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Sex Offenses and Scientific Investigation

Frank E. Horack, Jr.*

LAWS affecting human conduct and individual relationships are, perhaps, more the product of the religion, customs, and mores of a society than any other portion of the statutory or common law. And, as might be expected, they have been subject to less change and amendment than other branches of our jurisprudence.

Jurists frequently have lamented the lack of scientific data with which to test the validity of our legal rules. Except for the ambitious and valuable beginnings of the Johns Hopkins Institute of Law, the Cleveland Crime Survey, and the individual work of such men as Hall, Dession, and Moore, no extensive legal data exists concerning the legal control of human relations. Most of the social science studies have been founded on such narrow sampling that the reliability of their conclusions must be accepted with caution. Dr. Kinsey and his associates are the first of the biological scientists to enter the field. Their volume, "Sexual Behavior in the Human Male"¹ is the first in a series which awaits the completion of 100,000 case histories. The widespread attention which this volume has attracted in all walks of life, in all literature from the humorous to the professional, is indicative of the importance of the subject matter to society. Although there has been criticism of its statistical method and philosophical doubts concerning its postulates, it is obvious that the volume presents important legal questions for legislators, judges, law enforcement officers and administrators of the penal and institutional systems.

Perhaps the most serious issue does not relate to the subject matter of the volume at all, but rather to the broader question of whether lawyers can and will use scientific data and whether scientists can produce data useful for legislative, administrative, and judicial rule-making. The answer to such questions should so obviously be "yes" that it seems preposterous to raise the issue and yet clearly the success of such correlated action depends upon the ability of the lawyers to consider the data presented by the scientists and for the scientists to recognize the difficulties that the law-making or law-applying personnel face in the adjustment of fact to belief and to social rule.² Certainly some pages from only the very recent history of science discloses the difficulties involved in changing belief to accord with fact.³

* Acting Dean and Professor of Law, Indiana University School of Law.

¹ Kinsey, *Sexual Behavior in the Human Male* (1948).

² For a discussion of a previous attempt of lawmakers to utilize scientific information see Cook, *Eugenics or Euthenics* (1943) 37 Ill. L. Rev. 287.

³ The publisher is obviously aware of this. He includes the usual statement, "This book is intended primarily for workers in the fields of medicine, biology, psychology . . . law enforcement groups . . ."

I.

A LEGAL system is based upon a few primary postulates. Thus, in our society we recognize, among others, the protection of the individual and the state from foreign aggression, the maintenance of internal order and the protection of individuals from physical violence, the property system and the enforceability of agreements, the superior position of the individual to the state, and the institution of the family.⁴

From these general postulates flow a great many subsidiary rules of law, each supporting in its own way the primary proposition. Thus, from the assumption of the necessity of the family in the social system we create the institution of monogamous marriage and build custom, mores and laws to support it. A host of legislative and judicial rules support and promote the relationship: tort actions against those who invade the relation; tax exemption; statutory actions for wives against gamblers and tavern owners; the sex laws; homestead exemptions; participation of the wife in the conveyancing of realty; the reduction in penalties for crimes of violence resulting from invasion of the marriage relation, *et cetera*, *et cetera*.

The relation is protected even before its creation by the breach of promise laws; when terminated by divorce, the "innocent spouse" may claim alimony; and when terminated by death, curtesy and dower protect property interests, the surviving spouse has superior interests in the deceased's body, and the state recognizes claims for widow's pensions, bonuses and social security benefits.

These and many other sanctions in themselves have little meaning, except as they in a cumulative fashion tend to encourage the creation of the marriage relation and protect it from external interference. Most of the sex laws have similar objectives. It is significant to note that of the six forms of sexual outlet that Kinsey analyzes only those which most directly challenge the sexual integrity of the marriage relationship have been made criminal,⁵ even though the remaining may be subject to social or religious condemnation. Thus, there is little doubt as to the social objectives of the system of sex regulation.

Once a rule has been established, however, the rule will operate and must operate with some degree of uniformity and thus, in particular cases, result in what may be believed to be an unfair, unwise, or unscientific consequence. This cannot be totally avoided for law is force and law is power, and the very nature of society requires that when its goals are not achieved by the suasion of

⁴ Sidwick, *The Principles of Political Economy* (1901) 419.

