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THE PLIGHT OF THE SEXUAL PSYCHOPATH: A LEGISLATIVE BLUNDER  
AND JUDICIAL ACQUIESCENCE

I. Introduction

Due to the acute sensitivity of the interests which they threaten, sex crimes have consistently provoked the most intense public reaction. Hence the development of a popular conviction that there exists a specially distinct class of mentally defective sex offenders who should not be imprisoned but placed within a peculiarly orientated program of psychiatric treatment.<sup>1</sup> Couched in hysteria and sensationalism, the populace demanded a more effective handling of the serious sex offender.<sup>2</sup> The "Sexual Psychopath" and "Sexually Dangerous Person" laws appeared to satisfy this urgency as reflected with the enactment in the past twenty-eight years of such specialized legislation in over half the state jurisdictions and the District of Columbia.<sup>3</sup> These statutes were initially thought to be progressive and enlightened, a well-reasoned attempt to protect the public from brutal sex crimes while at the same time protecting and hopefully rehabilitating the offender.<sup>4</sup> While identifying the psychopath as abnormal but not legally insane, they represent a significant advance of psychiatry into the legal order by providing for the civil commitment, isolation and treatment of the psychopath rather than his incarceration.

The legislation emphasizes both the protection and security of society and the rehabilitation of the psychopath himself. The New Hampshire statute typifies these optimistic objectives:

It is hereby declared that the frequency of sex crimes within this state necessitates that appropriate measures be adopted to protect society more adequately from aggressive sexual offenders; that the laws of this state do not provide for the proper disposition of those who commit or have a tendency to commit such crimes and whose actions result from a psychopathic condition; that society as well as the individual will benefit by a civil commitment which would provide for indeterminate segregation and

1 For general discussions of the rationale underlying sexual psychopathy statutes, see Cavanagh, *Sexual Anomalies and the Law*, 9 CATHOLIC LAW. 4 (1963); Cohen, *Administration of the Criminal Sexual Psychopath Statute in Indiana*, 32 IND. L.J. 450 (1957); Hacker and Frym, *The Sexual Psychopath Act in Practice: A Critical Discussion*, 43 CALIF. L. REV. 766 (1955).

2 TAPPAN, REPORT OF THE NEW JERSEY COMMISSION ON THE HABITUAL SEX OFFENDER 13 (1950):

Their popularity must be attributed in the main not to any foundation in fact for their adoption, but to the exploitation of the peculiarly intense anxieties about sex crimes that most people feel: the channels of publicity have been receptive mainly to the rabidly distorted declarations of ill-informed, often hysterical prophets of calamity.

See also SUTHERLAND & CRESSY, PRINCIPLES OF CRIMINOLOGY 127 (5th ed. 1955).

3 See Appendix.

4 The following cases contain typical statements of the two-fold purpose of the legislation: *People v. McCracken*, 39 Cal.App.2d 336, 246 P.2d 913, 918 (1952); *LaMorre v. Superintendent of Bridgewater State Hospital*, 347 Mass. 534, 199 N.E.2d 204, 206 (1964); *State v. Noll*, 171 Neb. 831, 108 N.W.2d 108, 111 (1961). See generally Cohane, *Psychiatry and the Criminal Law*, 1 AM. J. MED. JUR. 152 (1938); MARYLAND LEGISLATIVE COUNCIL, AN INDETERMINATE SENTENCE LAW FOR DEFECTIVE DELINQUENTS 2 (No. 29, 1950).

treatment of such persons; that the necessity in the public interest for the provisions hereinafter enacted is a matter of legislative determination.<sup>5</sup>

The power of a state legislature to frame legislation in this area is predicated upon two considerations: 1) the police power of the state, and 2) the doctrine of *parens patriae*. The constitutionality of these statutes has uniformly been held to be a reasonable and valid exercise of the police power of the state.<sup>6</sup> In upholding such a statute, the Supreme Court of Missouri stated the usual rationale:

Under its police power the State may also enact a new procedure both curative in purpose and rehabilitating in objective, and which substitutes treatment and cure for punishment. . . . This must be particularly true where (as to the instant Act) one purpose of the legislation is the protection of the public from indecent advances or criminal attack by those whom the State has the power to classify as mentally ill and the right to confine and attempt to cure.<sup>7</sup>

According to the doctrine of *parens patriae*, the state has the power to legislate in response to a particularized harm or threat to society as where a group of people are found to be dangerous to the health or morals of its citizens.<sup>8</sup>

Born in an atmosphere of public acerbity and indignation, these statutes form a highly controversial body of social legislation, and have failed to live up to the expectations which originally surrounded their enactment. It shall be the scope of this article to compare and examine the vital provisions of the statutes and the litigation created in their aftermath.

## II. Statutory Contrast and Comparison

The basic dissimilarity which underscores many aspects of this legislation is first indicated by the variance with which the states designate the mentally abnormal sex offender. Ten states term the offender as either a "Criminal Sexual Psychopath" or as a "Sexual Psychopath."<sup>9</sup> Two jurisdictions describe him as a "Sexually Dangerous Person"<sup>10</sup> while in nine states he is merely referred to as a person convicted of certain specified crimes.<sup>11</sup> Four states term him a "Sex

5 N.H. REV. STAT. ANN. § 173:1 (repl. vol. 1964).

6 United States *ex rel.* Gerchman v. Maroney, 235 F.Supp. 588, 593 (W.D.Pa. 1964); People *ex rel.* Elliott v. Juergens, 407 Ill. 391, 95 N.E.2d 602, 605 (1950); People v. Piasecki, 333 Mich. 122, 52 N.W.2d 626, 630 (1952); State v. Madary, 178 Neb. 383, 133 N.W.2d 583, 588 (1965).

7 State *ex rel.* Sweezer v. Green, 360 Mo. 1249, 232 S.W.2d 897, 902 (1950).

8 *Id.* at 902; Buck v. Bell, 274 U.S. 200 (1927) (sterilization); Jacobson v. Massachusetts, 197 U.S. 11 (1904) (compulsory vaccination); Compagnie Francaise v. State Board of Health, 186 U.S. 380 (1902) (quarantine); Varholy v. Sweat, 153 Fla. 571, 15 So.2d 267 (1943) (venereal disease).

9 ALA. CODE tit. 15, §434 (Supp. 1963); D.C. CODE ANN. §22-3503 (1961); FLA. STAT. ANN. §917.12 (Supp. 1964); IND. ANN. STAT. §9-3401 (repl. vol. 1956); IOWA CODE ANN. §225A.1 (Supp. 1964); MICH. STAT. ANN. §28.967(1) (1954); MO. ANN. STAT. §202.700 (1959); NEB. REV. STAT. §29-2901 (1964); N.H. REV. STAT. ANN. §173:2 (repl. vol. 1964); WASH. REV. CODE ANN. §71.06.010 (1962).

10 ILL. ANN. STAT. ch. 38, §105-1.01 (Smith-Hurd 1964); MASS. ANN. LAWS ch. 123A, §1 (1965).

11 CONN. GEN. STAT. ANN. §17-244 (1958); KAN. GEN. STAT. ANN. §62-1534 (1964); ORE. REV. STAT. §137.111 (Supp. 1963); S.D. CODE §13.1727 (Supp. 1960); UTAH CODE ANN. §77-49-1 (Supp. 1965); VA. CODE ANN. §53-278.2 (repl. vol. 1958); W.VA. CODE

Offender"<sup>12</sup> but Ohio classifies him as a "Psychopathic Offender."<sup>13</sup> In Vermont he is considered a "Psychopathic Personality."<sup>14</sup> California amended its law in 1963 so that it now deals with a "Mentally Disordered Sex Offender."<sup>15</sup>

The efforts of the state legislatures in defining the sexual psychopath or his equivalent have resulted in widespread ambivalence and inconsistency. In general, the definition of the sexually psychopathic person, or its statutory equivalent, incorporates two essential elements: (1) an overt act—often a charge or conviction of a sex crime; and (2) a specified yet divergently defined state of mind. The second element has proved a great source of consternation to the legislative craftsmen. Basically, the sexual psychopath is considered to be suffering from such an unstable personality that his sexual behavior contravenes both the law and the social norms of propriety while demonstrating a compulsive predisposition toward the commission of sexual offenses. The legislative definitions are clearly lacking in exactness chiefly because they try to translate into statutory language what is already a vague and indefinite medical concept. Ohio offers a meaningful example of the inherent inability of a state legislature to depict with any degree of specificity the condition of psychopathy:

'Psychopathic offender' means any person who is adjudged to have a psychopathic personality, who exhibits criminal tendencies and who by reason thereof is a menace to the public. Psychopathic personality is evidenced by such traits or characteristics inconsistent with the age of such person, as emotional immaturity and instability, impulsive, irresponsive, reckless, and unruly acts, excessively self-centered attitudes, deficient powers of self-discipline, lack of normal capacity to learn from experience, marked deficiency of moral sense or control.<sup>16</sup>

Washington offers little more intelligibility although it utilizes an apparently scientific standard, defining a sexual psychopath as ". . . any person who is affected in a form of psychoneurosis or in a form of psychopathic personality, which form predisposes such person to the commission of sexual offenses in a degree constituting him a menace to the health or safety of others."<sup>17</sup>

The vexation of the legislature in this regard is frequently reflected by the general and all-inclusive terms found in the definitions. One state initially pinpoints the offender as one convicted ". . . for any offense against public morals and decency, as relating to crimes pertaining to sex, in which perversion or mental aberration, appears to be or is involved . . ." but then destroys any precision it might have achieved by adding ". . . or where the defendant appears to be mentally ill. . . ."<sup>18</sup> New Hampshire appears to have expanded the condition of sexual psychopathy into one co-extensive with insanity:

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ANN. §2666(1), (2) (1961); WIS. STAT. ANN. §959.15 (1), (2) (1958); WYO. STAT. ANN. §7-348(a) (Supp. 1965).

12 COLO. REV. STAT. ANN. §39-19-1 (1963); N.J. STAT. ANN. §2A:164-3 (1953); PA. STAT. ANN. tit. 19 §1166 (1964); TENN. CODE ANN. §33-1301 (Supp. 1965).

13 OHIO REV. CODE ANN. §2947.24(B) (Page Supp. 1964).

14 VT. STAT. ANN. tit. 18, §2816 (1959).

15 CAL. WELFARE & INST'NS CODE §5500 (1966).

16 OHIO REV. CODE ANN. §2947.24(B) (Page Supp. 1964).

17 WASH. REV. CODE ANN. §71.06.010 (1962).

18 KAN. GEN. STAT. ANN. §62-1534 (1964).

The term 'sexual psychopath' . . . means any person suffering from such conditions of emotional instability or impulsiveness of behavior, or lack of customary standards of good judgment, or failure to appreciate the consequences of his acts, or a combination of any such conditions, as to render such person irresponsible with respect to sexual matters and thereby dangerous to himself or to other persons.<sup>19</sup>

The Iowa statute, however, explicitly differentiates between psychopathy and mental illness by limiting the designation of "criminal sexual psychopath" to those ". . . who are suffering from a mental disorder and are not a proper subject for the schools for the mentally retarded or for commitment as a mentally ill person, having criminal propensities toward the commission of sex offenses, and who may be considered dangerous to others, . . ."<sup>20</sup> One state takes a comparatively plausible approach, defining a "sexually dangerous person" as one who by his repetitive or compulsive misconduct in sexual matters has shown "a general lack of power to control his sexual impulses."<sup>21</sup> Perhaps the best reasoned solution to this perplexing problem of legislative definition is that adopted by those jurisdictions which define the psychopath or dangerous sex offender as one convicted of variously enumerated sex crimes thereby avoiding the precariousness of delineating a particular type of emotional behavior.<sup>22</sup> However, by refraining from a description of a psychiatric or mental imbalance, these statutes provide no scientific criteria whatsoever by which a sound medical judgment that the offender is actually mentally ill may be formulated. In general, it becomes obvious that the definition of the sexual psychopath remains essentially unsettled, undefined and obscure, and by its nature lends itself toward ambiguity, misconstruction and interpretative distortion.

The same disparity and divergence which plagues the definition of the sexual psychopath also permeates the statutory framework concerning the basis of jurisdiction. Typically, an individual is brought under these statutes by being *charged or convicted* of one of several listed sexual offenses. Fifteen states specifically permit a petition alleging sexual psychopathy or a similarly related condition to be filed upon the *conviction* of the defendant of certain sexual offenses.<sup>23</sup> Thus New Jersey provides:

19 N.H. REV. STAT. ANN. §173:2 (repl. vol. 1964).

20 IOWA CODE ANN. §225A.1 (Supp. 1964); see generally Fahr, *Iowa's New Sexual Psychopath Law—An Experiment Noble in Purpose?*, 41 IOWA L. REV. 523 (1956).

