



DSM-5 proposed diagnostic criteria for sexual paraphilias: Tensions between diagnostic validity and forensic utility

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ABSTRACT

In order to prevent sexual crimes, “sexual predator” laws now allow indefinite preventive civil commitment of criminals who have completed their prison sentences but are judged to have a paraphilic mental disorder that makes them likely to commit another crime. Such proceedings can bypass the usual protections of criminal law as long as the basis for incarceration is the attribution of a mental disorder. Thus, the difficult conceptual distinction between deviant sexual desires that are mental disorders versus those that are normal variations in sexual preference (even if they are eccentric, repugnant, or illegal if acted upon) has attained critical forensic significance. Yet, the concept of paraphilic disorders – called “perversions” in earlier times – is inherently fuzzy and controversial and thus open to conceptual abuse for social control purposes. Consequently, the criteria used in diagnosing paraphilic disorders deserve careful scrutiny. The DSM-5 sexual disorders work group is proposing substantial revisions to the paraphilia diagnostic criteria in the DSM-5 nosology. It is claimed that the new criteria provide a reconceptualization that clarifies the distinction between normal variation and paraphilic disorder in a way relevant to forensic settings. In this article, after considering the logic of the concept of a paraphilic disorder, I examine each of the proposed changes to the DSM-5 paraphilia criteria and assess their conceptual validity. I argue that the DSM-5 proposals, while containing a kernel of an advance in distinguishing paraphilias from paraphilic disorders, nonetheless would yield criteria for paraphilic disorders that are conceptually invalid in ways open to serious forensic abuse.

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The American Psychiatric Association's *Diagnostic and Statistical Manual of Mental Disorders* (DSM; American Psychiatric Association, 2000) – often called the “Bible of psychiatry” in virtue of its influence and authority – is undergoing a revision that will shortly lead to a fifth edition (DSM-5). Starting with the third edition in 1980 (DSM-III; American Psychiatric Association, 1980), the DSM has offered descriptive, symptom-based diagnostic criteria that define each of the mental disorders. The DSM's necessary-and-sufficient diagnostic criteria are used by virtually all mental health professions, as well as attorneys, to determine what is and is not a mental disorder in clinical, research, and forensic settings in the United States and increasingly throughout much of the world.

On the DSM-5 website (American Psychiatric Association, 2010a), the Task Force working on the DSM-5 has posted many proposed changes to the diagnostic criteria for categories throughout the Manual, each of which could have a substantial impact on who is considered to be mentally disordered. In this paper, I evaluate the proposed changes to the section of disorders known as “sexual paraphilias,” that is, disorders of the objects of sexual impulses, desires, and arousal, as they currently appear on the website (as of November, 2010). These conditions used to

be known as “sexual perversions” or “sexual deviations.” The DSM-III introduced the more neutral term *paraphilia*, noting that this term's Greek components correctly emphasize that there is a deviation (*para*) in that to which the person is attracted (*philia*).

Currently, the specific DSM paraphilia categories prominently include pedophilia, exhibitionism, voyeurism, sadism, masochism, frotteurism (rubbing against strangers), fetishism, and transvestic1 fetishism. Many other paraphilias, from asphyxophilia to zoophilia, can be diagnosed within a “wastebasket” category of “paraphilia not otherwise specified” (paraphilia NOS) that encompasses any condition judged by the clinician to be a paraphilia that does not fall under any of the specific categories provided by the DSM. However, the categories specifically named in the DSM along with the new categories proposed for the DSM-5 between them encompass the paraphilias most relevant to forensic evaluation, so I focus on these categories.

Because of strong feelings about what is normal versus disordered sexuality, as well as theoretical uncertainty about the nature of human sexuality, the definitions of the paraphilias remain among the most controversial in the DSM. Given the malleability of human sexuality and the creativity of human beings in pursuing and amplifying sexual pleasure, it remains a debated question as to what justifies the classification of a source of sexual pleasure or a type of sexual activity as a mental disorder. The malleability of normal sexuality and our current

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ignorance of the mechanisms underlying sexual desire are powerful reasons for being conservative in attributing paraphilic disorders.

The justification for paraphilic diagnoses has become even more puzzling since homosexuality was eliminated as a diagnostic category from DSM-III (Bayer, 1981; Spitzer, 1981), followed by the final elimination in the revised third edition (DSM-III-R; American Psychiatric Association, 1987) of a remaining more limited category of “ego-dystonic homosexuality” in which the patient is distressed about his or her homosexuality. During the nineteenth and early twentieth centuries, homosexuality was considered the prototypical sexual perversion. For quite powerful reasons, including changing social values regarding both homosexuality itself and the importance of the reproductive function of sexuality, and the fact that homosexuality is compatible with a full capacity for love and relationship happiness, homosexuality was reclassified as a non-disordered variant of human sexuality. One might have expected, based on parallel logic, that other supposed paraphilias would inevitably be depathologized as well as part of a broadened acceptance of human sexual pluralism. But that has not happened. This historical circumstance pointedly raises the question whether there is a defensible conceptual basis for the lines that are being drawn by the DSM between the normal and the disordered.

