The Legal Pad Volume 4, Issue 11 November 1, 2020

"First Amendment freedoms are most in danger when the government seeks to control thought or to justify its laws for that impermissible end." – Justice Kennedy, *Ashcroft v. Free Speech Coalition*, 535 U.S. 234,253 (2002)

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Coming Soon:

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And it just keeps coming!

Separating the Wheat from the Chaff since 2016

Feedback? News? Write!

TLP Editor Address (Exactly & Only as Below):

Cyrus P. Gladden II
1111 Highway 73
Moose Lake, MN 55767-9452

Your *Last* Chance to Get the Stimulus Payment

This Is Your Last Chance to Request Your Stimulus Payment!

1. You ARE Eligible!

On 9/24/2020, in a federal class action, *Scholl et al. v Mnuchin et al.*, Judge Phyllis Hamilton (N.D. California) ordered the IRS (reported at www.lentcapraser.com/2020/09/federal-judge-certifies-class-orders-trump-administration-to-stop-denying-pandemic-relief-funds-to-incarcerated-persons).

The rationale offered last May by MSOP's Nancy Johnston for urging MSOP residents to return the $1200 Stimulus Payment to the IRS was that effectively, we were supposedly "incarcerated" for purposes of IRS payments. Now this nationwide ruling has held that even prisoners are entitled to this Stimulus Payment, vaporizing that rationale. To all "civilly" confined in any gulag on a 'pre-crime' basis: You are legally entitled to that payment beyond any legal question whatsoever.

Under the 2020 "CARES Act," eligibility criteria for the "Economic Impact Payment" ("EIP," i.e, the 'Stimulus Payment') are simple; almost every gulag resident qualifies:

a) You are a U.S. citizen or a resident alien;
b) You have a Social Security number; and
c) You can't be claimed as a dependent on anyone's tax return.

2. How Can You Get It?

To find out the status of your Stimulus check, have someone visit www.irs.gov/eip and click on "Get my Payment."

If you didn't file tax returns for Tax Years 2019 or 2018, you have to file a claim for that Stimulus Payment. No matter what, if the "Get My Payment" page doesn't think you have a payment coming, or you can't use the internet, you must file a claim for it. If you have internet access, or someone you trust can do so, this can be done through that same web page, but now click on "Non-Filers: Enter Payment Info Here." The lawsuit set a Nov. 21st deadline for such digital requests.

If you have a bank account, you can simply have your account information entered there, and the IRS will digitally send the payment to that account. If you don't have a bank account, the IRS will send it to you by mail.

Department of the Treasury
Internal Revenue Service
Ogden, UT 84404-5402

Be sure to refer to the formal name of the payment (above) and state your Social Security number (as well as your full name). Ask if your payment is already on the way. If not, simply ask for it. To avoid confusion, keep your letter short and straightforward (two paragraphs should do it).

The lawsuit set a deadline of Nov. 4th for postmark of such mailed claims. So you must mail this right now! If you can't make the deadline, you would have to file a tax return next spring for Tax Year 2020 and request the stimulus payment as a refundable tax credit in that return. This runs the risk that Congress may pass a law meanwhile revoking the payment for those in lockup.

Roman Denarius: Mercury Depicted. Is the message that money is fugacious?

NYC attorney Bill Dobbs (longtime ally to committed SOs) suggests that your IRS mailing include these, if possible:

1. A note or letter -- brief, requesting the "EIP"/"Economic Impact Payment". Refer questions: https://www.lentcapraser.com/pub/CARES_CASE_FAQ.pdf. If you DID file a tax return in 2020 for tax Year 2019, simply sign the letter and send it. You may not seal it! I strongly suggest sending it by Certified Mail.

2. If you did NOT file a tax return in 2020 for Tax Year 2019, print out IRS Form 1040 (double-sided) from our Client Network (\\msop.dhs\Client\ML Public Folder_Tax Forms\2019 Federal Tax Forms, Instructions\f1040pdf – Important: Click Page Down for second page!) and fill it out, — list the "EIP" as a refundable tax credit, and include it in your refund amount. Enclose this with your letter and mention it in your letter.

FYI: website set up by lawyers for the class action: https://caresactprisoncase.org/

News stories about the case:

Detroit Free Press | Oct 19, 2020: Nov. 4 deadline near for prisoners to apply for COVID-19 stimulus checks. https://www.freep.com/story/news/local/michigan/2020/10/19/stimulus-checks-prisoners-in-michigan/3653109001

Los Angeles Times | Oct 12, 2020: Federal stimulus checks must go to prison inmates, U.S. judge in California rules https://www.latimes.com/california/story/2020-10-12/stimulus-checks-prison-inmates-federal-judge-california

New York Times | Oct. 15, 2020: Prisoners cannot be denied virus relief payments, a judge rules. https://www.nytimes.com/live/2020/10/15/world/covid-coronavirus#prisoners-cannot-be-denied-virus-relief-payments-a-judge-rules

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What the...?

Is Jerry Sandusky *Completely Innocent*??

Joseph R. Stains, "Reconsidering Monsters," 42(3) *Skeptical Inquirer* (May/June 2018)
Book Review: The Most Hated Man in America: Jerry Sandusky and the Rush to Judgment. By Mark Pendergrast. Mechanicsburg, PA: Sunberry Press, Inc. ISBN 1-62006-765-9. 391 pp. Paperback. $19.95

Complete Text:

"'Jerry Sandusky is a monster, a serial pedophile!' is so deeply entrenched in the American psyche that it is virtually impossible to mention another view without arousing contempt or condescending pity. The only way to see the case through a fresh set of eyes would be a work by someone detached from all things Pennsylvania – a credentialed, disinterested investigator with a flair for thorough, balanced research and with an established track record of even-tempered integrity.

Mark Pendergrast has achieved that niche with *The Most Hated Man in America: Jerry Sandusky and the Rush to Judgment*, probably the most evenhanded and thoroughly documented volume on the topic.

While much rhetoric and probing of the past six years took sides on the guilt or innocence of the Penn State University (PSU) football program *vis-à-vis* Sandusky's antics, virtually all presumed his guilt. Pendergrast's central focus is on the integrity of the case itself. From the police investigations and the trial, Pendergrast identifies each of the ten primary witnesses in the prosecution's case and examines the development of their claims.

At the outset, he focuses on a 2000 or 2001 episode of alleged abuse that took place in a shower. It was the largest source of national outrage and almost surely the incident most familiar to the public. Pendergrast affirms (as some others have) that the episode was grossly embellished by the grand jury presentment's author. Eyewitness Mike McQueary actually denied seeing any sexual contact between Sandusky and his alleged victim; in his first recounting, the night of the shower, he never articulated seeing any specific behavior – only hearing slapping sounds that he in-

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Joe Paterno

ferred were sexual. Both Sandusky and self-identified Victim 2 have independently denied sexual behavior that night and attributed the sounds to towel-slapping or slap boxing. (The jury ultimately acquitted Sandusky of that rape charge.)

Contemporary investigation of a 1998 episode cleared Sandusky of wrongdoing based on firm testimony from the youth involved that nothing sexual had occurred. Pendergrast goes on to reveal conclusive evidence that the janitor in another alleged shower incident witnessed a perpetrator who was not in fact Sandusky.

Researching the background and police interviews of the remaining eight young men -- not boys – who testified against Sandusky at the trial, Pendergrast verifies that many were recruited by police, initially denied any abuse, and relented only after being subjected to repressed-memory therapy and/or leading police interviews. The only two designated victims at trial who came forward on their own did so in response to the post-indictment appeal for more victims – by which time, Pendergrast suggests, financial motive may have become a factor. The book demonstrates internal contra- in those cases.

Pendergrast chronicles the trial's daily proceedings in detail, noting Sandusky's naïve choice of a small-town lawyer as his defense counsel, the ambient presumption of guilt in the jury pool, the willingness of the prosecution to present – and of the judge to accept – hearsay testimony for the janitor episode after the original witness had said in a taped police interview that Sandusky was not the perpetrator he saw.

In a case devoid of any physical evidence, Pendergrast's work boldly goes where almost no one has gone before – to suggest the fundamental innocence of Sandusky in the entire case.

Unlike attorney Louis Freeh, who presumed the guilt of both Sandusky and the PSU athletic staff – and was toasted and paid over $6 million by the university trustees for his conclusions favoring their previous firings of two PSU leaders – Pendergrast takes us into adventurous territory at financial and reputational risk. Having followed the case closely and read scores of works on all sides of the issue, I find no one who has better prepared his case. Accept or reject the thesis of *The Most Hated Man in America*, but do not take it lightly. Pendergrast has done meticulous background work on every major player in the unfolding drama. And he provides material background for answering any question one may pose to him.

If Pendergrast has a dog in the fight, it is his rejection of repressed- memory therapy, whose techniques, along with manipulative and misleading interview strategies by police, were used extensively in the counseling of several of the designated victims. This is his area of expertise (see his books *Memory Warp* and *The Repressed Memory Epidemic*), and when its use is in doubt in particular instances, he volunteers that truth. He concedes the sincerity of several of the witnesses while questioning the veracity of their claims.

The final chapters offer rarely published perspectives from Sandusky himself on the case and his personal experiences and conclusions from it. Noteworthy are the contrasts between the dossiers of nearly all convicted pedophiles and that of Sandusky – healthy; intimate marriage; immaculate police record into his fifties; drug-, alcohol-, and pornography-free lifestyle; a testosterone level too low to beget biological children of his own; a vocational schedule too preoccupied for the alleged innumerable trysts as claimed against him; unwavering insistence on his innocence; and repugnance toward sex crimes.

