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# Nebraska Statutory Revision of Punishment of Sex Offenders

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### Nebraska Statutory Revision of Punishment of Sex Offenders

A recent amendment to the Nebraska statutes provides<sup>1</sup> that who-soever should debauch the person or deprave the morals of a minor; fondle a child under 16 in a lewd manner; or expose his person to a child under 16 should be guilty of a felony upon the first conviction, and should be liable to fine, or imprisonment, or both.<sup>2</sup> It is further provided that if the person commits a second offense of the same nature, psychiatric examination of the offender before sentencing is required. If examination discloses sexual perversion, the offender is to be confined in a mental institution; if no perversion is found, upon conviction the offender shall be subject to a five to ten year sentence in the state penitentiary.<sup>3</sup>

<sup>1</sup> Neb. Rev. Stat. § 28-929 (Cum. Supp. 1953).

<sup>2</sup> Ibid.

<sup>3</sup> Neb. Rev. Stat. §§ 29-2901 to 29-2907 (Cum. Supp. 1953).

Passed to control sexual indecencies toward young children,<sup>4</sup> the amendment supplemented an earlier statute which guarded the morals and persons of minors by forbidding the solicitation of such youngsters or the communication to them of any venereal disease.<sup>5</sup> The old law failed to guard adequately against sexual perverts who preyed upon the young. The amendment dovetails with the Nebraska sex psychopath law<sup>6</sup> in that it calls for compulsory psychiatric examination with hospitalization upon a finding of psychosis. However, such examination is given only after commission of a second offense, differing in this respect from the sex psychopath act.

Nebraska's sex psychopath law, passed in 1949,<sup>7</sup> was the first attempt of the legislature to combat the sex crime dilemma.<sup>8</sup> The law vests authority in the county attorney to institute proceedings against anyone whose sexual conduct shows good cause for judicial inquiry into his mental condition. The petition for such inquiry is filed in the district court of the county of the accused's residence, and the accused is examined by two licensed physicians, each with at least two years special training in mental diseases.

The accused has the right counsel, and to issue subpoenas for witnesses to testify in his behalf. The doctors must submit their findings at least ten days prior to the hearing, and must appear and testify at the hearing, where they are subject to cross-examination. The jury, which can be waived by the accused, then renders its verdict, and if the accused is found to be a psychopathic personality, he is committed to one of the state mental hospitals for treatment until fit for discharge. If never fit for discharge, the patient may be institutionalized for life.

Whether it is wise to give such free rein to the county attorney or his informers has been questioned.<sup>9</sup> It is feared that such discretionary powers might allow the attorney to hail almost anyone into court for psychiatric examination, on very little evidence. It might be wise to place a check on the attorney, except in cases of actual overt acts, such as those the new act was enacted to cover, for even though psychiatric examination would undoubtedly determine the mental condition of the accused, such an examination might well ruin an otherwise spotless reputation. Yet, if the county attorney's power were

<sup>4</sup> Statement of Judiciary Committee on L.B. 412, Neb. Legis., 71st Sess. (1953).

<sup>5</sup> Neb. Rev. Stat. § 28-929 (Cum. Supp. 1951).

<sup>6</sup> Neb. Rev. Stat. § 28-929 (Cum. Supp. 1953).

<sup>7</sup> *Ibid.*

<sup>8</sup> Other jurisdictions with similar sexual psychopath statutes include: California, Illinois, Massachusetts, Minnesota, Missouri, New Hampshire, New Jersey, Ohio, Vermont, Virginia, Washington, Wisconsin, Indiana, and the District of Columbia.

<sup>9</sup> Drummond, *The Sex Paradox* 58 (1953).

removed, a sex-motivated murder might be the first of a series of deviant acts to come to the attention of the courts. This important issue has not yet been brought before the Nebraska Supreme Court.<sup>10</sup>

An understanding of the type of criminal who sexually attacks the young is necessary to fully appreciate advantages of examination after the first act. Legislative intent<sup>11</sup> behind the Nebraska statutory definition<sup>12</sup> indicates that a standard medical definition of psychopath should be used. Medicine defines the psychopath as one who "... insists upon gratification of his impulses without thought of the appropriateness of time or place; he has no consideration for others and will not understand the need for, or obey, social conventions.... One of the basic characteristics of the psychopath is the inability to achieve a goal.... Other basic psychological characteristics in the psychopath are his outstanding egotism, impulsiveness, resistance to discipline and training and an appalling lack of sentiment and gratitude. ... Added to this is a lack of insight into his own difficulties and a strong tendency to project blame for his troubles to others."<sup>13</sup> He cannot learn by experience<sup>14</sup> and is incapable of experiencing ordinary emotion.<sup>15</sup> Unlike the legally insane, psychopaths know the difference between right and wrong, but even knowing they are doing wrong, they are compelled to do so.<sup>16</sup> Of course, sexual psychopaths are but one group; there are many other psychopathic types.<sup>17</sup>

