

## COMMENT

### THE VALIDITY OF THE SEGREGATION OF THE SEXUAL PSYCHOPATH UNDER THE LAW

It would be of interest to the legal profession that the term "psychopathic personality" is no longer regarded by psychiatry as meaningful, yet it will probably remain embalmed for some time to come in the statutes of several States where the pursuit of demons disguised as sexual psychopaths affords a glimpse of a 16th Century approach to mental illness.<sup>1</sup>

#### INTRODUCTION

In the years 1938-39 Illinois, California, Michigan and Minnesota adopted "sexual psychopath" laws as a means of dealing with sex offenders.<sup>2</sup> Presently some thirty states and the District of Columbia have some form of sexual psychopath statute, making possible the indefinite commitment of a sex offender.<sup>3</sup> This comment will describe the procedures used by the various states under these statutes, analyze the purposes of the statutes, and measure their effect against those purposes. Finally the question of whether there is any valid reason for the classification and special treatment of sexual psychopaths under the law over and above the ordinary criminal sanctions and civil commitment procedures will be discussed. It will be assumed that the sexual conduct used as a basis for application of the sexual psychopath statutes is subject to criminal sanction.

#### CRIMINAL SANCTIONS FOR SEXUAL ACTS

In evaluating the sexual psychopath statutes, it must be remembered that the statutes operate in legal systems which provide criminal sanctions for certain sexual conduct independent of the sexual psychopath statutes. Examination of these criminal sanctions

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<sup>1</sup> Roche, *The Criminal Mind* 25 (1958).

<sup>2</sup> Levy, "Interaction of Institutions and Policy Groups: The Origin of Sex Crime Legislation," 5 *Law. & L. Notes* 3 n.1 (1951).

<sup>3</sup> Bowman & Engle, "Sexual Psychopath Laws," in *Sexual Behavior and the Law* 757, 774 n.2 (Slovenko ed. 1965). The states are: Alabama, California, Colorado, Connecticut, Florida, Illinois, Indiana, Iowa, Kansas, Maryland, Massachusetts, Michigan, Minnesota, Missouri, Nebraska, New Hampshire, New Jersey, New York, Ohio, Oregon, Pennsylvania, South Dakota, Tennessee, Utah, Vermont, Virginia, Washington, West Virginia, Wisconsin, and Wyoming.

reveals wide variation in approach by the individual states.<sup>4</sup> For example, an act of sodomy, performed in private between consenting adults is not a crime in Illinois<sup>5</sup> but renders the participant liable to a sentence up to life imprisonment in Nevada.<sup>6</sup> Ohio<sup>7</sup> and Pennsylvania<sup>8</sup> forbid placing an individual convicted of sodomy on probation. Conviction of a second offense of this nature may result in a substantially longer sentence in some states, perhaps even life imprisonment.<sup>9</sup>

In spite of the wide variation between states, a few general principles do emerge. The sanctions imposed are heavy, usually involving either long prison terms or fines or both. An even stronger sanction is imposed where the element of force is present or where the victim is a child.<sup>10</sup>

### THE DEFINITION OF THE SEXUAL PSYCHOPATH

The first problem which must be faced in evaluating the sexual psychopath laws is to determine which individuals shall be subject to their provisions. Here again the approaches of the individual states vary. One group of states defines the sexual psychopath in terms of a repeated course of conduct which, if continued, would constitute a danger to others. Typical of this group is the statute of the District of Columbia:

"Sexual psychopath" means a person, not insane who by a course of repeated misconduct in sexual matters has evidenced such lack of power to control his sexual impulses as to be dangerous to other persons because he is likely to attack or otherwise inflict injury, loss, pain, or other evil on the objects of his desire.<sup>11</sup>

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<sup>4</sup> See generally Mueller, *Legal Regulation of Sexual Conduct* (1961).

<sup>5</sup> Ill. Rev. Stat. ch. 38, §§ 11-2 to 11-6 (1964). The Illinois criminal statutes have recently been changed, and the use of force, lack of age of a participant, or performance in public have become essential elements for the conduct to be considered criminal.

<sup>6</sup> Nev. Rev. Stat. § 201.190 (Supp. 1963).

<sup>7</sup> Ohio Rev. Code Ann. § 2951.04 (Page 1953).

<sup>8</sup> Pa. Stat. Ann. tit. 19, § 1081 (1964).

<sup>9</sup> See, e.g., N.Y. Pen. Law § 1940 (life indeterminate); Ore. Rev. Stat. § 167.050 (1957) (life indeterminate).

<sup>10</sup> See Mueller, *op. cit. supra* note 4, at 65-158; see also Bensing, "A Comparative Study of American Sex Statutes," 42 J. Crim. L. & Criminology 57 (1951).

<sup>11</sup> D.C. Code Ann. § 22-3503 (1961). Other states which have adopted this pattern of definition are Massachusetts, Mass. Ann. Laws, ch. 123A, § 1 (1965) (sexually dangerous person); Nebraska, Neb. Rev. Stat. § 29-2901 (1956) (sexual psychopath); New Jersey, N.J. Rev. Stat. 2A:164-5 (Supp. 1964) (sex offender);

A second group of states requires the existence of some mental disorder (often excluding a disorder of such severity as to remove criminal responsibility) coupled with "criminal propensities" or "a predisposition" toward the commission of sex offenses. Some of these states specifically require that the person be a danger to the health or safety of others, while other states are silent on this matter. An Iowa statute provides:

All persons charged with a public offense, who are suffering from a mental disorder and are not a proper subject for the schools for the mentally retarded or for commitment as a mentally ill person, having criminal propensities toward the commission of sex offenses, and *who may be considered dangerous to others*, are hereby declared to be "criminal sexual psychopaths."<sup>12</sup>

While an Alabama law states:

Any person who is suffering from a mental disorder but is not mentally ill or feeble-minded to an extent making him criminally irresponsible for his acts, such mental disorder having existed for a period of not less than one year and being coupled with criminal propensities to the commission of sex offenses is hereby declared to be a criminal sexual psychopathic person within the meaning of this article.<sup>13</sup>

There appears to be no difference in definition when the phrase requiring the individual to be a danger to others is omitted. The courts apparently assume that the existence of the psychopathic condition coupled with "criminal propensities" automatically makes the individual a menace to the public.<sup>14</sup>

The remaining states require conviction for a felony or a sex crime before invoking the statute, and define the sex psychopath in vague terms of "danger to others." Ohio, however, defines the psychopathic offender as:

any person who is adjudged to have a psychopathic personality, who exhibits criminal tendencies and who by reason thereof is a

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Vermont, Vt. Stat. Ann. tit. 18, § 2816 (1958) (psychopathic personality); Wyoming, Wyo. Stat. Ann. § 7-351 (Supp. 1963). For a discussion of the problems inherent in this type of definition see Comment "Sexual Psychopathy—A legal Labyrinth of Medicine, Morals, Mythology," 36 Neb. L. Rev. 320 (1957).

