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The Sexual Psychopath

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Mr. X was arrested when twenty-seven years of age on charges involving a seven year old girl, and was sent to a house of correction to serve a ten month sentence. A year later he was again arrested for molesting a young girl and was sentenced to three and one-half years. After his release he was convicted and sentenced to life imprisonment for attacking a nine year old girl. Twenty years later he was paroled, but subsequent to parole was arrested twice on similar sex offenses.

Mr. Y was arrested on charges of indecent and obscene exposure in the presence of a young girl, and on arraignment pled guilty. He was fined three hundred dollars and granted freedom. Under the law, Mr. Y was a misdemeanant and could be punished by imprisonment for not more than one year or by fine not to exceed five hundred dollars. Mr. Y may be fined, he may waste a year of his life in prison, but chances are that he will seek more of the same sexual gratification when released from confinement.

Mr. Z, a high school teacher, was voted most popular instructor by his pupils. He was of superior intelligence, prominent and successful in creative work and in avocations of civic importance. But Mr. Z was by nature homosexual, and on one occasion, when blind to ethical and religious considerations, engaged in sexual relations with a young male student. As would naturally be expected, his moral obliquity was anathema to the school administration and the high school parent; thus Mr. Z was promptly relieved of his position. Consulting a psychiatrist, he was advised to leave the small town in which he lived and take up residence in a large eastern city where he could find many

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contemporaries similarly disposed and of like desires. Mr. Z, armed with unsound advice, packed his bags and sought the natural anonymity which the big city affords. He might have faced a criminal charge of sodomy involving a prison sentence of ten years or less, but the public prosecutor was a busy man, and the certain publicity would have created an embarrassing situation for the victim's family. Even the casual observer can foresee the bitterness and hesitancy which awaits the emotionally insecure Mr. Z.

There is no questioning the fact that Messrs. X, Y, and Z are sex offenders, and as such are a potential menace to society, though there is little of common ground or belief among them. Looking at the cold, hard language of our criminal statutes, one could find a crime and a penalty to fit each case; hence the conclusion that all three are criminals. Following the usual legalistic routine of sentencing in court, each will find his sentence, but once released, the prisoner comes back to society perhaps a greater menace than before his incarceration. Each is a sex offender and has committed a clear-cut definable offense; yet as individuals they are worlds apart. Mr. X is a conspicuous malcontent, he is predatory by instinct, a sexual pervert, and in no sense an asset to society. Mr. Y is not inherently dangerous, in fact, he is more likely to be relegated to the category of a nuisance or something which repels; hence the penalty exacted is not far removed from that meted out for traffic offenses. Mr. Z is certainly not a criminal in the moral sense of the word, and though his conduct is not to be condoned or encouraged, he is not a fit subject for imprisonment or senseless isolation. If properly guided he can and most likely will put his intelligence to work for the greater good of the community.[1]

Ideally, it should be the "offender" and not the "offense" that is brought to focus before the court and the jury. Persons convicted of sex crimes are sentenced to prison for a term of years fixed by penal laws, and so often the terms are woefully short in relation to the gravity of the offense. Added to this is the fact that the judge imposing the sentence is hampered by a maximum upper limit beyond which the period of confinement cannot be continued. Convictions are difficult to obtain because a host of impedimenta rise to haunt the prosecutor when he attempts to marshal his evidence against the accused. The scourge of publicity and the pangs of shame so likely to attach to the commission of a sex offense, make the finding of fact a nightmarish task. Witnesses are shallow and irresolute, forgetful, or purposefully vacant, and more often than not, a juvenile victim will be so rattled and incoherent that it is impossible to procure an intelligible account of the event. As the state must prove its case beyond all reasonable

[1]Three works of fiction present a realistic picture of the plight of the homosexual and lesbian who try to exist in a hostile society. Hall, *The Well of Loneliness* (1929); Niles, *Strange Brother* (1931); Maxwell, *The Folded Leaf* (1945).

doubt, juries are loathe to convict, thus the people are denied protection from the guilty who escape conviction.[2]

Suppose the sex offender is sent to prison for a lengthy term. What guarantee is there that he will leave his confinement imbued with a will to follow a normal course of life? Of course this very same problem exists with respect to the rehabilitation of any criminal, yet the consequences of prison routine are more pronounced in the case of the sex delinquent. Much of the external physical environment in a penitentiary favors the development of sexual abnormalities.[3] Cells are too often overcrowded. Three or more may be in one cell, and wardens do not bother themselves with the problem of providing the prisoner with suitable cellmates. Thus the young delinquent may be put in the same cell with a much older, more practiced offender, and before long the younger of the two must acquiesce to the physical appetite of his elder mate or suffer loss of life or abuse in the alternative. It is easy to understand why the penitentiary has been labeled an "advanced school" for the encouragement and refinement of abnormal sex outlets.

The Need for Legislation

During the first half of our century many sincere psychiatrists, sociologists, and lawyers, sensing the definite need for enlightenment, have devoted much time and thought to these problems. As a state, Massachusetts in 1911[4] was the first to recognize defective delinquents as a separate and distinct class. The statute defines several classes of offenders and a commitment procedure is outlined to meet the problems peculiar to each class. The term of commitment is indefinite, and even the first offender may be committed if the court is of the opinion that the individual has a tendency to recidivism of a serious type.[5] Though the Massachusetts act contains no definition of the term "mental defective", the administrative policy in force has attached a fixed meaning to the phrase. One of the decisive factors in determining mental status

[2]*See Reports of Committees*, 12 Mod. L. Rev. 483, 488 (1949) which offers statistics with relation to the conviction of sex offenders in Great Britain. The Citizens' Committee on the Control of Crime in New York City published a report dealing with the problem of sex offenses in that city. Of 2022 defendants arraigned for trial from July 1, 1937, to December 1, 1938, 808 or 39.9 per cent were convicted. Of the 85 repeaters, 50 were convicted; 46 of these were sentenced to prison, 2 were committed to institutions, and 3 had their sentences suspended. In length, the sentences in many instances followed the characteristic attitudes of the sentencing judges.

[3]Karpman, *Sex Life in Prison*, 38 J. Crim. L. & Criminology 475 (1948).

[4]For general information concerning this early legislation, see Robinson, *Institutions for Defective Delinquents*, 24 J. Crim. L. & Criminology 352 (1933); Glueck, *Psychiatric Examination of Persons Accused of Crime*, 36 Yale L. J. 632 (1926). See also Glueck, *Mental Disorder and Criminal Law* (1925); Mullins, *How Should the Sexual Offender be Dealt With?*, 2 Medico-Legal & Crim. Rev. 236 (1934); Weihofen, *Insanity as a Defense in Criminal Law* (1933).

[5]Mass. Gen. Laws (1932), c. 123, § 113. *See* Overholser, The Massachusetts Procedure Relative to the Sanity of Defendants in Criminal Cases (The Briggs Law).

has been the Binet-Simon test. The examiners have accepted an "intelligence quotient" of .75 (mental age of 12 years) as the dividing line between normal and subnormal. In 1921 New York opened an institution for defective delinquents at Napanoch, thus making a bold attempt to segregate completely those who were not insane and yet not completely within the realm of the normal. Under the New York plan the abnormal is segregated as well as the subnormal, hence the intelligent psychopath will be shifted to the broadening ranks of defective personalities.[6]

Subsequent to the passage of the Massachusetts and New York laws much attention was focused upon the sex delinquent as a particular menace. Authors writing in the popular magazines ground out tons of literature decrying the abominable state of American criminal law administration, pointing up the dire threat posed by sex fiends and killers. It became the fashion of the day to label all sex delinquents "psychopathic personalities", and it was generally felt that thousands of such creatures were on the loose across the country. J. Edgar Hoover attested that the most rapidly increasing type of crime was that perpetrated by the degenerate sex offender.[7] Statisticians have pointed out most balefully that approximately 18,000 women are raped every year in the United States, hence the average citizen is likely to feel that his nation is headed for moral bankruptcy, and is more likely to demand that something concrete be effected by his local representatives to palliate the rude shock wrought by this unsavory publicity.

