"The Strings in the Books Ain't Pulled and Persuaded": How the Use of Improper Statistics and Unverified Data Corrupts the Judicial Process in Sex Offender Cases

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I. Introduction

We begin this article by sharing something about our past legal practice careers, as we believe that is so relevant to the topic that we focus on in this article. When MLP was a rookie Public Defender in Trenton, NJ (in the early 1970s), he regularly visited the Menlo Park Diagnostic Center where some of his clients – those who had been found, in the phrase used then, to be "repetitive and compulsive sex offenders"[1]-- were housed. When HEC was a rookie Public Defender in Newark NJ, in the late 2000s, she regularly visited the Special Treatment Unit (STU) – attached to the state prison in Avenel, NJ- where some of her clients – now classified as sexually violent predators -- were housed.[2] When the two of us talked about our experiences during the latter years, we were stunned at the similarities that we found: almost no meaningful treatment of any sort; prison-like conditions, and a population made up of a (distinct minority) of those whom we would all agree were a significant danger to the

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[1] See e.g., N.J. STAT. ANN. § 2A:164-3, repealed by L. 1978, N.J. STAT. ANN. § 2C:98-2 (West 1998). See generally Deborah W. Denno, *Life Before the Modern Sex Offender Statute*s, 92 NW. U. L. REV. 1317 (1998).

[2] See generally, Melissa Wangenheim, *"To Catch a Predator": Are We Casting Our Nets Too Far?: Constitutional Concerns Regarding the Civil Commitment of Sex Offenders*, 62 RUTGERS L. REV. 559, 58-83 (2010).

community but a majority of whom had committed crimes involving no personal contact.[3]

As we discussed this further, we both inevitably focused on what is at the heart of this paper: the way that improper statistics and unverified data has so contaminated the "debate" (quote marks need to be put around that word) whether in Facebook discussions or in US Supreme Court cases. We believe we have an absolute obligation to call out those who distort the evidence and create a false consciousness in this area, be they TV news pundits or Supreme Court justices.[4] We use the word "corrupts" in our title consciously because we believe that what has resulted is the corruption of the judicial process.[5] Our thesis is

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[3] In the 1970s, the vast majority of residents of the sex offender facility in NJ were charged with such crimes as peeking in windows and the theft of underwear from laundromats.

[4] See e.g., *37 Scarey Repeat Sex Offenders Statistics (undated),* accessible at https://healthresearchfunding.org/37-scarey-repeat-sex-offenders-statistics/; Jessica M. Pollak & Charis E. Kubrin, *Crime in the News: How Crimes, Offenders and Victims Are Portrayed in the Media*, 14 J. CRIM. JUST. & POPULAR CULTURE 59, 60-64 (2007).

We are not so naïve to think it will have much of a difference on Facebook debates, but we do hope that it may eventually have an impact on the way that both trial and appellate courts approach these issues.

[5] We are aware that the phrase "judicial corruption" usually is defined to include the receipt of something of value. See e.g., Cynthia A. Koller & Elizabeth B. Koller, *Splintered Justice: Is Judicial Corruption Breaking the Bench?* 47 No. 5 Crim. L. Bull. Art. 5 (Fall 2011) ("we define judicial corruption as: *a breach of the public's delegated and implied trust in which judges manipulate the power of their official positions by receiving or agreeing to receive something of value in return for influence in the performance of their official duties*") (emphasis in original). *See also*, Tom Condon, *Sex Offender Registry: More Harm than*

simple. An examination of a range of judicial decisions involving sexual offender determinations reveals that, frequently, courts rely improperly on inaccurate and underdeveloped statistics as well as unverified and outdated information. This reliance, too often, underlies rulings that subject the sex offender to significant sanctions and loss of liberty. Additionally, the continuation of the testimonial script that all sex offenders are high recidivists, dangerous, compulsive, and untreatable, contributes to the anti-therapeutic effect of shaming and humiliation.[6] This results in isolation, seclusion, lack of dignity; also, it further trivializes the judicial process, and violates the tenets of therapeutic jurisprudence. We will consider each of these, and we will look at all of this through the filter of the Supreme Court's decision in *McKune v. Lile*,[7] a case decided sixteen years ago, but one that is beginning to resurface in new,

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Good?, CT Mirror (May 21, 2018) available at: https://ctmirror.org/2018/05/21/sex-offender-registry-harm-good/. However, the meaning of "corruption" in this context goes far beyond the simple exchange of money-for-favors. See Kellam Conover, *Rethinking Anti-Corruption Reforms: The View from Ancient Athens*, 62 Buff. L. Rev. 69, 69 (2014) ("Over two millennia ago, Aristotle posited that ruling in one's own interest, not in the people's interest, causes polities to deviate from their intended purpose— what he terms `corruption,'" citing Aristotle, Politics bk. 3, § 1279a29-33 (H. Rackham trans., Harvard Univ. Press rev. & reprt. ed. 1990)). See also, Zephyr Teachout, *Love, Equality, and Corruption*, 84 FORDHAM L. Rev. 453, 455 (2015) (arguing that Aristotle understood corruption in the context of "questions of motive, intent, feeling, and passion").

[6] We discuss how "the focus of sex offender laws is to shame and humiliate those persons subject to regulation" extensively in Michael L. Perlin & Heather Ellis Cucolo, SHAMING THE CONSTITUTION: THE DETRIMENTAL RESULTS OF SEXUAL VIOLENT PREDATOR LEGISLATION (2017).

[7] 536 U.S. 24 (2002).

critical literature that has deconstructed its basic fallacy in ways that we hope will stay at the forefront of this debate for the coming years.[8]

Our title comes from one of Bob Dylan's greatest songs, *The Lonesome Death of Hattie Carroll*, about the death of a country club waitress at the hands of an inebriated tobacco empire scion.[9] It comes from a verse that – importantly for our purposes – talks about the sort of judicial corruption that Dylan saw in that case (in which the defendant was given a 6-month sentence):

> In the courtroom of honor, the judge pounded his gavel
> To show that all's equal and that the courts are on the level
> *And that the strings in the books ain't pulled and persuaded*
> And that even the nobles get properly handled.[10]

We argue here that, in fact, the "strings in the book" *are* "pulled and persuaded" so that judges do not have to deal with the reality to which they willfully blind

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[8] For the most recent critique, see David T. Goldberg & Emily R. Zhang, *Our Fellow American, the Registered Sex Offender*, 2017 CATO SUP. CT. REV. 59, 76 (2016-2017) ("Justice Kennedy's plurality opinion in *McKune v. Lile*, which offered a litany of deeply problematic factual assertions about `sex offenders[,]'…continue to shape legal decisions to this day.").

[9] See Michael L. Perlin, *Tangled Up in Law: The Jurisprudence of Bob Dylan*, 38 FORD. URB. L.J. 1395, 1404 (2011): "Even if Dylan had only written Hurricane and The Lonesome Death of Hattie Carroll …, he would have had more of an impact on the way that the American public thinks about the criminal justice system than all the professors of criminal law and procedure (including myself) put together."

[10] http://bobdylan.com/songs/lonesome-death-hattie-carroll/ (emphasis added).

themselves:[11] that the premises of their decisions related to the assessment of who is a sexually violent predator are built on houses of cards that could and should crumble quickly if we examine – dispassionately – the underlying statistics and data. In a recent article, one of the co-authors (MLP) has critiqued the teleological way that courts interpret biologically-based evidence in a range of criminal procedure cases, so that they can end up with the result that, a priori, they want to reach,[12] looking specifically at how "judges who, like the rest of us, are subject to an incessant media barrage of media hysteria on questions of whether sex offenders are likely to recidivate."[13] We believe that it is *impossible* to make sense of the law or the science in this volatile area of law and policy until we come to grips with this reality.

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[11] See e.g., Global–Tech Appliances, Inc. v. SEB S.A., 563 U.S. 754, 766 (2011) ("Many criminal statutes require proof that a defendant acted knowingly or willfully, and courts applying the doctrine of willful blindness hold that defendants cannot escape the reach of these statutes by deliberately shielding themselves from clear evidence of critical facts that are strongly suggested by the circumstances").

[12] Michael L. Perlin *"I've Got My Mind Made Up": How Judicial Teleology in Cases Involving Biologically Based Evidence Violates Therapeutic Jurisprudence,* -- CARDOZO JOURNAL OF EQUAL RIGHTS AND SOCIAL JUSTICE -- (2018, forthcoming).

[13] *Id.*, manuscript at 18, citing, inter alia, Heather Ellis Cucolo & Michael L. Perlin, *"They're Planting Stories in the Press": The Impact of Media Distortions on Sex Offender Law and Policy* 3 U. DENV. CRIM. L. REV. 185 (2013). See e.g., Catherine Donaldson-Evans, *Molesters Often Strike Again,* FOX NEWS (Apr. 16, 2005), accessible at http://www.foxnews.com/story/2005/04/16/molesters-often-strike-again.html, quoting forensic psychologist Louis Schlesinger (**"**It happens all the time").

This article will proceed in this manner. First, we consider how courts rely on inaccurate statistics in this context,[14] contrast these with the *accurate* statistics, and look carefully at the blunder in the context of the *McKune* case, and the *denouement* of that decision. Next, we discuss how these errors have led to the inappropriate shaming and humiliation of persons enmeshed in the sexually violent predator act (SVPA) commitment process,[15] and have consequentially trivialized the judicial process, noting, however, that there have been *some* recent cases that do the underlying issues more seriously. We then explain the significance of therapeutic jurisprudence (TJ) in this context, and then show how the errors in question violate all the precepts of TJ. We conclude with some modest suggestions for the courts and for litigators in this complex and difficult area of the law.

I. How courts rely on inaccurate statistics

Sex offender statutes and implementing court decisions are designed to isolate, restrict and/or remove sexual offenders from society.[16] Strict monitoring and

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[14] It has now become clear that this may *not* be the only area of the law on which this sort of mis-reliance has occurred. On mis-reliance in sentencing decisionmaking, see e.g., John Lightbourne, *Damned Lies & Criminal Sentencing Using Evidence-Based Tools*, 15 DUKE L. & TECH. REV. 327 (2017); https://www.propublica.org/article/suspect-evidence-momentous-supreme-court-decision-criminal-sentencing (Dec. 11, 2017).

