

1949

The Illinois Proposal to Confine Sexually Dangerous Persons

Newton Minow

Northwestern University School of Law

Follow this and additional works at: <https://scholarlycommons.law.northwestern.edu/jclc>

 Part of the [Criminal Law Commons](#), [Criminology Commons](#), and the [Criminology and Criminal Justice Commons](#)

Recommended Citation

Newton Minow, The Illinois Proposal to Confine Sexually Dangerous Persons, 40 J. Crim. L. & Criminology 186 (1949-1950)

This Criminal Law is brought to you for free and open access by Northwestern University School of Law Scholarly Commons. It has been accepted for inclusion in Journal of Criminal Law and Criminology by an authorized editor of Northwestern University School of Law Scholarly Commons.

The Illinois Proposal to Confine Sexually Dangerous Persons

Psychiatrists believe that a substantial percentage of sex crimes are committed by persons technically termed "psychopathic personalities" or, more particularly, "sexual psychopaths."¹ Case histories of such persons indicate a lifelong tendency not to conform to the customs of the group;² psychopaths are prone to consistently misbehave, and demonstrate an habitual failure to learn from experience.³ Psychopathic personalities have been defined as persons suffering from a "mental instability not amounting to a certifiable mental disease or deficiency, but characterized by emotional dullness or instability, together with a lack of perseverance, persistent failure to profit by experience, and persistent lack of ordinary prudence, often resulting in . . . sexual excess . . . or delinquency."⁴

To meet the menace of the sex crime and the sexual psychopath, seven states have passed laws which permit the confinement of persons judged sexually dangerous to the community.⁵ Illinois passed the first valid legislation of this type in 1938, providing for the detention and commitment of criminal sexual psychopathic persons.⁶ This statute defines such persons as individuals suffering for at least one year from a mental disorder, not insane or feeble-minded, coupled with criminal propensities toward the commission of sex offenses.⁷ Under this act, the state's attorney or attorney general may file a petition in court if he believes that any person charged with a criminal offense is a criminal sexual psychopathic person.⁸ Upon the filing of this petition, the court appoints two psychiatrists to examine the individual to find out whether he is criminally sexually psychopathic.⁹ Before the criminal offense is tried, a hearing on the petition is held before a jury. At this hearing, evidence of the commission of other crimes by that person may be introduced. If the jury finds that the person is a criminal sexual psychopath, the

¹ For a general discussion of the concept of the psychopathic personality, see Arief and Rotman, *Psychopathic Personality* (1948) 39 *J. Crim. L. & Criminology* 158. The authors state that there is no classification in psychiatry more misused than the term psychopathic personality. In fact, they state that the term has "become the wastebasket of psychiatry, serving as a cover-all for all persons who indulge in anti-social conduct."

² A summary of the symptoms of a psychopathic personality is made in Hovey, *Behavior Characteristics of Anti-Social Recidivists* (1942) 32 *J. Crim. L. & Criminology* 636.

³ An excellent comment in 96 *U. of Pa. L. Rev.* 872 (1948) points out that: "In the ordinary affairs of life, the behavior of the 'normal' man may be influenced by the fact that penalties are liable to be inflicted if anti-social tendencies are indulged. In the majority of psychopathic personalities, the penalty may be clearly appraised, but outweighed or obscured by the urgency of the desire to commit the illegal act."

⁴ Henderson and Gillespie, *Textbook of Psychiatry* (1936). For a substantially similar definition phrased in more technical medical language, see Noyes, *Modern Clinical Psychiatry* (1940) 504.

⁵ Legislation directed at the sexual psychopath is in effect in Illinois, Michigan, Minnesota, California, Massachusetts and Ohio.

⁶ *Ill. Rev. Stat.* (1947) c. 38 §§820-825.

⁷ *Ill. Rev. Stat.* (1947) c. 38 §820.

⁸ Jurisdiction is vested in the Circuit courts outside of Cook County, the Criminal Court of Cook County, the City Courts, the County Courts, the Municipal Court of Chicago and other municipal courts in the state under Section 821 of the 1938 Act.

⁹ *Ill. Rev. Stat.* (1947) c. 38 §823 provides that a "Qualified psychiatrist within the meaning of this section is a reputable physician licensed to practice in Illinois, and who has exclusively limited his professional practice to the diagnosis and treatment of mental and nervous disorders for a period of not less than five years."

court then commits such person to the Department of Public Safety, with directions to confine the person in specified state institutions until he recovers from such psychopathy. At any time after commitment, the person may by written application have a jury hearing to determine whether he has recovered.¹⁰ If the jury finds that he has recovered, he is then committed to the custody of the sheriff pending trial for the criminal offense charged against him. If the jury finds that he has not recovered, he is returned for further custody to the Department of Public Safety.

