

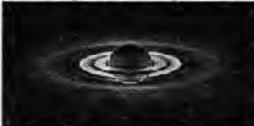
"The human capacity to injure other people is very great precisely because our capacity to imagine other people is very small." - Elaine Scarry, "The Difficulty in Imagining Other People," in Martha C. Nussbaum (ed.) *For Love of Country?* (pp. 98-110, at 103) (Boston: Beacon Press, 2002)

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Seeking a clearer picture...



Or at least a futuristic one: Saturn eclipsing the sun.

**Coming Soon:**

- ✓ Residency & Employment Restrictions: No Impact on Racism, Just Politics
- ✓ Banishment by a Thousand Laws
- ✓ Packingham - Wayne Logan's Take
- ✓ Remorse Bias - What's THAT?
- ✓ A Little History Yields Deja Vu
- ✓ Othering and Resistance. Huh?
- ✓ 'New' SORN Laws Are Punitive
- ✓ The Latest on Anti-SO Vigilantism
- ✓ Beware the Deepfake
- ✓ What Is E-Carceration? Why You Will Care
- ✓ RNR vs. Good Lives vs. Virtue Ethics vs. Desistance: any bets?
- ✓ MnSOST-4, SAPROF, Survival Analysis, etc.—Talking Smack about Junk
- ✓ Lie-Detector Interrogation & Peter Meter Testing: Keeping You Down by False Hope, Fear, & Shame
- ✓ Hello? Hello?: The Deliberate Disconnection of SOCC Victims as Involuntary Laryngectomy: Why We Desperately Need Internet Access as a Public Voice
- ✓ Conscience Confrontation of Legislators (Real Psychopaths)
- ✓ Predicting Sex Crimes as to Those Without Any (We did warn you.)
- ✓ Z-RFID Microchip Implants in SOCs for Life Proposed (Yup: Ditto.)
- ➔ So much to learn, you'll need a cranial 40 TB solid-state drive!

Feedback? News? Write!

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# An Urgent Epiphany for President Putin:

**Editor's Note to TLP Readers:**

The text which immediately follows (ending on page 5) is a complete quote of a message sent to President Vladimir Putin of the Russian Federation prompted by the extremely ill-advised invasion of Ukraine by Russian troops.

While this text is irrelevant to the usual subjects of this newsletter, the existential danger posed by the extraordinary act of aggression raises its subject matter to universal importance and commands attention.

We in the so-called western world often deem the Cold War to be at an end. However, this act of war forcefully brings home the fact that those on the other side of the world see things differently and often feel that they are the target of economic, financial, and propaganda actions that appear to them to be a form of asymmetric warfare.

We have most recently lived through a period of comparatively small (albeit inconclusive and seemingly never-ending) wars in the Middle East not involving any of the major world powers.

This has unfortunately led us to assume that war is a minor matter and not a realistically conceivable possibility among world powers. I refer now to a potential war between Russia and NATO countries.

The US is a member of NATO and deems itself as having a moral obligation to protect weaker countries of the European continent from possible massive invasion from the east with total conquest in mind.

In shorter words, the present situation is far more perilous than almost any person-in-the-street in the United States perceives.

Quite bluntly, the ball on all this is in Vladimir Putin's court, as it were. For this reason, I felt that sending the following message to him was an imperative thing to do. If all went well, he should have received this message about March 15th.

I fervently hope that he has taken the opportunity to read it closely and ponder it intensely. For our relations with the Russian Federation, we, as a nation, must consider the implications of the thoughts expressed below, both generally by the author of *The Fourth Age* and as applied by me afterward to the present situation.

Perspective on Progress - The Future & The Fourth Age and an Invitation to You and to the Ever-Indispensable Russian People:

*We Need You. Join the Modern World and Share in: Permanent Peace; the Quest for Equality of Opportunity for All; Endless and Unimaginable Prosperity; Duly Rewarded Innovation; Freedom of Creativity, Thought and Speech; and Full Participation by All.*

**Editor's Introductory Note:**

Mr. Putin, this message of epiphany is addressed to you, and through you to your

kind and caring and ever thinking and diligent Russian people, who need only greater access to the progress engine of the world to thrive and prosper, and to blossom in peace, interchange of technology, unlimited trade, and unlimited creative thought. They would not have chosen you as their leader if they did not see those same qualities in you. This is why I am certain that you will earnestly receive and ponder this timely, indeed, crucial message.



The ball on all this is in Vladimir Putin's court

The world stands ready and eager to provide you full participation in the same standard of living and wealth prevalent elsewhere through such international participation that only circumstance has prevented you from attaining. This is in recognition that offering to those in need opportunities to elevate their standard of living and to gain greater access to the tools of collective self-improvement always adds to the further improvement and profit of the entire world.

To understand this message and its offer in the heartfelt and brotherly sentiment and in its undeniable logic of greater benefit and an indescribably better future for all, it is first necessary to comprehend it in its context of both world history and the great future that awaits us all through the cooperation this message proposes.

To gain such comprehension fully and accurately, please take the time to read the following book excerpt and some closing thoughts offered afterward

Byron Reese, *The Fourth Age: Smart Robots, Conscious Computers, and the Future of Humanity* (Atria Paperback (Simon and Schuster, New York, 2018)

**Text Excerpts:**

p. 200 "The question of suffering in a simulation is touched upon but then dodged in *The Matrix* when Agent Smith explains that at first the Matrix was designed to be a perfect human world, where none suffered, where everyone would be happy." But he goes on to explain that it was a disaster because our

brains wouldn't accept that as possible. But this is a Hollywood answer. There are plenty of actual societies with relatively little pain and suffering. [So maybe it is our society that is flawed in some ways.] So if our reality is a simulation, it seems neither intentionally benevolent nor cruel.

pp. 271-2. In the world of *Star Trek*, Jean-Luc Picard was a Frenchman who lived in the 24th century, in a time after humanity had passed through many existential challenges, including catastrophic wars, virulent diseases, and potentially devastating alien encounters. ...But human perseverance and optimism overcame all of them, and humanity emerged on the other side of this challenging time in a better world. Poverty was ended. Disease conquered. Only death remained...

In 2365, while on a routine mission, the *Enterprise* stumbled across a spaceship from 21st century Earth, and revived three of its inhabitants, who had been cryogenically frozen at the time of their deaths, centuries ago. One of the three was Ralph Offenhouse, who had once been a wealthy financier. In 1994, Offenhouse had been diagnosed with a terminal disease, and decided to have himself frozen, hoping to be revived at a later time after medical science had advanced. Shockingly, his crazy plan worked!

As you might expect, upon being revived, Offenhouse had difficulty making sense of this world around him. After his repeated attempts to contact his bankers proved futile, he and Picard shared this exchange:

*Captain Picard: This is the 24th century. Material needs no longer exist.*

*Offenhouse: Then what's the challenge?*

*Captain Picard: The challenge, Mr. Offenhouse, is to improve yourself. To enrich yourself. Enjoy it!*

Chapter 22. The Invention of Progress:  
p. 274: What will the Fourth Age [Robots and AI] ultimately bring about? The catalysts are AI and robotics, which will increase productivity, expand wealth, accelerate the acquisition of knowledge, prolong life, and everything else that we have discussed. But it will do so much more than we have covered here...

p. 275: The middle of the 20th century was a time obsessed with the future. Not just any old future, but a great, shiny, automated future. Things were going to get ever better and science would deliver a cure for everything that ailed us. But now, early in the 21st century, the narrative seems not so rosy. The future, to some, seems murkier, more fraught with peril. So it is fair to ask whether the progress we have enjoyed over the last few centuries will continue in the Fourth Age.

Throughout this book, I have touched on a few of the requirements needed for progress to happen. Imagination, a sense of time, a

(Continued on page 2)

system for the accumulation and expansion of knowledge, and so on. But those are simply necessary for it to occur. What actually makes it happen? By what mechanism do things get better? And can that mechanism be broken?

pp. 275-76: We take the idea of progress for granted. ...Why did it take us 90,000 years from when we got language to when we developed agriculture, but it took us only sixty years to go from the first computer to the iPhone? Why did it take 182 years to complete Notre Dame – but only 410 days to complete the Empire State Building? Because we invented progress, a way to make things get better.

'Better' is the key here. That's the interesting thing about progress. Despite a few stumbles, the overall trend line moves upward. Things are better now than they have ever been. This may be hard to accept if you happened to catch the news this morning, but it is true. A simple thought experiment can demonstrate this. Pick a time in the past. It can be 20 years ago, a hundred years ago, a thousand years ago, 10,000 years ago, you pick any time. And then spin the globe in your head and pick any spot in the world. And then choose any measure of progress you want to, such as life expectancy, infant mortality, access to education, individual liberty, standard of living, status of women, self-rule, anything. With few exceptions, wherever you pick, at whatever time, things are better today than they were back then. This was also true in 1950. Things in 1950 were better than they had ever been up until that time. And it was true in 1900, 1800, and 1700 as well. We might well suppose that it will be true in 2100. The fact that progress exists at all speaks quite well of us as a species, for it relies on cooperation, honesty, and benevolence. It involves selflessness as well as empathy.

pp. 276-77: In addition to making a better world, progress has given us a more prosperous one as well. This is a good thing. Increased prosperity is associated with better schooling, a more modern health care system, clean energy initiatives, better government services, more robust infrastructure, less child labor, more forest cover, more home ownership, higher personal savings, higher levels of educational attainment, faster internet speeds, and a lot more.

p. 277: Why has this been the case? Why have we had hundreds of years of nonstop progress, on all fronts, all around the world? Progress happens because of the symbiotic relationship between two things: civilization and technology. Civilization is the infrastructure that enables progress. Technology is the knowledge we use to amplify human ability. Grow one, and the other will grow as well. Our rocket ship of technological advance over the last few centuries has fed, and in turn

has been fed by, extraordinary advances in civilization.