It cannot be gainsaid that crime, sex and otherwise, is on the increase, just as population is on the increase. At least the modern individual, well supplied by periodicals and digests, has become aware of the fact that morals are not what they were in grandfather's day. Yet this is no time for panic, because even the statistician, unctuous and imposingly arithmetical as he may be, does not disclose the whole truth. It may be true that the law must wrestle with 18,000 cases of rape each year, but it would be absolutely absurd to insist that each of these many criminal acts was perpetrated by a sex degenerate. It should be remembered that rape must be divided into two categories—forcible and statutory—the latter applying to sexual intercourse regardless of force, with a female below the age of consent.[8] During the decade 1930-39 in New York City, only 18 per cent of the rape convictions were forcible rape. It is also well known that charges of forcible rape are often made out without legal justification by some females for the purposes of blackmail, and by others, who have engaged voluntarily in intercourse, yet filed charges to protect their reputations.[9] To add more ambiguity to the statistical jungle, if all cases of statutory rape were actually counted, the annual figures would soar into the millions.

Whether or not the alarm has been justified is not the lawyer's problem. The simple fact is that most people, rightly or wrongly, have become aware of the present inadequacy of the law. This is naturally a prerequisite for bold, sweeping and changing legislation. However, there is a second factor, less publicized and less pronounced, which has added stimulus to the demand for new law: the general inadequacy of the average criminal code as it relates to punishment. Most states have relatively severe penalties after conviction for rape,[10] sodomy,[11] incest,[12] and carnal abuse of children.[13] Much less severe punishment is provided for indecent exposure, lascivious and lewd conduct, and impairment of morals of minors. Thus the penalty clauses encompass both ridiculous extremes, evidencing a hit and miss pattern which has proved a very poor deterrent for the sex delinquent. It is at once apparent that there is little correlation between the penalty exacted and the danger to society threatened by the individual offender.

Of course only a minority of sex deviators are a menace to society in the sense that they are likely to commit inherently dangerous crimes. Not all of the subjects are rapists or sex murderers.[14] There are many, such as homosexuals, exhibitionists, fetishists, and voyeurs, who have no vicious tendencies, who shun disorder and are repelled by thoughts of violence. Yet it is foolish to generalize and label any one class as non-dangerous, because the meekest of homosexuals may present a threat when driven by jealous instincts.[15] Those responsible for administering the criminal codes are at once faced with a dilemna in that stated penalties are either too harsh or too mild, and lack of any prosecution in lesser cases would lead to implied countenance of antisocial behavior. It is the view of some authorities that punishment for homosexual conduct should be abolished when such occurs between responsible adults and practiced with full consent of both parties.[16]

[6] 34A N. Y. CONSOLIDATED LAWS (McKinney Supp. 1938), "Mental Deficiency Laws", §§ 124-126.

[7] J. Edgar Hoover, *How Safe Is Your Daughter?*, American Magazine, 144:32-33 July, 1947. David G. Wittels, *What Can We Do About Sex Crimes?*, Sat .Eve. Post 221:30 December 11, 1948. F. C. Waldrup, *Murder as a Sex Practice*, Amer. Mercury 66:144-158, February, 1948. *Homosexuals in Uniform*, Newsweek, 29:54, June 9, 1947.

[8] The age of consent is generally 16-18 years.

[9] Sutherland, *Sexual Psychopath*, 40 J. Crim. L. & Criminology 543 (1950).

[10] NORTH CAROLINA CODE ANN. § 4204 (death); MO. REV. STAT. (1949) § 559.260 (death or imprisonment for not less than 2 years); KAN. G. S. (1949) 21-424 (5-21 years); N. Y. Penal Law § 2010 (1-20 years).

[11] MO. REV. STAT. (1949) § 563.230 (not less than 2 years); KAN. G. S. (1949) 21-907 (not exceeding 10 years); N. Y. Penal Law § 690 (not exceeding 20 years).

[12] MO. REV. STAT. (1949) § 563.220 (not exceeding 7 years); KAN. G. S. (1949) 21-906 (not exceeding 7 years); N. Y. PENAL LAW § 1110 (not exceeding 10 years).

[13] CALIF. PENAL CODE § 288 (1 year-life).

[14] A tabulation has been made of all cases of murders of females reported in the New York Times during three different years. In the three years (1930, 1935, 1940) 324 females were reported to have been murdered, and only 17 of these cases were reported as involving rape or suspicion of rape. Of the 324 murders of females, 102 were reported to have been committed by husbands of the victims, 37 by fathers, or other close relatives. These figures would indicate that the number of sex killers is anything but forbidding.

[15] Krafft-Ebing, Psychopathia Sexualis (1901) 547, case No. 204.

[16] *See* 12 Modern Law Review 483, 849 (1949).

A prison sentence would be futile in this instance; however it appears equally pointless to obliterate all censure when there is nearly total agreement that the type of conduct mentioned is distinctly aberrational.

The conclusion must be reached that sex offenders are not deterrable by punishment, and it is equally true that complete condonation will only aggravate the weakness. Some have voiced the opinion that the so-called sexual psychopath always commits his offense in hiding because of fear of detection and punishment, hence he is deterrable. Nevertheless this argument seems fallacious when one considers the fact that most sexual acts are by nature private and unpublished. On the other hand the exhibitionist commits his offenses in public where he is almost certain to be observed, and just as certain to be apprehended and punished.

Realizing the glaring inadequacies in the modern penal sanction, and jostled by public pressure and emotion, a rash of spirited legislation has appeared on the legal market, aimed at halting the moral decline. Massachusetts and New York had set strong examples, but the initial features of these laws left much to the imagination, and little of the specific was enacted with reference to the sex offender. With the public appetite whetted, and law makers alive to the challenge, the psychiatrist and his legion of classifications has at last been afforded a top priority on the legislative scene. The psychiatrists have long recognized that a large segment of the criminal population was neither insane nor sane by usual standards. So in between the extremes of mental capacity they have fashioned an intermediate group, the psychopathic personalities, who have lately been recognized as the pawns of an ill equipped society. These facts disclosed, it has become the task of the lawyer as well, to understand not only the psychopath, but how to regulate his sins without penalizing him unduly.

Recent Legislation and the Sexual Psychopath

Following the example of several other states, the Missouri legislature has passed an emergency measure designed to cope with the sexual psychopath and his instincts.[17] This legislation, introduced in the 1949 session, became law on August 1, 1949, and with minor variations is very similar in scope to the provisions already enacted in these other jurisdictions.[18] Apparently recognizing that the sexual

[17]Mo. Rev. Stat. (1949) §§ 202.700-202.770. See also Mo. Rev. Stat. Ann. (1949) §§ 9359.2-9359.9.

