The Legal Pad
Volume 2, Issue 1
January 1, 2018

What Kind of Year Will It Be?

In This Issue:

Coming This Year:

- ✓ The Rind Report
- ✓ MnSOST-3.1 and 3.12: Junk Science & Guessing
- ✓ The Routine & Nonroutine of the Static-99R: The Good, the Bad, & the Very Ugly
- ✓ The Sham: MSOP 'Treatment'
- ✓ Forgetting Precedent: *Specht, Winship & Gault*
- ✓ Junk Science:
  - ✓ Rape as a Disorder
  - ✓ Pedosexuality Does Not Impair Volition or Predict Recidivism
- ✓ No Science = No Due Process
- ✓ Desistance: The Rule, Regardless of Treatment
- ✓ Ethics vs. SO Treatment
- ✓ The Truth About SO Recidivism
- ✓ More Legislative Hearing Excerpts
- ✓ Scary Myths & Public Panic
- ✓ Innocence & Wrongful Conviction
- ✓ The Prevalence of Deviance
- ✓ Computer-Created Artificial Child Porn, Immersive Sexual Virtual Reality, AgePlay, and Simulated AI Robotic Love Dolls: How Real Must It Be to Become a Full Replacement for Sexual Assault/ Abuse?
- ✓ Denial of Internet Access to Hold You Incommunicado

— & Tons More!

Here's your thought for the New Year: In uncertain times, it's easy to be fearful. But just remember that "the only thing we have to fear is fear itself." So remain calm and carry on. Things are advancing ever faster, whether you know it or not. No amount of hate by others can restrain or retard such positive progress toward the future.

Screw the Auld Acquaintance;
Bang a Gong, Get It on — Way on!

It is sometimes observed that if you want to set a goal you will be sure to fail to make, just state it in a New Year's resolution. Therefore, expect no resolutions here, nor should you make any.

Similarly, Fearless Predictions are at their least-correct when pronounced in connection with things that are supposed to come to pass (or not) within the next calendar year. Most strangely of all, the closer one gets to the end of the year, the worse the accuracy of such self-sure prognostications.

Let's face it: none of us came into this world with a crystal ball. Hence, at the very least, such predictions should be made only with great humility and an enormous load of caveats, reservations, and just plain hemming and hawing. And none of us should ever forget that, just when you think you've got it all figured out, "The Adjustment Bureau" (great flick, BTW) kicks into high gear to turn everything you thought you knew into unconscious self-parody.

Yet, the need for enquiring minds to know is uniquely elevated at the end of the preceding year — and here we are! So, with more than a little hesitation and breath-sucking, the following (MSOP word here) "expectations" are offered for your contemplation (that is, when your navel loses its fascination for you).

Let's start with the really big-picture scenario over which you have no input, much less control. First, we offer a little history lesson.

Almost 2,000 years ago, Nero (briefly, Roman Emperor) found himself subject to criticism concerning his mismanagement and his corruption. Together, these were sapping the welfare of the common class for the further enrichment of himself and his political cronies.

To deflect these criticisms, Nero blamed two religious splinter groups cited as 'dangerous foreigners,' namely the Jews and the Christians. Nero ordered large numbers from these groups to be seized.

This gave him a sizable reservoir upon which to draw to order to be put to death in ever-more-creative ways in the Coliseum, as an enhancement to the ever-popular 'bread-and-circuses' shows carried on there as a distraction from the public's woes. Thus began the hoi polloi's rapt fascination for blood sport that descends to this very day.

Unfortunately for Nero, everything wears a bit thin after a while. At about the same time that this display of barbarity began to lose its attraction, Nero coincidentally realized the only cure for the ills of Rome, the city, would be massive urban renewal — the kind that requires dozing large tracts and basically starting over there. Of course, bulldozers were not available or even conceived two millennia ago.

However, Nero — never one bothered by compassion — hit upon a solution he would have called the next best thing: He ordered a secret cadre, acting under cover of darkness, to set torch to the city — then mostly of wood construction. Afterward, all concern about corruption and mismanagement was forgotten as Romans mourned their dead and their losses of nearly everything.

The conflagration was blamed (you guessed it) on the Jews and the Christians on the plausible-sounding claim that they resorted to such an enormous act of terrorism out of revenge for the murderous executions of their relatives in the Coliseum. Even larger round-ups of them were conducted, ending in the near utter genocide of all of both faiths who lived anywhere near Rome.

As one of the greatest distractions of all time, this worked for a while. However, it had not completely escaped note that Nero had reacted with surprising unconcern when informed of the start of the fires that ultimately joined to consume the city (complaining of insomnia from the cacophony and the smoke, while placidly strumming the aptly named lyre for which he is now infamous).

Eventually, after things failed to improve for the common man even after the rebuild (heavily focused on erecting edifices and monuments extolling the glory of Nero), a coup was organized and Nero's eventual overthrow and death was assured.

Today, we have our own Nero of a sort — certainly a leader that fancies himself as the first American Emperor. Just like Nero, his prime concern is with further enrichment of himself, his relatives, and his equally rich cronies.

Again, the welfare of the working class is no real concern of his, only a thin veil in front of the real monetary machinations. These involve tax avoidance, unpaid debts, payoffs and support by fat insurance companies and HMOs. These firms will be rewarded by destruction of the fledging public health care program previously in place. Americans will be forced to give an unprecedented portion of each paycheck to those firms for puny health care more pockmarked by uncovered exceptions and huge deductibles than there remain bomb craters in the rice paddies of Vietnam.

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

Like Nero, our fair-toupeed and woven-haired leader has his own scapegoats, namely the terrorists claimed to be lurking everywhere, the disaffected inhabitants of oppressed and officially harassed communities of color, and the hysterically-claimed legion ranks of sex offenders. These last, through mandatory registration and community notification, are individually forced into the limelight and to remain there, thus creating the illusion that they are literally round every corner — and with nightmarish intent.

Further, the biggest theft of all — of the American Presidency — was pulled off without a hitch because those who should have been on guard against digital chicanery failed to even comprehend that technique, and the American public had so lost interest in the mechanics of democracy that it shrugged beforehand at the installation and use of digital voting-tally reporting systems utterly open to hacking and without the simplest of paper trails and other means of vote accounting.

Meanwhile, hackers from one of the two world's largest government-organized crime syndicates performed their sneaky vote heist on cue when the right amount of silver had secretly crossed the correct number of back-room palms.

Perhaps to correctly allot the blame we have to look back to the deliberate dismantling of America's public school system, with its intended consequential dumbing down of the American electorate, that was further aimed at creating a permanent underclass of minimum-wage service workers with no significant knowledge or skills — those for whom upward mobility is just a distant myth. These, it was calculated, would be needed as serfs to the mega-corporations that profit from all those services, continuing the ever-heightening disparity between the invented poor and the conniving rich.

Perhaps we must add-in the compounding corporate greed that caused the disemboweling of the American system of electronic news, with its once-awesome capacity for in-depth feature

(Continued from page 1)

reporting and analysis, and that wrought its replacement — by endless retained spinmeisters posing as independent commentators, and by entire cable TV channels and radio networks serving up rank propaganda as a complete replacement for the news.

But at the end of the chain, we, as the American people, are all to blame for our indifference in the face of all of this creeping, seeming decay, secretly engineered by those with something to gain by it. Now we, as the American people, must stand up and do something about this at last.

We have beheld an American President willing to seize power through executive orders decreeing decisions that, by right, belong to Congress instead.

We have beheld an American President whose idea of justice is to promise automatic pardons to any of his staff who sustain convictions for misdeeds done at his bidding, and to threaten firings of chief law enforcement officials who fail to back off from investigation of such official misconduct and of illegal collusion with Russian governmental gangsters.

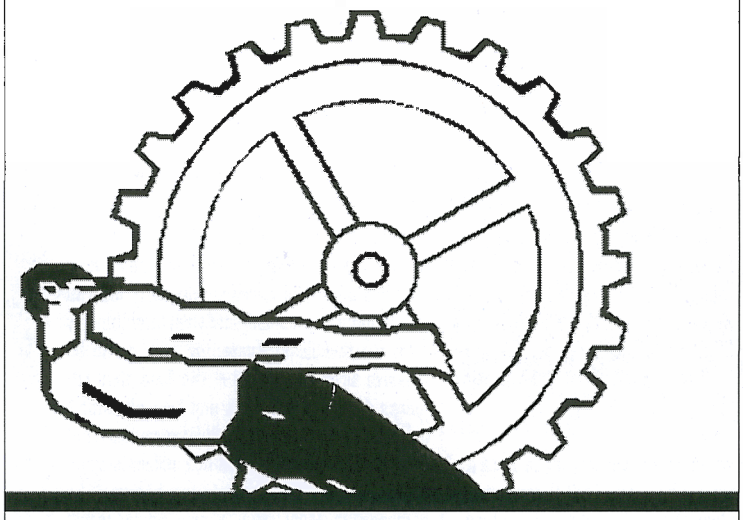
We have beheld an American President who deliberately proclaims one thing on Day One, only to make a categorically irreconcilable contradiction on Day Two, and who alternates between terse personal denials and elaborate, unbelievable denials by underlings when confronted with evidence of misdeeds.

We have beheld an American President whose habit of post-midnight tweeting and of other reckless statements proves at least a dangerously injudicious temperament and an utter disregard for the importance of statesmanship and strongly suggests an emotional and mental instability that calls into question the possibility of delusions.

And we now see an American President willing to provoke and perhaps even initiate nuclear war to simply save personal face when confronted by a small dictator whose arms will, in the end, not save him from being toppled by his own.

Given this American President's own Nero-esque pattern of sowing distractions to divert attention from questions about improper actions of his own or at his direction, it would be reckless folly to merely assume that he would never stoop to initiating or provoking a war to serve as the ultimate cover for such misdeeds and to cause a collective total amnesia as to the just cause for his impeachment. This concern is so serious that it has caused armed services chiefs to hold dialog as to whether he is fit to have unlimited control over America's nuclear arsenal.

On the other hand, it is now apparent that it is not beneath this American President to deliberately foster the impression that he might actually take such cataclysmic action if cornered by the apparent impendency of impeachment, followed by criminal prosecution. This, alternatively, is still no man who should ever head the federal government.



But worse than such effective extortion to avoid prosecution is the misuse of cold-war 'brinksmanship' that is necessarily implicated in such action. As the country learned in the Cuban Missile Crisis of 1962 (which itself missed precipitating WW III only by a hair's breadth), brinksmanship is a last resort reserved only for the direst of situations not resolvable through any other means. It is fraught with so many unknowns in every case that chances of total war by sheer accident in that toe-to-toe confrontation are incalculably high and utterly unmanageable.

The mere thought that any American President would ever connive to obstruct justice ending in his own punishment by threat of such misuse of the War Power is an inconceivable and absolutely intolerable eventuality.

Now, based on this comparison of the ancient tale of Nero to the current circumstance of an alarmingly similar man who currently occupies 1600 Pennsylvania Avenue in our Nation's capital, here is the first and most alarming prediction — really, more of a warning: If we, the American people, do nothing and simply allow this situation to fester as it drifts into exponential danger, do not be surprised if you wake up to World War III at some point before the end of the year. There really isn't any more to say than that, but it certainly should serve as your wake up call.

Barring Armageddon, What About Us?

Not to engage in too much repetition, I have already outlined where I see the three cases, *Karsjens, Gladden, and Gamble* (the Wage Case) as heading.

Fairly early in the year, a decision will be reached in the U.S. District Court as to what portions of the *Karsjens* case remain viable for further litigation notwithstanding the earlier 8th Circuit ruling overturning Judge Frank's original Phase I judgment. The most momentous question is whether the claim of punitiveness of the Minnesota sex offender commitment regime was implicitly disposed of by that 8th Circuit ruling or instead, remains 'alive' for a subsequent trial.

As to Phase 2 claims, the largest question is likely to be which of them can proceed either under or apart from the "shock the conscience" standard employed by the 8th Circuit. At the least, the First Amendment claims in *Karsjens* are likely candidates to survive this analysis, because restrictions on content of First Amendment expression are always judged under a "strict scrutiny" analysis.

Turning to the *Gladden* case, it will remain necessary to first gain some clarity on what aspects of the *Karsjens* case can still proceed before we will know when the Gladden case can begin to roll forward in earnest. While there are no guarantees, that clarification may come in a ruling by Judge Frank as soon as April.

Meanwhile, as I have previously announced, the first half of the 1994 legislative hearings have been audited, and apt portions from them have been transcribed. Those transcripts will begin to appear in a series of issues of this newsletter, starting with this one. The second half of those recordings remain in the sound processing stage. They will become available later (hopefully as the first half has been finished in these pages).

Finally, the Wage Case will first undergo a motion to add all of the "collective plaintiffs" (all those who signed the "consent" form). Again, if you have not already done so, sign it now (in the presence of the Notary Public) and return it to either Cyrus Gladden (me) or David Jannetta right away. Your failure to do so will mean that you cannot get your unpaid wage portions through our case; you would have to file your own case (with no guarantee of success).

While that motion will be pending, the case will enter the discovery phase. We expect good results from that phase, which will take most of the year. Trial is projected to take place at the start of 2019.

It remains to be seen what actions and changes will be underataken by MSOP itself in 2018. The only thing certain is that surprises will occur.

It seems fairly certain that, having invested an entire day at MSOP Central in St. Paul in training on psychopathy, MSOP therapists and other staff persons will try to claim that any behaviors by an MSOP "client" signifies the existence in that client of "psychopathy."

In the *Karsjens* trial, MSOP testimony stated that "high psychopathy" was so common among MSOP clients as to be nearly a hallmark of those committed to MSOP. In reality, examiners testifying at our commitment trials often made a claim of psychopathy — mainly because the breadth of the various criteria for that categorization (it is NOT a "disorder" or mental illness) makes it very easy to assert on flimsy evidence.

This current 'drive' by MSOP to corroborate that finding appears aimed at shoring up flimsy commitments that are likely to crumble under later attack. Hence, we urge you to study up on psychopathy generally and on "sexual psychopathy" specifically, and to be on your toes to detect such efforts to label you as psychopathic. In particular, you should use that knowledge to refrain at this time from behaviors and statements that can be claimed to display psychopathy.

Lastly, recent actions by the Property Department and by Health Services seem designed to provoke enraged responses. We urge you to learn to count to ten, and to resort to appropriate bureaucratic procedures to appeal or grieve inane decisions and actions by those departments and by all other MSOP staff and, above all, to refrain from any actions or words that can be construed as hostile.

* * * * * * * * *

Well, at Least Our Reportage Will Be World Class!