21 MASS. ANN. LAWS ch. 123A, §1 (1965).

22 See statutes cited note 11 *supra*; representative is the Wyoming statute which reads in pertinent part:

Whenever any person is convicted of or pleads guilty to any one or more of the following crimes, as defined in the following sections of Wyoming Statutes 1957: Indecent exposure . . . , rape . . . , attempt to commit rape . . . , incest . . . , sodomy . . . , seduction . . . , taking immodest, immoral or indecent liberties with any child under eighteen (18) years of age . . . , knowingly committing any immoral, indecent, or obscene act in the presence of any child under eighteen (18) years of age and causing or encouraging any child under eighteen (18) years of age to cause or encourage any other child to commit or attempt to commit with the person convicted, any immoral or indecent act . . . and accosting, annoying or molesting any child under the age of eighteen (18) years, with intent to commit any unlawful act. . . . WYO. STAT. ANN. §7-348(a) (Supp. 1965).

23 See statutes cited note 11 *supra*; in those states however, the designation and definition of the offender is co-extensive with the basis of jurisdiction. Several jurisdictions do differentiate between definition and basis of jurisdiction further illustrating the inconsistency in

Whenever a person is convicted of the offense of rape, carnal abuse, sodomy, open lewdness, indecent exposure or impairing the morals of a minor, or of an attempt to commit any of the aforementioned offenses, or assault with intent to commit rape, carnal abuse or sodomy, the judge shall order the commitment of such person to the diagnostic center for a period not to exceed 60 days.<sup>24</sup>

Two states, New Hampshire<sup>25</sup> and Washington,<sup>26</sup> extend jurisdiction when the alleged psychopath is *charged* with variously enumerated sexual offenses. Alabama takes a compromising position by requiring either a *charge* or a *conviction* of any sex crime.<sup>27</sup> California extends coverage to include a person convicted of any offense, *whether a sex offense or not*, if it appears to the satisfaction of the court that there is probable cause for finding such person a mentally disordered sex offender, whereupon the proceedings may be suspended and the person certified for examination within the meaning of the statute.<sup>28</sup> The Wisconsin statute is singular in its provision that conviction of a sex crime is a sufficient jurisdictional basis but adds that "sex crime" within the meaning of the statute,

. . . includes any crime except homicide or attempted homicide if the court finds that the defendant was probably directly motivated by a desire for sexual excitement in the commission of the crime; and for that purpose the court may in its discretion take testimony after conviction if necessary to determine that issue.<sup>29</sup>

Vermont confers jurisdiction merely upon the conviction of a felony or a misdemeanor for the third time,<sup>30</sup> but the jurisdictional requirements are more easily satisfied in Illinois<sup>31</sup> and Missouri<sup>32</sup> where one need only be charged with *any* criminal offense. Florida, Indiana and Michigan demand, with few exceptions, only a charge or conviction of *any crime*.<sup>33</sup> Minnesota, Nebraska and the District of Columbia offer a most liberal construction; no charge or conviction of a crime is necessary but only facts presented which demonstrate that good cause exists for judicial inquiry.<sup>34</sup> While this approach is probably justified on the theory that it provides for the identification and confinement of a psychopath before his abnormality is allowed to express itself through overt behavior with

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these statutes from state to state. See COLO. REV. STAT. ANN. §39-19-1 (1963); MASS. ANN. LAWS ch. 123A, §4 (1965); OHIO REV. CODE ANN. §2947.25 (Page Supp. 1964); PA. STAT. ANN. tit. 19, §1166 (1964); TENN. CODE ANN. §33-1301 (Supp. 1965).

24 N.J. STAT. ANN. §2A:164-3 (Supp. 1964).

25 N.H. REV. STAT. ANN. §173:3 (repl. vol. 1964). This statute is noteworthy by also providing that jurisdiction is acquired when facts are presented to the county attorney which show good cause or when the offender is only arrested and charged with other specified offenses enumerated in a later section of the statute.

26 WASH. REV. CODE ANN. §71.06.020 (1962).

27 ALA. CODE tit. 15, §436 (Supp. 1963).

28 CAL. WELFARE & INST'NS CODE §5501 (1966).

29 WIS. STAT. ANN. §959.15(2) (1958).

30 VT. STAT. ANN. tit. 18, §2813 (1959).

31 ILL. ANN. STAT. ch. 38, §105-3 (Smith-Hurd 1964).

32 MO. ANN. STAT. §202.710 (1959).

33 FLA. STAT. ANN. §917.12 (Supp. 1964); IND. ANN. STAT. §9-3403 (repl. vol. 1956); MICH. STAT. ANN. §28.967(2) (1954).

34 D.C. CODE ANN. §22-3504 (1961); MINN. STAT. ANN. §526.10 (1945); NEB. REV. STAT. §29-2902 (1964).

possible danger to the community, it is nevertheless a procedure which might be easily abused. Once again, the statutory treatment of the jurisdictional prerequisites exposes that same heterogeneity and irregularity which pervades all aspects of this legislative craftsmanship and lays bare the wavering incertitude upon which the legislation is structured.

Exceptionally liberal is the Iowa statute which allows the filing of a petition alleging sexual psychopathy by "any reputable person having knowledge that an individual who is charged with a public offense is a criminal sexual psychopath as defined in this chapter. . . ."<sup>35</sup> This has the unusual effect of allowing an individual, completely uninstructed in criminal psychology or mental illness, to bring his opinion into play — indeed an exceptionally broad extension of discretion. Depending upon whether a conviction or merely a charge of a crime is required for jurisdictional purposes, the criminal proceedings may be suspended at various stages pending a determination of psychopathy.<sup>36</sup>

A petition alleging psychopathy having been filed with the court, every statute in some form or other provides for a medical examination of the alleged psychopath. The examining doctor directs his efforts toward an ascertainment of whether or not the convicted or charged offender possesses a psychological or emotional disturbance or deficiency predisposing him toward seriously abnormal behavior as would endanger the health or safety of others.<sup>37</sup> The personal examination is normally conducted by a board of two or three psychiatrists, specially qualified in the field of nervous disorders, after which their report is filed with the court which makes the final determination of the mental condition of the defendant in an immediate hearing.<sup>38</sup> Most of the statutes require the examination to be conducted by several "qualified" or "duly licensed" physicians but do not define what is meant by "qualified" or "licensed."<sup>39</sup> Furthermore, the typical statute prescribes, in addition to examination by individual physicians, a medical examination consisting of a report from the staff of a state mental hospital, the department of health or the state diagnostic center, again without furnishing any meaningful criteria whatsoever according to which competency

35 IOWA CODE ANN. §225A.2 (Supp. 1964). See also MO. ANN. STAT. §202.710 (1959).

36 CAL. WELFARE & INST'NS CODE §5501 (1966); UTAH CODE ANN. §77-49-1 (Supp. 1965); WYO. STAT. ANN. §7-348 (Supp. 1965).

37 See, e.g., ORE. REV. STAT. §137.113 (Supp. 1963):

The examining psychiatrist shall include in his report a statement as to whether or not, in his opinion, the convicted person has any mental or emotional disturbance, deficiency or condition predisposing him to the commission of any crime to a degree rendering the convicted person a menace to the health or safety of others. The report shall also contain any other information which the examining psychiatrist believes may aid the court in sentencing.

38 In contrast to these procedures in which a hearing is held immediately after the initial medical examination, Indiana provides that, if upon the conclusion of the hearing and examination, it appears that the person is a criminal sexual psychopath, the person is then committed to an appropriate state psychiatric institution for an indeterminate period not to exceed sixty days for the purpose of further observation and diagnosis. The superintendent of the institution then files a final report upon which the final determination is made. IND. ANN. STAT. §9-3404(d) (Supp. 1965). Similar is CAL. WELFARE & INST'NS CODE §5512 (1966).

39 MASS. ANN. LAWS ch. 123A, §4 (1965) ("not less than two psychiatrists"); MINN. STAT. ANN. §526.10 (1945) ("two duly licensed doctors of medicine"); ORE. REV. STAT. §137.112(3) (Supp. 1963) ("qualified psychiatrist, who may be either a member of the hospital staff or a psychiatrist engaged in private practice"); WASH. REV. CODE ANN. §71.06.040 (1962) ("two duly licensed physicians").

or professional skill of the staff members may be measured.<sup>40</sup> In contrast to defined procedures, the Iowa statute places the medical examination within the discretion of the court, and should one be ordered, the court not only selects the examiner but also the time and place of the examination.<sup>41</sup>

Only a few states attempt to impose a standard of qualification for the appointment of competent medical examiners. Thus Alabama describes a qualified psychiatrist as "a reputable physician licensed to practice in the state of Alabama who has limited his professional practice exclusively to the diagnosis and treatment of mental and nervous disorders for a period of not less than three years."<sup>42</sup> The Florida statute provides:

The circuit court judge shall then appoint not less than two nor more than three qualified psychiatrists who are licensed physicians in the state and who have directed their professional practice primarily to the diagnosis and treatment of mental and nervous disorders for a period of not less than five years, to make a personal examination of the alleged sexual psychopath, directed toward ascertaining whether the person is a criminal sexual psychopath.<sup>43</sup>

Similar is the Illinois statute which identifies a qualified psychiatrist as a "reputable physician licensed in Illinois to practice medicine in all its branches, who has specialized in the diagnosis and treatment of mental and nervous disorders for a period of not less than 5 years."<sup>44</sup> Utah requires only "two or more competent and reputable physicians recognized as specialists . . . in the field of psychiatry,"<sup>45</sup> while Wyoming is significant by demanding only that one of the appointed physicians be expert in psychiatry.<sup>46</sup> The California statute is comparatively progressive in its attempt to specifically frame an intelligible set of criteria according to which medical examiners are to be selected:

The judge shall appoint not less than two nor more than three psychiatrists, each of whom shall be a holder of a valid and unrevoked physician's and surgeon's certificate who has directed his professional practice primarily to the diagnosis and treatment of mental and nervous disorders for a period of not less than five years, and at least one of whom shall be from the medical staff of a state hospital or county psychopathic hospital, to make a personal examination of the alleged mentally disordered sex offender, directed toward ascertaining whether the person is a mentally disordered sex offender.<sup>47</sup>

With the exception of the California enactment, a striking similarity in the statutory treatment of medical examinations is the manifest absence of any

40 See, e.g., COLO. REV. STAT. ANN. §39-19-2(2) (1963) ("A complete psychiatric examination shall have been made of him by the psychiatrists of the Colorado psychopathic hospital or by psychiatrists designated by the district court. . . .").

41 IOWA CODE ANN. §225A.4 (Supp. 1964) ("At said hearing the court shall determine whether he shall be medically examined, if so, by whom such examination shall be conducted, and the time and place thereof."). See also VA. CODE ANN. §53-278.3 (repl. vol. 1958).

42 ALA. CODE tit. 15, §434 (1959).

43 FLA. STAT. ANN. §917.12(2)(c) (Supp. 1964).

44 ILL. ANN. STAT. ch. 38, §105-4.01 (Smith-Hurd 1964).

45 UTAH CODE ANN. §77-49-2 (1953).

46 WYO. STAT. ANN. §7-349 (Supp. 1965).

47 CAL. WELFARE & INST'NS CODE §5504 (1966).



clear or definable statutory guidelines by which qualified medical examiners are to be chosen, a defect which inherently weakens and hinders the possibility of any effective diagnostic analysis.

After the petition has been filed alleging a person to be a sexual psychopath and the report of the medical examination indicates he is within the respective statutory definition of sexual psychopath, a hearing is then conducted by the court to determine finally the question of the psychopathy of the accused and an order and judgment are then entered in accordance with such finding and determination. The legislatures have afforded the alleged psychopath certain rights during the course of the hearing but again such rights are sprinkled in a sporadic and scattered scheme. A number of jurisdictions grant the alleged psychopath procedural rights akin to those furnished in criminal procedures — the right of a jury trial (if demanded) and the right to counsel at every stage of the proceeding,<sup>48</sup> the right to cross-examine and to call his own witnesses,<sup>49</sup> the right to present evidence in his behalf and full rights of appeal,<sup>50</sup> and the right to subpoena witnesses.<sup>51</sup> Several states by implication do not grant the accused the right to a hearing; the court makes its determination solely on the basis of the medical report filed with it.<sup>52</sup> In Colorado, the discretion of the judge is controlling:

Whenever a district court, after the psychiatric examination of and report on a person convicted of any one or more of the crimes enumerated in section 39-19-1, shall be of the opinion that it would be to the best interests of justice to sentence such person under provisions of this article, he shall cause such person to be arraigned before him and sentenced to the Colorado state penitentiary until such time as the state board of parole shall review the case or transfer to the appropriate institution as provided in section 39-19-6.<sup>53</sup>

Vermont provides only for a "due hearing"<sup>54</sup> while Wisconsin resorts to a rather unconventional procedure in which a hearing is given only after an application for release has been made.<sup>55</sup>

The "hearing" significantly lacks many of the substantive evidentiary safeguards normally accorded a defendant even in a civil proceeding. The statutes regularly consider as competent the introduction of evidence of the commission by the alleged psychopath of any number of past crimes involving sexual motivation of which the accused has been convicted together with the record of the punishment inflicted therefor.<sup>56</sup> New Hampshire admits the report of the medical

48 D.C. CODE ANN. §§22-3505—22-3508 (1961).

49 FLA. STAT. ANN. §917.12(2)(d) (Supp. 1964).

50 IOWA CODE ANN. §225A.5 (Supp. 1964).

51 N.H. REV. STAT. ANN. §173:5 (repl. vol. 1964).

52 KAN. STAT. ANN. §62-1536 (1964); PA. STAT. ANN. tit. 19, §1170(a) (1964); UTAH CODE ANN. §77-49-4 (1953).

53 COLO. REV. STAT. ANN. §39-19-5(1) (1963).

54 VT. STAT. ANN. tit. 18, §2814 (1959).

55 WIS. STAT. ANN. §959.15(6), (14) (1958).

56 ALA. CODE tit. 15, §438 (1959); D.C. CODE ANN. §22-3508 (1961) ("evidence of conviction of any number of crimes the commission of which tends to show that the patient is a sexual psychopath"); FLA. STAT. ANN. §917.12(2)(d) (Supp. 1964) ("evidence of the commission of said person of any number of crimes involving sexual motivation of which the accused heretofore has been convicted"); ILL. ANN. STAT. ch. 38, §105-5 (Smith-Hurd

examination into evidence at the hearing,<sup>57</sup> whereas other states admit it but only with the express limitation that it is not to be used in any other judicial proceeding involving the accused other than a proceeding to determine his psychopathy.<sup>58</sup> In general, the various rights and protections given the defendant in a sexual psychopathic hearing are unsystematically and irregularly granted and represent only another aspect of the derangement and perplexing unevenness which characterizes this exceptional legislation.

