treatment ...that lasts for years, ostensibly to change someone's psychiatric diagnosis,'¹⁸ with the true purpose of prolonging his confinement? Such a scenario would likely be difficult to detect, in part because of

the ongoing debate as to whether these individuals are amenable to treatment at all.¹⁹ When a confined individual alleges that the state has impinged on his constitutional rights, the proper guardian of his rights ought to be the federal courts rather than the state.²⁰ In the context of sexually violent predators, however, the courts have adopted the professional judgment standard, which presumes that the treatment decisions of a qualified mental health professional are valid unless they substantially depart from generally accepted norms. Because the generally accepted norms for treating sexually violent predators are ill defined,²² courts lack a principled metric with which to apply the standard. By continuing to adhere to a standard that the courts cannot apply in practice, they are abdicating their role as the protector of individual rights."

pp. 1290-91: (In *Allen v. Illinois*.) "The four dissenting Justices argued that '[a] goal of treatment is not sufficient ...to prevent a characterization of proceedings as "criminal."⁷⁰ The dissent reasoned that to allow a stated goal of treatment to bar a characterization of a statute as criminal would enable legislatures to circumvent sentencing limitations and indefinitely commit people, resulting in the "evisceration of criminal law and its accompanying protections."⁷¹"

pp. 1294-95: "For the purposes of this Note, the most interesting discussion in *Seling* happened in dicta. The majority noted that the case did not allow the Court to consider whether and to what extent the Court might 'look to actual conditions of confinement and implementation of the statute to determine in the first instance whether a confinement scheme is civil in nature.'¹⁰⁷... Justice Scalia's concurrence went on, however, to suggest that a due process challenge could establish a facially civil statute as criminal if "harsh executive implementation ...contradict[ed] the statute's civil character," and state courts had "authoritatively interpret[ed] the state statute as permitting impositions that are indeed punitive."¹¹⁰ Justice Scalia apparently suggests, therefore, that SVPs may be able to launch a challenge under the Due Process Clause if the implementation contradicts the statutory purpose. As one commentator has noted, "[d]espite the outcome, ...most members of the Court appeared to assume or at least leave open the possibility - that evidence of a statutory scheme's implementation might dislodge early "facial" findings of proper statutory purpose."¹¹¹"

pp. 1295-96: "...[A] careful reading of the Court's precedent reveals at least two ways that such statutes might be invalidated based in large part on a showing of inadequate treatment. The first way would if the Supreme Court were faced with a determination of whether the statute is criminal or civil in the first in-

stance.¹¹³ The Court might look to the actual conditions of confinement in deciding whether the civil label would be accepted.¹¹⁴ If the Court were to conclude that the SVPs were being confined under conditions that were essentially the same as prisoners who have no right to treatment, then the Act could be divested of its civil nature, found to be criminal,¹¹⁵ and therefore violative of the Double Jeopardy and Ex Post Facto Clauses.¹¹⁶ The other way that inadequate treatment might lead to invalidation of a statute would be if harsh executive implementation resulted in punitive conditions and was supported in the state courts.¹¹⁷ This would reveal the criminal effect, or perhaps even the original purpose of the statute.¹¹⁸ This approach would have invalidation implications as a substantive due process challenge.¹¹⁹

Based on the aforementioned Supreme Court precedent and the statutorily imposed obligations,¹²⁰ it seems that there is a qualified right to reasonable treatment for involuntarily civilly committed sexually violent predators.¹²¹ Furthermore, it appears that the constitutional validity of such statutes can be critically affected by the presence or absence of treatment.¹²² But establishing that some right to treatment exists does not answer the equally daunting question of implementation."

p. 1296: III. Providing Treatment A. What is Treatment?

"This area of psychological treatment suffers from a relative lack of data,¹²³ research,¹²⁴ and professional consensus.¹²⁵"

pp. 1297-99: B. Challenging the Adequacy of Treatment

The Professional Judgment Standard "When challenging the sufficiency of treatment, litigants are faced with the serious challenge of overcoming the professional judgment standard as articulated in *Youngberg v. Romeo*.¹²⁸ Under this standard, treatment decisions for involuntarily committed individuals, 'if made by a professional, [are] presumptively valid; liability may be imposed only when the decision by the professional is such a substantial departure from accepted professional judgment, practice, or standards as to demonstrate that the person responsible actually did not base the decision on such a judgment'.¹²⁹...

