The Legal Pad
Volume 4, Issue 7
July 5, 2020

"Rights are not given; rather, they are the products of political organizing, effort, and activism as much as they are products of litigation and briefs."
– *Guy Padraic Hamilton-Smith*, "The Digital Wilderness: A Decade of Exile & the False Hopes of Lester Packingham," 24 *Tex. J. on C.L. & C.R.* 25, 57 (2018).

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His evil spirit lives on in every vicious lie about you.

Winnowing the Wheat from the Chaff since 2016

TLP Editor Address (Exactly & Only as Below):

Cyrus P. Gladden II
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Moose Lake, MN 55767-9452

Covid Kills 8 or More in New Jersey SOCC Facility.

Some Confined There for Decades — All Pointlessly Vulnerable to It.

Jordan Michael Smith, "Obscure New Jersey 'Treatment' Facility Has a Higher Covid-19 Death Rate Than Any Prison in the Country," *The Appeal*, June 4, 2020

The detainees already completed their sentences – but they are prevented from leaving for years. And with the coronavirus spreading, their lives are at risk.

This story was produced with Type investigations.

Text excerpts:

"With its innocuous name, the Special Treatment Unit sounds like a hospital. It's a building in Avenel, New Jersey, housing 441 'residents,' as it calls them. It has what state officials have described as a 'comprehensive treatment program' with cognitive behavioral therapy delivered by mental health experts.

But the STU is actually a prison in all but its name – it's run by the state's Department of Corrections and located on the grounds of the East Jersey State Prison. So-called residents live there involuntarily, often for decades on end, their lives controlled and regimented. That's because the detainees in the STU were all convicted of sex offenses and deemed too dangerous to release, despite research showing that such assessments are often flawed.

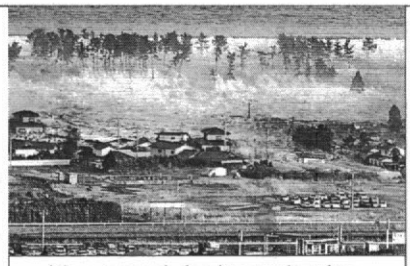
Inside this small, harmless-sounding complex, at least eight individuals died of Covid-19 by the end of May. Two others have died since mid-March, but the causes haven't been released. As of May 28, state officials confirmed 55 STU prisoners tested positive, but prisoner Roy Marcum said on June 2 that he believes the number is about 70.

With at least eight deaths per 441 prisoners, the STU has a higher death rate – by far – than any prison in America. Its death count is equal to that of all the prison complexes combined in California, Or all those in Arizona, Pennsylvania, or more than 14 other states, according to Bureau of Prisons data. New Jersey ranks fourth in prison deaths due to the coronavirus (43 as of Wednesday).

Unlike in jails or prisons around the country, every individual in the STU has completed his criminal sentence. Some completed their sentences long ago and have been held in the STU since it opened in 1999. At least one of the eight people who died committed his crime more than 30 years ago, in the 1980s. Experts say America's way of dealing with individuals convicted of sex crimes has long been cruel, unjust, and counterproductive. In the pandemic era, it's becoming fatal.

Some prisoners have resigned themselves to their fate. Joshua Denisiuk, 26, was convicted for sex crimes he committed when he was just 15 and has been in the STU since 2013. He knows there is little he can do to avoid the coronavirus besides wash his hands frequently. 'If I get it, I get it,' he said.

For centuries, the ideas behind a process called 'civil commitment' have allowed authorities to involuntarily institutionalize individuals whom psychiatric experts believe to be incapable of caring for themselves. Beginning in the 1960s, civil commitment became used primarily to hospitalize people who were considered an imminent danger to themselves or others, for short periods.



Like a tsunami, despite warning signs, Covid-19 took most by surprise.

But in 1999, New Jersey followed other states in enacting a Sexually Violent Predator Act. The law effectively permits state officials to indefinitely lock up people convicted of sex offenses who 'are likely to engage in repeat acts of predatory sexual offenses.' When people around New Jersey convicted of sex offenses approach the end of their criminal sentences, the state's attorney general can petition to hold them under the law. Once they're in, they sometimes remain held there for the rest of their lives.

The American Psychiatric Association and many other health experts oppose civil commitment of individuals who have committed sex crimes, saying it lacks a scientific basis and violates core civil liberties. 'Contemporary civil commitment measures grew out of interwoven panics concerning "stranger danger," satanic ritual abuse, and violent crime,' said the historian Paul Renfro, author of 'Stranger Danger: Family Values, Childhood and the American Carceral State.' Renfro points to research showing that civil commitment does little to address sexual violence and that recidivism for sex crimes is actually lower than for other crimes.

But the Supreme Court has upheld the practice, and 20 states now have civil commitment laws for people classified by the state as sexually violent predators (SVPs), as does the federal government and its Bureau of Prisons. Approximately 5,400 individuals around the country – almost all men – are held under these laws.

As its name suggests, civil commitment is a civil procedure, not a criminal one. People held under these laws do not have the same legal rights as others in the justice system. They are held indefinitely, without potential release dates, living in limbo for years – sometimes for their entire lives. 'Once you're there, nobody wants to take a chance and release someone who's been civilly committed,' said Russell, who requested that his last name not be used to avoid being harassed by his neighbors. He spent nine years at the STU before being released nearly a decade ago.

Experts say America's way of dealing with individuals convicted of sex crimes has long been cruel, unjust, and counterproductive. In the pandemic era, it's becoming fatal.

The underlying basis for civil commitment is the assumption that an individual who commits a sex offense at some point in his life is an eternal risk to his community. Experts disagree.

Nobody is a risk all the time,' said Maia Christopher, executive director of the Association for the Treatment of Sexual Abusers. Determining the risk level of individuals is critical, she added, but SVP laws are broad and severe. Once individuals are caught in the system, it's difficult for them to get out. 'There are very few ways for people to get acknowledged for positive behavior,' Christopher said.

In New Jersey as elsewhere, so-called SVPs are kept in separate facilities from prison detainees. 'They don't consider you prisoners, but they treat you like prisoners,' said William Moore, who was in the STU for 15 years before being released in 2014 at age 65. The state does not have to prove beyond a reasonable doubt that an individual will commit a sex crime in the future – authorities just need to present 'clear and convincing evidence' to a judge.

Some of the detainees, like Denisiuk, were convicted of crimes as children. He doesn't participate in the treatment that is offered. He said his lawyer advised him against it, warning him that anything an individual said to a therapist or staff member in the facility can be used against him in a hearing. Rather than incriminate himself by saying the wrong thing, he hopes his case is resolved in court and that he is eventually freed, since he already completed the sentence for the sexual assault he committed as a teenager more than 10 years ago.

People in civil commitment are at a heightened risk of contracting the coronavirus because of age and poor health conditions. 'We know that the death rate from Covid is higher among older individuals, and civil commitment disproportionately affects older individuals,' said Mike Mangels, a public defender who represents the STU residents. Since people in civil commitment have already served their sentences – sometimes lengthy – they are older on average than other incarcerated people. Since the pandemic started, they are afraid for their lives. They have to watch as some of the people they have known for 10 years or more, in some cases, are carted out, never to be seen again,' he said.

Marcum, a 56-year-old who has been in the

STU since 2000, told *The Appeal* and Type Investigations that as of last Saturday, 29 detainees were isolation because they had tested positive for Covid-19. Detainees are now locked in their cells for more than 23 hours per day, he said, but for weeks state officials prohibited them from even wearing masks. Hand sanitizer was considered contraband until recently, according to detainees and news reports, and testing was slow and haphazard. 'For a week I was getting a call just about every day that another person had died,' said Mangels, the public defender.

Liz Velez, a spokesperson at New Jersey's Department of Corrections, said residents are not locked down and leave their cells for showers, phone calls, and 'passive recreation' such as playing board games and reading. 'The STU [is] located in the northern region of the state – the region hardest hit by the pandemic.' Velez said. Across all our facilities we've implemented various virus mitigation strategies from enhanced sanitation, ensuring access to sanitation products like soap and hand sanitizer, along with CDC education on proper hygiene and we also distributed masks to all inmates, residents, and employees.'

The STU follows social distancing guidelines and anyone testing positive for the virus is placed in medical isolation with a well-trained team she said, noting that the department was also providing on-site testing to residents and state DOC employees.