A rebuttal of the book's points and thesis will not be successful on a pedestrian level – the only level that has emerged so far. It should be required revealing the truth in the case, it may be well ahead of its time.

The Most Hated Man in America reminds us that the purpose of police investigation must be open-minded discovery of both incriminating and exculpatory facts and not the building of testimony toward presupposed guilt. Ethically sound prosecution has no place for redacting fictional grand jury testimony, for leaking of sensational details to the media before indictment, or for padding of witness testimony with hearsay and discredited therapy. It indicts the media's impulsive urge to publish sensational scenarios before analytical research of facts has been engaged – at risk to the reputations and very lives of innocent people, whatever the outcome. And as a precautionary word about societal prejudgment (See Richard Jewell, Duke LaCrosse, McMartin Preschool, and Lindy Chamberlain cases), it is an urgent appeal to sustain the under-practiced principle of innocent until proven guilty.

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Desistance Occurs With Age Regardless of Dynamic Social Factors.

Patrick Lussier, "Desistance from Crime Without Reintegration: A Longitudinal Study of the Social Context and Life Course Path to Desistance in a Sample of Adults Convicted of a Sex Crime," 60(15) *Int'l Jour. Of Offender Therapy & Comparative Criminology* 1791-1812 (Nov. 2016)

Abstract: "Criminological theories suggest that desistance from crime cannot be considered outside its social context. Few studies, however, have examined the social context and its importance for individuals convicted of a sex offense. Their unique experience during community reentry warrants specific attention to this group. Using prospective longitudinal data, the current study examined desistance from general offending in a sample of 500 adult males convicted of at least one sex offense. Cox proportional hazards models showed that, although desistance is associated with the presence of prosocial social influences, these differences disappeared after controlling for prior involvement in crime and delinquency. Employment and marital status, commonly described as key turning points, were not found to be significant factors associated with desistance. Of importance, aging and the absence of recent substance abuse issues were key factors associated with desistance. Although these findings warrant further on the absence of community reintegration."

Editor's Closing Note: Studying releases from Florida's SO commitment facility, *Montaldi* states: "The most dramatic difference comes from offenders who were age sixty or older at time of [release] [N = 93]. Out of this group, no one obtained a new charge or conviction for either rape or child molestation (0%). ...Age may be cancelling out history as a risk discriminator....

"...[E]specially when criminal history is far in the past, even "bad" people may not be currently dangerous. Recent data are showing this." (*Daniel Montaldi*, "A Study Of The Efficacy Of The Sexually Violent Predator Act In Florida," 41 *Wm. Mitchell Law Rev.* 780-865 at p. 811, 818 [2015])

With sex-crime recidivism rates drastically plummeting from age 40 on, with total recidivism extinction by age 60 among those committed, it should be no surprise that other factors such as social setting can make no further reduction, nor can they generate recidivism where no tendency toward it remains in existence.

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Risk Assessment Tools Condemn People to Indefinite Incarceration.

Erica Meiners, "How 'Risk Assessment' Tools Are Condemning People to Indefinite Imprisonment," *Truthout* (Oct. 6, 2016), https://truthout.org/articles/how-risk-assessment-tools-are-condemning-people-to-indefinite-imprisonment

Text excepts: "While locking people up for potential crimes might sound like a middling Tom Cruise movie, or a new FX series, this future is now. Through predictive policing, criminogenics, and risk assessment, our current wave of criminal justice reform argues that we can identify who is dangerous, who is likely to break the law. Risk assessment is increasingly used to determine who will be released on bail, who will be sentenced to prison, who will be granted parole and who will be kept on supervision once released.

And nowhere in the justice system is risk assessment more entrenched than in the foggy world of people with convictions for sex offenses....

While locking up people with convictions for sex offenses for years beyond their legal sentences may sound appealing to people to combat sexual violence in our society, in truth, post-release punishments for people with convictions for sex offenses have done nothing gests that sex offender registries and the multiplying regime of community notification laws, for example, have reduced child sexual violence, caught perpetrators, or protected children: Research supported by the U.S. Department of Justice concludes that Megan's Law, a key federal law that contributed to the establishment of sex offender registries, 'has no effect on reducing the number of victims involved in sexual offenses.' States with civil commitment laws do not have lower rates of child sexual violence than states without civil commitment. Labeling the passports of people with convictions for sex offenses, or limiting their housing options and employment opportunities, does not reduce child sexual violence.

Yet the fact remains: Most of the people in civil commitment facilities sexually assaulted children or women. If released, some of these folks might harm again. Others will not. But regardless of that uncertainty, once they have complet-

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ed their sentences, is it acceptable for our society to use a checklist, a psychological evaluation, or a software program to legitimate continued confinement?

Delving into the world of risk assessment for those with convictions of sex offenses offers a window into the wider carceral reform movement's increasing reliance on risk assessment – and it also stands as a warning....

Civil Commitment

Does the Static-99R predict whether someone with a sexual offense might harm again? Fundamentally, according to Dr. Brian Abbott, 'social science research doesn't have this ability.' As 'sexual recidivism risk science is too imprecise.'

Similarly, Daniel Coyne, a Chicago lawyer with clients in civil commitment projections, research, and longitudinal studies – but most were never designed for individual predictions. Actuarial data, he says, 'might say I am due for a heart attack, but does this mean I will have one?' When applied to individuals, risk assessment instruments in the sex offender world only have a 58 percent accuracy rate, states Coyne. 'Not much better than a coin toss.'

...The American Psychiatric Association declared in 1998 that the civil commitment of people with convictions for sex offenses was a 'misuse of psychiatry,' yet the American Psychological Association has made no such proclamation.

States with civil commitment laws do not have lower rates of child sexual violence than states without civil commitment.

Risky Reform Futures

...[I]s the right question to be asking in this moment really how to balance professional judgment and a predictive instrument? Instead, perhaps we should be asking why there is such a profound silence surrounding the elephant in the room: the structural problems in society that drive harm? If reoffending can be predicted, why is the problem with the person? Why not the wider environment that shapes our life pathways?

And why wouldn't we conclude, as Harcourt writes in *Against Prediction*, 'that there is a problem with prisons, punishment, or the lack of reentry programs'? And why wouldn't predictability then motivate an examination of the root of these institutions, rather than a push to seek more reform?

Similarly, cities pay to expand facilities to monitor those with convictions for sex offenses, including civil commitment institutions, despite the fact that research has demonstrated that registries, and an array of other punitive responses, have neither protected children nor ended sexual violence. If our goal is to end, or reduce, sexual violence, why not focus and support proven preventive measures, including meaningful sex education and non-stigmatizing mental health care? Why not focus on ending patriarchy?

...[A]s risk assessment in our political moment gains a measure of mainstream scrutiny, another story could emerge. Perhaps the focus on the supposedly incorrigible nature of people convicted of sex offenses (and the assumption that, given the gravity of their acts, many require indefinite detention) deftly masks our collective reality: Just like prisons, maybe big data can't make us safe. In fact, it might make things worse.

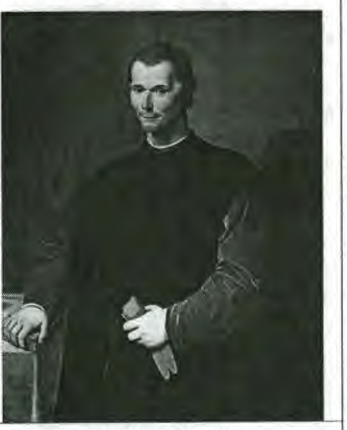
...[F]or those in indefinite confinement and their families, the future is a question mark – and with big data in charge, the answer is often limitless incarceration."

MN Legislator Trumps *Fugelseth* Ruling, Plays with Lives by Barring Unconditional MSOP Release.

Brianna Bierschbock, "After Court Ruling, Legislators Scramble to Clarify Law on Releasing Sex Offenders," *Minnpost* (April 24, 2018), https://www.minnpost.com/politics-policy/2018/04/after-court-ruling-legislators-scramble-clarify-law-releasing-sex-offenders/

Text: "The Minnesota Legislature and the courts are once again butting heads over whether the state should release more people from its sex offender treatment program.

Last week, the Minnesota Supreme Court declined to overturn a January ruling from the state's appeals court that sex offender Kirk Fugelseth no longer needed inpatient treatment for a sexual psychopathic disorder and approved him for unconditional release, meaning he will no longer be monitored by the state.



Niccolò Machiavelli

Releasing the offender was an unusual move from the appeals court, and it conflicts with how state officials have been interpreting the law on releasing sex offenders. Currently, offenders who want to leave the Minnesota Sex Offender Program (MSOP) can petition a judicial panel for release and be granted provisional discharge, which involves the offender moving into a group home and being monitored 24/7 by the state. Generally, only after that happens can they be unconditionally released into the community.

The recent ruling has lawmakers scrambling to clarify state law to make sure nearly two dozen offenders like Fugelseth aren't suddenly released without supervision. On Monday, the state Senate unanimously approved a proposal that the standard.' [illegible]

'It's simply unbelievable that Minnesotans' safety is put in jeopardy by the court's decision,' said bill author Sen. Warren Limmer, R-Maple Grove. 'Violent sex offenders and mentally ill people should not be released until we are absolutely sure they are no longer a danger to our community. In the past, the state has set a high bar for release of dangerous people who are previously committed.'

