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Adjudicating Sex Crimes as Mental Disease

Melissa Hamilton*

I. Introduction

Sexual deviance is a topic of virtually infinite allure, captivating the media's attention and causing widespread apprehension both inside the criminal justice system and in the public-at-large.¹ With the recent foment of fear about sexually violent predators, lawmakers have sought ways to reduce the perceived risk to public safety and to calm their constituents' concerns. The prevailing strategy is a medicalization of social control in which officials employ certain psychiatric illnesses related to unusual sexual preferences to justify a host of civil and criminal laws in managing sex offender populations. In psychiatry's nosology—the Diagnostic and Statistical Manual of Mental Disorders (“DSM”)²—mental disorders of sexual deviance are called paraphilias.

Paraphilias are particularly salient in being considered relatively synonymous with sex-based crimes.³ In slang, paraphilias are bizarre, kinky, or weird sex,⁴ while in legal terms they are generally considered sexual perversions or deviances.⁵ The clinical DSM characterization of paraphilias delineates sexual fantasies or behaviors that involve unusual objects, activities, or situations and are usually accompanied by

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1. Richard L. Lippke, *Why Sex (Offending) is Different*, 30 CRIM. JUST. ETHICS 151, 151 (2011) (“[T]he public has some kind of peculiar hang-up about crimes involving sex.”).

2. AM. PSYCHIATRIC ASS'N, DIAGNOSTIC AND STATISTICAL MANUAL OF MENTAL DISORDERS DSM-IV-TR (4th ed. 2000) [hereinafter DSM-IV-TR].

3. ANIL AGRAWAL, FORENSIC AND MEDICO-LEGAL ASPECTS OF SEXUAL CRIMES AND UNUSUAL SEXUAL PRACTICES 2 (2009) (frequently illegal, paraphilias are uniquely attractive).

4. *See id.* at 4.

5. Fabian M. Saleh et al., *The Management of Sex Offenders: Perspectives for Psychiatry*, 18 HARV. REV. PSYCHIATRY 359, 366 (2010).

significant distress or impairment in social functioning.⁶ A few of the current DSM paraphilias are pedophilia, sexual sadism and masochism, exhibitionism, voyeurism, and the polymorphous category of paraphilia not otherwise specified.⁷

The attribution of a sex-based mental disorder can have significant legal consequences in providing the government a justification to infringe upon a defendant's interests in liberty and privacy. For example, studies of factors leading to forensic recommendations in favor of sexual predator civil commitment consistently show that instances involving a paraphilia diagnosis are significant predictors of outcomes in favor of involuntary commitment.⁸ In criminal cases, a paraphilia diagnosis has been employed for various purposes. Disorders of sexual deviance are cited to deny bail pending trial.⁹ There may be sentencing repercussions from the presence of paraphilic disorder to justify a prison sentence as opposed to community supervision¹⁰ and, as an aggravating factor, to support a longer term of imprisonment.¹¹ Judges in many cases have ruled that a pedophilia diagnosis, for example, warranted extended sentences, as it was relevant to protecting society.¹² United States Sentencing Commission members and expert witnesses called before a public hearing in 2012 about the appropriateness of lengthy sentences for child sexual exploitation offenders evidently agree, since at least a dozen times they cited the prevalence of paraphilias in the offender group.¹³

6. DSM-IV-TR, *supra* note 2, at 535.

7. *Id.*

8. *See infra* text accompanying notes 116-29.

9. *E.g.*, United States v. Blauvelt, No. WDQ-08-0269, 2008 U.S. Dist. LEXIS 87060, at *15-19 (D. Md. Oct. 28, 2008); United States v. Colin, No. 1:07-CR-512, 2007 U.S. Dist. LEXIS 91409, at *12 (N.D.N.Y. Dec. 12, 2007); United States v. Coffey, No. 5:01-CR-268, 2001 U.S. Dist. LEXIS 10452, at *20 (N.D.N.Y. July 24, 2001); State v. Enrique T., 937 N.Y.S.2d 203, 207-08 (App. Div. 2012).

10. State v. Lottie, No. 93050, 2010 WL 2333052, at *3 (Ohio Ct. App. June 10, 2010).

11. *E.g.*, United States v. Mantanes, 632 F.3d 372, 375 (7th Cir. 2011); Wells v. United States, No. 3:07cv1740, 2010 U.S. Dist. LEXIS 5332, at *38 n.10 (D. Conn. Jan. 25, 2010); People v. Myers, 2006 Cal. App. Unpub. LEXIS 11484, at *3 (Ct. App. Dec. 21, 2006).

12. *E.g.*, United States v. Hammonds, No. 10-6498, 2012 U.S. App. LEXIS 7099, at *8 (6th Cir. Apr. 6, 2012); United States v. Garnette, 474 F.3d 1057, 1061 (8th Cir. 2007); State v. Yingling, No. 2-307 / 11-1537, 2012 Iowa App. LEXIS 329, at *2 (Iowa Ct. App. 2012); Wisconsin v. Roders, Nos. 84-1222-CR and 84-1223-CR, 1985 Wisc. App. LEXIS 3472, at *14 (Ct. App. June 12, 1985).

13. *Child Pornography Offenses: Public Hearing Before the U.S. Sentencing Comm'n* 2, 112-13, 128, 169, 236 (2012), available at http://www.ussc.gov/Legislative_and_Public_Affairs/Public_Hearings_and_Meetings/20

Paraphilias have been consequential in death penalty sentencing hearings, offered by the prosecution as an aggravating factor suggesting the need for complete incapacitation.¹⁴ Parole decisions can be impacted, too. A paraphilia diagnosis has encouraged officials to mandate mental health treatment as a condition of parole,¹⁵ postpone parole release,¹⁶ or entirely deny parole.¹⁷

On the other hand, defense counsel have cited mental disorders of sexual deviance as benefiting their clients' legal positions. Characterizing the existence of a paraphilia as a mitigating factor, defendants have argued that a lesser sentence is justified¹⁸ or that a death sentence is undeserved in capital cases.¹⁹ They have also offered paraphilia diagnoses to support incompetency²⁰ or to support an insanity defense.²¹

120215-16/Hearing_Transcript_20120215.pdf.

14. Lynch v. Hudson, No. 2:07-cv-948, 2011 WL 4537890, at *76 (S.D. Ohio Sept. 28, 2011) (noting prosecutor argued defendant deserved death for his status as a pedophile); State v. Kleypas, 40 P.3d 139, 274-76 (Kan. 2001) (while defendant argued mitigating, prosecutor countered, asserting it meant defendant would pose a risk in prison to weaker male inmates).

15. People v. Holmgren, No. B205684, 2008 Cal. App. Unpub. LEXIS 9559, at *3-4 (Ct. App. Nov. 25, 2008) (pedophilia); People v. Johnson, No. B196843, 2008 Cal. App. Unpub. LEXIS 817, at *2 (Ct. App. Jan. 30, 2008) (paraphilia not otherwise specified).

16. *E.g.*, Hess v. Bd. of Parole & Post-Prison Supervision, 514 F.3d 909, 915 (9th Cir. 2008) (pedophilia); McClure v. Bd. of Parole & Post-Prison Supervision, 237 P.3d 879, 881 (Or. Ct. App. 2010) (rape paraphilia); Davis v. Lampert, 25 P.3d 408, 411 (Or. Ct. App. 2001) (exhibitionism and voyeurism).

17. *E.g.*, Ehler v. Nooth, 384 F. App'x 690, 691 (9th Cir. 2010); *In re Cody*, No. D058970, 2011 Cal. App. Unpub. LEXIS 7308, at *4 (Ct. App. Sept. 28, 2011); McGowan v. N.J. State Parole Bd., 790 A.2d 974 (N.J. Super. Ct. App. Div. 2002).

18. United States v. Freeman, 194 F. App'x 777, 779 (11th Cir. 2006) (paraphilia involving sexual interest in children); United States v. Roderick, No. 2:10-CR-741-DCN, 2011 U.S. Dist. LEXIS 81086, at *2 (D.S.C. July 25, 2011); United States v. Williams, No. ACM 35350, 2004 CCA LEXIS 269, at *9-10 (A.F. Ct. Crim. App. Nov. 30, 2004) (exhibitionism, frotteurism).

19. Many cases involve sexual sadism. *E.g.*, Schwab v. Crosby, 451 F.3d 1308, 1316 (11th Cir. 2006); State v. Smith, 159 P.3d 531, 542 (Ariz. 2007); Ault v. State, 53 So. 3d 175, 193 (Fla. 2010) (ruling pedophilia mitigating in compelling the defendant to kidnap); Brant v. State, 21 So. 3d 1276, 1283 (Fla. 2009); *see also* People v. Runge, 917 N.E.2d 940, 986 (Ill. 2009) (ruling sexual sadism does not render death sentence cruel and unusual punishment).

20. State v. Ross, 873 A.2d 131, 146 (Conn. 2005) (sexual sadism); State v. Bordelon, 2007-0525, p. 19 (La. 10/16/09); 33 So.3d 842, 855 (sexual sadism).

21. *E.g.*, Moorman v. Schriro, 426 F.3d 1044, 1052 (9th Cir. 2005) (pedophilia); United States v. Polizzi, 549 F. Supp. 2d 308, 337 (E.D.N.Y. 2008) (pedophilia); *see also* Cowley v. Stricklin, 929 F.2d 640, 643 (11th Cir. 1991) (finding constitutional error in

The psychiatric diseases of the paraphilias are now entrenched in the law in decisions concerning culpability, desert, and risk. Though, as the foregoing cases suggest, it is a tough balancing act, considering the existence of psychiatric illness suggests less responsibility, while at the same time implying a greater risk of future dangerousness.²² To better navigate this conundrum, the law has drawn on the psychiatric sciences. Part II of this Article outlines a basic need for law and science to serve each other even though they may not share objectives. With respect to the advent of new laws to control sex offenders, a law-psychiatry interface is utilized, whereby sexual offenders diagnosed with mental disorders can face negative legal consequences. Part III shows how diagnostic criteria have been interpreted to allow the use of sexual offenses as a proxy to diagnose mental disorder. The problem is that psychiatric diseases do not commit sex crimes—people do.²³ This Part also outlines reasons why the mutually reinforcing nature of this professional combination ignores substantial evidence that the DSM-based disorders of sexual deviance suffer substantial empirical and normative flaws. Part IV argues that the conflation of sexual crimes with mental illness is largely pretextual to serve the interests of criminal justice officials in justifying preventive detention. Overall, the paraphilias are a poor fit to answer legal questions about whether infringement upon substantial personal interests is lawfully appropriate. A review of case law, though, shows that legal challenges to the use of paraphilias for case adjudications, whether using the *Frye/Daubert* thresholds for the admissibility of scientific evidence or due process standards, have generally been unsuccessful. Finally, Part V provides concluding remarks, including a warning that a law-psychiatry interface can in a similar manner be exploited to apply to virtually any type of deviance, simply by linking it to mental disease.

not providing court-appointed experts to assist an insanity defense based on sexual sadism).

22. See *Rose v. Lee*, 252 F.3d 676, 695 (4th Cir. 2001) (denying ineffective assistance claim for failing to offer evidence of sexual sadism, noting that despite “alleged mitigation value,” the disorder is “repellent”).

23. Gregory DeClue, *Paraphilia NOS (Nonconsenting) and Antisocial Personality Disorder*, 34 J. PSYCHIATRY & L. 495, 498 (2006).

II. Sex Offender Policy Driven by the Specter of Mental Disease

The law often seeks input from the sciences.²⁴ This inquiry can be mutually beneficial. Legal practitioners seek information from scientists to address relevant legal issues, while scientists gain tangible and practical benefits when their services and research are sought. Both disciplines, in some sense, seek consensus. For law, that consensus often is in the form of a normative inquiry with an ontological assumption that a definitive answer can be ascertained.²⁵ For science, it is the collaborative establishment of testable theories to explain or predict the phenomenon at issue.²⁶ Yet the law-science interface can be problematic considering that their epistemological foundations and pragmatic goals differ.²⁷ From the epistemic perspective, “[l]aw is a discipline of the humanities, based upon beliefs, arguments, and deduction. Truth, in law, is derived . . . by persuasion and argument.”²⁸ Science, though, seeks truth through observable phenomena, utilizing empiricism, observation, and experimentation.²⁹ The goals of the disciplines are often incongruous. The law’s normative inquiry is inherently value-laden and targeted toward a subjectively-derived notion of achieving justice.³⁰ Science’s heuristic method seeks a more objectively-derived knowledge.³¹ These disciplinary differences are so structurally fundamental that it appears unnecessary to recognize these corollaries: (1) science cannot commandeer the law’s normative inquiry, and (2) the law should not undermine the integrity of science.³² Nonetheless, both rules are severely tested in the high profile area of sex offender policy,

24. Saleh et al., *supra* note 5, at 366 (noting legal theory must evolve and be informed by discoveries in science and medicine).

25. Steven K. Erickson, *The Myth of Mental Disorder: Transsubstantive Behavior and Taxometric Psychiatry*, 41 AKRON L. REV. 67, 78 (2008).

26. See generally Michael Friedman, *Explanation and Scientific Understanding*, 71 J. PHIL. 5 (1974).

27. Erickson, *supra* note 25, at 78 (“The goals of each discipline [law and science] are inconsistent even when they appear identical because of their different approaches to understanding the problem to begin with.”); Robert A. Prentky et al., *Sexually Violent Predators in the Courtroom: Science on Trial*, 12 PSYCHOL. PUB. POL’Y & L. 357, 359–60 (2008) (“In any context, the science-law interface must negotiate the potential for breakdown in three basic areas: translation, boundaries, and evaluation.”).

28. Erickson, *supra* note 25, at 71.

29. Lee Epstein & Gary King, *Empirical Research and the Goals of Legal Scholarship*, 69 U. CHI. L. REV. 1, 1 (2002).

30. Prentky et al., *supra* note 27, at 359–60.

31. Erickson, *supra* note 25, at 78; Prentky et al., *supra* note 27, at 360.

32. Erickson, *supra* note 25, at 78.

which has evolved so as to be dependent on the intersection between law and the science of psychiatry.

A. *Medicalization of Social Control*

Sex crimes remain a prominent legal and public issue as society continues to be in the grip of a moral panic about sexual offenders.³³ The media and lawmakers have reified the image of the sexually violent predator (the “SVP”).³⁴ Other works have explained why this image is mostly mythical and the SVP is, in reality, a socio-legal construct.³⁵ A result of the hype has been a plethora of new laws, as well as a strengthening of existing legal frameworks, specifically for sexual offenses (generally referred to herein as “SVP laws”).³⁶ These employ a penological mixture of punishment, incapacitation, and treatment. The consequences of these unique laws targeting sex-based offenses and sexual offenders include denying bail, adding conditions for supervised release, lengthening sentences, restricting parole, imposing sex offender registry requirements and residency restrictions, and seeking sex offender civil commitments.³⁷ The foregoing necessarily involve civil rights interests because they infringe upon liberty and privacy,³⁸ thereby rendering SVP laws as a human rights issue deserving attention and vigilance.³⁹

Policy analysts have offered explanations for the unique reaction to sex offenders. There are concerns about the connection between particularly harmful behaviors against vulnerable groups—here being women and children—and the presumption of long-term propensity for

33. Melissa Hamilton, *Public Safety, Individual Liberty, and Suspect Science: Future Dangerousness Assessments and Sex Offender Laws*, 83 TEMPLE L. REV. 697, 700–01 (2011).

34. *Id.*

35. *Id.*; Michael Petrunik et al., *American and Canadian Approaches to Sex Offenders: A Study of the Politics of Dangerousness*, 21 FED. SENT’G REP. 111 (2008).

36. For examples of such new and existing laws, see Hamilton, *supra* note 33, at 702–07.

37. TRACY VELÁZQUEZ, VERA INST. OF JUSTICE, THE PURSUIT OF SAFETY: SEX OFFENDER POLICY IN THE UNITED STATES 1 (2008), available at http://www.vera.org/sites/default/files/resources/downloads/Sex_offender_policy_with_appendices_final.pdf.

38. Hamilton, *supra* note 33, at 702–07.

39. Charles Moser & Peggy J. Kleinplatz, *DSM-IV-TR and the Paraphilias: An Argument for Removal*, 17 J. PSYCHOL. & HUM. SEXUALITY 91, 93 (2006).

sexual recidivism.⁴⁰ Together, these fears have fostered an idiosyncratic model of criminal justice that trades the normal foundation of proportionality of punishment for crimes with an inherently risk-based model underlying the SVP laws.⁴¹ This is true despite the fact that risk-based assessments for sex offenders are inherently faulty in being simultaneously subjective and unreliable.⁴²

The special treatment of dangerous sex offenders often is based on a moralistic philosophy that is inherently confused by whether they are mad or bad,⁴³ or, more likely, some combination thereof. Thus, the risk model has adopted a disease mentality through the conflation of medical pathology and its assumed consequence of evil behaviors.⁴⁴ The existing SVP law model is entrenched with a law-psychiatry interface in which the modern treatment of sex offenders operates via a modal logic that presumes them a dangerous and bad people due to mental disease. A commentator has referred to such a model as a form of “desert-disease jurisprudence” in the way the law reacts to dangerous people.⁴⁵ One who commits a criminal offense normally bears responsibility unless she is not competent, in which case, she would not deserve punishment.⁴⁶ But those with a severe mental disorder are treated differently in the disease model since they were not acting rationally or autonomously.⁴⁷ More specifically, the SVP law model represents gap-filling between desert and disease in which normal responsibility rules for criminal versus civil control are blurred.⁴⁸ This desert-disease model for sexual transgression, nonetheless, does not operate to conceptualize offenders as sympathetic or less culpable.⁴⁹ The special laws regard sexual deviance as caused by some degree of volitional, rather than merely cognitive disorder, such

40. Petrunik et al., *supra* note 35, at 111.

41. Erickson, *supra* note 25, at 115.

42. *Id.* See generally Hamilton, *supra* note 33, at 720–34.

43. Petrunik et al., *supra* note 35, at 111; see also Steven K. Erickson & Michael J. Vitacco, *Predators and Punishment*, 18 PSYCHOL. PUB. POL’Y & L. 1, 2 (2012). It has been argued that regarding psychopathy and criminal responsibility, “[d]ating back to the moral psychiatry movement, those individuals who routinely displayed a lack of respect for legal rules and social norms without additional evidence of overt mental illness have posed a dilemma for legal scholars and moral philosophers.” *Id.* (citation omitted).

44. Petrunik et al., *supra* note 35, at 111.

45. Stephen J. Morse, *Mental Disorder and Criminal Law*, 101 J. CRIM. L. & CRIMINOLOGY 885, 892 (2011) (citation omitted).

46. *Id.*

47. *Id.*

48. *Id.* at 952–53.

49. *Id.* at 958.

that the existence of the mental disorder is typically conceived not as a mitigating factor; rather, it is usually considered aggravating in nature.⁵⁰ These cognitive plus volitional impairments substantiate a presumption of risk of future dangerousness and, in turn, are used by officials to justify segregation and containment of sex offenders.⁵¹ The SVP law model of medicalizing social control here also assumes a homogeneous class of sexual predators in which sexual deviance derives from a mental disorder—i.e., the disease aspect.⁵² As others have recognized, this “one size fits all” mentality seems to underlie criminal justice officials’ efforts to control sex offenders.⁵³

In sum, management of the sex offender population via SVP laws currently draws on a desert-disease perspective. One may wonder, then, about the historical explanation for these policies as uniquely applied to sex-based offending. It appears likely that SVP laws and the accompanying law-psychiatry fusion have been influenced by the fact that, for the last century, mental health professionals have recognized sexual deviance as a form of mental illness.⁵⁴ Today, disorders of sexual appetite are included in the authoritative treatise of the DSM, currently under its rubric of paraphilias. The DSM, a categorical classification system for mental disorders, is the product of an authoritative institution—the American Psychiatric Association (“APA”).

50. Peggy Heil & Dominique Simons, *Multiple Paraphilias: Prevalence, Etiology, Assessment, and Treatment*, in *SEXUAL DEVIANCE: THEORY, ASSESSMENT, AND TREATMENT* 527, 559 (D. Richard Laws & William T. O’Donohue eds., 2d ed. 2008) [hereinafter cited individually by author and title]. “Agents who are unable to conform their conduct to the requirements of the criminal law due to mental defects are excused in many jurisdictions based on the notion that responsibility requires the ability of conscious, goal-directed acts.” Erickson & Vitacco, *supra* note 43, at 3.

51. Saleh et al., *supra* note 5, at 365.

52. Peggy Heil & Dominique Simons, *Multiple Paraphilias: Prevalence, Etiology, Assessment, and Treatment*, in *SEXUAL DEVIANCE: THEORY, ASSESSMENT, AND TREATMENT*, *supra* note 50, at 558.

53. Saleh et al., *supra* note 5, at 361. The authors suggest the plethora of sex offense-based legislation “appears to have been premised on the false assumption that those regularly or habitually deviating from sexual norms belong to a relatively homogeneous offender class, that all members of the class are potentially dangerous, and that they all need the same sort of legal control.” *Id.* at 365 (citation omitted).

54. Peggy Heil & Dominique Simons, *Multiple Paraphilias: Prevalence, Etiology, Assessment, and Treatment*, in *SEXUAL DEVIANCE: THEORY, ASSESSMENT, AND TREATMENT*, *supra* note 50, at 533.

B. *The Law-Psychiatry Interface*

As a general matter, the APA has found a powerful tool in its diagnostic manual. The DSM is known as the “bible” of psychiatry and is widely influential across professional disciplines. Through the acculturation of the DSM, the APA virtually appropriated the field of mental health.⁵⁵ While purportedly based on scientific principles, the DSM is, at its core, a political document; the APA is a professional organization that clearly came to understand its ability to assert its power in the broader world.⁵⁶ This is true even for matters otherwise reserved to legal professionals. A particularly relevant strategy was employed when the institution adopted the nomenclature of “mental disorder,” which allowed the APA to broaden the DSM’s coverage and the institution’s influence in the law enormously.