We've already explored technology and its seemingly magical ability to double in power over fixed time scales. Civilization, technology's equal partner in progress, merits close examination as well. First of all, what is it? Will and Ariel Durant dedicated over a half century of their married life together to writing their eleven-volume magnum opus, *The Story of Civilization*, which opens with a definition that I have never seen bettered:

*Civilization is social order promoting cultural creation. Four elements constitute it: economic provision, political organization, moral traditions, and the pursuit of knowledge and the arts. It begins where chaos and insecurity end. For when fear is overcome, curiosity and constructiveness are free, and man passes by natural impulse towards the understanding and embellishment of life.*

Civilization drives progress a hundred different ways. It provides a stable platform for the advancement of knowledge to occur, along with the prosperity needed so that subsistence isn't everyone's full-time job. It sets up the rules that we must operate within, and the rewards that motivate us. Civilization facilitates the free flow of information, and, as its name suggests, allows civil discourse to occur and conflicts to be resolved. Civilization is law codes, it is coinage, it is scientific inquiry, and it is the educational system.

p. 278: We have come a long way on our pathway to civilization. Yet our journey is far from complete. As the Swedish doctor Hans Rosling said, "You have to be able to hold two ideas in your head at once: the world is getting better and it's not good enough." While it takes but a few moments to make a list of the appalling atrocities and injustices that plague our world, most generations do leave the world a little better of a place than they found it. The cumulative effect of this, the compounding of this interest across centuries, has brought us to today.



Can civilization be lost? Yes. It has to be handed down from generation to generation. If we ever fail at this task, we would become savages once again. We are closer to our primitive selves than we think. There is a reason that William Golding translated a name of Satan, Beelzebub, into the English "Lord of the Flies" as the title for his book on the fragility of civilization and the ease with which our savage instincts can surface.

Our primitive nature still lurks within us, which perhaps explains why eating chicken off the bone instead of with utensils has been shown to increase aggression and disobedience in kids. Perhaps gnawing on a chicken bone stirs our inner barbarian and conjures up distant memories encoded in our DNA.

Although civilization can be lost, historically it has been resilient. Without a doubt, its influence ebbs and flows, but over the long haul, it heads upward. It is hard to overstate just how intertwined civilization and progress are. You can tell the story of scientific and material progress by looking across time and noting places where civilization flourished.

pp. 278-79: Consider classical Greece, almost 2,500 years ago. Civilization blossomed, democracy was born. Philosophy advanced and the rule of law was enforced. And what a time of progress it was. Eratosthenes calculated the circumference of the earth. Hippocrates made medicine a science. Theophrastus classified and named plants. Eupalinus built a magnificent aqueduct, Archimedes made his famous screw to raise water, and Anaximander postulated that life on earth began in the oceans. The list goes on and on.

Three centuries later, civilization exploded in China. The Han dynasty unified China under an efficient bureaucracy and saw great advances in art and culture. In that environment, astonishing achievements were made in math and science, some of which would not be duplicated anywhere else for two thousand years.

Move forward three centuries, and shift your focus to Rome. Rome epitomized civilization with its law code and efficient government. *Pax Romana* brought prosperity and stability to millions. And during this time, the Romans laid roads and built harbors so technologically advanced that they are still used today.

Fast-forward seven hundred years to the Islamic Golden Age, when an attempt was made to gather all written knowledge from all cultures around the world and translate it into Arabic. And while the Islamic peoples of Northern Africa and the Near and Middle East were doing that, they made monumental advances in algebra, geometry, trigonometry, and even hints of calculus, which would not be formalized elsewhere for almost a thousand years.

In the modern era, from the last few centuries to today, we have seen civilization expand in all areas of life. And it is no coincidence that over that same period we have witnessed progress that is unprecedented in history. This march forward of civilization and progress shows no sign of abating, and there is no reason it ever has to. As long as technology advances, so will human productivity, and through that, civilization.

There is a reason that William Golding translated a name of Satan, *Beelzebub*, into the English "Lord of the Flies" as the title for his book on the fragility of civilization and the ease with which our savage instincts can surface.

pp. 280-81: Most technology is neutral and can be used for good or bad purposes. Dynamite can be used to build a tunnel through a mountain or to blow one up. Metallurgy can be used to make swords or plowshares. Luckily for us, the vast majority of humans prefer to build than to destroy. The modern world proves this. It can exist only because most people are honest most of the time. Imagine if 20% of the people who ordered items online disputed the charges on their credit cards. The might say, 'Sure, a package was delivered to my house, but it just had a brick in it.' If this happened, credit cards would vanish overnight. They can exist only because most people are honest. It turns out that most of us are collectively building much faster than a relative few can destroy.

We use our technology, generally speaking, for good. Take the Internet, for example. Sure, there are bad actors there. We hear about them all the time. But step back and the big picture shows two billion people [previous number of Internet users] helping each other. Everywhere you look there are forums where people post questions and total strangers take time out of their busy days to post answers. All over the Internet, support groups and meetups and useful information can be found, all the product of individuals who are not given even a thin dime for their efforts. But they do it anyway, because like most people, they care.

The comedian Patton Oswalt said it well:

*We would not be here if humanity were inherently evil. We'd have eaten ourselves alive long ago. So when you spot violence or bigotry or intolerance or fear or just garden variety misogyny, hatred or ignorance, just look it in the eye and think, 'The good outnumber you, and we always will.'*

No one predicted the Internet. We happened upon it. It is being used today for completely different purposes than it was created for. DARPA didn't build it because it believed the world needed a consumer file sharing and communication network, but it turns out that we did.

And once we had it, and once we started figuring out stuff to do with it, all sorts of amazing things happened that no one ever predicted, many of which show us in our best light. No one speculated that there would be an open-source movement in which huge numbers of programmers would share the code they write freely with others. No one saw the rise

(Continued on page 3)

of Creative Commons and other rights structures that allow vast numbers of people to freely share what they create. No one foresaw Wikipedia, where people not only labor for free but do so in anonymity.

So will progress continue? Absolutely, as long as technology advances, because that's what increases productivity. And throughout human history, we have used our increased productivity, on net, to better the world. For ten thousand years, good has edged out evil.

The doubling power of technology ... has a subtle but important implication. If technology really does double, double, and double, it means that we are eventually going to be able to solve all *purely technical* problems. If a problem is purely technical, then that implies it has a technical solution, and we will find that solution as technology keeps doubling in power. And because we tend to underestimate how big doubling soon gets, the odds are that we will solve these problems sooner than one might expect.

Now, don't get me wrong. There are many problems that aren't technical. Envy, hatred, racism, and greed, to name a few. In the end, our challenge is to become better people, and technology can help there only indirectly – and it can sometimes hurt. But for problems that are purely technical, we will develop technical solutions.

p. 283: Three scourges, hunger, poverty, and disease, have plagued humanity without interruption since our beginning. They've afflicted us so much that we almost accept them as inevitable. But are they really? Or are they technical problems that we are on the cusp of solving?

To begin with, hunger is, at its core, a technical problem. We don't have to have hunger; we simply haven't ended it.

p. 285: Fortunately, with technology like AI and robots, we can do a great deal to lower the price of food and end hunger. AI will give us amazing new insights in what to grow where, and where to sell it. Beyond that we can make better seeds and can disseminate empowering information on irrigation, fertilizing, and crop rotation. Armed with a smartphone, every farmer can become better at farming than anyone else who lived more than a decade ago. Yields will rise and costs will fall, all thanks to technology....

Everyone is likely to be a vegetarian in the future. A vegan, actually. This will come about due to artificial meats being cheaper, tastier, healthier, and more environmentally friendly. If an artificial steak bleeds like a real one, tastes better than the best steak you ever had, is packed with healthiness, and costs only pennies, why would you buy a 'real' one?

p. 286: Poverty is a technological problem as well. Artificial intelligence, robotics, and all the other technologies that we develop will create prosperity so perva-

sive that no part of the world will be left behind. ...[P]overty will almost certainly be eliminated. Why such optimism?

If you graph out the average human income over the last couple thousand years, you get a line that is flat for almost all that time, until around 1700, where it takes a sharp turn upward and shoots up like a rocket, never faltering, never looking back. I know of no reason that that line is not going to continue to shoot upward, growing average incomes by many multiples. We've already discussed at length how this came about, how the scientific method launched the Industrial Revolution and began an age of unprecedented innovation.

...[In] 1980, the world's population was four billion, and half of them lived on less than \$2 a day, adjusted for inflation. By 1990, that number had fallen to 35 percent. In that year, the United Nations set a goal of halving poverty in 25 years. They reached that goal five years early, and so reconvened in 2010 to set a new goal: completely end poverty by 2030, a goal that we have a good shot at reaching. At present, about 12% of the world lives in poverty, or just under a billion people.

p. 287: ...[A]fter the 2030 goal is reached, the next goal should be to get everyone above \$3 a day, which is a measurably better lifestyle, and then work our way up to \$10, which is the present worldwide median.

That is a tall order. How exactly can we achieve it? Through increased productivity. People working 12 hours a day can't double their income by doubling the hours they work. The have to make each unit of work more productive, which is done, of course, through technology. By increasing productivity, the poorest parts of the world will rise out of poverty, and given the rate of technological growth, it will happen sooner rather than later. Think of the cell phone. In 1984, 1% of the adults in the world had a mobile phone; by 2020, 90% of people over age six will have one. The cell phone is an empowering technology and multiplies labor in real ways by increasing the speed at which information can travel. Or consider the Internet. In 1997, 1% of the world had access to the Internet; that number is now 50%. It too will rise to close to 100%. The Internet is a great multiplier of human labor by making its vast storehouse of knowledge freely available and by providing new ways to buy and sell goods.

With artificial intelligence, everyone's smartphone will have the world's best doctors in it. And educators. And mechanics, therapists, plumbers, personal trainers, dieticians, and so much more. For no cost at all, the vast storehouse of knowledge that is civilization's great gift will be available to everyone. The Internet was empowering, but simply having access to information is not the same as

having access to an artificial intelligence sitting atop all of that knowledge. Each decision we make can be informed by AI, effectively making every person on the planet smarter and wiser than any person has ever been. AI will empower even the very poorest to have access to the same knowledge as the very wealthiest. Knowledge really is power, the power to better your own life. Innovations will come nonstop, giving the bottom billion the tools they need to rise out of poverty and share in the immense wealth of the modern world.

With regard to disease, our third scourge, it too is a technical problem. There's no reason there has to be disease. It just exists because we haven't figured out how to eliminate it. And we can have some confidence that it will be eradicated. Why such optimism?

Consider the worst disease of all time: smallpox. This scourge plagued humanity for 10,000 years. In the 20<sup>th</sup> century alone, it killed more than 400 million people, more people than have died in all wars in all of history. Just think about that. And we eliminated it! Edward Jenner made a vaccination for it in the 1790s. This is astonishing because this was before Louis Pasteur was even born, and he is the person who developed germ theory. So we learned to vaccinate against smallpox before we knew it was caused by germs, with technology little better than stone knives and bear skins.

