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## THE SEXUAL PSYCHOPATH AND THE LAW

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James M. Reinhardt and Edward C. Fisher

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The manner in which the people of the United States have tried to deal with sex offenders is perhaps the outstanding enigma in the whole history of attempts in this country to protect innocent individuals and to guard the social interest. Fixed penalties—running up to twenty years imprisonment—are established for crimes of rape, with no provision for adjudication on the basis of circumstances and without reference to the possible psychopathy of the offender. Moreover, we continue to rely upon fines, jail sentences and reformatory commitments as a means of controlling inveterate sex offenders whose conduct not only defies such treatment, but generally grows worse with it. As we well know, some of the most heinous sex offenses on record have been committed by “fiends” whose backgrounds were marked by repeated fines and jail sentences.

It is not intended to suggest that all recidivous sex offenders are physically dangerous, but experience shows that some of them are compulsively so, and that most of them are driven by uncontrollable impulsions that do not respond to customary legal procedures. It is important, therefore, that society make up its mind what kind of perversions it is willing to tolerate and what chances it is willing to take. In all events realism is an absolute essential in any attempts to control sex “inebriates”. Reliance upon traditional juridical procedures has taken us nowhere. We are slow to try some other way, and we think, for a perfectly understandable reason. We have not known what to try. Knowledge of the nature and development of “sexual psychopathy” is, to say the least, imperfect.

The “Blue Beard” of tomorrow is not immutably visible in early sex abnormalities. There are danger signals, but it is when the “monster of murder castle” breaks loose that we know what we have had all along. “Sexual psychopathy” is a relatively new term. It has been thrown about with such lurid am-

biguity as to instill both doubt and fear. Our legal procedures were evolved to deal with people who have committed crime already, not with people who are suspected of criminal tendencies. This is the "rub" that has made the going slow. The difficulty inheres largely in our popular concepts of criminal responsibility—concepts derived from a social morality that made room for feeble-minded and "insane" people, but not for "psychopaths". Again the reasons are logical. These so-called psychopaths could talk sense, they were average or better in school, they knew the "difference between right and wrong;" they knew what they had done, many of them gave evidence of ability to contemplate the consequences of their acts, and sometimes even exhibited marked feelings of remorse. They were obviously not insane, and they were not feeble-minded. "They were therefore criminals."

In addition to the definitional difficulties in the way of setting up effective controls against dangerous sex perverts, there has always been the problem of securing adequate testimony. Frequently the court must rely upon a single witness, often a child, reluctant to testify, whose immediate relatives try to shun exposure through what appears to be a humiliating ordeal. Any one at all familiar with problems of conviction in such cases knows that pride and fear on the part of the injured persons are frequently the offender's most formidable defenses.

The law needs the support of the public; and what is more urgently needed is a realistic legal approach.

It is no argument that other types of offenders are not reformed. The "sexual psychopath" presents a unique problem, one that can't wait for private experimentation with dangerous sex perverts left at large. The first job is to make society safe. We are convinced that the social interest can be protected from "sexual psychopaths" without decreasing the chances that so-called "occasional" sex offenders will be properly dealt with by the accustomed legal processes. It is important to recognize that not every person who commits a "perverted" sex act is a "sexual psychopath." Many sex crimes, including instances of rape and sodomy, are no more attributable to "irresistible impulses" than the general run of offenses committed by embezzlers, thugs, "confidence" artists, and many others. Evidence on this point is revealed in variations in sex criminality with respect to age and time as influenced by changing mores, changing legal pressures, and social standards. It is observed also in some sexually ambivalent types whose sex attentions are re-oriented to take advantage of whatever the biological environ-

ment affords. Some of these may, after a period of indiscriminate wanderings settle down to a fairly stable family life.

This type of sexual vagrant is a criminological problem, but not the problem that concerns us here. Our attention is on the sex aberrant who has demonstrated not merely a complete lack of social responsibility for his sex acts, but also inability to achieve it. Such a one is referred to in this paper as a "sexual psychopath". It is absolutely necessary that this "sexual psychopath" be singled out for bold and distinctive treatment. The public hesitates. It has other pressing interests. Moreover, "goonish" sex murders are not a common occurrence in any community. The exhibitionist, the habitual window peeper, even the sodomist, without brutality manifestations, arouses relatively mild community reactions. A jail sentence or a year in the reformatory eases the public demand and removes the nuisance temporarily. People forget. They cannot afford to forget for we are called to deal with sexualized impellants that defy control, not simply with first acts.

