

Forensic Usage of the Paraphilia NOS, Nonconsent, Diagnosis: A Case Law Survey

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Sexually Violent Predator (SVP) statutes

- Permit post-incarceration civil commitment of sexual offenders
 1. Conviction of a sexually violent offense;
 2. Presence of a mental disorder/abnormality; that
 3. Causes volitional impairment; and thereby
 4. Increases sexual recidivism risk
- As of 2011, 20 states and the federal government have SVP laws
- In summer 2008, over 3,451 individuals were confined nationwide pursuant to SVP laws

Paraphilias

- Most common diagnostic category in SVP commitment
- Historically understudied
- Ambiguous/poor wording of *DSM* criteria raise the possibility that a paraphilia diagnosis can function as a mere behavioral descriptor
 - Raises issues re: etiological/pathological discrimination

Criterion A

- “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 nonconsenting persons**
- that occur over a period of at least 6 months”

Criterion B

- “For Pedophilia, Voyeurism, Exhibitionism, and Frotteurism, the diagnosis is made if **the person has acted on these urges** or the urges or sexual fantasies cause marked distress or interpersonal difficulty”
- “For Sexual Sadism, the diagnosis is made if **the person has acted on these urges with a nonconsenting person** or the urges, sexual fantasies, or behaviors cause marked distress or interpersonal difficulty”
- For the remaining Paraphilias [ostensibly including Paraphilia Not Otherwise Specified], the diagnosis is made if **the behavior, sexual urges, or fantasies cause clinically significant distress or impairment in social, occupational, or other important areas of functioning**”

302.9 Paraphilia Not Otherwise Specified

- “This category is included for coding Paraphilias that do not meet the criteria for any of the specific categories.
- Examples include, but are not limited to, [listing does not include biastophilia (rape/coercion/nonconsent)]”

Other Conditions That May Be a Focus of Clinical Attention: Problems Related to Abuse of Neglect

- “This section includes categories that should be used when the focus of clinical attention is severe mistreatment of one individual by another through physical abuse, sexual abuse, or child neglect.”

Sexual Abuse of Adult:

- “This category should be used when the focus of clinical attention is sexual abuse of an adult (e.g., sexual coercion, rape).
- **Coding note:** *Code*
 - **V61.12** *if focus of clinical attention is on the perpetrator and abuse is by partner*
 - **V62.83** *if focus of clinical attention is on the perpetrator and abuse is by person other than partner”*

Paraphilia, NOS, Nonconsent (PNOSN)

- Notwithstanding the existence of V Codes V61.12 and V62.83, many evaluators have interpreted the previous language—in light of the the *DSM's* affordance for clinical judgment—as permitting a diagnosis of PNOSN should an individual present with a paraphilic interest in nonconsensual or coercive sexual activity (with the later having first been distinguished from sexual sadism)
- For example, Doren (2002) offers a list of diagnostic indicators in the absence of self-reported nonconsensual sexual preference

Debate over the diagnosis: proponents

- *DSM* diagnosis not required by statute
- *DSM* taxonomy/criteria too restrictive
- Coercive/nonconsenting paraphilic interest supported by clinical experience, *DSM-IV-TR Casebook* example, and a handful of preliminary studies
- *DSM* diagnostic criteria only guidelines

Debate over the diagnosis: critics

- Adherence to explicit *DSM* diagnostic criteria fosters clearer communication and greater reliability
- Defined paraphilias have demonstrated poor reliability
 - Can expect even poorer reliability for vaguely defined PNOSN
- Paraphilic Coercive Disorder was explicitly rejected from inclusion in *DSM-III*
- The *DSM-IV-TR* paraphilia criteria carelessly/mistakenly worded, as admitted by the Chair and Editor of the Text and Criteria in *DSM-IV*
- Too few studies and too many outstanding issues

*Debate being noticed by the judiciary (e.g., *Brown v. Watters*, 2010)

Current study

Methodology

- **Purpose:** broadly examine the use of Paraphilia NOS, Nonconsent, diagnosis in court
- **Method:** Employed a case law analysis methodology
- **Search strategy:** Westlaw Terms & Connectors search string in ALLCASES database:
 - paraphilia /5 nos "n.o.s." "not otherwise specified" /5 "nonconsent!" "non-consent!"

