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**Covid Comment:**

Some issues are best encapsulated visually, rather than verbally. Like, for example, the current tension between preventing further deaths in the Covid-19 pandemic vs. the need to get back to making money.



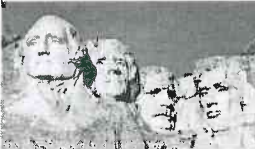
Employment

vs.



Mass Quarantine & Death

If you must get back to work, be very careful. Pandemics don't end overnight and they sometimes come back for an encore.



**Quick! Write this down!**

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(Exactly & Only as Below):

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# What Does Independence Mean To You?

by *Cyrus Patrick Gladden II*

"This is not a test."

On this 245<sup>th</sup> celebration of our nation's celebration of the signing of the Declaration of Independence, the question arises: What does independence mean to you, from this perspective of indefinite pseudo-incarceration claimed to be for preventive detention, but really just as further punishment for crimes in the distant past?

A little lesson from history may inspire us. The Declaration of Independence didn't just spring out from the heads of some visionaries. It was first preceded by a period of worsening relationships with Great Britain, and ultimately during the last year and a quarter beforehand, by military skirmishes and even actual battles (for instance, Bunker Hill) with English troops brought in to suppress unrest by colonists.

The force exerted by large armed forces from England emphatically underscored that the Crown was making only empty gestures toward conciliation, while striking down every hint of dissent — often by seizing those rumored to utter it and incarcerating them in chains on prison ships anchored offshore.

Thus, by April 1776 most colonists had become convinced that separation was necessary and inevitable, only asking when and how. At a time when there was no central government, or even a country, representatives — already convened in a hitherto loosely organized "Continental Congress" — wrangled with those questions over more than two months.

The Declaration of Independence was written largely by Thomas Jefferson, who had already displayed talent as a writer of political philosophy. At the request of his fellow committee members he wrote the first official draft. Committee members made a number of merely semantic changes, and they also expanded somewhat the list of charges against the king.

The Congress deleted a condemnation of the British people, and, dismaying to Jefferson, also deleted a denunciation of the African slave trade, at the insistence of some Southern delegates.

Ironically, the concepts espoused by the Declaration were nothing new at the time, and indeed, arose from English philosophers and political theorists themselves, especially as the Age of Enlightenment began in earnest not long before the American Revolution.

Abandoning any claim based on the rights of Englishmen, however, the Declaration put forth the more fundamental doctrines of natural rights of all men and of government under social contract, ideas that were truly novel at the time. Thus, the Declaration was an attempt to assert a new doctrine for the ages, one morally just and politically valid. The right of the colonists to government ultimately of their own choice was valid — and so too is that same right to this very day.

Some of the phrases of the declaration have steadily exerted profound influence in the United States, especially the proclamation that "We hold these truths to be self-evident, that all men are created equal, that they are endowed by their Creator with certain unalienable Rights, that among these are Life, Liberty and the pursuit of Happiness."

This quote usually omits the immediately following phrase that finishes the point: "— That to secure these rights, Governments are instituted among Men, deriving their just powers from the consent of the governed — That whenever any Form of Government becomes destructive of these ends, it is the Right of the People to alter or to abolish it..."

The Declaration cited notions of "despotism" and "tyranny" that previously were not much considered, and specifically denied incarceration other than for conviction of crime, and expressly denounced "mock trials," which we know all too well. Other phrases and assertions boldly advance ideas that are additionally sprinkled throughout, sowing seeds of inspiration for all humanity, such as "...to assume among the powers of the earth, the separate and equal station to which the Laws of Nature and of Nature's God entitle them"

Not to be ignored or read lightly, knowing full well that if the Revolution thus commenced should fail, the heads of each signer would be displayed on pikes in encampments of victorious enemy soldiers, the signers close the Declaration with these solemn words: "And for the support of this Declaration, with a firm reliance on the protection of Divine Providence, we mutually pledge to each other our Lives, our Fortunes and our sacred Honor."

Signing followed, with John Hancock famously signing first and in a center location on the page in large and clear lettering, explaining that if the British came for him, he wanted no mistake or uncertainty of his identity to intervene. We can learn much from such great and resolute courage.

Almost immediately after the American Revolution was over, the Declaration inspired others elsewhere to overthrow their own masters, for instance in France, and later in the Hispanic colonies of the Americas.

Today, however, much of that noble luster on the concepts advanced so heroically back then seems tarnished by all of the vilifying trash-talk that causes people in these United States to study their neighbors with distrust of suspected motivations. I draw to your attention that the stars on the flag depicted on this page have fallen from their place in embar-

assment to symbolize these United States under such conditions of disunity and distrust.

The very fact that we now languish in this Prison of Others' Fear and Loathing bespeaks the willingness of the masses to forget about constitutional guarantees that arose from those pre-Revolutionary abuses by that dictatorial government. This includes Bills of Attainder (which then served the very same purpose of locking up those thought likely to cause trouble or to violate laws) and abrupt and arbitrary actions, including legislative acts and judicial orders unjustified by the actual facts (giving rise to the constitutional guarantee of substantive due process).

If we are to keep our nation, we must all rise above this fear and hatred of each other and accord to each other brotherliness and presumptive trust in one's presumed sanity and good will. We cannot be constantly driven by fears of imagined scary monsters in human form, whether suspected to be under the bed or just around the corner.

Like Abraham Lincoln later stated when standing on the Gettysburg battlefield in the Civil War that inevitably followed from that failure to initially condemn and abolish slavery, the nation is always subject to testing whether, conceived in liberty and equality of rights, it can "long endure."

We do not deceive ourselves that our own plight will be more than "little noted" or will be "long remembered," as Uncle Abraham lamented about his words. Nor do we claim pride in the criminal deeds of our younger years, only in the distance and maturity that lies between then and now, as we yearn only for peaceable, law-abiding years with which to conclude our lives.

In this moment, we as a people have so preoccupied ourselves with such fears and hatred of conjured vile images of each other that we have forgotten to take precaution against the menacing malice of those despots in other lands and their robotic followers who so clearly mean our country harm, if not outright annihilation.

Thus, this is another such test of national endurance — which it is reasonable to believe that we will face as a people urgently and lethally all too soon, requiring heroic acts of that "last full measure of devotion." Our enemies seek to continue and heighten our internal distraction and obsession with fears and hatreds of each other, to sap the unity so desperately needed to strengthen our defenses against those mortal enemies.

This then is the test. Let us all not fail it, so that, when you hear in deadly earnest the Civil Defense announcement that is no test, our government, of the people, by the people, and for the people, shall not perish from the Earth.

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## Let Freedom Ring!

### Sex Offender Commitment Violates Professional and Societal Ethics

*Editor's Edition Note:* Looking back, it seems clear that most TLP editions have actually been printed and distributed/mailed substantially after the first of that month. Therefore, my plan to devote the July edition to honoring the spirit of Independence Day needs a little resetting of the clock, so to speak. Hence, we advance this special theme to this June edition instead. Hey — any day is a good day for liberty!

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*Rebecca L. Jackson & Christmas N. Cowell, "Sex Offender Civil Commitment", Chapter 24 in The Wiley-Blackwell Handbook of Legal and Ethical Aspects of Sex Offender Treatment and Management, 1st ed., Karen Harrison & Bernadette Rainey, (John Wiley & Sons, 2013)*

#### Text excerpts:

p. 411: "Despite the legal validation of these [sex offender civil commitment] laws and their administrative practices, scholars and practitioners alike continue to ask: *should* we as a society civilly commit sex offenders? Perhaps more specifically to our purpose in this chapter, the question posed is: should mental health professionals participate in any aspect of their implementation?"

#### pp. 411-12: **Ethical Issues in Sex Offender Civil Commitment**

...[I]t has been argued that the requirements and implementation of the laws circumvent procedural safeguards and protections inherent in the constitution (and codified into law), and, as they subject individuals to indeterminate periods of confinement for crimes they *might* commit, are punitive in nature, rather than therapeutic. As such, many practitioners view participation in SVP work as representing complicity in the suppression of individual rights to liberty and fairness, and participation in a retributive and punitive process (rather than one that is

rehabilitative or therapeutic). These views are therefore at odds with ethical principles underlying behavioral science disciplines that call for practitioners to respect and safeguard individual rights and to do no harm to clients in their applications of behavioral science. For instance, the Ethical Principles of Psychologists and Code of Conduct (EPPCC) emphasize these expectations in the principle of 'Beneficence and Non-maleficence' in which psychologists are expected to 'seek to safeguard the welfare and rights of those with whom they interact professionally' and to 'take care to do no harm' (American Psychological Association, 2002: 1062).

These concerns, and the ensuing debate in the field, have intensified as SVP legislation and confinement programs have matured, and a trend toward very long periods of post-incarceration confinement and low discharge rates has been observed. Also highlighting concerns regarding restriction of liberties and the punitive nature of SVP laws, confinement programs were noted to lack systems, procedures and resources for the release/transition of residents in their facilities into the community. Further, practitioners began to identify new concerns regarding the paucity of research demonstrating the effectiveness of SVP legislation in preventing or substantially reducing rates of sex crimes in the community. Adding to this concern is the rising, exorbitant costs of SVP laws to communities, and whether the benefit obtained from these programs justifies their cost. This latter issue has been a particular point of contention among practitioners, due to fears that 'SVP programs will draw more and more resources away from programs that address the great bulk of sexual violence in the community' (Janus, 2004: 1237).

...[O]ne justification for SVP legislation is predicated on the legal principle of 'police power,' allowing states with the responsibility of protecting its citizens 'the right to write statutes for the benefit of society at large, even when providing this benefit may come at the cost of restricting the liberties of certain individuals' (Testa & West, 2010: 35). However, this argument, used as justification for restricting the rights and liberties of an identified group, is thought by many to represent a 'slippery slope', ultimately allowing for a gradual expansion of the applicability of such restrictions to other subgroups of individuals deemed 'undesirable' through the inappropriate pathologizing of their behaviors. The American Psychiatric Association raised an additional professional objection, describing SVP legislation as an abuse of psychiatric principles and practices in order to affect social policy and shortcomings of the criminal justice system (Brief for the American Psychiatric Association, 1997). Finally, there is growing concern regarding the

unclear benefits of SVP programs to the community at large — benefits that are used to justify the harm or liberties taken from the individuals in these cases.

p. 417: "...Having expertise in matters of law, rather than behavioral science, it has been suggested that judges (as well as juries) may have difficulty in accurately assessing the quality and accuracy of expert testimony (Appelbaum, 2002; Sreenivasan, Weinberger & Garrick, 2003) in SVP cases. As such, substantial weight, perhaps undue weight, may be given to the opinions of testifying experts and actuarial findings informing judicial decisions (Sreenivasan, Weinberger & Garrick, 2003; Janus & Prentky, 2003), threatening expectations that practitioners avoid 'misuse of their influence' (American Psychological Association, 2002: 1062) and ensure that others understand the nature and implications of the 'limitations of their expertise' (American Psychological Association, 2002: 1063). This is compounded by the assertion that by proving testimony in that vein (particularly ultimate issue testimony), experts are 'serving as an agent of the state's punitive apparatus' (Bonnie, 1998: 7), in ethical conflict with their role as an impartial professional imparting expert scientific knowledge (Specialty Guidelines for Forensic Psychology, 2011; see Chapter 5).

p. 418: "...[P]articipation in treatment activities with SVP clients or within SVP processes also presents unique ethical challenges for clinicians. Indefinite terms of confinement, and therefore treatment, place clinicians in the difficult position of continuing to work with some residents long after substantial treatment gains and progress have been made, though practical barriers (such as inadequate community transition programming and legal restrictions) inhibit release and opportunities for further rehabilitation....

