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INDIANA'S SEXUAL PSYCHOPATH ACT IN OPERATION

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Introduction

Persons who violate accepted standards of sexual conduct have always been objects of societal concern. Accordingly, legislation designed to curb sex offenders dates from the beginning of recorded history.[1] One of man's more recent attempts to cope with this problem is the Indiana Criminal Sexual Psychopathic Persons Act of 1949, as amended in 1959.[2] The act has received neither the judicial, nor the scholarly scrutiny which it deserves. Since 1959, the Indiana Supreme Court has spoken on the subject only twice, and only one student law review note has dealt with the act's provisions.[3]

This article will describe the functioning of the sexual psychopath act and, where necessary, the authors will present suggestions for improvement in this functioning. However, neither the constitutionality of the Indiana scheme nor its value in preventing recidivism among sex offenders will be considered. The former will have to be determined by future developments in federal case law[4] and the latter cannot be discerned without a follow-up study of those persons who have gone through the rehabilitation process.[5]

The Statutory Scheme

The sexual psychopath act is a sub-system of criminal law.[6] Chart

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1. Good, *Capital Punishment and Its Alternatives in Ancient Near Eastern Law,* 19 STAN. L. REV. 947, 956-61 (1967).

2. IND. ANN. STAT. §§ 9-3401 to 9-3410 (Burns 1956 Repl.), *as amended* (Burns Supp. 1968). [Hereinafter referred to as the Sexual Psychopath Act].

3. See Wolfe v. State, —Ind.—, 219 N.E.2d 807 (1966); State *ex rel.* Haskett v. Marion Criminal Court, —Ind.—, 234 N.E.2d 636 (1968); Note, *Indiana's Sexual Psychopath Statute,* 44 IND. L.J. 242 (1969). One reason for this lack of attention has been the mistaken belief that the statute is not used. See, *e.g.,* P. GEBHARD, J. GAGNON, W. POMEROY, C. CHRISTENSON, SEX OFFENDERS 847 (1965).

4. See, *e.g.,* Specht v. Patterson, 386 U.S. 605 (1967).

5. The Department of Mental Health is usually not aware of the conduct of discharged sexual psychopaths unless they are recommitted to its jurisdiction.

6. The authors do not express any view on the position taken by the Indiana Supreme Court that the Sexual Psychopath Act is essentially civil in nature. State *ex rel.* Haskett v. Marion Criminal Court, —Ind.—, 234 N.E.2d 636 (1968). In operation, sexual

A is a schematic representation of that sub-system, illustrating the stages of a sexual psychopathy proceeding and the various options available at each stage. As noted at point five on the chart, a petition initiating a sexual psychopathy proceeding cannot be filed until a criminal charge has been lodged in a court of competent jurisdiction.[7] The sub-system cannot be activated, therefore, by either party until a crime has been committed, an offender has been located and arrested, and the prosecuting authorities have filed a formal criminal charge. (See chart A points 1, 2, 3, 4). The scope of the statute has been limited by judicial decision from any criminal charge to criminal charges relating to sex offenses.[8] In addition, charges of murder, manslaughter, or rape of a female child under the age of twelve are excluded by the language of this statute.[9] An indefinite commitment to a state hospital under the sexual psychopath statute acts as, and is therefore one path to, a final disposition of an appropriate criminal charge.[10]

In order to obtain a sexual psychopathy disposition of a criminal charge, the defendant, or someone acting in the defendant's behalf, or the prosecutor must file a petition for the examination of the defendant.[11] Unless such a petition is filed, the normal course of criminal proceedings will follow. The filing of the petition initiates the procedures of the sexual psychopath act; however, at any stage of those procedures a decision can be made ending the process. In that event, the defendant is left to the normal course of criminal proceedings for ultimate disposition.

A sexual psychopathy proceeding may be aborted by a withdrawal of the petition for examination by the petitioning party, or the court may deny the petition of either party on any of several grounds.[12] (See Chart A at point 6). If the petition is granted, the court appoints two qualified physicians who examine the defendant and file a written report with the court.[13] The power to end the proceeding then rests with each physician, for if either physician reports that the defendant is not a criminal sexual psychopath then the proceedings must end.[14] (See chart A at point 7).

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psychopathy proceedings occur only in courts with criminal jurisdiction, and only when a criminal charge is pending.

7. IND. ANN. STAT. § 9-3403 (Burns 1956 Repl.).

8. State *ex rel.* Savery v. Marion Criminal Court, 234 Ind. 632, 130 N.E.2d 128 (1955).

9. IND. ANN. STAT. § 9-3403 (Burns 1956 Repl.).

10. *Id.* § 9-3409.

11. *Id.* § 9-3403.

12. Student comment has made note of statutory language authorizing differential treatment of petitions filed by the prosecutor and those filed by and on behalf of the defendant. Note, *Indiana's Sexual Psychopath Statute,* 44 IND. L.J. 242, 248 (1969). It appears that such differentiations are not made in practice. See text at note 73 *infra.*

13. IND. ANN. STAT. § 9-3404 (Burns 1956 Repl.).

14. *Id.* See also 1949 OP. IND. ATT'Y GEN. 13.

If both physicians report that the defendant is a criminal sexual psychopath, a court hearing is held. If the judge finds, despite the physicians' reports, that the defendant is not a probable sexual psychopath, the proceedings end. (See chart A at point 8).

The 1949 act provided for an indefinite commitment to the Division (now the Department)[15] of Mental Health if the judge found a defendant to be a sexual psychopath following the reports of the two physicians.[16] In 1959 the act was amended to interpose two more stages prior to the ordering of an indefinite commitment.[17] Today, a finding of probable sexual psychopathy by a trial court results in a limited commitment to the Department of Mental Health, to last no more than sixty days from the date of admission to the hospital. By the end of the sixty day period, the Department of Mental Health must report its observations to the court. Should the Department report that the defendant is not a sexual psychopath, the proceedings halt.[18] (See chart A at point 9). A positive finding of sexual psychopathy by the Department of Mental Health does not bind the court, however; and the defendant may still be found not to be a sexual psychopath, in which case he is returned to court for further criminal proceedings. (See chart A at point 10).

The abortion of a sexual psychopathy proceeding prior to an indefinite commitment subjects the criminal defendant to regular criminal proceedings such as he would face in jurisdictions without sexual psychopath acts or as he would face in Indiana if a petition had never been filed. Such cases will normally be disposed of through dismissal, acquittal, or conviction of the crime charged. (See chart A at point 16). Although not adjudged a sexual psychopath, an individual may still find himself in a state mental hospital receiving care and treatment similar to that received by sexual psychopaths. Sometimes criminal charges are aborted and the defendant is civilly committed to the Department of Mental Health as mentally ill.[19] (See chart A at point 13). Prior to trial on criminal charges, a defendant may be found incapable of assisting in his defense and be committed to the Department of Mental Health.[20] (See chart A at point 14). In addition, persons found not guilty of criminal charges by reason of insanity are committed to the Department of Mental Health[21] (see chart A at point 15), and persons convicted and committed to the Indiana Department of Corrections may find themselves in a state

15. IND. ANN. STAT. §§ 22-5002, 22-5004 (Burns 1964 Repl.).
16. Ch. 124, § 4, 1949 Ind. Acts 328.
17. Ch. 356, § 1, 1959 Ind. Acts 955.
18. IND. ANN. STAT. § 9-3404(d) (Burns Supp. 1968).
19. *Id.* § 1201-1256 (Burns 1964 Repl.), *as amended* (Burns Supp. 1967).
20. *Id.* § 9-1706a (Burns 1956 Repl.), *as amended* (Burns Supp. 1967).
21. *Id.* § 9-1704a (Burns 1956 Repl.), *as amended* (Burns Supp. 1967).

mental hospital pursuant to an administrative transfer.[22]

A criminal defendant committed under the sexual psychopath statute remains under the jurisdiction of the Department of Mental Health until unconditionally discharged by the court which committed him. Under statutory authority granted to the Commissioner of Mental Health, the sexual psychopath is not necessarily confined to a state hospital for the length of his commitment. Normally, he will be found on a parole status which is subject to revocation by the Department of Mental Health.[23] (See chart A at point 11). A sexual psychopath, whether or not on parole status, can petition the committing court for discharge at any time after his commitment.[24] If the court is shown that the sexual psychopath has "fully and permanently recovered from his psychopathy," a discharge must be ordered.[25] (See chart A at point 12).

History of the Sexual Psychopath Act[26]

In 1949, Indiana became one of a small minority of states which had created a special statutory scheme for the commitment of sex offenders. Two factors converged in Indiana to lead to such a result. First, a favorable judicial attitude towards such enactments existed immediately after World War II, and second, the years 1947 to 1949 produced an hysterical public demand for new solutions to the problem of sex offenders.

Prior to World War II, the states of California, Illinois, Michigan, and Minnesota had enacted schemes for the civil commitment and psychiatric treatment of sexual psychopaths.[27] By the end of 1947, Massachusetts, Vermont, and Wisconsin had also enacted similar provisions.[28] Indiana lawmakers had, therefore, several examples of the "modern" treatment of sex offenders in neighboring states. In addition, the Michigan and Minnesota statutes had survived constitutional chal-

22. *Id.* § 13-1628 (Burns Supp. 1967).

23. *Id.* § 9-3407 (Burns 1956 Repl.).

24. Statutory language is ambiguous about who may file a discharge petition. It is the position of the Department of Mental Health, however, that the Department is without the authority to file a petition on behalf of a sexual psychopath. See IND. ANN. STAT. § 9-3408 (Burns 1956 Repl.). In practice, neither prosecuting attorneys nor the Department of Mental Health initiate proceedings for discharge, thus this process is left entirely to the committed individual. See text at notes 137-38 *infra.*

25. IND. ANN. STAT. § 9-4308 (Burns 1956 Repl.). For comment on the statutory standard of discharge see note 41 *infra,* at 465 and note 12 *supra,* at 259-60.

26. The following discussion relies in part on C. Wallin, A Study of the Indiana Sexual Psychopath Law and of Twenty Sex Offenders Committed Under the Law from March 7, 1949—March 7, 1950, 8-23 (1951) (unpublished Master's thesis in the Indiana University Library).

27. CAL WELFARE AND INST. CODE §§ 5500 *et seq.* (West 1939); ILL. ANN. STAT. c. 38, §§ 820.1 *et seq.* (1938); MICH. STAT. ANN. § 28.967 (1939); MINN. STAT. ANN. §§ 526.09 *et seq.* (1939).

28. MASS. ANN. LAWS, ch. 123A (1947); VT. REV. STAT. §§ 6699 *et seq.* (1947); WIS. STAT. § 959.15 (1947).

lenges in their states' highest courts, and the United States Supreme Court had placed its imprimatur on the Minnesota scheme.[29]

While this favorable juridical atmosphere prevailed, Indiana also became the scene of complicated litigation over the rape/murders of six Indiana women. Four of the murders had occurred in the Fort Wayne area during 1944 and 1945. They had dropped from the public mind by June 1947 when Ralph W. Loubaugh walked into a police station and confessed to three of the crimes.[30] He pleaded guilty to these crimes on October 27, 1947 and was sentenced to death. Previously another person had been indicted for one of the three murders to which Loubaugh confessed, but the prosecution was dropped.[31] Subsequent to Loubaugh's convictions, a third man, Robert V. Christen, was indicted for one of the murders of which Loubaugh was convicted. Christen was convicted and sentenced to life imprisonment, leaving two men convicted of the same crime.[32]

Adding to the public confusion surrounding those complicated cases, Robert A. Watts, a twenty-five year old Negro, was arrested on November 12, 1947 on a charge of attempted rape.[33] Following several days of intense questioning by Indianapolis police, Watts confessed to the murders of two Indianapolis women. Watts' past history of sex offenses, including several rape and peeping charges, were uncovered and publiciz-

29. Minnesota *ex rel.* Pearson v. Probate Court, 309 U.S. 270 (1940); People v. Chapman, 301 Mich. 584, 4 N.W.2d 18 (1942); Minnesota *ex rel.* Pearson v. Probate Court, 205 Minn. 545, 287 N.W. 297 (1939). These decisions were relied upon by proponents of the 1949 statute. See note 37, *infra.*

30. Brief for Appellee at 9, Loubaugh v. State, 226 Ind. 548, 82 N.E.2d 247 (1948).

31. Brief for Appellant at 187-88, Christen v. State, 228 Ind. 30, 89 N.E.2d 445 (1950).

32. The testimony of the previously indicted person was a key factor in the prosecutions of both Christen and Loubaugh, having at various times identified each as the assailant in one of the murders. Christen's conviction was reversed by the Indiana Supreme Court for insufficient evidence. Christen v. State, 228 Ind. 30, 89 N.E.2d 445 (1950). These cases were further complicated by the confession of Franklin Click to two of the murders for which Loubaugh was convicted. Brief for Appellant at 34-39, Click v. State, 228 Ind. 644, 94 N.E.2d 919 (1950). Click was convicted of one murder and sentenced to death, despite evidence that his confessions, made while he was facing a life sentence for kidnapping, were motivated by potential monetary gain. His conviction and death sentence were affirmed by the Indiana Supreme Court. Click v. State, 228 Ind. 644, 94 N.E.2d 919 (1950). The multiple confessions in these cases are similar to developments in the 1964 Wylie murders in New York City. Two persons confessed to the murders, one was convicted, People v. Robles, 29 A.D.2d 751, 287 N.Y.S.2d 100 (1968), and it appears that the actual murderer is currently at large in Europe. See J. BRUSSEL, CASEBOOK OF A CRIME PSYCHIATRIST 106-35 (1968).

