



June 1997

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Recommended Citation

Alexander, Rudolph Jr. (1997) "Reconstructing Sex Offenders as Mentally Ill: A Labeling Explanation," *The Journal of Sociology & Social Welfare*: Vol. 24 : Iss. 2 , Article 5.

Available at: <https://scholarworks.wmich.edu/jssw/vol24/iss2/5>

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Reconstructing Sex Offenders as Mentally Ill: A Labeling Explanation

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A growing number of states are being pressured to keep incarcerated sex offenders behind bars longer. The response to this pressure has been to look to the mental health system and retrieve civil commitment for sex offenders, a policy largely abandoned in the 1960s. In the 1970s, the courts ruled that civil commitment to a mental institution required that the individual be both mentally ill and dangerous. So legislators, with the support of a few mental health professionals, met this requirement by legislatively reconstructing sex offenders as mentally ill and permitting their indefinite commitment to mental institutions. The author discusses the process of reconstructing sex offenders as mentally ill from a labeling perspective.

An increasing number of states have sought to control sexual perpetrators through their commitments to the mental health system after these perpetrators served criminal sentences (Erlinder, 1993; LaFond, 1993; Scheingold, Olson, & Pershing, 1993; Wettstein, 1993). This increase occurred within the last decade as numerous states passed legislation permitting civil commitment of sex offenders to mental institutions (Alexander, 1993; Fujimota, 1992). In the past, civil commitment was used for minor sex offenders instead of imprisonment. Now, it is used after a convicted sex offender has served all of his or her sentence. Alexander (1995) reported that 14 states and the District of Columbia had civil commitment statutes, and four states had pending bills in their legislatures. Each year, a new state adds civil commitment of convicted sex offenders to its civil statutes (Dowling & Lovitt, 1995). A recent survey of legal codes showed that 17 states had civil commitment of sex offenders to mental institutions.

In the process of passing civil commitment legislation, legislators had to reconstruct sex offenders as being mentally ill because

civil commitment to a mental institution required that a person be both mentally ill and dangerous (*Foucha v. Louisiana*, 1992). In the 1960s most states repealed civil commitment laws for sex offenders because of a growing consensus that these offenders were not mentally ill (Group for the Advancement of Psychiatry, 1977). In the 1970s, the courts held that civil commitment required that a person be both mentally ill and dangerous (*Foucha v. Louisiana*, 1992). So, legislatures created new definitions of mental illness just for sex offenders.

Sociologists have long discussed society's labeling of deviant behavior and developed the labeling perspective to provide a framework for understanding the process of deviance making. The labeling perspective has been used to explain both the criminalization of deviant behavior and the medicalization of deviant behavior. It provides a framework for understanding the processes involved in states reconstructing sex offenders as mentally ill because it involved medicalizing deviance.

Deviance, Labeling, and Medicalizing Deviance

Goode (1990) defined deviance as "behavior that some people in a society find offensive and that excites—or would excite if it were discovered—in these people disapproval, punishment, condemnation of, or hostility toward the actor" (p. 24). The most important factor in the study of deviance is the study of people who have the power to disapprove, punish, and condemn other persons. State legislatures and Congress have the power to label officially because these institutions make laws. They are sometimes assisted by the mental health profession when the deviance is viewed as a result of a mental disease. Also, the judicial system (i.e., the trial court and sometimes appellate courts) must sanction the commitment of an individual to a mental institution. As such, it sanctions the process of deviance making and gives legal force to the labeling process.

An intense debate has occurred between persons who believed in the medical model of mental illness (Henderson & Kalichman, 1990) and those who believed in the labeling model (Scheff, 1984). Those who favor the medical perspective state that it is preposterous to believe that labeling creates deviance, and those who favor the labeling perspective state that it is erroneous

to believe that some people have diseased minds which mental health professionals could uniformly discover. Some aspects of both perspective are correct, and a modified version of labeling provides a strong explanation for understanding the process of deviance making (Goode, 1990).

An essential component of the labeling model is that mental disorder is a term for a state of mind that supposedly causes behavior incompatible with one's social environment. The larger society finds this behavior to be troublesome. The labeling model provides that mental disorder is not a disease and is the result of a judgment based on social values. The judgment that someone has a mental disorder is made primarily on extrapsychiatric factors, such as one's race, sex, social class, and amount of power. A large number of persons engage in deviant behaviors, but society specifically targets only a few persons and rationalizes the same behaviors in other persons (Scheff, 1984).

