

# Only Yesterday: The Rise and Fall of Twentieth Century Sexual Psychopath Laws

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# Only Yesterday: The Rise and Fall of Twentieth Century Sexual Psychopath Laws

*Tamara Rice Lave\**

## INTRODUCTION

"The most rapidly increasing type of crime is that perpetrated by degenerate sex offenders . . . . Should wild beasts break out of circus cages, a whole city would be mobilized instantly. But depraved human beings, more savage than beasts, are permitted to rove America almost at will."

J. Edgar Hoover, 1947<sup>1</sup>

Sexually violent predator laws are not the first wave of American legislation aimed at committing sex offenders to locked mental hospitals; they are the second. Preceding them by half a century were the sexual psychopath laws, which differed in significant detail but provided the same basic framework of indeterminacy and dangerousness. Like the sexually violent predator laws, the sexual psychopath laws were enacted in response to a few high profile sex crimes. Citizens across the United States were terrified that they were being engulfed by a wave of sex crimes, and politicians responded. Between 1937 and 1967, twenty-six states and the District of Columbia passed legislation calling for the indefinite civil commitment of so-called sexual psychopaths.<sup>2</sup> By 1990—when the first sexually violent predator law was passed in the state of Washington<sup>3</sup>—most of the sexual psychopath laws had fallen out of use or been overturned.

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1. J. Edgar Hoover, *How Safe is Your Daughter?*, AM. MAG., July 1947, at 32.

2. Alan H. Swanson, *Sexual Psychopath Statutes: Summary and Analysis*, 51 J. CRIM. L. & CRIMINOLOGY 215, 215 (1960).

3. NAT'L CTR. FOR PROSECUTION OF CHILD ABUSE, CHILD ABUSE AND NEGLECT STATUTES AT A GLANCE: INVOLUNTARY CIVIL COMMITMENT OF SEXUALLY VIOLENT PREDATORS 1 (Sept. 1999).

This Article looks at the history of the sexual psychopath laws. It begins by critically examining the popular belief that there was a sex crime wave. It then discusses different solutions proffered to solve the sex crime problem. Finally it provides an overview of the sexual psychopath laws and discusses the reasons for their demise.

### I. THE TENOR OF THE TIMES

On March 20, 1937, a nine-year-old girl's mutilated body was found in a burlap sack. Within hours, a twenty-six-year-old barber confessed to raping and bludgeoning her to death with a hammer in his Brooklyn Barbershop.<sup>4</sup> On July 31 of the same year, an eight-year-old girl was found nude in the cellar of her Brooklyn home. The police interrogated an ex-convict for seventeen hours, allegedly beating him with a rubber hose, before he confessed.<sup>5</sup> Less than one month later—on August 13—a house painter for the Works Progress Administration used a grasshopper in a milk bottle to lure a four-year-old girl to a deserted house near a Staten Island swamp. After attempting to sexually assault her, the man strangled the girl with the straps of her red bathing suit and then dropped a fifty pound brick on her back.<sup>6</sup>

These crimes ignited the local and national press.<sup>7</sup> Magazines like *Time*,<sup>8</sup> the *Christian Century*,<sup>9</sup> and *Nation*<sup>10</sup> published articles about the rash of sex crimes. In 1937 alone, there were 143 articles published about sex crimes in the *New York Times*—so many that it had to create a new index category.<sup>11</sup> Sex offenders were described as a nationwide menace. In July 1947, FBI Director J. Edgar Hoover published an article in American magazine entitled, "How safe is your daughter?" Hoover declared, "The most rapidly increasing type of crime is that perpetrated by degenerate sex offenders . . . [It] is taking its toll at the rate of a criminal assault every 43 minutes, day and night in the United States."<sup>12</sup> In the December 1948 edition of the

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4. *Ossido Gets Death for Slaying Girl*, 9, N. Y. TIMES, May 12, 1937, at 48–49.

5. *Marks Convicted of Slaying Girl*, 8, N. Y. TIMES, Oct. 30, 1937, at 11.

6. *Painter, 57, Admits Killing Girl of 4*, N. Y. TIMES, Aug. 15, 1937, at 1.

7. Stephen Robertson, *Separating the Men From the Boys: Masculinity, Psychosexual Development, and Sex Crime in the United States, 1930s–1960s*, 56 J. HIST. & MED. ALLIED SCI. 3, 3 (2001).

8. *Pedophilia*, TIME, Aug. 23, 1937, <http://www.time.com/time/magazine/article/0,9171,883671,00.html>.

9. C.J. Dutton, *Can We End Sex Crimes?*, THE CHRISTIAN CENTURY, Dec. 22, 1937, at 1594–95.

10. Sheldon Glueck, *Sex Crimes and the Law*, NATION, Sept. 25, 1937, at 318–20.

11. Estelle B. Freedman, "Uncontrolled Desires": *The Response to the Sexual Psychopath*, 74 J. AM. HIST. 83, 83 (1987).

12. Hoover, *supra* note 1, at 32–33.

*Saturday Evening Post*, David Wittels proclaimed, "Most of the so-called sex killers are psychopathic personalities . . . . No one knows or can even closely estimate how many such creatures there are, but at least tens of thousands of them are loose in the country today."<sup>13</sup>

Even the academic journals reflected an increase in articles related to sex crimes. From 1921 to 1932, only about six articles focused specifically on sexual offenders were published.<sup>14</sup> The number increased five-fold in the years from 1933 to 1941. From 1942 through 1951, the number of articles published exceeded one hundred.

The public was outraged and demanded that something be done to combat sex offenders. One thousand angry citizens held a meeting in Ridgewood, New York on August 14, 1937, in response to the "increasing wave of sex crimes against young girls." Various speakers addressed the gathering including representatives of the police department, the state legislature, and an assortment of civil groups.<sup>15</sup> A month later, a mass meeting to curb sex crime took place in New Rochelle, New York.<sup>16</sup> Citizens groups and law enforcement teamed together in Westchester, New York in 1937 to promote changes in the law.<sup>17</sup> On September 4, 1937, "drives to stop crimes of sex degeneracy" started in communities throughout Massachusetts.<sup>18</sup>

### *B. Was There Really a Sex Crime Wave?*<sup>19</sup>

Stories about sex offenders pervaded the popular and academic press, and many Americans believed that sex offenses were on the rise. Investigating the legitimacy of this belief is difficult, however. One obvious approach would be to look at contemporaneous crime

13. David G. Wittels, *What Can We Do About Sex Crimes*, SATURDAY EVENING POST, Dec. 11, 1948, at 30.

14. BENJAMIN KARPMAN, *THE SEXUAL OFFENDER AND HIS OFFENSES* ix (Julian Press 1954).

15. *Painter Admits Killing*, *supra* note 6, at 20.

16. *Westchester Acts to Curb Sex Crime*, N. Y. TIMES, Sept. 19, 1937, at 52.

17. One of their goals was to "curb the circulation of lascivious motion pictures and publications." *Id.*

18. *To Counsel Hurley on Sex Crimes*, N. Y. TIMES, Sept. 5, 1937, at 7.

19. Although this Section just discusses the United States, sex crimes reportedly increased in Europe as well. The Geneva Institute of Legal Medicine in Switzerland measured a steady increase in sex crimes (charges, convictions, and sentences) throughout Europe. Commitments for sex crimes increased from 20,000 per year for 1920 and 1921 to 40,000 per year for 1935. See Marie E. Kopp, *Surgical Treatment as Sex Crime Prevention Measure*, 28 J. CRIM. L. & CRIMINOLOGY 692, 694 (1938) (citing Francois Naville, *La castration therapeutique et preventive des delinquents et pervers sexuels* [The therapeutic and preventive castration of delinquents and pervers], JOURNAL DE MEDECINE DE LYON 711-22 (1935)). Sex crimes also increased in England and Wales between 1920 and 1935. *Id.* (citing HIS MAJESTY'S STATIONARY OFFICE—LONDON, CRIMINAL STATISTICS FOR ENGLAND AND WALES

data; yet, the FBI has cautioned that "statistics collected before 1960 are not comparable to subsequent or prior years' data and should be used with great caution."<sup>20</sup> Since the FBI data was widely available, it will still be evaluated not for its truth, but for the impact it should have reasonably had on peoples' beliefs. In addition, independent crime data will be examined from New York City.

### 1. Analysis of FBI Statistics

#### a. Important Caveat Regarding Reliability of Data

The FBI began collecting arrest data from police stations across the country in 1930 and compiling it in the Uniform Crime Reports for the United States and its possessions (UCR).<sup>21</sup> In 1931, Sam Bass Warner published an article in the Harvard Law Review in which he sharply criticized the UCR. Warner concluded, "If the federal Government is to maintain its present reputation for the accuracy of its statistics, it must stand by the slogan, 'Better no statistics, than false statistics.'"<sup>22</sup> Over twenty years later, the accuracy of the UCR was still questioned. In 1958, esteemed

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(1937)). The trend continued as the number of sex crimes increased from 5,000 in 1938 to over 13,000 in 1950. *British Incensed by Sex Crimes Rise*, N. Y. TIMES, Aug. 6, 1951, at 5.

20. FED. BUREAU OF INVESTIGATION, DATA CAVEATS TO UCR DATA 1930-1959 2 (Uniform Crime Reporting Program CD-ROM, Mar. 25, 2008) (on file with author) [hereinafter UCR DATA CAVEATS].

21. Marvin E. Wolfgang, *Uniform Crime Reports: A Critical Appraisal*, 111 U. PA. L. REV. 708, 710 (1963). In 1958, the name was condensed to Uniform Crime Reports for the United States, and in 1958 to Crime in the United States. UCR DATA CAVEATS, *supra* note 20, at 1.

22. In 1931, Sam Bass Warner published an article in the Harvard Law Review in which he sharply criticized the UCR:

In entitling its pamphlet *Uniform Crime Reports*, and stating that the figures it contains of the number of major felonies known to the police "provide an index to the volume, geographic distribution, and periodic fluctuation of these crimes" and are based on "comparable monthly crime reports," the Department of Justice is giving the support of its name and reputation to figures unworthy of such backing. Even if the word "uniform" were omitted from the title and the inaccuracies of the figures pointed out, it is doubtful if the publication of such statistics would not do more harm than good. In spite of anything said in the report, the Federal Government would be giving credence to police statistics by publishing them. Public opinion and legislation would be based on them. If the Federal Government is to maintain its present reputation for the accuracy of its statistics, it must stand by the slogan: "Better no statistics, than false statistics!"

See generally Sam Bass Warner, *Crimes Known to the Police—An Index of Crime?*, 45 HARV. L. REV. 307, 330 (1931).

criminologist and University of Pennsylvania Professor Thorsten Sellin stated: "The U.S. has the worst criminal statistics of any major country in the Western world."<sup>23</sup>

The problems with the UCR were multi-fold. A lack of data presented one hurdle. The FBI could not compel police to report arrests, and so in the first year, just 300 police agencies across the country reported their arrest data. By 1961, that number had increased to 7,800 agencies across cities that comprised 96% of the total population in the United States. Consequently, what might appear to the unsophisticated reader as a large increase in the number of rapes over this time period could be partially explained by the increase in the number of police departments reporting crime data.