33. Watts was convicted of one murder and sentenced to die. His conviction was affirmed by the Indiana Supreme Court in Watts v. State, 226 Ind. 655, 82 N.E.2d 846 (1948). Watts appealed to the United States Supreme Court on the contention that his confessions were involuntary. The Supreme Court reversed in Watts v. Indiana, 338 U.S. 49 (1949). Watts was retried, convicted, and sentenced to die. Watts v. State, 229 Ind. 80, 95 N.E.2d 570 (1950).

ed,[34] and Indiana authorities initiated a reappraisal of the state's handling of sex offenders.

Intense public pressure led to a conference involving law enforcement and medical officials.[35] The state's prosecuting attorneys also took up the problem of sex offenders at their annual meeting.[36] During this period, Watts was convicted and sentenced to die, and legal maneuvers in his behalf remained in the public view. A draft proposal, relying heavily on the Michigan and Illinois experiences, was presented to the legislature in January, 1949. Unexpected opposition to the draft forced the attorney general's office to file a formal opinion on the constitutionality of the bill. In the absence of significant appellate decisions, the attorney general's opinion still remains the only definitive statement on the meaning of the 1949 act.[37]

Two amendments to the bill were made in the House of Representatives. The first required that one of the two "qualified examining physicians" be a psychiatrist.[38] Since only one medical examination was required for an indefinite commitment under the 1949 act, this was clearly intended as insurance that a valid medical opinion would be obtained. This amendment was eliminated from the final act because of the lack of psychiatrists in many areas of Indiana. The second amendment to the bill was incorporated into the final act. This proposal limited the situations in which proceedings under the sexual psychopath act would be available. The amendment exempted any person charged with murder, manslaughter, or rape of a female child under the age of twelve.[39] This limitation was specifically designed to prevent the act from becoming a haven for the most serious offenders. The act, as amended, passed both houses of the legislature and was signed by the governor on March 7, 1949.[40]

By 1959, it had become apparent that the 1949 act, which relied for its medical judgment solely on the opinions of two doctors, neither of whom was required to be a psychiatrist, had resulted in the commitment of many persons who did not fit the medical definition of a sexual psychopath. In a 1957 article on the administration of the act, Elias Cohen, Assistant to the Commissioner of Mental Health, concluded that over twenty-three per cent of those persons committed did not meet the

34. The Indianapolis News, Nov. 14, 1947, I, at 1.
35. The Indianapolis News, Mar. 4, 1948, II, at 1, col. A.
36. The Indianapolis News, Mar. 19, 1948, II, at 15, col. A.
37. 1949 Op. Ind. Att'y Gen. 12.
38. 1949 Ind. H.R. Jour. 172.
39. *Id.* at 620, 621.
40. *Id.* at 1069, 1117.

statutory standard.[41] In response to this problem the act was amended to give the Commissioner of Mental Health review power in the commitment process.[42] A sixty day observation period was interposed between the findings of the two examining physicians and the order for an indefinite commitment. The amendment provided that further proceedings could not take place if, at the end of the sixty day observation period, the Department of Mental Health found the defendant not to be a sexual psychopath.

Methodology

The only readily available information on the operation of the sexual psychopath act is contained in a central file in the offices of the Indiana Department of Mental Health. This information consists of a case file on each person committed to the jurisdiction of the Department. Each file contains pertinent court orders and proceedings and a complete medical record. The amount of personal data in these files varies greatly.

On March 1, 1969, the date this study was completed, there were 637 case files. Cases 1 through 225 are indefinite commitments under the 1949 act made prior to the 1959 amendments; 1 through 160 were analyzed in a 1957 study by Elias Cohen, Assistant to the Commissioner of Mental Health;[43] cases 161 through 225 are not included in the present article because those commitments took place under the 1949 statutory scheme, and their value is now limited to a replication of Mr. Cohen's results. The information which follows in this article was taken from cases 226 through 621.[44] Cases 622 through 637 were observational commitments made after September 9, 1968. These were excluded from this article because not enough time had elapsed to insure that all proceedings had been completed and reported to the Commissioner's office.

Case files can only provide information on proceedings which result in at least a sixty day commitment to the Department of Mental Health. In order to understand proceedings which begin and end at the county level, failing to reach at least the sixty day commitment, a questionnaire was devised and mailed to each trial court judge and prosecuting attorney

41. Cohen, *Administration of the Criminal Sexual Psychopath Statute in Indiana*, 32 IND. L.J. 450, 458 (1957). [Hereinafter cited as Cohen].

42. Ch. 356, 1959 Ind. Acts 955.

43. Cohen.

44. The total number of case files included is 397, covering the commitments of 396 individuals. Two hundred forty-eight individuals have been adjudged sexual psychopaths, one person twice, for a total of 249 indefinte commitments. One hundred forty-eight persons, committed for sixty day observations, were not adjudged as sexual psychopaths.

in the state. Fifty-two per cent of the prosecutors and fifty-seven per cent of the judges replied.[45] By comparing the replies of the prosecutors and judges with the records of the Commissioner of Mental Health, we believe that a valid picture of the operation of the act at the county level has been obtained.

The Sexual Psychopath

Who is the sexual psychopath that the Indiana statute seeks to identify and detain? The answer is not at all certain. This imprecision has led to allegations that statutes of its type are void because of vagueness. Few people still contend that sexual psychopath defines a recognizable medical category.[46] However, that does not mean that it cannot define a recognizable and justifiable legal category.[47] In Indiana, a person may be a sexual psychopath if he is suffering from a mental disorder [is neurotic or character disordered], provided that he is over sixteen years of age, not feebleminded, and not insane [psychotic].[48] An individual is commitable if, in addition to the above, he possesses a "propensity" to commit sex offenses.[49] The basis for exclusion of both the feebleminded and those suffering from psychotic disorders is that they are subject to commitment under other statutes.[50] The Indiana classifications, which can be shown to have a basis in the American Psychiatric Association's Standard Nomenclature, would meet any reasonableness test they would face in court.[51]

Assuming a given number of persons within the population of Indiana who fit the aforementioned statutory criteria, the vast majority of such persons do not fall within the provisions of the present law. Those sexual psychopaths who have yet to commit a sex offense, who have committed a sex offense but have yet to be apprehended, and who are apprehended and released without the filing of a formal criminal charge

45. The completed questionnaires and case records are on file in the Indiana University School of Law Library in Bloomington, Indiana.

46. But see H. CLECKLEY, THE MASK OF SANITY (1950) and note 51 *infra*.

47. *Cf.* Boutilier v. Immigration and Naturalization Service, 387 U.S. 118 (1967).

48. IND. ANN. STAT. § 9-3401 (Burns 1956 Repl.). The words in parenthesis show the Department of Mental Health's interpretation of the statutory language. For a justification of the Department's interpretation, see Cohen, at 457.

49. *Id.*

50. IND. ANN. STAT. § 22-1907 (Burns 1964 Repl.) and IND. ANN. STAT. §§ 22-1201 to 22-1256 (Burns 1964 Repl.), *as amended* (Burns Supp. 1967).

51. AMERICAN PSYCHIATRIC ASSOCIATION, STANDARD NOMENCLATURE (1952) reprinted in part in J. KATZ, J. GOLDSTEIN & A. DERSHOWITZ, PSYCHOANALYSIS, PSYCHIATRY & LAW 506-14 (1967). It is beyond the authors' competence to join the debate over whether or not mental illness exists or whether character disorders are mental illnesses. See the authorities cited in Livermore, Malmquist, & Meehl, *On the Justifications for Civil Commitment*, 117 U. PA. L. REV. 75, 80 n. 19 (1968).

cannot be proceeded against.[52]

The authors do not wish to suggest that the provisions of this act should extend to persons who have yet to be identified as perpetrators of a sex offense. There are grave philosophical and practical barriers to such an attempt. But to understand what the Indiana sexual psychopath statute does, we must also realize what it does not do. It does not operate until a sex offender has committed a crime and has been apprehended. It does not, therefore, prevent sex offenses in the first instance. It may, however, prevent recidivism by those persons who are subjected to the treatment which the act offers.[53]

A sexual psychopath statute, however, need not wait until an offense has been committed. One can visualize a rational system designed to detect and detain potential sex offenders. Such a system would be based on a "prediction-prevention" model of law enforcement, rather than on the "deterrent" model upon which our criminal law claims to rest.[54] It certainly seems that the social good is increased by the use of what Blackstone called "preventive justice."[55] Indeed Blackstone's concept of preventive justice has found a home at many stages of our judicial

52. The figures given in the F.B.I.'s Uniform Crime Reports, 96-111, (1966) indicate that of reported sex offenses approximately sixty per cent are cleared by arrest. Only one half of those arrested are ever formally charged.

53. See text at notes 4-5 *supra*.

54. The terminology is from A. Dershowitz, The Role of Law in the Prediction and Prevention of Harmful Conduct (Paper delivered at the 43d Annual Meeting of the American Orthopsychiatric Association, 1966), reprinted in part in J. KATZ, J. GOLDSTEIN & A. DERSHOWITZ, PSYCHOANALYSIS, PSYCHIATRY & LAW 588 (1967). See also Dershowitz, *Psychiatry in the Legal Process: "A Knife That Cuts Both Ways,"* 51 JUDICATURE 370 (1968), and Frankel, *Preventive Restraints and Just Compensation: Toward a Sanction Law of the Future*, 78 YALE L.J. 229 (1968).

55. 4 W. BLACKSTONE, COMMENTARIES *251:

OF THE MEANS OF PREVENTING OFFENCES

> . . . And really it is an honour, and almost a singular one, to our English laws, that they furnish a title of this sort; since *preventive* justice is, upon every principle of reason, of humanity, and of sound policy, preferable in all respects to *punishing* justice; the execution of which, though necessary, and in its consequences a species of mercy to the commonwealth, is always attended with many harsh and disagreeable consequences.

Lewis Carroll found a delightful way of voicing his agreement with Blackstone: "[T]here's the King's Messenger. He's in prison now, being punished: and the trial doesn't even begin till next Wednesday: and of course the crime comes last of all."
"Suppose he never commits the crime?" said Alice.
"That would be all the better, wouldn't it?" the Queen said . . . .
Alice felt there was no denying that. "Of course it would be all the better," she said, "but it wouldn't be all the better his being punished."
"You're wrong there, at any rate," said the Queen. "Were you ever punished?"
"Only for faults," said Alice.
"And you were all the better for it, I know!" the Queen said triumphantly.
"Yes, but then I had done the things I was punished for," said Alice," that makes all the difference."
"But if you hadn't done them," the Queen said, "that would be better still; better, and better, and better!" L. CARROLL, THE ANNOTATED ALICE 248 (1960).

system. The quarantine of persons afflicted with contagious diseases,[56] the detention of potential saboteurs,[57] the bail system,[58] and civil commitments of the mentally ill[59] are but a few examples.