Sample

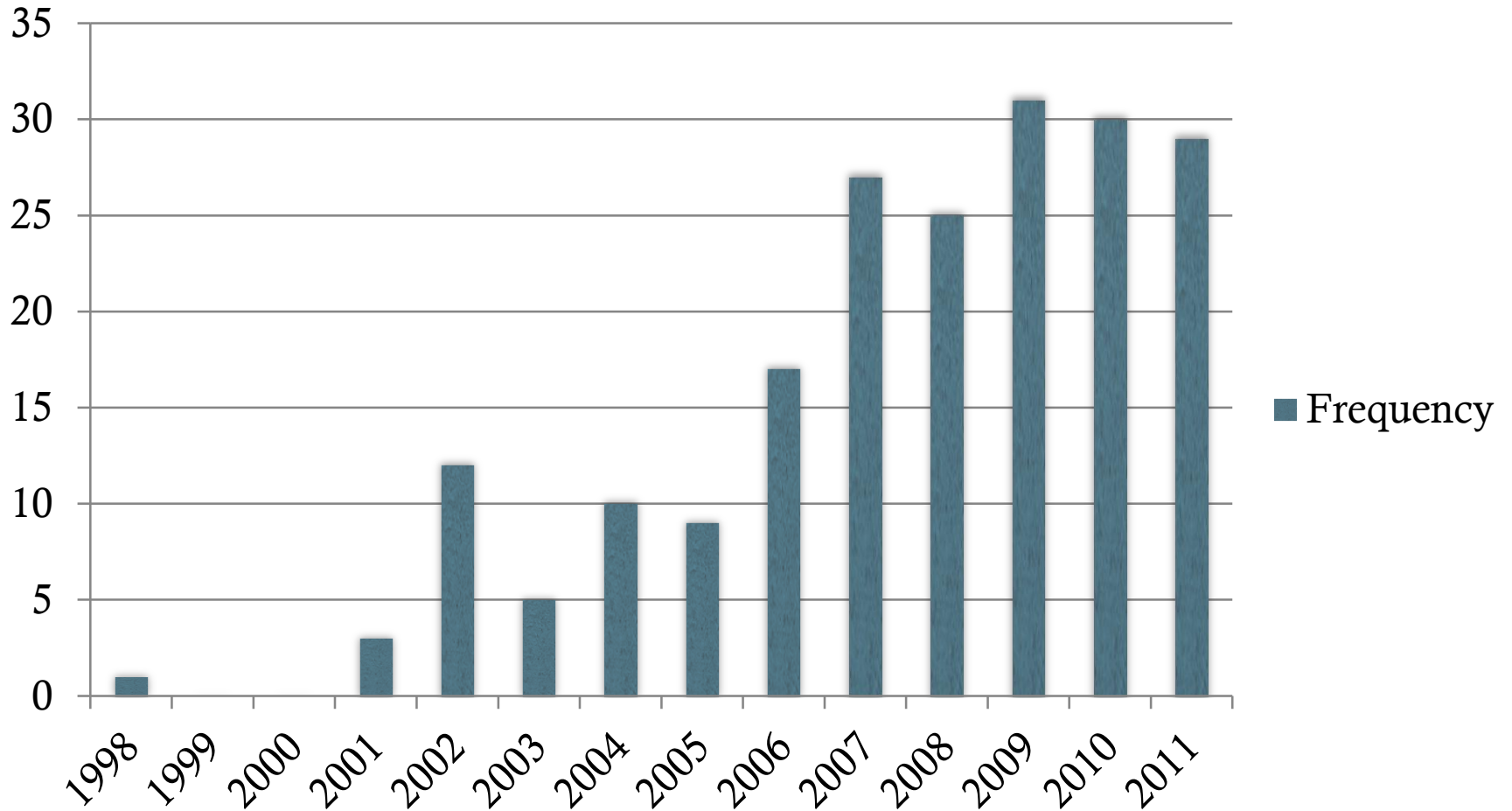
- Search returned 237 cases as of 1/1/12
- Duplicate opinions were removed from all analyses
- Cases involving the same individual were handled differently for
 - the jurisdiction- and year-frequency analyses (only first instance included) and
 - the 2008–2011 in-depth analyses (only most recent case included, unless an older opinion was distinctly more informative ($n = 1$))
- Jurisdiction and year analyses $N = 199$
- 2008–2011 analysis $N = 127$

