The Legal Pad

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"The right to think is the beginning of freedom, and speech must be protected from the government because speech is the beginning of thought." – *Stanley v. Georgia*, 394 U.S. 537, 566 (1969).

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Reading the Names of the Dead

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Feedback? News? Write!

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The Spirit of Truth Lives On

Ridley Seawood, Sept. 22, 2021, https://perilouschronicle.com/2021/09/22/detainee-resistance-at-msop-shadow-prison-intensifies/....

Excerpts:

"A movement is growing among detainees inside the Minnesota Sex Offender Program in Moose Lake, Minnesota. Since mid-August, dozens of detainees held at the secure treatment facility have been meeting in the yard for rallies, speak-outs, and peaceful demonstrations. They are calling for an end to their indefinite detention under Minnesota's civil commitment law, which they say is a violation of their constitutional rights.

On September 20, under a full moon, 10 prisoners 'sat in a circle' and refused to return to their unit when staff ordered detainees off the yard. 'We haven't seen a star in 10 years,' said Peter, who reported the incident to Perilous. Detainees negotiated with guards for 2 hours before agreeing to exit the yard back to their units with a disciplinary hearing forthcoming.....

Minnesota is one of only 20 states in the U.S. with a civil commitment program [specifically aimed at sex offenders]. Minnesota's program is the largest of its kind and is enveloped in controversies ranging from racial discrimination and discrimination against LGBTQ detainees, to criminal behavior by staff. However, the primary contention [against] the program is that for many of the people committed there, it's a death sentence.

Perilous corresponded with 7 detainees about their experience in the Minnesota Sex Offender Program. Several detainees reported that they'd participated in a rally on Friday, August 13th inside the secure treatment facility at which 120-130 detainees met in the yard and held a speak out and protest calling for an end to the program – the largest demonstration inside the facility to date....

Civil commitment is a non-criminal process that allows for the indefinite detention of people deemed potentially dangerous to the public based on previous conduct and mental health diagnosis. It is a preventive measure that has garnered significant criticism from those detained and their advocates because few people have ever progressed through treatment to release and individuals detained within this system are not afforded the same rights as a person detained as a state prisoner.

In the wake of the ongoing demonstrations and organizing inside the facility, detainees and their advocates report that the facility's administration has begun using retaliatory tactics to crack down on what they believe ought to be First Amendment-protected speech. 'When we did our rallies, we didn't have a lot of friction with the administration at the beginning,' Daniel Wilson, co-founder of OCEAN, told Perilous, 'but when they realized this was something we were going to do every day, they started to come down on us.'

...Organizers with End MSOP are working to build a coalition of groups concerned with the prevention of sexual harm and the closure of the Moose Lake facility. 'We are getting trained on how to make a bill into a law, how to write a bill, how to do lobbying,' says David Boehnke, a member of End MSOP, 'there seems to be a turn toward trying to phase out the program and to invest in more effective solutions to sexual violence. I think that's an exciting direction.'

A financial oversight hearing in front of the Minnesota state legislature committees that determine funding for the civil commitment program was held on August 2nd....

Civil Protest in the Spirit of Truth and Conscience

At stake is a 96 million dollar budget that advocates for the closure of the program say is a waste of money that could be better spent supporting survivors of harm and investing in evidence-based solutions rather than indefinite detention.

Janet Mackey, a survivor of sexual abuse, retired social worker, and author of *Silenced Lives: The Sex Offenders' Legacy*, agrees that programs like MSOP don't do what they say they do. 'They call themselves treatment facilities, but they really don't provide treatment,' she said. 'What they're trying to do is just keep people in there for the rest of their lives.'

...Ruby Brewer, a former Clinician at the Moose Lake facility, submitted testimony before the legislative committee as a member of End MSOP. She claims to have 'heard other supervisors, unit directors, clinicians, and security refer to clients in derogatory, racist, and discriminatory ways.' Additionally, she and other clinicians were told 'we had to lower the scores of quarterlies and annuals to avoid progressing detainees.'

Brewer asserts that though research suggests that sex offender treatment programs should be no longer than 3 years, for detainees sentenced to indefinite treatment at MSOP, 'it takes an average of 17 years just to get to Phase 3.'

Eric S. Janus, President and Dean Emeritus of Mitchell Hamline School of Law and a leading national expert on sexual violence law and policy, spoke at the hearing, telling lawmakers that 'there is a broad consensus that the current system of civil commitment of sex offenders in Minnesota captures too many people and keeps many of them too long.'

Detainees say that their resistance has been gathering attention. 'Since the rally at St. Paul, said Russell Hatton, a first nation Anishinaabe and co-founder of OCEAN, 'there's a lot more mental health professionals who are writing to us and encouraging us that we have to keep up the pressure on them, internally, and what's been going on externally.'

OCEAN organizers are working to build a broad coalition of detainees inside the Moose Lake facility. Lincoln Brown, an artist and detainee at Moose Lake since 1995, says Hatton and Wilson approached him looking for creative ideas to expand on in their organizing efforts. Hatton, he says, is 'good at community building' and 'patient with listening to others and then getting his message through as a result of listening.'

Brown says that in his conversations with Hatton and Wilson, he suggested they put out flyers inviting others at the facility to share their experiences at a rally. 'Lo and behold,' Brown said, 'it turned out a lot of guys here feel that they are oppressed, silenced, manipulated. There's a culture of fear coming down from the administration.'

...After a rally on August 18th, several detainees who spoke with Periloius reported that the MSOP administration handed out disciplinary infractions to approximately 25 detainees who were present at the rally. A Minnesota DHS [Dept. of Human Services] spokesperson confirmed that some protest participants were 'cited for behavior during or after protests that violated facility rules and policies.'

Hatton told Perilous that as of mid-September more than 60 detainees have received protest-related disciplinary infractions, which restrict detainees to their rooms for up to 60 days and can strip them of privileges they previously earned.

On Wednesday, September 1st, just over 2 weeks after the first rally, Daniel Wilson of OCEAN was placed in a segregation unit without explanation, where he remains today. He says that he has yet to be given an official reason for his transfer but that staff verbalized to him that 'he wasn't being transparent.' A Minnesota DHS spokesperson said that they could not comment on an individual's situation or confirm their participation in the program."

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CURE's Charlie Sullivan on Dan Wilson's "Good Trouble"

Email from Charlie Sullivan, President of International CURE to Tiffany M. of EndMSOP, Sept. 28, 2021

Excerpts:

"On Oct. 5th the Hearing and Release Unit of [the Minnesota Dept. of] Corrections [considered whether] to return Daniel Wilson to prison for three major and three minor Behavior Expectation Reports ("BERs") and missing treatment sessions in the last four months in the Minnesota Sex Offender Program (MSOP). The three major BERs are 1) having too much property in his room (including two pears, legal work, and two books); 2) being a participant in a peaceful protest inside the facility; and 3) asking his peers to send money to PAD (Positive Attitude Development), a non-profit organization in Duluth, MN. There are about 300 "policies" where a "client" (as MSOP calls them) could receive a BER. The three minor BERs are: 1) handing out business cards to his peers in MSOP that listed the EndMSOP email address [Ed. Note: MSOP confinees have no access to email or the internet at all]; 2) saying verbally "EndMSOP"; and 3) being in an unauthorized area.

Now, what are the reasons why Daniel did 'good trouble'?

1) A federal judge, Donovan Frank, an appointee of Pres. George W. Bush, ruled in 2015 that the MSOP is unconstitutional because it locks up civilly committed persons indefinitely. In the 26 years of its existence the MSOP has released only 14 men, while 88 men have died. An individual is six times more likely to die in MSOP than to be released. The MSOP has never supported a release. These releases were judicial decisions overriding a lack of recommendation by MSOP.
2) These 'clients' include a 'shock-the-conscience' disproportionate number of people of color and people who are gay. [Ed. Note: Not to mention the majority of MSOP confinees being senior citizens.]
3) Contrary to MSOP's claim that it is 'world class' and has 'state of the art' treatment, it has been criticized by an Lake, MN. Also, he has pointed out that the Minnesota Supreme Court originally stated that the treatment provided by MSOP would only require 32 months to complete.

I will conclude with what the late Cong. John Lewis defined as 'good trouble': 'When you see something that is not right, not fair, not just, you have to speak up ...you have to do something.' I believe Cong. Lewis, whom I knew for thirty years, would consider Dan's oversight of MSOP 'policies' as 'good trouble.'"

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Notes from EndMSOP Agenda Oct 2, 2021

Excerpts from Notes from CURE conference call 10/2/21 (Included SOCC confinees from 3 states – none from MSOP!)

- James Hydrick (from California's Coalinga SOCC facility) reports: Unit 5 there was used for Covid quarantine. Now it's shut down because all staff working in it got the Delta variant. The rest of staff in Coalinga are now refusing to work in Unit 5 due to inadequate ventilation (50 patients in a unit designed for 32). Throughout Coalinga facility, infected patients are now staying in their own units. The facility is short of staff, who are forced to work 3 shifts in a row as overtime, eating sack lunches. Under the totality of current conditions, there is no way of treating patients. Those in Phases 3 & 4 have been moved to 4 different units. Those who refuse to move to those units are kicked out of treatment (losing that Phase 3-4 status). 1 to 2 weeks before 10/2, the facility released massive data on patients to an outside agency without legal authorization. All patients got a notice that their restricted data was disclosed & that a HIPAA investigation has begun .
- North Dakota's SOCC facility is completely overrun with Covid. The earliest release hearings coming up are in November (per "Larry R." there).

According to a recent EndMSOP flyer: In MSOP, 90 confinees have not been convicted of any crime.