But think about what we can do with our technology today. We can deconstruct our pathological foes down to their essence, and in the future we will model them in computers and try 10,000 treatments in a moment's time. Plus, we are beginning to have a deeper understanding of the human genome and have already begun making treatments for diseases that are customized to a particular patient. Finally, we have big data. We can study the medical histories of innumerable patients battling some disease and coax out the subtlest bits of information that hold the clues to creating a cure....

The combination of artificial intelligence, more data, and ever cheaper sensors will be unbelievably powerful. The breakthroughs will come quite rapidly and be dramatic in nature. Viruses, as an example, are insidious little creatures, to be sure. They have evolved to be incredibly efficient at what they do, which is to use their hosts to replicate themselves. But they are stump stupid. They can't form a strategy to counter what we do to them. After all, they can't sequence our genome. All they can do is wait for some chance mutation to occur to circumvent what we come up with. That's it. That is their entire playbook right there. Meanwhile, our medical knowledge continues to double, double, and double, year by year, decade after decade. Who do you



think wins at that game?

pp. 290-91: Free Clean Energy

...[E]nergy is the most abundant thing in the universe. While fossil fuels themselves are finite and scarce, energy is everywhere. I am told on good authority, in fact, that  $e=mc^2$ , meaning that the tiniest piece of matter contains a wealth of energy. Technology is the key to unlocking energy in all its clean green forms. Given that technology does that 'doubling thing' we explored earlier, it is just a matter of time before one of the dozens of potential sources for unlimited nearly free energy gives up its secrets and begins powering the planet.

There is no end of the sources of energy around us, each of which is just a few technical breakthroughs away from transforming our entire planet. A single hurricane, for instance, contains enough energy to power the United States for a year. We just need to figure out how to harness it. We live on a planet where the oceans conveniently rise and fall every day. There's more energy given off in that than we could possibly ever use. We just have to learn how to harvest a small portion of it. We live on a planet that has a molten core, hotter than the surface of the sun. If we could harvest a tiny fraction of it, the whole planet could crank up the AC with the windows wide open entirely guilt free. We have winds in the upper atmosphere that constantly blow at 200 miles an hour, and any number of companies are working on how to get access to that energy. Fusion reactors, power plants that try to create a miniature sun and harvest the inexhaustible power that could produce, are being built in China, around Europe, and elsewhere. And then, of course, there is the sun, which kindly rains down on us 4 million exajoules of energy each year. How many exajoules do we use? Five hundred. So out of 4,000,000 exajoules gifted to us by the sun, we just need to figure out how to collect 500. That's a technical problem if ever there was one.

**A**rificial intelligence, robotics, and all the other technologies that we develop will create prosperity so pervasive that no part of the world will be left behind.

p. 292: We can expect major breakthroughs because the financial incentives are all there. We have seen the

(Continued on page 4)

price of solar and other clean energies fall so dramatically because of the profit motive and the wealth that even small improvements in energy production bring about. There is no reason to believe that will change.

#### No More War

What about war in the Fourth Age? Are we going to enter an era in which AI weapons ...cause a proliferation of war? I don't think so. Instead, I believe humanity is nearing the end of organized warfare between nations. That probably seems like a preposterously optimistic prediction. You can't turn on the news without hearing the sounds of sabers rattling.

p. 294: Can we really avoid war in the future? I think there are compelling reasons to have hope.

First and foremost, there are financial reasons. War is no longer profitable for nations. There is no longer any loot to haul off, as wealth is increasingly stored in intangibles. ...[O]nce the possibility of a nation benefitting financially from war vanishes, so will war. In the modern age, wealthy nations just can't afford to go to war with each other. ...In a world of asymmetrical war, wealthy nations actually have more to lose than poor ones, since destruction has become inexpensive while the value of targets has gone up astronomically. As the entire world becomes wealthier war becomes more financially unthinkable.

...The world is ever more intertwined in trade. Trading partners seldom go to war with each other, because it is bad for business, and business wields enormous influence. Our world financial system is becoming a single interdependent monolith in which warfare is virtual economic suicide.

pp. 294-95: Second, the conditions that foster war are vanishing. The lower the per capita GDP in a country is, the higher the likelihood for future war, so if we end poverty, we reduce war. Food insecurity is also a good predictor of future conflict, so if we end hunger we reduce war. Illiteracy and lack of education have been shown to correlate to both poverty and war, and lucky for us, educational attainment and literacy are rising. Democratic peace theory maintains that democracies very seldom go to war with each other, and democracy is sweeping the world. Coming out of World War II there were just ten democracies, and now there are well over a hundred. Monarchies, which often have regarded war as sport, are vanishing.

p. 295: Third, the worldwide culture is shifting. We live in a world where economic accomplishments have largely replaced military ones for men. Nationalism is on the decline. The ability of states to stem the flow of information is vanishing everywhere, making it harder for countries to monopolize information and control a narrative. People every-



Unsuccessful Negotiations

where no longer assume that the official government story is the correct one, making it harder to make up pretenses for war. The 24/7 news cycle brings the horrors of war into our houses in real time, and the Internet puts a face to the suffering on all sides. More people travel internationally, which contributes to peace, as does the increasing number of marriages between people of different nationalities, races, and religions. Governments are becoming more transparent and open, with over fifty nations either developing or deploying open government initiatives.

Communication is easier than ever, and it promotes peace. If the hotline between the White House and the Kremlin helped defuse tensions in the Cold War, how much more do six billion mobile phone accounts? Social media allows people to organize and push governments to reform. Fewer language barriers exist. ... AI-based real-time voice translation is coming soon, tearing down more barriers to communication.

p. 296: ...[I]t is likely that in the Fourth Age, spending on armaments won't decline, and we will continue to make new and better weapons, including killer robots with AI. For a long time to come, nations will continue to expend vast storehouses of wealth to have lethal arsenals. What will change is the calculus around when to use them. That will become an ever more expensive and riskier proposition.

p. 315: Chapter 26: **The Fifth Age.**

p. 316: Jack Kennedy ...said: 'Our most basic common link is that we all inhabit this planet. We all breathe the same air. We all cherish our children's future. And we are all mortal.'

pp. 316-17: This is where we stand right now: at the beginning of a great new age, the Fourth Age, which is giving us amazing new powers that we can use to better the lives of everyone on the planet. This is in our collective best interest, for if all people sleep peaceably in their own bed at night, if everyone has good health

and real opportunity, then the social problems we struggle with, the last vestiges of our savagery and greed, will gradually vanish.

pp. 317-18: There was a time when that wish for safety, health, and prosperity for everyone was beyond our grasp, literally impossible to achieve. The term we use for such impossible worlds is 'utopia,' which appropriately means 'no place.' It doesn't exist, but we sure wish it did.

When you read some of the oldest of the utopian literature from the 16<sup>th</sup> and 17<sup>th</sup> centuries, you can only imagine how outlandish the worlds that these authors envisioned must have seemed at the time. Sir Thomas More's 1516 book *Utopia*, which gave us the word 'utopia,' describes a land with religious freedom for all. *Civitas Solis*, written in 1602, imagines a place with no legal slavery, while *Adventures of Telemachus* of 1699 describes a utopia with a constitutional government.

Those were crazy ideas, weren't they? Religious freedom would undoubtedly lead to civil war, and slavery and absolute monarchy had been universal for thousands of years.

In the 19<sup>th</sup> century, more utopian literature was published that contained outlandish ideas such as universal education, the legal equality of men and women, governmental safety nets, and preventative health care. These ideas are not regarded as crazy anymore, and our modern world is on a trajectory to achieve them. And when we achieve them, we will have come up with still more crazy ideas, until one day we will wake up and find that we cannot imagine a world any better than the one we live in. I deeply believe this will happen.

Until that time, I suggest we move beyond utopias, these 'no places.' We need a new word to spark a new mindset. A word that is aspirational and confident, not simply wishful. If 'utopia' means a world that doesn't exist, I offer the word 'verutopia,' meaning 'a real place,' a

place we can all work together to build.

It is within our ability to achieve such a world, to bring about the Fifth Age, a world of opportunity and abundance for all. We can build that future, and perhaps even occupy it ourselves. It is no longer simply an idle dream but a real possibility. It is no longer a question of resources, it is simply a question of will.'

**I**f all people sleep peaceably in their own bed at night, if everyone has good health and real opportunity, then the social problems we struggle with, the last vestiges of our savagery and greed, will gradually vanish.

Mr. Putin, you have recently complained of a lack of "security" for Russia and have directed commencement of a military campaign of violent invasion of Ukraine in an apparent attempt to create security. Yet it should be clear to you now, having read the foregoing excerpt, that true security for any country lies not in military aggression but in the goodwill held in the hearts of those in the rest of the world for one's country. Such goodwill is fostered by governmental openness, not secrecy, and international trade based on fair dealing and seeking a beneficial bargain for all parties to it.

Also from this excerpt, you no doubt understand that such goodwill arises from a country's participation with other nations of the world in the common cause of accelerating such progress toward a future:

- of ending hunger, poverty, and illness everywhere;
- of providing to everyone everywhere on the planet maximum access to participation in the constantly, geometrically increasing pace of technological innovation;
- of the endless abundance of everything that flows from it; and
- of every conceivable opportunity for everyone everywhere.

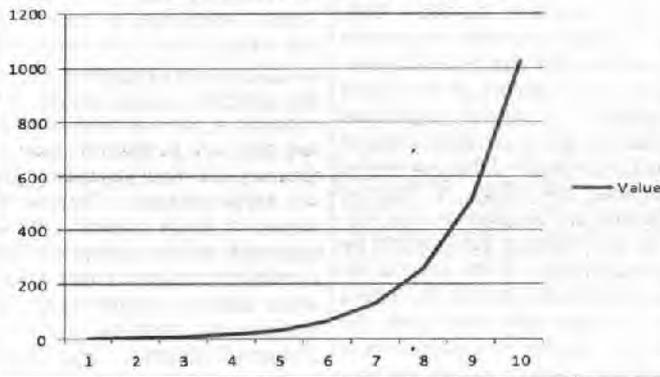
From the foregoing excerpt, it should be obvious that this optimal future is not only possible, in the end it is inevitable. It is in the collective interest of everyone alive today and all who will follow to do all that we can to speed progress to that future.

We in the West are aware that there exist differences of opinion between how things are viewed here and in your country. That is not a problem. We have long experience with expressed differences of opinion. We respect differing views. Culture, civilization in the larger sense, and relations, both between peoples and countries, thrive on correct perception and understanding of different experiences and different views.