Variables

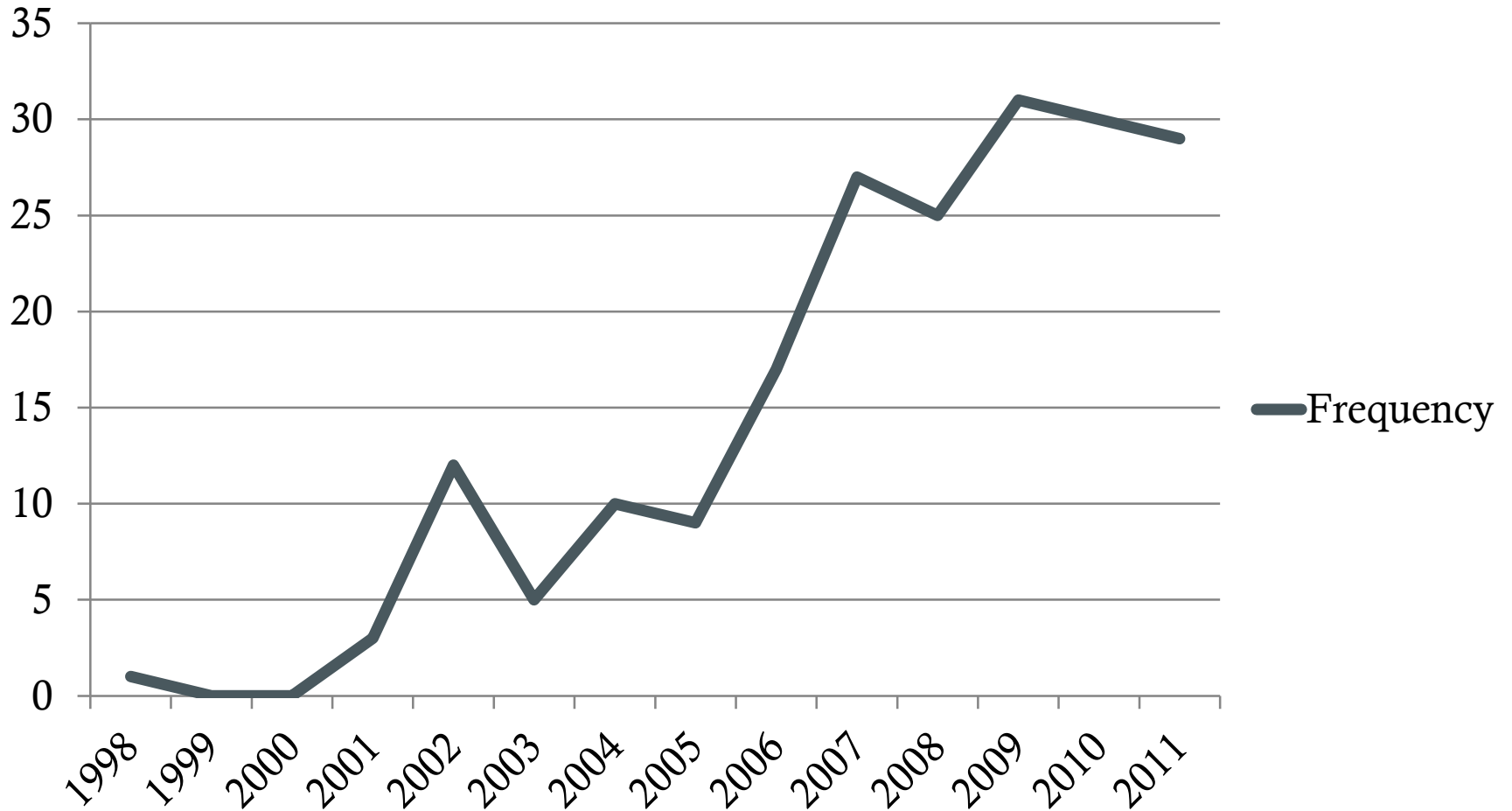
- Case name
- Year
- Court jurisdiction and level
- Case outcome
- Evaluation type
- Defendant age
- Party introducing the diagnosis
- Physiological testing
- Psychological testing
- Self-report
- Other diagnoses (Axis I/II)
- Presence of opposing expert(s)
 - Whether referenced controversy
 - Whether offered a different interpretation of factual evidence
- Sufficiency/admissibility of diagnosis directly challenged
 - Ruling if so
- Diagnostic support
 - Behavioral

