1954

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Recommended Citation

Ferd Paul Mihm, A Re-Examination of the Validity of Our Sex Psychopath Statutes in the Light of Recent Appeal Cases and Experience, 44 J. Crim. L. Criminology & Police Sci. 716 (1953-1954)

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A RE-EXAMINATION OF THE VALIDITY OF OUR SEX PSYCHOPATH STATUTES IN THE LIGHT OF RECENT APPEAL CASES AND EXPERIENCE

Ferd Paul Mihm

The author is a member of the New York Bar. He is not at present active in the profession, except as legal questions are involved in his industrial and civic responsibilities.—EDITOR.

INTRODUCTION

Under the tradition of our Anglo-American legal and criminal system, we have in marked contrast differentiated the handling of ordinary criminals from psychotic and feeble-minded offenders. We have maintained two separate and distinct sets of procedures for these groups, employing civil methods of commitments for the latter. Originally there arose a widespread conviction that in the general, over-all field of delinquency there was a special class designated as defective delinquents who should not be sent to ordinary prisons but who should receive special handling adapted to meet their peculiar needs. And historically, society has quite early recognized that its interests might best be protected through administering medical treatment as opposed to imprisonment for insane criminal offenders.

A striking aspect of this type of procedure is that the commitments are for indeterminate lengths of time. Parole or complete freedom is given only upon the reestablishment of sufficient control and mental stability. This is diametrically opposed to the mode of handling the criminal. In that case we have felt it important that a maximum period be set for sentence in accordance with the seriousness of the crime or the dangerousness of the offender.

Throughout the years another exception has crept into criminal procedure in the defense of insanity, the case of the irresistible impulse. This is a radical extension of the same theory inasmuch as the offender is considered not insane.

Most recently, however, still another extension of this concept has been made in affording similar treatment to sane criminal sex offenders who are found to be what has been loosely characterized as sexual psychopaths. Up to this time we have avoided granting any exception to neurotics or psychopaths on the ground that they know what they are doing and if they so desired could control their behavior. However, because the spotlight of public attention has focused in recent times on several brutal sex crimes involving children, a great clamor has arisen for the suppression and control of these atrocities. It is quite easy to under-

stand the public apprehension in view of weird cases like that of Albert Fish, sixty-five years old, who has been described as "a meek and innocuous little old man, gentle and benevolent, friendly and polite", who practiced eighteen different acts of perversion according to an examination by a psychiatrist in 1928 and was credited with sexual crimes upon at least one hundred children and the murder of five after he became impotent, not to speak of an admission of cannibalism, for he actually ate some of his victims.

Through the combined efforts of sociologists, psychiatrists and of criminologists (for the first time in legal history) there arose a series of sex psychopath statutes in sixteen states and the District of Columbia designed to meet the sex crime problem.¹ But notoriety, born of sensationalism and crying for hasty action, very often has the effect of distorting the extent and nature of the problem. While it might be relatively easy to pass social legislation in answer to public clamor and agitation for new and stringent laws, it is quite another matter to satisfy the demands of constitutionality and practicability. Some pertinent phases of this question have been segregated in the following categories of interest.

CONSTITUTIONALITY

Extension of insanity concept

The legislature's extension of the concept of insanity to include sexually irresponsible persons appears on the surface to be well within the boundaries of the lawful exercise of state police power. In this country that same power, formerly exercised by the king through his lord chancellor, is now exercised by the state in its role as *parens patriae*.² As cited in a number of supreme court decisions, the legislature is free to recognize degrees of harm and to confine its restrictions to those classes where the need is deemed the clearest.³

1. CAL. WELFARE AND INSTITUTIONS CODE §5500 *et seq.* (Deering Supp. 1949); D.C. CODE §22-3501 *et seq.* (Supp. VII 1949); ILL. REV. STAT. c. 38, §38 *et seq.* (Supp. 1949); 4 IND. STAT. ANN. §9-3401 *et seq.* (Burns Supp. 1949); 4 MASS. LAWS ANN. c. 123A (Supp. 1948); 25 MICH. STAT. ANN. §28.967(1) *et seq.* (Supp. 1949); 31 MINN. STAT. ANN. §526.09 *et seq.* (1947); 19 MO. REV. STAT. ANN. §9359.1 *et seq.* (Supp. 1949); NEB. LAWS, c. 294 (1949); N. H. LAWS, c. 314 (1949); N. J. STAT. ANN. §2.192-1, 4 *et seq.* (Supp. 1949); OHIO GEN. CODE §13451-19 *et seq.* (Page Supp. 1949) (not limited to sexual psychopathic offenders); VT. REV. STAT. §6699 *et seq.* (1947); WASH. LAWS, c. 273 (1947), as amended, WASH. LAWS, c. 198 (1949); 1 WIS. STAT. §5137 *et seq.* (1947).

2. State *ex rel.* Paxton v. Guinotte 257 Mo. 1, 165 S.W. 718 (1914).

3. 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); Keokee Coke Co. v. Taylor, 234 U.S. 224 (1914).

Compulsory vaccination laws [*Jacobsen v. Mass.*, 197 U.S. 11 (1904)]; quarantine [186 U.S. 380 (1902)]; sterilization [*Buck v. Bell* 274, U.S. 200 (1927)]; *In re Hendrickson* 12

Civil v. criminal procedure

In determining the constitutionality of the sex psychopath statutes, the crux of our consideration rests upon the judicial determination of whether the proceedings under the act are criminal or civil.⁴ No one questions the power of the state to commit to institutions mentally unbalanced persons who become dangerous to the peace and safety of the community. The care, treatment and indeterminate commitment of persons who are insane, mentally deranged, emotionally or mentally ill, has long been considered a civil rather than a criminal proceeding.⁵ The object of the state is to offer a method for protecting society from the acts of such persons by placing them in such confinement as would be favorable to their cure. This commitment is not regarded as a punishment or a sentence. Consequently, the normal guarantees so jealously guarded by the courts in criminal proceedings do not apply to civil commitment procedures.⁶

Parens patriae doctrine

This *parens patriae* doctrine, implemented through civil commitment proceedings, is the underlying theory behind the sex psychopath laws. In *State ex rel Swetzer v. Green*⁷ the court in certifying the validity of the Missouri statute stated the act was not punitive but similar in character and purpose to other statutes providing for a civil inquiry into the sanity of a person and also similar to various juvenile statutes which place certain minors charged with the commission of a crime into a separate and distinct class, making available substitutive remedial

Wash. 2d 600, 123 P.2d 322 (1942)] (examples of public safeguards established to protect the peace and safety of the community).