An Important Follow-up: Nothing Is Static — So Say the Static-99's Creators

In 2014, the creators of the Static series of actuarial risk assessment instruments (ARAIs) announced their finding that sex offenders can and do change, such that offense history information decreases in relevance as it fades into the individual's past. (*R.K. Hanson, A.J.R. Harris, L. Helmus & D. Thornton*, "High Risk Sex Offenders May Not Be High Risk Forever," 29 *Jour. of Interpersonal Violence* 2792-2813, doi: 10.1177/0886260514526062 (2014).

In other words, even the most "static" risk indicators are actually time-dependent (that is, "dynamic") indicators. The significance of this announcement is greatly magnified by the fact that all Static-series ARAIs are (or at least have been) regarded as "static" in nature.

That is, the ten factors considered in the Static-99R, for instance, are not deemed subject to change. This is because they involve historical facts that occurred in the past, and thus cannot be changed, or, alternatively, because they involve traits that are not regarded as subject to change over a lifetime.

Given this announcement, one would expect that developers of the Static-series of ARAIs would follow through by announcing at least some significant scoring adjustment to each of their factors to account for the 'decay' in impact of a given factor over years or decades. Yet to date (over three years later), no announcement has yet been made by the Static creators to that effect. This leaves the current meaning and effect of each Static recidivism predictive score in doubt.

* * * * * * * *

Well Deserved Vacation!

Another Important Message from the 'Statican': Victim Empathy or its Lack Is a Wash as to Recidivism Prospects

Even earlier (2010), *A.J.R. Harris & R.K. Hanson*, "Clinical, Actuarial and Dynamic Risk Assessment of Sexual Offenders: Why Do Things Keep Changing?," 16 *Jour. Of Sexual Aggression*, No. 3, p. 296-310 (November 2010), at 298, announced:

"Many evaluators had assumed that having been sexually abused as a child, not displaying victim empathy and having low self-esteem would be related to sexual recidivism; this turned out not to be the case."

Again, it is important to note that one of these two principal researchers was R.K. Hanson — the same prime developer of the Static-series ARAIs, undoubtedly an expert on actuarial factors as to sexual recidivism.

This particular finding is of accentuated significance in MSOP. That's because MSOP relies strongly on the Stable-2007 assessment of dynamic factors. Lack of victim empathy is a factor used in the Stable-2007 to indicate a heightened probability of recidivism. The above finding by Harris and Hanson contradicts that use.

* * * * * * *

The G2i Problem: Applying Group Data to The Individual

Quotes & Notes from: *Carl E. Fisher, David L. Faigman, & Paul S. Appelbaum*, "Toward a Jurisprudence of Psychiatric Evidence: Examining the Challenges of Reasoning from Group Data in Psychiatry to Individual Decisions in the Law," 69 *University of Miami Law Review* 685 (Spring 2015):

p. 691: **II. WHERE LAW AND PSYCHIATRY INTERSECT**

"...The Supreme Court of the United States has repeatedly held that the law is not bound by psychiatry's official nosology because the usual professional diagnoses of mental disorders are often disputed and potentially inexact.[9]

"...Overall, in both law and society, there is a significant doubt regarding psychiatry, especially its ability to distinguish 'normal' from 'disordered.'

p. 692: "...[W]hen the law strays from accepted clinical concepts, such as the invention of a novel 'mental abnormality' definition for 'sexual predator' laws, the fundamental justifications to confine certain people with alleged mental illnesses become confused."

p. 705: **III. G2i IN LAW AND PSYCHIATRY**

"...In psychiatry, validity implies a given diagnostic label accurately defining a discrete syndrome reflecting a particular mental state.[63] [As] to validity, ontology (do disorders exist?) can be framed as a separate question from epistemology (how can we know anything about them if they do exist?).[64] Many psychiatric researchers and practitioners accept the first point – that mental disorders do exist and are real phenomena in the world – while having less confidence about the second point – i.e., there is recognition that psychiatrists cannot always accurately perceive and describe mental disorders as they exist in the world.[65] This difficulty in understanding and characterizing the fundamental nature of disorders is reflected in different concepts of validity demonstrating areas of disjunction between measurement and reality:

content validity (*does the diagnosis measure all the generally accepted characteristics of the disorder construct?*),

concurrent validity (*does it correlate with other findings associated with the disorder, e.g. laboratory findings or brain imaging?*),

discriminant validity (*does it delimit this disorder from other disorders and from the absence of disorder?*), and

predictive validity (*does it add to the ability to anticipate outcomes?*).[66]"

p. 706: "Another set of empirical data about *DSM* diagnoses relates to *reliability*. Diagnostic reliability is a measure of repeatability and consensus. More specifically, inter-rater reliability is the probability of two clinicians examining the same person and deriving the same diagnosis, while test-retest reliability is a related measure that measures the stability of the diagnostic label over time.[70] Both concepts relate to replicability. Statistically, the reliability of DSM diagnoses is commensurate with the diagnostic reliability of other medical procedures, such as evaluating angiograms or reading x-rays, which is to say, better than chance but far from perfect.[71]"

Notes:

9 In *Clark v. Arizona*, 548 U.S. 735, 744 (2006), for example, the Court quoted the fifty-year-old decision of *Greenwood v. United States*, 350 U.S. 366, 375 (1956): "The only certain thing that can be said about the present state of knowledge and therapy regarding mental disease is that science has not reached finality of judgment." See also *Kansas v. Hendricks*, 521 U.S. 346 at 360 n. 3 (1997); *Addington v. Texas*, 441 U.S. 418, 430 (1979).

18 Whereas it is fairly clear that a person suffering from a "mental illness" should receive treatment when civilly committed, the non-medical category of "mental abnormality" creates confusion, since the offender has been civilly committed and might be categorized as "suffering" from a condition, but one that is not an "illness" and not treatable. See, e.g., *Am Psychiatric Assn Task Force on Sexually Dangerous Offenders, Dangerous Sex Offenders* 11-177 (1999) (tracing the history of "sexual psychopath laws," and noting the "purpose" of such laws as shifting from "therapeutic" to "incapacitative"); *W.L. Fitch*, "Sexual Offender Commitment in the United States: Legislative and Policy Concerns," 989 *Annals N.Y. Acad. Sci.* 489, 500 (2003); *Sameer P. Sarker*, "From *Hendricks* to *Crane*: The Sexually Violent Predator Trilogy and the Inchoate Jurisprudence of the U.S. Supreme Court," 31 *J. Am. Acad. Psychiatry & L.* 242, 247 (2003).

63 *Paul S. Appelbaum*, "Reference Guide on Mental Health Evidence," in *Reference Manual on Scientific Evidence* (3rd ed. 2011) at 839 (defining validity as "the extent to which the diagnosis corresponds to the person's actual mental state").

64 *Claire Pouncey*, Commentary, "Mental Disorders, Like Diseases, Are Constructs. So What?," in *James Phillips*, "The Six Most Essential Questions in Psychiatric Diagnosis: A Prologue, Part 1: Conceptual and Definitional Issues in Psychiatric Diagnosis," 7 *Phil., Ethics & Human Med.*, Jan. 2012, at 6, available at http://www.peh-med.com/content/7/1/3.

65 See generally, e.g., *Phillips et al.*, "Six Most Essential Questions," *supra* note 64.

66 See *Eduard Vieta & Mary L. Phillips*, "Deconstructing Bipolar Disorder: A Critical Review of Its Diagnostic Validity and a Proposal for DSM-V and ICD-11," 33 *Schizophrenia Bull.* 886, 886 (2007).

70 *Helena Chmura Kraemer et al.*, "DSM-5: How Reliable is Reliable Enough?," 169 *Am. J. Psychiatry* 13, 13-14 (2012).

71 *Id.* at 14.

Death Notice

Per rumor, Bill Biels, recently confined in MSOP-SP, died in the night of December 30-31, 2017. At press time, no official confirmation or further details were available.

HERE'S WHAT YOU'VE BEEN WAITING FOR: THE FIRST INSTALLMENT OF TRANSCRIBED EXCERPTS FROM THE 1994 LEGISLATIVE HEARINGS ON THE MINNESOTA SEX OFFENDER COMMITMENT BILL

		1994 MCCTA Legislative Recordings (CDs)
		(Note: All emphases are editorially supplied, except where marked otherwise.)
		1st Installment: 9 Sets
		Set 1 (9 tracks/disks)
		Joint Hearing of the Senate Judiciary & Crime Prevention Committees & House Judiciary Committee
		Proceedings of August 24, 1994
		[*Disk 1:*]
Running Time (Start)	Speaker	Statement
01:00	Spear?	(- Sen Reichgott & Speaker (Spear) will share chair because Rep. Skoglund (one of bill's authors) will present the bill)
02:06	" "	(- Following Skoglund's introduction of bill, some overview of it will be provided by Marlys Macpherson and John Kerwin, followed by detailed discussion of the bill)
24:35	Marlys Macpherson, of the Legislative Auditors Office	"So once they've served_____[their prison sentence], the Department of Corrections has no authority to hold them beyond their scheduled release date. And that is what, of course, prompts the problem of how you deal with sex offenders who pose a risk to reoffend. ...So it is that problem in the criminal statutes that prompts the need for civil commitment procedures for those people who are likely to recommit another sex offense."
		[Disk 1 ends @ 52:05]
		[*Disk 2:*]
		[Discussing Linehan holding by Minnesota Supreme Court]
33:11	John Kirwin, Ass't Attorney General	"The Supreme Court seemed to think it was necessary in some way under this statute to identify a disorder. Perhaps what they were saying is that for them, the disorder is the inability to control. As you'll see in the bill you're going to look at later on, in the new statutory language, we suggested the finding of disorder in a different way, that has nothing to do with the level of control."
		[Disk 2 ends @ 52:01]
		[*Disk 3:*]
01:00	Senator Berglund	"I believe that there's an element of planning that goes into all of these crimes. Most people who are habitual sex offenders are not raping every woman who walks down the street in sequence. There is some decision made about picking a victim."
13:06	Rep. Bishop	"The item of evidence that I understood from the *Linehan* case which would preclude any new case from succeeding is that the standard for which evidence was supposed to be proffered is an impossible standard, and that is *Pearson*'s utter lack of power to control impulses. And in order to prove by clear and convincing evidence that someone has an utter lack of power to control their impulses – you can't get there from here. And therefore, we have to have the other statute."
		[Disk 3 ends @ 51:58]
		[*Disk 4:*]
09:40	Senator Anderson	"I have a couple of comments that go to the issue of constitutionality here. One is some of the answers that were made a couple of minutes ago about [elements] number 1 and number 2 and what the relationship is. I think it's important, in my mind at least, that if you just meet number 1, if you're just saying that, because you've committed these acts that are criminal acts, therefore you have a disorder, that, I think, would run into double jeopardy problems, because you would be saying that, just by virtue of the criminal acts you've committed, you have a disorder, and therefore you're committable, and then you can be punished again, basically. And so I think it's important to emphasize that you have to meet both of those things and that simply having committed acts is not enough to have a disorder."
24:37	Senator Bishop	"We are basically saying, 'We don't care if ability to control is an issue as for sexually dangerous persons; this is not to be an element."
		[Disk 4 ends @ 51:59]

		[*Disk 5:*]
18:50	Dr. William Erickson	"We still come to differences of opinion on the point of the *Pearson* requirement for an utter lack of ability to control behavior. The simple fact is that in the majority of the cases we see, the misconduct, the sexual misbehavior, the predation, the rapes were planned, were clearly under the conscious control of the individual. ...Some have in a number of instances said that we can't apply either the statutory or the *Pearson* case definitions to the cases in point."
		[Disk 5 ends @ 52:03]
		[*Disk 6:*]
35:53	Skip Humphrey, Attorney General	"We owe it to the victims of these sexual predators to use every legal means at our disposal to ensure the public safety. And we owe it to everyone who represents the next potential victim of these predators. ..."
39:40	" "	"...And under the new [SDP] standard, it is not necessary to prove that that person has an inability to control his sexual impulses."
		[Disk 6 ends @ 52:03]
		[*Disk 7:*]
05:44	Michael Freeman, Hennepin County District Attorney	"We need that tool [civil commitment of sex offenders] still to keep the streets a little bit safer."
06:06	" "	"It helps us to keep the people in St. Peter who should stay there, and also helps us in the commitment process during the fall for the psychopathic personality petitions and trials that are ongoing."
09:36	" "	"It's my understanding that it's the intent of the legislature to provide an alternative definition of the word 'control' and 'harm' that will clarify the applicability of the statute in order to protect and defend the people of the state."
30:18	Professor, Eric Janus	"Using the civil commitment system to confine people like Linehan who are not mentally ill, not incompetent, who are fully accountable of their actions, and should be held fully accountable of their actions, is unconstitutional preventive detention. A law authorizing such detention would in essence establish a 'dangerousness court' authorized to lock people up indefinitely based upon the predictions of mental health professionals about what they think these people might in the future do. Applied to people like Linehan, who have served their criminal sentences, where the law requires that they be released, this is double jeopardy. Preventive detention, dangerousness courts, double jeopardy - these are, in my opinion, anathema to our democratic way of life."
32:40	" "	"The primary tool for protecting the public from violent behavior is the criminal justice system. In such a system the awesome power of the state to deprive a person of her or his liberty is made only after a unanimous jury verdict, based on a beyond a reasonable doubt standard, and -- and I think this is the key -- based on proof of past criminal conduct. The civil commitment also provides a way of protecting the public through deprivation of liberty. But the protections in the civil process are much looser. There's no jury, there's a lower standard of proof, and here's the real key: Confinement under the civil system is based on expert characterization of current condition and expert prediction of future behavior. It's a much, much looser system. Why is our criminal justice system the primary system we have for dealing with violence? Why don't we just use the looser, easier-to-use civil system? The answer is quite easy: because our constitution, the due process clause – in its substantive branch – limits civil confinement drastically. And this is the key point here that I think needs to be taken into account: No matter how strong the state's interest in protecting the public from perceived danger -- and I do believe that that interest is very strong – the due process clause prohibits the use of civil commitment except in a narrow range of circumstances. In other words, we do not have a balancing test here. The test for the constitutionality of this statute is not to balance the state's interest in protecting the public against Mr. Linehan's interest in being free. The state has a strong, strong interest; there's no question about it. It's a compelling interest. Nonetheless, outside of a very narrow area, civil commitment is not the way that the courts have permitted that interest to be vindicated. Now, that is not just my opinion, I urge the committee to study the *Salerno* case – United States Supreme Court, study the *Foucha* case – United States Supreme Court. Both of those cases are based on the principle that the ability to confine people outside of the criminal process is limited by the substantive due process clause. Second, take a look at the Minnesota Supreme Court decision and the Washington Supreme Court decisions. They are both very squarely acknowledging that the substantive due process clause limits the state's power. It's also the basis for the decisions in Wisconsin invalidating the Wisconsin sexual predator law. So the real question here is not whether there are limits on the state's ability to use civil commitment. The real question is what are those limits? That's the only question I think that needs to be presented and talked about here. What are the constitutional limits that the courts imposed on the state's ability to use the looser, more flexible, and therefore more potentially abused power to deprive a person of their liberty in the civil system. Well, we're not without a compass here. We know what those limits are. They are limits in addition to dangerousness. In other words, when we find that we think that an individual is dangerous, that is not the end of the inquiry. That's the beginning of the inquiry about whether we can use civil commitment. Dangerousness is only the beginning. We can look, and we ought to look at the *Pearson* case and the *Blodgett* case, our Minnesota Supreme Court cases that are based on the Constitution. Both of them, in 1939 and 1994, said: We hold this statute to be constitutional, this sexual predator statute, because it is limited – limited how? – limited to people who have an utter lack of ability to control their sexual behavior.