Results

Year frequency



Year frequency trend



Jurisdiction frequency of PNOSN

State	Frequency	%	State	Frequency	%
Federal	11	5.5	Nebraska	2	1.0
Arizona	3	1.5	New Jersey	57	28.6
Arkansas	1	0.5	New York	1	0.5
California	48	24.1	North Dakota	5	2.5
Florida	5	2.5	Pennsylvania	2	1.0
Illinois	7	3.5	Texas	5	2.5
Iowa	1	0.5	Virginia	2	1.0
Massachusetts	2	1.0	Washington	35	17.6
Minnesota	4	2.0	Wisconsin	7	3.5
Missouri	1	0.5	CA + NJ + WA	140	70.3

State frequency of PNOSN and # of SVPs

State	#	%	State	#	%
Arizona	3 [58]	1.6 [1.7]	New Jersey	57 [340]	30.5 [10.0]
California	48 [808]	25.7 [23.7]	New York	1 [52]	0.5 [1.5]
Florida	5 [240]	2.7 [7.0]	North Dakota	5 [58]	2.7 [1.7]
Illinois	7 [224]	3.7 [6.6]	Pennsylvania	2 [9]	1.1 [0.3]
Iowa	1 [75]	0.5 [2.2]	Texas	5 [99]	2.7 [2.9]
Massachusetts	2 [105]	1.1 [3.1]	Virginia	2 [138]	1.1 [4.1]
Minnesota	4 [516]	2.1 [15.1]	Washington	35 [213]	18.7 [6.3]
Missouri	1 [110]	0.5 [3.2]	Wisconsin	7 [352]	3.7 [10.3]
Nebraska	2 [10]	1.1 [0.3]			

Notes:

- Other SVP states: KS = 216 (5.8%), NH = 0 (0%), SC = 94 (2.5%)
- AR is a non-SVP state

Examination variables

- **Evaluation type:** 99.2% SVP (1 level of community notification case in Arkansas)
- **Examinee age:** 99.2% adults (1 Pennsylvania case involved a juvenile near the age of majority)
- **Additional Axis I disorder(s):** 65.5% ($N = 119$)
- **Additional Axis II disorder(s):** 86.6% ($N = 119$)

PNOSN diagnostic support

	Frequency	Percent
Past behavioral evidence only*	66	52.0
Physiological testing	1	0.8
Psychological testing	2	1.6
Self-report	15	11.8
Physiological + self-report	1	0.8
Unclear	42	33.1
Total	127	100

*Use of past behavioral evidence assumed in all cases

Opposing expert

- **Presence of:** 60.2% ($N = 118$)
- **Noted PNOSN controversy:** 36.2% ($N = 69$)
- **Interpretation of evidence did not support PNOSN:** 66.2% ($N = 68$)

Case outcome

	Frequency	Percent
+ SVP finding	93	73.2
- SVP finding	2	1.6
Other	32	25.2
Total	127	100

Ruling when court asked to decide on diagnosis

	Frequency	Percent
Uphold diagnosis	18 (94.7%)	14.2
Invalidate diagnosis	1 (5.3%)	.8
Other	16	12.6
Not raised	92	72.4
Total	127	100

