

# CALIFORNIA'S SEXUAL PSYCHOPATH— CRIMINAL OR PATIENT?

## I

### CALIFORNIA'S SEXUAL PSYCHOPATH LAW

The sexual psychopath law resulted from insistent demands on the part of medical and legal leaders, as well as some enlightened civic groups, who were convinced that the commission of a sex crime is usually, if not always, evidence of a mental disorder which should be treated rather than punished.<sup>1</sup> Although not always viewed with complete approval by the courts,<sup>2</sup> the enactment by the legislature of the sexual psychopath law was generally hailed as a realistic and significant step toward progress in the law.<sup>3</sup>

As defined by statute, a "mentally disordered sex offender" means any person who by reason of mental defect, disease or disorder is predisposed to the commission of sexual offenses to such a degree that he is dangerous to the health and safety of others.<sup>4</sup>

When a person is convicted of any criminal offense, the trial judge *may*, if it appears that there is probable cause for believing that such person is a mentally disordered sex offender,<sup>5</sup> adjourn the proceeding or suspend the sentence and certify the person for a hearing and examination by the Superior Court to determine whether he is a mentally disordered sex offender.<sup>6</sup> This procedure is not applicable to any person sentenced to death or ineligible for probation.<sup>7</sup> The person certified or alleged to be a mentally disordered sex offender is then taken before a judge of the Superior Court and informed of the allegation made and of his right to make a reply and produce witnesses. The judge then fixes a time and place for the hearing<sup>8</sup> and arranges for the probation officer's report to be made available

<sup>1</sup> 43 CALIF. L. REV. 766 (1955).

<sup>2</sup> For a vigorous dissent which exemplified the classical view of punishment rather than treatment, and a reluctance to place any faith in the ability of psychiatrists to be of any benefit to the mentally disordered sex offender, see Doran, J., in *People v. Hector*, 104 Cal.App.2d 392, 231 P.2d 916 (1951).

<sup>3</sup> "It is a significant step when the law, through legislative enactment, gives recognition to a person who, though not insane, is not wholly responsible for his criminal manifestations." 14 BAYLOR L. REV. 93, 104 (1962); *cf.* 1 STAN. L. REV. 486 (1949).

<sup>4</sup> WEST'S ANN. WELFARE & INST. CODE §5500.

<sup>5</sup> "Sexual psychopath" is construed to have the same meaning as "mentally disordered sex offender." WEST'S ANN. WELFARE & INST. CODE §5500.

<sup>6</sup> *Id.* §5501 (a). Note: Whereas the procedure as set out by §5501 (a) is discretionary in the event the person has been convicted of any criminal offense, §§5501 (b) and (c) make such procedure mandatory where the person is convicted of a sex offense involving a child under 14 years of age and the offense is a misdemeanor and the person has previously been convicted of a sex offense in this or any other state, or the sex offense involving a child under 14 years of age is a felony.

<sup>7</sup> *Id.* §5500.5.

<sup>8</sup> *Id.* §5503.

to the court.<sup>9</sup> Two or three qualified psychiatrists are appointed to examine the alleged offender in order to determine whether he is in fact a mentally disordered sex offender.<sup>10</sup> If the person is found not to be such he is returned for sentencing. If he is found to be a mentally disordered sex offender who would not benefit by care and treatment in a state hospital, the court *may* return him to the original court for sentencing.<sup>11</sup>

If, on the other hand, it appears that there is sufficient cause to believe that the person is a mentally disordered sex offender, the judge may require that such person be placed in a psychiatric facility or state hospital for observation and diagnosis for a period not to exceed 90 days.

The superintendent of the hospital is then required to report to the court the diagnosis and recommendations concerning such person within 90 days. This diagnosis and recommendation report is to include an opinion as to whether or not the person is a mentally disordered sex offender; whether or not he is a danger to the health and safety of others; whether or not he will benefit by care and treatment in a state hospital, and a recommendation as to the person's future care, supervision, and treatment. If the report states that the person is not a mentally disordered sex offender or that he is a mentally disordered sex offender but will not benefit by care or treatment in a state hospital and is a danger to the health and safety of others, he is returned to the court to await further action with reference to the criminal charges (usually sentencing).

In the latter circumstance, the court also has the option of returning the person to the superior court which may, upon a similar finding, commit him for an indefinite period to the Department of Mental Hygiene for placement in a state institution or institutional unit for the care and treatment of mentally disordered sex offenders where he is to remain until he is no longer a danger to the health and safety of others.