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Documents from EndMSOP

* Excerpts from online article by Ridley Seawood, *Perilous Chronicle*:

"Detainees at MN Shadow Prison Resist Indefinite Detention in Sex Offender Program" (July 14, 2021), https://perilouschroniocle.coim/2021/07/14/detainees-at-mn-shadow-prison-resist-indefinite-detention-in-sex-offender-program/?fbclid=IwAR1BQ_beR...:...:

"While advocates for maintaining civil commitment laws argue that it is integral to ensuring public safety, a 2017 article co-authored by Meiners reports that 'statistics do not point to a reduction in the number of sex offenses, or lower recidivism rates ...for people in Washington and the 19 other states that use civil commitment, as compared to the 30 states where there are no civil commitment laws.'"

* Email exchange on the subject of PPG testing:

Bonni: Question.... Am I the only one that thinks the PPG is sexual assault? I am so saddened that my husband HAS to submit to this test. It makes me sick to my stomach. SERIOUSLY! What the hell is wrong with these people?

Sara: NO! You are not alone in that thought at all! When I first heard and read what it was, I was mortified! The 1st thing that came to mind was, "OMG! That's like rape, or some sort of sexual abuse"! On top of that, it's junk science, just like a polygraph. I'm so sorry your hubby is going through this!

Bonni: Oh sweet Jesus! I don't even want to know where they attach all that on a woman! When my hubby told me about this test we were in visiting and I just started crying. I felt so helpless that I couldn't protect him from this test. And to top it off the test clinicians (if you can call them that) sit across the desk from them during this test watching the reaction results on a computer screen. It's straight up sexual assault and so gross! – Oh, and if you don't react during this test they consider you dangerous! – So what happens if the guy doesn't like porn at all? Because that's what they make them watch. Porn of every shape, size, and kink. It's sickening.

Sara: ...It's junk science, but you must pass it to phase-up/be released. Ick! - And listen to sexual, "erotic," molesting, and rape type sound, and violence. The visuals and audio are "implied," but geez, men wake up erect even when they need to pee! Also, you don't even need to become fully or semi-erect to fail this test.

Merry: And what about those in the videos? Aren't they being victimized as well? Isn't that a crime?

Tiffany: It's horrible! If you don't have a reaction they say you need to do it again. frickin virtual reality of it.... So what are the sickos getting child actors to do this or coming up with these scenarios. Just frickin weird.... And forcing someone to watch a "rapey scenario" especially if they had been a victim themselves. I can't imagine the trauma....

Ruby: Here is the thing.... Reacting to a picture or whatever does NOT equate committing another sex crime. This test is not accurate nor does it ever show where a guy is at with inappropriate sexual interests.

Tiffany: Also.... Even babies get erections. It's a natural thing that is not always connected to sexual thoughts. And how can they prove it's because of that specific image, or if they had a thought of something else.... – What about the risk of someone doing violent crimes? Why isn't any other group of people held like this and 'treated'? It's not right no matter how it's looked at. Education and prevention are more effective than locking up someone forever and trying to decide who is going to be dangerous or not. – The criminal sentences have an out date and having civil commitment just goes around all that. It doesn't make sense and it shouldn't exist. The US needs to reevaluate the system. – The states with and without civil commitment show no difference in the rates of sex crimes....

* End MSOP email excerpts, post-meeting at State Capitol and Governor's Mansion on July 18, 2021

Irene: Why can't these Senators, Congress, President, see what's going on? These men are dying and it is not a treatment facility! This needs to be shut down, all the civil commitment facilities! ...Cameras need to be in these facilities with a wide investigation. Medical, therapy, food is not happening. ...Closing these facilities is very important!

Alicia: MSOP needs to end. They've done their time!

Lucas: Solidarity from Mankato!

Patricia: I'm praying that my son can get out of there. He has been there 14 years for something he didn't even do. But because we didn't have money for a lawyer he got put into MSOP. My son shouldn't be there. ...MSOP needs to end. It's not a treatment center, it's a prison.

Tara: When someone would die in there, the security would say, "Another one completed treatment."

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Stagnant

http://texansagainstcivilcommitment.com: Segment 7 - Stagnant, by "moosejaw72" (guest blog #7 by a Resident at the Texas Civil Commitment Center) "As long as there is sexual abuse, it will always exist. You can indefinitely confine men who have raped and label that treatment to pull the wool over the eyes of the public. This will certainly stop or slow down those offenders, but what about the men who wake up today and make the choice to rape? In the movie

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Minority Report they had the ability to see future crimes before they were committed. Apparently, Gov. Abbott (of Texas) saw the movie and thought it was a documentary.... ...He has promised to get all rapists off the streets.

My message to Gov. Abbott is ... eliminate the lies that are being spread about civil commitment [of sex offenders] being treatment, when folks are sitting around here stagnant. Stop telling the courts, juries, media, and public that civil commitment is a seamless transition back to society. Residents are stuck in tiers – all assignments completed – with no movement forward and no explanations as to why. Every few years they let a few residents out so they can justify their jobs, pat themselves on the back, and congratulate themselves on progress....

Civil commitment is an evil sent straight from Hell. No amount of treatment could brainwash me into believing in this sham program; and I 100% believe in treatment – applied as it was intended.

...All I know how to do is get by, one day at a time. Civil commitment steals all purpose, hope and meaning from your life...."

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Contrast of Criminal to "Civil Commitment" Standards of Proof as to Sex Crimes

Standard	*Proof Required to Convict/ Commit*	*Confrontation Right vs. Hearsay Usability*	*What the Conviction/ Commitment Really Means*
Criminal Standard:	"Proof beyond a reasonable doubt of guilt"	Right to Confront One's Accuser's in Open Court	Conclusion: "We are convinced that you committed this crime."
Commitment Standard:	"Clear and Convincing Evidence" (in the subjective perception of the judge who allows evidence of such accusations in advance of trial	Hearsay Allowed via "Expert's" Testimony, Incorporating Hearsay Statements and Accepting Them as Basis for "Expert Opinion" (no confrontation)	Conclusion: "We think that it is likely that you committed this crime, based only on the fact of the accusation, and on what we think you have a propensity to do."

Virginia Report, Segment 8

There are basically just two types of sex offenders typically confined in SOCC facilities: rapists (typically of adult women), and "pedophiles" (really, pedosexuals). "Deviance" is a term used by the "DSM-5" (current edition of the American Psychiatric Association's Diagnostic and Statistical Manual) to describe any sexual responses other than attractions to standard sexual activities with adult women or men. These atypical sexual attractions or interests are called "paraphilias" in the DSM-5. By the numbers, by far the largest category of individuals in the overall paraphilia category are "pedophiles" (pedosexuals, claimed to SOCC facilities whose rationales for commitment involved a claim of "paraphilia" are in fact pedosexuals. Only a handful of other paraphilias (such as window peepers or 'flashers') are represented in the population of such confinees.

In contrast, attempts over the years by various psychologists to declare a different sexual disorder comprised of an urge specifically to rape someone, claiming that the motivation is sexual pleasure derived from the imposition of terror and physical pain upon the victim, have been repeatedly rebuffed by the editors of the DSM, as it has evolved through its various editions. Their latest rejection of such a 'rape syndrome' as a sexual disorder was particularly emphatic and final. Thus, rapists are not now regarded as suffering from a "paraphilia" (a/k/a "deviance), but instead are simply deemed individuals who, either lacking in social skills with which to persuade women to engage in sex with them, or who simply just don't care to undertake such social persuasion, simply take sex by force. In other words, they are regarded simply as sex criminals, rather than being "sexually disordered." In late October 2014, New York's highest court ruled, in *In re Donald DD* (N.Y. Court of Appeals, reported in *Rochester Democrat & Chronicle*, quoted in *CURE-SORT News*, Vol. 24, No. 1, pp. 4-5 [Winter 2015]) that a multiple rapist could not remain committed on a sole diagnosis of Anti-Social Personality Disorder (ASPD), since that diagnosis conveys no problem in controlling one's behavior, and simply indicates a propensity to commit crimes.

Roughly two-thirds of all SOCC confinees in Minnesota, illustratively, were committed on the basis of sex crimes involving children. Most of these crimes are only prompted by such pedosexual attractions, and do not involve rape. While some child rapes occur from time to time, they are usually perpetrated by 'sexual opportunists,' who are not really pedosexuals, but rather those who simply see a child as a rape 'target of opportunity.' While this is reprehensible, it is not pedosexuality.

As to pedosexuality and indeed all other non-standard sexual attractions/interests, ered by individuals at or shortly after puberty, or at the latest in young adulthood. Whenever first experienced, they are in fact a permanent part of the psychological makeup of the individual. No more than recent, failed attempts to beat homosexuality out of gay men, there is simply no way to ever 'erase' a pedophilic sexual orientation or to replace it with another orientation not previously existing in that individual. Therefore, the common pseudoscientific claim that pedosexuals represent an inherent, unacceptable threat of recidivism is false on at least three different levels.

First, research has studied the comparative rates of recidivism as between pedosexuals, on one hand, and rapists on the other. The results of these studies have invariably ascertained that those comparative rates are nearly identical, that is, within one or two percentage points at any specific age range. *Richard Wollert*'s research ("Low Base-Rates Limit Expert Certainty When Current Actuarials Are Used....," 12 *Psychology, Public Policy and Law* 56, at 61 et seq.), tracking recidivism by age brackets, and comparing rates for rapists, on one hand and pedosexuals on the other, firmly establishes this, using R. Karl Hanson's own samples for the Static-99. Hence, the fact is that "deviance" does not pose any risk level of recidivism beyond that reflected by a past sex crime of any kind. In short, "deviance" as a factor predictive of more likely recidivism is just a false myth. This is strongly buttressed by the observations on the point of pedophilic sexual attractions set forth at pages 86-87 of the *Report of Class Member Cyrus Gladden II in Reply to '706 Experts' Report*, in turn quoting *Thomas K. Zander*, "Civil Commitment without Psychosis: The Law's Reliance on the Weakest Links in Psychodiagnosis," 1 *Jour. Of Sexual Offender Civil Commitment: Science and the Law* 17, at 37-38 [2005]), and citing: *Claude Crepault & Marcel Couture*, "Men's Erotic Fantasies," 9 *Archives of Sexual Behavior* 565 (1980); and *Terrell L. Templeman & Ray D. Stinnett*, "Patterns of Sexual Arousal and History in a 'Normal' Sample of Young Men," 20 *Archives of Sexual Behavior* 137 (1991), at the outset of this predictor of sex crimes were scientifically correct, all of these members of the public would be sex-crime committing machines. Obviously, there is no such widespread epidemic of actual sex crimes with children. Clearly then, a pedophilic attraction ("deviance") simply does not present even merely a propensity for such actual crimes, much less an irresistible urge to commit them.