The modified version of labeling acknowledged that some people developed conditions that caused hallucinations and delusions. Edwin Lemert stated long ago that the sociologist was not primarily concerned with the cause of hallucinations and delusions, but what it was about these behaviors that caused society to shun, segregate, and commit to mental institutions some persons who have displayed these behaviors. Stigma, labeling, and societal reactions to behaviors believed to be indicators of mental disorder are "potent and crucial sociological factors to be taken into account in influencing the condition of the mentally disordered" (Goode, 1990, p. 322).

The modified labeling perspective provides that "holding psychiatric conditions constant, the greater the problems the mentally disordered individual creates for others, the greater the likelihood of being labeled as mentally ill and the greater the likelihood of being institutionalized and treated" (Goode, 1990, p. 323). Furthermore, according to Goode (1990), "as a general rule, the more deviant an activity is, the greater the likelihood that it will be medicalized, especially in Western society" (p. 324).

Medicalizing some deviant behavior is not necessarily bad. For instance, mere addiction to drugs was once criminalized, and persons who were addicted to drugs could be fined and imprisoned. The medicalization of addiction caused a policy change,

and addiction was no longer a crime but an illness deserving compassion. However, medicalizing deviant behavior has some negative effects, for example, the depoliticalization of behavior. Political dissenters in Russia were routinely institutionalized in mental institutions for criticism of the Russian political system.

According to Conrad (1980), "defining deviant behavior as a medical problem allows certain things to be done that could not otherwise be considered; for example, the body may be cut open or psychoactive medications may be given" (p. 81). This last effect, the medical social control of deviant behavior, is important for sex offenders. Medicalizing a sex offender as having a medical disease permits his or her involuntary commitment from prison to a mental institution for an indeterminate time.

The preceding discussions regarding deviance, labeling, and medicalizing deviance provide a framework for understanding the processes and decisions regarding sex offenders. Before discussing these processes and decisions, the author describes two civil commitment statutes. One was passed in the State of Washington and the other in Minnesota. These states were selected for several reasons. First, Washington and Minnesota have been the most active in committing sex offenders to mental institutions. Second, some states have used the Washington and Minnesota statutes as models for their statutes. Third, both the Washington and Minnesota Supreme Courts have ruled regarding the constitutionality of civil commitment for sex offenders.

Civil Commitment Statutes for Sex Offenses

In the late 1930s, Minnesota passed a statute permitting the civil commitment of a person who was assessed as having a "psychopathic personality" and who was sexually irresponsible. The Minnesota legislature defined a psychopathic personality as "the existence in any person of such conditions of emotional instability, or impulsiveness of behavior, or lack of customary standards of good judgment, or failure to appreciate the consequences of personal acts, or a combination of any such conditions, as to render such person irresponsible for personal conduct with respect to sexual matters and thereby dangerous to other persons" (*In re Blodgett*, 1994, p. 919). Because of the broadness of the statute, the

Minnesota Supreme Court narrowed the statute to “those persons who, by habitual course of misconduct in sexual matters, have evidenced an utter lack of power to control their sexual impulses and who, as a result, are likely to attack or otherwise inflict injury, loss, pain or other evil on the objects of their uncontrolled and uncontrollable desire” (*In re Blodgett*, 1994, p. 919).

Commitment under this statute could be indefinite or until the treatment staff at the institution felt that the individual should be released. Initially, the law was used for persons who were caught peeping in windows, persons who exposed themselves publicly, and persons who engaged in consensual homosexual acts (Halvorsen, 1993). Later, it was applied to more serious offenders. However, unlike during its earlier use, it was targeted at prisoners who had been convicted of sex offenses and who were nearing the completion of their criminal sentences (Hall, 1994).

Unlike Minnesota, Washington had to pass new legislation to commit civilly sex offenders. Also unlike Minnesota, Washington called its offenders “sexual predators.” The Washington statute was passed after Washington citizens, outraged by two highly brutal sex crimes, demanded that their legislature pass a bill to control offenders who prey on women and children. The Governor formed a task force, which did not have any representatives from psychiatry, to propose a bill to control sex offenders. The task force acknowledged that sex offenders did not meet Washington’s civil commitment requirement that was used for ordinary citizens, which required a mental illness and evidence of a current act of danger to self or others. The task force acknowledged that it had to construct a new definition of mental illness that would include just sex offenders (Reardon, 1992). Despite the opposition by the Washington State Psychiatric Association, the Washington legislature passed the bill unanimously and called it the Sexually Violent Predator Statute (Washington Statute, 71.09.020).