When psychiatry turned away from the term “mental illness” to the expansive “mental disorder,” it opened a Pandora’s Box whereby almost any behavior can be deemed an affliction of the mind—and used by law to meet its own political ends. If law is a vehicle in which political ideas are executed . . . psychiatry has unwittingly given law the means to achieve politically efficient ends for dealing with many socially and politically difficult problems.⁵⁷

The APA has, since the adoption of the broader genus offered by the “mental disorder” terminology, continued to expand its coverage. The DSM originally listed 106 mental disorders in its first edition in 1952.⁵⁸ The most current edition, the DSM-IV-TR, lists over 250

55. Owen Whooley, *Diagnostic Ambivalence: Psychiatric Workarounds and the Diagnostic and Statistical Manual of Mental Disorders*, 32 SOC. MENTAL ILLNESS 452, 453 (2010); see also Warren A. Kinghorn, *Whose Disorder?: A Constructive MacIntyrean Critique of Psychiatric Nosology*, 36 J. MED. & PHIL. 187, 194 (2011) (asserting that “the DSM project cloaks the will to power in therapeutic veil”).

56. See generally Christopher Cotton & John W. Ridings, *Getting Out/Getting In: The DSM, Political Activism, and the Social Construction of Mental Disorders*, 9 SOC. WORK MENTAL HEALTH 181, 181-92 (2011) (documenting APA’s removing homosexuality from DSM in 1973 due to political pressure).

57. Erickson, *supra* note 25, at 73.

58. *Id.* at 77 n.39.

disorders.⁵⁹ Conceivably, the APA can attempt to encompass virtually any mental phenomenon within the DSM's taxonomy. With its creation and maintenance of the DSM, the APA now wields enormous power over any person or institution, including the law, willing to be governed by its epistemology and its nosology.⁶⁰

The APA has asserted its dominion in the criminal justice arena, more specifically, in adjudging deviance as a mental health issue. In propagating and monopolizing its classification system for psychiatry, the APA discovered that "any behavior that produced discomfort or socially undesirable behavior could be asserted as representing a disordered psyche irrespective of biological evidence."⁶¹ Regarding sexual deviance and paraphilias, as cases in point, critics contend that the DSM categorizes them as mental disorders not because of "some mental degeneration of the brain but because such behavior is socially construed to be a process of a sick mind."⁶²

C. *The Paraphilic Disorders*

The term paraphilia was first introduced to American psychiatry by the work of Austrian sexologist Richard von Krafft-Ebing, who in 1886 penned *Psychopathia Sexualis* (Sexual Psychopathy), a work that continues to be a primary treatise in the sex offender treatment field.⁶³ The term paraphilia derives from the Greek words *para* meaning "beyond, amiss, altered" and *philia* meaning "love."⁶⁴ It has also been translated as "interest in perversion," "love of the perverse," and "love of something beyond normal."⁶⁵ The core of a paraphilia is an abnormal sexual interest.⁶⁶

59. *Id.* at 77.

60. *Id.* at 98.

61. *Id.* at 99.

62. *Id.* at 114.

63. Saleh et al., *supra* note 5, at 361 n.14.

64. Joel S. Milner et al., *Paraphilia Not Otherwise Specified*, in *SEXUAL DEVIANCE: THEORY, ASSESSMENT, AND TREATMENT*, *supra* note 50, at 384. Another asserts *para* is Greek for deviation and *philia* means attraction. Jerome C. Wakefield, *DSM-5 Proposed Diagnostic Criteria for Sexual Paraphilias: Tensions Between Diagnostic Validity and Forensic Utility*, 34 INT'L J.L. & PSYCHIATRY 195, 195 (2011).

65. AGRAWAL, *supra* note 3, at 3.

66. David Thornton, *Evidence Regarding the Need for a Diagnostic Category for a Coercive Paraphilia*, 39 ARCHIVES SEXUAL BEHAV. 411, 411 (2010).

The APA incorporated this label in the third edition of its taxonomy (DSM-III) in 1984.⁶⁷ The initial DSM, published in 1952, considered sexual deviation a type of sociopathic personality disturbance, while DSM-II in 1968 referred to sexual deviations.⁶⁸ The DSM's change from sexual deviation to paraphilia in DSM-III was purported to signify an "atheoretical, non-perjorative descriptor" to disassociate the mental health concept from the legalistic signifiers of deviance and perversion.⁶⁹ Notwithstanding that intent, in the law, paraphilias appear to have retained a vituperative connotation. For example, recent case law often represents paraphilias in terms of sexual deviance⁷⁰ and perversion.⁷¹

There are two general criteria for paraphilias. The first, Criterion A, requires "recurrent, intense sexually arousing fantasies, sexual urges, or behaviors" generally involving: 1) nonhuman objects; 2) the suffering or humiliation of oneself or one's partner; or, 3) children or other non-consenting persons that occur over a period of at least six months.⁷² Criterion B is met if "the fantasies, sexual urges, or behaviors cause clinically significant distress or impairment in social, occupational, or other important areas of functioning."⁷³ For those paraphilias involving nonconsenting victims (i.e., pedophilia, sexual sadism, voyeurism, exhibitionism, and frotteurism), Criterion B can alternatively be met if the person has acted on such urges.⁷⁴ Per the DSM's modal logic, paraphilias generally appear in early adolescence, are relatively stable, and are considered rather immutable.⁷⁵

67. American psychiatry initially noted the term paraphilia in the 1930s. Milner et al., *supra* note 64, at 384.

68. AGGRAWAL, *supra* note 3, at 8.

69. Milner et al., *supra* note 64, at 384; Moser & Kleinplatz, *supra* note 39, at 93.

70. *E.g.*, Yancy v. Voss, No. SACV 06-356-JFW (CW), 2011 U.S. Dist. LEXIS 43880, at *4-5 (C.D. Cal. Mar. 21, 2011); United States v. Graham, 683 F. Supp. 2d 129, 135 (D. Mass. 2010); Orozco v. Ahlin, No. CV 08-5504 AHM (CT), 2008 U.S. Dist. LEXIS 108797, at *18 (C.D. Cal. Dec. 3, 2008); *In re Johnson*, No. A11-792, 2011 Minn. App. Unpub. LEXIS 902, at *12 (Ct. App. Sept. 26, 2011); *In re Brady*, No. 09-09-00360-CV, 2011 Tex. App. LEXIS 4502, at *5 (Ct. App. June 16, 2011); *People v. Williams*, No. D046925, 2006 Cal. App. Unpub. LEXIS 4240, at *3 (Ct. App. May 16, 2006); *In re E.S.T.*, 854 A.2d 936, 939 n.2 (N.J. Super. Ct. App. Div. 2004).

71. *E.g.*, United States v. Harris, 339 F. App'x 533, 535 n.2 (6th Cir. 2009); *People v. Hill*, No. A126089, 2011 Cal. App. Unpub. LEXIS 1621, at *12 (Ct. App. Mar. 4, 2011); *In re G.R.H.*, 2008 ND 222, ¶ 4, 758 N.W.2d 719, 721 (N.D. 2008).

72. DSM-IV-TR, *supra* note 2, § 302.81, at 570.

73. *Id.*

74. *Id.*

75. Lippke, *supra* note 1, at 152.

The DSM includes eight specific paraphilias and a residual category. Comments in the DSM indicate that it is entirely appropriate for mental health professionals to diagnose an individual with more than one paraphilia. In the brief introductions of the individual paraphilias that follow, summary references to the historical origin of their names highlight their cultural roots. More importantly, the descriptions should make evident why the paraphilias as mental disorders are considered commensurate with sex-based crimes.

Pedophilia is the most commonly studied and discussed paraphilia in clinical and forensic literature.⁷⁶ The etymology of pedophile is lover of children.⁷⁷ The appellation derives from the Greek words *pedeiktos* for child and *philia* for love.⁷⁸ The DSM criterion specific for pedophilia refers to “intense sexually arousing fantasies, sexual urges, or behaviors involving sexual activity with a prepubescent child or children (generally age [thirteen] years or younger).”⁷⁹

Frotteurism derives from the French verb *frotter*, which does not have a sexual connotation per se but means the act of rubbing.⁸⁰ In the DSM, it is described as sexually arousing fantasies or behaviors involving “touching and rubbing against a nonconsenting person.”⁸¹ Frotteurism is a more recent addition to DSM’s paraphilias, introduced in 1984.⁸²

Exhibitionism involves “exposing one’s genitals to an unsuspecting stranger,”⁸³ while voyeurism regards the “act of observing an unsuspecting person who is naked, in the process of disrobing, or engaging in sexual activity.”⁸⁴ Another paraphilia is fetishism, which is

76. AGGRAWAL, *supra* note 3, at 46; Michael C. Seto, *Pedophilia: Psychopathology and Theory*, in *SEXUAL DEVIANCE: THEORY, ASSESSMENT, AND TREATMENT*, *supra* note 50, at 164.

77. STEPHEN T. HOLMES & RONALD M. HOLMES, *SEX CRIMES: PATTERNS AND BEHAVIORS* 110 (3d ed. 2009).

78. AGGRAWAL, *supra* note 3, at 45.

79. DSM-IV-TR, *supra* note 2, § 302.2, at 571. The DSM pedophilia has another age specifier in which the individual diagnosed be at least 16 years and more than five years older than the child of interest.

80. Patrick Lussier & Lyne Piché, *Frotteurism: Psychopathology and Theory*, in *SEXUAL DEVIANCE: THEORY, ASSESSMENT, AND TREATMENT*, *supra* note 50, at 145.

81. DSM-IV-TR, *supra* note 2, § 302.89, at 570. (positing this common scenario: “He rubs his genitals against the victim’s thighs and buttocks or fondles her genitalia or breasts with his hands.”)

82. Niklas Langström, *The DSM Diagnostic Criteria for Exhibitionism, Voyeurism, and Frotteurism*, 39 *ARCHIVES SEXUAL BEHAV.* 317, 320–21 (2010).

83. DSM-IV-TR, *supra* note 2, § 302.4, at 569.

84. DSM-IV-TR, *supra* note 2, § 302.82, at 559.

derived from the Portuguese *feitiço*, meaning artificial.⁸⁵ In the DSM, it includes sexual arousal to “nonliving objects.”⁸⁶ The DSM has a separate category for transvestic fetishism, more specifically referring to cross-dressing, which the commentary limits to applying only to heterosexual males.⁸⁷

Sexual sadism was coined by the same Austrian psychiatrist responsible for introducing the ideology of paraphilia to the American profession.⁸⁸ Krafft-Ebing based the term on the licentious sexual behaviors of the Marquis de Sade.⁸⁹ The DSM describes the sexual sadistic disorder as “acts (real, not simulated) in which the . . . psychological or physical suffering (including humiliation) of the victim [is sexually exciting to the person].”⁹⁰

Krafft-Ebing also created the term masochism, naming it after the author Leopold von Sacher-Masoch who wrote erotic novels in the late 1800s, such as the celebrated *Venus in Furs* about a domineering woman torturing and subjugating the male hero.⁹¹ In the DSM, sexual masochism includes the “act (real, not simulated) of being humiliated, beaten, bound, or otherwise made to suffer.”⁹²

85. Jean-Luc Nancy & Thomas C. Platt, *The Two Secrets of the Fetish*, 31 DIACRITICS 3, 4 (2001).

86. DSM-IV-TR, *supra* note 2, § 302.81, at 560-70. Studies show the most common objects for fetishists are female underwear, feet-related objects (boots, shoes, socks), and leather. Martin P. Kafka, *The DSM Diagnostic Criteria for Fetishism*, 39 ARCHIVES SEXUAL BEHAV. 357, 360 (2010).

87. DSM-IV-TR, *supra* note 2, § 302.3, at 574-75.

88. Pamela M. Yates et al., *Sexual Sadism: Psychopathology and Theory*, in SEXUAL DEVIANCE: THEORY, ASSESSMENT, AND TREATMENT, *supra* note 50, at 213.

89. AGGRAWAL, *supra* note 3, at 169.

90. DSM-IV-TR, *supra* note 2, § 302.84, at 573-74 (sadists’ desired responses are obedience, submission, humiliation, fear, and terror.) AGGRAWAL, *supra* note 3, at 167. For sexual sadists, the suffering is sexually arousing, not the infliction of pain. *Id.* The DSM offers examples:

Sadistic fantasies or acts may involve activities that indicate the dominance of the person over the victim (*e.g.*, forcing the victim to crawl or keeping the victim in a cage). They may also involve restraint, blindfolding, paddling, spanking, whipping, pinching, beating, burning, electrical shocks, rape, cutting, stabbing, strangulation, torture, mutilation, or killing.

DSM-IV-TR, *supra* note 2, § 302.84, at 573.

91. Mary Jane Heron & William J. Herron, *Meanings of Sadism and Masochism*, 50 PSYCHOL. REP. 199, 199 (1982).

92. DSM-IV-TR, *supra* note 2, § 302.83, at 573.

Finally, there is a residual category. Paraphilia not otherwise specified (“paraphilia NOS”) is a diagnosis reserved for what might otherwise qualify as a paraphilia by virtue of the general criteria, but fails sufficiently to meet the standards for any of the eight specific categories. The DSM expresses that “[e]xamples include, but are not limited to, telephone scatologia (obscene phone calls), necrophilia (corpses), partialism (exclusive focus on part of body), zoophilia (animals), coprophilia (feces), klismaphilia (enemas), and urophilia (urine).”⁹³ This residual category of paraphilia NOS was introduced to the DSM in 1987.⁹⁴ Professionals refer to paraphilia NOS as a wastebasket⁹⁵ or a catchall category.⁹⁶ Some sex offender treatment experts have identified more than fifty paraphilias in the NOS category in the literature,⁹⁷ while others allege hundreds have been identified.⁹⁸

The uses of paraphilia NOS which have garnered the most debate in the sexual offender treatment community, and in the courts, involve what is commonly referred to as “paraphilia NOS-nonconsent” in two forms. One is commonly described in terms of rape paraphilia, and the other is known as hebephilia, which involves sexual interest in pubescent or postpubescent children.⁹⁹ The explanation for these two is based on the fact that paraphilia NOS is a residual category with no criteria of its own.¹⁰⁰ Thus, the natural reference point is the general criteria of the paraphilias as a nosological category. Criterion A is the most relevant one, which includes a subcategory alternative of sexual interest or

93. DSM-IV-TR, *supra* note 2, § 302.9, at 576.

94. John Matthew Fabian, *Diagnosing and Litigating Hebephilia in Sexually Violent Predator Civil Commitment Proceedings*, 39 J. AM. ACAD. PSYCHIATRY & L. 496, 498 (2011) [hereinafter Fabian, *Diagnosing and Litigating*].

95. Wakefield, *supra* note 64, at 195.

96. United States v. Caporale, No. 5:08-HC-2037-BO, 2012 U.S. Dist. LEXIS 55794, at *1, *7 (E.D.N.C. Apr. 20, 2012); Orozco v. Ahlin, No. CV 08-5504 AHM (CT), 2008 U.S. Dist. LEXIS 108797, at *26 (C.D. Cal. Dec. 3, 2008); Prentky et al., *supra* note 27, at 366.

97. Saleh et al., *supra* note 5, at 362 (conceding likely many others).

98. *E.g.*, *In re Williams*, 264 P.3d 570, 572 n.5 (Wash. Ct. App. 2011); J. Paul Fedoroff, *Forensic and Diagnostic Concerns Arising from the Proposed DSM-5 Criteria for Sexual Paraphilic Disorder*, 39 J. AM. ACAD. PSYCHIATRY & L. 238, 240 (2011); Michael B. First & Robert L. Halon, *Use of DSM Paraphilia Diagnoses in Sexually Violent Predator Commitment Cases*, 36 J. AM. ACAD. PSYCHIATRY & L. 443, 445 (2008) (noting that famous sexologist John Money identified and named over 100 deviant sexual interests); Milner et al., *supra* note 64, at 390 (noting some are subtypes of existing paraphilias).

99. Fabian, *Diagnosing and Litigating*, *supra* note 94, at 497.

100. *Id.* at 499.

behavior regarding nonconsenting persons. A rape victim by definition was not consenting and, in hebephilia, a pubescent or postpubescent youth under the age of sixteen generally cannot legally consent to sexual contact.

D. *The Law and Paraphilias*

Case law references to DSM paraphilia diagnoses are legion. Overall, judicial curiosity in understanding the meaning of paraphilias is evident in the frequent exercise in judicial opinions of describing them in layman's terms. Often the portrayal of the paraphilias generally are in terms of sexual deviance and perversion.¹⁰¹ In addition, judicial opinions use normative descriptions such as abnormal arousal.¹⁰² Similarly, decisions concerning the length of sentences suggest abnormal sexual preference¹⁰³ and disorder of sexual appetite.¹⁰⁴ As another specific example, a state expert in one case referred to paraphilia as "odd sexual behavior in general."¹⁰⁵ The expert went on to explain that "[a]ny oddity, any peculiarity of a sexual object, [or any] sexual activity with that object . . . [is] love of the different."¹⁰⁶ In a prosecution on child molestation charges, a state expert described paraphilia as the preferred way of sexual gratification that is different from the "normal male/male, female/female, male/female sexual interacting or courting kind of behavior."¹⁰⁷

Numerous cases mention specific paraphilias. Pedophilia, rape paraphilia, and hebephilia references are evaluated in detail below. Still, it is noted that opinions cite diagnoses of sexual masochism,¹⁰⁸

101. *See supra* notes 71-72 and cases cited therein.

102. *In re Williams*, 264 P.3d at 572; *see also* *United States v. Graham*, 683 F. Supp. 2d 129, 135 (D. Mass. 2010) (citation omitted) (asserting that paraphilias are "not within the realm of what are considered and defined as normal or appropriate sexual behavior").

103. *United States v. Pritchard*, 392 F. App'x 433, 435 n.2 (6th Cir. 2010).

104. *Commonwealth v. Rossmeisl*, No. 1952-05, 4326-05, 1918 EDA 2006, 1919 EDA 2006, 2006 Pa. Dist. & Cnty. Dec. LEXIS 285, at *12 (Aug. 16, 2006).

105. *People v. Seja*, F059924, 2011 Cal. App. Unpub. LEXIS 5474, at *4 (Ct. App. July 22, 2011).

106. *Id.*

107. *People v. Hill*, No. A126089, 2011 Cal. App. Unpub. LEXIS 1621, at *8-9 (Ct. App. Mar. 4, 2011). The court condoned such evidence as relevant to the defendant's mental state at the time of the crime. *Id.* at *41.

108. *Paulos v. Ludeman*, No. A10-1634, 2011 Minn. App. LEXIS 185, at *4 (Ct. App. Mar. 1, 2011); *In re Brian J.*, 58 Cal. Rptr. 3d 246, 256 (Ct. App. 2007); *Medley v.*

frotteurism,¹⁰⁹ fetishism,¹¹⁰ exhibitionism,¹¹¹ and voyeurism.¹¹² Cases mention diagnoses of sexual sadism,¹¹³ while others used the phraseology of atypical paraphilia with sadistic features¹¹⁴ or paraphilia with sadistic features.¹¹⁵ Although infrequent, opinions mention diagnoses of some other diagnoses linking to the NOS genre, including telephone scatologia,¹¹⁶ zoophilia,¹¹⁷ urophilia,¹¹⁸ klismaphilia,¹¹⁹ and partialism.¹²⁰

The mental diseases of sexual deviance matter for a host of issues in criminal law, such as insanity, competency, bail, sentencing, and parole.¹²¹ They also clearly dominate legal decisions to civilly commit

Ludeman, No. A07-97, 2007 Minn. App. Unpub. LEXIS 705, at *5 (Ct. App. July 10, 2007); *In re Kapprelian*, 168 S.W.3d 708, 712 (Mo. Ct. App. 2005); *State v. Armstrong*, 152 Ohio App. 3d 579, 2003-Ohio-2154, 789 N.E.2d 657, at ¶ 27 (9th Dist. Lorain Cnty. 2003).

109. *Bonior v. Conerly*, 416 F. App'x 475, 476 (6th Cir. 2010); *People v. Towne*, No. H033465, 2011 Cal. App. Unpub. LEXIS 1602, at *5-6 (Ct. App. Mar. 4, 2011); *In re Hanenberg*, 2010 ND 8, ¶ 3, 777 N.W.2d 62, 63 (N.D. 2010).

110. *E.g.*, *In re A.M.*, 2010 ND 163, ¶ 3, 787 N.W.2d 752, 754 (2010); *In re R.L.C.*, No. A-0941-07T2, 2009 N.J. Super. Unpub. LEXIS 2451, at *6 (App. Div. Sept. 30, 2009); *State v. Prust*, 2004 WI App 68, ¶ 3, 271 Wis. 2d 818, 677 N.W.2d 732 (Ct. App. 2004); *M.V.M. v. Tartalia*, No. 2588-9-II, 2001 Wash. App. LEXIS 1161, at *4 (Ct. App. June 1, 2001).

111. *Laxton v. Bartow*, 421 F.3d 565, 568 (7th Cir. 2005); *Towne*, 2011 Cal. App. Unpub. LEXIS 1602, at *5; *People v. Calderon*, No. B206734, 2009 Cal. App. Unpub. LEXIS 1427, at *9 (Ct. App. Feb. 23, 2009); *In re O.S.*, 763 N.W.2d 723, 727 (Neb. 2009).

112. *Laxton*, 421 F.3d at 567.