[18]Similar Statutes: Cal. Civ. Code (Deering 1941) §§ 5501, 5503-5511, 5512.5, 5513 (Supp. 1947) §§ 5500, 5502, 5502.5, 5512, 5514-4416; Note, 1 Stan. L. Rev. 486 (1949); 80th Cong. 2d Sess., U.S.C. Cong. Service 362-364 (1948); Ill. Ann. Stat. (Smith-Hurd, Supp. 1948) c. 38. §§ 820-825. Notes 39 Col. L. Rev. 534 (1939), 40 J. Crim. L. & Criminology 186 (1950); Ind. Stat. Ann. (Burns 1949) §§ 9-3401-3410; 25 Ind. L. J. 186 (1950); Mass. Ann. Laws (Supp. 1948) c. 123a, §§ 1-6; Mich. Stat. Ann. (Henderson, Supp. 1949) §§ 28.967 (1)-28.967(9); Minn. Stat. (Henderson, 1945) §§ 526.09-526.11; 32 J. Crim. L. & Criminology 196 (1941); Rev. Stat. Nebraska (Supp. 1949) 29-2901-29-2907; N. J. Stat. Ann. (Supp. 1949) §§ 2:192-1.4 to 2:192-1.12; Ohio Gen. Code Ann. (Page, 1949) §§ 13451-19 to 13451-22; Wash. Rev. Stat. Ann. (Remington, Supp. 1947) §§ 2252-10-2252-15; Wis. Stat. (Brossard, 1947) § 51.37.

psychopath is not deterrable, these laws are based on the premise that persons who commit such crimes have no control over their sexual impulses and are destined to repeat their crimes again and again regardless of punishment and unfortunate consequences.[19]

The Missouri statute defines the sexual psychopath as a person suffering from a mental disorder and not insane nor feeble minded, and further stipulates that such mental disorder must have existed for a period of not less than one year prior to the filing of the petition for commitment. In addition, the person so described must have criminal propensities to the commission of sex offenses and be considered dangerous to others.[20] This definition, though general in scope, can be upheld on constitutional grounds because it does provide a reasonable ground for classification.[21] Nevertheless it would not be reasonable to apply the provisions of the statute to every person guilty of a sexual offense, not even to all persons who have strong sexual propensities. Such an application would make the act very cumbersome to enforce and would inevitably be objectionable on constitutional grounds.[22]

Psychiatrists and neurologists are not agreed as to what constitutes a sexual psychopathic personality, hence any definition is subject to

[19]Although current literature of psychiatry strongly indicates that the sex criminal has a high rate of recidivism, figures do not invariable support this conclusion. According to reports by the Federal Bureau of Investigation on twenty-five different types of crimes, it was noted that drug addicts had the largest proportion of previous convictions and stand first in recidivism in the list of twenty-five crimes. Larceny was second, vagrancy third, drunkenness fourth, and burglary fifth. Rape stood nineteenth, near the bottom of the list, and "other sex offenses" tied for seventeenth place. For a general discussion, critical of sexual psychopath laws, see Sutherland, *The Sexual Psychopath Laws*, 40 J. Crim. L. & Criminology 543 (1950).

[20]Mo. Rev. Stat. (1949) § 202.700; Mo. Rev. Stat. Ann. (Supp. 1949) § 9359.2.

[21]The laws which have been enacted regarding sexual psychopathics usually contain two elements in their definitions of the psychopath. The first of these is an overt act (which is referred to as "propensity to sex offenses" in the Missouri statutes) and the second is a particular state of mind. The mental state is variously defined. Minnesota defines the psychopath more comprehensively as meaning "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." The District of Columbia defines it more simply as "a lack of power to control sexual impulses." The definition chosen by the Missouri legislature is in substance that of Illinois and was held constitutional by the Supreme Court of the latter state in People v. Sims, 382 Ill. 472, 47 N.E.2d 703 (1943). It seems to be the concensus of judicial opinion that such classification is a valid exercise of police power because it is essentially an application of social control where the need is greatest, thus even some inequality as a result is pardonable.

[22]This theme was ably brought out by the United States Supreme Court in State of Minnesota v. Probate Court of Ramsey County, 309 U.S. 270 (1940) when it upheld the provisions of the Minnesota statute. Mr. Chief Justice Hughes in writing the opinion of the court states: "As we have often said, the legislature is free to recognize degrees of harm, and it may confine its restrictions to those classes of cases where the need is deemed to be the clearest. If the law presumably hits the evil where it is most felt, it is not to be overthrown because there are other instances to which it might have been applied. Miller v. Watson, 236 U.S. 373, 384, 35 S. Ct. 342, 344 . . ."

criticism. Yet there is general uniformity of belief that the psychopath as a person is abnormal emotionally and unable to conform to the demands of conventional routine. He is not considered psychotic, thus does not come within the jurisdiction of the law governing commitment to insane hospitals. He is often very difficult to deal with and may cause great distress to those associated with him, either through family or business relationship.[23] He may have high intelligence, yet still seems unable to develop emotionally. Inability to learn by experience is one of his fundamental characteristics. Such ordinary emotions as love, hate, mercy, pity, and grief are in a considerable degree disassociated from his thoughts, thus once an habitual manner of gratifying an urge is acquired, it will be continued with small regard for the consequences.[24]

Examining the characteristics of our subjects, Mr. X, Mr. Y, and Mr. Z, it would be at once apparent that Mr. X would fall within the class of personality defined by statute. His sexually motivated behavior renders him a potentially dangerous individual capable of almost any degree of crime. If a true sadistic pedophile[25] he will employ the most brutal tactics to achieve gratification of his desires, and his uncontrolled impulses will inevitably lead to violence. If confined to prison for a term of years he will likely spend years brooding over his fate, and upon release will be more powerfully driven by impulse than he was before the sentence. He is a definite recidivist who cannot appreciate the consequence of his behavior; therefore, a period of commitment, as provided for by statute[26] is the best insurance society can buy.

Mr. Y, undoubtedly a milder person, is a borderline case. It would be useless to generalize and state that all persons of his class are innocuous or not a potential threat. As will be noted in further dis-

[23] There are many types of psychopathic personalities. Among the several classifications are the schizoid type, the paranoid type, the cyclothymic type, the drug addict, the explosive type, and the sexual type.

[24] The vagueness of the term "psychopath" is illustrated by the fact that under the administration of one psychiatrist in the Illinois State Prison, 98 per cent of the inmates were diagnosed as psychopathic personalities, while in similar institutions, psychiatrists have come to the conclusion that not more than 5 per cent belong to this class. Of the sex delinquents diagnosed by the Psychiatric Clinic of the Court of General Sessions in New York City, 15.8 per cent were reported to be psychopathic, while of sex offenders diagnosed by psychiatrists in Bellvue Hospital, New York City, 52.9 per cent were found to be psychopathic. Certain psychiatrists regard almost all crimes as sex crimes; even theft, through its connection with the Oedipus Complex, is regarded as symbolic incest. None of the sexual psychopathic laws can be construed, however, as giving credence to this expansive concept.

[25] In the condition known as sadistic pedophilia, the individual seeks out children or young adolescents as his victims to gratify a sadistic impulse and to satisfy his sexual desires. The younger pedophile is to be regarded with caution; he may be heterosexual, homosexual, or of bisexual nature. In this type of person we find the rapist and the lust murderer. Many of the pedophiles have the accompanying perversions of fetishism, uroglania, and koprolagnia. The anal-sadistic element enters into the psychopathic nature of these individuals through acts of fellatio. Some of the most brutal murders are committed by the sadistic pedophile. For a very comprehensive description of this type of criminal, see de River, *The Sexual Criminal* (1949), pp. 75-86.

[26] To be discussed *infra* note 59 re commitment.

cussion of the law, his type could very well be subjected to the scrutiny of the court and its advisers, and commited, should medical treatment be considered advantageous. He may be deprived of freedom for an appreciable time, thus suffer the outrages of a disease not self imposed. Nevertheless, a period of institutional confinement is far preferable to a series of meaningless jail sentences and fines.

Mr. Z is probably without the realm of the legislator's intent. He is definitely not dangerous in the sense that society will suffer undue physical harm from his behavior. It goes without saying that the community will suffer moral hurt as a result of his activity if in any degree pronounced, and any proselytizing on his part will raise the ire of his more fortunate contemporaries. But he cannot be classified as psychopathic; he does appreciate consequences, and in summing up his attributes, he apparently is a greater asset to society than a detriment. He needs guidance, but not commitment under the offices of a law designed to meet the inadequacies of the criminal psychopath.

