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Coming Soon:

- ✓ The Routine & Nonroutine of the Static-99R: The Good, the Bad, & the Very Ugly Got Much Worse in 2015.
 - ✓ The Math Behind the MnSOST-3.1 Pushed Pencil-Whipping into a Whole New Dimension
 - ✓ 'Stranger Danger' Debunked
 - ✓ MSOP Media Censorship vs. Disconnect between Imagery & 'Hands-on' Sex Crimes
 - ✓ Equal Protection May Rise Again – A Double-Header: (1) Animus against Us: Sufficient Alone?, (2) Strict Scrutiny Can Strike Down SO Commitment As Quasi-Criminal
 - ✓ For Effective Defense Assistance, SO Commitment Appointed Attorneys Must Be Educated Specialists
 - ✓ MnSOST-4: Still Junk Science
 - ✓ Janus—Everyone Has Difficulty Controlling Behavior, So Everybody Should Be Locked Up.
 - ✓ Interesting Facts & Implications from 2018 SOCCPN Annual Survey of Commitment Facilities
 - ✓ Colorado Sex Offender Registration Law Unconstitutional
 - ✓ Adversarial Allegiance in Static-99R Norm Selection
 - ✓ LSI Inaccuracy as to US Offenders
 - ✓ Doren's Weidschaug - Quotes from *Evaluating Sex Offenders*
 - ✓ Faigman Speaks Out on Sex Offender Commitment Issues
 - ✓ Sex Offender Registration: Useless & Counterproductive
 - ✓ Subsequent Punishment - Clear and Present Danger and Other 1st Amendment Tests
 - ✓ Treatment as not affecting recidivism likelihood later
 - ✓ Prescribing Child Sex Dolls to Prevent Sex with Real Children
 - ✓ MnSOST-3 – Retrospective Review of Predictive Accuracy
- And of course, much, much more!

Pay Da Bill (Cable TV, That Is)!

By Cyrus Gladden

Unless you have Rip Van Winkle Syndrome, no doubt you are aware that, as of July 1st, free cable TV will end in MSOP. This includes both its Moose Lake and St. Peter facilities. You have two options. The first is to do nothing. If more than 15% of all MSOP residents choose this course, on July 1st, we will all wake up to only local TV stations on our TV sets. All other channels, including all 50 current music channels, will be gone.

The other choice is to pony up \$49.08 by June 10th for three months of cable. If 85% of all MSOP residents do this, cable TV will continue during that period. Presumably, continuing cable TV after that will require further payments, probably in that same amount, for each ensuing quarter-year.

Now, I know that in DOC prisons, we were all used to decent cable TV for free. Likewise, everyone who arrived in MSOP since 2012 has also never had to pay a dime for cable TV. In 2010-11, MSOP tried to force its residents to pay for cable TV. At that time, a choice of different channel packages was offered. Ray Semler and others challenged that cable subscription arrangement and won. It is not clear whether an identical challenge would be successful today. Semler vows to raise the same objection. Back then, the outcome was that MSOP was forced to refund all

payments by its residents. That could happen again. Therefore, the best bet for those who value continued cable TV is to pay up, and hope for that kind of eventual refund. If that's successful, it will be like getting cable TV and a handy refund deposit in the old account.

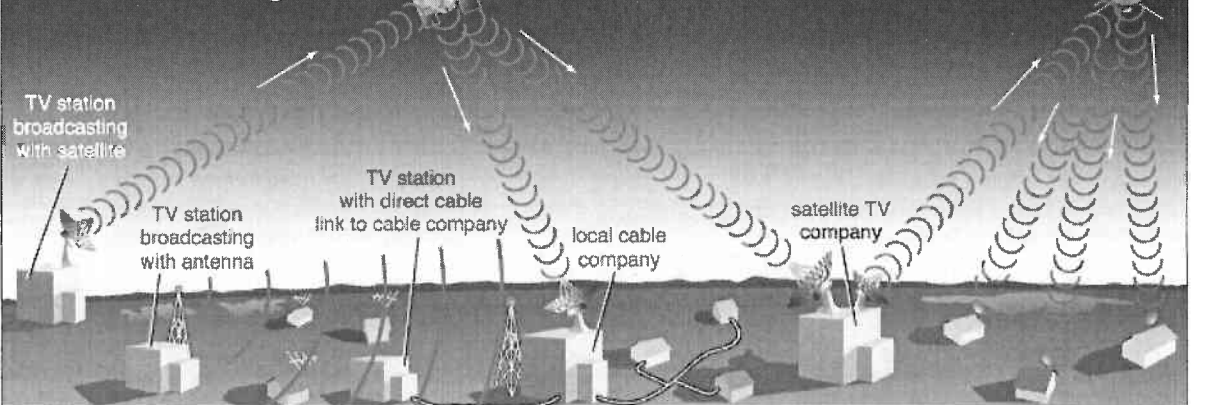
However, there's a bigger reason to 'pay the bill' on cable TV for the time being. It's because what we do now about cable TV will have an impact on two court cases against MSOP. The first is the ongoing 'Wage case,' which seeks to get the unpaid portion of the federal minimum wage for all who have worked, and going forward, for all who will choose to work in MSOP.

The other case is about all of the nearly countless ways that MSOP deprives us of our First Amendment rights. It does this by media censorship, restricting visiting, and mail interference, among many other things. Most crucially, MSOP denies us any access whatsoever to the internet, which now is the universal means of communication, dialog, education, and commerce. We were already being forced to live in a black hole. And now, even our cable TV -- among other things, the last means we still have of getting news beyond this local area, of getting all manner of documentaries and investigative reporting, and of getting meaningful political commentary and debate -- is poised to dematerialize.

Both of these cases will be adversely impacted if we don't at least try to keep our cable TV, even though it means shelling out for it. If we don't, attorneys for MSOP in both cases will tell the court that we chose to forgo cable TV; that we didn't think of it as a modern necessity. Those attorneys will say about the Wage case that this shows that the items they do provide to us are sufficient so that we don't need the minimum wage. (This is their last argument against giving us the minimum wage in that case.) About the First Amendment case, they will say that, since we obviously didn't care enough to try to save our cable TV, we obviously don't need or even just want the internet. I can't say for certain that this will make us lose either case -- or both of them, but at the least, I can say that it will make it harder to win each of them.

Thus, your choice in this moment is far more important than you ever imagined -- even crucial. I am only asking that you act like these things depend on you. If you can, please fill out a Transfer Authorization form for \$49.08, check the "Other" box, and write "Cable TV cost," and drop that form in the Banking box in your unit. And then have some friend pat you on the back for doing the right thing.

Cable and Satellite Television Broadcasting



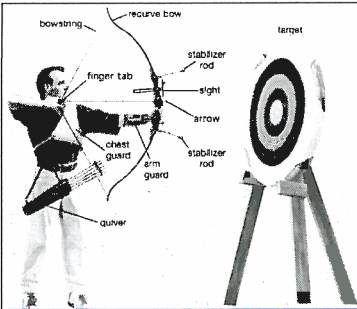
Television signals can be broadcast, or sent, through antennas, underground cables, or satellites.

How Sex Offender Commitment Laws Defy the Facts and Substantive Due Process.

Tamara Rice Love & Justin McCrary, "Do Sexually Violent Predator Laws Violate Double Jeopardy or Substantive Due Process?" 78 Brook. L. Rev. 1391 (Summer 2013)
 p. 1392: "...In this article, we question a core

empirical foundation for the Court's holding in [*Kansas v. Hendricks*]: that SVPs are so dangerous that they will commit repeat acts of sexual violence if they are not confined. Our findings suggest that SVP laws have had no discernible impact on the incidence of sex crimes. These results challenge the only constitutionally permissible justification for SVP legislation...."
 p. 1395: "Many have criticized the Court's holding in *Hendricks*. *Eli Rollman* argues that several factors show that the law should be considered criminal, including 'the fact that implementation of

the Act is delayed until the 'anticipated release' of a prisoner, thereby lessening the effect of any treatment, while simultaneously maximizing punishment."19 Andrew Campbell criticizes the majority for allowing the states to "[m]erely redefine any measure which is claimed to be punishment as 'regulation,' and, magically, the Constitution no longer prohibits its imposition."20 Others have focused their attention on the nebulous quality of 'mental abnormality.'21 The American Psychiatric Association created a task force to evaluate SVP laws and concluded that, 'sexual



All right, Doctor, let's see if you can hit the target from this distance.

(Continued from page 1)

predator commitment laws represent a serious assault on the integrity of psychiatry, particularly with regard to defining mental illness and the clinical conditions for compulsory treatment.²² Still another line of critique focuses on the use of actuarial instruments to prove dangerousness. Bernard Harcourt criticizes the actuarial nature of SVP laws for treating offenders as objects,²³ while Richard Wollert²⁴ and Tamara Lave²⁵ contend that we simply do not have the ability to accurately predict future dangerousness, which means that these states are locking away people who would not reoffend if released."

p. 1396: "In this article, we expand on these criticisms in a new and important way. We question whether SVPs are 'extremely dangerous' and thus highly likely to commit violent sex crimes if released. In our analysis, we use original data gathered directly from SVP states to review commitments across the country. Next, using panel data for the last few decades, we examine the impact of SVP laws on the incidence of sex-related homicide and forcible rape. We also use data collected in the National Child Abuse and Neglect Data System (NCANDS) to examine the impact of SVP legislation on the incidence of non-fatal child sexual abuse.²⁶ Finally, since underreporting poses problems in accurately measuring the incidence of sex crimes, we also examine gonorrhea rates, a common proxy for the prevalence of sexual abuse.

pp. 1396-97: "We found that SVP laws have had no discernible impact on the incidence of sex crimes or gonorrhea - a result that carries enormous constitutional significance.²⁷ If the state cannot justify its law on incapacitation grounds, then it must offer another reason for locking these individuals away indefinitely - under the constraints imposed by the Constitution. The state may not continue to hold persons in custody who have served their maximum prison sentence under a justification that they deserve additional custody to pay for their crimes. Nor may the state lock up persons as SVPs to deter would-be-offenders. Both these rea-

sons are punitive and they violate double jeopardy."

p. 1397: "Furthermore, because SVP laws infringe on a fundamental liberty interest, they are subject to heightened scrutiny under the Fifth and Fourteenth Amendments.²⁸ The Court has consistently held that, to meet the demands of substantive due process, a civil commitment law must only apply to individuals who are mentally ill and dangerous.²⁹ Our findings show that SVP laws are not so narrowly tailored.