Ten years' experience with the 1938 act has indicated serious difficulties in its administration. The gravest defect is that the definition section of the Act limits its coverage to persons charged with crime and having a mental disorder for over a year prior to any action under the act; furthermore, the prosecutor must prove that the alleged psychopath has criminal propensities toward the commission of sex crimes. As a result of these stringent requirements, the 1938 act has been used sparingly. Only sixteen persons have been confined under the statute in the ten year period since its passage.

Seeking to remedy the administrative difficulties presented by enforcement of the 1938 statute, the Committee on Criminal Law of the Chicago Bar Association has proposed a new law to deal with sexually-dangerous persons. This new proposal contains six major changes aimed at removing the present shortcomings by: eliminating the necessity of a criminal charge to bring the individual within the scope of the Act; expanding the definition of persons intended to be embraced by the Act; sending persons committed under the act to the Department of Public Welfare rather than the Department of Public Safety; introducing the technique of a conditional release with continuing supervision by the Court over the individual for one to three years; providing additional procedural safeguards for the individual at the hearings; authorizing the court to compel an individual to submit to psychiatric examination.

Criminal Charge Not Prerequisite to Hearing Regarding Sexually Dangerousness

Under the new Illinois proposal, a person need not be charged with a criminal offense to authorize a hearing regarding his mental condition. If the attorney general or state's attorney believes that good cause exists for a judicial determination as to whether or not a person is sexually dangerous, he is authorized to file a petition with the clerk of a court having jurisdiction under the Act.¹¹ The petition follows the pattern of the present statute in that it would state why the person is considered sexually dangerous and would request the court to order a psychiatric examination of the individual. Only the state's attorney or the attorney general can file such a petition. If the judge believes that the petition is correct, he would then order an examination of the individual by two qualified psychiatrists¹² and set a date for the hearing. The psychi-

¹⁰ Ill. Rev. Stat. (1947) c. 38 §825 provides that the court is to set a date for the hearing within ten days after such a written application is filed.

¹¹ Jurisdiction under the new proposal is vested in the same courts as in the 1938 Act except that the Juvenile Court of Cook County is also given the power to hold hearings concerning a minor's sexual irresponsibility.

¹² Qualifications for examining psychiatrists in the new bill are identical to those in the present statute. However, various other qualifications have been suggested, e.g.,

atrists would then be required to submit written reports of their examination before the hearing.

There are three different ways in which a person would come under the proposed law: 1) Whenever the attorney general or state's attorney files a petition as outlined above; 2) whenever the judge in a criminal proceeding believes the defendant to be sexually dangerous, he may order the hearing and examination of that person on the court's own motion; 3) whenever a defendant has been adjudged guilty of either a crime against nature, rape, or crime against children, and a petition has not yet been filed for a hearing, the court is then ordered not to impose sentence on the defendant until after a hearing is held and a determination is made as to whether the defendant is a sexually dangerous person. Thus, under the new proposal, there would be a mandatory hearing before sentence but after conviction of the more serious sex crimes, and discretionary hearings when the state's attorney, attorney general or a criminal court judge believes that a hearing should be held.

New Definition of Sexually Dangerous Person

The second important change in the new proposal is related to the expansion of the definition of a sexually dangerous person. The term "sexually-dangerous person" according to the proposed act shall mean any person evidencing one or more of the following: "1) Emotional instability in sexually-motivated behavior so as to render him dangerous to others; 2) uncontrolled impulses in sexually-motivated behavior such as to render him dangerous to others; 3) a lack of customary standards of judgment in sexually-motivated behavior such as to render him dangerous to others; 4) a failure to appreciate the consequences of his sexually-motivated behavior such as to render him dangerous to others." Thus, the new definition eliminates the one year duration and criminal propensities requirements of the present statute. It is also noteworthy that the proposed definition specifically omits the terms "criminal" and "psychopath."