But concerns about the STU long predate the coronavirus. In 2016, detainees there filed a class action lawsuit against authorities, alleging that conditions at the facility were 'punitive.' Detainees 'are entitled to considerate treatment' but were instead treated like 'criminals whose conditions of confinement are designed to punish,' the suit noted, citing examples such as infrequent family visits and little or no educational, vocational, or recreational activities.' Detainees, it added, 'are being denied meaningful mental health treatment that gives them a realistic opportunity for their conditions materially to improve.'

In response to Covid-19, group treatment programs in the STU, and around the country, have been canceled or scaled back. New Jersey's Department of Human Services, which runs the mental health treatment unit at the STU, did not respond to a request for comment by publication time. But according to detainees, the most common form of treatment in the facility, group therapy, has been canceled since mid-March, which means individuals in civil commitment cannot even work to be among the few deemed worthy of release.

As of 2016, only 15 percent of prisoners at the STU were ever released. The rest exist in purgatory, made worse by the threat of coronavirus. 'People are scared,' Marcum said. He is still hopeful that one day he'll be released. 'Less so as the years go by.'

Residents of the STU are eligible for furloughs in the community, but Velez said 'no such trips have been scheduled during the pandemic to minimize exposure in the community.'

'It would be one thing to lose the few freedoms we have if what they did was effective – but what they did was clearly pretty ineffective,' Marcum said.

Unlike those incarcerated in prison or jail, the identities of people in civil commitment are unavailable to the public. The names of the eight people at the STU whose deaths were confirmed to be related to Covid-19 have not been released. They existed there anonymously, some for decades, and they died just as anonymously.

'We called it the Pine Box Release Program' – because the only way you were leaving it was in a box, dead,' said Russell, the former prisoner released in 2011. He still has friends there, men who have been there for decades. He's hoping they'll one day be released, alive. But in the age of the coronavirus, he isn't counting on it.

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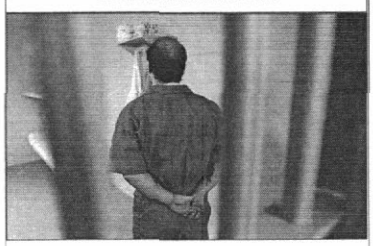
Rushville Gulag Conditions



Thomas Powers, May 30, 2020 Letter

Letter summaries & excerpts:

This is a facility for those committed following the completion of their prison sentences for sex crimes. Typically, those sentences were extremely long, with no parole being granted. Here we are called "residents," not "inmates." However, this does not change the reality of the situation. In addition for two daily counts requiring lock-ins for about a half hour each, we are locked in our cells all night from 10:45 p.m. until 7:15 a.m. Other irregular lock-ins can occur at any time due to altercations, power loss, etc., or whenever staff persons deem it necessary.

Cell dimensions etc.: width of cell: 7 feet (Bunk bed spans width at rear of cell.) In some living units, there is no ladder, hence the occupant of the upper bunk must climb up using the dresser to get into bed, and must climb down as well in the same way. Accidental falls have occurred. In some cases, this has resulted in head injuries requiring stitches.

Front-to-back depth of cell: 10 feet, 4 inches. Curiously), cell height = 11 feet, 10 inches (apparently to allow light in from high horizontal slit window (non-opening, 5 feet wide by 9 inches high) while minimizing risk of window breakage, and also to maximize claimed cubic footage of cell without widening or deepening its 'footprint.

The toilet/sink device is stainless steel (identical to modern prisons everywhere). There is a small dresser that both cell occupants share. Also like modern prison furnishings, there is a very small table/desk (approx.: 2 feet wide by 1.75 feet deep) with only one stool (again: steel)

As a standard matter, there are 18 2-men cells on each "pod." There are 3 pods per "unit." Also in each pod: one handicapped cell, three showers, and 2 microwaves (but no toaster and no sink), two or more couches in dayspace, plus a commons TV, 1 outgoing phone (by Securus), plus 1 incoming phone for up to 3 30-minute calls per week at scheduled times (evenings mostly). Our living units do not have any PCs, vending machines, ping-pong. The only ice maker is off-unit, which extremely limits our access to it.

All meals are eaten in the pod, and all medications are taken in it. Except when going to treatment groups (currently suspended due to the Covid-19 pandemic) or other officially required appointments, or to the library, the gym, or the yard (at scheduled times), all "residents" spend almost all of the time in either this dayspace or in their rooms

A Segregation unit apparently holds up to 48 inmates, divided over four units. Another unit of the same size has been re-designated for those under quarantine for either having a Covid-19 infection or being suspected of it due to noted symptoms. A later addition to the facility added two more units with 24 cells each and two very large units of 96 inmate occupancy each. One of these is for those who are elderly or very sick (other than with Covid-19). In addition, the health care department has 12 single-occupancy cells.

All building in this facility are air condition ed. There is no direct access to outside air. Due to the common ventilation in our buildings, influenza and other airborne viruses go through our building, spreading infection rapidly.

Our unit staff are not armed. They do carry handcuffs, however. They are officially titled "Security Therapy Aides" ("STAs"). At one time, they went on strike to remove "Therapy" from their job title. They often have a hostile demeanor to the residents. Many complaints have been filed of incidents of abusive behavior by STAs. STAs have been given wear masks, gloves and face shields (to prevent Covid-19 transmission), but refuse to wear any of these. There is an extraction/riot gear team. Two unidentified staff have been confirmed as ill with the Covid-19 virus.

There is no way for residents to "socially distance" from one another or from staff.

> The occupant of the upper bunk must climb up using the dresser to get into bed.

Residents have been given masks, but are not allowed to wear gloves or face shields. Recently, two TDF-Rushville residents have also been confirmed as having contracted Covid-19 infections.

In all, the capacity of the facility is 732 inmates. Recently, occupancy of the facility is at about 570. Release from TDF-Rushville is usually by "conditional release," also know in some other SOCC states as "provisional discharge" or other terms with names similar to either of these ones. Currently, there are about 75 out on conditional release from here. These releasees live in single-occupancy apartments.

Because I will not admit to the 'truth' of 'facts' contained only in police reports, I will never be allowed to advance in treatment These included 'creative writing' by police.

Stimulus checks are arriving here most via direct deposit. There is no interference here with receipt of this money.

Thomas Powers, May 10, 2020 Memo

Text excerpts:

"The Illinois Program started on January 1, 1998. Originally it was housed at the Sheridan Correctional Center (U.S. Northern District 1998-99). Then moved to the Joliet Correctional Center (Northern District) from 2000 to 2006. In 2006 the program moved to this Illinois Dept. of Corrections Juvenile facility, a newly built vacant building in Rushville, IL. Originally, all single cells made for juveniles, double bunking was added for the sexually violent, the so-called 'worst of the worst'.

Why I mentioned Northern and Central District Courts of Illinois for the U.S. District Courts: Because the Northern District Courts are located in Chicago and Rockford, Il. The program was getting rhythm in the matter of *Hargett v. Adams*. Dr. Fred Berlin conducted an evaluation of the program in Joliet ordered by the US Northern District Court in Chicago. Many believe that the move from Joliet to Rushville was politically influenced because of 40-year House Speaker Michael Madigan and his daughter Attorney General Lisa Madigan (democrat); the Madigans' influence in this area including the U.S. Central District judges has made Rushville what it is today. This move came on the 'cusp' of the Northern District and Dr. Berlin's recommendation deciding the changes to be made. That was 2006.

Now in the year 2020, those changes have never been made and it has become a 'warehouse' for men with a sham and disguise of treatment, just another prison. [The TDF-Rushville facility is still owned by the Illinois Dept. of Corrections. However, it is operated by the Illinois

(Continued on page 3)

Now in the year 2020, [recommended] changes have never been made and it has become a 'warehouse' for men with a sham and disguise of treatment, just another prison.

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Dept. of Human Services.]

The majority of the 600 residents at Rushville are from the Northern part of the state. Chicago and Cook County and surrounding counties. We have to travel, for myself monthly, approximately 4½ hours to court which means for a 9:00 a.m. court time, they get me up at 2:30 a.m. for 4:00 gate time.

With my last court date on March 2, 2020, the court was closed. I have moved for speedy trial/video-telephonic court. No response. I am allowed one court appointed evaluator; the state gets two. Both of their state evaluators using only 20 year old past conduct refused to meet with me, saying that I met the criteria for civil commitment. My doctor who spent thirty to forty hours with me says I do not meet the criteria.

We do not earn money here. I believe we are the only SVP program that earns 'Life Reward Points" for the economic benefit that the residents provide. The 'points' can only be spent at the 'company store.' Somewhat of a monopoly, wouldn't you say?