"...[T]hese laws are expressly premised on the claim that SVPs currently suffer from mental illness, which causes them to have 'serious difficulty in controlling behavior,' thus making them distinguishable 'from the dangerous but typical recidivist.'³¹ Yet we show that the best available evidence of those in SVP custody suggests that these individuals are not in fact distinguishable from the 'dangerous but typical recidivist,' which is pivotal to the distinction between civil and criminal laws. Finally, there is a robust debate in legal academia regarding the extent to which courts should defer to legislative findings.³² We hope that our article will lend support to the importance of independent fact-finding, especially when fundamental rights of unpopular groups are at stake."

p. 1401: "...Crime and disorder are lower after SVP passage than before, but this holds true for states that have not passed any SVP law."

p. 1402: "...Overall, however, our estimates are consistent with SVP laws having no discernible deterrent or incapacitation effects"

p. 1410:

Treatment State	Year SVP Passed
Washington	1990
Kansas, Minnesota, Wisconsin	1994
Arizona, California	1995
Illinois, North Dakota	1997
Florida (dropped), Iowa, New Jersey, South Carolina	1998
Massachusetts, Missouri, Texas, Virginia	1999
Pennsylvania	2003
Nebraska, New Hampshire	2006
New York	2007

p. 1413: "3. Child Sexual Abuse

We turn now to the same research design for child sexual abuse. These data are available beginning in 1990, but for only a subset of

the states, and the most recent year available is currently 2008, for the states for which data is available.

child molesters also declined with age, the drop was much less dramatic until the offender reached age 49, when recidivism

Class	Mean Rate of Abuse (per 100,000)	Difference After Passage - Before Passage	Number Of States
SVP States (1990)	44.9		17
SVP States (2008)	19.4	-25.5	17
Non-SVP States (1990)	61.2		24
Non-SVP States (2008)	33.2	-28.0	24
Difference-in-Difference Estimate		+2.5 (Higher for SVP States!)	

[Note: the table above shows a greater decrease in recidivism over these years in states without SVP laws!]

p. 1414: "...[T]here is little evidence SVP passage had a discernible effect on sex crimes."

p. 1418: "...Overall, the picture is consistent with no statistically important change."

p. 1419: "...The decline is statistically indistinguishable from zero.... [T]he data indicate that SVP laws have had no discernible deterrent or incapacitation effects on the rate of forcible rape.

"...[T]he data indicate that SVP laws have had no discernible deterrent or incapacitation effect on the rate of child sexual abuse."

p. 1420: "...[W]e additionally examine...the patterns in the prevalence of gonorrhea leading up to and subsequent to SVP law passage. Both figures indicate that SVP laws have had no discernible impact on the prevalence of sexual abuse.

p. 1422: "...Second, we used an event study estimate to see whether there was any impact upon the rate of sex-related homicide, forcible rape, child sexual abuse, or gonorrhea post passage of SVP laws. Neither approach provides discernible evidence of preventive effects. Either there are no preventive benefits associated with these laws, or the benefits are too small to measure with these methods.

"Although our findings may seem surprising, the results are to be expected when the advanced age of SVPs is taken into account. Studies show that, like other types of offenders, as sex offenders age, their recidivism rate drops."

p. 1423: "Interestingly, advancing age seems to affect sex offenders at different rates. Hanson found that the recidivism rate of both incest offenders and rapists declined steadily over time, and neither type of offender released after age 60 recidivated. Although the recidivism rate of extra-familial

dropped dramatically."⁸⁵

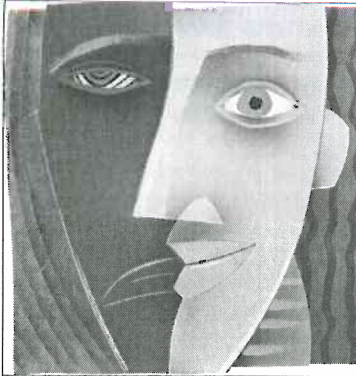
pp. 1427-28: "...When constitutional rights are at stake, however, the Court should maintain a more detached and critical perspective.¹⁰⁹... The Court retains an independent constitutional duty to review factual findings where constitutional rights are at stake."¹¹⁰

p. 1429: "...[T]here is precedent for using empirical studies to challenge the constitutionality of a particular law, even when it requires overturning legislative findings of fact."¹¹⁸

pp. 1433-34: "Although the Court held in *Hendricks* that the SVP law in Kansas did not violate substantive due process, that challenge was based on whether mental abnormality constituted mental illness.¹³⁷ We believe that our findings can serve as the basis for a due process challenge on other grounds, namely that so-called SVPs are not sufficiently dangerous to justify indefinite, involuntary commitment.

"SVP laws clearly infringe upon a fundamental liberty interest. The Court has recognized that indefinite, involuntary civil commitment to a locked mental institution constitutes a 'significant deprivation'¹³⁸ and 'massive curtailment'¹³⁹ of liberty. Indeed, the Court began its analysis in *Hendricks* by recognizing that 'freedom from restraint "has always been at the core of the liberty protected by the Due Process Clause from arbitrary governmental action."¹⁴⁰ The liberty interest at stake in SVP commitment involves both the freedom from bodily restraint¹⁴¹ and the freedom from indefinite, involuntary commitment in a mental institution.¹⁴² The loss of liberty goes beyond a freedom from confinement to include the stigma associated with such confinement, or as the Court put it, 'adverse social consequences ...that ...can have a significant impact on the individual.'¹⁴³

(Continued on page 3)



People with a mental illness may not be able to control their feelings. But we are not mentally ill.

(Continued from page 2)

pp. 1434-35: "Because SVP laws infringe on fundamental rights, they are subject to heightened scrutiny. In *Reno v. Flores*, the Court laid out how heightened scrutiny applies to a substantive due process claim: 'The Fifth and Fourteenth Amendments' guarantee of 'due process of law' ...include [s] a substantive component, which forbids the government to infringe certain 'fundamental' liberty interests at all, no matter what process is provided, unless the infringement is narrowly tailored to serve a compelling state interest.'¹⁴⁴ Another articulation of the strict scrutiny standard requires that 'the law ...advance a compelling state interest by the least restrictive means available.'¹⁴⁵ We recognize that although strict scrutiny is a demanding standard, it by no means implies a death knell for legislation.¹⁴⁶

"Protecting people from dangerous sex offenders clearly constitutes a 'compelling state interest,' but our findings show that locking up adjudicated SVPs is not 'narrowly tailored' to meet this goal. The lack of an incapacitation effect means that we are indefinitely confining many people who are at low risk of committing a violent sexual offense if released. Our findings show that SVP legislation is neither 'carefully limited'¹⁴⁷ regarding the circumstance under which detention is allowed, nor 'sharply focused'¹⁴⁸ on the problem of preventing violent sex crimes. Instead, we show that SVP legislation is just a 'scattershot attempt'¹⁴⁹ at addressing a serious problem that results from the indefinite commitment of many people who would not reoffend."

pp. 1435-36: Furthermore, our findings show that SVP laws do not comport with the level of dangerousness required to justify indefinite civil commitment. The state of Kansas had argued that it should not have to prove that a person had difficulty controlling his dangerous behavior in order to commit him as an SVP, but the Court held otherwise in *Kansas v. Crane*¹⁵⁰:

"We do not agree with the State,

however, insofar as it seeks to claim that the Constitution permits commitment of the type of dangerous sexual offender considered in *Hendricks* without any lack-of-control determination. *Hendricks* underscored the importance of distinguishing a dangerous sexual offender subject to civil commitment 'from other dangerous persons who are perhaps more properly dealt with exclusively through criminal proceedings.' That distinction is necessary lest 'civil commitment' become a 'mechanism for retribution of general deterrence' - functions properly those of criminal law, not civil commitment.¹⁵¹"

"Instead, the Court held that the demands of due process required the state to prove that the person has a 'mental abnormality' or 'personality disorder' that makes it 'difficult, if not impossible, for the [dangerous] person to control his dangerous behavior.'¹⁵² The Court further described that 'the severity of the mental abnormality itself, must be sufficient to distinguish the dangerous sexual offender whose serious mental illness, abnormality, or disorder subjects him to civil commitment from the dangerous but typical recidivist convicted in an ordinary criminal case.'¹⁵³

"Our findings show that this threshold for dangerousness has not been met. If the state was successfully locking up only those who had a difficult if not impossible time refraining from committing violent sex crimes, then there should be an incapacitation effect. The lack of such an effect as demonstrated by our data suggests that the state is locking up people who are equally or even less dangerous than the typical recidivist."