Settings for confinement programs are often correctional in nature, where facilities, personnel and practices have a primary goal of community safety and security, rather than the well-being or therapeutic management of its residents (for a discussion of these issues, see Weinberger & Sreenivasan, 1994). Institutional policies and procedures may significantly conflict with the ethical principles and practices of behavioral health clinicians, particularly principles pertaining to multiple-role conflicts and resident rights to autonomy, privacy and confidentiality. In addition, by the very nature of SVP laws, clinicians are often working with individuals whose initial and ongoing participation is coerced to some degree, and in which certain treatment goals are not developed collaboratively between the therapist and the client, but dictated by virtue of the client's circumstance (for example, participation in antiandrogenic pharmacotherapy in some jurisdictions (Harrison, 2008). Further, clinicians in

these settings may often be in the position of enforcing policies and facilitating institutional or system rules and practices that are punitive rather than rehabilitative or therapeutic, or that serve the function of justice, under the guise of 'treatment.' Most of these circumstances are in direct opposition to professional ethics principles and standards for behavioral health professionals, who have ethical responsibilities to avoid multiple relationships, and ensure the confidentiality of the client's information and promote rights to dignity, fair treatment and self-determination. These circumstances are also very disruptive to the establishment of therapeutic or working relationships between clinicians and residents, considered essential to promoting behavioral change in the field and representative of the ethical principle of 'fidelity' in which practitioners aspire to 'establish relationships of trust with those with whom they work' (American Psychological Association, 2002: 1062).

p. 419: One of the more noted examples of role dilemmas faced by practitioners involves resident participation in therapeutic programming itself. Documentation generated in the course of treatment is often utilized later in forensic evaluations and legal processes pertaining to the ongoing detention (or initial detention in the case of detainees) of a resident and can be used to support their continued detention (with the argument that had the resident not participated in treatment, this information would not have been gathered, recorded and used in this manner). Indeed, in some programs, clinicians may be directed or even trained to focus on specific information in their documentation that would facilitate the goals of decision makers and other third parties (such as forensic evaluators) in their functions. Many feel this places the clinician in the position of serving in an investigative role for these other purposes, threatening their primary role as a therapist or agent of change, as well as their ethical responsibilities to ensure the well-being of their client, and to avoid deception or misrepresentation of information or their role to their clients (Winick, 1998).

In fact, the Specialty Guidelines for Forensic Psychology (2011: 8) specifically warn:

"Therapeutic services can have significant effects on current or future legal proceedings. Forensic practitioners are encouraged to consider these effects and minimize any unintended or negative effects on such proceedings or therapy when they provide therapeutic services in forensic contexts."

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(Continued on page 3)

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## Why Do You Lose Your Due Process Rights When the State Wields Its 'Mental Health' Laws Against You Like Weapons?

Maureen F. Larsen & Robert Schopp,  
"Sexual Predator Laws: Clarifying the Relationship Between Mental Health

Laws and Due Process Protections," 97:4 *Nebraska Law Rev.* 1167 (2019)

Text excerpts:

p. 1170: "...[G]enerally police power cannot be used to prevent future crimes because 'evidence of propensity can be considered relatively unreliable and more difficult for a defendant to rebut.... [citing *Powell v. Texas*, 392 U.S. 524, 532 (1968)]. However, the Court has held that civil commitment may be used to confine persons with mental disorders based on a prediction of dangerousness using a state's police power and *parens patriae* authority.

p. 1171: "...In *O'Connor v. Donaldson*, Chief Justice Burger explained that when exercising *parens patriae* power, 'at a minimum a particular scheme for the protection of the mentally ill must rest upon a legislative determination that is compatible with the best interests of the affected class and that its members are unable to act for themselves.' [citing 422 U.S. 563 (1975) (Burger, concurring).

The authority under *parens patriae* presumes that the individual to which it is applied does not have the capacity to manage his or her own affairs. If an individual is dangerous but does not lack this capacity, states may not commit the individual under the doctrine of *parens patriae* alone. The state's police power is also insufficient because 'a finding of dangerousness alone is ordinarily not sufficient ground on which to justify indefinite involuntary commitment.' [*Kansas v. Hendricks*, 521 U.S. 346, 358 (1997).

p. 1175: "...Foucha was diagnosed with antisocial personality disorder 'for which there is no effective treatment,' and ordered him released because he was determined to no longer be 'mentally ill.' [*Foucha v. La.*, 504 U.S. 71, at 77 (1992)] The Court rejected the State's argument that Foucha could be indefinitely confined because his antisocial personality sometimes led to aggressive conduct, stating 'this rationale would permit the State to hold indefinitely any other insanity acquittee not mentally ill who could be shown to have a personality disorder that may lead to criminal conduct.' [Id at 82.] This holding cannot be reconciled with the Court's holding in *Hendricks*.

pp. 1175-76: In *Hendricks*, ...the Court permitted *Hendricks*'s indefinite confinement because he was found to have a 'mental abnormality' or 'personality disorder' that makes it difficult, if not impossible, for the person to control his dangerous behavior. [*Kansas v. Hendricks*, 521 U.S. 346, 358 (1997).] [Note: However, as to Pedophilia (not "Pedophilic Disorder"), this is incorrect, in light of the vast minority of males who admit while anonymously responding to surveys that they have pedophilic orientation/attraction/desire -- but never act upon it.] The Court's determination that pedophilia was a 'mental abnormality' that renders one

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**Lack of Measurability**

unable to control behavior ultimately justified commitment based on the classification of pedophilia alone.

p. 1176: III. A LACK OF MEASURABLE STANDARDS MAKE SVP STATUTES UNWORKABLE.

a. The Court's Vague Mental Illness Standard

...In *Hendricks*, the Court not only held that a 'mental abnormality' satisfied the requirement of 'mental illness,' it also held that a 'lack of volitional control' was sufficient for 'mental abnormality.' [Hendricks, 521 U.S. at 360.] Volition is defined as the ability to make a choice or determine something. [Volition, Black's Law Dictionary (10<sup>th</sup> ed. 2014)].

p. 1177: "...The nature of predatory sexual assaults requires that an offender restrain [himself] from such acts in public to avoid immediate detection. This restraint demonstrates the ability to choose when and where to engage in the offensive conduct. Offenders like *Hendricks* must engage in planning and strategy to establish circumstances where he would have the opportunity to assault his victims. Pedophilia may be a mental disorder or character trait that makes it difficult to refrain from molesting children, but an offender acts intentionally when yielding to his desire to do so. A predatory sexual offender's ability to deliberate about whether to commit an act is evidence that the offender can engage in practical reasoning [citing: *Robert F. Schopp, Automatism, Insanity, and the Psychology of Criminal Responsibility* at 193 (1991)]. Presumably, *Hendricks* was able to choose not to engage in child molestation under certain circumstances, and if an offender can make a deliberate choice to engage in conduct or not to engage in conduct, the offender does not lack volitional control [Id.].

In a subsequent case challenging *Kansas*'s statute, the Supreme Court further relaxed its mental illness requirement. In *Kansas v. Crane* [534 U.S. 407 (2002)], the Supreme Court clarified that its ruling in *Hendricks* did not require a '*total or complete* lack of control,' but a 'mental abnormality' or 'personality disorder' that makes it '*difficult, if not impossible, for the [dangerous] person to control his dangerous behavior.*' [Id., quoting *Hendricks*, at 358]. In discussing whether an 'emotional impairment' would be sufficient for civil commitment, the Court stated that while most cases would involve persons that were unable to control their urges as *Hendricks* had been, other sex offenders with emotional or psychiatric illnesses that involved 'compulsive, repetitive, or driven behavior' may also be determined to be 'unable to control their dangerousness.' [Id.]

p. 1178: ...The Court highlighted psychiatry's inability to clearly distinguish between 'a defective understanding or appreciation' and an 'ability to control ... behavior,' and left open the possibility that an 'emotional' impairment would constitute the requisite 'mental abnormality' [*Crane*, at 415]. Recognizing that it had not 'distinguished for constitutional purposes among volitional, emotional, and cognitive impairments,' the Court attempted to establish some limit when it indicated that 'there must be proof of serious difficulty in controlling behavior.' [*Crane*, at 412, 414-15].

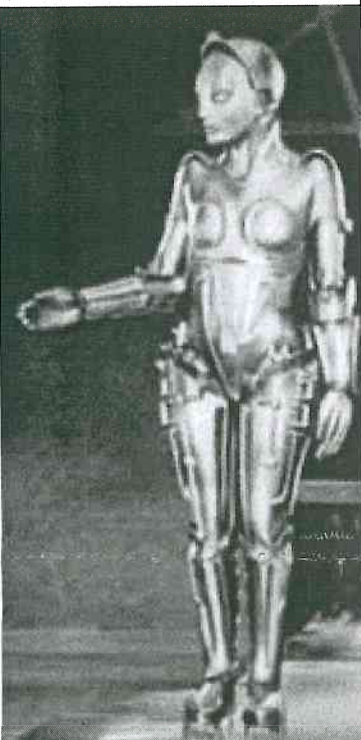
pp. 1178-79: [*Stephen J. Morse* ["Uncontrollable Urges and Irrational People," 88 Va. L. Rev. 1025, 1054 (2002)] argues for abandonment of volitional impairments as legal criteria because the standard imposes 'almost no limit on commitment [Id.]. To distinguish a desire and a reflexive bodily movement, *Morse* analogizes strong desires to the full bladder.

'Assume that an agent needs to urinate, but is unable to find an appropriate place to do so. As time passes and the bladder continues to fill, the desire to urinate will become increasingly powerful and unpleasant. At some point, however, the person's bladder will empty because the pressure on the urethral (urinary) sphincter will mechanically force it to open; he or she will no longer be able to "hold it in," no matter what the cost might be for doing so. For example, suppose the agent is threatened with death for permitting his bladder to empty. The agent will surely exercise control for a very lengthy period, but all agents will finally empty their bladders because, ultimately, voiding will be a product of literally uncontrollable mechanism. The sphincter 'fails' because the physical pressure on it is too great.

Strong desires are allegedly analogous to the full bladder. Increasing desire is analogized to increasing pressure on the sphincter, and we are supposed to conclude that people are no more responsible for yielding to some desires than they are for emptying their bladders. But desires are not physical forces, actions are not mechanisms, and people are not sphincters. There are no "desire units" that will finally mechanically force the "action switch" to flip if enough "desire units" are added.' [*Morse*, at 1057].

The Court requires 'proof of serious difficulty in controlling behavior' [*Crane*, at 414-15], yet courts are unable to objectively examine an individual's ability to control or resist his or her desires.

(Continued on page 4)



Atomaton

Hence, volitional impairments should not be used to satisfy the legal requirement of mental illness.