⁵ Extra-marital intercourse, homosexual outlet, animal contacts.

Kinsey apparently does not understand this dichotomy of the law, for he suggests that "85% of the younger male population could be convicted as sex offenders if law enforcement officials were as efficient as most people expect them to be."⁷ And we might add 85% similarly could be convicted as common thieves. The real point is that "most people" *don't* expect the law to be enforced under these circumstances.

It is an easy step from this premise to the next—that sex offenders are badly treated after apprehension. Probably so. Certainly any lawyer who has gone through the apprenticeship of a prosecuting attorney's office is well aware that many enforcement officers, particularly in the larger urbanized centers, do not deal delicately with law violators. "Official brutality" has long been condemned but never completely eradicated. That there is no defense or justification for such action is clear. Unfortunately, it is not reserved for sex offenders alone.⁸ Likewise, the disparity between the judgment of policemen in apprehension and the attitude of the judge in sentencing is probably as common in the area of non-sex offenses.⁹ In sum, in the course of the survey Dr. Kinsey has had opportunity to study the operation of law as it affects sex offenders, but his observations and his shock¹⁰ need not be reserved for sex offenders.

Further testing of these hypotheses make clear the necessity for caution. Many of the crimes which, if considered as independent prohibitions might seem artificial and unreal, take significance and seem valid when viewed as secondary sanctions necessary for the promotion of the primary postulate—the protection of the family relationship. Thus, the conclusions concerning the validity of statutes prohibiting extra-marital intercourse even if biologically unsound make perfectly good sense in terms of protecting the interest which most husbands and wives have in the maintenance of the marriage relation. And while in rejoinder it may be pointed out that the sanction of the marriage relation as measured by the divorce rate perhaps is not as firmly held as it was by earlier generations, adultery as a cause for divorce still speaks of the interest of one spouse in maintaining the relation on an exclusively monogamous basis.¹¹

⁷ *Id.* at 224.

⁸ See Borchard, *Convicting the Innocent* (1932).

⁹ The classical story of the policeman asking the prosecutor how to charge a small boy caught in the act of stealing an apple from a fruit peddler's cart. The prosecutor said, "Charge him with impersonating an officer."

¹⁰ "English and American law forces most boys . . . into illicit activity." Kinsey, *op. cit. supra* note 1, at 224. "In any case, at any social level, the human animal is more hampered in his pursuit of sexual contacts than the primitive anthropoid in the wild . . ." *Id.* at 268. The anthropoid is also free to kill what he can and take what he wills, but most people prefer the restraints we have in exchange for food, shelter, and security.

¹¹ In states where adultery is the only ground for divorce it must be admitted that

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Similarly many other laws relating to indirect sanctions, such as prohibition of indecent exposure, publication of lewd and obscene literature, and the general regulatory statutes aimed at reducing stimuli tending to induce sexual outlet, which of themselves seem biologically unsound are nevertheless understandable attempts by legislative bodies to support the basic premise of family stability. Thus, wide-spread change in the sex laws should not be contemplated as the result of the new data in the Kinsey Report. Society intends to protect individuals against the violent sex crimes and no substantial portion of the population is prepared to abandon the family relation as the basis of social organization even admitting of substantial violation of its tenets. Legislative change of either the primary and secondary sanctions is not to be expected.

It is, of course, possible to argue that some of these indirect sanctions are unnecessary to the protection of the family relation and it is equally possible to assert that extra-marital intercourse "properly understood" is neither an invasion of the relation or dangerous to it. The difficulty with maintaining this proposition is that in our democratic society we have carefully preserved the right of the people through their elected representatives to make laws that they believe to be desirable. This concept of our governmental organization reserves to all the people the right to establish their own standards. This right encompasses the power to be wrong, quite as much as the power to be correct. It means that our society may establish standards of morals and enact them into law even though they attempt to exact conduct from society which is higher than a majority can attain. Indeed there are many who assert that it is only in this fashion that "progress" is made.¹²

II.

THE portion of Dr. Kinsey's report which presents perhaps the most puzzling data is that which asserts that in spite of our democratic postulate of social unity we have in fact, a stratified society divided, at least in sexual matters, on the basis of educational attainment and economic position.¹³ Specifically the report seeks to classify all males into three classes, primarily on the basis of whether they have completed the first eight grades of secondary education, completed high school, or have had some college experi-

the adultery is often fictitious; where, however, multiple grounds are available, "cruel and inhuman treatment" frequently hides the real fact of extra-marital intercourse.