4. The framers of the first Michigan statute made the mistake of placing the statute in the criminal code. As a result in *People v. Frotczak* 286 Mich. 51, 281 N.W. 534 (1938), the court declared the statute void on grounds of double jeopardy and lack of jury trial. This defect was shortly remedied however by a new statute which was upheld in *People v. Chapman* 301 Mich. 584, 4 N.W. 2d 18 (1942).

5. *In re Breese* 82 Iowa 573, 48 N.W. 991 (1891); *In re Cook*, 218 N.C. 384, 11 S.E.2d 142 (1940); *Hirst v. Cramer*, 195 S.W.2d 738 (Mo. 1946); *McGoldrick v. Downs* 184 Misc. 168, 53 N.Y.S.2d 333 (Sup. Ct. 1945).

6. *Hirst v. Cramer*, *supra* note 5; *McGoldrick v. Downs*, *supra* note 5; *In re Dowdell* 169 Mass. 387 (1897). (In this case the court held that the commitment of the insane under the state statute did not violate the 14th Amendment); *In re Estate Rogers* 147 Neb. 1, 22 N.W.2d 297 (1946); *State v. Green*, *infra* note 7; *State v. Chapman*, *supra* note 4; *People v. Sims* 382 Ill. 472, 47 N.E.2d 703 (1943); *People v. Redlich*, 83 N.E.2d 735 (Ill. 1949). In this case the court declared that the purpose of the statute is to prevent a person afflicted with such mental disorders from being tried for criminal offenses until sufficient recovery can be made for such psychopathy. Henry Weihofen and Winfred Overholser claim that the proceeding is neither civil nor criminal, but rather a special one "conducted primarily for the benefit of the person whose mental state is in question and it bears no resemblance to an action either civil or criminal." Weihofen and Overholser, *Commitment of the Mentally Ill*, 24 TEXAS L. REV. (1946).

7. 232 S.W.2d 897 (Mo. 1950).

procedures in place of criminal ones. Under this doctrine of *parens patriae* Judge Conkling said the state not only has the right but the duty of guardianship to those persons who are *non sui juris* and who are found to be dangerous to the health, morals and safety of its citizens as well as to themselves.⁸

One of the purposes of these statutes is to escape the rigidity of criminal proceedings.⁹ The objectives of the act are remedial, therapeutic and preventive, said the court in a recent New Hampshire case.¹⁰ It seeks to cure and prevent rather than punish. The protection of society as well as the benefit of the individual are the main objectives, all of which spells out a civil rather than a criminal proceeding.^{10a}

Theory v. practice

However, what might in theory amount to a perfectly valid exercise of state police power, might also in practice constitute an unlawful deprivation of personal liberty and property. The Supreme Court in *State ex rel Pearson v. Probate Court of Ramsey County*,¹¹ anticipating just such a potential abuse, warned that a law of this type though "fair on its face and impartial in appearance" was nevertheless open to abuse in its administration. Developing this thought, the court continued, "It would not be reasonable to apply the provisions of the statute to every person guilty of sexual misconduct, or even to persons having strong sexual propensities." Such a definition would not only make the act impractical of enforcement and perhaps unconstitutional¹² in its application, but would also be an unwarranted extension of the meaning of the words defined.¹³

Are we to judge these sex psychopath statutes solely in the light of their objective purposes? Or do these statutes perhaps in practice constitute a misuse of the state's power to sacrifice personal liberties?

8. In a late Illinois case [*People v. George*, 95 N.E.2d 606 (Ill. 1950)] the statute was declared constitutional. For similar decisions see: *In re Turner*, 94 Kan. 115, 145 Pac. 871 (1915); *McIntosh v. Dill*, 86 Okla. 1, 205 Pac. 917 (1922). For articles on the constitutionality of these acts see Notes, 96 U. of Pa. L. Rev. 872 (1948); 37 MICH. L. REV. 613 (1939); 1 STAN. L. REV. 486 (1949).

9. See Note, 39 COL. L. REV. 534 (1939).

10. *In re Moulton*, 96 N.H. 370, 77 A.2d 27 (1951).

10a. *In re Kemmerer*, 309 Mich. 313, 15 N.W.2d 652; 36 A.B.A.J. 665 (1944). "A Criminal proceeding is a proceeding which is prosecuted by the state against a person charged with a public offense to obtain punishment therefor." *McGoldrich v. Downs*, *supra* note 5.

11. *Supra* note 3.

12. There is a very strong presumption of constitutionality as regards state statutes and the Supreme Court will not declare them invalid except upon inescapable grounds. 11 AM. JUR., *Constitutional Law* §128 (1937).

13. Notwithstanding this, the court stated the assumption must be maintained that the state court will protect the constitutional rights of persons so charged and adequately safeguard these rights at every step of the proceedings.

It might be in order at this juncture to inspect some of the underlying concepts and issues inherent in the answers to these questions.

POLICE POWER

All inclusiveness of these powers

While the use of the term "police power" is essentially modern, its counterpart may be found in early Greek and Roman law where the state assumed responsibility for the public safety and health of its citizens. As developed through necessity, it has become one of the broadest powers of the state.¹⁴ In its enlarged meaning the Supreme Court has said that "the police power is not subject to any definite limitation but is coextensive with the necessities of the case and the safeguard of the public interest."¹⁵

All rights, individual or otherwise, are held subject to the police power of the state.¹⁶ In *Varholy v. Sweet, Sheriff*, a Florida Supreme Court case decided in 1943, it was held that while the 14th Amendment "authorized the Federal Court to declare invalid state laws abridging the rights of citizens or denying due process of law, it was not intended to interfere with the power of the state to protect the lives, liberty and property of the citizens of the state and to promote education, good order, health, peace and morals."

The sex offender acts have been justified in a great many test cases under these broad police powers under the theory that the threat to the public safety justifies the passage of these laws. In *State ex rel Pearson v. Probate Court of Ramsey County*, the court pointed out that a law which presumably hits "the evil where it is most felt" is not to be overthrown because there are other instances to which it might have applied. In *State v. Green* the court said that it was the legislature's prerogative to conclude that the need for detention and treatment of sexual psychopaths is a type of harm from which society needs protection. In an Illinois Supreme Court case¹⁷ it was stated, "the state not only has the power but the duty to protect society from persons who are sex criminals and who have not recovered from their criminal propensities while serving in the penitentiary." But the court in this case also stated that in addition to public safety, public morals were involved,

14. Police power is universally conceded to include everything essential to the public safety, health and morals and to justify the destruction or abatement by summary proceedings of whatever may be regarded as a public nuisance.

15. *Canfield v. U. S.*, 167 U.S. 518 (1897), citing *Rideout v. Knox*, 148 Mass. 368, 19 N.E. 390 (1888).