The APA has also recommended that the volitional element not be used in the context of the insanity defense, stating that 'a mental disorder which can potentially lead to exculpation "should usually be of the severity (if not the quality) of conditions that psychiatrists diagnose as psychoses." Another medical organization, the Association for the Treatment of Sexual Abusers, called the volitional impairment standard 'meaningless and unworkable.' [Brief for the Association for the Treatment of Sexual Abusers as Amicus Curiae Supporting Petitioner, *Kansas v. Crane*, 534 U.S. 407 (2002), 2001 WL 670067, at\*2].

p. 1180: ...In *Hendricks*, the Court stated that the 'mental abnormality' requirement was satisfied because *Hendricks*'s pedophilia was listed as a 'mental disorder' in the DSM [*Hendricks*, at 372]. In *Crane*, however, the Court recognized that 'the science of psychiatry, which informs but does not control ultimate legal determinations, is an ever-advancing science, whose distinctions do not seek precisely to mirror those of the law.' [*Crane*, 534 U.S. at 413]. The APA explicitly warned against using its standards for SVP commitment when stating that the DSM's 'comprehensive classification schemes are not restricted to identifying those persons who warrant civil treatment, let alone confinement. Nor are they designed to identify those subject to various legal standards, such as those for involuntary confinement. Thus, the

authors of DSM-IV caution that "in most situations, the clinical diagnosis of a DSM-IV mental disorder is not sufficient to establish the existence for legal purposes of a 'mental disorder,' 'mental disability,' mental disease,' or 'mental defect.' [Brief for the American Psychiatric Association as Amicus Curiae in Support of Leroy Hendricks, *Kansas v. Hendricks*, 521 U.S. 346 (1997), 1996 WL 469200, at\*23].

In *Clark v. Arizona* [548 U.S. 735 (2006)], the Supreme Court itself warned against using the DSM as evidence of a mental disease, recognizing that 'dangers arise because of the imperfect fit between the questions of ultimate concern to the law and the information contained in a clinical diagnosis' [*Id.* at 774].

pp. 1180-81: In the context of SVP commitments, the failure to construct a sufficient legal standard and the resulting reliance on the DSM causes mental abnormalities to be defined by the offender's conduct. For example, the current DSM-V defines pedophilic disorder as 'a paraphilia involving intense and recurrent sexual urges towards and fantasies about prepubescent children that have either been acted upon or which cause the person with the attraction distress or interpersonal difficulty.' [*Am. Psychiatric Ass'n, Diagnostic and Statistical Manual of Mental Disorders* (5<sup>th</sup> ed. 2013)]. The classification itself includes an inherent danger that a person with the disorder will act on his urges and sexually assault children [*Id.*]. In using the DSM's classification of pedophilia, the classification is the legal justification for commitment: the offense of child molestation leads to a classification of pedophilia, and the classification satisfies both the 'mental abnormality' and dangerousness requirements. Thus, the convicting offense of child molestation may itself be sufficient for indefinite confinement.

p. 1181: SVP statutes protect society by permitting the indefinite confinement of pedophiles, but this raises the question of whether civil commitment would be justified in other contexts as well. For example, kleptomania is a mental disorder defined in the DSM-V as a 'recurrent failure to resist urges to steal objects that are not needed for personal use or for their monetary value.' [*Id.*]. The Supreme Court has held that an individual's conviction for a criminal act satisfies the dangerousness requirement even if it is a non-violent crime against property. [*Jones v. United States*, 468 U.S. 354, 364-65]. Following this reasoning, the definition of kleptomania satisfies both the 'mental abnormality' and the 'dangerousness' prongs for civil commitment. When mental health laws are permissibly exploited for one class of individuals, there is an inherent danger that these laws may be more broadly applied to other individuals as well.

pp. 1181-82: B. The Danger of Predicting Dangerousness

Along with a showing of 'mental illness,' civil commitment requires a determination that the individual is dangerous. This requires a finding that individual will likely engage in future conduct that is dangerous to the public or the individual [*Hendricks* at 360-61]. An individual is dangerous if the probability and severity of his or her potential reoffending are high enough to justify commitment, but there is a risk of recidivism with all individuals convicted of a crime. In 2014, the Department of Justice reported that 67.8% of all released state prisoners were arrested for a new crime within three years and 76.6% were arrested within five years. [*Matthew R. Durose et al. Bureau of Justice Statistics, NCJ244205, Recidivism of Prisoners Released in 30 States in 2005: Patterns from 2005 to 2010* (2014)]. In a similar study of sex offenders, only 3.5% were reconvicted of a sex crime within three years. [*Patrick Langan et al., Bureau of Justice Statistics, NCJ198281, Recidivism of Sex Offenders Released from Prison in 1994* (2003)]. Because sex offenders have a significantly lower risk of reoffending than non-sex offenders, the severity of harm likely with sexual offenses is used to justify commitment. However, in a longitudinal study published by the Department of Justice, only 1.3% of rapists and 2.5% of child molesters were rearrested for molesting a child after release [*Id.* at 31]. [Note:, or course, what would a rapist of adult women be doing sexually abusing a child?] The vast majority of sex crimes against children that were committed by released prisoners were by prisoners that had not been convicted of prior sexual offenses [*Id.*]. While 83% of these crimes were committed by individuals that did not have a prior conviction for a sex crime, individuals with a prior sexual offense accounted for only 17% [*Id.*].

p. 1182: Because sex offenders have a very low probability of reoffending, the threshold of risk sufficient for commitment must necessarily be low. The Court has held that while criminal convictions require proof beyond a reasonable doubt, an offender may be committed under an SVP statute using a clear and convincing standard [*Addington v. Texas*, 441 U.S. 438, 428 (1979)]. At least half of the states with SVP laws use this less stringent standard. The language of SVP statutes also makes a determination of dangerousness easily attainable. Most states define 'sexually violent predator' as a person who suffers from a mental abnormality or personality disorder which makes the person likely to engage in acts of sexual violence. Statutory definitions of 'likely' include such language as 'substantially probable,' 'more likely than not,' and 'the person's propensity to

commit acts of sexual violence is of such a degree as to pose a threat to the health and safety of others.' It is also significant that only two states require a recent overt act to establish a finding of dangerousness.

pp. 1182-83: The use of estimated risk raises genuine questions regarding reliability. Estimates of dangerousness are made using opinion testimony by mental health professionals and actuarial testing. [*Addington v. Texas*, 441 U.S. 418, 429 (1979) ("Whether the individual is mentally ill and dangerous to himself or others ...turns on the *meaning* of the facts which must be interpreted by expert psychiatrists and psychologists.")] Mental health professionals are asked to assess an individual's level of risk; however, there is considerable evidence that these estimates are not reliable. In *Barefoot v. Estelle*, [463 U.S. 880 (1983)], the Supreme Court addressed the issue of where mental health expert testimony regarding a defendant's future dangerousness was constitutional in the context of capital punishment. Under Texas law, a sentence of death required the jury to find 'a probability that the defendant would commit criminal acts of violence that would constitute a continuing threat to society' [*Id.* at 884]. Both the defendant and the APA argued that the expert testimony used to predict the defendant's future risk was unreliable. [*Id.* at 898-99]. The Court rejected the APA's argument that psychiatrists were not experts at assessing future risk, stating that the adversarial system would be able to discover reliability issues. [*Id.* at 899]. The Court further argued that the APA had argued that psychiatrists predicting future dangerousness were wrong 'only most of the time, and not all of the time.' [*Id.* at 901].

pp. 1183-84: Under the Supreme Court's decision in *Daubert v. Merrell Dow Pharmaceuticals, Inc.*, [509 U.S. 579 (1993)], evidence of future dangerousness must be the product of reliable principles and methods to ensure scientific validity [*Id.*]. Estimates of dangerousness by mental health professionals have not been shown to be reliable, but they are still used in SVP commitment proceedings. [See, e.g., *In re Graham*, 837 N.W.2d 382, 385 (N.D. 2013) (stating that State law requires the State to prove by clear and convincing evidence that the individual is sexually dangerous.]. Several studies show that these estimates are no more accurate than chance. [See *Barefoot*, 463 U.S. at 918 (Blackmun, J. dissenting); *Thomas W. Campbell, Assessing Sex Offenders: Problems and Pitfalls* 94-97 (2004) (citing research showing violence prediction error rates ranging from 54% to 94%).] When discussing the ability of psychiatrists and psychologists to predict future danger-

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Wrong Only Most of the Time

ousness, *Schopp and Quattrocchi* observed:

'Unfortunately a large and rather consistent body of empirical evidence indicates that the standards of the profession include no ability to accurately predict dangerous behavior. Not only have psychologists and psychiatrists been unable to predict dangerousness to a degree of certainty which would justify infringing on a client's rights, they have been unable to predict any more accurately than have nonprofessionals.' [Robert F. Schopp & Michael R. Quattrocchi, "Tarasoff, The Doctrine of Special Relationships, and the Psychotherapist's Duty to Warn," 12 C.L. Fac. Pub. 23 (1984).]

pp. 1184-85: ...In *Crane*, the Supreme Court stated that SVP commitment requires that an offender's estimated future dangerousness 'must be sufficient to distinguish the dangerous sexual offender ...from the dangerous but typical recidivist convicted in an ordinary criminal case.' [Kansas v. Crane, 534 U.S. 407, 413 (2002)]. [Note: since recidivism rates by criminals in such "ordinary" criminal cases are higher than 50%, this would require a recidivism prediction approaching 100% certainty.] The tools currently used to estimate dangerousness clearly do not meet this standard.

...The threshold used in estimating dangerousness dichotomizes an offender's risk of future sexual violence by classifying individuals as either dangerous or not dangerous. [Robert F. Schopp & Michael R. Quattrocchi, "Tarasaurus Rex: A Standard of Care That Could Not Adapt," 11 Psychol. Pub. Pol'y & L. 109, 111 (2005).] The use of this dangerous/hot dangerous threshold generally focuses only on an offender's risk factors and does not include a more thorough analysis weighing both the likelihood and the degree of future harm [id.]. [Note: So this is not a 'sex offender vs. sex offender' risk comparison. However, by 'taking off the table' the issue of future harm, this allows judicial inflammatory rhetoric against the asserted 'certain' and 'terrible' psychic harms to all sex crime victims, albeit unlikely as future recidivism, to substitute as justification for such analysis as a justification for commitment -as-sheer-incapacitation-functionally-extending-a-preceding-criminal-sentence-belatedly-deemed-inadequate-if not-as-

cross-political-point-making-through-judicial-rabble-raising.]

pp. 1185-86: Research has demonstrated that judges most often rely on categorical estimates of risk (high vs. low) rather than percentages or statistical probabilities. [Nicholas Scurich & Richard S. John, "The Effect of Framing Actuarial Risk Probabilities on Involuntary Civil Commitment Decisions," 35 L. & Hum. Behav. 83 (2011).] Forty years ago, Stephen J. Morse, writing on mental health, warned against using categorical estimates because of the lack of agreed-upon scientific meaning in legal prediction criteria [Morse, supra, at 561], yet these standards are still being used. Morse articulated that the terms such as 'likely' and 'harm' are both nonscientific and vague and that the use of such predictive criteria in mental health law requires 'an honest and rigorous assessment of the accuracy of behavioral predictions.' [id. at 562].