Subsequent to a determination that a person is a sexual psychopath, the statutes commonly provide for his commitment to the state hospital or another appropriate institution where he is confined indeterminately until there are reasonable grounds to believe that he has recovered from his condition of psychopathy or that he no longer constitutes a danger to others.<sup>59</sup> The indefinite terms of confinement again expose the inadequacy of the legislation; in Colorado, a person found to be a sex offender within the terms of the statute, is sentenced in lieu of the sentence provided by law for his offense "for an indeterminate term having a minimum of one day and a maximum of his natural life."<sup>60</sup> If a charge of a crime is pending, the court may order the person to be tried upon such charges "as the interests of substantial justice may require" and then to be committed after termination of the criminal proceedings.<sup>61</sup> In New Jersey, an administrative official is authorized to transfer a sexual psychopath to or from any institution within the jurisdiction for the purpose of providing for the needs of the person according to the individual circumstances of the case.<sup>62</sup> This has been interpreted to include the transfer of a sexual psychopath to the state prison to serve the remainder of his term.<sup>63</sup> Under such a statute, the offender is found to be mentally ill but is nevertheless incarcerated under the provisions of an act which is theoretically non-punitive, remedial and curative in nature. Thus "imprisonment" is the proper type of clinical "treatment" for this particular psychopath.

Having been confined indefinitely for purposes of therapy, the sexual psychopath is invariably given the right to periodic examinations to determine whether or not he has recovered although the statutes differ slightly as to the precise procedure to be followed. Normally, application is made by the psychopath himself, an interested person, or the court, and the superintendent of the hospital must certify that the offender is no longer dangerous to the health and

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1964) ("evidence of the commission by the respondent of any number of crimes together with whatever punishments, if any, were inflicted"); IOWA CODE ANN. §225A.10 (Supp. 1964) ("Evidence of past acts of sexual deviation by the person charged shall be admissible at the hearing"); MASS. ANN. LAWS ch. 123A, §5 (1965) ("past criminal and psychiatric record and any other evidence that tends to indicate that he is a sexually dangerous person").

57 N.H. REV. STAT. ANN. §173:5 (repl. vol. 1964).

58 D.C. CODE ANN. §22-3506(b) (1961); FLA. STAT. ANN. §917.12(2)(c) (Supp. 1964); IND. ANN. STAT. §9-3404(a) (Supp. 1965).

59 Typically, in the District of Columbia, the psychopath is confined to a hospital indefinitely until "... the Superintendent of Saint Elizabeth's Hospital finds that he has sufficiently recovered so as not to be dangerous to other persons. . . ." D.C. CODE ANN. §22-3509 (1961).

60 COLO. REV. STAT. ANN. §39-19-1 (1963). See also PA. STAT. ANN. tit. 19, §1166 (1964).

61 Mo. ANN. STAT. §202.730 (1959).

62 N.J. STAT. ANN. §2A:164-7 (1953).

63 State v. Newton, 17 N.J. 271, 111 A.2d 272, 275 (1955).

safety of others, or that he has fully recovered.<sup>64</sup> The California procedures for re-examination and release are exceptionally thorough:

After a person has been committed for an indeterminate period to the department for placement in a state hospital as a mentally disordered sex offender and has been confined for a period of not less than 6 months from the date of the order of commitment, the committing court may upon its own motion or on motion by or on behalf of the person committed, require the superintendent of the state hospital to which the person was committed to forward to the committing court, within 30 days, his opinion under (a) or (b) of Section 5517, including therein a report, diagnosis and recommendation concerning the person's future care, supervision, or treatment. After receipt of the report, the committing court may order the return of the person to the court for a hearing as to whether the person is still a mentally disordered sex offender within the meaning of this article.<sup>65</sup>

Colorado accords a psychopath the right to be examined within six months after his confinement and at least once a year thereafter whereupon the state board of parole decides if he should be paroled on the basis of such examination.<sup>66</sup> The Massachusetts statute permits a hearing, and examination for discharge every twelve months upon the filing of a written petition by the committed person, his parents, spouse, issue, next of kin or any friend.<sup>67</sup>

The nature of the release again differs from state to state. In Alabama, for example, if the offender is found to have fully recovered from his psychopathy, he is ordered discharged from custody and placed on probation for such a reasonable time as the circumstances may justify; if he violates the terms of his probation, the court may either return him to the custody of the director of the department of corrections for further treatment under the previous commitment or have him serve his sentence for the crime for which he was convicted.<sup>68</sup> The Colorado provision is obscure, authorizing the state board of parole to issue an absolute release from confinement of any person sentenced under the act "at such time and under such conditions as the interest of justice and the welfare of society may dictate."<sup>69</sup> Florida precludes any form of absolute release by requiring the recommencement of criminal proceedings immediately upon discharge.<sup>70</sup> In Kansas, if after the commitment to any state or county institution, it should appear that the defendant has been mentally restored, he is then returned to the court where he was initially convicted and sentenced or paroled

64 See, e.g., FLA. STAT. ANN. §917.12(3) (Supp. 1964); ILL. ANN. STAT. ch. 38, §105-9 (Smith-Hurd 1964).

65 CAL. WELFARE & INST'NS CODE §5519 (1966).

66 COLO. REV. STAT. ANN. §39-19-6 (1963).

67 MASS. ANN. LAWS ch. 123A, §9 (1965). See also IOWA CODE ANN. §225A.12 (Supp. 1964); MO. ANN. STAT. §202.740 (1959); NEB. REV. STAT. §29-2906 (1964); OHIO REV. CODE ANN. §2947.27 (Page 1954); PA. STAT. ANN. tit. 19, §1172 (1964); UTAH CODE ANN. §77-49-7 (Supp. 1965); VT. STAT. ANN. tit. 18, §2815 (1959); WYO. STAT. ANN. §7-357 (1957).

68 ALA. CODE tit. 15, §441 (1959).

69 COLO. REV. STAT. ANN. §39-19-7 (1963).

70 FLA. STAT. ANN. §917.12(3) (Supp. 1964) ("If criminal proceedings are still pending against such persons then they shall recommence upon the order by the circuit court discharging the person from the institution.")

as the court deems best under the circumstances.<sup>71</sup> The pertinent section of the Massachusetts statute, with regard to conditions of release, is particularly pliable:

The parole board shall carefully and thoroughly consider the reports of the department of mental health concerning the progress of such person, as well as any other information it deems relevant, and may grant such person a parole permit to be at liberty upon such terms and conditions as it shall prescribe, including the condition he receive out-patient treatment, and any other condition that the commissioner of mental health may recommend. Such terms and conditions may be revised, altered, amended or revoked by the parole board at any time. The violation by the holder of a parole permit to be at liberty of any of the terms or conditions of such permit, or of any law of the commonwealth, shall render such permit void. The parole board may revoke such permit at any time.<sup>72</sup>

Missouri extends the probationary period for a minimum of three years<sup>73</sup> whereas Pennsylvania merely grants parole subject to supervision.<sup>74</sup>

Disparity and dissimilarity also characterize the statutory treatment of the effect of confinement of a sexual psychopath upon pending criminal proceedings. The statutes of Indiana and Michigan are clearly expressive of a legislative purpose to the effect that a determination of psychopathy operates as a bar to criminal proceedings growing out of the same offense. Thus the Indiana statute provides:

No person who is found in such original hearing to be a criminal sexual psychopathic person, and such finding having become final, may thereafter be tried or sentenced upon the offense with which he originally stood charged, or convicted, in the committing court at the time of the filing of the original petition.<sup>75</sup>

Although the overwhelming majority of the statutes are silent on this point, perhaps one thread of consistency which may be isolated is the inference in many of them that a sentence served as a sexual psychopath is a bar to subsequent criminal prosecution.<sup>76</sup> On the other hand, the Ohio approach is to return a released psychopathic offender to a penal institution until the total period of his confinement equals the sentence he received upon conviction; he is then released subject to supervision.<sup>77</sup> In Pennsylvania, the psychiatric treatment received is in lieu of the criminal sentence but is for an indefinite term.<sup>78</sup> Under the Washington statute, the court has three courses of action available to it in dealing with the offender released from treatment, dependent on the circum-

71 KAN. STAT. ANN. §62-1537 (1964). See also ILL. ANN. STAT. ch. 38, §105-9 (Smith-Hurd 1964).

72 MASS. ANN. LAWS ch. 123A, §9 (1965).

73 MO. ANN. STAT. §202.740 (1959).

74 PA. STAT. ANN. tit. 19, §1173 (1964). See also WYO. STAT. ANN. §7-352 (Supp. 1965) (probationer may receive outpatient psychiatric treatment at his own expense and in manner prescribed by court).

75 IND. ANN. STAT. §9-3409 (repl. vol. 1956). MICH. STAT. ANN. §28.967(8) (1954), is to the same effect.

76 See, e.g., ILL. ANN. STAT. ch. 38, §105-9 (Smith-Hurd 1964). This provision permits the discharge of a recovered sexual psychopath but is silent as to the resumption of any criminal proceedings.

77 OHIO REV. CODE ANN. §2947.27 (Page 1953).

78 PA. STAT. ANN. tit. 19, §1166 (1964).

stances of the confinement: (1) If the offender had been convicted of, or had pleaded guilty to the criminal charge, and the maximum sentence for the crime has not expired, the superintendent certifies his opinion to the board of prison terms and paroles; (2) If the maximum sentence for the criminal charge has ended, the superintendent paroles the psychopath under terms and conditions he considers advisable; (3) If the maximum sentence for the criminal charge has not ended and the sexual psychopath did not plead guilty to or was not convicted of the charge, the superintendent returns the psychopath to the committing court which may hear and determine the criminal charge.<sup>79</sup> Several states explicitly provide that the confinement for psychopathy is not to operate as a defense against a later prosecution or execution of a sentence for the criminal offense upon which the commitment was originally based.<sup>80</sup> Minnesota is strikingly clear:

The existence in any person of a condition of psychopathic personality shall not in any case constitute a defense to a charge of crime, nor relieve such person from liability to be tried upon a criminal charge, unless such person is in a condition of insanity, idiocy, imbecility, or lunacy within the meaning of the laws relating to crimes and criminal procedure.<sup>81</sup>

Such a provision would seem to destroy any psychological incentive to reform and therefore must impede any rehabilitative program since theoretically, the treatment facilities of the state are being drawn upon for the purpose of cure and reformation not the mere postponement of a sentence to prison. This would appear to be the rationale underlying the provisions of several states which do consider confinement as a sexual psychopath as a complete defense to trial or sentence for the crime involved. The shallowness of the legislation is again divulged by the fact that no state considers the effect of confinement as a sexual psychopath on the statute of limitations.

### III. Judicial Construction and Approval

The main thrust of the constitutional attacks upon this legislation has taken several distinct forms but the statutes have been uniformly upheld because of their civil or non-criminal nature; the courts have supported the civil or special procedures of the statutes citing their stated purpose and the treatment contemplated. In upholding the Illinois statute, that state's Supreme Court, in *People v. Redlich*,<sup>82</sup> drew the spirit of its conclusion from an examination of the law's express purpose:

The trial of the question of his insanity, feeble-mindedness, or psychopathy, as defined by statute, is no part of the criminal proceedings, has no connection with his guilt or innocence, and is not in aid of a determination of that question, but the sole object of the proceeding is to ascertain the

<sup>79</sup> WASH. REV. CODE ANN. §71.06.090 (1962).

<sup>80</sup> D.C. CODE ANN. §22-3510 (1961); FLA. STAT. ANN. §917.12(3) (Supp. 1964); VT. STAT. ANN. tit. 18, §2815 (1959).

<sup>81</sup> MINN. STAT. ANN. §526.11 (1945).