The proposed definition is modeled in large part upon the definition found in the present Minnesota statute.¹³ It is readily apparent that this definition lacks precision of statement and is subject to attack on that ground. However, judicial acceptance of this definition is found in *State ex rel Pearson v. Probate Court of Ramsey County*,¹⁴ in which a person committed to state care under the Minnesota statute appealed to the United States Supreme Court on the grounds of vagueness in the definition. The Supreme Court of Minnesota had held that the definition was "intended 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."¹⁵ The Minnesota court went on to decide that it would be unreasonable to apply this definition to every person committing any sexual misconduct, but would limit its

membership in the American Board of Neurology and Psychiatry. Such a statutory definition of a doctor's qualifications would insure the appointment of competent examiners and also reduce the chances of the judge's appointments on patronage motives. The best solution appears to be that of an official court clinic composed of specialists on sex offenders.

¹³ Minn. Stat. Ann. (1947) §§526.09-526.11.

¹⁴ 309 U.S. 270 (1940).

¹⁵ *State ex rel. Charles Edwin Pearson v. Probate Court of Ramsey County*, 205 Minn. 545, 287 N.W. 297 (1939).

application to those persons lacking the power to control their sexual desires. The Supreme Court of the United States held that it was bound by the construction of the statute in the Minnesota Court. As so construed, the Supreme Court held that this definition of a sexual psychopath was sufficiently definite to be upheld.¹⁶ In the light of the *Pearson* decision,¹⁷ it therefore seems clear that the definition in the proposed bill in Illinois is free from constitutional inhibitions.¹⁸

The new definition is further significant in that the entire tenor of the new proposal is couched in terms of the civil nature of the proceedings. In the proposed act, the individual is consistently referred to as a "patient," and the new statute is to be clearly placed in the Civil and not in the Criminal Code. This emphasis is undoubtedly based on the experience of the Michigan legislators who wrote a similar sexual psychopathic statute, incorporated it into the Michigan Criminal Code, and saw it declared unconstitutional by the Michigan Supreme Court in *People v. Frontzak*.¹⁹ The Michigan statute of 1937 was the first of its type.²⁰ The *Frontzak* decision held the statute unconstitutional because it did not observe certain rights guaranteed to the accused in a criminal trial.²¹ It therefore seems apparent that this new proposal emphasizes the civil nature of the action and hearing to avoid the pitfalls of the Michigan experience, as well as to escape the rigidity of criminal proceedings.²²

The theory of the civil rather than criminal classification of the statute rests on an analogy to insanity inquests and lunacy hearings.²³ Such inquests have long been treated as civil suits,²⁴ even though an individual's liberty may be restrained as a result of the inquiry. Some

¹⁶ Note (1941) 32 J. Crim. L. & Criminology 196, discusses the *Pearson* doctrine and also the general legal problems involved in dealing with the sexually irresponsible.

¹⁷ Even though the definition in the new proposal has received judicial acceptance, it is to be noted that such acceptance has been conditioned upon a rather limited construction of that definition. The Massachusetts legislature sought to avoid the danger of constitutional obstacles in the courts by originally incorporating the Minnesota court's construction of the statutory language. Thus the Massachusetts bill defines a psychopathic personality as a person evidencing "an habitual course of misconduct in sexual matters evidencing an utter lack of power to control sexual impulses and likely to attack or otherwise inflict injury, loss, pain or other evil." Mass. Ann. Laws (Supp. 1947) c. 123(a).

¹⁸ The Supreme Court of the United States appears even more definitely committed now to the principle of following state construction of state statutes. Cf. *Musser et al. v. Utah*, 333 U.S. 95 (1948).

¹⁹ 286 Mich. 51, 281 N.W. 534 (1938).

²⁰ Mich. Pub. Act 1937, No. 196.

²¹ The Michigan Supreme Court placed emphasis on the fact that the statute was contained in the criminal procedure code and that the indefinite confinement was regarded as an added penalty for crime. The precise ground of unconstitutionality was that the individual was deprived of the right to jury trial of a jury from the vicinage.

²² As a result of the *Frontzak* decision, a new statute was passed in Michigan. The present Michigan law (Mich. Stat. Ann. (Supp. 1947) §§28.967(1)-28.967(9) is very similar to the Illinois proposal, with the important difference of making commitment as a psychopath a complete defense to a criminal charge. Its constitutionality was tested and upheld in *People v. Chapman*, 301 Mich. 584, 4 N.W. (2d) 18 (1942).

²³ See Comment (1947) 56 Yale L.J. 1178 for a general discussion of the legal and medical considerations involved in committing the mentally ill.

