NOTE

CONSTITUTIONAL LAW

INDIANA SEXUAL PSYCHOPATH STATUTE

Following the recent trend in other jurisdictions the Eighty-sixth Session of the General Assembly of Indiana enacted a statute providing for the commitment of criminal sexual psychopaths.[1] This legislation manifests an increasing awareness of the social problems presented by the tendency of these offenders toward recidivism of a serious nature as well as the inadequacy of conventional criminal prosecution in dealing with them.[2] As scientific knowledge of the underlying causes of this type of mental deficiency has increased, the short comings of the criminal law; the need for proper protection of society; and the necessity for adequate care of the individual, have been pointed out with increasing clamor by members of the medical and legal professions.[3]

Due to the constitutional limitations on a criminal action[4] the ultimate validity of such a statute depends, in large measure, upon the judicial determination of whether the proceeding under the act is criminal or civil. The essential difference between the two proceedings should be determined by considering the object to be attained, rather than an abstraction drawn from

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1. Ind. Acts 1949, c. 124, p. 328.

2. In 14 OREG. L. REV. 352 (1935) Dr. H. H. Dixon states:

> The psychopath does not learn by experience, and will almost invariably repeat. Because of this, punishment does not alter his attitude and the lack in his emotional makeup is in no way altered by reasoning or punishment. Any attempt at punishment, followed by parole, results only in repetition of their criminal behavior. When this type of behavior is once crystalized, the alternative appears to be permanent custody . . . Since this individual can be *readily diagnosed* society would be saved much distress by early institutionalization. In early cases we can correct the factors leading to the personality distortion.

See also 25 MENTAL HYGIENE 76. *But see* the report of the New Jersey COMMISSION FOR THE INVESTIGATION OF THE HABITUAL SEX OFFENDER, which was submitted to the Legislature Feb. 1, 1950. This report concluded that the average sex offender is a mild-mannered, much-maligned, and non-dangerous person who *seldom* repeats his offenses and that progression from minor to major sex crimes is rare.

3. GLUECK, MENTAL DISORDER AND CRIMINAL LAW (1925); Mullins, *How Should the Sexual Offender be Dealt With?*, 2 MEDICO-LEGAL & CRIM. REV. 236 (1934); Weihofen, *Insanity as a Defense in Criminal Law* (1933); 14 ORE. L. REV. 352 (1935). Critics have offered alternative proposals to meet the problem of the sex offender. See *Report of Committee on Forensic psychiatry, Circular letter* 131, Feb. 12, 1949; Karpman, *Sex Life in Prison*, 38 J. CRIM. L. & CRIMINOLOGY 475 (1948).

4. In a note, 3 JOHN MARSHALL L. J. 407 (1938) the writer adopts a distinct minority view and discusses the constitutional limitations on the Illinois Sexual Psychopathic Statute as though it were a criminal proceeding.

the form of the proceeding.[5] The result sought in a criminal action is the punishment or fine of the offender for a public wrong.[6] The sexual psychopathic proceeding is conducted for the benefit of the person whose mental state is in question as well as for the protection of society and the end to be achieved is not essentially a punative sanction to exact retribution from the unfortunate person.[7]

The courts have upheld analogous proceedings for the commitment of the insane,[8] feeble-minded,[9] drug addicts,[10] dipsomaniacs,[11] inebriates[12] and defective delinquents[13] as civil inquests, leaving the determination of the condition to persons possessing the necessary education and experience.[14] The legislatures passing these statutes recognized the futility of criminal prosecution and punishment to reform these offenders and substituted provisions providing for special judicial handling and treatment of them following commitment. The Indiana statute covers a segment of society requiring similar consideration.

A Michigan sexual psychopathic statute was held unconstitutional on the

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5. Boyd v. U. S., 116 U. S. 616 (1885); Amato v. Porter, 157 F.2d 719 (10th Cir. 1947); Iowa v. Chicago, B. & Q. R. R., 37 Fed. 497 (S. D. Iowa 1889); Illinois v. Illinois Cent. R. R., 33 Fed. 721 (N. D. Ill. 1888); State *ex rel.* Zimmerman v. Euclide, 227 Wis. 279, 278 N. W. 535 (1938); 16 N. Y. U. L. Q. 303 (1938).