Fugelseth was civilly committed for treatment in MSOP 15 years ago after admitting to molesting more than two dozen children across several states. MSOP was started in the mid-1990s as a way to treat people with sexual disorders, and the concept was simple: Offenders were civilly committed to the program for treatment indefinitely, often after serving a prison sentence, or until experts decided it was safe to release them. Today, the program houses more than 700 offenders.

Other than Fugelseth, there are 21 offenders in MSOP who have been provisionally discharged or have orders to be provisionally discharged and could be released unconditionally under the appeals court ruling, said Chuck Johnson, the acting commissioner of the Department of Human Services, which runs MSOP. Before Fugelseth, only one other individual has ever been unconditionally released from the program.

The ruling could also apply to 120 other offenders in MSOP who are awaiting placement in the final phase of treatment in the program, as well as 200 patients on provisional discharge who were committed as mentally ill and dangerous and currently reside in the state's security hospital in St. Peter.

'It could be days or weeks,' before some of the offenders furthest along in the process of discharge could be released, Johnson said.

Dealing with legal challenges with MSOP is familiar territory for lawmakers. For years, the program was the subject of a class action lawsuit that argued the program was unconstitutional because it confined offenders indefinitely but rarely let anyone out. In the first 20 years of the program, no one was ever released.

In June of 2015, federal judge Donovan Frank ruled the program was unconstitutional because it created a 'climate of despair' that made treatment ineffective. Frank didn't order the program shut down, but he did direct the state to begin a two-year process of reviewing every offender currently in treatment. After that ruling, more offenders started moving through the phases of treatment within MSOP and were being placed in group homes, even if Frank's ruling was ultimately struck down by the 8th Circuit Court of Appeals.

Limmer has been a critic of the program [illegible] are now indefinitely confined in MSOP. 'I would always hope there's a need for redemption in individual lives, but this is a very unique population,' Limmer said. 'This population there might be a few people that are adapting well to their treatment and the programing that they have in our system but, nevertheless, I think there are many in the system that should not be released.'

Editor's Closing Note: State Senator Limmer knows full well that, with nearly rare exception, those confined in MSOP's two facilities do not suffer from lack of self-control, and do not present any higher risk of re-offense if released than do sex offenders released every day from Minnesota prisons. I know he knows this because I personally sent him a large mailing containing research articles and other documents proving this beyond any earnest question.

Yet, in a crass play to baseless public fears, he cast himself as their 'white knight' hero by introducing and strenuously advocating for passage of the new statutory amendment rendering the Fugelseth decision unavailing for any other MSOP confinees who otherwise could at long last gain freedom by that appellate court decision.

Limmer did this by casting us all as uncontrollable, sex-crazed monsters that must remain locked up, lest we rape and molest from each corner of the state to the other. He cast this false impression of us even though knowing the true facts that I sent him.

What makes this inexcusable is that he also knew that the basis for the *Fugelseth* decision had been the intransigent refusal by MSOP to actually release many whom it had already slated for "provisional discharge." The Court of Appeals simply wearied of this political

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refusal to honor confinees' warranted and promised release.

By his legislative move, Limmer returned our fate to the status of a political football. In effect, this ensured that many who MSOP itself conceded should be released will not be anytime in the near future. As to older members of this cadre, this legislative act may constitute their death warrant through natural causes before release will ever occur.

For this, Sen. Limmer richly deserves and is hereby awarded *The Legal Pad Machiavelli Award.* Think: Slimeball.

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Science Rules on Sex Offender Treatment: No Proof It Works

Marnie E. Rice & Grant T. Harris, "Treatment for Adult Sex Offenders: May We Reject the Null Hypothesis?", Chapter 13 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. 219: "Scientific progress, especially in technology, has been achieved by means of general principles put into research practice. Among these is the minimization of various forms of bias.... Regarding interventions of all kinds, the default, parsimonious (null) hypothesis is that an intervention has no effect unless the evidence forces a conclusion otherwise. In accepting the existence of effects, decisions are conservative, hypothesized effects must be quite likely to be true, given available data, and obtained results should be unlikely, given null hypotheses. And such latter likelihoods must be low (hence, the customary alpha – 0.05; Balluerka, Gomez & Hidalgo, 2005).

An important empirical and policy-related matter over the past six decades concerns the evidence that interventions deliberately applied by practitioners have caused reductions in adult sex offenders' risk. In comparing sex offenders exposed to different treatments (including no treatment), if differences in subsequent offending were attributable to known differences in risk measured before treatment occurred, the parsimonious account would proscribe assuming any additional effect of treatment. In the context of sex offender intervention, clearly specifying and evaluating null and alternate hypotheses has been a challenge.

p. 220: **What Do the Authorities Say About Treatment Efficacy?**

Reading summaries in books and chapters, statements by the Association for the Treatment of Sexual Abusers (ATSA), and even meta-analyses on the sex offender treatment literature, one would conclude that the effectiveness of treatment had been conclusively demonstrated and the null hypothesis definitively rejected. Consider the following from ATSA public statements: 'Research has shown that well-designed sex offender treatment can reduce the recidivism of sex offenders' (ATSA, 2011a), and 'studies conducted since [the 1980s] have examined programs using more "state-of-the-art" treatment techniques and results are indicative of some reduction in recidivism for the groups of offenders receiving treatment' (ATSA, 2012). The following quotation comes from a recent book chapter: 'There is an impressive body of evidence indicating that sexual and non-sexual offenders can be effectively reintegrated into the community provided they participate in specific types of programmes' (Ward, Collie, & Bourke, 2009, p. 308)....

pp. 220-21: **Why Should We Not Accept This?**

The purpose of this chapter is to ask whether, according to the principles outlined in the first paragraph, the available evidence warrants accepting these firm conclusions, specifically as they apply to adult sex offenders. Early in our careers, we conducted a treatment evaluation that reinforced the importance of empirical evaluations of treatment effectiveness. Between 1968 and 1978, the 'Social Therapy Unit' of our institution, the Waypoint Centre for Mental Health Care, gained international recognition as a model program for the treatment of serious offenders, especially psychopaths.

p. 221: We were eager to carry out empirical measurement of the value of this program. We could not conduct a random assignment study because the program had been discontinued (for reasons having nothing to do with efficacy), but a quasi-experimental design matched treated participants to comparison cases from the penitentiaries on a number of relevant characteristics. Disappointingly, the results showed no overall group difference (therapeutic community versus prison) or recidivism (Rice, Harris, & Cormier, 1992). Surprisingly, given the goal of positive change in psychopathic personality, psychopaths who participated in the program had higher rates of violent recidivism than psychopaths who did not. The opposite was observed among non-psychopaths. This study provided an important lesson in the requirement that treatment effects be empirically demonstrated....

Since the publication of this evaluation of the Social Therapy Unit, randomized controlled trials (RCTs) have become the 'gold standard' for the evaluation of treatment effectiveness in medicine and related fields.

pp. 221-22: RCTs compare participants assigned at random to one of at least two treatments. Typically, participants are assigned either to an active treatment under investigation or to a control condition which can be no treatment, a placebo, an alternate treatment, or some combination of these. The best RCTs are 'double-blind' in which neither participants nor clinicians know who receives which treatment. Although common in medical trials, they are much more difficult, if not impossible, for evaluations of psychological treatments. For psychological treatments, single-blind studies, in which therapists are aware whether the treatment is the one expected to do best, but the participants are not, are much more feasible.

p. 222: Because those who drop out are very likely to be different from those who do not in ways related to the outcomes, analyses must consider treatment as assigned. It is clear that adult sex offenders who quit treatment have worse criminal and socio-demographic histories than completers, and thus their higher rates of recidivism can, in the absence of convincing evidence to the contrary, be attributed to differences that existed before treatment occurred (Nunes & Cortoni, 2008; Olver & Wong, 2009; Seager, Jellicoe & Dhaliwal, 2004).

How Persuasive Is the Adult Sex Offender Treatment Literature?

Among outcome studies for sex offenders, weak designs are the norm. Hanson et al. (2009) used guidelines by the Collaborative Outcome Data Committee (CODC) (2007b) to rate the quality of all 129 sex offender treatment outcome studies they could find.[1] Of these, 105 were rejected as too weak to be informative, 19 more were rated as weak, five were rated as good, and none as strong. ...Most troubling is that many of the rejected studies had been published in the per-reviewed literature.

Of the four studies of adult sex offenders rated 'good' by Hanson et al. (2009), two were RCTs, and neither showed any positive effect of treatment (Marques et al., 2005; Romero & Williams, 1985). Only one of the four showed any indication of positive treatment effects (McGrath, Hoke & Vojtisek, 1998). In that study, cognitive behavioral treatment was compared to non-specialized services, and the treatment group exhibited a significantly lower rate of sexual recidivism in a five-year follow-up. However, Hanson et al. (2009: 870) called this a 'need, volunteer, and dropout' design in which 'the factors that excluded offenders from the treatment group were not fully known, but could reasonably be expected to have involved decisions made by the offenders and treatment providers.' McGrath, Hoke & Vojtisek (1998) stated that the comparison participants specifically selected non-specialized services and included one offender who had dropped out of cognitive-behavioral treatment. Given that the entire goal of the CODC guidelines was to rate the likelihood of bias, it is clear this study could not warrant a rating of 'good.'

p. 223: ...Because the few available RCTs of adult sex offender interventions have indicated no specific positive effects of treatment, we conclude that the non-experimental evaluations cannot trigger rejection of the null hypothesis.

