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## COMMENTS

### COMMITMENT OF SEXUAL PSYCHOPATHS AND THE REQUIREMENTS OF PROCEDURAL DUE PROCESS

#### I. INTRODUCTION

States have defined a sexual psychopath as one who is predisposed to the commission of sex crimes and who is dangerous to society.<sup>1</sup> A psychopath is not characterized as either criminal<sup>2</sup> or insane.<sup>3</sup> Procedures for the determination of sexual psychopathy in the United States have been inconsistently applied because of the clash of two important competing forces—societal interest and individual liberty.

Societal interest manifests itself in two principal ways: police power and the doctrine of *parens patriae*. The state can imprison a psychopath by virtue of its police power,<sup>4</sup> which is founded upon the right of society to protect itself from potentially dangerous individuals.<sup>5</sup> People unfamiliar with this type of

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1. E.g., Cal. Welf. & Inst'n's Code § 6300 (West 1972) provides a representative definition of sexual psychopathy: "As used in this article, 'mentally disordered sex offender' means any person who by reason of mental defect, disease, or disorder, is predisposed to the commission of sexual offenses to such a degree that he is dangerous to the health and safety of others."

2. E.g., *Ex parte Keddy*, 105 Cal. App. 2d 215, 217-18, 233 P.2d 159, 161 (2d Dist. 1951) ("A 'sexual psychopath' is not committed because he is guilty of a crime"); *People v. Capoldi*, 10 Ill. 2d 261, 266, 139 N.E.2d 776, 778 (1957) (trial on issue of mental disorder not part of criminal procedure); *Commonwealth v. Gomes*, 355 Mass. 479, 484, 245 N.E.2d 429, 432 (1969) (proceeding is civil in nature); *State v. Madary*, 178 Neb. 383, 388-90, 133 N.W.2d 583, 587-88 (1965) (statutes provide for civil commitment); *In re Mundy*, 97 N.H. 239, 240, 85 A.2d 371, 372 (1952) (psychopathic commitment is not a criminal matter); *State v. Labor*, 128 Vt. 597, 598, 270 A.2d 154, 155 (1970) (psychopathy proceeding not a criminal action).

3. E.g., *People v. Tipton*, 90 Cal. App. 2d 103, 202 P.2d 330, 331 (3d Dist. 1949) (persons declared to be psychopaths are not necessarily adjudged insane); Fla. Stat. Ann. § 917.13 (1973); Ill. Ann. Stat. ch. 38, § 105-1.01 (Smith-Hurd 1970) (mental disorder); Iowa Code Ann. § 225A.1 (1969) ("suffering from a mental disorder and . . . not a proper subject for the schools for the mentally retarded or for commitment as a mentally ill person . . ."); Mo. Ann. Stat. § 202.700 (Vernon 1972) ("not insane or feeble-minded"); Wash. Rev. Code Ann. § 71.06.010 (1975) ("hereditary, congenital or acquired condition affecting the emotional or volitional rather than the intellectual field"); see *Cross v. Harris*, 418 F.2d 1095, 1098-99 (D.C. Cir. 1969) (mentally ill patients can not be committed under psychopathy statute).

4. See, e.g., *State ex rel. Fulton v. Scheetz*, 166 N.W.2d 874, 878 (Iowa 1969) (one object of the sexual psychopathy statute is to sequester persons who may be dangerous).

5. Note, *Due Process and the Development of "Criminal" Safeguards in Civil Commitment Adjudications*, 42 *Fordham L. Rev.* 611, 613-14 (1974) [hereinafter cited as *Criminal Safeguards*]; *Developments in the Law—Civil Commitment of the Mentally Ill*, 87 *Harv. L. Rev.* 1190, 1324-29 (1974) [hereinafter cited as *Civil Commitment*]. While a society can protect itself, the Supreme Court in *O'Connor v. Donaldson*, 422 U.S. 563 (1975), held that absent an actual finding of dangerousness, an insane person may not be deprived of liberty. This same rationale is applicable to the psychopath. If he is not dangerous—some commentators argue that not all psychopaths are dangerous, see note 12 *infra* and accompanying text—state police power alone cannot justify commitment of the psychopath. Nor may the states simply set lower standards for

personality regard a psychopath as highly dangerous, equating a sex offender with the sex fiend who habitually and brutally preys upon children and women.<sup>6</sup> As a result of these fears, and in the exercise of the state's police power, a body of law has arisen in some states whereby a person who is judicially determined to be a psychopathic sex offender can be sentenced to the equivalent of life imprisonment<sup>7</sup> with little hope of release or parole.<sup>8</sup>

Societal interest is also reflected in the *parens patriae* doctrine. *Parens patriae* is the right and obligation of the state, acting as protector of its people, to help its citizens.<sup>9</sup> Treatment of psychopaths has been included under this obligation.<sup>10</sup>

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a determination of dangerousness. In this case, there would be constitutional problems with the definition of dangerousness and when it might be applied.

6. See *People v. Hector*, 104 Cal. App. 2d 392, 397-99, 231 P.2d 916, 920 (2d Dist. 1951) (Doran, J., dissenting). See also N.H. Rev. Stat. Ann. § 173-A:1 (Cum. Supp. 1975) ("It is hereby declared that the frequency of sex crimes within this state necessitates that appropriate measures be adopted to protect society more adequately from dangerous sexual offenders . . ."); Comment, *Toward a Less Benevolent Despotism: The Case for Abolition of California's MDSO Laws*, 13 Santa Clara Law. 579, 581-83 (1973) [hereinafter cited as *Less Benevolent Despotism*].

7. E.g., Cal. Welf. & Inst'ns Code § 6316 (West Supp. 1975); Colo. Rev. Stat. Ann. § 16-13-203 (1973); Mass. Ann. Laws ch. 123A, § 5 (1972); Ohio Rev. Code Ann. § 2947.25(E)(2) (Page 1975).

8. While all states allow for release upon recovery, it has been determined that it is extremely difficult to predict future sexual behavior. The psychiatrist reporting on the parole issue normally takes a conservative position and does not deem the patient recovered unless circumstances clearly indicate complete recovery. T. Szasz, *Psychiatric Justice* 72-74 (1965). Since this is seldom the case, the sex offender remains in commitment. In re *Kramer*, 257 Cal. App. 2d 287, 291, 64 Cal. Rptr. 686, 689 (2d Dist. 1968). In states such as California the mental hospitals can be similar to prisons with the patient being treated like a criminal. *People v. Feagley*, 14 Cal. 3d 338, 365, 535 P.2d 373, 390-91, 121 Cal. Rptr. 509, 526-27 (1975).

9. See *Criminal Safeguards*, supra note 5, at 615-16; *Civil Commitment*, supra note 5, at 1207-12. See generally Laves, *The Prediction of "Dangerousness" as a Criterion for Involuntary Civil Commitment: Constitutional Considerations*, 3 J. Psychiatry & Law 291, 296-98 (1975).

10. E.g., *State v. Noll*, 171 Neb. 831, 108 N.W.2d 108, 112 (1961) (treatment of the psychopath is basis for commitment); *Sevigny v. Burns*, 108 N.H. 95, 227 A.2d 775 (1967) (one aim of statute is to benefit defendant by cure); *State v. Newell*, 126 Vt. 525, 526, 236 A.2d 656, 658 (1967) (a purpose of sex offender statute is to advance interest of psychopath); *State v. Torpy*, 52 Wis. 2d 101, 109, 187 N.W.2d 858, 863 (1971) (an object of act is to provide treatment); *Criminal Safeguards*, supra note 5, at 613-17; *Civil Commitment*, supra note 5, at 1207-22.

Absent treatment, a psychopath may not be committed under this doctrine. Even though some states, in theory, provide for treatment and commit psychopaths expressly for that purpose, treatment of psychopaths has been illusory in practice. See *People v. Feagley*, 14 Cal. 3d 338, 535 P.2d 373, 121 Cal. Rptr. 509 (1975). Right to treatment has been the subject of many court decisions in recent years. E.g., *Donaldson v. O'Connor*, 493 F.2d 507 (5th Cir. 1974), vacated on other grounds, 422 U.S. 563 (1975); In re *Ballay*, 482 F.2d 648, 658-60 (D.C. Cir. 1973); *Rouse v. Cameron*, 373 F.2d 451 (D.C. Cir. 1966); *Wyatt v. Stickney*, 344 F. Supp. 373 (M.D. Ala. 1972), aff'd in part, 503 F.2d 1305 (5th Cir. 1974); *People v. Feagley*, 14 Cal. 3d 338, 535 P.2d 373, 121 Cal. Rptr. 509 (1975) (right to treatment arose from statutory provision). For discussions of the right to treatment see, e.g., *Criminal Safeguards*, supra note 5; *Civil Commitment*, supra note 5; Comment, *Due Process for All—Constitutional Standards for Involuntary Civil Commitment and*

A countervailing influence is the concept of individual liberty which, *inter alia*, requires that no person be taken from society unless he poses a definite threat to it.<sup>11</sup> Commentators have argued that a sex offender who is not dangerous and poses no threat to society should not be deprived of his freedom merely because he is sexually different.<sup>12</sup> In this context individual rights outweigh those of society.

Because commitment of a psychopath is the subordination of individual liberty to the interests of the state, it is particularly important that the psychopath be given procedural due process protections in commitment proceedings.<sup>13</sup> Ironically, fundamental due process rights have not always been fully accorded to the sex offender in such proceedings.<sup>14</sup> Courts have only recently begun to infuse the sexual psychopathy laws with some of the basic constitutional guarantees of due process. The Supreme Court of California in several recent decisions, for example, has attempted to provide for more adequate legal treatment of sex offenders.<sup>15</sup> Thus, in California the

Release, 34 U. Chi. L. Rev. 633 (1967); Comment, Civil Restraint, Mental Illness, and the Right to Treatment, 77 Yale L.J. 87 (1967). See generally Hearings on Constitutional Rights of the Mentally Ill before the Subcomm. on Constitutional Rights of the Senate Comm. on the Judiciary, 91st Cong., 1st Sess. (1969); id., 91st Cong., 2d Sess. (1970).

11. See generally B. Schwartz, Constitutional Law 193-94 (1972).

12. Studies have shown that the sexual psychopath is neither a habitual offender, nor a criminal who progresses to more serious offenses. Tappan, *Some Myths About the Sex Offender*, 19 Fed. Probation 7, 8-10 (June 1955). Furthermore, most sex offenders are convicted of "nuisance" crimes such as voyeurism and indecent exposure. *The Mentally Disabled and the Law* 341-75 (rev. ed. S. Brakel & R. Rock 1971). Sex offender statutes do not usually encompass crimes involving rape or homicidal acts. Tappan, *supra*, 7-8; see *People v. Burnick*, 14 Cal. 3d 306, 328, 535 P.2d 352, 368, 121 Cal. Rptr. 488, 504 (1975). See generally *Jackson v. Indiana*, 406 U.S. 715, 733 (1972); Laves, *The Prediction of "Dangerousness" as a Criterion for Involuntary Civil Commitment: Constitutional Considerations*, 3 J. Psychiatry & Law 291 (1975).