[15] See generally, Michael L. Perlin & Naomi Weinstein, "*Friend to the Martyr, a Friend to the Woman of Shame": Thinking About the Law, Shame and Humiliation*, 24 SO. CAL. REV. L. & SOC'L JUST. 1 ,41-47 (2014).

[16] See e.g., Pamela Foohey, *Applying the Lessons of GPS Monitoring of Batterers to Sex Offenders*, 43 HARV. C.R.-C.L. L. REV. 281, 283 (2008): "Residency restrictions push sex

post- criminal sentence sanctions have been deemed necessary for two central reasons: (1) such individuals commit crimes that society has deemed to be the most heinous,[17] and (2) sex offenders have a high rate of recidivism and are highly likely to repeat offending behaviors. [18]

The two major sorts of legislative enactments designed to confine and restrict offenders are civil commitment laws, and registration and notification laws. Both of these legal sanctions necessitate the use of expert testimony during court

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offenders to more rural areas at the outskirts of cities and towns. Not only does this remove sex offenders from the areas where they are likely to find work and treatment, but it also isolates them from society, aggravates their housing problems, and forces them to live near each other."

On the potential impact of the Supreme Court's decision in *Grady v. North Carolina*, 135 S. Ct. 1368 (2015), holding that attaching a GPS monitoring device to a person was a Fourth Amendment search, to sex offender monitoring technologies, see Ben A. McJunkin & J.J. Prescott, *Fourth Amendment Constraints on the Technological Monitoring of Convicted Sex Offenders,* 21 NEW CRIM. L. REV. – (2018) (forthcoming), accessible at https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3198319.

[17] When members of the public are asked to imagine a typical sex offender or offense, "most people naturally envision sex offenders who commit the most heinous sex offenses such as rape and child sexual abuse." Margaret C. Stevenson et al, *The Influence of a Juvenile's Abuse History on Support for Sex Offender Registration*, 21 PSYCHOL. PUB. POL'Y & L. 35, 40-41 (2015).

[18] There is some important empirical evidence that such laws actually *increase* the rate of recidivism. *See, e.g.*, J.J. Prescott & Jonah E. Rockoff, *Do Sex Offender Registration and Notification Laws Affect Criminal Behavior?* 54 J. L. & ECON. 161 (2011); Stephanie N.k. Robbins. *Homelessness Among Sex Offenders: A Case for Restricted Sex Offender Registration and Notification*, 20 TEMP. POL. & CIV. RTS. L. REV. 205, 208 (2010).

proceedings.[19] Expert predictions of future violence "central to the ultimate question…whether petitioners suffer from a mental abnormality or personality disorder"[20] that cause them to be predisposed to commit future crimes, are necessary in the civil commitment of sexual offenders.[21] Importantly, the bases for these predictions have not gone unchallenged; in 2004, a Florida appellate judge wrote that "[w]e have embarked on the first steps into a new world, arguably a science fiction world, in which judges and juries are asked to prevent crimes years before they occur."[22] Judicial opinions are constrained by the statutory language

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[19] In the few cases that have considered the question, such testimony has regularly passed the standard for the admission of expert testimony established by the Supreme Court in Daubert v. Merrell Dow Pharmaceuticals, Inc., 509 U.S. 579, 587-89 (1993) (scientific evidence is admissible if it is valid and reliable). See Melissa Hamilton, *Public Safety, Individual Liberty, and Suspect Science: Future Dangerousness Assessments and Sex Offender Laws,* 83 TEMP. L. REV. 697, 735-40 (2011).

[20] *In re* Young, 857 P.2d 989, 1018 (Wash. 1993).

[21] *In re* Detention of Thorell, 72 P.3d 708, 758 (Wash. 2003); *In re* Detention of Holtz, 653 N.W.2d 613, 615 (Iowa 2002).

See generally, FED. R. EV. 702:

> If scientific, technical, or other specialized knowledge will assist the trier of fact to understand the evidence or to determine a fact in issue, a witness qualified as an expert by knowledge, skill, experience, training, or education may testify thereto in the form of an opinion or otherwise.

[22] *In re* Commitment of Burton, 884 So.2d 1112, 1120 (Fla. App. 2004). On how jurisdictions that adhere to the *Frye* rule [see Frye v. United States, 293 F. 1013 (D.C. Cir. 1923) ("the thing from which the deduction is made must be sufficiently established to have gained general acceptance in the particular field in which it belongs") on the admissibility of scientific evidence assess testimony based on the sorts of risk assessment instruments typically used in sex offender cases, see Douglas Mossman et al, *Risky Business Versus*

that requires expert testimony on the issue of dangerousness.[23] Thus, in responding to a challenge to admitted future dangerousness testimony, a Massachusetts trial judge has stated that courts must "respect [the] policy of [the] legislature with respect to the trustworthiness of psychiatric opinion evidence in cases involving sexually dangerous persons."[24] For a judge to make a ruling on the potential future risk of an individual, his or her ultimate decision is inevitably purely based on the subjective opinion of an expert witness, devoid of concrete answers and verifiable

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Overt Acts: *What Relevance Do "Actuarial," Probabilistic Risk Assessments Have for Judicial Decisions on Involuntary Psychiatric Hospitalization?*, 11 HOUS. J. HEALTH L. & POL'Y 365, 399 n. 158 (2011); see also, Hamilton *supra* note 19, at 735-37.

[23] For decades, a debate has raged on the parallel question of the extent to which an expert mental health professional can predict dangerousness on the part of someone subject to involuntary civil commitment. See generally, MICHAEL L. PERLIN & HEATHER ELLIS CUCOLO, MENTAL DISABILITY LAW: CIVIL AND CRIMINAL, §§ 3-4 to 3-4.2.4, at 3-48 to 3-78 (3d ed. 2017). By way of example, John Monahan and Henry Steadman have questioned the factors used by mental health professionals to make clinical assessments of dangerousness. "[U]nless actuarial research can independently verify the predictive value of these and other, more theoretically derived factors, their actual as opposed to perceived usefulness in risk assessment will remain unknown." John Monahan & Henry J. Steadman, *Toward a Rejuvenation of Risk Assessment Research*, in VIOLENCE AND MENTAL DISORDER 7 (John Monahan & Henry J. Steadman eds., 1994), as discussed in Grant H. Morris, *Defining Dangerousness: Risking a Dangerous Definition*, 10 J. CONTEMP. LEGAL ISSUES 61, 86 n. 145 (1999). At the best, mental health professionals cannot predict long-term dangerousness accurately "at much better than a modest level of accuracy," Perlin & Cucolo, *supra*, § 3.4.2.3, at 3-69, citing John Monahan, *Clinical and Actuarial Predictions of Violence*, *in* 1 MODERN SCIENTIFIC EVIDENCE: THE LAW AND SCIENCE OF EXPERT TESTIMONY (David Faigman et al. eds., 1997), § 7.2.2-1[2] at 317.

[24] Commonwealth v. Parks, 2005 Mass. Super. LEXIS 225, at *12 (Mar. 9, 2005) (citing Commonwealth v. McGruder, 205 N.E.2d 726 (Mass. 1965)).

scientific conclusions.[25] And courts have erred on the side of caution, willing to easily accept an expert's determination of high risk.[26]

This notion of a purported reality of high recidivism has been perpetuated by experts working in the field of sex offender assessment, court decisions supporting civil commitment of offenders after they have served a criminal sentence, and most notably the media. All three of these contributing factors are interconnected and have continuously built open each other's misinformation and inaccurately perceived truths.[27]

The media has focused significantly on the heinous and highly emotionally-charged crimes of individuals such as Earl Shriner --whose crime precipitated the first new generation sex offender law -- and Jesse Timmendequas, whose victim is the namesake of Megan's Law.[28] A writer of a *New York Times* op-ed column in

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[25] On the dangers of admitting unverified expert testimony in other forensic settings, see Valena E. Beety, *Cops in Lab Coats and Forensics in the Courtroom*, 13 OHIO ST. J. CRIM. L. 543, 545 (2016), characterizing this as a "dangerous path."

[26] On how fear of voter retaliation supports this approach, at least in part, see generally, Heather Ellis Cucolo & Michael L. Perlin, *"They're Planting Stories in the Press": The Impact of Media Distortions on Sex Offender Law and Policy* 3 U. DENV. CRIM. L. REV. 185 (2013).

[27] And this observation is not new, see Hal Arkowitz & Scott Lilienfeld, *Once a Sex Offender, Always a Sex Offender? Maybe Not*, SCI. AM. (April 1, 2008), accessible at https://www.scientificamerican.com/article/misunderstood-crimes/

[28] Earl Shriner's crime provoked Washington State to enact the first of the new generation sex offender laws and the murder and sexual assault of Megan Kanka by Jesse Timmendequas produced New Jersey's Megan's Law- that served as the "model community

1993 concluded, "There can be no dispute that monsters live among us. The only question is what to do with them once they become known to us."[29] As a result of the media's depiction of a uni-dimensional "sex offender " in broadcast news and newspaper articles,[30] the general public has conceptualized what it believes to be the prototype of this "monstrous imminent evil" – a male who violently attacks young children who are strangers[31] The common wisdom is that – per the television series, *Law and Order: SVU* – recidivism rates are near 100% for sex offenders.[32]

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notification law" for other states to follow. See Cucolo & Perlin, *supra* note 26, at 188 n. 26. For a recent article offering an array of legal theories under which such laws might be challenged – including substantive due process – see Wayne A. Logan, *Challenging the Punitiveness of "new-Generation" SORN Laws,* 21 NEW CRIM. L. REV. -- (2018) (forthcoming), accessible at https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3180899.

[29] Andrew Vachss, *Sex Predators Can't Be Saved*, New York Times, (Jan. 5, 1993). Vachss is a popular novelist and an attorney who represents children and youth in abuse/neglect, delinquency, custody/visitation proceedings and in related tort litigation. See http://www.vachss.com/vachss/credentials.html. He writes frequently about what he perceives as the nature of evil as reflected in the actions of sex offenders. See http://www.vachss.com/mission/sick_vs_evil.html.