p. 1186: Because of the Supreme Court's vague 'mental abnormality' standard and the lower courts' inability to accurately assess dangerousness, there is a strong argument that SVP laws are invalid. Due process provides that a law is void for vagueness if it does not give fair warning and if it allows for arbitrary and discriminatory application. [Grayned v. City of Rockford, 408 U.S. 104, 108 (1972).] The Supreme Court has held that the void-for-vagueness doctrine applies to both civil and criminal actions where the 'exaction of obedience to a rule or standard ...was so vague and indefinite as really to be no rule or standard at all. A.B. Small Co. v. Am. Sugar Refining Co., 267 U.S. 233, 239 (1925). The lack of an objective legal standard for the requisite 'mental abnormality' and the reliance on inaccurate assessments of dangerousness fails to sufficiently define what characteristics are sufficient for commitment under SVP statutes. Offenders may be arbitrarily committed based on ambiguous definitions and unreliable predictions of future risk. Because SVP laws lack sufficiently defined characteristics and measurable standards, these statutes are unconstitutionally vague.

p. 1187: IV. CLARIFYING THE NATURE OF SVP STATUTES

The purpose of the criminal justice system is to prevent harm. [Wayne R. LaFave, Criminal Law § 1.2 (5th ed. 2010)]. Harm is prevented by punishing individuals that have harmed or by using the threat of punishment to deter those that would commit harm [id.]. The Supreme Court's holdings that SVP statutes are civil in nature belies the fact that these statutes are being used as punishment. The punitive nature of SVP statutes is evidenced by both their purpose and effect. Hart has articulated that the difference between civil and criminal actions is moral condemnation and that '[i]t is the expression of the community's hatred, fear, or contempt for the convict

which alone characterizes physical hardship as punishment.' [Henry M. Hart, Jr., "The Aims of the Criminal Law," 23 L. & Contemp. Probs. 401, 405 (1958)...] The imposition of 'unpleasant physical consequences' constitutes punishment if there is a 'community condemnation of [the] anti-social conduct [id.]. SVP commitments restrict an individual's physical liberty by confinement in a prison, institution, mental hospital, or other similar facility. An offender is condemned both in his criminal adjudication and by his commitment as a sexual predator.

Maintaining Sex Offender Culpability

pp. 1187-88: ...Should a determination that a sex offender has a mental abnormality such as pedophilia lessen that offender's blameworthiness? The answer is no. ...[M]ental disorders like pedophilia do not render the offender less responsible. Should the finding of mental abnormality mitigate society's condemnation of sex offenders? The answer to this question is no. In most contexts, a finding that a person is mentally ill is a measure that justifies commitment and renders that person less culpable for his conduct. In contrast, SVP statutes distort the judgment of blameworthiness by blurring the lines between criminal and mental health laws. SVP statutes do not diminish the culpability of offenders because (1) most states require a conviction, and (2) there is inherent condemnation contained in the language of the statutes.

The majority of SVP laws require a determination that an individual is a sexually violent predator. 'Predator' is defined as 'one who preys, destroys, or devours' [Merriam-Webster's Collegiate Dictionary (11th ed. 2016)]. This statutory language clearly constitutes moral outrage for committed individuals and minimizes any dilution of culpability that may occur. Furthermore, this language likely stigmatizes the offender in such a way that his commitment makes him even more reprehensible than if he had simply been convicted. This further supports the argument that SVP statutes are punitive.

pp. 1188-89: ...[W]hile the Court has consistently stated that SVP laws do not promote retribution and deterrence, this view is difficult to defend. While a discussion of criminal justice theories is beyond the scope of this Article, it would be fair to conclude that the threat of indefinite confinement would deter predators from engaging in sexually violent conduct, or at a minimum, these statutes may be intended to deter individuals. [S]tatistics show that the number of sexual assaults reported has declined more than 30 percent since SVP statutes were enacted. [Jane Wiseman, Incidence and Prevalence of Sexual Offending (Part I), Sex Offender Management Assessment and Planning Initiative (2015) (reporting that the number of sexual assault victimizations in the United States dropped by

more than 30 percent between 2002 and 2011).] With respect to retribution, locking up sexually violent predators indefinitely would certainly be 'an expression of society's moral outrage at particularly offensive conduct' [Gregg v. Georgia, 428 U.S. 153, 183 (1976)]. Fourth, the behaviors involved in a predator's underlying criminal offense constitute crimes and, therefore, support a finding that SVP statutes are punitive. Finally, SVP statutes have alternative purposes of treatment of the offender and the protection of society; however, the Court has stated that treatment is not required in civil commitments because the state has an interest in protecting the public from dangerous individuals with treatable as well as untreatable conditions [Hendricks, 521 U.S. at 366]. Applying the factors outlined in *Kennedy v. Mendoza-Martinez* supports the conclusion that SVP statutes are punitive.

pp. 1189-1190: The Court has said that a statute 'would be criminal if it was sufficiently punitive 'either in purpose or effect.' [Seling, 531 U.S. at 269]. While the Court held that Kansas's SVP statute was not intended to be punitive, its legislative history conclusively shows that it was. In support of the statute, the Kansas Attorney General testified:

'Most new laws against criminal conduct tend to provide punishment after the victimization has occurred. Senate Bill 525 will act prospectively and be preventative of criminal conduct and not just punitive. You have a rare opportunity to pass a law that will keep dangerous sex offenders confined past their scheduled prison sentence. As I am convinced none of them should ever be released, I believe you, as legislators, have an obligation to enact laws that will protect our citizens through incapacitation of dangerous offenders. [Brief for the American Psychiatric Association as Amicus Curiae in Support of Leroy Hendricks, Kansas v. Hendricks, 521 U.S. 346 (1997), at 13-14.]'

An objective reading of this legislative history demonstrates that the statute was not civil in nature because its express purpose was to keep predators incarcerated after their criminal sentence was over to prevent future crimes. In *United States v. Melendez-Carrion*, the Second Circuit Court of Appeals determined that a statute permitting preventative detention constituted punishment because the detention period was not limited and could last up to one year, and the confinement could not be 'characterized as mild.' [790 F.2d 984, 999 (2d Cir. 1986).] In recognizing that the purpose of the statute was to protect the community from future crimes, the court stated:

'The difficulty arises from the undeniable fact that incarceration to protect society from a person's future criminal conduct is regulatory in a sense but at

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tionary executive implementation.<sup>42</sup> Wide variation in per capita commitment rates and in discharge rates provide strong evidence that the deprivations of liberty in these programs depend more on executive whim than on the rule of law. One thing that does not vary is the controversy and critique these programs engender.<sup>43</sup>

- Notes:
- 27 Eric S. Janus, *Failure to Protect: America's Sexual Predator Laws and the Rise of the Preventive State* (2006), at 15.
  - 28 Off. of Legis. Auditor: State of Minnesota, *Psychopathic Personality Commitment Law* (1994), <https://www.auditor.leg.state.mn.us/ped/pedrep/ppcl.pdf>.
  - 29 Janus, *supra* note 27.
  - 30 Logan, *supra* note 8, at 1316.
  - 31 Sex Offender Civil Commitment Programs Network, *Annual Survey* (2016).
  - 32 *Id.*; see also Off. of Legis. Auditor: State of Minnesota, *Civil Commitment of Sex Offenders* (2011)
  - 33 David Robinson, "Death, Assaults, and Sex Offenses: Life Behind Central New York Psychiatric Center's Walls," *USA Today*, Feb. 7, 2018, <http://www.lohud.com/story/news/investigations/2018/02/07/central-new-york-psychiatric-center-crimes/1074161001/>. Michael Barajas, "A Prison by Any Other Name: How Texas Created a New For-Profit Lockup, Which It Really Doesn't Want You to Call a 'Prison,'" *Tex. Observer*, Feb 12, 2018, <https://www.texobserver.org/a-prison-by-any-other-name/>. David S. Prescott, "As Courts Censure Civil Detention Practices, Is It Time for Professionals to Speak Up?," *Forensic Psychologist*, Sept. 14, 2015, <https://forensicpsychologist.blogspot.com/2015/09/as-courts-censure-civil-detention.html>. Anita Hassan & Mike Ward, "Texas Sex Offender Program a Catch-22 for Mentally Ill," *Hous. Chron.*, Dec 14, 2014, <https://www.cbsnews.com/mews/zsx-ex-offender-confinement-costing-states-too-much/>.

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## MN SDP/SPP Law's Forbidden Purpose

Two Decades of Executive Implementation, State Court Approval, and Legislative Acquiescence, Demonstrate That MSOP Has the Forbidden Purpose of Punishment.

1. MSOP's Implementation Fails to Meet the Objective Indicia of a Bona Fide Civil Commitment Scheme.  
The concept of a bona fide commitment scheme and the theory of substantive due process violation when a purported com-

mitment scheme actually has a forbidden purpose of punishment have been discussed *supra*, including the fact that the MCCTA in general, and in particular its implementation through MSOP, primarily serve that forbidden purpose of punishment. Moreover, also discussed elsewhere herein are the facts that Minnesota has the highest per capita sex-offender commitment rate in the nation, and that the MSOP system for policing duration of confinement pursuant to such commitments is utterly dysfunctional, as appears from comparison to similar programs in Wisconsin and New York State. Both of those programs have smaller populations of clients confined, yet their community placement numbers far exceed the negligible provisional discharge record of Minnesota's MSOP. (Collectively, see Jennifer E. Schneider et al., "SOCCPN Annual Survey of Sex Offender Civil Commitment Programs 2014," at 5, '6, 8, available at [http://soccpn.org/images/SOCCPN Annual Survey2014 revised.p df.](http://soccpn.org/images/SOCCPN%20Annual%20Survey2014%20revised.pdf)) Other states as well have succeeded in placing committed clients in the community including New Jersey (47), Virginia (116), and Illinois (29). (*Id.*, at 8). MSOP's poor performance is aberrational.

Second, the scientific consensus is that risk of sexual recidivism decreases with age. See Robert Prentky, Howard Barbaree and Eric Janus, *Sexual Predators: Society, Risk and the Law* (Routledge, 2015) at 106-113 (citing studies showing that age-related "reductions in recidivism among sex offenders are consistent across studies and are very similar to reductions in recidivism (both violent and nonviolent) in the aging non-sexual criminal population," and describing the "aging effect" as "one of the most robust findings in the field of criminology.") Even assuming, for argument, that each individual committed over the past 25 years met constitutionally adequate standards for "dangerousness," this research raises the strong presumption that, as a statistical matter, the risk posed by those individuals has decreased over time.

If nothing else, this science would put the State on notice that it must monitor and periodically assess the risk posed by its aging dependents, in order to assure itself – and the court – that not one person is confined beyond the constitutionally permissible period. The fact, as discussed above, that other states with more careful systems in place have released clients at rates that exceed Minnesota's rate by orders of magnitude further bolsters this point.

Third, MSOP has violated another of the central indicia of a bona fide civil commitment system: that it must not impinge on the primacy of the criminal justice system as the state's tool for managing antisocial behavior.