²⁴ *People v. Janek*, 287 Mich. 563, 283 N.W. 689 (1939). "The sanity proceeding . . . is an inquiry in the nature of an inquest, humanely provided for safeguarding the rights of an accused mentally incapable of advising with counsel . . . It is not a trial placing a defendant in jeopardy, but a collateral inquiry to preserve him from the jeopardy of a trial while insane."

courts have characterized such hearings as "special proceedings,"²⁵ all courts have uniformly agreed that this type of judicial action is not a criminal trial. Main reliance for this position is based on the fact that no punishment is intended for the individual; instead, the courts have reasoned that the state is merely extending its care and custody to afflicted persons who are dangerous to themselves and the community.²⁶

Treatment v. Incarceration

The third major change in the new proposal is that persons who are committed under the proposed act will be sent to the Department of Public Welfare rather than to the Department of Public Safety. At present, the Department of Public Safety has control over such persons. The Department of Public Safety contains the state law enforcement agencies, the prison administrations, the state police, and is generally concerned with criminal problems. The Department of Public Welfare, on the other hand, supervises the 25 state welfare institutions and mental hospitals.²⁷ The change is proposed as a result of a newer approach of dealing with such people as a medical problem.²⁸ All of the proceedings for commitment and release have been chosen with the governing thought that treatment is to be preferred over punishment or mere incarceration.²⁹ It is additionally desirable that persons deemed dangerous be confined in mental institutions because such persons have usually created difficult problems in prison administration.³⁰

Use of Conditional Release

The fourth major change made by the new proposal is the provision for the conditional release of persons who have been adjudged no longer sexually dangerous. The device of the interlocutory order has been employed to provide 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

²⁵ *In re Breese*, 82 Iowa 573, 48 N.W. 991 (1891); *In re Cook*, 218 N.C. 384, 11 S.E. (2d) 142 (1940).

²⁶ *County of Black Hawk v. Springer*, 58 Iowa 417, 10 N.W. 791 (1881). Compare this with the dissent of Butzel, J. in *People v. Frontczak*, 286 Mich. 51, 281 N.W. 534 (1938): "Such proceedings [insanity hearings] do not involve trials for crime, but are merely inquests. The mental and physical disorders with which sex degenerates are afflicted require their segregation and hospitalization just as much as similar treatment is required for insane persons and those afflicted with communicable diseases. To effect such segregation, no more than an inquest . . . is required. The person is not being committed as punishment for a crime, and the proceedings do not constitute a criminal trial." See also *People v. Redlich*, 402 Ill. 270, 83 N.E. (2d) 736 (1949), for a similar argument by the Illinois court in interpreting the present Criminal Sexual Psychopath Statute.

²⁷ The Illinois Blue Book for 1947-48 states that the Department of Public Welfare was responsible for care and treatment of 45,000 wards in 1947. Compare Wiltrakis, *Your Mental Hospitals—Overcrowding* (March 1949) *The Welfare Bulletin* (official publication of the Illinois Department of Public Welfare). The author states that there are now 43,000 patients in Illinois state mental institutions in space deemed adequate for 28,000 patients.

²⁸ Wall and Wylie, *Institutional and Post-Institutional Treatment of the Sex Offender* (1948), 2 *Vanderbilt L. Rev.* 47, discusses some special problems presented by the sex offender in the typical mental institution.

²⁹ See Dession, *Psychiatry and the Conditioning of Criminal Justice* (1938) 47 *Yale L.J.* 319.

³⁰ Karpmann, *Sex Life in Prison* (1948) 38 *J. Crim. L. & Criminology* 475.

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 to society. If the patient had been adjudged guilty of any crime immediately before commitment under this act, upon his conditional discharge the state's attorney is ordered to bring him before the court where he was convicted for sentencing or other disposition. The new bill follows the 1938 Act in stating that any determination that a person is a sexually dangerous person shall not constitute a defense to any criminal charge. However, the new bill does authorize the court to consider the period of time spent in custody of the Department of Welfare in imposing sentence for the crime.