In fact, even collection of, and masturbatory use of child porn materials do not prompt sex acts with children. ("The statistics establish no causal link between child porn materials and actual behavior." *United States v. C.R.*, 792 F. Supp. 2d 343, 376 [E.D. N.Y. 2011; quoting *Jenkins*, Beyond Tolerance at 173 (2001)]). Obviously, pedosexuals ("deviants") are the collectors of such materials. Again, the lack of sex crimes with children on the part of such collectors belies the notion that their "deviance" creates an unacceptable risk, or indeed, any risk at all, of sex crimes.

Second, recidivism statistics have drastically changed since the start of the 1990s. Probably mostly due to the far more severe sentences for sex crimes since then, coupled with unbelievably intense criminal investigation into even baseless suspicions of sex crime, the rate of sex crimes has dwindled to near non-existence currently. Even among those with sex-crimes records, the general rate of average recidivism (for one-time prison releases) has dropped from roughly 17% back then for sex crimes to a mere 3%, as measured anytime since 2005.

On this point, the aforesaid *Report in Reply, supra*, at pp. 19-20, details this point thus:

"...A 2002 study by the U.S. Dept. of Justice found that of sex offenders released in 1994 from prisons in 15 states, only 5.3% were rearrested for another sex crime within three years. Of the convicted child molesters in this group, only 3.3% were rearrested for another sex crime against a child.

"A 2007 Minnesota Dept. of Corrections study derived a mere 3.2% sex-crime recidivism base rate over an average 8.4-year post-prison-release recidivism. That report attributed that low recidivism rate, in substantial part, to "the longer and more intense post-release supervision of sex offenders." (*Id.*, p. 3). It is equally important that this study's protocol excluded the impact of commitment from the low recidivism percentages reported. That is, those low rates would still exist in the absence of commitment. Similar low rates of sex-crime recidivism have been found in other states in the last ten years as well.

"A 2007 study by the Missouri Dept. Of Corrections found a 3% re-offense rate among sex offenders released in

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2002. An Alaska Judicial Council report in 2007 matched this 3% figure. A 2008 study by California's Sex Offender Management Board of 4,204 sex offenders found 3.38% sex-crime recidivism after ten years of prisoner release. An Indiana corrections report on sex offenders released in 2005 found only 1.05% recidivism over three years. Simply put, high sex-crime recidivism is only a myth – anywhere."

To some any remote possibility of recidivism appears an "unacceptable risk," but such views are unquestionably anti-scientific.

Margo Kaplan, *supra*, discusses the role that pedophilia/pedosexuality plays in sex offender commitment thus:

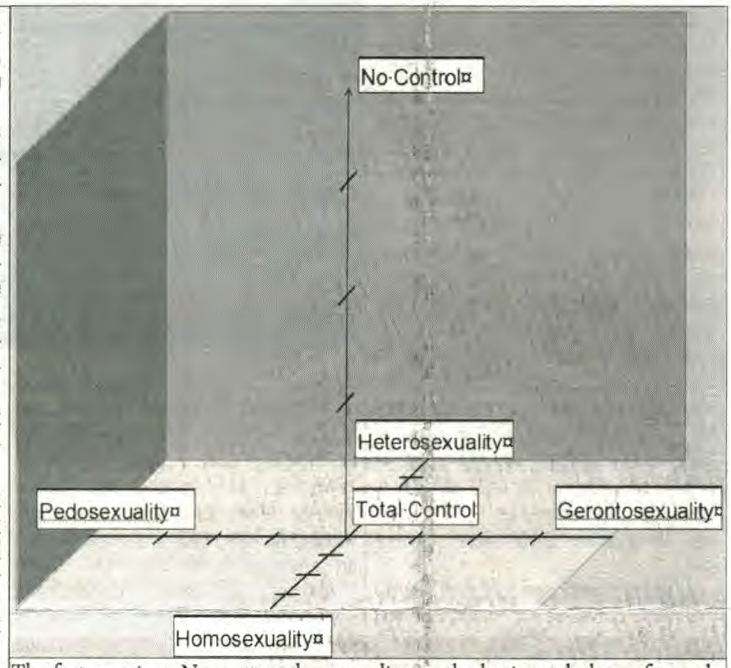
p. 149: "'A diagnosis of pedophilic disorder raises the odds of civil commitment by approximately 4,500%; ....' [citing: *Jill S. Levenson & John W. Morin*, "Factors Predicting Selection of Sexually Violent Predators for Civil Commitment," 50 International *J. of Offender Therapy & Comp. Criminology* 609, 622, tbl. 3 (2006)].

p. 151: "At present, the concept of volitional impairment is highly questionable in both law and psychiatry. [See *Robert A. Prentky et al.*, "Sexually Violent Predators in the Courtroom," 12 *Psychol. Pub. Pol'y & L.* 357 (2006), at 363 ("[I]t is problematic, and perhaps impossible, to distinguish between impulses that are irresistible and impulses that simply are not resisted."); *Thomas K. Zander*, "Civil Commitment Without Psychosis: The Law's Reliance on the Weakest Link in Psychodiagnosis," 1 *J. Sexual Offender Civ. Commitment: Sci. & L.* 17 (2005), at 65-66 (examining the issues in determining volitional impairment in paraphilia cases).] Psychiatric literature is rife with ambiguity and uncertainty about the concept of volitional impairment and self-control in general, and with concerns about its use in SVP proceedings. [See *Zander, supra*, at 65-66 ("[N]one of the paraphilias require any type of volitional impairment or inability to control impulses to make a diagnosis."); *Prentky, et al., supra*, at 363-64 ("The volitional dysfunction standard as applied in insanity defenses is rarely appropriate in the SVP context.").]

"For these reasons, the APA cautioned against assuming impaired impulse control from a psychiatric diagnosis for the sake of legal proceedings." [See *DSM-V*, supra, at 25 (cautioning the use of DSM-V diagnostic criteria when making legal decisions); *Stephen J. Morse*, "Preventive Confinement of Dangerous Offenders," 32 *J. L. Med. & Ethics* 56 (2004), at 64-65 (discussing the problems inherent in measuring lack of control); *Allen Frances et al.*, "Defining Mental Disorder When it Really Counts: DSM-IV-TR and SVP/SDP Statutes," 36 *J. Am. Acad. Psychiatry & L.* 375, 378 (2008), at 379 (discussing use of the DSM in forensic settings).]

p. 152: "Yet psychiatric research has not demonstrated that paraphilic disorders are associated with volitional impairment or impulse control. ... Research has also questioned the relationship between pedophilic disorder and long-term recidivism. [See *Anthony R. Beech & Leigh Harkins*, "DSM-IV Paraphilia: Descriptions, Demographics, and Treatment Interventions," 17 *Aggression & Violent Behav.* 527 (2012), at 529 (citing research that found a pedophilic diagnosis was unrelated to long-term recidivism).]

"...Most states allow courts to assume the actor has difficulty controlling his actions from the defendant's mental disorder and his past acts. [See *Kenneth W. Gaines*, "Instruct the Jury: Crane's 'Serious Difficulty' Requirement and Due Process," 56 *S.C. L. Rev.* 291, 300-01 (2004) (arguing that Arizona, California, Illinois, Massachusetts, Minnesota, South Carolina, Texas, Washington, and Wisconsin fail to require a separate finding of lack of control); *Janine Pierson*, Comment, "Construing Crane: Examining How State Courts Have Applied Its Lack-of-Control Standard," 160 *U. Pa. L. Rev.* 1527, 1537-46 (2012) (arguing that ten states do not require a separate showing of lack of control, and either ignore the requirement or inappropriately conflate it with the mental abnormality requirement).] This practice essentially allows courts to conflate pedophilic disorder and other paraphilic disorders with volitional control, a presumption that is not supported by scientific evidence. [See *Michael B. First & Robert L. Halon*, "Use of DSM Paraphilia Diagnoses in Sexually Violent Predator Commitment Cases," 36 *J. Am. Acad. Psychiatry & L.* 443, 450 (2008) (describing the distinction between diagnosis of paraphilia and volitional impairment). Courts' willingness to assume volitional impairment, despite lack of evidence, may in fact be tied to the disgust pedophilic disorder instills. Historically, the determination that a sexual urge creates an impulse control problem has been linked to whether the underlying interest is considered acceptable. It was at one time commonly accepted that individuals could suffer from 'compulsive homosexuality' and 'compulsive masturbation' because same-sex attraction and masturbation were in themselves viewed as problematic. See *Moser, supra*, at 323 ("[C]ompulsive masturbators and compulsive homosexuals began to disappear once those behaviors were no longer seen as signs or symptoms of psychopathology."); *Moser, supra*, at 92 (detailing the history of and problems with paraphilia as a concept). Similarly, courts may be presuming that individuals with sexual interest in children must lack control over their actions.]