This understanding and full discourse among everyone permits arriving at

(Continued on page 5)

### Exponential Value Increase



universal accommodation and adjustment. This is most especially important in international relations, as the world becomes more interconnected and fully participatory by all countries. No intelligent leader would ever obstruct such discourse, and it is unquestionable that you, Mr. Putin, are a very intelligent person.

**W**e will ...come up with still more crazy ideas, until one day we will wake up and find that we cannot imagine a world any better than the one we live in. I deeply believe this will happen.

The author of the book quoted above submits that there is no useful place in world relations for warfare, now or in the future. We in the West now recognize this and we trust that you, as well, see the futility and solely destructive impact of war.

The country perpetrating aggressive war upon another may view that action as advantageous today, but, on a later day, after adversities turn the tide of war or other later circumstances reveal the inadvisability of such preemptive warfare, that aggressor-country may rue the day it set out on that course.

A complicating fact is that the modern invention of nuclear armaments and extraordinarily potent warfare chemicals and militarily created diseases of exceptional virulence and lethality proves that warfare can no longer be confined to small selected areas or populations.

In particular, the effectively permanent lethality of the plutonium dust settling out of the atmosphere after nuclear detonations can easily render large and somewhat unpredictable areas uninhabitable areas that may even prove deadly to merely enter.

In the case of a massive exchange of nuclear weapons, beyond the destructive power of those aggregate explosions themselves, that vast and permanent poisoning effect may kill billions and turn most of the world into unsurvivable territory. By comparison, just pause for a moment to ponder the radiation poisoning of the entire region around Chernobyl

and Pripyat in Ukraine from just one nuclear reactor accident. Deliberate use of what could easily cascade into thousands of nuclear explosions of far greater lethality each is an unconscionable nightmare to unleash upon all of humanity. I'm sure that you already wholeheartedly agree with this.

The fundamental truth is that there will be no winners of World War II. That is the first and most obvious reason why it can never be fought. Some may foolishly believe that a 'limited war' of a non-nuclear nature can be fought and won. But the reality is that, whether by desperate defenders or by aggressors disappointed at stalled advances, eventually resort to nuclear, chemical and/or biological weaponry of mega-death dimension is inevitable. Rather than engaging in such horrific and futile bloodletting for only the most short-term gains that must be balanced against worldwide condemnation, it is an essential necessity that militarily strong nations forswear aggressive warfare and work with all other nations for the elimination of warfare altogether forever for the existential continuation and ultimate good of humanity.

I think it safe to say that I speak for all correctly analytical and brotherly and compassionate human beings everywhere, both in the West and in your realm, when I say that we all love peace and the assurance that peace and goodwill by all for all can bring to everyone.

Parents here and in Moscow as well all fervently hope to be able to put their children to bed each night with assurances to them of a good night with no fears and a better tomorrow than was today. We must all work together to be able to honestly make such assurances without undisclosed fearful reservations.

At most throughout human history, "winning" a war was merely a transient event, capable of having its outcome reversed in due course of years or decades. Now, given the incredibly speeded up nature of human events, especially on the global scale, the time frame of reversal of an apparent victory today can be as short as months or a few fleeting years. And the historical stature of victorious warriors can, in retrospect, be

reduced to despised and reviled caricatures – even by their own former followers.

**I**t is an essential necessity that militarily strong nations forswear aggressive warfare and work with all other nations for the elimination of warfare altogether forever for the existential continuation and ultimate good of humanity.

Being on the wrong side of history, that is, being treated unkindly by posterity, is a huge risk for those who seek to inflict their will upon other countries and peoples by force of arms. Surely, Mr. Putin, you would not choose to be remembered in such villainous or recklessly foolish terms.

Why not instead choose a course for your country that will have you remembered long and favorably by your own people and by all other countries as well? This is the course that clearly recommends itself from the foregoing excerpt.

Why choose unimaginable destruction that will only forestall progress by the world to technological heights? Those heights, on track for emergence in the near future, as the book conveys, will provide in the end so much for everyone that no one will be able to identify any remaining need. This delay of advancement everywhere would surely impact your own people as profoundly adversely as everyone else.

Instead, why don't you open your doors to trade, to exchange of technology, and to cooperation and partnership toward that far better future that awaits us all? War only makes us all losers, Mr. Putin.

Instead, join the rest of the world and make of us all – emphatically including your homeland and its people – winners by the prosperity and great possibilities for all that such unanimous participation and cooperation in technological progress will bring!

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### Virginia Report, # 12

#### A Predisposition Is Not a Volitional Impairment of Lack of Adequate Control.

**VI. F. Claimed Lack Of "Adequate Control" Over Sexual Behavior Is Not "Volitional Impairment," As An Indispensable Commitment Element To Fulfill the Requirement of Substantive Due Process.**

Deirdre M. Smith, "Dangerous Diagnoses, Risky Assumptions, and the Failed Experiment of 'Sexually Violent Predator' Commitment," 67 *Oklahoma Law Rev.*

619, 675 (No. 4, Summer 2015), addresses the point from the standpoint of a bewildered psychiatric profession thus:

"...As one group of commentators noted: 'Assessing volitionality is perhaps the most hopeless of all diagnostic quagmires.' [citing Robert A. Prentky et al., "Commentary: Muddy Diagnostic Waters in the SVP Courtroom," 35 *Jour. Am. Acad. Psychiatry & L.* 455 (2008), at 457].

"...[Psychiatrists] have ...been ambivalent about their ability to understand and identify volitional impairment, particularly in the criminal context. [Michael B. First & Robert L. Halon, "Use of DSM Paraphilia Diagnoses in Sexually Violent Predator Commitment Cases," 36 *J. Am. Acad. Psychiatry & L.* 443, 445 (2008), note 314, at 451; John Monahan, "The Scientific Status of Research on Clinical and Actuarial Predictions of Violence," in *Modern Scientific Evidence and the Law and Science of Expert Testimony* 30, 308-11 (David L. Faigman et al. eds., 1997)]. Such concerns on the part of the psychiatric profession have led many states to eliminate volitional impairment (frequently referred to as 'irresistible impulse') as a basis for the insanity defense. As the APA famously cautioned regarding the limits of psychiatry: 'The line between an irresistible impulse and an impulse not resisted is probably no sharper than between twilight and dusk.' With respect to SVP laws, the Association for the Treatment of Sexual Abusers (a group of medical professionals) stated in its amicus brief to the Supreme Court in *Crane* that the concept of volitional impairment in SVP legal standards is 'meaningless and unworkable.' [Brief for the Association for the Treatment of Sexual Abusers as Amicus Curiae Supporting Petitioner, *Kansas v. Crane*, 534 U.S. 407 (2002), 2001 WL 670067, at \*2]. Like the problematic 'irresistible impulse' test for criminal responsibility, the ATSA argued, the notion of 'volitional impairment,' even if it exists, should similarly be rejected because of the inability of experts to identify it. *Id.* at \*4-7."

"...[D]rawing a conclusion that the defendant has a volitional impairment from only a diagnosis and past offense 'is at best post hoc ergo propter hoc reasoning, and at worst, a complete tautology.'" Janine Pierson, "Construing *Crane*: Examining How State Courts Have Applied Its Lack-of-Control Standard," 160 *U. Pa. L. Rev.* 1527, 1552-53 (quoting Stephen D. Hart & P. Randall Kropp, "Sexual Deviance and the Law," in: *Sexual Deviance: Theory, Assessment and Treatment* 557, 564 (D. Richard Laws & Wm. T. O'Donoghue, eds., 2008)).

Indeed, there really isn't any known  
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way to assess how much control ("volitional") any given sex offender has. As R.L. Jackson, R. Rogers & D.W. Shaman, "The Adequacy and Accuracy of Sexually Violent Predator Evaluations: Contextualized Risk Assessment in Clinical Practice," 3 *Int'l. J. of Forensic Mental Health* 115, 126 (2004) determined, "[N]o variables on either the actuarial methods or the structured clinical methods allow the clinician to draw conclusions regarding the volitionality of the offender's behavior."

This element of lack of "adequate control" fails to satisfy the *Kansas v. Crane* standard of "serious difficulty in controlling" sexual criminal conduct and indeed defies it, especially since that presumption reverses the burden of proof, effectively requiring a defendant to prove that his control is "adequate," and since any sex crime within recent time before the defendant's current incarceration is always accepted as irrebuttable presumption or proof that such self-control is not adequate.



Franz Kafka, author of *The Trial*

Note in this regard that "there is presently no consensus among medical professionals on how to measure a person's self-control." *Pierson, id.*, at 1556.

The editors of the DSM have also made statements regarding the problem of assuming lack of volitional impairment because of a diagnosis of pedophilia (or any DSM disorder for that matter). *Michael B. First & Robert L. Halon*, "Use of DSM Paraphilia Diagnoses in Sexually Violent Predator Commitment Cases," 36 *J. Am. Acad. Psychiatry L.* 443, at 450 (2008):

"...In lieu of a direct assessment of volitional capacity, many SVP evaluations have instead focused on the presence of risk factors that predict future sexual violence, on the assumption that those who are scored as being at high risk of sexually reoffending do so because of difficulty controlling their behavior. The validity of this approach has been justifiably criticized [citing: R. Rogers R. Jackson, *supra*]...

...[H]aving a high risk of reoffending

according to one of these instruments does not also imply that there is a mental abnormality causing this high risk or that, even if caused by a mental abnormality, there also exists in the offender the requisite volitional impairment in reference to committing the offenses."

**A**ssessing volitionality is perhaps the most hopeless of all diagnostic quagmires.

Thomas K. Zander, "Civil Commitment without Psychosis: The Law's Reliance on the Weakest Links in Psychodiagnosis," 1 *Jour. Of Sexual Offender Civil Commitment: Science and the Law* 17, at 65 (2005), addresses the concept of "volitional impairment" in its application in sex offender commitment cases as follows:

"...Doren's volitional impairment theory that paraphilia 'overwhelms the individual's ability to consider various options and consequences' is unsupported by the diagnostic criteria or text of the DSM-IV-TR, or by the scholarly literature. ...In fact, the manual cautions diagnosticians as follows:

The fact that an individual's presentation meets the criteria for a DSM-IV diagnosis does not carry any necessary implication regarding the individual's degree of control over the behaviors that may be associated with the disorder...."