So I was stuck. I owed $10,000 in filing fees. I do not earn money. The court refused to take 'Life Reward Points.' So I filed four cases in state court right down the street in Schuyler County Court House. First Case actually emulated the Minnesota case of 'no treatment.' I have been here eight years and the only treatment they have given me is ancillary groups. As of November 2018, I was put in to 'Power to Change' – this should be 'Powers to Change', and get this: Because my offense description (2000), attempted aggravated criminal sexual assault,' does not match the Rockford Police reports. The team said 'lie and you can move forward.' We have a new case out of the 7th Circuit Court of Appeals (*Lacy v. Butts*, 922 F.3d 371 (April 25, 2019), which states 'risk of self-incrimination that flowed from inmate's participation in program was real and appreciable. Adverse consequences that inmate faced were sufficiently severe to amount to compelled self-incrimination.' The ancillary group called 'Power to Change: is that an adverse consequence? Dr. Berlin spoke on this past conduct and recalling all the past would be like a drug addict having to recall every drug incident.' Why? Because all progress notes/treatment notes get turned over to the Attorney General's Office.

This is a five Phase program; actually, Phase Five is 'Conditional Release.' I am stuck in Phase 2, Power to Change is not 'sex offender-specific treatment.' A problem is that the US Supreme Court never defined treatment. – Even though the 'APA's amicus brief in *Kansas v. Hendricks* gave suggestions in addition to the opinions given by Dr. Fred Berlin in his evaluation on Illinois' program in Joliet 'TDF'. Both said 'no more than 3 years for treatment'. Is it realistic? Yes, it's a simple program. The attorneys of 'Heyl, Royster, Voelker & Allen' attorneys for defendants in the matter of *Powers v. Caraway*, Case No. 20-4080 USDC-CD/ Illinois.

We have a law called the 'Sex Offender Evaluator and Treatment Provider Act.' 225 ILCS 109/1 et seq. Sec. 109/40 states that 'no person should provide sex offender evaluation and treatment unless licensed to do so.'

As of April 15, 2020, all groups have been cancelled due to Covid-19, except for a 20-minute check-in with your primary facilitator.

A doable formula: One-on-one therapy with licensed clinician satisfies 225 ILCS 109/40. There are approximately 300 residents in treatment divided by the 30 therapists. This equals 10 residents per therapist. Give the resident one-on-one for three hours and in their 40-hour workweek they still have 10 hours left. The amount of work in treatment that would be accomplished would definitely meet that 3-year goal of getting out of here. Your comments (all) would be appreciated. Another implementation would be to set mentoring groups during the week to assist with higher phases prior to presenting to the licensed therapist.

If *Bell v. Wolfish* states 'pre-trial detainees cannot be punished,' why does the Rushville 'TDF' have prison-like rules and a behavior committee to hand out punishment such as depriving us of our property, taking privileges, put us in Segregation and forcing us to wear yellow jump suits – all in an attempt to establish appearance of an anti-social personality disorder symptom that we cannot follow rules.

The fourth case is on wages and U.S. currency. Our Administrative Code Title 59.299.330 implements for the 'economic benefit' of the 'TDF' that the resident will receive commensurate compensation of the State and Federal minimum wages. But we get 'Monopoly money' to be spent at the 'Company Store.'

The House Built on Shifting Sand

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Report from FL Profiteer-Run Gulag

Editor's Note: The following account comes from Michael Head, a shadow prisoner of the Florida gulag run by the contractor Liberty Health Care (ironic name, I'd say).

"Here at the F.C.C.C. we have had a total of 10 residents test positive for Covid-19, two of which were fatal. Our infirmary and special housing area are under constant quarantine. Any new arrivals that we get now have to spend 2 weeks in isolation. (The maintenance department installed an outside shower because there is no shower around the intake area). This is an area that I believe has 5 lock-down cells.

We are on a restricted-type movement. There currently are 10 dorms that can go to the Gym/Recreation unit. They can go for one hour at a time — separate from every other dorm. The Library does only pickup and delivery. The computer lab is by sign-up only and one has to wait to be called. Canteen is by dorm, and only when called."

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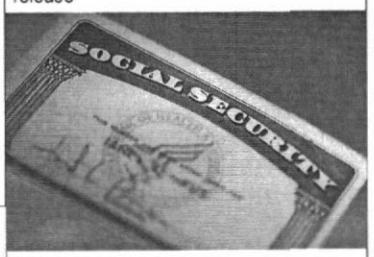
CURE-SORT Reports on Other Gulags

Report from CURE-SORT's Eldon Dillingham on SOCC News from Other States (June 9, 2020)

"The numbers are declining in the State of Washington [SOCC] program. Based on the enclosed, they seem to be placing guys in LRA [least restrictive alternative]. ...[T]he state finds places for them, pays them $500 or so per month for rent, signs them up for social security (100%) due to the fact they have been declared to have a mental illness – thus making them eligible. Also, the state purchases smart phones for them. I imagine the phones, in part, are provided as the means to track them. ...[A]fter six months or so, they move to unconditional release



North Dakota is down to 26 from around 73 a couple of years ago. We cannot learn the reason, but rumor is the governor told the counties the state is not paying for the men in [sex offender] civil commitment, so each county can reimburse the state for care of those committed...."

North Dakota is down to 26 from around 73 a couple of years ago.

Several of us [activists against SOCC] are feeling better each month about punching some significant holes in [SOCC]. We feel that if one or two states 'walk' on civil commitment, the rest will fold. Kansas elected officials don't like it, the cost, but are too coward[ly] to take the leap. They will, when they see other states walking.... Hopefully, Washington or North Dakota. Also, Florida releases quite a few."

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WA Gulag Insider Adds This Report

Excerpts from Letter from Richard Scott ("Scotty") dated 4-26-20

Text excerpt:

"...Our state is broke.... Now this SOTP joint, SCC, must reduce actual expenditures. And so we are about to see an increase in UCRs (unconditional releases)! There are already 45 pending....

The UCRs will be mostly guys at CP LRAs (community placement least restrictive alternatives). We have 115 presently at LRAs...

[Scotty also reports that he has not seen any arrivals of newly committed people, and does not believe any have been lately, citing COVID-19 as the main reason for delay in that commitment process.]

Our count here fell to 177 and will be 170 real soon under SCC. We wait the next EMIS report.

The last one showed 188 UCR in total.

The newest [report, previously] I have shows 191.

We are also about to run out of YSCOs (Youth Sex Crime Only). Everyone agrees they never should have been filed on!

[Among pending litigation there, Scotty cites:] Minimum Wage – C19-5574: Court appointed a pro bono lawyer.

Referring to MN, he says:] Your state is also broke so this is a good time to be talking to the media about the high cost per year per guy -- like we did last year and in the past."

Editor's Note: An "emis" report dated May 18th of data from the Washington SOCC program shows 170 shadow prisoners in their gulag. It further shows 150 shadow prisoners projected at the end of June 2021. It also reflects 50 shadow prisoners released to less restrictive alternative housing in the last two years.

This report also lists monthly expenses during that time. Interestingly, that

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amount has stayed stable during those two years despite those releases. Further, notwithstanding the 20 less shadow prisoners anticipated a year from now, projected monthly expenses by then are actually expected to be higher.

Quite apart from all legal and moral violations of governmental programs of incarceration under guise of treatment that aim to confine most of their occupants until death, such inflexible costs that remain high in spite of large numbers of releases sharply highlight the conclusion that the expenses of such bureaucracies cannot effectively be reined in so long as the program continues. Q.E.D.: All systems of sexual shadow prisoner gulags simply must be terminated.

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Trifecta of Commentators Put Big Lie of High SO Recidivism to Rest.

Editor's Note: What follows is like a set of nested Russian dolls: a trio of excerpted commentaries debunking the false belief – at its worst even expressed by the U.S. Supreme Court — that sex-crime recidivism is 80%. It should not take extended explanation that venomously fraudulent lies such as this are directly responsible for the plight of all individuals confined in SOCC, as well as mistreatment by government and individuals of released sex offenders. Read and be enlightened – and righteously angered by that fraud.