That part of the Missouri definition which requires that the mental disorder exist for a period of not less than one year prior to filing charges is no doubt taking account of the repetitious nature of the subject crime; however it is submitted that the inclusion of this condition will eventually destroy the effectiveness of the legislative effort. After more than a decade of experience in Illinois, most prosecutors in that state have been forced to the conclusion that the requirement is much too rigid and unrealistic.[27] Combined with the requirement that the prosecution must prove that the individual has definite criminal propensities, this section calls for shelving of the commitment plan. As a result, in Illinois, the law was used sparingly, only sixteen persons having been confined in a ten year period subsequent to its adoption. The number of cases under the Minnesota law decreased from about thirty-five in the first year after its enactment to about ten at the end of a ten year period; moreover most of those confined were homosexuals who were generally released after a few months of treatment.[28]

Enforcement Procedure

Under the Missouri law[29] when any person is *charged with a criminal offense* and it shall appear to the prosecuting or circuit attorney that such person is a criminal sexual psychopath, then the prosecuting or circuit attorney shall file with the clerk of court wherein such person stands charged of the criminal offense, a petition in writing setting

[27] Seeking to remedy the administrative difficulties presented by enforcement of the 1938 Illinois Statute, the Committee on Criminal Law of the Chicago Bar Association has proposed a revised law to deal with the sexually dangerous. In this proposal the necessity of the existence of a mental disorder for a year's duration has been stricken. Under the Indiana, California, and Minnesota Statutes, first offenders as well as recidivists may be committed.

[28] Minnesota, Annual Reports of Bureau of Criminal Apprehension.

[29] Mo. Rev. Stat. (1949) § 202.710.

forth facts tending to show that the person named is a criminal sexual psychopath. The act further provides that when any reputable person having knowledge that an individual so charged is a criminal sexual psychopath so informs the prosecuting or county attorney of such facts, the prosecuting or circuit attorney shall, if satisfied that the allegations have merit, prepare a petition verified upon his information and belief.[30] Even a cursory reading of this section indicates that the legislators intended that only a responsible individual would have discretion as to the filing of a petition. Added to this safeguard is the further requirement that the individual under consideration be charged with a criminal offense, a provision written into the law to prevent abuse by unscrupulous relatives and blackmailers. Without any such restriction, the petition for commitment would be a powerful weapon in the hands of an enemy, corresponding to an ill so often found in poorly drafted compulsory sterilization measures. In Nebraska the alleged sexual psychopath need not be charged with a crime. Proceedings may be begun on the basis of facts brought to the prosecuting attorney, who will in turn decide whether facts presented relate to "an habitual course of misconduct in sexual matters."[31] Nor is the criminal charge a condition precedent in the District of Columbia, Massachusetts, Minnesota, and Wisconsin.

Once the petition has been filed in Missouri, a copy shall be served personally upon the person charged and notice in writing given him that a hearing will be held by the court on a date and at a time specified in the notice, this date of hearing not to be less than twenty days later than the date of service of the notice.[32] Upon the hearing, if prima facie proof of the criminal propensities be made, the court shall appoint two qualified physicians to make an examination of the person charged or shall request the director of the division of mental diseases to designate two members of the medical staff of any state mental hospital

[30] Compare this section with similar requirements in the recently enacted Indiana law, IND. STAT. ANN. (Burns Supp. 1949) which reads: "When any person is charged with a criminal offense except the crime of murder or manslaughter, or rape on a female child under the age of twelve or has been convicted of or has pleaded guilty to such offense and has been placed on probation, or has been convicted or pleaded guilty to such offense but has not yet been sentenced, and it shall appear that such person is a criminal sexual psychopathic person, then the prosecuting attorney of such county, or someone on behalf of the person charged, may file with the clerk of the court in the same proceeding wherein such person stands charged with, or has been convicted of, or has plead guilty to, such criminal offense, a statement in writing setting forth facts tending to show that such person is a criminal psychopathic person." Note that the prosecuting attorney *or* someone on behalf of the person charged may file the petition, whereas the Missouri law permits only the attorney to file. In both statutes it is essential that the person be *charged* with an offense as a prerequisite to institution of commitment proceedings. Under the Indiana, California, and Minnesota statutes, first offenders as well as recidivists may be committed. Some states require prior conviction of sex offenses, and as indicated in the Missouri law, proof of the continued existence of such condition for a period of time is a prerequisite. It may be said that proof of prior conviction is an important aid to the court in determining the defendant's mental state, but such a requirement seems ancillary rather than essential to a determination of the question.

[31] Neb. Laws (1949) c. 294.

[32] Mo. REV. STAT. (1949) § 202.720(1).

to make such examination.[33] Most statutes of this type have incorporated similar provisions for medical examination by two physicians who shall submit reports of their finding and conclusions. Usually any licensed physician is considered competent to make such an examination, though as a practical matter he may lack the experience necessary to thoroughly analyze this type of offender.[34] Judges in Indiana have already commented upon the scarcity of competent examiners, especially in smaller communities.[35] In Illinois, the statute provides for examination by two psychiatrists, however the Chicago Bar Association's suggested revision calls for additional requirements for examining psychiatrists to insure appointment of skilled men and to reduce the chances of judicial appointments based on patronage. It might also be feasible to provide for a permanent psychiatric board to examine the individual cases or at least supervise the appointment of qualified examiners. Continuity in personnel of the examiners would make it possible for a group of individuals to specialize in the study of sex offenses, to improve scientific and procedural methods of examination, and develop understanding of the nature of the mental disorders encompassed by the statute.[36] If the Missouri law had made selection of a qualified psychiatrist mandatory instead of permissive, the procedure would have been about as workable as any suggested to this date.

When the medical examination is called for it shall be made in the county in which the proceedings are pending or in the county of residence of the person to be examined, the court fixing the time, date, and place of examination. The report of such examination shall be in writing and filed as a part of the court record; however, it shall not be open to public inspection. If the court is not satisfied that there is prima facie proof of the criminal propensities for the commission of sex offenses, or if the report of at least one of the examining physicians does not establish the fact of a mental disorder of such nature, then the court shall dismiss the petition.[37] On the other hand, if prima facie proof is made to the court and if the report of one of the examining physicians does establish the fact of a mental disorder,

[33] Mo. REV. STAT. (1949) § 202.720(2).

[34] Indiana requires only two qualified physicians. Nebraska requires not only that the physician be licensed to practice medicine and surgery, but that he possess in addition two years of special training in mental diseases. In State of Minnesota v. Probate Court of Ramsey County, 309 U.S. 270 (1940), the court was of the opinion that any argument to the effect that these doctors were not sufficiently expert would only invite conjecture. Thus it was their conclusion that qualified medical men are usually available.

[35] See Indianapolis Star, Nov. 23, 1949, p. 1, col. 5.

[36] See note, 39 Col. L. Rev. 534 (1939).