		Now I urge you to go back and read *Pearson*, because it's very prescient. In *Pearson*, the Legislature enacted a very broad statute to deal with a perceived problem of sexual violence. It used the term psychopathic personality and said people with psychopathic personalities can be committed if they're dangerous. And the court looked at it and said, 'Well, we understand what the word psychopathic personality means; it means mental disorder.' Did the court say, 'O.K. fine. As long as you have a mental disorder, it's a constitutional use of state power'? No. The court went on to narrow it and said, 'We can't use this broad definition because the statute would be in risk of being unconstitutional if we use this broad definition of mental disorder. We have to narrow it. How? We narrow it to those persons who have an utter lack of ability to control their behavior.' The U.S. Supreme Court took the case in 1940 and upheld the constitutionality of the statute. But not without noting the narrowing construction given by the Minnesota Supreme Court. And it said, any other construction 'might render it of doubtful validity.' Now, we don't have to go all the way back to 1939 and 1940. Some of the most prestigious and authoritative legal commentators have taken a look at this subject, and I would refer you to the classic article in the Harvard Law Review, 87 *Harvard Law Review* 1190, in 1974, in which the Harvard Law Review collected all of the learning about civil commitment in a review article and that article addressed the question of police power commitments. That's what we're dealing with here – commitments which are based on the desire of the state to protect the public. And in that article, the Harvard Law Review said, 'Police power commitment standards would appear to be unconstitutionally overbroad unless mental illness is interpreted to mean a condition which induces substantially diminished criminal responsibility.' Now that is essentially the line taken by our court in *Blodgett* and *Pearson*. The inability to control behavior relates to a person's criminal responsibility. And the basic idea that is being put forth in *Pearson*, in *Blodgett*, in the Harvard Law Review article is this: Criminal law is for people who are responsible for their behavior. Civil commitment is for people who lack criminal responsibility for their behavior. Criminal law is for people who can control their behavior and should be held responsible for it. Civil commitment is for people who can't control their behavior and therefore can't be held responsible for it. It is as simple as that. In our society, we put criminals in jail; we don't put them in mental hospitals. That's what *Pearson* is about; that's what *Blodgett*'s about; that's what this law review article is about. And I would refer you also to the dissent of Justice Gardebring in *Linehan*. Justice Gardebring by the way, was one of the four votes voting to uphold the constitutionality of the statute in *Blodgett*. And Justice Gardebring said that it was fundamentally unfair to put a person in the hospital – it would be – based on some finding of civil commitment when the state had also held that person criminally responsible. She said it is not right that the state have it both ways with one individual. One way for one person, one way for another, but not both ways. Either they are criminally responsible, or they are mentally ill, but we can't have it both ways. Now, so *Pearson* and *Blodgett* established a very clear line. They said we got – your only people who can use the civil commitment method, but only for people who can't control their behavior. It's a line that makes a lot of intuitive sense. And then what did they do in *Linehan*? They applied that line. That's all they did. And you know what? It wasn't a new line. *Linehan* didn't blow a hole in anything. *Linehan* applied the law as it has been stated since 1939. The only thing the Supreme Court did in *Linehan* was say, 'We said it in 1939, and we mean it.' And what did Dr. Erickson say? Linehan is not the kind of person who can't control himself. If I can characterize him in very kind of gross terms, he is a criminal. He has adopted a certain way of life. He has made choices in his life. Hopefully, he has reformed some of those choices, but they were life choices just like the life choices all of us make in our lives. And we in our society hold people responsible for that. How? By putting them in prison. Now, you know, I have heard a lot of discussion here and in the Task Force about what it means to lack control and all of these definitions and what a mental disorder is and all that stuff. These things are really hard to define and they are subjected to be hugely elastic type of implementation. As we know, the psychopathic personality statute as it existed up to this date has been used all the way at one end to put people who excessively masturbated in the hospital, people who engaged in consensual homosexual behavior, all the way to rape-murders. Extremely elastic. And I'm afraid that the proposal that you have before you is also elastic, although perhaps not quite as elastic...."
		[Disk 7 ends @ 51:59, in Bishop question to Janus]
		[*Disk 8*:]
03:00	Rep. Bishop (responding to E. Janus)	"I believe this legislature and other legislatures, like Wisconsin and Washington, are going to need ... to recognize that because of the line of cases ending up with *Linehan*, the *Pearson* ... standard is an impossible standard to meet for these kinds of people, where they, the psychopaths or whatever you call them, sexual psychopaths, they are clever, they plan, they do know how to control, but they won't ... That's why we have to have something that takes out that utter lack of ability to control, because they have a disorder, you can predict that they're going to reoffend sometime. They're gonna plan it, they are in fact predators, and we can't control 'em. **What is the future? Vigilantism? Death penalty? What else? Society won't tolerate constant attacks, murders, rapes by these small number of predators.**"
		[Disk 8 ends @ 51:57]
		[*Disk 9*:]
		[Nothing of interest]
		[Meeting adjourned]
		[Disk 9 ends @ 27:20]
		(Senate committee to meet separately on next day @ 9:00 A.M.)
		(end of *Set 1*)

1994 Windmills Capture MCCTA Legislative Hearing Bloviation

PPG Revisited by Request

Editor's Note: By popular request, a quick review of some criticisms of PPG is offered here.

Material previously published focused on technological problems with PPG testing. These included procedural problems (especially the flaw of the 'circumferential method') and the general problem of incorrect/inaccurate readings.

In contrast, the following additions will focus on the impact of PPG testing on offenders and their futures.

1. Making Monsters

Let's start by returning to *Andrew S. Balmer & Ralph Sandland,* "Making Monsters: The Polygraph, the Plethysmograph, and Other Practices for the Performance of Abnormal Sexuality," 39 *Jour. Of Law and Society* 593-615 (No. 4, December 2012), ISSN: 0263-323X, 593-615. These authors contend that, "...[i]mportantly, the use of the polygraph, plethysmograph, and other practices in the treatment programmes of sexual offenders is fundamentally tied to the performance of an altogether alien, indeed, 'monstrous, identity'." They argue that, especially because in most cases PPG testing indicates some level of deviant orientation, it tends to make a sex offender confirm a mental label of himself as most fundamentally being a sexual deviate. They add that PPG tests are usually combined with polygraph testing that again asks whether one has such deviant sexual orientations. When admissions are made or when denials are identified as deceptions, this adds yet further confirmation of what the offender then sees as an immutable, bedrock-level deviant orientation (most often, pedophilia). Because the reactions measured by these tests are beyond one's control, the offender begins (if not already) to see himself as uncontrollably deviant, in the process conflating with that conclusion the notion that he cannot control his behavior in response to such sexual attractions.

The impact of such adjunctive use of polygraphy deserves further attention to clarify and emphasize this impact.

"Obtaining a sexual history is a standard procedure in the treatment of sex offenders. According to the Arizona guidelines, the kinds of things that are investigated during a sexual history exam include:

'Age of onset of expected normal behaviors ...degree of use of pornography, phone sex, cable, video, or internet for sexual purposes, current and past range of sexual behavior ...thoughts [and fantasies] preceding and following crimes; ...masturbation, use of tools, utensils, food, clothing, current sexual practices ...motivation to change ...attitudes [including sexual] toward women, men, and children ..., level of denial, level of deception.[51]'

"This examination is thus one made through which the offender's desires are made visible. If, as he is often understood to be, he is in denial of his condition or refuses to acknowledge his crimes, if he is deceptive, then the polygraph becomes a useful tool in producing the knowledge of his abnormal sexual history." (emphases supplied).

Unfortunately, the cost of all this 'grilling' of an offender is that he becomes convinced by all of this review not only that he has considerable deviant orientation, but that the extent and consistency over time of that orientation are known to therapists and will be applied in label-like fashion to him permanently.

In a section of their article titled "Denial, Deception, and the Incurably Risky Offender" (pp. 606-07), *Balmer and Sandland* explain this impact further:

"The polygraph becomes effective because sex offenders, in the various guidelines, reports, and scientific papers are characterized as being inherently deceptive. ...This is the key to the legitimization of polygraphy and plethysmography: that the sex offender is conceived of as secretive, as one who lies about his crimes. In this context, the polygraph **facilitates the production of confessions of deviance and desire.** Indeed, it is hard to miss the centrality of its effect on the frequency of confessions made by offenders to the arguments supporting the technique's use. For example, in *Grubin and Madsen,* 'it should also be noted that in post-conviction testing the emphasis is ...on the facilitation of disclosures relevant to supervision and treatment.'[75] Most clearly, there is an acknowledgement by some that it needn't matter that the device may not be up to the usual scientific standards so long as it convinces offenders to account their sexual histories in increasing amounts of detail. So one finds, for instance, *Ahlmeyer et al.* agreeing with *Chambers*[76] that:

'The polygraph is not a test, but a treatment tool designed to elicit a client's admissions to past behaviors and monitor current behaviors. Many therapeutic interventions that do not meet the standards requiring adequate documentation of practice standardization, reliability, and validity, are nonetheless effectively utilized in the field.77'

"As such, the way in which the polygraph is primarily understood to be assisting treatment professionals is through its effect on the confessional behavior of the offender, whether or not it 'works.' ...The significance of the elicitation of further confessions of victims, or sexual fantasies, of childhood acts of masturbation, and so on, and so on, is that more information is equated to better risk management, which is essential in the case of the sex offender because of his construction as incurable and monstrous, both in the treatment discourse, popular media, and governance response."

p. 610: "...[T]he polygraph and plethysmograph function to sustain an algorithmic system of risk assessment by facilitating the overcoming of denial and the exposure of deception. That the technologies might not actually work, that they might be just one more instance of the 'bogus pipeline',90 isn't too much of a worry so long as more admissions are made and risk can be managed."

However, the key here is the focus on the incurable and monstrous nature of the orientation, as inculcated to the offender. To emphasize this to the offender, such offense details are effectively demanded of the offender, and then 'rubbed in his nose.' Along the way, the offender is shamed for being secretive and deceptive about that orientation and his behavior to address it.

Notwithstanding this thought that "more information is equated to better risk management," the overall impact on the offender of this exhaustive interrogation, with sometimes nearly countless instances of deviant sexual behavior, is confirmation of the sense of self-identification as permanently deviant. This is further confirmed by the traditional connection between confession and subsequent punishment.

The offender is being convinced of the irredeemable wrongness not just of his conduct, but of his psyche. Since his record bespeaks past non-self-control, the message to him is of a personal inability to exercise such self control. In essence, the offender is being indoctrinated into a permanent self-view as a sexual monster in need of external restraint, for lack of which he will offend again and again.

At pp. 610-12, *Balmer and Sandland* observe that, "...in order to protect these binaries of innocence/adulthood, paedophile/normal, not only do we have to produce information about the paedophile as risky, we must also constitute them as fundamentally different to us. But this leaves them too close to the terrifying spectre of human monstrosity. This total othering would leave them as an uncontrollable risk, so post-probation strategies have to engage offenders in a practice of self-management that teaches them to redirect their deviance towards normality." This however, is an unattainable fantasy on the part of therapists. A deviant orientation remains an orientation, and like all orientations, is essentially immutable. In ordering such redirection, therapists demand the impossible. Attempts toward such replacement sexuality only confirm to the offender that he is incapable of change, with a concomitant message that failure to make such change is therapeutically deemed to reflect even more dangerousness. Explaining further, the authors continue:

"The purpose of these treatment programmes became to teach offenders to behave normally. So, for instance, of a number of currently used 'behavioral sexual arousal control techniques' in the United States, the practices of 'covert sensitization' and minimal arousal conditioning'[93] have been adopted in more than half the programmes.[94] These techniques access the ways in which the offender directs his desire and trains him to interrupt existing chains of fantasy and behavior. Through addition of other practices such as 'orgasmic conditioning' or 'masturbatory satiation', the offender is encouraged to direct his desire towards more appropriate objects. These technologies of desire are quite revealing of an underlying heteronormative or even homophobic tone in offender treatment that often embeds particular ideals about age-appropriate (that is, middle-aged partners for middle-aged men), female-male relationships.[95]

"Moreover, around a quarter of American training programmes include 'aversive behavioral rehearsal'.[96] As part of this

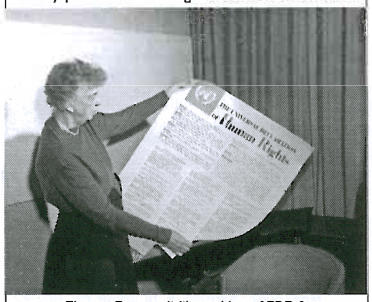
(Continued from page 7)

particular practice, the offenders must create detailed descriptions of their abuse of victims, write a narrative of the event from their victim's perspective, and then act out, through role-play, the victimization. First, offenders role-play as their victim with another group member playing out their abuse patterns on them, and then they switch roles and the offender plays himself as another group member plays his victim. During these role-plays the offender is encouraged to narrate in the first-person, present tense, describing the thoughts, feelings, and fantasies he experienced during the assault.[97]

"The procedure thus requires the offender to reperform the detailed events of the crimes for which he has already been convicted, which he might deny are sexually abusive or perhaps denies were planned, or perhaps denies altogether, in front of a group of other offenders and treatment professionals so that he can no longer deny his guilt. Such practices have, on occasion, raised concerns in the literature and Pithers, for example, outlines a very serious case in which offenders were forced to perform role-plays of abuse that they themselves had suffered as children, some realistically using details provided to therapists.[98] Clearly it is not the overt intention of therapists to abuse their clients, but these behavioral technologies are not only questionable, they are evidently damaging, and perhaps represent an eruption, within the discourse and practice of treatment, of a desire to further punish the offenders." (emphases supplied),

Again, as discussed in an earlier edition, the notion of replacing one orientation, no matter how "deviant," with another one more socially preferred has no actual basis in reality. The centers in the brain that are responsible for sexual orientation are not cognitive, and hence cannot be governed by concepts of "appropriateness."