¹² "The problem, then, is the limited one of investigating the working rules of collective action which bring reluctant individuals up to, not an impracticable ideal, but a reasonable idealism, because it is already demonstrated to be practicable by the progressive minority under existing conditions." Commons, *Institutional Economics* (1934) 874.

¹³ Kinsey, *op. cit.* *supra* note 1, at cc. 10 and 11.

ence. It will be interesting to anticipate whether the following volume on the sexual behavior of the female can fit this pattern in light of the rather different educational background of women prior to the second decade of the 20th century.

This stratification of society presents an extremely important hypothesis, a hypothesis which cannot be tested nor indeed even challenged until further studies of this general character have been conducted. On the face of it, however, it is suspect. It is the kind of classification that the Italian school of sociologists advanced in the early 30's as a justification for the regulation of the personal lives of less favored classes. It assumes an inflexibility in our society which of course may exist statistically, but which seems to need further proof. Certainly the barriers to a fluid social structure in which an individual may move from the lowest economic levels to the highest, from one geographical community to another with little if any restraint save his own ingenuity, presents a social system which does not require nor imply stratification.

Although Dr. Kinsey devotes considerable discussion to vertical mobility in society¹⁴ and recognizes turbulence in social and educational groupings it is clear that the real impact of Chapters 10 and 11 are more consistent with assumptions of stratification than with those of flexibility. The thesis operates in two directions: (1) that although individuals move economically either up or down from the class of their parents their sexual habits are fixed by the kind of education they ultimately receive, and (2) that if by accident they achieve social or economic status beyond their educational expectations they may move in individual instances into a new sex pattern. Thus, stratification is postulated either in terms of the individual or in terms of the group. It is apparent that this data should be treated with the utmost caution, for Dr. Kinsey himself warns that his generalizations are founded upon too few cases to warrant an attempt at statistical analysis.¹⁵

Furthermore, the statistical correlation which appears to exist in the report is subject to numerous explanations, for as Dr. Kinsey himself tells us the accident of correlation can exist without actual correlation between the facts compared. For example, it is difficult to determine the effect of education in terms of the interviewed subject's ability to disclose or prevent disclosure of data in his case history. Certainly it is a possible explanation that variation in vocabulary, speed of response, and the ability to evaluate the significance of a particular question might explain some of the differences between the three groups.¹⁶ This need not imply that the interview-

¹⁴ *Id.* at 417-439.

¹⁵ *Id.* at 419.

¹⁶ Not to mention the effect of social conditioning. *Cf. Id.* at 443.

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ing techniques, the systems of cross-checking for accuracy, etc.,
have not been kept at a high level by the interviewing staff but
rather that we can never underestimate the wit of the witness.

Assuming the validity of the stratification postulate, it seems
unlikely that general knowledge of the diversity of the sex habits
of the three groups would result in a change in our sex laws. The
real impact, as Kinsey implies, comes at the level of law enforce-
ment. This is merely another way of saying that no matter what
the law is it must have a measure of flexibility in enforcement.
Dean Pound once observed that this was a fundamental character-
istic of American society, explainable in terms of our Puritanical
background. He pointed out that the religious background of the
Puritan assumed that the nature of man was sin and therefore man's
actions should be sharply restricted. But the Puritan's political
philosophy was that the nature of man was to be free. Thus, to
avoid the dilemma, they passed laws restricting the actions of man
and left him free by not enforcing them. Dr. Kinsey has discov-
ered this as it relates to the sex laws, but it is by no means peculiar
to this field of social regulation. The ordinary law enforcing officer,
be he policeman, administrator, or prosecutor soon learns that it
does him no good to be a busybody and that it is better to wait and
act upon complaint and affidavit than to "crusade" himself. Thus,
in the case of the sex laws, in spite of Dr. Kinsey's worry about the
lower level policeman arresting and prosecuting upper level couples
who engage in petting, it is much more likely that the policeman
will merely enjoy the view and wait for complaining neighbors. If
stratification is, in fact, the true character of our social organiza-
tion, and there is little ability to cross these social and educational
boundary lines except on a business level, then it would appear that
one class of society is not likely to come in contact with another
class with sufficient frequency to arouse neighborhood complaint
and that there will be no "class struggle" over sexual mores. There
will be isolated cases, of course, just as ulcered old bachelors and
dispeptic old maids complain occasionally about the apple-stealing
forays of ten year old children.

