

**A REAL-LIFE MINORITY REPORT**  
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*Precrime*. This is a word made familiar to the millions of movie-viewers who watched the hit movie *Minority Report*, starring Tom Cruise and released in 2002. The movie raised questions about the Government's ability to accurately predict future crimes and effectively prevent them from ever happening. In the movie, those predicted to commit future crimes were apprehended by the officers of the Precrime Division and committed to a crime prevention detention facility. The sci-fi thriller made millions at the box office. While it was a success as far as the cinema world is concerned, those facing situations similar to the one Tom Cruise's character faced can't help but feel saddened that the message of the movie did not contribute to citizens asking more questions about the Government's precrime operations.

On June 1, 2011, I called the Farina, Illinois police chief and turned myself in as a parole absconder from the State of Missouri. Eleven days prior I had become a technical parole violator when I left the State of Missouri without the prior permission of my parole officer. After a brief visit with family and the securing of my personal possessions, I called the police and turned myself in. After being returned to the Missouri Department of Corrections, I was scheduled to go before the Parole Board. When I appeared before the Board, I acknowledged that I was guilty of violating a stipulation of my parole. The Board found me to be a technical parole violator, ordering a re-release on parole in five months.

My family, friends and I made plans for my release. My employer was contacted, and my previous job was waiting for me. My bank account was in good standing and in the black. My friends set up a cell phone contract for me. And, clothes and money were sent in for the long train ride from Kansas City to St. Louis.

Eight days before my release I was called to the visiting room of the prison. I thought this strange, as I had never submitted a visitor request form. While I was waiting, an officer said to me, "Your attorney is signing in now and will be here shortly." This was not good news; I did not have an attorney.

I was escorted to the attorney-client visiting room, where my new Public Defender introduced himself. He said he was sorry to inform me that a Prosecutor's Review Committee had recommended to the Attorney General's Office that a Petition be filed to have me committed to the Missouri Department of Mental Health as a sexually violent predator (SVP). This was a shock!

After all, the Parole Board had voted to re-parole me. I had not committed any new crimes while on parole. On the contrary, I paid all my parole fees, maintained full-time employment, attended mandatory group therapy, established my own residence and paid all my bills on time. By all accounts, I was successfully reintegrating into society and was living a productive life. I had re-established contact with out-of-touch family members, established new, life-affirming relationships, was a good employee with excellent relationships with coworkers and supervisors, involved in community service, participating in the Twelve Step groups of my choice and attending to my spiritual needs.

The County in which I committed my crime picked me up from the prison. The following Monday, a Probable Cause Hearing was held to determine whether the State had enough evidence to proceed to trial. At this hearing, a great deal was made about prior criminal conduct and the results of actuarial testing. My scores and situation were the same as they were prior to being released on parole. The only difference was that I was back in prison for a technical parole violation, *not a new crime*.

The State of Missouri has been using the civil commitment process to confine people to the Department of Mental Health since 1999. Prior to that, persons who were considered sexually dangerous persons were committed to the DMH through the Criminal Sexual Psychopath law. This law committed persons to the DMH rather than prosecuting them through the criminal courts system. The Missouri Sexually Violent Predator Act (SVPA) became effective in 1999 and is codified at §632.480 *et seq.* Revised Statutes of Missouri. The SVPA is in a division of the Missouri Statutes called Comprehensive Psychiatric Services.

States have long had the power to commit persons who are deemed to be dangerous to themselves or others. However these were always commitments for definite periods of time, and for generalized dangerousness. With the SVP commitment statutes in place, convicted and post-incarceration sex offenders are targeted for indefinite commitment.

States have historically offered several reasons for incarcerating criminals: retribution- the State's exacting vengeance on behalf of the people; deterrence- the theory that punishing criminals through isolation by incarceration coerces obedience from the people, and future obedience from the convicted criminal; and, rehabilitation- historically, by providing vocational education, job skills training and drug treatment opportunities. With around twenty States now having post-conviction commitment procedures in place for sex offenders, we can add a new goal for incarcerating criminals: **precrime incapacitation**.

In my case, the State proposes that, while on parole, I acquired a mental abnormality, in the form of Antisocial Personality Disorder, that makes it more likely than not that I will commit crimes of sexual violence if not confined to a secure facility for the rest of my life. Prior to my first release from prison, I participated in a sexually violent predator interview, as do all persons with a qualifying offense, with Dr. Kimberly Weitzl, a forensic psychologist specializing in end-of-confinement evaluations of sex offenders. The resulting report indicated that I do not meet the criteria of a SVP. I was then released on parole. Interestingly, the same psychologist did my second end-of-confinement evaluation and determined that I did meet the criteria. Twenty-two months separated the two interviews. This is difficult to comprehend.