Even if police departments were participating, they did not always report all of their arrests.<sup>24</sup> Between 1949 and 1952, the FBI did not accept data from New York City because the number of offenses was significantly underreported. In 1950, New York City improved its collection methods, and in 1952, the FBI began again including its arrest data. The consequence, however, was the appearance of a significant increase in crime between 1948 and 1952.<sup>25</sup> Chicago and Philadelphia also improved their reporting systems, which resulted in an apparent but not real increase in the incidence of crime.<sup>26</sup>

Until 1958, there was an additional problem with the UCR, which had to do with the way that it calculated crime rates.<sup>27</sup> Crime rates were originally calculated using the number of crimes reported every year divided by the most recent decennial census population. Since the population was actually increasing, this method of reporting made it appear that the crime rate kept increasing until the year of the decennial census and then it would appear to drop sharply. The FBI now publishes a caution in each of the pre-1960 UCRs not to compare crime rates across years.<sup>28</sup>

Another problem with turning to the UCR to look at the incidence of sex crimes was more foundational. Although forcible rape was one of the seven index offenses reported to the FBI, the accuracy of this data hinged directly on the accuracy of the rape data supplied by police departments. Until the 1970s, rape statutes required that a woman resist her assailant and that there be

23. Robert Wallace, *Crime in the U.S.*, LIFE, Sept. 9, 1957, at 49.

24. UCR DATA CAVEATS, *supra* note 20, at 2.

25. Wolfgang, *supra* note 21, at 715.

26. *Id.* at 716.

27. In 1958, the FBI began calculating crime rates with annual census data. *Id.* at 725.

28. UCR DATA CAVEATS, *supra* note 20, at 2.

corroborating evidence apart from the woman's testimony.<sup>29</sup> Not surprisingly, these requirements meant that many acts that would now be defined as rapes were not. There was also the problem of "unfounding." Even if a woman reported that she had been raped, the police had the ability to "unfound" the crime if they did not believe that it occurred.<sup>30</sup> During this time period, issues like the way a woman was dressed and her sexual history could support a decision to "unfound" a crime.<sup>31</sup> Political pressure to abate public fear could also result in underreporting of crimes by the police.

Beyond the unreliability of the rape data, there was an even bigger black hole in the reporting of sex crimes—the utter void of any and all data on child molestations. The FBI simply did not provide crime statistics on the most feared form of sexual offending: child molestation. Nor does it now.<sup>32</sup> Although it has been possible since about the 1970s to get data on substantiated cases of sexual abuse from the department of Health and Human Services, they are collected by Child Protective Services and not by the police, and the definitions are not the same.

The absence of reliable data on child molestation is a political advantage for those who want to capitalize on public anxiety to pass new anti-sex offender legislation. Although there can be arguments among experts about the incidence of rape, the absence of numbers of child molestation means that there is nothing to quell public anxiety. Thus, if a politician like Herbert Hoover stated that sex offenses against children were on the rise, there was no way to either confirm or deny his statement. In essence, the incidence of child molestation becomes fungible, thus allowing politicians to put forth any figures they want to justify passage of specific anti-sex offender legislation.

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29. Ronet Bachman & Raymond Paternoster, *A Contemporary Look at the Effects of Rape Law Reform: How Far Have We Really Come?*, 84 J. CRIM. L. & CRIMINOLOGY 554, 559 (1993) (citing Julie Horney & Cassia Spohn, *Rape Law Reform and Instrumental Change in Six Urban Jurisdictions*, 25 L. & SOC'Y REV. 117, 118–19 (1991)).

30. In 1983, the Chicago Police Department conducted an internal audit of unfounding practices. They conducted a random sample of 2,386 unfounded complaints from 1982 and evaluated whether they thought the unfounding decisions were supported. They discovered that unfounding was a problem for all crimes, and that it was actually less of a problem for rape. For instance, they found that 18% of unfoundings in rape were unsupported as compared with 36% in robberies, 47% in burglaries and 52% in thefts. Wayne A. Kerstetter, *Gateway to Justice: Police and Prosecutorial Response to Sexual Assaults Against Women*, 81 CRIMINOLOGY 267, 280 (1990).

31. Bachman & Paternoster, *supra* note 29, at 560.

32. Child molestation is not one of the index offenses. Nor is it counted separately in any other table.

One might wonder why, given these serious problems, it makes sense to look at the UCR data at all. Since the public, politicians, and some academics relied on the UCR in coming to their opinions regarding sex crimes, it is important to look at what this data source showed. It must be stressed that the data is not being looked at for its truth but instead for its impact on the public.

*b. UCR Data*

An analysis of the UCR demonstrates that the number of rapes known to law enforcement increased significantly from 1935 to 1955.<sup>33</sup> "Offenses known to the police" included attempted rapes; however it did not include arrests or cleared cases.<sup>34</sup> Complaints determined to be groundless were not included.<sup>35</sup> In 1935, there were 4,106 rapes known to police as compared with 10,634 in 1955. Not only was this an absolute increase of 159%, but it was an increase in the rate per 100,000 population. In 1935, there were 7.2 rapes per 100,000. By 1955, the rate had increased to 13.2 per 100,000. Thus, the number of rapes per 100,000 population increased by 83% during this twenty year time period.

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33. This data was culled from a CD-ROM provided by the FBI, labeled *1930–1959 Editions of Crime in the United States*. It contains PDF files of the *Uniform Crime Reports for the United States and Its Possessions* from 1935 to 1955 issued by the FBI. The author calculated the rape rate per 100,000 and the percentage that rape comprised of all crime.

34. 6 FED. BUREAU OF INVESTIGATION, *UNIFORM CRIME REPORTS FOR THE UNITED STATES AND ITS POSSESSIONS—FOURTH QUARTERLY BULLETIN 2* (1935) (Uniform Crime Reporting Program CD-ROM, Mar. 25, 2008) (on file with author) [hereinafter 1935 UNIFORM CRIME REPORTS]. This definition was used throughout the years analyzed, 1935 to 1955. *Id.*

35. "'Offenses known to the police' include, therefore, all of the above offenses, including attempts, which are reported by the law-enforcement agencies of contributing communities and not merely arrests or cleared cases. Complaints which upon investigation are learned to be groundless are not included in the tabulations which follow." *Id.*



Table 1: Number of Rapes Known to Police, 1935–1955 (Source: F.B.I. Uniform Crime Reports, 1935–1955)

Year	# of Cities	Population of Reporting Cities <sup>36</sup>	Number of Rapes	Rate per 100,000	% of all Crime for that Year <sup>37</sup>	% Change from Prior Year (rate per 100,000)
1935	1,423	57,222,252	4,106	7.2	.55%	n/a
1936	1,658	60,372,091	4,758	7.9	.65%	+ 9.72%
1937	1,809	61,551,252	5,243	8.5	.66%	+ 7.59%
1938	1,929	62,463,295	5,186	8.3	.64%	- 2.35%
1939	2,105	63,857,696	5,640	8.8	.65%	+ 6.02%
1940	2,001	65,128,946	5,799	8.9	.64%	+ 1.14%
1941	2,109	65,815,613	6,041	9.18	.66%	+ 3.15%
1942	2,119	65,322,511	6,602	10.11	.77%	+ 10.13%
1943	2,089	65,598,206	7,041	10.73	.85%	+ 6.13%
1944	2,161	66,776,823	7,289	10.92	.85%	+ 1.77%
1945	2,267	67,608,610	7,800	11.54	.79%	+ 5.68%
1946	2,262	67,262,382	8,150	12.12	.78%	+ 5.03%
1947	2,392	68,280,062	8,615	12.62	.84%	+ 4.13%
1948	2,404	68,142,674	8,402	12.33	.82%	- 2.30%
1949	2,416	60,781,747	7,591	12.49	.72%	+ 1.30%
1950	2,297	69,643,614	7,530	10.81	.72%	-13.45%
1951	2,421	69,980,551	7,731	11.05	.71%	+ 2.22%
1952	2,450	76,094,589	8,760	11.51	.68%	+ 4.16%
1953	2,542	76,811,320	9,020	11.7	.67%	+ 1.65%
1954	2,583	79,754,626	9,761	12.2	.66%	+ 4.27%
1955	2,643	80,350,125	10,634	13.2	.72%	+ 8.20%

Unfortunately, data is not available to calculate whether there was also an increase in other sex offenses. Although the FBI provided arrest data on “vice and prostitution” as well as “other

36. Three points are worth noting. First, as explained above, most of the annual population figures are not accurate. Instead, they are the preceding decennial census population data for each of the participating cities or counties. Second, the UCR at times provides conflicting population estimates of the reporting cities. To provide consistency, I always chose the population figures that the UCR used in calculating its annual crime rate. Third, from 1935 to 1951, the UCR used different population figures in calculating crime rates for different crimes. This is because not all of the cities provided arrest data on some of the lesser crimes like burglary and auto theft. The population figures cited above, however, were always used to calculate the rape rate per 100,000 population.

37. In calculating this percentage, I divided the number of rapes by the total number of crimes for each year. For all years, crimes included: murder and non-negligent manslaughter, manslaughter, rape, burglary, larceny, and auto theft.

sex offenses," it did not do so in a systematic fashion. Each of the Uniform Crime Reports from 1935 through at least 1951 warned that arrest numbers should not be used to calculate actual rates of crime:

The tabulation of data from fingerprint records obviously does not include all persons arrested, since there are individuals taken into custody for whom no fingerprint cards are forwarded to Washington. Furthermore, data pertaining to persons arrested should not be treated as information regarding the number of offenses committed, since two or more persons may be involved in the joint commission of a single offense, and on the other hand one person may be arrested and charged with the commission of several separate offenses.<sup>38</sup>

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38. 1935 UNIFORM CRIME REPORTS, *supra* note 34, at 26. *See also* 7 FED. BUREAU OF INVESTIGATION, UNIFORM CRIME REPORTS FOR THE UNITED STATES AND ITS POSSESSIONS—FOURTH QUARTERLY BULLETIN 150 (1936); 8 FED. BUREAU OF INVESTIGATION, UNIFORM CRIME REPORTS FOR THE UNITED STATES AND ITS POSSESSIONS—FOURTH QUARTERLY BULLETIN 215–16 (1937); 9 FED. BUREAU OF INVESTIGATION, UNIFORM CRIME REPORTS FOR THE UNITED STATES AND ITS POSSESSIONS—FOURTH QUARTERLY BULLETIN 157–58 (1938); 10 FED. BUREAU OF INVESTIGATION, UNIFORM CRIME REPORTS FOR THE UNITED STATES AND ITS POSSESSIONS—FOURTH QUARTERLY BULLETIN 202 (1939); 11 FED. BUREAU OF INVESTIGATION, UNIFORM CRIME REPORTS FOR THE UNITED STATES AND ITS POSSESSIONS—FOURTH QUARTERLY BULLETIN 203 (1940); 12 FED. BUREAU OF INVESTIGATION, UNIFORM CRIME REPORTS FOR THE UNITED STATES AND ITS POSSESSIONS—FOURTH QUARTERLY BULLETIN 202 (1941); 13 FED. BUREAU OF INVESTIGATION, UNIFORM CRIME REPORTS FOR THE UNITED STATES AND ITS POSSESSIONS—FOURTH QUARTERLY BULLETIN 85 (1942) (quote changed slightly, but meaning still the same); 14 FED. BUREAU OF INVESTIGATION, UNIFORM CRIME REPORTS FOR THE UNITED STATES AND ITS POSSESSIONS—SECOND QUARTERLY BULLETIN 86 (1943); 15 FED. BUREAU OF INVESTIGATION, UNIFORM CRIME REPORTS FOR THE UNITED STATES AND ITS POSSESSIONS—SECOND QUARTERLY BULLETIN 90 (1944); 16 FED. BUREAU OF INVESTIGATION, UNIFORM CRIME REPORTS FOR THE UNITED STATES AND ITS POSSESSIONS—SECOND QUARTERLY BULLETIN 112 (1945); 17 FED. BUREAU OF INVESTIGATION, UNIFORM CRIME REPORTS FOR THE UNITED STATES AND ITS POSSESSIONS—SECOND QUARTERLY BULLETIN 115 (1946); 18 FED. BUREAU OF INVESTIGATION, UNIFORM CRIME REPORTS FOR THE UNITED STATES AND ITS POSSESSIONS—SECOND QUARTERLY BULLETIN 113 (1947); 19 FED. BUREAU OF INVESTIGATION, UNIFORM CRIME REPORTS FOR THE UNITED STATES AND ITS POSSESSIONS—SECOND QUARTERLY BULLETIN 113 (1948) (quote changed slightly, but meaning still the same); 20 FED. BUREAU OF INVESTIGATION, UNIFORM CRIME REPORTS FOR THE UNITED STATES AND ITS POSSESSIONS—SECOND QUARTERLY BULLETIN 111 (1949); 21 FED. BUREAU OF INVESTIGATION, UNIFORM CRIME REPORTS FOR THE UNITED STATES AND ITS POSSESSIONS—SECOND QUARTERLY BULLETIN 106 (1950); 22 FED. BUREAU OF INVESTIGATION, UNIFORM CRIME REPORTS FOR THE UNITED STATES AND ITS POSSESSIONS—SECOND QUARTERLY