[30] Pollak & Kubrin, *supra* note 4, at 15 ("Reality is socially constructed, in large part, through the media, which provide a way for dominant values in society to be articulated to the public."), and *id.* at 17, (with regards to emotion, newspapers focus on ideas whereas television emphasizes "feeling, appearance, mood…there is a retreat from distant analysis and a dive into emotional and sensory involvement").

[31] Heather Ellis Cucolo & Michael L. Perlin, *Preventing Sex-Offender Recidivism through Therapeutic Jurisprudence Approaches and Specialized Community Integration*, 22 TEMPLE POLITICAL & CIVIL RTS. L. REV. 1, 16 (2013); Helen Gavin, *The Social Construction of the Child Sex Offender Explored by Narrative*, 10 QUALITATIVE REPORT 395, 395 (2005) ("The dominant narrative construction, in Western societies,

The role of the media in the development of sex offender law is a base reflection of the power of fear in the creation of law and policy. By extrapolating from the scenario of the worst case,[33] we have created policies that reject valid and reliable statistics, that reject science, and that, instead, generate a body of statutes and court decisions based on inaccurate presumptions. For example, prior to the enactment of national sex crime registries and notification laws, there were no verifiable reports of any increase in sex crimes.[34] In fact, a federally-funded study showed that a decline in sexual assault cases began *before* the enactment of sex offender reforms. This finding would seem to indicate that, since the pattern of decline began *prior* to the enactment of sex crime reforms, the laws themselves could not have affected the start of this downward pattern.[35]

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concerning child sex offenders identifies such individuals as purely male, inherently evil, inhuman, beyond redemption or cure, lower class, and unknown to the victim"). On the "monster" metaphor in general, see JOHN DOUARD & PAMELA D. SCHULTZ, MONSTROUS CRIMES AND THE FAILURE OF FORENSIC PSYCHIATRY (2013).

[32] See Cucolo & Perlin, *supra* note 26, at 217.

[33] This is a perfect reflection of the vividness heuristic. See *infra* text accompanying note 149.

[34] Christina Mancini, J.C. Barnes & Daniel P. Mears, *It Varies from State to State: An Examination of Sex Crime Laws Nationally*. 24 CRIM. JUST. POL'Y RES. 166 (2013).

[35] *See* Kristen Zgoba et al, *Megan's Law: Assessing the Practical and Monetary Efficacy* (December 2008), accessible at http://www.state.nj.us/corrections/SubSites/REU/research.html. A more recent study by Professor Zgoba and two colleagues – tracking 547 convicted sex offenders over a fifteen-year period – have concluded that SORNA laws "do not have a demonstrable effect on future offending." Kristen M. Zgoba, Wesley G. Jennings & Lara M. Salerno, *Megan's Law 20 Years Later,* 45 CRIM. JUST. & BEHAV. – (2018) (forthcoming), manuscript at 17. *See also*,

The judiciary is susceptible to the same moral panic as are the press and the general public. The media-driven panic over sex offenders has directly influenced judicial decisions—both at the trial and appellate levels – in this area of the law, especially in jurisdictions with elected judges.[36] The demonization of this population has helped create a "moral panic"[37] that has driven the passage of legislation– much of which has been found by valid and reliable research to be counter-productive and engendering a *more* dangerous set of conditions[38] – and judicial decisions, at the

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Susan K. Livio/Statehouse Bureau, *Maureen Kanka Defends Megan's Law Despite Report Saying It Fails to Deter Pedophiles*, accessible at http://www.nj.com/news/index.ssf/2009/02/despite_new_report_on_megans_l.html (Megan Kanka's mother (Maureen Kanka) informed the Newark Star-Ledger (New Jersey's largest circulation newspaper) that the "purpose of [Megan's Law] was to provide an awareness to parents….Five million people have gone to the state website. It's doing what it was supposed to do…we never said it would stop them from re-offending or wandering to another town".).

[36] Cucolo & Perlin,,*supra* note 26. at 218-19.

[37] *See e.g.,* Daniel M. Filler, *Making the Case for Megan's Law: A Study in Legislative Rhetoric*, 76 IND. L.J. 315, 346-66 (2001); Eric Fink, *Liars and Terrorists and Judges, Oh My: Moral Panic and the Symbolic Politics of Appellate Review in Asylum Cases*, 83 NOTRE DAME L. REV. 2019, 2038-39 (2008);

[38] Tusty ten Bensel & Lisa L. Sample, *Social Inclusion Despite Exclusionary Sex Offense Laws: How Registered Citizens Cope with Loneliness*, CRIM. JUSTICE POL'Y REV, doi:10.1177/0887403416675018 (2016), accessible at http://journals.sagepub.com/doi/abs/10.1177/0887403416675018?journalCode=cjpa
See also, Sarah Tofte et al., *No Easy Answers, Sex Offender Laws in the US*, Human Rights Watch, at 126 (September 11, 2007). accessible at https://www.hrw.org/report/2007/09/11/no-easy-answers/sex-offender-laws-us
We have known this for at least two decades, see Eric Janus & Robert Prentky, *Sexual Predator Law: A Two-Decade Retrospective,* 21 FED'L SENTENCING RPTR, 2008 WL 8509309,

trial, intermediate appellate and Supreme Court levels, all reflecting the "anger and hostility the public feels" about this population.[39]

In the case of *United States v. Comstock*,[40] the Supreme Court's opinion reinforced the power of Congress to prevent this "dangerous" cohort of individuals from entering society.[41] Although it is impossible to know with any level of confidence whether the Justices writing for the majority were moved or influenced in any way by public sentiment,[42] there is no doubt that the majority blindly

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at 91 n. 24 (2008) (citing sources); Joanna S. Markman, *Community Notification and the Perils of Mandatory Juvenile Sex Offender Registration: The Dangers Faced by Children and Their Families*, 32 SETON HALL LEGIS. J. 261, 270, 282-83 (2008).

[39] Meghan Gilligan, *It's Not Popular but It Sure Is Right: The (In)Admissibility of Statements Made Pursuant to Sexual Offender Treatment Programs,* 62 SYRACUSE L. REV. 255, 271 (2012).

[40] United States v. Comstock, 560 U.S. 126, 140 (2010) (finding a "constitutional power to act in order to protect nearby (and other) communities from the danger federal prisoners may pose").

[41] Corey Rayburn Yung, *Sex Offender Exceptionalism and Preventative Detention,* 101 J. CRIM. L. & CRIMINOL 969, 996 (2011) ("the majority opinion essentially rewrote law surrounding the Necessary and Proper Clause to allow for virtually unfettered federal power in the area of sex offender civil commitment"). *Comstock* expressly declined to address whether § 4248 or its application denied equal protection, procedural or substantive due process, or any other constitutional rights. *Comstock,* 560 U.S. at 130.

[42] For sixty years, it has been a "given" that the Supreme Court is responsive. See Robert Dahl, *Decision-Making in a Democracy: The Supreme Court as a National Policy-Maker*, 6 J. PUB. L. 279, 285 (1957) ("The fact is, then, that the policy views dominant on the Court are never for long out of line with the policy views dominant among lawmaking majorities of the United States."). More recent studies, interestingly, suggest there is a five to seven-year time lag between the expression of public opinion and its articulation in Supreme

accepted the opinion that sexual predators pose a high risk of dangerousness and that future risk can be determined.[43] Notably, the convictions in the cases of three of the five persons designated as "sexually dangerous" whose appeals were heard in the *Comstock* case were on charges of possession of child pornography.[44]

The valid and reliable research paints an entirely different picture from the one accepted by the general public and the media and unthinkingly endorsed by the Supreme Court.[45] Contemporaneous Department of Justice statistics demonstrate that, "not only do few sex offenders get rearrested for committing a new sex crime, but sex offenders are less likely than non-sex offenders to be rearrested for any

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Court opinions. See e.g., William Mishler & Reginald Sheehan, *Public Opinion, the Attitudinal Model, and Supreme Court Decision Making: A Micro-Analytic Perspective*, 58 J. POL. 169, 196-98 (1996); William Mishler & Reginald Sheehan, *The Supreme Court as a Countermajoritarian Institution? The Impact of Public Opinion on Supreme Court Decisions*, 87 AM. POL. SCI. REV. 87 (1993).

The most recent study is clear: "The empirical results suggest justices write opinions with an eye toward anticipated public opinion." Ryan C. Black et al, *The Influence of Public Sentiment on Supreme Court Opinion Clarity*, 50 LAW & SOC'Y REV. 703, 727 (2016).

[43] Justice Alito's concurring opinion focuses upon the fears of "dangerousness" and "risk" in allowing this population to return to the community and therefore, must support federal intervention. Citing evidence of the States' unwillingness to assume the financial burden of containing these individuals, Justice Alito deemed that the burden thus fell upon Congress to prevent these prisoners to enter the community and "present a danger [wherever] they chose to live or visit." *Comstock*, 560 U.S. at 158.

[44] *Id.* at 131.

[45] *See infra* notes 61-65.

crime at all."[46] This is certainly an extremely complicated area and outcomes can vary based on the definitions of "re-offense," the cohort studied, and the methods used in carrying out the study. Thus, the conclusions of numerous reports and studies on re-offense and dangerousness are hotly contested, but recent studies undeniably show misguidance in our general understanding of recidivism:

1. Since 1992, sex offenses in the U.S. have declined by 60 percent; rape rates, too have followed a similar trajectory. [47] Recidivism rates for *all*

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[46] *See* Tamara Rice Lave, *Throwing Away the Key: Should States Follow* U.S. v. Comstock *by Expanding Sexually Violent Predator Commitments?* 14 U. PA. J. CONST. LAW 391, 396-97 (2012), *citing* Patrick A. Langan, Erica L. Schmitt & Matthew R. Durose, *Recidivism of Sex Offenders Released from Prison in 1994,* Bureau of Justice Statistics, U.S. Dep't of Justice, Pub. No. NCJ 198281 (2003), at 2.

