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Special Statutory Treatment for Sexual Psychopaths

J. A. Guzzetta

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power incumbering the use of other consumers. The Lehman-Roosevelt bill also provides for the construction of transmission lines to serve the preference users if arrangements can't be made with the owners of the existing facilities.

CONCLUSION

Federal power policy as exemplified through large scale federal projects is no longer an issue at Niagara, but the issue of public versus private power development remains. The decision is primarily one of personal philosophy as to the place of government in economic activity, for government ownership of public utilities is neither novel nor necessary.

The argument most convincing in favor of the State of New York's position is the fact that if it were not for the reservation in the Treaty of 1950, the parties would now be before the F. P. C. In issuing the license the Commission would be forced to give the State the preference. It is odd that the thirty year licensing policy of the federal government should be changed in this case. The situation is certainly vulnerable to accusations of special legislation.

But there is a historical argument in favor of the private companies, for private capital alone has borne the risk entailed in developing the Niagara since the first white man settled at its banks. In fact the development of hydro-electric power and its transmission were gifts of these private companies to the world. We might also add that the area has been progressively and adequately served by private enterprise for sixty years.

The power is at Niagara waiting to be used. Soon Canada will be completing the plants they began back in 1950 when the treaty was signed but the United States will only be able to show endless debates and indecision. Let us hope that this Congress will determine the licensee so that we may soon begin to realize the fruits of this most valuable natural resource.

Frank J. Laski
Theodore H. Schell

SPECIAL STATUTORY TREATMENT FOR SEXUAL PSYCHOPATHS

INTRODUCTION

The complex dynamism which is the law must, by definition, become increasingly cognizant of, and correspondingly responsive to, forces or pressures which emerge from time to time as novel

NOTES AND COMMENTS

or recurrent elements of community motion within the body politic. Inexorably the network of legal mechanisms is then subjected to gradual adjustment or expansion more adequately to accommodate particular manifestations of the phenomena of social, political and economic change, growth and development. Such change by expansion or adjustment in any part of the legal system necessarily affects the entire structure and therefore demands close examination and appraisal with a view to the eradication of defects and maximization of salutary potential. Modern developments, particularly in psychiatry and medical science, have effected definite alterations in the areas of criminology and penology, a major aspect of which is the unique treatment afforded, by special statutory provision, to a class of mentally abnormal, but not insane, persons called "sexual psychopaths."

A GENERAL VIEW OF SEXUAL PSYCHOPATH STATUTES

Within the past twenty years of medical and psychotherapeutic advancement, there has been a substantial accretion of knowledge about mental disorders categorically interposed between insanity and feeble-mindedness.¹ In line with the basic theory of modern preventative criminology, which emphasizes anticipation of criminal activity by means of recognition of criminal tendencies,² sex offenders in particular have been the subjects of widespread special statutory treatment.³ The purpose of such special treatment is twofold: to protect the community by isolating sexually irresponsible persons; to effect curative treatment for sex offenders.⁴

As of 1951, sixteen jurisdictions had sexual psychopath statutes.⁵ Although many of the statutes are similar in structure and scope, no two are identical.⁶ For example, in the District of Columbia the United States Attorney may initiate proceedings under the statute whenever it appears to him that a person is a sexual psychopath,⁷ whereas in Michigan the statute requires a charge of crime against a defendant before proceedings to deter-

1. 1 STAN. L. REV. 486 (1949).

2. See WIS. LAWS 1947, c. 459, § 51.015 (5) which provides for confinement, at the court's discretion, of the alleged sexual psychopath until the statutory proceedings relating to the existence of sexual psychopathy can be had.

3. See East, *Sexual Offenders—A British View*, 55 YALE L. J. 527 (1946); Leppmann, *Essential Differences Between Sex Offenders*, 32 J. CRIM. L. & CRIMINOLOGY 366 (1941).

4. 96 U. OF PA. L. REV. 872, 874 (1948).

5. California, District of Columbia, Illinois, Indiana, Massachusetts, Michigan, Minnesota, Missouri, Nebraska, New Hampshire, New Jersey, New York, Ohio, Vermont, Wisconsin, and Washington. See 60 YALE L. J. 346 (1951).

6. See Tappan, *The Habitual Sex Offender*, appendix (Report and Recommendation of the New Jersey Commission on the Habitual Sex Offender, 1950).