16. *Beer Company v. Massachusetts*, 115 Mass. 153 (1874).

17. *People ex rel. Elliott v. Juergens*, 95 N.E.2d 602 (Ill. 1950).

both of which are among well-settled grounds upon which police power may be exercised.

Limitations of police power

However broad and all-inclusive police powers may be,¹⁸ it is equally well settled that these powers are subject to definite limitations. The exercise of police power must be reasonable. Constitutional guarantees of personal liberty and private property can not be unreasonably and arbitrarily invaded. These constitutional guarantees do not limit the exercise of the police power of the state to preserve the public health, safety, morals, etc. only so long as "that power is reasonably and fairly exercised and not abused."¹⁹

Do these statutes pass the test of valid exercise of police power?

Conversely, one might say that to constitute a valid exercise having a "reasonable relation to a proper purpose" the exercise of the statute in practice must be effective and accomplish the purpose for which it was intended. It must, indeed, "hit the evil where it is most felt." Here our sex offender acts fall miserably short. These laws are never used in some states, and seldom used in others because they are dangerous in principle.²⁰ They are, therefore, unimportant in such states. Sixteen persons were confined under this law in Illinois within ten years after its enactment. In Minnesota the law decreased from thirty-five for the first year to about ten per year thereafter for about a ten-year period. (Most of these were for homosexuality and were released within a few months.)

Fallacies concerning the sex offender

The ineffectiveness of our present sex psychopathic laws²¹ stems in part from the hasty manner in which they were enacted without proper scientific investigation and partly from many fallacies that have existed and, strangely enough, still persist. Isolated sex crimes of the more atrocious type have led to widespread publicity on the subject. The

18. The asexualization of habitual sex criminals was upheld as constitutional in *Davis v. Walton*, 74 Utah 80, 276 Pac. 921 (1929).

19. RUSSELL, *THE POLICE POWER OF THE STATE* (1900.) "It has been said that the test when such regulations are called in question, is whether they have some actual and reasonable relation to the maintenance and promotion of the public health and welfare and whether such is in fact the end sought to be obtained." Also, "In determining the constitutionality of a state police power statute, the question is whether its restrictions have a reasonable relation to a proper purpose." *Keokee Coke Company v. Taylor*, 234 U.S. 224 (1914).

20. Sutherland, *Sexual Psychopath Laws*, 40 J. CRIM. L. & CRIMINOLOGY 543 (1950).

21. PLOSCOWE, *SEX AND THE LAW* (1951).

flame of popular zeal has been further fanned by misinformed writers. Many of these fallacies have been exploded in Dr. Paul W. Tappan's comprehensive report to the New Jersey Legislature,²² some of which are:

1. That there are tens of thousands of sex fiends abroad in the land.²³
2. That sex offenders are usually recidivous.²⁴
3. That sex offenders progress to more serious types of crime.²⁵
4. That it is possible to predict the danger of sex crimes to be committed.²⁶
5. That sex psychopathy or sex deviation is a clinical entity.²⁷
6. That these individuals are over-sexed. The reverse is usually true.
7. That effective treatment methods to cure sex offenders are already known and employed.²⁸
8. That the laws passed recently in one quarter of the states are getting at the brutal and vicious sex criminal.²⁹
9. That civil adjudication of the sex deviate or an indeterminate

22. TAPPAN, *THE HABITUAL SEX OFFENDER* (Report to the New Jersey Legislature, 1950).

23. "Most Sex Offenders are charged with relatively minor crimes. They are not for the most part degenerate, sex fiends who are potential killers."

24. Sex offenders have a low rate of recidivism. In figures compiled thru the F.B.I. it rates seventeenth and is almost at the bottom of the list. Sutherland, *supra* note 20.

The type of offender spoken of and also as one incapable of learning from experience and given to repetitive misconduct in these matters, is part of a small minority of the total sex offenders.

25. The danger of murder by a relative or other intimate associate is very much greater than the danger of murder by an unknown sex fiend. Sutherland, *supra* note 20.

26. "There is much vagueness in the public mind as to what is a sexual criminal. To some he is a sex maniac, a terrible monster of some sort that threatens their peace and security. Usually one has in mind a brutal assault on some child, or possibly a rape or other similar assault. The meaning or frequency of sex crimes, or other relation to the over-all problem of crime in general, is a subject little known to the general public. The prevalence of prostitution as an inescapable evil, or of homosexuality or other perversions, are looked upon with mixed feelings of tolerance, contempt, and indifference. But should one revolting sex crime take place, the entire community is aroused and the spotlight of attention centers upon the whole sex picture, arousing public spirit and action, which after a time of appeasement, finally peters out, and the so-called sex crime wave disappears. The actual presence of any sex crime wave is subject to serious doubt. Valid statistics cannot substantiate that sex crimes are on the increase." Karpman, *The Sexual Psychopath*, 42 J. CRIM. L. & CRIMINOLOGY 184 (1951).

27. In Ravenscroft, *Examination of the Nebraska Statute*, 29 NEB. L. BULL. 506 (1950), the writer claims that the psychopath definitely is not identifiable, and that as a result there is vagueness and indefiniteness in the statutes.

28. There is one psychiatrist for every 600 clinics doing preventive work for the general public, and one for every 221,600 of population. Personal clinical psychologists and psychiatric social workers and special nurses trained for psychopathic cases meet only a small fraction of the current needs. There is a lack of institutional study on the treatment and cure of the sex deviate. The above is according to Dr. Raymond Waggoner, director of the Neuro-Psychiatric Institute and a member of the State Mental Health Commission of Michigan.

29. See PLASCOWE, *supra* note 21, and TAPPAN, *supra* note 22. Professor PAUL W. TAPPAN's report to New Jersey Legislature, *supra* note 21.

commitment to a mental hospital is similar to our handling of the insane and therefore civil liberties and due process are not involved. (This point will be dealt with in greater detail later in this article.)

10. That the sex problem can be solved merely by passing a new law.

CONSTITUTIONAL SAFEGUARDS

Just what constitutional safeguards are involved in our consideration of the validity of these statutes? How have the states, in the enactment of these statutes and in the proceedings under them, discharged their duties with respect to these constitutional safeguards? Judge Ploscowe in his book cited above, in speaking of our constitutional heritage says, "This tradition takes a bad beating at the hands of the sex psychopath laws. For, by the simple device of shifting the basis of jurisdiction from the criminal side of the law to the civil side, these laws make it possible to keep men in protective custody for periods up to a lifetime." The use of this legal expediency becomes necessary in the face of the deprivation of these fundamental rights. But how far can we go in validating the usurpation of these constitutional rights where these laws do not accomplish their purpose, do not protect society from the threat of harm involved and do not in fact hit "the evil where it is most felt."