[47] David Finkelhor & Lisa Jones, *"Have Sexual Abuse and Physical Abuse Declined Since the 1990s?"* Crimes Against Children Research Center, University of New Hampshire. (November 1, 2012) , also available at https://www.nsopw.gov/en-US/Education/FactsStatistics*; See also*, Erica Goode, *Researchers See Decline in Child Sexual Abuse Rate,* New York Times, A13 (2012) ("Overall cases of child sexual abuse fell more than 60 percent from 1992 to 2010, according to David Finkelhor, a leading expert on sexual abuse who, with a colleague, Lisa Jones, has tracked the trend. The evidence for this decline comes from a variety of indicators, including national surveys of child abuse and crime victimization, crime statistics compiled by the F.B.I., analyses of data from the National Data Archive on Child Abuse and Neglect and annual surveys of grade school students in Minnesota, all pointing in the same direction."); But see, Corey Rayburn Yung, *How to Lie with Rape Statistics: America's Hidden Rape Crisis,* 94 IOWA L. REV. 1197 (2014) (discussing study that addresses how widespread the practice of undercounting rape is in police departments across the country).

released prisoners – not just those who committed a sexual crime - tend to range between 56.7% (within one year after release) and 76.6%[48].

2. For non-incarcerated sex offenders, five-year recidivism rates were less than 5% for federal probationers.[49] Additionally, previous research consistently found that recidivism rates for sex offenders are generally lower than 20% after a five-year follow-up.[50]
3. Amongst civilly committed sex offenders, rates of recidivism are similar to those of other incarcerated offenders, with rates of reoffending for sex crimes falling within the range of 28%.[51]
4. Older age is generally tied to lower risk of recidivism amongst sex offenders. A 2003 report found that: "(1) age was a "powerful determinant" of sexual arousal assessed by volumetric phallometry[52], and (2) sexual

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[48] Matthew R. Durose, Alexia D. Cooper & Howard N. Snyder, *Recidivism of Prisoners Released in 30 States in 2005: Patterns from 2005 to 2010*. Washington, DC: Bureau of Justice Statistics (2014), accessible at https://www.bjs.gov/index.cfm?ty=pbdetail&iid=4986.
[49] William Rhodes et al., *Recidivism of Offenders on Federal Community Supervision*, DOJ 241018 (2013), accessible at https://www.bjs.gov/index.cfm?ty=pbdetail&iid=5642.

[50] Lawrence L. Bench & Terry D. Allen, *Assessing Sex Offender Recidivism Using Multiple Measures, A Longitudinal Analysis*, 4 PRISON J. 411 (2013).
[51] Grant Duwe & Valerie Clark, *The Effects of Prison-Based Educational Programming on Recidivism and Employment*, 4 PRISON J. 454 (2014)
[52] The measurement of penile blood volume change, rather than penile circumference change. See Ray Blanchard et al, *Phallometric Comparison of Pedophilic Interest in Nonadmitting Sexual Offenders Against Stepdaughters, Biological Daughters, Other Biologically Related Girls, and Unrelated Girls,* 18 SEXUAL ABUSE: J. RES. & TREATMENT 1,

recidivism decreased as a linear function of age at time of release from prison (based on an analysis of 468 sex offenders released from a federal penitentiary in Ontario)."[53] The authors posited that "these findings are less than surprising, given the well documented decline of bioavailable testosterone over the course of the lifespan, and the equally well documented decrease in libido in males as age increases."[54]

Regulating, criminalizing and sanctioning actions involving sexual activity-void of sexual offending – has had a complicated and rocky history within the law and courts.[55] Cases involving sex crimes can further complicate a judge's

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6 (2006).

[53] Robert Alan Prentky & Austin F. S. Lee, *Effect of Age-at-Release on Long Term Sexual Re-offense Rates in Civilly Committed Sexual Offenders*, 19 SEX ABUSE 43, 45 (2007) (citing a report of Howard E. Barbaree, et al., *The Development of Sexual Aggression Through the Life Span. The Effect of Age on Sexual Arousal and Recidivism Among Sex Offenders*, 989 ANNALS N.Y. ACAD. SCI. 59 (2003)).

[54] *Id.* But see, Marnie E. Rice & Grant T. Harris, *What Does It Mean When Age is Related to Recidivism Among Sex Offenders?* 38 LAW & HUM. BEHAV. 151 (2014) (no adjustment to a sex offender's score on a comprehensive actuarial tool that includes age at first or index offense should be made simply because the offender is older).

[55] See e.g., Bowers v. Hardwick, 478 U.S. 186 (1986) (a divided Court found that there was no constitutional protection for acts of sodomy, and that states could outlaw those practices) *later overruled by* Lawrence v. Texas, 539 U.S. 558 (2003) (Texas statute forbidding two persons of the same sex to engage in certain intimate sexual conduct violates due process clause). See e.g., Catherine Carpenter, *On Statutory Rape, Strict Liability, and the Public Welfare Offense Model*, 53 AM. U. L. REV. 313, 317 (2003), discussing "the 'public welfare offense' model where the majority of jurisdictions, either by legislative enactment or court decision, have determined that the protection of the community demands strict regulation of sexual activity." On how the public responds in related ways to questions of both sexual

established "moral" position on sensitive issues, and court decisions are unlike any other area in our jurisprudence.[56] The judgment that precedes the adjudication of these crimes is overwhelming and steeped in fear, disgust and a belief that the charged individual is automatically guilty and deviant. There is rampant ignorance as to the legal, societal and psychological underpinnings as to the circumstances surrounding these cases by not only the "court of public opinion"[57] but of the highest court itself.

And now, for the first time, we are beginning to some of the legal roots of these attitudes. In a recent article, Professor Ira Ellman and a colleague discussed the Supreme Court's continued reference to the "frightening and high" statistics of recidivism by sexual offenders.[58] They referenced two fundamental decisions by the

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autonomy and sexual offenses in matters involving persons with mental disabilities, see Michael L. Perlin, Heather Ellis Cucolo & Alison J. Lynch, *Sex, Sexuality, Sexual Offending and the Rights of Persons with Mental Disabilities,* 6 LAWS 20 (2017); Michael L. Perlin, Alison J. Lynch, & Valerie R. McClain, "*Some Things are Too Hot to Touch": Competency, the Right to Sexual Autonomy, and the Roles of Lawyers and Expert Witnesses,* -- TOURO L. REV. – (2018) (forthcoming). On how the public demands strict regulation of consensual sexual activity on the part of persons with mental disabilities, see MICHAEL L. PERLIN & ALISON J. LYNCH, SEXUALITY, DISABILITY AND THE LAW: BEYOND THE LAST FRONTIER? (2016).

[56] *See* PERLIN & CUCOLO, *supra* note 23, § 5- 5-6.4.1, at 5- 286 (characterizing Court's decisions in sex offender area as "void of concrete and credible supporting evidence").

[57] *See,* in this context, Dara L. Schottenfeld, *Witches and Communists and Internet Sex Offenders, Oh My: Why It Is Time to Call Off the Hunt*, 20 ST. THOMAS L. REV. 359, 361 (2008).

[58] Ira Ellman & Tara Ellman, *"Frightening and High": The Supreme Court's Crucial Mistake About Sex Crime Statistics*, 30 CONST. COMMENT. 495 (2015).

Court that set the stage for inaccurate statistical reference to the re-offense rate of offenders.[59]

In one of those cases, *McKune v. Lile*, the Court, relying on one prior source, cited an 80% rate of re-offense as a basis underlying the justification to restrict the rights and liberties of individuals convicted of sexual offenses.[60] The court noted that convicted sex offenders who reenter society are much more likely than any other type of offender to be rearrested for a new rape or sexual assault and states thus have a vital interest in rehabilitating convicted sex offenders".[61] The Court's acceptance of the re-offense rate as "frightening and high," and much greater than the rate for other offenders, has been echoed by federal and state courts ever since.[62] According to the article by Professor Ellman and his colleague:

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[59] McKune v. Lile, 536 U.S. 24 (2002), and Smith v. Doe, 538 U.S. 84 (2003). *See generally*, PERLIN & CUCOLO, *supra* note 23, §§ 5-4.10.1.1 & 5-6.4.1, at 5-192to 5-193, and 5-284 to 5-286.

[60] The Court relied on a statistic found within a non-peer reviewed, anecdotal article about the author's own group therapy program, Robert E. Freeman-Longo & R. Wall, *Changing a Lifetime of Sexual Crime*, PSYCHOLOGY TODAY, Mar. 1986, at 58. See *infra* text accompanying notes 64-65.

[61] McKune v. Lile, 536 U.S. 24 (2002).

[62] A Lexis search yielded at least over 100 cases using the "frightening and high" language in determining the outcome of sex offender cases. *See* Does #1-5 v. Snyder, 834 F.3d 696 (6th Cir. 2016), *reh'g denied* (Sept. 15, 2016), *cert. denied sub nom*. Snyder v. John Does #£1-5, 138 S. Ct. 55 (2017). discussed *infra* ("As in *Smith*, the legislative reasoning behind SORA is readily discernible: recidivism rates of sex offenders, according to both the Michigan legislature and *Smith*, are 'frightening and high.' "); Belleau v. Wall, 811 F.3d 929, 934 (7th Cir. 2016) (The Supreme Court in *Smith v. Doe,* 538 U.S. 84, 103 (2003), remarked on "the high rate of recidivism among convicted sex offenders and their

McKune provides a single citation to support its statement "that the recidivism rate of untreated offenders has been estimated to be as high as 80%": the U.S. Dept. of Justice, Nat. Institute of Corrections, *A Practitioner's Guide to Treating the Incarcerated Male Sex Offender xiii* (1988). Justice Kennedy likely found that reference in the amicus brief supporting Kansas filed by the Solicitor General, … as the SG's brief also cites it for the claim that sex offenders have this astonishingly high recidivism rate. This Practitioner's Guide itself provides but one source for the claim, an article published in 1986 in *Psychology Today*, a mass market magazine aimed at a lay audience. That article has this sentence: "Most untreated sex offenders released from prison go on to commit more offenses—indeed, as many as 80% do." But the sentence is a bare assertion: the article contains no supporting reference for it. Nor does its author appear to have the scientific credentials that would qualify him to testify at trial as an expert on recidivism. He is a counselor, not a scholar

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dangerousness as a class. The risk of recidivism posed by sex offenders is 'frightening and high…..When convicted sex offenders reenter society, they are much more likely than any other type of offender to be rearrested for a new rape or sexual assault."); *see also* e.g., United States v. Cotton, 760 F. Supp. 2d 116, 128–9 (D.D.C. 2011) (same); United States v. Garner, 490 F.3d 739, 743 (9th Cir. 2007) (same); State v. Peterson-Beard, 377 P.3d 1127, 1146 (Kan. 2016) (same); State v. Russell, 772 N.W.2d 270 (Iowa 2009) (same); State v. Stone, 350 P.3d 1138 (Kan. 2015) (same).