The Problem of Applying the Professional Judgment Standard to the Context of Sexually Violent Predator Treatment Programs

There is not, however, a generally accepted practice or standard when it comes to the treatment of SVPs.¹³⁵ One commentator noted that "[t]here is not enough current scientific evidence about the efficacy of sex-offender treatments to warrant strict confidence in any set of treatment guidelines.¹³⁶ There is a healthy and ongoing debate as to wheth-

er they are treatable at all, which treatments work, and which standards should be used for treatment and ethical conduct.¹³⁹ The association for the Treatment of Sexual Abusers (ATSA) is the only organization that can arguably be said to have set standards and guidelines, but the validity of ATSA's sugges-



A Professional

tions has received serious criticism and is not representative of a professional consensus.¹⁴⁰ Furthermore, ATSA's guidelines instruct its members to follow the standards unless, in their professional judgment, they feel that they should deviate.¹⁴¹ For the purpose of evaluating a treatment decision under the professional judgment standard, ATSA is therefore circular.¹⁴²"

pp. 1300-01: "...[B]y turning a deaf ear to grievances about the sufficiency of treatment, courts could unwittingly be opening the door to a general invalidation of a state's statutory scheme. By insulating treatment programs from review, the professional judgment standard enables potentially unchecked application and punitive conditions of confinement.¹⁴⁸ The professional judgment standard has the potential to become the exact situation in which the Supreme Court has indicated a statute might be invalidated. For the purposes of protecting society from the release of dangerous SVPs, it seems that the professional judgment standard may represent a large risk, rather than a useful protection from litigation. Because the professional judgment standard has the potential to shield questionable treatment decisions from the light of judicial scrutiny, continued use of the standard could produce the type of 'harsh executive implementation' that Justice Scalia has suggested might lead to the invalidation of the statute under the Due Process Clause. The long-term implications of the standard, therefore, may be in significant tension with its goals. To put it bluntly, by continuing to use the professional judgment standard, the courts might unwittingly be giving the state administrators just enough rope to hang themselves."

Notes:

18 *Allison Retka, "I'm Going to Die Here," Mo. Lawyer's Weekly*, June 12, 2009, at 14. (quoting Dr. Delaney Dean)

19 See *infra* note 126 & accompanying text.

20 See, e.g., *Chapman v. California*, 386 U.S. 18, 21 (1967) ("But the error from which these petitioners suffered was a denial of rights ...rooted in the Bill of Rights, offered and championed in the Congress by James Madison, who told the Congress that the 'independent' federal courts would be the 'guardians of those rights.'... With faithfulness to the constitutional union of the States, we cannot leave to the States the formulation of the authoritative laws, rules and remedies designed to protect people from infractions by the States of federally guaranteed rights.")

22 See *infra* notes 125, 139-140.

70 *Allen v. Illinois*, 478 U.S. at 380

71 *Id.*

107 *Seling v. Young*, 531 U.S. 250, 266 ((2001). The Supreme Court did not have an occasion to determine the statute's civil or criminal nature in the first instance because the Washington Supreme Court had already done so. See *id.* at 265. Justice Stevens made clear in his dissent that he did not find that reasoning persuasive. See *id.* at 277 ("If conditions of confinement are such that a detainee has been punished twice in violation of the Double Jeopardy Clause, it is irrelevant that the scheme has been previously labeled as civil without full knowledge of the effects of the statute."). The Court also "did not decide whether a different legal theory, substantive due process would provide redress in an 'as applied' context." *Eric S. Janus*, "Treatment and the Civil Commitment of Sex Offenders," in *Bruce J. Winick & John Q. LaFond* (eds.), *Protecting Society from Sexually Dangerous Offenders* (2003), at 126.

110 *Id.*, at 269-70

111 *Eric S. Janus & Brad Bolin*, "An End-Game for Sexually Violent Predator Laws: As-Applied Invalidation," 6 *Ohio St. J. Crim. L.* 25 (2008), at 39.

113 *Young*, 531 U.S. at 266-7.

114 *Id.*

115 *Allen v. Illinois*, 478 U.S. 364, 373-74 (1986).

116 *Young*, 531 U.S. at 266.

117 *Id.* At 269-70 (Scalia, J., concurring).