All forms of preventive justice suffer from one critical defect—an inability to know whom to prevent. Our inability to say, with accuracy, who will or will not commit a future sex offense stems from the laws of statistics. A large number of false positives (predictions of an event which does not in fact occur) invariably results when one attempts to predict, by clinical or statistical means, the occurrence of a rare event.[60] Fortunately for society, the sex offense is a rare event. However, this rarity forces us to wait until the event occurs and only then proceed to prevent the individual from committing another such act.

Although the sexual psychopath statute does not operate unless a crime has been committed, there is no requirement that the alleged sexual psychopath be found guilty of committing that crime. While it is not likely that the elimination of normal criminal protections results in the commitment of "innocent" persons,[61] the lack of a conviction requirement has created two prosecutorial practices.[62] First, prosecutors can proceed against a defendant under the sexual psychopath statute even though they do not have sufficient evidence for a criminal conviction. This can occur either when there is a lack of evidence of guilt or when evidence of guilt is present, but inadmissible at a criminal trial. Second, prosecutors may threaten misdemeanor defendants with a sexual psychopathy proceeding in order to secure a guilty plea.

While neither practice is illegal, both have a potential for abuse. The requirement of finding guilt[63] prior to the institution of sexual

56. The fate of (Typhoid) Mary Mallon, who was incarcerated for twenty-six years for being a typhoid carrier, is an example. N.Y. Times, Nov. 12, 1938, at 17, col. 7.

57. Hirabayashi v. United States, 320 U.S. 81 (1943); Korematsu v. United States, 323 U.S. 214 (1944); *Ex parte* Endo, 323 U.S. 283 (1944). See Rostow, *The Japanese American Cases—A Disaster*, 54 YALE L.J. 489 (1945). For a contemporary example see 50 U.S.C. §§ 811, 813 (1964) which provide a manner by which to detain security risks. See C. ALLEN, CONCENTRATION CAMPS U.S.A. (1966).

58. Note, *Preventive Detention Before Trial*, 79 HARV. L. REV. 1489 (1966).

59. See authorities cited note 54 *supra*.

60. An example of the overprediction phenomenon can be found in Livermore, Malmquist, & Meehl, *supra* note 51, at 84-85. For more on the problems of prediction see P. MEEHL, CLINICAL v. STATISTICAL PREDICTION (1954).

61. The authors noted several cases in which the Department of Mental Health recommended that a defendant be allowed to stand trial because of (possible) innocence. The facts of one case, in which a man was committed for indecent exposure by his adult sister because he walked around the family home in his underwear, strongly suggested an abuse of the statutory provisions (Case 263).

62. These practices were brought to the authors' attention by one prosecutor and one judge (formerly a prosecutor) who had engaged in them.

63. This finding need not be a formal criminal conviction. One of the reasons for not requiring a conviction was the desire not to stigmatize a mentally ill offender with a

psychopathy proceedings would eliminate both practices. Then, the examining physicians would be justified in the presumption of guilt they indulge in when forming their diagnosis.[64]

Bringing the Sexual Psychopath Act into Play

A petition requesting examination of the defendant must be filed with the court in order to initiate proceedings under the sexual psychopath statute. By studying petitions one learns which parties bring the act into play, thereby giving an impression of how the act is viewed by persons dealing with it. The authors expected that this act, which provides for an indefinite civil commitment, would have been utilized almost exclusively by prosecuting authorities. It was thought that defendants would view the act as potentially oppressive because of their concern about the adequacy of state hospital facilities and the fear of being forgotten in a mental hospital. The files of the Department of Mental Health, however, show that one-quarter to one-half of all sexual psychopath proceedings are initiated by the defendant or someone in his behalf.[65] Of 397 cases reviewed, 30.7 per cent were filed by the prosecutor, twenty-one per cent were filed by the defendant or someone in his behalf, and forty-eight per cent of the cases did not indicate who had filed the petition.[66] Assuming constant proportions throughout the unknown group, a figure of forty per cent is computed for cases filed by defendants.

This percentage was confirmed by the questionnaires. Sixteen of forty-four judges reporting sexual psychopathy proceedings in their courts stated that fifty per cent or more of the petitions filed in their courts were filed by the defendant. There were major differences between counties. Lake County, for example, reported that approximately three-quarters of

criminal conviction. Interview with Cleon Foust, Dean, Indiana University School of Law at Indianapolis, and formerly Attorney General of Indiana, Apr. 1, 1969. One might ask, however, who suffers from the greatest stigma, an ex-convict or an ex-criminal sexual psychopath? A formal criminal conviction would carry with it, of course, certain civil disabilities. See, *e.g.*, IND. ANN. STAT. § 29-4804 (Burns 1969 Repl.) disenfranchising persons convicted of crime during the period of their imprisonment.

64. Many judges and prosecutors instruct the examining physicians to presume the defendant's guilt. It also has been established that clinicians have a negative attitude toward known sexual offenders. Berman & Freedman, *Clinical Perception of Sexual Deviates*, 52 J. OF PSYCHOLOGY 157-60 (1961).

65. Petitions filed "on behalf of the defendant" numbered only eleven. These included petitions from wives, mothers, and attorneys. While it is possible that some of these were filed against the defendant's personal wishes, the number is too small to affect the conclusions stated in the text.

66. The Department of Mental Health does not require that committing courts send it a copy of the petition, although they do request all other pertinent information. Ind. Dep't of Mental Health, Codified Official Bulletins V-5.04.D(Nov. 20, 1967). [Hereinafter cited as Official Bulletins]. Only a few courts send copies of the petitions; nevertheless, the identity of the petitioner can sometimes be obtained from the wording of court orders.

the petitions filed were initiated by the defendant.[67] Because Lake County accounts for one-quarter of all sexual psychopath commitments, this figure has had a marked effect on the totals. Marion County, however, reported that approximately ninety-five per cent of their cases were filed by the prosecutor.[68]

The figures indicate that many defendants view the act as a beneficial alternative to a criminal prosecution. This impression is confirmed by a study of the criminal charges brought against defendants who initiated sexual psychopathy proceedings. It was expected that these cases would show exclusively charges of serious felonies; however, of the seventy-nine charges that could be accurately attributed to defendants who had initiated sexual psychopathy proceedings, only twenty-four were of felonies carrying minimum sentences of two years or more.[69] The remaining fifty-five charges were, in the majority, potential misdemeanors, and only one carried a minimum sentence of over one year.[70] This large number of minor offenses indicates that defendants are willing to use the statute even if they would only face light criminal punishments.

Disposition of Petitions Prior to the Appointment of Examining Physicians

Disposition of a petition for examination by either withdrawal or dismissal is a rare event, occurring in less than four per cent of the cases. Several factors account for this: first, the statute seems to require that a petition from the prosecutor be entertained;[71] second, the formal requirements for a petition are not stringent;[72] and, third, the vast majority of

67. Questionnaire received from the Hon. John J. McKenna, Judge, Lake Criminal Court. The files indicate that the higher proportion of petitions filed by defendants may be due to policies of the Lake County Public Defender.

68. Questionnaire received from the Hon. Saul B. Rabb, Judge, Marion Criminal Court.

69. These included six charges of first degree burglary, minimum sentence ten years, IND. ANN. STAT. § 10-701 (Burns 1956 Repl.); seventeen charges of rape and statutory rape, minimum sentence two years, IND. ANN. STAT. § 10-4201 (Burns 1956 Repl); and one charge of kidnapping, minimum sentence life imprisonment, IND. ANN. STAT. § 10-2901 (Burns 1956 Repl.).

70. These include twenty-three charges of assault and battery, which may be either a misdemeanor or a felony with a minimum sentence of one year, IND. ANN. STAT. § 10-403 (Burns 1956 Repl.); five charges of incest which may be either a misdemeanor or a felony with a minimum sentence of two years, IND. ANN. STAT. § 10-4206 (Burns 1956 Repl.); two charges of indecent exposure, a misdemeanor, IND. ANN. STAT. § 10-2801 (Burns 1956 Repl.); and twenty charges of sodomy which may be either a misdemeanor or a felony with a minimum sentence of two years, IND. ANN. STAT. § 10-4221 (Burns 1956 Repl).

71. One judge replied to the questionnaire that it was "impossible" to deny the petition of a prosecutor. This position is unsound since it is axiomatic that the petition must at least allege a criminal offense within the provisions of the statute.

72. The statute merely requires that the petition be "a statement in writing setting forth facts tending to show" that the defendant is a criminal sexual psychopath. IND. ANN. STAT. § 9-3403 (Burns 1956 Repl.).

prosecuting attorneys indicated that they do not oppose petitions filed by or for the defendant.[73]

It appears that the grounds for dismissal of petitions are almost always statutory. The crime is either not a sex related offense or it is a murder, manslaughter, or rape of a female child under the age of twelve. That such petitions are filed is a confession of ignorance by members of the bar. The statutory limitations are explicit, and the judicially imposed limitation is annotated in the Burns 1956 Replacement.[74]

Examining Physicians

It was noted earlier that an attempt to amend the 1949 bill to provide that one of the two qualified examining physicians be a psychiatrist had failed. In practice, however, it appears that in two-thirds of all cases one, if not both, of the examining physicians have specialized training in psychiatry.[75] This is always true in Lake and Marion Counties, which account for forty-seven per cent of all commitments. In addition, over half of all other reporting jurisdictions follow a similar procedure. The lack of physicians with training in psychiatry in rural portions of the state is still so acute that several replies to the questionnaire cited a lack of trained individuals as the reason for not utilizing psychiatrists.[76]

Following a personal examination of the defendant, the statute requires the physicians to file in court "a written report of the results of their examination, together with their conclusions."[77] The reports provide evidence to be considered at the hearing, and they are available to all concerned parties. In addition, copies of these reports are filed with the Department of Mental Health if a sixty day observational commitment is ordered.[78] Several files did not contain written medical reports. Indications are that the examinations took place at the courthouse on the day set for hearing and that the doctors presented their findings orally at the hearing. Such practices are clearly in violation of statutory requirements.[79]

It was expected that virtually all examining physicians would find the

73. The opinion that the defendant should be allowed his "day in court" on the issue of sexual psychopathy was a typical reply to the questionnaire.

74. IND. ANN. STAT. § 9-3403 (Burns 1956 Repl.).

75. It is impossible to distinguish from the available records what percentage of "psychiatrists" are so certified by the American Board of Psychiatry and Neurology.

76. Several judges inquired why the State of Indiana could not provide psychiatric assistance to rural counties. Such assistance could be necessary in any legal proceeding involving a determination of mental illness. The authors feel it appropriate to restate this inquiry.

77. IND. ANN. STAT. § 9-3404 a (Burns Supp. 1967).

78. Official Bulletins, V-5.04.D.

79. Additional types of statutory violations in the commitment process will be discussed in the text at notes 139-46 *infra*.

defendant to be a sexual psychopath and recommend further observation. However, it appears that a large number of petitions are disposed of when either or both of the examining physicians report a negative conclusion. Because such cases are not found in the files of the Department of Mental Health,[80] their total number is unclear. The returned questionnaires indicate that such dispositions occur in from one-fifth to one-quarter of all cases.

The remaining examination reports are found in the files of the Department of Mental Health. Their quality is quite poor. The authors are unable to judge the medical validity of these reports. However, it is apparent that the reports do not provide the court or attorneys with the types of information and conclusions which lead to a meaningful hearing and findings of fact subject to a meaningful review. The reports are brief and fail to support their conclusions.[81] Many examples were found of one sentence reports reading "it is my professional opinion that the defendant is a criminal sexual psychopath."[82] The lack of legally adequate medical reports is particularly appalling in view of additional data which suggests that judges and lawyers are relying inordinately on the examining physicians' opinions.[83]

Blame for the poor quality of examining physicians' reports cannot rest solely with the medical profession. If judges, prosecuting attorneys, and defense attorneys wish to have medical judgments prepared in a manner appropriate for a legal setting,[84] they must make their requirements clear to the examining physicians.[85] The questionnaires indicate, however, that the vast majority of judges and prosecuting attorneys make little or no effort to explain to the examining physician what he is expected to discover and in what form it should be presented. Only twenty-three per cent of the judges reported giving instructions to the physicians, and most of these were limited to simply providing the physician with a copy of the act containing the legal definition of a sexual psychopath.

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80. The Department files contain only cases in which the defendant has at least been committed for a sixty day observational period.