The states have in various and sundry ways attempted to answer this dilemma, some of which we shall next consider.

Due process

Behavior scientists, who have to a great extent fathered these statutes, have been recommending for quite some time that we stop sentencing on the basis of the crime committed. Indeed they propose that we should not sentence at all at the time of conviction in any fixed terms, but rather for an indefinite term. They recommend this on the theory that if you continue unnecessary supervision when the offender has reached a point of improvement he is apt to deteriorate again. From that point of view you may have an individual who has committed quite a serious crime who, after a very brief period of treatment, may be well enough adjusted to return to the community.

On our main point of issue on the other hand, the opposite is the case with trivial offenders, who are not aided by any amount of protection and who are not a potential threat to the community. These statutes make no distinction between the dangerous sex criminal and the ordinary run of sex deviants such as homosexuals, exhibitionists,

peepers, fetishists and frotteurs. In view of the lack of capacity of prisons and clinical criteria to tell when a person is ready to be released, may not the "forgotten man" be increasing?³⁰ Where there is admittedly no successful treatment for the peepers, is the indefinite incarceration of such an individual justified in view of the small amount of annoyance he causes? No amount of legal abstraction or juggling of nomenclature from criminal to civil can defend this stand. In at least five³¹ of the states, persons may be adjudicated sex psychopaths without having first been charged or convicted of a crime. In many of the other states there need only be a charge of a crime without a conviction.

The New Jersey statute calls for a conviction first for certain specified criminal offenses, coupled with a psychiatric diagnosis which, taken together, may result in an adjudication of psychopathy. The period of confinement for treatment is definitely limited and coextensive with the maximum criminal sentence for the crime involved. The New Jersey statute is a safeguard against indefinite incarceration which may stem from psychiatric premonitions and conclusions about which the psychiatrists themselves disagree. It also prevents the indefinite confinement from ever advancing from the therapeutic to the punitive or correctional stage because of insufficient therapeutic facilities and personnel. Thomas A. Larremore,³² in his report on this and three other articles, points out, however, two criticisms of the New Jersey statute: "First, they fail to provide for the preventive adjudication of deviants, and, second, they do permit release of individuals still dangerous and needing treatment."³³ In view of the fact that our legal system demands a certain amount of reasonable definiteness where the deprivation of individual liberties is at stake, it is quite understandable why there has been little use made of the statutes in Massachusetts, Illinois and the District of Columbia.

In all fairness it should be pointed out that the states have made

30. From the point of view of many psychiatrists, the great weakness in our system of criminal law is that under penal statutes a person convicted of a crime must be released at the attainment of his maximum sentence. This is so even though it may be apparent at the expiration of the maximum that the individual is still a dangerous person, who probably, upon his return to the community, will inflict additional injuries and engage in further violations of the criminal law. Actually short prison terms will not cure but will tend by way of example to discourage indiscreet homosexuals and other minor sex deviants.

31. Wisconsin, Minnesota, Massachusetts, Washington, District of Columbia and New Hampshire.

32. Legal consultant to the American Social Hygiene Assn.

33. In *Ex parte Stone*, 87 Cal. App. 2d 777, 197 P.2d 847 (1948), the court in its attempt to protect individual rights and afford due process to all, actually was forced to release an admittedly dangerous sexual psychopath. This is another example of the ineffectiveness of these laws and the inefficiency of hospitalization today in the treatment of sex psychopathy.

some efforts to protect individual rights under our traditional concept of due process. The right to a writ of habeas corpus which is available to the insane or mental defectives³⁴ is available also to defendants who have been committed under these acts.³⁵

Under the Ohio law the individual must be sent to a penal institution after his release from a mental hospital to serve a term which, together with the term already spent in confinement, totals the applicable criminal sentence. In this respect it is similar to the New Jersey statute. In all other states, the completely indefinite sentence is used. The Ohio statute also provides for rights at the hearing, to representation by counsel, use of subpoena, examination and cross-examination as well as the right to produce witnesses. These very rights were upheld in a late California case and were held applicable to all individuals coming within the purview of these statutes.³⁶

In *People v. Barnett*,³⁷ a California Supreme Court case, it was claimed that the denial of the court to a hearing on the issue either before or after the trial constituted an abuse of discretion. Michigan offers the individual committed as a sexual psychopath a complete defense to the crime of which the individual was accused at the time of the filing of the petition. The Indiana statute has a similar provision. Most of the other statutes, however, claim that commitment is not a sufficient defense to criminal prosecution.

In *Malone v. Overholzer*,³⁸ the court pointed out that the defendant's right to counsel, habeas corpus and a fair hearing on the issue of whether or not he had recovered from his sex psychopathy, was not to be denied at any time.

A very interesting case, illustrating how some of these procedural safeguards may be denied, is *People v. Artinian*,³⁹ a Supreme Court case dated April 5, 1948. The defendant was originally arraigned in Detroit on a charge of rape to which a plea of not guilty was entered. Before trial the prosecuting attorney filed a petition for an examination of the defendant by a psychiatrist under the Michigan Act,⁴⁰ alleging that the defendant was a criminally psychopathic person. The court granted the petition and appointed a psychiatric commission which filed a report which stated in brief that they found that the patient

34. *Vona v. State*, 54 N.Y. Supp.2d 453 (Ct. Cl. 1945). *Ravenscroft*, *supra* note 27.

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

Ex parte Stone, *supra* note 33.

36. *People v. Thompson*, 227 P.2d 272 (Cal. App. 1951).

37. 27 Cal.2d 649, 166 P.2d 4 (1946).

38. 93 F. Supp. 647 (D.C. 1950).

39. 320 Mich. 441, 31 N.W.2d 638 (1948).

40. MICH. STAT. ANN. §28.967(4) (Supp. 1953).

was neither psychotic nor feeble-minded and under the acts involved must therefore be considered a criminal sexual psychopath. The report further stated that his behavior was compulsive in nature and that he recognized that he had no control over the expression of his impulses nor insight into the causes of his deviated behavior. The report concluded with the recommendation that in accordance with the acts involved, the patient be sent to an appropriate institution for treatment and care. At a subsequent hearing the only testimony that was introduced was that of the two psychiatrists. On the sole basis of this testimony the defendant was adjudged to be a criminal sexual psychopathic person and was accordingly committed forthwith to a state hospital. Two years later the defendant filed a motion to set aside the order of commitment and effect a discharge on the grounds that the petition failed to contain any of the facts required by the statute and also because there was no evidence supporting the adjudication made by the court. From an order denying this motion, the defendant appealed. In handing down its decision the Supreme Court of Michigan found that the Lower Court had erred and that the original petition, indeed, did not contain sufficient facts tending to show that the defendant was a criminal sexual psychopathic person. The court found that the original petition was "fatally defective and in consequence the subsequent proceedings invalid." The omission of the factual basis of this report was tantamount to saying that the judgment of the doctors was to be substituted for that of the court. The deprivation of the defendant's rights at the hearing amounted to denial of due process.