<sup>12</sup> Iowa Code Ann. § 225A.1 (Supp. 1964). (Emphasis added.)

<sup>13</sup> Ala. Code tit. 15, § 434 (1958). Ind. Ann. Stat. § 9-3401 (1956) (criminal sexual psychopathic person) and Mich. Stat. Ann. § 28.967(1) (1954) (criminal sexual psychopathic person) are also silent on the element of danger to the public safety or welfare.

<sup>14</sup> See, e.g., State v. Criminal Court, 234 Ind. 632, 130 N.E.2d 128 (1955); *In re Maddox*, 351 Mich. 358, 88 N.W.2d 470 (1958).

menace to the public. Psychopathic personality is evidenced by such traits or characteristics inconsistent with the age of such person, as emotional immaturity and instability, impulsive, irresponsible, reckless, and unruly acts, excessively self-centered attitudes, deficient powers of self-discipline, lack of normal capacity to learn from experience, marked deficiency of moral sense or control.<sup>15</sup>

The intrinsic breadth of this definition is obvious, and whether it is any more helpful than the "danger to others" statutes in identifying the individuals to be covered, is open to question.

Further examination of these statutes clearly reveals that they fail in their purpose of defining the individuals subject to their procedure. Such phrases as "repeated misconduct," "danger to others," and "criminal propensities" are subject to many possible interpretations. For example, how many acts are required to constitute repeated misconduct? Does the possibility that an individual will expose himself in public make him a danger to others? One critic of the sex-psychopath statutes has pointed out:

The basic task of the sex-psychopath laws is to differentiate dangerous sex offenders from minor criminals who commit sex crimes and who should be handled by the ordinary procedures of the criminal law . . . . *The sex-psychopath laws fail miserably in this vital task.*<sup>16</sup>

The Supreme Court has said that such statutes withstand claims of unconstitutional vagueness, that they call for proof of conduct which proof accords due process and equal protection, that the class *is* identified and *is* dangerous to the community, and that the legislatures may so declare.<sup>17</sup>

Presumably one of the reasons for the use of such terms as sexual psychopathy is the desire to utilize the expertise of those members of the medical profession who specialize in the study of mental disorders. Yet psychiatrists cannot agree among themselves on a meaning for these terms,<sup>18</sup> and generally seem to concede that

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<sup>15</sup> Ohio Rev. Code Ann. § 2947.24(B) (Page 1953). Compare Washington, which in addition to defining sexual psychopath [Wash. Rev. Code Ann. § 71.06.010 (1962)], defines psychopathic personality as: "the existence in any person of such hereditary, congenital or acquired conditions affecting the emotional or volitional rather than the intellectual field and manifested by anomalies of such character as to render satisfactory social adjustment of such person difficult or impossible."

<sup>16</sup> Ploscowe, *Sex and the Law* 227 (1951).

<sup>17</sup> *Minnesota v. Probate Court*, 309 U.S. 270 (1939). *Accord*, *Commonwealth v. Ackers*, 175 N.E.2d 677 (Mass. 1961); *Annot.*, 24 A.L.R.2d 350, 363-64 (1952).

<sup>18</sup> See, e.g., Lindman & McIntyre, *The Mentally Disabled and the Law* 305-06 (1961); *Representation and Recommendation of the N.J. Comm'n on the Habitual Sex Offender* 40-42, 57-58 (1950).

they "have no legitimate place in psychiatric nosology or dynamic classification,"<sup>19</sup> "The term subsumes a long, broadly descriptive list of personality traits and is not a specific diagnostic label based on scientific data."<sup>20</sup> Thus such general terms as sexual psychopath provide little or no help to the psychiatrist in determining which individuals fit the statutory definitions.

Examination of the more specific statutory criteria may well afford little assistance to the psychiatrist. For example, Dr. Karpman examines the District of Columbia definition<sup>21</sup> of sexual psychopath and complains:

What sort of person, it may be asked, is it who is not to be regarded as insane yet whose repeated misconduct in sexual matters reveals an utter lack of power to control his impulses, an irresistible desire to attack other people without regard for social or personal considerations? Who does not know the paranoid schizophrenic who attacks innocent people and for this reason becomes dangerous to the community? Where is the difference between the sexual psychopath who impulsively attacks an unknown person, and the schizophrenic who does the same thing?<sup>22</sup>

There is good reason to believe that the classification under these statutes is a legal one, using—perhaps unfortunately—medical nomenclature. But since not only terminology, but experts as well, are borrowed from the medical profession, the view persists that sex deviates ought to fit comfortably and precisely into a psychiatric classification. From a psychiatric view point it is no more valid to group sex offenders in one category than it is to "group biological disorders together simply because they share one symptom."<sup>23</sup> The sexual misconduct may be a symptom of some underlying mental disorder such as schizophrenia, psychosis, or neurosis rather than a form of mental illness in and of itself.<sup>24</sup>

Professor Tappan cogently sums up the problems faced by the psychiatrist in dealing with the definition problem. After listing the notion that sex psychopathy or sex deviation is a clinical entity as one of the several myths surrounding the sex offender, he states:

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<sup>19</sup> Karpman, *The Sexual Offender and His Offenses* 478 (1954).

<sup>20</sup> Bowman & Engle, *supra* note 3, at 766. The term may, however, have some validity for administrative purposes. See Overholser, *The Psychiatrist and the Law* 50-51 (1953); see also Roche, *op. cit. supra* note 1, at 25.