13. See *People v. Feagley*, 14 Cal. 3d 338, 346-48, 535 P.2d 373, 377-78, 121 Cal. Rptr. 509, 513-14 (1975). There is a potential for great abuse of commitment proceedings by governmental authorities. The Soviets often commit dissidents to "mental hospitals" in order to "cure" them. Chief Judge David L. Bazelon, United States Court of Appeals, District of Columbia, has written, "As I read the Russian case studies it became clear to me that, if authentic, they were indeed an example of the potential for abuse of the psychiatrist's power to diagnose mental illness, allegedly on the basis of his medical expertise but actually on the basis of a hidden political or social agenda." Bazelon, *Forward*, 13 Santa Clara Law. 367 (1973). See generally Goldstein, *Compulsory Treatment in Soviet Psychiatric Hospitals: A View from the Inside*, 19 Int'l J. of Offender Therapy and Comparative Criminology 121 (1975); Laves, *The Prediction of "Dangerousness" as a Criterion for Involuntary Civil Commitment: Constitutional Considerations*, 3 J. Psychiatry & Law 291, 299-302 (1975).

14. Only a few states grant the psychopath a jury trial, counsel at all stages of the proceedings, right against self-incrimination, and a standard of proof beyond a reasonable doubt in determining his psychopathy. See note 80 *infra*. No case has been discovered where the psychopath is given such basic "criminal" rights such as the right against improper search and seizures.

15. See *People v. Feagley*, 14 Cal. 3d 338, 535 P.2d 373, 121 Cal. Rptr. 509 (1975); *People v. Burnick*, 14 Cal. 3d 306, 535 P.2d 352, 121 Cal. Rptr. 488 (1975); see *People v. Bonneville*, 14 Cal. 3d 384, 535 P.2d 404, 121 Cal. Rptr. 540 (1975) (mem.).

alleged psychopath facing commitment proceedings now has the right to a unanimous jury trial,<sup>16</sup> and a right to the standard of proof beyond a reasonable doubt for determination of psychopathy.<sup>17</sup> Furthermore, the California courts now deem such proceedings (formerly considered civil) criminal in nature.<sup>18</sup> In light of this reclassification, the offender may have the opportunity of obtaining the full panoply of rights available to one facing criminal charges.<sup>19</sup>

This Comment will examine state procedures for the commitment of sex offenders in light of constitutional requirements of procedural due process and will analyze the methods by which various states attempt to balance state interest against the rights of the individual. It is suggested that state procedures for psychopathic commitment fall into three categories: 1) Alternative Sentence Commitment,<sup>20</sup> 2) Special Proceeding Commitment,<sup>21</sup> and 3) Miscellaneous.<sup>22</sup>

16. *People v. Feagley*, 14 Cal. 3d 338, 342, 535 P.2d 373, 375, 121 Cal. Rptr. 509, 511 (1975).

17. *People v. Burnick*, 14 Cal. 3d 306, 310, 535 P.2d 352, 355, 121 Cal. Rptr. 488, 491 (1975).

18. *Id.* at 318, 535 P.2d at 359, 121 Cal. Rptr. at 495.

19. This full panoply of rights theoretically consists of those rights which are procedurally required under the due process clause for criminal prosecutions. *United States ex rel. Gerchman v. Maroney*, 355 F.2d 302, 312 (3d Cir. 1966); see *Specht v. Patterson*, 386 U.S. 605, 609-10 (1967); note 56 *infra* and accompanying text.

20. Conn. Gen. Stat. Ann. §§ 17-244 to -245 (1975); N.J. Stat. Ann. §§ 2A:164-3 to -13 (1971); Pa. Stat. Ann. tit. 19, §§ 1166-74 (1964), as amended (Supp. 1975) (declared unconstitutional, *United States ex rel. Gerchman v. Maroney*, 355 F.2d 302 (3d Cir. 1966) and suspended, Pa. R. Crim. Proc. 1415 (Pa. Stat. Ann. Supp. 1975)); S.D. Compiled Laws Ann. §§ 22-22-9 to -10 (1967); Utah Code Ann. §§ 77-49-1 to -8 (1953), as amended (Supp. 1975); Act of March 22, 1975, ch. 495, §§ 19.2-300 to -302, 1 Va. Acts of Assembly; Wyo. Stat. Ann. §§ 7-348 to -362 (1957), as amended (Cum. Supp. 1975).

21. See Ala. Code tit. 15, §§ 434-42 (1959), as amended (Supp. 1973) (subsequently declared unconstitutional by *Davy v. Sullivan*, 354 F. Supp. 1320 (M.D. Ala. 1973) (three judge court, per curiam)); Cal. Welf. & Inst'ns Code §§ 6300-30 (West 1972), as amended (West Supp. 1975); Colo. Rev. Stat. Ann. §§ 16-13-201 to -216 (1973); D.C. Code Encycl. Ann. §§ 22-3501 to -3511 (1967); Fla. Stat. Ann. §§ 917.13-.28 (1973), as amended (Supp. 1975); Ill. Ann. Stat. ch. 38, §§ 105-1.01 to -12 (Smith-Hurd 1970), as amended (Smith-Hurd Supp. 1975); Iowa Code Ann. §§ 225A.1-.15 (1969), as amended (Supp. 1975); Mass. Ann. Laws ch. 123A, §§ 1-11 (1972), as amended (Supp. 1974); Minn. Stat. Ann. §§ 526.09-.11 (1975); Mo. Ann. Stat. §§ 202.700-.770 (Vernon 1972); Neb. Rev. Stat. §§ 29-2901 to -2910 (Supp. 1974); N.H. Rev. Stat. Ann. §§ 173A:1-.10 (Cum. Supp. 1975); Ohio Rev. Code Ann. §§ 2947.24-.29 (Page 1975); Ore. Rev. Stat. §§ 426.510-.680 (1974); Vt. Stat. Ann. tit. 18, §§ 8501-06 (1968), as amended (Supp. 1975); Wash. Rev. Code Ann. §§ 71.06.010 to .140 (1975); Wis. Stat. Ann. §§ 975.01-.18 (1971), as amended (Spec. Pamphlet 1975); See Ind. Stat. Ann. §§ 35-11-3.1-1 to -37 (Burns 1975).

22. Ga. Code Ann. § 77-539 (1973); Tenn. Code Ann. §§ 33-1301 to -1305 (Supp. 1975). Several States have recently repealed their psychopathy statutes and impliedly have chosen to deal with the sex offender by employing existing criminal laws. Among these states are: Kansas, Michigan, North Dakota, and West Virginia. The following states never have had psychopathy statutes: Alaska, Arizona, Arkansas, Delaware, Hawaii, Idaho, Kentucky, Louisiana, Maine, Maryland, Mississippi, Montana, Nevada, New Mexico, New York, North Carolina, Oklahoma, Rhode Island, South Carolina, and Texas. One commentator has classified

## II. ALTERNATIVE SENTENCE COMMITMENT

Seven states provide by statute for commitment of a psychopath after conviction of a sex-related crime in lieu of a standard prison sentence.<sup>23</sup> This commitment is procedurally characterized as one of the sentencing alternatives which the judge can choose in determining sentence in a criminal trial.<sup>24</sup> This sentencing alternative may be employed only under limited conditions. It may be imposed only upon those who, after a medical examination, have been determined to be sexually psychopathic. Also, five of the states list the specific sexual crimes which alone will permit the court to order a mental examination of the psychopath prior to sentencing.<sup>25</sup> The remaining two states do not define the specific crimes which may trigger a court's order for an examination.<sup>26</sup>

The statutes differ on the issue of whether the sentencing judge must or may, at his discretion, order an examination upon conviction. Absent a request by counsel for either side, to which the court must accede, the matter is left to the judge's discretion in Connecticut<sup>27</sup> and Virginia.<sup>28</sup> In these states,

Idaho among those states which have a specialized psychopathy statute. Comment, *The MDSO—Uncivil Civil Commitment*, 11 *Santa Clara Law*. 169, 169-70 n.11 (1970). It is suggested that this is a misreading. See *Idaho Code* § 66-317 (Cum. Supp. 1975).

Arizona and Nevada provide that sex offenders register in each city in which they reside. These statutes do not provide for commitment of psychopaths. See *Ariz. Rev. Stat. Ann.* §§ 13-1271 to -1274 (1956); *Nev. Rev. Stat.* §§ 207.152-.157 (1957), as amended (Supp. 1973).

23. See note 20 *supra*.

24. The alternative feature of this type of statute is a critical element, without which the statutes might be fatally infirm. See *Davy v. Sullivan*, 354 F. Supp. 1320 (M.D. Ala. 1973) (Alabama statute declared unconstitutional as permitting double jeopardy in that it allowed imposition of prison sentence after psychopath had been committed to a hospital but confined there in a penal atmosphere).

25. *N.J. Stat. Ann.* § 2A:164-3 (1971) (rape; carnal abuse; sodomy; incest; private lewdness; public lewdness; indecent exposure; impairing the morals of a minor; attempt to commit these offenses; assault with intent to commit rape, carnal abuse, or sodomy); *Pa. Stat. Ann.* tit. 19, § 1166 (1964) (indecent assault; incest; assault with intent to commit sodomy; solicitation to commit sodomy; sodomy; assault with intent to ravish or rape); *S.D. Compiled Laws Ann.* § 22-22-9 (1967) (indecent molestation of a child); *Utah Code Ann.* § 77-49-1 (Supp. 1975) (convicted of or pleading guilty to rape, sodomy, incest, indecent exposure, or attempt to commit these offenses; assault with intent to commit rape or sodomy; child molestation); *Wyo. Stat. Ann.* § 7-348 (Cum. Supp. 1975) (indecent exposure; rape; attempt to commit rape; incest; sodomy; seduction; taking immodest, immoral or indecent liberties with a child under eighteen years; knowingly committing any immoral or obscene act in the presence of such a child; knowingly causing or encouraging any such child to commit or attempt to commit with the person convicted any immoral or indecent act).

26. *Conn. Gen. Stat. Ann.* § 17-244 (1975) (where defendant is convicted of an offense for which the penalty may be imprisonment in the Connecticut Correctional Institution or of sex crime involving physical force or violence, disparity of age between an adult and a minor, or sexual act of a compulsive or repetitive nature); *Law of March 22, 1975, ch. 495, § 19.2-300, 1 Va. Act of Assembly* (any criminal offense which indicates sexual abnormality).

27. *Conn. Gen. Stat. Ann.* § 17-244 (1975).

28. *Law of March 22, 1975, ch. 495, § 19.2-300, 1 Va. Acts of Assembly*

the type of crime which brings the statute into operation is broader than in those states where the applicable crimes are expressly identified. In New Jersey, Pennsylvania, South Dakota, Utah, and Wyoming, the judge is required to order an examination upon conviction of the specified crimes.<sup>29</sup>

While there is agreement among the states as to the effect of a determination of psychopathy after an examination—the judge can use such as the basis for sentence—these seven states differ in the quantum of discretion provided the judges in applying the alternatives. Three states allow the judge to choose any one of several alternatives in sentencing: he may place the psychopath on probation and require him to receive out-patient treatment; he may commit the psychopath to a mental hospital for treatment; or he may impose the prescribed prison sentence.<sup>30</sup> In three other states, when the examination has shown the defendant to be a psychopath, the court must order commitment to a mental hospital.<sup>31</sup>

Since commitment under these statutes is considered a part of the criminal process, New Jersey, Pennsylvania, and Wyoming explicitly allow parole probation during the period of commitment.<sup>32</sup> Connecticut, South Dakota, and Utah do not expressly provide for such probation.<sup>33</sup>

The Virginia statute<sup>34</sup> presents a different alternative to the above mentioned statutes. While the criminal conviction does trigger the psychopathic examination,<sup>35</sup> the judge is powerless to impose psychopathic commitment in lieu of the sentence.<sup>36</sup> The statute provides the judge only with another means to determine the length of the prison sentence. With the examination in hand,

29. N.J. Stat. Ann. § 2A:164-3 (1971); S.D. Compiled Laws Ann. § 22-22-9 (1967); Utah Code Ann. § 77-49-1 (Supp. 1975); Wyo. Stat. Ann. § 7-348 (Cum. Supp. 1975). Pennsylvania also had a similar provision in its statute, Pa. Stat. Ann. tit. 19, § 1167 (1964), suspended, Pa. R. Crim. Proc. 1415 (Pa. Stat. Ann. Supp. 1975).