> of sex crimes or re-offense rates, and the cited article is not about recidivism statistics. It's about a counseling program for sex offenders he then ran in an Oregon prison. His unsupported assertion about the recidivism rate for untreated sex offenders was offered to contrast with his equally unsupported assertion about the lower recidivism rate for those who complete his program. (internal references deleted).[63]

Thus, the authors conclude that "the evidence for *McKune's* claim that offenders have high re-offense rates (and the effectiveness of counseling programs in reducing it) was just the unsupported assertion of someone without research expertise who made his living selling such counseling programs to prisons."[64]

This article has been cited twice in the case law. In one case, the Illinois Supreme Court rejected the defendant's arguments that had relied on the Ellmans' article, with these words:

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[63] Ellman & Ellman *supra* note **58**, at 497–98. See also, Steven Yoder, *What's the Real Rate of Sex-Crime Recidivism?* Pacific Standard (May 27, 2016), accessible at https://psmag.com/news/whats-the-real-rate-of-sex-crime-recidivism (critiquing the Freeman-Longo and Wall article in this context).

[64] Ellman & Ellman *supra* note **58**, at 499, concluding that the Solicitor General was complicit in urging the Court toward this conclusion with the argument that "[t]he absence of ready and reasonable alternatives for reducing recidivism among convicted sexual offenders bolsters the constitutionality of [Kansas's Sexual Abuse Treatment Program]." Amicus Brief of the United States at 24, McKune v. Lile, 536 N.W.2d 24 (2002) (No. 00-1187). *Id.,* n. 15.

> The problem for the defendant is that, regardless of how convincing that social science may be, "the legislature is in a better position than the judiciary to gather and evaluate data bearing on complex problems." … Simply put, we are not a superlegislature.[65]

In the other opinion, in his dissent in *State v. Peterson-Beard*,[66] writing for himself and two colleagues, Judge Johnson drew extensively on this research, in support of his conclusion that "a recent investigation into the source of *Smith* 's seemingly compelling statistics calls into question their bona fides."[67] Following this lengthy review, he concluded:

> The article recognized that human nature is such that, when faced with an immeasurable fear and strongly held belief, a person will tend to ignore or discount quantifiable facts. "The label 'sex offender' triggers fear, and disgust as

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[65] People v. Pepitone, -- N.E. 3d --, 2018 WL 1633044 (Ill. 2018), at *6 (citations omitted). Tellingly, footnote 3 in the *Pepitone* opinion says this:

> One of the *amicus* briefs reminds us that it is "perhaps subjective" whether recidivism rates are low or high. Further, as the State observes, "[n]obody knows the true re-offense rate for child sex offenders" because only a small percentage of sex offenses are reported and only a small percentage of reported offenses result in arrests. However, "researchers widely agree that observed recidivism rates are underestimates of the true reoffense rates of sex offenders." (Emphasis omitted.) *Sex Offender Management Assessment and Planning Initiative*, Chris Lobanov–Rostovsky & Roger Przybylski, eds., Office of Sex Offender Sentencing, Monitoring, Apprehending, Registering, & Tracking 91 (2014), https://smart.gov/SOMAPI/pdfs/SOMAPI_Full% 20Report.pdf.

[66] State v. Peterson-Beard, 377 P.3d 1127, 1146 (Kan. 2016).

[67] *Id.* at 1146.

> well. Both responses breed beliefs that do not yield easily to facts." [Ellman & Ellman], 30 Const. Comment. at 508. Yet, I must cling to the belief that the persons who have been privileged to serve on our nation's highest Court will yield to the facts and give a closer look at whether our statutory scheme is rationally connected to the nonpunitive purpose of public safety and whether its terms and conditions are excessive in relation to that public safety purpose. If they do, I submit that an objective analysis will disclose that, in the current version of [the Kansas sex offender law] , public safety has crossed over the line and is now a "sham or mere pretext" for imposing additional punishment on the offender.[68]

In spite of the existence of extensive scientific literature on sexual and violent recidivism research, continued myths and misconceptions continue to exist. Stunningly, a recent investigative article underscores that at least one state (California) sought to suppress research studies that showed that *untreated* sex offenders with *all* of the risk factors of committed SVPs had just a 6.5% rate of contact sex crimes during an almost five-year exposure in the community,[69] and that California "shut down" the study when these statistics became known.[70] According to the authors of the article, these findings "undermine any theory of fixed levels of sexual violence risk."[71]

The irrational fear over these types of crimes permeates all facets of the law-this

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[68] *Id.* at 1147.

[69] Tamara Rice Lave & Franklin E. Zimring, *Assessing the Real Risk of Sexually Violent Predators: Doctor Padilla's Dangerous Data,* 55 AM. CRIM. L. REV. 705, 709-10 (2018). The efforts made to suppress this study are detailed, *id.*, at 724-28.

[70] *Id.* at 740.

[71] *Id.*

fear affects lawyers (both prosecutors and defense counsel), legislators and judges alike.[72] Throughout the case law, from the inception of the new generation laws until present, myths and misconceptions continue to be voiced by the courts in making their decisions.[73] Yet the inadequate and inaccurate response to sexual offending can be mainly attributed to the failure of public policy to create a working relationship between effective law making and sexual violence prevention and intervention.[74]

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[72] Edward Koch, *The Independence of the Judiciary?* 1 N.Y. CITY L. REV. 457, 477-78 (1996) ("It is not just public officials who are guilty of exerting pressure against judges", referring to press attacks against Judge Denny Chin for ruling that New York's Megan's Law could not be applied retroactively, see Doe v. Pataki, 940 F. Supp. 603 (S.D.N.Y. 1996)). See generally, Jill Levenson et. al., *Public Perceptions About Sex Offenders and Community Protection Policies*, 7 ANALYSES SOC. ISSUES & PUB. POL'Y 1, 2 (2007) ("Sex offenders and sex crimes incite a great deal of fear among the general public, and as a result, lawmakers have passed a variety of social policies designed to protect community members from sexual victimization").

[73] *See* LA. REV. STAT. ANN. § 15:561.2 (2012) (The Louisiana legislature relied upon purported high recidivism rates among sex offenders as its justification for the non-punitive objective of protecting the public from sexual re-offenders, without any proof or certainty of this statement.); *See* United States v. Comstock, 550 U.S. 126, 127 (2010) (the majority accepted the fact that sexual predators pose a high risk of dangerousness and that future risk can be determined).

[74] JOAN TABACHNICK & ALISA KLEIN, ASS'N FOR THE TREATMENT OF SEXUAL ABUSERS, A REASONED APPROACH: RESHAPING SEX OFFENDER POLICY TO PREVENT CHILD SEXUAL ABUSE 3 (2011), available at http://www.atsa.com/pdfs/ppReasonedApproach.pdf:
Experts agree that a criminal justice response alone cannot prevent sexual abuse or keep communities safe. Yet, tougher sentencing and increased monitoring of sex offenders are fully funded in many states, while victim services and prevention programs are woefully underfunded.

Yet, this is not the end of the story. In very recent years, some state and federal courts have begun to scale back restrictions on sex offenders and scrutinize the constitutionality of enacted laws. The decade or so of poking holes in the solid foundation of incorrect and unfounded beliefs surrounding sexual offending, appears to have finally made an impact in the judiciary.[75] Several recent decisions have thus -- in certain jurisdictions -- abruptly halted the "runaway train" of sex offender legislation.

In late 2016, the Sixth Circuit concluded, in *Does #1-5 v. Snyder,* that Michigan's sex offender registry and residency restriction law constituted *ex post facto* punishment.[76] Significantly, this decision stood in stark contrast with the judgments of other courts that have largely rejected various constitutional challenges to specialized sex offender laws and policies.[77] In *Does #1-5,* the plaintiffs, who filed anonymously, argued that various provisions of SORA were "unconstitutionally vague, should not be enforced under strict liability standards, infringed upon freedom of speech, and hobbled their rights to parent, work, and travel."[78]

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[75] Although much groundwork has been laid in questioning misconceptions, the authors must point directly to the research of Ira Ellman and Tara Ellman*, supra* note 58, that has been scarcely noted and discussed in the recent case law.

[76] Does #1-5 v. Snyder, 834 F.3d 696 (6th Cir. 2016), *reh'g denied* (Sept. 15, 2016), *cert. denied sub nom*. Snyder v. John Does #£1-5, 138 S. Ct. 55 (2017).

[77] Melissa Hamilton, *Constitutional Law and the Role of Scientific Evidence: The Transformative Potential of* Doe v. Snyder*,* 58 B. C. L. REV. E-SUPPLEMENT 34 (2017).

[78] *Id.* at 37 *citing* Doe. v Snyder, 101 F. Supp. 3d 722, 727 (E.D. Mich. 2015).

The Sixth Circuit found the retroactive application of the Michigan Sex Offenders Registration Act (SORA) to be punitive and therefore unconstitutional.[79] In conducting the rationality-excessiveness test, the court considered the legislature's stated goals of promoting public safety and reducing recidivism.[80] The court found little to no evidence on the record to support the claim that SORA served either of these goals.[81] Considering the stated goal of reducing recidivism, the court found the evidence on the record demonstrated SORA had, at best, no impact on recidivism.[82] In fact, the court found evidence in the record that the law may actually *increase* the risk of recidivism.[83] Compounding the court's unwillingness to uphold SORA was the State of Michigan's failure to so much as analyze recidivism rates in the state, despite having the necessary data to do so.[84] As for public safety, the court found that the record disclosed no relationship between SORA's registration requirements and public safety whatsoever. To uphold SORA, the court found, would amount to writing a blank check to the legislature to pass whatever laws it wished.[85]

Of note in the *Does #1-5* case was the unique approach that the Sixth Circuit took by discussing "scientific evidence that refutes moralized judgments about sex

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[79] *Does* #1-5, 834 F.3d at 705–06.