Far from being a rare and exceptional tool, a "narrow exception" to the charge-

and-conviction paradigm, a "limited subclass of dangerous persons," MSOP has been intentionally shaped as a tool that rivals the scale of the criminal justice system. *Hendricks*, 521 U.S. at 357. The population of MSOP in 1996 was less than 10% the number of sex offenders in prison in Minnesota. (*Eric S. Janus & Nancy Walbek*, "Sex Offender Commitments in Minnesota: A Descriptive Study of Second Generation Commitments", 18 *Behav. Sci. & L.* 343, 356 (2000). However, MSOP has now become a competitor to the correctional system, confining a population exceeding 40% of the number of imprisoned sex offenders. In 2015, there were 1688 sex offenders imprisoned (*Minnesota Department of Corrections*, "Adult Inmate Profile as of 7/1/2015," available at [http://www.doc.state.mn.us/pages/files/6914/3826/9238/ Minnesota Department of Corrections: Adult Inmate Profile 07-01-2015.pdf](http://www.doc.state.mn.us/pages/files/6914/3826/9238/Minnesota%20Department%20of%20Corrections%20Adult%20Inmate%20Profile%2007-01-2015.pdf)), while 726 were under commitment to MSOP. (Minnesota Department of Human Services, "Minnesota Sex Offender Program Statistics," available at <http://mn.gov/dhs/people-we-serve/adults/services/sex-offender-treatment/statistics.jsp>, p. 6. Civil commitment of sex offenders is not exceptional; under the MSOP regime, it has become a routine and major component of the state's arsenal for addressing sexual violence.

### 2. The Minnesota Judiciary Has Overseen Nearly Every Detail in the Decades-Long Patterns of Implementation.

There is hardly a detail of the decades-long implementation of MSOP that could escape state court supervision. If, as this Court has found in the *Karsjens* case, MSOP has been persistently operated in a punitive manner, the state courts, in over 400 instances, have blessed these practices as perfectly consistent with the statutory commands of state law. The persistent pattern of implementation, and the punitive purpose it reflects, are not rogue, random, or temporary, but rather enjoy the authoritative imprimatur of the state courts.

Despite hundreds of opportunities, the Minnesota courts have explicitly refused to address the systemic, implementation-based claims that are at the core of this Court's findings in the *Karsjens* case of improper, punitive purpose. The Minnesota appellate courts' decisions on MSOP can be classified into four main categories.

Category one: Immediately following enactment of the MSOP laws, the courts opined on their constitutionality. These early cases necessarily examined the laws' constitutionality ex ante, relying on the legislative and executive espousals of proper purpose to assess the bona fides of the purported civil commitment scheme. *In re Blodgett*, 510 N.W.2d 910 (1994), *Linehan III*, 557 N.W.2d at 187 (Minn. 1996), *Call*, 535 N.W.2d at 319-20.

(As of 2018)	Commitments per 10 <sup>6</sup> state population	Final Discharges to date
Minnesota	134	3
Average of other SO commitment states	34	78

In the second category of cases, the state courts summarily dismissed claims of unconstitutionality based on *stare decisis*. Typical of these cases is *In re Deloach*, 2005 WL 2496010 (Minn. App. 2005). More than a decade into the implementation of MSOP, the state court of appeals brushed aside the claim of unconstitutionality with the summary statement that "each of these challenges has been rejected by this court and the supreme court in previous decisions," and that the court of appeals "is not in a position" to overturn established supreme court precedent." *Id.* at \*3. Citing decade-old precedents, the court did not examine any claim that intervening patterns of implementation revealed an improper purpose. *Id.* See also *In re Thompson*, 2007 WL: 2993851 (Minn. App. 2007) (citing 13-year-old precedent in summarily dismissing constitutional challenge). In a similar vein, the Minnesota Supreme Court, ignoring a pointed plea from the chief judge of the Court of Appeals, *In re Civil Commitment of Ince*, A12-1691, 2013 WL 1092438 (Minn. App. Mar. 18, 2013) (Johnson, C.J., concurring) ("The lack of a clear and definite legal standard is in tension with fundamental notions of the rule of law. A statute that may deprive a person of his liberty should have 'an understandable meaning with legal standards that courts must enforce.'"), refused to set or clarify the risk-threshold standards for MSOP commitments. *In re Civil Commitment of Ince*, 847 N.W.2d 13 (Minn. 2014).

In the third category of constitutional cases, the state courts explicitly refused to take cognizance of the very implementation-based systemic challenge that forms the basis for the instant case. In *In re Civil Commitment of Travis*, 767 N.W.2d 52, 58 (Minn. App. 2009), the Minnesota Court of Appeals explicitly refused to recognize a systemic, as-implemented challenge to MSOP's validity in the context of a petition for commitment. Symmetrically, Minnesota law prohibits as-applied constitutional challenges in the narrowly prescribed statutory proceedings for reduction of custody. See *Minn. Stat. § 253B.18 Subd. 4c* (2016), and *Minn. Stat. § 253D.27* (2016). See also *In re Civil Commitment of Moen*, 837 N.W.2d 40 (2013), rev. denied Oct. 15, 2013 (refusing to recognize claim that commitment invalid because of failure to provide treatment), *In re Civil Commitment of Lindsey*, 2011 WL 1938288 (Minn. App. 2011) (refusing to consider

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Community Placement Proposal

as-implemented evidence of unconstitutionality as grounds for discharge from commitment).

In *Travis*, 767 N.W.2d at 56, the Minnesota Court of Appeals had the opportunity to approve a systemic investigation of the MSOP program and definitively rejected the opportunity. The state trial court had indicated its intention to examine the bona fides of the MSOP scheme by taking evidence about the patterns of implementation. The trial court intended to take evidence to determine whether "the actual implementation of the SDP/SPP laws suggest a regime of [preventive] detention itself, heretofore anathema to due process." *Id.* at 56 (quoting the district court's order).

The Court of Appeals unambiguously and authoritatively prohibited the district court from undertaking this examination of "actual implementation," the very same inquiry that is now before this Court:

"The district court's investigation of constitutional violations under a substantive-due-process standard focusing on the treatment of others is precluded by governing cases. We reverse the district court's decision to hold an evidentiary hearing and conduct related discovery to determine whether the constitutionality of the SDP and SPP statutes, and we remand for further proceedings.

*Id.* at 67. See also *In re Civil Commitment of Navratil*, 799 N.W.2d 643, 651 (Minn. App. 2011) ("The treatment of committed individuals is the province of the commissioner of human services, not the district court.")

The Minnesota courts have extended this refusal to address the patterns of implementation to the reduction in custody and discharge phases of commitment, as well. In *Loneragan*, Judge (now Justice) Hudson of the Court of Appeals clarified that the tribunals statutorily authorized to consider reductions in custody could not consider the implementation of the law in determining the legitimacy of confinement:

"We note the Commitment Act, chapter 253B, provides a patient with a right to treatment. *Minn. Stat.* § 253B.03, subd. 7 (2010), but that act does not explicitly grant either the special review board or the judicial appeal panel authority to review a denial of treatment."

In *re Loneragan*, 2012 WL 4773877 (Minn. App. 2012). And in *Moen*, the Court of Appeals refused to provide a forum for committed individuals to raise a right to treatment claim as a means of invalidat-

ing his ongoing commitment. *Moen*, 837 N.W.2d at 49.

Fourth, the Minnesota appellate courts have prohibited commitment courts from addressing the lack of availability of less restrictive alternatives, even those that are necessary to enable individuals to move from the total confinement of MSOP into a less restrictive community setting. Prosecutor Kirwin's summary of the law puts it this way:

"In order for a less restrictive alternative to be appropriate, it must be presently available. The court cannot order that a community placement be developed, where none exists. A trial court did not err in rejecting an otherwise-available alternative placement, where there was no funding mechanism to pay for it."

John L. Kirwin, *Civil Sex Offender Laws*, Minn. Attorney Gen. Office, *Continuing Legal Education Seminars*, p. 37 (2005) (available at <http://www.mcaamn.org/docs/2005/SexCaselawOutline5-2005.pdf>) (footnotes and citations omitted).

### 2. The Legislature Has Knowingly Acquiesced in an Unconstitutional Implementation of the MSOP Program.

Despite mounting evidence that the MSOP suffered significant defects, the Legislature has done nothing to correct the problems. Indeed, the Legislature has addressed the MSOP program, but the changes have been largely cosmetic. See 2013 *Laws of Minnesota*, Ch. 49, §9 (recodifying and combining SPP and SDP sections). This in spite of overwhelming red flags that were identified by its own Legislative Auditor including:

- The highest per-capita population of civilly committed sex offenders in the nation; and
- In the more than twenty years that the program has been in operation, no civilly committed sex offender has ever been discharged, likely due to problems in the treatment program, an executive order discouraging discharges, the absence of any meaningful community-based services suitable for supervising released offenders, and a release standard that is stricter than most other states which allow for discharge when an offender no longer meets the commitment criteria, *inter alia*.

Office of the Legislative Auditor, *State of Minnesota, Evaluation Report: Civil Commitment of Sex Offenders* (March 2011), available at <http://www.auditor.leg.state.mn.us/ped/pe-drep/ccso.pdf>. [hereinafter, *OLA Report*]

The *OLA Report* laid bare the significant problems that have existed within Minnesota's program. Far from being a civil law with the purpose of providing treatment, the main goal of MSOP appears instead to be punitive preventive detention. In spite of the *OLA Report* and comprehensive recommendations, the Legislature

has failed to implement the lion's share of recommendations.

The Legislature also ignored the unequivocal recommendations of the Task Force appointed by this Court in the *Karsjens* case.

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## Texas-Style SOCC: Life in a Failed Private-Contractor Prison



Matt Clarke, "Failed Texas Prison Houses Texas Civil Detainees," *Prison Legal News*, Sept. 2018, reprinted in *CURE-SORT News*, 1<sup>st</sup> Quarter 2020, p. 6

### Text Excerpts:

"In 2015, Texas converted its outpatient program for civilly committed sex offenders into a 'tiered' treatment program, in which participants start out in a 'total confinement facility' at twice the cost of the original program. [Editor's note: To date, there are no known releases from that facility even to any provisional discharge status.] The state awarded Correct Care Solutions a \$24 million contract to provide housing and treatment at the Texas Civil Commitment Center (TCCC) in Littlefield, formerly a failed private prison known as the Bill Clayton Detention Facility.

Correct Care had just acquired GEO Care, a subsidiary of the GEO Group – a for-profit prison firm whose 2009 abandonment of the Littlefield facility had almost forced the city into default on its bonds. Geo Care had a poor reputation, having been sued multiple times for providing inadequate health care. The company was known for having cooked alive a Florida psychiatric hospital patient who was left in a scalding hot bath, and for providing such abysmal care at a Texas immigration detention center that it sparked a riot.

The state's contract with Correct Care required it to hire about 100 employees to provide treatment and housing for 277 civilly committed sex offenders at TCCC, which it rented from Littlefield. The contract was extended in 2017.

The intersection of the Texas Civil Commitment Office (a state agency not known for respecting offenders' civil rights), a private prison spinoff with a questionable history, and a desperate small Texas city with a huge debt load and an empty prison is an example of one development

in what has been called the 'treatment industrial complex' – when for-profit companies take over correctional treatment programs.