118 *Janus & Bolin*, *supra* note 111, at 41 ("It is not clear, nor may it ultimately matter, whether the post-enactment actions of the state changed the law's character, or merely revealed its [pre-existing] true character. The important point here is that ...the purpose might be revealed by post-enactment implementation.")

119 *Id.*

120 *Kansas v. Hendricks*, 521 U.S. 346, 367 (1997). With varying degrees of specificity, all SVP statutes oblige the state to provide treatment.

121 *Janus*, *supra* note 107, at 125-26.

122 *Id.* At 120 ("Arguments about the nature and efficacy of sex offender treatment are central to the constitutional debates about sex offender commitment statutes...").

123 *Abby Goodnough & Monica Davey*, "For Sex Offenders, A Dispute Over Therapy's Benefits," *New York Times*, March 6, 2007, at A1.

124 *Gregory DeClue*, "Practice Standards and Guidelines for the Evaluation, Treatment, and Management of Sexual Abusers: Bamboozle No More," 34 *J. Psychiatry & Law* 197 (2006) ("There is currently some difference of opinion about what to make of recent studies that do show differences in detected recidivism between treated sex offenders and untreated controls, because those studies all have significant design limitations."); *Goodnough & Davey*, *Therapy*, *supra* note 123 ("It has never been regarded as a legitimate and recognized topic for research by psychologists," said Robert Prentky, director of research at the Justice Research Institute in Boston. "There is a very strong undercurrent of disrespect for this area of research and perhaps even skepticism, frankly.")

125 *DeClue*, *supra* note 124, at 203-04 ("In sum, there is considerable controversy over whether and to what extent sex-offender treatment reduces sexual recidivism. A corollary is that if sex-offender treatment does work, we do not know which treatment techniques or methods work best."); *Janus*, *supra* note 107, at 121 ("Currently, there is no consensus about the efficacy of sex offender treatment...").

128 457 U.S. 307 (1982).

129 *Id.* at 323.

135 *DeClue*, *supra* note 124, at 207.

136 *Id.*

139 *DeClue*, *supra* note 124, at 207 (critiquing the Association for the Treatment of Sexual Abusers' 2005 Practice Standards and Guidelines and finding that "there is not enough current scientific evidence about the efficacy of sex-offender treatments to warrant strict confidence in any set of treatment guidelines...").

140 Compare *Jill Levenson & David D'Amora*, "Commentary. An Ethical Paradigm for Sex Offender Treatment: Response to Glaser," 6 *W. Criminology Rev.* 145, 148-49 (2005) (defending, *inter alia*, the ATSA's Practice Standards and Guidelines and arguing that sex offender treatment can comport with ethical standards of treatment), with *Bill Glaser*, "Therapeutic Jurisprudence: An Ethical Paradigm for Therapists in Sex Offender Treatment Programs," 4 *W. Criminology Rev.* 143 (2003) (criticizing the ATSA Practice Standards and Guidelines and arguing that

many sex offender treatment programs are antithetical to traditional mental health ethics).

141 *DeClue*, *supra* note 124, at 199 ("ATSA recognizes that members must exercise their professional judgment when interpreting and applying the ATSA Guidelines...") [quoting ATSA Practice Standards and Guidelines].

142 *Id.* If the guidance set forth in ATSA was the standard for dealing with sexually violent predators, then the professional judgment standard would be practically impossible to apply. Even treatment decisions that substantially departed from accepted professional judgment, practice, or standards would be permitted if the departure was made according to one's professional judgment. The end result would be a lack of meaningful constraints or review of treatment decisions.

148 The logic used in the Ninth Circuit's reasoning in *Sharp v. Weston* illustrates this problem well. The court was admonishing the state administrators for invoking the professional judgment standard to buttress the validity of his opinion that the state had complied with an injunction. The Ninth Circuit's logic, however, applies with equal strength to the proposition that the professional judgment standard should never be used when an involuntarily committed individual challenges the constitutionality of his treatment. See *Sharp v. Weston*, 233 F.3d 1166, 1171 (9th Cir. 2000).

Editor's Closing Note: But what is the professional judgment standard? – what most/all commitment facilities do, or what other SO treatment programs do? – Or what general psychological therapists do with SOs? (These practice standards are extremely divergent!)

Even With Actuarial Tools, Recidivism Risk Assessment Is a Failure.