Conclusion

p. 1436: "SVP laws are premised on incapacitating dangerous sex offenders who would be committing sexually violent crimes if they were released into the community after serving their prison terms...."

"In this article, we analyzed that theory from three different perspectives. First, we ran a difference-in-differences regression. We found that there is no statistically significant change in the incidence of sex homicide, forcible rape, or child sexual abuse post passage. We then ran a disparate impact analysis and once again found that SVP laws have had no noticeable effect on the rate of sex killing, forcible rape, or child sexual abuse. Finally, we analyzed whether SVP laws have had an impact on the incidence of gonorrhoea, and we find that they have not."

Notes:

¹⁹ Eli M. Rollman, "Supreme Court Review, 'Mental Illness: A Sexually Violent Predator is Punished Twice for One Crime,'" 88 J. Crim. L. & Criminology 985, 1013 (1998)

²⁰ Andrew D. Campbell, Note, "Kansas v. *Hendricks*: Absent a Clear Meaning of Punishment, States Are Permitted to Violate Double Jeopardy Clause," 30 Loyola U. Chi. L. J. 87, 87 (1998) (quoting Justice Marshall dissenting in *United States v. Salerno*, 481 U.S. 739, 760 (1987)).

²¹ See Stephen J. Morse, "Fear of Danger, Flight from Culpability," 4 Psychol. Pub. Pol'y & L. 250, 261 (1998) (arguing that the term 'mental abnormality' is 'circularly defined ...collapsing all badness into madness'); Bruce J. Winick, *Sex Offender Law in the 1990s: A Therapeutic Jurisprudence Analysis*, 4 Psychol. Pub. Pol'y & L. 505, 525-30 (1998) (arguing that the definition of mental abnormality is so broad that it can apply to any behavior).

²² Am. Psychiatric Ass'n., "Dangerous Sex Offenders: A Task Force Report of the American Psychiatric Association" 173 (1999).

²³ Bernard E. Harcourt, *Against Prediction: Profiling, Policing, and Punishing in an Actuarial Age* (2007) (also contending that the SVP laws are radically inefficient by focusing resources on rare events).

²⁴ Richard Wollert, "Low Base Rates Limit Expert Certainty When Current Actuarials Are Used to Identify Sexually Violent Predators: An Application of Bayes' Theorem," 12 Psychol. Pub. Pol'y & L. 56 (2006)

²⁵ Tamara Rice Lave, "Controlling Sexually Violent Predators: Continued Incarceration at What Cost?," 14 New Crim. L. Rev. 213 (2011)

²⁶ See Nat'l Data Archive on Child Abuse & Neglect, National Child Abuse and Neglect Data System (NCANDS), Detailed Case Data Component (DCDC), NDACAN, http://www.ndacan.cornell.edu/ndacan/Datasets/Abstracts/DatasetAbstract_NCANDS_General.html [hereinafter NCANDS Data].

²⁷ At first glance, it may appear that our methodology is ruled out by *McCleskey v. Kemp*, 481 U.S. 279 (1987), where the Court held that even if a large scientific study showed the death penalty had a racially discriminatory impact, a petitioner must still show that the discrimination was purposeful. Unlike in *McCleskey*, however, we are not using statistics to make an equal protection argument but instead to examine whether SVP law is civil or criminal. If the state cannot justify SVP law on non-punitive grounds, then it must be struck down as a violation of double jeopardy. In *Green v. United States*, 355 U.S. 184 (1957), the Supreme Court reversed *Green's* conviction for first degree murder on the grounds that it constituted double jeopardy. Justice Black explained why the framers considered double jeopardy such a serious infringement of a person's rights:

"The constitutional prohibition against 'double jeopardy' was designed to protect an

individual from being subjected to the hazards of trial and possible conviction more than once for an alleged offense.... The underlying idea, one that is deeply ingrained in at least the Anglo-American system of jurisprudence, is that the State with all its resources and power should not be allowed to make repeated attempts to convict an individual for an alleged offense, thereby subjecting him to embarrassment, expense and ordeal and compelling him to live in a continuing state of anxiety and insecurity, as well as enhancing the possibility that even though innocent he may be found guilty."

355 U.S. 184, 187-88. Therefore, it does not make sense to argue that individual SVPs must make a showing particular to their case, because if the law is not constitutional, then the state is barred from trying to commit anyone under it in the first place.

²⁸ "Freedom from physical restraint being a fundamental right, the State must have a particularly convincing reason, which it has not put forward, for such discrimination against insanity acquitees who are no longer mentally ill." *Foucha v. Louisiana*, 504 U.S. 71, 86 (1992).

²⁹ "A finding of dangerousness, standing alone, is ordinarily not a sufficient ground upon which to justify indefinite involuntary commitment. We have sustained civil commitment statutes when they have coupled proof of dangerousness with the proof of some additional factor, such as a 'mental illness' or 'mental abnormality.'" *Kansas v. Hendricks*, 521 U.S. 346, 358 (1997) (internal citations omitted); see also *Addington v. Texas*, 441 U.S. 341, 433 (holding that to civilly commit someone to a mental institution, the state is required by the Due Process Clause to prove by clear and convincing evidence that the person is mentally ill and requires hospitalization for "his own welfare and protection of others.").

³¹ *Kansas v. Crane*, 534 U.S. 407, 413 (2002)

³² See, e.g., Caitlin E. Borgmann, "Rethinking Judicial Deference to Legislative Fact-Finding," 34 Ind. L.J. 1 (2009) (arguing that legislatures are poorly suited for gathering and evaluating facts impartially, especially when considering legislation restricting controversial or minority rights and thus advocating that courts should independently review the factual foundation of legislation that curtails basic individual rights, regardless of whether those rights are subject to heightened scrutiny); Ruth Colker & James J. Brudney, "Dissing Congress," 100 Mich. L. Rev. 80 (2011) (criticizing the Rehnquist Court for using its authority to diminish the proper role of Congress, including by "transforming what had been considered proper factual questions within Congress's purview into legal questions for the Court's

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exclusive determination" and thus "displacing Congress's proper factfinding role"); John O. McGinnis & Chas. W. Mulaney, "Judging Facts Like Law: The Courts Versus Congress in Social Fact-Finding," 25 Const. Comment. 69 (2008) (advocating for "independent judicial evaluation of facts necessary" for assessing the constitutionality of legislation).

85 See R. Karl Hanson, "Recidivism and Age: Follow-Up Data from 4,673 Sexual Offenders," 17 J. Interpers. Violence 1046, at 1054 (2002)

109 But see Borgmann, *supra* note 32, at 78 (arguing that the Court does not always defer when it is supposed to or remain critical when it is supposed to).

110 *Gonzales v. Carhart*, 550 U.S. 124, 165 (2007)

118 See, e.g., *Brown v. Bd. Of Education of Topeka, Kan.*, 347 U.S. 483 (1954) (where the Court held that segregated public school education violated the Equal Protection Clause). In coming to this conclusion, the Court contradicted specific findings to the contrary by state legislatures and courts. Indeed, in *Plessy v. Ferguson*, 163 U.S. 537 (1896), the Court had held that "separate but equal" did not violate equal protection. Key to the Court's decision in *Brown* were psychological studies that showed the detrimental impact of segregated education on minority children. The Court held that these studies were relevant regardless of whether they had existed at the time *Plessy* was decided. "Whatever may have been the extent of psychological knowledge at the time of *Plessy v. Ferguson*, this finding is amply supported by modern authority. Any language in *Plessy v. Ferguson* contrary to this finding is rejected." *Brown*, 347 U.S. at 494-95.

137 *Hendricks* argued that his Due Process rights were violated because a mental abnormality did not constitute a mental illness. The Court disagreed, stating that "the term 'mental illness' is devoid of any talismanic significance." *Hendricks*, 521 U.S. at 359.

138 *Foucha*, 504 U.S. at 80 (quoting *Jones v. United States*, 463 U.S. 354, 361 (1983)).

139 *Vitek v. Jones*, 445 U.S. 480, 491 (1980) (quoting *Humphrey v. Cady*, 405 U.S. 504, 509 (1972)).

140 *Hendricks*, 521 U.S. at 356 (quoting *Foucha*, 504 U.S. at 80).

141 *Foucha*, 504 U.S. at 80.

142 *Id.* at 82

143 *Vitek*, 445 U.S. at 492.

144 507 U.S. 292, 301-02 (1993).

145 *Bernal v. Fainter*, 467 U.S. 216, 219 (1984).

146 *Adarand Constructors, Inc. v. Peña*, 515 U.S. 200, 237 (1995) ("We wish to dispel the notion that strict scrutiny is 'strict in

theory, but fatal in fact."); see also Adam Winkler, "Fatal in Theory and Strict in Fact: An Empirical Analysis of Strict Scrutiny in the Federal Courts," 59 Vand. L. Rev. 793, 808-09 (2006) (finding that courts do not always strike down statutes under strict scrutiny and sometimes strike down statutes under rational review).

147 507 U.S. 292, 301-02 (1993).

148 *Bernal v. Fainter*, 467 U.S. 216, 219 (1984)

149 *Salerno*, 481 U.S. at 750.

150 *Kansas v. Crane*, 534 U.S. 407, 412 (2002).

151 *Id.* (quoting *Hendricks*, 521 U.S. 346, 360 (1997)).

152 *Id.* at 411 (quoting *Hendricks*, 521 U.S. at 358).

153 *Id.* at 413.