As the statute defined it, a sexually violent predator is “any person who has been convicted of or charged with a crime of sexual violence and who suffers from a mental abnormality or personality disorder which makes the person likely to engage in predatory acts of sexual violence.” Further, mental abnormality was defined as “a congenital or acquired condition affecting the emotional or volitional capacity which predisposes the person

to the commission of criminal sexual acts in a degree constituting such person a menace to the health and safety of others." Finally, predatory behaviors were defined as "acts directed towards strangers or individuals with whom a relationship has been established or promoted for the primary purpose of victimization" (Washington Statute 71.09.020).

The statute provided that a person who has been found to be a sexual predator by a judge or jury shall be committed to the Department of Social and Health Services until the person's mental abnormality or personality disorder was no longer evident and the person was safe to be in the community. For political reasons, the statute did not cover family members who sexually victimized family members, although statistics revealed that children were more likely to be sexually assaulted by their relatives than strangers (Scheingold et al., 1992).

Court Rulings Supporting the Constitutionality of Committing Sex Offenders as Mentally Ill

On appeal to the Supreme Court of Minnesota, the new use of civil commitment was upheld (*In re Blodgett*, 1994), and the U.S. Supreme Court refused to hear Blodgett's appeal (*Blodgett v. Minnesota*, 1994), establishing the constitutionality of this law. Writing for the Minnesota majority, Justice John E. Simonett conceded that psychopathic personality was not medically recognized and could not be found in the *Diagnostic Statistical Manual of Mental Disorders* (DSM-III-R) (American Psychiatric Association, 1987). However, it, according to the Justice, constituted more than a social maladjustment and was a severe mental condition. In Justice Simonett's opinion, it was analogous to the antisocial personality disorder in the DSM-III-R with the additional feature of sexual violence (*In re Blodgett*, 1994)

In like manner, the Supreme Court of Washington upheld its violent sexual predator statute. Writing for the majority, Justice Barbara Durham stated that the Sexual Predator Statute required that the person designated to be committed must have a mental abnormality or personality disorder. Justice Durham observed that mental abnormality was not defined in the DSM-III-R, but the experts for the State testified that mental abnormality was similar

to mental disorder. Because the offender was diagnosed as having paraphilia, he met the statutory definition of being mentally ill (*In re Young*, 1993).

The Application of the Labeling Perspective to Reconstruction of Sex Offenders as Mentally Ill

Goode (1990) provided a key theoretical proposition in the understanding the medicalization of sexual deviance when he wrote that the greater the problems created, the greater the likelihood of being institutionalized. Highly publicized instances of sexual assaults force a number of citizens to go to their state legislatures demanding more control of sex offenders. In the State of Washington, outraged citizens threatened to defeat any politician who opposed the civil commitment bill (LaFond, 1992). This pressure, or trouble, created a major problem for politicians, who acceded to the wishes of the public.

Goode also indicated that certain practices, and persons who engaged in them, were more likely to be seen as indicators of mental illness. One of the stated aims of civil commitment was to protect women and children from sexual perpetrators. An adult's engaging in sex with a child is deviant behavior and potentially an indicator of mental illness. "Normal" sex involves two consenting adults. Thus, the practice of sex between a child and adult is more likely to be viewed as deviant behavior and a sign of a mental disorder.

Yet, as the labeling perspective suggests, not all deviant behavior will be viewed the same. The Washington legislature purposely excluded parents, grandparents, or uncles who may have repeatedly sexually abused a child relative. These persons were not to be viewed as predators and were excluded from the definition of a predator and indefinite civil commitment in a mental institution.

Another example of how similar sexual behaviors is viewed differently by persons empowered to label and medicalize deviant behavior is illustrated by marriage laws, and this difference supports another aspect of labeling. For instance, a number of states permit adolescents as young as 13, 14, and 15 to marry with the consent of the adolescents' parents or legal guardians (Laws

of Puerto Rico Annotated @ 31-242; Montana Code Annotated @ 40-1-213; North Carolina General Statute @ 51-2; Virginia Code Annotated @ 20-48; Wyoming Statute Annotated @ 20-1-102;). Thus, a 30- or 40-year-old male could marry a 13-year-old female, and sex between them would be normal behavior. However, an unmarried couple of the same ages as the above example could lead to a criminal sentence and civil commitment to a mental institution. The absence of a marriage license could mean that the man had a mental disorder because he was having sex with a child. The labeling perspective explains the differentiation in these situations.