Jodi L. Viljoen, Dana M. Cochran & Melissa R. Johnson, "Do Risk Assessment Tools Help Manage and Reduce Risk of Violence and Reoffending? A Systematic Review," 42 *Law and Human Behavior* 181 (June 2018), DOI: <http://dx.doi.org/10.1037/11hb0000280>

[Abstract Excerpts:]

p. 181: "Although it is widely believed that risk assessment tools can help manage risk of violence and offending, it is unclear what evidence exists to support this view. ...[W]e identified 73 published and unpublished studies (N = 31,551 psychiatric patients and offenders, N = 10,002 professionals) that examined either professionals' risk management efforts following the

use of a tool, or rates of violence or offending following the implementation of a tool. ...The primary findings [included that] there is insufficient evidence to conclude that tools directly reduce violence or reoffending, as findings are mixed..."

[Text Excerpts:]

ca. p. 189: "Some Have Questioned the Value of Tools for Risk Management

...In particular, critics have pointed out that tools tend to have high rates of false positives, meaning that many offenders who are rated as high risk do not reoffend (e.g., Ryan et al., 2010). It is thought that this 'risk inflation' might lead to stigma, over-incarceration and warehousing of individuals who are high risk, and a decreased focus on rehabilitation and therapeutic efforts (Almond, 2012; Fitzgibbon, 2007; Rose, 1998; Ryan et al., 2010). At the same time, there is concern that the use of risk assessment tools might lead to an inappropriate withdrawal of resources from clients who are low risk, because these individuals may be falsely viewed as not needing treatment (Large, et al., 2014; Rose, 1998; Ryan et al., 2010). Thus, in these critics' views, risk assessment tools provide a 'beguiling, but flawed, rationale for the distribution of resources' (Nielssen, Ryan, & Large, 2011, p. 270). This concern is compounded by the fact that assessments can be costly and could erode resources that might otherwise be available for treatment (Nielssen et al. 2011).

Furthermore, some critics have questioned the motives that underlie the adoption of risk assessment tools. Hannah-Moffat and colleagues (2009) argues that a primary reason that agencies use tools is not to reduce risk or to protect others, but rather to protect themselves from lawsuits by creating a 'paper trail' (p. 396). Similarly, Undrill (2007) describes risk assessment as a 'neurotic organizational attempt to tame anxiety' (p. 294). In other words, there is concern that the use of tools puts the needs of the agency before those of the clients themselves.

Finally, critics have pointed out that despite claims that risk assessment tools help to manage risk, there is little evidence to support such assertions (e.g., Wand, 2012). For instance, in a survey of 1,937 psychiatrists, 87% of respondents endorsed the view that tools provide a false sense of security, as there is little direct evidence that tools help to reduce adverse events (Royal College of Psychiatrists, 2008). Some risk assessment researchers and tool developers have offered similar cautions. For instance, Rice, Harris, and Hilton (2010) noted that, 'At this point, no one can promise that the introduction of any formal violence risk assessment (actuarial or nonactuarial) will improve real risk-related decisions.'

(Continued on page 9)

No one really knows what strategies in the application of available empirical evidence will ensure that avoidable violent recidivism and unnecessary restriction of offenders' freedoms are simultaneously minimized' (p. 113)."

References:

Almond, T. (2012). An assessment tool that safeguards or stigmatizes young offenders? *Probation Journal*, 59(2), 138-150

Fitzgibbon, D.W.M. (2007). Risk analysis and the new practitioner: Myth or reality? *Punishment & Society*, 9, 87-97.

Hannah-Moffat, K. et al. (2009). Negotiated risk: Actuarial illusions and discretion in probation. *Canadian Jour. Of Law & Society/Revue Canadienne Droit Et Societe* (University of Toronto Press), 24(3), 391-409

Large, M.M. et al. (2014). Can violence risk assessment really assist in clinical decision-making? *Australian and New Zealand Journal of Psychiatry*, 48(3), 286-288

Nielssen, O., Ryan, C., & Large, M. (2011). Risk assessment and resource allocation. *Australasian Psychiatry: Bulletin of Royal Australian and New Zealand College of Psychiatrists*, 19(3), 270

Rice, M.E., Harris, G.T., & Hilton, N.Z. (2010). The Violence Risk Appraisal Guide and Sex Offender Risk Appraisal Guide for Violence Risk Assessment and the Ontario Domestic Assault Risk Assessment and Domestic Violence Risk Appraisal Guide for Wife Assault Risk Assessment. In R.K. Otto, K.S. Douglas (eds.), *Handbook of violence risk assessment* (pp. 99-119). New York, NY: Routledge/Taylor & Francis Group.