*c. Comparing the Incidence of Rape with Other Violent Crimes*

In order to appreciate the significance of the change in the number of known rapes, it is important to look at what was happening with other violent crimes. Whereas both the absolute number of rapes and the rate per 100,000 were increasing, the incidence of most other violent crimes was dropping.<sup>39</sup>

For example—although the absolute number of murders known to the police increased by 357 from 1935 to 1955, the rate per 100,000 population decreased by 22%. Similarly, the number of robberies increased by 10,765 during this same period, but the rate dropped 9%. In contrast, the number of aggravated assaults increased by 41,558 during this same twenty year period. This corresponded with an 84% increase in the rate per 100,000—a change only slightly higher than the 83% increase in the number of rapes per 100,000.<sup>40</sup>

Table 2: Violent Crime Data from 1935–1955, Murder and Non-Negligent Manslaughter, Robbery, and Aggravated Assault<sup>41</sup>

Year	Murder <sup>42</sup>	Murder Rate per 100,000	Robbery	Robbery Rate per 100,000	Agg. Assault	Agg. Assault Rate per 100,000
1935	3,423	6.0	37,967	66.4	26,178	45.7

BULLETIN 104 (1951) (quote changed slightly, but meaning still the same). In her frequently cited article, *"Uncontrolled Desires": The Response to the Sexual Psychopath*, Estelle Freedman contends that the rate of "other sex offenses" increased from 24.9 to 48.1 per 100,000. Freedman, *supra* note 11, at 84 n.3. She also argued that the rate of arrests for prostitution dropped. Freedman relies on the *Uniform Crime Reports 1932–1960* for this proposition. As noted above, however, these conclusions are ungrounded, as the FBI specifically stated that the data should not be used to reflect any actual trends in the number of crimes. "For various reasons, Uniform Crime Reporting (UCR) statistics collected prior to 1960 are not comparable to subsequent or prior years' data and should be used with great caution. UCR statisticians strongly discourage use of these data for any legitimate and comparative research." Data Caveats included on CD-ROM by FED. BUREAU OF INVESTIGATION, UNIFORM CRIME REPORTING PROGRAM 1930–1959 (CD-ROM, Mar. 25, 2008) (on file with author).

39. The author calculated both the change in the absolute number of known crimes and the change in rate per 100,000 using the data provided in Table 2.

40. For a discussion in the change in number and rate per 100,000 of known rapes, see Part I.B.1.b, Table 1.

41. 1935 UNIFORM CRIME REPORTS, *supra* note 34. All of this data in Table 2 was taken from the *Uniform Crime Reports* from 1935 to 1955. I did not include the number of cities and the population since it is the same as in Table 1.

42. Murder includes non-negligent manslaughter.

1936	3,736	6.2	33,603	55.7	27,830	46.2
1937	3,765	6.1	36,799	59.8	27,886	45.6
1938	3,296	5.3	37,024	59.3	27,739	44.5
1939	3,467	5.4	35,276	55.2	29,683	46.5
1940	3,509	5.4	34,220	52.5	29,803	45.8
1941	3,605	5.48	32,521	49.4	31,845	48.4
1942	3,617	5.54	30,784	47.1	34,029	52.1
1943	3,130	4.77	29,695	45.3	32,627	49.7
1944	3,283	4.92	29,251	43.8	36,621	54.8
1945	3,711	5.49	36,697	54.3	40,435	59.8
1946	4,362	6.49	42,229	62.8	45,410	67.5
1947	4,178	6.12	40,677	59.6	49,291	72.2
1948	4,085	5.99	38,285	56.2	51,625	75.8
1949	3,501	5.76	39,324	64.7	50,207	82.6
1950	3,556	5.11	34,825	50.0	51,102	73.4
1951	3,416	4.88	34,474	49.3	49,355	70.5
1952	3,846	5.05	45,320	59.6	61,985	81.5
1953	3,707	4.8	49,171	64.0	64,961	84.6
1954	3,829	4.8	56,828	71.2	67,768	85.0
1955	3,780	4.7	48,732	60.6	67,736	84.3

*d. Report of the Citizens Committee on the Control of Crime in New York*

In 1939, the city of New York conducted a study to determine whether there had been a sex crime wave between 1937 and 1939. The report was entitled, "The Problem of Sex Offenses in New York City: A Study of Procedure Affecting 2022 Defendants made by the Staff of the Citizens Committee on the Control of Crime in New York." In the Foreword, the Committee wrote, "This inquiry was undertaken because the Spring and Summer of 1937, had been marked by three murders of victims of sex offenders, and the community had been stirred to a belief that a 'wave' of sex offenses was sweeping the city."<sup>43</sup>

To address whether this belief was true, the Committee studied all 2,022 defendants "accused, arrested and brought to arraignment or trial for a sex offense in the boroughs of Manhattan, Brooklyn, the Bronx and Queens" between July 1, 1937 and December 1,

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43. W.P. BEAZELL, THE PROBLEM OF SEX OFFENSES IN NEW YORK CITY: A STUDY OF PROCEDURE AFFECTING 2022 DEFENDANTS MADE BY THE STAFF OF THE CITIZENS COMMITTEE ON THE CONTROL OF CRIME IN NEW YORK 1 (Feb. 15, 1939) (on file at Univ. of Rochester Library, Dep't of Rare Books, Special Collections & Preservation) [hereinafter BEAZELL STUDY].

1938.<sup>44</sup> Sex offenses included both felonies and misdemeanors. The felonies included: rape (forcible, statutory, and attempted), carnal abuse, sodomy, incest, seduction, and abduction.<sup>45</sup> The misdemeanors included impairing morals and indecent exposure.

Table 3—Analysis of All Sex Cases in New York City Between July 1, 1937, and December 1, 1938, in which Defendant was Accused, Arrested and Brought to Arraignment or Trial<sup>46</sup>

Type of Offense	Number Studied (Total 2022)	Average Age of Defendants (Range 16–86)	Age of Victims (Range 2–68 Yrs old, Average Age 13 Yrs, 8 months)
Rape—Forcible	250	16–20	Most 17 yrs old
Rape—Attempted	114	21–25	Most 10 yrs old
Rape—Statutory	640	16–20	Most 15 yrs old
Carnal Abuse	173	26–30, 36–40	Most 8 yrs old
Sodomy	161	36–40	Not provided
Incest	39	16–20	Not provided
Seduction	40	21–25	Not provided
Abduction	28	16–20	Not provided
Impairing Morals	301	16–20	Most 11 yrs old
Indecent Exposure	276	31–35	Not provided

The Committee tabulated the number of sex offense complaints made to the New York City police from 1929 to 1938. It found that although sex offenses fell slightly from a high of 1,891 in 1937 to 1,888 in 1938, they were still significantly higher than the eight year period from 1929 to 1936.<sup>47</sup>

Table 4—Sex Offenses in New York City, 1929–1938

Year	Number of Complaints Made to Police
1929–1935	Average of 900 per year
1936	1,252
1937	1,891
1938	1,888

The Committee found that for sex offenses other than rape, the number increased from 1,096 in 1937 to 1,140 in 1938. Rape,

44. *Id.* This number included all cases “finally disposed of during the time.” *Id.*

45. *Id.* at 2.

46. *Id.* at 3–9.

47. *Id.* at 2.

however, decreased from 796 to 748 in the same period.<sup>48</sup> It is important to contextualize this data within population trends. In 1930, the population in New York City was 6,930,446, and in 1940 it had increased to 7,454,995—a percentage increase of 11.4%.<sup>49</sup> From 1930 to 1938, the number of complaints made to the police went up 110%.

*e. Expert Opinion Regarding the Incidence of Sex Crimes*

Given the disparate data above, it is not surprising that experts could not agree. Although some believed that sex crime rates were rising, many did not. Part of the discrepancy had to do with which claim was being disputed—the increase in forcible rapes or David Wittels’s notorious claim that there were tens of thousands of sex killers on the loose.

In their 1949 article, “The Sexual Psychopath and the Law,” James Reinhardt and Edward C. Fisher agreed that sex crimes were in fact on the rise across the country. They cited J. Edgar Hoover and then claimed that the “rate of arrests for rape during the past ten years has increased approximately 65[%], and arrests for sex offenses, exclusive of prostitution and commercialized vice have shown an increase of 145[%].”<sup>50</sup>

Yet, many prominent experts disputed these findings. Perhaps the most notable report on the issue was prepared by the New Jersey Commission on Sex Crimes. On March 10, 1949, the New Jersey Senate created a commission to study sex crimes. In fulfilling their mission, this Committee met with officials from Delaware, Pennsylvania, Massachusetts, New York, Maryland, Connecticut, and Rhode Island. They also invited internationally known experts like Morris Ploscowe, Dr. Alfred Kinsey, and Edwin H. Sutherland to participate. The New Jersey Commission concluded that there were not tens of thousands of homicidal sex fiends:

It has been carefully estimated by Dr. Kinsey that not more than 5 percent of our convicted sex offenders are of a dangerous variety, exercising force or injury upon a victim. Crime reports support this finding . . . . The sex fiend as

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48. *Id.* at 2.

49. CAMPBELL GIPSON, U.S. BUREAU OF THE CENSUS, POPULATION OF THE 100 LARGEST CITIES AND OTHER URBAN PLACES IN THE UNITED STATES: 1790 TO 1990 13 (1998), <http://www.census.gov/population/www/documentation/twps0027/twps0027.html>.

50. James M. Reinhardt & Edward C. Fisher, *The Sexual Psychopath and the Law*, 39 J. CRIM. L. & CRIMINOLOGY 734, 737 (1949).

portrayed by Dr. Wittels, et al, is a rare phenomenon in the criminal history of any state: the tens of thousands that he hypothecates are the much publicized creatures of his well stirred imagination.<sup>51</sup>

In 1955, Dr. Albert Kinsey spoke at the Congress of Correction—a four day meeting sponsored by the American Correctional Association in Des Moines, Iowa. Kinsey said that there was no evidence of either an increase or a decrease in sex crimes over the last fifty years.<sup>52</sup>

In his influential 1951 book, *Sex and the Law*, Morris Ploscowe challenged Wittels's<sup>53</sup> claim that there were tens of thousands of sex killers in the U.S. Ploscowe wrote: "Most sex offenders are charged with relatively minor crimes. They are not for the most part degenerate sex fiends who are potential killers. Nor are they individuals with persistent patterns of illicit sexual activity who graduate from minor crimes to atrocious major offenses."<sup>54</sup>

He then addressed the question of whether there had been an increase in sex crimes. Ploscowe first turned to rape statistics reported in 1938 by the Citizens Committee on the Control of Crime in New York. Ploscowe noted that of 2,366 indictments for rape, just 418 of them (18%) were for forcible rape whereas the remaining 1,948 (82%) were for statutory rape (sex with a minor under the age of 18).<sup>55</sup> Ploscowe stressed the importance of this distinction:

If most rapes simply involve consensual acts of sexual intercourse with under-age girls they are not the product of degenerates and psychopaths who force their attentions upon unwilling victims. Only where the age disparity between the man and the girl are very great is it possible to say that the rape may be the work of a mentally abnormal individual, a psychopath, or a potentially dangerous sex offender.<sup>56</sup>

Next, Ploscowe discussed the FBI's Uniform Crime Report published in 1960. He stated that in 1960, 7,719 forcible rapes and 50,101 other sex offenses were reported (this category included

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51. PAUL W. TAPPAN, *THE HABITUAL SEX OFFENDER: REPORT AND RECOMMENDATIONS OF THE COMMISSION ON THE HABITUAL SEX OFFENDER* 13-14 (1950).