Radley Balko, "The Big Lie about Sex Offenders," *Washington Post, The Watch*, March 9, 2017), www.washingtonpost.com/news/the-watch/wp/2017/03/09/the-big-lie-about-sex-offenders/

Text excerpts:

"Much of the destructive, extra-punishment punishment we inflict on sex offenders is due to the widely held belief that they're more likely to reoffend than the perpetrators of other classes of crimes. This has been the main justification for the Supreme Court's authorization of sex-offender registries and for holding sex offenders indefinitely after they've served their sentences. Lower courts have then cited those rulings to justify a host of other measures, from severe restrictions on where sex offenders can live to GPS monitoring of their every move.

Then problem, as Adam Liptak writes at the New York Times, is that the claim just isn't true.

'Last week at the Supreme Court, a lawyer made what seemed like an unremarkable point about registered sex offenders.

"This court has recognized that they have a high rate of recidivism and are

THE TRUTH IS TRANSPARENT.

very likely to do this again," said the lawyer.

The Supreme Court has indeed said the risk that sex offenders will commit new crimes is "frightening and high." That phrase, in a 2003 decision upholding Alaska's sex offender registration law, has been exceptionally influential. It has appeared in more than 100 lower court opinions, and it has helped justify laws that effectively banish registered sex offenders from many aspects of everyday life.

[Explanatory supplementing text excerpt from *Adam Liptak*, "Did the Supreme Court Base a Ruling on a Myth?", *New York Times*, March 6, 2017, https://nyti.ms/2mvdQOd:]

'...Justice Anthony M. Kennedy's majority opinion in the 2003 case, *Smith v. Doe*, cited one of his earlier opinions for support, and that opinion did include a startling statistic. 'The rate of recidivism of untreated offenders has been estimated to be as high as 80 percent,' Justice Kennedy wrote in the earlier case, *McKune v. Lile*.

He cited what seemed to be a good source for the statistic: "A Practitioner's Guide to Treating the Incarcerated Male Sex Offender," published in 1988 by the Justice Department.

The guide, a compendium of papers from outside experts, is 231 pages long, and it contains lots of statistics on sex offender recidivism rates. Many of them were in the single digits, some a little higher. Only one source claimed an 80 percent rate, and the guide itself said that number might be exaggerated.

The source of the 80 percent figure was a 1986 article in *Psychology Today*, a magazine written for a general audience. The article was about a counseling program run by the authors, and they made a statement that could be good for business. "Most untreated sex offenders released from prison go on to commit more offenses – indeed, as many as 80 percent do," the article said, without evidence or elaboration.

That's it. The basis for much of American jurisprudence and legislation about sex offenders was rooted in an offhand and unsupported statement in a mass-market magazine, not a peer-reviewed journal.

...The most detailed examination of how all of this came to pass was in a 2015 article in *Constitutional Commentary* by *Ira Mark Ellman and Tara Ellman*, who were harshly critical of the Supreme Court.

"Its endorsement has transformed random opinions by self-interested nonexperts into definitive studies offered to justify law and policy, while real studies by real scientists go unnoticed," the authors wrote. "The court's casual approach to the facts of sex offender re-offense rates is far more frightening than the rates themselves."'

At *Slate*, David Feige brings the data:

'In the most comprehensive single study on re-offense rates to date, the U.S. Department of Justice followed every sex offender released in almost 15 states for three years. The recidivism rate? Just 3.5 percent. These numbers have been subsequently verified in study after study. The state of Connecticut Criminal Justice Policy and Planning Division did a five-year study that found a recidivism rate of 3.6 percent. A Maine study found that released sex offenders were arrested for a new sex crime at a rate of 3.9 percent. Government studies in Alaska, Delaware, Iowa, and South Carolina have also replicated these results – all finding sex-crime recidivism rates of between 3.5 and 4 percent.'

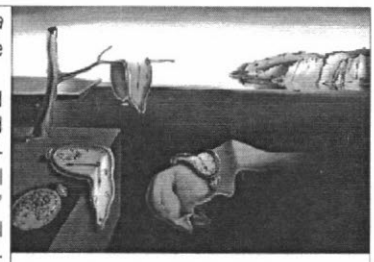
We've discussed this before here at *The Watch*, as well as other areas where the Supreme Court has relied on bad information in important rulings. And this is just a small slice of a much larger problem – the courts' inability to reconcile the evolving nature of science with the criminal justice system's premium on precedent and finality.

[A final pertinent excerpt from the *Liptak* article:] 'Lower courts generally accept what the Supreme Court says. That is true not only about the law but also about facts subject to independent verification. Last year, though, the federal appeals court in Cincinnati gently suggested that the Supreme Court had taken the wrong turn in its 2003 decision in *Smith v. Doe*.

Judge Alice M. Batchelder, writing for a unanimous three-judge panel, described "the significant doubt cast by recent empirical studies on the pronouncement in *Smith* that 'the risk of recidivism posed by sex offenders is "frightening and high."'"

The appeals court struck down a particularly strict Michigan sex offender law as a violation of the Constitution's *ex post facto* clause, saying it retroactively imposed punishment on people who had committed offenses before the law was enacted.'

There isn't much sympathy out there for sex offenders. But if the public wants to prioritize retributive justice over all else and put every sex offender away for life after the first offense, then let's have that debate. I wouldn't favor that approach.



But that at least is a much more honest discussion than how we've approached this issue for the past 30 years or so. What we've done instead is allowed sex offenders to be 'released' from prison, but then made it impossible for them to live anything resembling normal lives. Casting them off and marginalizing them after they're out, regardless of the nature of their crimes, isn't just cruel; it doesn't make society any safer, either. I haven't seen data on this, but it seems likely that removing support networks, making it more difficult to solicit help, limiting what they can do to earn a living and even limiting their ability to attend religious services makes recidivism more likely, not less.

And that's before we even get to the subject of this post – that all of these policies are based on a widely held assumption that all the available data say is utterly false."

The Supreme Court has relied on bad information in important rulings. And this is just a small slice of a much larger problem – the courts' inability to reconcile the evolving nature of science with the criminal justice system's premium on precedent and finality.

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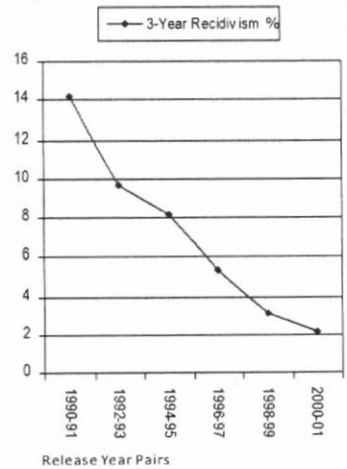
Minnesota's Recidivism Drop:

Source: Minnesota Dept. of Corrections, "Sex Offender Recidivism in Minnesota," (April 2007).



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The Moral: For the last 20 years, MSOP has known that sex-crime recidivism has dropped to an extremely low level —and has stayed there. Also note the drops before enactment of the SPP/SDP law (late 1994).

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Risk Assessment Compared to Salem Witch Trials

Susan Hatters Friedman & Andrew Howie, "Salem Witchcraft and Lessons for Contemporary Forensic Psychiatry," 41 *Jour. Am. Acad. Psychiatry & L.* 294-99 (2013)

Text excerpts:

p. 295: "Alleged witches ...who pleaded innocent might have been tortured to procure a confession or put to death.7 ... If judges assumed that all suspects were guilty, then those who confessed were less threatening as they were returning to God from the Devil.[6]

In a unique case, Giles Corey refused to plead to the indictment and was pressed to death....[3,21] Although rarely applied in the colonies, English common law allowed for [such pressing], the ultimate goal of which was forcing a person to plead rather than causing death.6 Persons were believed not to plead because they were either mute by visitation of God (imbecility or mental illness) or mute by malice (as with Mr. Corey). In order that justice not be cheated by those who refused to plead, defendants who stood mute would have heavier and heavier stones placed on their chests until they either entered a plea or suffocated.[22,23]...

p. 297: The eight [accusing] girls did not experience residual symptoms [as they would have had they suffered inadvertent ergot poisoning] such as dementia or weakness.[24] Finally, the girls appeared able to turn their symptoms on and off.[24]

To explain the girls' accusations and behavior, deception (malingering), factitious disorder (Munchausen's), and conversion disorder, as well as reaction formation, dissociation, and possession have been put forward.[4,5,7,10,11,15,19,20,25] Certainly, the sick role was reinforced, not only by sympathy but by the tremendous amount of power that these formerly powerless girls were able to wield. Also, whether one believes that the girls purposefully took their roles or did so through an unconscious psychological process, there is no disagreement about the trouble with giving up that role. It was not a sensible option to state that one was never really afflicted; she would then herself face accusations of witchcraft.[8]

Psychiatric interpretations of the witch hunts (which have often suggested that those persecuted for witchcraft were the mentally ill of the day) have been criticized for failure to consider the occurrences in the context of the thinking of the time, using inappropriate sources, and failure to understand that confessions were often obtained under torture and coercion.[9] Confessions were made to avoid execution, rather than because of delusion.