<sup>82</sup> 402 Ill. 270, 83 N.E.2d 736 (1949).

mental condition of the accused, whether or not insane, feeble-minded or psychopathic, as defined by statute, so as to determine if he should be required to plead to the indictment and be placed upon trial for the offense charged.<sup>83</sup>

The same reasoning was echoed by the Supreme Court of New Hampshire in *In re Moulton*<sup>84</sup> where the court found the purpose of the statute to be therapeutic, preventive and remedial, seeking the protection of society and the benefit of the person involved, within the framework of a legitimate and worthwhile statutory method.

On only one occasion has a sexual psychopath statute been held unconstitutional. In *People v. Frontczak*,<sup>85</sup> the petitioner had been convicted of gross indecency and had been committed pursuant to the Michigan statute to the state hospital. Not unlike many of the statutes here being considered, the Michigan act provided in part:

If it shall be determined and adjudged by the court that such person is a menace to public safety for any of the reasons stated in the petition, the court shall enter an order that said person be removed and committed to such suitable state hospital or state institution as the court may designate in such order, sentence to be suspended or held in abeyance during the time such person is in the custody of such institution and such person to remain in such state hospital or state institution until the said court, upon application and proceedings in accordance with the provisions of section one-a, shall find that said person has ceased to be a menace to the public safety because of said tendencies and mental condition. Upon such finding, such person shall be released from the custody of such hospital or institution and after allowing and crediting on the sentence originally imposed the time spent in any such hospital or institution, the court shall return such person to the jail or prison to which he was formerly committed, to serve the remainder of his sentence (if any) according to law, subject to any parole or other proper order affecting such person.<sup>86</sup>

Although the Michigan Supreme Court's decision in striking down the statute was premised primarily upon its insertion in the criminal code chapter relating to judgments and sentences in criminal cases, its language nevertheless bears substantial importance:

This enactment is more than an inquest relative to the mental condition of a prisoner because the company in which it is found is a part of criminal procedure following conviction of a criminal offense and after sentence and during confinement and, in the instance at bar, removed from the jurisdiction of the trial court and domicile of the prisoner and vested in another court, at a point removed from the prisoner's former domicile, and where he is to be tried by a jury in a vicinage where the criminal law has him in confinement and where he committed no crime. The statute requires the petition to negative insanity of the prisoner, and there is no law of the state penalizing or subjecting to hospitalization any person who appears "to be a sex degenerate" and appears "to be suffering from a

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83 *Id.* at 276, 83 N.E.2d at 740.

84 96 N.H. 370, 77 A.2d 26, 28 (1951).

85 286 Mich. 51, 281 N.W. 534 (1938).

86 Mich. Public Acts 1937, No. 196.

mental disorder characterized by marked sexual deviation, with tendencies dangerous to the public safety."<sup>87</sup>

While the court relies on the legislative scheme to invalidate the statute, it may be inferred with appreciable force that the court actually steps beyond the technical procedural basis of its holding and examines the substantive effect of the statute, deciding that it punishes not for crime but rather for mental condition — an invalid extension of the state's police power. Unfortunately the careful and cautious approach enunciated in *Frontczak* was short-lived. In *People v. Chapman*<sup>88</sup> the same court retreated from its rigid position in *Frontczak* by upholding a new and very similar statute in which jurisdiction was predicated on a charge of a criminal offense where it appears that the charged person is a sexual psychopath. The substantive effect of the statute was very analogous to the former enactment, but here the court drew undue significance from the fact that the statute had been removed from the criminal code:

We are satisfied that the present statute is distinguishable and contains none of the constitutional infirmities of the previous statute relating to sex deviators, which was held unconstitutional in the *Frontczak* case. The statute involved in such case was, as stated in the majority opinion, placed in the Criminal-Code chapter relating to judgments and sentences in criminal cases. The present statute is not contained in either the Code of Criminal Procedure or the Penal Code. It makes sex deviators subject to restraint because of their acts and condition, and not because of conviction and sentence for a criminal offense. It does not extend or impose an added or different sentence under the guise of hospitalization.<sup>89</sup>

The court was also influenced considerably by the fact that the former statute contained no definition of "criminal sexual psychopath" whereas the present statute did, although in vague and uncertain terms.<sup>90</sup>

The *Chapman* decision marked the point of departure for a long line of cases in which all the features surrounding the commitment of a psychopath have been justified as special proceedings of a civil nature collateral to the criminal case.<sup>91</sup> An illustration of this preoccupation with the civil or rehabili-

87 *People v. Frontczak*, 286 Mich. 51, 281 N.W. 534, 536 (1938).

88 301 Mich. 584, 4 N.W.2d 18 (1942).

89 *Id.* at 602-03, 4 N.W.2d at 26.

90 The definition is reproduced in all essential respects by the present definition which reads: "Any person who is suffering from a mental disorder and is not feeble-minded, which mental disorder is coupled with criminal propensities to the commission of sex offenses is hereby declared to be a criminal sexual psychopathic person." MICH. STAT. ANN. §28.967(1) (1954).

91 *Miller v. Overholser*, 206 F.2d 415, 417 (D.C. Cir. 1953) (District of Columbia); *People v. Hymes*, 161 Cal.App.2d 668, 327 P.2d 219, 222 (1958) (California); *People v. Sims*, 382 Ill. 472, 47 N.E.2d 703, 705 (1943) (Illinois); *People v. Piasecki*, 333 Mich. 122, 52 N.W.2d 626, 629 (1952) (Michigan); *State v. McDaniel*, 307 S.W.2d 42, 44 (Mo.App. 1957) (Missouri); *State v. Madary*, 178 Neb. 383, 133 N.W.2d 583, 587 (1965) (Nebraska); *In re Mundy*, 97 N.H. 239, 85 A.2d 371, 372 (1952) (New Hampshire); *Cf. Hultquist v. People*, 77 Colo. 310, 236 Pac. 995, 997 (1925); *In re Bresee*, 82 Iowa 573, 48 N.W. 991, 992 (1891); *State v. Linderholm*, 84 Kan. 603, 114 Pac. 857 (1911); *McGoldrick v. Downs*, 184 Misc. 168, 53 N.Y.S.2d 333, 336 (Sup. Ct.) *aff'd*, 267 App. Div. 863, 56 N.Y.S.2d 533 (1945); *In re Cook*, 218 N.C. 384, 11 S.E.2d 142, 143 (1940). See generally *Weihofen and Overholser, Commitment of the Mentally Ill*, 24 TEXAS L. REV. 307, 344 (1946).

tative aspects of this legislation is found in the statement of the Supreme Court of Missouri, designating the proceeding as a civil inquest:

The purpose of a criminal proceeding is to punish. But this Act is but a civil inquiry to determine a status. It is curative and remedial in nature instead of punitive. . . . One of the evident purposes of the enactment is to prevent persons suffering from this mental disorder, though "not insane or feebleminded," from being punished for crimes they commit during the period of this mental ailment. . . . One purpose of the Act is to protect, treat and cure, and the State here is concerning itself with the future well being and return to normal living of a person so charged.<sup>92</sup>

It becomes clear that underlying the reasoning of the courts in classifying these proceedings civil or curative in nature is the tacit assumption that the individual will be the beneficial recipient of specially orientated psychiatric therapy to remedy his mental aberrations. If the psychopath is not in fact receiving special therapeutic treatment, it is not unreasonable to conclude that what might be theoretically termed a "civil" commitment evolves in fact into a "punitive" one. It has already been pointed out that a sexually psychopathic person may be confined for an indefinite period despite the fact that the length of imprisonment for the crime with which he was charged or convicted might have been far less.<sup>93</sup> This precise anomaly confronted the Michigan Supreme Court in *In re Kemmerer*.<sup>94</sup> In that case, an offender who had been adjudged a sexual psychopath applied for a writ of habeas corpus contending that the maximum sentence on a charge of the misdemeanor (indecent exposure) which had led to his commitment could only have been one year whereas his incarceration as a psychopath was for an indefinite period, possibly for life, and further alleged that he was not receiving proper treatment. The court summarily dismissed these contentions, which action clearly exposes an inherent defect which perpetually plagues the legislation — the absence of an objective standard by which proper "treatment" may be measured. The court noted that it was not within its province to fill the vacuum created by the silence of the legislature as to the standard of "treatment":

It is not within our province to prescribe the treatment that should be accorded petitioner. It must be borne in mind that he is not being punished, that he is an unfortunate psychopath and that he is entitled to such treatment as his condition requires.<sup>95</sup>

The Court of Appeals for the Sixth Circuit subsequently refused a writ of habeas corpus to petitioner Kemmerer and held that it was obliged to follow the decision of the state court concerning an interpretation of a state statute.<sup>96</sup> Although the evidence indicated that the psychopath was placed in a cell block with convicted criminals and forced to work in prison indus-

92 *State ex rel. Sweezer v. Green*, 360 Mo. 1249, 232 S.W.2d 897, 900 (1950).

93 See, e.g., COLO. REV. STAT. ANN. §39-19-1 (1963); PA. STAT. ANN. tit. 19, §1166 (1964).

94 309 Mich. 313, 15 N.W.2d 652 (1944), *cert. denied*, 329 U.S. 767 (1946).

95 *Id.* at 317-18, 15 N.W.2d at 653.

96 *Kemmerer v. Benson*, 165 F.2d 702 (6th Cir. 1948), *cert. denied*, 334 U.S. 849 (1949).



tries, the federal court remarked tersely: "These are matters for the consideration of the State Hospital Commission, but even if they were incorporated in the petition and were shown to be true, they would not justify [petitioner's] discharge."<sup>97</sup> The practical import of this decision is to condone the indefinite confinement in a prison under the shallow guise of "treatment."<sup>98</sup> Indeed, the courts are exceedingly reluctant to pierce the theoretically civil veil of the statutes and lay bare the inescapable fact that in actuality they may well deprive an individual of his substantive personal freedoms and liberties without due process. The New Jersey legislature apparently has recognized the possibility of abuse in this area. Its statute provides that in the event that the court shall order a commitment of a sexual psychopath, such order shall not specify a minimum period of commitment, "but in no event shall the person be confined or subject to parole supervision for a period of time greater than that provided by law for the crime of which such person was convicted."<sup>99</sup> However, this laudable legislative intent was seemingly disregarded in the case of *State v. Bray*.<sup>100</sup> There, where an offender was convicted of incest and sentenced to ten to fifteen years in prison, it was held that his commitment to a state hospital for an *indeterminate term* did not constitute a more severe sentence than a vacated sentence of ten to fifteen years in the state prison.<sup>101</sup> The court's rationale, that the defendant might recover and be paroled at an earlier date than he would have had he been imprisoned, is highly questionable and furnishes another example of the insensitivity of the legal order to the rights of the sexual psychopath.

One court has noted: "There may be a vast gulf between the objectives of the act and its actual operation if adequate facilities and personnel are lacking to effect its objectives."<sup>102</sup> This perceptive observation was given expression in *Commonwealth v. Page*<sup>103</sup> where it was held that a sexual psychopath committed for an indefinite period to the Massachusetts treatment center which had not in fact been established, had been invalidly deprived of his rights. Evidence was introduced showing that persons confined there for psychiatric attention were housed with the general prison population. In addition, there existed no separate staff for the treatment of sex offenders; there was merely a general

97 *Id.* at 703.

98 The quality of treatment envisioned in the decisions of the court does not always correspond with reality. The inadequacy of treatment is reflected in a report for recommended treatment filed by an examining doctor in one of Nebraska's diagnostic centers:

'Because of his inability to learn, this man will probably have to be maintained in an institution for the remainder of his years. It is felt that if he were allowed to go back into society, and if he had the opportunities, he would do the same things which he did prior to coming to us. However, it is felt that he should be allowed to go to the various institutional programs and activities providing he does not get too excited and his conduct is such that it does not embarrass anybody.

Comment, *Sexual Psychopathy—A Legal Labyrinth of Medicine, Morals and Mythology*, 36 NEB. L. REV. 320, 350 (1957).

99 N.J. STAT. ANN. §2A:164-6 (1953).

100 67 N.J.Super. 340, 170 A.2d 501 (1961).

101 *Id.* at 346, 170 A.2d at 504.

102 *In re Moulton*, 96 N.H. 370, 77 A.2d 26, 29 (1950).

103 338 Mass. 313, 159 N.E.2d 82, 85 (1959). Perhaps the court was influenced by the fact that the defendant had served his term in prison and the day before he was to be discharged, the district attorney reported that he was a sex offender as defined in the statute and after examination and diagnosis, he was committed to the treatment center for an indefinite term. This makes clear the convenience of this type of statute by which a criminal may be in effect isolated from society indeterminately.

program of group and individual psychiatric therapy for the total prison population, which population might include sex offenders. The court found this program plainly inadequate:

It is not sufficient that the Legislature announce a remedial purpose if the consequences to the individual are penal. While we are not now called upon to state the standards which such a center must observe to fulfill its remedial purpose, we hold that a confinement in a prison which is undifferentiated from the incarceration of convicted criminals is not remedial so as to escape constitutional requirements of due process.<sup>104</sup>

However, only a year later, the same court stripped the *Page* decision of its meaning by holding that a treatment center which had been established only three weeks after the decision in *Page*, and which was located at the correctional institution, was adequate within the meaning of the statute.<sup>105</sup> The court dispelled any doubts raised by the immediate establishment of the new center in a rather unconvincing fashion:

It can hardly be expected that within such a brief period a smoothly operating and adequately staffed treatment center could be established. It is apparent that the departments of correction and mental health were endeavoring to set up a center that would comply with the statutes. The center established . . . leaves much to be desired. . . . We cannot assume that the necessary action to establish a fully adequate treatment center, already begun, will not be carried to completion.<sup>106</sup>

From this it appears that good intentions are sufficient to satisfy the demands of due process, despite the probability that meager and ineffective psychiatric therapy is afforded.<sup>107</sup> Thus the impetus initially provided in *Page* has never reached its logical extension.