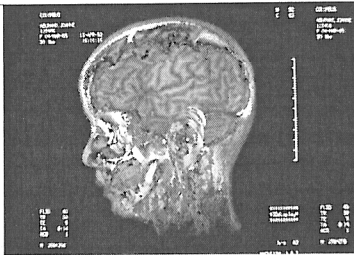
Disgust Sensitivity and Political Leanings: Which Came First?

Kathleen McAuliffe, "The Yuck Factor," *The Atlantic*, March 2019, pp. 66-72

p. 66: "Study after study shows that a high 'disgust sensitivity' tends to go hand in hand with traditionalism, religiosity, support for authority, and distrust of outsiders. Does biology influence ideology? And if so, why?"
p. 68: "...To a surprising degree, a recent strand of experimental psychology suggests, our political beliefs may have something to do with a specific aspect of our biological makeup; our propensity to feel physical disgust.

"In the mid-2000s, a political scientist approached the neuroscientist Read Montague with a radical proposal. He and his colleagues had evidence, he said, that political orientation might be partly inherited, and might be revealed by our physiological reactivity to threats. To test their theory, they wanted Montague, who heads the Human Neuroimaging Laboratory at Virginia Tech, to scan the brains of subjects as they looked at a variety of images - including ones displaying potential contaminants such as mutilated animals, filthy toilets, and faces covered with sores - to see whether neural responses showed any correlation with political ideology. Was he interested?"

"...[T]he team returned with studies to argue their case, and eventually he signed on. When the data began rolling in, any skepticism about the project quickly dissolved. The subjects, 83 in total, were first shown a randomized mixture of neutral and emotionally evocative pictures - this second category contained both positive and negative images - while undergoing brain scans.



Then they filled out a questionnaire seeking their views on hot-button political and social issues, in order to classify their general outlook on a spectrum from extremely liberal to extremely conservative. As Montague mapped the neuroimaging data against ideology, he recalls, 'my jaw dropped.' The brains of liberals and conservatives reacted in wildly different ways to repulsive pictures: Both groups reacted, but different brain networks were stimulated. Just by looking at the subjects' neural responses, in fact, Montague could predict with more than 95 percent accuracy whether they were liberal or conservative.

"The subjects in the trial were also shown violent imagery (men pointing revolvers directly at the camera, battle scenes, car wrecks) and pleasant pictures (smiling babies, beautiful sunsets, cute bunnies). But it was only the reaction to repulsive things that correlated with ideology. 'I was completely flabbergasted by the predictability of the results,' Montague says.

"...Compared with liberals, they'd previously found, conservatives generally pay more attention - and react more strongly - to a broad array of threats. For example, they have a more pronounced startle responses to loud noises, and they gaze longer at photos of people displaying angry expressions. And yet even in this research, Hibbing says, 'we almost always get clearer results with stimuli that are disgusting than with those that suggest a threat from humans, animals, or violent events...'

"...[N]umerous studies have found that high levels of sensitivity to disgust tend to go hand in hand with a 'conservative ethos.' That ethos is defined by characteristics such as traditionalism, religiosity, support for authority and hierarchy, sexual conservatism, and distrust of outsiders...."

p. 71 "More recent investigations by Petersen and Aaroe suggest that those with high disgust sensitivity tend to be leery of any stranger, not just foreigners. They view casual social acquaintances with a certain amount of suspicion - a robust finding replicated across three studies with a total of 4,400 participants. The implication is clear: Disgust and distrust are somehow linked...."

"As the social psychologists Simone Schnall, at the University of Cambridge, and Jonathan Haidt, at NYU, have shown, disgust sensitivity may also help shape beliefs about

right and wrong, good and evil. [Article cites testing involving a dirty desk and involving putrid odors while subjects answered questions on various moral issues. These issues included gay rights and premarital sex.] ...Variations on these studies ...reveal a consistent pattern: When we experience disgust, we tend to make harsher moral judgments."

Taking Pedophilia Seriously

Quotes & Notes from: *Margo Kaplan*, "Taking Pedophilia Seriously," 72 *Wash. & Lee L. Rev.* 75 (Winter 2015):

p. 75: "...[S]exually violent predator statutes expand state power to civilly commit individuals by distorting the concept of pedophilia as a mental disorder. At the same time, anti-discrimination law is dismissive of pedophilia as a mental disorder, excluding it from civil rights protections ordinarily associated with mental illness."

p. 82: "...Researchers estimate that approximately one percent of the male population - and an unknown but presumably smaller percentage of the female population - lives with pedophilia...."

p. 83: "Interestingly, some attraction to prepubescents seems even more common. Studies of sexual arousal indicate that a surprising proportion of the population, particularly among men, has fantasized about prepubescent children during intercourse or masturbation or may become aroused upon viewing images of prepubescents." [citing: *Lea H. Studer & A. Scott Aylwin*, "Pedophilia: The Problem with Diagnosis and Limitation of CBT in Treatment," 67 *Med. Hypotheses* 774, at 775 (2006) (examining the prevalence of pedophilia in men); *Michael C. Sato*, *Pedophilia and Sexual Offending Against Children* (2008), at 7 (citing several studies). At Note 46, adding: "One study found 62% of men had fantasized about young girls and 3% about young boys, while another found that 9% had fantasized about sex with young children, with 7% indicating some likelihood that they would have sex with a child if they were guaranteed that they would not be identified or punished. *Sato, supra*, at 7."

pp. 84-85: "Sexologists, psychiatrists, and legal scholars usually associate pedophilia with one of two categories: (1) a mental disorder or (2) a form of sexual orientation called 'erotic age orientation.'"

pp. 86-87: "Pedophilia need not entail any behavior; one may be a celibate pedophile, similar to how one may have sexual desires for adults while remaining celibate."

p. 91: "...[I]ndividuals with pedophilia rarely

(Continued on page 5)

spontaneously molest children, and the vast majority of sexual abuse of children is premeditated. [citing *Hall & Hall, supra*, at 462 (arguing that, because 70% to 80% of sex offenses against children are premeditated, the notion that people with pedophilia lack self-control is untenable)] A recent study found no connection between pedophilia and impulse-aggressive traits and in fact found more evidence of inhibition, passive-aggression, and harm avoidance. [citing: *Lisa J. Cohen et al.*, "Impulsive Personality Traits in Male Pedophiles Versus Healthy Controls: Is Pedophilia an Impulsive-Aggressive Disorder?," 43 *Comprehensive Psychiatry* 127, 132-33 (2002). ...Similarly, MRI studies have found no evidence to suggest any differences in the parts of the brain that relate to self-control or impulsivity." [citing: *James M. Cantor*, "Understanding MRI Research on Pedophilia," http://individual.utoronto.ca/james_cantor/blog2.html]. [So: volitional impairment can be ascertained; if brain parts are intact, no impulsivity or volitional control problem.]

p. 92: "Treatment cannot convert sexual interests; therapy to redirect sexual attraction away from children toward adults has fared no better with pedophilia than it has with same-sex attraction." [citing *M. Seto, Pedophilia and Sexual Offending Against Children* (2008), at 175-76 (discussing the efficacy of therapy aimed at changing a pedophile's interest in children and noting that it is unclear whether the therapy results in actual changes in interest or greater control over pedophilic sexual arousal); *Alice Dreger*, "What Can Be Done about Pedophilia?," *The Atlantic* (Aug 26, 2013, 9:42 AM), <http://www.theatlantic.com/health/archive/2013/08/what-can-be-done-about-pedophilia/279024/> ("We have not yet found a way to convert pedophiles into non-pedophiles that is any more effective than the many failed attempts to convert gay men and lesbians into heterosexuals.")

p. 104: "Changing social mores, including prejudices, often inform judgments of what desires are pathological. [stating, at note 122: "For example, same-sex attraction was once considered pathological. *Andreas De Block & Pieter R. Adriaens*, "Pathologizing Sexual Deviance: A History," 50 *J. Sex. Res.* 276, 287-89 (2013); *Charles Maser*, "Paraphilia: A Critique of a Confused Concept," in *New Directions in Sex Therapy: Innovations and Alternatives* 91 (Peggy J. Kleinplatz, ed. 2001), at 96. Psychiatrists also diagnosed slaves that attempted to escape with a psychological disorder called drapetomania. *Patrick Singy*, Letter to the Editor, "What's Wrong with Sex?," 39 *Archives of Sexual Behav.* 1231 (2010)."] The

“We have not yet found a way to convert pedophiles into non-pedophiles that is any more effective than the many failed attempts to convert gay men and lesbians into heterosexuals.” *Alice Dreger*, "What Can Be Done about Pedophilia?," *The Atlantic* (August 2013).

DSM's current definition of a paraphilia is oddly broad and archaic, entailing 'any intense and persistent sexual interest other than sexual interest in genital stimulation or preparatory fondling with phenotypically normal, physically mature, consenting human partners.'" [citing: DSM-V at 685]

p. 105: "Distress and interpersonal difficulty are also questionable criteria because they may be caused by the individual's shame and fear of societal response rather than the sexual desire itself. [citing: *Agustin Maldin*, "Pedophilia: A Diagnosis in Search of a Disorder," 41 *Arch. Sexual Behav.* 1083 (2012) at 1084 (discussing the criteria of distress in a pedophilic disorder diagnosis); *Alan W. Shindler & Charles A. Maser*, "Why Are the Paraphilias Mental Disorders?," 8 *J. Sexual Med.* 927, 928 (2010) (explaining that an individual with a paraphilia may experience distress because of societal discrimination). The DSM attempts to avoid this problem by requiring that the distress and impairment be caused by the paraphilia as opposed to societal response. But it is impossible to tease out causation in this way. All distress likely has some internal and external cause. An individual may be repulsed by his sexual interest for children in part because he finds it morally repugnant and in part because he knows society condemns it as morally repugnant."]