There has been considerable controversy in sex offender legislation on the issue of the ultimate criminal responsibility of the individual committed to a state institution as a sexual psychopath. If the individual has been convicted of a sex crime immediately prior to his commitment as a psychopathic personality, or if he faces conviction as soon as he is released from the mental hospital, there is little incentive for him to reform under treatment knowing that he will start a prison term immediately upon his release. On the other hand, the courts and psychiatrists have consistently regarded such individuals as legally sane, thereby holding them legally accountable for their crimes. The new proposal's grant of discretion to the trial judge to consider the time spent in confinement when setting the sentence for past convictions is a compromise solution. Undoubtedly, the drafters intend that the courts should, in their consideration of time spent in confinement, give minimum or even suspended sentences to the individual who has spent years in mental institutions. Michigan has seen fit to go all the way in regarding commitment as a psychopath as a complete defense to the crime of which the individual was accused at the time of filing the petition. On the other hand, most states have agreed with the Illinois drafters that mere commitment is not a sufficient defense to criminal prosecution. The proposal's specific grant of discretion to the trial judge represents an attempt at compromise between these two conflicting attitudes.³¹

Procedural Safeguards

The fifth significant alteration made in the new proposal concerns additional procedural safeguards afforded to the individual at the hearing. Under the proposed act, the person alleged to be sexually dangerous may be represented by counsel,³² and no hearing is to be held

³¹ The Illinois, Wisconsin, Minnesota and Massachusetts statutes specifically provide that commitment as a sexually-dangerous person shall not constitute a defense to criminal charges. The California statute suspends criminal proceedings after commitment. The Ohio statute represents a rather unique compromise device; 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.

³² The 1938 Act makes no such express provision. Under the new proposal, the court is specifically ordered to appoint counsel if the individual is unable to procure counsel for himself.

except in his presence.³³ He may demand a jury of six persons and may summon witnesses in his own behalf. The two psychiatrists also serve as witnesses, and they are subject to cross-examination by the person alleged to be dangerous. On the problem of jury trial, it is important to note that the 1938 act makes jury trial mandatory at the hearing,³⁴ while the new proposal makes use of a jury merely permissive, providing that the defendant can have a jury if he so desires. This trend toward a permissive use of the jury is also found in the California,³⁵ Michigan,³⁶ and Wisconsin³⁷ statutes, while in Massachusetts³⁸ the use of a jury is discretionary with the court. Minnesota³⁹ and Ohio⁴⁰ make no provisions whatsoever for jury participation at the hearings.

Any legislative attempt to deal with a sexually dangerous person must ultimately rest on a delicate balance of the interest of the protection of society with the essential constitutional rights of the individual. A law allowing confinement of a person without that person's commission of a crime is subject to serious and vicious abuse. To meet these inherent dangers, the new proposal provides at least four substantial procedural safeguards to the individual. First, individuals are protected against blackmail and harassment by the fact that only the state's attorney, the attorney general, and in some cases a criminal court judge can institute proceedings under the act.⁴¹ Second, further protection is offered the individual in that the judge must pass upon the sufficiency of the petition prepared by the state's attorney or the attorney general. If the judge believes that there is no good reason for a hearing, he can simply dismiss the petition at that point. Third, the procedural safeguards mentioned above are now made available to the individual at hearing: the rights to counsel, jury, and to summon and cross-examine witnesses are now made expressly available to the person alleged to be dangerous. Fourth, additional protection is provided in the fact that the judge may set aside the verdict of the jury as in other civil proceedings.

The Problem of Self-Incrimination

The last significant change made in the new proposal is the specific provision giving the court power to compel the individual to submit to a psychiatric examination. Under the present act, there is a serious problem presented if the individual protests that the information elicited by such examination would tend to incriminate him and therefore refuses to be examined or answer questions. It is to be remembered that a determination that a person is dangerous is not a defense to criminal

³³ The proposal allows evidence of the commission of any past crimes by the alleged psychopath at the hearing if it is deemed "relevant." This provision is a narrower one than the 1938 act which broadly permits the introduction of evidence of the commission of any number of crimes. The language of the new proposal implies that such evidence must be limited to related sex offenses.

³⁴ Ill. Rev. Stat. (1947) c. 38, §824.

³⁵ Calif. Penal Code (Deering Supp. 1945) §6102.

³⁶ Mich. Stat. Ann. (1947 Supp.) §§28.967(1)—28.967(9).

³⁷ Wis. Laws (1942) c. 459.

³⁸ Mass. Ann. Laws (Supp. 1947) c. 123(a).

³⁹ Minn. Stat. Ann. §§526.09-526.11.

⁴⁰ Ohio Gen. Code (1947 Supp.) §§13451-19—13451-23.

⁴¹ The California statute permits the petition and affidavits to be made by any person. The other state statutes all provide for initiation of proceedings by either the district attorney, state's attorney, attorney general, or the court after conviction but before sentence of specified sex offenses.

prosecution for past sex offenses. Thus, the individual may argue that his answers to the questions of the psychiatrists could be used against him in subsequent criminal proceedings, thereby violating his privilege against self-incrimination.