The community legitimized the roles taken by the girls, misguided professionals (clergy and doctors) helped, and those in authority willingly acquiesced,[3,8,20] a phenomenon that has been repeated across time and place. A plausible and multifactorial has been that power, fear, malice, and incompetence allowed the events to transpire. Although there has been an evolution of society's conceptualization of witchcraft and supernatural phenomena over time, the occurrences at Salem were not an isolated New England colonial experience. Arthur Miller's *Crucible*,[26] ostensibly about the Salem witch trials, is an allegory and a cautionary tale regarding 1950s McCarthyism.[11] There are modern day parallels at home and internationally.

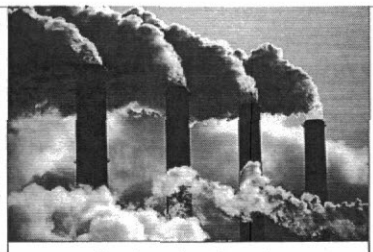
Modern Reassessment: Lessons for Forensic Psychiatry

In the modern era, false claims of victimization, such as the more recent daycare sexual abuse hysteria of the McMartin case from California to New Zealand's Christchurch Civic Creche case and trials brought about by so-called recovered memories have been likened to the Salem events.[3,9,11,27-30] Excessive fear can distort perceptions of even simple phenomena. In any time period, human deviancy can be misattributed, resulting in catastrophic errors of judgment. Concerns about child witnessing, the certainty of physician diagnosis, and the use of special evidence in the absence of study remain contemporary problems.

A modern re-examination of childhood testimony from the Swedish witch hysteria of 1670 and 1671 reviewed over 800 child testimonies from supposed child victims up to age 16. Stereotyped testimony correlated with age, gender and social influence.[31] At the time, the courts considered whether the children's testimonies were 'the result of satanic seductions or the reflection of real events' (Ref 32. p. 66)

p. 298: The modern caveat regarding child testimony, related to lessons from the witchcraft trials, is that such testimony is fraught with difficulties that must be thoughtfully addressed. Safeguards do exist, however, in corroborative, noncoercive interviewing. A balanced approach to protecting rights has to be taken, rather than deductive certainty.

In the 1983 McMartin preschool case in Manhattan Beach, California, hidden underground tunnels, airplane rides from the daycare, satanic worship while dressed as witches, ritual sacrifice, drinking blood, and eating of feces were all



Blowing a lot of smoke

alleged.[33] The case occurred soon after the Vietnam conflict, the upheaval of the 1970s, and women's entry into the workplace. It began with a mother with schizophrenia calling the police to say that her young son was sodomized at daycare and progressed to the police sending letters to 200 families of current or former students.[11] It led to panic at a national level, with the FBI and Interpol investigating. The trial was the lengthiest and most expensive in American history, included the bizarre stories just described of ritual abuse of many children, and yet did not result in a single conviction for any of the seven defendants.[11,33]

The McMartin case shared similarities with long ago Salem: fantastical child testimony mirroring the beliefs of the time by suggestible children, interviews with leading questions, and the idea that innocent children cannot lie.[33] In videotaped interrogations of the children, examiners promised rewards and asked leading questions.[11] Battling concerns about modern day competence in child interviewing, recent scholarship has focused on appropriate interview techniques. Subsequent studies have investigated the utilization of child interviewing techniques specifically by examining transcripts of the McMartin case. In one study, techniques used by the McMartin interviewers were more effective than simple suggestive questions at inducing preschool children to make false allegations against a classroom visitor.[34] Another study used two specific components of the McMartin interviews, reinforcement and co-witness information, in interview of children ages 5 to 7. Reinforcement increased false allegations against a classroom visitor threefold. Especially when being asked about events considered fantastic such as leaving the school in a helicopter, false allegations increased with reinforcement. A second interview without reinforcement continued to find the children repeating the false allegations. This strongly suggested that one interview with reinforcement can lead to persistent false allegations by the children.[35]

Hood[28] described a strikingly similar case, the more recent New Zealand Christchurch Civic Creche case, as the product of a moral panic about childhood abuse and mass psychogenic illness, for which another innocent individual was the scapegoat. The unreasonable fear was similarly reinforced by what has been described as 'largely untrained and unsupervised sexual abuse counselors who, imbued with their philosophies of authoritarian feminists, pursued their mission of detecting child abuse with zeal' (Ref. 29, paragraph 6). Although full psychological analysis of these major daycare scandals is beyond the scope of this article, they share with Salem prominent features of moral panic, scapegoating, and suspension of disbelief....

p. 299: **Conclusions**

Factors brewing in Salem have occurred elsewhere in time and place. Malice and incompetence, projected onto bad circumstances and compete confidence by key players that they were right are certainly not unique to Salem. Malice included greed, settling scores, and scapegoating in Salem and, in the daycare scandals, included homophobia, xenophobia, and scapegoating. Incompetence in Salem included reliance on flawed testimony, medical determinations of witchcraft, and theological explanations of natural justice, whereas in the daycare scandals, it similarly included reliance on problematic eliciting of children's testimony. Finally, bad circumstances (isolation and in constant rule of law in Salem or community fears about putting children in daycare when women were entering the workforce in large numbers) stirred the pot. Lessons for forensic psychiatry involve not only understanding the larger factors involved in society's fears, but also cautions regarding eliciting child testimony, certainty of physician diagnosis, use of special evidence, and tautological reasoning.

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SOCC - What Recidivism Difference Does It REALLY Make?

Rydberg, Jason, "Civil Commitment and Risk Assessment in Perspective," 16 *Criminology & Public Policy* 935-945 (Issue 3, Aug. 2017).

Text excerpts:

p. 939: "It is worthwhile to note that scholars have questioned whether we should reasonably expect civil commitment to have *any* impact on sexual recidivism. For instance, Ackerman and colleagues (2012) pointed out that the sex offenders civilly committed around the United States are above average age (44.4 years), and that following long periods of incarceration, sex offenders released to the community will be in age brackets with ...low offending rates, suggesting that the selective incapacitation effects of civil commitment should be expected to be small....

That being said, several studies have been aimed at attempting to evaluate the impact of civil commitment programs on recidivism. ...For example, Wilson and colleagues (2013) were afforded the unique chance to conduct recidivism follow-up of a small sample of 31 sex offenders released from civil commitment in Florida (average length of stay of 8 years). After 2.5 years of follow-up, only 1 of those 31 offenders (3.2%) sexually recidivated, and this result (unsurprisingly) was not statistically distinguishable from a comparison sample. This lack of sex offenders released from civil commitment programs for recidivism follow-up has resulted in researchers using a variety of counterfactuals to estimate the effect of civil commitment, or what *would* have happened to sexual recidivism outcomes had the (a) civil commitment policy never been implemented or (b) the sample in question never been assigned to civil commitment.

In a recent example, Duwe (2014) used the validation sample for the MnSOST-3 risk assessment instrument to project what the sexual recidivism rate for 105 civilly committed sex offenders would be if they had been released to the community. He concluded that, based on projections, civil commitment resulted in a 12% decrease in the 4-year sexual rearrest rate (3.2% vs. 2.8%)...."

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Ackerman, Alissa R. et al. "Legislation Targeting Sex Offenders: Are Recent Policies Effective in Reducing Rape?", *Justice Quarterly*, 29: 858-887 (2012).

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Wilson, Robin et al., "Comparing Sexual Offenders at the Regional Treatment Centre, (Ontario) and the Florida Civil Commitment Center," *Int'l Jour. of Offender Therapy & Comparative Criminology*, 57: 377-95 (2013).

> Scholars have questioned whether we should reasonably expect civil commitment to have *any* impact on sexual recidivism.

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DSM-5 Confusion re Paraphilias, Disorders, & Orientations Makes Diagnosis Impossible.

Charles Moser, "DSM-5, Paraphilias, and the Paraphilic Disorders: Confusion Reigns", 48 *Archives of Sexual Behavior* 681-689 (Issue 3, April 2019)

Text excerpts:

[Pages unknown] "Six years ago, the American Psychiatric Association (APA) published a new edition of its ...DSM-5.... The revision process involved the appointment of Workgroups (and Sub-WorkGroups) for each [DSM] section. The Paraphilias SubWorkGroup (PSWG) reviewed the latest research and considered changes to the diagnostic criteria and text of the newly renamed Paraphilic Disorders section. The members of the PSWG ...solicited comments on their proposals from both the public and professionals. ...The text of the final proposal submitted by PSWG to the APA is confidential and not available....