...As one critic notes, "[i]t does not seem possible for a person sexually interested in children not to be socially impaired in some way because societal norms dictate that it is abnormal for a person to be sexually interested in children." [citing: *Wm. T. O'Donohue et al.*, "Problems with the DSM IV Diagnosis of Pedophilia," 12 *Sexual Abuse: J. Res. & Treatment* 95, 102 (2000).]

p. 107: 2. Erotic Age Orientation: Pedophilia as a Sexual Orientation

"The fifth edition of the DSM, as originally published in October 2013, referred to pedophilia as a sexual orientation. [DSM-V, at 698] It specifically stated that an intense and persistent sexual interest in prepubescent children that is not acted on or accompanied by distress or impairment is better characterized as a sexual orientation than a mental disorder." [*ibid.*, stating that if individuals "have never acted on their impulses, then these individuals have a pedophilic sexual orientation but not a sexual disorder."]

pp. 108-09: "While sexual orientation is commonly used to describe the gender to

which one is attracted, several scholars and advocates argue for a more expansive definition. [citing: *Elizabeth M. Glazer*, "Sexual Reorientation," 100 *Geo. L.J.* 997, 1057-58 (2012) (arguing for a broader definition of sexual orientation); *Ann E. Tweedy*, "Polyamory as a Sexual Orientation," 79 *U. Cin. L. Rev.* 1461, at 1479-1509 (2011) (discussing expanding sexual orientation to include the preference of polyamorous relationships); *Michael D. Storms*, "Theories of Sexual Orientation," 38 *J. Personality & Soc. Psychology* 783, 783-91 (1980) (discussing the limits of common theories regarding the nature of sexual orientation); see also: *Elizabeth F. Emens*, "Compulsory Sexuality," 66 *Stan. L. Rev.* 303, 338-344 (2014) (proposing additional axes by which to measure asexuality).] Some have proposed, for example, that sexual orientation should include an axis of sexuality versus asexuality - the extent to which one experiences sexual urges or interest at all. [citing: *Emens, supra*, at 338-340 (discussing asexuality using existing models of sexual orientation); Storms, *supra*, at 783-91 (positing asexuality as a distinct sexual orientation).] Sexual orientation might also consider the extent to which one focuses sexual interest on others as opposed to autoeroticism. [See *Emens, supra*, at 341-42 (discussing asexuality along an autoerotic axis); *Glazer, supra*, at 1054-55 (arguing for separation of sexual orientation into general orientation and specific orientation).] Other scholars have proposed expanding it to include the extent to which individuals are polyamorous as opposed to monogamous. [See *Tweedy, supra*, at 1482-1509 (discussing polyamory as a sexual orientation).] More controversial definitions of the term might also include whether one is attracted to humans, non-human animals, or inanimate objects. [See *Jesse Bering, Perv: The Sexual Deviant in All of Us* (2013) at 117-18 (discussing sexual attraction to non-human animals and inanimate objects).]

"Those who argue that pedophilia is a type of sexual orientation distinguish between different types of sexual orientations: sexual gender orientation, the focus of most research on sexual orientation, is but one. [See *M. Seto*, at 231 (defining sexual gender orientation).] This view places pedophilia on a larger spectrum of erotic age orientation, which describes how individuals experience sexual attraction to age groups ranging from infants to the elderly. [See *Seto*, at 3-4 & n. 1, 231 (explaining age orientation); *Bering, supra*, at 169 (discussing erotic age orientation); *Hall & Hall, supra*, at 458 (same).] Erotic age orientation contains at least five categories of sexual interest: (1) pedophilia (attraction to prepubescents); (2) hebephilia (attraction to minors in early puberty); (3) ephebophilia (attraction to older adolescents); (4) teliphilia (attraction to sexually mature persons); and gerontophilia (attraction to the elderly).

[*Bering, supra*, at 169 (noting the different categories of sexual interest); *Seto, supra*, at 3-4 & n. 1 (defining the types of sexual interest); *Hall & Hall, supra*, at 458 (discussing categories of sexual interest within erotic age orientation).] Some also categorize nepiophilia (attraction to infants) as a separate type of erotic age orientation rather than as a subset of pedophilia. [*Seto, supra*, at 4 ("It is not clear if sexual preference for infants ...represents variants of pedophilia or instead represent different paraphilias.")]

pp. 109-10: "One difficulty in determining whether pedophilia should be considered a type of sexual orientation is that, despite over a century of social science research and legal analysis, there is no one accepted definition of sexual orientation. [See *Emens, supra*, at 339-44 (discussing various models of sexual orientation); *Jessica A. Clarke*, "Inferring Desire," 63 *Duke L.J.* 525, 541 (2013) (noting that "there is no unitary definition"); *Randall L. Sell*, "Defining and Measuring Sexual Orientation: A Review," 26 *Archives Sexual Behav.* 643, 644-49 (1997) (describing confusion surrounding the conceptual definition of sexual orientation).] Several means of organizing individuals into categories of sexual orientation based on sexual interests or behaviors have been proposed, accepted, and subsequently rejected and replaced throughout history. [See *Clarke, supra*, at 541-42 (noting that the understanding of sexual orientation has fluctuated over time).] The concept of homosexuality has transformed over the past century from a tendency to engage in same-sex sexual behavior, to a type of gender deviance, to an abnormal personality and mental disorder, and finally to an affirmative social identity. Still, terms such as 'homosexual' and 'bisexual' do not have universally accepted characteristics. Nor are these terms even widely accepted by the very communities they identify; those who prefer to identify as gay, lesbian, or queer, for example, reject the word 'homosexual.'" pp. 110-11: "Modern conceptions of sexual orientation generally share certain characteristics. Perhaps most prominently, sexual orientation generally involves a type of sexual interest. [Some researchers also distinguish different types of psychological components, such as sexual interest versus affection and love. See *Sell, supra*, at 648-49 (discussing various psychological components).] It also requires sexual interests have a certain breadth and depth. [*Tweedy, supra*, at 1466-68 (discussing the concept of sexual orientation as an identity), and at 1482-83 (discussing importance of "embedded-ness").] It implies something stronger than, say, an individual's interest for individuals with green eyes or dimples.

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Comparing a sexual orientation to this type of preference trivializes sexual orientation's depth and its role in the individual's psyche. Erotic age orientation is similarly defined by sexual interest. Such sexual interests must be intense and persistent in order to fall into a category; a fleeting attraction to a child is insufficient to qualify as pedophilia."

"Sexual orientation is also widely accepted as immutable, unchosen.... [See *John Money, Gay, Straight and In-Between* 11 (1988) (stating sexual orientation is not a choice or preference)]. Sexual gender orientation is something that one discovers rather than acquires and which cannot be reoriented...." [See *Seto*, at 231 noting that "reorientation therapies have not worked for homosexual men." Indeed, reorientation therapy has been so discredited and its attendant risks so high that some states have banned such therapy for minors.]

p. 112: "There is also evidence that erotic age orientation is ...immutable...." [*Studer & Aylwin, supra*, at 776 (describing arguments that "pedophilia," like heterosexuality or homosexuality, represents sexual arousal to a particular identifiable group, and is not voluntarily decided); *Dreger, ibid.*].

IV. Rethinking the Law's Approach to

Pedophilic Disorder

A. Civil Commitment Law

1. Civil Commitment: Justifications and Limitations

pp. 139-40: "...The Supreme Court has held that civil commitment is unconstitutional unless the individual has a valid mental disorder; otherwise, it might be construed as punishment for future crimes. [*Foucha*, see *David J. Gottlieb*, "Preventive Detention of Sex Offenders," 50 *U. Kan. L. Rev.* 1031 (2002), at 1037-38 (describing *Foucha* and the invalidity of preventive detention)]. The American Psychiatric Association supports this limitation and recommends that civil commitment be limited to persons who have a 'severe mental disorder' and 'lack of capacity to make a reasoned treatment decision.' Many state civil commitment statutes imply that psychosis, which entails some sort of loss of contact with reality, is required for such commitment. Prior to the 1990s, civil commitment proceedings were almost exclusive to persons with psychosis." pp. 141-42: "Most criminal law scholarship distinguishes and justifies civil commitment on the grounds that it is non-punitive. Civil commitment is limited to those who are unable to exercise their autonomy. Retributivism therefore, generally requires that the state limit civil commitment to those who have mental illnesses that significantly compromise their ability to choose to act in accordance with the law. [(Discussing the