In a leading recent New Hampshire case,⁴¹ while the court did attest to the validity of the New Hampshire Act, it also pointed out that the act was subject to criticism in that it was capable of abuse in application. The court said that "when and if abuse is shown, the court will be open to remedy it. There may be a vast gulf between the objectives of the act and its actual operation, if adequate facilities and personnel are lacking to effect its objectives."

The attitude of the courts in this type, as well as other similar proceedings, has consistently been to narrowly limit any abridgment of these procedural safeguards. In the petition of *Morin et al.*⁴² (concerning which certiorari was denied in 1949), the Supreme Court of the United States admitted that under the Doctrine of *parens patriae* constitutional guarantees applicable to criminal proceedings did not apply to proceedings under a statute providing that a child adjudicated a delin-

41. *In re Moulton*, *supra* note 10.

42. 289 U.S. 709 (1949).

quent may be committed to an industrial school for a term of the child's minority. The court added, however, that "the better practice would have been to offer further notice and opportunity for hearing before committal."

Cruel and unusual punishment

Another of our constitutional safeguards is a prohibition against cruel and unusual punishment. It has been repeated many times⁴³ that these statutes are not punitive but remedial. A very interesting question is, when does care and treatment end and punishment begin? In *ex parte Stone*,^{43a} cited above, the court said, "while it may well be said that, when by lapse of time it has become probable that as a result of such a trial the defendant will be acquitted and be entitled to be restored to his liberty while still a menace to society because of his sex psychopathy, it [the court] cannot therefore hold that accused without ever being granted a trial on the charge against him and without the imposition of any sentence, fix a term of imprisonment." Nor may he, because he has such a psychopathy, "be bounced from the court to the hospital and from the hospital back to the court ad infinitum."

The similarity of sex psychopath statutes with those dealing with the commitment of the insane has of course been stressed in defense of the former. In *ex parte Stone* the court pointed out a very interesting distinction between statutes applicable to sexual offenders charged with a crime and those applicable to the insane, wherein it said,

"Statutes applicable to sex psychopaths charged with crime differ from those applicable to the insane; for sex psychopaths are not necessarily insane and are not by reason of their mental condition unable to defend themselves from criminal charges; and if they are convicted of crime and cannot be benefited by hospitalization, the public is as well protected from them when they are committed to a prison; and if they are innocent of the crime they are entitled to their liberty until again charged with a crime or committed as insane under proceedings brought for that purpose under the applicable statutes. The presumption of innocence still protects the petitioner and he is not to be dealt with as a lawbreaker unless and until so adjudicated."

There is much difference of opinion as to what constitutes cruel and unusual punishment.⁴⁴ Where because of lack of adequate treat-

43. Notes, 37 MICH. L. REV. 613, 96 U. OF PA. L. REV. 872, 1 STAN. L. REV. 486, *supra* note 8. Also see: *People v. Chapman*, *supra* note 4; *People v. Sims*, *supra* note 6; *In re Moulton*, *supra* note 10, *Sweezer v. Green*, *supra* note 7.

43a. *Supra* note 33.

44. "Whether a penalty prescribed by municipal ordinance constitutes cruel and unusual punishment prohibited by Constitution is not determined by the amount of fine nor length of the sentence in a penal institution which might be imposed, but rather by the nature of the punishment." *In re Calhoun*, 94 N.E.2d 388, 87 Ohio App. 193 (1949).

ment facilities a deviant is incarcerated for a period of time all out of proportion to the actual offense complained of, and under conditions that amount to little or complete absence of treatment,⁴⁵ very serious doubts arise as to whether such unwarranted, prolonged incarceration might not be considered cruel or unusual punishment.

Self incrimination

The issue of self incrimination has likewise been neatly side-stepped by classifying the proceeding as a civil rather than a criminal one.⁴⁶ Originally this privilege was designed to protect individuals from giving testimony under tortuous methods. While the former reverential attitude towards this privilege has somewhat changed in modern opinions, wherein it is now balanced between the detriment to the individual on the one hand and the protection of society as well as the efficient administration of justice on the other hand,⁴⁷ there can be no doubt that a clear-cut privilege against self-incrimination still exists.

In *Counselman v. Hitchcock*,⁴⁸ an oft-cited Supreme Court case on this subject, the court said,

"It is broadly contended on the point of the appellee that a witness is not entitled to plead the privilege of silence except in a criminal case against himself; but such is not the language of the Constitution. Its provision is that no person shall be compelled in any court case to witness against himself. This provision must have a broad construction in favor of the right which it was intended to secure. . . . The privilege is limited to criminal matters, but it is broad as mischief against that which it seeks to guard. . . . It is an ancient principle of the law of evidence, that a witness shall not be compelled, in any proceeding, to make disclosures or to give testimony which will tend to incriminate him or subject him to fines, penalties or forfeitures. . . . We are clearly of the opinion that no statute which leaves the party or witness subject to prosecution after he answers the incriminating question put to him, can have the effect of supplanting the privilege conferred by the Constitution of the United States. . . . In view of the constitutional provision, a statu-

45. *Kemmerer v. Benson*, 165 F.2d 702 (6th Cir. 1948).

46. The following cases hold that the privilege against self incrimination does not apply in insanity proceedings: *State v. Coleman*, 96 W.Va. 544, 123 S.E. 580 (1924); *State v. Chandler*, 126 S.C. 149, 119 S.E. 724 (1923); *Plocker v. State*, 92 Fla. 878, 110 So. 547 (1926); *GREENLEAF ON EVIDENCE*, §469-E (16th ed. 1899); *State v. Church*, 199 Mo. 605, 95 S.W. 16 (1906); *State v. Petty*, 32 Nev. 384, 18 Pac. 934, (1910); *People v. Austin*, 199 N.Y. 446, 93 N.E. 37 (1910); *People v. Schuyler*, 106 N.Y. 298, 12 N.E. 783 (1887); *People v. Furlong*, 187 N.Y. 198, 79 N.E. 978 (1907); *People v. Truck*, 170 N.Y. 203, 63 N.E. 281 (1902); *People ex rel. Kemmler v. Durstan*, 119 N.Y. 569, 24 N.E. 6 (1890).