[37] Mo. REV. STAT. (1949) § 202.720(3). This provision is more liberal than those appearing in other statutes. For example, the Indiana law requires that *both* physicians state their conclusions to the effect that the person is a sexual psychopathic. The Nebraska law merely provides that if such physicians (two) find that such person is not a sexual psychopathic, the proceedings shall be dismissed. This section, more vague than the Missouri counterpart, does not indicate what the result shall be, should the physicians disagree.

then the court shall order a hearing to be held on the petition, twenty days written notice to be served on the person charged. The judge may at his discretion, and at the request of the person charged, provide for the determination of the issue of criminal sexual psychopathy by a jury.[38] There is a definite trend toward the permissive use of the jury, and like arrangements are made in the California, Michigan, and Wisconsin statutes. The Illinois law makes the use of a jury mandatory, but the Chicago Bar Association revision recommends that the party charged may demand a jury of six persons and may further summon witnesses in his own behalf. Minnesota and Ohio make no provisions for jury participation in the hearings; in Massachusetts the use of the jury is discretionary with the court. In effect, the Missouri statute is a combination of the permissive and the Massachusetts rule of judicial discretion. The Indiana act provides that the hearings shall be conducted by the court without a jury. The age old criticism of the juror's deciding a technical problem is forever present, and there is a certain amount of truth to the contention that a jury may be reluctant to commit one accused of a sordid sex offense, allowing him to escape with comparatively light punishment. In the reverse instance, the jury may be loath to convict one who has been charged with a trivial offense to what may appear to be an indefinite period of confinement. And it should also be considered that lack of jury trial will not necessarily give rise to serious constitutional objections.[39]

At the hearing, the examining physicians appointed or designated by the court may testify as to their examination of the person charged and the results obtained; but the reports filed in court shall not be admissible in evidence against the person charged. The person charged shall be entitled to counsel and have the right to present evidence in his behalf. As a natural corollary of this right it would seem plausible that counsel would have the further right to cross-examine the physicians, though the statute is silent on this point. Since the psychiatrists appointed to make the examination are qualified to give opinion testimony, it is only logical that they should apprise the alleged sexual psychopathic of the facts on which their determination is based so that he may defend himself.[40] In addition, the right to cross-examination and testimony of other witnesses will require the experts to justify their positions.[41]

Self Incrimination

There is no question but that administration of the early sexual psychopath laws was a tedious task in light of the constitutional prohibitions against self incrimination. Defense attorneys were quick to block

[38] Mo. Rev. Stat. (1949) § 202.720(4).
[39] See note 81 *infra*.
[40] People v. Artinian, 320 Mich. 441, 31 N.W.2d 688 (1948).
[41] 3 Wigmore, Evidence §§ 991, 992 (3d ed. 1940); 7 Wigmore, *op. cit.* § 1984.

the full effect of the proceedings by advising their clients to refuse to talk to the psychiatrists. Without such discussion the psychiatrist was unable to make any diagnosis and could go no further.

In *State* ex rel. *Sweezer* v. *Green*,[42] it was held that the Missouri Act, in authorizing a medical examination, did not violate the constitutional inhibition that "no person shall be compelled to testify against himself in a criminal cause" for the reason that the constitutional provision applies only in a criminal cause, whereas the proceeding under the Act is merely a civil inquest as to the individual's mental condition and sex deviation. However, even if the proceeding under the Missouri Act were deemed criminal in nature, the provision to the effect that the examiner's report cannot be used in evidence against the person charged, would dispose of most fears with respect to self incrimination. In analogous proceedings, similar grants of immunity have been upheld and the witness compelled to disclose incriminating information.[43] Should the individual charged refuse to testify or give evidence, the court would have the power to insist that he speak under penalty of contempt of court. The Indiana legislature foreseeing such an impasse specifically strengthened its law with a provision that "the alleged psychopath shall be required to answer the questions propounded by such physicians under penalty of contempt of court."[44] Compulsory examination provisions are written into the Illinois and Michigan sexual psychopathic statutes, and despite the fact that these statutes have made no express provision for immunity, the provisions have been sustained as not being within the scope of constitutional prohibition.[45] The situation here is much akin to that presented in insanity hearings wherein the defendant has introduced the defense of insanity, and there is sufficient authority rejecting the defendant's

[42] —Mo.—, 232 S.W.2d 897 (1950).
[43] United States v. Weinberg, 65 F.2d 394, 395 (2d Cir., 1933), noted in 34 Col. L. Rev. 173 (1934). See Rapacz, *Rules Governing the Allowance of the Privilege Against Self Incrimination*, 19 Minn. L. Rev. 426 (1925); 8 Wigmore, Evidence (3d ed. 1940) § 2271; American Law Institute Code of Evidence, Rule 202.
[44] Ind. Stat. Ann. (Burns Supp. 1949) § 9-3404; In 40 J. Crim. L. & Criminology 186 (1949), the author raises the possibility that a broad grant of immunity, such as provided for in the Indiana and Missouri statutes, would encourage sex offenders to confess all their past offenses during the psychiatric examination, thus insuring themselves immunity from subsequent prosecution. See note, 25 Ind. L. J. 188 (1950) wherein the following suggestion has been made relative to the problem: "To obviate this difficulty a specific provision might be inserted in the statute ordering the examiners not to turn over any specific data or facts, such as times, dates, places, names, etc., obtained in the interview to the prosecution. As long as the prosecutors are denied access to such incriminating data, the policy of the privilege, to prevent the use of information obtained during the examination in subsequent criminal proceedings against the accused, would be satisfied, and the objectionable use of the privilege avoided." Another alternative is that of a Wisconsin statute, Wis. Stat. (1947) § 357.12 (2), providing that, "no testimony regarding the mental condition of the accused shall be received from witnesses summoned by the accused until the expert witnesses summoned by the prosecution have been given an opportunity to examine and observe the accused if such an opportunity shall have been seasonably demanded." This statute has expressly been held constitutional by the Wisconsin Supreme Court in Jessner v. State, 202 Wis. 184, 231 N.W. 634 (1930).
[45] People v. Redlich, 402 Ill. 270, 83 N.E.2d 736 (1949); People v. Chapman, 301 Mich. 584, 4 N.W.2d 18 (1943).

contention of privilege to exclude evidence in these cases.[46] The recently revised Illinois Mental Health Act[47] provides in Section 6(1) that the "Court shall have the power and authority to compel the person alleged to be mentally ill or in need of mental treatment to submit to examination by the physician so appointed by the court." To this date the provision has not been attacked by any person whose sanity has been in question, which is indicative of the lack of disturbance in insanity hearings over the problem of self incrimination.

The Missouri law further provides that evidence of past acts of sexual deviation by the person charged may be admissible at the hearing.[48] If it were not for the fact that the law also provides that the physicians' reports are not to be admissible in evidence against the person charged, this feature would be totally objectionable as being self incriminatory in nature. The privilege against self incrimination very emphatically extends to any facts which tend to incriminate,[49] and by questioning an individual, the physician is very likely to uncover evidence of prior criminal offenses. Though considered vital information for the medical expert in formulating his opinion as to the existence or non-existence of phychopathic tendencies, this evidence would be damaging in the hands of the prosecutor in a subsequent trial of the cause, and might very well lead to conviction of the individual for any past crimes he may have committed. However, under the Missouri law the reports of the examiners should at most be considered advisory, and thus submitted only for the court's guidance.[50] A comparable provision in the Illinois statute was held to apply only to such crimes as tend to show a sexual psychopathic condition since this was the obvious legislative intent. Further, the Illinois court has held that since the commitment proceeding was not criminal in nature, the person charged was not entitled to a trial free from evidence of prior convictions.[51]

[46] State v. Coleman, 96 W. Va. 544, 123 S.E. 580 (1924); State v. Chandler, 126 S.C. 149, 119 S.E. 774 (1923); Noelke v. State, 214 Ind. 427, 15 N.E.2d 950 (1938). See Weihofen, *Insanity as a Defense in Criminal Law,* (1933) pp. 216-218.

[47] ILL. REV. STAT. (1947) c. 91½, §§ 1-16.

[48] MO. REV. STAT. (1949) § 202.720 (4).

[49] 8 WIGMORE, EVIDENCE (3d ed. 1940) §§ 2260, 2261; Counselman v. Hitchcock, 142 U.S. 547 (1891). From the standpoint of relevancy, however, most courts have been quite liberal in admitting evidence of other sex crimes as indicative of the fact that the defendant is more likely to be guilty of the offense for which he is being held. In such cases it is argued that proof of prior and subsequent acts is admissible to show a lustful disposition, thee xistence and continuance of illicit relations. *See* note, 17 Kansas Bar Journal 253 (1949).