Freewheeling discretion in the transfer of sexual psychopaths from treatment to penal facilities is another area which has been given attention in a few cases. Although the psychopath or serious sex offender is individually treated by the law within an elaborate structure consisting of supposed medical attention, by denying him the defense of insanity, the law places him in an unfortunate situation should it be eventually decided that he is unable to benefit from the treatment. In such event he is then often returned to prison to serve out his

<sup>104</sup> *Id.* at 85.

<sup>105</sup> *Commonwealth v. Hogan*, 341 Mass. 372, 170 N.E.2d 327, 330 (1960). The court apparently ignored the fact that this center was separated from the rest of the hospital by only double doors, and that the center was staffed by the general medical staff at the hospital. The center was under the control of the department of correction and there were no full time personnel assigned to the center.

<sup>106</sup> *Id.* at 330. See Curran, *Commitment of the Sex Offender in Massachusetts*, 37 *Mass. L.Q.* 58 (1952). For a criticism of the decision in *Hogan*, see Tenney, *Sex, Sanity and Stupidity in Massachusetts*, 42 *B.U.L. Rev.* 1, 19-20 (1962).

<sup>107</sup> See *People v. Redford*, 194 Cal. App.2d 200, 14 Cal.Rptr. 866, 867 (1961) where the trial court was held to have power, in a case where one had been adjudged a sexual psychopath, to order execution of the prison sentence prior to commitment for treatment. This adds further support to the mounting inference that the best interests of the psychopath are of little importance and that the rehabilitative spirit of the legislation is secondary to the goal of his estrangement from society.

term.<sup>108</sup> The abuse of such a procedure, in which the offender may be summarily transferred back and forth between a prison and a hospital, was exposed in *Ex parte Stone*.<sup>109</sup> There the superintendent of the State Hospital had concluded on several occasions that the petitioner was so sexually ill and mentally deranged that neither treatment nor care could be helpful. Therefore, he was returned to the lower court for further disposition in accordance with the statute. However, the prosecuting attorney argued that a jury trial on the criminal offense was no longer practical since the witnesses had scattered and the memory of the chief witness had been weakened by reason of the lapse of time. Five or six times the court ordered the psychopath back to the hospital for as long as he was a menace to the health and safety of others. Finally, after several years of transfers, the court ordered an immediate trial on the criminal charge. In so holding, the tribunal placed paramount importance on the protection of the offender's individual freedoms even though this might contravene the purpose of the statute — the protection of the community:

While it may well be said that where by lapse of time it has become probable that as the result of such a trial the defendant will be acquitted and be entitled to be restored to his liberty while still a menace to society because of his sexual psychopathy, we cannot therefore hold that accused, without ever being granted a trial on the charge against him, and without the imposition of any sentence fixing a term of imprisonment, may be incarcerated for the remainder of his life because he is such a psychopath, or that he may be bounced from the court to the hospital and from the hospital back to the court ad infinitum.<sup>110</sup>

This case furnishes another rare instance of judicial awareness of the rights of the psychopath.

Similarly, the absence of any legislative directives as to the type of treatment to be afforded the psychopath has resulted in another abuse — his placement with the criminally insane. In *Miller v. Overholser*,<sup>111</sup> the defendant was charged with sodomy and taking indecent liberties with a child. Having been found to be a "sexual psychopath" within the terms of the District of Columbia statute, he was confined to Saint Elizabeth Hospital until he sufficiently recovered. After spending some time at the hospital, he petitioned for a writ of habeas corpus and the defendant introduced evidence to the effect that he was being kept with the criminally insane and assaulted by mentally deranged persons in shackles thereby violating the rehabilitative spirit and purpose of the statute. The court sustained his argument noting that widely different methods of care are appropriate for different types of insane persons and that the defendant was actually being confined with the hopeless and violent — "not a place of remedial restriction."<sup>112</sup>

108 See, e.g., D.C. CODE ANN. §22-3510 (1961); FLA. STAT. ANN. §917.12(3) (Supp. 1964); VT. STAT. ANN. tit. 18, §2815 (1959).

109 87 Cal.App.2d 777, 197 P.2d 847 (1948).

110 *Id.* at 850. But see *People v. Thompson*, 102 Cal. App. 183, 227 P.2d 272 (1951).

111 206 F.2d 415 (D.C. Cir. 1953).

112 *Id.* at 419. But see *People v. Barzee*, 213 Cal.App.2d 139, 28 Cal.Rptr. 692 (1963) where it was held that sexual psychopathy proceedings are essentially civil in nature, even though the place provided for custodial care and treatment is on grounds of the state prison.

The difficulties raised by the transfer to a penal institution of a person committed under a civil procedure for treatment faced the Michigan Supreme Court in *In re Maddox*.<sup>113</sup> The issue there was whether a psychopath sentenced to the state prison for an indefinite term was receiving treatment "in an appropriate state institution" within the meaning of the Michigan statute. Several psychiatrists testified that this was the proper treatment for this specific type of adamant violent psychopath, that the prison atmosphere provided regimentation and compelled the self-discipline necessary for the rehabilitation of such a person. The technically civil nature of the commitment notwithstanding, the court reasoned that the petitioner was being imprisoned for life solely on the basis of a medical diagnosis: "We believe that incarceration in the State prison of Southern Michigan cannot constitutionally be based upon either medical diagnosis at a civil commitment proceedings [sic], or administrative decision of the State hospital commission after civil commitment."<sup>114</sup>

Indeed, it seems only reasonable to conclude that confinement which amounts to imprisonment may be ordered only after a trial which is conducted according to the guarantees of personal liberties extended by the Constitution. However, the decisions in *Page*, *Stone*, *Miller* and *Maddox* mark rare exceptions to the traditional drift of the case law which, on the whole, sanctions abusive departures from the procedural guidelines of due process by conveniently depicting the entire proceeding as civil in nature. Only in an exceptionally well documented case, where it is irrefutably shown that the offender is not receiving proper treatment, will a court hold otherwise.

Concomitant with the assumption that these proceedings are of a civil nature is the well settled proposition that the commitment of a sexual psychopath for an indeterminate period and his subsequent trial and conviction of a crime is not violative of the prohibition against double jeopardy.<sup>115</sup> Again prime consideration is focused upon the purpose of the legislation—the protection of society against sexual psychopaths. The fact that one may be committed, in some form or another, twice for the same offense yields to the overriding policy of protection of the public.

While some statutes explicitly grant the right of a jury trial to an alleged psychopath or sex offender,<sup>116</sup> the judicial decisions repeatedly declare that "due process" does not require the extension of this right to a sexual psychopath in a proceeding to ascertain his mental condition.<sup>117</sup> Other courts resort to the pragmatic ratiocination that the right is not a constitutional requirement in such a special statutory proceeding.<sup>118</sup> Similarly it has been held that an alleged sexual psychopath is not entitled to a jury determination of his psychopathy

113 351 Mich. 358, 88 N.W.2d 470 (1958).

114 *Id.* at 370, 88 N.W.2d at 476. Compare the decision *In re Kemmerer*, 309 Mich. 313, 15 N.W.2d 652 (1944), *cert. denied*, 329 U.S. 767 (1946), text accompanying note 94 *supra*.

115 *People v. Levy*, 151 Cal.App.2d 460, 311 P.2d 897, 900 (1957); *Ex parte Keddy*, 105 Cal.App.2d 215, 233 P.2d 159, 161 (1951); *Commonwealth v. Dagle*, 345 Mass. 539, 188 N.E.2d 450, 452 (1963); *Commonwealth v. Ackers*, 343 Mass. 63, 175 N.E.2d 677, 680 (1961). See statutes cited notes 80 and 81 *supra*.

116 See, e.g., D.C. CODE ANN. §22-3508 (1961).

117 *People v. Hymes*, 161 Cal.App.2d 668, 327 P.2d 219, 222 (1958); *People v. Willey*, 128 Cal.App.2d 148, 275 P.2d 522, 524 (1954). *Cf. In re Dowdell*, 169 Mass. 387, 47 N.E. 1033 (1897).

118 *In re Moulton*, 96 N.H. 370, 77 A.2d 26, 28 (1950).

prior to trial on the criminal charge involved; no defendant is entitled, as a matter of right, to have his status as a sexual psychopath determined prior to sentence.<sup>119</sup> This is another instance in which the hapless psychopath has been dispossessed of a fundamental right because the proceeding in which it is asserted is ostensibly "civil" in substance.

Putting aside the discussion of the "civil" nature of psychopathy proceedings and the judicial utterances consequent upon that principle, the power of the state to define and classify sexual psychopaths has been upheld on other grounds. Although indecisiveness and lurking ambiguity checker the various definitions of "psychopath," "serious sex offender," etc., it has been held that such definitions do not deny equal protection of the law since designation of a class of sex offenders in terms of the crimes which they have committed and in terms of mental condition is a reasonable and rational basis of classification. In *State ex rel. Pearson v. Probate Court of Ramsey County*,<sup>120</sup> the petitioner attacked the Minnesota definition of "psychopathic personality" as vague and indefinite thereby constituting invalid legislation. The State Supreme Court had no difficulty in dismissing this contention by concluding that the definition reasonably described and applied a clear and definite standard to a specified class of people:

[T]he act is intended to include those persons who, by a habitual course of misconduct in sexual matters, have evidenced an utter lack of power to control their sexual impulses and who, as a result, are likely to attack or otherwise inflict injury, loss, pain or other evil on the objects of their uncontrolled and uncontrollable desire.<sup>121</sup>

In affirming, the United States Supreme Court felt compelled to construe the statute precisely as the highest court of the state had interpreted it.<sup>122</sup> Similar definitions have been uniformly upheld as furnishing a reasonable and ascertainable standard.<sup>123</sup> That section of the Michigan statute which limits the class of criminal sexual psychopathic persons to those charged with a criminal offense has been held not violative of equal protection as class legislation.<sup>124</sup>

Other alleged abuses of the sexual psychopath's rights which have grown out of the liberally construed framework of this special legislation have taken several particularized forms. One problem relates to the use of information

119 *People v. McCracken*, 39 Cal.2d 336, 246 P.2d 913, 918-19 (1952).

120 205 Minn. 545, 287 N.W. 297 (1939), *aff'd*, 309 U.S. 270 (1940). The present definition is identical:

The term "psychopathic personality," as used in sections 526.09 to 526.11, means the existence in any person of such conditions of emotional instability, or impulsiveness of behavior, or lack of customary standards of good judgment, or failure to appreciate the consequences of his acts, or a combination of any such conditions, as to render such person irresponsible for his conduct with respect to sexual matters and thereby dangerous to other persons. MINN. STAT. ANN. §526.09 (1945).

121 *Id.* at 555, 287 N.W. at 302.

122 *Minnesota ex rel. Pearson v. Probate Court of Ramsey County*, 309 U.S. 270, 273 (1940).

123 *United States ex rel. Gerchman v. Maroney*, 235 F.Supp. 588 (W.D.Pa 1964); *People v. Levy*, 151 Cal.App.2d 460, 311 P.2d 897 (1957). See also *People v. Sims*, 382 Ill. 472, 47 N.E.2d 703 (1943); *Commonwealth v. Ackers*, 343 Mass. 63, 175 N.E.2d 677 (1961).

124 *People v. Chapman*, 301 Mich. 584, 4 N.W.2d 18 (1942); *State v. Wingler*, 25 N.J. 161, 135 A.2d 468 (1957).

obtained during the medical examination of an alleged psychopath in a subsequent proceeding against him. It is again conclusively settled that the privilege against self-incrimination offers no protection against its admissibility to determine his psychopathy in the special hearing so provided.<sup>125</sup> However, it is conceivable that during the course of the psychiatric examination, the defendant may make disclosures which not only reflect his mental condition but which may also disclose past criminal conduct. With awareness of this danger, one court has held that although the defendant may not refuse to submit to the examination, if a disclosure which tends to show a sexually psychopathic condition, cannot be made without simultaneously exposing the defendant to possible criminal liability, the privilege of self-incrimination will protect the defendant from making any disclosure at all.<sup>126</sup> With similar awareness of the overtones of self-incrimination, a few statutes declare that during the personal examination, the alleged psychopath must answer any questions propounded by the psychiatrists under the penalty of contempt of court, but also note that the report filed by the psychiatrists shall not be competent evidence in any other proceeding against the person except in a hearing to ascertain his psychopathy.<sup>127</sup> However, this protection is manifestly inadequate; if the privilege against self-incrimination should be extended to the use of this information in the criminal proceedings growing out of the same offense, why should this protection not also cover the pending psychopathy hearing where unsubstantiated and unproven prior activities may be disclosed which could prove sufficient in themselves to place the offender in confinement indefinitely? Moreover, there is nothing to prevent the use of information acquired through the examination as a basis for a subsequent investigation of past crimes which may result in an ultimate conviction.<sup>128</sup>

125 *People v. Redlich*, 402 Ill. 270, 83 N.E.2d 736, 741 (1949); *State ex rel. Sweezer v. Green*, 360 Mo. 1249, 232 S.W.2d 897, 902 (1950); *In re Moulton*, 96 N.H. 370, 77 A.2d 26, 28 (1950); *In re Miller*, 98 N.H. 107, 95 A.2d 116, 117 (1953). *But see State v. Kirtley*, 327 S.W.2d 166, 168 (Mo. 1959) (proceeding wherein realtor refused to testify during hearing in which judgment creditor sought to examine realtor under oath respecting realtor's ability to satisfy judgment): "Insofar as the Sweezer case limits the availability of the plea of privilege against self-incrimination to a strictly 'criminal case,' as distinguished from a civil proceeding, it is disapproved."