As part of that trend, Correct Care is making a play for the civil commitment market. In addition to TCCC, it runs a civil commitment center [for sex offenders] in Florida, and has a contract to build a new \$36.4 million, 268-bed [sex offender civil commitment ("SOCC")] facility in South Carolina. [Editor's Note: The South Carolina facility is now in operation in 2020.]

Since [the Littlefield facility] opened, over 139 TCCC employees, including eight clinical therapists, have left their positions. Most resigned. One licensed vocational nurse, hired as a 'therapeutic security technician,' quit after 18 months because she was appalled at the conditions at the [Littlefield] facility – especially the lack of medical care. 'A lot of these guys were really old,' she said. 'The clinic was always running out of medications or never had the right ones. It was all very unorganized.'

The staff turnover at TCCC has had a detrimental effect on the offenders housed there. Therapy is required for offenders to advance through the four-tiered program and eventually be released on GPS-monitoring as outpatients. [However, this has never happened.] If a therapist resigns, offenders receiving treatment from that therapists must start over at the beginning of their tier. Thus, some are faced with the prospect of having to repeat the same tier over and over.

In its 19-year history, no one has ever been fully released from Texas' civil commitment program. Only five have been released from confinement since TCCC opened [all five before the Littlefield facility opened] – four to go to hospices before they died. Roughly half of the offenders in the program were returned to prison for minor violations of their civil commitment conditions. 'To be constitutional, it has to be a therapeutic program,' said Conroe attorney Scott Pawgan, who represents one of the offenders held at TCCC. 'It's got to be the worst therapeutic program in the history of sex offender treatment, far and away.'

Meanwhile, civilly committed sex offenders are required to wear GPS monitors while imprisoned at TCCC. They are told to call their living quarters 'rooms,' not cells, and informed the facility is not a 'prison' – though the conditions of their confinement, which may include placement in segregation, are similar to those in prison. Participants are called 'residents,' not inmates. Texas law allows TCCC to take one-third of any money offenders receive to defray the cost of their treatment and housing. Yet none know when, or if, they will ever be re-

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leased. It seems like a prison by any other name is still a prison – or something even worse in this case.

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## Meth King Ryan Magnus Cuts Plea Deal, Walks, Keeps Law License, Free to Resume Defrauding SOCC Defendants into Pleading to Life in Confinement.

Serious drug charges against a Mankato defense attorney who represented countless SOCC defendants over the years will be dismissed under a plea agreement if he completes five years of probation.

Ryan Blair Magnus, 47, having admitted to a drug addiction, appeared in Blue Earth County District Court to receive that plea deal, allowing him to avoid prison and even any felony conviction.

Magnus was charged with felony counts of drug sales and drug possession in February 2018. Several pounds of methamphetamine, plus marijuana, psilocybin (a hallucinogen), and a date rape drug were all found in a house Magnus owned and shared with two other people, the charges said. The meth sales charge stemmed from the quantity found. Magnus told law enforcement investigators that the date rape was for his "personal use."

Magnus spent three days in jail after the drugs were discovered when the Minnesota River Valley Drug Task Force searched the house.

In court Magnus admitted possessing the meth, claiming it was for personal use. He declined to make any further statement when invited by the judge.

Magnus told *The Free Press* last month he has "accepted responsibility" for his drug addiction and went to treatment.

A special prosecutor and judge were assigned to the case to avoid conflicts of interest, as Magnus practices in Blue Earth County. Steele County Attorney Daniel McIntosh prosecuted the case, and it was presided over by judge Stephen Ferrazzano II, who is chambered in Watonwan County.

Ferrazzano approved a plea agreement reached between Magnus and McIntosh in July.

Magnus pleaded guilty to a reduced charge of fifth-degree drug possession and received a stay of adjudication with a sentence of five years probation and a \$1,000 fine. That means a conviction won't go on his record and the charge will be dismissed if Magnus successfully completes probation and he either pays the fine or does community service to work it off.

Ferrazzano set standard conditions of probation, requiring Magnus to undergo a drug dependency evaluation and comply with the evaluator's recommendations.

Magnus has continued to represent clients while the charges were pending. The stayed conviction does not preclude him from continuing to practice.

Magnus is notorious among clients he represented in SOCC cases for misrepresenting to them that by pleading to commitment as a sexually dangerous person, a tandem charge of being a "sexual psychopath" would be dropped, allowing them to receive treatment in MSOP for a few years and then be released. He told those clients that declining that plea deal would cause them to spend the rest of their lives in MSOP confinement.

In fact, only a few of those who pled to SDP commitment because of this fraud have ever been released from MSOP. As many as 150 MSOP inmates may have been victims of this fraud.

Apparently, Magnus must have thought that lack of official or public interest about the fate of sex offenders would make chances extremely minimal of any investigation into this 'malpractice mill' that produced millions for him by betraying the interest of these clients in peril of lifetime preventive detention falsely styled as commitment for treatment.

In every sense of the term, all who were 'represented' by Magnus in this situation were victims of his greed and his criminal scheme. As to those who refused this 'deal' and stood on their right to trial in SOCC cases, Magnus took no meaningful steps to prepare or present a defense to the commitment petition, and failed to cross-examine expert witnesses presented by the prosecution.

Effectively, the commitment of these 'non-pleading' victims became intended fodder for Magnus's assertion to later clients he tried to persuade to plead to commitment, by citing their unsuccessful defense at trial (without disclosing that his sabotage of that defense had caused that loss at trial).

Presumably, Magnus will remain free to continue this fraudulent practice. It is likely that his motive in this practice was to sharply curtail the amount of work he would have to perform in each SOCC case, thus maximizing his fee per hour. His fees for this line of work contributed to financing his personal meth addiction and the amassing of distribution-level quantities of drugs.

Magnus's SOCC defense practice required driving to courts in a vast array of counties in southern, central, and western Minnesota. In doing so, he held himself out as an especially highly qualified expert attorney within this area of specialization. It is probable that he received at least \$10,000 per case of this kind for his services.

Despite his claims of such expertise, I have not been able to confirm any SOCC

case in which he actually managed to achieve either dismissal of the commitment petition, or to obtain a judgment finding the defendant he represented not to be subject to commitment. Doing the math on that per-case estimated fee, it appears that Magnus was paid approximately \$2 million over the years for such minimal, mere deal-making representation, in which he had no intent of trying the case in earnest.

It also remains open to question how many prosecutors and judges were on his list of addict-customers.

Surely, one is compelled to think, the judges before whom Magnus demonstrated his lack of preparation and presented such grossly questionable stipulation 'deals' must have been able to see the indicia of pulling a 'fast one' on the client sex offender, and failure to create and advance any credible defense. If it was possible at all for a sex offender in a commitment case to get a fair shake, Magnus' conduct as a supposed advocate nailed shut that exit door, sealing his clients' fate.

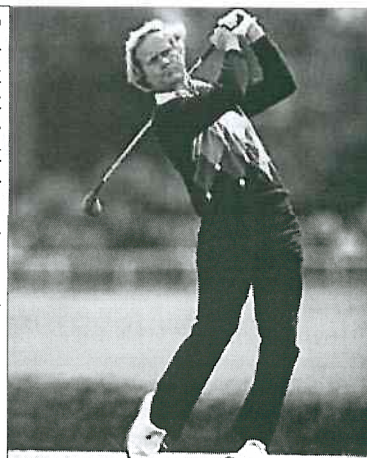
Frankly, the most likely inference is that most of those judges simply didn't care about the life of the human being in front of them, thinking instead only of whether the case could be closed in time for a 2:00 tee time. Some may even have been on Magnus' route for delivery of his dubious product, and thereby have become complicit, if not compelled by craving, in that overriding enterprise.

There is no room in the halls of justice for such misconduct as that of Magnus. Those who choose such enslaving masters upon whose dedication and arduous and intellectually excelling efforts ride the fates of those entrusted to them as clients. But this case is not just about the defrocking of a single lawyer or solely about getting his due for a criminal business that enriched him at huge tragic cost to those left addicted in its wide wake.

It is about reform crying out to be effected in a sacred quest for justice that clearly has been corrupted by many nefarious influences, from rank politics to vicious bias and hired-gun whoring by those who hold themselves out as psychological experts but in reality are only hatchet-wielding character-assassins.

— And now this: the ultimate physical and mental enslavement device by self-administered means by those who feel a need to fill an undefinable hole — some *je ne sais quoi* that surely must be missing from their lives, and in the process abandoning all allegiance to such notions of duty, loyalty, and diligence, even when the future course of a human life depends on it.

In short, it is time to clean up the whole of this mess, to restore the justice process to what it was intended to be, to ensure fairness and the right to an effective defense, even in the face of witch-



Tee Time

hunting masquerading as science. Those unwilling to take dedicated part in this should stay home, and those who would seek to deliberately sell their own clients short and in the process corrupt the whole search for a just, fair, and compassionate outcome must be ejected firmly and permanently from the arena. We, the victims of such corruption, wait in fervent prayer for such urgent reform.

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## Thinking of Really Getting Out? Don't Count on It.

**Editor's Note:** The following two items (a newsletter excerpt and an excerpt from a personal letter of mine, upgraded a little) address the thorny thicket, to put it mildly, of international travel by anyone with one or more past sex offenses. As you will see, the situation is not encouraging and is compounded by actions and policies of our own government. Steel yourself and read on.

(eds.), "The Legal Corner [Department]," 12(6) *the [NARSOL] Digest*, 4-5, 7 (December 2019)

### Text Excerpts:

"Q: Can a sex offender maintain a passport and travel and/or work outside the United States?

A: ...If we were to only give the short answer of yes, we would invite more questions, so we will elaborate a bit... There is nothing that precludes a person convicted of a sexual offense from having a passport nor is there a prohibition on foreign travel. Having said that, the reality is there are significant barriers that make it far more difficult for a person convicted of a sexual offense to travel outside the United States.

If a person is under correctional supervision, travel outside the United States would have to be approved in advance by the supervising entity. It is NARSOL's experience that supervised offenders are seldom granted permission to travel

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outside the United States which means it will not be an issue for most until supervision ends. For a person not under any form of parole/probation or supervised release, he/she is free to travel wherever the heart leads provided the destination country is willing to grant entry.

NARSOL would like to clarify and remind our readers that American citizens do not have the right to enter a foreign nation simply because of the desire to be there. All nations have the right to determine who enters and prohibit all those they deem undesirable. It is NARSOL's experience that many nations will not grant entry to those with criminal convictions which includes those convicted of sexual offenses because they have determined that the presence of criminals is not in their national interest. [Canada is a good example of this.]

NARSOL does not have an issue with nations who on their own volition decide that they wish to deny entry to those they deem undesirable. Unfortunately, it's not that simple because the United States government has procedures in place that have the effect of convincing the foreign nation to deny Americans entry. For example, the United States marks the passports of some offenders with what amounts to a warning. The notice reads "The bearer was convicted of a sex offense against a minor and is a covered sex offender pursuant to 22 United States Code Section 212B(c)(1)."

In addition, the United States has urged the states to incorporate into their statutory schemes a requirement that registrants provide a 21-day advance notice of foreign travel with an itinerary. These notices are provided to the United States Marshals who in turn forward them to Interpol. This means that the foreign nation has advance notice before the person's arrival and many are denied entry. Another problem NARSOL is aware of is that some registrants have had their passports cancelled because they are required to have the aforementioned notice but the person did not know of the cancellation. This can occur for those who changed addresses after their passport was originally issued.