It should be borne in mind that all sex offenders are not psychopathic. Neurotic individuals, while neither insane nor psychopathic, often vent their spleen by committing sex crimes, and can be quite dangerous.<sup>18</sup> However, neurotics are able to live in society and are rarely hospitalized. Most people have neurotic symptoms.<sup>19</sup> The chief difference between the psychopaths and neurotics is that the abnormality of the psychopath is turned in on his own self, manifesting itself in symptoms of which the patient is aware, and of which he complains,<sup>20</sup> while the disturbance of the neurotic is shown in his out-

<sup>10</sup> Much has been written about the utility of sex psychopath laws. They have not been widely used or rigidly enforced. For a comprehensive discussion of their worth, see Drummond, *The Sex Paradox* 54 et seq. (1953).

<sup>11</sup> Hearings before the Judiciary Committee on L.B. 344, Neb. Legis., 69th Sess. (1951).

<sup>12</sup> Neb. Rev. Stat. § 28-929 (Cum. Supp. 1953).

<sup>13</sup> Bromberg, *Crime and the Mind* 54 (1948).

<sup>14</sup> Karpman, *Conscience in the Psychopath: Another Version*, 18 *Amer. J. Orthopsychiatry* 455 (1948).

<sup>15</sup> Cleckley, *Mask of Sanity* 256 et seq. (1941).

<sup>16</sup> Drummond, *The Sex Paradox* 40 (1953).

<sup>17</sup> Bromberg, *Crime and the Mind* 53 et seq. (1948).

<sup>18</sup> Guttmacher and Wiehofen, *Psychiatry and the Law* 30 (1952).

<sup>19</sup> *Id.* at 29.

<sup>20</sup> *Id.* at 99.

ward behavior, which is observable by others, although the patient may be wholly or partially unaware of it.<sup>21</sup>

The pedophile, whose sexual perversions are perpetrated exclusively on young children,<sup>22</sup> was undoubtedly the major offender whom the legislature intended to curb,<sup>23</sup> but the other types of sex perverts also attack the young.<sup>24</sup>

Pedophiles, homosexuals, exhibitionists, rapists—all who are threats to the well-being of youth—can change the entire course of the lives of the victims of their attacks. Children are impressionable throughout their youth, and often one sexual occurrence can warp their attitudes and influence their future behavior.<sup>25</sup> Thus it can be seen what a menace to youth these criminals really are.

There is a diversity of opinion as to whether a psychopath can be cured. Many regard such people rarely curable, and then only by long periods of therapy.<sup>26</sup> Ordinarily, the true psychopath will not seek a cure on his own volition.<sup>27</sup> Regardless of whether or not sexual psychopaths are curable, they can be a definite menace to society if unconfined. If they can be cured, psychopaths should be examined and institutionalized for treatment. If not, they should be removed from access to society. In any case, psychiatric examination is the only way these serious sex criminals can be recognized,<sup>28</sup> recognition of course being a prerequisite to disposition of their cases. Such examination in sex offenses should be compulsory everywhere.<sup>29</sup>

If, as the new statute provides, the sexual deviate is not examined until after his second offense, society is in effect actually aiding and abetting the criminal. After the first offense, the offender is either incarcerated in prison or released to go back into society. If he is released, he may continue his perverted conduct, while if he is imprisoned, there is a grave danger of his affliction becoming worse.<sup>30</sup>

<sup>21</sup> *Id.*, at 100.

<sup>22</sup> Bromberg, *Crime and the Mind* 84 (1948). Pedophiles are usually at least 40 years old, with a long history of deviation.

<sup>23</sup> Neb. Rev. Stat. §§ 29-2901 to 29-2907 (Cum. Supp. 1953).

<sup>24</sup> Commissioners of Correction and Mental Hygiene, *Report on Study of 102 Sex Offenders at Sing Sing Prison* 65 et seq. (1950).