52. *Dr. Kinsey Doubts Rise in Sex Crimes*, N.Y. TIMES, Sept. 28, 1955, at 26.

53. See *supra* text accompanying note 14.

54. MORRIS PLOSCOWE, *SEX AND THE LAW* 202 (Ace Books ed. 1962).

55. *Id.*

56. *Id.*

statutory rape). Ploscowe then questioned the FBI's methodology in using the number of reported rapes to estimate the number of actual forcible rapes (15,560):

These are shocking figures, if all of the actual or estimated rapes were forcible in character. Yet law enforcement officials are continually confronted with the fact that so many so-called forcible rapes really involve no element of force, or lack of consent and that often complaint is made for reasons other than the ostensible ones.<sup>57</sup>

Ploscowe then criticized the way that sex offenses were defined. He noted that included in reported sex offenses were acts committed by homosexuals. "These individuals are nuisances for the most part. They create scandal and annoyance, but they are not a serious danger to the women and children of a community."<sup>58</sup> Ploscowe had a similar view of exhibitionists, peeping toms, frotteurs, and fetishists. "These individuals are generally not assaultive or dangerous, however much their behavior may annoy, frighten, or shock women and children who observe it or are subject to it."<sup>59</sup>

Ploscowe's argument is undermined, at least in part, by his sloppy use of FBI data. I reviewed the Uniform Crime Report from 1960 and found that there were 8,461 rapes known to police in 1960.<sup>60</sup> The number that Ploscowe referred to above—7,719—was just the number of arrests that the FBI tallied via arrest cards provided.<sup>61</sup> Furthermore, the FBI clearly stated that the number of arrests would be lower than the number of offenses known to police both because it only received arrest information from 60% of the country and because a person could be arrested for more than one crime.<sup>62</sup> Ploscowe wrote that there were 50,101 reported other sex offenses, but this is also misleading. In 1960, the FBI recorded 50,101 arrests for other sex offenses, but this was not a

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57. *Id.* at 203.

58. *Id.*

59. *Id.*

60. FEDERAL BUREAU OF INVESTIGATION, CRIME IN THE UNITED STATES: UNIFORM CRIME REPORTS FOR THE UNITED STATES 82 (1961) (Uniform Crime Reporting Program CD-ROM, June 20, 2005) (on file with author).

61. *Id.* at 90.

62. *Id.* at 89. "Through arrest data, an indication of the extent of all types of criminal acts is available although this will be a smaller measure than offenses known to police." *Id.*



complete count.<sup>63</sup> Ploscowe was correct, however, that the FBI's estimate for the number of forcible rapes that year was 15,560.<sup>64</sup>

Edwin Sutherland, head of the Department of Sociology at Indiana University, was critical of the belief that there was a sex crime wave. First Sutherland discussed data on violent rapes. He contested the FBI's claim that approximately 50% of all rapes were forcible by pointing out that just 18% of rape convictions in New York City from 1930–1939 were for forcible rape.<sup>65</sup> Sutherland then argued that forcible rapes were a flawed way of deciding how many dangerous sex offenders there were since

females frequently conceal the fact of forcible rape rather than undergo the shame of publicity. On the other hand, charges of forcible rape are often made without justification by some females for purposes of blackmail and by others, who have engaged voluntarily in intercourse but have been discovered, in order to protect their reputations. Physicians have testified again and again that forcible rape is practically impossible unless the female has been rendered practically unconscious by drugs or injury; many cases reported as forcible rape have certainly involved nothing more than passive resistance.<sup>66</sup>

Sutherland urged that the number of sex related killings be used as a measure instead. He looked at all the homicides involving female victims reported in the *New York Times* in 1930, 1935, and 1940. From the total of 324, just seventeen (5.3%) involved rape or suspicion of rape. Based on this data, Sutherland concluded that the number of rape related murders per year did not exceed one hundred across the whole country. This number, he concluded, "is certainly a far cry from Wittels's estimate that tens of thousands of sex killers are abroad in the nation."<sup>67</sup>

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63. *Id.* at 90.

64. *Id.* at 2.

65. Edwin H. Sutherland, *The Sexual Psychopath Laws*, 40 J. CRIM. L. & CRIMINOLOGY 543, 544–45 (1950).

66. *Id.* at 545. This argument would not be made now in part because the definition of rape has been expanded so that not even passive resistance may be necessary. For example, rape is defined under California Penal Code Section 261 as an act of sexual intercourse that, among other circumstances, occurs when a person is unconscious or asleep, unaware that the act occurred, defrauded, unaware of the nature of act because defrauded as to professional purpose of act, under the belief that the person is their spouse. CAL. PENAL CODE § 261 (West 2006).

67. Sutherland, *supra* note 65, at 545–46.

## II. SEARCHING FOR SOLUTIONS

Although experts disagreed as to the extent of the problem, the public had no such ambivalence. Americans were outraged at what they saw to be an increase in sex crimes and demanded that something be done. Many solutions were proposed to address the danger of sex offenders.

### *A. Making Potential Victims Less Vulnerable*

Some of the recommendations were aimed at changing the behavior of potential victims, particularly children. Members of a citizens group in Ridgewood, New York recommended that children refuse candy and other presents from strangers. They also warned little girls not to "roam the streets in scanty attire such as so-called 'sun-suits' . . . ." <sup>68</sup>

### *B. Treating Victims with More Sensitivity*

A report to the Joint Legislative Committee on Law Enforcement by the Westchester County Citizens Committee recommended that hearings be closed so that children would feel more comfortable testifying: "The present practice . . . of permitting gaping; morbid crowds of spectators to throng our court rooms when sex crimes against children are being tried is an inhuman and unnecessary punishment for the complainant and her family."<sup>69</sup> J. Edgar Hoover supported this proposal. He stated that the nation as a whole should adopt the policy of not publishing the identities of victims and their families while at the same time "proclaiming" information about the defendants. Hoover argued that this policy would result in more complete reporting of sex crimes.<sup>70</sup>

### *C. Tightening Control of Sex Offenders—Increased Police Monitoring*

The police responded to the public's fears by increasing surveillance of sex offenders. In August 1937, New York City police began compiling a list "of all known degenerates"—specifically those who had been charged with a sex crime in the

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68. *Residents of Ridgewood Call Upon Legislature to Lend Aid*, N. Y. TIMES, Aug. 15, 1937, at 20.

69. *Drastic Sex Laws in State Demanded; Westchester Report Urges Incarceration as Insane of Habitual Offenders*, N. Y. TIMES, Dec. 3, 1937, at 2.

70. Hoover, *supra* note 1, at 32.

last fifteen to twenty years. The list was intended to aid police in sex murder investigations but also to enable the police to periodically check on those named. By August 13, 1937, there were already 300 people from Brooklyn on the list, and the police intended to do the same in other boroughs throughout the city.<sup>71</sup> Chicago also began keeping a similar list and recommended that a judge specialize in sex cases.<sup>72</sup> Albany County District Attorney John T. Delaney recommended universal fingerprinting.<sup>73</sup> In 1938, the local Works Products Administrator in New York City ordered that all men exposed to children be fingerprinted or be subject to "severe disciplinary action." The order applied to about 10,000 workers, including watchmen, shopkeepers, guards, and those who worked directly with children such as teachers and recreation workers.<sup>74</sup>

In Los Angeles, Chief of Police James E. Davis created a bureau of sex offenses under the theory that "each minor sex offender is a potential major sex criminal." It was intended to contain classification of all local sex offenders including fingerprints, photographs, and a psychiatric examination. Also compiled was a description of the methods of each individual offender under the theory that "all criminals use certain characteristic methods of committing crimes and the indexing of these individual 'trademarks' has been invaluable in linking a series of criminal acts to one particular offender."<sup>75</sup> The information was to be made available to all county law enforcement agencies.

#### *D. Increasing Punishment*

Others recommended that sex offenders be punished more severely. A 1938 report by the Citizens Committee on the Control of Crime in New York City showed that three out of five sex offenders went unpunished. Of the two that were punished, it was often for a lesser charge due to plea bargaining, which the report criticized.<sup>76</sup>

Longer sentences and increased parole supervision were also recommended. Some advocated the end of determinate sentences for sex offenders and that release not occur without a state

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71. *Police Making List of Sex Criminals*, N.Y. TIMES, Aug. 13, 1937, at 19.

72. *Chicago Plan Set to Stop Attack*, N.Y. TIMES, Aug. 24, 1937, at 24.

73. *Lax Enforcement Blamed for Crime*, N.Y. TIMES, Dec. 1, 1937, at 11.

74. *Will Fingerprint WPA Men Workers*, N.Y. TIMES, Dec. 4, 1938, at 55.

75. *Sex Crimes Clinic Opens*, L.A. TIMES, July 30, 1938, at A1.

76. *Rise in Sex Crimes Termed Alarming*, N.Y. TIMES, Mar. 7, 1938, at 18.

psychiatrist's agreement.<sup>77</sup> Westchester County Children's Court Judge George W. Smyth recommended life sentences for adults who "corrupt the morals of children." He argued: "Too often degenerates are convicted only on misdemeanor charges and escape with short jail sentences."<sup>78</sup>

On August 11, 1937, County Judge Peter J. Brancato sentenced Raymon C. Rodriguez to twenty-five years to life in prison for sexually assaulting two ten-year-old girls. Although Rodriguez had prior convictions, this was his first conviction for a sex related crime. In sentencing Rodriguez, Judge Brancato declared, "I am not going to wait until more progressive legislation is had in the treatment of sex crimes. Sex perverts are baneful enemies of society who should be segregated for the longest possible time in order to protect our little ones."<sup>79</sup>

### *E. Changing the Offender—Pornography and Media Exposure*

Some stressed the importance of eliminating factors that incited potential sex offenders. Testifying before New York City Hall on September 31, 1937, at a legislative hearing investigating sex crimes, Dr. Thomas S. Cusack stated, "Ever since prohibition our theatres have stimulated the sex impulse, our burlesque houses, our filthy magazines, all have been a stimulus to sex crimes."<sup>80</sup>

Not surprisingly, halting the sale of pornography was one proposed solution. In 1937, the New York Society for the Suppression of Vice "urged a war on obscene magazines." The Society insisted that it wasn't censoring publications but was instead investigating complaints of obscenity and then reporting them to the police so that they could make arrests when warranted and bring offenders to court. In a formal announcement, the Society declared:

The society's activities in suppressing disreputable magazines . . . are aimed at protecting the public from indecent and obscene literature and especially to safeguarding children and youth, for such material falls not only into the hands of perverts and adults of low mentality, but children as well. Some of the sex magazines complained of, both those legally actionable and those technically within the law, are demoralizing to susceptible adults and incite the weak minded to sex delinquency and

77. *Drastic Sex Laws in State Demanded*, *supra* note 69, at 2.

78. *Asks Life Sentences for Sex Offenders*, N.Y. TIMES, Apr. 11, 1937, at 40.

79. *Sex Criminal Gets 25 Years to Life*, N.Y. TIMES, Aug. 12, 1937, at 8.