Rose, N. (1998). Governing risky individuals: The role of psychiatry in new regimes of control. *Psychiatry, Psychology, and Law*, 5(2), 175-195

Royal College of Psychiatrists (2008), *Rethinking risk to others in mental health services: Final report of a scoping group* (CR 150). Royal College of Psychiatrists.

Ryan, C. et al. (2010). Clinical decisions in psychiatry should not be based on risk assessment: *Australasian Psychiatry: Bulletin of Royal Australian and New Zealand College of Psychiatrists*, 18(5), 398-403

Undrill, G. (2007). The risks of risk assessment. *Advances in Psychiatric Treatment*, 13(4), 291-297

Wand, T. (2012). Investigating the evidence for the effectiveness of risk assessment in mental health care. *Issues in Mental Health Nursing*, 33(1), 2-7

What Are The Chances?

Ignore Bayes' Theorem at Your Own Risk. Judging Personal Risk by Group Is Just a Guess.

Richard W. Elwood, "Defining Probability in Sex Offender Risk Assessment," 60 (16) *Int'l Jour. Of Offender Therapy & Comparative Criminology*, pp. 1928-1941 (December 2016), DOI: 10.1177/0306024X15587912.

Abstract (p. 1928): "Risk is the probability of an adverse event or outcome. In a previous article, I compared the Bayesian and Frequentist models of defining probability. Both approaches are widely used in the biomedical and behavioral sciences even though they yield different results. No consensus has emerged as to which is more appropriate. The choice between them remains controversial. There is ongoing debate and confusion over using actuarial scales to predict individuals' risk of sexual recidivism. Much of the debate comes from not distinguishing Frequentist from Bayesian definitions of probability. Much of the confusion comes from applying Frequentist probability to individuals' risk. By definition, only Bayesian probability can be applied to the single case.

...Although Bayesian probability is well accepted in risk assessment generally, it has not been widely used to assess the risk of sex offenders. This article concludes that the Bayesian model provides a viable alternative to logistic regression and may be more useful in quantifying the absolute recidivism risk of individual sex offenders. It shows how evaluators can easily calculate Bayesian probabilities and their associated credible intervals from an actuarial data set. Last, the article proposes a forensic practice guideline that evaluators do not conclude that an offender meets an absolute risk threshold unless the subject's risk exceeds the threshold by a credible margin of error. 1...show how the Bayesian view alone provides a coherent scheme to conceptualize individuals' risk of sexual recidivism."

Text Excerpts:

Probability

"I define risk by the probability of an adverse event or outcome. Probability can be defined in either Frequentist or Bayesian terms.1 While they may yield the same numerical value, they differ in what probability means. Frequentist probabilities are defined by relative frequencies, how frequently an event or outcome occurs over a series of repeated trials. ...A heads means that heads will come up half the time. The Frequentist position is not simply that the notions of probability and frequency are intimately connected, but that they are actually identical' (Appleby, 2005, p. 3). However, a single trial has no relative frequency. A

single coin toss must result in either heads or tails. There is no series of trials or ratio of heads to tosses. Therefore, Frequentist probability cannot be meaningfully applied to a single event. However, sexual recidivism is a single event. Thus, by definition, the concept of Frequentist probability cannot be applied to an offender's risk of sexual recidivism.

...Bayesian probability is now widely accepted as a proper format for predicting risk in actuarial science (Dudley, 2006; Makov, 2001), epidemiology (Dunson, 2001), and throughout the biomedical and behavioral sciences (e.g., Altman & Royston, 2000; Ashby & Smith, 2000; Aven & Eidesen, 2007; Christian, Croghan, & Maxfield, 2013; Cook, 2008; Elwood, 1993; Gigerenzer Gaissmaier, Kurz-Milcke, Schwartz & Woloshin, 2008; McCormick, Rudin, & Madigan, 2012)...