If, however, the superintendent of the hospital reports that the person is a mentally disordered sex offender and could benefit by treatment in a state hospital, the court would still have the option either to return his case to the criminal court for further disposition or to commit him to the state hospital for an indeterminate period.<sup>12</sup> When a person is committed for an indeterminate period the superintendent of the state hospital is required to file an opinion with the court if he believes that the person (a) will not benefit by further treatment in the hospital and is not a danger to the health and safety of others, or (b) has not recovered and is still a danger to the health and safety of others. If the opinion reflects (a) above, the person is returned to the court, either to be sentenced or placed on pro-

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<sup>9</sup> *Id.* §5503.5.

<sup>10</sup> *Id.* §5504.

<sup>11</sup> *Id.* §5511.7.

<sup>12</sup> *Id.* §5512.

bation for at least five years, provided that the person is eligible for probation.<sup>13</sup> But if the opinion reflects (b), the person is returned to the committing court where it may impose sentence or probation. An alternative is to recertify the person to the Superior Court, which may recommit him for an indeterminate period to a state institution for the care and treatment of such mentally disordered sex offenders.<sup>14</sup>

Subsequent reports of the superintendent may be required after confinement of the person for at least six months, with procedures followed as outlined above.<sup>15</sup>

The courts have determined that this law is civil<sup>16</sup> and collateral to criminal proceedings<sup>17</sup> for the purpose of protecting society from the activities of sexual psychopaths.<sup>18</sup> It secondarily affords a means whereby persons found guilty of criminal offenses may be aided by medical treatment.<sup>19</sup> As construed by the courts, the law was not intended to be a mitigating circumstance,<sup>20</sup> nor does it give rise to an inference of permanent insanity on the part of the offender.<sup>21</sup> The law cannot be used as a legal bypass whereby those suffering dangerous sexual perversions might be kept in a mental hospital for a short time and then released,<sup>22</sup> since any medical treatment is in addition to, and not in lieu of, punishment.<sup>23</sup>

Thus, upon superficial examination the psychopath law would seem to satisfy the demands of those groups demanding society's protection from heinous sex crimes and of those groups calling for treatment rather than punishment of such offenders.<sup>24</sup> But it must here be noted that ". . . the road leads to either or both the insane asylum or the penitentiary . . .,"<sup>25</sup> and that in the end ". . . the existence of (the mental) disorder is not a defense to a charge of the crime, and the offender is held completely accountable therefore."<sup>26</sup>

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<sup>13</sup> *Id.* §5517.

<sup>14</sup> *Id.* §5518.

<sup>15</sup> *Id.* §5519.

<sup>16</sup> *People v. Fuller*, 226 Cal.App.2d 331, 38 Cal.Rptr. 25 (1964); *People v. Barzee*, 213 Cal.App.2d 139, 28 Cal.Rptr. 692 (1963); *People v. Redford*, 194 Cal.App.2d 200, 14 Cal.Rptr. 866 (1961).

<sup>17</sup> *People v. Hymes*, 161 Cal.App.2d 668, 327 P.2d 219 (1958); *People v. Olds*, 140 Cal.App.2d 156, 294 P.2d 1034 (1956).

<sup>18</sup> *People v. McCracken*, 39 Cal.2d 336, 246 P.2d 913 (1952); *People v. Levy*, 151 Cal.App.2d 460, 311 P.2d 897 (1957); *cf.* 25 ST. JOHNS L. REV. 203, 232 (1950).

<sup>19</sup> *Thurmond v. Superior Court*, 49 Cal.2d 17, 314 P.2d 6 (1953); *People v. Levy, supra*.

<sup>20</sup> *People v. McCracken, supra* note 18; *People v. Levy, supra* note 18.

<sup>21</sup> *People v. Jensen*, 43 Cal.2d 572, 275 P.2d 25 (dictum) (1954).

<sup>22</sup> *Ex parte Gross*, 115 Cal.App.2d 502, 252 P.2d 416 (1949).

<sup>23</sup> *People v. Levy*, 151 Cal. App.2d 460, 311 P.2d 897 (1957).

<sup>24</sup> 43 CALIF. L. REV. 766 (1955).

<sup>25</sup> 96 U. OF PA. L. REV. 872 (1948).

<sup>26</sup> *Op. cit. supra*; *cf.* 43 CALIF. L. REV. 766, 776 (1955).