<sup>21</sup> See note 11 *supra* and accompanying text.

<sup>22</sup> Karpman, *op. cit. supra* note 19, at 488.

<sup>23</sup> Slovenko & Phillips, "Psychosexuality and the Criminal Law," 15 *Vand. L. Rev.* 797, 823 (1962).

<sup>24</sup> *Ibid.* See Karpman, *op. cit. supra* note 19, at 478-85.

Two thirds of the psychiatric authorities consulted by the writer pointed to the wide disagreement among psychiatrists as to the meaning of the term, "sex psychopath." More than half of them maintained that this condition is not a sufficiently clear diagnostic entity to justify legislation concerning the type. . . . The statutory definitions by which the several jurisdictions have attempted to define the coverage of their psychopath laws have in fact made even more vague what was already quite unclear concerning the sorts of cases that were designed to be included . . . . The descriptive clauses in the enactments leave much to be desired either from the point of view of medical diagnosis or court application.

Insanity and feeble-mindedness are generally excluded by the terms of the laws, but there remains a virtually unlimited area of psychological variability that can be interpreted to come within their intended scope. The concepts employed to define the psychopath, such as mental disorder, mental illness, mental disease, emotional instability, impulsiveness in behavior, and other similar qualities are far from specific in their meaning. This is particularly true if psychological deviation is viewed as a relative matter, with wide gradation from normal to abnormal, and with a majority of men somewhere in between. The more functional terms applied in some of the laws, suggesting a "propensity" to sex crimes, or lack of customary standards of good judgment have very little utility for distinguishing the psychopath or the abnormal sex offender from other sexual deviates. Such expressions could easily be applied to sex offenders who are non-pathological in psychological orientation.<sup>25</sup>

Since the psychiatrist is given no adequate medical standards to use as a measuring device, he must look elsewhere for a basis for his decision as to whether he thinks this individual constitutes a danger to society and consequently should not be permitted to remain at large. But such criteria are not medical in nature and consequently the psychiatrist has no special expertise to determine the question. Yet who can question but that his recommendation will be largely dispositive of the issue? The result is that fundamentally social-legal determinations are made by the psychiatrist as a medical expert.

The statutory definitions are not based solely on the desire to utilize medical knowledge. Nonmedical factors such as the desire to protect society from repeated sexual misconduct have also played a role. Still, there seems to be no justification for defining those persons who may be subject to sex-psychopath proceedings in such

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<sup>25</sup> Tappan, "Some Myths About the Sex Offender," 19 Fed. Prob. 7, 10 (June 1955).

vague terms.<sup>26</sup> The need for a clear definition becomes apparent when the consequences of a finding of sexual psychopathy are considered—an indefinite commitment to a state mental institution. Further, such a finding is not often something the particular individual seeks, it is thrust upon him involuntarily.<sup>27</sup>

### PROCEDURES UNDER THE SEX-PSYCHOPATH STATUTES

The sex-psychopath statutes may be divided into two groups: those which may be applied before an individual is convicted of a crime (pre-conviction statutes) and those which can be applied only after the defendant is convicted of a criminal offense (post-conviction statutes).<sup>28</sup> Presently thirteen jurisdictions have pre-conviction statutes.<sup>29</sup> Since 1950, however, most states enacting such legislation have adopted the post-conviction form of statute.<sup>30</sup> The exceptions to this trend are Florida and Iowa, as well as Alabama, which in 1961 converted its statute to the pre-conviction form.<sup>31</sup>

#### *Procedures under Pre-conviction Statutes*

Eight of the thirteen jurisdictions having pre-conviction statutes require that the offender have been charged with some criminal offense in order for the sex-psychopath procedures to be invoked.<sup>32</sup> Only two of these eight states, Alabama and Washington, require that the offense charged be sexual in nature. The five remaining jurisdictions do not require that any criminal charge be pending,

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<sup>26</sup> One of the criticisms of the sex-psychopath statutes is that they are so broad that usually only the minor offender falls prey to them. See Ploscowe, *op. cit. supra* note 16, at 229.

<sup>27</sup> Compare the defense of insanity which the defendant must affirmatively prove. See *Lynch v. Overholser*, 369 U.S. 705 (1962), holding that the lower District of Columbia court erred in forcing the defense of insanity on the accused when he did not seek it.

<sup>28</sup> For a fairly recent survey of the various statutes and their procedures see Lindman & McIntyre, *op. cit. supra* note 18, at 319-26; Swanson, "Sexual Psychopath Statutes: Summary and Analysis," 51 J. Crim. L., C. & P.S. 215, 228-35 (1961).

<sup>29</sup> Ala. Code tit. 15, § 436 (Supp. 1964); Cal. Welfare & Inst'n Code § 5600; Fla. Stat. Ann. § 917.12 (Supp. 1964); Ill. Rev. Stat. ch. 38, § 105-3 (Smith-Hurd 1964); Ind. Ann. Stat. § 9-3403 (1956); Iowa Code Ann. § 225A.2 (Supp. 1964); Mich. Stat. Ann. § 28.967(3) (1954); Minn. Stat. Ann. § 526.10 (1947); Mo. Ann. Stat. § 202.710 (1959); Neb. Rev. Stat. § 29-2902 (Supp. 1963); N.H. Rev. Stat. Ann. § 173:3 (1964); Wash. Rev. Code Ann. § 71.06.020 (1962); D.C. Code Ann. § 22-3504 (1961).

<sup>30</sup> Lindman & McIntyre, *op. cit. supra* note 18, at 300.

<sup>31</sup> See appropriate statutory citations *supra* note 29.