Further, an offender who writes a narrative of a sexually deviant event with anything other than details unequivocally and unmistakably portraying traumatization and suffering on part of the 'victim' will be significantly penalized through treatment demotion or its equivalent. Knowing this, almost all offenders will provide such detail, no matter how far it strays from their actual recollection of the experience.



Eleanor Roosevelt (then widow of FDR & tireless advocate for his brainchild, the United Nations) admires one of its best resolutions ever, the Universal Declaration of Human Rights.

Further, in an ensuing role-play that offender will be effectively forced to depict such traumatization and suffering through playing the role of the victim. Failure to portray this, again regardless of the actual facts of the real event, will cause another group member to strongly criticize his performance.

Yet the requirement for first-person, present-tense narration of thoughts, feelings, and fantasies he experienced during the sexual act(s) makes deception far more difficult and easier to spot. The result is that either therapists or group members are likely to accuse the offender of faking that account.

However, this only exposes the fact that the offender may have some honestly held recollections that lead him to conclude either that the sexual act was not sexually abusive in the practical sense, or was not an event culminating from a sinister plan, or perhaps an insistence that the alleged sexual act never actually took place at all. (Not all accused sex offenders actually did commit the offense of which they were accused.)

In any such scenario, an offender is in a compelled scenario where to speak his subjective recollection of the truth will be substantially penalized. In such a scenario, an offender is forced into deception, but punished for either the truth or a deception he may choose to employ to avoid the unacceptable subjective truth. This is not treatment, it amounts only to laying of a snare to trip up offenders and then to penalize them for their fall. Any offender experiencing such a snare immediately sees the 'fake' nature of treatment as nothing more than a repetitive festival of condemnation, alternatively performed by therapists and various group members. This is a toxic, futile, and very likely counterproductive scenario.

2. Judicial Awareness of PPG Inaccuracy

By way of example, *United States v Guy Randy White Horse*, No. 2001DSD38, 177 F. Supp. 2d 973, 976 (D. S.D. 2001), noted that "The association for the Treatment of Sexual Abusers (ATSA) has found that the PPG testing is usually preferred over viewing time measures in the assessment of deviant sexual interests [the Abel test]." However, the PPG is not accepted by the medical profession as a reliable or valid diagnostic tool.

Likewise, *United States v. Jeremy Birdsbill*, No. CR0272, 243 F. Supp. 2d 1128, 1133-34 (D. Mont. 2003), held that Dr. Abel's study uses no control groups and that there has been no attempt to study detection of faking, and also that the PPG itself is subject to being faked by the subject.)

These findings are congruent to findings in research cited in my earlier article on the PPG. In light of this consistent set of conclusions, it is clear that no great purpose is served by use of the PPG test that would justify any purported need to overlook the serious problems described above.

3. Involuntary Plethysmography Barred

In a third case, *United States v. McLaurin* (2d Cir., 10/3/13), the federal Second Circuit (think: New York) ruled that a sex offender could not be ordered to undergo "penile plethysmography" testing (for the unaware, strapping a strain gauge to one's penis to detect an erection, as one is shown differing types of pornography).

Rejecting the government's argument that getting an erection when viewing child pornography was related to sex-crime recidivism, the court observed that traditional conditions of supervised release of sex offenders were already calculated to protect the public. Calling plethysmography "unduly intrusive," the court stated, "A person, even if convicted of a crime, retains his humanity."

The opinion declared that criminal laws are intended to punish a mental state only when it accompanies an unlawful act, and "un-acted-upon prurient sexual thoughts" must not factor into the sentencing equation.

"In any event," continued that court, "we also find it odd that, to deter a person from committing sexual crimes, the Government would use a procedure designed to arouse and excite a person with depictions of sexual conduct closely related to the sexual crime of conviction."

Penile plethysmography is used by numerous states as to sex offenders, both in prison-based and parole-based treatment, and also in sex offender commitment facilities – often with its results used to deny release. Therefore, it is hoped that the pragmatic reasonability and the plain humanity of this decision spreads to the minds of all other judges.

Where, as with PPG testing:

- there is no connection between a result showing only the existence of an orientation and later recidivism;
- the procedure has serious potential for falsely showing erection when in fact the exact opposite is occurring;
- apart from that potential, its inaccuracy and susceptibility for 'faking' overshadow the magnitude of its supposed findings; and
- its capacity for producing therapeutically toxic impacts is staggering and ominous,

such a procedure should have no place in sex offender assessment or therapy.

* * * * * * * *

A Tool for Good or Ill?
Can CATSO Read a Community's Collective Mind?

Nine years ago, a little-known study was done to determine whether it is possible to find out a community's attitude about sex offenders. The results of this study were published in an article by Wesley *T. Church II*, "The Community Attitudes Toward Sex Offenders Scale: The Development of a Psychometric Assessment Instrument," 18 *Research on Social Work Practice* 251-59 (No. 3, May 2008). In brief, this article's Abstract explains succinctly:

"Objectives: The objective of this study was to examine the nature of individual attitudes toward sex offenders. Because the term 'sex offender' tends to evoke strong emotions, and given that open-ended self-reports tend to be highly subjective, particularly in the context of such pointed terminology, this study sought to develop an attitude assessment tool that addresses specific domains found in the literature. Methods: Through a number of iterations, the Community Attitudes Toward Sex Offenders Scale was developed. Results: Exploratory and subsequent confirmatory factor analyses found a four-factor 18-item version to best represent the domains of interest. Factor and item characteristics are reported. Conclusions: Replication and extension to other populations appears warranted."

The interesting thing is that this is the only study of its type that I have found. Does anyone else know of others like it?

The upside potential of knowing how an entire community feels about sex offenders is that it could aid you in settling in a supportive, non-hostile environment that you could select.

The downside, of course, is that unfriendly officials in charge of your release and placement may be aware through such research of which communities are especially hostile to sex offenders.

In the MSOP context, for instance, this may already be knowledge possessed by the DHS. Its pertinent officials may be deliberately selecting such hostile communities to search for housing and employment for you upon your projected release. In choosing to do this, they would be able to know that the chances of success in a town with such a bad attitude are slim to none.

This could explain the foot-dragging that has been going on for quite some time now in actually releasing those cleared for such release. 'Just some food for thought here.... So what do YOU think?

* * * * * * * *

Another Useful Excerpt from the *Gladden Complaint*:

The Junk Science Concept of Sexual Psychopathy as a Mental Illness or Disorder

At trial in the *Karsjens v. Jesson/Piper* case, MSOP Executive Director Nancy Johnston claimed that "Sixty-seven percent [of MSOP detainees] are highly psychopathic.... Tr. 3220-21." This claim exemplifies the hysterical, anti-scientific nature of the entire concept of "psychopathy," and particularly the scientifically baseless, invented term, "sexually psychopathic personality."

First, "psychopathy" is not a diagnostic mental illness or disorder under the DSM-5. Psychopathy is merely a "heuristic construct" for modeling purposes. *Erica Beecher-Monas & Edgar Garcia-Rill*, "Danger at the edge of Chaos: Predicting Violent Behavior in a Post-*Daubert* World," 24 *Cardozo L. Rev.* 1845, 1873 (2003). "No one is quite sure what psychopathy means,.... The [PCL-R] instrument consists of twenty risk factors, ...: Glibness/superficial charm; grandiose sense of self-worth; need for stimulation/proneness to boredom; pathological lying; conning/manipulative; lack of remorse or guilt; shallow affect; callous/lack of sympathy; parasitic lifestyle; poor behavioral controls; promiscuous sexual behavior; early behavioral problems; lack of realistic long-term goals; impulsivity; irresponsibility; failure to accept responsibility; many short-term marital relationships; juvenile delinquency; revocation of conditional release; criminal versatility.... [T]hese factors appear to be rather subjective,...." (*Ibid.*) As such, it is a label arrived at merely upon behavioral observation of the offender.

Ms. Johnston claimed that "the top three or four traits" of psychopathy are "lack of empathy for others, lack of remorse, difficulty taking responsibility for one's actions, [and] impulse control." However, in fact, only the first two of these are contained as such within those 20 PCL-R factors. The third is not one of those factors. Instead, the actual PCL-R factor sounding closest to it is that of "failure to accept responsibility." However, this refers to failing to conduct one's life responsibly; it has nothing to do with taking responsibility for one's past deeds, as in criminal misconduct. The fourth item stated by Johnston ("lack of impulse control") likewise is not the same as mere "impulsivity" (which doesn't include any determination of inability to control one's impulses).

Indeed, the first edition of the DSM took pains to make clear that no such psychiatric diagnosis ever existed. *Marna J. Johnson*, "Minnesota's Sexual Psychopathic Personality and Sexually Dangerous Persons Statute: Throwing Away the Key," 21 *William Mitchell Law Review* 1139 [1996]), flatly states, at Footnote 10: "The term "psychopathic personality," however, was expunged from the psychiatric nomenclature in 1952." "Psychopathy ...is not an acknowledged psychiatric diagnosis in the DSM...." *R.A. Prentky, E.Janus, H. Barbaree, B.K. Schwartz & M.P. Kafka*, "Sexually Violent Predators in the Courtroom: Science on Trial," 12 *Psychology, Public Policy & Law* 357, 368-69 (2006).

"Psychopathy" is merely an unscientific impression in the eyes of certain psychologists. One of these is Robert Hare, who designed a questionnaire of 44 points in total. According to Hare, one must achieve a score of 30 on his checklist to be considered psychopathic. Hare, as creator of the PCL-R (Psychopathy Checklist-Revised) refuses to grant access to the instrument or any of the data upon which it is claimed to be based except to those who have taken a training program offered by Hare, and have been approved ("qualified") by Hare to receive such materials. He has even engaged in litigation against lawyers and judges for disseminating the instruments and such materials to clients, other parties to litigation, and to the public. As a result, the PCL-R has never been subjected to robust critique and hence cannot be deemed to be the valid product of a scientific process. *Beecher-Monas & Garcia-Rill, supra*, notes 201-203.

The PCL-R was designed to determine one's propensity to resort to physical violence, not to commit sex crimes. (*Beecher-Monas & Rill, ibid.*) No RAI has been as misapplied to sex offenders as the PCL-R. Designed to ascertain the likelihood of future physical violence by a given offender, it inherently has no application to the commission of future crimes of a sexual, rather than a violent nature. While some sex crimes involve violence, it is axiomatically true that the motivation for sex crimes – even those that include violence – is completely different from the motivations that prompt acts of non-sexual physical violence. Accordingly, none of the factors used in the PCL-R serve as indicators of the probability of sex crime recidivism. See, e.g., *United States v. King*, 2013 U.S. Dist. LEXIS 54655 (E.D. N.C. 2013) (stating that the PCL-R does not predict sexual recidivism....). To same effect, see also: *United States v. Lange*, 2012 U.S. Dist. LEXIS 159498 (E.D. N.C. 2012) (stating that the PCL-R does not predict sexual recidivism at all)."

Indeed, even merely as a predictor of the likelihood of future physical violence, it has been found that the PCL-R lacks fundamental validity and reliability. Thus, e.g., *United States v. Taylor*, 320 F Supp. 2d 790, 2004 U.S. Dist. LEXIS 10957 (N.D. Ind. 2004), banned its use even in the context of death penalty proceedings:

> "The Court takes issue with one of the proposed tests in particular. In recent years, the reliability of the Interview Schedule for Psychopathy Checklist-Revised ('PCL-R') has been called into question as an indicator of a defendant's future dangerousness. Specifically, following an extensive review of literature addressing institutional violence and the PCL-R that concentrated on the use of the PCL-R in capital sentencing proceedings, John F. Edens, a psychologist with extensive experience in the area of risk assessment concluded, 'the position that PCL-R scores for any one offender provide much useful information regarding his relative or absolute risk for future institutional violence while incarcerated clearly is untenable....' *Edens, J. F., Petrila, J., & Buffington-Vollum, J. K.* (2001), "Psychopathy and the Death Penalty: Can the Psychopathy Checklist-Revised Identify Offenders Who Represent 'A Continuing Threat to Society?'," *Journal of Psychiatry and Law*, 29:433-481; see also *Edens, J.F.*, (Oct. 2001) "Misuses of the Hare Psychopathy Checklist -Revised in Court: Two Case Examples," *Journal of Interpersonal Violence*, Vol. 16, No. 10, 1082-1093; "Declaration of Thomas V. Ryan, Ph.D., ABPP, *United States v. Stitt*, Case No. 298 CR 47 (E.D. Va.) Document No. 175, filed March 18, 2004. Thus, due to the uncertainty of the validity and reliability of the PCL-R as it is used in capital sentencing hearings, the Government and any of its experts is prohibited from utilizing this test in evaluating Defendant Thomas."

Accord: *United States v. Lee*, 2010 US Dist LEXIS 145997 (E.D. Ark 2010):

> "In support of his Rule 59 motion, Petitioner has attached numerous affidavits, presented in 65 pages. Such affidavits are submitted by: ...(3) Dr. Thomas Ryan, disavowing the use of PCL-R for measuring future dangerousness and psychopathy; (4) John Edens, Ph.D., a licensed psychologist, opining on inappropriateness of using PCL-R to predict future dangerousness; (5) a group of 5 experts opining on the inappropriateness of relying on the PCL-R to predict future dangerousness, allegedly filed with a motion in limine seeking to exclude Dr. Ryan's testimony in another federal capital case;...."

A fortiori, since the PCL-R has been determined to lack validity even in its avowed field of specialization (violence prediction), it cannot be said to have any validity in the field of sex-crime recidivism prediction.

In fact, Nancy Johnston testified at a different time in the *Karsjens* trial that only 50% of MSOP's detainees have "antisocial personality disorder." (Tr., vol. 15, p. 1319, ln. 25). Generally, "psychopathy" is considered to simply amount to more extreme behaviors characteristic of "antisocial personality" -- itself a highly controversial "personality disorder." It follows that the percentage of the 'psychopathic' subset of those deemed 'antisocial' must be a lesser percentage that that 'parent' antisocial set. For instance, estimations of the average percentage of prison inmates (of all kinds and description) who exhibit antisocial behaviors is 75%, while such inmates whose behaviors can be described as 'psychopathic' amount to only 20% of the inmate population. Therefore, Johnston's claim that 67% of MSOP detainees are "psychopaths" at all, much less "highly psychopathic," is oxymoronic. Partly, the answer to this seeming riddle is that Ms. Johnston (not a holder of a psychology doctorate) claimed that a PCL-R score of 25 is considered "high" (Tr., vol. 15, p. 1320, ln. 25) (even though the aforesaid score of 30 is necessary to even be deemed psychopathic at all, much less "highly" so).