"...[D]iagnosticians ...may resort to inappropriate *post hoc* reasoning that, because the examinee has repeated sex crimes, he or she must have a volitional impairment. Such reasoning requires ignoring all of the evidence of the examinee's ability to control his or her behavior, such as by concealing the crime, being selective about when and against whom he committed it in order to avoid detection, etc....

"...Mercado, Schopp, and Bornstein (2005) undertook one of the few reviews of this literature. After an extensive review of the legal definitions of volitional impairment and the empirical research in psychology regarding this concept, they concluded as follows:

"While the *Crane* decision requires some evidence of volitional impairment to legitimize postsentence sex offender civil commitment schemes, we have little information on exactly what it means to be able to control one's conduct, other than subjectively defined loss of control or history of failure to control conduct... Following *Crane*, the evaluation of an offender's volitional capacity will be increasingly important for decision-making concerning SVPs. Indeed, mental health professionals will likely be asked to provide testimony or to report relative to whether an individual is able to control his or her behavior. Unfortunately, clinicians have no meaningful understanding of the mental compo-

nents underlying individual control. Legal precedent, theoretical literatures, empirical research, and practice guidelines all lack clear operationalizations or conceptions of the 'criteria relevant to volitional impairment. Instead, there is pervasive ambiguity and uncertainty, with frequent overlap between the notions of impulsive behavior and low self-control.' (p. 306)

"An empirical study that examined the operationalization of the volitional impairment standard, and the other criteria for SVP commitment, found results that call into question the validity of these standards. Jackson, Rogers, and Shuman (2004) examined the SVP evaluations of 88 forensic psychologists who reviewed interviews and case histories of six sex offenders who were likely candidates for SVP commitment. The researchers had 5 years of follow-up data that showed whether or not the examinees actually reoffended. In addition to finding that the accuracy of the risk assessments of these experts was only 53% (slightly better than chance), the researchers 'found, 'Importantly, ratings of volitional impairment were unrelated to the presence of mental abnormality' (pp. 122-123). The researchers, noting the lack of specificity about the 'serious inability to control behavior' standard of *Crane*, stated, 'This lack of operationalization likely leads to interpretations of the standard that differs across jurisdictions and experts, ... decreasing the reliability and validity of experts' conclusions.' (p. 125).

"In light of the paucity of support in the DSM or in the scholarly and empirical literature for the concept of volitional impairment as a meaningful factor for the diagnoses generally applied in SVP cases, this concept can hardly be said to validate these diagnoses. On the contrary, it may confound them, as illustrated by the research of Jackson et al. (2004), further casting doubt on the validity of civil commitment of persons who are not psychotic."

Indeed, there really isn't any known way to assess how much control ("volitional") any given sex offender has. As R.L. Jackson, R. Rogers & D.W. Shaman, "The Adequacy and Accuracy of Sexually Violent Predator Evaluations: Contextualized Risk Assessment in Clinical Practice," 3 *Int'l. J. of Forensic Mental Health* 115, 126 (2004) determined, "...[N]o variables on either the actuarial methods or the structured clinical methods allow the clinician to draw conclusions regarding the volitionality of the offender's behavior."

Stephen Morse in "Blame and Danger: An Essay on Preventive Detention," 76 *Boston U. L. Rev.* 113 (1996) at 124, makes these astute observations: "How could the law broaden the class of nonre-

sponsible agents? First, it could assume that anyone who would unjustifiably hurt another person must be irrational and thus nonresponsible. Such an assumption collapses the categories of madness and badness, sickness and evil, and evidences a failure of nerve about the very possibility of objective criteria for rationality and moral judgment." At p. 141, Morse concludes: "The civil commitment of sexual predators, who are responsible and are not especially likely to reoffend compared to other types of violent offenders, weakens rather than reinforces the traditional civil/criminal confinement distinction. The indefinite civil detention of responsible but dangerous sexual predators might provide some social safety at great expense, but only by undermining the liberty the law usually accords to responsible citizens. Medicalization of violent sexual predation is legal prestidigitation that wrongly justifies the unjustifiable"

**C**linicians have no meaningful understanding of the mental components underlying individual control.

The editors of the DSM have made statements as to the problem of assuming lack of volitional control merely because of a diagnosis of pedophilia. *Jennifer Jason*, "Beyond No-Man's Land: ..." (etc.), *supra*, at 83 *S. Cal. L. Rev.* 1331, citing *Brief for the Am. Psychiatric Ass'n. & Am. Acad. Of Psychiatry & the Law as Amicus Curiae in Support of Respondent*, at 1, *Kansas v. Crane*, 534 U.S. 407 (2002), 2001 U.S. S. Ct. Briefs LEXIS 763. At 1339, Jason adds: "... [A]n individual who has pedophilia will not necessarily ever engage in a sexual act with a child." (emphasis supplied; citing: *Michael B. First & Allen Frances*, "Issues for DSM-V: Unintended Consequences of Small Changes: The Case of Paraphilias," 165 *Am. J. Psychiatry* 1240, 1240 (2008).

Therefore, continues Jason:

"Psychiatry ...argues that a pedophilia diagnosis does not necessarily mean that an individual has a volitional impairment because the DSM's definition of pedophilia includes with self-control and without self-control." (Id., p. 1347).

"Psychiatry ...argues that volitional impairment cannot be measured on the basis of likelihood to commit a sexual act again in the future because likelihood to commit an act in the future is not necessarily caused by lack of control in the individual...

"Volitional impairment is not included in the DSM's definition of pedophilia and is not meant to be implied by its definition.

"...[M]any individuals with pedophilia have no trouble controlling their behavior... Some individuals with pedophilia

(Continued on page 7)

collect child pornography but never engage in a sexual act with a child. Some individuals with pedophilia cross the line from fantasy to behavior but only in situations in which they have easy access to potential victims, such as with family members.... Risk assessment measures... essentially are a measurement of [past] sexual acts by others....

## **M**edicalization of violent sexual predation is legal prestidigitation that wrongly justifies the unjustifiable

The APA argues that the volitional impairment concept should be limited to 'such severe impairment as to avoid the large gray area: inability to control the conduct, as proved with a high degree of certainty.' (J. Jason, *supra*, 1350-52, citing: DSM-IV-TR, at xxxiii; First & Halon, *supra*, at 450; Kansas v. Crane, Brief for the APA in Support of Respondent, *supra*, at \*29).

In addition, notes Jason, at 1355: "Psychiatry recommends that mental health professionals testifying as 'experts' in SVP trials must caution triers of fact (that) there is no professional consensus in the field of mental health concerning what constitutes volitional impairment nor even what constitutes adequate psychiatric or psychological evidence of it." (citing First & Halon, *id.*, at 451). "...[T]he expert should also inform triers of fact that even information yielded by scientifically generated actuarial risk-assessment instruments cannot resolve the question of volitional impairment." (First & Halon, *ibid.*)

In sum, there is no scientific basis for any presumption of a lack of control on any Respondent's part, whether from any diagnosis of pedophilia or from any evidence of a claimed likelihood of future offense.

Therefore, as thus construed and judicially applied in SOCC cases, this case law element and presumption of lack of control deprives Respondents of substantive due process.

### **1. In General, the Presumption Built into the SOCC Law of an Inherent Lack of Adequate Control from a Disorder's Existence Violates Substantive Due Process.**

#### A Disregard of the Requirement That Specific Claimed Symptoms of a Cited "Disorder" in a Given Commitment Defendant Be Shown to Deprive Him of His Ability to Control His Actions.

In *Kansas v. Crane*, 534 U.S. 407, 151 L. Ed. 2d 856, 122 S. Ct. 867 (2002), the U.S. Supreme Court held that, in order to be committed under sex offender commitment legislation that is not impermissibly punitive, one must be shown to have "serious difficulty" in controlling one's

sexual offending. However, in Minnesota appellate court decisions since that case, such a dubiously vast array of evidence and testimony have been relied upon by prosecutors and judges to support a claimed inference of such "serious difficulty" that the *Crane* limitation no longer carries any meaning or impact in Minnesota's judicial interpretation, construction, implementation, and application of the aforesaid Act. To the extent my research has been able to examine decisional law in other states on this point, it appears to be largely congruent with Minnesota's unspoken defiance of the *Crane* standard. This deprives SOCC Respondents everywhere of substantive due process.

Also as to this last point, see: Peter C. Pfeifferroth, writing in "The Need for Coherence: States' Civil Commitment of Sex Offenders in the Wake of *Kansas v. Crane*," 55 *Stan. L. Rev.* 2229 (June 2003), at 2250: "The courts appear to be following Justice Scalia's dissent [in *Crane*], not the majority holding, by finding an implicit lack of volitional control in the determination that an offender suffers from a mental abnormality."

This, of course, does not just transgress the standard of *Crane*, but also in fact defies the parallel principle of psychiatry: "Do not assume that diagnosis of a paraphilia implies volitional impairment. One needs to provide positive evidence that the offender has difficulty controlling his sexually assaultive behavior as a result of the paraphilia or of a comorbid condition. It is important to understand that having a diagnosis of paraphilia does not imply that the person also has difficulty controlling his behavior" Michael B. First & Robert L. Halon, "Use of DSM Paraphilia Diagnoses in Sexually Violent Predator Commitment Cases," 39 *Jour. Am. Acad. Psychiatry & Law* 443, 450 (2008; emphasis added). Cf. *State v. Rosado*, 889 N.Y.S. 2d 369, 382-83 (N.Y. Sup. Ct. 2009) ("The two concepts of predisposition and volition are separate and distinct, like apples and oranges. A disorder, like pedophilia, might predispose someone to the commission of sex offenses, but the offender might have a great degree of control over the predisposition.")

"The fact that decision-makers were more likely to find a lack of control in the context of a commitment proceeding than in an insanity hearing is especially distressing from the standpoint of assuring due process because the context of the proceeding should have no bearing on the determination of a defendant's inherent biological or character trait [citing: Cynthia Calkins Mercado et al., "Decision-Making About Volitional Impairment in Sexually Violent Predators," 30 *Law & Human Behav.* 587, 589-90, 592, 598 (2006)]. This research suggests that bias against sex offenders may cause the concept of volitional impairment to be used as a sword to civilly commit defendants more often than it is used as a shield

to exculpate defendants of criminal responsibility in the context of an insanity hearing." (Janine Pierson, "Construing *Crane*: Examining How State Courts Have Applied Its Lack-of-Control Standard," 160 *U. Pa. L. Rev.* 1527, 1551-52 (April 2012))

Proving the abstraction "control" requires demonstrating that one is currently leading a sex-crime-free life despite the opportunity in open society to commit a sex crime. Of course, while still incarcerated after one's prison release date in a commitment facility, there is no way to prove this. Effectively, upon the mere accusation of inadequate "control" of supposed "impulses," a commitment respondent is deprived by confinement of the opportunity to disprove that accusation in the only way it can be disproved. This too deprives commitment defendants of substantive due process.