81. The authors wish to acknowledge several remarkable exceptions to this rule from two or three physicians who file reports of consistently high quality.

82. For two examples of reports which were filed prior to 1956 see Cohen, at 460-61.

83. See text at note 92 *infra*.

84. Reports should present the ascertainable facts from both the defendant's social history and psychological test results, the facts which have not been ascertained, and the doctor's diagnosis and the factors upon which it is based. Without such reports, attorneys cannot judge the validity of the doctor's conclusions and judges cannot make findings of fact that are sufficient to provide a meaningful review by higher courts.

85. The difficulties of adapting psychiatric information to a judicial setting are great, and practice shows that lawyers and judges often defer to testimony which sounds scientific. See Washington v. United States, 390 F.2d 444 (D.C. Cir. 1967).

This failure of the legal profession explains the findings of Cohen, confirmed by our results, that large numbers of doctors' reports address themselves to questions other than whether the defendant is a sexual psychopath.[86] Often reports discuss whether a defendant is competent to stand trial, needs treatment, and was responsible for his actions. While such findings would be relevant in certain legal proceedings, they are not relevant in the context of a sexual psychopathy proceeding.[87] Physicians who know what is expected of them would not submit such irrelevant reports. A substantial improvement in this situation could be effected by the education of the bar.[88] Improved medical reports may avoid un-

86. Cohen, at 460.

87. For example, competency hearings, IND. ANN. STAT. § 9-1706a (Burns 1956 Repl.), *as amended* (Burns 1967 Supp.); commitments of the mentally ill, IND. ANN. STAT. §§ 22-1201 to 22-1256 (Burns 1964 Repl.), *as amended* (Burns 1967 Supp.); or criminal trials in which a plea of not guilty by reason of insanity has been entered, IND. ANN. STAT. §§ 9-1701 to 9-1703 (Burns 1956 Repl).

88. It is hoped that representatives of Indiana's trial judges and prosecuting attorneys will prevail upon the Attorney General and the Commissioner of Mental Health to prepare information for attorneys involved in these cases and to prepare sample instructions and report forms to be supplied to examining physicians. One circuit court, in an attempt to standardize examining physicians' reports, has merely codified their worst features. The form reproduced below calls for conclusions but only provides a minimum of space for the justifications of the conclusions. The form does not inquire about, and apparently the court does not expect, any psychological testing to which the defendant may have been subjected.

STATE OF INDIANA IN THE HUNTINGTON CIRCUIT COURT
SS:
COUNTY OF HUNTINGTON
IN THE MATTER OF THE PETITION OF
_____,
PROSECUTING ATTORNEY, FOR THE
EXAMINATION OF_____ CAUSE NO._____
_____,
AN ALLEGED CRIMINAL SEXUAL PSYCHOPATHIC
PERSON.

STATEMENT OF MEDICAL EXAMINER

I, ..., M.D., of the City of Huntington, County of Huntington, State of Indiana, do hereby certify that I am duly licensed to practice medicine in Indiana; that I am not related, by consanguinity or marriage to..... ....., who is alleged to be a criminal sexual psychopath and whom I have carefully and separately examined this ..... day of ....., 19.....; that I am of the opinion that he (is) (is not) a criminal sexual psychopath and (is) (is not) a proper person for detention in a Division of Mental Health, (and) (not) to be confined by the Department of Mental Health of the State of Indiana in an appropriate psychiatric institution for an indeterminate period for the purpose of observation, evaluation and diagnosis of such person by the psychiatric staff of such institution; and that I have formed my opinion that he (is) (is not) a criminal sexual psychopathic person from the following facts observed by me. (Describe physical and mental conditions; appearance and behavior of patient.)

[space]

I have also received the following information from others relative to the alleged criminal sexual psychopathic person's condition:

[space]

The following is a brief statement of the medical history of .....

necessary observational commitments and may make the remaining observations more meaningful by providing the Department of Mental Health with the benefit of an additional opinion.

The Initial Hearing

After two examining physicians find a defendant a sexual psychopath, the court holds a hearing to determine for itself whether the defendant is "probably a criminal sexual psychopath."[89] This initial hearing[90] has been analogized to a criminal "probable cause" hearing, and all procedural protections of a full and fair hearing apply.[91]

An important question raised by our investigations is: Do procedural protections have any effect on the outcome of the hearing? As noted previously, judges and lawyers defer inordinately to the doctors' reports. The conclusions of the two examining physicians are never overruled by the judge.[92] In every case in which the examining physicians concluded that the defendant was a sexual psychopath, and in several cases in which they did not,[93] the defendant was committed to the hospital for a sixty day observation. Two interpretations of these facts are possible. First, each decision may be substantively correct. If this is the case, then procedural safeguards serve simply as deterrents to the filing of unmerit-

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which information I received from the said ....., and others:
[space]
_____M.D.
Subscribed and sworn to before me this.....day of ....., 19.....
_____
CLERK, HUNTINGTON CIRCUIT COURT

89. IND. ANN. STAT. § 9-3404(d) (Burns Supp. 1968).

90. The statute does not require, nor does there appear to be, a hearing on whether the petition should be granted.

91. Note, *Indiana's Sexual Psychopath Statute*, 44 IND. L.J. 242, 256-68 (1969). Although statutory language does not explicitly require all due process safeguards, it appears that the majority of hearings are conducted within Specht v. Patterson, 386 U.S. 605 (1967), standards. The authors did not discover any case files showing evident failure of process; however, due to a lack of court records in many files, this cannot be taken as conclusive. See 44 IND. L.J. at 242, 243 for the history of the Haskett case, in which an initial sexual psychopath hearing was vacated because of lack of counsel.

Any procedural defects in commitments are cognizable on a motion for a belated new trial, INDIANA SUPREME COURT R. § 2-40. It is doubtful, however, if any of the dispositions would be altered upon retrial. Haskett, whose commitment was voided on July 20, 1967, was ordered for re-examination on the same day.

92. Of seventy-seven judges replying to the survey, forty-three had utilized the statute at some time during the past ten years. None of the forty-three reported such an occurrence. But see Wilson v. State, 236 Ind. 278, 139 N.E.2d 554 (1957). One prosecutor reported a case in which a petition had been granted, the doctors had reported that the defendant was a sexual psychopath, but the judge did not commit the defendant for an observation because the crime charged was not sex-related. This cannot be considered a case of a judge overruling the doctors, but rather a case of a legal defect which was not caught when the petition was filed.

93. For a discussion of these and other instances of failure to comply with statutory provisions, see text at notes 139-46 *infra*.

orious cases and as desirable forms of judicial ritual. The second possibility, as the proponents of due process in the area of civil commitment contend, is that erroneous substantive decisions are being made in the absence of such protections.

However, even in the presence of such protections erroneous decisions are being made.[94] The bar's inability to obtain adequate medical reports and its reluctance to actively utilize such protections as the right of cross examination[95] have resulted in the neutralization of these protections.

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94. See note 92 *supra* and text at note 103 *infra*.

95. The first excerpt is from the Transcript of State of Indiana v. —, Cause No. 33272, Lake Criminal Court, June 26, 1961, 5-7.

(Prosecuting Attorney)

Q. Tell the Court your name.

A. —.

Q. What is your business or profession?

A. Doctor of Medicine.

Q. You Practice in Crown Point?

A. In Crown Point, Indiana.

Q. How long have you practiced medicine, Doctor?

A. Ten years.

Q. During that time have you had occasion to specialize in any degree in the treatment of mental diseases or treating mental patients?

A. Yes.

Q. You have been practicing in that field?

A. Yes.

(Defense Attorney)

I will stipulate to the Doctor's qualifications.

(Prosecuting Attorney)

Q. Have you had occasion to examine the defendant, ——?

A. Yes.

Q. When did this examination take place?

A. . . . I don't know the exact date, last Thursday, in the Lake County Jail.

Q. What did this examination consist of, Doctor?

A. A review of his case, a discussion with the defendant as to what he had done, a discussion whether he realized this was something illegal and immoral and questions leading him to realize this is something we should not do and questioning him further if he had any previous history as to this type of thing.

Q. Did you ascertain he had a previous history of this type of thing?

A. He admitted to previous charges but he didn't admit to charges of the same type.

Q. Based on your examination and your experience do you have an opinion as to whether or not the defendant, —, is a criminal sexual psychopath as set forth in the Indiana statutes, are you familiar with the definition?

A. I have the code in my pocket right now, yes he would be classified, under the Indiana statute as a criminal sexual psychopathic person.

Q. You say he is a criminal sexual psychopathic person?

A. Yes.

(Defense Attorney)

Q. Is it true as a result of your examination, you found out the defendant, when he is drinking, has propensities to commit sexual misbehavior?

A. I did not cover that particular point in examining him, however, generally speaking, this would be true, but I had not discussed this with —.

Q. You found further, pursuant to our statute, he is not feebleminded?

A. He is not feebleminded.

No further questions.

Commitment for Observation

The 1959 amendments to the sexual psychopath act interposed an observational commitment between an initial finding of probable sexual psychopathy and the final adjudication of an indefinite commitment to the Department of Mental Health. These additional procedures have added an average of over three months to the commitment process. Table 1 indicates that the average elapsed time from the date of an observation order to an order adjudging a person a sexual psychopath is 98.2 days.

Such testimony in sex deviant commitments is not atypical. The following is from the transcript of a hearing under the Massachusetts Sexually Dangerous Persons Act, MASS. ANN. LAWS, ch. 123A (1947):

(Prosecuting Attorney)

Q. What is your name?

A. Dr. —.

Q. And are you associated with the Bridgewater Treatment Center?

A. I am a consultant with the Division of Legal Medicine, Department of Mental Health, based in the Sex Treatment Center at Bridgewater.

. . . .

(Defense Attorney):

I will waive—

(Prosecuting Attorney):

Mr. —has agreed to Dr. — qualifications.

THE COURT:

All Right.

Q. Did you have occasion to examine Mr. —, the petitioner who is before the court this day?

A. Yes, sir.

Q. And when was the last time you examined him, sir?

A. I examined him on his recent observation period. . . I have, of course, seen him in 1961 and 1962 also.

Q. And where did this examination take place?

A. Bridgewater Sex Treatment Center.

Q. And following the further examination, did you have discussions with other members of your profession at the Bridgewater Sex Treatment Center with reference to Mr. ——?

A. Yes, I did.

Q. Did you form an opinion based upon your discussion with Mr. —as well as your discussion with the attending psychiatrists?

A. Yes, I did.

Q. And what is that opinion, sir?

A. My opinion is that he remains at this time a sexually dangerous person within the meaning of the law.

Q. And what is that opinion based upon?

A. It's based upon the interviews I had with him, the discussions of his current condition, as well as a history of his past offences and his past mental and emotional condition, as well as recent observations by other staff members in staff discussions, psychologists, and so on.

. . . .

(Prosecuting Attorney):

I have no further questions, thank you very much.

(Defense Attorney):

I have no questions.

Transcript, Commonwealth v. —, Middlesex Superior Court No. 63107, 1517 (June 1, 1967).

In order to isolate potential delay, Table 1 breaks down this figure into three constituent parts: observation order to hospital admission, hospital admission to the filing of an observation report, and the filing of an observation report to an adjudication of sexual psychopathy. The first two columns are based on those cases, out of a total of 397, in which this information was available. Because the files of the Department of Mental Health do not record the date of the second court hearing unless that hearing resulted in a determination of sexual psychopathy, column three is based on the average days in 241 out of 249 cases in which sexual psychopathy was adjudicated.