30. Conn. Gen. Stat. Ann. § 17-245 (1975); N.J. Stat. Ann. § 2A:164-6 (1971); Wyo. Stat. Ann. § 7-352 (Cum. Supp. 1975). In the sense that the court's power to commit a psychopath to a hospital as an alternative to a prison term is within the scope of a court's broad authority to impose sentence after conviction of a crime, no constitutional problems are raised. See *Williams v. New York*, 337 U.S. 241, 250-51 (1949) (trial judge has wide discretion in sentence determination; he can obtain pertinent information and is not restrained in the information received).

31. Pa. Stat. Ann. tit. 19, §§ 1166-70 (1964), suspended, Pa. R. Crim. Proc. 1415 (Pa. Stat. Ann. Supp. 1975); S.D. Compiled Laws Ann. § 22-22-10 (1967); Utah Code Ann. § 77-49-5 (1953).

32. N.J. Stat. Ann. § 2A:164-8 (1971); Pa. Stat. Ann. tit. 19, § 1172 (Supp. 1975); Wyo. Stat. Ann. § 7-356 (Cum. Supp. 1975).

33. Virginia does not provide for commitment on account of sexual psychopathy. See text accompanying note 36 *infra*. The psychopath who is sentenced pursuant to a criminal conviction is allowed parole as is any criminal. Law of March 22, 1975, ch. 495, §§ 19.2-313 to -315, 1 Va. Acts of Assembly.

34. Law of March 22, 1975, ch. 495, §§ 19.2-300 to -304, 1 Va. Acts of Assembly. The prior Virginia psychopathy statute, Law of April 7, 1950, ch. 463, 1 Va. Acts of Assembly (repealed 1975), provided that on conviction of any crime indicating sexual abnormality, the judge could order a psychiatric examination in order to aid him in sentence determination.

35. Law of March 22, 1975, ch. 495, §§ 19.2-300 to -304, 1 Va. Acts of Assembly.

36. *Id.* §§ 19.2-301, -304.

the judge has the option to suspend sentence,<sup>37</sup> suspend the imposition of sentence, change the term of probation, or alter the actual period of confinement within the permitted statutory boundaries. If the court does lengthen the period of probation, a hearing with counsel must be held.<sup>38</sup>

None of the statutes within this category, except those of New Jersey<sup>39</sup> and Virginia,<sup>40</sup> expressly provides for any due process rights in the determination of psychopathy and sentencing of a psychopath. This is because these states categorize the commitment merely as an alternative to sentencing and not as a separate proceeding.<sup>41</sup> This categorization may be in error, however. Both the Supreme Court and the Third Circuit have rejected this classification and have held psychopathic commitment by sentence alternative subject to due process of law.

In *United States ex rel. Gerchman v. Maroney*,<sup>42</sup> petitioner had been convicted of an assault with intent to ravish.<sup>43</sup> The trial judge received a psychiatric report prior to sentencing; held an informal sentencing hearing; determined Gerchman to be a psychopath; and sentenced him to an indeterminate period of treatment in lieu of a standard sentence of imprisonment.<sup>44</sup>

The court of appeals found that the determination of psychopathy involved an independent penal proceeding in which fundamental due process rights were denied to the sex offender.<sup>45</sup> The court first distinguished the psychopathy proceeding from a civil action.<sup>46</sup> It then reasoned that the

37. Id. § 19.2-303.

38. Id. §§ 19.2-303 to -304. Attorney for the commonwealth must also be present. While Virginia courts have not interpreted this statute, it appears that the hearing will be an adversary one if counsel is allowed to participate. The Virginia alternative in effect bypasses the question of due process in psychopathy commitment proceedings. In this sense, it is distinguishable from the other statutes in this category.

39. See note 64 *infra* and accompanying text.

40. It will be remembered that the Virginia statute does not require psychopathic commitment at all, but merely affects the prison sentence itself. An adversary hearing is also provided if the period of probation is to be lengthened. See note 38 *supra* and accompanying text.

41. See notes 23-24 *supra* and accompanying text. The Supreme Court has held in *Williams v. New York*, 337 U.S. 241 (1949), that a convicted felon has no right to a hearing or cross examination of witnesses in the judge's determination of sentence. The court can receive any information which will help it reach a fair conclusion: "Under the practice of individualizing punishments, investigational techniques have been given an important role. [R]eports have been given a high value by conscientious judges who want to sentence persons on the best available information rather than on guesswork and inadequate information. . . . We must recognize that most of the information now relied upon by judges to guide them in the intelligent imposition of sentences would be unavailable if information were restricted to that given in open court by witnesses subject to cross examination." Id. at 249-50 (footnote omitted)

42. 355 F.2d 302 (3d Cir. 1966).

43. Id. at 305. While most psychopaths have been determined not dangerous, see note 12 *supra*, Gerchman is the exception to the rule. Petitioner attacked a retarded woman in his automobile, physically assaulted her, and tied her to a tree. Id.

44. Id. at 306-07. The judge read part of the psychiatrist's report into the record. He also called for comments from Gerchman, his wife, mother and lawyer. Id.

45. Id. at 309.

46. Id.



psychopathy statute was criminal in nature since it could be invoked only after conviction of specified offenses and because it imposed a radically different punishment—mandatory commitment for an indeterminate period—from that imposed for the underlying felony.<sup>47</sup>

Secondly, the court found that due process guarantees could not be denied petitioner solely on the theoretical basis that the statute was nothing more than an exercise of judicial sentencing discretion.<sup>48</sup> The Third Circuit found that the psychopathic proceeding involved "a new factual finding [that of psychopathic behavior] which went substantially beyond the finding of guilt of assault and battery with intent to ravish."<sup>49</sup> These new facts were the sole basis for the mandatory commitment.<sup>50</sup> The court concluded:

The proceeding under the [Pennsylvania] Act is thus neither a civil commitment nor a sentence . . . . It is a separate criminal proceeding which may be invoked after conviction of one of the specified crimes. Petitioner therefore was entitled to a full judicial hearing before the magnified sentence was imposed. At such a hearing the requirements of due process cannot be satisfied by partial or niggardly procedural protections. A defendant in such a proceeding is entitled to the full panoply of the relevant protections which due process guarantees in state criminal proceedings.<sup>51</sup>

Since the statute failed to provide the defendant such rights, it was unconstitutional.<sup>52</sup>

The Supreme Court adopted the *Gerchman* reasoning in *Specht v. Patterson*.<sup>53</sup> *Specht*, convicted of taking indecent liberties with a minor, was sentenced under the Colorado psychopathic statute to an indeterminate period of detention.<sup>54</sup> The Court found that the psychopathic proceeding resulting in

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47. *Id.* at 309-10. The court found that the penal characteristics of punishment were not lost simply because the proposed punishment goes beyond retribution. As defined by the Third Circuit, punishment can include treatment. *Id.* The offender faced a potentially magnified sentence. If he was determined not to be a psychopath he would be liable solely for a specified maximum sentence for the underlying felony. This usually is not an indefinite period, but commitment as a psychopath can be for an indeterminate period. *Id.* at 311.

48. *Id.* at 310-11.

49. *Id.* at 311.

50. *Id.*

51. *Id.* at 312; accord, *United States ex rel. Wintz v. Rundle*, 281 F. Supp. 85 (E.D. Pa. 1968) (additional findings of fact found present in psychopathy proceedings).

52. The Third Circuit also raised the question of the right to a jury trial. While not deciding the question, the court strongly indicated that a jury trial would be proper procedure in this case. 355 F.2d at 313-15. It must be noted that the right to a jury trial was not selectively incorporated into the fourteenth amendment until 1968, two years after the *Gerchman* decision. See *Duncan v. Louisiana*, 391 U.S. 145 (1968).

53. 386 U.S. 605 (1967).

54. See *id.* at 607. The Colorado statute of commitment which was effective at the time of *Specht*, Law of April 1, 1953, ch. 89, §§ 1-10, [1953] Colo. Laws 249-52 (repealed 1968), allowed for an in lieu of sentence commitment after a complete psychiatric examination was given to the defendant and after a written report was filed with the court. This statute was basically identical with the Pennsylvania statute considered in *Gerchman*. Compare *id.*, with Pa. Stat. Ann. tit. 19, §§ 1166-70 (1964), suspended, Pa. R. Crim. Proc. 1415 (Pa. Stat. Ann. Supp. 1975). The defective Colorado statute has been replaced by a Special Proceeding Commitment type. See note 21 *supra*.

commitment was criminal in nature. It also reasoned that the statute was not merely a sentencing alternative since it involved a new charge of psychopathic behavior and new findings of fact.<sup>55</sup>

While declaring the Colorado statute violative of due process, the Court laid out the guarantees which must be provided to the psychopath in proceedings for a determination of psychopathy:

Due Process, in other words, requires that he be present with counsel, have an opportunity to be heard, be confronted with witnesses against him, have the right to cross-examine, and to offer evidence of his own. And there must be findings adequate to make meaningful any appeal that is allowed.<sup>56</sup>

Therefore, a broad reading of these two cases leads to the conclusion that alternative sentence commitment cannot be classified as a mere sentence alternative available to a judge. An independent proceeding, complete with adequate due process procedures, must be held.<sup>57</sup>

These cases have not, however, led to a wholesale declaration that the statutes are unconstitutional. Courts have narrowly construed these two cases. In *United States ex rel. Demeter v. Yeager*,<sup>58</sup> the Third Circuit examined *Specht* and its own decision in *Gerchman*. Demeter, who was challenging his psychopathic commitment, had pleaded *non vult* to impairing the morals of a child.<sup>59</sup> The commitment was based upon the recommendation of the examining psychiatrist that the petitioner be classified as a psychopath.<sup>60</sup> While the proceeding involved an independent determination of psychopathy, which was a new finding of fact, the length of commitment was in parity with the term of sentence permissible for the underlying

55. 386 U.S. at 608. Because of these new findings, namely, that the accused was a public threat and a mentally ill habitual offender, the Court was able to distinguish this case from one involving a mere probationary report. *Id.* at 606-08.

56. *Id.* at 610. Presently there is a conflict among lower courts on the question of whether the psychopath is entitled to more rights than those enumerated in *Specht*. California has sought to expand the rights, while Illinois and Massachusetts have kept them to the listed minimum. See notes 119-61 *infra* and accompanying text.

New Jersey has reached the same conclusion as have both *Specht* and *Gerchman*. In *State v. Horne*, 56 N.J. 372, 267 A.2d 1 (1970), appellant challenged his psychopathic determination on the basis of a denial of due process. The New Jersey court determined that psychopathic commitment requires a full plenary hearing, since the determination of psychopathy could have far-reaching consequences and result in a denial of an individual's liberty. *Id.* at 379, 267 A.2d at 4.

The Virginia Statute, see notes 34-38 *supra* and accompanying text, would not suffer from the defects outlined in *Specht* and *Gerchman*. This is because there is no commitment based on a separate determination of psychopathy. The judge can only adjust the prison term or probation within reasonable bounds. Therefore, it might be concluded that for alternative sentence commitment to remain within constitutional boundaries, it must do away with psychopathic commitment altogether. But see text accompanying notes 58-66 *infra*.

57. This independent penal hearing comes quite close to Special Proceeding Commitment. Thus, the questions concerning adequate due process rights raised under that type of commitment would be relevant. See pt. III *infra*.