<sup>25</sup> Karpman, *Considerations Bearing on the Problems of Sexual Offenses*, 43 *J. Crim. L.* 13 (1952); Guttmacher, *Sex Offenses* 117 (1951); Fishman, *Sex in Prison* 67 (1934).

<sup>26</sup> English and Pearson, *Emotional Problems of Living* 353 (1945); Cleckley, *Mask of Sanity* 285 (1941). To the effect that they are curable, see Doshay, *The Boy Sex Offender and His Later Career* 154 (1943); Abrahamsen, *Crime and the Human Mind* 197 (1944).

<sup>27</sup> Drummond, *The Sex Paradox* 41 (1953).

<sup>28</sup> Commissioners of Correction and Mental Hygiene, *Report on Study of 102 Sex Offenders at Sing Sing Prison* 26 (1950).

<sup>29</sup> *Ibid.*; Abrahamsen, *Crime and the Human Mind* 204 (1944).

<sup>30</sup> Reinhardt, *The Sexual Psychopath and the Law*, 39 *J. Crim. L.* 734 (1949); Fishman, *Sex in Prison* 20 et seq. (1934).

Oscar Wilde's famed "Ballad of Reading Goal," is an excellent first-hand report of the evil perversions of prison life.

The vilest deeds, like prison weeds  
 Bloom well in prison air;  
 It is only what is good in man  
 That wastes and withers there.

It is also quite expensive to keep the offender in prison, where there is little chance of rehabilitation, even if it is attempted.<sup>31</sup> It is generally agreed among psychiatrists that psychopaths are not deterrable by punishment,<sup>32</sup> and thus there is no real utility in imprisoning such offenders except to isolate them from potential victims. A sex criminal, having served his sentence, must once more venture out into the world, and one who has been exposed to the sexual aberrations of prison life is potentially more dangerous after incarceration than before.

Little comfort can be gained from confining sex offenders to prison, as approximately 95 percent of all criminal law violators, including "lifers," return to society in a little more than eight years after sentencing, and the great majority of those imprisoned for the lesser criminal offenses return after two years or less.<sup>33</sup>

While it is true that most sex criminals are not prone to repeat their crime,<sup>34</sup> and that those who do repeat generally do not increase the gravity of the offense,<sup>35</sup> nevertheless, pedophiles and exhibitionists are given to recurring criminal acts,<sup>36</sup> as are homosexuals, the group usually most severely affected by prison life.<sup>37</sup> Once these deviates develop a method of satisfaction for their sex drives, they will repeat the act again and again, regardless of the consequences.<sup>38</sup>

Since these perverts are the most dangerous to the well-being of youth, it seems fruitless, even dangerous, to confine them where their criminal tendencies can be compounded, and then to set them free without psychiatric examination.<sup>39</sup> Yet precisely such a result could occur under the present law.

<sup>31</sup> Commissioners of Correction and Mental Hygiene, Report on Study of 102 Sex Offenders at Sing Sing Prison, 16, 28 (1950).

<sup>32</sup> Bromberg, *Crime and the Mind* 190 (1948); East, *Sexual Offenders—A British View*, 55 *Yale L.J.* 527 (1947).

<sup>33</sup> Drummond, *The Sex Paradox* 46 (1953).

<sup>34</sup> Guttmacher, *Sex Offenses* 113 (1951); East, *Sexual Offenders—A British View*, 55 *Yale L.J.* 527 (1947).

<sup>35</sup> Guttmacher, *Sex Offenses* 114 (1951).

<sup>36</sup> Drummond, *The Sex Paradox* 112 (1953); Abrahamsen, *Crime and the Human Mind* 117 (1944).

<sup>37</sup> Fishman, *Sex in Prison* 83 (1934).

<sup>38</sup> Personal interview with Dr. George J. Lytton, M.D. and psychiatrist, Director of Central Nebraska Mental Hygiene Clinic, Hastings, Nebraska.

<sup>39</sup> Karpman, *Considerations Bearing on the Problems of Sexual Offenses*, 43 *J. Crim. L.* 13 (1952); Commissioners of Correction and Mental Hygiene, Report on Study of 102 Sex Offenders in Sing Sing Prison 26 (1950).

If, on the other hand, sexual offenders were examined after their first offense, the problem of recurring crime could be eliminated. Nebraska law calls for examination by two experienced physicians with at least two years of psychiatric study.<sup>40</sup> These practitioners could determine, with more than adequate certainty,<sup>41</sup> the mental state of the prisoner. If they should find him to be psychopathic, he should be institutionalized for treatment, under any theory of the sex psychopath laws.<sup>42</sup> If found not to be a sexual deviate, the prisoner could be sentenced. In either case, society has benefited from his immediate examination, for if he should be a pervert, he would not be imprisoned and then released, without rehabilitation, to attack again. His perversions would be discovered upon examination, and therapy could be provided.