Table 1

TIME FROM OBSERVATION ORDER TO ADJUDGED SEXUAL PSYCHOPATH ORDER

Year	*Observation Order to Hospital Admission*		*Hospital Admission to Filing of Observation Report*		*Filing of Observation Report to Adjudged Sexual Psychopath Order*	
	Average Days	*Cases*	*Average Days*	*Cases*	*Average Days*	*Cases*
1959	13.4	12	40.7	13	43.9	9
1960	22.4	35	44.7	35	77.8	17
1961	14.9	43	47.5	42	35.7	26
1962	18.6	51	48.6	51	25.3	32
1963	22.4	40	49.25	40	23.5	25
1964	21.9	41	51.7	42	16.3	28
1965	16.8	53	41.6	53	20.6	37
1966	17.3	45	53.9	44	33.1	35
1967	16.3	35	75.1	34	23.0	22
1968	15.0	21	61.9	21	14.8	10
TOTAL	18.2	376	50.6	375	29.4	241

Column 1 indicates that an average of eighteen days elapsed from the observation order to admission to the appropriate state hospital. Whether or not he is ultimately found to be a sexual psychopath, this time represents a total loss to the defendant because the statutory sixty day period for observation runs from the date of admission to the hospital.[96] The administrative procedures of the Department of Mental Health require that the court send to the geographically appropriate state hospital duplicate copies of several papers including the order of commitment.[97] The hospital then must issue a "confinement authority" for

96. IND. ANN. STAT. § 9-3404(d) (Burns Supp. 1967).
97. Official Bulletins, V-5.04.D 1.

the internal records of the Department of Mental Health[98] and send two copies of the authority to the committing court and one copy of the authority and the court order to the central office of the Department of Mental Health.[99] The hospital designated in the "confinement authority" to receive the defendant then awaits a contact from the court to arrange for an admission day suitable to both the hospital and the local authorities.[100]

The function of the sixty day observation is to allow the staff of a district state hospital to diagnose the defendant. While some therapeutic value may result from these first two months, the Department of Mental Health views this period as designed solely to "[a]dmit, confine, observe, evaluate and diagnose the accused."[101] This can be contrasted with the Department's view of its role towards adjudged sexual psychopaths which is to "[a]dmit, care for, and treat the patient."[102] It is to the defendant's advantage to have the diagnosis completed in as short a period of time as is medically feasible. If a person is not found to be a sexual psychopath, he will be returned to court and his criminal charges disposed of. For those ultimately adjudged sexual psychopaths, an earlier attainment of that status means earlier treatment and earlier eligibility for parole.

Column 2 of Table 1 shows that an average of 50.6 days elapsed between the defendant's admission into the hospital and the filing of an observational report with the court. The table indicates an upward trend over the last ten years: in 1959 the average time spent in the hospital

98. *Id.*, V-5.04.D 2. A copy of the 'confinement authority' is reproduced below.

STATE OF INDIANA
DEPARTMENT OF MENTAL HEALTH
CONFINEMENT FOR OBSERVATION OF CSP

Pursuant to the provisions of Chapter 124 of the Acts of 1949, as amended by Chapter 356 of the Acts of 1959, and in view of the finding and order of the..... Court, signed by the Honorable ....., Judge, and dated ..... finding that ..... is a probable criminal sexual psychopath, and committing said person to the Department of Mental Health for the purpose of observation, evaluation and diagnosis, the Commissioner of Mental Health hereby directs that the said ..... be confined in ..... for an indeterminate period of not to exceed sixty days, for the purpose of observation, evaluation and diagnosis of said person by the psychiatric staff of such institution.

For the Commissioner:

Superintendent

Date

DMH Form V-5.13 of R-20 Nov. 67

99. *Id.*, V-504.D2(2)(b).
100. *Id.*, V-504.D2(c).
101. *Id.*, V-504.D2(d).
102. *Id.*, V-504.F3.

was 40.7 days, yet by 1967 this figure had reached an average of 75.1 days on a sixty day commitment. Indeed, the averages for the years 1967 and 1968 both exceed the statutory period.

This upward trend stems from administrative rather than medical necessity. Table 2 shows that this average period varies greatly among the six state hospitals currently receiving sexual psychopaths. Two of the hospitals produce observation reports in less than twenty-five days. Logansport State Hospital, which is the second busiest in volume and always produces a legally adequate report, requires an average of only 38.3 days. The Norman M. Beatty Memorial Hospital, however, which receives the bulk of sexual psychopaths, takes an average of 62.8 days to file a report, 2.8 days over the statutory period.

Table 3 shows a ten year trend within Norman M. Beatty Memorial Hospital. The length of time has been steadily increasing from a low in 1959 of 37.75 days to a high of 97.81 days in 1967, which is more than one month over the statutory period. The experiences of Madison State Hospital, Richmond State Hospital, Logansport State Hospital,

Table 2

ELAPSED TIME FROM HOSPITAL ADMISSION TO FILING OF OBSERVATION REPORT

Hospital	*Average Days*	*Cases*
Norman M. Beatty	62.8	200
Logansport State	38.3	51
Central State	53.3	48
Richmond State	19.7	35
Evansville State	24.9	30
Madison State	41.6	11
TOTAL	50.6	375

Table 3

ELAPSED TIME FROM HOSPITAL ADMISSION TO FILING OF OBSERVATION REPORT

Dr. Norman M. Beatty Memorial Hospital

Year	*Average Days*	*Cases*
1959	37.75	8
1960	49.26	19
1961	56.11	18
1962	57.78	23
1963	60.80	20
1964	61.50	26
1965	55.46	26
1966	65.73	26
1967	97.81	21
1968	74.00	13
TOTAL	62.79	200

and of Norman M. Beatty Memorial Hospital during the year 1959 indicate that a medically complete report can be prepared within one month from admission. The statutory provision of sixty days is twice as long as is medically required and it is obvious that, in accordance with Parkinson's Law, the length of time required to complete these reports has grown to meet the allowable limit.

The whole system could be improved if some of the waste time were eliminated. The authors recognize that changes in statutory language cannot substitute for increased facilities and better distribution of cases among hospitals; however, we do recommend that the statute be amended to shorten the statutory observation period and to make that shortened period run from the date of the observation order. These changes would produce institutional pressures to lower the figures seen in the first two columns of Table 1. Without such pressure, it is unlikely that the current trends will be reversed.

Observation Reports

In his study of commitments under the 1949 act, Elias Cohen found that thirty-seven out of 160 cases (twenty-three per cent) did not meet the statutory criteria for commitment, because the defendants were insane, feebleminded, or suffering from no mental disease.[103] The purpose of the 1959 amendments was to eliminate such cases from the commitment process. The value of the amendments has been proven. One hundred and forty-eight persons who could, under the 1949 act, have been adjudged sexual psychopaths, have not been so adjudged since 1959 either because the hospital found that they were not sexual psychopaths or, even if legally commitable, recommended another disposition. This figure, thirty-seven per cent of all cases, indicates that those portions of the commitment process which take place at the county level have not become more accurate since Cohen's study, despite an increase in experience with the act and despite a growing tendency to use examining physicians trained in psychiatry. Two observations emerge from this condition. First, there has perhaps been a lessening of stringency at the local level since the 1959 amendments give the district state hospital the last say. Second, it might confirm the impression that the legal profession is failing at the local level to obtain correct diagnoses, despite the availability of psychiatrists. In any event, the 1959 amendments are operating to prevent unnecessary and inappropriate commitments.

The Second Hearing

The first question about the second hearing at which a probable

103. See Cohen, at 458.

sexual psychopath is adjudged or not adjudged a sexual psychopath is: Does that hearing ever occur? The statute does not explicitly require a second hearing. It states that following an observational report which concludes that the defendant is a sexual psychopath, "the court shall then determine the question of the psychopathy of the accused person. . . ."[104] It is clear that, despite a reported statement from the Department of Mental Health that a defendant is returned to court for a second hearing,[105] this does not always take place. Indeed, the Department's Official Bulletin recognizes that some courts do not hold second hearings:

> N.B. Some courts may determine that the probable criminal sexual psychopath (CSP-Observation) is an *adjudged* criminal sexual psychopath (CSP-Adjudged) without having the accused return to court. However, separate confinement orders will be necessary for the two separate statutes [sic] of the patient (even though both confinements might be in the same hospital and even though the patient might not have left the hospital) and will be issued by the superintendent after receiving the order of commitment from the court.[106]

The second question raised by the data collected is: Would a full and fair hearing be effective?[107] Of a total of 397 cases, the authors were able to record only eight instances in which the court deviated from the position taken by the district state hospital. In three of these, the court did not adjudge a person a sexual psychopath despite a hospital finding of such psychopathy.[108] In the 249 commitments of adjudged sexual psychopaths since the 1959 amendments, only five persons were so adjudged against the recommendation of the state hospital. In four of those cases the defendant was committed despite a negative finding by the hospital; a violation of the statutory provisions.[109] In the fifth, the defendant was diagnosed as a sexual psychopath and legally commitable,

104. IND. ANN. STAT. § 9-3404(d) (Burns Supp. 1967). That the statute does not require a second hearing may serve to invalidate many current commitments. See Specht v. Patterson, 386 U.S. 605 (1967), and Note, *supra* note 12, at 255-58.

105. Note, *supra* note 12, at 257 n.92.

106. Official Bulletins, V-5.04.F1.

107. For similar doubts concerning the initial hearing see text at notes 89-95 *supra*.

108. Cases 399, 464, 599. Two of the three cases contained special circumstances which might account for the variance. The first had serious procedural irregularities (399) and the second involved a twenty-four year old black defendant charged with the armed rape of a twenty year old white girl. (599).

There were three other cases in which a second commitment order was not issued despite a recommendation by the state hospital; two of these were based on the judge's belief that no second order was necessary (Cases 604, 616); the third involved the case of a man who had never been discharged from a 1951 sexual psychopathy commitment and was, therefore, still under a final commitment (Case 290).

109. Cases 228, 268, 280, 403.

but the hospital staff recommended that the defendant be sent to jail. The judge simply disregarded the recommendation.[110] In another case a second order was issued against the hospital's finding of no sexual psychopathy, but the judge withdrew the order when the illegality of that action was brought to his attention by hospital officials.[111] Because the court followed the finding and recommendations of the state hospital in ninety-eight per cent of all cases, the efficacy of due process protections at this second hearing as well as at the first is in doubt.

Who Becomes a Sexual Psychopath?

Thus far, this article has concentrated on the processes leading to a commitment as a probable and/or adjudged sexual psychopath. In order to appreciate the impact of this statute, one must look at the individuals who fall under its provisions. The composite obtained is of a white male, under the age of forty and married at least once.

Of 396 persons found to be probable sexual psychopaths since 1959, only twenty-eight (7.1 per cent) are black. This figure is slightly higher than the less than five per cent reported during the first seven years of the act's operation by Cohen, although it is still below statistical expectations.[112] Commitments of blacks are evenly distributed over the years 1961 through 1968.

Only four women, one of whom was black, have been found to be probable sexual psychopaths during the last ten years. The cases of the four women, two of whom were adjudged sexual psychopaths, do not differ in any respect from the bulk of the cases. The last woman to be committed was committed in 1962.

Table 4 presents an age distribution of offenders in cases 226 to 621. The distribution is quite consistent with that obtained by Cohen for cases 1 to 160 (See Table 5). Table 6 represents the marital status of offenders 226 to 621, showing that less than one-third had never married. This figure varies from Cohen's results in cases 1-160, but the difference is not significant.[113] These general statistical similarities indicate that the average person adjudged a sexual psychopath under the 1949 act is of the same type found to be a probable sexual psychopath under the 1959 amendments.

110. Case 605. In at least twelve other cases similar recommendations by the district state hospital were followed.
111. Case 236.
112. Cohen, at 456.
113. *Id.*, at 456, Table 4.