6. Amato v. Porter, 157 F.2d 219 (10th Cir. 1947); Lauders v. Staten Island R. R., 53 N. Y. 450 (1873); State *ex rel.* Zimmerman v. Euclide, 227 Wis. 279, 278 N. W. 535 (1938); 24 TEX. L. REV. 307 (1946).

7. In Vona v. State, 54 N. Y. S.2d 453 (1945), the court said the commitment of a defective delinquent is not a proceeding for the punishment of crime but rather the state intervenes for the welfare of its wards. In 24 TEX. L. REV. 307 (1946) the writer suggests that a commitment proceeding cannot be considered even a civil trial; "It is a special proceeding *sui generis* 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." *See In re* Breese, 82 Iowa 573, 48 N. W. 991 (1891); *In re* Cook, 218 N. C. 384, 11 S. E.2d 142 (1940).

8. IND. STAT. ANN. (Burns 1933) § 8-202; Emry v. Beaver, 192 Ind. 471, 137 N. E. 55 (1922); Chase v. Chase, 163 Ind. 178, 71 N. E. 485 (1904). People v. Janek, 287 Mich. 563, 283 N. W. 699 (1939), held that a sanity proceeding is not a trial placing a defendant in double jeopardy, but a collateral inquiry to preserve him from the jeopardy of a trial while insane.

9. IND. STAT. ANN. (Burns 1933) §§ 22-1712, 27-1720; State v. Troxler, 202 Ind. 268, 173 N. E. 321 (1930); People v. Niesman, 356 Ill. 322, 190 N. E. 668 (1934); Cahalan v. Dept. of Mental Health, 304 Mass. 360, 23 N. E.2d 918 (1939); *Ex parte* Roberts, 202 Mass. 536, 88 N. E. 927 (1909).

10. CALIF. WELFARE & INSTITUTIONS CODE §§ 5400-5407 (1937); *Ex Parte* Liggett, 187 Cal. 428, 202 Pac. 660 (1921); IDAHO CODE ANN. § 66-316; *In re* Hinkle, 33 Idaho 605, 196 Pac. 1035 (1921); MASS. ANN. LAWS. 1942 c. 123, § 62.

11. *Ibid. See also* Goodwin v. State, 95 Ind. 551 (1884), where the court held dipsomania to be a type of moral insanity; Bradley v. State, 31 Ind. 492 (1870).

12. See Note 10 *supra. Ex parte* O'Connor, 29 Cal. App. 225, 155 Pac. 115 (1915); *In re* Scrange, 182 Iowa 880, 164 N. W. 778 (1917).

13. MASS. ANN. LAWS (Supp. 1947), c. 123; N. Y. MENTAL DEFICIENCY LAW § 124-126; Vona v. State, 54 N. Y. S.2d 453 (1945).

14. Prescott v. State, 19 Ohio St. 184 (1869); 39 COL. L. REV. 534 (1939); 16 N. Y. U. L. Q. 302 (1939).

grounds that the legislature, by placing the act in the criminal code and providing for conviction and sentence on the criminal charge prior to the commitment proceeding, had subjected the defendant to a criminal prosecution.[15] This was said to result in two trials and convictions for the same crime, a denial of due process, and an attempt to keep the defendant confined under the police power when he had already been sentenced for the crime. The Indiana act is not contained in the criminal code and the proceeding must be instituted prior to sentence on the criminal charge.[16] The Indiana Act further stipulates that no person found to be a criminal sexual psychopath may thereafter be tried or sentenced upon the offence with which he originally stood charged or convicted.[17] The inclusion of these provisions would seem to obviate the difficulty encountered by the Michigan act, a subsequent version of which, removing the unconstitutional features of its predecessor, was upheld as involving a civil proceeding.[18]

CLASSIFICATION

A criminal sexual psychopath is defined by the statute as any person charged with a criminal offence,[19] over the age of sixteen years who is suffering from a mental disorder and is not insane or feeble-minded, which mental disorder is coupled with criminal propensities to the commission of sex offenses.[20] This provision has been attacked in other jurisdictions as an arbitrary classification. However, it has been upheld as reasonable and as not denying due process since the legislature, in the exercise of the police power, may limit the scope of legislation to those areas where the need is presumably greatest, even though in practice it results in some inequality.[21] A similar provision in the Illinois statute was sustained as a reasonable classi-

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15. People v. Frontczak, 286 Mich. 51, 281 N. W. 534 (1938). The precise ground of unconstitutionality was that the individual was deprived of the right to jury trial by a jury from the vicinage. Noted in 37 MICH. L. REV. 613 (1939); 18 MICH. STATE B. J. 83 (1939).