7. 62 STAT. 347, D. C. Code § 22-3504 (1951).

mine whether a person is a sexual psychopath may be begun.⁸ More important, however, the Michigan statute upon analysis discloses the glaring defect of an overreaching provision for the imposition of a sexual psychopath statute; for it should be noted that even where there is a requirement that a crime be charged against a defendant before proceedings are commenced, there is no restriction of the charge to dangerous sex crimes, or even crimes involving sexual activity. The effect of such carelessly broad language in sexual psychopath statutes, i. e., the failure initially to differentiate between dangerous sex criminals and those criminals either without mental abnormalities or not inherently dangerous to society, has justifiably been strongly criticized.⁹ It is clear, however, that there is no valid constitutional objection either to a statute which provides, as the Michigan statute, that a criminal charge must be made before proceedings to determine the psychopathic condition of the defendant,¹⁰ or to a statute which does not require a criminal charge to be made.¹¹

A few statutes provide that a defendant must be convicted of a crime before the commencement of proceedings concerning sexual psychopathy, although again it should be noted that the conviction need not be of a crime involving dangerous sexual aberration.¹² The inevitable consequence of the failure of a sexual psychopath statute to have limited application to dangerous sex criminals is the application of the statute to minor sex offenders (e. g., exhibitionists and "peepers"). Such use has resulted in the possible lifetime commitment of a man not dangerous to the community, of "superior intelligence", and evincing merely "marked psychological deviations", where the criminal charge against him had a maximum punishment of one year imprisonment (indecent exposure).¹³ Improper and unwise application of the sex-psychopath laws may also have the lamentable result of depriving apparently dangerous sex criminals of necessary therapeutic treatment where an interpretation of the statutory language limits its applicability to minor sex offenders.¹⁴ Due to such misuse in their

8. 25 MICH. STAT. §§ 28.967-(3) (Supp. 1947).

9. See Ploscowe, *Sex and the Law* (Prentice Hall, Inc. ed. 1951) 227; Tappan, *op. cit. supra* note 6, 25-26.

10. *People v. Chapman*, 301 Mich. 584, 4 N. W. 2d 18 (1942) (objection based on denial of equal protection of the law, U. S. CONST. AMEND. XIV, rejected).

11. *Minnesota ex rel. Pearson v. Probate Court of Ramsey County*, 309 U. S. 270 (1940).

12. See CAL. WELF. AND INST. CODE § 5501 (Deering, Supp. 1947); Ploscowe, *op. cit. supra* note 9, 232.

13. *In re Kemmerer*, 309 Mich. 313, 15 N. W. 2d 652 (1944), *cert. denied*, *Kemmerer v. Michigan*, 329 U. S. 767 (1946); Tappan recommends that sex offenders be given special statutory treatment "only where there has been a conviction in a criminal court for a serious sex crime, evidencing the danger of the offender to the security of the community." Tappan, *op. cit. supra* note 6, at 46.

14. See *People v. Haley*, 46 Cal. App. 618, 116 P. 2d 498 (1941); 39 COL. L. REV. 534, 536 (1939).

NOTES AND COMMENTS

application the statutes are sometimes considered too severe, and many prosecutors are chary about using them, preferring to get criminal convictions unless there is insufficient evidence to convict.¹⁵ Consequently, the sexual psychopath statutes of many jurisdictions have become very nearly, if not completely, inoperative.¹⁶

Proceedings under the sexual psychopath statutes have been generally designated as civil in nature (comparable to insanity proceedings) primarily for the purpose of obviating the stringent rules of criminal proceedings.¹⁷ Such provisions facilitate the application of the statutes, for they allay the constitutional attack on this type of legislation which was relied on to invalidate the first sexual psychopath statute in Michigan (1937).¹⁸ The New York statute, notorious for its "first truly indeterminate sentence" provision, is distinguishable in several respects from most other sexual psychopath laws. The sentence imposed after determination of the sexual psychopathic condition of a defendant is a criminal sentence, not a civil commitment, and may be indeterminate (i. e., from one day to life) in the discretion of the court.¹⁹ Although the act is not limited in application only to persons falling within a vague statutory definition of "sexual psychopathy,"²⁰ it explicitly does not apply to persons merely accused of crime.²¹ Before sentence may be imposed or probation granted under the New York statute, individuals who have been convicted of certain designated felonies involving dangerous sexual activity are required to be given physical and psychiatric examinations.²² Analysis of the New York provisions for the isolation and treatment of sexually irresponsible persons evidences several potential improvements over other sex-psychopath laws.²³ First, the legislators have wisely avoided using a psychiatric term, so vague and am-

15. Sutherland, *The Sexual Psychopath Laws*, 40 J. CRIM. L. AND CRIMINOLOGY 543, 552-4 (1950).

16. According to Tappan's survey, the sexual psychopath statutes of Wisconsin, Michigan, Massachusetts, and Washington are virtually inoperative; and those of Illinois, New Hampshire, Indiana, and Vermont are rarely used. Tappan, *op. cit. supra* note 6, appendix.

17. See *People v. Sims*, 382 Ill. 472, 47 N. E. 2d 703 (1943); 96 U. of PA. L. REV. 872, 878 (1948).

18. See *People v. Fronizak*, 286 Mich. 51, 281 N. W. 534 (1938). But see Hughes, *The Minnesota "Sexual Irresponsibles" Law*, 25 MENT. HYG. 76, 83 (1941).