Table 4

Distribution of Offenders by Age
Cases No. 226-621

Age	Adjudged Sexual Psychopaths	Not Adjudged Sexual Psychopaths	TOTALS
Under 18	5	4	9 (2.3%)
18-21	42	18	60 (15.1%)
22-25	44	15	59 (14.9%)
26-30	23	20	43 (10.8%)
31-35	28	19	47 (11.8%)
36-40	32	20	52 (13.1%)
41-45	28	18	46 (11.6%)
46-50	14	7	21 (5.3%)
51-60	18	11	29 (7.3%)
61-70	7	6	13 (3.3%)
71 & over	1	2	3 (0.8%)
Unknown	7	8	15 (3.7%)
TOTALS	249	148	397 (100%)

Table 5

Comparison of Age Distributions of Offenders

	Granucci & Granucci Cases No. 226-621	Cohen Cases No. 1-160
Under 18	9 (2%)	3 (2%)
18-21	60 (15%)	15 (9%)
22-25	59 (15%)	31 (19%)
26-30	43 (11%)	34 (21%)
31-35	47 (12%)	29 (18%)
36-40	52 (13%)	19 (12%)
41-45	46 (12%)	5 (3%)
46-50	21 (5%)	8 (5%)
51-60	29 (7%)	10 (6%)
61-70	13 (3%)	4 (3%)
71 & over	3 (1%)	2 (1%)
Unknown	15 (4%)	——— ———
TOTALS	397 (100%)	160 (99%)

Table 6

Marital Status of Offenders (No. 226-621)

	Adjudged Sexual Psychopaths	Not Adjudged Sexual Psychopaths	TOTAL
Single	86 (35%)	40 (27%)	126 (32%)
Married	111 (45%)	66 (45%)	177 (45%)
Separated	6 (2%)	4 (3%)	10 (2%)
Divorced	33 (13%)	23 (15%)	56 (14%)
Widowed	3 (1%)	4 (3%)	7 (2%)
Unknown	10 (4%)	11 (7%)	21 (5%)
TOTALS	249 (100%)	148 (100%)	397 (100%)

A further indication of the consistency in the use of the statute can be found in Tables 7, 8, and 9, which show the diagnostic groupings of probable sexual psychopaths and adjudged sexual psychopaths, and compare the diagnostic groupings of the offenders in cases 1-160 to those in cases 226-621. Because of a confusing array of terms used in the medical reports and because of multiple diagnoses in many cases, these tables are broken into the gross psychiatric categories which correspond to the provisions of the statute: mentally disordered (Neurotic Reactions and Personality Disorders), but neither insane (Psychotic) nor feebleminded (Feebleminded). Two additional columns provide for offenders who were not suffering from a mental disorder (No Mental Illness) and those for whom no clear diagnosis could be obtained from the file (Unknown).

As expected, over seventy-five per cent of all offenders diagnosed as psychotic (forty-eight of sixty-three) appear in Table 7. Only four of the fifteen psychotics found in Table 8 represent cases in which the district state hospital found the defendant not to be a sexual psychopath.[114] The remaining eleven, while not meeting the statutory requirements, were found by the hospital to be sexual psychopaths because they were not grossly psychotic and were considered, for other factors, to be good treatment risks.

As expected, over seventy-seven per cent of all offenders diagnosed as suffering from a neurotic reaction or personality disorder (212 of 272) appear as adjudged sexual psychopaths in Table 8. Of the sixty similarly diagnosed individuals who were found by the court not to be sexual psychopaths only three were diagnosed and recommended for commitment

Table 7

Diagnostic Groupings of Not Adjudged Sexual Psychopaths

	Neurotic Reactions & Character Disorders	Psychotic Disorders	Feebleminded	No Mental Illness	Unknown
1959	4		1		
1960	5	10	3		1
1961	6	6	5		
1962	7	7	3		2
1963	6	6	3		1
1964	4	7	1	1	2
1965	10	5	1		3
1966	2	3	1	1	3
1967	7	2	1		4

114. See text at note 109 *supra*.

1968	9	2	1		2
Total	60	48	20	2	18
%	(41)	(32)	(13)	(1)	(12)
					Total (99.0)*

* All columns rounded off.

Table 8

Diagnostic Groupings of Adjudged Sexual Psychopaths

	Neurotic Reactions & Personality Disorders	Psychotic Disorders	Feebleminded	No Mental Illness	Unknown
1959	6	2	1		1
1960	14	1	2		1
1961	23	2			3
1962	28	1			2
1963	19	4			2
1964	27	2			1
1965	33	1		1	2
1966	31				4
1967	22	1			1
1968	9	1			1
Total	212[1]	15	3	1	18
%	(85)	(6)	(1)	(0.4)	(7)
					Total (99.4)*

*All columns rounded off except "No Mental Illness."
[1]One individual is included in 2 yearly figures.

Table 9

Diagnostic Groupings of Offenders

	Cohen Cases 1 - 160	Granucci & Granucci Cases 226 - 621
Neurotic Reactions & Character Disorders	123 (77%)	272[1] (69%)
Psychotic Disorders	24 (15%)	63 (16%)
Feebleminded	9 (6%)	23 (6%)
No Mental Illness	4 (2%)	4 (0.7%)
Unknown		35 (9%)
TOTAL	160 (100%)	397 (100.7%)*

*All columns rounded off except "No Mental Illness."
[1]One individual counted twice.

as sexual psychopaths by the hospital.[115] The remaining fifty-seven were either found not to have a propensity for future sex crimes or, although technically sexual psychopaths, the hospital recommended against com-

115. See text at note 108 *supra.*

mitment on grounds that the individual might be innocent of the criminal charge or that he would make a poor treatment risk.

Table 9 shows the combined diagnostic groupings of offenders in cases 1-160 and cases 226 to 621. Here, too, the comparison between groups is remarkable.

One factor which has not remained constant, however, is the source, by counties, of the offenders committed. In his 1957 study, Elias Cohen noted discrepancies between the relative populations of counties and the number of persons they committed.[116] For example, Elkhart County, with a population less than one-quarter that of Lake County, committed an equal number of persons during the years 1949 to 1956. He further noted that the seven largest counties with more than forty per cent of the state's population contributed only thirty per cent of all commitments. Table 10 presents a breakdown by counties of cases 1-160 and cases 226-621. Remarkable changes in distribution can be noted. During the past ten years, Lake County has committed almost five times the number of persons committed from Elkhart County, while their populations have remained in about the same proportion to one another. The seven counties referred to by Cohen have accounted for 207 commitments over the past ten years, over fifty-two per cent of the total, a twenty-two per cent increase in the proportion of their share of the 1949-1956 commitments.

Cohen's figures are more limited in scope than those currently

Table 10

DISTRIBUTION OF COMMITMENTS BY COUNTY

	Granucci & Granucci Cases No. 226 - 621			Cohen Cases No. 1 - 160	
County	*Adjudged S.P.*	*Not Adjudged S.P.*	*Total*	*Total*	*Pop. in Thousands**
Adams	1		1	3	25
Allen	18	10	28	6	232
Bartholomew	4	1	5	3	48
Benton					12
Blackford	1	6	7	2	15
Boone	2		2	1	28
Brown					7
Carroll				2	17
Cass		1	1		41
Clark				2	63
Clay					24
Clinton	1	3	4	1	31
Crawford		1	1		8
Daviess	1		1	1	27

116. Cohen, at 458-60 n.11.

County	Adjudged S.P.	Not Adjudged S.P.	Total	Total	Pop. in Thousands*
Dearborn	1		1		29
Decatur	1	1	2		20
DeKalb				1	28
Delaware	8	3	11	1	111
Dubois		2	2		27
Elkhart	13	9	22	13	107
Fayette	1		1	1	24
Floyd				2	51
Fountain	1	1	2	1	19
Franklin				1	17
Fulton	3	1	4		17
Gibson		1	1		30
Grant				2	76
Greene					26
Hamilton	5		5	2	40
Hancock					27
Harrison	3		3		19
Hendricks				3	41
Henry	1	1	2	1	49
Howard	6	3	9	3	70
Huntington	2	1	3		34
Jackson				6	31
Jasper	1	2	3	1	19
Jay				1	23
Jefferson	2		2		24
Jennings					17
Johnson				1	44
Knox		4	4	5	42
Kosciusko		1	1		40
LaGrange	3	2	5		17
Lake	71	35	106	13	513
LaPorte	8	7	15	5	95
Lawrence	1		1	1	37
Madison	1	4	5	3	126
Marion	51	3	54	21	698
Marshall	1		1		32
Martin					11
Miami		1	1	8	38
Monroe	1	2	3		59
Montgomery	2	1	3	4	32
Morgan	2	4	6	1	34
Newton					12
Noble	2	1	3		28
Ohio					4
Orange				1	17
Owen		1	1		11
Parke					15
Perry		3	3		17
Pike					13
Porter	7	3	10	5	60
Posey				1	19
Pulaski		1	1	1	13
Putnam					25
Randolph	1		1	2	28
Ripley	1	2	3	3	21
Rush		1	1	1	20

County	Adjudged S.P.	Not Adjudged S.P.	Total	Total	Pop. in Thousands*
St. Joseph	5	3	8	2	239
Scott					15
Shelby	5	1	6	1	34
Spencer		2	2		16
Starke	1	1	2	4	18
Steuben		1	1	1	17
Sullivan		1	1	1	22
Switzerland					7
Tippecanoe				3	89
Tipton	2	3	5	1	16
Union					6
Vanderburgh		2	2	1	166
Vermillion	2	1	3		18
Vigo	1	3	4		108
Wabash	4	5	9	4	33
Warren					9
Warwick		1	1		24
Washington		1	1		18
Wayne				5	74
Wells				1	21
White	1		1		20
Whitley					21
TOTALS	249	148	397	160	4,667

* Rounded to nearest 1,000. Source: Indiana Almanac, 37-38 (1967).

available because he could only work with adjudged sexual psychopaths. Cases 226-621 can be broken into those who were and were not ultimately adjudged sexual psychopaths. When this is done, additional differences between counties can be noted. Marion County found fifty-four persons to be probable sexual psychopaths and fifty-one of those were ultimately adjudged sexual psychopaths. This ninety-five per cent adjudication rate can be contrasted with Lake County where only seventy-one out of 106, less than seventy per cent, ultimately were adjudged sexual psychopaths. Knox County, which had committed five sexual psychopaths during 1949-1956, has failed in four attempts since 1959 to obtain an indefinite commitment.

What significance these difference have, if any, is elusive. The vagaries of chance play a role in placing offenders into the process. The remaining differences must be attributed to the personalities at all levels who have a hand in the act's operation. In one county for example a local judge has held the act unconstitutional, and the local prosecutor has abandoned efforts for further commitments.[117] One prosecutor reported disillusionment with the statute because of a case in which an early release from the Department of Mental Health resulted in recidivism.[118] Each

117. Questionnaire received from M. Dale Palmer, Esq.
118. Questionnaire received from Allan A. Rasor, Esq.

county has its own history, each has its own personalities, and each has undergone personnel changes during the twenty year span covered by the available data.

Of the data available on sexual psychopaths, the single most important item is the nature of the offenses with which they are charged. By looking at the catch, one can learn about both the fishermen and the quality of their net. Sexual psychopath statutes should aim for offenders whose acts are deviant in either or both of two important respects, the use of violence by the offender and crimes in which there is a significant age disparity between a mature offender and an immature victim.[119] Table 11 categorizes those adjudged sexual psychopaths and those not so adjudged into five offender types. These categories, which are modified from those developed by Indiana University's Sex Research Insitute,[120] illustrate the criteria for violence and disparity in age.

Aggressive Offenders v. Adults includes persons charged with non-consensual offenses, such as rapes and assaults with intent to rape, in which the victim is over seventeen years of age. Heterosexual Offenders v. Children includes persons charged with any offense in which the victim is under eighteen years of age and of the opposite sex from the offender. Homosexual Offenders v. Children includes persons charged with any offense in which the victim was under eighteen years of age and was of the same sex as the offender. These two categories include persons charged with various forms of child molesting ranging from minor forms of physical contact (touching) to sexual intercourse. All such offenses are considered non-consensual because of actual physical violence or because of the immaturity of the victim. Offenders v. Morality includes persons charged with offenses without victims[121] (*e.g.*, acts of homosexuality between consenting adults). This is the only category which does not include either a possibility of violence or disparity of age between offender and victim. In all categories the offenders are male unless otherwise noted.

Table 11 includes separate columns for offenders who were and

Table 11

Sex Offenders Groups

	Adjudged Sexual Psychopaths	Not Sexual Psychopaths	TOTAL	%
Aggressive Offenders v. Adults (Age 18 and over)	25[1]	14[1]	39	9.7

119. Cohen, at 450.

120. P. GEBHARD, J. GAGNON, W. POMEROY, C. CHRISTENSON, SEX OFFENDERS 11 (1965). [Hereinafter cited as SEX OFFENDERS].

121. See generally E. SCHUR, CRIMES WITHOUT VICTIMS (1965).

Heterosexual Offenders v. Children				
Age 1 - 7	20	12	32	
8 - 12	44	12	56	
13 - 17	21	14[2]	35	
Total	85	38	123	30.9
Homosexual Offenders v. Children				
Age 1 - 7	7	4	11	
8 - 12	15[3]	12	27	
13 - 17	33	10	43	
Total	55	26	81	20.6
Incest Offenders v. Children				
Age 1 - 7	7	8[4]	15	
8 - 12	20[4]	9	29	
13 - 17	23	12	35	
Total	50	29	79	19.8
Offenders v. Morality				
Exhibitionists	16	14	30	
Adult Homosexual	10	5	15	
Others	3	4	7	
Total	29	23	52	13.0
Not Sex Related	1	1	2	0.5
Unknown	5	17	22	5.5
TOTALS	250*	148	398*	100.0

*One adjudged sexual psychopath fell into two groups.