113. *Litmon v. Flores*, No. C 03-03996 RMW (PR), 2008 U.S. Dist. LEXIS 58545, at *19 (N.D. Cal. July 11, 2008); *In re Sugden*, 2010 WI App 166, ¶ 6, 30 Wis. 2d 628, 795 N.W.2d 456 (Ct. App. 2010).

114. *Maimon v. Belleque*, No. 06-1100-PA, 2007 U.S. Dist. LEXIS 44064, at *4 (D. Or. June 15, 2007).

115. *Ehler v. Or. Bd. of Parole*, No. 08-483-KI, 2009 U.S. Dist. LEXIS 63751, at *1-2 (D. Or. July 24, 2009); *In re Day*, 342 S.W.3d 193, 206 (Tex. Ct. App. 2011).

116. *In re Henson*, 97 S.W.3d 67, 69 (Mo. Ct. App. 2002); *State v. Maybrey*, No. 01C01-9703-CC-00117, 1998 WL 161144, at *1 (Tenn. Crim. App. Apr. 7, 1998); *State v. George*, No. 01C01-9512-CC-00407, 1997 Tenn. Crim. App. LEXIS 250, at *1, *7 (Tenn. Crim. App. May 13, 1997).

117. *In re Hanenberg*, 2010 ND 8, ¶ 3, 777 N.W.2d 62, 63 (2010); *In re Grinstead*, No. 09-07-00412-CV, 2008 WL 5501164, at *4 (Tex. Ct. App. Jan. 15, 2009); *People v. Grant*, No. A 092910, 2002 Cal. App. Unpub. LEXIS 3417, at *11 (Ct. App. Mar. 5, 2002).

118. *Fair v. State*, 161 P.3d 466, 468 (Wash. Ct. App. 2007).

119. *People v. Hubbart*, 106 Cal. Rptr. 2d 490, 498 (Ct. App. 2001).

120. *People v. Martinez*, No. D055776, 2011 Cal. App. Unpub. LEXIS 2887, at *3 (Ct. App. Apr. 19, 2011); *People v. Wright*, No. C057457, 2009 Cal. App. Unpub. LEXIS 2325, at *3 (Ct. App. Mar. 29, 2009).

121. *See infra* notes 8-21 and accompanying text.

sex offenders. Notably, the desert-disease model and the APA's influence via the DSM are especially evident in the sexual predator civil commitment regime.¹²² Twenty states and the federal government statutorily permit the indefinite commitment of sexually violent offenders to secure psychiatric facilities—purportedly for treatment and potential cure.¹²³ A recent survey counted at least 3500 individuals currently committed or detained under such laws in those jurisdictions that responded.¹²⁴ In some states, approximately five percent of sex offenders about to be released upon serving their sentences are civilly committed.¹²⁵ Significantly, such detention, though extreme in nature, is external to the normal criminal adjudication and sentencing system for criminal offenses.¹²⁶ Those committed are rarely ever released.¹²⁷

The typical sexual offender civil commitment statute requires three elements: (1) a prior conviction for a sexually violent offense; and, (2) a mental disorder or disability (3) causing the individual significant difficulty in controlling recidivist behavior.¹²⁸ The second element is the most relevant to paraphilias. Critics contend that the courts have been “deliberately vague” in defining mental disorder and permitting “far too much latitude and inconsistency.”¹²⁹ Notwithstanding such displeasure,

122. Saleh et al., *supra* note 5, at 361 (“The growth of sexually violent person commitment laws seems premised on the idea that by forcing a connection between the individual defendant and the treatment facility and by then supervising that connection for a reasonable time period, the criminal justice system can promote treatment.”).

123. Corey Rayburn Yung, *Sex Offender Exceptionalism and Preventive Detention*, 101 J. CRIM. L. & CRIMINOLOGY 969, 975-76 (2011) (citation omitted).

124. REBECCA JACKSON ET AL., SOCCPN ANNUAL SURVEY OF SEX OFFENDER CIVIL COMMITMENT PROGRAMS 2011 (2011), available at http://www.soccpn.org/images/SOCCPN_Annual_Survey_2011_revised_1_.pdf.

125. Richard W. Elwood et al., *Diagnostic and Risk Profiles of Men Detained under Wisconsin's Sexually Violent Person Law*, 54 INT'L J. OFFENDER THERAPY & COMP. CRIMINOLOGY 187, 188 (2010) (indicating about 4% referred to commitment in Wisconsin); Jennifer E. Schneider, *A Review of Research Findings Related to the Civil Commitment of Sex Offenders*, 36 J. PSYCHIATRY & L. 463, 465 (2008) (noting 3.3%–6.4% annually in Minnesota from 1991-1999).

126. See generally Elwood et al., *supra* note 125, at 188.

127. Schneider, *supra* note 125, at 479.

128. See also 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, 377 (2008); Saleh et al., *supra* note 5, at 365.

129. Shoba Sreenivasan et al., *Normative Versus Consequential Ethics in Sexually Violent Predator Laws: An Ethics Conundrum for Psychiatry*, 38 J. AM. ACAD. PSYCHIATRY & L. 386, 390 (2010); see also Frances et al., *supra* note 128, at 376–77; Prentky et al., *supra* note 27, at 360 (“The problem of translation is amplified in the SVP context because the legal categories and thresholds are themselves poorly defined, in large measure because of the lack of clarity about the normative values underlying these

the Supreme Court considered the second element for purposes of sex offender civil commitment in the case of *Kansas v. Hendricks*.¹³⁰ There, the state sought to commit the defendant based on a long history of sexually abusing children and a diagnosis of pedophilia.¹³¹ The lower court ruled that the state's commitment statute, which used the terminology "mental abnormality" for the second element, was insufficiently vague for due process purposes.¹³² The Supreme Court reversed, ruling that even though the Court's previous discussion of a qualifying disorder for civil commitment referred to it as a "mental illness," such terminology was not intended as having any "talismanic significance" and the Court had "never required state legislatures to adopt any particular nomenclature in drafting [a] civil commitment [law]."¹³³ Instead, legislatures retain much freedom in crafting terms that have legal meaning.¹³⁴ The *Hendricks* Court then expressly recognized that a diagnosis of pedophilia was a sufficient diagnosis for the purpose of sex offender civil commitment,¹³⁵ thereby opening the door to the acceptance of other paraphilias as qualifying diagnoses.

The strong influence of the paraphilias in committal proceedings is consistently shown by statistical analyses. Studies of those committed or detained in sexual offender commitment facilities indicate that the diagnosis of any paraphilia ranges from forty-six percent to ninety-eight percent.¹³⁶ Pedophilia and paraphilia NOS are the most common disorders cited in civil commitment proceedings,¹³⁷ with roughly half of those committed or detained being diagnosed with one or the other.¹³⁸

laws."); Saleh et al., *supra* note 5, at 365 ("That these statutes used inconsistent definitions of proscribed sexual behaviors is hardly surprising since the public, mental health professionals, and the legal profession hold such widely divergent views as to what defined a sexually dangerous person.").

130. 521 U.S. 346 (1997).

131. *Id.* at 354.

132. *Id.* at 356.

133. *Id.* at 359.

134. *Id.* Likely as a result of the ruling, the federal sex offender commitment statute enacted with the Adam Walsh Child Protection Act of 2006 delineates the second element in a manner potentially to cover all bases: "mental illness, abnormality, or disorder . . ." 18 U.S.C. § 4247(a)(6) (2006).

135. 521 U.S. at 360.

136. Schneider, *supra* note 125, at 465, 467.

137. Rebecca L. Jackson & Derek T. Hess, *Evaluation for Civil Commitment of Sex Offenders: A Survey of Experts*, 19 SEX ABUSE 425, 427 (2007); Julia E. McLawsen et al., *Civilly Committed Sex Offenders: A Description and Interstate Comparison of Populations*, 18 PSYCHOL. PUB. POL'Y & L. 453, 453 (2012).

138. Shan Jumper et al., *Diagnostic Profiles of Civilly Committed Sexual Offenders*

Researchers have also shown the salience of a paraphilia diagnosis for positive decisions to civilly commit.¹³⁹ In a study of a large sample of individuals evaluated for commitment, bivariate results showed the factor with the highest correlation to a recommendation of commitment was a paraphilia NOS diagnosis, greater even than antisocial personality disorder.¹⁴⁰ Pedophilia was also highly correlated and had a statistical effect (i.e., positive impact) greater even than the number of previous victims or the individual's statement of intent to commit a new sex crime.¹⁴¹ A logistic regression analysis likewise found a significant impact on the likelihood of the assessor to recommend commitment: holding constant other variables of interest, a paraphilia NOS diagnosis raised the odds of being recommended for commitment by over 10,500% while a pedophilia diagnosis raised the odds over 4500%.¹⁴² These studies provide clear evidence of the role that diagnoses of sexual deviance play in imposing preventive detention.

Likely an important reason that these disorders matter to legal decisions and are routinely used to justify long-term restrictions for both criminal law and civil commitment purposes is that the DSM conceptualizes paraphilias as a systemic issue within the individual. This conceptualization often appears in case law. Opinions often cite experts referring to the chronic nature of paraphilias.¹⁴³ One expert made this assertion abundantly clear, describing paraphilia as "chronic, unremitting life-long deviant sexual behavior."¹⁴⁴ An expert in another case justified a current paraphilia diagnosis despite the defendant's last sexual offense occurring sixteen years earlier, based, in part, on his history of offending

in Illinois and Other Reporting Jurisdictions: What We Know So Far, 56 INT'L J. OFFENDER THERAPY & COMP. CRIMINOLOGY 838, 838 (2012).

139. Jill S. Levenson & John W. Morin, *Factors Predicting Selection of Sexually Violent Predators for Civil Commitment*, 50 INT'L J. OFFENDER THERAPY & COMP. CRIMINOLOGY 609, 618 (2006).

140. *Id.*

141. *Id.* Sexual sadism increased the odds of commitment recommendation 85,500% but result not statistically significant because of the few cases with the diagnosis. *Id.* at 621-22.

142. *Id.*

143. *E.g.*, *United States v. Shields*, 597 F. Supp. 2d 224, 234 (D. Mass. 2009); *Orozco v. Ahlin*, No. CV 08-5504 AHM (CT) 2008 U.S. Dist. LEXIS 108797, at *18 (C.D. Cal. Dec. 3, 2008); *In re Day*, 342 S.W.3d 193, 205 (Tex. Ct. App. 2011); *In re Brady*, No. 09-09-00360-CV, 2011 Tex. App. LEXIS 4502, at *5, *17 (Ct. App. June 16, 2011); *In re Williams*, 264 P.3d 570, 572 (Wash. Ct. App. 2011); *People v. Seymour*, No. A115509, 2009 Cal. App. Unpub. LEXIS 757, at *52 (Ct. App. Jan. 28, 2009).

144. *People v. Meyers*, No. C042511, 2005 WL 1303553, at *6 (Cal. Ct. App. June 2, 2005).

prior to that conviction, analogizing the situation to “once an alcoholic, always an alcoholic.”¹⁴⁵ Case opinions similarly contain descriptions of paraphilias in terms of addiction, such as an expert characterizing paraphilia as an addictive disorder,¹⁴⁶ and in another, the witness indicated that pedophilia is a “lifelong problem, like an addiction.”¹⁴⁷ Other cases note that testifying experts denoted paraphilic conditions as evidently incurable,¹⁴⁸ such as assuring that the disorder is one that “[would] not go away with time.”¹⁴⁹ At the same time, some experts are noted as indicating that a paraphilic disorder can be treated and possibly controlled over the long term.¹⁵⁰

In sum, courts’ frequent utilization of the mental diseases of sexual deviance indicates that these diseases resonate in the law and that they impact legal decisions, with important consequences for individuals. To the extent these decisions drive adjudication, sentencing, parole, and commitment consequences, they also impact the use and expenditure of government resources. The next section considers various normative and empirical issues that test the law-psychiatry interface and questions the propriety of those results.

145. *Felix v. Hennessey*, No. C 01-3138 WHA (PR), 2010 U.S. Dist. LEXIS 91926, at *4 (N.D. Cal. Aug. 11, 2010); *see also Duniyan v. State*, 247 S.W.3d 77, 78 (Mo. Ct. App. 2008) (indicating most psychologists believe past behavior is best predictor of future behavior).

146. *Litmon v. Flores*, No. C 03-03996 RMW (PR) Docket No. 45, 2008 U.S. Dist. LEXIS 58545, at *17 (N.D. Cal. July 11, 2008).

147. *In re Brian J.*, 58 Cal. Rptr. 3d 246, 257 (Ct. App. 2007).

148. *United States v. Irey*, 612 F.3d 1160, 1200 (11th Cir. 2010) (pedophilia); *People v. Scott*, No. F060923, 2011 Cal. App. Unpub. LEXIS 7648, at *7 (Ct. App. Oct. 6, 2011) (paraphilia NOS-nonconsent); *State v. Sugden*, 2010 WI App 166, ¶ 61, 330 Wis. 2d 628, 795 N.W.2d 456 (Ct. App. 2010) (paraphilia nonconsent); *People v. Schmidt*, 2002 Cal. App. Unpub. LEXIS 9490, at *25, *93 (Ct. App. Oct. 11, 2002) (sexual sadism).

149. *Duniyan*, 247 S.W.3d at 78; *see also People v. Meyers*, No. C042511, 2005 WL 1303553, at *6 (Cal. Ct. App. June 2, 2005) (indicating that while rapes occurred years before, with no evidence of sexual activity while confined, paraphilia is “an extremely deep-seated medical disorder that is life-long”).

150. *E.g.*, *Yancy v. Voss*, No. SACV 06-356-JFW (CW), 2011 U.S. Dist. LEXIS 43880, at *14 (C.D. Cal. Mar. 21, 2011); *In re Day*, 342 S.W.3d 193, 203 (Tex. Ct. App. 2011); *People v. Seymour*, No. A115509, 2009 Cal. App. Unpub. LEXIS 757, at *53 (Ct. App. Jan. 28, 2009).

III. The Law-Paraphilia Divide: Normative and Empirical Challenges

The gap-filling, desert-disease model of sex offender laws provides some utility to criminal justice officials in attempting to protect society from sexual predators. Still, the law-psychiatry interface and the translation between scientific and legal terms is a necessary yet potentially hazardous feat considering the substantial infringement on liberty and privacy that the laws inflict.¹⁵¹ Putting it bluntly, commentators writing about the “most critical problems that occur at the intersection of law and science in the (SVP) context,” note two general concerns, those being that “‘good science’ will be unrecognized or misunderstood by the law and that the pressures of the law will not only use but encourage ‘bad science.’ Both concerns are potential sources of injustice and . . . threaten the integrity of science and the law.”¹⁵²

A. *Normophilia: Contrasting Sexual Deviance*

The DSM’s asserted vision of the paraphilic disorders contemplates psychosexual interest in *unusual* objects, activities, or situations. The paraphilias, then, are theoretically contrasted with its antonym: normophilia.¹⁵³ A relevant inquiry is how to define normal sexual interests and behaviors and then to consider what value such an exercise has for society. It turns out that such categorization serves prevailing political and social interests by drawing import from psychiatry. Even though psychiatric diseases are intended to be based on scientific principles—rather than being prescriptive—the lynchpin of the sexual interest being an *unusual* one inherently involves also a normative inquiry.

History has shown that all societies endeavor to normalize sexual preferences and to regulate the sexual behavior of their members.¹⁵⁴ The definition of what is erotically normative and who decides, is, therefore, pivotal. In Western culture, the definitional role evolved from the nineteenth century’s religious model of sin to one drawing also on pathological criminality in the twentieth century.¹⁵⁵ The particular strategy of control in the last few decades and into the twenty-first

151. Prentky et al., *supra* note 27, at 359–60.

152. *Id.* at 357–58.

153. AGGRAWAL, *supra* note 3, at 1 (citation omitted).

154. See Saleh et al., *supra* note 5, at 365.

155. Moser & Kleinplatz, *supra* note 39, at 94.

century has involved defining any sexual interest considered deviant as pathognomonic, and hence symptomatic, of mental disease.¹⁵⁶ As a result, the “equating of unusual sexual interests with psychiatric diagnoses has been used to justify the oppression of sexual minorities and to serve political agendas.”¹⁵⁷ This explains the relevance of paraphilias in modern law.

In anthropological terms, paraphilias provide an emic categorization for a Westernized method of situating normality and inflicting societal pressures, causing individuals who vary sexually from the norm to experience distress.¹⁵⁸ But there are fundamental problems with this disease-based model. Psychiatrists have always had trouble with consistency in defining paraphilias or in distinguishing them from non-paraphilic, or normal, sexual interests.¹⁵⁹ What are considered deviant sexual interests vary cross-culturally and, within any culture, vacillate.¹⁶⁰ As typical sex practices change, “some paraphilias based upon a specific erotic interest may come and go as a function of historical realities.”¹⁶¹

Even within any time frame or cultural base, there are thorny issues in differentiating what is normal as compared to abnormal; and further, what is abnormal and also deserving a pathologizing stigma.¹⁶² Often the basis for defining normality is related to procreative sex. Krafft-Ebing, on whose work the American psychiatric profession’s initial embrace of

156. *Id.* at 92.

157. *Id.* at 93.

158. D.L. Davis & R.G. Whitten, *The Cross-Cultural Study of Human Sexuality*, 16 ANN. REV. ANTHROPOLOGY 69, 76 (1987).

159. Charles Moser, *Yet Another Paraphilia Definition Fails*, 40 ARCHIVES SEXUAL BEHAV. 483, 483 (2011).

160. Dinesh Bhugra et al., *Paraphilias Across Cultures: Contexts and Controversies*, 47 J. SEX RES. 242, 242 (2010).

Humans are sexual animals, but vary across culture in their propensity to use sex as a non-procreative and pleasurable activity. Sexual behaviors in the non-procreative tradition differ across partners; depend on the availability of partners, fantasies, and opportunities; and are influenced by cultural norms, mores or morals, religion, religious taboos, types of societies, and expectations of its members.

Id.

161. Saleh et al., *supra* note 5, at 362.

162. D. Richard Laws & William T. O’Donohue, *Introduction*, in SEXUAL DEVIANCE: THEORY, ASSESSMENT, AND TREATMENT, *supra* note 50, at 2 (noting such decisions are value judgments).

paraphilias was based, considered any non-procreative activity as perverse. In his view, bestiality, fellation, cunnilingus, and homosexuality were perversions, while rape was not because it could result in pregnancy.¹⁶³ In a similar vein, the DSM-II offered the following description for its diagnostic category of sexual deviations:

This category is for individuals whose sexual interests are directed primarily toward objects other than people of the opposite sex, toward sexual acts not usually associated with coitus, or toward coitus performed under bizarre circumstances, as in necrophilia, pedophilia, sexual sadism, and fetishism.¹⁶⁴

These indicate some continued vestige in religiosity, though other references could be used to determine normalcy, such as statistical, cultural, or subjective measures.¹⁶⁵

Because of the value judgment underlying normality and the uncertainty of human sexuality, together the paraphilias are perhaps the most contested group in the DSM.¹⁶⁶ A critic notes that the DSM's vision of sexual normality is too simplistic, pathologizing behaviors or fantasies that historically are quite common.¹⁶⁷ The DSM paraphilias appear to be based on an assumption that normal sex is about intimate bonding, yet historically, much sex involves coercive schemas and indulging power imbalances.¹⁶⁸ For instance, sadistic and masochistic behaviors are fairly

163. AGRAWAL, *supra* note 3, at 2.

164. AM. PSYCHIATRIC ASS'N, DIAGNOSTIC AND STATISTICAL MANUAL OF MENTAL DISORDERS DSM-II, § 302, at 44 (2d ed. 1968).

165. AGRAWAL, *supra* note 3, at 8; HOLMES & HOLMES, *supra* note 77, at 13-18.

166. Wakefield, *supra* note 64, at 195.

167. Andrew C. Hinderliter, *Defining Paraphilia: Excluding Exclusion*, 2 OPEN ACCESS J. FORENSIC PSYCHOL. 241, 253 (2010), available at http://forensicpsychologyunbound.ws/OAJFP/Volume_2__2010_files/Hinderliter%202010.pdf; see also Lippke, *supra* note 1, at 152. Surveys of male college students show many would rape a woman if assured of not being caught. See generally Mary P. Koss et al., *The Scope of Rape: Incidence and Prevalence of Sexual Aggression and Victimization in a National Sample of Higher Education Students*, 55 J. CONSULTING & CLINICAL PSYCHOL. 162 (1987); Neil M. Malamuth, *Rape Proclivity Among Males*, 37 J. SOC. ISSUES 138 (1981); Neil M. Malamuth et al., *Sexual Responsiveness of College Students to Rape Depictions: Inhibitory and Disinhibitory Effects*, 38 J. PERSONALITY & SOC. PSYCHOL. 399 (1980).

168. AGRAWAL, *supra* note 3, at 170 (observing sadomasochistic activities occur in "normal" lovemaking since dominance and aggression have social value); Hinderliter, *supra* note 167, at 255.

common¹⁶⁹ and are ubiquitous themes in pornographic materials.¹⁷⁰ Empirical studies similarly show that interests and behaviors considered abnormal in the DSM paraphilias are prevalent among the public at large.¹⁷¹ For example, a survey of undergraduate men showed that ninety-five percent reported having at least one deviant fantasy and that sixty-three percent had engaged in at least one deviant behavior.¹⁷² Similarly, in a community sample of men ages forty to seventy-nine, researchers found that sixty-two percent reported some degree of sexual arousal from at least one paraphilia-related stimulus while forty-four percent had engaged in at least one paraphilia-related sexual behavior.¹⁷³ Extrapolating to the prevalence in the general population, the authors of the latter study concluded that “[i]n view of this number, both mental and real-life sexual experiences that are currently commonly regarded as

169. Richard B. Krueger, *The DSM Diagnostic Criteria for Sexual Masochism*, 39 ARCHIVES SEXUAL BEHAV. 346, 351 (2010) (indicating 1-5% of Americans engage in sexually masochistic or sadomasochistic behavior); Richard B. Krueger, *The DSM Diagnostic Criteria for Sexual Sadism*, 39 ARCHIVES SEXUAL BEHAV. 325, 326 (2010) [hereinafter Krueger, *Sexual Sadism*].