<sup>32</sup> The states are Alabama, Florida, Illinois, Indiana, Iowa, Michigan, Missouri, and Washington. See appropriate statutes *supra* note 29.

demanding only a showing of probable cause to invoke the procedures.<sup>33</sup>

The proceedings are initiated by filing a petition or statement in the appropriate court. This is usually done at the discretion of the state's attorney,<sup>34</sup> although some statutes permit the defendant<sup>35</sup> or some reputable third party<sup>36</sup> to initiate the action when there is "reason to believe" the individual is a sexual psychopath.<sup>37</sup> The initiation of these procedures usually stays any pending criminal charges.<sup>38</sup> The contents of the petition will vary somewhat depending on the particular statute of the jurisdiction. However, facts showing the basis for the belief that the individual is a sexual psychopath must be alleged. A petition that set forth no facts but merely alleged the conclusion that the individual was a sexual psychopath has been held defective to the extent that the entire proceedings were declared invalid.<sup>39</sup>

The next step in the proceedings is a medical examination by two or more psychiatrists or physicians before a hearing is held. The qualifications required of the examiners vary from merely being a licensed medical doctor<sup>40</sup> to being a psychiatrist with five years experience.<sup>41</sup> Three states by statute require the defendant to answer the medical examiner's questions or face contempt, and a number of jurisdictions have ruled that the privilege against self-incrimination is not available in these proceedings.<sup>42</sup> Some of the states re-

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<sup>33</sup> See the California, Minnesota, Nebraska, New Hampshire, and District of Columbia statutes, *supra* note 29.

<sup>34</sup> See, e.g., D.C. Code Ann. § 22-3504 (1961).

<sup>35</sup> See, e.g., Ind. Stat. Ann. § 9-3403 (1956). In Indiana if the prosecution seeks application of the statute the court must conduct the inquiry, but if the defendant seeks such action it becomes a matter of discretion with the court and the court's refusal to conduct such a procedure is not error unless it is an abuse of that discretion. *State v. Criminal Court*, 234 Ind. 632, 130 N.E.2d 128 (1955). In that case the court held that the refusal to conduct a hearing concerning sexual psychopathy was not an abuse of discretion even though defendant made out a *prima facie* case.

<sup>36</sup> See, e.g., Iowa Code Ann. § 225A.2 (Supp. 1964).

<sup>37</sup> See, e.g., Ala. Code tit. 15, § 436 (Supp. 1963).

<sup>38</sup> See, e.g., D.C. Code Ann. § 22-3510 (1961).

<sup>39</sup> *People v. Artinian*, 320 Mich. 441, 31 N.W.2d 688 (1948). See *In re Carter*, 337 Mich. 496, 60 N.W.2d 433 (1953), in which the court held that a petition which stated the defendant had been accused of sex crimes in the past but never convicted was insufficient.

<sup>40</sup> Minn. Stat. § 526.10 (1961).

<sup>41</sup> Mich. Stat. Ann § 28.967(4) (1954).

<sup>42</sup> D.C. Code Ann. § 22-3506 (1961); Ind. Stat. Ann. § 9-3404 (Supp. 1965); Mich. Stat. Ann. § 28.967(4) (1954). For a general discussion of the privilege against self-incrimination as it relates to these procedures, see Mihm, "A Re-examination of the Validity of Our Sex Psychopath Statutes in the Light of Recent Appeal Cases and Experience," 44 J. Crim. L., C. & P.S. 716, 728-30 (1954).



quire that all of the examiners concur in a finding that the defendant probably is a sexual psychopath before a hearing may be held.<sup>43</sup>

Once the examiner's report is filed showing there is cause to believe the defendant is a sexual psychopath, a hearing is held. The defendant is entitled to be represented by counsel and some states specifically provide that the court must appoint counsel if the accused cannot hire his own.<sup>44</sup> The statutes often provide that a broad range of evidence relating to prior sexual misconduct will be admissible at the hearing, including either reports of the medical examiners or, more often, the testimony of the medical examiners themselves.<sup>45</sup>

If the accused is found to be a sexual psychopath he is committed for an indefinite period to an appropriate institution.<sup>46</sup> Generally the statutes provide that throughout this commitment periodic examinations of the individual must be made and a report thereof given to the appropriate authority, *i.e.*, the committing court.<sup>47</sup>

When the individual has improved to the extent he is no longer considered dangerous or has fully recovered, release proceedings may be instituted through the committing court or a parole board in accordance with the statutory provisions. The release may be final, or some sort of parole may be imposed.<sup>48</sup> Habeas corpus has been

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<sup>43</sup> See, *e.g.*, Ala. Code tit. 15, § 437 (Supp. 1963). By comparison New Hampshire requires only a majority of these examiners to find the individual is a sexual psychopath. N.H. Rev. Stat. Ann. § 173:5 (1964).

<sup>44</sup> Lindman & McIntyre, *op. cit. supra* note 18, at 301, list only three states, Iowa, Minnesota, and Nebraska, that provided by statute for the appointment of counsel in 1961. Since then California, New Hampshire, and the District of Columbia have made provision for the appointment of counsel. Quare whether *Gideon v. Wainwright*, 372 U.S. 335 (1963), should impose a similar duty on the other states. *LaMorre v. Superintendent*, 199 N.E.2d 204 (Mass. 1964), took the position that since such proceedings are not penal in nature the right to counsel under *Gideon* does not apply, but the soundness of this approach is open to challenge in light of the result of a finding of sexual psychopathy. See generally Annot., 87 A.L.R.2d 950 (1963).

<sup>45</sup> See, *e.g.*, Ill. Rev. Stat. ch. 38, § 105-5 (1964); Iowa Code Ann. § 225A.10 (Supp. 1964); see also Swanson, *supra* note 28, at 224 n.75.

<sup>46</sup> See, *e.g.*, D.C. Code Ann. §§ 22-3508, 22-3509 (1961). Iowa gives the court discretion to commit or have the accused stand trial on the original criminal charge. Iowa Code Ann. § 225A.11 (Supp. 1964). For an argument that there should be more use of outpatient treatment in cases of sexual psychopathy, see Furia & Mees, "Dangerous to be at Large—A Constructive Critique of Washington's Sexual Psychopath Laws," 38 Wash. L. Rev. 531 (1963).

<sup>47</sup> See N.H. Rev. Stat. Ann. § 173:7 (1964).