[1]Includes two incest offenders against daughters over 18.
[2]Includes two female offenders against males.
[3]Includes two female offenders against females.
[4]Includes two male offenders against males (son and nephew).

offenders who were not adjudged sexual psychopaths. A brief review of each column indicates that, with the possible exception of Offenders v. Morality, there is no correlation between the type of offender and his status as a sexual psychopath or not a sexual psychopath. The Department of Mental Health, therefore, is not differentiating sexual psychopaths from non-sexual psychopaths on the basis of the offense charged. Over seventy-five per cent of the twenty-two unknown cases in Table 11 fall into the not sexual psychopath column. The reason for this is that there is less information in the files on cases which do not result in an indefinite commitment.

Over seventy-one per cent of the cases since 1959 fall into the Offender v. Children categories. This is a significant increase over the forty per cent reported by Cohen for cases to 1957[122] and is similar to findings in California where over sixty per cent of sexual psychopaths had offended against children.[123] Of the 398 cases studied 123 (thirty per cent) were Heterosexual Offenders v. Children, a remarkable correspondence to the California study where of 207 cases, sixty-three (thirty per cent) were in this category.[124] Over three-quarters of the victims of this group in Table 11 were females under the age of twelve.

The percentage of violent offenders in Table 11 is 9.7, a marked decrease from the seventeen per cent in this category in Cohen's study.[125] Again, Indiana figures since 1959 correspond closely with results in California where only twenty-one of 207 sexual psychopaths (less than ten per cent) were Aggressive Offenders v. Adults.[126] The Indiana figure does not hold true for black offenders, however, over thirty-five per cent of whom fell into this category.

The foregoing indicates that since 1959 eighty-one per cent of all cases in which the sexual psychopath statute has been used involved violence or children. The fear that this statute might be used to enforce disputed sexual mores has not been borne out. Only thirteen per cent of all cases involve Offenders v. Morality, a decrease from the sixteen to thirty-three percent reported by Cohen.[127] Also significant is that this category had the highest percentage of not sexual psychopaths. Of the 250 adjudged sexual psychopaths, only 11.6 per cent were Offenders v. Morality and only ten of the 250 (2.5 per cent) were consenting adult homosexuals. Although the California study does not categorize Offender v. Morality *per se*, exhibitionists (who comprise only a portion of this category) account for fifteen per cent of the adjudged sexual psychopaths in the California report.[128] It is obvious from these figures that Indiana committed fewer offenders who fall into this category, for the thirteen per cent includes exhibitionists, adult homosexuals, and others.

The conclusion drawn is that the sexual psychopath statute has not been used to incarcerate nuisance offenders, but has been focused on those who are violent or offend against children. Since the 1959 amendments, even fewer nuisance offenders have been proceeded against and fewer have been adjudged sexual psychopaths. In this regard, Indiana's experience

122. Cohen, at 454.
123. SEX OFFENDERS 848-49.
124. *Id.*
125. Cohen, at 453, 454.
126. SEX OFFENDERS 849.
127. Cohen, at 454.
128. SEX OFFENDERS 849.

compares favorably with results obtained under a similar statute in California.

Table 12 presents the number of persons admitted to each district state hospital for observation each year. Separate listing is made of those

Table 12

HOSPITAL OF INITIAL ADMISSION
CASES 226-621

Adjudged Sexual Psychopaths

Year	*Norman M. Beatty*	*Logansport State*	*Central State*	*Richmond State*	*Madison State*	*Evansville State*
1959	8		1			
1960	6	3	4	3	2	
1961	14	1	8	4	2	
1962	10	7	9	5	1	
1963	10	5	3	5	2	
1964	21	4	4		1	
1965	20		7	7	3	
1966	24	1	6	1	3	
1967	14	3	3	1	1	
1968	7		1	1	1	
Totals	134	24	46	27	16	0

Total Number of Cases: 247[1]

Not Adjudged Sexual Psychopaths

Year	*Norman M. Beatty*	*Logansport State*	*Central State*	*Richmond State*	*Madison State*	*Evansville State*
1959	1	1	1		2	
1960	14	5				
1961	6	7			1	3
1962	13	2		2	2	
1963	11	1		1	3	
1964	7	6		1		1
1965	6	4		6		1
1966	3			1	3	3
1967	8		1		2	3
1968	6	3		1	1	3
Totals	75	29	2	12	14	14

Total Number of Cases: 146[1]

GRAND TOTAL	209	53	48	39	30	14

GRAND TOTAL OF CASES: 393[2]

[1]Two unknown cases.
[2]Four unknown cases.

who were subsequently adjudged sexual psychopaths and those who were not. Significant differences between hospitals can be noted in the percentage of initial admittees for observation who ultimately were adjudged sexual psychopaths. Central State Hospital had virtually all of its original observatees later adjudged sexual psychopaths, whereas not one of Evansville State Hospital's fourteen observation patients later became an adjudged sexual psychopath. These differences correspond to the differences among counties in proportion of observations later adjudged sexual psychopaths. The possible explanations mentioned for those differences are applicable here as well.[129]

Table 13 presents the current status of the 249 adjudged sexual psychopaths as of March 1, 1969. The data is accurate only in so far as their status was accurately reflected in the central files of the Department of Mental Health. Those shown as hospitalized constitute 34.1 per cent of all adjudged sexual psychopath commitments since 1959. The majority of those still hospitalized (fifty-one out of eighty-five) were committed within the last three years. Not all of the eighty-five are physically within a district state hospital. Many are free on some form of limited parole.

Table 13 indicates that forty-eight persons (19.3 per cent) are currently on escape status. This figure does not include eighteen persons who have been absent without permission from the hospital but subsequently were returned. This combined total of sixty-six persons is higher than the number of discharges granted within the same period. The whereabouts of most of the escapees is unknown, although several are currently serving prison sentences in Indiana and other states.

Table 13

CURRENT STATUS OF ADJUDGED SEXUAL PSYCHOPATHS*

Year	*Hospitalized*	*Discharged*	*Paroled*	*Escaped*	*Dead*	*Totals*
1959	1 (10%)	5 (50%)	2 (20%)	2 (20%)		10 (100%)
1960	3 (17%)	9 (50%)	4 (22%)	1 (5.5%)	1 (5.5%)	18 (100%)
1961	8 (29%)	8 (29%)	5 (18%)	6 (21%)	1 (3.0%)	28 (100%)
1962	1 (3%)	11 (36%)	10 (32%)	9 (29%)		31 (100%)
1963	5 (20%)	9 (36%)	5 (20%)	5 (20%)	1 (4.0%)	25 (100%)
1964	7 (23%)	4 (13%)	14 (47%)	5 (17%)		30 (100%)
1965	9 (24%)	5 (14%)	16 (43%)	7 (19%)		37 (100%)
1966	27 (77%)		2 (6%)	6 (17%)		35 (100%)
1967	15 (62.5%)		3 (12.5%)	5 (21%)	1 (4.0%)	24 (100%)
1968	9 (82%)			2 (18%)		11 (100%)
Total All Years	85 (34.1%)	51 (20.5%)	61 (24.5%)	48 (19.3%)	4 (1.6%)	249 (100%)

* As of 1 March 1969.

129. See text at notes 117-18 *supra*.

Parole

Table 13 shows that as of March 1, 1969 there were sixty-one persons on an indefinite parole status. The sexual psychopath statute grants to the Commissioner of Mental Health power to parole adjudged sexual psychopaths without court authorization.[130] The superintendent of each district state hospital and his staff have the responsibility to initiate parole plans and to forward them to the Commissioner for approval.[131] The Commissioner's office usually requires a showing of medical justification from the superintendent along with an appropriate parole plan including community sponsor and job.

There are three types of parole, short limited paroles (visits), limited paroles of up to one year, and indefinite paroles.[132] The indefinite parole is used in Tables 13 and 14 since it reflects an administrative decision to end hospitalization (if a person remains without incident on indefinite parole he will normally be eligible for a discharge) and is always approved by the central office.

During the last ten years, 112 persons have been released on indefinite parole of which seventeen were returned to the hospital as parole violators and six went on escape status when they failed to report to the hospital for a periodic visit. Of the seventeen returned to the hospital, ten are currently on indefinite parole status again, and seven remain in the hospital or on limited parole.

A critical factor in the operation of the sexual psychopath act is the amount of time adjudged sexual psychopaths remain in custody. For the 112 parolees the average time spent from the date of their adjudgment as sexual psychopaths to their first indefinite parole was 664 days (one year and ten months). The figure rises to 734 days (two years and four days) when calculated from the date of the sexual psychopath's initial hospital admission. Table 14 shows the distribution, in length of time, of these paroles by hospital of admission. One-half of the paroles were granted in the first eighteen months of hospitalization, twenty-eight per cent in the first year. This compares favorably with similar statistics compiled by Cohen, who found that twenty-five out of 103 paroles (over twenty-four per cent) were granted during the first year.[133]

130. IND. ANN. STAT. § 9-3407 (Burns 1956 Repl.). The statute refers to the Indiana Council for Mental Health, whose functions are now vested with the Commissioner of Mental Health. IND. ANN. STAT. § 22-5007 (Burns 1964 Repl.).

131. Official Bulletins, V-5.06 B2.

132. Official Bulletins, V-5.06 B.

133. Cohen, at 464. Cohen's dates are computed from hospital admission, because there was no observational period in cases 1-160. However, Cohen does not state whether he includes limited paroles in his figures.

The foregoing figures for average time to parole are underestimations for they do not take into account persons who have been hospitalized over the average time and yet who still have not been paroled. As of March 1, 1969, forty-five adjudged sexual psychopaths fell into this category.[134]

Although Cohen could not find any correlation between discharges and the offenses charged,[135] certain patterns do emerge in the parole structure. Of the thirty-three adjudged sexual psychopaths who were granted indefinite parole in less than one year, none were Aggressive Offenders v. Adults which comprise almost ten per cent of the total commitments. One group of offenders, Offenders v. Morality, received forty per cent of all paroles granted within one year. In addition, seven out of ten consenting adult homosexuals received such paroles. It would appear, therefore, that hospital paroles are granted to less serious offenders first. The fact that seventy per cent of all adult consenting homosexuals received early paroles further strengthens the impression that the statute does not, in practice, serve as a vehicle to oppress Offenders v. Morality.

Discharges

Information upon which to make conclusions about the operation of the discharge provision of the sexual psychopath statute is not available. The files of the Department of Mental Health do not always indicate if a discharge has occurred. Even when a discharge is noted, the grounds for discharge, medical or legal, are often not recorded. Therefore, Cohen's conclusion that the courts are more willing to grant discharges than the hospitals were willing to grant paroles cannot be confirmed.[136]

Of fifty-one recorded discharges, only twelve (twenty-four per cent) were ordered directly from the hospital without a prior period spent on indefinite parole. This is in contrast to Cohen's finding that forty-four per cent of all discharges prior to 1957 were direct from the hospital.[137] The average time from adjudgment as a sexual psychopath to such a discharge was 1514 days (four years and two months). This figure is higher by 619 days (one year and eight months) than the average time for the thirty-nine discharges granted from indefinite parole. Any attempt to draw conclusions from this data would be fool-hardy for several

134. Of these forty-five, at least eleven have been released on limited parole. All persons receiving indefinite paroles had been released from the hospital on limited parole for at least three months.

135. Cohen, at 465.

136. *Id.*, at 465. Cohen appears to have failed to recognize that many persons released directly from the hospital need not have "fully and permanently" recovered if their commitments were invalid.

137. *Id.*, at 464.