58. 418 F.2d 612 (3d Cir. 1969) (*per curiam*), cert. denied, 398 U.S. 942 (1970).

59. *Id.* at 613.

60. *Id.*

felony.<sup>61</sup> The court in *Demeter* determined that the statute was constitutional because it contained two requirements. First, it provided parity of sentences,<sup>62</sup> and the court distinguished the prior cases on this basis:

[*Specht* and *Gerchman*] do not apply here. . . . [T]hey dealt with statutes which created a special additional penalty which could extend to life imprisonment after conviction of certain specified offenses. . . . However, under the [New Jersey statute] it cannot extend beyond the maximum sentence for the crime involved.<sup>63</sup>

Secondly, the court determined that in the case before it, the requirements of a hearing set forth in *Specht* and *Gerchman* were met. The New Jersey statute permitted the alleged offender a chance to rebut the psychiatrist's recommendation of psychopathy, even though this hearing was not a full judicial proceeding of an adversary nature.<sup>64</sup>

Therefore, under the *Demeter* approach sentence parity and a rebuttal hearing allow alternative sentence commitment to remain within the limits of the legitimate sentencing power of a judge, so that such commitment is still a constitutional alternative to a prison sentence.<sup>65</sup> If, however, this narrow construction is incorrect and an adversary hearing is required, the result would be to end the possibility of alternative sentence commitment.<sup>66</sup> Instead,

61. *Id.* at 614.

62. *Id.*; see N.J. Stat. Ann. § 2A:164-6 (1971).

63. 418 F.2d at 613-14.

64. *Id.* at 614. The court felt that it would be meaningless to remand the case because petitioner was denied a rebuttal hearing. The court indicated that petitioner's subsequent conduct showed him to have psychopathic tendencies. *Id.*

The New Jersey Supreme Court did not accept the argument that a mere rebuttal hearing is sufficient. That state has required a full plenary hearing. *State v. Horne*, 56 N.J. 372, 267 A.2d 1 (1970). But see *Davy v. Sullivan*, 354 F. Supp. 1320, 1326 (M.D. Ala. 1973) (three judge court, per curiam) (parity of sentence is the only requirement).

65. None of the alternative to sentence statutes except those of New Jersey, N.J. Stat. Ann. §§ 2A:164-3 to -13 (1971), and Virginia, Law of March 22, 1975, ch. 495, §§ 19.2-300 to -304, 1 Va. Acts of Assembly, even meet the two constitutional tests established by the Third Circuit. All of them except Utah, Utah Code Ann. §§ 77-49-1 to -8 (1953), and Pennsylvania, Pa. Stat. Ann. tit. 19, §§ 1166-74 (1964), as amended (Supp. 1975), suspended, Pa. R. Crim. Proc. 1415 (Pa. Stat. Ann. Supp. 1975), conform to the requirements of sentence parity; but only New Jersey and Virginia allow for a hearing.

66. While the two requirements of parity of sentence and rebuttal hearing now form the basic constitutional requirements for these statutes in the Third Circuit, it is contended that this reading of *Specht* and *Gerchman* is too narrow and any statute which employs only these two requirements would still be questionable on due process grounds. It must be remembered that the statutes involved in the *Specht* and *Gerchman* cases were found unconstitutional not only because there was no parity of sentences—the statutes potentially extended the maximum sentence—but also because the statutory procedures necessarily involved new proceedings and new findings of fact in the determination of sexual psychopathy without adequate procedural safeguards being guaranteed. See notes 42-57 *supra* and accompanying text. Even though *Demeter* provided for parity and a rebuttal hearing, it could still be found unconstitutional since it did not guarantee the accused's full panoply of rights in these new proceedings and findings of fact, in apparent violation of both *Specht* and *Gerchman*. It is interesting to note that New Jersey did not adopt *Demeter* and has required a full plenary hearing in the determination of psychopathy. See note 64 *supra*.

on the question of psychopathy, a special hearing necessarily would have to be initiated and some states have already adopted this approach.

### III. SPECIAL PROCEEDING COMMITMENT

The statutes which fall into this category<sup>67</sup> generally provide for the commencement of sex offender proceedings after a sexual-criminal charge has been filed by the state against the alleged sex offender or after an actual conviction of a crime.<sup>68</sup> Such procedures are considered civil, distinct from the criminal proceeding in which they originated.<sup>69</sup> The statutes provide that the sex offender can be committed to a mental hospital or its equivalent for a period of one day to life<sup>70</sup> for the purposes of the protection of the public and treatment of the sick offender.<sup>71</sup> In varying manners, all of the statutes

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67. See note 21 *supra*.

68. Ala. Code tit. 15, § 436 (1958), as amended (Cum. Supp. 1973), declared unconstitutional in *Davy v. Sullivan*, 354 F. Supp. 1320 (M.D. Ala. 1973) (three judge court, per curiam); Cal. Welf. & Inst'n's Code § 6302 (West 1972); Colo. Rev. Stat. Ann. § 16-13-205 (1973), D.C. Code Encycl. Ann. § 22-3504 (1967); Fla. Stat. Ann. § 917.14 (1973); Ill. Ann. Stat. ch. 38, § 105-3 (Smith-Hurd 1970); Iowa Code Ann. § 225A.2 (1969); Mass. Ann. Laws ch. 123A, § 3 (1972); Mo. Ann. Stat. § 202.710 (Vernon 1972); Neb. Rev. Stat. § 29-2902 (Supp. 1974); N.H. Rev. Stat. Ann. § 173-A:4 (Cum. Supp. 1975); Ohio Rev. Code Ann. § 2947.25 (Page 1975), Vt. Stat. Ann. tit. 18, §§ 8501-06 (1968), as amended (Supp. 1975); Wash. Rev. Code Ann. § 71.06.030 (1975) Statutes of two states, Minn. Stat. Ann. § 526.10 (Cum. Supp. 1975); Ore. Rev. Stat. § 426.520 (1974), provide for separate proceedings, but require only a good faith belief that the defendant is a psychopath in order for the district attorney to commence psychopathy proceedings.

69. State ex rel. *Pearson v. Probate Ct.*, 205 Minn. 545, 549-50, 287 N.W. 297, 300 (1939), *aff'd*, 309 U.S. 270 (1940) (findings of fact in this proceeding are of psychopathic personality and not of criminality); State v. *McDaniels*, 307 S.W.2d 42, 44 (Mo. Ct. App. 1957) (proceedings are not criminal); State v. *Labor*, 128 Vt. 597, 598-99, 270 A.2d 154, 155 (1970) (sex offender procedure is not criminal); Cal. Welf. & Inst'n's Code § 6302 (West 1972); Fla. Stat. Ann. § 917.24 (1973); Ill. Ann. Stat. ch. 38, § 105-3.01 (Smith-Hurd 1970); Mass. Ann. Laws ch. 123A, § 3 (1972); Neb. Rev. Stat. § 29-2902(1) (Supp. 1974); see note 124 *infra*. The court in *Davy v. Sullivan*, 354 F. Supp. 1320, 1327-28 (M.D. Ala. 1973) (three judge court, per curiam), could not decide if Ala. Code tit. 15, §§ 434-42 (1959), as amended (Supp. 1971), was criminal or civil. But cf. *Hill v. Burke*, 289 F. Supp. 921, 926 (W.D. Wis. 1968), *aff'd*, 422 F.2d 1195 (7th Cir.), cert. denied, 400 U.S. 944 (1970). Logically the proceedings should be considered distinct from criminal proceedings since new findings of fact are necessarily involved; the court is determining psychopathy, not whether the defendant committed a specified crime. See, e.g., State ex rel. *Pearson v. Probate Court*, *supra* at 549-51, 287 N.W. at 298.

70. Ala. Code tit. 15, § 438 (1959), declared unconstitutional, *Davy v. Sullivan*, 354 F. Supp. 1320 (M.D. Ala. 1973) (three judge court, per curiam); Cal. Welf. & Inst'n's Code § 6326 (West 1972); Colo. Rev. Stat. Ann. § 16-13-203 (1973); D.C. Code Encycl. Ann. § 22-3508 (1967); Fla. Stat. Ann. § 917.19 (1973); Ill. Ann. Stat. ch. 38, § 105-8 (Smith-Hurd Supp. 1975); Iowa Code Ann. § 225A.11 (1969); Mass. Ann. Laws ch. 123A, § 5 (1972); Mo. Ann. Stat. § 202.730 (Vernon 1972); Neb. Rev. Stat. § 29-2903 (Supp. 1974); N.H. Rev. Stat. Ann. § 173-A:6 (Cum. Supp. 1975); Ohio Rev. Code Ann. § 2947.25(E)(2) (Page 1975); Ore. Rev. Stat. § 426.620 (1974); Vt. Stat. Ann. tit. 18, § 8505 (Supp. 1975); Wis. Stat. Ann. § 975.06 (Supp. 1975), amending id. § 975.06 (1971). But see Ind. Stat. Ann. §§ 35-11-3.1-19, -28 (Burns 1975).

71. *Miller v. Overholser*, 206 F.2d 415, 418-19 (D.C. Cir. 1953) (interest and purpose of statute is treatment); State ex rel. *Fulton v. Scheetz*, 166 N.W.2d 874, 878 (Iowa 1969) (the second object of the statutes is treatment); State v. *Noll*, 171 Neb. 831, 835-38, 108 N.W.2d

provide some procedural safeguards for the alleged sex offender, including a right to notification of the pending proceeding,<sup>72</sup> a right to a hearing to determine sexual psychopathy,<sup>73</sup> and a right to counsel at such hearing.<sup>74</sup> These due process requirements conform to the minimum that has been required by the United States Supreme Court. In *Minnesota ex rel. Pearson v. Probate Court*,<sup>75</sup> an alleged psychopath committed under Minnesota law unsuccessfully challenged the sex offender law on a due process and equal protection basis. The Court determined that the equal protection clause did not prohibit a state from classifying the sex offender as a special category and providing special procedures for dealing with persons in this group,<sup>76</sup> the members of which had shown that they were actually dangerous and incapable of controlling their sexual impulses.<sup>77</sup> The Court further determined that petitioner's due process rights had not been violated, since Minnesota guaranteed defendant's rights to a hearing and counsel.<sup>78</sup>

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108, 111-12 (1961) (one basis of the laws is treatment); *Seigny v. Burns*, 108 N.H. 95, 96, 227 A.2d 775, 777 (1967) (per curiam) (statute's aim is to benefit by treatment); *State v. Newell*, 126 Vt. 525, 526, 236 A.2d 656, 658 (1967) (purpose of the laws is to advance the interest of the psychopaths); *State v. Torpy*, 52 Wis. 2d 101, 109, 187 N.W.2d 858, 863 (1971) (object of sex statutes is to provide treatment); see Fla. Stat. Ann. § 917.13 (1973); Ohio Rev. Code Ann. § 2947.24 (Page 1975); Wash. Rev. Code Ann. § 71.06.091 (1975).

72. Cal. Welf. & Inst'n Code § 6303 (West 1972); Colo. Rev. Stat. Ann. § 16-13-206 (1973); Iowa Code Ann. § 225.14 (1969); Mass. Ann. Laws ch. 123A, § 5 (1972); Ore. Rev. Stat. § 426.540 (1974); see Ind. Stat. Ann. § 35-11-3.1-11 (Burns 1975).