<sup>48</sup> For a comparison of release procedures and a discussion thereof see Swanson, *supra* note 28, at 218-19, 228-35. Tappan has argued that one of the big problems with the statutes is that of standards for release. Psychiatrists, fearing public reaction, are reluctant to release "sex psychopaths" from custody. See Tappan, "Sentences for Sex Criminals," 42 J. Crim. L. & Criminology 332, 335 (1951).

held an appropriate remedy for those seeking release from sex-psychopath commitment.<sup>49</sup>

New Hampshire has a specific provision that if the psychopath has been in custody more than two years and has received the maximum benefit from whatever treatment has been made available and there are more than thirty sexual psychopaths in custody, then the individual psychopath may be transferred to the state prison where he is to be segregated from the other prisoners.<sup>50</sup> This presents an interesting question as to just how much importance should be attached to the contention that treatment of the individual is one of the major purposes of these statutes.

Finally, the states divide on the effect of the finding of sexual psychopathy pending criminal charges. Three states provide that such a finding precludes trial on any original charge.<sup>51</sup> The position of California and Nebraska is unclear. The remaining states specifically provide that such a finding is not a defense, and that the sex-psychopath procedures are not to change the insanity test for criminal responsibility.<sup>52</sup>

#### *Procedures under Post-conviction Statutes*

The post-conviction statute cannot be brought into operation until the defendant has been convicted of some crime, usually sexual in nature.<sup>53</sup> In discussing procedures under these statutes it should be remembered that they and the pre-conviction statutes are not mutually exclusive in relation to the time at which they may be invoked in a criminal proceeding. Generally the pre-conviction statutes, although applicable prior to conviction may be instituted at any time up to sentencing. Thus either type of statute may be applied following a conviction, the distinction being that the post-conviction statutes may be applied *only* at that time.

Under the post-conviction statutes the procedures may be instituted by the court either on its own motion,<sup>54</sup> on motion of

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For an analysis of actual application of release procedures in Nebraska implying that the one necessary element is some third party trying to obtain the prisoner's release see Comment, *supra* note 11.

<sup>49</sup> See Mihm, *supra* note 42, at 725.

<sup>50</sup> N.H. Rev. Stat. Ann. § 173:11a (1964). A similar practice without any such statute was disapproved in Michigan. *In re Maddox*, 351 Mich. 358, 88 N.W.2d 470 (1958).

<sup>51</sup> Ill. Ann. Stat. ch. 38, § 105-9 (Smith-Hurd 1964); Ind. Ann. Stat. § 9-3409 (1956); Mich. Stat. Ann. § 28.967(8) (1954).

<sup>52</sup> See, *e.g.*, D.C. Code Ann. § 22-3511 (1961); Iowa Code Ann. § 225A.13 (Supp. 1964).

<sup>53</sup> See, *e.g.*, Conn. Gen. Stat. Ann. § 17-244 (1960); N.J. Rev. Stat. § 2A:164-3 (Supp. 1964).

<sup>54</sup> Pa. Stat. Ann. tit. 19, § 1166 (1964).

the state's attorney,<sup>55</sup> or at the request of a representative of the defendant.<sup>56</sup> Some states, however, vest no discretion in the court but make the proceedings mandatory upon conviction of certain offenses.<sup>57</sup> The next step is the psychiatric examination, and as in the case of the pre-conviction statutes, there is a wide variance in the qualifications required of the examiners. When the report of the examiners is received, the court in most cases makes a decision without a separate hearing on the specific issue of sexual psychopathy.<sup>58</sup> Massachusetts,<sup>59</sup> Maryland,<sup>60</sup> and Ohio<sup>61</sup> do provide a separate hearing and the procedure followed is similar to that used in the pre-conviction jurisdictions, including provision for counsel and broad rules of admissibility.

A number of states specifically permit the court to place the defendant on probation on condition he receive outpatient treatment if the court feels this approach will be satisfactory.<sup>62</sup> The advantage to this provision is readily apparent. It gives the court greater flexibility in dealing with offenders and permits some distinction between the treatment imposed on the minor offender and that required for one that might be classified as truly dangerous.

When probation is not available or not used in a particular case, then, as in the pre-conviction statutes, most of the post-conviction statutes call for the defendant to be sentenced to an indeterminate term, up to life, in an appropriate institution.<sup>63</sup> Connecticut,<sup>64</sup> New Jersey,<sup>65</sup> West Virginia,<sup>66</sup> Wisconsin,<sup>67</sup> and Wyoming<sup>68</sup> limit the sentence to the maximum penal sanction that could have been imposed for the offense of which defendant was convicted. The requirements for parole or release are generally the same as those under the pre-conviction statutes.<sup>69</sup>

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<sup>55</sup> Vt. Stat. Ann. tit. 18, § 2813 (1957).

<sup>56</sup> Va. Code Ann. § 53-278.2 (1950).

<sup>57</sup> See, e.g., Tenn. Code Ann. § 33-1303 (Supp. 1964).

<sup>58</sup> See, e.g., Colo. Rev. Stat. Ann. §§ 39-19-1 to 39-19-10 (1963).

<sup>59</sup> Mass. Gen. Laws Ann. ch. 123A, § 5 (1965).

<sup>60</sup> Md. Ann. Code art. 31B, § 8A (Supp. 1964).

<sup>61</sup> Ohio Rev. Code Ann. § 2947.25 (Page 1953).

<sup>62</sup> E.g., Colo. Rev. Stat. Ann. § 39-19-5 (1963); Conn. Gen. Stat. Ann. § 17-245 (1960); Mass. Gen. Laws Ann. ch. 123A, § 5 (1965); N.J. Rev. Stat. § 2A:164-6 (1953); W. Va. Code Ann. § 2666(6) (1961).

<sup>63</sup> See, e.g., Colo. Rev. Stat. Ann. § 39-19-1 (1963).

<sup>64</sup> Conn. Gen. Stat. Ann. § 17-245 (1960).

<sup>65</sup> N.J. Rev. Stat. § 2A:164-6 (1953).

<sup>66</sup> W. Va. Code Ann. § 2666(12) (1961).

<sup>67</sup> Wis. Stat. Ann. § 959.15(12) (1958).

<sup>68</sup> Wyo. Stat. Ann. § 7-356 (Supp. 1963).