It is well to be reminded again that sexualized "criminal" monsters do not begin as monstrosities. It is true that some "sexual psychopaths" may continue indefinitely without exhibiting proclivities to brutality. Exhibitionisms and homosexualities for instance, are not likely to give rise to physical violence where a sadistic component is absent. The discovery of a sadistic component, however, is no simple matter. The exhibitionist who knocked down a young woman, dragged her into an alley, assaulted and murdered her was not the product of the moment. He was already made for the act. There have been, moreover, many instances of brutality where the purpose was to destroy resistance or to do away with a source of evidence against the perpetrator. Whatever the type or manifestation of "sexual psychopathy", fines, jail and penitentiary sentences are worse than worthless as means of reform. Indeed, as Lindner has well emphasized, the prison walls, whether or not they provide explorative fields for eroticisms, do intensify the demands and even hasten the fruition of deep-seated perversions not hitherto exposed. These may burst out in acts of sexual brutality on a later day.

There is no occasion for fanaticism in the effort to solve this social problem, but the urgency at the moment is great. All the evidence points to a tremendous increase in the number and seriousness of sex offenses. According to J. Edgar Hoover, writing for the *American Magazine* in July, 1947, there is a criminal assault in the U. S. every 43 minutes, day and night. The rate

of arrests for rape during the past ten years has increased approximately 65 per cent, and arrests for sex offenses, exclusive of prostitution and commercialized vice, have shown an increase of almost 145 per cent.

Any attempt to deal with the problem realistically is bound to encounter difficulties. The task of defining the sexual psychopath is not the most difficult one. In most instances he provides a substantial clue by the recidivous nature of his perverted acts. There are other warnings available to the accomplished eye; inability to form and hold friendly human associations; to work toward normal goals, to sense social responsibility; to maintain coherent interests; to rise above purely biological attachments. There are others which, taken together and in combination with specific manifestations of abnormal sex interests, should put society on guard.

### *States that Point the Way*

As noted, this is not a legislative problem alone, but the state law-making bodies will have to set up appropriate procedures before further steps can be taken. Minnesota, Wisconsin, and the District of Columbia have pointed the way by adopting laws providing for examination by qualified psychiatrists, appointed by the court, of any person, who in the judgment of the court, upon proper complaint, is suspected of being a "sexual psychopath". These acts are designed to establish the existence of "sexual psychopathy" while the establishment of guilt or innocence of a person charged with a misdemeanor or felony is left to the traditional court procedure. The law is so worded as to give the suspect every legal protection under the constitution, and the acts have passed the constitutionality test upon appeal (Minnesota)<sup>1</sup> to the Supreme Court of the United States.

Here are presented the pertinent features of the District of Columbia law<sup>2</sup> which contains essentially the same features as the Minnesota Act as related to the control of "sexual psychopaths". The term "sexual psychopath" is defined in the act as ". . . Any person, not insane, who by a course of repeated misconduct in sexual matters has evidenced such lack of power to control his sexual impulses as to be dangerous to other persons because he is likely to attack or otherwise inflict injury, loss, pain, or other evil on the objects of his desire . . ." (Sec.201)

<sup>1</sup> *Minnesota v. Probate Court*, 205 Minn. 545, 287 N. W. 297, Aff. 60 S. Ct. 523, 84 L. Ed. 477, 309 U.S. 270, 126 A. L. R. 530.

<sup>2</sup> Public Law 615—80th Congress, Chap. 428—2nd Session. H.R. 6071, entitled "An Act to provide for the treatment of sexual psychopaths in the District of Columbia . . ."