See also, illustratively, *Haggard v. Curry*, 732 F. Supp. 2d 1003, 1013; 2010 U.S. Dist. LEXIS 91882 (N.D. Cal. 2010), noting that "the creator of the PCL-R test 'specifically notes that his tests should never be used on inmates over the age of 40, as his test is attempting to assess psychopathy, which is a characteristic that decreases with age.'" Not all, but most sex offenders ultimately committed, especially after long criminal sentences, are already in the post-age-40 category. (Fifty percent of MSOP detainees are in fact over age 50.) Ergo, by definition, the PCL-R should not be used on MSOP detainees over age 40 in any context. Surely this must apply with even more force to misuse of the PCL-R when the question is not physical violence propensity, but instead an

Well Deserved Vacation!

(Continued from page 9)

attempt to predict future sex-crime recidivism.

The "SRA-FV/FV Light" is governed by the same criticisms: *United States v. King*, 2013 U.S. Dist. LEXIS 54655 (E.D. N.C. 2013), at Footnote 7, reveals that: "The Structured Risk Assessment-Forensic Version (SRA-FV) includes scoring from the Psychopathy Checklist (PCL-R). See Govt. Ex. 2, at 16."

Bruce J. Winick, The Right to Refuse Mental Health Treatment (Am. Psychol. Ass'n., Washington, DC, 1997), flatly declares, at p. 316-19: "...[M]erely labeling a class of offenders as mentally disordered sex offenders or as sexually violent predators does not itself mean that they are mentally ill within the meaning of the Constitution or that their hospitalization or treatment would be medically justified."

At Footnote 22, *Winick* applies this to 'sexual psychopathy': "*S. Brakel, et al., The Mentally Disabled and the Law* 743 (3rd ed. 1985) (referring to the '[g]rowing awareness that there is no specific group of individuals who can be labeled sexual psychopaths by acceptable medical standards and that there are no proven treatments for such offenders....'); *A. Stone*, "Mental Health and Law: A System in Transition" 192-94 (DHEW Pub. No. (ADM) 76-176, 1975); *LaFond*, "Washington's Sexually Violent Predator Law: A Deliberate Misuse of the Therapeutic State for Social Control," 15 *U. Puget Sound L. Rev.* 655, 662 (1992) ('Most experts and policy-makers had concluded that sex offenders were not mentally ill and that involuntary indeterminate treatment was ineffective in changing their criminal behavior. Coercive rehabilitation simply did not work.'); *Reardon*, "Sexual Predators: Mental Illness or Abnormality? A Psychiatrist's Perspective," 15 *U. Puget Sound L. Rev.* 849 (1992).

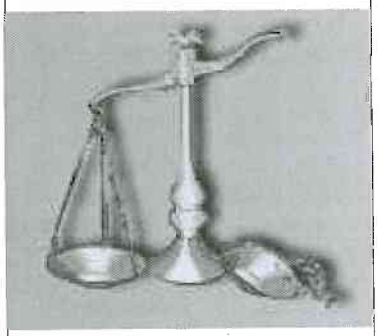
> "...It has become common practice to modify risk assessments based on the Static-99/99R because of the presence of psychopathy and indicators of deviant sexual interests, although to date there has been no research validating this procedure. The current research was conducted to fill this gap in the literature. Using a sample of 272 sexual offenders, the extent to which psychopathy, sexual deviance, and their interaction added to the predictive validity of the Static-99R was examined. Analyses were conducted using the whole sample as well as subgroups of rapists and child molesters. It was found that although the Static-99R predicted sexual recidivism, adding psychopathy and sexual deviance in a Cox regression analysis did not improve the prediction. This held true for child molesters when examined on their own...." (*Jan Looman, Nicola A.C. Morphett & Jeff Abracen*, "Does Consideration of Psychopathy and Sexual Deviance Add to the Predictive Validity of the Static-99R?," 57 *Int'l. Jour. of Offender Therapy & Comparative Criminology* 939-965 (Issue 8, Aug. 2013), Abstract, p. 939; emphasis supplied)

"Neither sexual psychopathy, the label once given to the propensity to commit sex offenses, nor antisocial personality disorder, the condition rejected as a basis for involuntary hospitalization in *Foucha*, are medical conditions for which psychiatric hospitalization or intrusive treatment would be therapeutically justified. In its study on sexual psychopath legislation, the Group for the Advancement of Psychiatry concluded that these laws 'lack clinical validity.' The study found that sexual psychopathy is 'not a psychiatric diagnostic category' but 'a meaningless grouping from a diagnostic and treatment standpoint.' It observed that offenders committed under these statutes are given little treatment or 'inappropriate or ineffective treatment.' These 'mentally disordered sex offender' statutes once were in vogue but now have fallen into disfavor. In those jurisdictions that retain them or that have adopted a newer version under which sex offenders are hospitalized as sexually violent predators, they must be regarded as constitutionally suspect under *Foucha* to the extent they authorize involuntary psychiatric hospitalization or intrusive treatment of those committing sex offenses who, apart from their criminal behavior, are not mentally ill. Sexual psychopathy is not regarded by clinicians as a mental disorder; even if it were, it would not satisfy the narrow definition of mental illness that may be implicit in *Foucha*. It has no apparent organic etiology, is not itself a treatable condition (at least absent motivation for treatment on the part of the individual), and does not produce cognitive or volitional incapacity that would justify involuntary hospitalization or treatment. Like antisocial personality disorder, found not to be a mental illness justifying commitment to a psychiatric hospital in *Foucha*, this or similar labels should not justify forced hospitalization or intrusive treatment." (*Winick*, p. 319).

Note that Dr. Robin Wilson testified that the PCL-R (the sole tool claimed to assay "psychopathic" tendencies) is not an "actuarial" instrument in the first place, having no "actuarial scale." (*Karsjens* Trial Tr., v. 2, p. 442). Dr. Vietanen complained that the PCL-R has "poor interrater reliability." (Trial Tr. V. 10, p. 2303). Dr. Sawyer testified that the PCL-R "actually has poor predictive validity with sex offenders." (Trial Tr., v. 11, p. 2600). These criticisms are just the tip of the iceberg of scientific debunking of the PCL-R.

To begin with, the PCL-R purports to measure a "heuristic ...construct" called "psychopathy."

> "No one is quite sure what psychopathy means,.... The [PCL-R] instrument consists of twenty risk factors, ...: Glibness/superficial charm; grandiose sense of self-worth; need for stimulation/proneness to boredom; pathological lying; conning/manipulative; lack of remorse or guilt; shallow affect; callous/lack of sympathy; parasitic lifestyle; poor behavioral controls; promiscuous sexual behavior; early behavioral problems; lack of realistic long-term goals; impulsivity; irresponsibility; failure to accept responsibility; many short-term marital relationships; juvenile delinquency; revocation of conditional release; criminal versatility.... [T]hese factors appear to be rather subjective,...." *Erica Beecher-Monas & Edgar Garcia-Rill*, "Danger at the Edge of Chaos: Predicting Violent Behavior in a Post-*Daubert* World," 24 *Cardozo L. Rev.* 1845, 1873 (2003).



Some of them would seem to apply to some attorneys. Information used to score these factors can be drawn from any portion of one's lifetime to date, so the PCL-R cannot measure changes over time; it treats subjects as stable 'statues.' *E. Beecher-Monas & E. Garcia-Rill, ibid.*

Kevin B. Riech, "Psycho Lawyer, Qu'Est-Ce Que C'est: High Incidence of Psychopaths in the Legal Profession and Why They Thrive," 39 *Law & Psychol.* Rev. 287 (2015), observes at 287:

> "Kevin Dutton, a research psychologist at the University of Oxford, makes this claim in his book, "The Wisdom of Psychopaths: What Saints, Spies, and Serial Killers Can Teach Us About Success.2 According to Dutton, 'Any situation where you've got a power structure, a hierarchy, the ability to manipulate or wield control over other people, you get psychopaths doing very well.'3 In a ranking of professions with the most psychopaths, lawyers come in at number two, after CEOs.4"
>
> p. 294: "...[Law] students who were characterized as 'feeling' types were twice as likely to drop out [of law school] compared to those characterized as 'thinking' types.56 The personality type that was both overrepresented in law school and had the lowest dropout rate was one that was characterized as typically 'dependable and practical with a realistic respect for facts'. And tending to emphasize 'analysis, logic, and decisiveness.'57 [Paul V. Miller] also found that students who preferred to make decisions based on a 'feeling' were more likely to drop out than those who preferred to make decisions on the basis of 'thinking.'58 These 'thinking' type students could easily discern inaccuracies, often hurt others' feelings without knowing it, and were excellent problem solvers.59"
>
> "...Lawyers are thought by some to have a lacking sense of morality – a focus on maintaining rules and regulations rather than 'moral' compassion.60 There is little research supporting this stereotype. However, gender differences might offer an explanation. Studies have shown that law school 'dramatically shifts female students' orientations from an ethic of care and compassion to an orientation similar to that of men, which typically emphasizes a rights and justice orientation.'61 Additionally, lawyers certainly tend to think differently, and perhaps value things differently, than the general population.62 This difference may cause lawyers to appear cold and impersonal, or even amoral.63"
>
> pp. 298-99: "As discussed and contrary to popular perception, psychopaths are not necessarily deranged monsters. In fact, some psychopaths may be able to master their psychotic attributes and excel over 'normal' people. Studies suggest that 'successful psychopaths have intact or enhanced neurobiological functioning that underlies their normal or even superior cognitive functioning, which in turn helps them to achieve their goals.'97 Accordingly, it is not surprising that psychopaths are so disproportionately common in the legal profession. A good lawyer should have the ability to make unemotional, rational decisions with laser-focus, much in the same way some psychopaths do. It appears not only that psychopaths might be able to function as lawyers, but also that the legal field is especially suited to take advantage of the traits many psychopaths possess."

Riech also points out that those in other professions and endeavors requiring boldness and steady nerves succeed best when they exhibit that attribute of psychopathy:

> p. 290: "On July 20, 1969, Neil Armstrong and the Apollo 11 crew had a short window – measured in seconds – to find a safe place to land the spacecraft on the surface of the moon.22 Data later showed Armstrong barely broke a sweat or exhibit-

p. 6: Table 1: Descriptive Statistics for Psychopathy Attitudinal Items Across Samples

Attitudinal scales and items	Forensic mental Health Practitioners	Probation officers	Jury Sample
Quasi-adaptive features			
Psychopaths are more likely to be successful in life than the average person is.	4.03	4.27	3.45
Psychopaths are more intelligent than the average criminal is.	4.06	4.88	4.34
Psychopaths have better social skills than the average person.	**4.20**	**4.76**	3.58
Being a psychopath can be helpful or advantageous in some jobs (such as an attorney, stock broker, politician)	**5.02**	4.25	3.55
Immutability			
Psychopaths can never change; they will always be psychopathic.	**4.71**	**4.95**	4.10
[BUT] Criminal psychopaths can be rehabilitated.	3.57	3.20	3.52

(Continued from page 10)

ed signs of stress during one on the most giant leaps in the history of mankind.23 Those who are able to control their response to stress in this almost psychopathic manner have a distinct advantage over the average person, who may fold under such intense pressure."

Sorman, K., Edens, J.F. & Kristiansson, M. et al., "Boldness and Its Relation to Psychopathic Personality: Prototypicality Analyses Among Forensic Mental Health, Criminal Justice, and Layperson Raters," *Law and Human Behavior*, Feb. 2016 (advance online publication), doi: 10.1037/lhb0000176, studied the role of boldness in the purported "psychopathic personality." At Abstract, slip, p. 1, those researchers explained their study and presaged their conclusion thus:

"...In 3 samples (forensic mental health practitioners, probation officers and a layperson community sample), we investigated adaptive traits as conceptualized in the Triachic model of psychopathy (*Patrick et al*, 2009), specifically the relevance of boldness to construals of psychopathic personality. Participants completed prototypicality ratings of psychopathic traits, including 3 items created to tap components of boldness (Socially bold, Adventurous, Emotionally stable),.... The composite Boldness scale was rated as moderately to highly prototypical among forensic mental health practitioners and probation officers.... For the individual items, Socially bold was rated as highly prototypical and was associated with theoretically relevant correlates. Adventurous also was seen as prototypical, though to a lesser degree. Only forensic mental health practitioners endorsed Emotionally stable as characteristic of psychopathy...."

Text excerpts, starting at slip. p. 1, explain the background, starting in nothing more than the *a priori* intuitive declarations of one psychiatrist before and just after World War II:

"Despite this extensive focus on criminality, dysfunction, and psychopathology, some historical (e.g., *Cleckley*, 1941) and more recent models (e.g., *Patrick, Fowles, and Krueger*, 2009; see also *Lilienfeld & Widows*, 2005; *Lykken*, 1995) have argued that psychopathy also includes certain characteristics (e.g., social prowess, lack of anxiety, fearlessness) that may not be overtly maladaptive and might in fact be associated with some positive outcomes. For example, in describing the backgrounds of psychopaths, *Cleckley* (1946) asserted:

'Not rarely the records will show that he has won the chancellor's prize at college for an essay on the Renaissance, or graduated from high school summa cum laude, or outstripped 20 rival salesmen over a period of six months, or married the most desirable girl in town, or, on a first venture into politics, got himself elected to the state legislature. (p. 22)'

Slip, p. 2: "The Triarchic Model

"...The model encapsulates psychopathy into three distinguishable phenotypic domains: Disinhibition (reflecting aspects of impulsivity, externalizing problems, irresponsibility), Meanness (reflecting traits of callousness, aggression, manipulativeness, lack of empathy), and Boldness (reflecting social dominance, venturesomeness, emotional stability). Prototypically bold individuals would present as self-confident, self-assured, and persuasive, appearing comfortable in most social contexts. They would experience lower than average levels of fear or distress when faced with threatening or stressful situations and enjoy the challenge of participating in adventurous activities. Such individuals would be optimistic, hard to discourage, recover quickly from adversity, and exhibit a nonchalant attitude toward the possibility of future problems."

[Table 1, above, is discussed below.]

p. 10: "Discussion

"...Among forensic mental health practitioners and probation officers, who would be expected to have considerable experience working with persons who demonstrate varying levels of psychopathic traits, Socially Bold and Adventurous items were rated as moderately to highly prototypical of psychopathy. In fact, these ratings were in a range similar to or higher than the average CAPP item. These findings seem to clearly support the content validity of such traits and bolster the argument that they represent important aspects of how forensic mental health and criminal justice professionals conceptualize this disorder. Jury venirepersons also rated Socially Bold as moderately prototypical, though the Adventurous item ratings were near the mid-point of the scale, indicating an essentially neutral attitude about this concept.