'quarantine' model of commitment): "As both *Schulhofer* and *Gottlieb* have noted, we ought not to civilly commit an infectious individual who is able to control disease transmission purely on the grounds that we fear he will not act responsibly. See *Stephen J. Schulhofer*, "Two Systems of Social Protection: Comments on the Civil-Criminal Distinction, with Particular Reference to Sexually Violent Predator Laws," 7 *J. Contemp. Legal Issues* 69 (1996), at 91 (arguing that quarantining an infectious individual who can control transmission of the disease would violate her autonomy as a responsible person);.... Such quarantine would amount to preventive detention based on our fear about their future choices and would not adequately respect their autonomy. See *Schulhofer* at 91 (If we simply fear that she may choose to ignore the sanctions deployed to prevent such misconduct, then a decision to quarantine her in advance is a decision to ...violate her autonomy....").] Failure to make this distinction could result in the detention of individuals out of fear of the choices they will make. As preventive detention, this would fail to respect the individual's autonomy to decide whether to commit an offense; as punishment, it would improperly punish an individual who has not yet committed a culpable act." [See *Schulhofer, supra*, at 92-93 ("[A] free society should never resort to regulatory confinement measures that bypass the individual's capacity for autonomous choice."); *Kimberly Kessler Ferzan*, "Beyond Crime and Commitment: Justifying Liberty Deprivations of the Dangerous and Responsible," 96 *Minn. L. Rev.* 141 (2011), at 177-78 ("Pure prevention ...fails to take people's autonomy seriously, to announce rules, to give individuals opportunities to comply, and to treat individuals as responsible agents when we punish them.");]

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

p. 151: "At present, the concept of volitional impairment is highly questionable in both law and psychiatry. [See *Robert A. Prentky et al.*, "Sexually Violent Predators in the Courtroom," 12 *Psychol. Pub. Pol'y & L.* 357 (2006), at 363 ("[I]t is problematic, and perhaps impossible, to distinguish between impulses that are irresistible and impulses that simply are not resisted."); *Thomas K. Zander*, "Civil Commitment Without Psychosis: The Law's Reliance on the Weakest Link in Psychodiagnosis," 1 *J. Sexual Offender Civ. Commitment: Sci. & L.* 17 (2005), at 65-66 (examining the issues in determining volitional impairment

in paraphilia cases).] Psychiatric literature is rife with ambiguity and uncertainty about the concept of volitional impairment and self-control in general, and with concerns about its use in SVP proceedings. [See *Zander, supra*, at 65-66 ("[N]one of the paraphilias require any type of volitional impairment or inability to control impulses to make a diagnosis."); *Prentky, et al., supra*, at 363-64 ("The volitional dysfunction standard as applied in insanity defenses is rarely appropriate in the SVP context.");]

"For these reasons, the APA cautioned against assuming impaired impulse control from a psychiatric diagnosis for the sake of legal proceedings." [See *DSM-V, supra*, at 25 (cautioning the use of DSM-V diagnostic criteria when making legal decisions); *Stephen J. Morse*, "Preventive Confinement of Dangerous Offenders," 32 *J. L. Med. & Ethics* 56 (2004), at 640-65 (discussing the problems inherent in measuring lack of control); *Allen Frances et al.*, "Defining Mental Disorder When it Really Counts: DSM-IV-TR and SVP/SDP Statutes," 36 *J. Am. Acad. Psychiatry & L.* 375, 378 (2008), at 379 (discussing use of the DSM in forensic settings).]

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

"...Most states allow courts to assume the actor has difficulty controlling his actions from the defendant's mental disorder and his past acts. [See *Kenneth W. Gaines*, "Instruct the Jury: Crane's 'Serious Difficulty' Requirement and Due Process," 56 *S.C. L. Rev.* 291, 300-01 (2004) (arguing that Arizona, California, Illinois, Massachusetts, Minnesota, South Carolina, Texas, Washington, and Wisconsin fail to require a separate finding of lack of control); *Janine Pierson*, Comment, "Construing Crane: Examining How State Courts Have Applied Its Lack-of-Control Standard," 160 *U. Pa. L. Rev.* 1527, 1537-46 (2012) (arguing that ten states do not require a separate showing of lack of control, and either ignore the requirement or inappropriately conflate it with the mental abnormality requirement).] This practice essentially allows courts to conflate pedophilic disorder and other paraphilic disorders with volitional control, a presumption that is not supported by scientific evidence." [See *Michael B. First & Robert L. Halon*, "Use of DSM Paraphilia Diagnoses in Sexually Violent Predator Commitment Cases," 36 *J. Am. Acad. Psychiatry &*

"A free society should never resort to regulatory confinement measures that bypass the individual's capacity for autonomous choice."

Stephen J. Schulhofer, "Two Systems of Social Protection: Comments on the Civil-Criminal Distinction, with Particular Reference to Sexually Violent Predator Laws," 7 *J. Contemp. Legal Issues* 69, at 92-3 (1996).

L. 443, 450 (2008) (describing the distinction between diagnosis of paraphilia and volitional impairment). Courts' willingness to assume volitional impairment, despite lack of evidence, may in fact be tied to the disgust pedophilic disorder instills. Historically, the determination that a sexual urge creates an impulse control problem has been linked to whether the underlying interest is considered acceptable. It was at one time commonly accepted that individuals could suffer from 'compulsive homosexuality' and 'compulsive masturbation' because same-sex attraction and masturbation were in themselves viewed as problematic. See *Moser, supra*, at 323 ("[C]ompulsive masturbators and compulsive homosexuals began to disappear once those behaviors were no longer seen as signs or symptoms of psychopathology."); *Moser, supra*, at 92 (detailing the history of and problems with paraphilia as a concept). Similarly, courts may be presuming that individuals with sexual interest in children must lack control over their actions.]

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

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

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Epidemics require an emergency response, including quarantine. But neither sex crimes nor paraphilias are epidemics or even merely transmissible. Extremely low sex-crime recidivism rates that shrink even further with each year post-prison release and with each year of increasing age post-last crime expose the hysteria about sex offenders as being just that. (See next article.)

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physical compulsion, as there is in cases of reflex, spasm and the like.”.)

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

Final Thoughts

p. 169: “...At present, our laws and policies often isolate individuals with pedophilia from resources that prevent abuse, exacerbating public health and criminal law problems. The rights of individuals with pedophilia, however, are in themselves an appropriate concern for the law. We should not ignore inconsistent or unjust laws simply because they only affect those who provoke revulsion.”

Other significant notes:

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

115 “As a result, the psychiatric community and its critics have spent the last century debating what constitutes a mental illness. See *Michael S. Moore*, *Law and Psychiatry*, at 155-216 (providing an extensive discussion about the definition of mental illness); *Zander*, *supra*, at 28 (“Debates about the validity of the construct ‘mental illness’ and ‘mental disorder’ have raged for the past half-century.”); *Massimiliano Aragona*, “The Concept of Mental Disorder and the DSM-V,” 2 *Dialogues Phil. Mental Neuro. Sci.* 1 (2009), at 1-13 (providing an example of scholarship that rejects a definition of mental disorder and argues mental disorder is best understood as a construct, which cannot provide a clear-cut demarcation between what is and is not a disorder). Some theorists argue that mental illness rarely reflects illness at all. But instead reflects subjective lay concepts and value judgments, and that the process of being labeled abnormal and ill causes psychological and social harms rather than identifying them. Such skeptics warn that psychiatry justifies coercive interventions to impose social norms rather than treat legitimate illness. See *Moore*, *supra*, at 155-81 (challenging these views); *Zander*, *supra*, at 28-29 (describing the debate about the validity of the construct of mental disorder); *Thomas Szasz*, *The Myth of Mental Illness: Foundations of a Theory of Personal Conduct* (1961) (arguing against classifying psychological problems as diseases or illnesses); *Eric J. Dammann*, “The Myth of

Mental Illness: Continuing Controversies and Their Implications for Mental Health Professionals,” 17 *Clinical Psychol. Rev.* 733 (1997) (summarizing *Szasz*’s views and the views of *Szasz*’s critics).”

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

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

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

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

295 “See *Schulhofer*, *supra*, at 92-93 (“[A] free society should never resort to regula-

tory confinement measures that bypass the individual’s capacity for autonomous choice.”); *Ferzan*, *supra*, at 177-78 (“[P]revention fails to take people’s autonomy seriously, to announce rules, to give individuals opportunities to comply, and to treat individuals as responsible agents when we punish them.”).

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

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

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

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

361 “See *Schulhofer*, *supra*, at 94-96 (“Preventive incapacitation of [individuals who are capable of choosing to act and responding to sanctions], as a substitute for reliance on the criminal process, is inconsistent with the core commitments of a free society....”).”

390 “See *Beech & Harkins*, *supra*, at 529 (citing studies concluding that a pedophilic diagnosis is unrelated to long-term recidivism); *Robin J. Wilson et al.*, ‘Pedophilia: An Evaluation Of Diagnostic and Risk Prediction Methods,’ 23 *Sexual Abuse* 260, 268-70 (2011) (“However, individuals who met DSM-IV-TR-based diagnoses of pedophilia were no more likely to be convicted of a new sexual offense than those who failed to meet the DSM-IV-TR diagnostic criteria for pedophilia....”); *Heather M. Moulden et al.*, ‘Recidivism in Pedophiles: An Investigation Using Different Diagnostic Methods,’ 20 *J. Forensic Psychiatry & Psychology* 680, 693

(2009) ("The results suggest that those individuals diagnosed as pedophiles do not recidivate more often or more quickly than non-pedophiles."); see also *Hamilton, supra*, at 579-80 ("Nor is a DSM diagnosis of pedophilia correlated with sexual recidivism. Actually, a study using a regression analysis method indicates that a DSM diagnosis of pedophilia is not even a significant predictor for sexual recidivism.")"

A Trio of Excerpts Summarize The Impact of Age on Sex Offender Recidivism

Low Sex Crime Recidivism Rates Bust the Myth of Scary Monsters

Grant Duwe, "Better Practices in the Development and Validation of Recidivism Risk Assessments: The Minnesota Sex Offender Screening Tool-4," (July 13, 2017) *Criminal Justice Policy Review* (2017)

Abstract excerpt:

"...Using sex offense conviction rates within 4 years of release from prison as the failure criterion, the data showed that 130 (2.3%) offenders in the overall sample were recidivists...."