As the commitment statutes set up systems of precrime incarceration, the actuarial assessments play a significant role. The actuarials are based on statistical assessments of sample groups of sex offenders. The developers created lists of historical data associated with recidivist sex offenders, and then created points for the historical factors. An assessor determines which historical factors are present in an offender's life, tallies the points, and offers a statistical likelihood of re-offense. There must be some subjectivity involved in the process, as I have several different scores on the same test. One such test, the STATIC-99, and its revisions, proposes likelihood of re-offense at the five and fifteen year marks. No statistical evaluation proposes to predict likelihood of re-offense over a lifetime. And, as the name of the evaluation suggests, it only measures static historical factors, while dynamic and mutable factors are not considered. Another concern with the STATIC-99 is that a person gets a higher score for being homosexual rather than heterosexual.

The STATIC-99 risk assessment methodology is as follows: a one-point value is assigned to each of the following factors, none of which, except age, is subject to change for a confined man. The higher the score, the greater the statistical risk.

1. Age—a person between the ages of 18 and 25 is scored one point;
2. A person who has never lived with a lover or significant other for at least two years—one point;
3. Present convictions for nonsexual violence—one point;
4. Prior nonsexual violence offense—one point;
5. Prior sexual offenses are identified in three ranges, based upon the number of charges and the number of convictions: depending upon this criminal offense history, points are scored from zero to three;
6. The number of times a person has been sentenced for felonies on different occasions scores an additional point if the person has been sentenced four or more times for any offense;
7. Convictions for non-contact sexual offenses—one point;
8. Unrelated victims—one point;
9. Victims who are strangers to the offender—one point;
1. If the offender has male victims—one point.

2. When all of these points are added up, an offender is considered low risk if he has zero or one points; if he has two or three points, he is moderate to low risk; if he has three, four or five points, he is rated moderate to high risk; and if he has six or more points, the offender is considered high risk.

As with the movie of the same name, there are minority reports, dissenting opinions. Particularly vociferous in his dissent in Dr. Allen J. Frances, the leading forensic psychologist on the team that wrote the Diagnostic and Statistical Manual III, IIIR and IV. The DSM is the go-to manual of diagnostic criteria for the diagnosis of mental illness. Especially in the case of statutory rapists, he notes that the behavior is certainly criminal, but does not rise to the level of mentally abnormal.

Former Chief Justice of the Missouri Supreme Court, Michael A. Wolf, wrote his opinions of matters regarding civil commitment in the case of *Murrell v. State* (2007). Among other things, he wrote:

The STATIC–99 is an instrument that is useful to sentencing judges in assessing the risk that a particular offender is in a category of persons who are more or less likely to re-offend and is perfectly appropriate at the sentencing stage. The STATIC–99 is being adopted for use by the Missouri Board of Probation and Parole in developing pre-trial sentencing assessment information for trial judges. This instrument is useful in informing the trial judge whether a particular offender shares the characteristics of those persons in a high, moderate, or low-risk group. Although the STATIC–99 does not, in fact, predict future behavior in a particular individual, a sentencing judge may find the assessment helpful in determining what kinds of controls, short of confinement, or what kind of program, in prison or in the community, might work to reduce the chance of recidivism in a particular type of offender. The sentence, as always, is based on the judge's judgment; the STATIC–99 is at best useful in reinforcing that judgment. The use of the STATIC–99 and the MnSOST–R methodologies in the civil commitment proceeding is a scientifically-based means to justify confining Murrell for the rest of his life regardless of the outcome of his treatment. The treatment that Murrell will be afforded by this civil commitment is designed to train him to curb his impulses. With treatment, he may become adequately trained to control his impulses, but using these statistical measures, he will still have a “52 per cent risk” of re-offending within 15 years. Does anyone remember the Soviets' misuse of their mental health system for incarcerating enemies of the state? Does this seem at all similar? The old Soviet Union is gone, but is its legacy of misusing its mental health system alive and well in this country?

What is most noteworthy about this scoring system is that, except for age, the risk score never changes once a person is confined. In other words, items 2 through 10 above will always be part of the confined offender's history, and they do not change. If he is committed civilly with, for example, a score of six or more, when he comes up for evaluation for release, he will still have the same score. It might be one point lower if he passes from under age 25 to over age 25, but that is the only thing that can possibly change about this evaluation. The other risk assessment instrument used by forensic psychologists, the MnSOST–R risk assessment methodology developed in Minnesota on a smaller number of sexual offenders than the STATIC–99, shares the same characteristics that make the STATIC–99 inappropriate

for use in civil commitment proceedings.

In Missouri, SVP commitment is indefinite; that is, “until such time as the person's mental abnormality has so changed that the person is safe to be at large.” As noted above, the risk score of a confined person never changes. That means that the determination of change in a person's mental abnormality is a subjective decision by the State.