NARSOL believes that the 21-day advance notice requirement is potentially vulnerable to a constitutional challenge because it serves as a prior restraint on travel. In addition, there are no provisions made for those who must travel on short notice for an unforeseen situation or for those whose job may require travel with little or no notice. This is an issue that we are continually monitoring closely with the hope of finding the right plaintiff (s) and legal team for a challenge. Until there is a successful challenge, NARSOL encourages anyone contemplating foreign travel to visit Registrant Travel Action Group's website at [\[registranttag.org/\]\(http://registranttag.org/\). RTAG has a travel matrix of nations that permit entry as well as a list of nations that routinely turn Americans away. In addition, NARSOL encourages anyone to contact the destination nation and ask questions. It's better to know before you expend the money only to have entrance denied."](http://</a></p></div>
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(Personal letter excerpt)

By Cyrus Gladden

Regarding your inquiry about emigrating after release, the news is not good. The federal "SORNA" law places considerable restrictions and requirements on those hoping to leave the U.S. who have sex-crime records. I don't have time to get into all of this at this time, but the basics are these: First, while the U.S. has not barred international travel by sex offenders (yet, at least), the feds do make it difficult and perilous.

First, you will need a passport. However, passports issued to sex offenders against minors now bear an express warning on the back to immigration/customs agent of other countries to the effect that you are a sex offender. This implies that caution should be used by such authorities in deciding to let you into their country at all and, if they do, authorities should keep close tabs on you due to your presumed proclivities. Most immigration agents greeting you at an airport/ship dock at any country would be very likely inclined to turn you around and send you back to the US at that point.

Second, before you leave, as part of your registration obligation, you must inform both the feds and the state you will be leaving from (i.e., the one you are living in and registered in at the time of your impending departure from the US) of your international destination and an address where you expect to be staying there. Failure to do so is a crime both at the federal level and in the state you left from. A different federal law, concerning sex tourism, requires that, as an SO, you must notify the federal agency in charge of that law of the entirety of your international travel plans. Again, failure to do so is a federal crime. Lest you be inclined to blow this off, be aware that the US has established what effectively is an army of investigators whose only job is to keep track of the whereabouts of SOs, especially ones who have left the country. They have the necessary resources and will check on the accuracy of everything you told them. Mistakes can happen in international travel, especially in light of language barriers. However, the law says that if you wind up somewhere other than where you thought you were going to be staying at, you must notify the feds, correcting the previous declaration to the place you are actually at or going to be at. Yes, failure to do this is also a serious fed crime.

At this time, whether the government



Fingerprinting it the border

(fed or state) can constitutionally demand that you continue to register your every move from one place to another outside the country is still undecided. (This issue is known as extraterritorial jurisdiction of laws.) But even if not, those investigators will go to great lengths to keep track of your moves and will especially investigate whether anything you do in such other countries could be deemed sex trafficking misconduct or anything preparatory to such misconduct (again a crime).

In light of all this, it is natural to be tempted to simply renounce one's US citizenship altogether – the only legal action one can take that will unquestionably free one from all such registration and related obligations to the US from wherever in the world you may be.

Yet the US requires that, in order to renounce, you must personally appear in a U.S. embassy or consulate and make the renunciation there (a form, proof of identity, and swearing on oath that this is your intent, and surrendering your US passport permanently on the spot).

The problem is that, if you may inadvertently have been tripped up by that morass of legal requirements, such that there may already be a warrant for your arrest, your renunciation will be deemed void and, while you are in the embassy, you will be arrested (it is US soil, after all). Then you'll be unceremoniously hauled back to a US jail via the next flight back to the States without need for any extradition. End of your international escapade.

Finally, about three-quarters of the world's countries have laws/rules that clearly ban sex offenders from entering. As to those which will allow entry, it is usually only for a very short time, either (ironically) as a tourist or for some legitimate business reason.

Only a handful of countries would seriously consider a request by a sex offender for naturalization or even merely indefinite non-citizen residency in their country. Such a request would certainly require stating a very convincing reason why you chose that country for naturalization or permanent residence. Again, the host country would thoroughly investigate this claim by you. (Lying, of course, would slam you in a true shithole prison in that country, making you wish you'd never have left the US.) Some have succeeded in all of this, but the numbers seem to be seriously dwindling in recent decades as the US continues to go way out of its way

to paint all SOs to foreign countries as devils incarnate.

And of course, you would never want to renounce your US citizenship without having already attained secondary citizenship in a foreign country. To do so would potentially result in being a "person without a country," ineligible to obtain a passport from any country and effectively treated as a refugee and, after any limited term of presence in a host country expires, an illegal immigrant subject to indefinite detention. This seems preposterous, but it has happened for real, so beware.

In sum, if you seriously aim to leave the US, be sure to consult with an attorney who specializes in emigration from the US, particularly one who has successfully made this happen for other SOs. Even doing this does not give you any guarantees, however.

Hence, it is extremely wise to also retain an attorney/law firm in the foreign country of your targeted desire to make all arrangements and to smooth the way. I surely would not take any of the steps I have outlined without using attorneys on both ends.

Obviously this is going to take buckets of money. That's not even counting the funds that any country willing to take you on as a resident will want you to be able to bring with you (i.e., by international electronic funds transfer). The non-wealthy need not apply.

The modest good news: a few countries these days are actually issuing passports to US citizens who can prove ancestry from that country (usually at least a one-quarter familial history). I don't know whether this would apply to you, but you could look into it.

A different long shot that has been used by others. The Sullivan case showed that Great Britain, along with other EU countries, bound by the European Convention on Human Rights (ECHR), forbidding unlimited 'pre-crime detention', are legally unable to extradite SOs to US states with SO commitment where the personal peril of such commitment is real. However, GB is currently finalizing its withdrawal from the EU. So in future GB will cheerfully extradite to the US.

Nonetheless, other EU countries probably will bar them. However, you would then have to plead with the host country to grant you political refugee status in order to stay in that country indefinitely. If they refuse, you would still be deported when your visa stay is over. Could you then get another country to take you? Probably not likely. If not, you could be deported back to the States.

God, I wish I had better news. The moral of this story is simply to be very careful if you want to become an 'international,' to try for citizenship in a different country, and to eventually renounce US citizenship. Nonetheless, if

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you have the means, it is worthwhile goal, given how terrible the US has treated us and the fact that most other countries are not full of people with such hateful attitudes against pedophiles or even against those with past sex offenses.  
Nuff said.

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## Suspending the Constitution – Can It Happen? Will You Let It?

John W. Whitehead, "Suspending the Constitution: Police State Uses Crises to Expand Its Lockdown Powers," *The Rutherford Institute* (March 24, 2020), [www.rutherford.org](http://www.rutherford.org)

Text excerpts:

"That was when they suspended the Constitution. They said it would be temporary. There wasn't even any rioting in the streets. People stayed home at night, watching television, looking for some direction. There wasn't even an enemy you could put your finger on." – Margaret Atwood, *The Handmaid's Tale*

"You can always count on the government to take advantage of a crisis, legitimate or manufactured.

This coronavirus pandemic is no exception.

Not only are the federal and state governments unraveling the constitutional fabric of the nation with lockdown mandates that are sending the economy into a tailspin and wreaking havoc with our liberties, but they are also rendering the citizenry fully dependent on the government for financial handouts, medical intervention, protection and sustenance.

Unless we find some way to rein in the government's power grabs, the fall-out will be epic.

Everything I have warned about for years -- government overreach, invasive surveillance, martial law, abuse of powers, militarized police, weaponized technology used to track and control the citizenry, and so on -- has coalesced into this present moment.

The government's shameless exploitation of past national emergencies for its own nefarious purposes pales in comparison to what is presently unfolding.

It's downright Machiavellian....

...The Trump Administration has asked Congress to allow it to suspend parts of the Constitution whenever it deems it necessary during this coronavirus pandemic and 'other' emergencies.

It's that 'other' emergencies part that should particularly give you pause, if not spur you to immediate actions (by action, I mean a loud and vocal, apolitical, non-partisan outcry and sustained, apolitical, nonpartisan resistance)....

We're talking about lockdown powers (at both the federal and state level): the ability to suspend the Constitution, indefinitely detain American citizens, bypass the courts, quarantine whole communities or segments of the population, override the First Amendment by outlawing religious gatherings and assemblies of more than a few people, shut down entire industries and manipulate the economy, muzzle dissidents, 'stop and seize any plane, train, or automobiles to stymie the spread of contagious disease,' reshape financial markets, create a digital currency (and thus further restrict the use of cash), determine who should live or die....

Specifically, the [U.S. Dept. of Justice – "DOJ"] wants to be able to indefinitely detain American citizens without trial. The DOJ also wants to be able to pause court proceedings and suspend the statute of limitations on criminal and civil cases....

As David C. Unger observes in *The Emergency State: America's Pursuit of Absolute Security at All Costs*:

'For seven decades we have been yielding our most basic liberties to a secretive, unaccountable emergency state – a vast but increasingly misdirected complex of national security institutions, reflexes, and beliefs that so define our present world that we forget that there was ever a different America. ...Life, liberty, and the pursuit of happiness have given way to permanent crisis management: to policing the planet and fighting preventative wars of ideological containment.... Limited government and constitutional accountability have been shouldered aside by the kind of imperial presidency our constitutional system was explicitly designed to prevent.'

...Whether or not this particular crisis is of the government's own making is not the point: to those for whom power and profit are everything, the end always justifies the means.

...Comprising the country's Continuity of Government (COG) plan, these directives (National Security Presidential Directive 51 and Homeland Security Presidential Directive 20), which do not need congressional approval, provide a skeleton outline of the actions the president will take in the event of a 'national emergency.'

Mind you, that national emergency can take any form, can be manipulated for any purpose and can be used to justify



Martial Law

any end goal – all on the say-so of the president.

Just what sort of actions the president will take once he declares a national emergency can barely be discerned from the barebones directives. However, one thing is clear: in the event of a national emergency, the president will become dictator because while the COG directives ensure the continuity of executive branch functions, they do not provide for repopulating or reconvening Congress or the Supreme Court....

The U.S. military has reportedly already been given standby orders under COG for this present coronavirus pandemic.

The plans for the shadow government administered by those who run the Deep State are more elaborate than many realize. Massive underground bunkers the size of small cities are sprinkled throughout the country for the government elite to escape to in the event of a national emergency. Mount Weather, near Bluemount, Va., is one of a number of such facilities....

In fact, Congress has no oversight, budgetary or otherwise, on Mount Weather, and the specifics of the facility remain top secret.

What is the bottom line here?

We are, for all intents and purposes, one crisis away from having a full-fledged authoritarian state emerge from the shadows, at which time democratic government will be dissolved and the country will be ruled by an unelected bureaucracy....

Power corrupts.

Absolute power corrupts absolutely.

Thus far, we have at least pretended that the government abides by the Constitution....

The attempts by each successive presidential administration to rule by fiat merely play into the hands of those who would distort the government's system of checks and balances and its constitutional separation of powers beyond all recognition.