Some readers may object to my equating risk assessment with risk prediction, agreeing with Doren (2006) that prediction is forecasting whether or not an event will occur. Doren argued that Bayesian probability applies only to prediction, risk assessment is not prediction, and therefore, Bayesian probability does not apply to risk assessment. However, Kruschke (2011) pointed out that statistically 'prediction simply means inferring the values of some missing data based on some other included data' (p. 13). In that sense, risk assessment and risk prediction are the same; both are probabilistic. Moreover, the prediction of violence is well established (Monahan et al., 2005; Skeem & Monahan, 2011), and recidivism is routinely predicted in the sex offender literature (Hanson & Morton-Bourgon, 2004; Harris, Phenix, Hanson & Thornton, 2003; Thornton, 2006; Wollert, 2006). Indeed, Bayesian probability applies to risk assessment precisely because risk is probabilistic.

...Baldessarini, Finklestein, and Arana (1983) introduced [Bayesian probability] to American psychiatry, coining the terms positive predictive power (PPP) and negative predictive power (NPP) for posterior probabilities. Janus and Meehi (1997) introduced Bayesian probability to sex offender risk assessment. PPP has since been applied to the Static-99 (Beauregard & Mieczkowski, 2009; Bengtson & Langstrom, 2008; Wollert, 2006) and Static-99R (Campbell & DeClue, 2010; Fazel, Singh, Doll, & Grann, 2012; Neller & Frederick, 2013). Frederick and Bowden (2009) devised the Test Validation Summary, an interactive, graphic computer program to adjust positive predictive values (PPV, equivalent to PPP) for various recidivism base rates.

...In Bayesian terms, an individual's probability of sexual recidivism is the PPP of recidivism (however defined). Absolute risk probabilities are critical in the United States, where they may be used to com-

mit offenders as sexually violent persons (SVPs). The PPP is derived from recidivism rates found in longitudinal studies of sex offenders. Actuarial scales like the Static-99R provide those rates. The confusion in sex offender risk assessment arises from not recognizing or distinguishing Frequentist from Bayesian probability. Nowhere is that confusion more evident than in the debate over using actuarial data to assess an individual's risk.

Group Versus Individual Risk

Harris and Hanson's (2004) assumption that an individual's risk is the same as the group recidivism rate contradicts their own Static-99 coding rules: 'The recidivism estimates provided by the Static-99 are group estimates [that] do not directly correspond to the recidivism risk of an individual offender.' (Harris et al., 2003, p. 81). The report format in the Static-99R and Static-2002R Evaluators' Handbook (Phenix, Helmus, & Hanson, 2012) likewise only cites the recidivism rate of a group, without reference to the risk of an individual.



The Tarot card representing chance

Given the conflicting advice, many forensic evaluators disavow any individual prediction and offer instead something like 'Mr. Smith's score places him in a group of sexual offenders, 55% of whom were charged with another sex offense within 10 years after release.' At least one evaluator has struggled to answer an attorney's question, 'So doctor, is Mr. Smith in the 55% group or in the 45% group?' The attorney asked whether Mr. Smith is in the recidivist group. Of course, in the Bayesian scheme, Mr. Smith and everyone else has a 55% probability of being in the 55% group that

(Continued on page 10)

(Continued from page 9)

recidivates. Both the question and the difficulty the evaluator had in answering it reflect the confusion over 'placing' individuals in groups, rather than assigning a probability to the individual.

Some U.S. state courts have accepted experts' testimony that the Static-99 'is simply a statement about how groups of people perform.' 'So you really can't come up with an individual prediction' (State v. Morales, 2003), and the Static-99 'has no predictive value for an individual' (New York v. Rosado, 2009). However, Bayesian probabilities reflect what we know. If all we know is that everyone in a group shares the same Static-99R score, we know the same thing about each of them and assign the same probability to all of them. Moreover, courts require that evaluators testify to the risk of an individual and not to the recidivism rate in a group of similar individuals. Evaluators cannot coherently disavow any individual risk prediction and then render an opinion on an individual's risk.

A colleague wrote to me, arguing,

'An individual's re-offense probability cannot be 40% or 63% or 1%. That is a group probability. Think about the two segments of that group – the ones who did reoffend and the ones who didn't. How can you say their individual probability was equal? One was 0% and one was 100%.'