It is also true that if this stratification exists, upper-level judges
will impose upper-level standards on lower-level defendants and
that these defendants will feel that they have been unfairly and
improperly convicted. But lawyers know that few defendants are
without personal justification for their own actions, and that the
common thief seldom feels without justification for his acts of
larceny.

When personal action runs afoul of social custom and law, the
individual usually comes off the loser. The individual is inclined to
berate the rest of society for its intolerant action. This is but an-

other way of saying that the individual with equal intolerance insists that society accept his particular customs and mores.

The criminal and civil law has consistently guaranteed protection to each individual against the invasion of his personal security and, to an ever increasing degree, protects his "right of privacy." This is to be expected; for as the urban ways of society bring men ever closer together the need for individual protection from the actions and judgments of the group becomes more immediate. Dr. Kinsey's data seems to support the need for this proposition—that so far as the personal lives of individuals are concerned they should be reasonably free from the judgments of the rest of society.

The report, however, is not entirely consistent on this point, for it is clear that Dr. Kinsey would have society conform to the biological data. But society is more than biology and it is obvious that little more can be hoped than better understanding of the problem, better sex education, and a legal *laissez faire* where the interests of others or of the family relation are not involved.

III.

THE principal impact of the Kinsey Report will be at the level of the administration of the law. It will provide the statistical support which police officers, prosecutors, judges, probation officers and superintendents of penal institutions need for judging individual cases.

It is both interesting and significant to note that the data which the report discloses is reasonably consistent with the present administration of our sex laws. Although judicial statistics are limited in quantity a few illustrations will establish the relation.

The Johns Hopkins study of judicial administration in Maryland for 1931 discloses that sex offenses other than rape were as follows: 381 prosecutions of which 102 were eliminated either by prosecutor, judge or jury. Of the remainder, 279 were guilty either by plea or conviction. Of this number only 9 were sentenced to the state prison or reformatory and only a total of 21 were restrained in institutions. Seventy-three were probated, 34 received suspended sentences and disposition not involving fine or imprisonment was made in the remaining 11 cases. Ninety-four per cent of those charged with violation were released.

In view of the Kinsey statistics on frequency of sexual outlet it is certain that 381 cases represent an inconsequential application of the sex law to sex violation and it is equally clear that with the release of one-third as not guilty, the imprisonment of but 21, the probation or suspension of substantially all the remainder, the law enforcing agencies have attempted to mitigate the rigor of the sex law in accordance with the general habit of the community.

Dr. Kinsey rightly points out that the price these few individuals pay individually in terms of public notoriety, shame and disgrace is a high one. This of course is true of all defendants who violate the law and who are apprehended. It is not unique in the field of sex violation.

It is encouraging to see that many law enforcement officers even without the assurance which the Kinsey Report will give them have administered the sex laws so far as it is within their power in a fashion as consistent as possible with the tenets of his report. It is to be expected that with the data now available this tendency will be confirmed at the prosecutor's level as well as at the sentencing level.

This attitude is confirmed in other situations. Every day divorces are granted on the grounds of adultery or granted on other grounds when promiscuity is the basis for the divorce. In every divorce action the prosecuting attorney is obligated to represent the interest of the state. If social judgments were consistent with the moral standards which society writes into its sex laws then it should be expected that the prosecuting attorney would file an information against the respondent for adultery, incest or fornication in all such cases. We know of course that this never happens and the prosecutor is never condemned for a failure to do so. In the course of a year there comes to every prosecutor's office a considerable number of complaints charging rape. The large percent of these cases fail for lack of evidence of violence.¹⁷ Frequently however evidence of intercourse is clear. The records again are barren of prosecutors filing information for fornication against both parties when the complaint of rape fails to materialize. In other words, our legal system corroborates in the great majority of cases Dr. Kinsey's conclusions concerning the sexual behavior of society.