170. Pamela M. Yates et al., *Sexual Sadism: Psychopathology and Theory*, in SEXUAL DEVIANCE: THEORY, ASSESSMENT, AND TREATMENT, *supra* note 50, at 215; Ana J. Bridges et al., *Aggression and Sexual Behavior in Best-Selling Pornography Videos: A Content Analysis Update*, 16 VIOLENCE AGAINST WOMEN 1065, 1075 (2010) (finding eighty-eight percent of scenes in popular pornography videos include physical aggression—primarily spanking, gagging, slapping).

171. Studies indicate a significant percentages of men in the community fantasize about coercive sexual encounters. WILLIAM H. MASTERS & VIRGINIA E. JOHNSON, *HOMOSEXUALITY IN PERSPECTIVE* 179 (1979) (finding forced sexual encounters were among the most reported sexual fantasies across gender/sexualities); Virginia Greendlinger & Donn Byrne, *Coercive Sexual Fantasies of College Men as Predictors of Self-Reported Likelihood of Rape and Overt Sexual Aggression*, 23 J. SEX RES. 1, 5 (1987) (finding nearly 54% of college men so fantasizing); A. B. Heilbrun & David T. Seif, *Erotic Value of Female Distress in Sexually Explicit Photographs*, 24 J. SEX RES. 47, 53 (1988) (reporting fantasies depicting women bound and in distress); Neil M. Malamuth & James V.P. Check, *Sexual Arousal to Rape Depictions: Individual Differences*, 92 J. ABNORMAL PSYCHOL. 55, 59 (1983) (reporting fantasies involving victim’s pain).

172. Kevin M. Williams et al., *Inferring Sexually Deviant Behavior from Corresponding Fantasies: The Role of Personality and Pornography Consumption*, 36 CRIM. JUST. & BEHAV. 198, 205 (2009) (prevalence of fantasies were 62% sadism, 83% voyeurism, 72% frotteurism, 13% pedophilia, 68% sexual assault, while the percentages for sexually deviant behaviors were 22%, 18%, 44%, 5%, and 25%, respectively).

173. Christopher Joseph Ahlers et al., *How Unusual are the Contents of Paraphilias? Paraphilia-Associated Sexual Arousal Patterns in a Community-Based Sample of Men*, 8 J. SEXUAL MED. 1362, 1366, 1369 (2011) (breaking down for the paraphilic-stimulus as fetishistic (24.5%), masochistic (18.5%), sadistic (24.8%), voyeuristic (38.7%), frotteuristic (15.0%), and pedophilic (10.4%)).

peculiar and exotic should lose their status as ‘rarities.’”¹⁷⁴

Others surmise that the paraphilias currently embodied in the DSM indicate that the authors have not considered the evolution of sexual mores.¹⁷⁵ A diagnostic descriptor unique to pedophilia provides a specific example that the DSM has been resistant to societal change. The latest DSM (DSM-IV-TR)¹⁷⁶ regards the sexual interest in prepubescent children and includes a parenthetical indicating a general description of children age thirteen and younger. Yet, the prepubescent nature of the child of interest is supposed to be at the heart of it being a disorder of sexual preference. Today, the age of thirteen does not truly represent the body shape, here being the degree of secondary sex characteristics, of prepubescence.¹⁷⁷ Statistics show that pubescence now generally occurs much earlier.¹⁷⁸ For this reason, commentators criticize the DSM’s vision of pedophilia as “using 1990s diagnostic criteria without employing additional knowledge derived from 21st-century science and specialized practice.”¹⁷⁹

Another issue with the modal assumption of chronicity is that the disorders of sexuality ignore the fact that an individual’s sexuality is malleable.¹⁸⁰ Interestingly, while paraphilias presume that individuals with the particular sexual interests covered therein are deviant, those who lack sexual desire are also targeted in the DSM, just within other categories (such as sexual arousal disorder or hypoactive sexual desire disorder).¹⁸¹ In sum, there appears no logical explanation for why certain paraphilias have been specifically recognized while others have not.¹⁸² Consider these examples: Why is fetishism involving nonliving objects

174. *Id.* The percentages of those engaging in paraphilic activities included those related to fetishism (24.5%), masochistic (2.3%), sadistic (15.5%), voyeuristic (18.0%), frotteuristic (6.4%), and pedophilic (3.8%). *Id.* at 1366.

175. Saleh et al., *supra* note 5, at 362; *see also* Langström, *supra* note 82, at 320–21 (reporting Swedish National Board of Health and Welfare in 2009 deleted the paraphilias of fetishism, sadomasochism, and transvestism from Swedish version of the World Health Organization’s ICD-10).

176. DSM-5 was pending at the time of this article. *DSM-5: The Future of Psychiatric Diagnosis*, AM. PSYCHIATRIC ASS’N, <http://www.dsm5.org/Pages/Default.aspx> (last visited May 10, 2013).

177. Robin J. Wilson et al., *Pedophilia: An Evaluation of Diagnostic and Risk Prediction Methods*, 23 *SEXUAL ABUSE* 260, 271 (2011).

178. Wakefield, *supra* note 64, at 205.

179. Wilson et al., *supra* note 177, at 271.

180. Wakefield, *supra* note 64, at 195.

181. DSM-IV-TR, *supra* note 2, §§ 302.71-.72, at 539, 543.

182. Fedoroff, *supra* note 98, at 240; Moser & Kleinplatz, *supra* note 39, at 96.

listed when it may be a solitary activity? With the large market for pornography materials, is voyeurism necessarily deviant? Is sexual fantasy involving a thirteen-year-old necessarily indicative of a diseased mind?

Notwithstanding the issue of what objects of interest are irregular, it is evident that fantasy and sexual interest are not always linked to actual sexual activity.¹⁸³ A recent study comparing samples of undergraduate males with convicted child molesters showed the former had more fantasies overall and more with sadomasochistic themes, even after adjusting for the potential for the molester group to underreport because of offenders' likelihood to provide biased responses in an attempt to provide socially desirable answers.¹⁸⁴ Reviewing empirical literature generally, other authors realistically conclude the following:

The idea that unusual or deviant sexual interests automatically lead to sexual offending or that all sexual offending refers directly to the presence of sexual deviant preferences is untenable (however invariably popular with (screen) writers). Numerous unusual sexual interests do not lead to offending behavior because they are directed towards objects (e.g. fetishism) or because people find other consenting adults to sexually interact with (e.g. sadomasochism). Interest in illegal sexual interactions (children or nonconsenting persons) can be found in a substantial part of the (male) population. The majority of them, however, never seem to act on these interests.¹⁸⁵

183. A Finnish study of men age 33–43 found the mean minimum age of preferred targets of sexual interest and fantasy was 24 years while the mean minimum age of actual sexual partners was around 34 years. Pekka Santtila et al., *Child Sexual Interactions with other Children are Associated with Lower Preferred Age of Sexual Partners Including Sexual Interest in Children in Adulthood*, 175 *PSYCHIATRY RES.* 154, 156 (2010) (acknowledging reasons results may not be generalizable).

184. Georgianna C. Brain, *A Comparison of the Nature and Prevalence of Sexual Fantasies Between Sex Offenders and Non-Offenders 24-5* (Aug. 2011) (unpublished M.S. thesis, Texas State University) (on file with Texas State University).

185. Wineke Smid et al., *Proxy Measures of Sexual Deviancy*, in *INTERNATIONAL PERSPECTIVES ON THE ASSESSMENT AND TREATMENT OF SEXUAL OFFENDERS* 172, 180 (Douglas Peter Boer et al. eds., 2011); see also Jerome V. Baumgartner et al., *Assessment of the Wilson Sex Fantasy Questionnaire Among Child Molesters and Nonsexual Forensic Offenders*, 14 *SEXUAL ABUSE* 19, 25 (2002) (finding hospitalized child molesters did not score significantly different on scales of sexually deviant fantasies than college males and samples of those sexually deviant but not criminals).

The classification of any particular sexual interest or behavior as unusual, and therefore paraphilic, is not the only problematic issue. Whether the paraphilia group should even be in the DSM is itself controversial.¹⁸⁶ A valid question, though left conspicuously unanswered by the APA, is: When does a certain sexual pleasure—even assuming it is unusual—become a mental disorder?¹⁸⁷ The APA has not made clear how the paraphilias that are included are inherently dysfunctional to the individual other than the disabling consequences that may be imposed by societal or legal reactions.¹⁸⁸ Experts note there is scant empirical evidence of any disease process that can explain the existence of the paraphilias listed in the DSM.¹⁸⁹ Indeed, the paraphilias so listed are not based on objective or empirical evidence of disorder.¹⁹⁰ To the contrary, studies exist that contradict the presence of any pathology or dysfunction that are otherwise deemed necessary to qualify as DSM mental disorders.¹⁹¹ It is notable that American psychiatry's conceptualization may be unique in the world. The British Psychological Society issued a statement in 2011 critiquing the inclusion of paraphilias in the DSM: "We believe that classifying these problems as 'illnesses' misses the relational context of problems and the undeniable social causation of many such problems[, and] of particular concern are the subjective and socially normative aspects of sexual behavior."¹⁹² Mental health experts around the world continue to express concern with the seeming unscientific basis for the DSM's sexual disorders. Even with the impending newest edition, to be referred to as DSM-5 and to be finalized in 2013, the APA has especially chosen not to field test the paraphilia group.¹⁹³ All of this strongly suggests that the strong focus on "normality," while eschewing the pathological element, means that paraphilias are more of a value-laden social construct than primarily a medical or scientific concept.¹⁹⁴ Together, the foregoing observations

186. Hinderliter, *supra* note 167, at 241.

187. Wakefield, *supra* note 64, at 195.

188. D. Richard Laws & William T. O'Donohue, *Introduction*, in *SEXUAL DEVIANCE: THEORY, ASSESSMENT, AND TREATMENT*, *supra* note 50, at 2.

189. Erickson, *supra* note 25, at 114.

190. Moser & Kleinplatz, *supra* note 39, at 94.

191. *Id.*

192. C. A. ALLAN, THE BRITISH PSYCHOLOGICAL SOC'Y, RESPONSE TO THE AMERICAN PSYCHIATRIC ASSOCIATION: DSM-5 DEVELOPMENT 25 (2011), available at http://apps.bps.org.uk/_publicationfiles/consultation-responses/DSM-5%202011%20-%20BPS%20response.pdf.

193. Fedoroff, *supra* note 98, at 238.

194. AGGRAWAL, *supra* note 3, at 4.

may explain ambiguities in the diagnostic criteria underlying the DSM disorders of sexual deviance.

B. *Diagnostic Issues*

Diagnostic vagueness in the paraphilia classifications is concerning. Notably, there are no validated or standardized diagnostic instruments which are available for the paraphilias.¹⁹⁵ Without clear boundaries, the paraphilia disorders cannot, then, even theoretically, distinguish adequately those with a mental disorder and those without.¹⁹⁶ The frequency of comorbid diagnoses indicates the overlapping nature of the paraphilias¹⁹⁷ and signifies vast heterogeneity within DSM disorders—meaning that persons with quite different profiles can be assigned the same paraphilic diagnosis.¹⁹⁸ It becomes understandable why studies of interrater reliability (degree of agreement among different raters) show extremely poor statistics for paraphilias.¹⁹⁹ In an effort to explain this lack of reliability, a psychiatrist with experience as a member of the working groups that developed DSM-III-R and DSM-IV observes that

[T]here is a natural tendency. . .to focus on making changes aimed at broadening the diagnostic umbrella of their assigned categories with the goal of increasing diagnostic coverage, i.e., reducing what they consider to be false negatives, an effort which inevitably comes at

195. Jackson & Hess, *supra* note 137, at 427; Richard B. Krueger et al, *Sexual and Other Axis I Diagnoses of 60 Males Arrested for Crimes Against Children Involving the Internet*, 14 PRIMARY PSYCHIATRY 623 (2009).

196. Moser & Kleinplatz, *supra* note 39, at 96.

197. Graham Mellsop & Shailesh Kumar, *Classification and Diagnosis in Psychiatry: The Emperor's Clothes Provide Illusory Court Comfort*, 14 PSYCHIATRY PSYCHOL. & L. 95, 97 (2007).

198. Stephen J. Morse, *Mental Disorder and Criminal Law*, 101 J. CRIM. L. & CRIMINOLOGY 885, 889 (2011).

199. The relevant statistic is the kappa coefficient. When the diagnosis can lead to significant infringement on the liberty of the individual involved, a suggested kappa of at least .9 (i.e., ninety percent rater agreement) should be expected. Jill S. Levenson, *Reliability of Sexually Violent Predator Civil Commitment Criteria in Florida*, 28 LAW & HUMAN BEHAV. 357, 363–64 (2004) (considering a kappa coefficient of .75 good, and citing prior studies with kappas of .30 sexual sadism, .36 paraphilia NOS, .47 exhibitionism, .65 pedophilia); W.L. Marshall, *Diagnostic Issues, Multiple Paraphilias, and Comorbid Disorders in Sexual Offenders: Their Incidence and Treatment*, 12 AGGRESSION & VIOLENT BEHAV. 16, 18 (2007) (reporting studies with kappas of .65 pedophilia, .30 sexual sadism, .47 exhibitionism, .36 paraphilia NOS).

the cost of increasing false positives.²⁰⁰

Part IV below develops the argument that the paraphilias, as scientific concepts, are a poor fit for important legal decisions as they have been reengineered to support the SVP law model that conflates sex crimes with mental disease. As a prerequisite for understanding such an argument, it is important to delineate how the vagueness in two diagnostic criteria of the paraphilia group has permitted mental health experts to substantiate affirmative diagnoses, despite significant reliability issues and the likelihood of false positives.

1. Criterion A: Abnormal Sexual Arousal Pattern

Criterion A generally concerns the individual's unusual "fantasies, sexual urges, or behaviors."²⁰¹ Because behaviors are detached with the "or" designation, many assessors have decoupled behaviors from the sexually arousing fantasies and sexual urges. Many forensic evaluators are thereby making a DSM paraphilia diagnosis without providing valid evidence to justify the diagnosis. Instead, they infer from the criminal sexual behavior the existence in the offender of the requisite "deviant sexual arousal pattern (i.e., recurrent, intense, sexually arousing fantasies and urges) that is the defining feature of a paraphilia."²⁰² Such inference may be unjustified. The fact that one can sexually function during a rape, for example, "provides no specific information about what is going on in his mind vis-à-vis the focus of his sexual arousal pattern during the act."²⁰³ Thus, the likelihood of false positives is high if the forensic examiner predicates the diagnosis on the mere commission of a criminal sexual offense without also establishing a causal link between the behavior and a paraphilic arousal pattern.²⁰⁴

Evaluators compound any such errors if they disregard the possibility that sexual behaviors had some cause other than a sexual fantasy or mental disorder.²⁰⁵ Individual circumstances and experiences

200. Michael B. First, *DSM-5 Proposals for Paraphilias: Suggestions for Reducing False Positives Related to Use of Behavioral Manifestations*, 39 ARCHIVES SEXUAL BEHAV. 1239, 1239 (2010) (citation omitted).

201. DSM-IV-TR, *supra* note 2, § 302.81, at 570.

202. First & Halon, *supra* note 98, at 444.

203. *Id.* at 446.

204. *Id.*

205. *Id.* at 445.

or cultural and social factors may drive behaviors.²⁰⁶ The offender may be acting out in a sexualized manner for other reasons, such as antisociality, alcohol-induced disinhibition, opportunity,²⁰⁷ or a medical condition (such as Alzheimer's disease).²⁰⁸

2. Criterion B: Significant Impairment

Mental health examiners now often also capitalize on a wording glitch existing in Criterion B, at least for those paraphilias specifically involving nonconsenting persons (i.e., pedophilia, sexual sadism, voyeurism, exhibitionism, and frotteurism).²⁰⁹ For them, the DSM-IV-TR indicates that Criterion B can be met if the behavior, urges, or fantasies cause significant impairment, or, alternatively, if the person acted upon them.²¹⁰ This appears to permit a diagnosis based on behavior alone, without also requiring that the urges cause the individual significant dysfunction or impairment. The Chair and Editor responsible for wording changes in the DSM-IV edition publicly acknowledge the problematic wording as simple errors that, in retrospect, the Chair and Editor have come to appreciate have contributed to misuse of the paraphilia section.²¹¹ Instead, there is a more simple explanation behind the wording in Criterion B, and it relates specifically to pedophilia. When the APA initially issued the DSM-IV (before the text revision), it did not include the alternative of acting on the urges for the nonconsenting-type

206. Alexander Tsesis, *Due Process in Civil Commitments*, 68 WASH. & LEE L. REV. 253, 294–95 (2011).

207. First, *supra* note 200, at 1242–43; First & Halon, *supra* note 98, at 449; *see also* Smid et al., *supra* note 185, at 180 (indicating studies show a “majority of sex offenders do not seem to have an explicit preference for illegal sexual interactions”); Vernon L. Quinsey, *Pragmatic and Darwinian Views of the Paraphilias*, 41 ARCHIVES SEXUAL BEHAV. 217 (2011) (arguing that pedophilia is inapplicable if the sexual contact with a child resulted from a “long-term strategy for obtaining an adult partner or . . . misapprehension of age”).

208. Wakefield, *supra* note 64, at 202; *see also* Drew A. Kingston et al., *Comparing Indicators of Sexual Sadism as Predictors of Recidivism Among Adult Male Sexual Offenders*, 78 J. CONSULTING & CLINICAL PSYCHOL. 574, 581 (2010) (regarding sexual sadism, the import is whether “violence is intended to cause physical suffering that is sexually arousing to the offender, as opposed to other possible motivations (e.g., gratuitous violence because the offender is angry at the victim”).

209. Allen Frances & Michael B. First, *Hebephilia Is Not a Mental Disorder in DSM-IV-TR and Should Not Become One in DSM-5*, 39 J. AM. ACAD. PSYCHIATRY & L. 78, 80 (2011).

210. *See id.*

211. *Id.*

paraphilias.²¹² Simply, Criterion B then required that the behavior, sexual urges, or fantasies cause significant distress or impairment to the individual.²¹³ This quickly turned into public relations nightmare for the APA because it prevented an evaluator from diagnosing an individual with pedophilia if he was not distressed about his sexual interest in children.²¹⁴ The concern had been that some egosyntonic individuals who act upon their pedophilic urges are not distressed.²¹⁵

Consequently, in the text revision (DSM-IV-TR), the authors modified the wording so that acting upon the sexual urges would be sufficient for Criterion B for pedophilia, though they made a broader extension as well as the other paraphilias involving nonconsenting victims.²¹⁶ In their own defense, the Chair and Editor of DSM-IV-TR contend that they had not anticipated the development of SVP laws, the role paraphilias would play in legal proceedings, or the significant harm resulting to many so diagnosed.²¹⁷

Even diagnosticians who continue to incorporate the requirement of distress or impairment to adjudge Criterion B often conflate its existence with the criminal justice consequences that the individual suffered, such as his arrest or incarceration, as a result of committing sexual offenses.²¹⁸ Arguably, the DSM itself suggests this connection. At first, the DSM expresses that a “[p]araphilia must be distinguished from the nonpathological use of sexual fantasies, behaviors, or objects as a stimulus for sexual excitement in individuals without a [p]araphilia.”²¹⁹ But then it explores what may qualify as dysfunction: “Fantasies, behaviors, or objects are paraphilic only when they lead to clinically

212. Hinderliter, *supra* note 167, at 251.

213. *Id.*

214. *Id.*

215. Wakefield, *supra* note 64, at 202 (“Some constituencies were outraged that these criteria seemed to give the ego-syntonic well-functioning paraphilic a free pass as far as disorder goes, even in such cases as the compulsive repetitive pedophile.”).

216. Frances & First, *supra* note 209, at 80-81.

217. *Id.* at 79-81.

218. This is evident in case law. *E.g.*, Sigman v. Rogers, No. 07-1383(DMC), 2008 U.S. Dist. LEXIS 71127, at *22 (D.N.J. Sept. 3, 2008) (finding social impairment since imprisoned twice); United States v. Abregana, 574 F. Supp. 2d 1145, 1152 (D. Haw. 2008) (noting impairment by being incarcerated thrice); People v. Hardin, 932 N.E.2d 1016, 1026 (Ill. 2010) (finding impairment based on prior convictions); People v. Willmes, No. H034656, 2010 Cal. App. Unpub. LEXIS 9444, at *11 (Ct. App. Nov. 30, 2010) (indicating repeated incarcerations caused impairment by keeping defendant from leading a normal life).

219. DSM-IV-TR, *supra* note 2.

significant distress or impairment (e.g., are obligatory, result in sexual dysfunction, require participation of nonconsenting individuals, *lead to legal complications*, interfere with social relationships).²²⁰

3. What Constitutes Paraphilia “Not Otherwise Specified”?

There are additional diagnostic challenges in the enigma of the paraphilia NOS residual. The “ambiguity has led to the distressing situation of the defining of paraphilia NOS by the idiosyncratic, unreliable, and untrustworthy standard of ‘you know it when you see it.’”²²¹ Its vagary is evident in many case opinions. In a notably oblique summary, an expert testified in a case in which the defendant was civilly committed that “[p]araphilia is a sexual disorder. Not otherwise specified means that I’m not able to be more specific.”²²² In another case, the opinion described the expert as indicating that “NOS was a type of paraphilia that was nonspecific and was a term that was used to describe general inappropriate sexual impulsivity.”²²³ Rather defensively, another testifying expert averred that the “DSM can’t possibly list all of the different potential . . . paraphilic diagnosis that are present out there, there’s a multitude.”²²⁴ Conversely, the defense expert in another case represented the NOS residual in political ideology, asserting that it was “a way for the [DSM] authors to cover themselves in case a new sexual appetite develops.”²²⁵ Several experts testified that paraphilia NOS was a residual category for less frequently occurring paraphilias,²²⁶ a concept

220. *Id.* (emphasis added).