## II

## PERSONS DEFINED AS PSYCOPATHS

The use of the term "psychopath" as used in the sexual psychopath statute has been said to be an objectionable one since it attempts to lump together on the one hand offenses such as violent rape of children, and on the other, exhibitionism, and the voyeurism of the "peeping Tom" presumably referring to one definite disease pattern. To apply essentially uniform rules and identical methods of hospitalization to people who only challenge concepts of modesty and to people who seriously endanger the physical integrity of other human beings seems to be a serious legislative mistake.<sup>27</sup>

The label of "psychopath," then, includes individuals not far removed from ordinary criminals, who should be treated accordingly and, at the other end of the spectrum, some so clearly akin to psychotics that they should be exonerated of guilt for their crimes.<sup>28</sup>

Psychiatrists are uncertain as to what causes the psychopath to act as he does, and are not in unanimity as to the proper treatment to be rendered,<sup>29</sup> but it is generally agreed that psychopathic personality disorders are manifested primarily by aberrant social conduct and by non-conformity to generally accepted standards of behavior.<sup>30</sup> There is also general agreement that a sexual psychopath is the most difficult to treat of all abnormal personalities,<sup>31</sup> since he is extremely unresponsive to any sort of penal or corrective measures, and this expedient often produces a very rebellious attitude on his part.<sup>32</sup>

The psychopath is further characterized by recidivism to such an extent that the paroled sex offender is seen to commit the same crime over and over again.<sup>33</sup>

<sup>27</sup> 43 CALIF. L. REV. 766, 770, 771 (1955).

<sup>28</sup> 53 J. CRIM. L., C. & P. S. 446 (1962); see Odenwald, *Punishment from the Viewpoint of Psychiatry*, 6 CATHOLIC LAW 126, 133 (1960).

<sup>29</sup> 53 J. CRIM. L., C. & P. S. 446 (1962); see 56 J. CRIM. L., C. & P. S. 27 (1965) for a scholarly discussion of the methods of analysis employed by psychiatrists in their examinations of sexual psychopaths, and the difficulties of determination of pathognomonic signs of sexual deviation.

<sup>30</sup> 53 J. CRIM. L., C. & P. S. 446 (1962); see WEIHOFFEN, *MENTAL DISORDER AS A CRIMINAL DEFENSE* 22 (1954).

<sup>31</sup> 14 BAYLOR L. REV. 93, 107 (1962); see WHITE, *ABNORMAL PERSONALITIES*.

<sup>32</sup> 11 U. OF PITT. L. REV. 636, 640 (1949); see NOYES, *MODERN CLINICAL PSYCHIATRY* 411 (3rd Edition, 1948).

<sup>33</sup> 11 U. OF PITT. L. REV. 636, 641 (1949). For California cases involving application of the sexual psychopathy law to persons who had prior convictions for the same or similar offenses, see: *People v. Schaletzke*, 49 Cal.Rptr. 275 (1966); *People v. McCracken*, 39 Cal.2d 336, 246 P.2d 913 (1952); *In re Keddy*, 105 Cal.App.2d 215, 233 P.2d 159 (1951); *Gross v. Superior*

## III

## HOSPITALIZATION OR IMPRISONMENT?

The recent case of *People v. Schaletzke*<sup>34</sup> is exemplary of the practical application of the current sexual psychopath law.

Defendant Schaletzke was arrested in 1956 for annoying or molesting a child under 18 years of age<sup>35</sup> and was given two years probation. In 1957 Schaletzke was again arrested on the same charge and was sent to Atascadero State Hospital where he remained for three months. After leaving the hospital he was sentenced to a year's term in the county jail and four years probation.

In the latter case Schaletzke had been arrested for lewd and lascivious conduct with a child under the age of fourteen years.<sup>36</sup> Schaletzke was convicted but proceedings were suspended because the court found him to be a probable mentally disordered sex offender. He was sent once again to Atascadero for observation and diagnosis for a period not to exceed 90 days.

The court received a report from the superintendent of Atascadero which certified that the patient was a mentally disordered sex offender; that society still needed to be protected from him; and that he was not amenable to treatment in a hospital setting and should be returned to the criminal court for action. Upon consideration of this report, the court denied probation and sentenced the defendant to a prison term.

In the course of its opinion in that case the court said, "The sexual psychopath law was passed because experience has shown that sexual psychopaths are *unable to benefit from ordinary penal confinement* and are in need of medical treatment . . ." <sup>37</sup> [Emphasis added.] Yet the defendant was imprisoned for the commission of an act which admittedly arose from a mental disorder. This points to an obvious deficiency in the legal apparatus designed to cope with this type of problem.