19. N. Y. PENAL LAW §§ 2188, 2189-a (Supp. 1950).

20. See Sutherland, *supra* note 15, at 552; there are at least twenty-nine different, but equally vague, definitions by psychiatrists of "sexual psychopath" given in Tappan, *op. cit. supra* note 6, at 40-2.

21. 1 STAN. L. REV. 486 (1949).

22. N. Y. CODE CRIM. PROC. § 659 (1945); *id.* § 660 (Supp. 1950); *id.* § 661 (1945); N. Y. PENAL LAW §§ 2188, 2189-a (Supp. 1950). For a thorough breakdown and consideration of the New York act (effective April 1, 1950. N. Y. LAWS 1950, c. 525, § 26) see 60 YALE L. J. 346-356 (1951).

23. *Id.* at 352.

biguous that psychiatrists cannot agree on a definition among themselves, as a judicial standard for the application of the law.²⁴ Second, the New York statute provides the beneficial procedural safeguards of the criminal law to those persons coming within its purview.²⁵ Third, the statute applies in terms only to those persons who have been convicted of acts deemed dangerous to society.²⁶ Fourth, it avoids the administrative predicament of those state laws which do not recognize an intermediate condition between psychopathy and complete recovery by providing for conditional as well as absolute release.²⁷

It would be unfortunate, however, to regard even the New York sex-psychopath law as a *passe partout* to the solution of the multifarious legal enigmas which arise upon the application of such legislation. It should be carefully considered that although the "truly indeterminate sentence" has been lauded as "an important move toward an enlightened penology,"²⁸ it has also been critically examined as a "threat to civil liberties."²⁹ It must also be noted that presumably, sex offenders under the New York statute are institutionalized in state prisons,³⁰ and it is highly questionable whether sending sex offenders to state prisons will do anything but impede therapeutic treatment and/or give impetus to aberrant sex practices.³¹ It is clear that unless properly administered, and adequate facilities conscientiously provided for, sexual psychopath statutes, including New York's, do not result in the achievement of their salutary objectives.³² It has been found, however, that in most states facilities to care for those committed under the stat-

24. Cf. Tappan, *supra* note 16.

25. Cf. *People v. Sims*, *supra* note 17.

26. Cf. Ploscowe, *op. cit.* *supra* note 9.

27. See 1 STAN. L. REV. 486 (1949).

28. 60 YALE L. J. 346, 350 (1951).

29. Wertham, *A Psychiatrist Looks at Psychiatry and the Law*, 3 BFLD. L. REV. 41, 50 (1953); Tappan, *Sentences For Sex Criminals*, 42 J. CRIM. L. & CRIMINOLOGY 332 (1952).

30. See *supra* note 28, at 354.

31. See Karpman, *Sex Life In Prison*, 38 J. CRIM. L. & CRIMINOLOGY 475 (1948); see also East, *Is Reformation Possible In Prison Today*, *id.* at 128, 130 (1947); Von Hentig, *The Limits of Penal Treatment*, 32 J. CRIM. L. & CRIMINOLOGY 401 (1941). As to the wisdom of imposing the indeterminate sentence, and the wariness of judges to use it unless they are assured of proper administration, see Dession, *Psychiatry and the Conditioning of Criminal Justice*, 47 YALE L. J. 319, 335-340 (1938). See also Tappan, *The Sexual Psychopath—A Civic-Social Responsibility*, 35 J. of SOCIAL HYG. 354, 358 (1950): "The power to hold individuals indefinitely in correctional institutions for most ordinary criminal acts is far too great a responsibility when we are still so little able to predict the convict's future course of conduct and when we have such small ground for assurance that the types of treatment we employ will be more effective if extended indefinitely. Unless it can be shown as to the sexual psychopath that it is possible not only to diagnose the condition accurately, but beyond that to make dependable prognosis of his future conduct and to employ efficacious treatment methods, there appears to be no valid rational for more prolonged treatment than is meted out to other offenders."

32. See *supra* note 28, at 356.

NOTES AND COMMENTS

utes are either inadequate or non-existent, and that the "patients" are subjected to merely custodial confinement in state hospitals.³³ Experience has shown that the vast demands made on psychiatric aid under such statutory schemes, and the relatively limited availability of competent psychiatrists and institutional facilities, pose enormous problems of administration and treatment.³⁴ And most important in our political system, it must be kept in mind that commitment (or imprisonment) under sexual psychopath law is ". . . in effect serious punishment in which liberty and due process are vitally involved."³⁵