80. *Research is Urged in Sex Crime Fight*, N.Y. TIMES, Oct. 1, 1937, at 46.

crime. Enforcement of the law is for the purpose of protecting these susceptible individuals as well as the general public.<sup>81</sup>

Others suggested that media attention played a role in increasing sex crimes and urged that it be reduced. In September 1937, Governor Hurley of Massachusetts formed a committee to study sex crimes. Committee member Roscoe Pound told the Massachusetts legislature that "suggestion" played a part in sex crimes and that "over publicity" stimulated at times additional crime.<sup>82</sup>

#### *F. Physical Solutions—Sterilization and Castration*

"Surgical treatment is intended not only as a crime prevention measure, but its chief aim is to offer relief to the sexually abnormal, whose mental suffering is a cause to untold unhappiness not only for himself but to his family and to the community in case of sex delinquency."<sup>83</sup>

Sterilization for those who attacked girls under sixteen was recommended by Illinois State Representative Peter C. Granata in 1937.<sup>84</sup> Erie County District Attorney Walter Newcomb proposed that second felony offenders be sterilized on the theory that "criminals beget criminals."<sup>85</sup> In 1937, twenty-eight states had sterilization laws and of these, seven specifically applied to sexual pervers.<sup>86</sup> Although some researchers also advocated surgery as a method for preventing sex crimes, others noted that sterilization alone would not be effective since it did not lower sexual desire.<sup>87</sup>

#### *G. Psychological Solutions—Diagnosis and Treatment*

The most common recommendation had to do with psychiatric diagnosis and treatment. Newspaper articles and magazines reflected optimism that psychiatrists could identify and then cure dangerous sex offenders. David Wittels wrote:

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81. *Vice Foes Ask War on Sex Magazines*, N.Y. TIMES, Aug. 31, 1937, at 11.

82. *To Counsel Hurley*, *supra* note 18, at 7.

83. Kopp, *supra* note 19, at 692.

84. *Chicago Plan*, *supra* note 72, at 24.

85. *Urges New Courts for Sex Offenders*, N.Y. TIMES, Dec. 2, 1937, at 9.

86. Note, *The Legal Disposition of the Sexual Psychopath*, 96 U. PA. L. REV. 872, 876 n.27 (1948) (citing Note, *Sterilization Laws—Their Constitutionality—Their Social and Scientific Basis*, 17 B.U. L. REV. 246, 247-49 (1937)).

87. Kopp, *supra* note 19, at 693.

On the morning of January 7, 1946, six-year-old Suzanne Degnan was missing from her bedroom. Later in the day, parts of her body were found in near-by sewers. The whole city and much of the country was aghast. The Chicago City Council voted to add 1000 policemen to the force. That was laudable, but it would have done better to hire 500 policemen and 50 psychiatrists, even if it meant paying for the training of young medical students for the jobs. Fifty psychiatrists, backed by sensible laws, could do more to halt crime waves in a city like Chicago than 5000 extra policemen could.<sup>88</sup>

At a hearing at City Hall in New York City in front of a legislative committee investigating sex crimes, two psychiatrists urged that psychiatrists be assigned to schools and courts so that they could "spot" individuals before they harmed society.<sup>89</sup> Dr. Perry M. Lichtenstein, psychiatrist for the New York District Attorney's Office, recommended that teachers get training in child psychology so that they could identify mental defects of children at a young age and guide them into normal lives.<sup>90</sup>

Many urged treatment in lieu of custody. City Magistrate Jeanette G. Brill declared that sex offenders "don't need a prison; they need a doctor."<sup>91</sup> Residents of Ridgewood, New York recommended that the state legislature consider the "treatment of degenerates in state institutions."<sup>92</sup>

In September of 1937, Governor Hurley of Massachusetts named a committee to recommend "[d]rastic changes in the statutes dealing with sex degeneracy."<sup>93</sup> The district attorney held a meeting at his office to discuss ways to lower the number of sex crimes. Committee members, members of the clergy, and business executives attended. At that meeting, Hurley stated that sex offenders should not be released without a psychiatrist's approval. Lieutenant Colonel Paul G. Kirk, Commissioner of Public Safety for the State of Massachusetts, was one of the committee of four. He emphasized how custody can be detrimental to sex offenders: "oftentimes more incarceration (of sex offenders) makes distorted minds more distorted and the particular form of perversion is passed on to others."<sup>94</sup>

88. Wittels, *supra* note 13, at 66.

89. *Research Is Urged*, *supra* note 80, at 46.

90. *Isolation Advised for Sex Criminals*, N.Y. TIMES, Oct. 14, 1937, at 52.

91. *Parents Are Blamed For Sex Crime Wave*, N.Y. TIMES, May 2, 1937, at N7.

92. *Residents of Ridgewood*, *supra* note 68, at 20.

93. *To Counsel Hurley*, *supra* note 18, at 7.

94. *Id.*

Even those who advocated harsher sentences stressed the importance of psychiatric diagnosis and treatment. J. Edgar Hoover suggested that parole and probation should be prohibited for those convicted of sex offenses until "members of a board of competent medical authorities are willing to certify that the wrongdoer has been under successful medical observation and treatment."<sup>95</sup> Hoover also spoke approvingly of a judge who gave twenty sex offenders the choice between prison or medical observation and treatment. All chose treatment, even though at times it was extreme. Only after the judge was satisfied that they would not commit any future sex offenses was he willing to "drop the case." Although Hoover said this treatment was an "official secret . . . it worked to the benefit of society."<sup>96</sup>

*H. Mayor LaGuardia's Plan—Precursor to the Sexual Psychopath Laws*

On August 9, 1937, Mayor LaGuardia of New York City announced a new plan to end sex crimes. He developed the plan over eighteen months through conversations with psychiatrists, lawyers, and judges. His plan applied to those newly arrested as well as retroactively to those already in jail. It required that prisoners who had been convicted of a sex crime be held under medical observation and then committed to Bellevue Hospital if they were found to be insane. Mayor LaGuardia explained:

I am ordering the Correction Commissioner to cause all prisoners convicted of impairing the morals of children and convicted of sex crimes involving perversion to be kept under observation during the terms for which they were convicted. On release the medical division of the Correction Department will cause the arrest of a prisoner who will be arraigned before a magistrate, upon an application for commitment to Bellevue, which will recite the details of his crime. If he is found insane his incarceration from there on will follow. The purpose of this plan is to go through every possible legal step to ascertain the sanity of these perverts, and if they are mentally deranged they will be committed for the protection of society. There have been legalistic and technical objections

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95. Hoover, *supra* note 1, at 33.

96. *Id.* at 103.

to the procedure,<sup>97</sup> but I am convinced that it is legal, proper and necessary.<sup>97</sup>

On August 18, 1937, the first prisoner was committed to King County Hospital for a ten day observation period under LaGuardia's new law. He had been convicted of impairing the morals of a thirteen year-old girl. If he was found to be mentally deficient then he would be incarcerated indefinitely. Mayor LaGuardia himself presided over the hearing as a magistrate by authority of the City Charter.<sup>98</sup> As Estelle Freedman notes, LaGuardia's plan ended up foreshadowing sex offender policy across the country.<sup>99</sup>

#### IV. THE SEXUAL PSYCHOPATH LAWS

Michigan passed the nation's first sexual psychopath law in 1935.<sup>100</sup> It ordered a judge to conduct a thorough review before sentencing anyone who had been convicted of indecent exposure or gross indecency if he appeared "though not insane, feeble-minded or epileptic . . . to be psychopathic, or a sex degenerate, or a sex pervert, with tendencies dangerous to public safety . . ."<sup>101</sup> In making this determination, a judge or jury had to call two or more reputable physicians, including one psychiatrist. If this evidence proved "to the satisfaction" of the judge or jury that the defendant was a sexual psychopath that caused him to be a "menace to the public safety," then the court was instructed to order him to a state hospital or institution until the defendant had "ceased to be a menace to the public safety because of said mental condition."<sup>102</sup> In that event, he would either be released or ordered to complete his custodial sentence.<sup>103</sup>

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97. *Mayor Offers Plan to End Sex Crimes*, N.Y. TIMES, Aug. 10, 1937, at 1.

98. *Mayor Presides in Sex Crime Case*, N.Y. TIMES, Aug. 18, 1937, at 42.

99. Freedman, *supra* note 11, at 94.

100. 1935 Mich. Pub. Acts 141. In 1937, Michigan revised the law so that the Commissioner of Pardons and Paroles was now authorized to petition a court to conduct a sexual psychopath determination if it had not already been done by the trial court before sentencing. In *People v. Frontczak*, the Michigan Supreme Court struck down the revised law concluding that it violated a person's constitutional right against double jeopardy. 281 N.W. 534, 536-37 (Mich. 1938). The law was subsequently revised again in 1940 to remove it from the criminal code and it was upheld in 1942 in *People v. Chapman*. 4 N.W.2d 18, 28 (Mich. 1942).

101. *Frontczak*, 281 N.W. at 535.

102. *Id.*

103. *Id.*



By 1967, twenty-six states and the District of Columbia had passed similar laws.<sup>104</sup> This Section, discusses the sexual psychopath laws. First, it looks at the U.S. Supreme Court's decision in *Pearson v. Probate Court*<sup>105</sup> which upheld the constitutionality of the sexual psychopath laws. Then, it describes the differences between the laws nationwide, with a special focus on commitments in New Jersey, Illinois, and Indiana. Finally, it presents criticisms of the laws that led to their eventual demise.

#### *A. Constitutional Underpinnings for the Laws*

In *Pearson v. Probate Court*, the United States Supreme Court held that states have the right under their police powers to single out sexually dangerous persons for special treatment out of the larger class of sex offenders. The Court held that sexual psychopaths or sexually dangerous persons constituted a dangerous element that the state legislature had the right to control.

The legislature's power to single out sexually dangerous persons was not absolute; it was limited by both the Due Process and Equal Protection Clauses of the Fourteenth Amendment. The Equal Protection Clause required that for some people to be treated differently than the larger group, their classification must be reasonably related to the objectives of the legislation.<sup>106</sup> In addition, the Due Process Clause required that the administrator's exercise of power be reasonably related to the purpose of the act.<sup>107</sup> Once those hurdles were met, however, the Court held in *Pearson* that the individual could not object that he had been deprived of his liberty in an unreasonable fashion.

#### *B. Requirements for Commitment*

The sexual psychopath statutes took three basic forms. Seventeen states required that a person be convicted of some crime before he could be committed for treatment. Although some of the states required that the conviction be for a sex offense (Alabama, Colorado, Kansas, Massachusetts,<sup>108</sup> New Jersey,<sup>109</sup> Oregon, Pennsylvania, South Dakota, Tennessee, Utah, Virginia,

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104. Swanson, *supra* note 2, at 215.

105. 309 U.S. 270, 277 (1940).

106. See generally *Morey v. Doud*, 354 U.S. 457 (1957).

107. *Pearson*, 309 U.S. at 274-75.

108. The 1947 version of this law did not require a conviction or a charge. TAPPAN, *supra* note 51, at 29-31; *id.* at 69 (attached chart).

109. New Jersey allowed commitment for someone convicted of possession of obscene literature or indecent communications to females. *Id.*

Wyoming), others did not (California, Indiana, Ohio, Vermont, Wisconsin).

Seven states required that the individual be charged with a crime (Florida, Illinois, Indiana, Iowa, Michigan, Missouri, and Washington). Of these, only Washington required that the charge be sex related.