16. Ind. Acts 1949, c. 124, § 4.

17. *Id.* § 9. The Michigan act is similar to the Indiana act in this respect, MICH. STAT. ANN. (Supp. 1947) § 28.967. However, the Illinois, Wisconsin, Minnesota and Massachusetts statutes specifically provide that commitment as a sexually dangerous person shall not constitute a defense to criminal charges. Seeking to remedy certain administrative difficulties the Committee on Criminal Law of the Chicago Bar Association has proposed a revised version of the Illinois Psychopathic Statute which grants discretion to the trial judge in considering the time spent in confinement when setting the sentence for past convictions. 40 J. CRIM. L. & CRIMINOLOGY 186 (1949).

18. People v. Chapman, 301 Mich. 584, 4 N. W.2d 18 (1943).

19. Ind. Acts 1949, c. 124, § 3. The act excludes the crimes of murder, manslaughter or rape of a female child under the age of 12, from its coverage.

20. Ind. Acts 1949, c. 124, § 4.

21. Minnesota *ex rel.* Pearson v. Probate Court of Ramsey County, 309 U. S. 270 (1939); People v. Sims, 382 Ill. 472, 47 N. E.2d 703 (1943); People v. Chapman, 301 Mich. 584, 4 N. W.2d 18 (1943).

fication, the court stating that the purpose of the act was to prevent punishment for crimes during the period of mental illness. Therefore, the provision for commitment when the psychopath was charged with a crime was not discriminatory.[22]

The Minnesota act defines a psychopathic condition as "the existence in any person of such conditions of emotional instability, or impulsiveness of behavior, or lack of customary standards of good judgment, or failure to appreciate the consequences of his acts, or a combination of such conditions, as to render such person irresponsible for his conduct with respect to sexual matters and thereby dangerous to other persons."[23] The Minnesota court construed this section as applicable only to persons who "by an habitual course of misconduct in sexual matters, have evidenced an utter lack of power to control their sexual impulses and who, therefore, are likely to attack or otherwise inflict injury, loss, pain or other evil on the objects of their uncontrollable desire."[24] This provision, as interpreted, was upheld by the Supreme Court in *Minnesota ex rel. Pearson v. Probate Court of Ramsey County*[25] as a rational basis for classification and, therefore, not a denial of equal protection of the laws in violation of the Fourteenth Amendment.

It should be noted that the accused is not committed on the basis of criminal responsibility, but rather because he was found to be a sexual psychopath during proceedings on the alleged criminal offense.[26] Although a person not so charged cannot be committed, offenders brought within the court's jurisdiction in this manner are more likely to be those of the general class of sexual psychopaths, who endanger the safety of society.

Determination of Condition

After the prosecuting attorney of the county, or someone on behalf of the person charged,[27] has filed a statement with the court[28] setting forth facts tending to show that the person is a criminal sexual psychopath, two

22. People v. Sims, 382 Ill. 472, 47 N. E.2d 703 (1943).

23. Minn. Stat. Ann. § 526.09-526.11.

24. State *ex rel.* Pearson v. Probate Court of Ramsey County, 205 Minn. 545, 549, 287 N. W. 297, 299 (1939).

25. 309 U. S. 270 (1939).

26. Vona v. State, 54 N. Y. S.2d 453 (1945).

27. The proposed revision of the Illinois statute provides for additional procedural safeguards to the individual. Only the state's attorney, and in some cases a criminal court judge, can institute proceedings under the act. This proposed change is to protect the individual from blackmail and harassment. Also the judge must pass on the sufficiency of the petition. These safeguards would seem to be desirable. The Indiana act grants the court discretionary power to pass on the sufficiency of the petition only when the petition is filed by someone on behalf of the person charged. The Illinois proposal would make the right to counsel expressly available to the accused. 40 J. Crim. L. & Criminology 186 (1949). The Indiana act makes no specific provision for counsel.