The following cases have held that this privilege is applicable only in criminal cases and not applicable to proceedings under the sex psychopath statutes:

People v. Chapman, *supra* note 4.

People v. Redlich, *supra* note 6.

In re Moulton, *supra* note 10.

47. 8 WIGMORE, *EVIDENCE* §§2250, 2251 (3d ed. 1940).

State v. Milam, 48 So. 2d 594 (Miss. 1950).

48. 142 U.S. 547 (1892).

tory enactment, to be valid must afford absolute immunity against future prosecution for the offense to which it relates."

Concerning the psychiatric oral examination, two questions are raised: (1) Does privilege extend to information needed in determining whether or not the individual is a sexual psychopath, and (2) Does it apply to information the individual is compelled to discuss and as a consequence lead to the discovery of the commission of past crimes. The latter would lead to the possible prosecution for past offenses.

In view of the fact that the whole purpose of this legislation is to extend the legal concept of insanity to include sexual psychopaths, privilege does not apply. The defense of privilege in an insanity proceeding has never been upheld. But as to whether this defense applies to such information as would lead to the discovery of his commission of past crimes, it is a much more difficult problem. Privilege against self-incrimination extends to any facts which may "tend to incriminate a person."⁴⁹ The information is of unquestioned importance in the psychiatrist's determination as to the sexual stability of the person, but this same information in the hands of a state's attorney might very well lead to a conviction of that individual for the crimes disclosed. There does not seem to be any question of the fact that such information would tend to incriminate him for such past crimes.

Under the Wisconsin statute there is a provision 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 after such opportunity shall have been duly demanded." However, this can reasonably defeat the whole proceedings in that the state's evidence can also be prohibited.

The Indiana Statute grants immunity to the defendant in that the use of the physicians' reports is forbidden in any other proceeding against the accused.⁵⁰ An immunity is also given under the Missouri Act. Such grants of immunity dispose of the problem of self-incrimination even when the act is deemed criminal in nature.⁵¹

Under the grant of immunity afforded by the Indiana Statute a wit-

49. 8 WIGMORE, EVIDENCE §§2250, 2251 (3d ed. 1940).

50. In 40 J. CRIM. L. & CRIMINOLOGY, 186 (1949), the writer suggests that this immunity might be generally opposed by most district attorneys in that it would encourage offenders to confess all under the protective umbrella of immunity. It was suggested that a possible solution might be in phrasing the questions in non-incriminating terms omitting dates, places, etc. or possibly in the elimination of specific data from the actual written reports made available to prosecutors.

51. These grants in analogous criminal proceedings, have been upheld in *United States v. Weinberg*, 65 F.2d 394, *cert. denied*, 290 U.S. 675 (1933). Also see 8 WIGMORE, EVIDENCE §2271 (3d ed. 1940).

ness would be compelled to speak under the penalty of contempt of court. In *People v. Redlich*,⁵² refusal to submit to psychopathic examination constitutes grounds for civil contempt in that the contemner fails to do something that he is ordered to do by the court for the benefit or advantage of another party. While imprisonment for criminal contempt is punitive, and must be for a definite term, sentence for civil contempt is remedial or coercive, the purpose of which is imprisonment until he has complied with the mandate of the court. Thus the dignity of the court and of legal authority is vindicated and the underlying ends are fulfilled.

In *People v. Scott*, an Illinois Supreme Court case,⁵³ the court held it to be error to read into evidence a doctor's unverified report as well as the showing that the defendant had refused examination by the doctors. Regarding this refusal the court said

"This was a privilege that the law guaranteed to the defendant. There is no law in the state that authorizes or permits a court, either on its own motion or a motion of a party to any civil suit or proceeding, to appoint alienists to examine a defendant or a party to such a suit with a view of qualifying them to testify as the court's witnesses for or against such party as to his mental or physical condition."

The privilege against self-incrimination, however, must be diligently sought after.⁵⁴

Jury trial

We are told that lawyers should come to realize that ordinary concepts of what due process requires, do not necessarily apply to all types of proceedings.⁵⁵ With respect to the issue of right of trial by jury there is varied and mixed reaction in the enactment and processing of these statutes. It has been held that a trial by jury is not a constitutional requirement inasmuch as the acts involved special statutory proceedings similar to those for the commitment of the insane, mentally ill, or the control of neglected or delinquent children.⁵⁶

In *In re Dowdell*⁵⁷ the court stated, "it has been declared repeatedly that the phrase 'due process of law' does not of itself require a trial by jury in states where usage and statutes are otherwise."⁵⁸ The Illinois

52. *Supra* note 46.

53. 326 Ill. 327, 157 N.E. 247 (1927).

54. "Privilege against self-incrimination is neither accorded to the passive, resistant, nor to the person who is ignorant of his rights, nor to one indifferent thereto, but it is valid only when insisted upon by the belligerent claimant in person." *United States v. Rainey*, 10 F R D. 431 (1950).

55. *Commitment of the Mentally Ill*, 25 MENT. HYG. 76. This is an excellent article on the medical as opposed to the legal point of view.

56. *State ex rel. Pearson v. Probate Court of Ramsey County*, *supra* note 3.

57. 169 Mass. 387, 47 N.E. 1033 (1897).

58. Cases cited by the Court: *Montana Co. v. St. Louis Mining & Milling Co.*, 152 U.S.

Legislature requires a jury trial for all commitment proceedings.⁵⁹ In *People ex rel. Elliott v. Juergens*⁶⁰ a Supreme Court of Illinois case, the court expressly applied this statute to cover commitment proceedings for sexual psychopaths. It includes not only the original commitment procedure but also the discharge.

In *People v. Scott* it was held that where the right of jury trial is preserved, the testimony of physicians is void as prejudicing the jury.⁶¹ Other jurisdictions refuse to admit physicians' reports as evidence but examiners may be summoned as witnesses. This dilemma is obviated where there is no provision in the statutes for a jury trial such as in Minnesota and Ohio enactments. In California, Michigan, Wisconsin and Washington, D. C., a jury trial is permissible and in Massachusetts it is discretionary with the court. The Indiana Act provides against a jury trial despite the fact that the Indiana Constitution declares that the right of trial by jury shall be inviolate in all civil cases. But here the term "civil" cases refers only to those actions triable by jury at common law.⁶²

INVALID CLASSIFICATION

Criteria

The right of the legislature to devise classifications of persons and things under its jurisdiction is well recognized provided these classifications are in accord with the aims sought to be achieved and based upon understandable and reasonable distinctions.⁶³ But these classifications must neither be arbitrary nor capricious but must rest upon reasonable and justifiable distinctions.