<sup>69</sup> See Lindman & McIntyre, *The Mentally Disabled and the Law* 302, 319-26 (1961); Swanson, *supra* note 28, at 228-35.

Under the post-conviction statutes it is possible that the defendant would be deemed ready for release before the sentence provided for by the criminal statutes had run. If the indefinite commitment were considered to be in lieu of the usual sentence this would present no problem, and a complete release would be possible. The criminal sentence is a factor in many instances, however. Some of the states handle this problem by providing for parole under close supervision up to the maximum criminal sentence expiration date and then release the individual outright.<sup>70</sup>

Ohio's approach is somewhat different. At the original sentencing the defendant is given two sentences: the one specified by the penal statutes, and an indefinite sentence under the psychopath law.<sup>71</sup> If he recovers before the period provided by the penal statutes has expired, the indefinite commitment is terminated, and the criminal sentence is instituted, with the time served under the indefinite commitment being credited as time served under the criminal sentence.<sup>72</sup> The parole board then determines whether the defendant will be paroled or required to serve the remainder of his sentence.

The Massachusetts sex-psychopath statute has a provision that permits prisoners already serving a sentence for some criminal offense to be transferred after a hearing to an appropriate institution as a sexually dangerous person, and there to be kept indefinitely.<sup>73</sup> Two recent decisions reveal the potentialities of this particular provision. In *LaMorre v. Superintendent*,<sup>74</sup> the defendant in 1959 entered a guilty plea to charge of indecent assault and battery, and open and gross lewdness. He was sentenced to two and a half to three years in a correctional institution. A petition filed by the District Attorney at that time to have sexual psychopathy proceedings instituted was denied. Thirty days before defendant was due to be released sexual psychopathy proceedings were instituted against him and sixty days later he was determined a sexually dangerous person, and committed for an indefinite period. The Massachusetts Supreme Judicial Court sustained the finding saying that the fact that he was not a prisoner at the time of the final determination and that he was not represented by counsel at the early stages of the proceeding did not invalidate the commit-

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<sup>70</sup> See, e.g., Wyo. Stat. Ann. § 7-356 (Supp. 1963).

<sup>71</sup> Ohio Rev. Code Ann. § 2947.25 (Page 1953).

<sup>72</sup> Ohio Rev. Code Ann. § 2947.27(A) (Page 1953).

<sup>73</sup> Mass. Gen. Laws Ann. ch. 123A, § 6 (1965). The Massachusetts court has held the section constitutional in *Commonwealth v. Ackers*, 175 N.E.2d 677 (Mass. 1961). *But see* *People v. Frontezak*, 286 Mich. 51, 281 N.W. 534 (1938), striking down a similar provision.

<sup>74</sup> 199 N.E.2d 204 (Mass. 1964).

ment. In *Commonwealth v. Peterson*,<sup>75</sup> proceedings were instituted against the defendant while he was serving a sentence for assault with a dangerous weapon on a police officer. The Massachusetts Supreme Judicial Court sustained a finding that defendant was a sexually dangerous person, finding no violation of due process even though defendant was not serving a sentence for a sexual offense, had no record of having been convicted for any sexual offense, no evidence of sexual misconduct while in prison was introduced, and the psychiatrist's definition of sexually dangerous person did not conform with the statutory definition.

### *Constitutionality of the Procedures*

Even a cursory examination of the procedures outlined above reveals that the problem of protecting the rights of the individuals involved is a real one. Not only are the statutory protections minimal, but there is also the problem of giving real substance to the few protections that are present. Frequently the courts have side-stepped challenges based on the constitutional rights of defendants in criminal actions by holding these procedures are civil rather than criminal in nature.<sup>76</sup> Yet it is clear that the impact of these statutes on an individual equals anything a criminal statute could muster and consequently the need for protecting the rights of the individual is as great.<sup>77</sup> The Supreme Court has declared that such procedures are not invalid on their face, but might be unconstitutional as applied.<sup>78</sup>

## VALIDITY OF POLICIES UNDERLYING THE LAWS

In evaluating the purposes of the sex-psychopath statutes and the validity of the assumptions underlying them, certain factors must be kept in mind. First, all states have purely civil commitment procedures applicable to mentally ill persons who might constitute a danger to themselves or others.<sup>79</sup> Why the special treatment of the sex psychopath with its heavy criminal sanctions? Further, as the discussion above indicates, there is no valid medical reason

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<sup>75</sup> 205 N.E.2d 719 (Mass. 1965).

<sup>76</sup> Cf. *Wilson v. State*, 236 Ind. 278, 139 N.E.2d 554 (1957); *People v. Chapman*, 301 Mich. 584, 4 N.W.2d 18 (1942). *But cf. Minnesota v. Probate Court* 309 U.S. 270 (1939). See generally Annot., 24 A.L.R.2d 350 (1952).

<sup>77</sup> See Lindman & McIntyre, *op. cit. supra* note 69, at 302-03; Mihm, *supra* note 42; Swanson, "Sexual Psychopath Statutes: Summary and Analysis," 51 J. Crim. L., C. & P.S. 215 (1960).

<sup>78</sup> *Minnesota v. Probate Court*, *supra* note 76.

<sup>79</sup> For a survey of involuntary commitment procedures in the various states see Lindman & McIntyre, *op. cit. supra* note 69, at 15-106.

to put sex offenders in a separate class, since their actions are symptomatic of a myriad of mental diseases. Finally, it is generally conceded that the element of deterrence is not a factor in punishment when the "sex psychopath" is involved.<sup>80</sup>

The question then becomes, why a special procedure for this group? Is there a rational basis for attempting to accomplish whatever the purposes of the statutes may be by these procedures, as opposed to the existing criminal and civil commitment procedures? What caused the comparatively rapid adoption of these statutes in thirty-one jurisdictions in less than thirty years?