"In contrast to the generally positive prototypicality data for the Socially Bold and Adventurous items, results for the Emotionally stable item were less clear. Forensic mental health practitioners, whose daily job functions include the assessment, treatment, and/or management of forensic detainees with serious psychiatric disorders, viewed this item as moderately prototypical of psychopathy, whereas probation officers (and jury venirepersons) clearly did not. One plausible interpretation of these results is that the emotional stability component of boldness is an especially salient indicator of psychopathy among practitioners in a forensic mental health setting specifically because typical detainees may suffer from severe symptoms such as gross disorganization, fragmented thought processes, emotional outbursts, or social withdrawal. Therefore, clients who display optimism, self-confidence or emotional resiliency might particularly stand out in an environment in which a majority of clients demonstrate a very different pattern of personality and interpersonal characteristics. Recall that in *Cleckley*'s (1941) seminal clinical profile for psychopathy several characteristics (e.g., absence of nervousness, absence of delusions, good intelligence) seemed to differentiate psychopathic patients from those with whom he worked who were suffering from serious mental disorder...."

"...Being emotionally stable in situations in which it is in fact appropriate to be distraught or afraid is not actually normal, per se, though it may be generally viewed as advantageous or even 'heroic' (*Lykken*, 1995). Had we chosen descriptors more indicative of atypical affective dispositions (e.g., 'Abnormally calm in emotionally provocative situations'; 'Abnormally cheerful about life despite facing severe legal sanctions') perhaps our participants might have viewed such characteristics as more representative of a psychopathic personality constellation . Future prototype studies should investigate other common language indicators of low stress reactivity and the ability to 'remain calm and focused in situations involving pressure or threat' (*Patrick et al*, 2009, p. 926)."

p. 11: "...[I]t is interesting to note that no aspects of Boldness were seen as relevant to a greater propensity to engage in crime. ...In terms of moral judgments, only the forensic mental health practitioners tended to associate higher Boldness with more negative views about psychopaths (in terms of being evil and deserving of greater punishment). This might indicate that individuals working in a forensic psychiatric setting perceive at least some aspects of the potential social attainments resulting from psychopathy to be essentially undeserved or ill-gotten (e.g., through socially exploitative behavior, perhaps directed at more vulnerable detainees."

"...[W]e believe the results of this study for the most part support the content validity of boldness as an important component of psychopathic personality, particularly traits associated with being Socially bold (dominant, socially assured, persuasive) and Adventurous (courageous, thrill-seeking, tolerant of uncertainty)...."

This examination of aspects of boldness as claimed attributes of psychopathy suggests that people who might simply remind one of Errol Flynn's characters are psychopaths. This in turn shows the vacuity of the definition of psychopathy.

The PCL-R was designed to determine one's propensity to resort to physical vio-

(Continued on page 12)

(Continued from page 11)

lence, not to commit sex crimes. (Ibid.)

"Psychopathy ...is not an acknowledged psychiatric diagnosis in the DSM...." *R.A. Prentky, E. Janus, H. Barbaree, B.K. Schwartz & M.P. Kafka*, "Sexually Violent Predators in the Courtroom: Science on Trial," 12 *Psychology, Public Policy & Law* 357, 368-69 (2006).

Marna J. Johnson, "Minnesota's Sexual Psychopathic Personality and Sexually Dangerous Persons Statute: Throwing Away the Key," 21 *William Mitchell Law Review* 1139 [1996]), flatly states, at Footnote 10: "The term "psychopathic personality," however, was expunged from the psychiatric nomenclature in 1952."

Distinctly but cumulatively, *David DeMatteo, John F. Edens, Meghann Galloway, Jennifer Cox, Shannon Toney Smith, Dana Formon*, "The Role and Reliability of The Psychopathy Checklist-Revised in U.S. Sexually Violent Predator Evaluations: A Case Law Survey," 38 *Law & Human Behavior* 248 (2014), at pp. 252-53, report:

> "Certainly in the context of criminal responsibility/sanity cases, the presence of psychopathy or the related diagnosis of antisocial personality disorder does not indicate that an offender lacks the capacity to either understand right from wrong or exercise control over his behavior. (*American Law Institute, Model Penal Code and Commentaries*, Sec. 4.01, 1985). As such, its use in some SVP cases as an indicator of impaired volitional control is ironic, if not downright contradictory."

Distinctly, in Minnesota, it has been held that the terms "clinical psychopath" (to the extent it has any meaning) and "sexual psychopathic personality are not the same. *In re Whitley*, 2010 Minn. App. Unpub. LEXIS 250, 2010 WL 1192307, at *6-7 (Minn. App., 2010).

"'[T]he word 'psychopath' may be used differently in the field of psychology from its use in the SPP-commitment statute . . . .' *In re Commitment of Luhmann*, ...2007 Minn. App. Unpub. LEXIS 890, 2007 WL 2417341, at *5 (Minn. App. Aug. 28, 2007)." In this light, the PCL-R test has no valid application to a determination of whether one satisfies the supposed 'standard' of either the SPP or the SDP definitions in *Minn. Stat.*, Ch. 253D.

Effectively, *Whitley* concedes that Minnesota's so-called Sexually Psychopathic Personality Law has nothing to do with mental/emotional pathology. Instead, that statute is simply a deliberately overbroad, vague dragnet of a legislatively invented standard. In other words, without medical/psychological moorings, it simply identifies a disfavored class of individuals for permanent preventive detention.

The fact that this 'test' is used, together with its subjective interpretations, to condemn individuals to lifetime detention under that SPP/SDP Act, and that such misuse of that test is condoned by Minnesota courts is a classic example of the junk-science employed as a superficial 'justification for such commitments.

In sum, "sexual psychopathy" is not a mental illness or disorder of any kind, or any partial disorder ("dysfunction"). Therefore, it cannot support civil commitment of any individual.

* * * * * * *

How Disgust and Notions of Contamination, Contagion, Social Order and an Imagined Sphere of Purity Requiring Protection Were Used to Justify and Propel Anti-Sex-Offender Legislation

Quotes & Notes from: *Mona Lynch*, "Pedophiles and Cyber-Predators as Contaminating Forces: The Language of Disgust, Pollution, and Boundary Invasions in Federal Debates on Sex Offender Legislation," 27 *Law & Soc. Inquiry* 529 (Summer 2002):

(p. 529): "...In this paper, I examine the emotional drive that appears to undergird contemporary sex offender lawmaking, suggesting that a significant force propelling the current panoply of sex offender containment strategies is a constellation of emotional expressions of disgust, fear of contagion, and pollution avoidance, manifested in a legislative concern about boundary vulnerabilities between social spheres of the pure and the dangerous....

(p. 530): "...[Sex offenders ...stand out as being particularly subject to the new 'risk management' penal strategies that, according to a number of scholars, have come to dominate punishment rhetoric and practices in recent years (see, e.g., ...*Kempf-Leonard and Peterson* 2000; ...*Simon and Feeley* 1995).

"...[H]istorian *Philip Jenkins* (1998) illustrates the roles of 'moral panics' surrounding the problem of child molesting in the social and political realms, and *Moreno* (1997) describes the use of images of the sex offender as a demonic monster for political and media gain....

(pp. 533-34): "Toward the end of the nineteenth century, the so-called sexual pervert was first 'identified' in medical-professional and legal realms; those who had a proclivity toward sex acts that did not lead to procreation ran the risk of being labeled a pervert, a label that was meant to describe the whole of the person, rather than the specific non-normative behaviors. Because 'perverts' were seen as fundamentally deviant and dangerous, a number of interventions were developed around the turn of the century to contain their social and moral threat.... [I]n the early 1900s, a number of laws that look like early precursors to the class of contemporary preventive detention statutes recently upheld in *Kansas v. Hendricks* (1997) were implemented. These statutes mixed criminal and civil elements, and had the potential to keep all forms of 'defectives' locked up in special institutions for unlimited periods of time (*Jenkins*).

"A second wave of laws aimed at sexual offenders was passed in jurisdictions across the country beginning in the late 1930s through to the early 1950s. Emerging psychiatric conceptions about deviancy, rather than the more biological assumptions underlying the earlier set of laws, informed these 'sex psychopath' statutes. These laws again mandated indefinite confinement of those deemed sexual psychopaths; those convicted of sex-related crimes were often evaluated and 'treated' by psychiatrists in locked mental institutions until such time that they were determined to no longer be a sexual danger (*Jenkins* 1998). During this period, acts considered deviant enough to warrant some kind of legal intervention ranged from adult homosexuality and bisexuality (see, e.g., *Karpman* 1954) and excessive masturbation or use of obscenities among boys (see, e.g., *Doshay* 1943), to sex-related murder and other acts of sexual violence. In the view of many medical experts and policymakers alike, any sign of sexual deviance (by their contemporary standards) demonstrated by an individual, even behavior as nonthreatening as transvestitism or consensual oral sex, indicated the potential for escalation to sexual violence (e.g., *Karpman* 1954; *Pollens* 1938; *Whitman* 1951). Noted criminologist *Edwin Sutherland* (1950a, b), who in the midst of this panic critiqued the sexual psychopath laws for their fallacious basis and uselessness as policy, identified several features that corresponded to the adoption of such statutes. Specifically, he argued that the laws tended to result from community agitation on the heels of well-publicized and serious sex crimes. This swell of fear and panic was typically followed by the establishment of official 'committees,' which often included psychiatric experts to deal with the issue, preferably through development of new policy. The particular form of policy response that called for isolation and treatment was consistent with the broader trend of medicalizing criminal justice at the time.

(pp. 535-36): "Sutherland's critiques almost seemed to foreshadow the changes to come in how sex offenders were viewed and treated in the criminal justice, medical-psychological, and even popular realms. Beginning in the late 1950s and continuing for nearly two decades, there was an ebb in the panic over sex crimes, sexual deviance, and sexual behavior generally. This was accompanied by the easing of some of the restrictive and invasive intervention measures that had been previously adopted (*Alexander* 1995); *Allyn* 1996; *Jenkins* 1998). Some experts – psychiatrists and academics – advocated for fewer criminal laws aimed at sexual deviants as the understanding of what constituted sexual deviance entered a state of upheaval. Formal legal intervention was seen as counterproductive for offenders and even victims in some situations.7 There was also a growing sensitivity in the courts and academic circles about the racial disproportionately in sex crime prosecutions and punishments (see, e.g., *Wolfgang and Riedel* 1975), and about the procedural rights of those suspected of, charged with, and punished for all kinds of criminal offenses (e.g., *Gideon v. Wainwright* 1963); *Miranda v. Arizona* 1966; *Morrissey v. Brewer* 1972). Thus, during this 'liberal era' (*Jenkins* 1998, 94), both the definition of sexual deviance and the appropriateness of criminalizing deviant sexual acts were pointedly questioned.

"By the 1980s, though, social and legal concern with sex offenses resurged, with some reshaping of early incarnations of panic. The initial thrust was due in part to feminist activism and scholarship that brought the issue of rape and, later, pornography, as uniquely damaging and subjugating for women and children, to the forefront in political, legal, and media realms (*Archard* 1998; *Dean* 1996; *Jenkins* 1998). Rather rapidly, though, these issues and concerns were co-opted by the emerging politically powerful Right.8 Concern expressed by feminists and humanists about the devaluation of women and children and victims of violence was transformed in the emerging 'tough on crime' political atmosphere by increasingly conservative lawmakers and policymakers to a general escalation of punishment for sex offenders, among other felons. Further, particularly in the case of child victimization, a more socially conserva-

(Continued on page 13)

(Continued from page 12)

tive powerbase, heavily influenced by increasing political activism among Christian fundamentalists, was able to relink such things as homosexuality, nontraditional sexual relationships, and even family reliance on day care centers to brutal sexual violations of children (Jenkins 1998). By the 1990s, the public, lawmakers, and the mass media expressed an ongoing sense of crisis about the particularly venal threat now dubbed 'sex offender' and his more violent counterpart, the 'sexual predator,' posed to innocent women and children (*Hebenton and Thomas* 1996a; *Jenkins* 1998; Moreno 1997).

"The criminal justice responses to this latest wave of concern ranged from traditional crime-control legislative reactions – increased prison sentences for those convicted of specified sex crimes – to relatively new strategies that physiologically alter the convicted offender, most notably, through the use of 'chemical castration.'9 California's recent legislative efforts offer a good example of those trends. The state legislature enacted a 'one strike' law in 1994, which mandates a 25-year sentence, with 15 years minimum served before parole eligibility, for those convicted of specified sex crimes, including rape, forcible spousal rape, and lewd and lascivious conduct with a child under the age of 14, among others (*Cal. Penal Code* Sec. 667.61 [1999]; *Zamoyski* 1995). In addition, California was the first state to enact, in 1996, chemical castration punishment for child molesters, required after the second conviction, and by judicial discretion for a first offense if it meets certain risk/seriousness criteria (*Cal. Penal Code* Sec. 645 [2000]; *Comment* 1997).10"

II. DISGUST, FEAR OF CONTAGION, AND THE SOCIAL ORDER

(pp. 538-40): "Disgust is considered one of a number of distinct human emotions, and while scholars continue to disagree over whether emotions like disgust are universal and/or basic human elements (*Miller* 1997; *Rozin, Haidt, and McCauley* 1993), there is a consensus that in its more elaborated, abstract forms, the kinds of things that inspire a disgust reaction in people are intimately tied to culture....

"Psychologist *Paul Rozin* and his colleagues (1989, 1993) have distinguished five levels of expansion of disgust and disgust elicitors,12 which become increasingly concerned with violations of the social order in the more elaborated forms. It is also at the higher levels that disgust elicitors are especially shaped by cultural particulars and idiosyncrasies, and it is these cultural elements that make disgust interesting – how it is shaped temporally and locally by various sociocultural forces. Thus, rules about food and food combination prohibitions to maintain purity; interpersonal taboos about how categories of people can interact (e.g., castes, untouchables); rules governing the contaminating forces associated with sexual behavior, menstruation, and other bodily functions; moral codes and certain legal prohibitions all speak loudly about the time and place in which the particular rules dominate.

"Because of the emotional power of disgust – it is strongly felt both physically and psychologically – its influence on the social order can be dramatic. Mary Douglas' (1966) groundbreaking work that analyzed cultural practices surrounding various types of defilement, as well as the larger meaning for the social structure in which the behaviors are situated, clearly illustrates the role of disgust and pollution in social life.13 Her structural theory about purity and pollutants asserts that 'dirt,' or contaminants, are not part of a universal category, but rather are contextually defined. A major characteristic of pollutants is that they are anomalous, and therefore have the potential to throw into disarray the proper order of things if they are allowed to remain in the domain. For Douglas, a social system creates rules about contaminating forces, attributes both power and danger to the pollutant, then creates remedies to protect the social order from becoming polluted. These remedies may be formalized as laws, or incorporated in the form of norms and informal social rules. Nonetheless, they dictate whole sets of social practices for the given culture or community.