221. Frances & First, *supra* note 209, at 80.

222. *In re* Grinstead, No. 09-07-00412-CV, 2008 WL 5501164, at *3 (Tex. Ct. App. Jan. 15, 2009); *see also* *People v. Pederson*, No. A115239, 2007 Cal. App. Unpub. LEXIS 9962, at *16-17 (Ct. App. Dec. 11, 2007) (noting expert testified NOS means no specific diagnosis exists within the DSM independently).

223. *People v. Bailey*, 937 N.E.2d 731, 737 (Ill. App. Ct. 2010).

224. *In re* A.M., 2010 ND 163, ¶ 4, 787 N.W.2d 752, 754 (2010) (internal quotation marks omitted) (expert explaining DSM’s failure to include paraphilia NOS-nonconsent).

225. *Commonwealth v. Rossmesl*, No. 1952-05, 2006 Pa. Dist. & Cnty. LEXIS 285, at *12 (Aug. 16, 2006); *see also* *People v. Hughes*, No. H022186, 2003 Cal. App. Unpub. LEXIS 6761, at *79 (Ct. App. July 11, 2003) (noting expert described NOS as any paraphilia that does not fit the specific categories).

226. *E.g.*, *United States v. Carta*, 620 F. Supp. 2d 210, 224 (D. Mass. 2009); *In re Orozco*, No. CV08-5504 AHM (CT), 2008 U.S. Dist. LEXIS 108797, at *25 (D. Cal. Dec. 3, 2008); *In re Dahl*, No. 96,728, 2007 Kan. App. Unpub. LEXIS 72, at *4 (Ct. App. Sept. 21, 2007); *Commonwealth v. Rossmesl*, No. 1952-05, 2006 PA. Dist. & Cnty. Dec. LEXIS 285, at *9, 12 (Aug. 16, 2006).

recognized in the DSM.²²⁷ The chimera of such a diagnosis did not seem to trouble judges considering that many case opinions mentioned a diagnosis of paraphilia NOS generally, without further specifying the particular abnormal sexual interest.²²⁸

Because of the lack of standards, assessors seem to not reserve paraphilia NOS just for unique or newly recognized sexual interests. Observers witnessed the unparsimonious lumping of disparate behaviors into a single paraphilia NOS diagnosis:

Most professionals in this field have seen evaluators connect separate types of offenses (one rape and one report of targeted masturbation in prison) to establish a single paraphilia diagnosis, or an act and an inferred fantasy (one rape and past bondage games with a consenting girlfriend) to establish a paraphilia. If, however, even under the most rigorous scrutiny there is no paraphilia, this implies that there is no basis to infer sexually deviant fantasies, thoughts, or behaviors in the offender's criminal or personal history. Instead, what is in the offender's history is general criminality with a sexual crime contained within it.²²⁹

The following is offered as another example:

[E]valuators will take a Lewd and Lascivious act in the presence of a minor and a sexual assault on an adult many years later; connect the two and diagnose Paraphilia NOS (non-consent). Therefore, under the current conditions of sex offender screening, the acts

227. But this view makes the use of paraphilia NOS for hebephilia problematic. *See infra* Part III.C.

228. *E.g.*, *United States v. Roderick*, No. 2:10-CR-741-DCN, 2011 U.S. Dist. LEXIS 81086, at *2 (D.S.C. July 25, 2011); *Jennings v. Rogers*, No. 06-5025 (JLL), 2008 U.S. Dist. LEXIS 36787, at *9 (D.N.J. May 2, 2008); *In re Brady*, No. 09-09-00360-CV, 2011 Tex. App. LEXIS 4502, at *8, *13 (Ct. App. June 16, 2011); *In re Grinstead*, No. 09-07-004120CV, 2008 WL 5501164, at *3 (Tex. Ct. App. Jan. 15, 2009); *People v. O'Shell*, 92 Cal. Rptr. 3d 57, 60 (Ct. App. 2009); *In re Allison*, 2005 WI App 1, ¶ 9, 277 Wis. 2d 873, 690 N.W.2d 884 (Ct. App. 2004).

229. Dean R. Cauley, *The Diagnostic Issue of Antisocial Personality Disorder in Civil Commitment Proceedings: A Response to DeClue*, 35 J. PSYCHIATRY & L. 475, 493 (2007).

don't even need to be necessarily similar in nature, but must merely have a non-consenting victim.²³⁰

This type of aggregation was represented in a legal case where the state expert described a “plethora of sexual deviancy that comes together” for the diagnosis of paraphilia NOS, citing to sexual interactions with prepubescent children and animals, an aggressive sexual act with a nineteen-year-old, and acts involving masochism, frotteurism, and exhibitionism.²³¹

From a scientific perspective it should be obvious that “[t]o the extent that this category [of not otherwise specified] becomes a waste-basket for sex offenders, it is taxonomically useless (i.e., it provides no discrimination).”²³² Experts assert that, in practice, clinicians worryingly overuse paraphilia NOS.²³³

C. *Constructing Arousal to Teenagers as Deviant: Hebephilia*

The issues of what is normatively deviant and the lack of diagnostic specificity in the paraphilias have led to an emerging controversy in the forensic science field and the courts. This involves the use of a new category of paraphilia involving sexual interest or behaviors toward minors that are older or more sexually mature (physically) than the group currently covered by the DSM's version of pedophilia. The prevailing moniker is hebephilia, a term constructed from the Greek word *ephebos*, meaning “one arrived at puberty.”²³⁴

There is little consensus about hebephilia. Even those who advocate hebephilia as a recognized mental disorder, disagree about what level of sexual maturity is involved (e.g., early pubescence, pubescence, or postpubescence) or what numerical age group, if any, should be included. There is also disagreement among them as to whether it should best be addressed as an extension of pedophilia or in the paraphilia NOS

230. *Id.* at 494.

231. *In re Grinstead*, 2008 WL 5501164, at *3.

232. Prentky et al., *supra* note 27, at 367.

233. Cauley, *supra* note 229, at 493–94 (“The recent over application of the Paraphilia NOS diagnosis in this field has reached the level where any two sexual offenses in the offender's history, no matter what the nature of the individual acts, will result in an NOS diagnosis.”); Marshall, *supra* note 199, at 20.

234. AGGRAWAL, *supra* note 3, at 45. Alternative names are hebophilia, ephebophilia, pheophilia, and Lolita Syndrome. *Id.*

residual. The argument for the latter is that paraphilia NOS includes interest in nonconsenting persons and thereby hebephilia is covered since it involves persons who generally cannot legally consent. The paraphilias working group for the upcoming DSM-5 have vacillated on the proposed definition, though they are working with it as a change to pedophilia.

Analogizing to pedophilia is problematic considering the prepubescence required by the former is vastly different in sexual maturity than pubescence. Pubescence can trigger normal sexual interest from a statistical perspective.²³⁵ As examples, normal desires can be triggered in these hypotheticals:

Individuals who harbor unrealistic Romeo-and-Juliet visions of young love, individuals who routinely have access to and find themselves sexually stimulated by young females or males (e.g., junior high school teachers, priests), individuals attracted to “forbidden fruit” or preoccupied with sexual purity, individuals who are predatory and see young girls and boys as easily seduced and thus a target of opportunity hard to resist, and many others may be inclined in their fantasies and possibly their actions to prefer pubescent targets for their desires.²³⁶

To the extent that a reason to find attraction to prepubescent children deviant as it does not foster procreative goals, it is noted that from a Darwinian perspective, attraction to pubescence could have reproductive value considering pubertal girls have the potential of many offspring in the future.²³⁷

Hebephilia, therefore, violates a basic principle underlying the paraphilias. They were meant to apply only to that which is unusual or bizarre, and attraction to pubescent or postpubescent individuals is neither.²³⁸ There is much research that supports the conclusion that many nonoffending men are sexually attracted to pubescent individuals, indicating it is definitively within the range of normality.²³⁹ In addition, various studies show that many men in the community have sexual

235. *Id.*

236. Wakefield, *supra* note 64, at 206.

237. Quinsey, *supra* note 207.

238. Frances & First, *supra* note 209, at 83.

239. *Id.* at 84.

fantasies or behaviors involving youth of various ages.²⁴⁰

Critics likewise contend that there is scant research on whether sexual interest in pubescent or post-pubescent youth is pathological and question why it is supposedly so fundamentally deviant that it deserves stigmatic labeling and ostracization. A commentator has suggested that including hebephilia in the DSM is extremely premature from a scientific perspective, as a “full understanding of [hebephilia] would require consulting experts and research from psychology, sexology, evolutionary biology, ethology, anthropology, and sociology.”²⁴¹ The commentator has gone on to suggest that

The lack of research interest in pedohebephilia is breathtaking in light of the extreme societal concern over adults and adolescents who interact sexually with children, and considering that [five percent] or more of males (over [five] million adults and 600,000 teenagers in the U.S.) may be preferentially attracted to children.²⁴²

240. See generally John Briere & Marsha Runtz, *University Males' Sexual Interest in Children: Predicting Potential Indices of "Pedophilia" in a Nonforensic Sample*, 13 CHILD ABUSE & NEGLECT 65 (1989) (surveying 193 male university students, finding nine percent reported fantasizing about sex with a young child, five percent masturbating to fantasies of sex with children, and seven percent likely to have sex with a child if assured they would not be caught or punished); Claude Crépault & Marcel Couture, *Men's Erotic Fantasies*, 9 ARCHIVES SEXUAL BEHAV. 565 (1980) (sampling ninety-four men, finding sixty-two percent reported fantasizing about sexually initiating with a with a young girl and three percent with a young boy); Terrel L. Templeman & Ray D. Stinnett, *Patterns of Sexual Arousal and History in a "Normal" Sample of Young Men*, 20 ARCHIVES SEXUAL BEHAV. 137 (1991) (surveying sixty college men where five percent expressed an interest in sex with a girl under twelve); Mary Ellen Fromuth et al., *Hidden Child Molestation: An Investigation of Adolescent Perpetrators in a Nonclinical Sample*, 6 J. INTERPERSONAL VIOLENCE 376, 379-80 (1991) (finding three percent of college men reported having a sexual experience with a child when they were age sixteen or over); T.P. Smith, *Effects of the Child's Relative Age Appearance and Attractiveness on Vulnerability to Pedosexual Interactions*, U. MICROFILMS INT'L, 1993, at 54.(reporting three percent of sample of 183 male college students on condition of anonymity had sexual contact with a prepubescent girl age twelve or younger and eleven percent with a girl twelve to fifteen when they were over eighteen).

241. Richard Kramer, *APA Guidelines Ignored in Development of Diagnostic Criteria for Pedohebephilia*, 40 ARCHIVES SEXUAL BEHAV. 233, 233 (2011).

242. *Id.* (citation omitted). The paraphilias subgroup ignores DSM research agenda development issues, including developmental issues concerning pedohebephilia since attraction to children develops during childhood. *Id.*

Despite hebephilia not yet being formally incorporated in the DSM, many mental health experts, as well as most courts in which it has been at issue, have already accepted it as a proper diagnosis. The confusion and lack of diagnostic criteria, however, are represented in the various definitions experts have given in legal proceedings. Case opinions show that mental health experts have described hebephilia as involving sexual interest in adolescents²⁴³ and, similarly, as involving sexual interest in “underage individuals though they are not considered children [such as adolescents].”²⁴⁴ However, other versions emphasize post-pubescence,²⁴⁵ including interest in “post-pubescent adolescents, i.e., teenagers or minors having secondary . . . characteristics.”²⁴⁶ One depiction expressly tied it to a legal definition: the expert defined hebephilia as sexual interest in post-pubescent children below the age of consent.²⁴⁷ Still other accounts appear to ignore sexual maturity and are simply age-based, such as delineating hebephilia to include interest in children older than thirteen,²⁴⁸ children between thirteen to sixteen years of age,²⁴⁹ and, finally, “young teens to . . . about age [seventeen].”²⁵⁰ In sum, the definitions in case law are disparate, defining hebephilia in terms of stage of sexual maturity, age ranges, and legal age of consent.

243. *United States v. Graham*, 683 F. Supp. 2d 129, 142 (D. Mass. 2010); *United States v. Polizzi*, 549 F. Supp. 2d 308, 337 (E.D.N.Y. 2008); *State v. Rachel*, 2010 WI App 60, ¶ 21, 324 Wis.2d 465, 782 N.W. 2d 443 (Ct. App. 2010); *In re Ayers*, No. 37822-1-II, 2010 Wash. App. LEXIS 647, at *1 (Ct. App. Mar. 30, 2010); *In re Miller*, No. 6-324 / 05-1453, 2006 Iowa App. LEXIS 720, at *3 (Ct. App. July 12, 2006); *but see Donaghe v. State*, No. 31144-5-II, 2005 Wash. App. LEXIS 1943, at *6 (Ct. App. Aug. 3, 2005) (analogizing hebephilia to pedophilia but involving adolescents).

244. *In re Williams*, 253 P.3d 327, 330 (Kan. 2011).

245. *E.g.*, *In re E.J.S.*, No. A-0696-06T2, 2007 WL 1038894, at *4 (N.J. Super. Ct. App. Div. Apr. 9, 2007); *In re Navratil*, 799 N.W.2d 643, 648 (Minn. Ct. App. 2011).

246. *United States v. Abregana*, 574 F. Supp. 2d 1145, 1150–51 (D. Haw. 2008).

247. *In re A.H.B.*, 898 A.2d 1027, 1030 (N.J. Super. Ct. App. Div. 2006).

248. *In re Dahl*, No. 96,728, 2007 Kan. App. Unpub. LEXIS 72, at *4 (Ct. App. Sept. 21, 2007).

249. *Commonwealth v. Connolly*, No. 05-1059C, 2006 Mass. Super. LEXIS 77, at *4 (Ct. App. Div. Feb. 3, 2006). In some cases experts testified that a hebephilia diagnosis applied even though the sexual activities with minors appeared consensual if not for their age. *In re Navratil*, 799 N.W.2d at 653 (Randall, J., dissenting) (calling it statutory rape with “women slightly younger”); *In re Miller*, No. 6-324 / 05-1453, 2006 Iowa App. LEXIS 720, at *4 (Ct. App. July 12, 2006) (noting expert characterizing it as defendant’s inability to resist an adolescent who approaches); *Commonwealth v. Plucinski*, 868 A.2d 20, 27 (Pa. Super. Ct. 2005) (referring to defendant’s actions with 14-year-old stepdaughter as being a sexual surrogate and situational).

250. *United States v. Carta*, 620 F. Supp. 2d 210, 225 n.166 (D. Mass. 2009) (alteration in original).

In many cases, the expert linked the hebephilia diagnosis generally to paraphilia NOS.²⁵¹ These included “paraphilia, underage males”²⁵² or paraphilia NOS with post-pubescent boys.²⁵³ In a sentencing hearing in a case for child pornography, the diagnosis was quite specific: “Paraphilia NOS Attraction to [and] Viewing of Sexually Explicit Images of Post-Pubescent Adolescent Females.”²⁵⁴ In another case the court added supervised release conditions based, in part, on the diagnosis of paraphilia NOS “involving pornography and teenage girls.”²⁵⁵ In a particularly strong advocacy for the significance of hebephilia, the expert asserted that it was causally related to the defendant’s past offending and to his likelihood of recidivism.²⁵⁶

The proponents of hebephilia face strong opposition. Legal challenges to its use in court proceedings are considered in the next Part. Furthermore, certain mental health experts worry that the field of psychiatry loses credibility by asserting, for instance, that a nineteen-year-old who prefers sex with a fourteen-year-old has a mental disorder²⁵⁷ or, regardless of an age difference, in treating attraction to a developed fourteen-year-old the same as attraction to a prepubescent ten-year-old.²⁵⁸ Indeed, in many countries, including in Europe, an adult

251. *In re Williams*, 253 P.3d 327, 330 (Kan. 2011) (paraphilia NOS with hebephilic tendencies with adolescents); *In re Johnson*, No. A11–792, 2011 Minn. App. Unpub. LEXIS 902, at *5 (Minn. Ct. App. Sept. 26, 2011); *In re Dahl*, No. 96,728, 2007 Kan. App. Unpub. LEXIS 72, at *3 (Ct. App. Sept. 21, 2007); *In re E.J.S.*, No. A-0696-06T2, 2007 N.J. Super. Unpub. LEXIS 2992, at *4 (Ct. App. Div. Apr. 9, 2007); *In re Miller*, No. 6-324/05-1453, 2006 Iowa App. LEXIS 720, at *3 (Ct. App. July 12, 2006); see also *In re M.N.A.*, No. A-4354-09T2, 2010 N.J. Super. Unpub. LEXIS 3036, at *6 (Ct. App. Div. Dec. 17, 2010) (involving expert who gave a plethora of NOS diagnoses, including depressive disorder NOS, impulse control disorder NOS, and personality disorder NOS).

252. *Berg v. Missouri*, 342 S.W.3d 374, 380 (Mo. Ct. App. 2001).

253. *Sigman v. Rogers*, No. 07-1383(DCM), 2008 WL 4104447, at *5 (D.N.J. Sept. 3, 2008).

254. *Walker v. United States*, No. 7:09-CV-90060, 2010 U.S. Dist. LEXIS 108981, at *48 (M.D. Ga. May 24, 2010).

255. *United States v. Blauvelt*, No. WDQ-08-0269, 2008 U.S. Dist. LEXIS 87060, at *13 (D. Md. Oct. 28, 2008).

256. *United States v. Abregana*, 574 F. Supp. 2d 1145, 1151 (D. Haw. 2008).

257. Richard Wollert & Elliot Cramer, *Sampling Extreme Groups Invalidates Research on the Paraphilias: Implications for DSM-5 and Sex Offender Risk Assessments*, 29 BEHAV. SCI. & L. 554, 555 (2011); Richard Green, *Hebephilia is a Mental Disorder?*, SEXUAL OFFENDER TREATMENT, http://www.sexual-offender-treatment.org/2-2010_01.html (last visited Apr. 10, 2013).

258. Howard Zonana, *Sexual Disorders: New and Expanded Proposals for the DSM-5—Do We Need Them?*, 39 J. AM. ACAD. PSYCHIATRY & L. 245, 248 (2011).

having voluntary sexual relations with a fourteen-year-old is legal.²⁵⁹ These issues, along with the likelihood that most sex with pubescent teenagers, and much of it with younger children, is more opportunistic,²⁶⁰ means a high probability of many false positive diagnoses of mental disorder.²⁶¹ One commentator summarized the situation thusly: “Diagnosing hebephilic behavior as mental disorder brushes aside common patterns of psychosexual development, sidesteps cultural influences on sexuality, ignores historic precedents, insults much of Europe and elsewhere that legalizes sex with [fourteen] year olds, or younger, and attempts to insinuate psychiatry as an agent of social control.”²⁶²

IV. Reframing Sex Crimes as Mental Disease

The law’s utilization of psychiatric diagnoses in the application of policies to control those sexual offenders perceived as dangerous continues despite significant normative and scientific challenges. Is the charge true that psychiatry is being used as a “prop of legitimacy” for SVP laws?²⁶³ The desert-disease model has in some ways benefited the mental health field where it has resulted in a “cottage industry and generated two partisan advocacy expert camps” in providing forensic evaluations.²⁶⁴ The partisanship is related not only to the adversarial

259. See generally *Worldwide Ages of Consent*, AVERT, <http://www.avert.org/age-of-consent.htm> (last visited Apr. 10, 2013). The age of consent in twenty European countries is under sixteen. *Id.*; Emily J. Stine, *When Yes Means No, Legally: An Eighth Amendment Challenge to Classifying Consenting Teenagers as Sex Offenders*, 60 DEPAUL L. REV. 1169, 1208 (2011).

260. Wakefield, *supra* note 64, at 204. “What would motivate a man who is attracted to adult women (*i.e.*, gynephilic) to approach a young girl for sex?” Amy D. Lykins et al., *Sexual Arousal to Female Children in Gynephilic Men*, 22 SEXUAL ABUSE 279, 280 (2010). Researchers studied 214 men referred to a Toronto sexual addiction center and classified as gynephilic. *Id.* at 282–85. While on average tests showed greatest arousal to adult females, there was also a significant response to pubescent, even prepubescent, females. *Id.* at 285. The authors find this of interest as nothing in their background suggested sexual interest other than to adult females. *Id.* The researchers conclude that results support the theory gynephilic men may molest girls as substitutes for their main preference. *Id.* at 287.

261. Wakefield, *supra* note 64, at 204.

262. Green, *supra* note 257.

263. Eric S. Janus, *Sexually Violent Predator Laws: Psychiatry in Service of a Morally Dubious Enterprise*, 364 MED. CRIME & PUNISHMENT 50, 50 (2004).

264. John Matthew Fabian, *Paraphilias and Predators: The Ethical Application of Psychiatric Diagnoses in Partisan Sexually Violent Predator Civil Commitment Proceedings*, 11 J. FORENSIC PSYCHOL. PRAC. 82, 82 (2011) [hereinafter Fabian,

nature of the law but also to the vagary in applying the DSM's criteria for paraphilias. Skeptics of the use of paraphilias in the law have charged that the "tolerance of the legal system for nonstandard and non-authoritative diagnoses suggests strongly that the legal system's reliance on diagnostic testimony is largely pretextual."²⁶⁵ It serves their mutual interests by labeling sexual offenders as mentally ill and also dangerous, therefore deserving severe punishment and preventive detention. It could be that the DSM's categorization provides clinicians and legal actors comfort by acknowledging that the diagnoses exist.²⁶⁶ Yet, as explained in this Article, it appears a false comfort considering the negative consequences to the defendants involved and the potential waste of governmental and treatment resources in the process. In sum, because the paraphilias are normatively questionable and scientifically unsound, they provide a poor fit for answering legal questions that intrude significantly upon civil rights.