73. Ala. Code tit. 15, § 438 (1959), declared unconstitutional, *Davy v. Sullivan*, 354 F. Supp. 1320 (M.D. Ala. 1973) (three judge court, per curiam); Cal. Welf. & Inst'n Code § 6321 (West 1972); Colo. Rev. Stat. Ann. § 16-13-210 (1973); D.C. Code Encycl. Ann. § 22-3508 (1967); Fla. Stat. Ann. § 917.18 (1973); Ill. Ann. Stat. ch. 38, § 105-5 (Smith-Hurd 1970); Iowa Code Ann. §§ 225A.4-.9 (1969); Mass. Ann. Laws ch. 123A, § 5 (1972); Minn. Stat. Ann. § 526.10 (1975); Mo. Ann. Stat. § 202.720(1) (Vernon 1972); Neb. Rev. Stat. § 29-2902(1) (Supp. 1974); N.H. Rev. Stat. Ann. § 173-A:5 (Cum. Supp. 1975); Ohio Rev. Code Ann. § 2947.25 (Page 1975); Ore. Rev. Stat. § 426.630 (1974); Vt. Stat. Ann. tit. 18, § 8504 (Supp. 1975); Wash. Rev. Code Ann. § 71.06.170 (1975); Wis. Stat. Ann. § 975.06(1) (Supp. 1975).

74. *State v. Labor*, 128 Vt. 597, 598-99, 270 A.2d 154, 155 (1970) (right to counsel affirmed by United States Supreme Court); Cal. Welf. & Inst'n Code § 6305 (West 1972); Colo. Rev. Stat. Ann. § 16-13-206 (1973); D.C. Encycl. Ann. § 22-3505 (1967); Fla. Stat. Ann. § 917.18 (1973); Ill. Ann. Stat. ch. 38, § 105-5 (Smith-Hurd 1970); Iowa Code Ann. § 225A.5 (1969); Mass. Ann. Laws ch. 123A, § 5 (1972); Minn. Stat. Ann. § 526.10 (1975); Mo. Ann. Stat. § 202.720(4) (Vernon 1972); Neb. Rev. Stat. § 29-2902(2) (Supp. 1974); N.H. Rev. Stat. Ann. § 173-A:4 (Cum. Supp. 1975); Ohio Rev. Code Ann. § 2947.25(D) (Page 1975); Ore. Rev. Stat. § 426.580 (1974); Wis. Stat. Ann. § 975.06(1) (1971); see Ind. Stat. Ann. § 35-11-3.1-13 (Burns 1975).

75. 309 U.S. 270, 275-76 (1940).

76. *Id.* at 274-76.

77. *Id.* at 274-75.

78. *Id.* at 275-77. The Court indicated that while the proceedings at issue were constitutional, implementation of the statutes conceivably could violate due process: "We fully recognize the danger of a deprivation of due process in proceedings dealing with persons charged with insanity or, as here, with a psychopathic personality as defined in the statute . . . [it] may be open to serious abuses in administration and courts may be imposed upon if the substantial rights of the persons charged are not adequately safeguarded at every stage of the proceedings." *Id.* at 276-77.

Each of the Special Proceeding Commitment states provides these minimum requirements of due process.<sup>79</sup> Some of these states accord alleged sex offenders broader due process rights<sup>80</sup> by relying on the equal protection clause<sup>81</sup> or by classifying sexual psychopathy proceedings as criminal in nature.<sup>82</sup>

#### A. Equal Protection

Although generally the psychopath is not considered insane,<sup>83</sup> some courts have held that where the effect of a psychopathy commitment proceeding is identical to that of an insanity commitment proceeding,<sup>84</sup> the due process requirements for each must be identical unless some rational basis exists for permitting lesser standards in the psychopathy proceedings.<sup>85</sup> This position has evolved through interpretation of two Supreme Court decisions which have recognized the validity of arguments advocating similar due process standards for similar procedures.

In *Baxstrom v. Herold*<sup>86</sup> the Supreme Court determined that the equal protection clause requires that all classifications of insanity commitment proceedings be subject to identical due process standards. In *Baxstrom*, New York State brought a civil commitment proceeding against petitioner, an imprisoned convict, at the expiration of his prison term.<sup>87</sup> Under the New

79. In *Specht v. Patterson*, 386 U.S. 605 (1967), the Supreme Court reaffirmed its requirement that these basic due process elements be present. See notes 53-56 *supra* and accompanying text.

80. *People v. Feagley*, 14 Cal. 3d 338, 352, 535 P.2d 373, 381, 121 Cal. Rptr. 509, 517 (1975) (unanimous jury); *People v. Burnick*, 14 Cal. 3d 306, 324, 535 P.2d 352, 364, 121 Cal. Rptr. 488, 500 (1975) (proof beyond a reasonable doubt); *People v. Pembrock*, 23 Ill. App. 3d 991, 995, 320 N.E.2d 470, 473 (1st Dist. 1974) (proof beyond a reasonable doubt); *People v. Potter*, 85 Ill. App. 2d 151, 156, 228 N.E.2d 238, 241 (4th Dist. 1967) (right to counsel at all stages of the proceedings); *In re Andrews*, — Mass. 2d —, 334 N.E.2d 15, 25 (1975) (proof beyond a reasonable doubt); *State ex rel. Farrell v. Stovall*, 59 Wis. 2d 148, 168, 207 N.W.2d 809, 818-19 (1973) (jury trial); Colo. Rev. Stat. Ann. § 16-13-211 (1973) (proof beyond a reasonable doubt); D.C. Code Encycl. Ann. § 22-3508 (1967) (jury trial); Ill. Ann. Stat. ch. 38, § 105-5 (Smith-Hurd 1970) (jury trial); Iowa Code Ann. § 225A.9 (1969) (jury trial); Mo. Ann. Stat. § 202.720(4) (Vernon 1972) (jury trial); Neb. Rev. Stat. § 29-2903(2)-(3) (Supp. 1974) (jury trial, proof beyond a reasonable doubt); Ore. Rev. Stat. §§ 426.590, 426.630(1) (1974) (jury trial); Wash. Rev. Code Ann. § 71.06.070 (1975) (jury trial).

81. E.g., *People v. Feagley*, 14 Cal. 3d 338, 352-58, 535 P.2d 373, 381-86, 121 Cal. Rptr. 509, 517-22 (1975); *State ex rel. Farrell v. Stovall*, 59 Wis. 2d 148, 207 N.W.2d 809 (1973).

82. E.g., *People v. Burnick*, 14 Cal. 3d 306, 314-25, 535 P.2d 352, 357-64, 121 Cal. Rptr. 488, 493-500 (1975).

83. See note 3 *supra* and accompanying text.

84. In this Comment, "insanity commitment" is used to connote involuntary civil commitment proceedings other than sexual psychopathy commitment. This includes those committed pursuant to incompetency proceedings, emergency commitments, and commitment of imprisoned convicts.

85. *People v. Feagley*, 14 Cal. 3d 338, 535 P.2d 373, 121 Cal. Rptr. 509 (1975); *State ex rel. Farrell v. Stovall*, 59 Wis. 2d 148, 207 N.W.2d 809 (1973).

86. 383 U.S. 107 (1966).

87. *Id.* at 108.

York statute, a jury was available to all classifications of persons subject to civil commitment except prisoners.<sup>88</sup> The Supreme Court struck down the statute as violative of equal protection, holding that:

[T]he State, having made this substantial review proceeding generally available on this issue, may not, consistent with the Equal Protection Clause of the Fourteenth Amendment, arbitrarily withhold it from some.

Classification of mentally ill persons . . . may be a reasonable distinction for purposes of determining the type of custodial or medical care . . . but it has no relevance whatever in the context of the opportunity to show whether a person is mentally ill *at all*.<sup>89</sup>

Six years later in *Humphrey v. Cady*,<sup>90</sup> the Supreme Court interpreted *Baxstrom* as applying not only to categories within a single type of commitment proceeding but to all commitment actions which contain similar procedures.<sup>91</sup> Humphrey had been convicted under the Wisconsin sex crimes statute and, in lieu of sentence, had been committed for the term of the maximum sentence, one year. At the expiration of such time, he became subject to a renewal order of commitment for a period of five years.<sup>92</sup> He claimed unequal treatment of the laws, since under the sex crimes statute no right to a jury trial was recognized in commitment proceedings, whereas under the mental health law such right was granted.<sup>93</sup> Although the Court left the determination of the facts to the court on remand,<sup>94</sup> it reasoned that where two different commitment statutes are identical in purpose and effect,<sup>95</sup> there must be a rational basis for any procedural differences which may exist between them.<sup>96</sup>

Neither *Baxstrom* nor *Humphrey* resolved the question of similarity between psychopathy and insanity commitment proceedings; neither case mandated identical procedures for the two types of proceedings. The vast majority of states in the Special Proceeding Commitment category have not applied the equal protection clause to provide such parity. Although courts in these jurisdictions have consistently sustained the traditional view that sexual

88. *Id.* at 110-11. While a prisoner was denied the right to a jury trial on the issue of his civil commitment, all other alleged insane persons were "expressly granted the right to de novo review." *Id.* at 111 (*italics omitted*).

89. *Id.* (*emphasis in original*); see *Jackson v. Indiana*, 406 U.S. 715 (1972).

90. 405 U.S. 504 (1972).

91. *Id.* at 508-09.

92. *Id.* at 510 n.6.

93. *Id.* at 508.

94. *Id.* at 514-16. The Court remanded the case for a full evidentiary hearing to determine if arbitrary procedures were in fact employed. On remand, the case was dismissed as moot upon stipulations of the parties. *State ex rel. Farrell v. Stovall*, 59 Wis. 2d 148, 163 n.41, 207 N.W.2d 809, 816 n.41 (1973).

95. See 405 U.S. at 509-10 & nn.4-6.

96. *Id.* at 510. The Court also intimated that it would not tolerate a situation in which the state might arbitrarily choose to commit the defendant on one of two theories when there was no distinction between the commitment procedures except the use of different due process standards. *Id.* at 512.

psychopathy proceedings are not violative of equal protection,<sup>97</sup> it appears that only a few have had to confront the equal protection issue in terms of the validity of the procedural distinctions, if any, between psychopathy and insanity commitment proceedings.<sup>98</sup> Wisconsin<sup>99</sup> and California<sup>100</sup> courts have determined that procedural differences between such proceedings in their states are arbitrary and in violation of the equal protection clause.

In *State ex rel. Farrell v. Stovall*,<sup>101</sup> petitioner had been convicted of three counts of indecent behavior.<sup>102</sup> He argued that the independent proceeding at which he had been determined to be a psychopath and committed to an indeterminate period of treatment<sup>103</sup> was in violation of his constitutional rights, since a jury trial, granted to persons subject to insanity commitment, was denied to him.<sup>104</sup> The Wisconsin court determined that both the psychopathy and insanity statutes required, prior to commitment, determinations of mental defect, dangerousness, and amenability to treatment; in that sense they were identical in scope.<sup>105</sup> The court rejected the state's argument that the two statutes were rationally distinct in that the psychopathy commitment proceeding, unlike the insanity proceeding, was an alternative to penal sentencing.<sup>106</sup> The court required that identical due process standards be applied in both independent commitment proceedings.<sup>107</sup>

97. *State ex rel. Pearson v. Probate Ct.*, 205 Minn. 545, 287 N.W. 297 (1939), *aff'd*, 309 U.S. 270 (1940); *State v. Ross*, 96 Ohio App. 157, 121 N.E.2d 289, 293, appeal dismissed, 161 Ohio 408, 119 N.E.2d 618 (mem.), cert. denied, 348 U.S. 846 (1954) (provisions of statute reasonable—they come within the legislative power of the state and do not transgress the constitution). Such cases, however, usually were concerned only with the threshold question of a state's power to make a sexual psychopathy classification and did not involve the issue of the relationship between insanity and psychopathy commitments. The Supreme Court has held that the initial classification of sex offenders itself does not violate the fourteenth amendment. *Minnesota ex rel. Pearson v. Probate Ct.*, 309 U.S. 270, 274 (1940).