LENGTH DISTRIBUTION OF PAROLES AND DISCHARGES BY HOSPITALS OF ADMISSION

Table 14 (From Date of Adjudged Sexual Psychopath Order)

PAROLES

Hospitals[1]	0-6 mos.	6 mos. - 1 yr.	1 yr. – 1 yr. 6 mos.	1 yr. 6 mos. – 2 yrs.	2 yrs. – 2 yrs. 6 mos.	2 yrs. 6 mos. – 3 yrs.	3 yrs. – 3 yrs. 6 mos.	3 yrs. 6 mos. – 4 yrs.	4 yrs. – 4 yrs. 6 mos.	4 yrs. 6 mos. – 5 yrs.	5 yrs. – 5 yrs. 6 mos.	5 yrs. 6 mos. – 6 yrs.	6 yrs. – 6 yrs. 6 mos.	6 yrs. 6 mos. – 7 yrs.	7 yrs. – 7 yrs. 6 mos.	7 yrs. 6 mos. – 8 yrs.	8 yrs. – 8 yrs. 6 mos.	8 yrs. 6 mos. – 9 yrs.	Total
Norman M. Beatty	3	8	17	4	9	5	2	2	1					1	1				53
Logansport State	2	2	3	2		2													11
Central State			4	3	3	4	1	2		1		2		1	1				22
Richmond State	2	6	6	2															16
Madison State	3	5	2																10
Total	10	21	32	11	12	11	3	4	1	1	0	2	0	2	2	0	0	0	112

DISCHARGES[2]

Norman M. Beatty	1	1	1		7	1	1	2	3		1			1					19
Logansport State			1		1			1	1	1									5
Central State					2		4	1	1	2	1		2		1			1	15
Richmond State				1	4		1		1		1	1							9
Madison State			1		1			1											3
Total	1	1	3	1	15	1	6	5	6	3	3	1	2	1	1	0	0	1	51

[1]Evansville State admitted no adjudged sexual psychopaths.

[2]Includes discharges following parole and discharges direct from hospital.

reasons. First, the process of discharge leaves many adjudged sexual psychopaths on indefinite parole long after they were eligible for and could likely have received their final discharge. A petition for discharge must be filed with the court by the adjudged sexual psychopath or someone in his behalf. The authors noted several cases in which the hospital had no objection to discharge yet no discharge had yet been obtained because of the sexual psychopath's lack of funds to conduct such a proceeding or his reluctance to go through the publicity of a discharge proceeding. That such sexual psychopaths have not been discharged does not reflect on either the willingness of the hospital to support discharge petitions, or on the willingness of the court to grant such petitions. A means by which these cases could be closed from court and hospital rolls would serve administrative and human needs.[138]

Commitments Not in Conformance with Statutory Provisions

Of 397 commitments of probable sexual psychopaths studied, sixty-eight (over seventeen per cent) were not in conformance with statutory provisions. This figure reflects instances of conscious disregard for the act's provisions, attempts to circumvent statutory limitations for the benefit of a given defendant, and the ignorance of the bar about the processes which lead to a sexual psychopath commitment.

Failures to follow statutory norms fall into several categories. The largest included forty-one cases in which examining physicians' reports were unwritten, missing, or found a defendant not to be a sexual psychopath. Of these forty-one, however, only nine were ultimately adjudged sexual psychopaths. There were five instances in which a court adjudged a person a sexual psychopath despite a finding by the district state hospital that he was not within the statutory provisions.[139] Eight cases appeared to be outside the scope of the statute altogether. In five of those, rape of a female child under the age of twelve had been committed.[140] The rape charges were amended by prosecutors to assault with intent to rape, assault with intent to gratify, and incest; commitments followed. Of the three remaining, one person was under the age of sixteen,[141] and two cases did not show any relationship to a sexual aberrance.[142]

The remainder of the failures to follow statutory norms were all unique, ranging from committing a man without holding any previous

138. The statutory provision is broad enough to allow for discharge proceedings initiated on the court's own motion. IND. ANN. STAT. § 9-3408 (Burns 1956 Repl.).

139. See text at notes 109, 111 *supra*.

140. Cases 342, 520, 538, 539, 580.

141. Case 354.

142. Cases 433 (theft), 604 (auto banditry). The lack of a sexual motive may be a failing of the files. In Case 516 a charge of burglary involved a theft of fetish objects.

proceedings[143] to committing a man a second time when the first observation was negative.[144] In one instance both a judge and a court clerk, in order to disguise the fact that an observational commitment had run over sixty days, falsified court records to read as if the final adjudgment order had been signed two months earlier.[145]

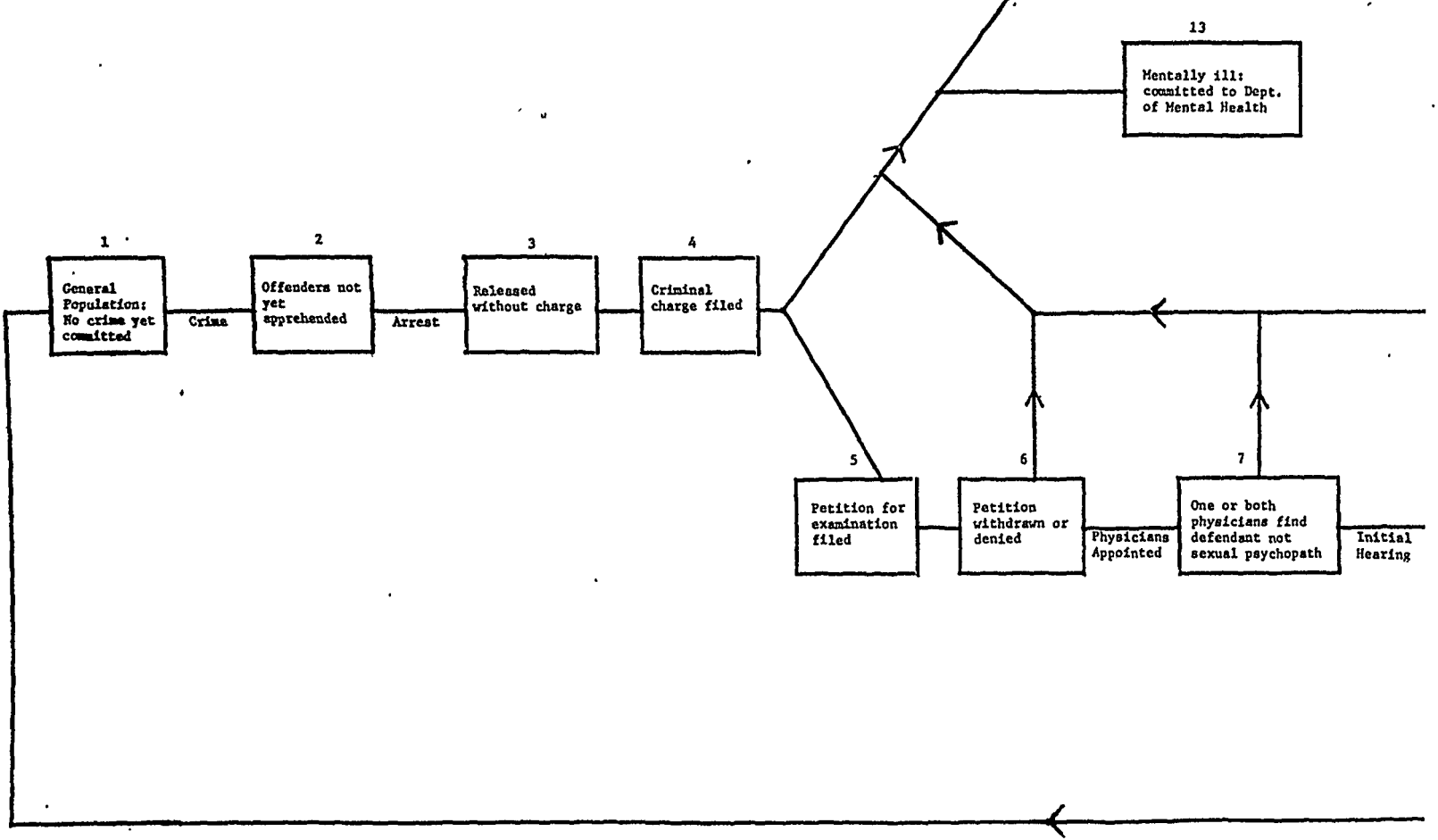
Some of the above described cases might not be found illegal if put to a court test. Prosecutors do have discretion to charge any of several offenses which the facts might warrant, and waivers by defendants who were petitioning may have cured what appear to be statutory defects. It is clear, however, that each case violates the spirit of the act as written and amended by the legislature. Even if one agrees with a judge's opinion that "this is a poorly written law,"[146] this should not be grounds for such a high number of cases ignoring its provisions.

Conclusion

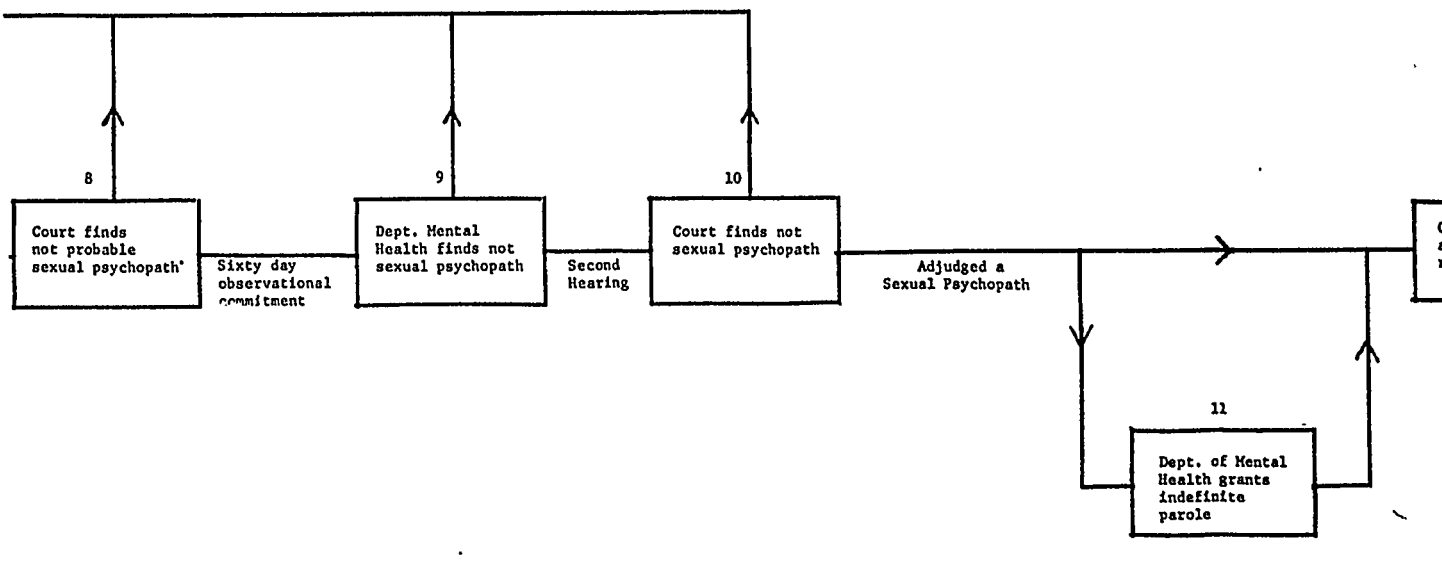
Despite failures on the part of the bar and certain administrative delays, the sexual psychopath act is functioning quite well in two of three major respects. First, the statute is being used to detain violent offenders and offenders against children, and is not being used as a vehicle to incarcerate less serious offenders. Second, those who are committed are, on the whole, being treated and released with dispatch. The third question, whether or not the sexual psychopath statute prevents recidivism, remains unanswered.

This picture will not remain static. Differences in operation have been noted between 1949-1957 and 1959-1968. Because of the wide discretion granted to many different persons in the administration of the sexual psychopath statute and because policies on parole and discharge can change overnight with changes in relevant personnel, constant monitoring will be required to insure continued proper functioning.

143. Case 478.
144. Case 532.
145. Case 350.
146. Case 261.


13
Mentally ill: committed to Dept. of Mental Health
1
General Population: No crime yet committed
Crime
2
Offenders not yet apprehended
Arrest
3
Released without charge
4
Criminal charge filed
5
Petition for examination filed
6
Petition withdrawn or denied
Physicians Appointed
7
One or both physicians find defendant not sexual psychopath
Initial Hearing

of Mental Health



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