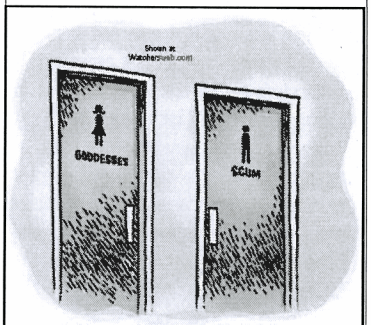
"*William Ian Miller* elaborates on the power of disgust to shape social and cultural life. For him, disgust not only shapes the social experience, it also has 'intensely political significance. It works to hierarchize our political order.... The world is a dangerous place where the polluting powers of the 'low' are usually stronger than the purifying powers of the high' (1997, 8-9). Thus, as a motivating force, disgust has the power to inspire extreme measures to protect against contamination: 'disgust can ...lead to disproportionate responses; it often seeks removal, even eradication of the disgusting source of threat' (*Miller* 1997, 251). And it demands action: 'Disgust is more than just a motivator of good taste; it marks out moral matters for which we can have no compromise' (*Miller* 1997, 194). Indeed, *Rozin* and his colleagues (*Haidt et al. 1997; Rozin 1999; Rozin and Singh* 1999) have demonstrated a link between disgust and the process of moralization, in that the cultural attachment of disgust to a given object, set of behaviors, or class of people is often related to the process by which a stigmatizing moral value is developed around the disgust elicitor. And, according to this line of research, where violations of individual rights may inspire anger and communal code violations inspire contempt, it is violations of culturally shaped purity/sanctity rules that inspire disgust (*Rozin* et al. 1999). *Rozin* (1999) argues that this process is therefore relevant to law and policy, in that moralized entities are likely to attract significant attention from government institutions in an effort to address the immoral threat.

"From the perspective of social interaction, when individuals or classes of people come to be viewed as disgusting, then all those who fall in the category of the disgusting will be subject to measures that seek to quarantine, separate, or even destroy them to defuse their powerfully contaminating forces. And the process by which disgust gets linked to an entity at the cultural level is often through language and the use of metaphor. Thus, both Kemper (1997) and Kristeva (1990) have argued that disgust played a role in Nazi anti-Semitism and its ultimate manifestation – the extermination of millions of Jews – through the rhetorical construction of Jews as disgusting in popular and political discourse (see also Nussbaum 1999). Both Kemper (1997) and Nussbaum (1999) point out the linguistic linking of the Jews to the emotion of disgust through the Nazi metaphor of Jews as vermin and as parasitic."

III. THE LANGUAGE OF DISGUST AND CONTAGION IN CONTEMPORARY SEX OFFENDER LEGISLATION

B. Characteristics of Disgust and Analytical Method

(pp. 543-44): "I examine two major characteristics of disgust elicitors in this analysis. The first has to do with the highly polluting or contaminating nature of disgust elicitors. According to disgust theorists, the disgusting is resistant to purification; rather, the things it contaminates are brought down to its level (*Miller* 1997; *Nemeroff & Rozin* 1994). According to the magical law of contagion, once an object of purity is touched by a contaminating source, even in some cases secondarily, the contamination lingers, perhaps forever (*Nemeroff & Rozin* 1994). Thus, the contaminated object/person may become indelibly soiled or impure, often as sullied as the original polluter. ... *Nemeroff & Rozin* (1994) found evidence of contagion beliefs among North American research subjects about the transferability of the negative characteristics of unappealing people through contact with their clothes or other personal effects (see also, *Rozin et al.* 1989). And the contaminating forces of these disgusting people were not ameliorated through washing or sterilizing the transmitting object in the minds of many research participants. Particularly in the case of contact with negative 'interpersonal-moral contagious entities' (Nemeroff & Rozin 1994, 178), a defiled entity's contamination is only minimally reduced by either physical or symbolic purification procedures, short of destruction of the contaminated object.



Restrooms at the Feminist Bookstore

"The second major characteristic I explored in these debates concerns the sphere of purity that must be protected from contamination. Disgust works as a dichotomy, rather than as a continuum, so that the distinct categories of the disgusting and the pure (nondisgusting) must not be blurred. Miller distinguishes disgust from its close emotional relative, contempt, in just these sorts of terms: 'Contempt marks social distinctions that are graded ever so finely, whereas disgust marks boundaries in the large cultural and moral categories that separate pure and impure, good and evil, good taste and bad taste' (1997, 220). Because of this dichotomy, clear boundaries between the two must be protected to maintain purity. Boundaries between pure and impure need to be diligently maintained because of the highly polluting nature of disgust elicitors. Further, that which disgusts, according to *Miller*, 'is marvelously promiscuous and ubiquitous.' (1997, 89), so it will tend to be more amorphous and will generally disregard spatial boundaries. In order to maintain purity then, extreme measures are necessary to segregate and contain the disgusting. In the case of contested areas for control, where boundaries are in flux of have not been set, this boundary vulnerability is likely to inspire efforts to erect or resurrect clear lines between the pure and the disgusting. And as a result, boundary building may play a functional role as a communalizing force. According to *Miller*, disgust 'is especially useful and necessary as a builder of moral and social community. It performs this function obviously by helping define and locate the boundary separating our group from their group, purity from pollution, the violable from the inviolable' (1997, 194).

"In order to explore these characteristics, I used latent content analytic methods

(Continued on page 14)

(Continued from page 13)

to sort and categorize the debate discourse (*Berg*, 1989). I began the analysis of the debates by coding for the general themes reflected in the data, then proceeded to develop five distinct categories of disgust/contagion language that emerged from the data, and a sixth category that represents a counterstory to the emotional language in the lawmaking. Those categories are (1) sex offenders as contaminators; (2) tools of contamination; (3) the sphere of purity; (4) the notion of boundaries/boundary violations; (5) the magical law of contagion; and (6) the dangers of emotional lawmaking. The first and second categories illustrate the highly contaminating nature of disgust elicitors described above and demonstrate how the 'sex offender' and his actions are discursively linked to notions of disgust and contamination. The third and fourth categories illustrate the centrality of boundary maintenance and the zone of purity to be protected in the legislative discourse. The fifth category illustrates the way in which the speakers implicitly endorse the laws of contagion, which in turn suggests the very kinds of remedies proposed in response to the sex offender problem. The final category illustrates a minority (and unpersuasive) discourse that sought to rein in the emotional pitch underlying the lawmaking and reassert both 'rationality' and constitutionality into the process."

IV. FEDERAL SEX OFFENSE LAWMAKING AS MANIFESTATIONS OF DISGUST

A. Sex Offenders as Contamination

(pp. 544-46): "Across the materials, sex offenders were both implicitly and explicitly conceptualized as dangerous contaminators of what is pure in America. Thus, they were referred to as, variously, 'a horrifying threat,' a 'blight on our country,' a 'scourge,' 'sick,' and 'twisted.' That these 'predators' are amorphous and insidious in how they spread their polluting qualities was also made known in the debates. They intrude, disrespect boundaries, creep, and invade the social spheres of purity:

"The sickness of child predators is prevalent. It is growing. So many ...jurisdictions have tried themselves to track these sexual predators and work, if you will, to fight against this siege upon our community.... We must act to protect our young people from the scourge of child predators seeking to harm them through internet communication, and we must act now.' (*Jackson-Lee*, Cong. Rec. 1998, H4493)....

"...[T]his male predator was never described as a family member, neighbor, or friend of potential victims. Rather, his threat came from outside the realm of the pure and innocent....

"...[I]n each debate, at least one speaker pointed to unspecified 'scientific studies' which confirm that 'those who commit acts of sexual violence against children have the highest rate of recidivism among all criminals and crimes.' (Lampson, Cong Rec. 1997, H7630). Congressman McCollum described the recidivism rate of registrable sex offenders at, '10 times greater than other criminals' (Cong. Rec. 1996b, H11132), and Congresswoman Jackson-Lee argued that 'it is a known fact that the scientific community has concluded that most pedophiles cannot control themselves' (Cong. Rec. 1996b, H11134).16 Senator Gramm cited the same 10-fold recidivism rate, here compared to convicted robbers and again without indicating where this figure originates, as he notes that 'sexual predators have a recidivism rate that is higher than any other known class of criminal activity.' (Cong. Rec. 1996, S3423)."

B. Tools for Contamination

(p. 547): "...[Most people] are surprised when they learn that child pornography is a tool of choice used by child molesters and pedophiles to entice young children into sexual activities.... Bottom line, let us remember that child pornography is used in every community in America to lure children into this child abuse. (*Bachus*, Cong. Rec. 1998, H4497)

"...The threat of contaminations appeared to be equally regarded if a youth was exposed to any form of sexual content on the Internet. Indeed, when the speakers specifically articulated an image of the perpetrator behind the pornographic material that exists on the World Wide Web, they described the most offensive and dangerous prototype of all – the child sexual predator – as the generic threat who must be controlled by the proposed bill. Those who would expose minors to pornography are 'cyber-predators' who 'stalk children on the Internet' (*McCollum*, Cong. Rec. 1998, H4491, and they were presented as highly likely to kidnap, rape, and photograph, even murder, those children at the other end of the Internet connection."

C. The Sphere of Purity That Must Be Protected from Contamination

(p. 549): "...The debates conveyed a sense that the very fiber of traditional family units is under siege by sex offenders, and that the only way to save the sanctity of the traditional family is through passage of these bills...."

(pp. 549-50): "The space where the innocents dwell – a sphere of purity that deserves protection from intrusion – was also defined in these debates. It includes the traditional, idealized havens of family homes, schools, communities, and neighborhoods:

...Sexual predators must be targeted and must be eliminated from our communities and made never to perpetrate their violent act upon innocent children in this country. (*Jackson-Lee*, Cong. Rec. 1997, H7631)"

D. The Importance of Strengthening Vulnerable Boundaries

(pp. 550-51): "Indeed, while each of these pieces of legislation can be viewed as efforts toward fortifying the boundaries between the pure and the contaminated through added law enforcement, prosecutorial, and punishment powers, this purpose was most explicit in the debate over the Child Protection and Sexual Predator Punishment Act of 1998. It is here that the contested terrain – so-called cyberspace – was identified and the goal of claiming it for the 'good' side was made clear. The Internet, for many who spoke in the 1998 debate, is at once a technological marvel and a danger zone"

'For our children [the Internet] represents a wonderful opportunity to gain knowledge and enhance their educational experiences. Unfortunately, it also represents a terrifying new way for some in our society to prey on innocent children. Increasingly, pedophiles and sexual predators are using the anonymity of the Internet to lure children into dangerous situations.' (*Poshard*, Cong. Rec. 1998, H4498)....

And cyberspace not only represents contested terrain; it also has created new breaches in the traditionally solid boundaries, such as between the family home and the larger world. Congressman McCollum warned his audience that with the Internet innovations, 'perfect strangers can reach into the home and befriend a child' (Cong. Rec. 1998, H4491). In Congresswoman Jackson-lee's imagery, this stranger is a 'predator who may currently be lurking behind our family computer screens' (Cong. Rec. 1998, H4493), thus presenting an all-too-nearby threat to the sanctity of the family home. They and others elaborated on this threat of boundary violation and penetration into the spheres of purity in their narratives of support for the 1998 bill:

'Cyber-predators' often 'cruise' the Internet in search of lonely, curious or trusting young people. Sex offenders who prey on children no longer need to hang out in the parks or malls or school yards. Instead they can roam from Web site to chat room seeking victims with no risk of detection. (*McCollum*, Cong. Rec. 1998, H4491).'"

(p. 552): "...[T]he measures required to protect and fortify the boundaries between the contaminator and the pure may well be extreme, but they are called for due to the gravity of the threat. In Senator Gramm's words, 'if you do commit this kind of terrible crime, part of our response will be to take extraordinary procedures to protect society' (Cong. Rec. 1996c, S3423). Gramm did not specify the particular 'terrible crime'; but left it to the imagination of his audience. Similarly, in Congressman Bachus' plea for more extreme (and potentially unconstitutional, overreaching, and intrusive measures aimed at sex offenders, he expressed his willingness to forgo the requirements of law in the name of protection of the innocent and pure:

'Present federal law ...was said to be the result of a compromise with civil libertarians, but I would say that it was an insane compromise with the devil, a compromise which exposes every American child to pedophiles and child predators who lurk in every American community, armed with items of child pornography. Let us also say that any item of child pornography, one item, is the ultimate example and evidence of the ultimate child abuse. (*Bachus*, Cong. Rec. 1998, H4504).'"

(p. 553): "'[This legislation is] designed to protect children from the weirdos, the wackos, and the slimeballs who use the latest technology to prey on children and their families.' *Weller*, Cong. Rec. 1998, H4494)"

E. Magical Law of Contagion

(p. 554): "It is also clear from these debates that, in conformity with the laws of contagion, the legislative efforts must focus on maintaining boundaries. As is implied in the following excerpts, once touched by the pollutant, the victim is lost to the contaminating forces, and there is no going back:

'The skyrocketing on-line presence of children, the proliferation of child pornography on the Internet, and the presence of sexual predators trolling for unsupervised contact with children, has resulted in a

(Continued on page 15)

Alcatraz Island

(Continued from page 14)

chilling mix which has resulted in far too many tragedies that steal the innocence from our children and create scars for life.' (*McCollum*, Cong. Rec. 1998, H4491)

"'This bill is part of a continuing fight against the relentless predators who target our children, the most vulnerable members of our society. I think that what people have to understand is ...that sexual offenders are different.... Long prison terms do not deter them. All too often, special rehabilitation programs do not cure them. No matter what we do, the minute they get back on the street, many of them resume their hunt for victims, beginning a restless and unrelenting prowl for children, innocent children to molest, abuse, and in the worst cases, to kill. So we need to do all we can to stop these predators. (*Schumer*, Cong. Rec. 1996a, H4453)

(p. 555): "It is a known fact that the scientific community has concluded that most pedophiles cannot control themselves...." (*Jackson-Lee*, Cong. Rec. 1996b, H11134)

V. THEORETICAL AND PRACTICAL IMPLICATIONS OF DISGUST'S INFLUENCE ON LAW

(pp. 557-58): "...[T]he language and tone of these debates ...powerfully convey the presence of an emotional drive behind the lawmaking. The legislators' discourse in large part reveals an almost visceral repulsion and disgust reaction to an imagined toxic threat, rather than an articulated concern based on rational, dispassionate assessment of a known social risk.

"Specifically, an underlying theme to the narratives offered by the bulk of the federal legislators in all these debates seems to be that the sex offender is essentially supernaturally dangerous and contaminating to the idealized social body. The prototypical sex offender constructed by the speakers was consistently the most despicable of the lot – an outsider predator who relentlessly lusts after the innocent and the pure, and who will both psychically and physically destroy his victim if left to his own devices. And while this kind of offender, though quite horrible, is statistically anomalous, therefore not the kind of pervasive threat to the well-being of the nation's children that is imagined here, the speakers held him up as the prime, if not sole target of the new laws.