98. Iowa, Minnesota, and Missouri have enacted statutes that expressly require identical procedures for the commitment of the mentally ill person and the sexual psychopath. Iowa Code Ann. § 225A.15 (1969); Minn. Stat. Ann. § 526.10 (1975); Mo. Ann. Stat. § 202.770 (Vernon 1972). There is nothing to indicate whether the statutes are based on equal protection considerations.

99. *State ex rel. Farrell v. Stovall*, 59 Wis. 2d 148, 207 N.W.2d 809 (1973).

100. *People v. Feagley*, 14 Cal. 3d 338, 535 P.2d 373, 121 Cal. Rptr. 509 (1975).

101. 59 Wis. 2d 148, 207 N.W.2d 809 (1973). Farrell had brought several actions in Wisconsin on the same basic issue. *Id.* at 152-53, 207 N.W.2d at 810-11. The present Wisconsin decision was the result of the consolidation of these actions on remand from the Supreme Court.

102. *Id.* at 152, 207 N.W.2d at 810.

103. *Id.* While the decision does not reveal that an independent proceeding was commenced, the statutes cited by the court require a hearing for determination of psychopathy. At such hearing the alleged psychopath is allowed counsel and the opportunity to present evidence. See Wis. Stat. Ann. § 975.06(1) (1971).

104. 59 Wis. 2d at 164-65, 207 N.W.2d at 816-17. A prior version of the psychopathic statute, abrogated in 1951, granted a jury trial to a sex offender. *Id.* at 155, 207 N.W.2d at 811-12.

105. *Id.* at 163-64, 207 N.W.2d at 816; see *Humphrey v. Cady*, 405 U.S. 504, 509-10 & nn.4-6 (1972); text accompanying notes 90-96 *supra*.

106. 59 Wis. 2d at 167, 207 N.W.2d at 818; see text accompanying note 95 *supra*.

107. This decision applied only to the initial commitment proceedings, and not to procedures



In *People v. Feagley*,<sup>108</sup> petitioner, committed for an indeterminate period because of his compulsive desire to touch hair,<sup>109</sup> challenged the California psychopathic commitment statute because, under the statute, he was denied the unanimous jury trial automatically granted under another statute to insane defendants.<sup>110</sup> The California court found that the psychopathy and insanity proceedings were identical; and because no rational basis existed for the procedural distinction,<sup>111</sup> the court required identical procedures for both.<sup>112</sup>

Thus, the equal protection clause can be used to provide significant procedural safeguards for the psychopath in commitment proceedings when such proceedings are identical to civil commitment proceedings in result, when no rational distinction between the two exists, and—critically—when the insanity proceedings themselves provide sufficient procedural safeguards. Of course, the value of this approach would be seriously lessened where civil commitment procedures are constitutionally inadequate.<sup>113</sup>

### B. *Criminal Classification*

Another method of granting additional procedural safeguards to the psychopath beyond the minimum already required is to consider psychopathy commitment laws criminal in nature, thereby granting the psychopath the ordinary rights of a criminal.<sup>114</sup> While there is implicit precedent for this

involving the actual care and custody of those committed. 59 Wis. 2d at 170-71, 207 N.W.2d at 819-20. It appears that there is a rational distinction between psychopaths and the insane when it comes to custody and care. *Baxstrom v. Herold*, 383 U.S. 107, 111 (1966).

Massachusetts has also accepted the equal protection argument in the psychopathy context. In *re Andrews*, — Mass. 2d —, 334 N.E.2d 15, 21-25 (1975). In that case, however, the Supreme Judicial Court applied the equal protection argument not to psychopaths in general but only to those psychopaths who were committed under Mass. Ann. Laws ch. 123A, § 6 (1972). That statute allows a prisoner already in a state detention center to be committed to an indeterminate period as a psychopath. *Id.* at —, 334 N.E.2d at 22-23. It is clear, however, that the court might in a proper case extend the equal protection reasoning to all psychopaths. There are no distinguishing characteristics between psychopaths committed prior to imprisonment and those psychopaths committed after some prison time has been served.

108. 14 Cal. 3d 338, 535 P.2d 373, 121 Cal. Rptr. 509 (1975).

109. Feagley was initially charged with molesting a child. There was no element of force in the incident since one of the girls to whom he had been talking let him touch her hair and neck. *Id.* at 342, 535 P.2d at 375, 121 Cal. Rptr. at 511. The charge was ultimately reduced to a simple battery. While Feagley faced a potential life imprisonment under the commitment statute, the criminal penalty for this battery was a fine of \$1,000.00 or a six month imprisonment.

110. *Id.* at 342, 535 P.2d at 375, 121 Cal. Rptr. at 511. California's requirement for a unanimous jury trial appears to go beyond the minimum necessary. Within reason states are free to establish jury requirements. *Williams v. Florida*, 399 U.S. 78, 103 (1970).

111. 14 Cal. 3d at 356, 535 P.2d at 384, 121 Cal. Rptr. at 520.

112. *Id.* at 352-55, 535 P.2d at 381-83, 121 Cal. Rptr. at 517-19.

113. See *State ex rel. Farrell v. Stovall*, 59 Wis. 2d 148, 170, 207 N.W.2d 809, 819-20 (1973). In such instances a frontal attack on the constitutionality of the psychopathy proceedings themselves would have to be made. Such an approach is difficult. See text accompanying notes 75-77 *supra*.

114. Comment, *The MDSO—Uncivil Civil Commitment*, 11 Santa Clara Law. 169, 178-82

theory in the decisions of other courts, only California has expressly taken this approach. The problem of relabelling these proceedings is made complex because psychopathy proceedings have long been termed civil in nature<sup>115</sup> and courts have generally refused to abandon this philosophy.<sup>116</sup> Furthermore, it is clear that an alleged psychopath in a commitment hearing would not benefit necessarily if every right accorded the criminal was granted to him.<sup>117</sup> While a reclassification of psychopathy proceedings as criminal in nature will not resolve all procedural issues immediately,<sup>118</sup> an analysis of the varying approaches to the question should clarify the nature of the problem.

In *Specht v. Patterson*,<sup>119</sup> the Supreme Court established requirements which are necessary in psychopathy proceedings: " [a] defendant in such a proceeding is entitled to the full panoply of the relevant protections which due process guarantees in state criminal proceedings.' "<sup>120</sup> The Court expressly stated that the "panoply" must include rights to an adversary hearing, counsel, cross-examination, confrontation of witnesses, and appeal.<sup>121</sup> Even though the statute involved in *Specht* theoretically was an alternative sentence type, the guidelines established in that case are applicable to Special Proceeding Commitment.<sup>122</sup>

States in the special proceeding category provide for a hearing and separate findings of fact in the determination of psychopathy.<sup>123</sup> Because courts of these states consider psychopathy commitment proceedings civil in nature<sup>124</sup> or, at best, special proceedings,<sup>125</sup> they have often limited the grant of

(1970) [hereinafter cited as Uncivil Commitment]; *Less Benevolent Despotism*, supra note 6, at 603-08. For discussions concerning the psychopath's right to criminal procedural safeguards in a civil commitment proceeding, see *Criminal Safeguards*, supra note 5, at 621-23; *Civil Commitment*, supra note 5, at 1295-1306.

115. See text accompanying note 69 supra.

116. See, e.g., text accompanying notes 149-50 infra.

117. See text accompanying notes 166-69 infra.

118. See text accompanying notes 161-70 infra.

119. 386 U.S. 605 (1967). See notes 53-56 supra and accompanying text.

120. 386 U.S. at 609, quoting *United States ex rel. Gerchman v. Maroney*, 355 F.2d 302, 312 (3d Cir. 1966).

121. *Id.* at 610.

122. See notes 54-55 supra and accompanying text.

123. See notes 72-74 supra and accompanying text.

124. See note 69 supra and accompanying text. E.g., *Miller v. Overholser*, 206 F.2d 415, 417 (D.C. Cir. 1953) (D.C. psychopathy proceeding is civil in nature); *In re Newton*, 357 Mass. 346, 351, 259 N.E.2d 190, 193 (1970) (application of psychopathy law results in civil commitment); *State ex rel. Sweezer v. Green*, 360 Mo. 1249, 1253, 232 S.W.2d 897, 900 (1950), overruled on other grounds, *State ex rel. North v. Kirtley*, 327 S.W.2d 166 (Mo. 1959) (sexual deviants subject to restraint because of dangerousness, not because of criminal conviction); *In re Moulton*, 96 N.H. 370, 373, 77 A.2d 26, 28 (1950) (psychopathic commitment involving care and treatment considered civil, and not regarded as punishment); *People v. Redford*, 194 Cal. App. 2d 200, 14 Cal. Rptr. 866 (4th Dist. 1961) (psychopathy laws not criminal in nature). But see *Hill v. Burke*, 289 F. Supp. 921, 926 (W.D. Wis. 1968), *aff'd*, 422 F.2d 1195 (7th Cir.), cert. denied, 400 U.S. 944 (1970) (psychopathy statutes provide for independent criminal proceeding).

125. See, e.g., *Gross v. Superior Ct.*, 42 Cal. 2d 816, 270 P.2d 1025 (1954) (psychopathy

criminal procedural rights to those listed in *Specht*.<sup>126</sup>

On the other hand, seven jurisdictions have enacted statutes requiring additional procedural protections for the psychopath similar to those required in criminal actions. The District of Columbia,<sup>127</sup> Iowa,<sup>128</sup> Oregon,<sup>129</sup> Missouri,<sup>130</sup> and Washington<sup>131</sup> have adopted jury trials for the psychopath. Colorado<sup>132</sup> requires the standard of proof beyond a reasonable doubt for the determination of psychopathy, and Nebraska<sup>133</sup> has incorporated both rights in its psychopathy actions.

Also, in *People v. Pembrock*,<sup>134</sup> Illinois adopted procedural safeguards for the sex offender beyond those specified in *Specht*. Pembrock, convicted of indecent liberties with a child, argued that his psychopathy commitment was improper because the standard of proof used to determine his condition—preponderance of the evidence—was constitutionally deficient.<sup>135</sup> The court held that the standard of proof beyond a reasonable doubt was the proper standard;<sup>136</sup> it relied on two United States Supreme Court cases involving

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proceedings are special actions of civil nature); *In re Mundy*, 97 N.H. 239, 85 A.2d 371 (1952) (not criminal nor really even an adversary civil proceeding); *State v. Madary*, 178 Neb. 383, 133 N.W.2d 583 (1965) (psychopaths require special consideration). The Second Circuit has stated that because the inmate has an interest in the designation of his status, marked changes in such designation can not be made without a "special proceeding," which must include the right of the prisoner to appear and call witnesses. He must also be advised of the evidence against him. *Cardaropoli v. Norton*, 523 F.2d 990, 996 (2d Cir. 1975).

126. See, e.g., *State ex rel. Fulton v. Scheetz*, 166 N.W.2d 874, 888-89 (Iowa Sup. Ct. 1969) (Iowa statute constitutional since it met requirements of *Specht*); *Petition of Peterson*, 354 Mass. 110, 114, 236 N.E.2d 82, 84 (1968) (statute vastly different than one struck down in *Specht* and more similar to Minnesota statute upheld in *Minnesota ex rel. Pearson v. Probate Court*, 309 U.S. 270 (1940)); *State v. Labor*, 128 Vt. 597, 270 A.2d 154 (1970) (court compared *Specht* requirements and Vermont law and found due process requirements met). The Eighth Circuit found the Nebraska statute constitutional, citing the *Specht* requirements and the fact that the statute provides for additional protections. *Irwin v. Wolff*, No. 74-1934 (8th Cir., Feb. 17, 1976); accord, *State v. Irwin*, 191 Neb. 169, 214 N.E.2d 575 (1974).