Remember, these powers do not expire at the end of a president's term. They remain on the books, just waiting to be used or abused by the next political demagogue....

The powers amassed by each successive president through the negligence of Congress and the courts – powers which add up to a toolbox of terror for an imperial ruler – empower whoever occupies the Oval Office to act as a dictator, above the law and beyond any real accountability....

This abuse of presidential powers has been going on for so long that it has become the norm, the Constitution be damned.

We no longer have a system of checks and balances....

All of the imperial powers amassed by Barack Obama and George W. Bush and now Trump – to kill American citizens without due process, to detain suspects (including American citizens) indefinitely,

to strip Americans of their citizenship rights, to carry out mass surveillance on Americans without probable cause, to wage wars without congressional authorization, to suspend laws during wartime, to disregard laws with which he might disagree, to conduct secret wars and convene secret courts, to sanction torture, to sidestep the legislatures and courts with executive orders and signing statements, to direct the military to operate beyond the reach of the law, to establish a standing army on American soil, to operate a shadow government, to declare national emergencies for any manipulated reason, and to act as a dictator and a tyrant, above the law and beyond any real accountability – have become a permanent part of the president's toolbox of terror....



Editor of newsletter decrying government abuse of individual rights being hauled away for "moral blasphemy."

Think on this: the presidential election is right around the corner.

Suddenly, the improbable possibility of any incumbent president attempting to extend the police state's stranglehold on power by using current events to justify postponing or doing away with an election – forfeiting the people's rights to govern altogether – and establishing a totalitarian regime seems less far-fetched than it did even a few years ago.

...Most Americans, fearful and easily controlled, would sooner rouse themselves to fight for that last roll of toilet paper than they would their own freedoms.

This is how freedom dies.

We erect our own prison walls, and as our rights dwindle away, we forge our own chains of servitude to the police state.

Be warned, however: once you surrender your freedoms to the government – no matter how compelling the reason might be for doing so – you can never get them back.

...If we continue down this road, there can be no surprise about what awaits us at the end.

The America metamorphosing before our eyes is almost unrecognizable from the country I grew up in, and that's not just tragic – it's downright terrifying."

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## There Is No Substitute for Liberty.

Let us end by recalling the spirit of the The Statue of Liberty, *formally titled:*

### ***Liberty Enlightening the World***

*"Keep, ancient lands, your storied pomp!"*

*cries she*

*With silent lips. 'Give me your tired, your poor,*

*Your huddled masses yearning to breathe free,*

*The wretched refuse of your teeming shore.*

*Send these, the homeless, tempest-tost to me,*

*I lift my lamp beside the golden door!"*

(Final lines of its dedication plaque, from "*The New Colossus*" by Emma Lazarus)

And finally, Lady Liberty's lament in the arresting song, "American Tune", by Paul Simon, reminding us all that liberty is what you create, defend, and revere.

Let us do so. Lady Liberty could use some help.

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"Many's the time I've been mistaken,  
And many times confused.  
Yes, and I've often felt forsaken,  
And certainly misused.

Oh. But I'm all right, I'm all right....  
Just weary to my bones.  
Still, you don't expect to be bright and bon vivant,  
**So far** away from home, so far away from home.

I don't know a soul who's not been battered,  
I don't have a friend who feels at ease.  
I don't know a dream that's not been shattered,  
Or driven to its knees.

Ah, but it's all right, it's all right,  
For we did so well so long.  
Still, when I think of the road we're traveling on,  
I wonder what's gone wrong.

I can't help it;  
I wonder what's gone wrong.

And I dreamed I was dying.

I dreamed that my soul rose unexpectedly,  
Looking back down at me, smiling assuredly.  
And I dreamed I was flying.

And high up above, my eyes could clearly see  
The Statue of Liberty, sailing away to sea.  
And I dreamed I was flying.

Well, we come on the ship they call the Mayflower,  
We come on the ship that sailed the moon.  
We come on the age's most uncertain hour,  
And sing an American tune.

Ah, but it's all right.  
You can't be forever blessed.  
Still, tomorrow's gonna be another working day  
And I'm trying to get some rest.  
That's all; I'm trying to get some rest."

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## **Special Supplement: You ARE Entitled to the Stimulus Payment Authorized by Congress**

*Stephen Raher*, “Since You Asked: Should Incarcerated People Be Receiving Stimulus Payments?”, *Prison Policy Initiative*, May 18, 2020 ([www.prisonpolicy.org/blog/2020/05/18/checks/](http://www.prisonpolicy.org/blog/2020/05/18/checks/))

[Prison Policy Initiative Editor’s Introduction:] “Recently, we’ve heard that some correctional authorities are sending stimulus checks for incarcerated people back to the IRS. But should people in prison and jail actually receive these payments? Prison Policy Initiative volunteer and attorney Stephen Raher offers a deep dive into the CARES Act, IRS policies, and the implications.”

[Text:] “On March 27, Congress passed the Coronavirus Aid, Relief, and Economic Security Act, more commonly known as the ‘CARES Act.’ One of the better-known aspects of the 883-page bill is the Treasury’s disbursement of one-time economic stimulus payments, which were designed with broad eligibility requirements to get financial relief into people’s pockets as quickly as possible.

Now the IRS is claiming that incarcerated people do not ‘qualify’ for stimulus payments and the agency is attempting to ‘claw back’ badly needed funds from vulnerable people who may need it most. But this policy is contradicted by the unambiguous language of the CARES Act itself.

### **Does Incarceration Make People Ineligible for Stimulus Payments?**

In short: According to the CARES Act, no. The provision regarding the stimulus payments is fairly straightforward: the government is directed to distribute \$1,200 to every ‘eligible individual.’<sup>1</sup> An eligible individual is defined as ‘any individual’ other than a nonresident immigrant, someone who is claimed as a dependent on another person’s tax return, a probate estate, or a trust.<sup>2</sup> Other parts of the law reduce the size of payments to high-earning taxpayers<sup>3</sup> and require eligible individuals to have tax ID numbers.<sup>4</sup> These basic eligibility requirements appear in the law itself, and are repeated on the IRS’s [webpage regarding stimulus payments](#). There is no language in the statute that directly or indirectly suggests that incarceration status affects eligibility.

### **Why Have I Heard That Payments to Incarcerated People Should be Returned?**

On May 6, 2020, the IRS updated the [frequently asked questions](#) (‘FAQs’) on its webpage to say that incarcerated people do not qualify for stimulus payments and should return any payments that they receive. The IRS cites no authority for this, and the only law mentioned in the FAQ is the statute that prohibits incarcerated people from receiving *Social Security* payments. But this is irrelevant since the stimulus payments are refundable tax credits<sup>5</sup> having nothing to do with Social Security. Despite the fact that this new advice comes from an IRS FAQ page, and not from the CARES Act itself, it has been cited widely in publications like *Forbes*, leading to a lot of confusion.

### **How Is It Possible That the IRS Website Would Give Advice That’s Not Consistent with the Law?**

There is a well-defined process for the IRS to issue rules and regulations that supplement tax laws passed by Congress. The purported ban on stimulus payments to incarcerated people was not a result of this rulemaking process. Instead, it appears that IRS made up this ‘rule’ out of whole cloth and announced it by posting it on a webpage.

It’s impossible to say why the IRS took this unusual approach, but here’s one theory: someone in the Treasury Department may have decided that giving money to incarcerated people is bad policy. Of course, [the IRS is severely under-resourced](#), as a result of decades of attacks by grandstanding members of Congress, so the agency doesn’t have the time or staff to go after individual incarcerated people to claw back stimulus payments. And the IRS would likely lose in court if such an action were challenged in litigation. But, by placing an FAQ on the agency’s website saying that incarcerated people cannot receive the payments, some prison systems will probably do the IRS’s dirty work by using the FAQ as a justification to intercept payments or bring disciplinary action against people who take the steps to claim the money to which they are legally entitled. In fact, we’ve heard that at least one state prison system is already doing this.

### **It Is Entirely Reasonable to Give Emergency Financial Aid to Incarcerated People.**

Even though this issue is fundamentally about the rule of law (more about that in a minute), as a practical matter some people can’t fathom giving money to incarcerated people or others who are

'dependent' on the government. But there are good reasons why people in jail or prison need emergency aid in these unprecedented times. First, many incarcerated people will be released soon (especially people in jail, where stays tend to be for short periods of time). Navigating the financial hurdles of post-incarceration life is difficult even in normal times. But to state the obvious, we are not in normal times: given the record-high unemployment rates, the well-documented challenges of finding work as a formerly incarcerated person are only going to get more formidable. It makes perfect sense for the government to provide monetary aid so that recently released people can obtain housing, clothing, and food. The CARES Act stimulus payments, while modest, can provide literally lifesaving assistance for people being released from incarceration.

It also makes sense to give money to people who won't necessarily be released from custody soon. Prisons and jails have shifted more and more costs onto incarcerated people – costs for things like hygiene supplies, medical copayments, and communication with loved ones. Since incarcerated people have little ability to earn money, they tend to rely on money transfers from friends and family to pay for basic necessities. But as family members on the outside (who are often low-income to begin with) lose their jobs in the pandemic-induced economic collapse, families will be increasingly less able to send money to loved ones inside. Providing stimulus funds to incarcerated people helps protect the health and well-being of those behind bars and provides relief to their loved ones at home.

### **The Implications of the IRS's Policy for Our Government and the Rule of Law**

Beyond the immediate implications for incarcerated people and their families, the IRS's errant attempt to prevent incarcerated people from receiving stimulus payments is troublesome because it upends our system of government, specifically the separation of powers. Executive-branch agencies (like the IRS) are charged with implementing the laws passed by Congress, not changing the law. But that seems to be exactly what's happening here: Congress said to give everyone money, but then the Treasury Department thought that incarcerated people should have been excluded. As every first-year law student learns, it is settled law that unambiguous statutes are to be applied as written, even if that could lead to arguably unintended consequences.<sup>6</sup>

Furthermore, interfering with the administration of the federal tax system (which would presumably include interfering with someone's ability to claim a valid tax refund) is a federal crime.<sup>7</sup> But we live in a time when the national government operates under a philosophy that only some people (namely, people without the right connections) are obliged to obey the law. The IRS's sudden about-face on stimulus payments provides a troubling illustration of this mindset: a government agency has ignored the clear-cut language of the governing law in an effort to impose additional punishment on people who are serving time for violating other laws.

#### Notes:

1 26 U.S.C. § 6428(a) and (f).

2 26 U.S.C. § 6428(d).

3 26 U.S.C. § 6428(c).

4 26 U.S.C. § 6428(g).

5 Even though the stimulus payments are tax credits, the CARES Act is very clear that people may claim the payments even if they have no taxable income. See Revenue Procedure 2020-28.

6 See *Magwood v. Patterson*, 561 U.S. 320, 334 (2010) (“[Courts] cannot replace the actual text [of a statute] with speculation as to Congress’ intent.”); *Henson v. Santander Consumer USA*, 137 S. Ct. 1718, 1725 (2017) (“[I]t is never our job to rewrite a constitutionally valid statutory text under the banner of speculation about what Congress might have done had it faced a question that, on everyone’s account, it never faced.”).

7 26 U.S.C. § 7212(a).

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