This holds true even though rehabilitation is not the basic aim of the criminal law, punishment being such aim,<sup>43</sup> for psychopaths are not affected by punishment.<sup>44</sup> However, detention can be as confining and thus unpleasant as imprisonment, so little punishment would be sacrificed.

A myriad of practical problems are raised by the theory that sex offenders should be hospitalized rather than imprisoned. Questions arise as to facilities for treatment, chances of effecting a cure, the prevalence of such crimes within the state, due process of law, and others of lesser import. At the present time, Nebraska has three large mental hospitals—at Hastings, Lincoln, and Norfolk—and Hastings alone has physical facilities to handle all the mentally ill in the state.<sup>45</sup> However, all three hospitals lack experienced staff members, and the only solution seen for this problem is increased salaries and more doctors.<sup>46</sup> Sex crimes within the United States generally, and Nebraska specifically, show little increase in recent years, contrary to the glut of recent publicity.<sup>47</sup> In light of this, it is felt that Nebraska's hospitals could undoubtedly handle all the sex deviates committed for many years to come,<sup>48</sup> if staffs are increased.

<sup>40</sup> Neb. Rev. Stat. § 28-929 (Cum. Supp. 1953).

<sup>41</sup> Abrahamsen, *Crime and the Human Mind* 111 et seq. (1944); Alexander and Staub, *The Criminal, The Judge, and The Public* 119 (Zilboorg's Transl. 1931).

<sup>42</sup> Glueck, 8 *Mental Hygiene* 1, 15-16 (1924).

<sup>43</sup> Bromberg, *Crime and the Mind* 190 (1948).

<sup>44</sup> *Ibid.*; East, *Sexual Offenders—A British View*, 55 *Yale L.J.* 527 (1947).

<sup>45</sup> Personal interview with Dr. G. Lee Sandritter, M.D. and psychiatrist, Superintendent of the Hastings State Hospital for the Mentally Ill.

<sup>46</sup> *Ibid.*

<sup>47</sup> Overholser, *The Psychiatrist and the Law* 49 (1953); Guttmacher, *Sex Offenses* 13 (1951).

<sup>48</sup> Personal interview with Dr. G. Lee Sandritter, M.D. and psychiatrist, Superintendent of the Hastings State Hospital for the Mentally Ill.

Here again the question of curability of psychopaths is important.<sup>49</sup> Hospital administrators dislike having incurables about, for they take time and expense which could be better spent on curable patients, and as a whole, their presence is demoralizing to other patients.<sup>50</sup> Yet, so long as any hope remains that such persons can be transformed into useful citizens in society, there is a moral duty to extend to them all possible methods of treatment.

It has been held that commitment of sexual offenders is not violative of the due process clause of the constitution,<sup>51</sup> the Minnesota statute having stood the test of constitutionality before the United States Supreme Court, thus furnishing a pattern for other states to follow.

To summarize, it is submitted that the present Nebraska law calling for psychiatric examination after the second offense should be amended to provide for examination after the first offense. Society and the offender would both benefit from this revision. The present bill is a step forward in bridging the gap between law and science, for medicine is being used to halt the commission of crime, but the bill can be improved.<sup>52</sup> To most effectively combat this problem of warped minds and anti social conduct, sympathetic and enlightened child training should be utilized, for sex criminals are made in youth.<sup>53</sup> But until that perfect state is reached, it is submitted that the suggested revision can serve as an effective stop-gap measure.

JAMES W. HEWITT, '56

<sup>49</sup> Bromberg, *Crime and the Mind* 84 (1948).

<sup>50</sup> Guttmacher and Weihofen, *Sex Offenses*, 43 J. Crim. L. 153 (1952).

<sup>51</sup> *State v. Probate Court of Ramsey County*, 309 U.S. 270 (1940).

<sup>52</sup> For an enlightened discussion of the lag of law behind modern medical science, see Overholser, *The Psychiatrist and the Law* (1953).

<sup>53</sup> A thorough treatment of the factors which cause psychopathy is given in Bromberg, *Crime and the Mind* (1948); Doshay, *The Boy Sex Offender and His Later Career* (1943).