28. Jurisdiction is vested with courts having general jurisdiction of criminal cases. Ind. Acts 1949, c. 124, § 2.

qualified physicians are appointed by the court to make an examination and submit a report of their findings and conclusions.[29] Usually any licensed physician is competent to make such an examination.[30] As a practical matter the Indiana statute may be inadequate in this respect, since some practitioners possibly lack the experience necessary to competently analyze this type offender. However, this potential weakness can be offset to a great extent by the proper exercise of judicial discretion in selecting examiners.[31] The United States Supreme Court held that a similar provision in the Minnesota statute did not deny due process, finding the argument that doctors may not be sufficiently expert untenable as merely inviting conjecture.[32]

Self-Incrimination

Under the Indiana statute the accused is required to answer the questions propounded by the examining physicians under penalty of contempt of court.[33] In Indiana the constitutional privilege against self-incrimination applies with equal vigor to testimony obtained in either a civil or criminal proceeding which may expose the accused to criminal prosecution.[34] However, while the resulting report of the examiners is available to the interested parties, the Indiana statute forbids its use in any other proceeding against the accused.[35] Although there has been no uniformity of expression as to what constitutes self-incrimination,[36] the inclusion of this immunity provision in the statute[37] probably eliminates all doubt as to the applicability of

29. Ind. Acts 1949, c. 124, § 4.

30. Weihofen, *op. cit. supra* note 3, at 202.

31. Most state statutes require the appointment of at least one psychiatrist. The suggested revision of the Illinois statute provides for additional requirements for examining psychiatrists. These were suggested to insure the appointment of competent examiners and to reduce the chances of the judge's appointments on patronage motives. The criticism has already been made, by some Indiana judges, that competent examiners are difficult to find, especially in smaller communities. See Indianapolis Star, Nov. 23, 1949, p. 1, col. 5. The best solution would seem to be an official court clinic composed of specialists on sex offenses. These clinics could be established in the larger cities and utilized by the surrounding area as well as the city itself. 40 J. Crim. L. & Criminology 186 (1949).

32. Minnesota *ex rel.* Pearson v. Probate Court of Ramsey County, 309 U. S. 270 (1939).

33. Ind. Acts 1949, c. 124, § 4.

34. Hale v. Henkel, 201 U. S. 43 (1905); Ross v. State, 204 Ind. 281, 182 N. E. 865 (1932); Overman v. State, 194 Ind. 483, 143 N. E. 604 (1924); French v. Venneman, 14 Ind. 282 (1860); Wilkins v. Malone, 14 Ind. 153 (1860); 2 Willoughby, Constitution of the United States § 712 (2d. ed. 1929).

35. Ind. Acts 1949, c. 124, § 4.

36. *Compare* State v. Height, 117 Iowa 650, 91 N. W. 935 (1902), *with* State v. Petty, 32 Nev. 384, 108 Pac. 934 (1910). *Compare* State v. Griffin, 129 S. C. 200, 124 S. E. 81 (1924), *with* Cooper v. State, 86 Ala. 610, 6 So. 110 (1889). See also 25 Mich. B. J. 169 (1946).

37. Ind. Acts 1949, c. 124, § 4. In 40 J. Crim. L. & Criminology 186 (1949), the writer raises the possibility that a broad grant of immunity, such as the Indiana statute provides, would encourage sex-offenders to confess all their past offenses during the

this constitutional proscription. In analogous proceedings similar grants of immunity have been upheld and the witness compelled to disclose incriminating information.[38] Even where no such immunity exists, compulsory examination provisions in the Illinois and Michigan sexual psychopathic statutes have been sustained as not being within the scope of this constitutional inhibition,[39] as have similar provisions in insanity and related statutes in other jurisdictions,[40] on the grounds that this prohibition applies to criminal actions only.

HEARING

In the event that both physicians conclude that the person is a criminal sexual psychopath[41] a hearing, following notice to the person so charged,[42] is held by the court to determine the accused's mental state. The report of the examiners is advisory and is submitted for the court's guidance to be considered with other evidence introduced by the parties at the hearing.[43]

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psychiatric examination, thus insuring themselves immunity from subsequent prosecution. To obviate this difficulty a specific provision might be inserted in the statute ordering the examiners not to turn over any specific data or facts, such as times, dates, places, names, etc., obtained in the interview, to the prosecution. As long as the prosecutors are denied access to such incriminating data, the policy of the privilege, to prevent the use of information obtained during the examination in subsequent criminal proceedings against the accused, would be satisfied and the objectionable use of the privilege avoided.