The rebellious attitude of the sexual psychopath toward penal confinement, his tendency to commit the same offense and the difficulty involved

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Court, 42 Cal.2d 816, 270 P.2d 1025 (1954); *People v. Levy*, 151 Cal.App.2d 460, 311 P.2d 897 (1957); *People v. Redford*, 194 Cal.App.2d 200, 14 Cal.Rptr. 866 (1961); *People v. Wells*, 112 Cal.App.2d 672, 246 P.2d 1023 (1952); *People v. Hector*, 104 Cal.App.2d 392, 231 P.2d 916 (1951); *People v. Neal*, 108 Cal.App.2d 491, 239 P.2d 38 (1951); *People v. Hite*, 134 Cal.App.2d 536, 286 P.2d 425 (1955); *People v. Warren*, 219 Cal.App.2d 723, 33 Cal.Rptr. 552 (1963); *People v. Morgan*, 146 Cal.App.2d 722, 304 P.2d 138 (1956); *People v. Blume*, 183 Cal.App.2d 474, 7 Cal.Rptr. 16 (1960); *People v. Elliott*, 158 Cal.App.2d 623, 322 P.2d 1029 (1958).

<sup>34</sup> 49 Cal.Rptr. 275 (1966).

<sup>35</sup> WEST'S ANN. PENAL CODE §647a.

<sup>36</sup> *Id.* §288.

<sup>37</sup> 49 Cal.Rptr. 275, 277, 278 (1966).

in his treatment, lead to the conclusion that the penal institution is unsatisfactory both for rehabilitation of the "patient" and for protecting society from the danger of his acts.

What then of the state hospitals, the remedy introduced by the legislature and acclaimed as a giant step toward progress?<sup>38</sup> The psychopath's introduction to this medium is during his 90 day "observation period."<sup>39</sup> Due to the lack of sufficient and adequately trained personnel, this period is actually not being used for continuous and thorough study; also, the examination by the two or three psychiatrists is of little value because the examination (which may determine the disposition of the case for many years or even a lifetime) are usually limited to one or at the most two interviews of an hour to an hour and a half.<sup>40</sup>

As of 1958, only fifteen states had more than 50% of the total number of physicians needed to staff the public mental hospitals, according to the standards set by the American Psychiatric Association. It has been said that in many of our hospitals about the best that can be done is to give a physical examination and make a mental note on each patient once a year. Often the staff is insufficient to accomplish even this.<sup>41</sup>

It would seem then that offering extensive psychiatric treatment to large numbers of convicted psychopaths by committing them to public mental hospitals rather than imprisoning them in penal institutions is in vain, since any increase in the number of difficult-to-manage criminal psychopaths in public mental institutions can only mean that many of the patients now in these overcrowded and understaffed hospitals will receive even less care than they are now getting. The criminal psychopaths committed to these institutions would, under present conditions, receive no therapy, but only custody in a public mental institution that would be for them, in everything but name, a penal institution.<sup>42</sup> The state brings this situation about by compelling the institutionalization of mentally ill persons and then failing to appropriate sufficient funds to enable the institution to procure the proper personnel and facilities to provide therapeutic, rather than mere custodial care.<sup>43</sup>

Thus, the psychopath has heretofore been relegated to either a prison or a state hospital, or both, neither of which is a proper place for him.<sup>44</sup>

<sup>38</sup> 43 CALIF. L. REV. 766 (1955).

<sup>39</sup> WEST'S ANN. WELFARE & INST. CODE §5512.

<sup>40</sup> 43 CALIF. L. REV. 766 (1955).

<sup>41</sup> Solomon, *The American Psychiatric Association in Relation to American Psychiatry*, 115 AM. J. PSYCHIATRY 1, 7 (1958); cf. Birnbaum, *The Right to Treatment*, 46 A.B.A.J. 499, 500 (1960).

<sup>42</sup> Birnbaum, *How to Treat the Criminal Psychopath*, 52 A.B.A.J. 69, 72, 73 (1966).

<sup>43</sup> Birnbaum, *The Right to Treatment*, 46 A.B.A.J. 499 (1960).

<sup>44</sup> 96 U. OF PA. L. REV. 872 (1948); see also SINGER & KROHN, *INSANITY AND THE LAW* 151 (1924); GLUCK, *MENTAL DISORDER AND THE CRIMINAL LAW* 383 (1925).