"It (the Constitutional prohibition against discriminatory classifications) does not prohibit or prevent classification, provided such classification of persons and things is reasonable for the purpose of the legislation, is based upon proper and justifiable distinctions considering the purpose of the law, is not clearly arbitrary, and is not a subterfuge to shield one class or unduly burden another or to oppress unlawfully in its administration." 12 AM. JUR., *Constitutional Law*, §476.

Vagueness of statutes

It is here contended that these laws are not based upon "understand-

160, 171 (1894).

Hurtado v. People, 110 U. S. 516 (1884).

Walker v. Sauvinat, 92 U. S. 90 (1875).

59. "During the 25 years this law remained on the books more sane persons were declared insane by jury trials as shown by the reports of institutions from year to year than were ever wrongfully committed under the earlier system." Dewey, *The Jury Law for Commitment of the Insane of Illinois*, 69 AM. J. OF INSAN. 571 (1913).

60. 407 Ill., 523, 95 N.E.2d 602 (1950).

61. *Supra* note 53; *Contra*: *Jessner v. State* 202 Wis. 184, 231 N.W. 634 (1930).

62. See Note, *Indiana Sexual Psychopath Statute*, 25 IND. L.J. 186 (1950).

63. *Cook Coffee Co. v. Flushing* 267, Mich. 131, 255 N.W. 177 (1934). *Little v. American State Bank*, 263 Mich. 645, 249 N.W. 22 (1933).

able and justifiable" distinctions and therefore create an unreasonable classification. Sex psychopath criminals are not *sui generis* capable of identification to merit special handling. The definitions used in the various laws usually contain two elements—one, an overt act, and, two, a state of mind. This state of mind is variously defined. The District of Columbia law defines it as lack of power to control one's sexual impulses. The Minnesota and Wisconsin laws define it as "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 such conditions". The Massachusetts law defines a sexual psychopath as a person "who by a habitual course of misconduct in sexual matters has evidenced the utter lack of power to control his sexual impulses." The District of Columbia Statute describes him as "any person, not insane but by a course of repeated misconduct in sexual manners who has evidenced such lack of power to control his 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 object of his desire" (Sec. 201).

As Edwin H. Sutherland points out in his article quoted above, "such definitions state that anyone who commits several series of sex crimes is a sex psychopath; the finger print record is the only evidence needed for diagnosing an offender as a psychopath and the services of psychiatrists are not needed. To say that a habitual offender is a sexual psychopath is without justification."

The term "sexual psychopath" is very misleading in that there is no general agreement amongst psychiatrists as to the exact technical significance of this term.⁶⁴ In May 1949 the report of the Authoritative Committee on Forensic Psychiatry substituted "psychiatrically deviated sex offender" for the term "psychopath," shunned the use of the word psychopath for the term "psychiatrically deviated sex offender." "The committee cautions against the use of this appellation, 'psychopath', in the law. . . . There is little agreement on the part of psychiatrists as to the precise meaning of the term."

The whole concept of sex psychopathy is scientifically unsound. As a descriptive term it is misleading. Sex delinquents are more and more being regarded as neurotic or psychotic, with few genuine psychopaths amongst them.⁶⁵

These laws create an unreasonable classification because they do not

64. Some idea of the vagueness of the term psychopath is clearly illustrated in the following figures: One psychiatrist in the Illinois State Prison classified 98 percent of the inmates psychopathic personalities, while in other similar institutions psychiatrists only diagnosed 5 percent as psychopathic. In the psychiatric clinic of the Court of General Sessions in New York City handling sex delinquents, 15.8 percent were reported psychopathic, while Bellevue Hospital, also in New York City, classified 52.9 percent of the sex offenders it diagnosed as psychopathic.

65. TAPPAN, *op. cit. supra* note 22.

distinguish between the dangerous sex deviants on the one hand and the minor sex offenders on the other hand.⁶⁶ It is likewise unreasonable in classification in that (in some states) it does not differentiate between those offenders charged or convicted of a crime from those not so charged or convicted. These statutes furthermore create an invalid classification in that they are based upon the erroneous assumption that it is possible to identify the sexual psychopath who is about to commit a sex crime prior to its actual commission.⁶⁷

In *In re Moulton*,^{67a} Justice Kenison made it very clear that he was only concerned with the constitutionality of the act on its face and that, only as to the specific attacks against the act made by the defendant. He said

"It is important that it is made crystal clear what we did not decide in this case. We did not pass on the validity of that part of the definition of sexual psychopath, section 2, which pertains to a person suffering from 'lack of customary standards of good judgment'. This may mean all things to all men and entirely different things to different groups of men."

He questioned also whether the New Hampshire act was intended to limit the right of a committed person to question the legality of the commitment by habeas corpus. He pointed out that the act involved many other questions of liberty in due process.

The concept of the sexual psychopath is too vague for just legal or administrative use. When can a person be deemed to be "completely and permanently cured"? What psychiatrist is competent to make such a prophecy? He would have to be more on the order of a prophet or fortune teller than of a psychiatrist. No diagnostic instruments, facilities or criteria are presently available to enable us to make these conclusions.⁶⁸

UNITED STATES SUPREME COURT CONSTRUCTION OF THESE STATUTES

The chief difficulty presented in the Supreme Court decision of *State v. Probate Court of Ramsey County*⁶⁹ is that the Supreme Court of the United States is definitely committed to the principle of following

66. Many sex offenses are merely misdemeanors. Homosexuality and exhibitionism are examples. According to the article *Homosexuals in Uniform*, Newsweek, June 9, 1947, p. 54, nearly 4,000 homosexuals were discharged from the armed forces.

67. Particularly in point here is the New Hampshire statute, which is based upon the so-called "model statute" prepared at the University of Pennsylvania.

67a. *Supra* note 10.

68. DR. WINFRED OVERHOLSER, Superintendent of St. Elizabeth's Hospital, has stated that "before the law can be expected to recognize this group as calling for specialized treatment it will be necessary for psychiatrists to come to a better agreement on the delimitations of the group" *Legal and Administrative Psychopaths*, 22 MENT. HYG. 20, 24 (1938).