Four states and the District of Columbia did not require charges or a conviction; instead, commitment could occur upon cause that the person was a sexual psychopath (District of Columbia, Minnesota, Massachusetts, New Hampshire, and Wisconsin).<sup>110</sup>

For someone to be committed as a sexual psychopath, almost all the states required that the individual be evaluated by two or more qualified psychiatrists.<sup>111</sup> New Jersey and Vermont used a state diagnostic facility to ensure more extended observation.<sup>112</sup>

The states differed as to what kind of proof was required. For example, Alabama required that there be a "[m]ental disorder existing for one year coupled with criminal propensities to commit sex offenses; not mentally ill or feeble-minded so as to be criminally irresponsible."<sup>113</sup> Illinois used an almost identical definition, except it did not require that the mental disorder exist for a year.<sup>114</sup> California, in contrast, required that there exist a "[p]redisposition to commit sex offenses dangerous to others plus any of the following: mental disorder, psychopathic personality, or marked departure from normal mentality."<sup>115</sup> Massachusetts defined a sexual psychopath as one who shows "[a] habitual course of misconduct in sexual matters evidencing an utter lack of power to control sexual impulses and likely to attack or otherwise inflict injury, loss, pain or other evil."<sup>116</sup>

### C. Commitment Proceedings

Most states required that sexual psychopath cases be adjudicated in a court of record—be it civil or criminal.<sup>117</sup>

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110. *Id.* at 29.

111. Swanson, *supra* note 2, at 228–35.

112. *Id.* at 232, 234.

113. *Id.* at 228.

114. William H. Haines, Harry R. Hoffman & Robert A. Esser, *Commitments Under the Criminal Sexual Psychopath Law in the Criminal Court of Cook County, Illinois*, 105 AM. J. PSYCHIATRY 420, 424 (1948).

115. Swanson, *supra* note 2, at 228.

116. Newton Minow, *The Illinois Proposal to Confine Sexually Dangerous Persons*, 40 J. CRIM. L. & CRIMINOLOGY 186, 189 n.17 (1949) (citing MASS. ANN. LAWS ch. 123(a) (Supp. 1947)).

117. TAPPAN, *supra* note 51, at 31.

California, Washington, D.C., Illinois, Iowa, Michigan, Missouri, Nebraska, and the State of Washington all allowed jury trials.<sup>118</sup> Some of these (Iowa, Missouri, and Nebraska) gave the judge discretion to conduct private hearings.<sup>119</sup> In contrast, Indiana, New Hampshire, and Wisconsin denied the right to a jury trial.<sup>120</sup>

Many states did not even provide for a hearing, including Colorado, Kansas, New Jersey, Pennsylvania, South Dakota, Tennessee, Utah and Wyoming.<sup>121</sup> For these states, judges relied on reports from one or more psychiatrists, often from a state hospital.<sup>122</sup>

### *D. A Close-up Look at Commitments in New Jersey, Illinois, and Indiana*

To see the way that the law was implemented, it is useful to turn to data compiled from three states: New Jersey, Illinois, and Indiana.

#### *1. New Jersey*

Paul Tappan studied the first cases committed under the New Jersey law. He found that among those committed were twenty-nine charged with open lewdness, twelve with rape, seven with sodomy, two with indecent exposure, one with possessing obscene pictures, three with exhibitionism, and two with fellatio.<sup>123</sup>

Table 5—Analysis of the First 83 Individuals Committed under New Jersey's Sexual Psychopath Law<sup>124</sup>

Qualifying Conduct	Number of Individuals
Open Lewdness	29
Rape	12
Carnal Abuse	12
Sodomy	7
Assault (Attempt to Rape)	3
Indecent Exposure	2
Incest	2
Obscene Pictures	1
Private Lewdness	1

118. Swanson, *supra* note 2, at 228–35.

119. *Id.* at 230–32.

120. *Id.* at 229, 232, 235.

121. *Id.* at 229–35.

122. *Id.*

123. TAPPAN, *supra* note 51, at 29.

124. *Id.*

Assault (Attempt Carnal Abuse)	1
Exhibitionism	3
Indecent Assault	3
Fellatio	2
Sex Assault and Battery	2
Attempted Indecent Assault	1
Attempt to Impair Morals of a Minor	1
Abetting Male to Solicit Minor for Sex Relations	1

## 2. Illinois

Illinois passed its sexual psychopath law in 1938 in response to “the perpetration of atrocious sex crimes in Chicago.”<sup>125</sup> There were two ways that a person could be adjudicated a sexual psychopath. If a person was facing criminal charges and the state attorney believed that the person in question was a sexual psychopath, then the state attorney could file a formal petition that would lead to examination by two psychiatrists followed by a jury trial. Alternatively, anyone convicted of rape, crimes against nature, incest, taking indecent liberties with a child, or an attempt to commit any of these crimes had to automatically undergo a sexual psychopath examination before he could be released from the Illinois State Penitentiary. This examination was conducted by one or two qualified doctors appointed by the county judge and a doctor employed by the Illinois State Penitentiary. These individuals did not have the right to a jury trial.<sup>126</sup>

If a person was adjudicated to be a sexual psychopath, then he remained committed to a state mental hospital until he “fully and permanently recovered from such psychopathy.”<sup>127</sup> At that point—if he had not already served time for the crime—he would face criminal charges.<sup>128</sup>

In 1956, the Illinois Commission on Sex Offenders prepared a report for the 68th Assembly of the State of Illinois. It reported that of the sixty-two individuals who were committed as sexual psychopaths between 1938 and 1952, thirty-one were non-violent. Twenty-three were committed for indecent exposure and eight were committed for contributing to the delinquency of a minor. In

125. Haines, Hoffman & Esser, *supra* note 114, at 422.

126. *Id.* at 423.

127. *Id.* at 422.

128. *Id.*

a 1963 study, the head of the Illinois Department of Safety found that more than two-thirds of those committed were non-violent.<sup>129</sup>

### 3. Indiana

Indiana committed a relatively high number of individuals under its sexual psychopath law as compared with other states.<sup>130</sup> A breakdown of the commitments over the first seven years of the statute is as follows:

Table 6—Analysis of the First 108 Individuals Committed under the Indiana Sexual Psychopath Law, 1949–1956	
Qualifying Conduct	Number
Sodomy	60
Public Indecency	23
Contributing to the delinquency of minors	13
Peeping in windows	7
Incest	3
Disorderly Conduct	1
Unnatural acts with wife	1

### E. Number of People Committed Under the Laws

Although the state statutes were expansive in defining who could fall under the law, few people were actually committed as sexual psychopaths. Some suggested that the law was used so infrequently because prosecutors and judges wanted to appear as “vigorous and aggressive defenders of the community” and thus were unwilling to offer treatment instead of prison.<sup>131</sup> They only resorted to the sexual psychopath laws when they did not think that they would be able to get a criminal conviction due to a lack of evidence.<sup>132</sup>

In preparing his report for the State of New Jersey, Paul Tappan compiled data showing the number of people committed under various sexual psychopath laws. He also interviewed

129. Lawrence T. Burick, *An Analysis of the Illinois Sexually Dangerous Persons Act*, 59 J. CRIM. L. CRIMINOLOGY & POLICE SCI. 254, 255 n.15 (1968).

130. PHILIP JENKINS, *MORAL PANIC: CHANGING CONCEPTS OF THE CHILD MOLESTER IN MODERN AMERICA* 88 (Yale Univ. 1998) (citing *THE LAW OF DEPRIVATION OF LIBERTY* 676–77 (Fred Cohen ed., West 1980)).

131. Sutherland, *supra* note 65, at 553.

132. *Id.* See also Burick, *supra* note 129, at 254–66. Of the state’s attorneys Burick wrote, “Only when they feel they do not have enough evidence to convict, do they file a petition under the statute.” *Id.* at 256.

administrative authorities from each of the states. Some of their statements are recorded below.<sup>133</sup>

Table 7—Commitments under Sexual Psychopath Laws <sup>134</sup>			
State	Status of Law as of 1950	Number of Commitments	Statements from Administrative Authorities
California	Operating	435 during first 10 years of statute. In operation into the 1970s. <sup>135</sup>	"Leaves much to be desired: an ineffectual law."
Illinois	Operating	16 cases in 10 years.	"... requires change; little interest in administering present statute."
Indiana	Operating	Between 1949–1956, approximately 23 individuals committed per year. <sup>136</sup>	
Massachusetts	Inoperative		"Law hurriedly enacted, not completely satisfactory; courts do not like it."
Michigan	Inoperative	During first 4 years, 99 confined, of these 29 released via court order or parole by end of four year period. <sup>137</sup>	
Minnesota	Operating	Over 200 cases in 10 years.	"... no triumph for justice or for the protection of society."

133. TAPPAN, *supra* note 51, at 34–35.

134. *Id.* Unless otherwise noted, all of the material noted in Table 7 comes from Tappan's *Habitual Sex Offender*.

135. JENKINS, *supra* note 130, at 88.

136. *Id.* Paul Tappan cited the much lower number of 7. TAPPAN, *supra* note 51, at 35.

137. Sutherland, *supra* note 65, at 553.

New Hampshire		0 cases.	"These cases should not be sent to a state hospital. No treatment facilities."
New Jersey	Operating	35 cases in six months	
Vermont	Virtually inoperative		
Washington	Inoperative		
Washington D.C.	Operating	14 cases that year.	"A star chamber procedure, with inadequate diagnostic and treatment facilities."
Wisconsin	Inoperative		"Law is too loosely drawn as to its coverage and treatment facilities."

During the first ten years after the law was passed, just sixteen people were adjudicated sexual psychopaths in Illinois.<sup>138</sup> During the first four years of the Michigan law, ninety-nine individuals were confined as sexual psychopaths; of these, twenty-nine were released either via court order or on parole by the end of that period.

#### *F. Release Procedures*

The majority of states provided for indeterminate and potentially life long commitment.<sup>139</sup> Most allowed those adjudicated as sexual psychopaths to be released only when authorities at the institution to which they had been committed deemed them to be cured or sufficiently recovered so as to no longer pose a risk of future dangerousness.<sup>140</sup> Some states required that a person stand trial for his original offense in criminal court once he was released.<sup>141</sup> Just three states—Indiana, Michigan, and New Hampshire—made commitment as a sexual psychopath a complete defense to a criminal charge.<sup>142</sup> Only New Jersey restricted the amount of time a sexual psychopath could be committed, which was to no more than the maximum sentence

138. *Id.* (citing Minow, *supra* note 116, at 186-87).

139. TAPPAN, *supra* note 51, at 34.

140. *Id.* at 33.

141. *Id.* at 34.

142. *Id.* at 33.

associated with the underlying crime for which the individual was committed.<sup>143</sup>

As a result, many sex offenders were confined significantly longer than they would have been if they had just served time for their underlying criminal offense. Tappan wrote:

It will be noted that, except for New Jersey, the several statutes provide for an indeterminate commitment without a terminal maximum. This fact together with the tendency to commit a large proportion of minor offenders has resulted in a situation in which individual whose conduct is no more than a nuisance in the community may be incarcerated for long periods of time, what with the disinclination of hospital authorities to assert that the patient is cured.<sup>144</sup>

### *G. Criticism of the Sexual Psychopath Laws*

The Sexual Psychopath laws were challenged on a number of fronts. Some questioned the underlying rational: once a sex offender, always a sex offender. Others criticized the way the laws were implemented, both in terms of who was committed and how sexual psychopaths were treated. Some courts found the laws legally problematic.

#### *1. Questioning the Underlying Rational: Can Sex Offenders Control Themselves?*

The claim that sex offenders could not control their urges was a central justification for the sexual psychopath laws; yet, data was often contradictory. The Citizens Committee on the Commission of Crime in New York studied all 2,022 sex offenders who proceeded from arrest through arraignment of trial from July 1, 1937, to December 1, 1938. It found that just 17.4% (352) had prior arrests.<sup>145</sup> Of these, 4.2% (85) had been charged with sex offenses, whereas 95.8% (267) had been charged with other misdemeanors or felonies.<sup>146</sup> Of those who had previously been arrested for a sex offense, 58% (49) had prior convictions for sex offenses.<sup>147</sup>

Paul Tappan recognized that recidivism was a crucial issue “since the danger to be anticipated from sex criminals is closely

143. *Id.* at 34.