Placed in the insane asylum, the psychopath is seen to cause incessant trouble, detracting from the possibility of effective care and treatment of the truly insane for whom the institution was established. In the penal institution these individuals are not understood and disorder becomes inevitable due to the psychopath's predisposition to becoming insubordinate, which leads to the adoption of repressive measures which necessarily enhance the admittedly difficult undertaking of curing these persons.<sup>45</sup>

#### IV

##### PROPOSALS

How, then, can this problem be remedied? It is submitted that the first modification to be made in the present law is one which follows the precedent set by Indiana and Michigan, allowing commitment as a sexual psychopath to constitute a complete defense to any further criminal proceedings growing out of the act involved.<sup>46</sup> The defense should only be allowed if the person was found to be a sexual psychopath within the meaning of the existing law and such determination had become final. The most effective argument to be made for this proposal is that no longer would the prospect of incarceration after treatment confront the psychopath. Knowledge that under the present law, "when treatment terminates prison begins" retards the initiative on the part of the patient, thus destroying one of the most essential aspects of psychiatric treatment—the cooperation of the patient.<sup>47</sup> With a final adjudication of sexual psychopathy under the proposed change, the state would be *required* to commit the psychopath for an indeterminate period of time (i.e. until sufficient recovery is achieved).<sup>48</sup>

Secondly, separate facilities which are staffed by psychiatrists, psychologists, and sociologists should be established. As proposed above, those persons found guilty of sex crimes under sections 5501 (b) and (c) of the California Welfare and Institutions Code would be committed to this institution for an indeterminate period of time.

In the proposed institution, facilities should be available for comprehensive psychiatric treatment. Staff social workers and psychologists would prepare case histories, interviews for counseling purposes, etc.<sup>49</sup> The environment of the institution should as much as possible resemble free society in order that the psychopath does not rebel being incarcerated in

<sup>45</sup> SINGER & KROHN, *op. cit. supra*, note 121, page 152.

<sup>46</sup> See IND. ANN. STAT., §9-3409 (Supp. 1959); MICH. STAT. ANN., §28.967 (8) (1954).

<sup>47</sup> 11 U. OF PITT. L. REV. 636, 651 (1949); cf. 14 BAYLOR L. REV. 93, 104 (1962). Note, this proposal would only apply to persons committed under WELFARE & INST. CODE §5501 (b) and (c). See footnote 3, *supra*.

<sup>48</sup> 51 J. CRIM. L., C. & P. S. 215, 225 (1960).

<sup>49</sup> 53 J. CRIM. L., C. & P. S. 446, 450 (1962).

what seems to him to be a prison, and to enable the psychiatrists in charge to treat their patients in a more natural setting. This is not to suggest that the psychopath should be subjected to a minimum security institution; there is a reasonable point between complete freedom and the stark confinement found in a cell.

Such an institution has been established in Maryland,<sup>50</sup> and has withstood the argument that with commitment being for an indeterminate period, the detention may be in excess of the original sentence imposed by the court.<sup>51</sup>

Thirdly, there should be adequate state financing of this project, which is the *sine qua non* of the project's success. The proposed institution will be no better than the staff and plant facilities available to guarantee its efficacy. Indeterminate commitment to an institution not properly equipped would be little improvement over the present situation. Since commitment of dangerous sexual psychopaths comes within the state's power of *parens patriae*, the above proposals merely complete a task already undertaken by the state.

While courts have become more realistic in their attempt to rehabilitate the convicted mentally disordered sex offender, their attempt is necessarily restricted by their duty to protect society from these persons who may, under the present law, be prematurely released. Such a restriction would be obviated by the proposed amendment requiring indeterminate commitment of such offenders to an institution properly geared to cope with their particular problems. This would seem to present a far better picture both as regards the possibilities of rehabilitation and cure for the psychopath and the protection of society, not to mention the release of the burden presently borne by the state hospitals which are required to attempt to care for these offenders while already overcrowded with persons severely mentally ill.

This group of proposals may not be a panacea, but it presents a picture closer to the realization of goals which have long been pursued and are only slowly being achieved.

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<sup>50</sup> *Id.* at 452.

<sup>51</sup> The state has the power to restrain the liberty of persons dangerous to the health and safety of the people. *Simmons v. Director, Patuxent Institution*, 227 Md. 661, 177 A.2d 409 (1962); cf. *Roberts v. Director, Patuxent Institution*, 222 Md. 643, 172 A.2d 880 (1961).