127. D.C. Code Encycl. Ann. § 22-3508 (1967).

128. Iowa Code Ann. § 225A.9 (1969).

129. Ore. Rev. Stat. §§ 426.590(2), 426.630(1) (1974).

130. Mo. Ann. Stat. § 202.720(4) (Vernon 1972) (jury trial within the discretion of judge).

131. Wash. Rev. Code Ann. § 71.06.070 (1975). Illinois also provides that an alleged psychopath can demand a jury trial. Ill. Ann. Stat. ch. 38, § 105-5 (Smith-Hurd 1970).

132. Colo. Rev. Stat. Ann. § 16-13-211(2) (1973).

133. Neb. Rev. Stat. § 29-2904 (Cum. Supp. 1974).

134. 23 Ill. App. 3d 991, 320 N.E.2d 470 (1st Dist. 1974).

135. *Id.* at 993, 320 N.E.2d at 471. Pembrock also raised an equal protection argument, claiming that he was denied procedures granted criminal defendants. *Id.* at 996, 320 N.E.2d at 474. He also asserted that the adjudication was defective due to errors of his assigned counsel. *Id.*

136. *Id.* at 995, 320 N.E.2d at 473; accord, *Stachulak v. Coughlin*, 369 F. Supp. 628, 630-31 (N.D. Ill. 1973), *aff'd*, 520 F.2d 931 (7th Cir.), cert. denied, 44 U.S.L.W. 3489 (U.S. Mar. 1, 1976) (No. 75-608); *In re Lamb*, — Mass. 2d —, 334 N.E.2d 28, 33 (1975); *In re Andrews*, — Mass. 2d —, 334 N.E.2d 15, 27 (1975).

*Lessard v. Schmidt*, 349 F. Supp. 1078 (E.D. Wis. 1972), vacated on other grounds, 414 U.S. 473 (1974) (*per curiam*), held that proof beyond a reasonable doubt is required in emergency

juvenile proceedings—*In re Gault*<sup>137</sup> and *In re Winship*.<sup>138</sup>

In each of these cases the Court determined that juvenile hearings, even though "special proceedings," were subject to certain due process requirements similar to those in criminal actions.<sup>139</sup> The Court reasoned that the youth in a juvenile proceeding, like the criminal at trial, is faced with a loss of liberty<sup>140</sup> and the social stigma of conviction,<sup>141</sup> and thus must have the same protections as a criminal. *Gault* held that these protections must include notice,<sup>142</sup> counsel,<sup>143</sup> confrontation and cross-examination at the hearing,<sup>144</sup> and an adequate record of the proceeding.<sup>145</sup> *Winship* required the beyond a reasonable doubt standard of proof in juvenile proceedings.<sup>146</sup>

commitments. While emergency commitment is factually distinguishable from psychopathy proceedings, this decision lends support to the argument that a higher standard of protection than is now provided in most jurisdictions is required in psychopathy procedures. The Wisconsin Supreme Court has acknowledged the possibility that Lessard may accurately express state law, but has neither accepted nor rejected the holding in light of the action of the United States Supreme Court in vacating the district court decision. *State ex rel. Haskins v. Dodge County Ct.*, 62 Wis. 2d 250, 268-69, 214 N.W.2d 575, 584-85 (1974).

Florida has accepted this higher standard of proof in insanity commitments. *In re Pickles'* Petition, 170 So. 2d 603 (Fla. Ct. App. 1965). The District of Columbia, in *In re Hodges*, 325 A.2d 605, 607 (D.C. Ct. App. 1974), and a New Jersey lower court, in *In re Perry*, 137 N.J. Eq. 161, 43 A.2d 885 (Ch. 1945), also have accepted the standard of proof beyond a reasonable doubt in insanity proceedings. Kentucky, a state without a psychopathy statute, has employed this standard of proof to lunacy commitments. *Denton v. Commonwealth*, 383 S.W.2d 681 (Ky. Ct. App. 1964) (proceedings called quasi-criminal).

The New Mexico Supreme Court has rejected the proof beyond a reasonable doubt standard and in civil commitment proceedings has adopted the standard of clear and convincing proof. *In re Valdez*, 540 P.2d 818 (N.M. 1975). The standard of clear and convincing proof has also been accepted as the applicable standard for insanity commitments in Washington. *In re Levias*, 83 Wash. 2d 253, 517 P.2d 588 (1973). A recent federal case has found this same standard applicable to the insanity commitment of children. *Bartley v. Kremens*, 402 F. Supp. 1039, 1053 (E.D. Pa.), stayed, 96 S. Ct. 558 (1975), appeal docketed, 44 U.S.L.W. 3445 (U.S. Jan. 27, 1976) (No. 75-1064). See note 146 infra.

137. 387 U.S. 1 (1967). The fifteen year old petitioner was committed as a juvenile delinquent for making lewd remarks. *Id.* at 4. The Court found that defendant had not received prior notice of the charges and at the hearing was denied the presence of the accusing party, counsel, and a proper record. *Id.* at 10.

138. 397 U.S. 358 (1970). *Winship*, a twelve year old, was held to be a juvenile delinquent after a hearing on a charge of taking \$112. At the hearing he had been denied the standard of proof beyond a reasonable doubt. *Id.* at 360-61.

139. *In re Gault*, 387 U.S. at 18-20.

140. *Id.* at 36; *In re Winship*, 397 U.S. at 366-67.

141. *In re Gault*, 387 U.S. at 24; *In re Winship*, 397 U.S. at 367.

142. *In re Gault*, 387 U.S. at 31-34.

143. *Id.* at 34-42.

144. *Id.* at 42-57.

145. *Id.* at 57-58. The Second Circuit in an analogous situation has guaranteed some of the same rights to prisoners prior to their classification as "special cases." See *Cardaropoli v. Norton*, 523 F.2d 990, 994-95 (2d Cir. 1975).

146. 397 U.S. at 368; cf. *Bartley v. Kremens*, 402 F. Supp. 1039, 1053 (E.D. Pa.), stayed, 96 S. Ct. 558 (1975), appeal docketed, 44 U.S.L.W. 3445 (U.S. Jan. 27, 1976) (No. 75-1064)

In *Pembrook*, the Illinois court recognized that a defendant's interests were identical in both juvenile and psychopathy proceedings.<sup>147</sup> Both the juvenile and the psychopath suffer a loss of liberty and incur social stigma because of confinement.<sup>148</sup> The court recognized fundamental distinctions between psychopathy commitment proceedings and criminal prosecution, however. Unlike a criminal proceeding, the court reasoned, the psychopathy commitment proceeding implies no moral blameworthiness.<sup>149</sup> The psychopathy statute also provides treatment instead of punishment.<sup>150</sup>

It appears, then, that most of the states which have adopted procedures in

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(children subject to involuntary insanity commitment guaranteed rights to: probable cause hearing, post commitment hearing, written notice, counsel, presence at hearings, confrontation and cross-examination of witnesses, and the standard of proof of clear and convincing evidence).

147. 23 Ill. App. 3d at 994, 320 N.E.2d at 473. Two recent Massachusetts cases have arrived at the same conclusion. In *re Lamb*, — Mass. 2d —, 334 N.E.2d 28 (1975); In *re Andrews*, — Mass. 2d —, 334 N.E.2d 15 (1975). Both petitioners sought relief from psychopathy commitment made after each had been committed to prison. Mass. Ann. Laws ch. 123A, § 6 (1972), as amended (Cum. Supp. 1974), empowers the superintendent of the prison to petition the court for commitment of an inmate if he believes the inmate to be a psychopath. The Supreme Judicial Court of Massachusetts accepted the analogy between psychopathy and juvenile commitment and held: "We nevertheless find that the implications of the foregoing cases, particularly *Winship* construed in the light of *Specht*, lead inexorably to the conclusion that a person who stands to lose his freedom and to be labeled sexually dangerous is entitled to the benefit of the same stringent standard of proof as that required in criminal cases." In *re Andrews*, — Mass. 2d —, 334 N.E.2d 15, 26 (1975); accord, In *re Lamb*, — Mass. 2d —, 334 N.E.2d 28, 33-34 (1975).

148. 23 Ill. App. 3d at 994, 320 N.E.2d at 473; accord, In *re Lamb*, — Mass. 2d —, 334 N.E.2d 28, 33-34 (1975); In *re Andrews*, — Mass. 2d —, 334 N.E.2d 15, 27 (1975).

149. 23 Ill. App. 3d at 995, 320 N.E.2d at 473. *Contra*, *People v. Burnick*, 14 Cal. 3d 306, 321, 535 P.2d 352, 362, 121 Cal. Rptr. 488, 498 (1975).

150. 23 Ill. App. 3d at 995 n.4, 320 N.E.2d at 473 n.4. *Contra*, *People v. Burnick*, 14 Cal. 3d 306, 319-21, 535 P.2d 352, 360-61, 121 Cal. Rptr. 488, 496-97 (1975); see *United States ex rel. Stachulak v. Coughlin*, 520 F.2d 931 (7th Cir. 1975), affirming 369 F. Supp. 628 (N.D. Ill. 1973), cert. denied, 44 U.S.L.W. 3489 (U.S. Mar. 1, 1976) (No. 75-608). The Seventh Circuit noted: "[S]ince the Act is an alternative to a criminal prosecution, it is also in a very real sense a penal measure." *Id.* at 936 n.5.

Another argument which has been raised against application of criminal protections is that in psychopathy proceedings the state does not attempt to prove a crime, and the jury merely adopts the opinion of the psychiatrist. See *People v. Burnick*, 14 Cal. 3d at 330, 535 P.2d at 368, 121 Cal. Rptr. at 504 (1975) (rejecting argument). It is submitted that the civil in nature standard can not be based on the assumption that the jury merely adopts the opinions of the psychiatrist. Courts demand that the factfinder make an independent finding. *Dittrich v. Brown County*, 215 Minn. 234, 235-37, 9 N.W.2d 510, 512 (1943) (trier of fact is arbitrator of medical testimony); see *Malone v. Overholzer*, 93 F. Supp. 647 (D.D.C. 1950). Furthermore, there is a tradition of judicial reluctance to accept opinions of psychiatrists. *People v. Burnick*, 14 Cal. 3d 306, 325-28, 535 P.2d 352, 365-66, 121 Cal. Rptr. 488, 501-02 (1975). This reluctance is not unfounded. One commentator has found that psychiatric examinations are extremely unreliable. See *Laves, The Prediction of "Dangerousness" as a Criterion for Involuntary Civil Commitment: Constitutional Considerations*, 3 J. Psychiatry & Law 291, 295 (1975) ("[D]iagnostic interviews [for civil commitment] lasted between 5 and 10.2 minutes. The 'evidence' upon which the examiners based their decisions to retain often, according to the author, seemed arbitrary, and in some such cases no evidence whatsoever could be found by independent experts").

addition to those required by *Specht* have not done so on the grounds that psychopathy proceedings are criminal in nature. In contrast, however, California has taken this approach. In *People v. Burnick*,<sup>151</sup> defendant, who had been convicted of homosexual relations with two minors, and then held to be a psychopath at commitment proceedings, appealed on the ground that an inadequate standard of proof had been applied in the latter proceeding. Relying on *Gault* and *Winship*, the court determined that the standard of proof beyond a reasonable doubt must be used in psychopathy commitment proceedings.<sup>152</sup> As in Illinois, the California court noted that psychopaths, like juveniles, suffer a loss of liberty and social stigma;<sup>153</sup> but the court appeared to go further than most other jurisdictions by impliedly categorizing the psychopathy proceeding as criminal in nature.<sup>154</sup> The court stated:

"It is a separate criminal proceeding which may be invoked after conviction of one of the specified crimes. Petitioner therefore was entitled to a full judicial hearing before the magnified sentence was imposed. At such a hearing the requirements of due process cannot be satisfied by partial or niggardly procedural protections. A defendant in such a proceeding is entitled to *the full panoply of the relevant protections which due*

151. 14 Cal. 3d 306, 535 P.2d 352, 121 Cal. Rptr. 488 (1975).