The statutes themselves set forth the ostensible motivations for their passage:

Sex offenders constitute a species of mentally ill persons in the eyes of the general assembly, and where this tendency is pronounced, they should have the same care and custody as mentally ill persons generally, and such persons should be given continued care and treatment so long as their release would constitute a threat to them or to the general public.<sup>81</sup>

Another statute declares:

that the frequency of sex crimes within this state necessitates that appropriate measures be adopted to protect society more adequately from aggressive sexual offenders; that the laws of this state do not provide for the proper disposition of those who commit or have a tendency to commit such crimes and whose actions result from a psychopathic condition; that society as well as the individual will benefit by a civil commitment which would provide for indeterminate segregation and treatment of such persons; that the necessity in the public interest for the provisions hereinafter enacted is a matter of legislative determination.<sup>82</sup>

If the actual purposes of these statutes are the protection of society and treatment of the individual, the question still remains what factors render sexual misconduct appropriate for special consideration as opposed, for example, to psychopathy evidenced by theft?

#### *The Protection of Society*

The need for protection of society assumes that there are a sufficient number of sex offenders, real or potential, who constitute a danger to the physical and mental well-being of the rest of society to warrant the passage of this type of statute. Tappan, relying *inter alia* on the Kinsey Reports, concludes that although there is

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<sup>80</sup> Karpman, *The Sexual Offender and His Offenses* 248-50, 486 (1954).

<sup>81</sup> Tenn. Code Ann. § 33-1302 (Supp. 1964).

<sup>82</sup> N.H. Rev. Stat. Ann. § 173:1 (1964).

some sex deviation in the populace, "vicious sex murderers" are rare.<sup>83</sup> Further, the criminal sanctions which can be imposed must be kept in mind when evaluating the existence of a class of "sex fiends." The truly dangerous offender is usually subjected to the criminal sanction, and the minor offender is caught up in the sex-psychopath procedures.<sup>84</sup>

What, then, of the emotional impact on the victim? Is there some basis here for these laws? There is no doubt that there is an emotional trauma from such an experience, yet there appear to be certain personality characteristics in some "victims" which predisposes them to become victims.<sup>85</sup> Further, much of the emotional trauma is not so much the result of the act itself but of the subsequent conduct of relatives and friends.<sup>86</sup> This does not mean that the emotional effects should be totally ignored, but that the actual impact in many instances would certainly be no greater than that suffered because of an encounter with some other form of criminal conduct, such as an armed robber. Why *in this instance* are our criminal sanctions deemed inadequate to protect society?

A strong possibility is the assumption that such offenders are recidivists. Sutherland<sup>87</sup> and Tappan,<sup>88</sup> relying on a myriad of statistical data, take the position that sex offenders have a very low rate of recidivism. The statistical validity of this position has been questioned on the grounds that only a minute percentage of the minor sex offenses committed are punished, and those who commit major offenses involving violence have little or no opportunity to repeat because of the extensive criminal sanctions applied.<sup>89</sup> In evaluating recidivism as a basis for justification of the sex-psychopath laws, one must question whether the purpose of the statute should be construed to be for the protection of society from the minor offender, whose practices at worst constitute a nuisance and bring no harm to others, or from the offender whose conduct may bring injury or even death to others.

Another possible basis for the sex-psychopath statute is that the minor offender is more likely to progress to more serious crimes

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<sup>83</sup> Tappan, "Some Myths About the Sex Offender," 19 Fed. Prob. 7 (June 1955). See also Sutherland, "The Sexual Psychopath Laws," 40 J. Crim. L. & Criminology 543, 544-46 (1950).

<sup>84</sup> Ploscowe, *Sex and the Law* 229 (1951).

<sup>85</sup> See Halleck, "Emotional Effects of Victimization," in *Sexual Behavior and the Law* 673 (Slovenko ed. 1965).

<sup>86</sup> See Tappan, *supra* note 83, at 8. For a study of a group of child victims of sex offenses see Bowman, *Sexual Deviation Research* 45-66 (1952).

<sup>87</sup> Sutherland, *supra* note 83, at 547.

<sup>88</sup> Tappan, *supra* note 83, at 8-9.

<sup>89</sup> See Bowman & Engle, "Sexual Psychopath Laws," in *Sexual Behavior and the Law* 757, 762-63, 769-70 (Slovenko ed. 1965).

and should be prevented from doing so. The consensus seems to be that this is not the case, that the minor offender is no more likely to commit a violent sexual act than any other person.<sup>90</sup> Therefore, there would still be validity in subjecting the minor offenders to at least the beginnings of the sex-psychopath procedures if there were some basis for selecting those particular few who promised to become dangerous in the future. Apparently medical knowledge has not yet progressed to a point where such a selection can be made with any degree of accuracy.<sup>91</sup> Thus the concept of progression provides no basis for these special procedures.

In summary, none of the possible bases for the concept of the protection of society is sufficient, in this author's opinion, to warrant the selection of the sexual psychopath for special treatment under procedures distinct from the usual criminal or civil commitment procedures. If society does not need special protection from this class, then we are left with the paternalistic view that these persons require medical treatment, and only through civil process can treatment be effectively administered.<sup>92</sup>

#### *Treatment of the Individual*

If treatment is the basic rationale, our methods must be effective or we have no grounds for applying the statutes. Extreme methods such as castration or electroshock therapy have not met with general approval or shown themselves to be effective.<sup>93</sup> Psychotherapy on the other hand has shown some encouraging results, but it is generally conceded that medical knowledge at present is inadequate to determine the extent to which this mode of treatment will prove successful.<sup>94</sup> Thus it would seem that at present there is still much work to be done in devising effective methods of treatment.

Assuming, however, that methods of treatment are known, these methods must be applied to the psychopath to justify holding him under the sex-psychopath laws. In reality, commitment to a state institution appears to afford the individual little hope of treatment; rather he is merely kept in custody at the institution.<sup>95</sup>

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<sup>90</sup> See Tappan, *supra* note 83, at 9.

<sup>91</sup> See Lindman & McIntyre, *op. cit. supra* note 69, at 306; Tappan, *supra* note 83, at 9-10.

<sup>92</sup> Bowman & Engle, *supra* note 89, at 768.

<sup>93</sup> See, e.g., Karpman, *op. cit. supra* note 80, at 614-15.

<sup>94</sup> *Id.* at 615. *But see* Bowman & Engle, *supra* note 89, at 768-69; Comment, 36 Neb. L. Rev. 320, 342 (1957), which questions whether the psychopathic personality can really be cured by psychotherapy. If the latter position is correct, quere whether psychotherapy is really treatment or a means of separating those likely to repeat their conduct from those who in all probability will not.