The fact remains: No matter where one lies on the horizontal plane of sexual orientation, there is no inherent connection to one's level of self-control over one's sexual actions. Moreover, except for rare individuals with no control over their momentary impulses, sexual behavior is a matter of deliberate choice.

p. 153: "...SVP statutes allow civil commitment of individuals who are able to understand and control their actions based on fear of the decisions they will make. [See *Gottlieb, supra*, at 1037, 1045 (arguing that preventive detention of sane individuals is not constitutional); *Schulhofer, supra*, 94-95 (arguing that SVP commitments should be impermissible without proof of mental illness).] This undermines the justifications central to the constitutionality of civil commitment. See *Gottlieb, supra*, at 1037-38, 1045 (arguing that there are constitutional limits to how far criminal and civil sanctions may overlap).]

pp. 153-54: "...SVP statutes use mental illness to civilly commit individuals who can rationally choose their behavior. An individual in the throes of sexual interest does not act on reflex. He feels an interest, forms an intent, and acts on it. [See *Morse, supra*, at 63 (examining how desire and control influence action and responsibility).] Refusing to engage in the sexual activity might be more difficult for an individual who desires it than for an individual who does not in that the former will suffer from frustration, tension, or loneliness. But these negative consequences do not prevent the individual from controlling his actions.... [See *ibid.* ("A desire is simply a desire ...there is no literal physical compulsion, as there is in cases of reflex, spasm and the like.").]

"...[A] deprivation of liberty – particularly one so complete and indefinite as civil commitment – should not be undertaken lightly. [See *Melissa Hamilton*, "Adjudicating Sex Crimes as Mental Disease," 33 *Pace L. Rev.* 536 (2013), at 541 (arguing SVP statutes are a human rights issue because civil commitment infringes on liberty and privacy).] It should not allow for the detention of those whose mental disorders might simply predispose them to choose to commit offenses. [See *Gottlieb, supra*, at 1045 (arguing that the state must show why civilly committed individuals differ from other criminals who commit sex crimes); *Schulhofer, supra*, at 94-95.] Otherwise, states may use civil law to circumvent constitutional limits on criminal law. [See *Gottlieb, supra*, at 1035 ("If the government may simply recast its criminal proceedings as civil, it may be able to accomplish the goals it might otherwise achieve only through punishment by a simple change in nomenclature.").] We must also take care not to detain people based on assumptions with questionable scientific merit, even with the best of intentions."

Other significant notes:

28 "...Some researchers argue that child-adult sexual experience does not inevitably result in psychological harm. See *Zander, supra*, at 39 (outlining this research).

115 "As a result, the psychiatric

(Continued on page 5)

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community and its critics have spent the last century debating what constitutes a mental illness. See *Michael S. Moore, Law and Psychiatry*, at 155-216 (providing an extensive discussion about the definition of mental illness); *Zander, supra*, at 28 ("Debates about the validity of the construct 'mental illness' and 'mental disorder' have raged for the past half-century."); *Massimiliano Aragona*, "The Concept of Mental Disorder and the DSM-V," 2 *Dialogues Phil. Mental Neuro. Sci.* 1 (2009), at 1-13 (providing an example of scholarship that rejects a definition of mental disorder and argues mental disorder is best understood as a construct, which cannot provide a clear-cut demarcation between what is and is not a disorder). Some theorists argue that mental illness rarely reflects illness at all, but instead reflects subjective lay concepts and value judgments, and that the process of being labeled abnormal and ill causes psychological and social harms rather than identifying them. Such skeptics warn that psychiatry justifies coercive interventions to impose social norms rather than treat *der, supra*, at 28-29 (describing the debate about the validity of the construct of mental disorder); *Thomas Szasz*, The Myth of Mental Illness: Foundations of a Theory of Personal Conduct (1961) (arguing against classifying psychological problems as diseases or illnesses); *Eric J. Dammann*, "The Myth of Mental Illness:' Continuing Controversies and Their Implications for Mental Health Professionals," 17 *Clinical Psychol. Rev.* 733 (1997) (summarizing Szasz's views and the views of Szasz's critics)."

126 "...*De Block & Adriaens, supra* at 278 (discussing the medicalization of aberrant sexual behavior steered by the use of physicians and psychiatrists as forensic experts to help ensure the state's control over private morality)."

201 "See *Zander, supra*, at 37-40 (summarizing 'debate about the conceptual validity of the diagnosis of pedophilia'); *Studer & Aylwin, supra*, at 776-78 (advocating that future DSM editions should drop pedophilia as a category); *Malòn, supra* at 1086 (discussing controversy surrounding the appropriateness of considering paraphilias as mental disorders); *Shindel & Moser*, at 928 (arguing that all paraphilias should be removed from the DSM); *Moser, supra*, at 92-93 (stating paraphilias are 'a pseudoscientific attempt to regulate sexuality'); *Prentky et al., supra*, at 366 (citing controversy regarding diagnostic validity); *Richard Green*, 'Is Pedophilia a Mental Disorder?,' 31 *Arch. Sexual Behav.* 467 (2002), at 469-70 (questioning validity of diagnosis of pedophilia)."

205 "The Fair Housing Act (FHA) also prohibits housing discrimination on the basis of disability. 42 *U.S.C.* § 3604(f)(1)(B). Like the ADA and Rehabilitation Act, the FHA prohibits discrimination based on mental disorders that substantially impair major life activities. Id., § 3602(h); see *Bragden v. Abbott*, 524 U.S. 624, 631 (1998) (noting that the ADA uses the same definition for 'disability' that the FHA does for 'handicap.'). Unlike the ADA and Rehabilitation Act, however, pedophilia is not explicitly excluded from coverage."

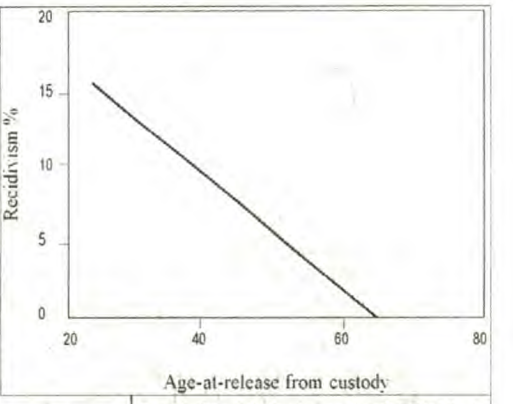
294 "...As both *Schulhofer* and *Gottlieb* have noted, we ought not to civilly commit an infectious individual who is able to control disease transmission purely on the grounds that we fear he will not act responsibly. See *Schulhofer, supra*, at 91 (arguing that quarantining an infectious individual who can control transmission of the disease would violate her autonomy as a responsible person.);.... Such quarantine would amount to preventive detention based on our fear about their future choices and would not adequate, fear that she may choose to ignore the sanctions deployed to prevent such misconduct, then a decision to quarantine her in advance is a decision to ... violate her autonomy....')."

295 "See *Schulhofer, supra*, at 92-93 ('[A] free society should never resort to regulatory confinement measures that bypass the individual's capacity for autonomous choice.'); *Ferzan, supra*, at 177-78 ('[P]ure prevention fails to take people's autonomy seriously, to announce rules, to give individuals opportunities to comply, and to treat individuals as responsible agents when we punish them.')."

328 "*Beech & Harkins, supra*, at 529 (describing the correlation between pedophilic disorder and civil commitment); *Zander, supra*, at 36 (describing the statistical connection between pedophilia diagnosis and civil commitment); *Hamilton, supra*, at 553-54 (examining statistically the role diagnoses of sexual deviance play in imposing preventive detention)."

> An individual in the throes of sexual interest does not act on reflex. He feels an interest, forms an intent, and acts on it.

331 "See, e.g., *Shindel & Moser, supra*, at 927 (stating that paraphilia diagnoses have been misused in criminal and civil commitment proceedings as indication that individuals cannot control their behavior); *Hamilton, supra*, at 554-55 (describing cases in which pedophilia was analogized to lifelong addiction); *Commonwealth v. Stephens*, 74 A.3d 1034, 1040-42 (Pa. Super. Ct. 2013) (referring to expert testimony that defendant was likely to re-offend because pedophilia was incurable, lifelong disorder); *United States v. Wetmore*, 766 F.Supp.2d 319, 336-37 (D. Mass. 2011) (citing expert testimony that the defendant was likely to re-offend because of pedophilia diagnosis); *In re Kennedy*, 578 S.E.2d 27, 29 (S.C. Ct. App. 2003) (finding pedophilia diagnosis alone sufficient to demonstrate sufficient likelihood of re-offending)."



344 "See *Morse, supra*, at 64-65 (discussing the problems inherent in measuring lack of control)."

345 "See *Frances et al., supra*, at 375-76 (describing the shortcomings of SCP definitions applied broadly by state statutes)."

361 "See *Schulhofer, supra* at 94-96 ing to act and responding to sanctions], as a substitute for reliance on the criminal process, is inconsistent with the core commitments of a free society....')."

390 "See *Beech & Harkins, supra*, at 529 (citing studies concluding that a pedophilic diagnosis is unrelated to long-term recidivism); *Robin J. Wilson et al.*, 'Pedophilia: An Evaluation Of Diagnostic and Risk Prediction Methods,' 23 *Sexual Abuse* 260, 268-70 (2011) ('However, individuals who met DSM-IV-TR-based diagnoses of pedophilia were no more likely to be convicted of a new sexual offense than those who failed to meet the DSM-IV-TR diagnostic criteria for pedophilia....'); *Heather M. Moulden et al.*, 'Recidivism in Pedophiles: An Investigation Using Different Diagnostic Methods,' 20 *J. Forensic Psychiatry & Psychology* 680, 693 (2009) ('The results suggest that those individuals diagnosed as pedophiles do not recidivate more often or more quickly than non-pedophiles.'); see also *Hamilton, supra*, at 579-80 ('Nor is a DSM diagnosis of pedophilia correlated with sexual recidivism. Actually, a study using a regression analysis method indicates that a DSM diagnosis of pedophilia is not even a significant predictor for sexual recidivism.')."