[50] Where the jury form of trial has been preserved (in Missouri the person charged may request jury consideration of the issue) in commitment proceedings, some courts hold the appointment of physicians to examine the person charged void as prejudicing the jury in favor of testimony given by the court appointed examiners. People v. Scott, 326 Ill. 327, 157 N.E. 247 (1927). *Contra,* Jessner v. State, 202 Wis. 194, 231 N.W. 634 (1930).

[51] People v. Sims, 382 Ill. 472, 47 N.E.2d 703 (1943). See State *ex rel.* Sweezer v. Green, —Mo.—, 232 S.W.2d 897 (1950), wherein the court upholds the Missouri law as not violating Section 19 of Article I of the Missouri Constitution in the matter of self-incrimination.

Commitment

There has been another conflict in sex offender legislation, and that revolves about the issue of ultimate criminal responsibility of the individual committed to a state institution as a sexual psychopath. If the individual has been convicted of a sex offense immediately prior to his commitment, or if he faces trial and conviction as soon as he is released from the mental hospital, it is argued that he will have little incentive to reform, knowing that he will start a prison term immediately upon release.[52] Michigan was the first state to give full credence to this postulate and regarded commitment as a psychopath a complete defense to the crime for which the individual was accused at the time of filing of the petition.[53] The Indiana statute asserts that "No person who is found to be . . . a criminal sexual psychopathic . . . 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."[54]

Most state statutes on the other hand provide that mere commitment is not a sufficient defense to criminal prosecution, and so the person charged is very likely to face criminal prosecution upon release from the mental institution.[55] This attitude is definitely reflected in the Missouri statute which states that a finding of criminal sexual psychopathy under the provisions of the law shall not constitute a defense in any criminal action.[56] As a compromise solution, the new Illinois proposal[57] grants discretion to the trial judge to consider the time spent in confinement when setting the sentence for past convictions. Another effort to anneal the effect of a long prison sentence is seen in the Ohio law under which the individual is sent to a penal institution after his release from the mental hospital until the total period of confinement equals the applicable criminal sentence. Either attempt at compromise is to be preferred to the Missouri provision, as it is quite apparent that the latter will in large measure nullify the advantages to be gained from medical treatment. New Jersey has decreed that the maximum confinement in a mental hospital is the length of the subject's sentence for his offense, and the Nebraska legislature has made no pronouncement on the matter, leaving all to conjecture.

[52] Report of a committee of Neurologists and Psychiatrists called by Thomas J. Courtney, State's Attorney of Cook County, Illinois, on Recommendations for the Treatment of Psychopaths (1938). Despite recommendations of the committee that the offender when cured should be freed, the Illinois statute as passed that year provided that the sexual psychopath should be remanded for trial once he had been adjudged cured. Though it may be said that the purpose of deterrence could be served by the subsequent trial and imprisonment, there were repeated statements in the report that the criminal psychopath is not deterrable.

[53] MICH. STAT. ANN. (Henderson Supp., 1949) §§ 28.967 (1) *et. seq.*

[54] IND. STAT. ANN. (Burns Supp. 1949) § 9-3409.

[55] The District of Columbia, Illinois, Massachusetts, Minnesota, Missouri, and Wisconsin accept this view.

[56] MO. REV. STAT. (1949) § 202.750.

[57] See note 27 *supra.*

Where the Missouri delinquent is found by the court or the jury to be a criminal sexual psychopath, the court may commit him to State Hospital No. 1 at Fulton where he will be detained until cured.[58] In the alternative, the court may order such person to be tried upon the criminal charges against him as the interests of substantial justice may require. Upon the subject's commitment to the hospital, the hospital staff will make periodic examinations with a view to determining the state of progress, and will report to the court not less than once a year.[59] Objection may be made to any course of indefinite commitment where the person so confined is in fact guilty of a criminal charge less than a felony. This would be the case of an individual such as Mr. Y, the exhibitionist or the voyeur, who though not a distinct menace to society, must be cured before being allowed to reenter society as a substantial person. Just this case was presented to the Michigan Supreme Court in 1944,[60] when a man charged with indecent and obscene exposure was indefinitely commited to an institution as a sexual psychopath. Complaint was made under the Michigan Penal Code which defined the offense as a misdemeanor punishable by imprisonment for not more than one year or by fine of not more than $500. Prior to trial, the prosecuting attorney presented a petition calling for the examination of the defendant by psychiatrists, and evidence adduced in examination pointed to the fact that the man was a frequent offender. The prisoner was first sent to a state hospital, then later transferred to the State Prison at Jackson where he was assigned to a cell block reserved for psychopaths.[61] Thus the defendant found himself a prisoner for an indefinite period, possibly for life, because of the commission of a misdemeanor. Subsequent to his commitment, he filed a petition for discharge, then requested a hearing; but the judge in the lower court found no factual showing which would warrant a discharge. Thereupon the defendant petitioned for a writ of habeas corpus which was denied by the Supreme Court on the ground that the prisoner was receiving adequate care and was not suffering cruel and unusual punishment. The court recognized that he was an unfortunate individual, but beyond commiseration it could offer him no further consolation, except to say that he was entitled to proper care, and should be institutionalized until it was safe for him to be released.

At any time after commitment, the Missouri law indicates that the person confined may submit an application in writing setting forth

[58] Mo. Rev. Stat. (1949) § 202.730.

[59] See note 26 *supra*.

[60] *In re* Kemmerer, 309 Mich. 313, 15 N.W.2d 652 (1944). See State *ex rel.* Sweezer v. Green, —Mo.—, 232 S.W.2d 897 (1950), wherein the relator had committed a minor offense for which the maximum punishment could not exceed a year in jail and a fine of $100, but if adjudicated a criminal sexual psychopath, he could possibly be detained under treatment for an indefinite period. The Supreme Court of Missouri denied the plea that commitment would enlarge relator's punishment, asserting that the period of commitment was not considered punitive.

[61] In Michigan, the persons assigned to the psychopath's block are not considered prisoners in the usual sense of the word, but are labeled "visitors."

facts showing that he has improved to the extent that his release will not be incompatible with the welfare of society.[62] The application is to be filed with the committing court, whereupon the court shall issue an order returning the person to its jurisdiction for another hearing. This hearing shall in all respects resemble the original hearing to determine the mental condition of the defendant. Following this proceeding the court will issue an order which shall cause the defendant either to be placed on probation for a minimum of three years, or be returned to the hospital. Upon the expiration of the probationary period and after further hearing by the court, the psychopath may be discharged. Apparently the yearly findings of the hospital staff will be made available to the committed person's attorney for use in petitions for discharge, and also as evidence at any hearings on such petitions if requested by the petitioner. The statute is silent on the use to which these reports are to be put, but it is reasonable to assume that the petitioner will be given every fair advantage.[63]

This plan calling for supervision by the court, and placing the individual on probation has lately grained considerable recognition. It was introduced into the Illinois proposal[64] which provided for a *conditional release* of persons who have been adjudged no longer sexually dangerous. The device of the interlocutory order has been employed in that code to provide the continuing court supervision considered necessary to assure a safe return of the person to society. The period of conditional release is specified to be not less than one year and not more than three years. During this period, the court is directed to retain jurisdiction of the patient and may from time to time modify the conditions and terms of the order of conditional discharge. If the patient breaches any of these conditions, the court may order him returned to the Department of Public Welfare for further care and treatment. Upon a showing of satisfactory termination of the conditional release, the court then enters a final judgment that the person is no longer sexually dangerous.