There will be specific exceptions. For example, if John Doe, unmarried and 20 years of age, is charged with adultery based on intercourse with Ruth Roe and the complaining witness is Richard Roe, 23 and Ruth's husband, the knowledge that 50% of males have intercourse outside the bounds of matrimony certainly will not soften Richard's wrath. Nor is it likely that all the husbands in the community will urge the prosecutor to dismiss the case, nor will they condemn the judge if he commutes the sentence. Usually the case will not come before the court because Richard will not complain. He will merely divorce Ruth. But in the occasional case where the issue of our custom and mores is specifically presented to the court the community's idealized judgment concerning the kind of morality it desires is likely to weigh more heavily upon the

¹⁷ Cf. *Id.* at 237.

prosecutor or the judge's decision than the data of the Kinsey Report. This may be wrong, but it is society in action.

There is general agreement among the reviewers,¹⁸ that the Report will have its greatest impact upon law enforcement. In general this is true, but one reservation is necessary. Law enforcement officials are as much conditioned by the society in which they live as are legislators. When the full blast of public opinion is directed at them they will conform to the customs and mores that society demands. In a majority of cases where there is no general public interest the Report will be effective. Officials will read it. Defense counsel will cite it. Even when it is not offered into evidence, it will condition official action. Psychiatrists, psychologists, penologists, juvenile and probation officers all participate in modern penal procedures—they will use the data and their professional advice will be heeded by the judge. Here the Report will control many decisions and dictate the disposition and treatment of many offenders.

In the occasional case where public clamor is aroused, the fact that the data will be disregarded is of no particular consequence. The admonition that social scientists must have the time consciousness of the geologist applies with particular truth to the transposition of the Kinsey Report into action. It will take time to root out prejudice,¹⁹ to establish caution in judgment, and to treat with candor all offenders.

Finally, because the Report is factual and statistical it offers no solutions to the problems that it raises.²⁰ This weakens the hands of those who use the Report. Offering no solution, pointing the way to no remedy, its data cannot be the substitute for judgment and decision.

It is not quite enough to tell the judge that although the particular defendant has violated the sex laws, so has almost every other male in society. Viewed by a legislator or a scientist this is an extremely important fact to know before laying down a rule or a generalization. But the judge's job is specific. The defendant is before him. Other violations are irrelevant, legally. In all probability the defendant has plead guilty. It is now the judge's respon-

¹⁸ Llewellyn, "The Limits of Sexual Law" in Geddes and Curie, *About the Kinsey Report* (1948); See also Book Reviews (1948) 26 Conn. B. Rev. 746; (1948) 8 Law Guild Rev. 367; (1948) 23 N.Y.U. L. Q. Rev. 540; (1948) 96 U. of Pa. L. Rev. 914; (1948) 38 J. Crim. L. & Criminology 687.

¹⁹ Kinsey, *op. cit. supra* note 1, at 591-594.

²⁰ "The present study, then, represents an attempt to accumulate an objectively determined body of fact about sex which strictly avoids social or moral interpretations of fact." *Id.* at 5. But see: "It may well be questioned how far an individual is responsible for his behavior when he conforms to the pattern of his social level, even though he may thereby be involved in a transgression of the law." *Id.* at 681. Of like import are passages at 173-197, 199, 203, 205, 222, 237, 263 and 296.

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sibility, a responsibility which he cannot share, to decide whether
the man will be released with a fine, with a suspended sentence, or
placed on probation. Even though the man's previous record is
"statistically normal," his conduct is now known to the judge, and
it is the judge alone who must answer to himself and the com-
munity if he releases the man and subsequently discovers that the
offender has committed further sex crimes, this time compounded
with violence which has threatened or taken life. It is natural that
judges should be cautious in their judgments. Thus, we should not
be too ready to criticize them for disregarding the implications of
the Report if in particular cases their judgment is that they are
dealing with a "bad actor" who should be locked up. That impris-
onment will do the offender no good, may even do him harm is
admitted—admitted not only for sex offenses but for all offenses.

In the end, some courts will use the data well, some will use it
badly; but, administratively it will be used for we will alter our
judgments piecemeal beginning with enforcement. Statutory
amendment or repeal must await a later date when better remedies
and solutions have been worked out. At present all we have is the
data. But if the data does nothing more than make every person
who is in a position to control the lives of others, cautious and aware
that his judgments may not reflect the single, firm judgment of
society, it will have done enough.