A. *Pretextuality*

The previous section demonstrated that practitioners have employed much diagnostic flexibility with the DSM criteria in a manner that serves the desert-disease model for controlling sexual offenders. A crucial inquiry is whether the law-psychiatry interface here has become so entangled that bad science is going unrecognized in legal forums. A prominent critic of the use of the DSM's unscientific paraphilias in SVP law decisions observes: "For reasons that were unanticipated just a few decades ago, the precise definitions of the paraphilias have become entwined with the attempt to prevent such harm to the public from the individuals illegally acting out certain paraphilic desires."²⁶⁷ Despite significant flaws in the science underlying the designation of paraphilic disorders, two constituencies, at least, are incentivized to maintain their utility: criminal justice officials and forensic evaluators. The legal and forensic psychiatry disciplines have certainly allied in using the specter of mental disease to control sexually deviant offenders. But they have done so decidedly in favor of prosecutorial interests. Professionals

Paraphilias and Predators].

265. Robert A. Prentky et al., *Commentary: Muddy Diagnostic Waters in the SVP Courtroom*, 36 J. AM. ACAD. PSYCHIATRY & L. 455, 457 (2008) [hereinafter Prentky et al., *Muddy Diagnostic Waters*].

266. Mellsop & Kumar, *supra* note 197, at 96.

267. Wakefield, *supra* note 64, at 196.

engaged in the cross-disciplinary interface appear to have adopted a phenomenological approach that has devolved into what social scientists refer to as groupthink—that is, when a group’s desire for consensus supersedes any realistic consideration of alternative theories or a reevaluation of potential faults in its ideology.²⁶⁸

Evidence of pretextuality in favor of prosecutorial interests is found in the conflation of sexual crimes with psychiatric illness by using criminal behavior as often the sole basis for a paraphilic diagnosis. “Enterprising” forensic evaluators now rely upon criminally offensive sexual behavior to fulfill both Criteria A (sexual preference) and B (dysfunction).²⁶⁹ These diagnostic loopholes inappropriately lead to the assignment of mental illness based primarily (or even solely) on repeated sexual offenses considering many paraphilic-type acts are crimes.²⁷⁰ In numerous case opinions, indeed, it often appears that the diagnosis for paraphilia was based on past criminal sexual behaviors alone.²⁷¹ Multiple problems result from this conflation. In psychological terms, this represents what is empirically referred to as the logical fallacy of affirming the consequent—that is, using the sexual offense to assume the paraphilia (the antecedent).²⁷² It seems illogical, too, that when a diagnosis is based on behavior, the behavior indicates a disorder even if it benefits the individual.²⁷³ Such diagnosis may not, therefore, represent any underlying pathology.²⁷⁴ The mere consequence that a sexual

268. See generally IRVING L. JANIS, VICTIMS OF GROUPTHINK: A PSYCHOLOGICAL STUDY OF FOREIGN-POLICY DECISIONS AND FIASCOES (1972).

269. Wakefield, *supra* note 64, at 202; First, *supra* note 200, at 1240.

270. Krueger, *Sexual Sadism*, *supra* note 169, at 341; Moser & Kleinplatz, *supra* note 39, at 98.

271. *E.g.*, *People v. Seja*, 2011 Cal. App. Unpub. LEXIS 5474, at *35 (Ct. App. July 22, 2011) (noting expert’s diagnosis supported by defendant’s prior crimes); *In re Conley*, No. 09-10-00383-C.V., 2011 Tex. App. LEXIS 7877, at *4 (Ct. App. Sept. 29, 2011) (state expert basing paraphilia NOS on defendant’s sexual offenses against non-consenting adults); *People v. Hardin*, 932 N.E.2d 1016, 1026 (Ill. 2010) (relying on three sex offenses with non-consenting persons (teenagers) over five years); *State v. Sugden*, 2010 WI App 166, ¶ 6, 330 Wis.2d 628, 795 N.W.2d 456 (Ct. App. 2010) (relying on details of defendant’s rapes and sexual aggression toward wife); *People v. Runge*, 917 N.E.2d 940, 949 (Ill. 2009) (basing sexual sadism on documented history of sexual transgressions); *People v. Torres*, 84 Cal. Rptr. 2d 96, 100 (Ct. App. 1999) (“[d]efendant’s criminal history, according to both experts, demonstrates his paraphilia.”).

272. First & Halon, *supra* note 98, at 446.

273. Moser & Kleinplatz, *supra* note 39, at 94.

274. Holly A. Miller et al., *Sexually Violent Predator Evaluations: Empirical Evidence, Strategies for Professionals, and Research Directions*, 29 LAW & HUM. BEHAV. 29, 39 (2005).

behavior is illegal or that it may be socially distasteful should forensically be irrelevant to the diagnostic evaluation.²⁷⁵

This manipulation of the DSM criteria thereby transforms immoral, sexual conduct into mental disease.²⁷⁶ An example is when diagnosticians use the paraphilia NOS category based almost solely on the individual's commission of multiple, yet disparate, sexual offenses. Here, the diagnostician merely amalgamates various sex crimes and infers a generic, wastebasket diagnosis. Such transformation has served the disease model, in that repeated, or even the threat thereof of future, behaviors becomes the disease component incorporated into SVP laws.²⁷⁷ The potential for a slippery slope becomes apparent. Assuming virtually all victims of sexual crimes are non-consenting, any individual who commits more than one sex-based offense over six months apart, no matter how disparate the behaviors or the motives, could theoretically be diagnosed with paraphilia NOS.²⁷⁸

Diagnostic criteria that presumes that a paraphilia cannot go into remission compounds these problems.²⁷⁹ Again, the diagnosis may not represent an underlying pathology but may be simply a descriptor of past behavior and, importantly, presumptively unchanging behavior.²⁸⁰ Any history of sex offenses, no matter how far in the past, is transformed into mental illness and assumed to be lifelong. This universal assumption of chronicity and the pretextuality of the paraphilias manifest most often in the diagnosis of mental disorder for child molesters and rapists.

B. *Child Molestation as Mental Disease*

Pedophilia is perhaps the most commonly known paraphilia and the one most likely to be recognized outside the mental health field. But this also makes the paraphilia of pedophilia an area where law, science, and common parlance collide. Often, the terms pedophile and child molester are used interchangeably,²⁸¹ as are pedophilia and the behavior of child

275. Moser & Kleinplatz, *supra* note 39, at 95.

276. Erickson, *supra* note 25, at 92–109; *see also* Erickson & Vitacco, *supra* note 43, at 8 (APA's vision of mental disorder requires distress or disability; "mere social deviance [being] insufficient").

277. Saleh et al., *supra* note 5, at 366.

278. Prentky et al., *supra* note 27, at 367.

279. Miller et al., *supra* note 274, at 39.

280. *Id.*

281. HOLMES & HOLMES, *supra* note 77, at 110.

molestation.²⁸² This conflation of terms is problematic for various reasons. It makes the pedophilic disorder intrinsically indistinguishable from the crime.²⁸³ And the diagnosis loses its connection to professional skill and training. For instance, it has been suggested that virtually any layperson can make the forensic diagnosis of pedophilia, even if the diagnosis results in significant legal consequences: “Some legal experts have suggested that pedophilia is so behaviorally explicit that anyone could arrive at the diagnosis with an adequate record and a command of the English language.”²⁸⁴

1. Issues of Reliability

Merging behavior with a diagnosis of pedophilia has contributed to diagnostic flaws by ignoring the recurrent and intense sexual fantasies or urges required by the DSM’s criteria. Essentially, the disorder of pedophilia can fundamentally differ from child molestation in requiring a psychological propensity—that is, a sexuo-erotic *preference* for prepubescent children, whether acted upon or not.²⁸⁵ Hence, it is critical to reinforce the difference based on the sexual interest: those with pedophilia have the sexual fantasies preferentially involving sexually immature youth but may not molest them, while those who do sexually assault young children may not have such a preference and thereby

282. *United States v. Ardolf*, 683 F.3d 894, 902 (8th Cir. 2012); Seto, *supra* note 76, at 164; Melissa Hamilton, *The Child Pornography Crusade and its Net-Widening Effect*, 33 CARDOZO L. REV. 1679, 1693 (2012).

283. Zonana, *supra* note 258, at 246. Some criminal statutes expressly use the terminology of pedophilia. DEL. CODE ANN. tit. 11, § 4205A (2010) (imposing additional penalties for pedophile offenders); S.D. CODIFIED LAWS § 22-24B-1 (2006) (codifying crime of “criminal pedophilia”).

284. Miller et al., *supra* note 274, at 47; *see United States v. Colin*, 1:07-CR-512 (GLS), 2007 U.S. Dist. LEXIS 91409, at *11–12 (N.D.N.Y. Dec. 12, 2007) (acknowledging absence of a clinical diagnosis, but labeling defendant a pedophile based on defendant’s sexually-charged interactions with 12-year-old girls).

285. AGRAWAL, *supra* note 3, at 47; Jennifer Jason, Note, *Beyond No-Man’s Land: Psychiatry’s Imprecision Revealed by its Critique of SVP Statutes as Applied to Pedophilia*, 83 S. CAL. L. REV. 1319, 1340 (2010) (observing experts improperly focus on illegal behavior, already criminalized, and not assessing for sexual fantasies of pubescent children). The psychiatric “bible” for the international psychiatry community specifically requires the sexual preference to prepubertal or early puberty children. INTERNATIONAL STATISTICAL CLASSIFICATION OF DISEASES AND RELATED HEALTH PROBLEMS, WORLD HEALTH ORG. F65.4 (10th rev. 2010), available at <http://apps.who.int/classifications/icd10/browse/2010/en#/F60-F69>.

should not be diagnosed as paraphilic.²⁸⁶ In simple terms, (diagnostically-confirmed) pedophiles and (behaviorally-substantiated) child molesters are not synonymous.²⁸⁷ Unfortunately, it is common practice in forensic settings to fail to distinguish ordinary criminals from those with pedophilia because the government is not proving the element of a pattern of preferential arousal to children.²⁸⁸ In one case, for instance, the expert diagnosed the defendant with pedophilia based on prior acts of sexual contact with children, as well as rape paraphilia for past acts of raping adult women, explaining the dual diagnoses just meant that defendant's sexual interests were not exclusive.²⁸⁹

Another empirical issue is that cause and effect are clouded by conflating pedophilia and child molestation.²⁹⁰ Logically, such a conflation is the result of circular reasoning. One who molests a child has pedophilia and vice versa. There is no way to empirically confirm or test such an imputed relationship. It is contended, too, that while child molestation is an immoral act, there is no medical evidence of it deriving from a mental deficiency; rather, it is a social construction that pedophilia is linked to a sick mind.²⁹¹ These grievances may help explain why there is evidence that a DSM diagnosis of pedophilia does not adequately measure a deviant arousal pattern to pubescent children. Studies have shown that a DSM-based pedophilia diagnosis is not correlated with phallometric indications of deviant arousal to pubescent children.²⁹² Nor is a DSM diagnosis of pedophilia correlated with sexual

286. Joseph A. Camilleri & Vernon L. Quinsey, *Pedophilia: Assessment and Treatment*, in *SEXUAL DEVIANCE: THEORY, ASSESSMENT, AND TREATMENT*, *supra* note 50, at 184; Marshall, *supra* note 199, at 20.

287. See Kerry Sheldon & Dennis Howitt, *Sexual Fantasy in Paedophile Offenders: Can Any Model Explain Satisfactorily New Findings from a Study of Internet and Contact Sexual Offenders?*, 13 *LEGAL & CRIMINOLOGICAL PSYCHOL.* 137, 153 (2008) (finding in a small sample no association between fantasies with children and child molestation).

288. Jason, *supra* note 285, at 1332.

289. *People v. Hooker*, 968 N.E.2d 1087, 1094 (Ill. App. Ct. 2007).

290. Camilleri & Quinsey, *supra* note 286, at 184.

291. HOLMES & HOLMES, *supra* note 77, at 30–45 (offering social learning, psychological, and sociobiological explanations for pedophilia); Fred S. Berlin, *Commentary on Pedophilia Diagnostic Criteria in DSM-5*, 39 *J. AM. ACAD. PSYCHIATRY & L.* 242, 243 (2011) (conceding that it is disingenuous to suggest pedophilia diagnosis in the DSM is not based in part on value judgment); Erickson, *supra* note 25, at 114.

292. Wilson et al., *supra* note 177, at 268 (studying 130 convicted sex offenders against children assessed at a sexual behavior clinic in Ontario). The authors note the lack of a correlation “is puzzling, given that these would appear to be the two most common means of diagnosing this condition.” *Id.* at 270.

recidivism.²⁹³ Actually, a study using a regression analysis method indicates that a DSM diagnosis of pedophilia is not even a significant predictor for sexual recidivism.²⁹⁴ These results undermine the prevailing risk-based model presumption that a diagnosis of pedophilia is an appropriate proxy for risk assessment supporting legal decisions. Experts likewise note that multiple studies show such low statistics for the reliability and validity of DSM diagnoses of pedophilia that it should be seriously questioned and construed to hold limited utility for practitioners,²⁹⁵ and even more inappropriate for legal proceedings.²⁹⁶ However, with the Supreme Court's acceptance of pedophilia as a qualifying mental disorder in the *Hendricks* civil commitment case,²⁹⁷ there appears little hope for legal challenges by counsel in a trial setting.²⁹⁸

The reciprocal nature of the law-psychiatry interface manifests strongly with regard to expanding diagnostic coverage from prepubescent children to hebephilia, however it may be defined. Critics contend that the recent exaltation of hebephilia is fundamentally based on its forensic utility for the application of SVP laws.²⁹⁹ Partisanship is evident, as “for self-serving reasons, it is applauded by those who generally work for the prosecution and criticized by those who generally work for the defense.”³⁰⁰ Two other potential egocentric foundations exist. One involves the composition of the DSM-5 paraphilias workgroup

293. Heather M. Moulden et al., *Recidivism in Pedophiles: An Investigation Using Different Diagnostic Methods*, 20 J. FORENSIC PSYCHIATRY & PSYCHOL. 680, 693 (2009) (finding no difference in violent, sexual or general recidivism rates for extra-familial child molesters diagnosed with pedophilia or not); Wilson et al., *supra* note 177, at 268.

294. Wilson et al., *supra* note 177, at 270; *see also* Moulden et al., *supra* note 293, at 693 (finding DSM diagnosis of pedophilia was negatively correlated with recidivism). *But see* United States v. Borocz, 705 F.3d 616, 620-21 (7th Cir. 2012) (noting longer sentence based in part on expert asserting that pedophilia correlates strongly and positively with sexual recidivism).

295. Kingston et al., *supra* note 208, at 575; Moulden et al., *supra* note 293, at 698; Wilson et al., *supra* note 177, at 270.

296. Marshall, *supra* note 199, at 16.

297. *See supra* notes 130-34 and accompanying text.

298. *See, e.g.*, United States v. Lange, No. 5:08-HC-2070, 2012 U.S. Dist. LEXIS 159498, at *22-23 (E.D.N.C. Nov. 7, 2012) (finding pedophilia diagnosis supported despite expert's expressed discomfort that it be based solely on prior molestation).

299. Frances & First, *supra* note 209, at 79; *see also* Fabian, *Diagnosing and Litigating*, *supra* note 94, at 501 (calling hebephilia a product of the “new-age” SVP laws).

300. Robert Prentky & Howard Barbaree, *Commentary: Hebephilia—A Would-be Paraphilia Caught in the Twilight Zone Between Pubescence and Adulthood*, 39 J. AM. ACAD. PSYCHIATRY & L. 496, 508 (2011).

proposing that hebephilia be formally adopted as a subset of pedophilia. The chair is the author of several studies on which the workgroup is basing the purported empirical support for hebephilia.³⁰¹ All four members of the workgroup would also appear to be incentivized to reach such a conclusion, considering they are specialists in sex offender treatment services,³⁰² for which broadening diagnostic coverage would benefit. The second potential conflict regards another prominent promoter of hebephilia (as a subspecies of paraphilias NOS) who strongly advocates the diagnosis in an influential instruction manual he authored and aptly titled, *Evaluating Sex Offenders: A Manual for Civil Commitments and Beyond*.³⁰³ The latter's influence is clear, as the author has testified supporting hebephilia as a proper diagnosis in numerous SVP court proceedings.³⁰⁴

A vocal opponent calls hebephilia the DSM-5 workgroup's "most flawed and blatantly overpathologizing paraphilia proposal."³⁰⁵ There are several criticisms about the hebephilia diagnosis that expressly relate to the law-psychiatry interface. Clearly, the proposal to expand pedophilia conflates law enforcement with mental illness.³⁰⁶ The inclusion of hebephilia seems simply to cater to the interests of criminal justice officials.³⁰⁷ If the reason that sexual interest in a group (children) or object is a mental disorder is that they are illegal, this reasoning seriously comingles the professional realms of psychiatry and the law.³⁰⁸ The tie of

301. Karen Franklin, *Hebephilia: Quintessence of Diagnostic Pretextuality*, 28 BEHAV. SCI. & L. 751, 765 (2010) (suggesting chair using the post to lobby for the disorder which will "shape ... forensic diagnosis of sex offenders for some time to come"); Kramer, *supra* note 241, at 233 (noting of the thirty-four studies cited in support ten co-authored by chair). *But see* James M. Cantor, *The Errors of Karen Franklin's Pretextuality*, 11 INT'L J. FORENSIC MENTAL HEALTH 59 (2012).

302. Kramer, *supra* note 241, at 233 (of the thirty-four studies cited, thirty-one are from a sex offender management perspective).

303. Franklin, *supra* note 301, at 760. The book is considered the bible for forensic evaluators in sex offender civil commitments. Thomas Zander, *Commentary: Inventing Diagnosis for Civil Commitment of Rapists*, 36 J. AM. ACAD. PSYCHIATRY & L. 459, 460 (2008).

304. *E.g.*, *United States v. Shields*, No. 07-12056-PBS, 2008 U.S. Dist. LEXIS 13837, at *4 (D. Mass. Feb. 26, 2008); *United States v. Abregana*, 574 F. Supp. 2d 1145, 1150 (D. Haw. 2008); *In re Miller*, No. 6-324, 05-1553, 2006 Iowa App. LEXIS 720, at *3 (Iowa Ct. App. July 12, 2006); *In re Risdal*, No. 6-305, 05-0739, 2006 Iowa App. LEXIS 763, at *3 (Iowa Ct. App. July 12, 2006); *In re Atwood*, No. 5-200, 03-1280, 2005 Iowa App. LEXIS 333, at *4 (Iowa Ct. App. Apr. 28, 2005).

305. Wakefield, *supra* note 64, at 206.

306. Zonana, *supra* note 258, at 247.

307. Wakefield, *supra* note 64, at 205.

308. Hinderliter, *supra* note 167, at 256-57.

hebephilia to the law would also illogically render a diagnosis based on the legal age of consent in the offender's particular jurisdiction. A federal district judge noticed this definitional problem:

The age of legal consent is of no use to psychologists seeking a uniform diagnostic standard because the age of consent varies from jurisdiction to jurisdiction. It is one thing to criminalize conduct in one state that is legal in another. It is quite another to label a sexual interest pathological in Pennsylvania and normal in New York.³⁰⁹

An academic has similarly remarked on the problem with correlating disorder with the age of consent:

If a man with consistent patterns of sexual attraction to [sixteen]- and [seventeen]-year-old girls lives in a state where the age of consent is [sixteen] but works in a state where the age of consent is [eighteen], defining [a paraphilia] in terms of age of consent would mean that, if this man meets a clinical significance criterion, his mental disorder is cured everyday when he goes home from work.³¹⁰

Any incorporation of the legal age of consent would likewise defy the APA's basic requirement that the delineation of a particular mental disorder should not be "primarily a result of social deviance or conflicts with society."³¹¹

2. *Frye/Daubert* Challenges

Numerous defendants have brought legal challenges to the diagnosis of hebephilia, citing issues involving logic, normality, and science. Several cases contain references to concessions that attraction to

309. *United States v. Carta*, 620 F. Supp. 2d 210, 224 (D. Mass. 2009) (footnote omitted).

310. Andrew C. Hinderliter, *Defining Paraphilia in DSM-5: Do Not Disregard Grammar*, 37 J. SEX & MARITAL THERAPY 17, 23–24 (2011) (footnote omitted).

311. Kramer, *supra* note 241, at 233.

postpubescents is not abnormal.³¹² For example, in a case involving sentencing for possession of child pornography, an expert testified that hebephilia could not be a psychological abnormality considering normal men are aroused by teenage girls.³¹³ A federal court in another opinion documented the expert's characterization as follows:

[A]dults males to respond to a psychosexually mature young adolescent girl with the physical sexual characteristics of an adult woman would not be regarded as abnormal and unusual [T]hose images are used all the time in advertising and marketing because it's understood that a sexually appealing adolescent is just that, sexually appealing.³¹⁴

Hebephilia would seem to be vulnerable under both the *Frye* and *Daubert* tests for admitting scientific evidence³¹⁵ based on lack of general acceptance in the mental health field, while additionally subject to attack under *Daubert* for having little support from peer-reviewed studies, for having very low interrater reliability statistics,³¹⁶ and for failing to follow the scientific method. Notwithstanding these considerations, overall, defendants have rarely succeeded in court in challenging a diagnosis based on hebephilia.³¹⁷ Often the legal claim in

312. *E.g.*, *United States v. Shields*, No. 07-12056-PBS, 2008 U.S. Dist. LEXIS 13837, at *4 (D. Mass. Feb. 26, 2008); *In re K.H.*, No. A-4375-09T2, 2010 N.J. Super. Unpub. LEXIS 3032, at *7 (Ct. App. Div. Dec. 17, 2010); *In re E.J.S.*, No. A-0696-06T2, 2007 N.J. Super. Unpub. LEXIS 2992, at *5 (Ct. App. Div. Apr. 9, 2007).