The United States Attorney for the District of Columbia is authorized by the law to file with the clerk of the court a statement setting forth the facts tending to show the prevalence of sexual psychopathy in an individual other than a defendant in a criminal proceeding, or in the case of a defendant in a criminal proceeding, prosecuted by such an attorney or any of his assistants, whenever it appears to him that such a person is a sexual psychopath. The law furthermore authorizes the court to file a statement of the facts with the clerk of such court whenever it appears to the court that any defendant in any criminal proceeding pending in such a court is a sexual psychopath.

Provision is made for the appointment of qualified psychiatrists to make a personal examination of the patient, and, as later to be noted, the rights of the patient to have the assistance of counsel at every stage of the proceeding are preserved, as well as his rights of appeal. The law gives the counsel for the patient the right to inspect the reports of the examination of the patient and protects the patient against the use of the psychiatric reports as evidence against him in any judicial proceeding, except that to determine the prevalence of sexual psychopathy under the title of this law.

The law provides, furthermore, that the hearing by the court to determine whether or not the patient is a sexual psychopath shall be conducted without a jury, unless a demand for a jury hearing is made by the patient or by the officer filing the statement within a specified length of time. The ordinary rules of testimony prevail in such hearings, except that evidence of conviction of other crimes tending to show that the patient is a sexual psychopath shall be admissible.

There is also provision in the law for the commitment of an individual, upon the establishment by the court of the existence of sexual psychopathy, to St. Elizabeth's Hospital for confinement and treatment until such time as the superintendent of the hospital "finds that he is sufficiently recovered so as not to be dangerous to other persons". Where such a person to be released is charged with a crime or is undergoing a sentence therefor, notice is to be given by the superintendent of the hospital to the judge of the criminal court, and the patient is to be delivered to the court "in obedience to proper precepts". "Nothing in this title shall alter in any respect the tests of mental capacity applied in criminal prosecutions under the laws of the District of Columbia." (Section 209).

Thus it is observed that the law protects the legal rights of the suspect at every step in the proceeding while at the same time

providing a safeguard for the public not available in the traditional criminal procedures.

No doubt the specific wording of the law may be open to objection in some particulars and psychiatrists may disagree as to its definition of the term "sexual psychopath". However, the obvious purpose of the law is to provide adequate legal procedure for determination of the dangerous proclivities of such persons and for their removal from society as potential menaces. The preliminary examination by psychiatrists appointed by the court corresponds to the familiar preliminary hearing by which probable cause for submitting the accused to trial is established. If both experts pronounce the suspect *not* a sexual psychopath no trial is had, but if one or both say he is, or if they cannot decide because of his refusal to submit to examination, the matter is then judicially determined in an established court of law. The trial follows the usual processes except that evidence of prior offenses is made admissible, thus removing one of the most formidable obstacles in the strictly criminal method of dealing with such offenders. His rights of jury trial and appeal are properly preserved. Provision is made for his incarceration unless and until "he has sufficiently recovered so as not to be dangerous to other persons." If he is one charged with crime or serving a sentence therefor the release is delivered back into the custody of the proper officer.

The Minnesota statute (Laws of Minn. 1939 c. 369) is substantially similar in its scope. It defines the term "psychopathic personality" 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 of such conditions, as to render such person irresponsible for his conduct with respect to sexual matters and thereby dangerous to other persons." Proceedings are instituted by submission of the facts to the county attorney, who, if satisfied that good cause exists shall prepare a petition to be executed by a person having knowledge of the facts, filed in the probate court, where the matter is set for hearing and examination. The court must appoint "two duly licensed doctors of medicine" to assist in the examination. The public may be excluded from the hearing. The "patient" is entitled to be represented by counsel and have compulsory process for his witnesses. From a finding that he is a "psychopathic personality" he may appeal to the district court.

The Minnesota Supreme court construed the above definition of "psychopathic personality" to include "those persons who,

by an 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 desires." The court further said: "It would not be reasonable to apply the provisions of the statute to every person guilty of sexual misconduct nor even to persons having strong sexual propensities. Such a definition would not only make the act impracticable of enforcement and perhaps unconstitutional in its application, but would also be an unwarranted departure from the accepted meaning of the words defined."<sup>3</sup>

This construction was adopted by the United States Supreme Court,<sup>4</sup> which upheld the act as against the contentions that it (1) was too vague and indefinite to constitute valid legislation, (2) denied equal protection of the laws and (3) denied due process of law.