#### B. The Mere Existence of a "Disorder" Cannot Inherently Connote Uncontrollable/Difficult-To-Control "Impulses"

Richard Wolert, writing in "Poor Diagnostic Reliability, the Null-Bayes Logic Model, and Their Implications for Sexually Violent Predator Evaluations," 13 *Psychol. Pub. Pol. and Law* 167 (2007), at 188, quotes the DSM-IV at pp. xxxii, xxxiii, and xxxvii, stating, "A DSM diagnosis does not carry any necessary implications regarding the causes of the individual's mental disorder or its associated impairments.... The fact that an individual's presentation meets the criteria for a DSM diagnosis does not carry any necessary implication regarding the individual's degree of control over the behaviors that may be associated with the disorder...."

Eric S. Janus, "Sex Offender Commitments and the 'Inability to Control' - Developing Legal Standards and a Behavioral Vocabulary for an Elusive Concept," Chapter 1, at pp. 1-8 to 1-9 in: *The Sexual Predator: Legal Issues, Clinical Issues, Special Situations* (Vol. II) Anita Schliank, ed. (Civic Research Institute, Kingston, N.J. 2001) explains this *non sequitur* thus:

"Caused Behavior  
"...[W]e should not use the concept of 'caused behavior' as a defining characteristic of inability to control, as this concept is often confused for the latter. It is assumed that if certain behavior is 'caused' by a given psychological condition, then the person had no 'control' over the behavior. But this approach proves too much. All human behavior is 'caused,' but we nonetheless insist that humans have control over their behavior, at least in general. It may be that we will want to say that certain kinds of 'caused behavior' evidence inability to control, such as a behavior 'caused' by a particular kind of mental disorder. But then the real work will be done by our characterization of the mental disorder,

not by the attribution of causation.' And just as being 'caused' does not make behavior beyond an individual's control, so too being 'caused by a mental disorder does not *ipso facto* justify that ascription.

[T]he fact that an individual's presentation meets the criteria for a DSM-IV diagnosis does not carry any necessary implication regarding the individual's degree of control over the behaviors that may be associated with the disorder. Even when diminished control over one's behavior is a feature of the disorder, having the diagnosis in itself does not demonstrate that a particular individual is (or was) unable to control his or her behavior at a particular time.'

[Note 41: *American Psychiatric Assn., Diagnostic and Statistical Manual of Mental Disorders* (4th ed. 1994 - "DSM-IV"); also stating, at Note 40, that "the notion that given behavior is 'caused' by a mental disorder is itself an extremely problematic conclusion to draw," citing: Virginia Adige Hiday, "Understanding the Connection Between Mental Illness and Violence," 20 *Int'l J. L. & Psychiatry* 399, 412 (1997)].

"Psychiatry argues that it is difficult to operationalize the concept of volitional impairment and, thus it is perhaps better to conceive of it as a complete lack of control, rather than some nebulous concept of inability to control oneself. Psychiatry argues that, as applied to pedophilia, volitional impairment cannot be inferred merely on the presence of the disorder in an individual because individuals with pedophilia have varying degrees of self-control. Moreover, it argues that volitional control cannot be measured on the basis of the likelihood to commit a sex act with a child again in the future because likelihood to commit an act in the future is not necessarily caused by lack of control in the individual.

**T**he expert should also inform triers of fact that even information yielded by scientifically generated actuarial risk-assessment instruments cannot resolve the question of volitional impairment.

"1. Not all Individuals with Pedophilia Have Volitional Impairment.

"...The DSM states that 'the fact that an individual's presentation meets the criteria for a [pedophilia] diagnosis does not carry any necessary implication regarding the individual's degree of control over the behaviors that may be associated with [pedophilia], and that a 'diagnosis in itself does not demonstrate that a particular individual is (or was) unable to control his or her behavior at a particular time.' Psychiatry indicates that the group of individuals diagnosed with pedophilia are not

(Continued on page 8)

necessarily more or less likely to have difficulty controlling their impulses in the future.

...[M]any individuals with pedophilia have no trouble controlling their behavior.

...The APA argues that the volitional impairment concept should be limited to 'such severe impairment as to avoid the large gray area: inability to control the conduct, as proved with a high degree of certainty.'

"Psychiatry recommends that 'mental health professionals testifying as 'experts' in SVP commitment trials must caution triers of fact' that 'there is no professional consensus in the field of mental health concerning what constitutes volitional impairment nor even what constitutes adequate psychiatric or psychological evidence of it,'" *J. Jason*, "Beyond No-Man's Land: Psychiatry's Imprecision Revealed by Its Critique of SVP Statutes as Applied to Pedophilia," 83 *So. Cal. L. Rev.* 1319, 1350, 1352 (2010), citing: *Michael B. First & Robert L. Halon*, "Use of DSM Paraphilia Diagnoses in Sexually Violent Predator Commitment Cases," 36 *J. Am. Acad. Psychiatry L.* 443, at 451 (2008)

*First & Halon*, *id.*, at pp. 444-45, amplify on this concept thus:

p. 444: "Of all the disorders included in the *DSM-IV-TR*, certain of the paraphilias come closest to the type of sexual psychopathology defined in the SVP laws, even though none has the requisite predisposition to act on the paraphilic fantasies and urges nor do they involve volitional impairment in doing so.

"We contend that, during the process of adjudication of SVP commitment trials, profound and avoidable errors are made by some mental health professionals who invalidly diagnose paraphilia, assert that there is volitional impairment based solely on the fact that the offender has a paraphilia diagnosis, and thus wrongly claim that the statutorily defined SVP commitment criteria are adequately addressed by the clinical diagnoses. In such cases, mental health experts have made a *DSM-IV-TR* diagnosis of paraphilia without providing valid evidence to justify the diagnosis. Instead, they infer from the criminal sexual behavior the existence in the offender of the requisite 'deviant sexual arousal pattern' (i.e., recurrent, intense, sexually arousing fantasies and urges) that is the defining feature of paraphilia."

p. 445: "...We propose the following three-step process to assist in those diagnostic efforts. First, establish whether a paraphilia is present; that is, provide reasonable evidence of the existence in the offender of the recurrent, intense, sexually arousing fanta-



"Better and Better!"  
exclaimed the Red Queen.

sies (i.e., mental imagery, that the individual considers to be erotic) and urges (i.e., to act on the fantasies) that are the *sine qua non* in paraphilic diagnosis. Second, if a paraphilia is present, establish whether the offender's sexually violent crimes occurred as a direct consequence of that paraphilia. Third, rather than assuming that a diagnosis of paraphilia implies volitional impairment, present positive evidence suggesting whether the offender is, or is not, volitionally impaired with regard to committing sex crimes. We acknowledge that this third step in the process – differentiating those offenders who legitimately lose control from those who simply choose to violate social rules – may be difficult, if not impossible, to accomplish. [citing: *R. Rogers, R. Jackson*, "Sexually Violent Predators: The Risky Enterprise of Risk Assessment," 33 *J. Am. Acad. Psychiatry & Law* 523-28 (2005); *C.G. Mercado, B.H. Bornstein & R.F. Schopp*, "Decision-making About Volitional Impairment in Sexually Violent Predators," 30 *Law & Human Behavior* 587-602 (2006); *B.D. Grunage*, "Volitional Impairment and the Sexually Violent Predator," 48 *Jour. Forensic Sci.* 861-68 (2003)] It is a conclusion to which, we believe, no expert witness can testify with any degree of certainty and that fact must be plainly stated to triers of fact.

At p. 450, *First & Halon* conclude: "...[T]here are no established, validated scientific methods for measuring impairment in an individual's ability to control his behavior [citing *C.G. Mercado, B.H. Bornstein & R.F. Schopp, supra*] ...."

In fact, most individuals who have a sexual interest in children never actually engage a child in sexual activity, irrespective of any lack of treatment. Further, the aforementioned lack of statistical difference in recidivism between those treated and those not treated points up that such lack of treatment — of pedophilia or of any other so-called disorder — does not inherently hamper any respondent's control of his sexual behavior.

Yet use of these disorders as an excuse to commit under said *Act* has allowed expert witnesses for the prosecution to regularly opine that the sheer "diagnosed" existence of such a

"disorder" in the sex offender in a given commitment case under said *Act* inherently deprives that sex offender of the ability to control his actions, such that he will purportedly commit future sex crimes on irresistible impulse. The practice of offering this opinion has become completely divorced from the emotional/mental state of the particular commitment respondent at bar, instead having morphed, without scientific basis, into a matter of sheer testimonial definition of a given "disorder."

Only in rare cases has a commitment defendant in such a commitment case declared (at any time) that he cannot control his pedophilic attraction, such that he concedes that he will commit another sex crime of that nature upon release or shortly thereafter, as would be necessary to evince a "serious difficulty" in controlling such an impulse. Instead, in almost every case where such a prosecution expert testifies beyond such a 'by definition' conclusion of supposedly 'irresistible impulse' that expert will merely cite the sex offender's past record of sex offense(s), as supposedly illustrating a lack of self-control as to such motivations. However, this is merely an attempt to throw a cloak of seeming science around the unscientific *non sequitur* mantra that 'he did it before, so he must be likely to do it again'. In short, this is a misuse of "junk-science" to falsely appear to scientifically support the required elements for a commitment under said *Act*.

Hence, in almost every such commitment instance pursuant to said *Act*, there is no basis for a reasonable fear that the committed sex offender will commit a sex offense from any "impulse" immediately following prison release, or even within a short period thereafter. Instead, mere statistics as to other sex offenders in the past are advanced to buttress what amounts to sheer speculation that eventually, perhaps many years or even decades later, that sex offender may commit another sex crime.

C. Predisposition Does Not a Volitional Impairment Make.

*State v. Rosado*, 889 N.Y.S.2d 369, 382-83 (N.Y. Sup. Ct. 2009), succinctly explains: "The two concepts of predisposition and volition are separate and distinct, like apples and oranges." A disorder, like pedophilia, might predispose someone to the commission of sex offenses, but the offender might have a great degree of control over the predisposition." (emphases added)

"There is no reliable basis to distinguish between those [sex offenders,] who offend because of a 'mental abnormality or personality disorder' and those who offend because they choose to,..." *John A. Fennel*, "Punishment by Another Name: The Inherent Overreaching in Sexually Dangerous Person Commitments," 35 *New England J. on Crim. &*

*Civ. Confinement* 37, at 39 (2009). At pp. 44-46, *Fennel* explains, applying this to pedophilia:

"No conclusions about an individual's volitional impairment should be inferred from a pedophilia diagnosis alone. A pedophile may or may not choose to offend against a child.