There are four changes in the paraphilia criteria proposed for DSM-5 that I consider here. The first is a proposal to clarify terminology by distinguishing paraphilias – which are to be considered non-disordered sexual variations – from paraphilic disorders, which are to be distinguished from the paraphilias themselves by the harm they cause (currently, “paraphilia” is used for both the deviant desire and the disorder). A second proposal is for diagnosis to rely more on the objectively ascertainable data of the number of an individual’s sexual victims, along with a continued emphasis on behavioral criteria as central to diagnosis. Two further proposed changes consist of new categories to be added to the paraphilic disorders. The first is *hebephilia* (sexual arousal to pubescent children), to be incorporated into an expanded category of pedophilia (arousal by prepubescent children) to be labeled *pedohebephilia*. The second proposed new category is *paraphilic coercive disorder*, which is basically arousal by the coerciveness of a sexual act, thus in effect a paraphilic rape disorder. After some introductory explanation of why the definition of the paraphilias has become of crucial importance to larger issues regarding the protection of civil liberties, I address the concept of disorder and its application to the paraphilias in some detail. I then offer a conceptual history of DSM criteria for the paraphilias, after which I consider each of the DSM-5 proposals in turn.

1. Why are the DSM-5 paraphilic disorder proposals so important?: The role of sexual diagnosis in preventive institutionalization under sexual predator laws

The behavior associated with the expression of some paraphilias – especially acts involving minors, or the involvement of nonconsenting victims, or various forms of bodily harm (e.g., during sadistic sexual acts) – is not only harmful but illegal. 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 individuals illegally acting out certain paraphilic desires. This is because the DSM definitions of the paraphilic disorders are now applied in civil commitment procedures allowed by “sexual predator” laws – also commonly known as Sexually Violent Predator (SVP) or Sexually Dangerous Person (SDP) provisions – that have been passed in various versions by about twenty states and the federal government (Frances, Sreenivasan, & Weinberger, 2008).

Sexual predator laws were to some extent prompted by public outrage at cases in which released sexual offenders committed horrific crimes soon after release. For example, in the case that led to the first such sexual predator law, in Oregon, an individual convicted of

kidnapping and sexually molesting two teenage girls was released after a ten-year prison term and two years later kidnapped, sodomized, and cut off the penis of a seven-year-old boy (Frances, Sreenivasan, & Weinberger, 2008). In response, rather than lengthening the prison terms of all such offenders, some legislatures chose to institute a form of selective preventive institutionalization upon release from prison of those offenders who are deemed likely to act illegally again due to a mental abnormality. The advent of such laws is attributable to several other factors as well. The general move towards fixed sentencing for a given crime was aimed at greater fairness, but it decreased the flexibility that judges and parole officers had under indeterminate sentencing to be sensitive to the details of an individual’s case and to provide lengthier sentences in more egregious cases. Legislatures resisted passing very long fixed prison terms for sexual crimes that would apply to everyone in a class of offenders, because that inevitably yielded some cases of gross injustice to less egregious offenders. Finally, perceived failure of rehabilitation and treatment programs for sex offenders to prevent recidivism led to a renewed belief that keeping individuals from society was a major goal in dealing with repeat offenders (Frances, Sreenivasan, & Weinberger, 2008).

It is unconstitutional to preventively detain normal individuals just because they are believed likely to commit heinous crimes. However, involuntary preventive institutionalization of the mentally ill is constitutional under circumstances in which the mentally ill individual poses an imminent danger to himself/herself or others due to the mental disorder. Such practices of involuntary commitment for the mentally disordered, traditionally applied primarily to the severely psychotic or suicidal, have found novel avenues of application within the American legal system to psychiatrically disordered sexual offenders whose impulses lead to illegal forms of sexual activity that they have trouble controlling. The Supreme Court has ruled that preventive institutionalization of potential sexual criminals is constitutionally acceptable and does not imply constitutionally barred “double jeopardy” even after such individuals have served full prison terms for their crimes, but only if it can be demonstrated that the threat of renewed harm upon their release is due to a mental disorder that renders the individual unable to exercise normal-range volitional control over sexual behavior.

In addressing the constitutionality of state laws providing for civil commitment of sexually dangerous persons, in the case of *Kansas v. Hendricks*, the Supreme Court ruled that individuals who are “unable to control their behavior and thereby pose a danger to the public health and safety” (521 U.S. 346, 357 (1997)) may be preventively institutionalized, as long as “a finding of future dangerousness” was linked “to the existence of a ‘mental abnormality’ or ‘personality disorder’ that makes it difficult, if not impossible, for the person to control his dangerous behavior” (*Id.* at 358). The Court emphasized that dangerousness in the form of inability to control one’s impulses must be due to a mental disorder to warrant preventive civil commitment:

A finding of dangerousness, standing alone, is ordinarily not a sufficient ground upon which to justify indefinite involuntary commitment. We have sustained civil commitment statutes when they have coupled proof of dangerousness with the proof of some additional factor, such as a ‘mental illness’ or ‘mental abnormality’. These added statutory requirements serve to limit involuntary civil confinement to those who suffer from a volitional impairment rendering them dangerous beyond their control.
(*Id.*)

In the follow-up case of *Kansas v. Crane*, the Supreme Court reaffirmed that a psychiatric criterion was essential in distinguishing those subject to preventive civil detention from those other dangerous persons who should be addressed through criminal law. Otherwise, civil commitment could become a non-constitutional “mechanism

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