This problem of self-incrimination was presented to the Illinois Supreme Court in January, 1949, in *People v. Redlich*.⁴² The case was decided on other grounds,⁴³ however, and the court did not discuss the merits of the defendant's contentions in regard to violation of his privilege against self-incrimination. The precise issue of the court's power to order a defendant to submit to psychiatric examination was left unanswered. This issue is clearly one of the most difficult constitutional issues raised under the proposal. Analyzing the privilege against self-incrimination in terms of its history and policy, it becomes clear that the privilege originated to protect individuals from testimonial compulsion through torture and inquisition methods.⁴⁴ Dean Wigmore has suggested that the 17th and 18th century's reverential attitude toward the privilege as a bulwark of liberty is seldom found in the more recent opinions.⁴⁵ The privilege should now be weighed in terms of the detriment to the individual against the safe and efficient administration of justice.⁴⁶

It seems clear that oral conversation is almost essential for a psychiatrist to form a sound opinion of the individual's mental condition. Two distinct problems are raised as a result of this oral examination. First, does the privilege apply to information which would aid in determining whether the individual is a sexually-dangerous person?⁴⁷ Second, does the privilege apply to information the individual is compelled to disclose which would lead to the discovery of his commission of past sex crimes? The two problems will be considered separately.

It may well be argued that the privilege does not apply to the actual psychiatric interview to determine whether or not the individual is a sexually dangerous person. Since the whole purpose of the legislation is to extend the legal concept of insanity to include those persons who

⁴² *People v. Redlich*, 402 Ill. 270, 83 N.E. (2d) 736 (1949).

⁴³ In the *Redlich* case, the defendant refused to submit to examination even after the court had entered a specific order directing him to answer the psychiatrist's questions. The trial court found him guilty of contempt of this order and sentenced him to confinement until he complied with the court order. The defendant was then tried on the original indictment for the crime against nature; he was found guilty and sentenced to the penitentiary. The case came to the Illinois Supreme Court on his appeal from the contempt finding. The Supreme Court decided that since the defendant had already been convicted on the original charge, the purpose of the Sexual Psychopath Statute had been frustrated, since this purpose was to provide the defendant with a prior determination of his mental condition before going to trial on the merits of the indictment. The court therefore concluded that the contempt order had lost its vitality through the defendant's subsequent trial and conviction; consequently the defendant's appeal was actually from a non-effective order, and was dismissed.

⁴⁴ 8 Wigmore, *Evidence* (3d ed. 1940) §§2250, 2251.

⁴⁵ For a spirited argument recommending the abolition of the privilege against self-incrimination, see Bird, *Our Constitutional Protection of Guilt* (1941), 25 *J. of Am. Jud. Soc.* 18.

⁴⁶ 8 Wigmore, *Evidence* (3d ed. 1940) §2251.

⁴⁷ See Inbau, *Self-Incrimination—What Can an Accused Be Compelled to Do?* (1937) 28 *J. Crim. L. & Criminology* 261, 282 for a discussion of the related problem of the application of the privilege against self-incrimination to psychiatric examinations of an accused who has pleaded insanity as a defense to the charges against him. The author concludes that the privilege has "no application to an inquiry as to his (the accused) mental responsibility at the time the act was committed."

are sexually dangerous to society, a comparison with the procedure of sanity inquests becomes relevant. The recently revised Illinois Mental Health Act⁴⁸ specifically 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." This provision has never been attacked by any persons whose sanity was in question. No one has argued so far that this provision is violative of the privilege against self-incrimination in insanity hearings. Keeping in mind that the proposed bill is a civil action, that the resulting confinement is for purposes of treatment and cure as contrasted with penalties and forfeitures, it is submitted that the individual's claims of self-incrimination, with respect to a determination of whether or not he is sexually dangerous, have no sound justification under the new proposal. The legislature and the courts have seen fit to compel a person to submit to mental examination when his sanity was in issue; a logical extension of the same principle would require that a person alleged to be sexually dangerous to the community should be likewise ordered to submit to psychiatric examination.