Other Constitutional Issues

On April 19, 1937, in the recorder's court for the city of Detroit, George Frontczak was convicted on a plea of guilty of gross indecency, and sentenced to a minimum term of thirty days and a maximum term of five years in the Detroit House of Correction. While the defendant was confined under sentence a statute was passed relative to sexual psychopaths, and he was duly committed to a state hospital under the

[62] Mo. Rev. Stat. (1949) § 202.740.

[63] Compare the wording of the Indiana statute which definitely provides that the person confined may make full use of the reports of the physicians to gain freedom. Ind. Stat. Ann. (Burns Supp. 1949) § 9-3408.

[64] See 40 J. Crim. L. & Criminology 186, 190 (1950).

new law. On appeal to the Supreme Court of Michigan,[65] the majority of the court in a five to three decision found that the enactment was more than an inquest relative to the mental condition of a prisoner. The opinion pointed out that the proceedings were criminal because (1) the inquest occurred only after conviction or plea of guilty of specific offenses, (2) the period of commitment was to be deducted from the regular sentence and (3) the statute was in the criminal code.[66] The dissenting justices took the position that the proceedings in the case were solely in the nature of an inquest, that they did not constitute a criminal proceeding in the sense that the prisoner was subjected to a trial for a statutory crime.

These objectionable features of the Michigan law were removed by subsequent legislation in 1939 which withdrew the subject matter from the criminal code. In addition, the new law provided that no person found in the original hearing to be a sexual psychopath could thereafter be tried upon the offense with which he originally stood charged.[67] This later enactment has been reviewed by the State Supreme Court and held constitutional.[68] The Missouri statute does not fall into the same constitutional predicament in that its provisions are not a part of the criminal code, but rather fall under the section dealing with public health and welfare, and commitment as authorized in Missouri occurs before any trial on the criminal offense. The Missouri law further indicates that support and maintenance of any person committed to the state hospital shall be charged and paid in accordance with the law as now provided for in the case of inmates of state hospitals for the insane.[69] All laws now in force relating to the admission of insane persons to state hospitals are to apply to criminal sexual psychopaths.[70]

It can readily be discerned that the ultimate validity of all such legislation for psychopaths will depend in large measure upon the judicial determination of whether the proceeding under the law is criminal or civil. If attention is directed to the object to be attained rather than to the abstract form of the particular proceeding, then

[65] People v. Frontczak, 286 Mich. 51, 281 N.W. 534 (1938).

[66] Chief Justice Wiest in his opinion states: "Section 1-b, added by the 1937 act, if considered a part of the criminal procedure, is void, as subjecting the accused to two trials and convictions in different courts for a single statutory crime, with valid sentence interrupted by supplementary proceeding in another court, with confinement in a non-penal institution and with possible resumption of imprisonment under the original sentence . . . For an overt act offense the accused has a right to trial by jury of the vicinage, while under this act, for no statutory offense, he is to be tried by a jury of another vicinage, possibly far removed from his former domicile and friends and, if penniless and friendless, and the procedure is not under the criminal code he cannot obtain counsel or have witnesses at public expense . . ."

[67] See MICH. STAT. ANN. (Henderson Supp. 1949) § 28.967 (1) *et seq.*

[68] People v. Chapman, 301 Mich. 584, 4 N.W.2d 18 (1942).

[69] MO. REV. STAT. (1949) § 202.760.

[70] MO. REV. STAT. (1949) § 202.770.

there can be no doubt that the proceeding is in essence civil.[71] In a criminal action, the result sought is primarily punishment of the offender for a public wrong, but the sexual psychopathic proceeding is conducted for the benefit of the person whose mental state is in question as well as for the protection of society.[72] The ultimate goal is not a punitive sanction, but a course of medical care.

The courts have upheld analagous proceedings for the commitment of the insane,[73], feeble-minded,[74] drug addicts,[75] dipsomaniacs,[76] and defective delinquents[77] as civil inquests, leaving the determination of the condition to experts possessing the necessary training and educational background.[78] In the past, provisions almost arbitrary have been tolerated in civil commitment statutes on the ground that expeditious action was necessary to protect society from the dangerous.[79] But the modern sexual psychopath legislation has been drawn with ample checks against arbitrary action by officials. The physicians' findings are never conclusive; there are provisions for hearing with ample notice; and a judge or judge and jury make the ultimate decisions.

Though many of the statutes provide that hearing either may[80] or shall be held without jury determination of the issue, there is little doubt that the provisions are constitutional.[81] Right to trial by jury is preserved only in those civil actions triable by jury at common law.[82] And since idiocy proceedings were conducted by the court without a jury in the very early times, commitment proceedings for various purposes where the legislature has eliminated trial by jury under the statute

[71] In State *ex rel.* Sweezer v. Green, —Mo.—, 232 S.W.2d 897 (1950), the Missouri Supreme Court has decreed that the Missouri statute is curative, remedial, and civil in character. Boyd v. U. S., 116 U.S. 616 (1885); Amato v. Porter, 157 F.2d 719 (10th Cir. 1947); State *ex rel.* Zimmerman v. Euclide, 227 Wis. 279, 278 N.W. 535 (1938); 16 N.Y.U.L.Q. 303 (1938).

[72] Decisions uniformly hold that the proceeding to determine whether a person is a sexual psychopath is a civil action. People v. Sims, 382 Ill. 472, 47 N.E.2d 703 (1943); People v. Chapman, 301 Mich. 584, 4 N.W.2d 18 (1942); Weihofen, *Nature of Commitment Proceedings*, 24 Tex. L. Rev. 307 (1946).

[73] People v. Janek, 287 Mich. 563, 283 N.W. 699 (1939), held that a sanity proceeding is not a trial placing a defendant in double jeopardy, but a collateral inquiry to preserve him from the jeopardy of a trial while insane.

[74] People v. Niesman, 356 Ill. 322, 190 N.E. 668 (1934); State v. Troxler, 202 Ind. 268, 173 N.E. 321 (1930); Cahalan v. Dept. of Mental Health, 304 Mass. 360, 23 N.E.2d 918 (1939).

[75] *Ex parte* Liggett, 187 Cal. 428, 202 Pac. 660 (1921); *In re* Hinkle, 33 Idaho 605, 196 Pac. 1035 (1921).

[76] See Goodwin v. State, 95 Ind. 551 (1884), where the court held dipsomania to be a type of moral insanity.

[77] MASS. LAWS ANN. (Supp. 1947), c. 123; N.Y. MENTAL DEFICIENCY LAW § 124-126; Vona v. State, 54 N.Y.S.2d 452 (1945).

[78] Prescott v. State, 19 Ohio St. 184 (1869); 29 Col. L. Rev. 534 (1939); 16 N.Y.U.L.Q. 302 (1939).

[79] *In re* Dowdell, 169 Mass. 387, 47 N.E.2d 1033 (1897).

[80] MO. REV. STAT. (1949) § 202.720 (4).

[81] State *ex rel.* Pearson v. Probate Court of Ramsey County, 205 Minn. 545, 287 N.W. 297 (1939), *aff'd* 309 U.S. 270 (1939); Davis v. Snyder, 45 Neb. 415, 63 N.W. 789 (1895); 24 Tex. L. Rev. 307 (1946). See note 39 *supra*.