144. *Id.*

145. BEAZELL STUDY, *supra* note 43, at 15.

146. *Id.*

147. *Id.* at 16.



related to the repetition of their crime.”<sup>148</sup> After evaluating both federal and local data, Tappan concluded that sex offenders did not have a high rate of re-offense. He first considered data from the FBI, which ranked recidivism of offenders for twenty-five types of offenses, including rape and other sex offenses. Tappan noted that sex offenders were consistently ranked very low among those caught re-offending. Rape was ranked from eighteen to twenty and “other sex offenses” was ranked one or two places higher.<sup>149</sup> Most of the recidivists in these categories did not have prior convictions for sex related crimes.<sup>150</sup>

Tappan then looked at the Mayor’s Committee for the Study of Sex Offenses in New York City, which had data on felony offenders convicted in county courts from 1930 to 1939.<sup>151</sup>

That study concludes that most offenders charged with sex felonies are without prior police records and that convicted sex offenders are less inclined to have had police records than other types of felons. Sixty-one percent or 2,001 out of 3,295 convicted sex offenders, had no criminal records, as against 35 percent for all other types of felons. . . . Even more significant was the finding of this study that sex offenders who had prior records of sex crimes represented only 9 percent of the total of 3,295 offenders studied.<sup>152</sup>

Tappan also cited the post conviction behavior of 555 offenders convicted of sex crimes in 1930. Only 191 of these offenders were re-arrested, and of these, just 20% were arrested for sex crimes. Tappan writes:

93 percent of these 555 offenders avoided further sex crimes during the twelve year period: only 7 percent reverted. Among the 40 offenders rearrested for sex crimes, 9 were acquitted or discharged, and among the remaining 31 only 2 were convicted three times (of indecent exposure), and 4 were convicted twice.<sup>153</sup>

Tappan pointed to the conclusions of the New York Committee:

In substance, then, the average sex offender’s criminal career seldom is prolonged. Even less seldom is it

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148. TAPPAN, *supra* note 51, at 22.

149. *Id.*

150. *Id.*

151. *Id.* at 23.

152. *Id.* (citing BEAZELL STUDY, *supra* note 43, at 89–91).

153. TAPPAN, *supra* note 51, at 23–24.

continuously sexual. When persistent at all, the design is usually criminal, not sexual. The average sex offender is often the less troublesome than the recidivist offender in the non-sexual field, who incidentally becomes involved in a sex crime. These facts indicate that the recommendation that all sex offenders be segregated for life is completely unrealistic and unwise. Such segregation however may be warranted for the abnormal offenders who have persistent patterns of sex misbehavior in their records. As we have seen this group is small in number. This makes it possible to segregate them within existing institutions and to provide adequate programs of remedial and custodial care within such institutions.<sup>154</sup>

Like Tappan, criminologist Edwin Sutherland also turned to the FBI data to buttress his claim that not all sex offenders recidivated. He pointed out that of 1,447 men arrested for rape in 1937, just 5.3% had prior rape convictions.<sup>155</sup>

## *2. Criticism of the Way the Laws Were Implemented: Disagreement as to the Definition of a Sexual Psychopath*

Benjamin Karpman, M.D. wrote in his 1954 book, *The Sexual Offender*, "The term 'sexual psychopath' and 'sexual psychopathy' have no legitimate place in psychiatric nosology or dynamic classification."<sup>156</sup> Judge Morris Ploscowe agreed. He wrote that the basic task of sexual psychopath laws is to separate the dangerous offender from the minor offender who should be adjudicated via the regular criminal laws. "The sex-psychopath laws fail miserably in this vital task."<sup>157</sup> Ploscowe discussed various statutes and how they were vague in describing what constituted a sexual psychopath and the difficulty psychiatrists had in identifying sexual psychopaths. "The basic difficulty is that the sex-psychopath laws are trying to get at a category of individuals—psychopaths or psychopathic personalities—who may be abnormal, but who are elusive even to the psychiatrists."<sup>158</sup>

The Committee on Forensic Psychiatry of the Group for the Advancement of Psychiatry was also critical of the sexual psychopath laws on the grounds that the definition of a psychopath was overly vague:

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154. *Id.* at 24 (citing BEAZELL STUDY, *supra* note 43).

155. Sutherland, *supra* note 65, at 547.

156. KARPMAN, *supra* note 14, at 478.

157. PLOSCOWE, *supra* note 54, at 212.

158. *Id.* at 213.

The Committee cautions against the use of the appellation, psychopath, in the law on several grounds. There is still little agreement on the part of psychiatrists as to the precise meaning of the term. Furthermore, the term has no dynamic significance. The Committee believes that in statutes the use of technical psychiatric terms should be avoided whenever possible. Psychiatric knowledge and terminology are in a state of flux. Once having become a part of the public law such a term attains a fixity unresponsive to newer scientific knowledge and application.<sup>159</sup>

The lack of a clear definition of sexual psychopathy led to the commitment of those who were not mentally ill. Dr. Ralph Brancale studied the first one hundred individuals committed to the New Jersey Diagnostic Center under the New Jersey law. He divided these individuals into nine categories. Brancale found that eighteen of the first one hundred individuals committed were normal.

Table 8—Clinical Diagnosis of the First 100 Individuals Committed under New Jersey's Sexual Psychopath Law <sup>160</sup>	
Diagnosis	Number of patients
Psychopaths	9
Fixed Homosexual Deviates	4
Psychotics	6
Mental Defectives	8
Organic Brain Disease	2
Schizoid	14
Neurotic	29
Situational Perversions	10
Normal	18

### *3. Further Criticism of the Law: Committing the Deviant but not the Dangerous*

The sexual psychopath statutes were also used to commit individuals deemed sexually deviant even if they were not dangerous.<sup>161</sup> In his critique of the laws, Tappan pointed out the findings of Dr. Alfred C. Kinsey regarding the high incidence of

159. TAPPAN, *supra* note 51, at 37 (citing GROUP FOR THE ADVANCEMENT OF PSYCHIATRY, REPORT NO. 9: PSYCHIATRICALY DEVIATED SEX OFFENDERS (1950)).

160. *Id.* at 26–27.

161. *Id.* at 18.

deviant sexual behavior among the general population.<sup>162</sup> This meant that almost anyone could be committed as a sexual psychopath.

Part of the reason why deviance and danger were not distinguished was because many believed sex crimes flowed on an inevitable continuum. Even if someone was not engaged in violent behavior now—like exhibitionists or peeping toms—he would do so later. Many psychiatrists disagreed. Tappan wrote:

It is the consensus of opinion among psychiatrists, confirmed by crime statistics, that sex deviates persist in the type of behavior in which they have discovered satisfaction. Any thoroughly frustrated, rigidly repressed personality may conceivably explode into violence it is true. There is no evidence, however, that this occurs more frequently among sex offenders than others; indeed there is good psychological ground to believe that individuals who experience some outlet of sexual tensions are less likely to need release of rage and aggression. Progression from minor to major sex crimes is exceptional, though an individual may engage at any given time in a variety of forms of sex outlets.<sup>163</sup>

Tappan then discussed the abuses that resulted from allowing deviance to justify commitment as a sexual psychopath. He pointed to the first fourteen individuals adjudicated as sexual psychopaths in one unspecified jurisdiction, some of whom were never charged with a crime.

Table 9—Analysis of First 14 Individuals Committed under Sexual Psychopath Law for unspecified jurisdiction (Cited in New Jersey study)<sup>164</sup>

Patient	Conduct Resulting in Commitment
1	Public masturbation (without indecent exposure).
2	The following of a white female by a negro (no assault or approach to “victim”).
3	A non-aggressive homosexual, convicted of passing bad checks.
4	A patient who touched the breast of a female in a department store.

162. *Id.* (citing Alfred Kinsey et al., *Concepts of Normality and Abnormality in Sexual Behavior*, in *PSYCHOSEXUAL DEVELOPMENT IN HEALTH AND DISEASE* 28 (Paul H. Hoch & Joseph Zubin eds., 1949)).

163. *Id.* at 14.

164. *Id.* at 28–29.

5	A patient addicted to indecent exposure when he is intoxicated.
6	Another, discovered exposed who had been propositioned and manipulated by a wanton female in a movie theatre.
7	Habitual indecent exposure.
8	Habitual indecent exposure.
9	Habitual indecent exposure.
10	Homosexuality with young males (including fellatio and sodomy).
11	Homosexuality with young males (including fellatio and sodomy).
12	Homosexuality with young males (including fellatio and sodomy).
13	Assault on a young girl.
14	Sex relations with (experienced) juvenile females.

A look at some cases is illustrative.<sup>165</sup> In the 1969 case of *Cross v. Harris*,<sup>166</sup> Mr. Cross was committed at the age of eighteen to Saint Elizabeth's Hospital pursuant to Washington, D.C.'s Sexual Psychopath Act for his "tendency to indecently expose himself in public."<sup>167</sup> He was confined for fifteen years.<sup>168</sup> Upon release, he was charged again with indecent exposure and confined once again as a sexual psychopath. He appealed, and the D.C. Circuit Court of Appeals remanded the case to determine whether Cross was really mentally ill and whether he was in fact dangerous.

Also of interest is the 1943 case of *Dittrich v. Brown County*,<sup>169</sup> in which the Minnesota Supreme Court affirmed the decision to confine Mr. Dittrich under Minnesota's sexual psychopath law on the grounds that he had a "craving for sexual intercourse and self-abuse by masturbation."<sup>170</sup> At trial, an expert testified that Mr. Dittrich's desire, if unquenched, "would be like steam under pressure," and thus he would pose a danger of molesting other women. The Minnesota Supreme Court upheld his

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165. For an account of the way that sexual psychopath legislation was enacted and enforced after the widely publicized murders of two children in Iowa, see NEIL MILLER, *SEX CRIME PANIC* (Alyson Books 2002).

166. *Cross v. Harris*, 418 F.2d 1095 (D.C. Cir. 1969).

167. *Id.* at 1096.

168. The underlying crime carried a maximum of ninety days in jail unless the victim was under sixteen, and then the maximum period of incarceration was one year. *Id.*

169. *Dittrich v. Brown County*, 9 N.W.2d 510 (Minn. 1943).

170. *Id.* at 235.

commitment even though Mr. Dittrich was "mentally bright, capable and a good worker" and had never attacked any women or made sexual advances toward women other than his wife.<sup>171</sup>

Finally, of note is the 1968 case of *State ex rel. Haskett v. Marion County Criminal Court*,<sup>172</sup> in which the Indiana Supreme Court upheld the commitment of Mr. Haskett as a sexual psychopath for peeping in a house.

Even if those treating an adjudicated sexual psychopath realized that he did not pose a danger, they could often do nothing to facilitate his release. The court's decision was final. Tappan explained:

The reports show a complete lack of clarity in the sort of mental conditions of offenders that is intended to be covered by the law. The point is well illustrated by comments of authorities in the District of Columbia that the findings of the medical staff of St. Elizabeth's Hospital frequently differ from the conclusions of the alienists and judges who make a finding of sexual psychopathy in the courts: the treatment authorities have no power to return patients with a finding that they are not psychopathic, the court decisions being conclusive, however inaccurate when little time has been given to diagnosis.<sup>173</sup>

#### *4. Using the Sexual Psychopath Laws only in Weak Cases*

Both Tappan and Sutherland criticized the sexual psychopath laws for allowing prosecutors to lock up individuals when there was insufficient evidence to get a criminal conviction. Tappan wrote:

A number of authorities associated closely with the sex psychopath statutes have emphasized the tendency of prosecution to consider the statute merely as a useful tool to be employed in accordance with their own convenience. In particular they appear inclined to utilize the law where the state's case is too weak for a criminal conviction but where a civil adjudication is easy.<sup>174</sup>

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171. *Id.*

172. *Indiana ex rel. Haskett v. Marion County Crim. Ct.*, 234 N.E.2d 636 (Ind. 1968).

173. TAPPAN, *supra* note 51, at 27.

174. *Id.* at 30.