However, the other question—whether or not the privilege applies to any specific facts the defendant is compelled to disclose which might lead to the discovery of his commission of past crimes—is a much more difficult problem. It is to be remembered that the privilege against self-incrimination extends to any facts which may "tend to incriminate" a person.⁴⁹ By questioning an individual, the psychiatrist might uncover evidence of prior criminal offenses. This information might validly be used by the psychiatrist in forming his opinion of the person's sexual stability; however, in the hands of the state's attorney or another prosecutor, it might easily lead to the conviction of the individual for any past crimes he may have committed. Thus, the privilege against self-incrimination seems to apply squarely, since the information the person is ordered to disclose might well tend to incriminate him for such past crimes.

Several possibilities are suggested here to meet this constitutional problem. One approach would be to offer the individual immunity from subsequent criminal prosecution on account of any acts or information which he is compelled to disclose to the examiners after he has claimed the privilege. This provision would certainly be adequate in protecting the individual. At the same time it would permit the psychiatrists to obtain sufficient information upon which to make a useful report to the court. However, this suggestion is subject to criticism on the grounds that it would discourage the state's attorney from employing the act at all if there were any chance of detriment to later criminal proceedings against the individual. The immunity waiver approach therefore appears heavily weighted in favor of the individual as opposed to the interest of the community in his future criminal liability. Furthermore, a broad grant of immunity would encourage sex-offenders to confess all their past offenses during their psychiatric examination, thus insuring themselves immunity from subsequent prosecution.

Another approach rests on the method of examination by the psychiatrists. If the examiners feel that they could obtain sufficient information about the sex offender's mental condition without requiring him

⁴⁸ Ill. Rev. Stat. (1947) c. 91½, §§1-16.

⁴⁹ 8 Wigmore, Evidence (3d ed. 1940) §§2260, 2261.

to disclose specific names, dates, and places, they could phrase their questions in general, non-incriminating terms. This approach would satisfy the policy of the privilege in that it would require the police and prosecution to make their own independent search for the facts necessary to establish the individual's criminal conviction. It would also be fair to the individual since any information he discloses would not be used against him in subsequent criminal proceedings.

A third technique which might be employed to counter the application of the privilege would be the use of an explicit provision in the statute ordering the psychiatrist not to turn over any specific data or facts obtained in the interview to the prosecution. As long as the prosecutors are denied access to such incriminating data, the policy of the privilege would be satisfied. These alternatives⁵⁰ are suggested here to counter the individual's arguments that his privilege against self-incrimination would apply to proceedings under the new proposal. The self-incrimination argument poses the most difficult constitutional problem of the bill; it is clearly a problem which the courts will have to answer if the proposal becomes the law.⁵¹

The six changes heretofore outlined represent the most significant features of the new proposal. In addition to the main bill, several companion bills have also been suggested. One proposes to conform the Illinois Penitentiary Act to the theory of the new proposal by providing that a convict confined for certain specified crimes cannot be released either upon expiration of his sentence or on parole until an examination is made to determine whether he is mentally ill, feeble-minded, or sexually dangerous. If he is determined to be sexually dangerous, the court may order him transferred to the Department of Public Welfare for treatment and care. Another companion bill seeks to extend the same general principles to proceedings involving delinquent children.⁵²

Some Alternative Proposals

Although there has been considerable popular support for specialized sex-offender legislation, the movement is not lacking in respectable

⁵⁰ 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 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). In effect, this technique penalizes the individual who refuses to submit to examination by making any of his own supporting evidence inadmissible. Its principal defect is that if a person refuses to be examined, he can effectively throw an administrative bottleneck into the entire proceeding since not only his own evidence but also that of the state's would be excluded from the hearing; it would thus actually defeat the purpose of the proposed bill in securing expert opinion as to the person's sexual responsibility.

⁵¹ A group of related cases throws some light on this problem. These are decisions which have rejected the defendant's contention of privilege to exclude evidence obtained by psychiatric examination when the defendant himself has introduced the defense of insanity. *State v. Coleman*, 96 W.Va. 544, 123 S.E. 580 (1924); *State v. Chandler*, 126 S.C. 149, 119 S.E. 774 (1923); *Blocker v. State*, 92 Fla. 878, 110 So. 547 (1926). Another related question is the application of the privilege against self-incrimination to *physical* examinations of the defendant. For a collection of cases on this question, see Note (1929) 24 Ill. L. Rev. 487.

⁵² A third bill seeks to exclude time spent in confinement as a sexually dangerous person from the Statute of Limitations on criminal prosecutions.

critics. Criticism has been levied at such statutes from legal,⁵³ medical, and lay sources. These critics have offered alternative proposals to meet the problem of the sex offender.