313. *United States v. C.R.*, 792 F. Supp. 2d 343, 428 (E.D.N.Y. 2011). The expert contended an entire area of sex offender literature has exploded around hebephilia: "It's a very, very, very controversial and hot area right now." *Id.* at 458.

314. *United States v. Wetmore*, 766 F. Supp. 2d 319, 330 (D. Mass. 2011).

315. *Frye* is a common standard used to legally challenge whether new scientific evidence is reliable, using a test of whether the evidence has been generally accepted in the relevant scientific community. *Frye v. United States*, 293 F. 1013 (D.C. Cir. 1923). *Daubert* is the common alternative, providing suggestions for a court to determine the admissibility of expert evidence, including testability, peer review and publication, methodological standards (including the error rate), and general acceptance. *Daubert v. Merrill Dow Pharm.*, 509 U.S. 579, 593-94 (1993).

316. Paul Good & Jules Burstein, *Hebephilia and the Construction of a Fictitious Diagnosis*, 6 J. NERVOUS & MENTAL DISEASE 492, 493 (2012). The authors go on to state that "from a societal standpoint, prematurely legitimizing another sexually dangerous mental disorder may further contribute to the sexual panic now gripping the country, one in which child molesters are more feared than terrorists." *Id.* (citation omitted).

317. *But see United States v. Abregana*, 574 F. Supp. 2d at 1150-51 (finding it not a serious mental disorder, with an emphasis on serious). Though the court in *United*

commitment proceedings is one of insufficiency of evidence, the argument being that hebephilia is factually inadequate to serve as a qualifying mental disorder.³¹⁸ One called it a “made up diagnosis,”³¹⁹ while defense counsel in another argued it was junk science.³²⁰ A similar challenge has been that it is an invalid diagnosis violating the *Frye* standard for the admissibility of scientific evidence.³²¹ Yet case law indicates courts have almost universally accepted the diagnosis for legal purposes,³²² even when state experts conceded it was not specifically contained within the DSM.³²³ In a representative state case, the defense expert contended that recurrent sexual behavior directed at adolescents could not qualify as a disorder of sexual appetite because the DSM’s focus was on sexual maturity, not cognitive ability to consent; instead he contended it was merely “bad behavior.”³²⁴ The court expressly rejected

States v. Carta describes the *Abregana* result differently, suggesting the basis of not committing the defendant was on not finding the requisite future dangerousness. *United States v. Carta*, 620 F. Supp. 2d 210, 226 (D. Mass. 2009). Other cases also have turned not on the hebephilia diagnosis but on failing to find a likelihood to reoffend. *Commonwealth v. Connolly*, No. 05-1059C, 2006 Mass. Super. LEXIS 77, at *4 (Super. Ct. Feb. 2, 2006); *Commonwealth v. Plucinski*, 868 A.2d 20, 27 (Pa. Super. Ct. 2005).

318. *E.g.*, *In re Johnson*, No. A11-792, 2011 Minn. App. Unpub. LEXIS 902, at *10 (Ct. App. Sept. 26, 2011); *Berg v. State*, 342 S.W.3d 374, 389 (Mo. Ct. App. 2011); *In re M.N.A.*, No. A-4354-09T2, 2010 N.J. Super. Unpub. LEXIS 3036, at *1 (Ct. App. Div. Dec. 17, 2010); *In re Miller*, No. 6-324/05-1435, 2006 Iowa App. LEXIS 720, at *1 (Ct. App. July 12, 2006).

319. *In re Dahl*, No. 96,728, 2007 Kan. App. Unpub. LEXIS 72, at *8 (Ct. App. Sept. 21, 2007).

320. *In re E.J.S.*, No. A-0696-06T2, 2007 N.J. Super. Unpub. LEXIS 2992, at *5 (Ct. App. Div. Apr. 9, 2007).

321. *In re Ayers*, No. 3788-1-II, 2010 Wash. App. LEXIS 647, at *2 (Ct. App. Mar. 30, 2010).

322. *E.g.*, *State v. Alfredo M.*, 947 N.Y.S.2d 594, 595 (App. Div. 2012); *In re Hooker*, 968 N.E.2d 1087, 1096 (Ill. Ct. App. 2012); *In re C.E.G.*, No. A-1624-11T2, 2012 N.J. Super. Unpub. LEXIS 1494, at *3 (Ct. App. Div. June 26, 2012); *In re Jacobson*, No. A11-2176, 2012 Minn. App. Unpub. LEXIS 320, at *12 (Ct. App. Apr. 23, 2012).

323. *E.g.*, *State v. Spencer D.*, 946 N.Y.S.2d 180, 182 (App. Div. 2012); *In re Johnson*, No. A11-792, 2011 Minn. App. Unpub. LEXIS 902, at *13 (Ct. App. Sept. 26, 2011); *In re Dahl*, No. 96,728, 2007 Kan. App. Unpub. LEXIS 72, at *3 (Ct. App. Sept. 21, 2007); *In re E.J.S.*, No. A-0696-06T2, 2007 N.J. Super. Unpub. LEXIS 2992, at *5 (Ct. App. Div. Apr. 9, 2007); *see also United States v. Abregana*, 574 F. Supp. 2d 1145, 1153 (D. Haw. 2008) (conflicting testimony by defense experts where one indicates hebephilia not in any important literature while another contradicted this and admitted to having himself co-authored a chapter about its existence); *Commonwealth v. Plucinski*, 868 A.2d 20, 22 (Pa. Super. Ct. 2005) (indicating expert testified hebephilia may not be itemized in the DSM but is promulgated in professional literature).

324. *Commonwealth v. Rossmeisl*, No. 1952-05, 2006 Pa. Dist. & Cnty. Dec. LEXIS 285, at *12 (Comm. Ct. Aug. 16, 2006).

that depiction and, instead, countenanced the use of hebephilia as a diagnosis for two reasons. For one, the court rejected the expert's attempt to link the DSM's nonconsenting aspect to sexual immaturity since doing so would effectively eliminate the DSM's nonconsenting persons alternative.³²⁵ The second rationale was that rejecting hebephilia would create a loophole for individuals to have sexual contact with adolescents, but without the attribution of a disorder, they would not be eligible for sexually violent predator status. However, such explanation is concerning since the court appears to concede to the massaging of psychiatric principles to justify a significant legal consequence.

Defendants have also attempted to convince federal judges that a hebephilia diagnosis was a poor fit for legal questions bearing significant consequences. Two federal district judges in Massachusetts have ruled to exclude from evidence testimony about hebephilia. In one, Judge Patti Saris (currently the chair of the United States Sentencing Commission) granted a motion to exclude evidence of a diagnosis of hebephilia upon finding the government had not shown that hebephilia was generally accepted as a mental disorder by professionals who assess sexually violent offenders.³²⁶ The following year, a colleague cited Judge Saris's opinion and similarly ruled in the case of *United States v. Carta* that a diagnosis of hebephilia violated the *Daubert* standard of admissibility for expert evidence, as it was not recognized by the psychiatric community as a serious mental disorder.³²⁷ The *Carta* district judge was convinced by the court-appointed expert's contentions that hebephilia was not a valid diagnosis, consistent criteria for assessment were unavailable, its omission from the DSM showed it was not generally accepted, the paraphilia diagnostic criteria referring to children assumes prepubescent (not post-pubescent) youth, and normal adults find sexually mature teenagers arousing.³²⁸ Further, the jurist criticized the diagnosis for blurring the distinction between criminal conduct and pathological

325. *Id.* at *13 (suggesting not recognizing a disorder related to adolescents who legally cannot consent is "illogical and at odds" with the DSM).

326. *United States v. Shields*, No. 07-12056-PBS, 2008 U.S. Dist. LEXIS 13837, at *4 (1st. Cir. Feb. 26, 2008). The judge eventually approved the civil commitment based on diagnosis of pedophilia. *United States v. Shields*, 597 F. Supp. 2d 224 (D. Mass. 2009).

327. *United States v. Carta*, 620 F. Supp. 2d 210, 225 n.166 (D. Mass. 2009).

328. *Id.* at 218. "Should an eighteen-year-old, for example, who is sexually interested in a fifteen-year-old be treated the same as a fifty-year-old interested in the same fifteen-year-old?" *Id.* at 224-25.

illness.³²⁹ But these rulings—that hebephilia was not an accepted mental disorder for civil commitment purposes—was quickly reversed on appeal by a First Circuit panel.³³⁰

The First Circuit panel overturning the lower court's *Carta* decision commented that a mental disorder need not be accepted by consensus in the medical community to be legally sufficient for civil commitment purposes and, in any event, it found there was sufficient evidence that a hebephilia diagnosis could exist in the DSM's paraphilia framework.³³¹ The panel interpreted the DSM paraphilia NOS criteria as broad enough to apply to a fixation on teenagers.³³² On remand, the case was reassigned to Judge Saris, who later adjudged the defendant eligible for commitment based on hebephilia.³³³ Still seemingly concerned about hebephilia capturing interest in older teens, she highlighted that the experts in the case had limited their diagnostic specification to attraction involving pubescent children ages eleven to fourteen.³³⁴ She appeared influenced, in part, by the fact that the diagnosis with that age range was under consideration for inclusion in DSM-5.³³⁵

Despite the First Circuit's *Carta* decision, a federal district judge in the Fourth Circuit has in several cases in 2012 ruled against the introduction of hebephilia, determining that it is insufficient for civil commitment purposes.³³⁶ The court credited the defense expert's testimony that the DSM does not actually list hebephilia, numerous psychologists have rejected it, and arousal to pubescent and postpubescent is not abnormal even if acting on it might violate the

329. *Id.* at 227.

330. *United States v. Carta*, 592 F.3d 34 (1st Cir. 2010).

331. *Id.* at 40. Another First Circuit panel has likewise ruled that "even if the issue begins and ends with the DSM," hebephilia is covered by the nonconsenting persons language and the DSM does not otherwise exclude pubescent children as the focus of attraction. *United States v. Wetmore*, 700 F.3d 570, 578 (4th Cir. 2012).

332. *Id.* at 41. The court cautioned that its decision did not mean everyone attracted to sexually mature teenagers would be hebephiles since diagnosis requires additional criteria. *Id.*

333. *United States v. Carta*, No. 07-12064-PBS, 2011 U.S. Dist. LEXIS 73007, at *1 (D. Mass. 2011).

334. *Id.* at *33.

335. *Id.*

336. *United States v. Shea*, No. 5:11-HC-2136-BO, 2012 U.S. Dist. LEXIS 94182, at *12-13 (E.D.N.C. July 9, 2012); *United States v. Caporale*, No. 5:08-HC-2037-BO, 2012 U.S. Dist. LEXIS 55794, at *8-9 (E.D.N.C. Apr. 20, 2012); *United States v. Hamelin*, No. 5:09-HC-2028-BO, 2012 U.S. Dist. LEXIS 54790, at *8 (E.D.N.C. Apr. 6, 2012); *United States v. Neuhauser*, No. 5:07-HC-2101-BO, 2012 U.S. Dist. LEXIS 7008, at *5-6 (E.D.N.C. Jan. 20, 2012).

law.³³⁷ Indeed, in one of these cases, the judge also summarily rejected the state's *Daubert* challenge to strike the defense expert's testimony thereon.³³⁸ His decisions are important considering that his judicial district is a primary jurisdictional venue for federal civil commitments.³³⁹ Nonetheless, whatever victory these decisions may have held in favor of rationally assessing the evidence here was short-lived. The Fourth Circuit reversed at least one of these decisions, soundly rejecting that hebephilia as a matter of law cannot qualify as a mental impairment justifying civil commitment.³⁴⁰ Citing, in part, the First Circuit's *Carta* opinion, the appellate panel concluded that

[t]hough his condition may elude definitive labeling, the evidence at hearing established that [defendant's] ability to function normally in society has been preempted by his sexual fixation on underage, pubescent boys, such fixation having heretofore so dominated his psyche as to substantially impair and disrupt his life.³⁴¹

In general, current precedents, including two federal appellate opinions, in favor of hebephilia, as admissible evidence in criminal cases and a qualifying mental disorder for commitment purposes, mean that it is likely to flourish in the law.³⁴² However, it appears an extremely poor fit for legal decisions. Much evidence attests that hebephilia is scientifically and normatively flawed: it is not based on empirical evidence, no consistent diagnostic criteria exist for it, forensic experts are

337. *Caporale*, 2012 U.S. Dist. LEXIS 55794, at *8 ; *Hamelin*, 2012 U.S. Dist. LEXIS 54790, at *8; *Shea*, 2012 U.S. Dist. LEXIS 94182, at *12.

338. *Caporale*, 2012 U.S. Dist. LEXIS 55794, at *16.

339. The Federal Bureau of Prisons' sexual predator commitment program is located at a facility in Butner, North Carolina. Derek Gilna, *Federal Sex Offender Civil Commitment Process Under Fire*, PRISON LEGAL NEWS, August 2012, at 1, 7.

340. *United States v. Caporale*, No. 12-6832, 2012 U.S. App. LEXIS 25014, at *22 (4th Cir. Dec. 6, 2012).

341. *Id.* at *22.

342. *United States v. Cooke*, No. 5:09-HC-02034-FL, 2013 U.S. Dist. LEXIS 37051, at *17 (E.D.N.C. March 18, 2013) (overruling objection that hebephilia is not a valid diagnosis); *United States v. Antone*, No. 5:07-HC-2042-FL, 2012 U.S. Dist. LEXIS 137049, at *5, 8 (E.D.N.C. Sept. 25, 2012) (disagreeing with magistrate's determination that paraphilia NOS-nonconsent for hebephilia was not a valid diagnosis because even though it is not specifically in the DSM, because the "term could conceivably be used to describe a person with abnormal sexual arousal toward nonconsenting sexual encounters.").

giving widely varying descriptions of its scope in case law, and interest in pubescent and post-pubescent youth is not inherently deviant or pathological. With the ambiguity in its ties to physical characteristics or age, it might be a slippery slope toward incorporating even older teenagers. The likelihood of many false positives is troubling. Further, making the definition dependent on the legal age of consent represents an unfortunate overlap between criminal law and psychiatric diagnosis. As other commentators have appropriately warned, “prematurely legitimizing another sexually dangerous mental disorder may further contribute to the sexual panic now gripping the country, one in which child molesters are more feared than terrorists.”³⁴³

C. *Rape as Mental Disease*

Assertions of pretextuality and the merger of legal interests with psychiatry are supported, too, in conceiving rape as a signifier of mental disorder. Numerous cases exist where experts use rape as the proxy for diagnosing mental disease.³⁴⁴ Admittedly, several attempts have been made over the years to specifically include rape as a paraphilia in the DSM. Yet a specific rape-type paraphilia has been formally rejected several times.³⁴⁵ The latest attempt was to add what would have been called paraphilic coercive disorder to DSM-5. Still, the working group designated it as specifically reserved in text of the DSM-5 to be the subject of continued formal review, which indicates the proposition survives on.³⁴⁶ Experts continue to diagnose rape as indicating mental disease and, as a recent empirical study of legal decisions shows, courts are overwhelmingly receptive.³⁴⁷ Judicial opinions show state experts giving various explanations for utilizing rape paraphilia despite the

343. Good & Burstein, *supra* note 316, at 493.

344. Sexual sadism is another potential diagnosis for rape but will not be addressed in more detail here as it is far less frequently employed and has rarely been contested in case decisions.

345. Thornton, *supra* note 66, at 412; Richard Wollert, *Paraphilic Coercive Disorder Does Not Belong in DSM-5 for Statistical, Historical, Conceptual, and Practical Reasons*, 40 ARCHIVES SEXUAL BEHAV. 1097 (2011).

346. Richard Balon, *Controversies in the Diagnosis and Treatment of Paraphilias*, 39 J. SEX & MARITAL THERAPY 7, 13 (2013).

347. Chris King et al., *Forensic Usage of the Paraphilia NOS, Nonconsent Diagnosis: A Case Law Survey*, Presentation at the American Psychological-Law Society Annual Conference (March 2012), available at <http://www.drexel.edu/~media/Files/psychology/labs/heilbrun/presentations/AP-LS2012ParaphiliaNOSNonconsent.ashx>.

APA's rejections. These include that the absence is due to feminists not wanting to give rapists a tool to exonerate them,³⁴⁸ feminist politics conceptualizing rape as a violent crime and not a sex crime,³⁴⁹ and a more generic conclusion that this treatment is the result of social and political pressures on the APA.³⁵⁰ Often they justify the diagnosis using existing DSM language through the paraphilia NOS residual, with its language regarding sexual behaviors involving nonconsenting persons. Their argument is that victims of rape are by definition not consenting.³⁵¹ This version of rape paraphilia is commonly designated paraphilia NOS-nonconsent.

1. Theoretical Rebuttals

There are several strong criticisms against specifically recognizing a rape paraphilia. An empirical challenge is that such a diagnosis lacks any evidence of reliability or validity.³⁵² One reason may be that sexual interest in the coercive aspect of the behavior is lacking. Studies fail to support the idea that men who rape are aroused by the coerciveness per se; rather, it appears that any coercion and aggression needed to achieve the sexual encounter simply fail to inhibit males who are hypersexual, antisocial, or lack an appreciation of the other person's resistance.³⁵³ At the same time, there is evidence that many rapes are more about power and control than sexual motivation.³⁵⁴ A review of historical perspectives on the reasons men rape uncovered evidence of five types of rapists:

- (1) disadvantaged men who resort to rape, (2) "specialized" rapists who are sexually aroused by violent sex, (3) men who rape opportunistically, (4) high-mating-effort men who are dominant and often psychopathic, and (5) partner rapists motivated by

348. *People v. Hardin*, No. A119690, 2009 Cal. App. Unpub. LEXIS 3611, at *5 n.2 (Ct. App. May 6, 2009).

349. *People v. Thomas*, No. C035786, 2002 Cal. App. Unpub. LEXIS 11548, at *7 (Ct. App. Dec. 13, 2002).

350. *People v. Dodele*, No. A097675, 2003 Cal. App. Unpub. LEXIS 1458, at *2 n.2 (Ct. App. Feb. 14, 2003).

351. *Thomas*, 2002 Cal. App. Unpub. LEXIS 11548, at *3.

352. Wollert, *supra* note 345.

353. Raymond A. Knight, *Is a Diagnostic Category for Paraphilic Coercive Disorder Defensible?*, 39 ARCHIVES SEXUAL BEHAV. 419, 424 (2010).

354. Zander, *supra* note 303, at 461.

assessments of increased risk of sperm competition.³⁵⁵

Any presumption that rapists are mentally disordered is also belied by the (unfortunate) frequency of sexual assaults. It has reasonably been argued that the “number of nonconsensual sexual acts among psychiatrically normal people suggests that this hypothesis is simply social control dressed up as pop psychology.”³⁵⁶

Others contend that formally accepting rape paraphilia specifically in the DSM would signify the mental health community succumbing to societal pressure rather than adhering to scientific principles.³⁵⁷ Whether expressly within the DSM or not, rape paraphilia diagnoses are driving legal decisions across jurisdictions.³⁵⁸ The result is a medicalization of rape by reframing the crime of rape into mental illness.³⁵⁹ And it appears evident that the reason for reifying rape paraphilia is much less about clinical concern and treatment as it is to serve criminal justice interests. For example, a prosecutor who pursues sex offender civil commitment (and is a member of the DSM-5 paraphilia working group) has argued in favor of the APA formally recognizing a mental disorder to apply to repeat rapists.³⁶⁰ He discounted criticism that a DSM diagnosis should not be based solely on past behavior by pointing out that many DSM disorders are applicable to prior criminal conduct.³⁶¹

2. Due Process Challenges

Despite significant empirical and theoretical challenges, courts continue to reject legal challenges to evidence of a rape paraphilia. In the apparently few cases in which defendants have sought *Frye/Daubert*

355. William F. McKibbin et al., *Why Do Men Rape? An Evolutionary Psychological Perspective*, 12 REV. GEN. PSYCHOL. 86, 89 (2008).

356. Wakefield, *supra* note 64, at 208.

357. Zonana, *supra* note 258, at 249.

358. Conover v. Main, No. 11-632(PGS), 2013 U.S. Dist. LEXIS 36780, at *7 (D. N.J. March 18, 2013); Sullivan v. Kramer, No. C 09-3690 RS (PIC), at *7 (N.D. Cal. Nov. 26, 2012); *In re Trulock*, 970 N.E.2d 560, 566 (Ill. App. Ct. 2012); *In re J.E.*, No. A-5297-08T2, 2012 N.J. Super. Unpub. LEXIS 1120, at *8 (Ct. App. Div. May 22, 2012); *People v. Welch*, No. H035567, 2012 Cal. App. Unpub. LEXIS 2519, at *5 (Ct. App. Apr. 3, 2012); *In re Smallwood*, No. A11-1971, 2012 Minn. App. Unpub. LEXIS 230, at *18-19 (Ct. App. Mar. 19, 2012).

359. Hinderliter, *supra* note 167, at 252; Moser & Kleinplatz, *supra* note 39, at 101.

360. Paul Stern, *Paraphilic Coercive Disorder in the DSM: The Right Diagnosis for the Right Reason*, 39 ARCHIVES SEXUAL BEHAV. 1443, 1444 (2010).