38. Brown v. Walker, 161 U. S. 591 (1895); Atkinson v. State, 190 Ind. 1, 128 N. E. 433 (1920); State v. Pence, 173 Ind. 99, 89 N. E. 488 (1909). In Bedgood v. State, 115 Ind. 275, 17 N. E. 621 (1888), a witness in a criminal trial was compelled to answer a question which might have resulted in his conviction of a crime, due to the existence of an immunity statute exempting witnesses from prosecution under these circumstances.

39. People v. Redlich, 402 Ill. 270, 83 N. E.2d 736, 741 (1949); People v. Chapman, 301 Mich. 584, 4 N. W.2d 18 (1943).

40. Noelke v. State, 214 Ind. 427, 15 N. E.2d (1938); State v. Coleman, 96 W. Va. 544, 123 S. E. 580 (1924); State v. Chandler, 126 S. C. 149, 119 S. E. 774 (1923); Blocker v. State, 92 Fla. 878, 110 So. 547 (1926), are decisions rejecting the defendant's contention of privilege to exclude evidence obtained by psychiatric examination where the defendant himself has introduced the defense of insanity. *See also* Countee v. United States, 112 F.2d 447 (7th Cir. 1940); Weihoffen, *op. cit. supra,* note 3 at 216-218. Closely related is the application of the privilege against self-incrimination to physical examinations of the defendant. In People v. Esposito, 287 N. Y. 389, 39 N. E.2d 925 (1942) the defendant pleaded insanity as a defense to a crime, the court holding that his constitutional immunities were not violated by virtue of the fact that drugs were injected into him during preliminary examination, since in presenting the defense of insanity he was subject to the use of methods set up by the medical profession for the determination of such condition. O'Brien v. State, 125 Ind. 38, 25 N. E. 137 (1890), held compulsory physical examination to determine accused's identity was admissable as evidence. 24 ILL. L. REV. 487 (1929); 25 MICH. STATE B. J. 169 (1946); 74 N. Y. J. REV. 375 (1940).

41. Ind. Acts 1949, c. 124, § 4.

42. *Id.* § 5.

43. Where the jury form of trial has been preserved by statute, in commitment proceedings, some courts hold the appointment of physicians to examine the defendant void as prejudicing the jury in favor of testimony given by court appointed examiners. People v. Scott, 326 Ill. 327, 157 N. E. 247 (1927). *Contra*: Jessner v. State, 202 Wis. 194, 231 N. W. 634 (1930). Other courts merely refuse to admit the commissions' report as evidence, but it is available to the parties concerned and may be introduced by summoning the examiners at witnesses. MASS. ANN. LAWS (Supp. 1947), c. 123; 19 MINN. L. REV.

It is also competent, although not essential, to introduce evidence of the commission of similar crimes together with the punishment inflicted and such other evidence as bears on the person's condition.[44] A comparable provision in the Illinois statute was held to apply only to such crimes as tend to show a sexual psychopathic condition since this was clearly the legislative intent. Further, the Illinois court held that since it was not a criminal proceeding in which the accused is entitled to a trial free from evidence of convictions theretofore had against him, the act was not invalid on that ground.[45]

Under the Indiana, California and Minnesota statutes first offenders as well as recidivists may be committed.[46] Some states require prior conviction of sex offenses and proof of the continued existence of such condition for a specified period of time as a prerequisite of commitment.[47] While proof of prior conviction may be an important aid to the court in determining the defendant's mental state, such a requirement seems ancillary rather than essential to the determination of this question. This safeguard was inserted to prevent abuse by relatives or others and not for constitutional reasons.[48] Indeed, Massachusetts, after once amending its act to require proof of prior conviction, now permits commitment of defective delinquents on the first offense if the court decides that the individual has serious recidivistic tendencies.[49] Moreover, the requirement in other states that the prosecutor must establish the continued existence of the psychotic condition for a specified period of time, has created evidential problems and has prevented the desired utilization of the statute.[50] The absence of such a provision in the Indiana statute eliminates this practical difficulty.

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308 (1935); 25 J. CRIM. L. & CRIMINOLOGY 859 (1935). Where the proceeding is by the court without a jury such criticism fails and the report is directly admissable. People v. Chapman, 301 Mich. 584, 4 N. W.2d 18 (1943).