Although state appellate court Justices are supposed to apply the law to a given set of circumstances, they are not above political pressures. The decisions to uphold Minnesota and Washington's civil commitment statutes for sex offenders were not unanimous, but a majority of the Justices of each court supported the reconstruction process. In the trial courts where the civil commitment process began, expert testimonies were offered by both sides. Both states' mental health professionals testified that the sex offenders under consideration were mentally ill. Yet, the defense attorneys for each man produced credible, expert testimony that these offenders were not mentally ill. The majority Justices in each state completely ignored the testimony of the defense and chose to concur with the state's experts. In additionally, the Justices enhanced their conclusions that sex offenders were mentally ill by referring to the DSM-III-R. The majority Justices in both states acknowledged that the DSM-III-R did not support the legislative definitions, but they constructed definitions anyway to support their ruling that sex offenders were mentally ill.

Last, Conrad (1981) stated that medicalizing deviant behaviors permitted the state to do something that otherwise could not be done without the label of mental illness. His conclusion is strongly supported with respect to sex offenders. Convicted sex offenders must be released from prison after serving their sentences. A sex offender who has a ten year sentence must be released at the end of that sentence. By legislators and a few mental health professionals' labeling sex offenders as mentally ill, the state may confine sex offenders indefinitely in mental institution and do not have to release them. Without the mental illness label,

they must be released. With it, they can be confined for the rest of their lives. Thus, Conrad's proposition that medicalizing deviant behaviors permits the state to do something that otherwise could not be done is certainly supported.

Implications of Labeling Sex Offenders as Mentally Ill

The success of labeling sex offenders as mentally ill has implications for other troublesome, deviant behavior. For instance, the stalking of women has begun to receive considerable attention (Darby, 1995; Ellis, 1995; Stadler, 1995; Zorn, 1995), forcing legislatures to make it a crime (Code of Alabama @ 13A-6-90; Alaska Statute @ 11.41.260; Arkansas Revised Statute @ 13-2923; California Penal Code @ 646.9). In most states, stalking is a felony, and in some states it is a misdemeanor. If some stalkers continued in their behavior after serving a criminal sentence, undoubtedly, calls will be made to do more to keep stalkers behind bars. Prison sentences could be toughened, but civil commitment also becomes a policy choice, provided a psychologist or psychiatrist is willing to conclude that stalking is evidence of a mental disorder.

However, the labeling perspective would suggest that not all stalkers would be civilly committed to mental institutions. As Goode wrote, the deviant label would not be applied to all persons who engaged in the deviant behavior. In situations where the stalkers are former husbands, for instance, legislators are unlikely to pass laws making these offenders eligible for civil commitment for an indefinite period. The reason for this proposition is that these situations involve intimates, and there is a tendency to view their behaviors differently. Legislators would exempt these offenders like that they exempted family members who sexually abused minor relatives. A plausible hypothesis from the labeling perspective is that strangers who stalk are more likely to be viewed as mentally ill than former husbands who stalk their ex-wives or men who stalk their former girlfriends.

The possibility of other criminal behavior being viewed as signs of mental illness so as to continue offenders' incarceration is not remote. For instance, a New Jersey politician proposed that all violent criminals in prison be eligible for civil commitment after they have completed their prison sentences (Wilson, 1994).

For this to occur, all that would be needed are a few mental health professionals willing to diagnose the prisoners as having a mental disorder and dangerous to the public. Then, these offenders could be legislatively constructed as mentally ill like sex offenders have been done.

There are other implications for legislating sex offenders as mentally ill. It retrieves the medical model of understanding criminal behavior for one type of crime. Woman advocates have declared that rape and other forms of sexual assaults are acts of violence, not sex, and should be treated as other violent crimes. Yet, the growing policy of viewing sex offenders as mentally ill challenges this perspective. Another implication is that it may open the door to a new legal defense in sexual assault cases. If some sex offenders have, as Minnesota calls it, uncontrolled and uncontrollable sexual impulses, then these offenders lack free will and should not be sanctioned by the criminal justice system. Some criminal defendants have avoided conviction and punishment under the theory that they had an irresistible impulse to commit their deeds.