We suggest disinterested examination of the entire literature on adult sex offender intervention reveals inappropriate biases on the part of practitioners and researchers. We cite here the very large number of peer-reviewed, published studies with designs so weak they are rejected as uninformative by meta-analysis and others employing objective criteria; and even among published studies considered informative, anomalies in methods and results that more often favored the alternate hypothesis.

p. 228: **Why Then Are RCTs for Adult Sex Offender Treatment So Uncommon?**

Weisburd (2010) challenged several 'folklores' used to eschew RCTs in the field of crime and justice. We summarize some here because they are so similar to those advanced against RCTs for the evaluation of treatment for adult sex offenders specifically (Marshall & Marshall, 2007). One folklore can be expressed as, 'We don't need RCTs because we know the most important causes of recidivism, so we can control for them.' ...Among sex offenders, even the best available actuarial tools (which include variables that cannot be causal) account for less than a quarter of the variance in outcome (Hanson & Morton-Bourgon, 2009). A second folklore discussed by Weisburd was that, when treatment effects are large, uncontrolled confounds are unimportant. [However,] among sex offenders, no one has seriously argued that the effects of treatment are large. A third folklore discussed by Weisburd was that, after factors known to affect recidivism are controlled, it can be assumed that all other biases are balanced. In fact, Weisburd countered there is a strong reason to believe that exclu-

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sion of variables is systematic. This is demonstrably the case in sex offender treatment research, where most studies included in meta-analyses compared those who completed treatment to a control group that included many who would have refused or dropped out had treatment been offered. ...[T]his design incorporates a known bias in favor of the treatment group.

We suggest disinterested examination whether intervention reveals inappropriate biases on the part of practitioners and researchers.

p. 229: **Why Is It So Difficult to Change the Beliefs of Sex Offender Researchers and Practitioners?**

...Unfortunately, as many researchers have learned, evidence is sometimes met with disdain or anger when the findings pp. 229-30: ...[S]tudies show that evidence alone is unlikely to change minds. People tend to believe that which they want to believe. Beliefs about what is true are very difficult to change, especially among those with a vested interest in the conclusions. In the case of sex offender treatment, those with vested interests include researchers who have published pro-treatment findings, sex offend- experience, those charged with making release decisions about sex offenders.

...In strongly supporting RCTs, the ATSA board ..stated, 'After 50 years of research, the field of sex offender treatment cannot, using generally accepted scientific standards, demonstrate conclusively that effective treatments are available for adult sex offenders.' (ATSA, 2011b)

Summary and Conclusions

Despite a large literature of individual studies, meta-analyses and commentaries saying that treatments have been shown to reduce risk among adult sex offenders, the currently available evidence is too weak to reject null hypotheses that such treatments have caused no reductions in recidivism. The findings from the strongest studies (a few RCTs) provide no evidence of treatment effectiveness. The most parsimonious interpretation of findings from weaker designs is that pre-treatment differences and other forms of selection bias are responsible for apparent treatment effects. ... Over the past 60 years, the field of sex offender intervention exhibits change where there should be stability; instead of a well-established foundation of effective therapeutic techniques, particular treatments go in and out of fashion in the absence of acceptable evidence as to efficacy. Moreover, the field exhibits stasis where progress should have occurred; the empirical basis underpinning the effectiveness of sex offender intervention, while more voluminous, is negligibly more informative or persuasive now than it was many decades ago. Hypotheses, suggestions and advice aside, essentially nothing is known (in the sense of empirically verified) about which therapeutic or supervisory techniques are effective for which targets in which types form of inadvertently increasing recidivism and wasting resources. There is the additional risk of harm to the credibility of the field in general; hostile observers may find sufficient basis to label the field of sex offender treatment a pseudoscience. Credibility, once lost, will be difficult to regain. Research entailing strong inference methods entails the field's only chance for progress where such has do not entitle researchers and clinicians, fervent desires for the possibility of effective treatment notwithstanding, to assume it either in the aggregate for sex offenders or in the case of any individual offender.

Even Children Can Do Real Science, but 'Professionals' Can Lie and Do Biased Junk Science.

Notes:

1 Hanson et al (2009) performed a great service to the field in ensuring that invaluable systematic review.

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After 50 years of research, the field of sex offender treatment cannot, using generally accepted scientific standards, demonstrate conclusively that effective treatments are available for adult sex offenders.' (ATSA)

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MSOP Treatment, as Judged by Its Own Regular Claims That Confinees Participating in It for Decades are Still Not Ready ing Failure, and Must Be Replaced Immediately!

Only Complete Dissolution of the 'Matrix System' and the Entire MSOP Treatment Regime and Its Replacement by a Simple Regimen, Proposed Short Period, Can Provide Society with Vastly Reduced Sex-Crime Recidivism without Resort to Lifetime or Near-Lifetime Preventive Detention.

The Court has already concluded that the MSOP "treatment program's structure has been an institutional failure and there is no meaningful relationship between the treatment program and an end to indefinite detention." (Conclusion 35).

The comparative experience in Washington State is instructive:

"While this may be a low bar for judging treatment programs, a federal court found that the program administrators in the State of Washington failed to exercise their professional judgment in running their civil commitment program, resulting in a 13-year injunction while the

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program corrected the treatment program. In that case, the court found that the treatment program had so departed from minimal professional standards that the treatment professionals must not have based their treatment decisions on their professional judgment. Some of the conditions which led to the injunction included: inadequate staffing, inadequate training of staff regarding the clinical mission of the facility, the lack of individualized treatment, the absence of arrangements for clients to transition to being released, inadequate provisions to allow clients' families to participate in treatment, and a punitive treatment environment.

"As a result:

"It is important that any civil commitment program for sex offenders offer adequate treatment to those in the program.

"A court could consider failure to release offenders from civil commitment as evidence that inadequate treatment is being provided or that the purpose of the program is punitive rather than rehabilitative...." (OLA Report, p. 52)

However, the epilogue that did not occur until after that OLA Report was written is that, thirteen years after the issuance of that injunction, and not long after the retirement of the issuing judge, that injunction was dissolved by order of the replacement judge, on the rationale that not enough progress had been made to justify continuance of that injunction(!) The case was thereupon dismissed.

Again, although this suggestion by the Court sounds nice, its effectiveness in practice is weighted down by the fanatical adherence by MSOP administrators and clinical supervisors to the unspoken concept that treatment of committed sex offenders 'should' take a long time, on the tacit belief that, to render any MSOP detainee "safe" for release, he must utterly be 're-made' as a different persona than himself. It is this belief, never laid bare, that is behind the decades-long detention and treatment of MSOP's detainees, compelling them to satisfy the Herculean requirements of a practically endless series of "Matrix" "goals" before administrators will consider an individual's release. This is the vehicle by which each treatment-participating MSOP detainee is denied "completion" of treatment over countless years, until they simply give up. It is deliberate and cruel.

According to Findings 80-81, these Matrix factors are applied to all MSOP treatment participants and are scored on the same scoring spectrum, including the aforesaid categories of the former juveniles, the old, the mentally ill, those with cognitive disabilities, and those with chronic behavior problems.

Finding 82 elegantly observes that "[t]he Matrix factors are not used by any other civil commitment program in the country." (Confirmed by Dr. Freeman's testimony, Trial Tr., v. 5, p. 1026; accord: Ms. Hebert's testimony, Trial Tr., v. 17, p. 3922). MSOP's use of these Matrix factors as it does has never been validated on a sex offender population. Id., v. 5, p. 1026. Accord: Darci Lewis testimony, Trial Tr., v. 7, p. 1448.

Note also Dr. Miner's testimony as to the Matrix:

"Q. Let's talk about the Matrix factors. Do you take any issue with the Matrix factors scoring guide?

"A. Yes.

"Q. And tell me about that.

"A. Well, the Matrix factors scoring guide doesn't meet minimal requirement for a psychological test as promulgated by the joint APA-AERA Guidelines for Psychological and Educational Testing. It doesn't include a lot of information that would be required in a guide or in a manual....

"It's been criticized for being unreliable..." (Trial Tr., v. 6, pp. 1183-84).

More pragmatically, Dr. Cauley testified that the Matrix factors at MSOP are "sort of an in-house tool that was developed by members of the -- employees at the facility. It serves a purpose perhaps of simply being – I wouldn't say treatment progress, but it's almost like a checklist of really how somebody is participating in treatment. Okay? So it's a lot of 1 to 5 ratings of things like attending groups, participating in group, that kind of thing. But it's unique to the Minnesota program. It's not used anywhere else. And it doesn't serve a larger purpose of assessing risk." (Trial Tr., v. 10, p. 2221).

The Matrix is "not tied to the initial risk. It's used for everyone in the same way and it doesn't start its hinging on likelihood of re-offending or risk for future sexual violence. It's just simply a checklist where you score 1 to 5 on the items. The items tend to be subjective and vague. And through my record review, that awareness has been going on for a long, long time, that there are concerns with the item, there's concerns about the reliability of scoring the matrix, there's concerns about staff training related to the matrix that have been going on for at least six years. And there's been a continued offer to resolve it through new training and then the next year the same problem arises.

"Q. ...[W]hat studies have been done of the matrix factors system?