"...[T]here is no reliable basis for distinguishing between an irresistible impulse and an impulse not resisted. If an offender can resist the impulse but chooses not to, the offender is just a typical recidivist. As such, the offender falls out of the legal reach of civil commitment laws.

"Note that the experts resort to speculating about unverifiable subjective mental states instead of providing scientific accounts of mental defects. ...In so doing, the expert leaves us with no principled way to distinguish between the offender who chooses to offend and the offender who lacks the control necessary to resist.

"...If the irresistible impulse cannot be distinguished from the impulse not resisted, how can the seriously difficult-to-control impulse be distinguished from the impulse controlled without serious difficulty? The distinction cannot even be articulated, yet experts continue to claim they can divine the difference. They tell convincing stories, yet they lack access to the thoughts of the offender. The only internally consistent way to commit recidivists is to contend that simply being a recidivist indicates a serious difficulty controlling deviant sexual impulses, ruling out the possibility that recidivists choose to offend. This hermetically sealed explanation surely reaches too far, enabling state experts to label all recidivists [as] sufferers of mental abnormalities or personality disorders." (emphasis supplied)

*Fennel* cites this incisive passage from *Bruce J. Winick*, "Sex Offender Law in the 1990s: A Therapeutic Jurisprudence Analysis," 4 *Psychol., Pub. Pol'y & L.* 505, 524-25 (1998):

"People diagnosed with pedophilia do not molest children in the presence of police officers or in other situations presenting a high likelihood of apprehension. Rather, they act with stealth, deception, and premeditation in an effort to avoid detection. This is purposeful, planned, and goal-directed conduct, not spontaneous and uncontrollable action or action that is substantially beyond the individual's ability to avoid. Although some conditions may be said to deprive people of the ability to control their behavior — at times, schizophrenia, major depression, Tourette's syndrome, and multiple personality will qualify — pedophilia and other paraphilias do not seem to have this effect. It may be sensible to classify the paraphilias as mental disorders for various purposes — for example,

(Continued on page 9)

for clinical reasons or for the purpose of making employment decisions, such as whether to hire a grade school teacher – but when the purpose involved is civil commitment, these conditions should not qualify. They neither render individuals incompetent to engage in rational decision making nor make them unable to resist their strong desires to molest children or otherwise to act out sexually.” (citations omitted).

As noted by *Janine Pierson*, in “*Construing Crane*” (etc.), *supra*, at 160 *U. Pa. L. Rev.* 1530, “*Crane* mandates that states require a separate finding on the issue of whether the defendant has serious difficulty controlling his behavior.” (*Crane*, at 534 U.S. 413). *Pierson* notes that *Justice Scalia’s* dissent in *Crane* “would have held that a finding of a lack of control is inherent in the finding of a mental abnormality that caused future dangerousness.” (citing *Crane*, at 420). *Pierson*, at 1537, complains that certain states with sex-offender commitment legislation have essentially disregarded this requirement of *Crane* and have instead “adopted Justice Scalia’s dissent as the law.” Minnesota, per *In re Ramey*, 648 N.W.2d 260, 266-67 (Minn. App. 2002), albeit before *Crane*, effectively is one of these states, since *Ramey* is still cited as valid law on this point, in *facit* *disregard* of *Crane*. See, e.g., *In re Garza*, 2008 WL 2889700, at \*8 (2008).

*Pierson* complains of the Wisconsin decision of this type, *In re Commitment of Laxton*, 847 N.W.2d 764 (Wis. 2002), as particularly egregious for having incorrectly equated “predisposition” with lack of control. “However, a ‘predisposition’ ... has no bearing on whether that person can ultimately control himself.... As psychologists have explained, a person’s predispositions do not necessarily bear on his volitional capacity.” (emphases supplied; citing *State v. Rosado*, 898 N.Y.S.2d 369, 382-83: “A disorder, like pedophilia, might predispose someone to the commission of sex offenses, but the offender might have a great degree of control over the predisposition.” – emphases supplied).

“Further, not all predispositions come to fruition. The person with perfect self-control may also fulfill the *Laxton* court’s second criterion – that he has a high likelihood of again committing sexual offenses – because he chooses to do so, exercising his perfect self-control. This exercise demonstrates that fulfilling the *Laxton* court’s burden of proof for commitment does not necessarily prove anything regarding a sex offender’s ability to control himself. This standard contradicts the Supreme Court’s ruling that ‘there must be proof of serious difficulty in controlling behavior.’ (*Crane*, at 413). Thus, the states that disregard the holding of *Crane* remove a key constitutional safeguard....” (*Pierson*, at 1541-42).

At footnote 139, *Pierson* clarifies even more succinctly: “An offender who wants to act on his desires in certain situations and accordingly does so is able to exercise self-control in those situations and is therefore not eligible for civil commitment (but should only be relegated to the criminal justice system if and when he commits a crime).” In SOCC cases, there is never any allegation or proof that the commitment respondent did not want to act on his desires in committing any crime he has been alleged to have committed.

*Pierson* also complains of state sex-offender commitment statutes (including Minnesota’s) that “[b]y requiring that a defendant have a mental disorder that causes volitional impairment, these statutes suggest that mental disorders and volitional impairment go hand-in-hand. This suggestion opens the door for the fact-finder to conflate the two concepts rather than properly keeping the concepts analytically distinct.” (*Id.*, at 1545-46).

In fact, *Holly A. Miller, et al.*, “Sexually Violent Predator Evaluations: Empirical Evidence, Strategies for Professionals, and Research Directions,” 29 *Law & Human Behavior* 29, 46 (2005), notes that “[i]n addition to the lack of agreed upon methodology to assess ‘inability to control,’ at present there is no consistently utilized definition of just what is being assessed.”

The only true standard of such dangerousness for commitment purposes is whether one so utterly lacks control of his own actions in the moment (volitional impairment) that, in that moment, he certainly will act upon an impulse that he simply cannot resist.

Because that standard of lack of volitional control is already within the parameters of commitment for those who are “mentally ill and dangerous,” and since such compulsion to act on an impulse is defined as a symptom of mental illness, those few can be committed under that statute; there is no need for a commitment statute specific only to sex offenders.

On the contrary, sex crimes are almost always the subject of extensive pre-planning and even long-term preceding actions (think: grooming, for instance) aimed at setting up an ideal opportunity for the crime(s) to follow. No matter how deplorable anyone finds that conduct, it is the absolute antithesis of lack of self-control. While one may argue that such deviousness and plotting call for harsh criminal penalties, it is illogical to argue that such cunning shows impaired volitional control.

**L**ack of treatment – of pedophilia or of any other so-called disorder – does not inherently hamper any respondent’s control of his sexual behavior.

#### D. The Long, Stepwise Grooming Of A Projected Future Victim Of Sexual Abuse, Or Alternatively, the Careful Planning By A Rapist, Shows Deliberation and Complete Volitional Control In Nearly All Sex Offenders.

The following excerpts show that a claim of volitional impairment (as often made by proponents of sex offender commitment) is ridiculously at odds with the long, stepwise deliberation of grooming of a projected future victim of sexual abuse. As the article further suggests, this also holds true in cases of planned rapes of adult victims, where careful planning of the rape crime replaces the grooming in cases of sexual abuse of children.

*Jan A. Elliott*, “A Self-Regulation Model of Sexual Grooming,” 18(1) *Trauma, Violence & Abuse* 83-97 (2017), Text Excerpts:

p. 83: “A preparatory process has been widely accepted to be a common feature in the sexual offending process (*Beauregard, Proulx, Rossmo, Leclerc, & Allaire*, 2007; *Finkelhor*, 1984; *Kaufman, Hilliker, & Daleiden*, 1996; *Smallbone & Wortley*, 2000; *Wolf*, 1984). Although not all sex offenses involve preparatory processes, it has been said that sexual assaults rarely occur spontaneously, and many studies have found that a majority of sexual offenders self-report engaging in behaviors designed to develop a relationship with their victim prior to the initiation of sexual contact (see table 1 in *Leclerc, Proulx, & Beauregard*, 2009). Furthermore, sex offenders may attempt (or may be required) to engage in the same type of behavior to develop relationships with caregivers, guardians, and others in the wider community in order to gain access to children (*McAlinden*, 2006; *Ost*, 2004).”

p. 84: “*Olson et al.’s* theory of luring communications. *Olson, Daggs, Ellevoid, and Rogers*, (2007) developed a theory of child sexual predators’ luring communications that aimed to emphasize the communicative processes involved in child sexual abuse. *Olson et al.* separate four factors sequenced over a period of time: (1) gaining access – the causal factor that predicts action; (2) the cycle of entrapment – the action factor; (3) communicative responses to sexual acts – the intervening factor; and (4) ongoing sexual abuse – the outcome factor. Each of these factors is indirectly influenced by the contextual environment: time, culture, and issues around power and control. The action factor has at its core the phenomenon of “deceptive trust development,” described as the phenomenon that enables the protagonist to groom, isolate, and approach the child. *Olson et al.* define grooming as “the subtle communication strategies that child sexual

abusers use to prepare their potential victims to accept the sexual contact.” (p. 241).”

p. 85: “*O’Connell’s* model of cybersexploitation. *O’Connell* (2003) was among the first to examine Internet sexual grooming strategies, using observation methods involving undercover researchers posing as young, isolated females, and created a model of ‘cybersexploitation.’ *O’Connell’s* model appears to contain three phrases that, for the purpose of this review, are labeled as targeting, grooming, and exploitation. Focusing on the grooming phase, *O’Connell* (2003) outlines seven stages that typically occur in sequence: (1) friendship forming, (2) relationship forming, (3) risk assessment, (4) exclusivity, (5) sexual, (6) fantasy reenactment, and (7) damage limitation.