Third, sex-crime recidivism rates have been studied as a specific function of increasing age. As noted above, the comparative rates of recidivism for rapists versus those for pedosexuals are nearly identical. The real determinant of likelihood of recidivism is age itself. That is, it has been shown that the most likely recidivists sex offenders in their early 20s upon prison release. Following age 30, the recidivism rate dwindles with each increasing year of age at current prison release. This rate of recidivism is represented by a line on a graph with increasingly steep downward pitch as it passes age 40 and especially for any year over age 50. By the time one reaches age 60 -- even as measured back when the average rate was that 17%, the rate for 60-year-olds was a mere 3% (again with rapists and pepp. 43-46 on this point. Summing up, this excerpt (p. 46) is particularly apt:

"Indeed, *Wollert*'s study involved all original data used to construct the Static-99. This data set was culled from prison releases in the roughly 20-year span ending in the early 1990s – a period, as noted *supra*, of vastly higher sex-crime recidivism at all age tiers. Considering the massive reduction in base-rate recidivism (averaging all ages) since then from 17.6% to 3.2%, both in Minnesota and with roughly matching figures in other states, it is reasonable to conclude that current recidivism percentages for those ages 60-69 are now roughly one-half of 1%."

Because it takes years to ascertain actual rates of recidivism over many years following prison release, it isn't yet possible to scientifically pin down current actual remaining-lifespan recidivism rates for those at and above age 60. However, based on short-term recidivism rates, compared to earlier short-term rates at various ages, it already appears that the current long-term/remaining lifetime recidivism rate for those at age 60 is probably very near to six-tenths of 1%. Compared with the current, short-term rate for all prison-released sex offenders, this lower rate shows that the strongest factor statistically indicating more likely recidivism is not deviance, but instead simply young age. Conversely, no matter how deviant one is, the odds of recidivism at or beyond age 60 are so miniscule as to defy accurate measurement.

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In readily conceivable terms, this means that in a large auditorium containing 1,000 sex offenders in this age bracket, only six will commit another sex crime before they die. Given the lack of scientific validity to any known means to make a prediction beyond pure chance, it is impossible to know who those six will be.

Such a rare possibility does not reflect an unacceptable risk of recidivism and is certainly no excuse for refusing to release pedosexuals simply because they are pedosexuals. Yet MSOP clinical and assessment officials insist that -- even in such senior years -- no one is safe enough to release because MSOP has not conferred "graduation" from its treatment program, which requires the impossible: that one is no longer a sexual deviate.

In Greek mythology, Sisyphus was tasked, as a condition of being released from slavery, to push a huge boulder to the top of a large hill. Try as he might, he could never get the boulder to the crest of the hill. It would always exhaust and overpower him, rolling all the way back to the foot of the hill. This repeatedly forced him to start all over again – endlessly, giving rising to the expression, "a Sisyphean task." MSOP's insistence that all pedosexuals detained by MSOP must either replace that attraction with some 'standard' sexual attraction or at least extinguish or nearly extinguish it is to demand a Sisyphean impossibility. It is simply excuse-making for never releasing any pedosexual.

Because of the lack of scientific validity of any of the elements of the *MCCTA*'s SPP and SDP commitment formulae, all commitment decisions thereunder are inherently arbitrary and are mere legislative categorization of those hated and feared.

Because "pedophilia" is circularly defined by commission of crimes, and because it is not a recidivism predictor, commitment of respondents on that basis violates substantive due process.

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Unreliability & Bias in Forensic Evaluations

Lucy A. Guarnera, Daniel C. Murrie, & Marcus T. Boccaccini, "Why Do Forensic Experts Disagree? Sources of Unreliability and Bias in Forensic Evaluations," 3(2) *Translational Issues in Psychological Science* 143-152 (2017)

Text excerpts:

p. 144: "...The National Research Council (NRC) and the President's Council of Advisors on Science and Technology (PCAST) reports identified two broad areas of problems in forensic science that appear applicable to forensic psychology: (1) unknown or insufficient field reliability of forensic procedures, and (2) experts' lack of independence from those requesting their services. We address both of these areas in turn.

Unknown or Insufficient Field Reliability of Forensic Opinions

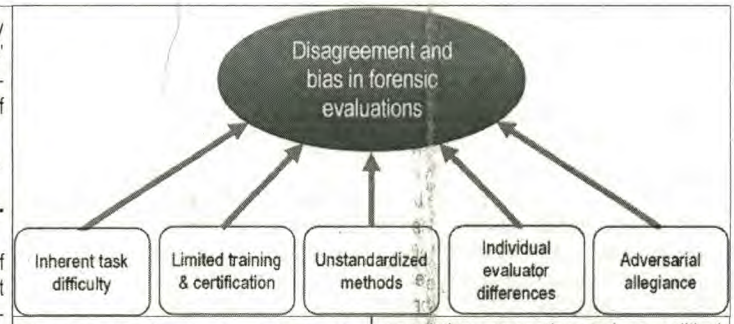
The (un)Reliability of Forensic Psychology?

Interrater reliability is the degree of consensus among multiple independent raters.[1] Of particular interest within forensic psychology is field reliability – the interrater reliability among practitioners performing under routine practice conditions typical of real-world work (Wood, Nezworski, & Stejskal, 1996). In general, the field reliability of forensic opinions is either unknown or far from perfect. ... Field reliability rates for ...common forensic opinions are similar although generally somewhat lower [than competency exam interrater reliability: 15-30% disagreement]; pairs of independent evaluators tend to disagree in approximately 25% -- 35% of sanity cases (Guarnera & Murrie, in press) and almost half (45%) of conditional release cases. (Acklin, Fuger, & Gownsmith, 2015). In a related issue, the interrater reliability of forensic assessment instruments scored under routine practice conditions in the field is often poorer than what has been documented in controlled validation studies and reported in test manuals (C.S. Miller, Kimonis, et al., 2012).

...[O]ne key foundational explanation is that forming a forensic opinion is an extraordinarily difficult task. For example, evaluations of legal sanity require clinicians to use limited and often contradictory information to draw conclusions about the mental state of a defendant at the time they committed the crime, which may have been months or even years ago.

p. 145: Figure 1. Sources of disagreement and bias in forensic evaluations.

[See next page.]



p. 146: **Unstandardized Methods**

...While there are now greater resources and consensus concerning appropriate practice than even a decade ago, forensic psychologists still vary widely in what they actually *do* during any particular forensic evaluation (Heilbrun & rooks, 2010). For example, Neal and Grisso (2014) found that 74% of forensic clinicians in a large international sample reported using at least one structured assessment tool in their most recent assessments – meaning the remaining 26% used clinical judgment alone. The 434 clinicians in the sample reported using a surprising total of 286 different tools, many with unknown reliability or validity. Furthermore, the sources of information clinicians reported using (e.g., medical records, justice records, educational records, collateral interviews, psychological testing) varied widely even within a particular type of evaluation. This diversity of methods – including the variety and at times total lack of structured tools – is likely a major contributor to disagreement among forensic evaluators.

...[L]ess structured instruments like the Psychopathy Checklist -- Revised (PCL-R; Hare 2003), ...showed an ICC_I of .60 in the field. Even within the PCL-R, more objective items with explicit scoring rules (e.g., criminal versatility), juvenile delinquency, revocation of conditional release, ICC_{AI} = .75-.80) tend to show greater field reliability than more subjective items requiring impressionistic judgments (e.g., impulsivity, glibness, callousness; ICC_{AI} = .23-.36; Sturup et al., 2014).

Individual Evaluator Differences

In addition to evaluators' inconsistent training and methods, patterns of stable individual differences among evaluators – as opposed to mere inaccuracy or random variation –seem to contribute to divergent forensic opinions. ...[S]ome evaluators assign consistently higher or lower PCL-R scores than others, even when there are no obvious differences among examinees that might explain these scoring trends (Boccaccini, Turner, & Murrie, 2008). Stable patterns of differences suggest that evaluators may adopt idiosyncratic decision thresholds that consistently shift their forensic opinions or instrument scores in a particular direction, especially when faced with ambiguous cases (Mossman, 2013).

pp. 146-47: Two factors that may contribute to evaluator's different decision thresholds are evaluator personality and evaluator attitudes. Regarding personality, A.K. Miller and colleagues (2011) demonstrated that evaluators that described themselves as more agreeable on a personality questionnaire rated offenders as less psychopathic on PCL-R items assessing glibness, grandiosity, conning, and pathologically lying (zero-order correlation = -.51, $p < .01$). The authors concluded that since agreeable people tend to assume the best about others, evaluators higher on agreeableness may have been less willing to assume that equivocal data from the case files indicated psychopathy.

...Furthermore, evaluators themselves appear to acknowledge the potential influence of attitudes on their forensic work. In a recent qualitative study, many forensic evaluators identified many preexisting personal, moral, or political values as influences on their forensic opinions (Neal & Brodsky, 2016).

p. 147: **Forensic Psychologist' Lack of Independence From the Retaining Party**

Upon these concerns about unknown or less-than-ideal field reliability of forensic psychology procedures, we now add concerns about forensic experts' lack of independence from those requesting their services (NRC, 2009). ...More modern surveys continue to identify partisan bias as judges' main concern about expert testimony, citing experts who appear to 'abandon objectivity' and 'become advocates' for the retaining party (Krafka, Dunn, Johnson, Cecil, & Miletich, 2002, p. 328).

Research on forensic psychologists working within adversarial settings appears to validate some of these concerns about adversarial allegiance, the tendency for experts to reach conclusions that support the party who retained them (Murrie et al., 2009).