A. There haven't. Matrix is unique to this program. It was developed by this program." (Id., pp. 2224-25).

MSOP Executive Clinical Director Jannine Hebert testified that, with respect to the way MSOP uses them, "there's no best practices with regard to the matrix factors specifically." (Trial Tr., v. 12, p. 2767). Effectively, this means that any way that MSOP chooses to use Matrix factor scoring is deemed by MSOP clinical leadership as perfectly acceptable despite the utter lack of any scientifically accepted protocol for such use.

At id., p. 2768, Ms. Hebert admitted the lack of research into Matrix factor scoring: "...It's not designed as a tool to be researched.

"Q. My question is yes or no. Have you done any research about whether the matrix factors that you use at MSOP effectively measure treatment change?

"A. Could you define research in that question?

"Q. Sure. Have you done any studies?

"A. Studies? No.

"Q. Okay. Have you done any analysis of a statistical nature?

"A. It doesn't lend itself for that kind of research, no.

"Q. So the answer is no?

"A. No.

"Q. Have you done any interrater reliability studies with respect to how the matrix factors are scored?

"A. No.

"Q. Are you aware of anyone who has done any interrater reliability studies with respect to the matrix factors?

"A. I don't know who else uses the matrix factors, so no. (Trial Tr., v. 12, p. 2768).

Hebert admitted in testimony that MSOP's matrix factors and their usage are under "extreme criticism":

"Q. Under extreme criticism from whom?

"A. To the extent that they were -- they have been part of the 706 comments and previous auditors' reports. I don't know specifically what extreme criticism was referring to, but it was pretty public that people were having opinions about Matrix factors.

"Q. Well, this is before the 706 report, so it can't be them, right?

"A. Oh, then it isn't.

"Q. Right, so it has to --

"A. It was in previous auditor's reports for sure, yes.

"Q. Sure. It was in previous auditor's reports several times years before, right?

"A. In different forms, yes.

"Q. Sure. "Extreme criticism" is what you call it here right?

"A. That is what I say here, yes." (Id., pp. 2768-69).

In Findings 83-86, the Court determined that MSOP clinical staff has experienced substantial confusion and inconsistencies in the use and application of the Matrix factors, with Matrix factors scores fluctuating at changes in clinical staffing, such that a lack of inter-rater reliability is presented. (D. McCulloch testimony, Trial Tr. v. 1, pp. 82-83.) Dr. Vietanen put it more bluntly: "...[T]here isn't any inter-rater reliability in matrix scoring." (Trial Tr., v. 10, p. 2327). Dr. Nicole Elsen conceded that scoring of the Matrix factors is somewhat subjective. (Trial Tr. v. 7, pp. 1347). Dr. Elsen also admitted that she had, at various times, directed the clinicians under her supervision in MSOP to lower a given treatment participant's Matrix scores, and that such scores were in fact lowered at her direction. (Id., pp. 1347-48.) Yet Dr. Elsen has never approved phase advancement of any MSOP detainee who has not met the Matrix goal requirements for such advancement. (Id., p. 1348).

"Why yes, Mr. Smith, I see the problem. You have biasopia."

"Haaven, et al., 2012 and an expert panel that reviewed MSOP client records in February 2013 that included Haaven, et al., and additional experts noted problems with the reliability of clinicians' ratings of the Matrix used by MSOP...." (706 Experts' Report, p. 33, quoted at Trial Tr., v. 3, p. 535.) Dr. Vietanen agreed that "was no apparent interrater reliability" as to use of Matrix factors. (Trial Tr., v. 10, p. 2303).

Ms. Todd-Bense, at MSOP--St. Peter, stated in an email that a lack of consistency exists as to Matrix scoring, particularly between treatment staff at St. Peter, compared to at Moose Lake. (Hebert testimony, Trial Tr., v. 12, pp. 2789-90).

Yet despite such observations and critical reports by external reviewers, MSOP has not investigated how clinicians are scoring the Matrix factors or what, if any, level of consistency exists in scoring Matrix factors. [Trial Tr. v. 1, pp. 90-92] Until 2014, MSOP did not provide training to all staff on the Matrix factors and their scoring. Not stated in these findings is whether such training has had any impact on accuracy and consistency of such scoring. Inconsistent scoring on Matrix factors can slow treatment progression.

The Matrix factors are not used by any other civil commitment program in the country.

Dr. Elsen testified that she reviews treatment records and holds conversations with therapists under her supervision in an attempt to ensure consistent

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application of Matrix factors. However, she conceded that she does not attend therapy sessions. Hence, her testimony is that she checks for consistency between the definitions of Matrix factors and what she is being told by her therapists and what they are writing in participants' treatment charts, not with what actually transpired in therapy groups. Elsen does not review all of their case notes, all of their group notes, all of the individual patient's files before deciding about such Matrix application consistency unless she "needs to look something up." Effectively, she simply takes her therapists' word for their claim of consistent Matrix factor application in the therapy group meetings. (Trial Tr., v. 7, p. 1376, l. 22 through p. 1378, l. 24).

Hebert admitted in testimony that MSOP's matrix factors and their usage are under "extreme criticism".

Dr. Wilson, *id.*, vol. 3, p. 536, concludes: "...[U]ltimately, we also need to have some sense of just exactly whether or not this tool [i.e., the Matrix] is telling us or doing what it's intended to do. And this speaks to the actual validity of the tool, and I'm not aware of any scientific investigation that's been done on this tool to establish what its reliability is or its validity. And unless you know those two things, how do you know what the tool is doing?" The Matrix "was just implemented without really knowing exactly what it was that it was measuring, or whether or not that was being measured consistently. This is a serious problem with respect to the psychometric ability of the tool." (Id., p. 537). The Matrix factors and the related scoring manual were developed by the MSOP or by someone under contract to the MSOP. (Ibid.).

"Treatment" of sex offenders, properly understood, isn't what is commonly understood as treatment at all. There is no meaningful role for either individual psychoanalytical treatment or "group therapy" (especially where, as does MSOP, rapists are 'homogenized' in groups-in-common with pedophiles, since the motivations and dynamics that divide these two groups are vast and utterly inconsistent). The Court, in Finding 70, ascertained that MSOP does not attempt to individualize treatment. Dr. Freeman testified that MSOP treatment improperly homogenizes both rapists and pedophiles in the same treatment 'boilerplate' modality. (Trial Tr., v. 4, pp. 881-82).

According to Finding 105, MSOP treatment participants are unaware of, and uncertain as to, how to progress through treatment. Finding 93 determined that motivation to participate in treatment is reduced by the lack of clear guidelines for treatment completion and of projected time lines for phase progression. Reciprocally, the OLA Report found lack of motivation to be a barrier to progression in MSOP treatment. Slow movement through the program was found by Site Visit Auditors to cause demoralization, increased hopelessness, and reduced motivation and engagement. [See also D. McCulloch testimony, Trial Tr. v. 1, p. 84, ll. 17-21, p. 102, ll. 6-8] Dr. Vietanen testified that she was ethically troubled by her experience as a treatment therapist in MSOP because "clients didn't move forward or move out, and that it didn't seem possible to do treatment in a way that was going to result in a positive outcome, i.e., returning to the community." (Trial Tr., v. 10, p. 2288). Due to a lack of sufficient staffing and to an onerous emphasis on report-writing, Dr. Vietanen was not allowed to perform individual treatment except in cases of a serious problem at the moment. (Id., p., 2289).

Finding 106 noted that some MSOP detainees have stopped participating in treatment, despite satisfying phase progression requirements, because they knew it was futile and they would never be released. Some detainees for over twenty years have completed the treatment program three times, but now are only in Phase II, simply because of later treatment program changes.

Finding 95 recaps the figures from Exhibit C to the Affidavit of Janine Hebert as to the distribution of MSOP detainees among those in treatment as opposed to those not, and as to the numbers and percentages of those in the respective phase of treatment. This last set of figures casts a picture of Phase 1-heavy distribution. Finding 96 updates these phase percentages through 2014, reflecting a lesser percentage in Phase 1, with a correspondingly larger percentage in Phase 2. However, less than 10% were then in Phase 3. It should be noted that the 1% figure of treatment 'refuseniks' is well-known among MSOP detainees to be patently, egregiously false. The true figure is easily at or above 15%. The fact of this falsehood casts all other percentages into equal doubt.

Also note that this estimate of a current 80-85% treatment participation rate among MSOP detainees would not be true were it not for DOC ISR requirements that each parolee committed to MSOP participate in treatment as a condition of not being revoked and returned to prison. Were that not such a requirement, nearly all parolees under commitment to MSOP would cease participating in treatment. Query: Now that MSOP's 'treatment' has been found by the Court to be no recognized form of treatment at all, and has been part of the Court's ruling of denial of substantive due process, shouldn't this requirement of participation also be struck down? Yet, since the DOC and its Commissioner are not defendants in *Karsjens*, how can we efficiently obtain such an injunction against enforcement of that DOC requirement?

The fact that MSOP clinical officials (along with the great majority of those in charge of sex offender commitment treatment programs elsewhere) have not yet grasped this elemental fact demonstrates the hopelessness of simply "developing" or "adjusting" current treatment regimens. What is needed is complete replacement of the entire theory of sex offender treatment.

Apart from problems of deceit and other ethical violations by therapists, the really big problem with treatment in sex offender commitment is that, whether deliberately or merely as an unintended outcome, it takes a minimum of a decade and a half — more often two or more decades —before therapists and assessors can agree that a given treatment participant is 'ready' for release.