However, Bayesian probabilities are not validated by individual outcomes. 'Probability statements are not about what is in fact the case, but about what one can reasonably expect to be the case' (Appleby, 2005, p. 448). For example,

'Alice buys one ticket in a lottery having 106 tickets, and her ticket wins. Even after it is known that Alice did win the lottery, we would still say that Alice was very unlikely to win. And we would be right to say it because the statement, that Alice is unlikely to win, is not, primarily, a statement about the actual outcome. Rather, it is a statement about what Alice and [we], could reasonably expect regarding the outcome. The fact, that Alice did win, does not alter the fact that she could not reasonably have expected to win' (Appleby, 2005, p. 458).

In a post to an online forum, an evaluator used the example of 'people whose true risk was 45%.' A colleague responded, 'How can a person's true risk be 45% [?] I either do or do not reoffend, I don't do it 45%.' The concept of a true risk reflects the Frequentist view of probability, which, of course, cannot be applied to a single person. In the Bayesian view, there is no true probability. Probability depends on the information we have....

Summary

"...The distinction between Frequentist and Bayesian concepts of probability has important practical consequences in sex offender risk assessment. Foremost, Frequentist probability by definition applies to series, not to single events like sexual recidivism. Much of the confusion and debate in sex offender risk assessment comes from trying to apply Frequentist probability to single events or individuals. The advantage of using the Bayesian scheme is that probability can be coherently applied to a single event. Because sexual recidivism is a single act, that advantage is decisive...."

Note:

1. Probability can also be defined in Propensity terms. Popper (1959) introduced the propensity theory of probability to accommodate single-event probabilities in quantum physics. In this scheme, probability reflects a physical disposition or tendency of an event to yield a single outcome or a relative frequency (Hájek, 2012). Propensity theories are still debated by philosophers (Belnap, 2007; Eagle, 2004; Gillies, 2000), but they have not been embraced by scientists, who view them as more metaphysical than scientific (Galavotti, 2014; Settle, 1972).

References

- Altman, D.J & Royston, P. (2000). What do we mean by validating a prognostic model? *Statistics in Medicine*, 19, 453-473
- Appleby, D.M. (2005). Probabilities are a single case or nothing. *Optics and Spectroscopy*, 99, 447-456
- Ashby, D. & Smith, A.F.M. (2000). Evidence-based medicine as Bayesian decision-making. *Statistics in Medicine*, 19, 3291-3305
- Aven, T. & Eidesen, K. (2007). A predictive Bayesian approach to risk analysis in health care. *BMC Medical Research Methodology*, 7
- Baldessarini, R.J., Finklestein, S. & Arana, G.W. (1983). The predictive power of diagnostic tests and the effect of prevalence of illness. *Archives of General Psychiatry*, 40, 569-573
- Beauregard, E. & Mieczkowski, T. (2009). Testing the predictive utility of the STATIC-99: A Bayes Analysis. *Legal and Criminological Psychology*, 14, 187-200
- Belnap, N. (2007). Propensities and probabilities. *Studies in History and Philosophy of Modern Physics*, 38, 593-625
- Bengtson, S. & Långström, N. (2008). Unguided clinical and actuarial assessment of re-offending risk: A direct comparison with sex offenders in Denmark. *Sexual Abuse: A Jour. of Research and Treatment*, 19, 135-153
- Campbell, T.W. & DeClue, G. (2010). Maximizing predictive accuracy in sexually violent predator evaluations. *Open Access Jour. Of Forensic Psychology*, 2, 148-232
- Christian, T.F. Croghan, T.W. & Maxfield, M. (2013). Using performance measures to promote evidence-based care: A Bayesian approach (Issue Brief). Washington, DC: Center on Health Care Effectiveness.
- Cook, N.R. (2008). Statistical evaluation of prognostic versus diagnostic models: Beyond the ROC curve. *Clinical Chemistry*, 54, 17-23
- Doren, D.M. (2006). Battling with Bayes: When statistical analyses just won't do. *Sex Offender Law Report*, 7, 49-50, 60-61
- Dudley, C. (2006). Bayesian analysis of an aggregate claim model using various loss distributions (Unpublished master's thesis). Heriot-Watt University, Edinburgh, Scotland
- Dunson, D.B. (2001). Commentary: Practical advantages of Bayesian analysis of epidemiologic data. *American Jour. Of Epidemiology*, 153, 1222-1226
- Eagle, A. (2004). Twenty-one arguments against propensity analyses of probability. *Erkenntnis*, 60, 371-416
- Elwood, R.W. (1993). Clinical discriminations and neuropsychological tests: An appeal to Bayes' theorem. *The Clinical Neuropsychologist*, 7, 225-234
- Fazel, S., Singh, J.P., Doll, H., & Grann, M. (2012). Use of risk assessment instruments to predict violence and antisocial behavior in 73 samples involving 24827 people: Systematic review and meta-analysis. *British Medical Journal*, 345, e4692.
- Frederick, R.I. & Bowden, S.C. (2009). The test validation summary. *Assessment*, 16, 215-236
- Galavotti, M.C. (2015). Probability theories and organization science: The nature and usefulness of different ways of treating uncertainty. *Jour. Of Management*, 41, 744-760
- Gigerenzer, G., Gaissmaier, W., Kurz-Milcke, E., Schwartz, L.M., & Woloshin, S. (2008). Helping doctors and patients make sense of health statistics. *Psychological Science in the Public Interest*, 8, 53-96
- Gillies, D. (2000). Varieties of propensity. *British Jour. for the Philosophy of Science*, 51, 807-835
- Hájek, A. (2012). Interpretations of Probability. In Zalta, E.N. (ed.), *The Stanford Encyclopedia of Philosophy*
- Hanson, R.K. & Morton-Bourgon, K.E. (2004). Predictors of sexual recidivism: An updated meta-analysis. Ottawa, Ontario: *Public Safety of Canada*
- Harris, A.J.R., Phenix, A., Hanson, R.K. & Thornton, D. (2003). Static-99 Coding Rules Revised-2003. Ottawa, Ontario: Dept. of the Solicitor General of Canada.
- Harris, A.J.R. & Hanson, R.K. (2004). Sex offender recidivism: A simple question. Ottawa, Ontario: *Public Safety Canada*
- Janus, E.S. & Meehl, P.E. (1997). Assessing the legal standard for prediction