...More recently, using scores from structured risk instruments (e.g., PCL-R, Statuc-99R) as a convenient way to quantify differences in expert opinion, researchers examining archival data found large scoring differences according to side of retention – prosecution-retained evaluators produced higher risk scores that made the examinee look more dangerous, while defense-retained evaluators produced lower risk scores that made the examinee look more benign. For example, Murrie et al. (2009) found an average difference of 5.8 points on the PCL-R (score range; 0-40) between opposing sexually violent predator (SVP) evaluators in Texas, a difference twice the standard error of measurement reported in the test manual (Hare, 2003).[3]

Recent surveys also suggest that evaluators tend to interpret risk scores in a way that favors the side that retained them (Boccaccini, Chevalier, et al., 2015; Chevalier, Boccaccini et al., 2015). For example, Chevalier et al. (2015) found that 94% of state-retained evaluators reported using high-risk/need norms for the Statis-99R (a way of interpreting scores that makes the examinee seem more risky, as compared to routine sample norms), but only 33% of respondent-retained evaluators reported using high-

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risk/need norms. Thus, two opposing evaluators who arrive at the same numerical score on a risk assessment instrument might still draw biased conclusions that favor the retaining side through differing norm selection.

pp. 147-48: These surveys and field studies of adversarial allegiance cannot rule out the possibility of selection effects creating the observed scoring differences (Murrie & Boccaccini, 2015). Attorneys may preselect evaluators whom they know to be sympathetic to their point of view, or gather preliminary opinions from multiple evaluators and ultimately retain only the most favorable opinion. Furthermore, may self-select according to preexisting attitudes or preferences, choosing to accept or decline particular types of cases or cases from particular referral sources (Neal, 2016). To eliminate the possibility of selection effects, Murrie and colleagues (2013) conducted an experiment where practicing forensic evaluators were randomly assigned to believe they were working for the prosecution or the defense on a real-world case consultation. Even with random assignment, evaluators still tended to score cases in the direction of allegiance. Unsurprisingly, allegiance effects were larger for the PCL-R (medium to large effect sizes;....) than for the more structured and objective Static-99R (small effect sizes;....). While the Murrie et al. (2013) experiment used sex offender case files scored with popular risk assessment instruments, other types of forensic evaluations and instruments likely show the same vulnerability to adversarial allegiance.

p. 148: **Future Directions for Research, Practice, and Policy**

The research overviewed here points to the growing realization that some portion of every forensic opinion – perhaps a larger portion than we now acknowledge –has more to do with the examiner than the examinee. This is a serious problem that risks arbitrary or unjust outcomes for those undergoing forensic evaluations, as well as diminishing the legal system's confidence in psychological expertise. Unreliable evaluations can also put the community at risk (e.g., assigning a low risk score to a truly high-risk individual likely to offend again). At the same time, some degree of unreliability and bias on complex human decision tasks is unavoidable in light of our 'bounded rationality'(Gigerenzer & Goldstein, 1996). Given this tension, what next steps are possible to prevent forensic psychology from becoming the NRC or PCAST's next target?....

Given that increased standardization of forensic methods has the potential to ameliorate multiple sources of unreliability and bias described here, more investigation of forensic instruments, checklists, practice guidelines, and other methods of standardization is a second research

priority (Aegisdottir et al, 2006). Some of this research should continue to focus on creating standardized tools for forensic evaluations and populations for which none are currently available. ...More qualitative (e.g., Pinals, Tillbrook, & Mumley, 2006) and quantitative (e.g., Neal & Grisso, 2014) investigations of how instruments are administered in routine practice, why instruments are or are not used, and what practical obstacles evaluators encounter are needed. Without greater understanding of how instruments are (or are not) implemented in practice – particularly in rural or other undersourced areas – continuing to develop new tools may not translate to their increased use in the field.

p. 149: ...While many clinicians cite introspection (i.e., looking inward to identify one's own biases) as a primary method to counteract personal ideologies, idiosyncratic responses to examinees, and other individual differences (Neal & Brodsky, 2016), research suggests that introspection is ineffective and may even be counterproductive (Pronin, Lin, & Ross, 2002). Thus, more disciplined changes to personal practice are needed. For example, when conducting examination for which well-validated structured tools exist, evaluators could commit to using such tools as a personal standard of practice. This would entail justifying to themselves (or preferably colleagues) why they did or did not use an available tool for a particular case. Practicing forensic evaluators could also use simple debiasing methods to counteract conformation bias, such as the 'consider-the-opposite' technique in which evaluators ask themselves, 'What are some reasons why my initial judgment might be wrong?' (Mussweiler, Strack, & Pfeiffer, 2000). To increase personal accountability, evaluators could keep organized records of their own forensic opinions and instrument scores, or even help organize larger databases for evaluators within their own institution or locality (Lemer & Tetlock 1999). Using these personal data sets, evaluators might look for mean differences in their own treatment score when retained by the prosecution versus the defense, or compare their own base rates of incompetency and insanity findings to those of their colleagues.

Modern surveys continue to identify partisan bias as judges' main concern about expert testimony, citing experts who appear to 'abandon objectivity' and 'become advocates' for the retaining party.

Ambitious evaluators could even experiment with blinding themselves to the sources of referral in order to counteract adversarial allegiance (Robertson & Kesselheim, 2016). For example, evaluators could try using a case manager, an individual who communicates with attorneys and controls the inflow and outflow of information, in order to prevent irrelevant, biasing information (such as the identity of the retaining party) from reaching the evaluator (Dror, 2013). Evaluators may soon be able to market (to attorneys or the court) their willingness to serve as blinded experts, since research suggests that mock jurors view the testimony of blinded experts as more credible (Robertson & Yokum, 2012).

Notes:

1 See generally Gwet (2014) for a more in-depth definition and discussion of interrater reliability.

3 *SVP* refers to sexually violent predator provisions, which allow for sexual offenders to be committed after completing their criminal sentence. While SVP proceedings are technically civil, they still involve an adversarial arrangement, with different forensic psychologists testifying for the state and for the respondent (i.e., the individual being considered for commitment).

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Lawyers Must Have "Tech Competence."

Robert Ambrogi, "Tech Competence," LawSites, https://www.lawsitesblog.com/tech-competence

Text Excerpt:

"*39 States Have Adopted the Duty of Technology Competence*

In 2012, something happened that I call a sea change in the legal profession. The American Bar Association formally approved a change to the Model Rules of Professional Conduct to make clear that lawyers have a duty to be competent not only in the law and its practice, but also in technology.

More specifically, the ABA's House of Delegates voted to amend Comment 8 to Model Rule 1.1, which pertains to competence, to read as follows:

'*Maintaining Competence*

To maintain the requisite knowledge and skill, a lawyer should keep abreast of changes in the law and its practice, including the benefits and risks associated with relevant technology, engage in continuing study and education and comply with all continuing legal education requirements to which the lawyer is subject.' [Emphasis added by author.]"

[Minnesota adopted this revised comment to Rule 1.1 on Feb. 24, 2015.]

Editor's Closing Note: Obviously, this applies to Incompetence by defense lawyers in SOCC cases, for instance, as to sex offender risk assessment practices and its actuarial tools, diagnoses of claimed sexual and/or personality disorders, and the inability of experts or science more generally to determine the existence of volitional impairment. Minnesota attorneys on panels volunteering their services pro bono or by court remuneration for such defense show stunningly abysmal incompetence in each of these critical fields. Hence, they are not competent to provide that defense. When this incompetence leads to commitment that would not have taken place but for such incompetence, these attorneys are subject to professional disci-

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SOCC Is the Rise of the Preventive State.

Eric S. Janus, "The Preventive State, Terrorists and Sexual Predators: Countering the Threat of a New Outsider Jurisprudence," 40 *Crim. L. Bull.* 576 (2004).

Text Excerpts:

p. 576: "...Using a phrase coined by Professor Carol Steiker, we are at risk of becoming a 'preventive state,' in which the paradigm of governmental social control has shifted from solving and punishing crimes that have been committed, to identifying 'dangerous' people and depriving them of their liberty before they can do harm.[1]

pp. 576-77: The impulse for prevention has taken its strongest form in two disparate areas: the antiterrorism efforts since 9/11, and ongoing legislative innovations in the campaign against sexual violence. In both areas, the government has erected what Professor Oren Gross has called an "alternate system of justice"[2] in which the normal protections of our civil liberties are substantially degraded in order to make room for an aggressive preventive agenda. Here, ...I am concerned with ...what might be called radical prevention – that differs from routine prevention in two ways. First, radical prevention seeks to intervene where there is some sort of "propensity" or risk of future harm, whereas routine prevention responds to actual or attempted harm. Second, radical prevention operates by substantially curtailing people's liberty before harm results, whereas in routine prevention individuals suffer deprivations of liberty only after actual harm is done or attempted....

pp. 577-78: The central thesis of this Article is that the sexual predator laws provide a model for undercutting these constitutional protections for liberty. The laws undercut these key bulwarks, and allow the establishment of an expansive alternate and degraded system of justice, in which radical prevention prevails at the

expense of liberty. Sexual predator laws do this by reintroducing and relegitimizing the concept of the degraded "other." Membership in this outsider group is then used to rationalize a degraded system of justice, in which the normal protections of the Constitution do not apply....

pp. 582-83: II. The Push for Radical Prevention to Combat Sexual Violence

...Sexual predator laws take two forms. Commitment laws are aimed at sex offenders who are completing their prison sentences, but are judged "too dangerous" to be released.[26] The laws are limited to offenders who not only pose a risk of future sexual harm, but also have some form of "mental disorder." Like conventional mental illness commitment laws, the predator laws are deemed civil not criminal in nature.[27]

Confinement is not in prisons, but in secure treatment facilities. Commitments are for an indeterminate period, ending only when the individual is no longer dangerous. In practice, however, committed sex offenders are very rarely discharged from these treatment facilities.[28]