In Stages 1 and 2, the protagonist seeks information about the target as a means of assessing aspects of their circumstances that may make them more amenable to manipulation as well as gaining insight into the target’s life (in order to relate to them). In Stages 3 and 4, the protagonist builds this relationship, establishing secretiveness and assessing the potential for detection (e.g., the whereabouts of caregivers, or surveillance over computer use). After establishing that it is safe to do so, the protagonist seeks to isolate the target and create exclusivity between themselves and the target. The protagonist seeks constant feedback from the target allowing them to assess the levels of trust. Once the protagonist feels they have gained the child’s trust, Stages 5, 6, and 7 involve introducing sexual topics into conversation and gauging the target’s responses. Three tactics are hypothesized for introducing sexual topics: (1) gentle boundary pressing; (2) reducing inhibitions through exposing the child to pornography or sending/requesting sexual images, and (3) fantasy reenactment, either through mutuality (encouraging the child to participate in fantasy) or through coercion.”

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*Finkelhor, D.* (1984). *Child Sexual Abuse: New Theory and Research*. New York, NY: Free Press.  
*Kaufman, K.L., Hilliker, D.R., & Daleiden, E.L.* (1996). Subgroup differences in the modus operandi of adolescent sexual offenders. *Child Maltreatment*, 1, 17-24.  
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(Continued on page 10)

**A** 'predisposition' ...has no bearing on whether that person can ultimately control himself.

McAlinden, A.M. (2006). "Setting 'em up': Personal, familial and institutional grooming in the sexual abuse of children. *Social and Legal Studies*, 15, 339-362.

O'Connell, R. (2003). *A typology of cyberexploitation and online grooming practices*. Preston, England: Cyberspace Research Unit, Univ. of Central Lancashire. Retrieved Sept. 6, 2009, from [http://netsafe.org.nz/Doc\\_Library/rachelocconnell1.pdf](http://netsafe.org.nz/Doc_Library/rachelocconnell1.pdf)

Olson, L.N., Daggs, J.L., Ellevoid, B.L., and Rogers, T.K.K. (2007). Entrapping the innocent: Toward a theory of child sexual predators' luring communication. *Communication Theory*, 17, 231-251.

Ost, S. (2004). Getting to Grips with sexual grooming? The new offense under the Sexual Offenses Act 2003. *Jour. of Social Welfare and Family Law*, 26, 147-159.

Smallbone, S. & Wortley, R. (2000). *Child sexual abuse in Queensland: Offender characteristics and modus operandi*: Full report. Brisbane, Australia: Queensland Crime Commission.

Wolf, S.C. (1984). A model of sexual aggression/addiction. *Jour. of Social Work and Human Sexuality*, 7, 131-148

Confirming these observations, Brian K. Payne & Matthew DeMichele, "Warning: Sex Offenders Need to be Supervised in the Community," *Federal Probation*, June 2008 Newsletter, [http://www.uscourts.gov/fedprcb/June 2008/05 sexOffenders.html](http://www.uscourts.gov/fedprcb/June%2008/05_sexOffenders.html), published by the Administrative Office of the United States Courts, states at page 5:

"For the most part, sex offenders do not act spontaneously, but rather they often conduct extensive planning of their offenses to prevent detection through secrecy and manipulation

...Sex offenders...seek to 'befriend' and intentionally 'groom' those around them. Sex offenders attempt to manipulate those in supervisory and authority roles (as well as potential victims)," adding at p. 9, "...[S]ex offenders tend not to attack spontaneously or randomly, but often go through extensive planning..."

These excerpts prove that sex crimes against children involve intricate, time-consuming "grooming" actions prior to sexual action involving the groomed child. This long period of preparation, involving stepwise deliberation on whether to advance to actual sexual actions at all, is utterly inconsistent with the notion of sex crimes committed spontaneously upon irresistible impulse. Hence, sex offender commitment, constitutionally requiring proof of volitional impairment, when applied against pedosexual offenders, almost universally comprises a violation of substantive due process. Unexcerpted

text in this article shows that the same holds true as to planned rapes.

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### DSM Diagnostic Misuse in SOCC Cases:

## ASPD Diagnosis Merely Resurrects Rejected "Rapism" Disorder

Dawn Pflugrad & Bradley Allen, "A Grounded Theory Analysis of Sexual Sadism in Females," 18(2) *Jour. Of Am. Acad. Psychiatry Law* 191-94 (2020)

#### Abstract excerpts:

"...Until recently, state evaluators ignored the crucial fact that rape as a mental disorder has been rejected by the Diagnostic Statistical Manual of Mental Disorders (DSM) four times in the past 45 years (in DSM-III, DSM-III-R, DSM-IV, and DSM-V). The most common diagnosis in SVP cases was 'other specified paraphilia disorder, nonconsent,' which was based on a misunderstanding and misuse of the DSM definition of 'paraphilia.' Sreenivasan and colleagues suggest antisocial personality disorder as an appropriate standalone diagnosis to replace 'paraphilia.' ...My contrasting view is the antisocial personality disorder is not an appropriate diagnosis in SVP cases because it overlaps almost completely with common criminality, holds only a very marginal place in psychiatric diagnosis, never serves as grounds for civil psychiatric commitment, and is never considered a valid psychiatric excuse to avoid prison for rape and therefore is not a legitimate psychiatric excuse for preventive incarceration after the criminal sentence has been served.

#### Text excerpts:

pp. 191-92: "...Recommending ASPD as a qualifying diagnosis in SVP cases has now gained urgency and support only because the previously preferred diagnosis in SVP cases, i.e., 'other specified paraphilia, nonconsent,' is rapidly losing its credibility and legitimacy. Promoting ASPD as a qualifying diagnosis is a last resort to support SVP commitments.

p.192: Misuse of Paraphilia in SVP Cases

"...[R]apists who have completed their criminal sentence are detained indefinitely (often for life) via psychiatric incarceration even though they may have no real psychiatric illness; and the broad and ambiguous definition of 'mental abnormality' in SVP statutes and Supreme Court ruling permits the misuse of psychiatric terminology. The Supreme Court rulings supporting the constitutionality of SVP statutes require that evaluators determine whether the rapist has a mental disorder, which can be used to justify psychiatric commitment, versus whether the rapist is just a common criminal who

cannot be preventively detained psychiatrically, however dangerous he may seem. The Supreme Court offered no definition of mental abnormality or mental disorder, nor did they offer guidelines on how to establish whether acts of rape result from a psychiatric problem rather than from common criminality.<sup>2,3</sup> In the absence of other guidance, expert witness evaluators on both sides of SVP cases have uniformly chosen to base their diagnosis on the DSM system of psychiatric diagnosis. Unfortunately, however, they far too often misunderstood how DSM is meant to be used and they have carelessly misapplied its bases in SVP cases.

The misuse of psychiatric diagnosis in legal settings should occasion grave concern, but no great surprise. In a cautionary statement, written 40 years ago and placed prominently before the text of the DSM-III, we warned about the danger that this text could be misused in legal settings. There is a substantial risk that the diagnostic information contained in the DSM will be misunderstood because of the imperfect fit between the questions of concern to the law and the information contained in a clinical diagnosis. We stated explicitly that the DSM definitions of mental disorders were developed to meet clinical and research needs, not the needs of legal professionals. DSM is written by and for clinicians (who are untrained in the level of language precision required in legal documents) and is not written for a legal audience. Every subsequent edition of the DSM manual has reaffirmed and expanded this warning, but it is routinely ignored in court proceedings.

pp. 192-93: "...The four different task forces preparing the four different editions of DSM published since 1980 have all concluded that coercive paraphilia has no standing in psychiatric diagnosis and should not be included anywhere in the manual of mental disorders. ...Coercive paraphilia was not included in DSM-IV, and was again proposed and rejected for DSM-5. The repeated rejections have been so complete that coercive paraphilia has never appeared as one of the many examples used to illustrate which diagnoses might be appropriate under other specified paraphilic disorder and has never been considered worthy for inclusion in the DSM appendix listing Conditions for Further Study.

p. 193: "...For rape ever to serve as grounds for diagnosing paraphilia, the act of forcing sex would itself have to be the preferred or necessary stimulus for the rapists to achieve sexual arousal, not just a means of enforcing compliance or incidental to the context. Rape as a crime is all too common and occurs in many different contexts (opportunistic rape, date rape, gang rape, wartime rape, rape under the disinhibiting influence of substances, and rape for gain). In contrast, a stereotypical specific sexual arousal

pattern, triggered only by coercion, is very rare, if it exists at all. Rape is always, or almost always, just a simple crime; it is never, or very rarely, related to paraphilic arousal patterns.<sup>5-8</sup>

...Evaluators purporting to provide expert testimony cannot possibly reliably pick out the extremely rare paraphilic rapist (assuming that such individuals exist at all) from the wide array of other, much more common factors associated with simple criminal rape...

...Unfortunately, many former prisoners continue in inappropriate psychiatric incarceration, victims of inexpert expert testimony.

#### **ASPD and Psychiatric Commitment**

...The DSM-5 definition of ASPD is mostly a cataloging of criminal behaviors, making ASPD extremely common among rapists and not useful in distinguishing between rape as a part of common criminality and rape arising from mental abnormality, which is a distinction clearly required by the Supreme Court in justifying the constitutionality of SVP statutes. ... [T]here are no other circumstances where ASPD is ever grounds for psychiatric commitment or for any other type of psychiatric hospitalization. ...ASPD has been included in DSM for historical reasons only; it is not included in *International Classification of Diseases, 11th Revision*, it was almost excluded from DSM-5, and it is not part of the practice of psychiatry and is not treatable.<sup>10-13</sup>

#### References

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- 3 *Kansas v. Crane*, 534 U.S. 407 (2002).
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- 7 First, M., Frances, A., "Issues for DSM-V Unintended Consequences of Small Changes: The Case of Paraphilias," 166 *Am. J. Psychiatry* 1240-41 (2008).
- 8 Frances, A, First, M.B., "Paraphilia NOS, Nonconsent: Not Ready for the Courtroom," 39 *J. Am. Acad. Psychiatry Law* 555-61 (2011).
- 10 *World Health Organization, International Classification of Disease, 11th Revision* (Geneva: World Health Organization, 2018).
- 11 Vognsen, J., Phenix, A., "Antisocial Personality Is Not Enough: A Reply to Sreenivasan, Weinberger, and Garrick," 32 *J. Am. Acad. Psychiatry Law* 440-42 (2004).
- 12 DeClue, G., "Paraphilia NOS (nonconsenting) and antisocial personality disorder," 34 *J. Psychiatry & L.* 495-514 (2006).
- 13 Cauley, D.R., "The Diagnostic Issue of Antisocial Personality Disorder in Civil Commitment," 35 *J. Psychiatry & L.* 475-97 (2007).

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