[82] Section 22(a) of Art. I of the Constitution of Missouri provides that right of trial by jury as heretofore enjoyed shall remain inviolate. The present constitution was adopted by vote of the people of Missouri, Feb. 27, 1945.

are held not to deny due process. In *Pearson* v. *Probate Court, of Ramsey County,* Mr. Chief Justice Hughes was only too careful to assert that the constitutional guarantee of jury trial did not apply to the sort of proceeding contemplated by these statutes.[83]

That portion of the Missouri statute which makes allowable introduction of evidence relating to past acts of sexual deviation is not violative of Article I, Section 13 of the Missouri Constitution which guards against ex post facto laws. Although the Supreme Court of the State has not explicitly put such a declaration in writing, this conclusion follows from the court's holding that the statute is not criminal and detention under it not punishment. This accords with the precedent already set by other state decisions.[84]

In *State* ex rel. *Sweezer* v. *Green*[85] it was alleged that the Missouri statute violated the provision in the Missouri Constitution which forbids the enactment of retrospective laws, in that the assault, which the relator was alleged to have committed, occurred before the effective date of the statute. The court cited several Missouri cases to the effect that the constitutional provision does not prohibit substitution of remedies nor retrospective legislation as such, unless vested rights are impaired. It held that the relator could have no vested right in an unenforced penalty, which the State could enforce against him if it chose to do so, and that under its police power the State could enact a new procedure both curative in purpose and rehabilitating in objective and which substituted treatment and cure for punishment.

The argument to the effect that these statutes are unconstitutional in that they deny equal protection of the laws,[86] is equally untenable. It is only too well recognized that the legislature may make classifications of persons, provided such classifications are based on substantial, existing distinctions and are in accord with the aims sought to be achieved. In this instance it is a reasonable and justifiable assumption that the class of sexual psychopathic persons most dangerous and most likely to commit sex crimes is that class which engages in other criminal conduct. It cannot be disputed that this legislation is a valid and proper exercise of state police power wielded as a measure of public safety.[87]

[83] *Supra* note 81.

[84] State *ex rel.* Sweezer v. Green, —Mo.—, 232 S.W.2d 897 (1950). See People v. Chapman, 301 Mich. 584, 4 N.W.2d 18, 24 (1942), *In re* estate of Rogers, 147 Neb. 1, 22 N.W.2d 297 (1946). A recent decision of the Oklahoma Supreme Court in the case of Skinner v. State, 189 Okla. 235, 115 P.2d 123, 125 (1941), upholding an habitual criminal sterilization act, is particularly applicable to the situation here. In that case the court remarked: "It is contended that . . . the act constitutes a bill of attainder and is an ex post facto law, and is violative of Sec. 15, Art. 2, of the Oklahoma Constitution, and Sec. 10, Art. 1, of the Federal Constitution. These constitutional inhibitions have reference only to punishment for crime . . . These contentions are, therefore, upon the premise that the act in question is a penal law, and that sterilization is inflicted as a punishment."

[85] —Mo.—, 232 S.W.2d 897 (1950).

[86] U. S. Const., Amend. XIV.

[87] Buck v. Bell, 274 U.S. 200 (1926); Compagnie Francaise de Navigation a Vapeur v. Louisiana State Board of Health, 186 U.S. 380 (1901); People v. Niesman, 356 Ill. 322, 190 N.E. 668 (1934); 39 Col. L. Rev. 534-537 (1939).

Conclusion

Many reasons are suggested for a surcease of legislation in this field of the sexual psychopath. First is the all time complaint that the state has no room for the psychopath, that mental hospitals are already crowded with psychotic patients. Of this fact there is little doubt. Yet it is equally plausible to state that convictions for crime should be slackened because of the overcrowded condition of the penitentiary. Crime is expensive and social benefits are expensive; nevertheless any expansion of social control will inevitably lead to pecuniary sacrifice by the public. A second reason is that the laws were passed in a period of panic and as panic subsides, enthusiasm for administration of the laws will cool; but this overlooks the fact that panics have a habit of recurring, and legislation once enacted will offer some measure of solace to a disturbed populace. Actually, the success or failure of any legislative effort should never be evaluated in terms of the fears or calms of the community. If the law is in fact good, and further, is an improvement over past efforts, then let criticism be shifted to the shoulders of the administrator. Thus the third challenge is unearthed: the failure of the prosecutor and the judge to cooperate. These judicial officers, it is said, are anxious to make records as vigorous and aggressive defenders of the community. They favor the most severe penalty available, are unwilling to look upon the sex offender as a patient, and use the psychopath laws only when evidence is so weak that conviction under the criminal law is improbable. If this be the case, and there is cause to believe that it is partially true, then the administrator must be enlightened through the combined efforts of medical and legal experts. Open minded, intelligent administration by the members of the bar and the medical profession should make for some improvement over the anemic status quo; and in time, the errors and lack of foresight prevalent in any legislation will be corrected.

If one has been led to believe that sex offender legislation represents an organized movement of psychiatrists and other medical experts to monopolize an element of society heretofore dominated by the legal mind, he is in error. Many psychiatrists, for example, are strongly of the opinion that psychopathic personalities are incurable, hence these critics are most likely to recommend wider use of the indeterminate sentence, with life sentences reserved for hopeless cases.[88] This does not indicate that such critics are hostile to the idea of curing the psychopath, but rather an unwillingness to release the offender from penitentiary confinement until more reliable techniques of psychotherapy are developed.

Anothr group of prominent psychiatrists[89] recommends a present Pennsylvania statute[90] as an excellent model for other states to adopt.

[88] *See,* Editorial Chicago Tribune, November 23, 1948.

[89] Group for the Advancement of Psychiatry, Report of Committee on Forensic Pcychiatry, Circular Letter 131, Feb. 12, 1949.

[90] PA. STAT. ANN. (Purdon 1948 Supp.) §§ 1153-1156.

This law provides that upon conviction of any offense, a defendant may be mentally examined. As a result of this examination, if the trial judge feels that it will better serve the policy of the statute to confine the defendant in a state mental hospital rather than in a prison, he may order the defendant committed to a state mental institution in lieu of a prison sentence. The defendant may then be indefinitely committed until cured. Undoubtedly this suggests a simpler solution, and in addition recognizes the fact that diagnosis of mental disorder may be a defense to a criminal charge.

The cases of Messrs. X, Y, and Z are but a few isolated irregularities among the flotsam of modern society. Sex offender legislation has offered a solution for the first two cases, and is flexible enough to allow more severe retribution should any undue violence be encountered. The case of Mr. Z must await another day when the medical and legal sciences have developed a cure easily administered by the public purse. In the meantime he will have to live pretty much at the mercy of the mores of his community and the social attitudes of his local law enforcement officer. The Kinsey Report[91] and like factual observations would lead one to believe that sex laws are Victorian when examined in light of the figures representative of modern moral conduct. But even so, many laws which would seem narrow and twisted when considered as independent prohibitions, appear useful and valid when viewed as secondary sanctions necessary for the promotion of a greater social end.[92] Assault and battery are forbidden and punishable by statute, yet it would be an exceedingly rare occasion if a prosecutor should choose to force action against two schoolboys for having engaged in fisticuffs. Equally rare is the case of the prosecutor who might file an information for fornication against both parties when the complaint for rape fails to materialize. Appreciating this dichotomy of the law, it can well be said that the letter of the law is plain and perhaps incongrous at first glance, but the spirit will in the long run control its administration.

It is doubtless true, as Professor Horack has suggested,[93] that our sex laws are derived from understandable attempts by legislative bodies to support the basic premise of family stability. Mr. Z in his own isolated way, may not be an object for social vengeance, yet if Mr. Z and his kind should be in preponderance, family relationship would fall into decay. Here again, administration of the law must stem from a person with a level head and one able to separate the dangerous from the abnormal. The world is freely populated by Pharisees who measure all moral standards by their own moral yardstick, who pretend to understand all, but understand nothing. Our administrators are sometimes drafted from these ranks, and so long as bigotry lives,

[91] Kinsey, Sexual Behavior of the Human Male (1948).
[92] See Horack, *Sex Offenses and Scientific Investigation*, 44 Ill. L. Rev. 150 (1949).
[93] *Supra* note 92.

justice will perforce go away. As heretofore indicated, legislation for the sexual psychopath will not find Mr. Z's solution—that lies with a sound judiciary who are at once watchdogs of the law and good counsel.