126 *People v. English*, 31 Ill.2d 301, 201 N.E.2d 455, 458-59 (1964). Compare with *State v. Petty*, 32 Nev. 384, 108 Pac. 934, 936 (1910).

127 D.C. CODE ANN. §22-3506(b) (1961); FLA. STAT. ANN. §917.12(2)(c) (Supp. 1964); IND. ANN. STAT. §9-3404(a) (Supp. 1965); MICH. STAT. ANN. §28.967(4) (1954). There exists, however, a possibility that under a statute granting this immunity, a defendant might insure himself against future prosecution by disclosing all past crimes to the doctors. Consequently it has been recommended that the report should always be denied the prosecutor so as to defeat such a broad immunity. See Note, *Constitutional Law—Indiana Sexual Psychopath Statute*, 25 IND. L.J. 186, 188 (1950).

128 However, that such information can be so used runs counter to the spirit of the pronouncements of the Supreme Court in *Counselman v. Hitchcock*, 142 U.S. 547, 563, 585-86 (1892):

It is an ancient principle of the law of evidence, that a witness shall not be compelled, in any proceeding, to make disclosures or to give testimony which will tend to criminate him or subject him to fines, penalties or forfeitures. . . . We are clearly of opinion that no statute which leaves the party or witness subject to prosecution after he answers the criminating question put to him, can have the effect of supplanting the privilege conferred by the Constitution of the United States. . . . In view of the constitutional provision, a statutory enactment, to be valid must afford absolute immunity against future prosecution for the offence to which the question relates.

Extraordinary liberality is extended by the case law to the manner in which the medical examination and accompanying expert testimony may be introduced into evidence at the hearing. That portion of the Pennsylvania statute which denies a defendant the right to examine the psychiatric report, learn of its contents or rebut any statements contained therein, has been upheld as not violative of due process.<sup>129</sup> Although the results of the medical examination are often the sole basis upon which a determination of psychopathy is made, it has been held by the Supreme Court of Nebraska that the testimony of a physician who examined the defendant was admissible at the hearing even though the physician admitted that he had seen a list of the defendant's past violations before he made his examination.<sup>130</sup> In *Commonwealth v. Dagle*<sup>131</sup> it was held that although the examining psychiatrist did not answer unqualifiedly, as the statute required, that if the prisoner were released he would be likely to commit an act of violence or aggression, his testimony that the prisoner would have great difficulty controlling his sexual impulses, which "might" result in violence, was sufficient to preclude his release: "It was not necessary that this witness testify in the precise words of the statute. Careful physicians, by training and experience, are guarded in prognosis."<sup>132</sup> The Illinois Supreme Court has recently construed the Sexually Dangerous Persons Act, which provides for the appointment of two qualified psychiatrists to examine the defendant, not to require that both should testify, and the testimony of one may establish a *prima facie* case in the absence of contradictory reports.<sup>133</sup> In a proceeding to determine whether the defendant was a sexually dangerous person, opinions of examining psychiatrists drawn from a study of records from a correctional institution have been held admissible in Massachusetts although based on hearsay.<sup>134</sup>

The constitutionality of the legislation as a whole has remained intact. It becomes increasingly apparent that the mentally deranged sex offender receives judicial recognition of his personal rights only in the rarest of instances where

129 *United States ex rel. Gerchman v. Maroney*, 235 F.Supp. 588 (W.D.Pa. 1964).

130 *State v. Madary*, 178 Neb. 383, 133 N.W.2d 583, 590 (1965).

131 345 Mass. 539, 188 N.E.2d 450 (1963).

132 *Id.* at 453.

133 *People v. Olmstead*, 32 Ill.2d 306, 205 N.E.2d 625, 629 (1965). *But see* *People v. Wasker*, 353 Mich. 447, 91 N.W.2d 866, 868 (1958), where in similar proceedings it was held error to receive the testimony of three examining psychiatrists, whose evidence had been tainted by their reception of information gained by one of them in his confidential relationship as the defendant's personal psychiatrist.

134 *Commonwealth v. McGruder*, 205 N.E.2d 726, 728 (Mass. 1965). See also *In re Mundy*, 97 N.H. 239, 85 A.2d 371, 375 (1952), where an expert at the hearing to determine the psychopathy of the accused was allowed to relate the substance of reports made by the police and probation departments. The reports contained extra-judicial statements by certain minors purporting to describe conduct on the part of the defendants which prompted the criminal charges. These hearsay statements were relied upon by the witness as a basis for his opinion that the defendants were sexual psychopaths, and the defendants were found not to be entitled to cross-examine these witnesses because of waiver. This result becomes all the more unfair in view of the New Hampshire statute which explicitly relates: "The county attorney shall appear for the examining board and cause witnesses to be subpoenaed, if necessary, in support of the report." N.H. REV. STAT. ANN. §173:5 (repl. vol. 1964). Surely the holding contravenes the legislative scheme. See also *In re Craft*, 99 N.H. 287, 109 A.2d 853, 855 (1954), where the same court found that due process is not denied in requiring a defendant to submit to an examination by a board of medical experts without notice of a right to be heard. "An individual's right of personal liberty is subject to such restriction as is reasonably necessary for the common welfare of society."

he can establish a flagrant constitutional deprivation. Thus where the defendant introduced an affidavit of his brother to the effect that he was a sexual psychopath and the reports of doctors describing him as a homosexual with a predisposition for engaging in indecent acts of a most shocking nature, it was held error to deny him a full hearing on the issue.<sup>135</sup> In *People v. Artinian*,<sup>136</sup> a petition filed by the prosecuting attorney, alleging that the defendant was a criminal sexual psychopathic person, was ruled fatally defective rendering the subsequent proceedings invalid where it contained no allegation of a factual nature tending to show the correctness of such conclusion. Moreover, it has been held prejudicial error and violative of due process in a sexual psychopathy proceeding to admit the confessions of the defendant to a sex murder without a preliminary showing of the voluntary nature of the confession.<sup>137</sup> The Illinois Supreme Court again demonstrated its occasional sensitivity to the rights of the luckless psychopath in *People v. Nastasio*<sup>138</sup> where it found erroneous in a psychopathy proceeding the admission of a deposition taken outside of the presence of the defendant although the defendant had been represented by counsel at the time the deposition was taken. Surprisingly, the court decided that the defendant could be prejudiced by his own absence because his suggestions to his attorney might well prove indispensable for an effective cross-examination.<sup>139</sup>

135 *People v. Barnett*, 27 Cal.2d 649, 166 P.2d 4, 8 (1946). See also *Hobbs v. Cochran*, 143 So.2d 481, 483 (Fla. 1962), where it was ruled that the trial court should have ordered psychiatric examination where the accused sexual deviate pleaded "guilty due to insanity," and the state attorney stated that he knew of no process for a psychiatric examination.

136 320 Mich. 441, 31 N.W.2d 688, 689 (1948). Other courts have imposed various restrictions upon the petition alleging psychopathy. See *State ex rel. Savery v. Criminal Court of Marion County*, 234 Ind. 632, 130 N.E.2d 128 (1955) (proceedings under the sexual psychopath statute are not proper as to a person charged with a crime other than a sex offense); *In re Carter*, 337 Mich. 496, 60 N.W.2d 433, 434 (1953) (prosecuting attorney's petition requesting a psychiatric examination under the sexual psychopath law was insufficient where the petition at most alleged that the plaintiff had been accused of sex crimes on previous occasions but not that he had ever been convicted, or his guilt established); *Wood v. Hansen*, 268 Wis. 165, 66 N.W.2d 722, 723 (1954) (a person convicted of disorderly conduct involving the use of indecent and obscene language is not within the scope of the statute providing for treatment of sex deviates). *But see*, *People v. Holnagel*, 371 Mich. 347, 123 N.W.2d 726, 728 (1963) (defendant's petition alleging that he had had sexual intercourse on some twelve occasions with casual strangers, and abducted and sexually molested a woman entirely unknown to him, was held not to warrant a declaration that he was a criminal psychopath).

137 *People v. Capoldi*, 10 Ill.2d 261, 139 N.E.2d 776, 779 (1957):

[I]t is of little significance that the proceedings are civil in nature. A defendant found to be a sexually dangerous person under the Act is deprived of his liberty as a consequence, and must be accorded the protections of due process in his trial.

See also *Ex parte Keddy*, 105 Cal.App.2d 215, 233 P.2d 159 (1951) (sexual psychopath held entitled as matter of right to release on bail). *But cf.* *People v. Morgan*, 146 Cal.App.2d 722, 304 P.2d 138, 139 (1956) where no violation of the right against self-incrimination or the protection against an unreasonable search and seizure was found to exist when a defendant charged with an infamous crime against nature had been taken in *flagrante delicto* by police and transported to a hospital where the doctor, without objection, took from his private parts fecal matter from which the doctor made smears and slides which were subsequently introduced into evidence. See also *Rochin v. California*, 342 U.S. 165 (1952).

138 19 Ill.2d 524, 168 N.E.2d 728, 731 (1960).

139 *Id.* at 530, 168 N.E.2d at 731. See also *People v. McDonald*, 44 Ill.App.2d 348, 194 N.E.2d 541, 544 (1963): "We conclude from the Supreme Court's expressions in the *Capoldi* and *Nastasio* cases that the provisions of the Sexually Dangerous Persons Act should be afforded the same strict construction as penal statutes." See also *People v. Olmstead*, 32 Ill.2d 306, 205 N.E.2d 625 (1965), where the Illinois Supreme Court concluded that the



In general, the inescapable fact remains that the precedents are uniform and nearly unanimous in upholding the paper validity of these statutes. Although courts strike them down in particular instances where there is an obvious and manifest abuse of the rights of the individual, the recent decision in *Commonwealth v. Peterson*<sup>140</sup> indicates that the courts will nevertheless extend their general approbation even to situations in which there has been a glaring misapplication of discretion. Here a prisoner who had been convicted of assault with a dangerous weapon on a police officer was found not to have been unconstitutionally deprived of his liberty by his confinement to a treatment center for a period up to life as a sexually dangerous person following proceedings initiated by the prison superintendent even though he was not serving a sentence for any sexual offense, had no record of conviction for sexual offenses and there was no evidence of sexual misbehavior while in prison.<sup>141</sup> Thus it is clear that many innocent victims, who because of their illness are unable to legally contest their own rights, are being indiscriminately trampled upon. It must be borne in mind that this legislation has a most sweeping impact and a judicial willingness to conclude that constitutional requirements have been satisfied has far-reaching consequences — a gloomy and hopeless confinement for an extremely long period of time.

#### IV. Sociological and Medical Criticism

There is widespread agreement among medical and sociology experts that the condition of sexual psychopathy or a related psychosis as defined by these special statutes lacks any accurate or sufficient criteria for purposes of an effective psychiatric diagnosis.<sup>142</sup> This naturally stems from the fact that “. . . psychiatrists themselves are in wide disagreement as to the connotations of the term

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right to a trial by jury was available to an indigent defendant applying for discharge on the basis of his recovery. The court significantly remarked:

To hold otherwise would be to permit the State to forever hold in confinement a defendant found to be sexually dangerous at the sole discretion of the officers of the State. The right of the individual, as protected by the provisions of this act, do not so intend.

205 N.E.2d at 630.

140 205 N.E.2d 719 (Mass. 1965).

141 *Id.* at 721.