There are some significant points of difference in the two laws which, however, do not materially affect their essential purpose or operation. The Minnesota law, following the modern trend in such matters, provides for a private hearing. The District of Columbia law requires the examination to be made by "qualified psychiatrists" while that of Minnesota specifies "duly licensed doctors of medicine to assist in the examination." The U. S. Supreme Court, referring to this provision said: "The argument that these doctors may not be sufficiently expert in this type of case merely invites conjecture. There is no reason to doubt that qualified medical men are usually available."

Such legislation might well provide for examination by competent psychiatrists or clinical psychologists, rather than "duly licensed doctors of medicine", as in the Minnesota act, since one might be licensed to practice medicine and still have but slight proficiency in the field of psychiatry.

The type of legislation used in Minnesota and the District of Columbia has definite advantages over that adopted in some other states, where such investigation can be instituted only after a *conviction* of some sex offense. This necessitates a criminal trial in which the suspect must have been found guilty of a specific offense beyond a reasonable doubt, and without the aid of reference to his former record of behavior. In such cases definite proof usually is difficult to obtain. The victim very often is some small frightened child. By their very nature such crimes are secretly perpetrated, in the absence of witnesses. The accused may have been guilty of other such atrocious offenses in

<sup>3</sup> *Minnesota v. Probate Court*, 205 Minn. 545, 287 N. W. 297.

<sup>4</sup> 60 S. Ct. 523, 84 L. Ed. 477, 309 U.S. 270.

the past but these cannot be used against him in a criminal prosecution for a specific crime. So he must be allowed to run free, unhampered in his operations by anything most states now have in the way of controlling him or protecting his innocent victims. He may be suspected, and different instances of his depraved condition will come to light, but none of these add up to proof beyond a reasonable doubt in a court of law. Even the fact that he is a known pervert with criminal tendencies is no ground for hampering his activities in any legal way, and he may commit all manner of sex offenses before being *convicted* of any of them.

Under the Minnesota and District of Columbia laws such offenses are *prevented*. Enforcement officers there are not compelled to stand idly by until the real harm is done and then seek to do something about it. An individual who is known to exhibit the familiar dangerous tendencies can be examined and put under restraint before he gets very far in his career.

We have studied a large number of miscellaneous sex cases, (usually grouped under such charges as "contributing to the delinquency of a minor" or even "disturbing the peace," these elastic categories including all kinds of obscenities, and even more serious matters) and even the maximum period of confinement permitted by the law for such offenses is comparatively light so that society does not even have the advantage of having the pervert out of circulation very long. He completes his sentence, is released, and goes back to the unrestricted practice of his nefarious habits. The public gets little benefit from his conviction and penalty—he gets none whatever.

Because laws similar to those of Minnesota provide for confinement in hospitals, it is sometimes charged that advocates of such legislation are urging greater leniency for the sex criminal. We have heard it said: "The remedy for the sex criminal is *jail!* Let's quit coddling them." We do not advocate coddling them, neither do we believe they should be allowed to go free until, under our ponderous legal machinery, enough proof can be marshalled to convict and put them away for a limited period in some penal institution such as a county jail which is neither intended nor equipped to deal with such cases.

Such factors as the presumption of innocence, proof beyond a reasonable doubt and all of the other valuable and ancient safeguards by which the person accused of crime has been surrounded are perfectly proper in their correct application. Still they have no more logical place in the investigation of a known or suspected corrupter of the minds and bodies of little children

than in the case of the insane person before the insanity board. We do not require such safeguards in the investigation and examination of the ordinary insane person, for such proceedings are based upon theories utterly different from those of the criminal law. Restraint and all possible treatment for the "patient" are, in the very nature of these cases, necessary and proper for the protection of the sexual psychopath as well as the public.

The sexual psychopath suffers from a form of mental deviation not now generally recognized in our laws, although it may be far more insidious in its potentialities than many forms of insanity. Medical science knows and classifies him. The layman recognizes him and his dangerous possibilities. It is time for the law to make provision for him, too.

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