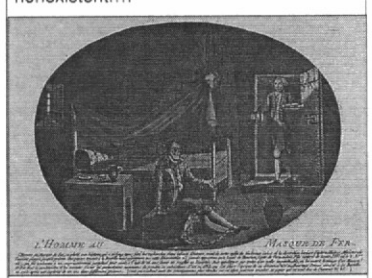
All participants in the revision process were required to sign confidentiality pledges, so which proposed changes were rejected by the internal APA review process are shrouded in secrecy. In the age of evidence-based medicine where the goals to avoid conflicts of interest and to maximize transparency are clear, the confidentiality pledges suggest that the APA was influenced by internal (and possibly external) political agendas. By requiring these confidentiality pledges, the impartiality and validity of the DSM-5 have been compromised.

Despite the stated guideline that 'no *a priori* constraints should be placed on change between DSM-IV and DSM-5; (APA, 2013a, p. 7), it appears that the APA never seriously considered removing the Paraphilic Disorders from DSM-5. Spitzer (2005) (editor of DSM-III; APA, 1980) stated, 'First of all it is not going to happen....' (p. 115), referring to removing the paraphilias from the DSM. ...The APA has never documented why it considers Paraphilic Disorders a mental disorder or described the specific problems these interests engender. The APA never explains why sex crimes are treated differently from other crimes. (E.g., In what way does repeatedly exposing one's genitals to unsuspecting strangers differ from repeatedly brandishing a gun at unsuspecting strangers in a robbery attempt?)

> The confidentiality pledges suggest that the APA was influenced by internal (and possibly external) political agendas.

The DSM-5 is a consensus document like many in medicine....

The credibility of the DSM-5 review process is in question when citations of the literature are missing, the rationale for inclusion or exclusion of articles from the literature reviews is absent, the evidence ratings of the research that were reviewed are omitted, and the grading of the strength of the recommendations are nonexistent....



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

As a scientific document, it is unlikely that the Paraphilic Disorders chapter of the DSM-5 would pass the peer review process for publication in an academic psychiatry journal. DSM-5 as a consensus document is quite different from other evidence-based practice guidelines published by other medical organizations.

The supporters of the DSM-5 may note correctly that there is a dearth of high quality research for most of psychiatry and especially for the Paraphilic Disor-

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ders. ...The authors should admit that differences in opinion do exist, so that mental health practitioners and others who rely on the DSM will not assume that all experts agree. When social or political influences color the analyses, as they often do, that should be acknowledged....

...Whether the APA agreed with these criticisms or not, the related issues were not clarified or addressed in the text. Field trials to test the reliability and validity of the new diagnostic criteria and the new paraphilia definition were not undertaken.

- Rejected -

Paraphilias and Paraphilic Disorders

...[T]he concept that the 'paraphilias are not *ipso facto* mental disorders' (APA, 2013a, p. 816) was present in both the DSM-IV and the DSM-IV-TR....

All the Paraphilic Disorder diagnoses contain at least two criteria. 'Criterion A specifies the qualitative nature of the paraphilia ...and Criterion B specifies the ...distress, impairment, or harm to others' (APA, 2013a, p. 686). The 'harm to others' was added when Criterion A specified the activity involved a nonconsenting individual. ...In DSM-5, satisfying Criterion A now indicates that the individual has a paraphilia, but not necessarily a mental disorder....

It is important to emphasize that even if the Paraphilic interest is constant, the diagnosis of a Paraphilic Disorder 'in remission' indicates the resolution of the distress or impairment – not resolution of the paraphilia. ...The remission criteria are completely omitted for Pedophilic Disorder, presumably for political reasons (Balon, 2014).

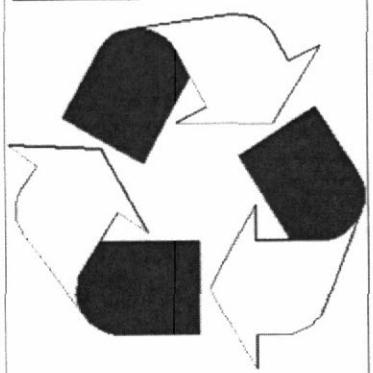
Many of the individuals who have criminal Paraphilic Disorders are living in a controlled environment (i.e., prison or a locked psychiatric unit), and the 'in full remission' specifier requires the individual to be symptom free 'for at least five years while in an uncontrolled environment' (APA, 2013a, pp. 687, 689, 692). That specifier makes it difficult, if not impossible, for those individuals ever to be judged as successfully treated (in full remission) and eventually released. The APA has equated committing a crime with a mental disorder that can never be resolved and only rarely can be in remission....

The New Definition of a Paraphilia

...The concept of phenotypically normal, physically mature partners is confused as well. Both men and women spend considerable amounts of time and money to alter their appearance, often in ways that are not phenotypically normal. Purple hair, hairless bodies, tattoos, piercings, silicone-augmented breasts, etc. are not phenotypically normal. I doubt the APA meant to categorize the individuals who eroticize these characteristics as having a paraphilia. Blanchard (2009) noted that developing a relationship with an amputee does not indicate a paraphilia, but developing a relationship with someone because he or she is an amputee does qualify. Does developing a relationship with prospective partners because they have desirable characteristics (blond, large breasts, muscular physique, or intelligence) indicate a paraphilia? What, if any, characteristics can serve as the basis of ongoing sexual attraction without being defined as a paraphilia?

Unintentional Paraphilias

...The new definition of a paraphilia seems to include individuals with rape fantasies (common among men and women; and by definition 'nonconsensual'), interest in partners with a shaved pubis (not phenotypically normal), a preference to be the receptive partner in anal intercourse (nongenital stimulation), a preference to stimulate a partner's genitals orally without reciprocation (not preparatory fondling), or a preference for transgender partners (not phenotypically normal preoperatively and possibly postoperatively). Arousal to romance novels (which rarely focus on copulation) and arousal to images of breasts and buttocks suggest that many of us have paraphilias. Sexual fantasies focused on at least some Paraphilic themes are common (Ahlers et al., 2011; Joyal, Cossette, & Lapierre, 2015). Normophilic individuals actually may be a sexual minority.



Just Circularity by a Different Shape....

Paraphilic Disorders and Criminal Behavior

...There is no indication that most individuals with a paraphilia or a Paraphilic Disorder cannot control their behavior.

...Crimes (even repetitive acts) are not mental disorders, i.e., there is no embezzlement disorder. Even when a mental disorder leads to repeated criminal acts (e.g., an individual with opioid use disorder who frequently steals money to obtain drugs), the diagnostic criteria do not mention the crime. Antisocial Personality Disorder mentions 'repeatedly performing acts that are grounds for arrest' (APA, 2013a, p. 659), but the specific crime is not mentioned. Impulse control disorders might imply a crime (e.g., Pyromania or Kleptomania), but note that most people who commit the crime do not have the disorder. In contrast, the APA implies that individuals who commit sex crimes, whether distressed or impaired because of their interests, are nonetheless mentally disordered; the crime is the disorder.

Preventive Incarceration

'The diagnosis of a mental disorder should have clinical utility ...for their patients' (APA, 2013a, p. 20)....

A diagnosis of a Paraphilic Disorder is usually made as part of a court ordered evaluation after an individual is arrested as part of the adjudication process or prior to the individual's release from prison. If a Paraphilic Disorder diagnosis is made, the diagnosis may be used by the criminal justice system as evidence of the need to incarcerate the individual involuntarily (usually for life) under the so-called Sexually Violent Predator (SVP) statutes. Rather than having any clinical utility for the patient/inmate, the purpose appears to be preemptive incarceration under the guise of treatment supposedly to protect the public.

If we, as a society, wish to extend the sentences of sex offenders, we should act through our legislative representatives to do so explicitly. The APA should act proactively to prevent the misuse of its diagnoses for social or legal control. At least at one time, the APA agreed that it had '...a strong interest in ensuring that medical diagnoses not be improperly invoked to support involuntary confinement ...[and SVP's] are not mentally ill under normal standards justifying civil commitment. (APA, 1996, p. 1)....