69. *Supra* note 3.

state construction of state statutes.⁷⁰ The Supreme Court in its decision of that case said that the construction of the state court was binding. It was therefore powerless to consider the constitutional questions raised by the appellant other than in the light of the state court's construction and interpretation.⁷¹

Another difficulty lies in the well-established principle as adhered to by the Supreme Court wherein all presumptions favor validity. The unreasonableness of classifications in and of itself is insufficient. They must be palpably unreasonable to overcome the weight of these presumptions.⁷²

CONCLUSION

Knowledge of the nature and development of sex psychopathy is imperfect; its meaning is shrouded with ambiguities.⁷³ As such the term has no place in dynamic, medical or legal classification.⁷⁴ Our entire legal writ regarding criminal law concerns people who have already committed crimes. This is the first time that criminologists and legislators have had to consider questions of inherent tendencies for the commission of crime in the light in which they are treated in the statutes. Therefore, because the statutes are based upon vague and indefinite legal psychiatric abstractions implemented by questionable legal expedencies, they constitute invalid legislation. Quoting Judge Ploscowe on the statement by Wittels that a psychopathic personality can easily be detected early in life by any psychiatrist, "he is showing the same ignorance of psychiatric experience which has characterized the legislators who voted the sex psychopath laws. This experience is clearly indicated by the New Jersey report on the habitual sex offender."

A re-examination of our statutes relative to sex offenses would seem to be in order in the light of the startling disclosures of the Kinsey report.⁷⁵ Much of our sex law is unrealistic. There appears to be no geographical or sectional similarities.⁷⁶ Most sex offenders are charged with relatively minor crimes.⁷⁷ The atrocious sex murders of women

70. *Musser v. Utah*, 333 U.S. 95 (1948).

71. *Guaranty Trust Co. v. Blodgett*, 287 U. S. 509, 513 (1933). *Hicklin v. Coney*, 290 U. S. 169, 172 (1938).

72. *Morganti v. Morganti*, 222 P.2d 78 (Cal. App. 1950).

73. Reinhardt & Fisher, *The Sexual Psychopath and the Law*, 39 J. CRIM. L. & CRIMINOLOGY 734 (1949).

74. Karpman, *The Sexual Psychopath*, *supra* note 26.

75. "Much of what the law denounces as criminal and subjects to serious penalties, appears to be relatively normal behavior in the human male." PLOSCOWE, *op. cit. supra*, note 21.

76. In Louisiana and North Carolina the crime of rape carries a death penalty, whereas in New Jersey the offender may escape with the payment of a fine.

77. In New York City of 2,366 indictments for rape during the 30's, only 418 of 18

and children are relatively rare occurrences however much fanfare and publicity they may receive. For the protection of society from the small group of major sex deviants responsible, our constitutional legal remedies, the prison, the electric chair or the asylum for the criminally insane are adequate.⁷⁸

The attitude of many sound-thinking jurists today regarding the efforts of psychiatry in the field of penology still coincides with the view of Professor Jerome Michael of Columbia University Law School who said fifteen years ago,

"They are skeptical of psychiatry because of the immodesty of some psychiatrists which has allowed them to make extravagant claims regarding their power of diagnosing and solving not only of individual, but of social problems. They are skeptical because of what they have been able to learn regarding the unreliability of psychiatric diagnosis and the uncertainty thereof. They are skeptical because of the fantastic character of the testimony which psychiatrists gave in the courts. They are skeptical because of the widespread disagreement among medical psychologists about the fundamental problems both in theory and practice. They do not understand how scientists can differ so radically among themselves about matters of science, and they are forced to conclude either that those who disagree are not scientists, or that about which they disagree is not science, but rather opinions of greater or less validity."

It is a mistake to blithely assume that because of the use of the legal expediency of civil classifications, no constitutional or procedural rights such as unlawful classification, denial of due process or equal protection of the laws, proper hearing, rights regarding self incrimination and ex-post facto laws, double jeopardy, and jury trial may not be violated. The underlying purpose of due process is to guarantee to every man his day in court. The concept embraces the administration of law equally and impartially, and employs understandable and reasonable rules which safeguard the protection of private rights. It is founded upon the basic principle that the law is to be available as a protection of private rights and interest as well as for the protection of society and that judgment is to be rendered only after the parties have had a fair trial. While it is conceded that a statute is not regarded as operating retrospectively⁷⁹ merely because it relates to antecedent events, and while it is also conceded that many of these procedural and constitutional rights may not apply in the strict sense to civil proceedings, who can say when and where the remedial aspects of this legislation merge into the

percent were for forcible rape ("Report of Mayor's Committee for the Study of Sex Offences").

78. PLOSCOWE, *op. cit. supra*, note 20.

TAPPAN, *op. cit. supra* note 22.

79. It becomes retrospective if it deprives one of positive rights which the state is bound to respect or protect. *American States Water Service Co. v. Johnson*, 31 Cal. App. 2d 606, 88 P.2d 770 (1939).

punitive. When this happens, the protective shelter of civil procedure is no longer consistent with the disregard of these rights. Where a statute under the guise of hospitalization and treatment in reality exacts or enlarges a punishment, there arises grave doubts as to the validity of such legislation.

In *ex parte Keddy*,⁸⁰ the court, in speaking of the constitutional right to bail of sexual psychopaths, maintained that this constitutional provision cannot be legally set aside by civil legislature or by the judicial branch of the government. The court maintained that no individual or public offender is "beyond or exempt" from the mandates of the constitution, state or federal, in this regard.

A weakness of the laws is that a conviction is not required and that not all crimes are limited to felonies. These laws violate the constitutional provision that all penalties be proportionate to the nature of the offense. They provide for the commitment of a sane person to an insane asylum "until he recovers." Insane people are in danger of being locked up upon suspicion in a proceeding which is not regarded as a trial, but rather an *ex parte* investigation. It is incumbent upon the courts and the law to be very alert to insure that the proceedings in which life and liberty are at stake are at all times fairly and impartially conducted. Judge J. A. Pope of the Chicago Municipal Court said,

"Even if it could be demonstrated that society could be protected from the sex offenders by some "railroading" process, I would oppose it lest it open the way to worse evils. The law must insure the full liberty of the individual until by an unlawful act he has withdrawn himself from its protection."⁸¹

It is, however, generally recognized that there is a class of sex criminals occupying a particular "medico-psychological"⁸² status requiring specialized treatment under the law. Because the full gamut of emotions and mental disturbances that beset humanity are complex and multitudinous, including a host of neurotic manifestations such as anxiety, depression, suicidal trends and psychosomatic desires; because of the wide variance of opinion as to when anti-social behavior becomes criminal; because there is a lack of sufficient objective criteria to satisfactorily understand and treat the mental conditions of sex offenders, for these reasons it is prudent for states to proceed most cautiously in the drafting of these types of statutes. They may vitally infringe upon important individual rights protected by our Federal Constitution.

80. 233 P.2d 159 (Cal. App. 1951).

81. A certification by two psychiatrists hired by the prosecution could very readily be offset by more than two found by the defense who, for a fee, would testify to the opposite.

82. TAPPAN, *op. cit. supra* note 22.