142 BIGGS, *THE GUILTY MIND* 164 (1st ed. 1955); DAVIDSON, *FORENSIC PSYCHIATRY* 109 (1952); DEPARTMENT OF MENTAL HYGIENE, CALIFORNIA SEXUAL DEVIATION RESEARCH 20 (Final Report, March, 1954) (hereinafter referred to as CALIFORNIA REPORT); ELLIS & BRANCALE, *THE PSYCHOLOGY OF SEX OFFENDERS* 37-41 (1956); GREENACRE, *TRAUMA, GROWTH, AND PERSONALITY* 165 (1st ed. 1952); KERR, *FORENSIC MEDICINE* 212 (6th ed. 1957); NOYES, *MODERN CLINICAL PSYCHIATRY* 504 (1940); PLOGOWE, *SEX AND THE LAW* 228-29 (1st ed. 1951); Apfelberg, Pfeffer and Sugar, *Psychiatric Study of 250 Sex Offenders*, 100 AM. J. PSYCHIATRY 762 (1944); Cason, *The Psychopath and the Psychopathic*, 4 J. CRIM. PSYCHOPATHOLOGY 522 (1943); Cason, *The Symptoms of the Psychopath*, 61 PUBLIC HEALTH REPORTS 1833 (1946); Cavanagh, *Sexual Anomalies and the Law*, 9 CATHOLIC LAW. 4, 28 (1963); Hacker and Frym, *The Sexual Psychopath Act in Practice: A Critical Discussion*, 43 CALIF. L. REV. 766, 772 (1955); Karpman, *The Sexual Psychopath*, 146 J.A.M.A. 721, 722 (1951); Mihm, *A Re-examination of the Validity of Our Sex Psychopath Statutes in the Light of Recent Appeal Cases and Experience*, 44 J. CRIM. L., C. & P.S. 716, 731-32 (1954); Niswander, *Some Aspects of "Sexual Psychopath" Examinations in New Hampshire*, 4 N.H. BAR J. 66, 73-74 (1962); Slough and Schwinn, *The Sexual Psychopath*, 19 U. KAN. CITY L. REV. 131, 138 n. 24 (1951); Slovenko and Super, *The Mentally Disabled, the Law and the Report of the American Bar Foundation*, 47 VA. L. REV. 1366, 1381 (1961); Comment, *Sexual Deviation and the Laws of Ohio*, 20 OHIO ST. L. J. 346, 357

psychopath.<sup>143</sup> The American Psychiatric Association has described a psychopath as

a person whose behavior is predominantly amoral or antisocial and characterized by impulsive irresponsible actions satisfying only immediate or narcissistic interest without concern for obvious and implicit social consequences accompanied by minimal outward evidence of anxiety or guilt. Increasingly considered a poor and inexact term.<sup>144</sup>

The term and the condition described are thus medically inexact and the examining psychiatrist has no intelligible standards by which he may make any scientific conclusions as to whether a person is a psychopath: "The psychiatrists have no diagnostic instruments or criteria by which to arrive at demonstrable conclusions on this question; they are expected to make expert judgments on questions on which neither they nor others are qualified to speak as experts."<sup>145</sup> Because the legislation has no scientific basis, medical science finds itself in a state of bewilderment as to the proper and exact identification of the conduct described in the statutes:

The present state of confusion and disagreement among psychiatric authorities about the large group of conditions known officially as personality pattern disorders makes it impossible for psychiatry to supply the precise, easily applicable definitions and diagnostic criteria needed for the type of sex offender laws now being written.<sup>146</sup>

This confusion of the legislators is evidenced clearly by the highly varied forms into which the statutory definitions have fallen.<sup>147</sup> One court has recognized the *legal* insufficiency of the statutory definition but resorted to a conveniently pragmatic proposition to overlook it:

While the definition of "sexual psychopath" contained in the statute is somewhat general, considering our present knowledge in the field of mental sciences, any specific definition would unduly fetter expansion and experimentation in the field.<sup>148</sup>

The all-inclusiveness which characterizes the statutory definitions has prompted one author to remark:

Most important, sexual psychopath legislation is deficient in that it lacks a scientific foundation. It is fallacious to group biological disorders together simply because they share one symptom. . . . In numerous studies of so-called sex offenders, there is found among them psychopathic person-

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(1959). See generally Note, *The Psychopathic Personality: Treatment and Punishment Alternatives Under Current and Proposed Criminal Responsibility Criteria*, 10 *RUTGERS L. REV.* 425 (1955).

143 TAPPAN, REPORT OF THE NEW JERSEY COMMISSION ON THE HABITUAL SEX OFFENDER 37 (1950) (hereinafter referred to as the NEW JERSEY REPORT).

144 AMERICAN PSYCHIATRIC ASSOCIATION, *PSYCHIATRIC GLOSSARY* 38 (1957).

145 Sutherland, *The Sexual Psychopath Laws*, 40 *J. CRIM. L. & C.* 543, 551-52 (1950).

146 Bowman and Rose, *A Criticism of Current Usage of the Term "Sexual Psychopath,"* 109 *AM. J. PSYCHIATRY* 177, 179 (1952).

147 See statutes cited notes 16-21 *supra*.

148 *People v. Levy*, 151 *Cal.App.2d* 460, 311 *P.2d* 897, 902 (1957).

alities, schizoid personalities, alcoholics, neurotics, schizophrenics, persons with chronic brain damage, mental defectives, and others. Some persons with sexual problems may obtain sexual pleasure by committing arson or by plunging a knife into a woman's back.<sup>149</sup>

If the medical profession is unable to identify the person afflicted by the condition enunciated within the statutory framework, it is absurd to expect a judge to compensate for this miserable failure of the legislature by creating out of thin air a workable diagnostic entity by which the psychiatrically deviated sex offender can be fairly isolated. The court finds itself in a dilemma which it is ill-equipped to resolve and therefore must rely almost exclusively on the recommendation of the examining doctors:

Even though examination skill is not a uniform part of the armamentarium of psychiatrists, and many psychiatrists are really not adept in this area, the law will accept the opinion of the psychiatrist, almost in blind faith. The only real challenge to the expert's opinion is another opinion, so that decisions all too frequently become a matter of numbers, that is, two or three out of three opinions clinches it. The quality of these opinions becomes a secondary matter — the presumption is that all psychiatrists have equal weight.<sup>150</sup>

Hence, innocent and harmless people are often subjected to indeterminate confinement by a legislative distortion in which the blind are leading the blind.

The difficulty in enforcing this legislation is compounded by the fact that there exists no effective program of therapeutic treatment for the mentally abnormal sex offender. Sexual offenders are not given any individual form of intensive psychotherapy,<sup>151</sup> and authorities have decried the deplorable scarcity of adequately trained personnel.<sup>152</sup> Even where facilities may be available, the treatment has been found to be "purely custodial."<sup>153</sup> The inadequacy of treatment has been said to stem from the lack of enough qualified doctors to administer the treatment and the inability of medical science to help the majority of sexual psychopaths.<sup>154</sup> The treatment center in Massachusetts has been described in unflattering terms: "For the treatment of sexually dangerous persons the physical plant is grossly inadequate despite its being well maintained, and this fact is readily acceded to by both the custodial and the mental health staffs."<sup>155</sup> While the sexual psychopath is differentiated from the normal criminal offender, isolated, and subjected to confinement for life on the theory that

149 Slovenko and Phillips, *Psychosexuality and the Criminal Law*, 15 VAND. L. REV. 797, 823 (1962).

150 Meyers, *Psychiatric Examination of the Sexual Psychopath*, 56 J. CRIM. L., & P.S. 27, 27-28 (1965). See generally *Primum non nocere: How to Treat the Criminal Psychopath*, 52 A.B.A.J. 69 (1966).

151 Hacker and Frym, *supra* note 142, at 773. See also, DiFuria and Mees, *Dangerous to be at Large—A Constructive Critique of Washington's Sexual Psychopath Law*, 38 WASH. L. REV. 531 (1963).

152 LINDMAN & MCINTYRE, *THE MENTALLY DISABLED AND THE LAW REPORT OF THE AMERICAN BAR FOUNDATION OF THE RIGHTS OF THE MENTALLY ILL*, 306-08 (1961). See also PLOSCOWE, *op. cit. supra* note 142, at 235-37.

153 NEW JERSEY REPORT 32. See also REPORT OF THE GOVERNOR'S STUDY COMMISSION ON THE DEVIATED CRIMINAL SEX OFFENDER 146 (Michigan, 1951).

154 LINDMAN AND MCINTYRE, *op. cit. supra* note 142, at 307.

155 Tenney, *Sex, Sanity and Stupidity in Massachusetts*, 42 B.U.L. REV. 1, 20 (1962).

he is being "treated" not "punished" the fact that such treatment is actually "nonexistent" in any accurate or meaningful sense of the term, renders this legislation a nullity.

While there is no worthwhile treatment available to the psychopath, it must also be mentioned that it is generally the opinion of experts that confinement or imprisonment does not benefit the dangerous sex offender nor does it operate to deter his sexual abnormalities.<sup>156</sup> Moreover, by placing many sexual deviates together, the legislation actually promotes sexual perversion.

This special legislation is premised upon the notion that most sex offenders who engage in compulsive and repetitive acts of sexual deviation are dangerous and will continue to commit these acts, but investigations show the contrary — there is in fact a low degree of recidivism among sexual offenders.<sup>157</sup> One report has concluded: "Not more than about 5% of convicted sex offenders are dangerous."<sup>158</sup> Nor is there any basis for the common belief that sex criminals engage in crimes of progressive seriousness.<sup>159</sup> The identification of mental illness with the commission of a sexual crime has not been established:

The preponderance of persons who carry out sex offenses for which they are punishable by our current laws are not involved in behavior fundamentally different from that commonplace in the population; such persons are not necessarily to be regarded as suffering with psychiatric disorders or as socially dangerous.<sup>160</sup>

Moreover, it has been shown that jurisdiction under several of these statutes may be gained by a charge or conviction of a "criminal sex offense"<sup>161</sup> by a charge or conviction of "any crime"<sup>162</sup> or even without a charge or conviction of any crime where a person having knowledge has sufficient reason to believe that the person is a sexually dangerous person or a sexual psychopath.<sup>163</sup> Thus many of the statutes fail to differentiate between the serious and the nonserious sex offender with the result that the nuisance type sex offender may face indefinite incarceration:

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156 Bowie and Williamson, *The Sexual Psychopath: An Unsolved Problem in Texas*, 38 TEXAS L. REV. 915, 916 (1960). See generally Tappan, *Some Myths about the Sex Offender*, 19 FED. PROBATION 7 (1955); Wall and Wylie, *Institutional and Post-Institutional Treatment of the Sex Offender*, 2 VAND. L. REV. 47 (1948).

157 GUTTMACHER, SEX OFFENSES 113-14 (1951); CALIFORNIA REPORT 100; LINDMÁN AND MCINTYRE, *op. cit. supra* note 142, at 304; NEW JERSEY REPORT 13-14; Atcheson and Williams, *A Study of Juvenile Sex Offenders*, 111 AM. J. PSYCHIATRY 366, 368-69 (1954); Fahr, *Iowa's New Sexual Psychopath Law—An Experiment Noble in Purpose?* 41 IOWA L. REV. 523, 528 (1956); Hacker and Frym, *supra* note 154, at 771; Slovenko and Phillips, *supra* note 149, at 826 n. 84; Tappan, *Sentences for Sex Criminals*, 42 J. CRIM. L., C. & P.S. 332, 336 (1951); Note, *Criminal Law—Wisconsin's Sexual Deviate Act*, 1954 WIS. L. REV. 324, 327.

158 REPORT OF THE ILLINOIS COMMISSION ON SEX OFFENDERS TO THE SIXTY-EIGHTH GENERAL ASSEMBLY OF THE STATE OF ILLINOIS 11 (1951) (hereinafter referred to as the ILLINOIS REPORT).

159 *Id.* at 11-19. See also GUTTMACHER & WEIHOFEN, PSYCHIATRY AND THE LAW 111-14 (1st ed. 1952); NEW JERSEY REPORT 14.

160 GROUP FOR THE ADVANCEMENT OF PSYCHIATRY, PSYCHIATRICALY DEVIATED SEX OFFENDERS 1 (Report No. 9 Feb., 1950).

161 See statutes cited notes 23-27 *supra*.

162 See statutes cited notes 31-33 *supra*.

163 See statutes cited note 34 *supra*.

The tranvestite, the exhibitionist, the frotteur, the homosexual who masturbates another either in the privacy of his bedroom or in a public toilet, the "peeping tom"—are typical of large numbers of sex offenders who are threatened with long-term incarceration by present sexual psychopath legislation. And what is even worse is that such legislation has not usually been implemented by facilities for treatment. The result is that many nuisance-type, nondangerous sex offenders have been imprisoned for long periods of time, without treatment, in those jurisdictions where such laws have been enforced.<sup>164</sup>

This situation has caused one author to suggest that a better use of the indeterminate sentence could be made by applying it to the armed robber who is more of a public menace than the nondangerous sex offender.<sup>165</sup> Not too far-fetched is this situation which plausibly might result from a strict enforcement of one of these statutes:

A man who stopped his car on a rural road, and who got out in order to urinate, is arrested for open lewdness. No psychiatrist is willing to swear that is *not* a sex psychopath, because that kind of negative diagnosis cannot be proved. The "offender" is then placed in a state hospital, not to be released until he is certified as cured. However, no hospital official can risk issuing a certificate that he will never commit a sex offense for the rest of his life. The net result is life imprisonment (in a hospital, but in confinement none the less) for a man whose only offense was having a full bladder at an inopportune time.<sup>166</sup>

There can be no justification for the indeterminate confinement of a "peeper" or his harmless equivalent to a hospital; protection must be imposed against the infliction of a serious punishment in which liberty and due process are vitally involved.<sup>167</sup> Punishment must remain reasonably commensurate with the act involved. The legislation, as it exists in many jurisdictions, is in large

164 Ploscowe, *Sex Offenses: The American Legal Context*, 25 LAW & CONTEMP. PROB. 217, 223 (1960).

165 Slovenko and Phillips, *supra* note 149, at 823.

166 DAVIDSON, *op. cit. supra* note 142, at 112-13.

167 NEW JERSEY REPORT 33: "Is there any value in providing for diagnosis of a novel category of mental aberration and for commitment to psychiatric hospitals if these patients are then to be held for prolonged periods without receiving any special treatment?" Since the confinement of a harmless offender may depend on the opinions of psychiatrists who are ill equipped to make any accurate diagnosis, one may easily be deprived of his liberty without any well reasoned basis. A report given by a court appointed psychiatrist in Indiana brings this abuse to light:

I examined D at ——— County jail on 3/10/55. His statement to me was as follows:

While sitting on a toilet in the NYC depot at ———, Ind., he fell asleep at 7:30 p.m. He was arrested by NYC police while in the toilet. Three hours later while walking on the streets of ——— he was arrested by the ——— police, taken to the station and under force (by club and fist) forced to sign a confession of his guilt of sodomy.