Rape is an interesting exception as a 'sex' crime. The APA has rejected a variety of proposals to add rape as a mental disorder to different editions of the DSM. The latest attempt, the proposed Coercive Paraphilic Disorder diagnosis (Quinsey, 2010), was rejected for inclusion in DSM-5 (as both a new disorder or as a condition for further study). By doing so, the APA confirms that, in their assessment, rape is just a crime and not a mental disorder (see Francis, 2011). Why some sex crimes come to be seen as mental disorders and others not is not clear. The logic behind this distinction has never been elucidated.

Pedophilia and Pedophilic Disorder

The Pedophilic Disorder section describes individuals who have sexual interests in children, but have not acted on their interests and are not distressed by them. 'These individuals have a pedophilic sexual orientation but not a pedophilic disorder' (APA, 2013a, p. 698). The concept of a pedophilic sexual orientation ruffled too many political feathers, which led to a press release correction (APA, 2013d). After the APA correction, the sentence should now read, have a pedophilic sexual interest, not orientation....

The APA has equated committing a crime with a mental disorder that can never be resolved and only rarely can be in remission.

...By implying that pedophilia is a sexual orientation and not a mental disorder, which is not amenable to change, the legal basis for SVP programs is questionable. Legally, these individuals must be incarcerated for treatment – not for preventive custody."

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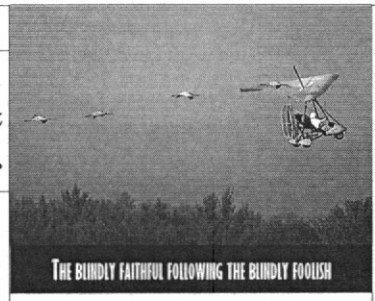
SO Commitment in Overview – Ethical & Legal Issues Abound.



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 retributional 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 Nonmaleficence' 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....

Many practitioners view participation in SVP work as representing complicity in the suppression of individual rights to liberty and fairness, and participation in a retributional and punitive process (rather than one that is rehabilitative or therapeutic).

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.'

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.'

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How Much Forbidden Legislative Intent Does It Take?

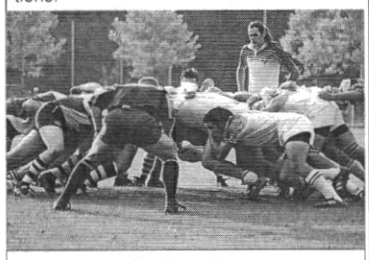
Richard H. Fallon, "Constitutionally Forbidden Legislative Intent," 130 *Harvard Law Rev.*, 523 (December 2016)

[Text Excerpts:]

pp. 525-26: "...In order to identify constitutional violations under the Equal Protection Clause, courts sometimes ask whether the legislature ...manifested animus toward an identifiable group.[3] ...Under constitutional provisions that restrict permissible state punishments – including ...bills of attainder,[12] ...-- judicial inquiries frequently begin with the question whether the legislature enacted a challenged provision with punitive intent.[14]"

p. 528: "After a court has determined that the legislature acted with forbidden intentions, a second question about current constitutional doctrine involves the consequences that ensue. Once again, the Supreme Court's cases exhibit a disparity of approaches. In some instances, the Court suggests that an impermissible purpose conclusively invalidates legislation, at least in the absence of an additional, legitimate purpose.[21] In others, it states that a finding of invalid purpose shifts the burden to the state to establish that it would have enacted the same legislation for other reasons.[22] In yet other cases, the Court says that a statute enacted for a forbidden purpose is invalid unless 'justified by a compelling interest' and 'narrowly tailored to advance that interest.[23]"

p. 540: "...Commentators have called for inquiries into whether a forbidden purpose 'contributed substantially to the adoption of the law'[71] or 'may have affected the outcome' of legislative deliberations.[72]"



Confrontation

Notes:

3 See. E.g., *Romer v. Evans*, 517 U.S. 620, 632 (1996); *City of Cleburne v. Cleburne Living Center, Inc.*, 473 U.S. 432, 440 (1985); *U.S. Dep't of Agriculture v. Moreno*, 413 U.S. 528, 534 (1973); see also *United States v. Windsor*, 133 S. Ct. 2675, 2694 (2013) (invalidating a federal statute "the principal purpose" of which was "to impose inequality").

12 U.S. Const. art. 1, Sec. 10, cl. 1.

14 See, e.g., *Kansas v. Hendricks*, 521 U.S. 346, 368-69 (1997); *Alice Ristroph*, "State Intentions and the Law of Punishment," 98 *J. Crim. L. & Criminology* 1353, 1370 (2008).

21 See, e.g., *Wallace v. Jaffree*, 472 U.S. 38, 56 (1985); *Lemon v. Kurtzman*, 403 U.S. 602, 612 (1971).

22 See, e.g., *Mt. Healthy City School Dist. Bd. Of Educ. V. Doyle*, 429 U.S. 274, 287 (1977); *Village of Arlington Heights v. Metro. Hous. Dev. Corp.*, 429 U.S. 252, 270 n. 21 (1977).

23 E.g., *Church of the Lukumi Babalu Aye, Inc. v. City of Hialeah*, 508 U.S. 520, 533 (1993).

71 *Donald H. Regan*, "The Supreme Court and State Protectionism: Making sense of the Dormant Commerce Clause," 84 *Mich. L. Rev.* 1091, 1148 (1986).

72 *Paul Brest*, Palmer v. Thompson, "An Approach to the Problem of Unconstitutional Legislative Motive," 1971 *Sup. Ct. Rev.* 95, 131

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Minority Report Redux: SOCC Is 'Pre-Crime' in Real Life.

Sameer P. Sarkar et al., "What Price Security? – A Review of Steven Spielberg's Minority Report," 30 *Jour. Am. Acad. Psychiatry & L.* 568-570 (2010)

Text excerpts:

p. 568: "Do you believe your dreams will come true? Would you believe another person's dreams? In 2054, we will not only believe in the predictive power of dreams, we will rest a whole crime-prevention strategy on it. This is the premise of *Minority Report*...

Is this beginning to sound professionally familiar? Since the 1970s, psychiatry has become preoccupied with the identification and prediction of future danger – especially the prediction of violence by persons who have mental disorders. ... Of course, one can argue that sentencing the violent psychopath has long been seen as containment only, with little or no treatment offered. Psychiatrists are invited to give expert testimony about future risk in relation to commitment and sentencing. In parallel, the 'science' of risk assessment has developed, so that psychologists become the contemporary precogs, using specially devised instruments to anticipate violence before it happens. The use of the Hare Psychopathy Checklist (PCL-R) as a predictor of future violence is a case in point.

...[*Minority Report*] shows things we are facing now: retinal scanning, facial recognition, and the ever-growing intrusiveness that allows everyone who matters to know everything about buying habits, our fantasies, and us....

p. 569: ...[T]he precogs have a special power to see the future, much like their present-day counterparts.

...[W]here are we all going to be if it becomes a crime to have violent intentions? The film depicts huge numbers of people detained ...on the grounds that they wanted to do something violent. Of course, the fact that a person wants to do something is no guarantee that he or she will do it. All sorts of variables may intervene: both internal and external. The person may think better of it .. or may be run over by a bus. Of course, the fact that the pre-crime unit operates to stop something from happening means that we never know whether it would have happened or not. At the moment of truth, the identified murderer may decide not to follow through with his or her homicidal intent. Think how hard Lady MacBeth had to work to make MacBeth kill the king.

Each person makes his or her own choices. We should be punished for what we do, not what we intend. Preventive detention is rarely justified, because so many harms and wrongs are done to innocent people to make the rest of us feel safe. ...If risk-assessment data can be successfully used to justify preventively detaining people who have mental disorders on the grounds of preventing violence, then why should it not be extended to preventing violence by persons who do not have mental disorders, like those shown in the film?

Who will be next on the preventive-detention list? Here is another link with the film: perceived danger may be a product of our dreams, fantasies, and other types of less rational thought. ...[T]he content of our dreams of violence are likely to be based on what we fear most, and this may or may not be real. In the United States in the 1940s, fear of Japanese people led to preventive detention for innocent citizens. At the same time in Britain, German Jews fleeing Hitler were also detained on the grounds that they were German, and therefore possible spies.... At present, there are talks about detaining people of a particular ethnicity on the grounds that they may be terrorists. The reasoning owes more to Alice in Wonderland than the risk assessment literature. Men of one persuasion committed a terrorist act; you are a man of that persuasion; therefore you are more likely than others to ...do what? Kill randomly? Blow up Buildings? Psychologists call this **fundamental attribution error**.

p.570: ...The pre-crime initiative in 2054 assumes that the future is 'out there' waiting to be discovered and stopped and that there is no doubt about what will happen. In reality, we create the future moment by moment in the here and now. ...When we perform a risk assessment with persons who have a mental disorder, ...we assemble the facts and then interpret them. Facts can always be interpreted another way, however, and then we will get a different version of the 'truth.' ...When we locked up all the Japanese, so that no Japanese person could commit an act of espionage or war, we did not prove that they were a real source of risk, only that they were a focus of our fear.