Conclusion

The labeling perspective does not enjoy wide support among academicians. It may not have neatly derived concepts and hypotheses that can be easily tested. However, it provides a useful framework for understanding how some phenomena are viewed. It certainly helps to explain how future, yet to be discovered problems may become medicalized so as the state can exert more social control.

References

- Alaska Statute @ 11.41.260.
- Alexander, R. Jr. (1993). The civil commitment of sex offenders in light of Foucha v. Louisiana. *Criminal Justice and Behavior*, 20, 371-387.
- Alexander, R. Jr. (1995). Employing the mental health system to control sex offenders after penal incarceration. *Law and Policy* 17, 112-130.
- American Psychiatric Association (1987). *Diagnostic and statistical manual of mental disorders*. 3d ed., Rev. Washington, DC: Author.
- Arkansas Revised Statute @ 13-2923.
- Blodgett v. Minnesota, 115 S. Ct. 146, 1994.

- California Penal Code @ 646.9.
Code of Alabama @ 13A-6-90.
- Conrad, P. (1981). The medicalization of deviance in American culture. In E. Rubington & M. S. Weinberg (Eds.), *Deviance: The interactionist perspective* (4th ed) (pp. 75–83). New York: Macmillan.
- Darby, J. (1995, October 20). Accused stalker ruled incompetent. *Times-Picayune Sec BK*, P. 1.
- Dowling, C.. & Lovitt, J. T. (1995, December 5). Released rapist called a threat: Convict gains freedom; Victims voice outrage *USA Today* P 3A.
- Ellis, R. (1995, October 5). Convicted stalker, 31, gets 15 years for threats. *Atlanta Constitution Sec XJM*, P3.
- Erlinder, C. P. (1993). Minnesota's gulag: Involuntary treatment for the politically ill. *William Mitchell Law Review*, 19, 99–159.
- Foucha v. Louisiana, 112 S. Ct 1780, 1992.
- Fujimota, B. K. (1992). Sexual violence, sanity, and safety: Constitutional parameters for involuntary civil commitment of sex offenders. *University of Puget Sound Law Review*, 15, 879–911.
- Group for the Advancement of Psychiatry (1977). *Psychiatry and Sex Psychopath Legislation: The 30s to the 80s*. New York: Mental Health Materials Center.
- Goode, E. (1990). *Deviant behavior* (3rd ed). Englewood Cliffs, NJ: Prentice Hall.
- Hall, M. (1994, August 17) "A furor brews over release of sex offenders *USA Today*, p 3A.
- Halvorsen, D. (1993, July 25). Sex criminal lockup law faces challenge. *Star Tribune* pp. 1A, 10A, 11A.
- Henderson, M. C. & Kalichman, S. C. (1990). Sexually deviant behavior and schizotypy: A theoretical perspective with supportive data. *Psychiatric Quarterly*, 61, 273–284.
- In re Blodgett, 510 N.W. 2d 910, 1994.
- In re Young, 857 P.2d 989, 1993.
- LaFond, J. Q. (1992). Washington's sexually violent predator law: A deliberate misuse of the therapeutic state for social control. *University of Puget Sound Law Review*, 15, 655–703.
- Laws of Puerto Rico Annotated @ 31-242.
- Montana Code Annotated @ 40-1-213.
- North Carolina General Statute @ 51-2.
- Reardon, J. D. (1992). Sexual predators: Mental illness or abnormality? A psychiatric perspective. *University of Puget Sound Law Review*, 15, 849–53.
- Scheff, T. J. (1984). *Being mentally ill: A sociological theory* (2nd ed). New York: Aldine.
- Scheingold, S., Olson, T., & Pershing, J. (1992). The politics of sexual psychopathy: Washington state's sexual predator legislation. *University of Puget Sound Law Review*, 15, 809–820.
- Stadler, M. (1995, November 7). Stalking the predator *New York Times Sec A*, P23.
Washington statute, 71.09.020.

- Wettstein, R. W. (1992). A psychiatric perspective on Washington's sexually violent predators statute. *University of Puget Sound Law Review*, 15, 597-633.
- Wilson, B. (1994, September 6). Mental hospitals aren't for criminals. *The New York Times*, p. A16.
- Wyoming Statutes Annotated @ 20-1-102.
- Zorn, E. (1995, October 5). In stalking, law itself sometimes crosses the line. *Chicago Tribune* Sec. 2c, P1.