Further, in many cases, even at this point so far down the line therapists and MSOP assessors will still deny that the treatment participant can be released with any assurance of safety of society.

At best, this is a portrait of a treatment program in profound failure — an utter failure at significantly reducing risk of re-offense below what aging of a given offender in that commitment-term-of-decades would have produced in the absence of any treatment.

Indeed, notwithstanding all that treachery by MSOP clinical staff in the meantime, even the profound impact of such aging has never been merely acknowledged by such therapists or their in-house assessors. Nor has the impact of the equally well known natural tendency toward desistance at any younger age from sex-crime recidivism ever been acknowledged or (and much more critically) fostered in any intentional, specific way.

In short, it is patently clear that, as presently configured, sex offender commitment is not really aimed at treatment-to-release. To the contrary, it aims to find excuses to decline release and to keep each confined individual permanently detained until death.

Oh Look! The Fat Lady (the Inimitable Kate Smith) IS Singing!!

Now, therefore, it is time to bite the bullet and admit that a complete paradigm-change is needed.

Some time back, I devised a 'short course' form of replacement for what has been passing as 'treatment' in sex offender commitment — a replacement that, on average, can easily graduate participants in a single year's time at most two years for the exceptionally intellectually sluggish or extremely unmotivated. (However, I submit that, if seeing release within such a short period as a very attainable outcome, very few would lack motivation to apply themselves with vigor and close attention.)

I present a terse summary of this 'short course' alternative again here:

What should replace the current conceptualization is a starkly contrasting model of simple, short, candid indoctrination, with completely voluntary adjunctive therapy held out for those who express a need or compelling desire for it, in order to ensure their personal non-reoffending after release. The standard indoctrination should consist of two branches:

(1) A short course of education into the physical, cognitive, and emotional facts of sexuality, from the perspective of victims, both adult and child. The emphasis here is upon convincing the offenders in this study of the often devastating consequences to victims of their actions and of the impossibility of avoiding infliction of that devastation while continuing to commit sex crimes.

(2) A short, simple examination of the massive array of monitoring, surveillance, investigation, and apprehension agencies, their countless, highly dedicated personnel, and their techniques, including high-tech tools, all poised to ensure that no released sex offender will be able to sexually reoffend, and that, when any move toward such perpetration is detected, or merely any attempt is made to evade supervision or registration, the offender will face immediate arrest and many years of further incarceration.

Parenthetically, since that two-pronged program was devised, the profound positive promise of 'natural desistance' from commission of sex crimes has emerged with full force.

Despite its provisional name, it turns out that a high degree of inspiration and motivation to adopt the attitudes and behaviors involved in such desistance can be inculcated through an additional short educational course primarily based on the real-life comparative experiences of released sex offenders — some of whom have seized the opportunity that a desistance attitude and lifestyle provide, and others who either turned away or failed to master and apply these attitudes and behaviors. It would be extremely foolish to fail to include this 'outcome

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based' study with such great promise as a 'third prong' in the short course I propose. Thus, this too is now a part of this short-course curriculum.

This overall proposed regimen, easily designed for maximum impact, combined with such post-release measures (which, if only by default, are currently performed very conscientiously by every police department of any area in which any sex offender resides or works, or which he frequents), will ensure non-re-offense far more effectively than 20 years of MSOP-style 'treatment' aimed at impossibilities and ending only in denial of release and in extreme frustration and rage.

I urge every academic researcher, every advocate for sex-offender reintegration and against sex-crime recidivism, and every decision maker in this field to thoroughly examine this option. And then to militate for this proposed change at the earliest possible time.

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Are Courts Being Scammed by Prosecutorial Myths of Dangerous Sex Offend-

Melissa Hamilton, "Briefing the Supreme Court: Promoting Science or Myth?", 67 *Emory Law Jour. Online* 2021 (2017)

Text excerpts:

pp. 2022-23: "INTRODUCTION

[Discussing SCOTUS advocacy in *Packingham v. North Carolina*,] "... Another issue arose in the briefing and oral arguments before the Supreme Court. The litigants and certain amicus curiae engaged in some debate about whether such a restriction is necessary in the first place. That is, various parties argued about whether the ban serves to protect the public from what North Carolina and the representatives of twelve other states in a collective amicus brief contend are high risk sex offenders who commonly use the internet to locate children for purposes of sexual exploitation.[3] In opposition, Packingham's submissions, as the individual petitioner, and the amicus brief by a group of sex offender treatment professionals refute such allegations.[4]

This debate is important because it goes to the heart of the foundational basis of North Carolina's justification for the ban. The Supreme Court has previously approved civil restrictions of sex offenders, such as public registries and residency restrictions, based on the belief that their recidivism risk is 'frightening and high.'[5] Yet, some experts point out that the scientific evidence is to the contrary.[6] News reporters have noticed and have run stories about the *Packingham* case, specifically challenging the Supreme Court's previous rulings that uphold sex offender restrictions.[7] The headline in the New York Times reads 'Did the Supreme Court Base a Ruling on a Myth?'[8] Similarly, Slate Magazine's coverage leads with 'The Supreme Court's Sex-Offender Jurisprudence is Based on a Lie.'[9]

The arguments concerning the government's purported need for a social networking ban refer to various statistical studies of sex offenders. This Essay contends that the case materials in *Packingham v. North Carolina* in support of the ban contain significant misunderstandings in conceptualizing and conveying the scientific evidence about the dangerousness of sex offenders. Such a conclusion is particularly distressing, as these errors are contained in briefs and oral arguments before the Supreme Court of the United States in an important constitutional case. The Supreme Court's majority opinion decided the case without relying, one way or the other, upon these scientific assertions. But if the justices had relied upon the version of the scientific evidence offered by the states in deciding *Packingham*, they would have continued to be misled about the risks involved. are more akin to junk science" than valid representations of the empirical evidence as applicable to the group of sex offenders to whom the ban targets.

p. 2025: II. RECIDIVISM RISK

The State of North Carolina asserted that registered sex offenders have a 'notoriously' high rate of sexual recidivism.[24] The only empirical support North Carolina provided was a statistic from a Department of Justice document published in 2003.[25] That report, aptly titled "Recidivism of Sex Offenders Released from Prison in 1994," contains the findings of a study tracking the rearrests of almost 10,000 sex offenders from fifteen state prisons in 1994 (the DOJ Recidivism Study).[26] The study collected a fairly representative sample from the United States, as it consisted of two-thirds of all male sexual offenders released in the country in that year.[27]

p. 2026: ...[T]he DOJ Recidivism Study indicated that 5.3% of released sex offenders were arrested on a new sex crime.[29] Then, as a sign that recidivism studies that rely upon arrest data may overreach in counting failures, the reconviction rate of sex offenders for new sex crimes was 3.5%[30] This means that one-third of those arrested for new sex crimes were not convicted of those charges.[31] Moreover, neither statistic – rate of arrests or convictions – supports any type of 'notoriously high' risk designation for sex offenders that North Carolina trumpets.

p. 2027: The recidivism rates quoted by the States' Amicus Brief are not the observed rates of recidivism, but merely *projected* rates using a technique called survival analysis.[40] As a result, one of the original study's authors has warned that the estimated rates should not be cited as actual rates.[41]

p. 2028: In contrast, the amicus brief in behalf of the Association for the Treatment of Sexual Abusers (and other groups) provided evidence of sexual recidivism studies from more appropriate samples.[47] This brief cited results from studies of released sex offenders in seven different states in America, showing sexual recidivism rates in the low single digits (most around 3%),[48] which is relatively consistent with the DOJ Recidivism Study results.

III. CROSSOVER OFFENDING RISK

pp. 2028-29: The next scientific debate concerns crossover offending. North Carolina ...contended that 'research shows a high cross-over rate for sexual offenders,' meaning that offenders with adult victims frequently molest children as well.[49] North Carolina's brief asserted that a 'majority of studies find rates in the range of 50 to 60 percent' for crossover offending, citing a publication produced by the Department of Justice's Office of ("SMART"), thus herein the 'Smart Report').[50] This statement is misleading in that a 'majority of studies' does not refer generally to sexual recidivism studies. The Smart Report's reference was actually to studies of only male offenders that specifically focused in crossover offending and used individual self-reports as the methodology (as opposed to other measurements such as official statistics in the form of arrests or convictions.).[51]

p. 2030: *A. Assessing the Evidence on Crossover Offending*

1. Imprecision in Defining Sexual Offending

...One study (English et al.) counted as offenses with victims such things as obscene phone calls, voyeurism, stalking, and Internet pornography viewing.[58] [A] study [by] O'Connell defined sexually deviant acts to include group sex, prostitution, peeping, and any sex with a male.[59] Then a third (Wilcox et al) recorded as offenses to be acts such as obscene phone calls, prostitution, calls to sex hotlines, adultery, threesomes, nude bars, and homosexual behavior.[60] This means that the rates of crossover offending with adults and children as victims are likely exaggerated due to counting the foregoing types of behaviors along with forcible rapes and child molestation. The inclusion of behaviors that may be minor and fail to rise to the level of crimes is a facial validity problem, meaning that the definition applied in the studies does not truly reflect the concept of criminal offending.[61]

'Nothing like a scary monster to whip the public into a frenzy of fear and loathing!

p. 2031: 2. Childhood Sexual Activity

...Researches in each study tabulated sexual acts over the subjects' lives; that is, they obtained self-reports of lifetime sexual histories. Thus, offenses against minors included acts when the subjects three-quarters of the sample recalled sexual offenses they committed when they were age thirteen or younger.[62] It appears that at least some of the 'offenses' against child victims may not have constituted crimes either. As further evidence of this, English et al.'s results also counted as child molestation any sexual behaviors with other minors that the subjects engaged in when they themselves were eight years old or younger.[63] It is unlikely for children at such tender ages to be legally culpable of such crimes.