Further, “upon determination by a court or jury that the person's mental abnormality has so changed that the person is not likely to commit acts of sexual violence if released, the court shall place the person on conditional release pursuant to the terms of this section.” The purported goal of SVP legislation is to confine sexually dangerous persons in secure facilities until they are safe to be at large. So, if a person's mental abnormality has so changed that the person is safe to be at large, why are they placed on lifetime conditional release? The requirements to be followed by a released person are extensive:

- (1) Maintain a residence approved by the department of mental health and not change residence unless approved by the department of mental health;
- (2) Maintain employment unless engaged in other structured activity approved by the department of mental health;
- (3) Obey all federal and state laws;
- (4) Not possess a firearm or dangerous weapon;
- (5) Not be employed or voluntarily participate in an activity that involves contact with children without approval of the department of mental health;
- (6) Not consume alcohol or use a controlled substance except as prescribed by a treating physician and to submit, upon request, to any procedure designed to test for alcohol or controlled substance use;
- (7) Not associate with any person who has been convicted of a felony unless approved by the department of mental health;
- (8) Not leave the state without permission of the department of mental health;
- (9) Not have contact with specific persons, including but not limited to, the victim or victim's family, as directed by the department of mental health;
- (10) Not have any contact with any child without specific approval by the department of mental health;
- (11) Not possess material that is pornographic, sexually oriented, or sexually stimulating;
- (12) Not enter a business providing sexually stimulating or sexually oriented entertainment;
- (13) Submit to a polygraph, plethysmograph, or other electronic or behavioral monitoring or assessment;
- (14) Submit to electronic monitoring which may be based on a global positioning system or other technology which identifies and records a person's location at all times;
- (15) Attend and fully participate in assessment and treatment as directed by the department of mental health;
- (16) Take all psychiatric medications as prescribed by a treating physician;
- (17) Authorize the department of mental health to access and obtain copies of confidential records pertaining to evaluation, counseling, treatment, and other such records and provide the consent necessary for the release of any such records;
- (18) Pay fees to the department of mental health and the department of corrections to cover the costs of services and monitoring;
- (19) Report to or appear in person as directed by the department of mental health and the department of corrections, and to follow all directives of such departments;
- (20) Comply with any registration requirements under sections 589.400 to 589.425; and
- (21) Comply with any other conditions that the court determines to be in the best interest of the person and society.

The Supreme Court's determination that SVP statutes are civil rather than criminal in nature does not do justice to the facts. SVP commitment is only triggered as a post-conviction, post-sentencing proceeding. SVP proceedings are based upon the commission of a criminal sexual act. In some instances, a person is committed after having been determined to be a criminal sexual psychopath. In all other instances,

commitment proceedings begin within one year of a person's release from the Missouri Department of Corrections. As commitment is a lifetime sentence following incarceration, it is clear that the State wanted a method for handing out life sentences without handing out life sentences. In any event, justice is not served by the Supreme Court's casuistry.

Interestingly, SVP commitment does not allow a person to challenge his conviction. The idea would be that due to the presence of a mental abnormality that makes it more likely than not that the person will commit crimes of sexual violence, what is their legal culpability for their criminal acts? However, the Courts have ruled that the presence of a mental abnormality for the purposes of SVP commitment does not rise to the level of insanity needed to overcome criminal culpability. Instead, the maze of legal casuistry runs in such a way that the person has just enough of a mental abnormality as to constitute them a present danger to society, but not enough of an abnormality so as to mitigate their guilt. Quite a paradox here: a win-win for the State; a lose-lose for the Defendant.

My criminal history is varied, but not feloniously extensive. I have felony convictions for statutory rape (2004) and aggravated robbery-accountability (1999). I have three misdemeanor convictions, and a traffic conviction. These convictions, as well as a juvenile conviction for theft, as well as subjective determinations by a psychologist, make me eligible for a diagnosis of Antisocial Personality Disorder. The subjective determination of a forensic psychologist is to decide whether or not such disorder is active, abated or in remission. And, of course, different determinations are come to by different psychologists depending on who is footing the bill for the evaluation: the State or the Defendant.

Precrime incapacitation statutes apply only to sex offenders. One wonders what the public would think if such a law were crafted to deal with all criminal offenders. For instance, many drug offenders recidivate near the seventy percent mark, while treated sex offenders recidivate under five percent. That is a drastic difference. And, where the typical sex offender has one to three victims, a drug offender can have hundreds of victims as their poisons spill out into the community, propagating a host of enabling crimes. Neither is it fair to classify drug offenses as nonviolent. Providing poison to another human being epitomizes violent, antisocial behavior. While there are violent sex offenses, many such crimes are committed through emotional manipulation rather than physical violence. If this were truly a public safety law, all classes of criminal offender would be subject to its scope.

While most will remember precrime as a plot line in a sci-fi thriller, to those of us facing loss of liberty as the result of precrime statutes, it is a frightening reality defying all reason and justice. As I await a jury to decide the rest of my life for me, I cannot help but shudderingly recall Winston Smith's encounters with O'Brien in George Orwell's *1984*. No, my story is not a science fiction thriller; it is a horror story.