The film's main message is that purchasing security at the expense of liberty or justice is too high a price to pay.

In a democracy, it is possible to pass laws that trample on civil liberties and deny due process to some in the name of some greater good. ...The relevance to us ...is that as medical professionals, we are being invited to manipulate the

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'evidence' of risk assessment, to give an uncertain process scientific validity for populist political purposes.... When Soviet psychiatry medicalized political dissent, U.S. and U.K. psychiatrists were rightly critical, but we now run the same risk.

The final point is about judging people by their intentions, which used to be God's prerogative. Having murderous thoughts is something we all do. ...The film is not about persons who have mental disorders, but to quote Niemuller's famous line about the man who does not act to protect the rights of others, '[A]nd when they came for me, there was no one left to protest.' The film might as well be about such persons. What will happen when my time comes?"

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Abolish Pre-Crime in Minnesota!

Eds. Just Future Project, "Abolish Pre-crime in MN" – An Appeal to Governor Tim Walz, (2020) (This is the text of the online petition to Gov. Walz to abolish pre-crime in Minnesota. The whole petition is available at http://actionnetwork.org/petitions/abolish-pre-crime-in-minnesota. Text excerpts:

Will the fat lady sing this time?

"No one should be punished for what they might do in the future. All persons in our society should be treated equally and with dignity. Laws that lock people in cages for imaginary future crimes are anathema to the basic American values of liberty and due process. They are also anti-science and ineffective: It is impossible to accurately predict human behavior.

In 1994, Minnesota launched a dystopian experiment in pre-crime preventative detention. The aim was to keep people locked up indefinitely even after they had completed their prison sentences. Like most bad laws, this was a knee jerk reaction by lawmakers driven by hysteria and focused on sensationalized media coverage of a deeply tragic but incredibly rare individual case. A quarter century later it is time for Minnesota to rethink this panic failed experiment and realign state policy with the values of restoration and reintegration, grounded in research and evidence.

To conceal this transparently unconstitutional practice from judicial scrutiny, Minnesota disguised its approach to warehousing people after prison as 'civil' – likening it to the hospitalization of persons suffering from acute mental illness under the traditional medical model of involuntary psychiatric commitment. This claim has always been openly fraudulent.

In 1988, the American Psychiatric Association concluded that these laws are a 'misuse of psychiatry' and a bastardization of the medical model of civil commitment. The diagnoses are pretextual. The treatment is a sham. The true intent is to indefinitely detain the person – the rest is just an excuse:

> 'In the opinion of the Task Force, the sexual predator commitment laws establish a nonmedical definition of what purports to be a clinical condition without regard to scientific and clinical knowledge. In doing so, legislators have used psychiatric commitment to effect nonmedical societal ends that cannot be openly avowed. In the opinion of the Task Force, this represents an unacceptable misuse of psychiatry.'

The costs of these laws – in terms of human lives, capital, and the rule of law – are inexcusable.

Over the last 25 years of Minnesota's system more than 70 men have died while imprisoned in this 'treatment' facility – for them, this was a life sentence. Only 9 people have ever been fully released. For the 731 people languishing in these prisons masquerading as 'treatment' facilities (at the beginning of 2020), they are 8 times more likely to die in Minnesota's gulag than they are to ever be released.

Minnesota is spending $110 million per year on this failed experiment. Systems of pre-crime preventative detention are an enormous waste of taxpayer money. This approach is the most expensive way to incarcerate someone, because the state has to pretend to provide treatment. And incarceration is always the most expensive way to address the problems confronting society. As the growing movement against mass incarceration in the United States has shown, we can't just incarcerate our way out of our problems. A 2011 study funded by the National Institute of Justice concluded:

> 'Even among this highest risk group (those highly considered for SVP commitment), detected rates of sexual recidivism were still quite low. Given the exceptionally high cost of SVP commitment and the fact that most new sexual offenses are not committed by known offenders, policymakers should be encouraged to better balance estimated crime prevention associated with SVP commitment with that of primary prevention techniques that may cast a wider net in terms of reducing sexual violence in the community. Increased focus on primary prevention relative to SVP commitment would in turn increase focus on the trends and factors known to be behind the extensive majority of sexual abuse cases.'

Victim organizations dedicated to ending sexual abuse such as the Wetterling Foundation have also advocated for state policy that focuses on primary prevention rather than wasting precious resources on persons who have already repaid their debt to society.

Thirty states have recognized these laws don't create safer communities and no new state has adopted a pre-crime preventative detention scheme since 2007. Sexual violence rates in the 30 states without these laws are the same as the 20 states dumping hundreds of millions of taxpayer dollars into these programs – which begs the question what exactly are these pre-crime states paying for?

Systems of pre-crime preventative detention threaten not only individual liberty and lives, but the most essential principles of the American legal system. These laws create a parallel (or shadow) legal system outside the customary protections of the criminal law. If we allow a *de facto* constitution-free zone for one disfavored group, the same exceptional approach can be applied to the rest of us. The result is a state empowered to imprison citizens prospectively, for what they might do in the future – so long as the state pays an expert to label them 'dangerous' and 'deviant.'

THE COSTS

OF THESE LAWS — IN TERMS OF HUMAN LIVES, CAPITAL, AND THE RULE OF LAW — ARE INEXCUSABLE.

Minnesota's Department of Human Services (DHS) is currently ignoring state law explicitly requiring DHS to 'assess the ...mental condition of every patient ...not less often than annually.' As a result, Minnesota is warehousing 731 souls under the guise of involuntary psychiatric treatment while refusing to actually give them psychiatric examinations necessary to determine their present mental condition or 'the medical necessity of continued care' – in a locked facility against their will. Minnesota has grown so emboldened and complacent that it isn't even bothering to pretend to run a bona fide civil commitment system anymore.

It is in your power to immediately begin to dismantle Minnesota's system of pre-crime preventative detention. Start by requiring DHS to comply with state law giving annual psychiatric examinations to every person subject to involuntary psychiatric commitment in Minnesota. This will result in the identification of a majority of Minnesota's shadow prisoners who do not meet the basic medical threshold for involuntary psychiatric commitment and should be released immediately. Your administration should simultaneously institute a moratorium on new admissions to Minnesota's failed experiment in pre-crime preventative detention and convene a blue ribbon commission of psychiatrists (not psychologists) to formulate a plan to deinstitutionalize every person who is not presently mentally ill and therefore does not qualify for involuntary psychiatric commitment under the traditional medical model of civil commitment.

Pre-crime preventative laws in the United States have been called a 'flagrant denial' of international human rights standards. More than 12 fugitives have successfully evaded the American justice system because British courts have refused to extradite them, citing pre-crime preventative detention laws – especially the Minnesota statute – as a violation of Article 5 of the European Convention on Human Rights.

The legacy of your administration will be your leadership in recognizing the dignity and equality of all persons in Minnesota – including those persons painted as pariahs whose human rights and basic humanity have been denied for the last 25 years. Stand on the right side of history. Abolish pre-crime in Minnesota!

Notes:

1. *American Psychiatric Association*, Dangerous Sex Offenders: A Task Force Report of the American Psychiatric Association (Washington, DC: American Psychiatric Association, 1999) 174.
2. *Mercado et al.*. Sex Offender Management Treatment and Civil Commitment: An Evidence Based Analysis Aimed At Reducing Sexual Violence (Washington DC: National Institute of Justice, 2011) 6.
3. Minn. Stat. 253B.03, subd. 5, Periodic assessment (2019)

Purchasing security at the expense of liberty or justice is too high a price to pay.

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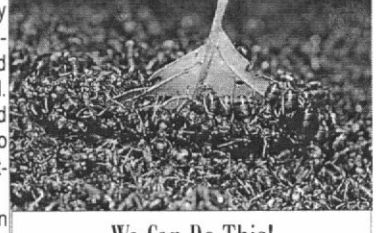

We Can Do This!