The primary, articulated purpose for these laws is incapacitation--prevention of future sexual violence by means of direct physical constraint. Treatment is identified as an additional purpose.[29]

p. 596: IV. Sexual Predator Laws: A Ready Template for the Preventive State

pp. 599-600: "Difficulty controlling" behavior is ubiquitous among "normal" human beings. Many people have difficulty – serious difficulty – controlling their eating, smoking, gambling, alcohol or drug use, computer gaming, or work hours. Further, it turns out (unsurprisingly) that impaired self-control is almost a defining characteristic of most people who engage in crime. Failure of self-control is a characteristic that sex offenders and other criminals share. Knight and Prentky report that "lifestyle impulsivity" is highly predictive of future sexual reoffending and is a "relatively robust predictor of reoffense risk across domains of criminal behavior."[88] One of the most widely accepted general theories of criminality, that of Gottfredson and Hirschi, argues that criminality stems from an underlying deficit in self-control.[89] Poor self-control is widely thought to be a "stable and robust predictor of reoffending among the general criminal population."[90] As Baumeister et al. point out: "the most important generalization about crime and criminality is that they arise from lack of self-control. Most crimes are impulsive actions, and most criminals exhibit broad and multifaceted patterns of lacking self-control."[91] In short, impaired self-control does not make sex offenders different from other criminals – it is precisely what makes them similar to other criminals.

pp. 600-01:Behind the "mental disorder" screen, the real work of creating the outsider group is done by the concept of risk as employed in the predator laws. Like diagnosis, risk-assessment is seen as an expert endeavor, one that is increasingly seen as being scientific.[92] Predator laws reify risk, make it concrete and ascribe it to the individual. Risk assessment reduces the future to a present "condition" or "propensity." It "seeks to bring the future into the present."[93] This is necessary because otherwise we couldn't lock somebody up now because of what they might do in the future. While the "causal factors" for violence may be a combination of internal (psychological) and external (environmental) factors,[94] the resultant "risk" is ascribed solely to the individual. He "is" dangerous, he "has" risk, and it is his "possession" of these characteristics that justifies his incarceration. Under the predator template, we lock people up who "pose a threat to others, not because of what they had done but because of who they are, because their very makeup as a human being made them a threat to 'the community.'"[95]

pp. 601-02: As constructed by the predator laws, risk tells us something essential – rather than accidental – about the person. This characteristic – sometimes called "dangerousness"--serves as a stable ingredient of the person, a part of him even if it is not now visible.[96] It is this internal characteristic, treated as having long-term stability, that justifies both the prediction of future behavior and the creation of outsider status. This is not

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simply a person who commits a crime, but rather a person whose nature is criminal, "a 'criminal man', a person who by his very nature is driven to commit the most violent of crimes against the most vulnerable of victims."[97]

In the predator template, risk quietly takes the place of race, gender, sexual orientation and disability in the outsider jurisprudence. The concept of risk, however, tends to remove the taint of racism, sexism, homophobia and other forms of rejected prejudice. Risk is seen as something in nature, "an ontological state of the world,"[98] "a material object amenable to objective calculation and measurement."[99] The use of science to measure risk and to demonstrate a "condition" underlying human violence, gives risk a "moral neutrality [and] scientificity."[100]

But this "naturalizing" of risk is misleading, disguising a strong moral condemnation of "the risky." As noted by Hudson, "the language of risk plays the same role in contemporary society as stigma and taboo in pre-modern societies."[101] "The morally neutral scientific, actuarial terminology of risk disguises the condemnatory pariahdom created by the classification. Persistent offenders, especially sex offenders, become the new lepers: diseased, incurable, unable to control outbreaks, themselves to blame for whatever privations society imposes upon them."[102]

pp. 602-03: Thus, we see that risk functions in much the same way that race did as a marker of degraded status. Of course, risk and race differ in many critical aspects. After all, unlike members of racial groups, the members of the group others in egregious ways, and it is this behavior – at least in part – that has landed them in the risky category. Sex offenders are properly blamed for the crimes they have committed. But this blame is expiated, so far as the law is concerned, in the criminal punishment that the justice system has meted out. Under the Constitution, the imposition of civil commitment, and the intrusive impositions on privacy and liberty of Megan's laws, cannot be premised on the blameworthy criminal "guilt" of the individuals.[103]

Furthermore, past harmful behavior is only a contingent feature of risk, perhaps an artifact of the limitations on our current ability to measure risk. There is nothing inherent in the notion of risk that limits its application to people who have actually engaged in harmful behavior. The logic of risk assessment would suggest that the risk exists even before any harmful behavior has occurred.

We are at risk of becoming a 'preventive state,' in which the paradigm of governmental social control has shifted from solving and punishing crimes that have been committed, to identifying 'dangerous' people and depriving them of their liberty before they can do harm.

Indeed, there is a long tradition – and a developing science –suggesting that the seeds of future antisocial behavior are in the person long before they become manifest. For at least a century, researchers have sought to identify something unique and different about criminals. The idea is that crime is not really a choice that an individual makes, but rather a manifestation of some aspect of his or her "constitution" or essential make-up. This sort of thinking has inspired a variety of "scientific" attempts to demonstrate a "criminal personality," a genetically inferior "type," related to the "lower" species, destined to commit crime.[104] In its 1939 Pearson decision, the Minnesota Supreme Court referred to "sex psychopaths" as "hopelessly immoral" and as a "type[] of 'unnaturals'."[105]

p. 604: In many ways, the early attempts to identify a "criminal type" have been discredited.[106]

But recent developments in science may breathe new life into this notion. In 2003, Harris and Rice recognized that "the preponderance of scientific evidence supports the idea that the majority of variance in violent criminal conduct (including sexual aggression) can be attributed to genetically and physiologically based enduring traits that, once initiated, exhibit life-long persistence under conditions so far observed."[107] In a similar vein, Quinsey has noted that there are a number of distinct psychological criminal violence. He notes that although each of these approaches uses somewhat different methods and includes somewhat different factors, their results correlate with each other and with future violence.[108] Building on the work of David Rowe, Quinsey wonders whether "a super-factor, called 'd,' underlies all of the disparate correlates of criminal propensity." Quinsey compares "d" (for deviance) with "g," the super-factor that underlies intelligence. Noting that "g" "is a biological variable reflecting some aspect of neural process speed," Quinsey cautions that "it is much less clear what the nature of d is."[109]

Quinsey's caution, however, may be irrelevant in the development of the law. The predator template provides a ready vehicle to transform this "condition" – the presence of "d" - into the mark of an outsider status.

p. 605: After Lawrence, we might have been tempted to pronounce American outsider jurisprudence all but dead. But there is evidence that the existence of the "degraded other" was not a horrible historical diversion, but rather a tragic, though central, aspect of our liberal democracy. We can see Lawrence as one key victory in a struggle to overcome a powerful addiction. But like all addicts, America is not cured of this disease, and must be vigilant to resist those apparently innocent "lapses" that lead inexorably to full relapse. The predator template is not an anomaly, but a reversion to a practice that fits all too comfortably into liberal democracies.

Barbara Hudson argues that the "key question for liberal theories of justice [is] that of membership and exclusion. Who is to be included in the community of justice, and whom is the just community to defend itself against?"[110] She endorses the work of Gilroy and Said, who posit "the necessity for liberalism of constructing irrational, uncivilized black and oriental 'others' who are defined by their lack of everything that distinguishes the citizen of the west."[111]

pp. 605-06: The role played by the negative other in liberal systems, according to Hudson, is to define what it means to have rights, by showing its opposite: "for rights to have meaning, to be cognitively as well as politically recognized, there must be groups without rights, so that the difference between rights and non-rights can be appreciated."[112] Outsider groups inhabit what I have referred to in this article as an "alternative system of justice." Hudson's point is that the existence of such a "no-rights zone" is not anomalous in liberal democracies, but rather consistent with their essential natures. Noting that even John Stuart Mill espouses "despotism" as a "legitimate mode of government in dealing with barbarians," limits that should be placed on measures taken to protect good citizens against the risky and dangerous. ...they have no real existence for us as moral agents with claims upon us....The tenets of rights-respecting democratic governance do not apply to them.[113]

p. 606: Hudson's analysis helps explain why the sexual predator template poses distinctive threats at this juncture in our history. The predator laws provide the outsider jurisprudence with a new and legitimized foothold in our national consciousness. There is a danger that this foothold will awaken our old addiction, supporting an expansive use of outsider logic, just at a time when we thought we had gotten some control over that destructive and immoral practice. Just as threatening is the role that the negative other plays in defining the meaning and scope of rights that "we the people" retain. By creating an outside group with radically reduced rights, the predator template changes the scale against which we measure and understand the terrorism-related restrictions on our own

Uniquely Stigmatizing Consequences, ala Philip Glass, *Waiting for the Barbarians*

rights. To the extent that an outsider exists in a legally degraded alternate system of justice, "our" protected position under the Constitution's umbrella is highlighted. The stark contrast between "our" rights and the outsiders' non-rights may obscure the serious, but relatively less severe degradation of rights enjoyed by the "in" group.

pp. 606-07: The predator template threatens the traditional liberty/security balance by transitioning from "guilt" to "risk" as the key predicate for liberty deprivation. Again, this is not an isolated or aberrational development, but an important move that accelerates and legitimizes major transformations in our society. Feeley and Simon have argued that we are becoming "markedly less concerned with responsibility, fault, moral sensibility" and more concerned with "techniques to identify, classify, and manage groupings sorted by dangerousness."[114] Many see this as part of a larger development, the rise of the "risk society." Rose describes Ulrich Beck's "claim that we live in 'risk society,' ... saturated with fear and foreboding, by hazards, political 'bads' or dangers and attempts to avoid harm."[115] In the "risk society," according to Hudson, governance makes the avoidance of risk "'the central object of decision-making processes, and administering individuals, institutions expertise and resources in the service of that ambition.'"[116]

pp. 607-08: This move from guilt to risk removes key constraints on the state's ability to limit liberty. The move to risk entails increased (and qualitatively different) surveillance of citizens. Under the traditional approach, our criminal justice system is in a crime-solving mode. Intervention and intrusion by the government are in response to some identified criminal activity, and only those whose behavior suggests a link to the crime are targeted. But the law must cast a much broader net if it is to prevent crime before it happens.[117] The more distant the "risk" is from actual crime, the broader must be the gaze of the government. We are accustomed to preventive surveillance in limited and public areas of our lives, such as measuring the our speed by radar on

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the highway. And in limited "special circumstances," the Supreme Court has approved "suspicionless searches" that intrude more deeply into our privacy.[118]

But the predator template legitimizes broad and intrusive surveillance of entire subpopulations. In this alternative system of justice, surveillance need not be limited only to those who are suspected of having committed a crime. Predator laws transform the government's role from reactive crime solving, to pro-active risk-assessment and control. The latter is much more intrusive and expansive than the former. Crime-solving begins when a crime is reported. Risk assessment precedes an actual event, and, by definition, is much broader than the crime whose "risk" is being assessed. Because it involves finding "risk" rather than "guilt," risk-assessment must necessarily touch many more people than crime-solving, by large orders of magnitude. Risk, says Kemshall, "becomes a self-justificatory logic for increased extension of the surveillance network into every aspect of social life."[119]

Further, the science and the politics of risk combine to broaden the scope of surveillance. The development of actuarial risk-assessment tools make risk-assessment much simpler to administer than the traditional clinical psychological examination. Though some of these tools remain rather complex, and require extensive documentation to administer, others are brief screening that are relatively simple to score.[120] Risk assessment will increasingly become a practical possibility, even for large groups of potentially risky people.