One group of prominent psychiatrists⁵⁴ recommends a present Pennsylvania statute⁵⁵ as an excellent model for other states to follow. This Pennsylvania statute, the Greenstein Act, 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, the judge may order the defendant committed to a state mental institution in lieu of a prison sentence. The defendant may then be confined indefinitely until cured. This group of psychiatrists prefers the Pennsylvania approach for its simplicity and its acknowledgment that a diagnosis of a mental disorder is a defense to a criminal charge.

Another group of critics⁵⁶ emphasize the position taken by some psychiatrists that psychopathic personalities are incurable; these critics therefore recommend a wider use of the indeterminate sentence in confining sex criminals in the prisons, with life sentences for those deemed hopeless cases. This group advocates the establishment of research facilities to investigate possible cures for the psychopath, but in the meantime to keep such persons permanently confined, pending the discovery of more reliable techniques of psychotherapy.

Conclusion

Pervading the entire new proposal is a recognition of the modern view that the sex offender is a special type of criminal, demanding special consideration and attention.⁵⁷ Sexual psychopaths are invariably recidivists who habitually fail to learn from experience.⁵⁸ Statistics of sex crimes have reached appalling totals. It has been reported that rape occurs in the United States every 45 minutes of every day,⁵⁹ and it has been estimated that 40,000 sex crimes are committed annually in this country.⁶⁰ Gradually, the concept of special treatment for this special problem has won acceptance in the legislatures and the courts. The realization has deepened that sex crimes are not ordinary crimes, and that sex offenders are not ordinary criminals with ordinary motives.⁶¹

⁵³ See Stewart, Concerning Proposed Legislation for the Commitment of Sex Offenders (1938), 3 John Marshall L. Q. 407.

⁵⁴ Group for the Advancement of Psychiatry, Report of Committee on Forensic Psychiatry, Circular Letter 131, Feb. 12, 1949.

⁵⁵ Pa. Stat. Ann. (Purdon 1948 Supp.) §§1153-1156.

⁵⁶ See Editorial, Chicago Tribune, November 23, 1948.

⁵⁷ See Note (1948) 39 J. Crim. L. & Criminology 485.

⁵⁸ Hughes, The Minnesota "Sexual Irresponsibles Law" (1940) 25 Mental Hygiene 76.

⁵⁹ This report was made by Harris, A New Report on Sex Crimes, Coronet, October, 1947, based on statistics in the United States for the seven month period Aug. 1946 to March 1947.

⁶⁰ This figure was listed in another popular magazine, *The Saturday Evening Post*, in Wittels, What Can We Do About Sex Crimes? Dec. 11, 1948.

⁶¹ Leppman, Essential Differences Between Sex Offenders (1942), 32 J. Crim. L. & Criminology 366. Also see East, Sexual Offenders—A British View (1946) 55 Yale L.J. 527. The author states: "Among the flotsam of modern society, sexual offenders require special consideration. To the average lawyer they represent a class of individuals little known and rarely encountered. For this reason, when legal precedent alone determines the outcome of litigation involving sexual offenders, it may be a case of the blind leading the blind."

The present trend of preventative legislation therefore seems particularly well-suited to meet the problem of the sexual psychopath.

Illinois was the first state to provide valid legislation dealing with the criminal sexual psychopathic offender in 1938. Other states have since passed similar legislation, and a few states have extended their statutes to include legal disposition of the individual before he has an opportunity to commit crimes.⁶² The proposed act represents an attempt to remove the administrative difficulties present in the 1938 statute, enabling the courts to deal with a psychopath before he harms society. It is a positive constructive approach toward meeting the menace of sex crimes. It recognizes that many sex offenders are sick people who should be kept out of the community until they are cured. It also operates to confine and treat a person convicted of or charged with crime and to keep him off the streets until he recovers from his mental disorder.

Obviously, this bill alone will not do the job of preventing all sex crimes. Other complementary measures such as improved and extended sex education will have to be made a part of a much broader program. Larger appropriations for better state mental institutions and more well-trained, competent psychiatrists are necessary ingredients to the successful operation of the statute. Although the new proposal makes no pretense at being a panacean solution to the problem, it is an enlightened attempt to stop sex crimes before they happen and treat sex offenders medically once they have committed crimes. At the same time, it is successful in preserving the basic rights and liberty of the individual.

NEWTON MINOW

⁶² Neither Massachusetts, Minnesota, nor Wisconsin provide that a crime or a charge thereof is necessary.