<sup>95</sup> See Lindman & McIntyre, *op. cit. supra* note 69, at 306-08; Ploscowe, *op. cit. supra* note 84, at 235; Tappan, *supra* note 83, at 11.



The primary reason for this, not considering the lack of effective methods of treatment, is the failure of the states to provide adequate funds, staff, and facilities to perform the necessary therapeutic functions.<sup>96</sup>

The lack of treatment is a basic condemnation of the sex deviate laws, since the philosophy behind such legislation is that these offenders should be treated rather than punished. Lack of treatment destroys any otherwise valid reason for differential consideration of the sexual psychopath. It would appear that the law is looking to medical knowledge for solutions to problems in this area only to find that such knowledge is as yet non-existent or imprecise.<sup>97</sup>

It appears, then, that at present there is no valid basis, either in terms of protection of society, or treatment of the offender, for the special procedures provided by the sex-psychopath statutes in light of the already existing criminal and civil commitment procedures. What, then, caused the comparatively rapid adoption of this type of statute in so many jurisdictions? Professor Tappan has suggested:

In the face of the patent fallacies used to support indefinite treatment of the sex deviate, is it not apparent that in reality other motives have guided most of the recent legislation? Perhaps the anxiety and guilt feelings that are associated with sex in the American mentality? Invidious treatment by open-ended sentences reflects our underlying need to punish the sex deviate more severely than other criminals. Our wishful thinking about therapy is a seemingly benevolent rationalization to cover fear and hate. It has been supported by the unfortunate notion that contemporary psychiatry possesses some mysterious omniscience in resolving behavior problems, a myth that reputable authorities in that field are at pains to destroy. Unhappily they have not been so audible in regard to the sex offender problem as certain rabid journalists have.<sup>98</sup>

This may help to explain why so many courts seem uneasy about applying these statutes. With a few notable exceptions, such as California, Michigan, and Wisconsin, the statutes are not widely used.<sup>99</sup> The courts, cognizant of the potential lifetime in custody

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<sup>96</sup> Lindman & McIntyre, *op cit. supra* note 69, at 307.

<sup>97</sup> *Id.* at 307-08.

<sup>98</sup> Tappan, "Sentences for Sex Criminals," 42 J. Crim. L. & Criminology 332, 335-36 (1951); Levy, "Interaction of Institutions and Policy Groups: The Origin of Sex Crime Legislation," 5 Law. & L. Notes 3 (1951), describes the role of the press, law enforcement agencies, and civic groups in creating the impression of a sex crime wave where in fact there was none and then discusses the forces behind the passage of this legislation.

<sup>99</sup> See Bowman & Engle, *supra* note 89, at 761-62.

and the lack of medical knowledge and treatment facilities, seek other means of dealing with the sex offender, especially when the offense is a minor one.

### CONCLUSION

There is no valid basis for identifying the sex offender as a class for special procedures beyond the criminal sanctions and civil commitment currently available. The application of the sex-psychopath statutes and the resulting indefinite commitment are penal in nature, notwithstanding judicial and legislative protestation to the contrary.

Yet there are some authorities who argue that while there is no basis for a different approach to the treatment afforded the sex offender at the hands of the law, in fact, most criminal conduct is the product of some mental disease and the concept of the indefinite sentence coupled with treatment aimed at rehabilitation actually represents a progressive approach to the handling of all criminal sanctions.<sup>100</sup> This idea presupposes a far more advanced knowledge of the human mind than today exists, and has all the problems concerning funds, facilities, and staff for treatment that are presently found in the sex-psychopath area. Further, this approach results in turning over to the psychiatrist the question of the extent of any sanction imposed and this would represent a fundamental change in the basic concepts of the criminal law, especially in relation to the questions of *who* has the duty of determining the existence of criminal responsibility and *what* the extent of that responsibility shall be in a given case. Needless to say such an approach is by no means unanimously accepted as valid.<sup>101</sup>

Regardless of the merit of such an approach as an ideal method, there is no doubt that at present, medical knowledge is insufficient to warrant instituting such a program. What then is to be done with the sex-psychopath statutes? If not repeal, then as a minimum these steps are suggested:

First, the courts should recognize that the statutes are fundamentally penal in nature and then take the necessary steps to protect the procedural rights of the accused. This would include the right to counsel, the right to be free from self-incrimination, and a separate hearing before a jury on the question of sexual psychopathy.

Second, the statutes should all be of the post-conviction type, limited to sex crimes of violence, or those involving children. This is especially important in light of the medical inability to

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<sup>100</sup> See Tappan, *supra* note 98.

<sup>101</sup> See, *e.g.*, Bowman & Engle, *supra* note 89; Sutherland, *supra* note 83.

predict future behavior and the invalidity of the concept that sex offenders tend to progress to more serious sex offenses.

Third, the courts should have the option of placing those found to be sexual psychopaths on probation subject to treatment as outpatients at some approved institution. This would give the court greater flexibility in the handling of these individuals than is presently possible under the mandatory commitment provisions. If commitment is appropriate it should be for a period not to exceed the maximum possible sentence imposed by the penal statutes for the crime of which the defendant stands convicted. If at the end of that period it is felt that the commitment should be continued, the state should be required to seek a new commitment order for another limited period. There should be a full hearing before the committing court with the defendant being accorded all the usual substantive and procedural safeguards and the state bearing the burden of proof.

Fourth, definite standards for release should be devised, based on the proposition that the defendant should be released as soon as he improves to the point where he no longer can be considered likely to demonstrate antisocial conduct that is dangerous to others. If the defendant reaches that stage of improvement before the maximum sentence under the penal statutes has run, the remaining time under that sentence should play no part in determining whether the defendant will be released outright, or be subject to supervision.

Finally, regardless of whether any of the above mentioned changes are adopted, there should be a fundamental change in the area of treatment. The states must offer more than mere custody to those committed. Facilities and staff must be improved so that those committed may have the treatment to which they are entitled. Effective outpatient programs should be developed to afford continued help to those no longer considered dangerous.

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