The very possibility of measuring risk creates a powerful pressure to prevent the risk. As Rose puts it:

p. 609: '[O]nce it seems that today's decisions can be informed by calculations about tomorrow, we can demand that calculations about tomorrow should and must inform all decisions made today. The option of acting in the present in order to manage the future rapidly mutates into something like an obligation.'[121]

Experience with the predator laws confirms this reality of this "obligation." Risks "are subject to 'hindsight scrutiny,' and with the luxury of hindsight, a key test for risk decisions is their defensibility."[122] There is immense political pressure to translate risk-knowledge into risk control. But because risk is a continuous variable (unlike guilt), this pressure has no inherent stopping point. The safest course for politicians is to promote the notion of "zero tolerance" for risk,[123] to expand preventive control to cover all degrees of risk, broadening the populations being assessed, and a lowering of the risk threshold for intervention.[124] As Hudson puts it, "the demand for safety is insatiable."[125]

Conclusion

Security--as achieved by the control of harmful behavior--is a necessary precondition to the enjoyment of liberty.[126] The question is how the two shall be balanced. In this Article, I have addressed a particular aspect of that more general question: how actual must the harm be before the government may intervene with substantial impositions on a person's liberty?

p. 610: No one is opposed to punishing people who engage in terrorism or commit rape, or for arresting people who are conspiring to commit terrorist acts or attempting to lure children over the Internet. We can all agree on the value of programs that seek to prevent sexual violence or infectious diseases by changing the conditions that are conducive to violence and disease in the society. The problem is not prevention – but radical prevention: invading people's privacy and physical liberty not in response to harm done, but rather to respond to a perceived "propensity" or "risk" of future harm.

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

Over the centuries, American jurisprudence has gradually imposed a strong set of safeguards against an overextension of security at the expense of liberty. These safeguards are both constitutional and political. We rely on both the courts and the political process to draw the right balance. But our history – and perhaps the very nature of our liberal democracy – exposes an Achilles heel in these safeguards. When we have targeted an outsider group, we disable the normal constitutional and political protections, creating a separate and degraded system of justice.

The threat of terrorism creates pressure to expand our programs of radical prevention. To date, with respect to bio-terrorism, the normal safeguards appear to be working to keep this pressure in check. But the template provided by the sexual predator laws could disable those safeguards, paving the way for an expansive, and liberty-constricting, preventive state."

Notes:

1 *Carol Steiker*, Foreword: The Limits of the Preventive State, 88 *J. Crim. L. & Criminology* 771, 774 (1998).

2 *Oren Gross*, Chaos and Rules: Should Responses to Violent Crises Always Be Constitutional?, 112 *Yale L.J.* 1011, 1018 (2003).

3 *Gross, supra* note 2, at 1038.

26 *Eric S. Janus & Nancy Walbek*, Sex Offender Commitments in Minnesota: A Descriptive Study of Second Generation Commitments, 18 *Behav. Sci. & L.* 343 (2000). A "first generation" of sex offender commitment laws flourished beginning the late 1930's after Minnesota's "sex psychopath" law was upheld in *State of Minnesota ex. rel. Pearson v. Probate Court*, 287 N.W. 297 (Minn. 1939), aff'd, 309 U.S. 270 (1940).

27 See *Kansas v. Hendricks*, 521 U.S. 346 (1997).

28 See *Eric S. Janus & Wayne A. Logan*, Substantive Due Process and the Involuntary Confinement of Sexually Violent Predators, 35 *Conn. L. Rev.* 319, 323 n.23 (2003) (noting very low rates of release for committed sexual predators).

29 *Kansas v. Hendricks*, 512 U.S. 346, 367 (1997).

88 *Robert A. Prentky & Raymond A. Knight*, Identifying Critical Dimensions for Discriminating Among Rapists, 59 *J. of Consulting and Clinical Psychology* 643, 643 (1991).

89 See *Daniel A. Krauss et al.*, Beyond Prediction to Explanation in Risk Assessment Research: A Comparison of Two Explanatory Theories of Criminality and Recidivism, 23 *Int'l J.L. & Psychiatry* 91, 98 (2000).

90 *Robert J. McGrath*, Sex Offender Risk Assessment and Disposition Planning: A Review of Empirical and Clinical Findings, 35 *Int'l J. Offender Therapy and Comparative Criminology* 328, 338 (1991).

91 *Roy F. Baumeister et al.*, Losing Control: How and Why People Fail at Self-Regulation 11-12 (1994).

92 *Janus & Prentky, supra* note 33.

93 *Nikolas Rose*, At Risk of Madness, in Embracing Risk: The Changing Culture of Insurance and Responsibility 214 (Tom Baker & Jonathan Simon eds., 2002).

94 *J. Arboleda-Florez et al.*, Understanding Causal Paths Between Mental Illness and Violence, 33 *Social Psychiatry & Psychiatric Epidemiology* S38-S46 (Supp. 1998); *V.A. Hiday*, Understanding the Connection Between Mental Illness and Violence, 20 *Int'l Law Psychiatry* 399, 399-417 (1998).

95 *Rose, supra* note 93, at 209.

96 *Grant T. Harris & Marnie E. Rice*, Actuarial Assessment of Risk Among Sex Offenders, in Sexually Coercive Behavior: Understanding and Management 989 (Robert A. Prentky et al. eds., 2003).

97 *Michael Petrunik*, Models of Dangerousness: A Cross Jurisdictional Review of Dangerousness Legislation and Practice, *Public Safety and Emergency Preparedness Canada* (Feb. 1994), avail. at http://www.psepcsppcc.gc.ca/publications/corrections/ 199402_e.asp.

98 *Carol C. Jaeger et al.*, Risk, Uncertainty, and Rational Action 18 (2001).

99 *Hazel Kemshall*, Understanding Risk in Criminal Justice 6 (Mike Maguire ed., 2003).

100 *Hudson, supra* note 39, at 66 (quoting *Mary Douglas*, Purity and Danger: An Analysis of Conceptions of Purity and Taboo (1966)).

101 *Hudson, supra* note 39, at 66.

102 *Hudson, supra* note 39, at 67.

103 *Hendricks*, 512 U.S. at 347 (noting that a conviction for a prior sexual offense does not again "affix culpability for prior criminal conduct, but uses such conduct solely for evidentiary purposes.").

104 *Stephen J. Gould*, The Mismeasure of Man 113-45 (1981).

105 *State of Minnesota ex. rel. Pearson v. Probate Court*, 287 N.W. 297, 301 (Minn. 1939), aff'd, 309 U.S. 270 (1940).

106 See generally *Gould, supra* note 104.

107 *Harris & Rice, supra* note 96, at 208.

108 Roundtable Discussion, Risk Assessment: Discussion of the Section, in Sexually Coercive Behavior: Understanding and Management 240 (Robert A. Prentky et al. eds., 2003).

109 Roundtable Discussion, *supra* note 108.

110 *Hudson, supra* note 39, at 38.

111 *Hudson, supra* note 39, at 181.

112 *Hudson, supra* note 39, at 181-82.

113 *Hudson, supra* note 39, at 183-84.

114 *Rose, supra* note 93, at 214 (quoting *Malcom Feeley & Jonathan Simon*, The New Penology: Notes on the Emerging Strategy of Corrections and Its Implications, 30 *Criminology* 449, 452).

115 *Rose, supra* note 93, at 213.

116 *Hudson, supra* note 39, at 44.

117 See *Kemshall, supra* note 99, at 1 (noting a "shift from the 'reactive investigation of individual crimes' to a 'strategic, future-oriented and targeted approach to crime control'.") (quoting *Mary Maguire*, Policing By Risks and Targets: Some Dimensions and Implications of Intelligence-led Crime Control, 9 *Policing and Society* 315, 316 (2000)).

118 See, e.g., *New Jersey v. T.L.O.*, 469 U.S. 325, 328 (1985).

119 *Kemshall, supra* note 99, at 33.

120 *Janus & Prentky, supra* note 33.

121 *Rose, supra* note 93, at 214.

122 *Kemshall, supra* note 99, at 12 (quoting *D. Carson*, Risking Legal Repercussions, in 1 Good Practice in Risk Assessment and Risk Management (H. Kemshall and J. Pritchard eds., 1996).

123 *Kemshall, supra* note 99, at 1.

124 *Janus, supra* note 30.

125 *Hudson, supra* note 39, at 60.

126 *Hudson, supra* note 39, at 40.

The template provided by the sexual predator laws could disable those safeguards, paving the way for an expansive, and liberty-constricting, preventive state.

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