44. Ind. Acts 1949, c. 124, § 5.

45. People v. Sims, 382 Ill. 472, 47 N. E.2d 703 (1943).

46. Ind. Acts 1949, c. 124, § 5; CALIF. WELFARE AND INSTITUTIONS CODE, c. 4 (1944); MINN. STAT. ANN. §§ 526.09-526.11.

47. ILL. REV. STAT. (1947), c. 38, § 37.665(1); MICH. STAT. ANN. (Supp. 1947) § 28.967(1).

48. 24 J. CRIM. L. & CRIMINOLOGY 325 (1933).

49. See Note 13 *supra.*

50. The most serious defect in the present Illinois statute is the definition section which limits its coverage to those persons charged with crime and having a mental disorder for more than one year prior to any action under the act; furthermore, the prosecutor must prove criminal propensities toward the commission of sex crimes. As a result of these stringent requirements the Act has been used sparingly and only sixteen persons have been confined in the ten year period since its passage. The suggested revision to the Illinois statute eliminates the necessity of a criminal charge and expands the definition of persons intended to be embraced by the act. 40 J. CRIM. L. & CRIMINOLOGY 186 (1949). Neither Massachusetts, Minnesota, nor Wisconsin provide that a crime or charge thereof is necessary.

JURY TRIAL

The Act provides that the hearing shall be conducted by the court without a jury.[51] Similar provisions in other statutes were unsuccessfully claimed to be an abrogation of the constitutional guarantee of trial by jury.[52] But this right is preserved only in those civil actions triable by jury at common law.[53] Consequently, since idiocy proceedings were conducted by the court without a jury in early times, commitment proceedings for various conditions where the legislature has eliminated trial by jury under the statute are held not to deny due process. On this basis the Minnesota sexual psychopath statute eliminating trial by jury was upheld in *Pearson v. Probate Court of Ramsey County,* the court alluding to this constitutional guarantee as not applying to a proceeding of the sort contemplated by the statute. It is interesting to note that after a careful study of the result of the use of jury trial for commitment of the insane in Illinois one writer observed that "during the twenty years this law remained on the books, more sane persons were declared insane by jury trial, as shown by the reports of institutions from year to year, than were ever wrongfully committed under the earlier system."[54]

COMMITMENT

Following a finding that the defendant is a criminal sexual psychopath, the act provides for an indefinite period of commitment, as do most insanity and related statutes,[55] subject to provisions for parole and discharge.[56] Such

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51. Ind. Acts 1949, c. 124, § 5. The Minnesota and Ohio Statutes make no provision for jury participation at the hearings. MINN. STAT. ANN. § 526.09-525.11; OHIO GEN. CODE (Supp. 1947) §§ 13451-19—15451-23. California, Michigan and Wisconsin provide for permissive use of the jury, if the defendant so desires. CALIF. WELFARE AND INSTITUTIONS CODE, c. 4 (1944); MICH. STAT. ANN. (Supp. 1947) §§ 28.967(1)-28.967(9); WIS. LAWS (1942), c. 459. While in Massachusetts the use of a jury is discretionary with the court. MASS. ANN. LAWS (Supp. 1947), c. 123(a). Jury trial is mandatory under the Illinois act. ILL. REV. STAT. (1947), c. 38, § 37.665(5).

52. 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). *See* People v. Frontczak, 286 Mich. 51, 281 N. W. 534, 537 (1938) (dissenting opinion); 24 TEX. L. REV. 307 (1946).

53. IND. CONST. Art. 1, § 20, provides that in all civil cases, the right of trial by jury shall remain inviolate. The phrase civil cases, as used in this section, includes only actions triable by jury at common law. State Bd. of Dental Examiners v. Davis, 69 Ind. App. 109, 121 N. E. 142 (1918); Wright v. Fultz, 138 Ind. 594, 38 N. E. 175 (1894); Lake Erie, W. & R. R. v. Heath, 9 Ind. 558 (1857).

54. Dewey, *The Jury Law for Commitment of the Insane in Illinois,* 69 AM. J. OF INSANITY 571 (1913); The Supreme Court of the U. S. in Southern R. R. v. City of Durham, 266 U. S. 178 (1924), denounced the use of jury trial in commitment proceedings stating that "since it is typically the most public, most formal and most elaborate form of judicial proceeding, the jury trial represents the extreme example of the unfortunate concomitants of judicial procedure in commitment cases." But see 25 IOWA L. REV. 156 (1940).