Legal analysis

First identified usage: *In re Commitment of State v. Seibert* (1998)

- **Factual circumstances:** Confined SVP appealed a denial of his petition for release on the grounds of treatability, inappropriate treatment, and insufficiently-tailored treatment
- **Holding:** Affirmed trial court
- **Government experts:** Drs. Raymond Wood and Charles Lodl
- “Wood diagnosed Seibert as suffering from “paraphilia not otherwise specified nonconsent” and an antisocial personality disorder. He described “paraphilia not otherwise specified nonconsent” as meaning in Seibert's case as having, for at least six months, continued recurrent urges, arousals and fantasies for having forced nonconsensual sexual contact. Wood testified that the paraphilia affected Seibert's emotional or volitional capacity and there was a substantial probability Seibert would commit additional acts of nonconsensual sexual violence. . . . Lodl agreed with Wood's diagnosis” (p. 746)

Bases for upholding the diagnosis

Courts have generally upheld the diagnosis on one of three grounds:

1. Narrowly via a due process analysis (e.g., *Brown v. Watters*, 2010)
2. Broadly via an admissibility analysis (e.g., *In re Matter of the Detention of Berry*, 2011)
3. Broader still via an admissibility analysis (e.g., *Commonwealth v. Dengler*, 2005; *In re Tripodes*, 2011)

The sole case of rejection: *People v. C.M.* (2009)

- **Factual circumstances:**
 - An SVP hearing (bench trial) involving a sex offender who had twice pled guilty to rape offenses
 - The state called two expert witnesses (Drs. Paul Etu and Lawrence Siegel) and the respondent called one (Dr. Leonard Bard)
- **Legal standard:** The government must prove each SVP element by C & C evidence, “without relying solely upon the defendant's commission of a sex offense”
- **Holding:**
 - Government did not meet its burden to prove by C & C evidence that C.M. suffered from a mental abnormality
 - The judge sitting as the factfinder concluded that the proffered expert evidence was too “loose” (e.g., insufficiently reliable NOS diagnoses; differing definitions of “nonconsent”) and “contradictory” (one expert diagnosed PNOSN; two did not)

Expert opinions

- **State's first expert:** diagnosed Paraphilia NOS, Nonconsent
- **State's second expert:** didn't diagnose Paraphilia NOS, Nonconsent, due to ambiguity of offense facts
- **Respondent's expert:** didn't diagnose Paraphilia NOS, Nonconsent; rejected validity of any NOS diagnosis in forensic contexts

Expert disagreements:

1. DSM-IV-TR editors' positions:
 - Inclusion of behavior in definition of paraphilias an error; behavior may be due to various motivations, and so cannot be the basis for diagnosis
 - Paraphilic Coercive Disorder rejected due to fear that it would be asserted as a defense to criminal prosecution
2. Definition of "nonconsent"
 - Active struggle/refusal requirement (any act which reduces active display of nonconsent would refute inference that lack of consent caused the arousal, e.g., when a knife is used to subdue victim)
 - Mere fact that victim was "clearly" nonconsenting is sufficient
3. Presence or validity of PNOSN

Study limitations

- Exclusive reliance on judicial opinions
 - Versus expert reports
- Reliance on mostly appellate opinions
 - Versus trial record
- Did not examine variables pertaining to volitional impairment

Final comments and directions for future research

- Case law analysis methodology insightful but limited
- More empirical work focused on validating a diagnosis that is reportedly buttressed by clinical experience is needed, especially in light of:
 - (1) the serious deprivation of liberty resulting from civil commitment;
 - (2) the apparent receptiveness of the courts to PNOSN; and
 - (3) the continued proposal to include a Paraphilic Coercive Disorder in the *DSM* (e.g., *DSM-5*)

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Slide 4: Sexually Violent Predator (SVP) statutes

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Slides 6–9: *DSM-IV-TR* Language

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Slides 10–12, 32: PNOSN, proponents, and critics; final comments and directions for future research

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Slide 21: State frequency of PNOSN and # of SVPs

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Slides 26–30: Legal analysis

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