[80] *Id.* at 704.

[81] *Id.* at 704–05.

[82] *Id.* at 704.

[83] *Id.* at 704–05 (*citing* Prescott & Rockoff, *supra* note 18, at 161).

[84] *Id.* at 705.

[85] *Id.*

offenders, specifically that they pose a unique and substantial risk of recidivism."[86] Melissa Hamilton, in her important article highlighting these points, identified the significance of the Sixth Circuit's reasoning and analysis. Hamilton focused on the implication of the court's suspicion of the long-held belief that sex offender recidivism was "frightening and high"[87] and that it was not clearly supported by the scientific evidence.[88]

Other Courts have followed the Sixth Circuit's lead in rejecting "frightening and high statistics" as the bases for decisions in sex offender cases. By way of example, the Pennsylvania Supreme Court, in *Commonwealth v. Muniz,*[89] held that Sexual Offender Registration and Notification Act ("SORNA") or "Megan's Law IV" registration requirements were "punishment," thus violating the ex post facto clauses of both the State and Federal Constitutions. Such requirements could not be applied retroactively, the Court found, as the individual had already been sentenced for the predicate crime. Elsewhere, in *Millard v. Rankin,*[90] Judge Matsch distinguished the Supreme Court's holding in *Smith v. Doe*[91] by employing the very same *Kennedy v. Mendoza-Martinez*[92] factors utilized in that case.[93] In reaching an

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[86] Hamilton, *supra* note 77, at 34.

[87] *Id.* at 38.

[88] *Id.*

[89] 164 A.3d 1189 (Pa. 2017).

[90] 265 F.Supp.3d 1211 (D. Colo. 2017).

[91] 538 U.S. 84 (2003).

[92] 265 F.Supp.3d at 1224 (*citing* Kennedy v. Mendoza-Martinez, 372 U.S. 144 (1963)).

[93] The factors in *Kennedy* were these: whether, in its necessary operation, the regulatory scheme: [1] has been regarded in our history and traditions as a punishment; [2] imposes

alternative conclusion, the *Millard* court distinguished Colorado's SORA from the Alaska statute that had been at issue in *Smith*. Judge Matsch stressed that Colorado's SORA imposed affirmative disabilities or restraints that were greater than those deemed "minor and indirect" by the Supreme Court in *Smith*.[94] Thus, Judge Matsch held that six of the seven factors weighed in favor of finding the state's SORA requirements punitive in their effects and, therefore, in violation of the Eighth Amendment's prohibition against cruel and unusual punishment.[95]

In *Millard*, persons who were registered under the Colorado Sex Offender Registration Act ("SORA"),[96] brought a § 1983 civil action and claimed that SORA violated their rights under the Eighth and Fourteenth Amendments to the United

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an affirmative disability or restraint; [3] promotes the traditional aims of punishment; [4] has a rational connection to a nonpunitive purpose; [5] is excessive with respect to this purpose; [6] come into play only on a finding of scienter; and [7] whether the behavior to which it applies is already a crime. *Id.* at 168-69.

[94] *Millard,* 265 F.Supp.3d at 1229 (In *Smith*, "the Court expressly noted that the law under consideration did not have an in-person reporting requirement, and further stated that the record contained 'no evidence that the Act has led to substantial occupational or housing disadvantages for former sex offenders that would not have otherwise occurred' *citing Smith,* 538 U.S. at 100.).

[95] *Id.* at 1235.

[96] *Id.* at 1212. SORA requires a person convicted of unlawful sexual behavior or another offense, the underlying factual basis of which involves unlawful sexual behavior, to register with the state as a sex offender. C.R.S. § 16-22-103. SORA defines unlawful sexual behavior to include a wide range of offenses, and its registration requirements apply to both adult and juvenile offenders. *See* City of Northglenn v. Ibarra, 62 P.3d 151, 156-57 (Colo. 2003); *see also* C.R.S. § 16-22-102(3) (defining "conviction") and § 16-22-102(9) (defining "unlawful sexual behavior").

States Constitution. In finding that the plaintiffs' Eighth and Fourteenth Amendment rights were violated,[97] the court looked at the criminal history of registrants David Millard, Eugene Knight and Arturo Vega, detailing the crimes that placed them on the registry and focused on the resulting hardships of being classified as a "sex offender" in the community:

> David Millard was forced to change residences and, as a result of highly detailed information published on the internet, constantly feared that his sex offender status would be discovered and result in his loss of employment.[98] Eugene Knight was a full –time father who received a letter from his child's school that identified him as a sex offender and barred him from entering school grounds. The court noted that, "[t]his exclusion from his children's school is solely because he is a registered sex offender. Neither DPS nor anyone else had ever accused Mr. Knight of any conduct allegedly disrupting school operations or creating an unsafe or threatening school environment."[99] Arturo Vega, who was adjudicated a juvenile offender at age 15 for conduct occurring when he was 13 years old, detailed the difficulty experienced in his employment as a direct consequence of his presence on the sex offender registry.[100] Because Vega was a juvenile offender, he made prior attempts to be removed from the registry. During the prior proceedings for removal, the magistrates improperly placed the burden on Mr. Vega to prove that another offense was not likely.[101] This testimony by Mr. Vega, prompted the *Millard* court to aptly describe the prior proceedings as a "Kafka-esque procedure, which was played out not once but

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[97] *Millard,* 265 F. Supp. 3d. at 1235.

[98] *Id.* at 1219.

[99] *Id.* at 1220

[100] *Id.* at 1221

[101] *Id.*

twice, [and] deprived Mr. Vega of his liberty without providing procedural due process."[102]

In addition to reviewing the personal hardships faced by the plaintiffs, the *Millard* court took note of a recent shift in the Supreme Court's conceptualization of privacy and access to the internet by citing the 2017 case of *Packingham v. North Carolina.*[103] Although *Packingham* had dealt with First Amendment violations of registered sex offenders, it contained a foreshadowing statement that applied directly to the issue in *Millard.* In his majority opinion in *Packingham,* Justice Kennedy had highlighted "the troubling fact that the law imposes severe restrictions on persons who already have served their sentence and are no longer subject to the supervision of the criminal justice system",[104] but noted that this was not an issue currently before the Court. Two months after the decision in *Packingham,* the *Millard* court seized upon the significance of Justice Kennedy's observation took advantage of the ripeness of that issue in the case at bar. [105] The *Millard* court fittingly took the language contained in *Packingham* and applied it to the relevant facts and circumstances of the *Millard* plaintiffs:

> This ongoing imposition of a known and uncontrollable risk of public abuse of information from the sex offender registry, in the absence of any link to an objective risk to the public posed by each individual sex offender, has resulted

[102] Id. at 1233.

[103] 137 S. Ct. 1730, 1735 (2017).

[104] *Id.* at 1737 (emphasis added).

[105] 265 F.Supp.3d at 1228.

> in and continues to threaten Plaintiffs with punishment disproportionate to the offenses they committed. Where the nature of such punishment is by its nature uncertain and unpredictable, the state cannot assure that it will ever be proportionate to the offense. SORA as applied to these Plaintiffs therefore violates the Eighth Amendment.[106]

The decisions in *Does #1-5, Muniz,* and *Millard* represent significant evidence of a judicial shift -- in these three jurisdictions -- in evaluating the constitutionality of SORA as applied. Noteworthy as well is the case of *Karsjens v. Jesson*,[107] that dealt with the as applied constitutionality of the Minnesota Sex Offender Program (MSOP). In *Karsjens,* multiple claims were brought under a § 1983 class action asserting that the MSOP was punitive in effect. The class action alleged, among other things, that the MSOP failed to provide treatment and denied the right to be free of inhumane treatment.[108] The court displayed its assurance that plaintiffs' would likely be successful in their claims if, through discovery, they are able to demonstrate that despite the commitment scheme's statutory treatment purpose, it is systematically applied in such a way as to indefinitely commit individuals who are no longer dangerous.[109] Judge Frank took seriously the plaintiffs' claims, stating that the program in Minnesota is "clearly broken," and

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[106] *Id.* at 1232.

[107] Karsjens v. Jesson, 6 F.Supp.3d 916 (D. Minn. 2014).

[108] *Id.* at 926.

[109] *Id.* at 931.

might be "one of the most draconian sex offender programs in existence."[110] The court observed as follows:

> At the center of Plaintiffs' challenge to the Minnesota sex offender commitment scheme is the allegation that a commitment to MSOP essentially amounts to lifelong confinement, equivalent to a lifetime of criminal incarceration in a facility resembling, and run like, a medium to high security prison. Under such conditions, and assuming the allegations in the Complaint to be true, it appears that MSOP may very well be serving the constitutionally impermissible purposes of retribution and deterrence.[111]

A year later, on February 2, 2015, the same court denied an additional motion to dismiss and motion for summary judgment by defendants and reiterated that, "not only does this case address the rights of those populations in our society that are most disliked and feared (and a number of individuals who are vulnerable), but it also heightens the concerns and fears of the public at large."[112] In a noteworthy footnote, the Court acknowledged and refused to dismiss the Plaintiffs'

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[110] *Id.* at 956.