55. GLUECK, MENTAL DISORDER AND CRIMINAL LAW (1925).

56. Ind. Acts 1949, c. 124, § 5.

a period of commitment in the Michigan statute, was held not to violate the constitutional prohibition against cruel and unusual punishment because it was a civil proceeding rather than a criminal action.[57] As stated by the Indiana court in *Kistler v. State*,[58] this inhibition is aimed at the kind and form of punishment rather than the duration and amount thereof. In order to effectuate the purpose of these statutes indefinite commitment would seem to be essential.[59]

CONCLUSION

Pervading the entire field of legislation dealing with this problem is a recognition that among the flotsam of modern society, sexual offenders require special consideration.[60] Unless early institutionalization is provided they will almost always repeat, and punishment does not alter this attitude.[61] The modern view that sex crimes are not ordinary crimes, and that sex offenders are not ordinary criminals with ordinary motives, has received increasing support.[62] Naturally these statutes present no panacean solution to the problem, but they are a step in that direction. The underlying condition demonstrating the relationship of the psychopath's past conduct to probable future consequences is as susceptible of proof as many criteria required to attain the pragmatic norm called justice.[63] In an effort to frustrate the legislative attempt to provide for the care of these unfortunates unable to care for themselves, the sexual psychopathic statutes of other states have been challenged most frequently under the due process clauses of the Federal and State Constitutions. The substantive features of these statutes have been held, almost without exception, to be within the police power of the state; hence the undoubted interference with personal liberty was not subject to constitutional proscription.[64] Similar proceedings under habitual criminal[65] and steriliza-

57. People v. Chapman, 301 Mich. 584, 4 N. W.2d 18 (1943).

58. 190 Ind. 149, 129 N. E. 625 (1921).

59. *Cf. Ex parte* Stone, 87 Cal. App.2d 907, 172 P.2d 847 (1948).

60. In 55 YALE L. J. 527 (1946), the author states that "to the average lawyer they represent a class of individuals little known and rarely encountered. For this reason, when legal precedent alone determines the outcome of litigation involving sexual offenders, it may be a case of the blind leading the blind."

61. See Note 2 *supra*.

62. 32 J. CRIM. L. & CRIMINOLOGY 366 (1941); 55 YALE L. J. 527 (1946).

63. Minnesota *ex rel.* Pearson v. Probate Court of Ramsey County, 309 U. S. 270 (1939).

64. This proposition has received general acceptance since the Supreme Court affirmed a sterilization proceeding, pursuant to a Virginia statute, in Buck v. Bell, 274 U. S. 200 (1926); *In re* Hendrickson, 12 Wash.2d 600, 123 P.2d 322 (1942). On the same basis sexual psychopathic statutes have been sustained in 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); People v. Sims, 382 Ill. 472, 47 N. E.2d 703 (1943); People v. Chapman, 301 Mich. 584, 4 N. W.2d 18 (1943).

65. IND. STAT. ANN. (Burns 1933) §§ 9-2207—9-2208; Barr v. State, 205 Ind. 481, 187 N. E. 259 (1933); Kelley v. State, 204 Ind. 612, 185 N. E. 453 (1933); De La Tour v. State, 201 Ind. 14, 165 N. E. 753 (1929).

tion acts[66] have been upheld in Indiana and other jurisdictions, as have statutes providing for commitment of the insane[67] and feeble-minded.[68] In view of the Indiana court's attitude toward the analogous proceedings mentioned and the uniform manner in which the federal and state courts have upheld sexual psychopathic statutes it is probable that the Indiana statute will not be invalidated as denying due process. There have been no legal arguments advanced which would justify such an interference with the legislative pronouncement.

66. Williams v. Smith, 190 Ind. 526 (1921), held unconstitutional as denying procedural due process. IND. STAT. ANN. (Burns 1933) §§ 22-1601—22-1612, amended the unconstitutional provisions of the foregoing act. Buck v. Bell, 274 U. S. 200 (1926). Skinner v. State *ex rel.* Williamson, 189 Okla. 235, 115 P.2d 123 (1941), held a state asexualization statute valid. For a criticism of the Oklhaoma statute see 55 HARV. L. REV. 285 (1941). Davis v. Walton, 74 Utah 80, 123 P.2d 322 (1942).

67. See Note 8 *supra.*

68. See Note 9 *supra.*