Nor do the researchers seem to distinguish perpetrator from victim when two minors engaged in sexual acts. Wilcox et al. counted as self-reported sexual offenses those that occurred when individuals were as young as six years of age.[64] Another study defined child molestation based simply on age differences, including when both were minors.[65] In sum, it appears that the so-called crossover-offending counts in these studies were not limited to conduct with children when the offenders were adults.

3. Reliability of Self-Reports

Third, all five studies relied upon self-reports by subjects during interviews with treatment staff, and the studies are further subject to question because researchers failed to externally validate the

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self-reported victims and offenses.[66]

p. 2032: The failure to validate is particularly troublesome here as the victim and offense counts reported in these studies yield unrealistic numbers of victims and sexual offenses per interviewee. For example, Heil et al.'s report indicated that individual inmate subjects recounted sexually offending against up to 215 different victims (on average reporting 18 victims) and up to 6,075 specific offenses (on average identifying 137 offenses).[68] O'Connell's study of patients referred for sexual deviance assessments found that subjects admitted to an average of 290 specific instances of sexually deviant behavior through their youth and adulthood.[69] In Wilcox et al.'s small sample of British probationers, subjects on average reported 82 contact sexual offenses (standard deviation of 188) plus 81 noncontact sexual behaviors (standard deviajects were somehow able to identify and recount literally hundreds of contact and noncontact sexual acts they had committed. These extreme numbers suggest that most of the behaviors were nonserious, and as experience with self-reports in criminological studies informs, such studies are ripe with over-reporting when eliciting events that are nonserious or high frequency occurrences.[71]

Overall, it seems preposterous to assume that the examinee's recollections were sound enough and sufficiently reliable to enable them to recount specifics about so many events and persons. Coupled with these studies' tendencies to count sexual offenses perpetrated when the examinees were as young as six,[72] the high numbers of 'admissions' seems implausible. To this point, Abel and Osborn's research found that adult offenders who reported having had a deviant sexual interest during childhood also admitted to committing an average of 380 sex offenses before reaching adulthood.[73]

pp. 2032-33: 4. Controversies with Polygraph

A fourth issue is evident as researchers in four of the studies allegedly supported the idea of a high crossover offense rate by using polygraph testing to intentionally increase the number and scope of admissions.[74] North Carolina's brief did not mention the disputed nature of polygraph exams, but the Smart report itself warns that using polygraph exams with sex offenders is a 'controversial' practice, in part because of the 'possibility of false admissions and overstating of the number of victims.'[75] Critics contend that the way polygraph exams of sex offenders are orchestrated enhances the likelihood that honest polygraph takers will be judged untrue, while frequent liars will be judged as truthful.[76] Indeed, studies of polygraph exams of sex offenders have indicated false-positive rates (innocent examinees judged as deceptive) are higher than false negative rates (lying examinees perceive as truthful).[77]

p. 2034: 5. False Confessions

O'Connell conceded that the result of examinees in his study reporting on average about 300 sexually deviant behaviors may in part be explained as their 'wanting to "pass" the [polygraph] examination may have led them to over-estimate their deviant sexual histories, and the polygraph charts may not have picked up their exaggeration.'[84]

Incentives for progress in treatment may increase false admissions. The Heil et al. study compared polygraph-induced admissions between a group of prisoners and a group of parolees.[85] The prisoners were rewarded for success in treatment with a transfer to a less secure facility and a reduction in sentence.[86] The parolees did not receive an analogous reward.[87] following polygraphs for the sample of prisoners was significantly greater than the increased disclosures from the parolees who did not receive equivalent incentives may be evidence of this carrot-like effect of inducing potentially false admissions by the prisoners.[88]

pp. 2034-35: Additional reasons may explain the role of polygraphs in inducing exaggerations. A polygraph examiner familiar with post-conviction sex offender treatment programs observes that program officials routinely challenge the credibility of every examinee, regardless of the polygraph results.[89] He explains that as a result,

> examinees [are] faced with a limited range of options, which may include accepting arbitrary consequences for making so many admissions, or developing skill at making safe admissions to placate or manipulate the polygraph examiner and referring agent into a sense of complacent satisfaction that they are extracting additional information by routinely questioning truthful examinees.[90]

Sex offenders may likewise falsely confess because they believe it is expected that they had previously unknown victims.[91] Thus, observers note that many [sex] offenders might have fabricated stories after deceptive test outcomes, in order to satisfy examiners or tr obscure the actual reason for failing the test.'[92] The National Resource Council, a research committee of the National Academy of Sciences, recognizes that false confessions are more common than people may think and that polygraph interrogations, particularly those involving false-positive test results, are prone to generating erroneous admissions.[93]

p. 2035: *B. Assessing the Risk of Registered Sex Offenders to Children*

North Carolina next proclaimed that 'registered sex offenders are proportionately far more likely than members of the general public to sexually assault minors'. ... [T]he state simply claimed that reported recidivism rates of sex offenders are underestimates because of the gross underreporting of sex crimes due to the victims' shame.[96]

p. 2036: ...North Carolina did not cite any empirical research to substantiate its seeming presumption that underreporting is a greater problem when the perpetrators are previously identified sex offenders – as opposed to the general public. To the contrary, the same Smart Report the State so frequently cited indicates the opposite. The Smart Report states that those who have had prior contact with police are most likely to be arrested, charged, and prosecuted for new sex crimes.[99] In sum, North Carolina failed to reveal what 'social science' might bolster its claim about the higher risk to children

IV. ONLINE RISK

...North Carolina's brief to the Supreme court made the following claim: 'Sexual predators commonly use social networking sites to cull information about minors.'[100] It supported this assertion by citing two studies.

p. 2037: *A. British Reports of Suspicious Online Activity*

The underlying source is a document generated by a division of the British national police agency concerning communications it had received from the public about possible online sexual exploitation.[103] However, the report does not differentiate complaints that were substantiated as constituting a crime. ... [M]any of the reports did not suggest the involvement of any adults. For example, the report indicates that a majority of the reports involving sexually suggestive images of minors were self-generated without any coercion or exploitive acts by adults.[104]

pp. 2038-39: *B. The Online Exploitation Study*

...Crunching data contained in the Online Exploitation Study [Brief of Respondent-Appellee, at 34, quoting *Kimberly J. Mitchell et al.*, "Use of Social Networking Sites in Online Sex Crimes Against Minors: An Examination of National Incidence and Means of Utilization," 47 *Jour. Adolescent Health* 183, 185 92010)], ...[o]verall, only 5% of cases of online sex crimes with minors included access to a child's home of school information through SNS [social networking sites].[118] Hence, North Carolina greatly exaggerated the frequency of offenders using SNS to gain information about home or school in cases of online sexual exploitation.

p. 2040: *B. The Online Exploitation Study*

The Petitioner's brief in *Packingham* filed earlier had used the Online Predators Study results [*Janis Wolak et al., Crimes Against Children Research Center*, Trends in Arrests of 'Online Predators' (2009), http://scholars/unh.edu/cgi/viewcontent.cgi?article=1051&context=ccrc] to highlight that 96% of those arrested for soliciting minors online were not registered sex offenders.[123]....

p. 2041: ...North Carolina ignored the researchers' conclusion in the Online Predators Study. Considering that the percentage of registered sex offenders in the online sex crimes was not more than 4%, the study's authors found that these small statistics mean 'aiming strategies to prevent online predation at [the] population [of registered sex offenders] may have limited utility because so few online predators are registered sex offenders.'[127]

'[T]he facts do not suggest that the Internet is facilitating an epidemic of sex crimes against youth....'[129]

In what rational world are old men to be feared as lathering sex maniacs simply for not being senile and disabled?

p. 2042: CONCLUSION

...In the end, North Carolina and thirteen other states weighing in as friends of the court in *Packingham v. North Carolina* offered a troubling version of the scientific evidence in an attempt to support a significant ban on registered sex offenders' use of SNS. It is not clear if the state's legal representatives were merely naïve and uneducated on the true science behind the empirical studies they touted. The alternative – that they intentionally tried to mislead the Supreme Court on the risks of sex offenders as a group – would be regrettable for ethical and political reasons. Perhaps, fortunately, the Supreme Court was able to render its finding on the unconstitutionality of the North Carolina statute without such questionable evidence of risk.

The case may be momentous for anoth-

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er reason. As Professor Wayne Logan reads the opinion, *Packingham* 'suggests a possible softening of the Court's customary unequivocal backing of laws imposing harsh sanctions on convicted sex offenders.'[139]

Notes:

3 Brief of Respondent-Appellee, *Packingham v. North Carolina*, 137 S. Ct. 368 (2017) (No. 15-1194); Brief for State of Louisiana and Twelve Other States as Amicus Curiae Supporting Respondents, *Packingham v. North Carolina*, 137 S. Ct. 368 (2017) (No. 15-1194) [hereinafter State's Amicus Brief].