Finally, there is some question as to the administrative advisability of establishing unique penal treatment for sexual psychopaths only, for often the causes of sexual and non-sexual criminality are extremely similar.³⁶ Also, in this regard, it has not been shown that sex offenders are more prone to recidivism than non-sex offenders.³⁷ Further, it has been suggested that sexual psychopaths may not respond to treatment as readily as other mentally abnormal persons, and hence the wisdom of allocating most of a state's limited psychiatric services to sex offenders is questionable.³⁸ From a general view, therefore, sexual psychopath statutes have been criticized as largely ineffectual.³⁹

An important aspect of an analysis of our experience with sex-psychopath laws is the availability of remedies to those persons committed or imprisoned pursuant to their provisions. A recent case in the District of Columbia⁴⁰ has shed some light on this vital phase of an appraisal of sex-psychopath law. *Miller v. Overholser* is of significance primarily because it is a source of very welcome persuasive dicta to the effect that conditions of confinement under a sexual psychopath statute may, within certain limits, be judicially reviewable by means of a writ of habeas corpus.⁴¹ This may not only directly afford a person so confined a highly desirable safeguard against improper detention, but indirectly

33. On the experience of those states which placed sex offenders in mental hospitals, see Tappan, *op. cit. supra* note 6, at 32.

34. See Wall & Wylie, *Institutional and Post-Institutional Treatment of the Sex Offender*, 2 Vand. L. Rev. 47 (1948); Comment, 57 YALE L. J. 1085 (1948).

35. Tappan, *op. cit. supra* note 6, at 16.

36. Abrahamsen, *Family Tension, Basic Cause of Criminal Behavior*, 40 J. CRIM. L. & CRIMINOLOGY 330 (1949).

37. See Tappan, *op. cit. supra* note 6, at 22-24; Sutherland, *supra* note 15, at 547-8.

38. See Tappan, *supra* note 31, at 361-2, 366.

39. See *supra* note 28, at 347; Ploscowe, *op. cit. supra* note 9, at 229.

40. *Miller v. Overholser*, 206 F. 2d 415 (D. C. Cir. 1953). Petitioner brought habeas corpus proceeding to test the validity of his detention as a sexual psychopath on the ground (*inter alia*) of improper conditions of confinement. Held: order of District Court for District of Columbia discharging writ reversed, and case remanded for hearing on petitioner's allegations.

41. *Ibid.*

work as a filip toward the improvement of administrative operations and treatment after commitment. Ordinarily, of course, the remedy of habeas corpus is used to secure total release from custody,⁴² and only in extreme cases where constitutional prohibitions are transgressed will the courts interfere with administrative modes of legal confinement or treatment.⁴³ It has been determined, however, that the writ is available not only to test the validity of confinement, but also the place of confinement.⁴⁴ Since in New York habeas corpus proceedings generally will only inquire into the court's jurisdiction to pronounce judgment (i. e., to test the power of the trial court to try the particular charge against the particular defendant before it), there is some question whether the writ would lie to test the place of confinement under the New York sexual psychopath statute.⁴⁵ On the other hand, a person improperly sentenced in New York, it has been held, may avail himself of the remedy of habeas corpus.⁴⁶ Under the facts of *Miller v. Overholser*, therefore, it appears that habeas corpus would be a proper remedy.⁴⁷ In any event, it has been suggested that where the writ of habeas corpus is blocked in New York, coram nobis is probably available to provide adequate remedy.⁴⁸

CONCLUSION

The expansion of our laws to accommodate and control the admittedly pressing problem of sexual aberration, dangerous to society and urgently serious to the individual, evidences grave defects. Empirical test demonstrates the misapplication of such legislation, due primarily to careless statutory provisions founded on incomplete knowledge about the subject matter, and most strikingly the fatal want or inadequacy of administrative implementation. As a valuable experiment, however, in a field fertile for interrelated legislative and administrative action, experience with sexual psychopath statutes may, it is hoped, lead to enlightened corrective and remedial measures in an area heretofore disregarded or improperly provided for, and open the door to intensified criminological investigation with a view to more effective methods of anticipating criminal tendency.

J. A. Guzzetta

42. See 1 BFLD. L. REV. 268 (1952).

43. *Garcia v. Steele*, 193 F. 2d 276 (8th Cir. 1951).

44. *Coffin v. Reichard*, 143 F. 2d 443 (6th Cir. 1944), cert. denied, 325 U. S. 887 (1945); *In re Bonner*, 151 U. S. 242 (1894).

45. *People ex rel. Tweed v. Liscomb*, 60 N. Y. 550, 570 (1875).

46. *People ex rel. Gray v. Warden of N. Y. County Penitentiary*, 168 N. Y. S. 708 (Sup. Ct. 1918).

47. "A person who is sentenced to a wrong place . . . is entitled to relief by habeas corpus." *Ibid.*; C. P. A. ARR. 77, § 1262; see also N. Y. MENT. HYG. LAW § 204 (1944).

48. See *supra* note 42, at 278.