*5. Disenchantment with Psychiatry's Ability to Predict Future Dangerousness*

Politicians and the population at large had high hopes at the time for psychiatry's expertise in predicting who was likely to re-offend. David Wittels quoted a Philadelphia psychiatrist as saying, "Psychopathic personalities can easily be detected early in life by any psychiatrist."<sup>175</sup> Many prominent psychiatrists, however, did not share this optimism.

In his report for the State of New Jersey, Paul Tappan reported a consensus among seventy-five prominent psychiatrists that accurate prediction of future crime was practically impossible. As Dr. J. B. Gordon, Medical Director of New Jersey State Hospital, put it, "This would require superhuman intelligence and the gift of prophecy."<sup>176</sup> Dr. Hilding Bengt, Commissioner of Mental Health of Pennsylvania, had a similar view: "It is impossible to predict accurately commissions of serious crimes in a person of certain tendencies. There are the unpredictable facts of circumstances, opportunity, and the timely reaction of the person."<sup>177</sup>

These experts' opinions were later tested and proved to be true. After the U.S. Supreme Court ruled in *Baxstrom v. Herold*<sup>178</sup> that it was an equal protection violation to commit an individual after his prison sentence had expired without a judicial determination of dangerousness, 967 inmates were transferred from Dannemora and Matteawan high security mental hospitals in New York to regular civil hospitals where they were widely feared by hospital staff.<sup>179</sup> Many of them were subsequently released into the community.

Although psychiatrists had classified all of these individuals as being at high risk to re-offend and had advised against them being released, very few actually did. Just 3% (26 of the 967) were sufficiently violent and were sent back to the maximum security hospitals. During the four-year follow-up, only 21% were assaultive

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175. Wittels, *supra* note 13, at 30-31.

176. TAPPAN, *supra* note 51, at 14.

177. *Id.*

178. *Baxstrom v. Herold*, 383 U.S. 107, 110 (1966).

179. Henry J. Steadman & Joseph Cocozza, *Violence, Mental Illness, and Preventative Detention: We Can't Predict Who is Dangerous: Lacking Even a Definition of Dangerousness, We Lock Up Hundreds of Psychiatric Guesses*, PSYCHOLOGY TODAY, Jan. 1975, at 33.

in either the community or the civil hospital.<sup>180</sup> In a sample of 246, there were sixteen convictions of which two were for felonies.<sup>181</sup>

#### *6. Criticism of the Way Sexual Psychopaths Were Treated: Lack of Treatment*

For many years, states simply did not try and treat sexual psychopaths. No states had separate facilities for sexual psychopaths, even though many experts agreed that they should not be housed with other patients.<sup>182</sup> Although all states except three<sup>183</sup> called for sexual psychopaths to be housed in mental hospitals, they received no treatment. As Tappan wrote:

The states that have passed special laws on the sex deviate do not attempt treatment! The "patients" are kept in bare custodial confinement. This point is central to the atrocious policy of those jurisdictions that commit non-criminals and minor deviates for indefinite periods to mental hospitals where no therapy is offered . . . . The point should be stressed that commitment of a sex deviate to a state mental hospital *does not imply clinical treatment*. These institutions lack the space, the personnel, the treatment methods, or even the desire to handle deviated sex offenders who are non-psychotic.<sup>184</sup>

That began to change after Tappan's New Jersey report was published in 1950. In 1951, Wisconsin started a sex offender treatment facility where intensive group therapy, among other techniques, was offered.<sup>185</sup> Massachusetts and Washington each started similar projects.<sup>186</sup> In 1950, New Jersey opened a new research facility. California opened Atascadero State Hospital in 1954 which was specifically created for confining and treating

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180. Henry J. Steadman & Joseph Cocozza, *Psychiatry, Dangerousness and the Repetitively Violent Offender*, 69 J. CRIM. L. & CRIMINOLOGY 226, 227 (1978).

181. Henry J. Steadman & Gary Keveles, *The Community Adjustment and Criminal Activity of the Baxstrom Patients: 1966-1970*, 129 AM. J. PSYCHIATRY 9, 86 (1972).

182. TAPPAN, *supra* note 51, at 32.

183. Washington specifically stated that sexual psychopaths should be imprisoned in state correctional institutes. *Id.* New Jersey and Vermont let the Commissioner of Institutions decide whether the offender should be housed in a penal or mental facility. *Id.*

184. *Id.* at 15-16.

185. JENKINS, *supra* note 130, at 89.

186. *Id.*



"mentally disordered sex offenders."<sup>187</sup> Approximately two-thirds of the 1,414 sexual psychopaths treated at Atascadero between 1954 and 1957 were released, and many were successful at avoiding re-arrest.<sup>188</sup>

### 7. Legal Criticisms

The sexual psychopath laws were also criticized by the courts. In the case of *Cross v. Harris* discussed above, Chief Judge Bazelon of the D.C. Court of Appeals gave a damning critique of sexual psychopath laws. He stated:

All too often courts justify a punitive disposition by looking to past conduct, while simultaneously ignoring the procedural requirements or criminal cases by invoking the false promise of "nonpenal" treatment and rehabilitation. "Non-criminal" commitments of so-called dangerous persons have long served as preventative detention, but this function has been either excused or obscured by the promise that, while detained, the potential offender will be rehabilitated by treatment. Notoriously, this promise of treatment has served only to bring an illusion of benevolence to what is essentially a warehousing operation for social misfits.<sup>189</sup>

Although the U.S. Supreme Court had upheld Minnesota's Psychopathic Personality Statute,<sup>190</sup> it struck down the Colorado Sex Offenders Act as a violation of due process.<sup>191</sup> Under the Act, a defendant convicted at trial of certain specified sexual offenses could be sentenced to an indeterminate sentence of one day to life if the trial judge believed that the defendant, "if at large, constitutes a threat of bodily harm to members of the public, or is an habitual offender and mentally ill."<sup>192</sup> In making its decision, the trial court would rely on a psychiatric examination and a written report that recommended whether the individual should be released or committed to the Colorado state hospital.<sup>193</sup> The defendant did not have the right to a hearing to contest these findings.

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187. *Id.*

188. *Id.*

189. *Cross v. Harris*, 418 F.2d 1095, 1107 (D.C. Cir. 1969).

190. *Minnesota ex rel. Pearson v. Prob. Ct.*, 309 U.S. 270, 277 (1940).

191. *Specht v. Patterson*, 386 U.S. 605, 607-08 (1967).

192. *Id.* at 607 (citing section 1 of the Sex Offenders Act, COLO. REV. STAT. §§ 39-19-1 (1963)).

193. *Specht*, 386 U.S. at 607-08.

The Supreme Court struck down the Sex Offenders Act on the grounds that it

does not make the commission of a specified crime the basis for sentencing. It makes one conviction the basis for commencing another proceeding under another Act to determine whether a person constitutes a threat of bodily harm to the public, or is an habitual offender and mentally ill. That is a new finding of fact . . . that was not an ingredient of the offense charged. The punishment under the second Act is criminal punishment even though it is designed not so much as retribution as it is to keep individuals from inflicting harm.<sup>194</sup>

#### *8. Demise of the Sexual Psychopath Laws*

In 1977, the Group for the Advancement of Psychiatry concluded that the sexual psychopath laws had not met their goals:

First and foremost, sex psychopath and sexual offender statutes can best be described as approaches that have failed . . . The mere assumption that such a heterogeneous legal classification ["sex psychopath" or "sexual offender"] could define treatability and make people amenable to treatment is not only fallacious; it is startling . . . If the assessment of the statute in terms of achieving certain goals, for whatever reasons, leads to the conclusion that an experiment has not been successful, it should be halted.<sup>195</sup>

By the 1990s, sexual psychopath statutes remained in just thirteen states and the District of Columbia.<sup>196</sup> Instead of treatment, sex offenders were now sentenced to lengthy periods of incarceration for their crimes.<sup>197</sup>

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194. *Id.* at 608–09 (citations omitted).

195. W. Lawrence Fitch & Richard James Ortega, *Law and the Confinement of Psychopaths*, 18 BEHAV. SCI. & L. 663, 666 (2000), available at <http://www3.interscience.wiley.com/cgi-bin/fulltext/76501318/PDFSTART> (quoting the 1977 plea for repeal of the special commitment laws by the Group for the Advancement of Psychiatry).

196. ROXANNE LIEB & SCOTT MATSON, WASH. ST. INST. PUB. POL'Y, SEXUAL PREDATOR COMMITMENT LAWS IN THE UNITED STATES: 1998 UPDATE 1–2 (1998), <http://www.wsipp.wa.gov/pub.asp?docid=98-09-1101>.

197. *Id.* at 2.

## CONCLUSION

Just as it had motivated the sexual psychopath laws almost half a century earlier, public outrage spurred the passing of the first modern sexual violent predator law in 1990. Citizens in the state of Washington were horrified by a rash of high profile crimes by convicted sex offenders who had been released from prison.<sup>198</sup> After a particularly horrific crime by a mentally retarded parolee with a history of kidnapping, rape, and murder, thousands of letters to the governor flooded in, and public forums were held to address child sexual assault. In 1990, Washington responded to the mounting pressure by passing the first sexually violent predator law.<sup>199</sup> The law ordered the indefinite commitment of sexual violent predators<sup>200</sup> after they had completed their maximum prison term.<sup>201</sup>

Currently, twenty states have laws calling for the involuntary civil commitment of sexually violent predators.<sup>202</sup> These include Arizona, California, Florida, Illinois, Iowa, Kansas, Massachusetts, Minnesota, Missouri, Nebraska, New Hampshire, New Jersey, New York, North Dakota, Pennsylvania, South Carolina, Texas, Virginia, Washington, and Wisconsin.<sup>203</sup> By the fall of 2006, 2,694 individuals were committed nationwide pursuant to sexual violent predator laws ranging in age from 18 to 102.<sup>204</sup>

These laws are a *déjà vu* of the sexual psychopath laws that occurred before them. Even the criticisms are similar. Psychiatrists argue that the term "sexually violent predator" is too vague to have clinical meaning, and scholars question the ability of experts to predict future dangerousness. Yet, there is one considerable difference between the laws of the past and those of the present—

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198. *Locking Up 'Sexual Predators,' A Public Outcry in Washington State Targeted Repeat Violent Sex Criminals, A New Preventative Law Would Keep Them in Jail Indefinitely*, L.A. TIMES, May 10, 1990, Home Ed. at 2.

199. Michael G. Petrunik, *Managing Unacceptable Risk: Sex Offenders, Community Response, and Social Policy in the United States and Canada*, 46 INT'L J. OFFENDER THERAPY COMP. CRIMINOLOGY 483, 492 (2002).

200. To qualify, a person must have at least one prior crime of sexual violence and must currently suffer from a mental abnormality or personality disorder such that he is likely to engage in future predatory acts of sexual violence. WASH. REV. CODE § 71.09.020 (2008).

201. Petrunik, *supra* note 199, at 492.

202. Monica Davey & Abby Goodnough, *Doubts Rise as States Hold Sex Offenders After Prison*, N.Y. TIMES, Mar. 4, 2007, at A18. Michael Cooper, *Senate Passes Bill to Detain Sex Offenders After Prison*, N.Y. TIMES, Mar. 6, 2007, at B3.

203. Davey and Goodnough, *supra* note 202, lists all of the above states except New York because it had not yet passed its sexually violent predator law.

204. Davey & Goodnough, *supra* note 202.

the faith in the power of psychiatry to cure deviance. One scholar wrote that unlike in the past, the primary purpose of the new legislation was “incapacitative rather than therapeutic. No one has suggested that these laws reflect a renewed faith in the power of psychiatry to cure sex offenders.”<sup>205</sup>

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205. AM. PSYCHIATRIC ASS'N, DANGEROUS SEX OFFENDERS: A TASK FORCE REPORT 12 (2005).