361. *Id.* at 1446.

hearings to challenge its admissibility as a scientific or medical construct, courts have rejected the need for such hearings.³⁶² Concerning *Frye*, judges reason that *Frye* is focused on whether a new scientific theory has achieved general acceptance. Since psychology as a science is not novel and paraphilia diagnoses are standard psychological applications, *Frye* is wholly inapplicable.³⁶³

Due process challenges to the inadequacy of a diagnosis of rape paraphilia for the purpose of civil commitment proceedings have failed in virtually every case.³⁶⁴ The basis of these challenges generally derives from Supreme Court jurisprudence. In a 1992 case generally addressing the constitutionality of civil commitment, the Court noted that the due process clause protects at its core a liberty interest in being free from bodily restraint imposed by arbitrary governmental action.³⁶⁵ The Court confirmed that civil commitment qualified as a significant deprivation of that liberty interest.³⁶⁶ Nonetheless, in *Kansas v. Hendricks*,³⁶⁷ a case about SVP civil commitment, the Supreme Court ruled that it intended to leave much flexibility to states in what terminology and which qualifying mental impairments were sufficient. However, a concurring opinion recognized a potential constitutional impediment, surmising that if a qualifying mental disorder or disability was “too imprecise a category to offer a solid basis for concluding that civil detention is justified, our precedents would not suffice to validate it.”³⁶⁸ The Seventh Circuit interpreted this potential constitutional challenge as follows:

362. *In re Williams*, No. 65436-5-1, 2012 Wash. App. LEXIS 1127, *14 (Ct. App. May 14, 2012); *In re Lopez*, No. 40827-9-II, 2012 Wash. App. LEXIS 198, at *15-16 (Ct. App. Jan. 31, 2012).

363. *Williams*, 2012 App. LEXIS 1127, at *14; *Lopez*, 2012 Wash. App. LEXIS 198, at *15; *In re Berry*, 248 P.3d 592, 595 (Wash. Ct. App. 2011); *In re Williams*, 264 P.3d 570, 575 n.11 (Wash. Ct. App. 2011).

364. *E.g.*, *Brown v. Watters*, 599 F.3d 602, 612 (7th Cir. 2010); *Yancy v. Voss*, No. SACV 06-356-JFW(CW), 2011 U.S. Dist. LEXIS 43880, at *44 (C.D. Cal. Mar. 21, 2011); *King v. Demorales*, No. CV 08-4984-TJH (JEM), 2010 U.S. Dist. LEXIS 126708, at *62 (C.D. Cal. May 3, 2010); *In re Post*, 187 P.3d 803, 817 (Wash. Ct. App. 2008); *see also Hoisington v. Williams*, No. CV-07-332-LRS, 2008 U.S. Dist. LEXIS 93364, at *20 (E.D. Wash. Oct. 30, 2008) (explaining defendant had not referred to any cases in which the diagnoses of paraphilias has not met general acceptance standards); *In re Marnten*, No. 61923-3-I 2010 Wash. App. LEXIS 382, at *9 (Ct. App. Mar. 1, 2010).

365. *Foucha v. Louisiana*, 504 U.S. 71, 80 (1992).

366. *Id.*

367. 521 U.S. 346, 447 (1997).

368. *Id.* at 373 (Kennedy, J., concurring).

[A] medical diagnosis can be based on so little evidence that bears on the controlling legal criteria that any reliance upon it would be a violation of due process. Therefore, a particular diagnosis may be so devoid of content, or [of] so near-universal in its rejection by mental health professionals, that a court's reliance on it to satisfy the "mental disorder" prong of the statutory requirements for commitment would violate due process.³⁶⁹

Detainees under sexual predator civil commitment have waged constitutional challenges that rape paraphilia is too vague for substantive due process purposes. These arguments have been slightly varied. Defendants have argued that it is an invalid diagnosis³⁷⁰ or too imprecise as a qualifying disorder for due process purposes.³⁷¹ Similarly, other defendants have challenged that the paraphilia for rape is not based on sound scientific principles³⁷² and not generally accepted.³⁷³ Others have invoked the relevance of the partisan expert factions that have developed, asserting that such a diagnosis was "only accepted by an extreme minority primarily composed of state-employed professionals charged with civil commitment evaluations."³⁷⁴ One expert noted that it was a "so-called 'diagnosis'" used primarily by SVP evaluators and merely "doublespeak for the crime of rape."³⁷⁵ Some litigants have justified their

369. *McGee v. Bartow*, 593 F.3d 556, 577 (7th Cir. 2010) (citation omitted).

370. *Id.* at 577; *Page v. California*, No. 1:06-cv-01409, LJO DLB PC, 2008 U.S. Dist. LEXIS 72652, at *3-4 (E.D. Cal. Aug. 19, 2008); *In re Lieberman*, 929 N.E.2d 616, 631 (Ill. App. Ct. 2010); *In re Marren*, No. 61923-3-I, 2010 Wash. App. LEXIS 382, at *1 (Ct. App. Mar. 1, 2010).

371. *King*, 2010 U.S. Dist. LEXIS 126708, at *55; *People v. Thomas*, No. C035786, 2002 Cal. App. Unpub. LEXIS 11548, at *30 (Ct. App. Dec. 13, 2002); *see also* *People v. Pedersen*, No. A 115239, 2007 Cal. App. Unpub. LEXIS 9962, at *15 (Ct. App. Dec. 11, 2007) (rejecting evidentiary challenge to paraphilia NOS as "meaningless" and "unsupported").

372. *Brown*, 599 F.3d at 610; *In re Williams*, 264 P.3d 570, 575 n.11 (Wash. Ct. App. 2011); *In re Post*, 187 P.3d at 803, 817 (Wash. Ct. App. 2008); *see also* *People v. Cordero*, No. B223215, 2011 Cal. App. Unpub. LEXIS 2780, at *8 (Ct. App. Apr. 15, 2011) (expert acknowledging "an inherently weak construct [without] without defined criteria").

373. *Williams*, 264 P.3d at 577 (claim procedurally defaulted); *see also* *Marren*, 2010 Wash. App. LEXIS 382, at *8 (challenging construct as overbroad and imprecise and not generally recognized in the psychiatric field).

374. *McGee* 593 F.3d at 578.

375. *State v. McCuiston*, 275 P.3d 1092, 1096 (Wash. 2012).

due process argument on the failure of the DSM to include a paraphilia specifically for rape.³⁷⁶ The defense in one federal case indicated its omission from the DSM meant it psychiatrically did not exist,³⁷⁷ while in another case the defense argued its exclusion demonstrated the consensus view in the profession that such a disorder is invalid and unreliable.³⁷⁸

Federal courts have rejected such due process challenges. In declining due process challenges to rape paraphilia, courts have often pointed to the Supreme Court's jurisprudence suggesting much flexibility in qualifying disorders for purposes of sex offender civil commitment.³⁷⁹ For example, the Seventh Circuit in two separate cases rejected due process challenges on the invalidity of rape paraphilia, drawing on several quotations from the Supreme Court's jurisprudence that recognize differences between law and psychiatry: "the science of psychiatry, which informs but does not control ultimate legal determinations, is an ever-advancing science, whose distinctions do not seek precisely to mirror those of the law."³⁸⁰ Correspondingly, *Hendricks* indicated that "[l]egal definitions . . . which must take into account such issues and individual responsibility . . . and competency, need not mirror those advanced by the medical profession."³⁸¹ Thus, "states must have appropriate room to make practical, common-sense judgments" as to what qualifies as mental conditions sufficient for civil commitment.³⁸² The Seventh Circuit ruled that these precedents signify that any controversy as to whether a diagnosis can meet the legal standard for a mental disorder is best resolved as an evidentiary question with cross examination exposing the relevant strengths and weaknesses.³⁸³

376. *In re Berry*, 248 P.3d 592, 596 (Wash. Ct. App. 2011); *see also King*, 2010 U.S. Dist. LEXIS 126708, at *59 (noting defendant's contention paraphilia NOS-nonconsent is a temporary diagnosis within the DSM).

377. *Brown*, 599 F.3d at 607.

378. *McGee*, 593 F.3d at 574.

379. *McCustion*, 275 P.3d at 1103; *King*, 2010 U.S. Dist. LEXIS 126708, at *61.

380. *Brown*, 599 F.3d at 611 (quoting *Kansas v. Crane*, 534 U.S. 407, 413 (2002)).

381. *Id.* (quoting *Kansas v. Hendricks*, 521 U.S. 346, 359 (1997)); *McGee*, 593 F.3d at 569 (quoting *Hendricks*, 521 U.S. at 359); *King*, 2010 U.S. Dist. LEXIS 126708, at *61.

382. *Brown*, 599 F.3d at 611; *McGee*, 593 F.3d at 580.

383. *McGee*, 593 F.3d at 612.

The debate as to whether rape paraphilia can be a valid diagnosis under the DSM is also unpersuasive to state courts.³⁸⁴ Several courts have explained that whether a disorder was explicitly contained in the DSM or whether there was disagreement among professionals were not dispositive issues, but simply factors to be considered by the trier of fact.³⁸⁵ A recent Illinois case is particularly instructive as it included the testimony of a professor of psychiatry at Johns Hopkins University School of Medicine who had served as chair of certain APA workgroups assigned to consider changes in the definitions of paraphilias in DSM-III and DSM-IV.³⁸⁶ At trial, the state offered two experts who, conceding controversy about the diagnosis and that it was not specifically listed as a disorder, testified that sufficient support existed within the DSM paraphilia section's criteria to warrant it.³⁸⁷ The Johns Hopkins professor, testifying for the defense, stated that it was inappropriate to combine paraphilia NOS with the separate diagnostic feature involving non-consenting persons; moreover, he confirmed that the APA had expressly rejected that diagnosis and there was no scientific support for it.³⁸⁸ Despite the apparent significance of this expert's testimony, the court merely viewed it as reflecting a question of fact for the fact finder to resolve in terms of judging the credibility of the conflicting expert opinions.³⁸⁹ In concluding that express coverage in the DSM is not dispositive, the court commented that "we cannot adopt any rule that asks the DSM to . . . answer the ultimate legal questions or create a perfect fit between law and medicine."³⁹⁰

In several other cases, federal and state courts have evaded evidentiary challenges to rape paraphilia by simple deference; that is, simply recognizing that other courts accepted the diagnosis and

384. *In re Lopez*, No. 40827-9-II, 2012 Wash. App. LEXIS 198, at *17 (Ct. App. Jan. 31, 2012); *People v. Dacayana*, No. B164664, 2004 Cal. App. Unpub. LEXIS 6871, at *10 (Ct. App. July 22, 2004) (citing *Kansas v. Hendricks*, 521 U.S. 346, 359 (1997)) (embracing the idea that medical and legal concepts are not synonymous and rape paraphilia is acceptable).

385. *People v. Pedersen*, No. A115239, 2007 Cal. App. Unpub. LEXIS 9962, at *17-18 (Ct. App. Dec. 11, 2007); *In re A.M.*, 2010 ND 163, ¶ 19, 787 N.W.2d 752, 759 (2010); *People v. Foster*, No. B183315, 2007 Cal. App. Unpub. LEXIS 568, at *15 (Ct. App. Jan. 24, 2007); *People v. Thomas*, 2002 Cal. App. Unpub. LEXIS 11548, at *32-33 (Ct. App. Dec. 13, 2002).

386. *In re Lieberman*, 929 N.E.2d 616, 619-20 (Ill. App. Ct. 2010).

387. *Id.* at 631.

388. *Id.*

389. *Id.*

390. *Id.* at 632 (citing *McGee v. Bartow*, 593 F.3d 556, 576 (7th Cir. 2010)).

permitting it.³⁹¹ Another method of avoiding addressing legal challenges has simply been to rule them procedurally defaulted when defendants failed to object to the evidence at trial.³⁹²

Overall, the use of rape paraphilia per se and the use of the polymorphous category of paraphilia NOS to provide a mental disorder diagnosis for repeat rapists supports a thesis that mental health evaluators are willing to expand diagnostic coverage for case adjudications. In the face of significant flaws in the scientific, theoretical, and legal bases for such a disorder, the proposition that the use of mental disorders to serve prosecutorial interests is merely pretextual also appears to be supported. The crime of rape becomes a proxy for mental disease.

D. *Ethical Considerations*

The law-psychiatry interface here may do a disservice to the independence and ethical values of both professions. Together, the significant harm that sexual victimization causes, the monolithic fear of the sexual predator, and the political clout behind SVP laws has debilitated the assessment process.³⁹³ Systemically, concern for false negatives overrides that of false positives.³⁹⁴ Even those performing the evaluations operate more from pessimism than optimism by being more concerned with being wrong in not diagnosing paraphilia, and the potential harms if wrong, rather than focusing on the likelihood of being scientifically accurate.³⁹⁵

A critic has charged that American psychiatry as an institution has been complicit in encouraging SVP laws with its “relentless and extensive campaign to extend the scope and power of their influence in the administration of justice, in the disposition of offenders, and in the

391. See, e.g., *Brown v. Watters*, 599 F.3d 602, 608 (7th Cir. 2008); *Yancy v. Voss*, No. SACV 06-356-JFW(CW), 2011 U.S. Dist. LEXIS 43880, at *4–5 (C.D. Cal. Mar. 21, 2011); *King v. Demorales*, No. CV 08-4984-TJH, 2010 U.S. Dist. LEXIS 126708, at *60–61 (C.D. Cal. May 3, 2010); *Hoisington v. Williams*, No. CV-07-332-LRS, 2008 U.S. Dist. LEXIS 93364, at *19 (E.D. Wash. Oct. 30, 2008); *People v. O’Shell*, 92 Cal. Rptr. 3d 57, 59 n.2 (2009); *In re Post*, 187 P.3d 803, 818 (Wash. Ct. App. 2008).

392. E.g., *In re Williams*, 264 P.3d 570, 577 (Wash. Ct. App. 2011); *In re Marnten*, No. 61923-3-I, 2010 Wash. App. LEXIS 382, at *9 (Ct. App. Mar. 1, 2010); *In re Cannon*, No. 61841-5-I, 2009 Wash. App. LEXIS 1880, at *5 (Ct. App. July 27, 2009); see also *Page v. California*, No. 1:06-cv-01409 LJO DLB PC, 2008 U.S. Dist. LEXIS 72652, at *8 (E.D. Cal. Aug. 19, 2008) (rejecting habeas as alternative remedy existed).

393. Prentky et al., *supra* note 27, at 360.

394. *Id.*

395. Wollert & Cramer, *supra*, note 257, at 563.

policies and practices of correctional institutions and agencies.”³⁹⁶ To be fair, individual assessors are not likely acting on their own, as observers note the “increasing tendency for experts to stretch or distort the science—to introduce bad science—in response to the strong advocacy pressures inherent in SVP proceedings.”³⁹⁷ The nature of the advocacy process of the law itself invites bias, including forensic bias and confirmatory bias. Forensic bias can occur through financial incentive, a desire to please, empathizing with a litigant or retaining attorney, or becoming involved in the adversarial process by steadfastly defending one’s position in face of the cross examination.³⁹⁸ Confirmatory bias is possible where one’s initial hypothesis or diagnosis is not reevaluated but confirmed through the selective collection of supporting evidence.³⁹⁹ Another avenue for bias is when the evaluator fails to independently assess the individual, which occurs often in forensic evaluations of sex offenders. A survey of evaluators in sex offender civil commitment proceedings uncovered evidence which the authors indicate suggest that many evaluators routinely rely upon a documented history of paraphilia without independently assessing it.⁴⁰⁰ A commentator has warned that mental health evaluators are on an ethical tightrope with “the pulling forces of forensic identification and bias, personal and moral beliefs about SVP legislation, and financial, personal, and reputation demands to be allegiant to their retaining lawyers inherently may cause a nasty fall, and ultimately they may have to choose one side or the other.”⁴⁰¹

With respect to the application of SVP laws, the law’s utilization of the disease model, with its referential use of mental disorders and the need for psychiatric experts to provide such diagnoses, displeases several

396. Michael Hakeem, *A Critique of the Psychiatric Approach to Crime and Correction*, 23 LAW & CONTEMP. PROBS. 650, 651 (1958).

397. Prentky et al., *supra* note 27, at 360.

398. Fabian, *Paraphilias and Predators*, *supra* note 264, at 94. Forensic identification leads to bias when an assessor is influenced through inquiry by the retaining expert. Forensic identification occurs through primacy and anchoring bias. Primacy occurs with the initial case conceptualized by the potentially retaining attorney who provides a theory which develops into the expert’s working hypothesis and expected outcome. Anchoring bias occurs when the expert refuses to reverse initial impression despite new or alternative information. *Id.* at 89.

399. *Id.* at 90; *see also* Prentky et al., *Muddy Diagnostic Waters*, *supra* note 265, at 456 (contending clinicians in SVP proceedings arrive at conclusions and then gather data to justify a priori conclusions).

400. Jackson & Hess, *supra* note 137, at 440; *see, e.g.*, *State v. Ross*, 873 A.2d 684, 661 (Conn. 2005) (diagnosis of sexual sadism based on other psychiatrists’ reports).

401. Fabian, *Paraphilias and Predators*, *supra* note 264, at 95.

mental health professionals.⁴⁰² A professor of psychiatry at Yale ruefully challenges his colleagues as forensic specialists: “Our culture has initiated a ‘war on sex offenders’ and the legal system has geared up to wage it. Since we have made the diagnosis almost completely overlap with the crime, we have become overly enmeshed with legal goals.”⁴⁰³ The law-psychiatry interface here alarms some mental health practitioners, too, in that shoehorning diagnoses to serve legal interests impedes a focus on best practices in treating sex offenders and preventing relapse.⁴⁰⁴ “Psychiatry, unlike the law, does not regard these patients as a homogeneous group of individuals who have simply violated ‘bright-line’ boundaries dividing proscribed from permitted sexual behaviors.”⁴⁰⁵ SVP laws were largely created with little attention to these realities.⁴⁰⁶

From a philosophical perspective, to confuse legal and scientific categories is to commit what some philosophers call the naturalistic fallacy—i.e., thoughtlessly equating what is with what ought to be.⁴⁰⁷ In any event, there are calls for all participants in the legal process to make substantive improvements. These include mental health experts focusing on standardization and attempting to have greater transparency if diagnosing paraphilia NOS in revealing their rationale.⁴⁰⁸ Lawyers on both sides should require more clarity about the diagnoses when introduced in legal proceedings,⁴⁰⁹ should improve their knowledge about the scientific foundations of the evidence in order to wage legal challenges, and should ask more probing questions to better assist the trier of fact. Finally, judges should take a stronger stand by acting as circumspect gatekeepers⁴¹⁰ by reevaluating whether evidence of mental disorders should be admissible, as legally relevant, under *Frye/Daubert* expert evidence standards, and compatible with constitutional due process considerations.

402. Kramer, *supra* note 241, at 234 (“Psychiatry is not a helping profession when it takes an adversarial stance toward such patients and exacerbates rather than relieves psychiatric symptoms.”).

403. Zonana, *supra* note 258, at 248.

404. Saleh et al., *supra* note 5, at 366.

405. *Id.* at 361.

406. *Id.*; see also Fabian, *Paraphilias and Predators*, *supra* note 264, at 83 (noting the DSM was not created for the “application of behaviorally driven symptomatology to answer legal questions”).

407. Prentky et al., *supra* note 27, at 359–60.

408. Frances et al., *supra* note 128, at 383.

409. *Id.*

410. See Prentky et al., *Muddy Diagnostic Waters*, *supra* note 265, at 458.

V. Conclusions

Fear of sexual predators has led society to adopt a law-psychiatry interface in which sexual offending is merged into a disease-based philosophy to justify various forms of punishment and preventive control. Sex crimes have become conflated with psychiatric disease. The multiple concerns expressed herein strongly suggest that the use of the psychiatric paraphilias in legal proceedings tends to undermine the independence and integrity of the legal and psychiatric professions. For the mental health field, the vagary of diagnostic criteria and the significant discretion subsequently provided has led to inconsistent and questionable diagnoses. The scientific requirements of validity and reliability make the DSM paraphilias highly questionable even for treatment purposes. For legal purposes, considering the significant negative consequences that follow, they are a poor fit in the law. The widespread acceptance of mental disorders for sexual deviance, despite these substantial scientific problems, ignores significant issues of due process and equity considering they help dictate infringements on fundamental interests of defendants.

Unfortunately, it appears that law and psychiatry will remain complicit in adapting diagnoses of mental illness to criminal justice officials' desire to control sex offenders. Academics and practitioners have sought the removal of the paraphilias from the DSM because labeling sexual behaviors as pathological has done great harm to many defendants.⁴¹¹ However, it is also recognized that removing the paraphilias, most particularly pedophilia, would be a public relations disaster for psychiatry.⁴¹² The APA's continuing involvement is evident with the overuse of paraphilia NOS, for example, and its ongoing consideration of adopting new paraphilias, such as rape paraphilia and hebephilia, that serve prosecutorial interests. The law's entrenchment is likewise strong, including the repeated acceptance in judicial decisions favorably embracing mental disease for sexual deviance—even those not otherwise specified—threatens to permit more shoe-horning diagnoses to satisfy criminal justice goals. The collaboration threatens not only the liberty and privacy interests of those who commit sex-based offenses. The potential exists for a contagion effect whereby interest groups might be encouraged to qualify all manner of criminal behaviors as distinct

411. Moser & Kleinplatz, *supra* note 39, at 107.

412. Robert L. Spitzer, *Sexual and Gender Identify Disorders: Discussion of Questions for DSM-V*, 17 J. PSYCHOL. & HUM. SEXUALITY 111, 115 (2005).

mental disorders.⁴¹³ Accordingly, if the interaction between law and psychiatry continues in this manner, all criminals may be deemed to have mental disorders. This outcome makes no logical sense, undermines the core tenets of the law, infringes upon fundamental rights, and methodically destroys trust in the science of psychiatry.

413. Zonana, *supra* note 258, at 246.