He said there were no witnesses or no complaint filed to his knowledge and that he was railroaded into signing the paper.

He stated that he was 33 years old, unmarried and not regularly employed. He said he went to school for 12 grades but never went to high school and that he quit school when he was 22 years of age.

His whole story was fantastic and I considered him a chronic liar.

In my opinion there is no cure for this man and he should be sent to prison rather than a hospital for treatment.

Cohen, *Administration of the Criminal Sexual Psychopath Statute in Indiana*, 32 IND. L. J. 450, 461 (1957).

part unenforceable: "Absolute law enforcement would perforce touch about 95% of the total male population."<sup>168</sup>

A final indication of dissatisfaction with this legislation is the infrequency with which it has been applied. Only sixteen persons were committed under the Illinois law during the first ten years following its enactment.<sup>169</sup> From 1949 through 1956, the Indiana statute was applied "very sparingly . . . and not uniformly utilized by the courts."<sup>170</sup> A New Hampshire doctor has reported: Of 161 examinations for commitment, conducted over a period of three years from 1958 through and including 1960, only 12 (7%) of those examined were found to be a "sexual psychopath" within the meaning of the New Hampshire statute and recommended for further treatment. Only 3 (1.7%) were found to be suffering from mental illness and were then committed to the State Hospital for treatment.<sup>171</sup> From 1947 through 1952, only one person had been found to be a sexual psychopath within the meaning of the Massachusetts statute.<sup>172</sup> Discontent with the legislation is unmistakable.

## V. Conclusion

While the advance of medical science into the law is most commendable, it remains the task of the lawmaker to coordinate and organize the available scientific knowledge into his legislative scheme in a fair and meaningful manner. Legal directives must not be framed upon hastily assumed postulates of current science. The legislator must determine with exactness the medical knowledge available for an effective operation of the legislation. The sexual psychopath laws define with elusiveness and vagueness the sexual misbehavior with which they are concerned; the statutes themselves have been shown to be inconsistently and divergently composed, lacking in uniformity and homogeneity. They are consistent only in their effect; one is deprived of personal freedoms and confined indefinitely on the subjective conclusions of unqualified experts who are making their diagnoses without any concrete touchstone, without any point of reference. By attempting to transform what is already an inadequate medical concept into a precise legal definition, the legislators have inextricably meshed mutually opposed elements of treatment and punishment into a maze and confusing labyrinth of uncertainty and obscurity in which an individual presented with an unconfirmed charge of window peeping or indecent exposure may be confined for the rest of his life. By summarily labeling the proceeding as one "civil" in nature, the courts are placing defenseless individuals in a hospital or prison for indeterminate terms. Indeed, the indefinite sentences and the extraordinary discretion which characterize most of the statutes, represent a noble yet futile attempt to compensate for the acute lack of knowledge which surrounds the

168 GROUP FOR THE ADVANCEMENT OF PSYCHIATRY, *PSYCHIATRICALY DEVIATED SEX OFFENDERS 2* (Report No. 9, Feb., 1950).

169 Comment, *The Illinois Proposal to Confine Sexually Dangerous Persons*, 40 J. CRIM. L., C. & P.S. 186, 186-87 (1949).

170 Cohen, *supra* note 167, at 466.

171 Niswander, *supra* note 142, at 73.

172 Curran, *Commitment of the Sex Offender in Massachusetts*, 37 MASS. L. Q. 58, 63 (1952).

sexual psychopath, his motivations, his propensities and his treatment. It becomes increasingly apparent that if the legislation is to satisfy the objections raised by the arguments of due process, equal protection, double jeopardy, etc., it is absolutely imperative that they provide a qualified caliber of personnel and therapy since the courts have consistently given prime consideration to the remedial nature of the legislation. But the treatment has been shown to be grossly inadequate and deficient, the legislation is an operational failure and what is improperly termed "civil treatment" evolves in fact into "punitive imprisonment." A theoretical designation of a statute as "civil" cannot shield its substantive effect; within the context of this legislation, forced hospitalization is forced incarceration.

Whether civil or criminal, the psychopathy hearings are one-sided affairs in which many fundamental constitutional rights are unjustly denied the defendant because of social expediency; society is being protected but at the expense and misfortune of the offender. We must be keenly mindful of the fact that the alleged psychopath may have his liberties curtailed under the provisions of one of these "civil" proceedings even though he may be innocent of the criminal charge raised against him in the information or indictment. Although the *need* for the legislation has been shown to be problematical at best, the fact is that such laws have been passed and must be administered equally and impartially for only if every man is accorded the same protections and liberties can the nourishing spirit of our jurisprudence be sustained. If the law is going to isolate a person, whether it be through a "civil" or "criminal" proceeding, the defendant is entitled to that degree of procedural protection which is commensurate with the penalty to be imposed. While the legislation marks the beginning perhaps of an enlightened solution for a most intricate and challenging problem, this remains a highly objectionable area of law which necessarily demands a meticulous re-examination and re-definition of the existing legal machinery, orientated toward a harmonious coalescence of a progressive science of psychiatry with traditional concepts of substantive due process.

*Michael B. Roche*

#### ADDENDUM

Subsequent to the submission of this note for publication, the United States Court of Appeals for the Third Circuit, in deciding *United States ex rel. Gerchman v. Maroney*,<sup>173</sup> has given expression to several arguments advanced *supra* by reversing the holding in the district court<sup>174</sup> where the petitioner, who had been confined under the Pennsylvania Sex Offender Act for an indefinite period, had been denied a writ of habeas corpus. The opinion of the district court has been cited several times *supra* as authority for the well-established proposition that psychopathy or related proceedings are civil in nature. Thus during a hearing to ascertain whether an individual, convicted of the crime of assault with intent to ravish, was a "person who, if at large, would constitute

<sup>173</sup> No. 15221, 3d Cir., January 11, 1966.

<sup>174</sup> *United States ex rel. Gerchman v. Maroney*, 235 F.Supp. 588 (W.D. Pa. 1964).

a threat of bodily harm to members of the public,<sup>175</sup> the offender was not entitled to the rights of confrontation and cross-examination of witnesses and trial by jury.

In reversing the lower court, the Third Circuit, despite an acute absence of directly applicable precedents, shattered the long standing tradition that such proceedings are civil in nature. In abandoning the customary reference to convenient pragmatics by which such proceedings had been disguised as civil and as rehabilitative or reformatory in nature, the court concluded:

The Act leaves no doubt, both in its language and its purpose, that it is a criminal statute and that what is imposed under its authority is criminal punishment. Its title and its text are replete with language which reveals that the proceeding is penal in nature. It may be invoked only after a precedent conviction of guilty of one of the specified crimes and prescribes a new and radically different punishment. A maximum sentence of life imprisonment is made on the determination by the Pennsylvania Board of Parole that the "interest of justice" so dictates.<sup>176</sup>

In what may well prove to be a landmark decision, the court contrasted the confinement under the Sex Offender Act "for a minimum term of one day and a maximum term of life" with the maximum confinement of five years for the crime of assault with intent to ravish and found the procedure and consequent sentencing not civil but essentially an independent criminal proceeding — a "much enlarged punishment for an essentially independent criminal offense."<sup>177</sup>

Having characterized the proceeding as one "criminal" in nature, the court found no difficulty in logically extending this determination to the interrelated rights of cross-examination and confrontation accorded an accused in a criminal trial. The court reasoned that the petitioner was entitled to a complete judicial hearing at which he must be allowed to cross-examine and confront witnesses against him:

At such a hearing the requirements of due process cannot be satisfied by partial or niggardly procedural protections. A defendant in such a proceeding is entitled to the full panoply of the relevant protections which due process guarantees in state criminal proceedings. He must be afforded all those safeguards which are fundamental rights and essential to a fair trial, including the right to confront and cross-examine the witnesses against him.<sup>178</sup>

By ordering a new trial, the court avoided a conclusive determination of the petitioner's right of trial by jury since it thus refrained from deciding whether the right, as guaranteed by the sixth amendment, is within the ambit of the due process clause of the fourteenth amendment. However, the court left no doubt as to the result if the sixth amendment is applicable to the states: "What we have already said makes it clear that the guarantee of jury trial would apply to a

175 PA. STAT. ANN. tit. 19, §1166 (1964).

176 United States *ex rel.* Gerchman v. Maroney, No. 15221, 3d Cir., January 11, 1966, at 12.

177 *Id.* at 14-15.

178 *Id.* at 17.



Barr-Walker proceeding if the Fourteenth Amendment makes it applicable in state criminal cases.<sup>179</sup>

The court also considered the claim that the Pennsylvania statute was constitutionally invalid on its face not essential to its holding and concluded further that the petitioner would have sufficient opportunity to challenge its constitutional validity in the state courts.

Although the decision marks an enlightened breakthrough, the court did limit its scope by explicitly noting that its rationale would not apply to those statutes which, unlike the Pennsylvania statute, do not require a conviction of a crime as a basis for jurisdiction. Nevertheless, by formulating a well-reasoned and cogent indictment of this exceptional statute and by raising a powerful voice of dissent in the legal maze of vacillation and indifference, this decision may well furnish the point of departure for a closer scrutiny and overdue analysis of related legislation. By its unequivocal characterization of the proceeding as one independently criminal in nature, the decision represents a long-awaited ray of light casting new hope into the gloomy world of the sexual psychopath.

#### APPENDIX

States where special sex-offender legislation is presently in force:

Alabama	ALA. CODE tit. 15, §§434-442 (1959) and (Supp. 1963).
California	CAL. WELFARE & INST'NS CODE §§5500-5522 (1966).
Colorado	COLO. REV. STAT. ANN. §§39-19-1-39-19-10 (1963).
Connecticut	CONN. GEN. STAT. ANN. §§17-244-17-257 (1958) and (Supp. 1964).
District of Columbia	D.C. CODE ANN. §§22-3501-22-3511 (1961).
Florida	FLA. STAT. ANN. §917.12 (Supp. 1964).
Illinois	ILL. ANN. STAT. ch. 38, §§105-1-105-12 (Smith-Hurd 1964).
Indiana	IND. ANN. STAT. §§9-3401-9-3412 (repl. vol. 1956) and (Supp. 1965).
Iowa	IOWA CODE ANN. §§225A.1-225A.15 (Supp. 1964).
Kansas	KAN. GEN. STAT. ANN. §§62-1534-62-1537 (1964).
Massachusetts	MASS. ANN. LAWS ch. 123A, §§1-11 (1965).
Michigan	MICH. STAT. ANN. §§28.967(1)-28.967(9) (1954).
Minnesota	MINN. STAT. ANN. §§526.09-526.11 (1945).
Missouri	MO. ANN. STAT. §§202.700-202.770 (1959).
Nebraska	NEB. REV. STAT. §§29-2901-29-2907 (1964).
New Hampshire	N.H. REV. STAT. ANN. §§173:1-173:16 (repl. vol. 1964).
New Jersey	N.J. STAT. ANN. §§2A:164-3-164-13 (1953) and (Supp. 1964).
Ohio	OHIO REV. CODE ANN. §§2947.24-2947.29 (Page 1954) and (Page Supp. 1964).
Oregon	ORE. REV. STAT. §§137.11-137.19 (Supp. 1963).
Pennsylvania	PA. STAT. ANN. tit. 19, §§1166-1174 (1964).
South Dakota	S.D. CODE §13.1727 (Supp. 1960).
Tennessee	TENN. CODE ANN. §§33-1301-33-1305 (Supp. 1965).
Utah	UTAH CODE ANN. §§77-49-1-77-49-8 (1953) and (Supp. 1965).
Virginia	VA. CODE ANN. §§53-278.2-53-278.3 (repl. vol. 1958).
Vermont	VT. STAT. ANN. tit. 18, §§2811-2816 (1959).
Washington	WASH. REV. CODE ANN. §§71.06.010-71.06.260 (1962).
West Virginia	W.VA. CODE ANN. §§2666-2672 (1961).
Wisconsin	WIS. STAT. ANN. §959.15 (1958) and (Supp. 1965).
Wyoming	WYO. STAT. ANN. §§7-348-7-362 (1957) and (Supp. 1965).

<sup>179</sup> *Id.* at 18; see *Gideon v. Wainwright*, 372 U.S. 335 (1963).