"Thus, the lawmakers, in voting for these four bills, committed considerable resources and massively expanded the reach of federal criminal law in response to an unrealistic, emotionally drawn monstrous figure. In the articulated view of almost all the speakers, the pernicious nature of the sex offender's contaminating powers demanded that as a legislative body, they enact whatever 'extraordinary measures' are necessary to monitor and contain him, even if it means sacrificing the very foundational rules of federal lawmaking. Nonetheless, the pieces of legislation generally created a pool of targeted offenders that extends well beyond this relentless predator/psychopath prototype. Perhaps because of the shapelessness of disgust – just as disgust elicitors seem to seep and ooze across boundaries – the disgust reaction here appears indiscriminantly, rather than distinguishing between subtypes of sex offenders by true level of threat. Thus, these lawmakers (at least verbally) imagined the most vile example and generalized from that by legislating punitive responses that affect huge classes of criminal actors."

(pp. 560-61): "...Because of the power of disgust as an emotion -- its highly economical nature in marshaling a strong aversive reaction, the amorphous and imprecise interpretation of disgust elicitors, and its ability to demand 'disproportionate responses' (*Miller* 1997, 251) – it has the strong potential for purely irrational and cruel actions and reactions (see also *Massaro* 1999 on this issue). At its worst, in Nussbaum's words, disgust 'collaborates with evil [and] offers nothing to keep our political hearts warm' (1999, 55). Further, Nussbaum argues, disgust has 'been used as a powerful weapon in social efforts to exclude certain groups and persons' including Jews, women, the poor, and homosexuals, so it cannot be analyzed outside the context of group dominance/subordination within social-structural relations (1999, 29)."

NOTES

"...[O]ne of the best-known and extreme antiabortion activists in the United States, Randall Terry, is also an activist against child pornography, and has been involved in demonstrations where activists enter mainstream bookstores and destroy art books that feature images of nude children (*Jenkins* 2001).

REFERENCES

Alexander, Rudolph, "Employing the Mental Health System to Control Sex Offenders after Penal Incarceration," 17 *Law and Policy* 111-130 (1995)

Susan Bandes, The Passions of Law (New York: New York Univ. Press, 1999)

Congressional Record (Cong. Rec.), 1996a. *Megan's Law. Congressional Record 142:H4451-57*

Congressional Record (Cong. Rec.), 1996b. *Pam Lychner Sexual Offender Tracking and Identification Act of 1996. Congressional Record* 142:H11130-35.

Congressional Record (Cong. Rec.), 1996c. *Sexual Offender Tracking and Identification Act. Congressional Record 142:S3421-24*

Congressional Record (Cong. Rec.), 1997. *Jacob Wetterling Crimes Against Children and Sexually Violent Offenders Registration Improvements Act of 1997. Congressional Record* 1432:H7626-31.

Congressional Record (Cong. Rec.), 1998. *Child Protection and Sexual Predator Punishment Act of 1998. Congressional Record* 144:H4491-505.

Carolyn Dean, Sexuality and Modern Western Culture (New York, Twayne, 1996)

Jonathan Haidt, Paul Rozin et al., "Body, Psyche, and Culture: The Relationship between Disgust and Morality, 9 *Psychology and Developing Societies* 107-31 (1997)

Bill Hebenton & Terry Thomas, "Sexual Offenders in the Community: Reflections on Problems of Law, Community, and Risk Management in the U.S.A., England and Wales," 24 *Int'l. Jour. Of the Sociology of Law* 427-43 (1996)

Philip Jenkins, Moral Panic: Changing Concepts of the Child Molester in America (New Haven, CT: Yale Univ. Press, 1998)

Theodore Kemper, "Habits of the Heartless: Emotions and Barbarism. Paper presented at the meeting of *American Sociological Ass'n.*, Aug. 9-13, 1997, Toronto, Canada

Kimberly Kempf-Leonard & Elicka Peterson, "Expanding Realms of the New Penology: The Advent of Actuarial Justice for Juveniles," 2 *Punishment and Society* 66-97 (2000)

Julia Kristeva, "'Ours to Jew or Die': Celine and the Categories of Anti-Semitism. In *Anatomy of Racism*, ed. David Theo Goldberg, 171-82 (Minneapolis: Univ. of Minn. Press, 1990)

Toni Massaro, "(Show Some) Emotion." In *Bandes* 1999 (*supra*)

William Ian Miller, The Anatomy of Disgust (Cambridge, Mass: Harvard Univ. Press, 1997)

Joelle Moreno, "'Whoever Fights Monsters Should See to It That in the Process He Does Not Become a Monster': Hunting the Sexual Predator with Silver Bullets – Federal Rules of Evidence 413-415 – and a Stake Through the Heart – Kansas v. Hendricks," 49 Fla. L. Rev. 505-62 (1997)

Carol Nemeroff & Paul Rozin, "The Contagion Concept in Adult Thinking in the United States: Transmission of Germs and Interpersonal Influence," 22 *Ethos* 158-86 (1994)

Martha Nussbaum, "'Secret Sewers of Vice': Disgust, Bodies, and the Law," In *Bandes* 1999 (*supra*).

Paul Rozin, "The Process of Moralization," 10 *Psychological Science* 218-21 (1999)

Paul Rozin, Jonathan Haidt & Clark McCauley, "Disgust," In *Handbook of Emotions*, ed. Michael Lewis & Jeanette Haviland, 575-94 (New York: *Guilford Press*, 1993)

Paul Rozin, Laura Lowery, Sumio Imada & Jonathan Haidt, "The CAD Triad Hypothesis: A Mapping between Three Moral Emotions (Contempt, Anger, Disgust) and Three Moral Codes (Community, Autonomy, Divinity)," 76 *Jour. Of Personality and Social Psychology* 574-86 (1999)

Paul Rozin, Carol Nemeroff, Marcia Wane & Amy Sherrod, "Operation of the Sympathetic Magical Law of Contagion in Interpersonal Attitudes among Americans," 27 *Bull. Of the Psychonomic Society* 367-70 (1989)

Jonathan Simon & Malcolm Feeley, "True Crime: The New Penology and Public Discourse on Crime, in Punishment and Social Control: Essays in Honor of Sheldon L. Messinger," ed. T. Blomberg & S. Cohen 147-80 (New York: *Aldine De Gruter*, 1995)

****

Expert Witness Bias

Article Excerpt:

Daniel Kriegman, Ph.D., New Salem Witch Trials: Evaluating Bias in Expert Witness Conclusions of 'Sexual Dangerousness,' Part 1," *Sex Offender Law Report*, Vol. 15, No. 4 (June/July, 2014), pp. 49-50, 60-63

(Editor's Note: Dr. Kriegman is a noted expert about sex offender commitment who has critiqued sex offender commitment proceedings in Massachusetts for decades.)

(pp. 49-50): (Author's Note): "...[A]s in the

(Continued on page 16)

(Continued from page 15)

Red Queen's better world, it can be shown that the preventative detention of the majority of men reviewed, committed and recommitted as sexually dangerous because of crimes they supposedly would commit if released is reckless and arbitrary with a level of validity approaching that found in witch trials.... [emphasis supplied]

"Researchers have shown that there is considerable bias and/or questionable validity in expert predictions of dangerousness. (*W.M. Grove, D.H. Zald, B.S. Lebow, B.E. Snitz & C. Nelson*, 'Clinical Versus Mechanical Prediction: A Meta-Analysis,' 12(1) *Psychol. Assessment* 19-30 (2000); *E.S. Janus & R.A. Prentky*, 'Forensic Use of Actuarial Risk Assessment with Sex Offenders: Accuracy, Admissibility, and Accountability,' 40 *Am. Crim. L. Rev.* 1143-489 (2003); *J. Monahan, Predicting Violent Behavior: An Assessment of Clinical Techniques* (1981); *G.G. Woodworth & J.B. Kadane*, 'Expert Testimony Supporting Post-Sentence Civil Incarceration of Violent Sexual Offenders,' 3 *L., Probability, & Risk* 221-41 (2004).

"However, as we will see, when it comes to predicting the likelihood of future sex offending, the bias becomes literally astronomical. Based on the actual patterns of experts opining "sexually dangerous," it can be established beyond the possibility of doubt that the methodology used and conclusions reached by the Qualified Examiners employed by the Commonwealth of Massachusetts leads (or allows) them to grossly overpredict dangerousness.... [emphasis supplied]

"...[I]t is this level of certainty we can reach about the extraordinarily high degree of bias demonstrated by 'experts' in sexual dangerousness proceedings, a degree of bias that is so extreme that it may justify referring to the resultant courtroom proceedings as the 'New Salem Witch Trials.'...." [emphasis supplied]

(pp. 59-60): (Text): "This study compares an upper limit of the base rate for sex offense recidivism with the actual rate of opining SD (i.e., opining that the offender is likely to reoffend) by examiners hired by the Commonwealth as Qualified Examiners (QEs). The study then compares the known base rate of sexual dangerousness as defined by the law and established by decades of actual judicial findings with the Qualified Examiners'; patterns of opining SD. The question is whether the expert rate of opining SD is at all in synch with either an upper limit of possible likelihood of sex offense recidivism or the established rates of 'sexual dangerousness.'....

"...[W]e can know the base rate or frequency of sexual dangerousness by looking at the actual rates of finding offenders to be sexually dangerous that were established by the judiciary of the Commonwealth. Indeed, the highest court in the Commonwealth, the Supreme Judicial Court, has determined that the judiciary's prior interpretation of 'likely' (to reoffend sexually and thus to present a risk of significant harm) – which lies at the core of the definition of SWD – is the proper and correct interpretation of the statute today (*Commonwealth v. Boucher*, 438 Mass. 274 (2002).) Thus, the actual frequency of sexual dangerousness has been established and experts' patterns of opining SD can be compared to the established base rate."

(p. 60): "We start with the assumption that the Commonwealth's examiners' methodology does not lead to biased conclusions and it leads them to make predictions that are more or less consistent with the actual risk. Normally, if the data then yields a probability of less than 5%, the null hypothesis is rejected. ...Given that I am alleging a degree of bias that rises to the level of ethical misconduct, I will use a more stringent criteria modeled on legal determinations. I will even go further beyond a reasonable doubt and will demonstrate that the bias is so severe that it goes beyond the possibility of doubt...." [emphasis in original]

"...[T]he following considerations make it almost certain that 50% is an overestimate of recidivism...."

(p. 61): "[T]he extremely low observed rate of recidivism over a five-year average period after release of SD men (2% if we assume that the one offender who was charged with a new offense was so convicted) is simply not possible if the true recidivism rate were 50% or higher."

(p. 62): "**Observed Recidivism Rate Lower**

"...[T]he observed recidivism of men who have been found not SD over the first decade of the TC's [Treatment Center's] management by the Justice Resource Institute under the administration of the DOC suggests a much lower rate of recidivism. Note that the vast majority of these men were considered SD ["Sexually Dangerous"] by the CAB [Community Access Board] and/or the Qualified Examiners at the time they were determined to be not SD by the court. During the nine-plus years that Dr. Barbara Schwartz had been the clinical director of the TC, approximately 50 men had been found to be not SD. Of these men, not one had been convicted of a new sex offense. (Barbara Schwartz, personal communication, Sept. 24, 2001.) It is just not plausible that the true base rate of recidivism for men released from the TC could be anywhere near 50% and zero out of 50 released men would be convicted of a new sex offense over an average of five years of living out in the community. Though it appeared at the time (2001) that one would be so convicted, this rate of reconviction (2% over five years) is almost impossible to conceive of if the true rate of recidivism for these men was greater than 50%." [emphases supplied]

(p. 63): "...Thus, using a 50% recidivism estimate to evaluate the accuracy of the Qualified Examiner's findings, gives the Commonwealth's experts a very strong benefit of the doubt."

* * * * * * * *

Risk Assessment Instruments Shouldn't Disagree, But They Do — Sharply.

Excerpts from: *Sandy Jung, Anna Pham & Liam Ennis*; "Measuring the Disparity of Categorical Risk among Various Sex Offender Risk Assessment Measures," 24 *Jour. Of Forensic Psychiatry & Psychology* 353-370 (No. 3, 2013), available at: http://dx.doi.org/10.1080/14789949.2013.806567

(See Abstract and Text after tables.)

Tables:

Table 1. Descriptive statistics: Static-99R, Static-2002R, SORAG, and SVR-20.

	Converted risk categories (n)		
Measure	Low (0-38%)	Moderate (39-90%)	High (91-100%)
SORAG (score range: -27 to 51)	44 (53.7%)	35 (42.7%)	3 (3.7%)
SVR-20 (score range: 0-40)	62 (83.8%)	9 (12.2%)	2 (2.7%)
SVR-20 (clinician rated)	27 (38.6%)	32 (45.7%)	11 (15.7%)

Table 3. Percentage agreement between risk categories of the Static-99R with the Static-2002R and the SORAG

	% agreement
Static 2002R	
Low	36.2
High	57.9
Percentage agreement (overall)	62.9
SORAG	
Low	14.0
Percentage agreement (overall)	37.2

Table 4. Percentage agreement between risk categories of the Static-2002R with the SORAG

	Static-2002R – High risk Category
SORAG	
Percentage Agreement (overall)	11.8

Abstract: "...[T]his study compares four risk assessment approaches, namely the Static-99R, Static-2002R, Sex Offender Risk Appraisal Guide (SORAG), and SVR-20, in order to evaluate the disparities among the risk categories of these measures."

Text:

p. 355: "...Barbaree et al examined the consistency of ranking risk among five risk assessment measures: RRASOR, Static-99, Violence Risk Appraisal Guide (VRAG), Sex Offender Risk Appraisal Guide (SORAG), and MnSOST-R. They predicted that, based on the fact that items in each instrument as being high risk, only3% of the sample was identified as high risk by all five instruments. Similarly, only 4% were identified as low risk simultaneously by all of the measures. Hence, different instruments appear to yield different outcomes (Barbaree et al., 2006)."

pp. 359-360: "Despite the similarity in development and items between the Static-2002R and its predecessor , the Static-99R, only moderate percentage agreements among the risk categories of these two measures were seen, ranging from 36.2 to 81.1% (see Table 3 for frequencies and percentage agreements by risk category).

p. 364: "...Barbaree et al.'s (2006) study ... found that the five actuarial instruments (VRAG, SORAG, RRASOR, MnSOST-R, and Static-99) did not produce consistent risk rankings for the same evaluations."

Editor's Note: Note these underlined examples: Table. 1: Wild discrepancy within SVR-20 between auto or clinician rating; Table 3 (comparing to Static-99): very little agreement at low end; Table 4: ditto in high-risk as to SORAG vs. Static 2002.

* * * * * * * *