[111] *Id.*

[112] Karsjens v. Jesson, No. CV 11-3659 (DWF/JJK), 2015 WL 6561712 (D. Minn. Oct. 29, 2015), *vacated & remanded sub nom*, Karsjens v. Piper, 845 F.3d 394 (8th Cir. 2017), *cert. den.,* 138 S. Ct. 106 (2017).

assertion that:

> Defendants were 'aware of the failure to progress Plaintiffs and [c]lass members through the different treatment phases to the point that they could be conditionally or unconditionally released' and that 'the MSOP treatment program as implemented had only conditionally released a single person and had never unconditionally released anyone committed to MSOP.'[113]

Even within this small segment of the opinion, the court created history by recognizing and proclaiming the above long-held suspicion and concern by individuals who question the basis for sex offender civil commitment. In further momentous recognition, the Court stressed the underlying politics of this area of the law:

> Moreover, the record before the Court highlights both the best and the worst of the three branches of our government. At a minimum, the evidence has shown that, to date, the executive and legislative branches in Minnesota have let politics, rather than the rule of law and the rights of "all" of their citizens guide their decisions. In a situation such as this, the federal court

[113] *Id.* at n. 29. (*citing* Third Amended Complaint, at 34, 81, 83–84.).

may have to step in to protect the rights of Plaintiffs.[114]

Any optimism inspired by Judge Frank's decision ended with the decision of the Eighth Circuit, which, in *Karsjens v. Piper,*[115] reversed Judge Frank's opinion and found no substantive due process violation. The Eighth Circuit explained that although civil commitment is a significant deprivation of liberty, the Supreme Court has never held that individuals "who pose a significant danger to themselves or others possess a fundamental liberty interest in freedom from physical restraint."[116]

In reviewing the recent cases that impact sex offender laws, it is noteworthy to consider how the denial of the petitions for certiorari by the Supreme Court in both the *Karsjens* case and the *Does #1-5* case affects the dialogue about a potential shift of opinion in the highest court in the land. By

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[114] *Id.* (*citing* United States v. Will, 449 U.S. 200, 218 (1980) (stating that the role of an Article III judge is to safeguard a litigant's "right to have claims decided by judges who are free from potential domination by other branches of government")).

[115] 845 F.3d 394 (8th Cir. 2017), *rehearing and rehearing en banc denied* (Feb.22, 2017), *cert. den.*, 138 S. Ct. 106 (2017).

[116] *Id.* at 407. In particular, the Eighth Circuit held that "[a]lthough the Supreme Court has characterized civil commitment as a significant deprivation of liberty, it has never declared that persons who pose a significant danger to themselves or others possess a fundamental liberty interest in freedom from physical restraint." citing Addington v. Texas, 441 U.S. 418, 425 (1979) and Foucha v. Louisiana, 504 U.S. 71, 116 (1992) (Thomas, J., dissenting) (criticizing the majority's analysis of a due process challenge to a civil commitment statute because, "[f]irst, the Court never explains whether we are dealing here with a fundamental right, and … [s]econd, the Court never discloses what standard of review applies")

denying the petition for certiorari in *Does #1-5*,[117] the Supreme Court left in place a decision from the Sixth Circuit Court of Appeals, that had declared portions of the law unconstitutional and effectively requires the Michigan legislature to replace the existing law. In denying the petition for certiorari in *Karsjens,*[118] the Supreme Court left the Eighth Circuit ruling to stand as precedent in the sex offender civil commitment system within Minnesota and other states in that Circuit.

Theoretically, the Court's refusal to review the *Karjens* case could be viewed as an abdication of constitutional oversight of sex offender commitment laws. One can question whether the Court was merely scaling back its federal oversight in these state issues or whether the Court is not quite ready to fully confront the "frightening and high" mythology that was exposed in Professor Ellman's article.[119] But, either way, in both circumstances, had the Court had granted certiorari, it would be forced to confront recent developments within the scientific community, in some manner or fashion, in order to effectively evaluate the constitutional issues raised. This entry into the "scientific world" is a "can of worms" that the Supreme Court has been hesitant to open fully; yet in this especially unique area of the law, it is impossible to divorce the science from the legislation in

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[117] Snyder v. John Does #1-5, 138 S. Ct. 55 (2017).

[118] Karsjens v. Piper, 138 S. Ct. 106, 107 (2017).

[119] See *supra* note 58.

the determination of constitutionality.[120]

II. On shame and humiliation

Shame and humiliation are often felt in combination with one another; it is necessary to consider both in detail in order to seek to understand how these emotions are generated as a direct result of our treatment of individuals that have been labeled as sexual offenders.

A. Shame

There is no question in our mind that our society has become one in which shame is used as a modality to control defendants' behavior.[121] "Shame is bordered by embarrassment, humiliation, and mortification, in porous ways that are difficult to predict or contain," and it is "one of the most important, painful and intensive of all emotions."[122] "Shame is considered to be more painful than guilt because one's core self--not simply one's behavior--is at stake."[123]

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[120] See Cucolo & Perlin, *supra* note 31, at 19 (footnote omitted):

> But we must honestly and thoroughly investigate the reasons supporting the enactment of such legislation while scrutinizing legislative usage of medical and scientific testimony to support sex-offender commitments. Before we could even begin to address the problems surrounding the science, however, we would need to re-consider the laws and foundations on which they were based.

[121]. Perlin & Weinstein, *supra* note 15, at 4.

[122] *Id.* at 7, quoting, in part, Toni M Massaro, *The Meaning of Shame: Implications for Legal Reform*, 3 PSYCHOL. PUB. POL'Y & L. 645, 655 (1997), and Robert Svensson et al., *Moral Emotions and Offending: Do Feelings of Anticipated Shame and Guilt Mediate the Effect of Socializing on Offending?* 10 EUR. J. CRIMINOLOGY 2, 3 (2012).

Shame is the emotion we experience when we realize that we are not living up to our standards or ideals.[124] Shame can occur alone or with another who causes or heightens the experience. "The shamed person feels exposed and wants to hide."[125]

B. Humiliation

As the authors noted in an earlier article:

Humiliation is the emotional experience of being lowered in status, usually by another person. There is the associated sense of powerlessness.[126] Humiliation has been defined as "the rejection of human beings as human, that is, treating people as if they were not human beings but merely things, tools, animals, subhumans, or inferior humans."[127] It is thus no surprise that the vast majority of sex offenders

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[123] *Id.,* quoting June Price Tangney et al., *Moral Emotions and Moral Behavior*, 58 ANN. REV. PSYCHOLOGY 345, 349 (2007).

[124] Heather Ellis Cucolo & Michael L. Perlin, *Promoting Dignity and Preventing Shame and Humiliation by Improving the Quality and Education of Attorneys in Sexually Violent Predator (SVP) Civil Commitment Cases,* 28 FLA. J. L. & PUB. POL'Y 291, 292 (2017).

[125] Aaron Lazare & Wilton S. Sogg, *Shame, Humiliation and Stigma in the Attorney-Client Relationship*, 47 PRAC. LAW. 11, 1**2** (No. 4 2001). On potential strategies to ameliorate the extent to which persons with mental illness are stigmatized, see Sareen K. Armani, *Coexisting Definitions of Mental Illness: Legal, Medical, and Layperson Understandings Paving a Path for Jury Bias*, 26 S. CAL. REV. L. & SOC. JUST. 213 (207).

[126] Cucolo & Perlin, *supra* note 124, at 292.

[127] Perlin & Weinstein, *supra* note 15, at 8, quoting Anita Bernstein, *Treating Sexual Harassment with Respect*, 111 HARV. L. REV. 445, 487 n.266 (1997) (quoting AVISHAI MARGALIT, THE DECENT SOCIETY 1 (1996)).

self-report being humiliated on a daily basis.[128] Elsewhere, with a colleague, one of the co-authors (MLP) has written:

> The use of humiliation techniques, whether done in overt or passive ways, violates rights to due process, privacy, and freedom from cruel and unusual punishment. By marginalizing the rights of those who are shamed and humiliated, such individuals are treated as less than human.[129]

Think about this in the context of criminal punishments (and though we adhere to the fantasy that sexually violent predator act commitments are *not* criminal, per the pretextual decision of *Kansas v. Hendricks*,[130] there is no question that they are).[131] Punishment was originally needed to "remove the evil spirit thought to cause an individual to transgress against society." It is a ritualistic

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[128] Cucolo & Perlin, *supra* note 31, at 30 n. 177 , citing Richard Gary Zevitz & Mary Ann Farkas, U.S. Dep't of Justice, *Nat'l Inst. of Justice Sex Offender Community Notification: Assessing the Impact in Wisconsin* 9 (Dec. 2002) available at www.ncjrs.gov/pdffiles1/nij/179992.pdf (finding that seventy-seven percent of interviewed sex offenders told of being humiliated in their daily lives due to expanded notification actions).

[129] Perlin & Weinstein, *supra* note 15, at 8, citing Bernstein, *supra* note 127, at 489-90.

[130] See Michael L. Perlin, "*There's No Success like Failure/and Failure's No Success at All": Exposing the Pretextuality of* Kansas v. Hendricks, 92 NW. U. L. REV. 1247 (1998), discussing the *Hendricks* decision, see 521 U.S. 346 (1997).

[131] We define "pretextuality" as courts' acceptance, either implicitly or explicitly, of testimonial dishonesty and their engagement similarly in dishonest decisionmaking. See Perlin, *supra* note 130, at 1252, and see generally, Michael L. Perlin, *Morality and Pretextuality, Psychiatry and Law: Of "Ordinary Common Sense," Heuristic Reasoning, and Cognitive Dissonance*, 19 BULL. AM. ACAD. PSYCHIATRY & L. 131, 133 (1991).

device conveying "moral condemnation," "inflicting humiliation," and dramatizing evil through a public "degradation ceremony."[132] In a parallel context, consider Justice Ginsburg's dissent in , in which she argued that the stigma of punitive segregation "should suffice to qualify such confinement as liberty depriving for purposes of Due Process Clause protection."[133] There is no question that "SVPA proceedings… are invariably and inevitably inundated with stigma, shame, and humiliation."[134]

It is also disconcerting to note that matters have gotten *worse* recent years. Studies have found that "[p]erceptions of individuals with mental illness as dangerous have increased over time .... [T]he odds of describing a person with mental illness as violent in 1996 were 2.3 times the odds of describing a person with mental illness as violent in 1950."[135] In short, the statistical errors on which

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[132] Michael L. Perlin, "*The Borderline Which Separated You from Me": The Insanity Defense, the Authoritarian Spirit, the Fear of Faking, and the Culture of Punishment,* 82 IOWA L. REV. 1375, 1385 (1997), quoting, on the issue of humiliation, CHRISTOPHER HIBBERT, THE ROOTS OF EVIL: A SOCIAL HISTORY OF CRIME AND PUNISHMENT 32 (1963) (discussing the use of sticks, pillory, branding iron, ducking stool, and scarlet letters).