Early-Adult Offending Loses Predictive Value over Time

Excerpts from: *Joanna Amirault & Patrick Lussier*, "Population Heterogeneity, State Dependence and Sexual Offender Recidivism: The Aging Process and the Last Predictive Impact of Prior Criminal Charges Over Time," 39(4) *Jour. Of Criminal Justice* 344-354 (July-Aug, 2011).

[Elsevier Highlights:]

"Prior offending in early adulthood loses its predictive value with the passage of time. ... Offender age at release and educational achievement were associated with recidivism. Risk assessment should consider both the age and the passage of time to assess risk of reoffending"

Abstract excerpt:

"...The findings indicate that for older sex offenders, prior criminal charges occurring in early adulthood (ages 18 to 23) are no longer predictive of future offending as the offenders age...."

Aging Rules! The Most Powerful Recidivism Factor Busts 'Need' for Commitment

Howard E. Barbaree et al., "Aging Versus Stable Enduring Traits as Explanatory Constructs in Sex Offender Recidivism: Partitioning Actuarial Prediction into Conceptually Meaningful Components," 36(5) *Criminal Justice and Behavior* 443-465 (2009)

Abstract Excerpt: "This study investigates whether sex offenders' age at release from custody affects their likelihood of reoffending. The participants were 468 men with a mean follow-up (time at risk) of just more than 5 years after release. Items from the Violence Risk Appraisal Guide (VRAG), the Sex Offender Risk Appraisal Guide (SORAG), the Rapid Risk Assessment of Sexual Offense Recidivism (RRASOR), the Static-99, and the Minnesota Sex Offenders Screening Test-Revised (MnSOST-R) were coded. The results provide a strong counterargument to previous research claiming that aging has no important effect on recidivism risk in sex offenders. A large body of evidence has recently accumulated indicating that recidivism in sex offenders decreases with the age of the offender at the time of his release from custody. Despite the weight of this evidence, aging has not been incorporated as a risk factor into general practice in forensic assessment, either of the sexual or the nonsexual violent offender. This study continued the exploration of the relationship between aging and actuarial risk in the prediction of recidivism in sex offenders.

Three predictor scales (antisocial behavior, sexual deviance, and age at release) were constructed, and each were independent of the others. Results show that the predictive ability of items tapping antisocial behavior is inflated by their association with age at release, whereas the predictive ability of items tapping sexual deviance is diminished by that association. An assessment instrument comprising an age-corrected antisocial behavior scale, an age-corrected sexual deviance scale, and an age at release scale predicted recidivism as well as the best existing actuarial instruments. Cox regression analysis shows that age at release provided unique and significant predictive ability over and above age-corrected antisocial behavior and age-corrected sexual deviance combined."

Editors End-Note: In short, Aging Rules! The older you get, the less the chance that you'll recidivate – Ever!



Opressors Everywhere! You ARE Being Watched!

Gladden Excerpt Motivational Analysis Shows Sex Offender Commitment Is a Bill of Attainder. (Last Installment)

"3. The Judicially Approved, Nearly Universal Prosecutorial Practice of Delaying Petitioning for Commitment Under the Act until the End of a Prison Sentence Shows the Punitive Aim of That Act.

Under said Act, if psychological/psychiatric treatment of sex offenders were part of the prosecution's aim in seeking such commitment, Defendant prosecutors would bring the SPP/SDP petition as soon as possible after the offender's conviction and commencement of his imprisonment, with an eye toward commencing said treatment as soon as possible. Under said Act, the state has every right at that point to invoke that SPP/SDP Act. However, in all the years since that Act, Defendant prosecutors, to the contrary, have deliberately chosen not to invoke that Act at the outset of a sex offender's time in prison. Instead, prosecutors intentionally wait until a given targeted sex offender is close to release from prison, only then invoking that legislation, so that such commitment will have the effect of maximizing continued confinement after prison release.

Moreover, as alleged *supra*, commitment petitions are typically not filed under said Act against imprisoned sex offenders until their prison release dates are imminent, even though the claimed facial basis for such commitment has been known by prosecutors filing such commitment petitions since the time of the current convictions of the respective sex offenders named in such petitions, typically at least several years earlier. The allegations of this paragraph also confirm that the true function of such sex offender commitment is

preventive detention, rather than timely, effective treatment.

To cover the rare occasion when a sex offender with time remaining prior to his prison release is committed under said Act, a Minnesota statute requires committed sex offenders to first complete that prison sentence before transfer to the MSOP commitment facility. This is contrary to civil commitments for mental illness of Minnesota prisoners with prison time remaining. Commitments of the latter type result in transfer to the mental illness treatment facility at St. Peter, MN immediately, regardless of the extent of prison time remaining in the prisoner's current sentence.

Further, while on intensive supervised release, any given sex offender, including one described by the SPP and/or SDP categories, would certainly have the opportunity to demonstrate both the ability and willingness to refrain from attempts at sex-crime recidivism. Yet, in view of the nearly universal timing of a petition to commit a sex offender at a time to thwart a sex offender's release from prison, such preventive detention under said Act serves to deliberately prevent that person from having any opportunity to prove himself in the community as a non-recidivist under extremely tight controls and monitoring.

4. The Punitive Intent and "Disproportionate Severity" of That Act Are Confirmed by Commitment of Those Who Recently Successfully Completed Treatment.

Even sex offenders who have just successfully completed prison-based treatment of sex offenders can be, and often are, committed under said Act. This supports the conclusion that the real function of such commitment is preventive detention, rather than treatment.

5. The Still-Extant Governorial Order Barring Releases Under the Act Also Reflects the Punitive Intent of That Act, as

(Continued on page 9)

Implemented with Judicial Approval.

An executive order by former Minnesota Governor Tim Pawlenty prevents any provisional releases from MSOP's sex-offender commitment facilities, except if ordered by a court or "required by law." This executive order has never been rescinded to date, and it currently remains in effect. Until very recently, this executive order was taken by all successive MSOP facility administrators as imposing an absolute ban on provisional discharges.

That still-extant executive order confirms that the true function of such sex offender commitment under said Act is to keep committed sex offenders, regardless of completion of treatment, confined as preventive detention.

Most currently, a new executive order by Gov. Mark Dayton directs MSOP officials not to accept any petitions from MSOP detainees for release. Together, these extant executive orders confirm that the true function of such sex offender commitment under said Act is to keep committed sex offenders confined regardless of completion of treatment - pure preventive detention."

Proposals for Legislative Reform of Sex Offender Commitment Procedures

Anne R. Izzi, "Constitutional Law - The Cage a Fetish Can Build: Proposed Legislative Reform for Civil Commitment Procedures in Sexually Violent Predator Laws," 39 *Western New England Law Rev.* 141 (2017)

pp. 145-6: "...[T]he facilities that do offer treatment are not beneficial because, as of yet, researchers in the field have not found any successful treatment options.³⁰ ...

"...[T]he issue is not treatment standards, but rather the current lack of any viable treatment methods in the field of sex offender management.

"Mere public intolerance or animosity cannot constitutionally justify the deprivation of a person's physical liberty."³¹

p. 147: "Sex offenders are victims of a moral panic.³² A moral panic is a 'mass movement that emerges in response to a false, exaggerated, or ill-defined moral threat to society and proposes to address this threat through punitive measures.'³³ Moral panics prey on the imagination because they are 'part real, part imagined,' conferring exaggerated characteristics onto a real scapegoat.³⁴

Periods of rapid social change provide a ripe environment to twist a disturbing event into

an extraordinary fear.

"The media is to blame for fueling these intense fears because it calls attention to the most extreme and rare cases, even more so with the rise of the internet.³⁵ Further, state legislatures are to blame for codifying the unrealistic fear there are sexual predators around every corner into law as 'panic [became] the prod and rationale for lawmaking.'³⁶

"Facilities that do offer treatment are not beneficial because, as of yet, researchers in the field have not found any successful treatment options." Anne R. Izzi, *id.*, at 145 (2017).

p. 154: "[A] study by Human Rights Watch found that only a very small percentage of registered sex offenders ever committed a second offense.⁸⁴ ...[T]here are no reliable tests for determining the likelihood of recidivism."⁸⁵

Notes:

22 "See ...*Brown v. Watters*, 599 F.3d 602, 606 (7th Cir. 2010). The doctor who evaluated Mr. Brown and determined he had a mental abnormality later 'admitted that the indicators used to reach a diagnosis of paraphilia NOS non-consent were not identified in the DSM; instead, they were indicators Dr. Doren himself had identified to bridge the gap or deficiency [that] ... exist[s] in the DSM[.]' *Id.* In spite of the doctor's confession on a cross-examination, the court held Mr. Brown met the requirements under Wisconsin's SVPA. *Id.* at 617."

30 *David Nordsieck*, "How the Professional Judgment Standard Could Undermine the Validity of Sexually Violent Predator Laws," 88 *Wash. U. L. Rev.* 1281 (2011)

31 *O'Connor v. Donaldson*, 422 U.S. 563, 575 (1975)

32 *Roger M. Lancaster*, *Sex Panic and the Punitive State*, (2011), at 23.

33 *Id.* Some examples of moral panics include witch hunts, McCarthyism, and Nazism. *Id.* at 23-4. Two key ingredients in each of these examples, and in the moral panic around sex offenses, are an imaginary threat and a real group that is portrayed unrealistically. *Id.* at 24.

34 *Id.* at 25.