4 Petition for Writ of Certiorari, *Packingham v. North Carolina*, 137 S. Ct. 368 (March 21, 2016) (No. 15-1194); Brief for Association for the Treatment of Sexual Abusers et al. as Amici Curiae Supporting Petitioner, *Packingham v. North Carolina*, 137 S. Ct. 368 (December 22, 2016) (No. 15-1194) [hereinafter ATSA Brief].

5 *McKune v. Lile*, 536 U.S. 24, 34 (2002). The Supreme Court's support for this assertion derives from an article in the trade magazine *Psychology Today*, in which the authors claimed that the recidivism rate was up to 80%. *Robert E. Freeman-Longo & Robert V. Wall*, "Changing a Lifetime of Sexual Crime," *Psychol. Today*, Mar. 1986, p. 58, at 58. The lead author has since admitted that the 80% estimate may once have been valid but now repudiates it as far too high a figure. *Joshua Vaughn*, "A Closer Look: Finding Statistics to Fit a Narrative," Sentinel (Mar. 25, 2016), http://cumberlink.com/news/local/closer_look/cloder-look-finding-statistics-to-fit-a-narrative/article_7c4cf649-0999-5efc-ae6a-26f4b-7b592c2.html. The author likewise argues that sex offender policies built upon such a façade are not supported by scientific evidence and are dysfunctional. *Id.*

6 *Ira Mark Ellman & Tara Ellman*, "Frightening and High': The Supreme Court's Crucial Mistake About Sex Crime Statistics: 30 *Const. Comment.* 495 (2015); *Melissa Hamilton*, "Constitutional Law and the Role of Scientific Evidence: The Transformative Potential of *Doe v. Snyder*," 58 B.C. L. Rev. E. Supp. 34 (2017).

7 *Radley Balko*, "The Big Lie About Sex Offenders," *Wash. Post* (Mar. 9, 2017), https://www.washingtonpost.com/news/the-watch/wp/2017/03/09/the-big-lie-about-sex-offenders/utm_term=ddb7fd592b34 .

8 *Adam Liptak*, "Did the Supreme Court Base a Ruling on a Myth?", *N.Y. Times* (Mar. 6, 2017), https://www.ny-times.com/2017/03/06/us/politic/supreme-court-repeat-sex-offenders.html?hp&action=click&pgtype=Homepage&clickSource=story-heading&module=second-column-region&region=top-news&WT.nav=top-news&r=2.

9 *David Feige*, The Supreme Court's Sex Offender Jurisprudence Is Based on a Lie, *Slate* (Mar. 7, 2017). http://www.slate.com/articles/news_and_politics/jurisprudence/2017/03/sex_offender_bans_are_based_on_bad_science.html.

24 Brief of Respondent-Appellee, *supra* note 3, at 14-15.

25 *Id.* at 41 (citing *Dominique A. Simons*, "Sex Offender Typologies," in *Sex Offender Management and Assessment and Planning Initiative*, 55, 61-62 (Christopher Lobanov-Rostovsky, et al. eds., 2014) [hereinafter *Smart Report*].

26 *Patrick A. Langan et al.*, U.S. Dept. of Justice, Recidivism of Sex Offenders Released from Prison in 1994, at 24 (2003).

27 *Id.* at 1.

29 DOJ Recidivism Study, *supra* note 26, at 1.

30 *Id.* at 2.

31 *Id.* at 1-2.

40 *Robert A. Prentky et al.*, "Recidivism Rates Among Child Molesters and Rapists: A Methodological Analysis," 21 *Law & Human Behavior* 635, at 642 (1997).

41 *Jill Levenson*, "Sex Offender Recidivism, Risk Assessment, and the Adam Walsh Act," 10 *Sex Offender Law Report* 1 (2009).

47 *ATSA Brief, supra* note 4, at 10.

48 *Id.*

49 *Brief of Respondent-Appellee, supra* note 3, at 41.

50 *Id.* at 61 (citing *Simons*, in *Smart Report, supra* note 25, at 55, 61-62).

51 *Simons*, in *Smart Report, supra* note 25, at 61).

58 *Kim English et al.*, Colo. Dep't of Pub. Safety, The Value of Polygraph Testing in Sex Offender Management (2000), at app. D.

59 *Michael A. O'Connell*, "Using Polygraph Testing to Assess Deviant Sexual History of Sex Offenders" (June 12, 1997) (unpub'd. Ph.D. dissertation, Univ. of Washington), at 46-47, 95 app A.

60 *Daniel Wilcox et al.*, "Sexual History Disclosure Using the Polygraph in a Sample of British Sex Offenders in Treatment," 34 *Polygraph* 171, at 182-83 app 1.

61 *Josine Junger-Tas & Ineke Haen Marshall*, "The Self-Report Methodology in Crime Research," 25 *Crime & Just.* 291, 320 (1999).

62 *English et al., supra* note 58, at 40 tbl. 7.

63 *Id.*

64 *Wilcox et al., supra* note 60, at 175.

65 *O'Connell, supra* note 59, at 46, 47, 50-59.

66 *Theodore P. Cross & Leonard Saxe*, "Polygraph Testing and Sexual Abuse: The Lure of the Magic Lasso," 6 *Child Maltreatment* 195, 201 (2001).

68 *Peggy Heil et al.*, "Crossover Sexual Offenses," 15 Sexual Abuse 221, 224, at 228 tbl. 1. (2003)

69 *O'Connell, supra* note 59, at 48.

70 *Wilcox et al., supra* note 60, at 174.

71 *Junger-Tas & Marshall, supra* note 61, at 322.

72 *Wilcox et al. supra* note 60, at 75.

73 *Gene G. Abel & Joanne-L. Rouleau*, "The Nature and Extent of Sexual Assault," in *Handbook of Sexual Assault* 9, 13 (W.L. Marshall, et al. eds., 1990) (discussing the same study and sample as in *Gene G. Abel & Candace Osborn*, "The Paraphilias: The Extent and Nature of Sexually Deviant and Criminal Behavior, 15 *Psychiatric Clinics N. Am.* 675 (1992).

74 *English et al. supra* note 58, at 31; *Heil et al. supra* note 68, at 226; *O'Connell, supra* note 59, at 35; *Wilcox et al., supra* note 60, at 172.

75 *Christopher Lobanov-Rostovsky*, "Sex Offender Management Strategies", in *Sex Offender Management and Assessment and Planning Initiative* [*Smart Report*], 145, 150-51 (*Christopher Lobanov-Rostovsky et al.* eds., 2014).

76 *Gershon Ben Shakhar*, "The Case Against Use of Polygraph Examinations to Monitor Post-Conviction Sex Offenders," 13 *Legal & Criminological Psychol.* 191, 196 (2008).

77 *Ewout H. Meijer et al.*, "Sex Offender Management Using the Polygraph: A Critical Review," 31 *Int'l Jour. Law & Psychiatry* 423, 425 (2008).

84 *O'Connell, supra* note 59, at 78. North Carolina's brief then cited the *Smart Report* for the finding that "64-66 percent of incest offenders report sexually assaulting children who they were not related to." *Brief of Respondent-Appellee, supra* note 3, at 41 (citing *Simons*, in Smart Report, *supra* note 25, 55, 61-82). Yet the three studies underlying the *Smart Report*'s assertion here were among those cited for the assertion that 50-60% of sex offenders with adult victims have also abused children just discussed. *Id.* Thus, this assertion also lacked sufficient and appropriate empirical support for the same reasons.

85 *Heil et al. supra* note 68, at 225.

86 *Id.* at 226-27.

87 *Id.*

88 *Id.* at 227-28.

89 *Raymond Nelson*, "Testing the Limits of Evidence Based Polygraph Practices," 45 *Polygraph* 74, 78 (2016).

90 *Id.*

91 *Cross & Saxe, supra* note 66, at 195, 200-01.

92 *Meijer et al. supra* note 77, at 426.

93 *Nat'l Res. Council*, *The Polygraph and Lie Detection* 56.

96 *Id.* at 38 (citing Reporting of Sexual Violence Incidents, *Nat'l Inst. of Just.* (2010).

99 *Roger Przybylski*, "Adult Sex Offender Recidivism," in Smart Report 91 (citing *Wendy Larcombe*, "Sex Offender Risk Assessment: The Need to Place Recidivism Research in the Context of Attrition in the Criminal Justice System," 18 *Violence Against Women* 482, 493 (2012)).

100 *Brief of Respondent-Appellee, supra* note 3, at 33.

103 *Child Exploitation & Online Prot. Ctr.*, Threat Assessment of Child Sexual Exploitation and Abuse 10 (2013).

104 *Id.* at 12.

118 *Kimberly J. Mitchell et al.*, "Use of Social Networking Sites in Online Sex Crimes Against Minors: An Examination of National Incidence and Means of Utilization," 47 *Jour. Adolescent Health* 183, 185 (2010)

123 Brief of Petitioner-Appellant, *Packingham v. North Carolina*, 137 S. Ct. 368 (2017) (No. 15-1194).

127 Online Predators Study [*Janis Wolak et al., Crimes Against Children Research Center*, Trends in Arrests of 'Online Predators' (2009), http://scholars/unh.edu/cgi/viewcontent.cgi?article=1051&context=ccrc] at 6.

129 *Id.* at 2.

139 *Wayne Logan*, SCOTUS Invalidates Law Criminalizing Sex Offender Access to Social Media, *Collateral Consequences Resource Center* (June 20, 2017) http://ccresourcecenter.org/2017/06/20/scotus-invalidates-law-criminalizing-sex-offender-access-to-social-media/.

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