of dangerousness in sex offender commitment proceedings. *Psychology, Public Policy, and Law*, 3, 33-64

Kruschke, J.R. (2011). *Doing Bayesian data analysis: A tutorial with RE and BUGS*. Amsterdam, The Netherlands: Elsevier

Makov, U.E. (2001). Principal applications of Bayesian methods in actuarial science: A perspective. *North American Actuarial Journal*, 5, 53-57

McCormick, T.H., Rudin, C., & Madigan, D. (2012). Bayesian hierarchical rule modeling for predicting medical conditions. *The Annals of Applied Statistics*, 6, 652-668

Monahan, J. et al. (2005). An actuarial model of violence risk assessment for persons with mental disorders. *Psychiatric Services*, 56, 810-815

Neller, D.J & Frederick, R.I. (2013). Classification accuracy of actuarial risk assessment instruments. *Behavioral Sciences & the Law*, 31, 141-153

New York v. Rosado, No. 29290 (153 N.Y. App. June 29, 2009).

Phenix, A., Helmus, A., & Hanson, R.K. (2012). *Static-99R & Static-2002R Evaluators' Workbook*.

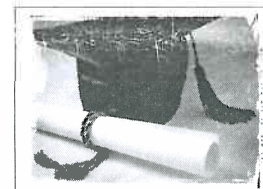
Settle, T. (1972). Presuppositions of propensity theories of probability. *British Jour. For the Philosophy of Science*, 23, 331-335

Skeem, J.L. & Monahan, J. (2011). Current directions in violence risk assessment. *Current Directions in Psychological Science*, 20, 38-42

State v. Morales (153 Ohio App., August 8, 2003).

Thornton, D. (2006). Age and sexual recidivism: A variable connection. *Sexual Abuse: A Jour. Of Research and Treatment*, 18, 123-135

Wollert, R. (2006). Low base rates limit expert certainty when current actuarials are used to identify sexually violent predators. *Psychology, Public Policy, and Law*, 12, 56-85



Questions? Comments!

This is TLP's contact data:

Cyrus P. Gladden II

1111 Highway 73

Moose Lake, MN 55767

Voicemail (for 15 second message):

218.351.1900, ext'n 99042

'Sorry, no subscriptions available to the incarcerated/committed. Can you receive email & do you have someone outside willing to scan TLP & 'broadcast email' it to many in your facility? If so, you may write to discuss this.