35 *Id.* at 26.

36 *Id.* at 78; see also *Richard G. Wright*, "From Wetterling to Walsh: The Growth of Federalization in Sex Offender Policy," 21 *Fed. Sent. R.* 124, 126 (2008). "Offenders may even stay on their state's registry after they die ...[a]pparently even in death, sex offenders are still dangerous." *Id.* at 125.

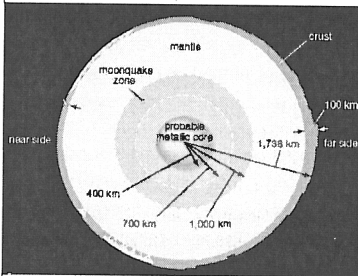
84 *Human Rights Watch*, *No Easy Answers: Sex Offender Laws in the U.S.* (Sept. 2007). <http://www.hrw.org/sites/>

"Mere public intolerance or animosity cannot constitutionally justify the deprivation of a person's physical liberty." *O'Connor v. Donaldson*, 422 U.S. 563, 575 (1975).

default/files/reports/us0907webcover.pdf [http://perma.cc/FT5P-6S4A], at 48. 98% of 500 sample registrants on the North Carolina sex offender registry had only committed that original offense. *Id.*

85 *Fredrick E. Vars*, "Rethinking the Indefinite Detention of Sex Offenders," 44 *Conn. L. Rev.* 161, 193 (2011). The variation in sex offense characteristics and motivations causes uncertainty in assessing the level of risk for a particular offender.

Pedophilia: Diagnosis Problems & CBT Limitations in Treatment



Therapists' view of a sex offender's psyche

Lea H. Studer & A. Scott Aylwin, "Pedophilia: The Problem with Diagnosis and Limitations of CBT in Treatment," 67 *Medical Hypothesis*: 774-781 (2006)

[Abstract Excerpt:]

"...[T]here is little reason to include pedophilia among the mental disorders of the DSM. ...A diagnosis of pedophilia seems to 'medicalize' an illegal behavior, or 'criminalize' fantasy; depending on the diagnostic criteria used, or the use made of the diagnosis. ...[T]he typical CBT-based relapse prevention treatment for pedophilia, which represents current best practice, is reviewed. It is suggested that this, as a stand-alone therapy, is suboptimal."

[Text Excerpts:]

p. 774: "Introduction

Dispassionate discussion of pedophilia is difficult and a great deal of emotion is evoked by the behavior of pedophiles. Some have suggested there is an innate biological imperative to protect our young and this should act to discourage some acts of child molestation. Violation of this imperative (and social taboo) may be the source of our outrage when members of society sexually exploit children. ...The term 'pedophilia' is of

Greek origin and means 'child lover.'² This term refers to the state of adults being sexually interested in children. Ironically, most people would not consider sexual abuse as love, and some individuals who molest children are not sexually aroused by them - at least not exclusively. Pedophilia as a diagnostic label is somewhat more precise and is defined according to particular criteria."

pp. 775-6: "...[C]lassical psychodynamic theory views pedophiles as being arrested at an early psychosexual stage and as typically having unresolved oedipal conflicts, while object-relations theorists would point to troubled self-object representations as causal factors. As another example, social learning theorists interpret high rates of childhood sexual victimization among pedophile samples as support of conditioning and modeling influences on later psychopathology."⁷

Sociocultural theory, as interpreted by *Kelly and Luski*, suggests numerous factors in modern society that make child molestation more likely to occur. For example, the socialization of males as dominant figures and as non-nurturing with children, the oppressed status of women/girls making victimization more tolerable to other men, generally repressive sexual norms for children, the erosion of traditional families, and fewer traditional external social controls over sexual behavior are possible disinhibiting factors for pedophilic behavior.

Neurological abnormalities have been considered as possible factors predisposing some men to pedophilia. Blanchard et al.⁸ for example, have suggested that subtle brain damage after birth (but during neurologically developmental years) may be implicated in later pedophilia. *Blanchard et al.*⁸ found that pedophilic men self-reported head injuries before the age of 13 years more frequently than non-pedophilic men. This replicated earlier work by the same group.⁹ Collectively, these two studies involved 1,891 men⁸ and while the strength of correlation was quite modest ($r=.12$) significance was obtained.

*Maes*¹⁰ implicated several monoamine and hormone irregularities in pedophilia, any one of which may be the predisposing factor alone or in combination. *Maes* reported that pedophiles appear to have decreased activity at the pre-synaptic 5-HT₂ receptor, and increased activity (upregulation) at the same post-synaptic sites. *Maes* reported pedophiles tend to have lower baseline serum levels of cortisol and prolactin. The impact on downstream behavior as a result of these hormonal variations (especially in males) is unclear. Other reports have suggested that prolactin levels among sex offenders are

(Continued on page 10)

higher than expected in the normal population. Testosterone has tentatively been implicated in aggression, and has been recently shown to have a small, but significant, relationship predicting sexual offense severity and recidivism among child molesters and rapists.¹²

In sum, there is little conclusive evidence that pedophilia has clear and direct physiological causation. Rather, contributory elements appear to promote or inhibit manifestation of this disorder. There are many who argue that sexual orientation is not a choice. The removal of homosexuality as a disorder from DSM may reflect some consensus on this point.¹³ It has been posited that pedophilia, like heterosexuality or homosexuality, represents sexual arousal to a particular identifiable group, and is not voluntarily decided, but biologically determined.¹⁴ Extending the sexual orientation argument to pedophilia is an unsettling prospect, as it could then become morally contentious to hold offenders accountable for their behavior.

Numerous studies have examined diverse variables such as family history, childhood abuse/neglect, sibship order and configuration, digit length ratios and handedness, substance abuse, and personality characteristics in attempts to understand how individuals come to obtain sexual gratification (or power and control) in activities with children. Positing that intimacy deficits and disrupted attachment to parents play important roles in the etiology of sexually abusive behavior, Marshall and his group have looked at numerous aspects of psychological functioning among sex offenders.¹⁵ Investigations have found that child molesters are lonely, have difficulty with intimacy, and have disrupted attachment bonds with other adults.¹⁶ A sample of child molesters were found to have lower self-esteem and reported a greater degree of maternal rejection than a sample of demographically matched normal controls.¹⁷ Ward, McCormack, and Hudson¹⁸ found that child molesters and rapists had a variety of deficits in establishing and maintaining intimacy in their relationships. Child molesters, for example, were found to be especially sensitive to rejection by others. While these are notable findings, they do not clarify the issue of cause and effect.

In what is most certainly an issue related to style of attachment and degree of intimacy, evidence indicates that sex offenders experience higher rates of childhood abuse than the general population.¹⁹⁻²¹ This disorder/behavior is clearly multi-determined. The Irrelevance of Diagnosis

Specifically, DSM indicates that homosexual pedophiles re-offend at twice the rate of

heterosexual pedophiles, but such a claim is unfounded. In fact, one recent study suggested that recidivism rates in a large sample (n=354) of child molesters did not differ significantly with victim gender.²³ As well, Marshall¹² noted that there is no evidence to suggest that 8-10 year-olds are preferred by heterosexual pedophiles as DSM claims.²²

p. 777: "In sum, it is advocated here that the category of pedophilia be dropped from future editions of the DSM as it appears the lines between psychopathology and legal description have become blurred. The institutions of justice and medicine both are served best when remaining as distinct from each other as possible..."

p. 778: "In many situations in general medicine, diagnosis can point the clinician toward or away from a specific treatment. This is not true for pedophilia. The present treatment of choice for pedophiles is group therapy from a cognitive-behavioral therapy (CBT) orientation. In 1999, Marshall¹² commented that sex offender treatment programs from a cognitive-behavioral perspective represented the future of sex offender treatment. This appears to have been prophetic, although Marshall subsequently began to re-evaluate the limitations of this model.³³ The typical CBT treatment program involves having patients participate in psycho-educational groups where modules on various topics are presented. Relapse prevention concepts adapted from addictions therapy³⁴ are frequently a major component of these programs. These concepts usually involve the identification of high risk situations and the completion of behavioral chains and crime cycles. Other groups often focus on anger management, assertiveness training, human sexuality, communications, control/reduction of deviant arousal, and substance abuse.

...Given that the offender is the treatment recipient, his experience in therapy should be a central issue. Yet, few attempts have been made to obtain the perceptions of sex offenders regarding their subjective experiences in treatment. The lay public and sometimes treatment providers, unfortunately, do not care what the sex offender thinks or how he feels about the treatment he receives. In one of the few studies to examine this subject using data provided by sex offenders, Day⁴⁵ reported that offenders in his sample found the most helpful elements of treatment were those related to interpersonal factors. Day concluded that intra-group relationships might play a more significant role in predicting outcomes than the content of the program itself. Drapeau, Korner, and Brunet⁴⁶ conducted a qualitative study of 24 pedophiles attending treatment. Similar to Day, Drapeau et al. reported that offenders' experience of the treatment staff [was] the

most important factor in their progress. Such findings seem to confirm Bordin's⁴⁷ position and the wider psychotherapy literature that relationships, not techniques, are the key agents of change."

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"The lay public and sometimes treatment providers, unfortunately, do not care what the sex offender thinks or how he feels about the treatment he receives." Studer & Aylwin, id. at 778.

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Gathering of psychodynamic, object-relations, social learning, and sociocultural theorists, neurologists, endocrinologists, psychologists, sexologists, and advocates of CBT, Relapse Prevention, and Good Lives Model to discuss pedophilia.