[133] Sandin v. Conner, 515 U.S. 472, 489 (1995) (Ginsburg, J., dissenting).

[134] Cucolo & Perlin, *supra* note 124, at 295.

[135] Angela M. Parcesepe & Leopoldo J. Cabassa, *Public Stigma of Mental Illness in the United States: A Systematic Literature Review*, 40 ADMIN. & POL'Y MENTAL HEALTH & MENTAL HEALTH SERVS. RES. 384, 390 (2013), as quoted in Aurélie Tabuteau Mangels, *Should Individuals with Severe Mental Illness Continue to Be Eligible for the Death Penalty?* 32 CRIM. JUST. 9 (Fall 2017).

courts rely – abetted by misleading media depictions[136] -- create an environment in which shame and humiliation fester, and through which the judicial process is trivialized, just as we regularly trivialize both valid and reliable behavior research (when it is dissonant with our false "ordinary common sense"[137] and the experiences of persons with mental illness.[138] There is no question left "on the table" about the law's power to shame and humiliate.[139]

III. How this violates therapeutic jurisprudence[140]

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[136] See generally, Cucolo & Perlin, *supra* note 26.

[137] False "ordinary common sense" is a "self-referential and non-reflective" way of constructing the world "('I see it that way, therefore everyone sees it that way; I see it that way, therefore that's the way it is')," supported by our reliance on a series of heuristics -- cognitive-simplifying devices that distort our abilities to rationally consider information. See Michael L. Perlin & Heather Ellis Cucolo, *"Tolling for the Aching Ones Whose Wounds Cannot Be Nursed": The Marginalization of Racial Minorities and Women in Institutional Mental Disability Law,* 20 J. GENDER, RACE & JUSTICE 431, 453 (2017), quoting Cucolo & Perlin, *supra* note 31, at 38; Michael L. Perlin, *"Simplify You, Classify You": Stigma, Stereotypes and Civil Rights in Disability Classification Systems*, 25 GA. ST. U. L. REV. 607, 622 (2009).

[138] See Michael L. Perlin & Alison J. Lynch, *How Teaching about Therapeutic Jurisprudence Can Be a Tool of Social Justice, and Lead Law Students to Personally and Socially Rewarding Careers: Sexuality and Disability as a Case Example*, 16 NEVADA L.J. 209, 216 n. 41 (2015), citing MICHAEL L. PERLIN, THE HIDDEN PREJUDICE: MENTAL DISABILITY ON TRIAL (2000).

[139] Perlin & Lynch, *supra* note 138. at 224 n. 85.

[140] This section is generally adapted from Michael L. Perlin & Alison J. Lynch, *"All His Sexless Patients": Persons with Mental Disabilities and the Competence to Have Sex*, 89 WASH. L. REV. 257, 277-79 (2014), and Michael L. Perlin & Alison J. Lynch, *"In the Wasteland of Your Mind": Criminology, Scientific Discoveries and the Criminal Process,* 4

Therapeutic jurisprudence "asks us to look at law as it actually impacts people's lives"[141] and focuses on the law's influence on emotional life and psychological well-being.[142] The ultimate aim of therapeutic jurisprudence is to determine whether legal rules, procedures, and lawyer roles can or should be reshaped to enhance their therapeutic potential *while not subordinating due process principles*.[143] There is an inherent tension in this inquiry, but David Wexler clearly identifies how it must be resolved: The law's use of "mental health information to improve therapeutic functioning [cannot] impinge upon justice concerns."[144]

VA. J. CRIM. L. 304 (2016). Further, it distills the work of one of the co-authors (MLP) over the past 25 years, beginning with Michael L. Perlin, *What Is Therapeutic Jurisprudence?* 10 N.Y.L. SCH. J. HUM. RTS. 623 (1993). See also, Michael L. Perlin, *"Have You Seen Dignity?": The Story of the Development of Therapeutic Jurisprudence,* 27 U.N.Z. LAW REV. 1135 (2017) (Perlin, *Seen Dignity*); Michael L. Perlin, *"Changing of the Guards": David Wexler, Therapeutic Jurisprudence, and the Transformation of Legal Scholarship*, -- INT'L J.L. & PSYCHIATRY – (2018) (forthcoming).

[141] Bruce J. Winick, *Foreword: Therapeutic Jurisprudence Perspectives on Dealing with Victims of Crime*, 33 NOVA L. REV. 535, 535 (2009).

[142] *See* David B. Wexler, *Practicing Therapeutic Jurisprudence: Psycholegal Soft Spots and Strategies*, *in* DANIEL P. STOLLE ET AL., PRACTICING THERAPEUTIC JURISPRUDENCE: LAW AS A HELPING PROFESSION 45 (2000).

[143] *See* e.g. Michael L. Perlin, *"And My Best Friend, My Doctor/ Won't Even Say What It Is I've Got": The Role and Significance of Counsel in Right to Refuse Treatment Cases*, 42 SAN DIEGO L. REV. 735, 751 (2005).

[144] *See* David B. Wexler, *Therapeutic Jurisprudence and Changing Concepts of Legal Scholarship*, 11 BEHAV. SCI. & L. 17, 21 (1993).

In a series of articles and a book, the authors have assessed various aspects of our sex offender policies through the prism of therapeutic jurisprudence.[145] In one of those articles, we concluded:

We believe that it is only through the use of therapeutic jurisprudence that we can best diminish the shaming and humiliating aspects of these processes. We know that nothing so clearly violates "the dignity of persons as treatment that demeans or humiliates them" as shaming.[146] To be consistent with TJ principles we must, rather, focus on reintegrating sex offenders into society and promoting sex

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[145] See e.g., Cucolo & Perlin, *supra* ote 26; Cucolo & Perlin, *supra* note 31; Cucolo & Perlin, *supra* note 122; Heather Ellis Cucolo & Michael L. Perlin, *"Far from the Turbulent Space": Considering the Adequacy of Counsel in the Representation of Individuals Accused of Being Sexually Violent Predators,* 18 U. PA. J. L. & SOC. CHANGE 125 (2015); Perlin, Cucolo & Lynch, *supra* note 55; Perlin, Lynch & McClain, *supra* note 55; Perlin & Cucolo, *supra* note 6.

The interests of one of the authors (MLP) predated the actual articulation of the phrase "therapeutic jurisprudence." In 1975, in one of his first articles, about the use of psychiatric testimony in criminal cases, he said this in discussing what he characterized as "quirky" cases:

> [Imagine] a defendant is charged with a minor offense (such as petty larceny) which nevertheless raises a question as to the possible existence of a psychiatric problem (*e.g.*, where the defendant steals only pantyhose), a psychiatric examination may serve to indicate the real problem (if, in fact, one is present) and to *direct the defendant towards a suitable therapeutic treatment program*.

Perlin, *Seen Dignity, supra* note 140, at 1141, quoting Michael L. Perlin, *Psychiatric Testimony in a Criminal Law Setting*, 3 BULL. AM. ACAD. PSYCHIATRY & L. 143, 146 (1975) (emphasis added).

[146] R. George Wright, *Dignity and Conflicts of Constitutional Values: The Case of Free Speech and Equal Protection*, 43 SAN DIEGO L. REV. 527, 549 (2006).

offenders' self-respect and dignity while fostering family and community relationships.[147] In an earlier article – focusing on the right to and quality of counsel at SVPA hearings -- the co-authors made this point:

> Those very variables that make SVPA litigation *different*--the need for lawyers to be able to understand, contextualize and effectively cross-examine experts on specific actuarial tests; the need for lawyers to recognize when an expert witness is needed to rebut the state's position, and the need for lawyers to understand the potential extent of jury bias (making the ideal of a fair trial even more difficult to accomplish) all demand a TJ approach to representation and to litigation.[148]

Certainly, the issues we raise here – the ways that courts use improper statistics and unverified data, misunderstand or ignore the significance of valid and reliable research and fall prey to the perniciousness of the vividness heuristic, a cognitive-simplifying device through which a "single vivid, memorable case overwhelms mountains of abstract, colorless data upon which rational choices should be made"[149] (in this case, the easily accessible *Psychology Today* article

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[147] Cucolo & Perlin, *supra* note 124, at 322-23, citing, in part, Cucolo & Perlin, *supra* note 31, at 40.

[148] Cucolo & Perlin, *supra* note 145, at 166-67.

[149] See Perlin, *supra* note 132, at 1417, and see Perlin, *supra* note 37, at 637 ("One vivid, negative anecdote-perhaps even an apocryphal one with no basis in fact-overwhelms an extensive contrary statistical database"). On the vividness heuristic in SVPA cases, see Cucolo & Perlin, *supra* note 124, at 325.

relied upon by the *McKune* court) – all ignore the precepts of therapeutic jurisprudence, and must be rejected as a modality of decisional analysis.[150] Perhaps cases such as *Muniz* and *Millard* will give other judges some traction if they choose to reject the hysterical thinking that has been the hallmark of sex offender decisionmaking for the past two decades.

IV. Conclusion

Although we have seen some significant steps forward in the courts' recognition of rights' violations and the mandate of necessary constitutional protections, overturning draconian laws and legislation continues to be an uphill battle. Clearly evidenced in numerous decisions, courts around the country continue to remain stagnant, clinging to misinformation and refusing to depart from prejudicial viewpoints that are pretextual and based on irrational fears. What continues to be the main culprit is the courts' use of inaccurate statistics and unverified data. The shameful efforts of states to suppress the true data has totally dominated this area of law and policy.[151]

We remain hopeful that some of the significant observations, such as those by Judge Frank in the *Jesson* case, as well as other recent caselaw on the rights of offenders in the community, will have a further impact on judges across the nation deciding similar issues in future lawsuits. To return to our title, the "strings in the books" *are* "being pulled and persuaded." We – and others -- have offered insight

[150] See generally, Perlin & Lynch, *supra* note138, at 216-17.

[151] See Lave & Zimring, *supra* note 69.

into these “strings,” yet key questions remain to be answered: in which direction are these “strings” being pulled, and is it factual or inaccurate information that underlies the “persua[sion]”? We believe it is imperative that scholars and researchers turn next to these questions to bring some measure of coherence – and *honesty* – to this complicated and emotionally-fraught area of law and policy.