152. *Id.* at 318-22, 535 P.2d at 359-62, 121 Cal. Rptr. at 495-98.

153. *Id.* at 318, 535 P.2d at 360, 121 Cal. Rptr. at 496; accord, *Donaldson v. O'Connor*, 493 F.2d 507, 520 (5th Cir. 1974), vacated on other grounds, 422 U.S. 563 (1975). In *Gault*, the Court stated: "Ultimately, however, we confront the reality [that the] boy is committed to an institution where he may be restrained of liberty for years. It is of no constitutional consequence—and of limited practical meaning—that the institution to which he is committed is called an Industrial School. . . . His world becomes 'a building with whitewashed walls, regimented routine and institutional hours . . . .' Instead of mother and father and sisters and brothers and friends and classmates, his world is peopled by guards, custodians, state employees, and 'delinquents' confined with him for anything from waywardness to rape and homicide.

"In view of this, it would be extraordinary if our Constitution did not require the procedural regularity and the exercise of care implied in the phrase 'due process.'" *In re Gault*, 387 U.S. 1, 27-28 (1967) (footnotes omitted).

Professor Wigmore has written: "The mental condition of one whose mind is so deranged as to require imprisonment for his own and others' good is indeed pitiable. But the mental attitude of one who is falsely found insane and relegated to life imprisonment is beyond conception. No greater cruelty can be committed in the name of the law." 5 Wigmore on Evidence § 1400, at 201 (Chadbourn rev. ed. 1974); see *Murel v. Baltimore City Crim. Ct.*, 407 U.S. 355, 359 (1972) (Douglas, J., dissenting) (dismissal of certiorari in case involving Maryland Defective Delinquent statute).

154. The majority decision nowhere states that the proceedings are of a criminal nature, but a reading of the case clearly permits this view. See 14 Cal. 3d at 335, 535 P.2d at 372, 121 Cal. Rptr. at 508 (Burke, J., dissenting).

While Massachusetts has stated that it accepted the "California" reasoning for psychopathic commitment, it has adopted *Burnick* only insofar as it granted proof beyond a reasonable doubt to the psychopath. *In re Andrews*, — Mass. 2d —, 334 N.E.2d 15, 27 (1975). That state has not adopted the criminal in nature standard: "We have consistently labeled c. 123A proceedings civil and nonpunitive. . . . We adhere to that position. Nevertheless, the affixing of a 'civil' label to SDP proceedings does not answer the question of what process is due, just as the affixing of a 'civil' label did not answer that question in the juvenile delinquency context." *Id.* at —, 334 N.E.2d at 26.

*process guarantees in state criminal proceedings. He must be afforded all those safeguards which are fundamental rights and essential to a fair trial . . .*" The *Specht* court unequivocally adopted this language as its own . . .<sup>155</sup>

Unlike some other jurisdictions, California does not believe that the *Specht* requirements set the outer limits on procedural safeguards for the psychopath.<sup>156</sup> In *Burnick*, the California court determined that under the *Specht* "panoply of rights" doctrine, the standard of proof beyond a reasonable doubt was one safeguard required in psychopathic commitment.<sup>157</sup> The court thus determined that a psychopathy commitment was a criminal type of punishment.<sup>158</sup> The court also noted that there is a moral blameworthiness implied in sex offender proceedings; the stigma which is placed upon the psychopath follows him everywhere.<sup>159</sup> The court therefore impliedly declined to distinguish between criminal and psychopathy proceedings.<sup>160</sup>

California was the only jurisdiction found to bring due process arguments this far. This does not mean that the California psychopathy law is free from defects. The statute fails to distinguish between degrees of psychopathy, so that a relatively harmless psychopathic compulsion such as voyeurism is

155. 14 Cal. 3d at 318-19, 535 P.2d at 359, 121 Cal. Rptr. at 495, quoting *Specht v. Patterson*, 386 U.S. 605, 609-10 (1967) (emphasis in California opinion); see *Less Benevolent Despotism*, supra note 6, at 603-04.

156. 14 Cal. 3d at 318, 535 P.2d at 359, 121 Cal. Rptr. at 495. "[I]f *Specht* did not prophesy each and every step in the future development of the role that due process must play in these commitment proceedings, it clearly pointed the way." *Id.*

157. *Id.* at 332, 535 P.2d at 369, 121 Cal. Rptr. at 505. See *In re Winship*, which stated that the court should examine, weigh, and balance the procedures, consequences, and interests involved to determine whether a particular due process safeguard should be required. 397 U.S. at 361-64, 366. The American Civil Liberties Union has recommended this higher burden of proof, as well as a criminal type trial, for the commitment of the insane. ACLU, *Policy Statement on Involuntary Commitment 2* (April 1974).

158. 14 Cal. 3d at 319-22, 535 P.2d at 360-61, 121 Cal. Rptr. at 496-97.

159. *People v. Burnick*, 14 Cal. 3d at 322-23, 535 P.2d at 362, 121 Cal. Rptr. at 498 ("He remains forever a pariah, branded with the twin marks of mental and sexual abnormality"); accord, *Donaldson v. O'Connor*, 493 F.2d 507, 520 (5th Cir. 1974), vacated on other grounds, 422 U.S. 563 (1975). An analogous situation might be found in the political arena. The presidential campaign of George McGovern was seriously hindered when it became known that Thomas Eagleton, his vice-presidential running mate, had undergone "therapy."

160. Though certain distinctions appear valid, see text accompanying notes 162-69 *infra*, in the context of the result of psychopathy proceedings, any distinction appears to be illusory. This is especially true in those jurisdictions in which courts have stated that the objective of psychopathy statutes is the protection of society rather than the treatment of psychopaths. *State ex rel. Fulton v. Scheetz*, 166 N.W.2d 874, 878 (Iowa Sup. Ct. 1969) (object of statute is to protect society by sequestering deviate); *State v. Braggs*, 9 Ohio Misc. 32, 221 N.E.2d 493, 495 (Juv. Ct. 1966) (purpose of statutes is confinement of psychopaths who are dangerous to society). This objective is the same as that in criminal prosecutions. *W. La Fave & A. Scott, Jr., Criminal Law* § 5, at 21-22 (1972); see *In re Ballay*, 482 F.2d 648, 657-58 (D.C. Cir. 1973) (criminal and commitment statutes both have purpose of confining defendant). The state's interest in the protection of its citizens is clearly valid. See *Criminal Safeguards*, supra note 5, at 613-15; *Civil Commitment*, supra note 5, at 1223. It appears, however, that the state can accomplish its purpose and, at the same time, afford greater procedural rights to the psychopath.

treated in the same manner as is a violent sex crime. Since there is no classification among psychopaths all offenders are exposed to the same potential confinement, regardless of the nature and extent of their threat to society.<sup>161</sup>

The California court in *Burnick* did not urge that all criminal due process rights be made available in all psychopathy proceedings.<sup>162</sup> It could hardly do so since standards must vary with the particular proceeding at issue.<sup>163</sup> Even *Gault* and *Winship*, which required certain criminal procedures to be observed in juvenile proceedings,<sup>164</sup> did not make all criminal procedures applicable to the juvenile. The court observed in *Winship*:

*Gault* decided that, although the Fourteenth Amendment does not require that the hearing at this stage conform with all the requirements of a criminal trial or even of the usual administrative proceeding, the Due Process Clause does require application during the adjudicatory hearing of "the essentials of due process and fair treatment."<sup>165</sup>

Furthermore, application of certain criminal procedures to commitment proceedings would benefit neither the psychopath nor the state, and, in fact, often would interfere with a fair and just determination of the facts. For example, the psychopath needs no constitutional right to remain silent, since this right developed in order to allow an accused freedom from possible self-incrimination.<sup>166</sup> A psychiatrist's examination of the psychopath is central to a commitment proceeding.<sup>167</sup> If an alleged psychopath could refuse to submit to such examination on the grounds of a right to remain silent, the state would be unable to meet whatever standard of proof the courts required.<sup>168</sup>

Another right not necessary in psychopathy proceedings but required in criminal proceedings is the right to public trial.<sup>169</sup> Due to the mental condition of the psychopath and the need for a speedy determination of his illness, an informal hearing with appropriate criminal safeguards—but without a gallery of onlookers—might be more appropriate than a public trial.

Within such limits, however, courts can make effective use of the criminal

161. This is a particularly important distinction, since the commentators have pointed out that most offenders sentenced under the psychopathy laws are those convicted of minor offenses. See note 12 *supra*. If this is true, these minor offenses are treated as serious ones. Governor Thomas E. Dewey of New York vetoed the New York statute precisely for this reason. See text accompanying note 187 *infra*.

162. 14 Cal. 3d at 317-18, 535 P.2d at 359, 121 Cal. Rptr. at 495.

163. *Morrissey v. Brewer*, 408 U.S. 471, 481 (1972) ("[o]nce it is determined that due process applies, the question remains what process is due").

164. See text accompanying notes 142-46 *supra*; *Criminal Safeguards*, *supra* note 5, at 621.

165. 397 U.S. at 359, quoting *In re Gault*, 387 U.S. 1, 30 (1967).

166. *Civil Commitment*, *supra* note 5, at 1306-07. This right also serves to maintain the balance between the state and the individual and to protect a person's dignity and privacy. *Id.* at 1307.

167. But see note 150 *supra*.

168. *Civil Commitment*, *supra* note 5, at 1309.

169. U.S. Const. amend. VI.



nature of psychopathy commitment proceedings to expand due process safeguards afforded the sex offender. They must make a selective determination of the rights involved by weighing the circumstances and effect of the proceedings on the individual and the state.<sup>170</sup>

#### IV. MISCELLANEOUS

Georgia<sup>171</sup> and Tennessee<sup>172</sup> have psychopathy statutes which differ from the defined categories outlined above. Unlike the other commitment statutes these jurisdictions provide that the sex offender must properly serve the statutory sentence<sup>173</sup> for the underlying felony at a state correctional facility before he may be committed to a state mental hospital for an indeterminate period on account of psychopathy or insanity.<sup>174</sup>

While both states provide for a psychopathic examination prior to such determination of psychopathy,<sup>175</sup> the two states differ in their procedures for psychopathic adjudication. Tennessee follows a traditional procedure. The psychopathic determination is made only after the sex offender is allowed an adversary hearing with counsel present.<sup>176</sup> The judge, as the sole trier of facts, determines psychopathy at a civil trial.<sup>177</sup> Because of its similarity to the Special Proceeding Commitment, the Tennessee statute is subject to the constitutional infirmities and challenges stated above.<sup>178</sup>

170. See *In re Ballay*, 482 F.2d 648, 656-69 (D.C. Cir. 1973).

171. Ga. Code Ann. § 77-539 (1973).

172. Tenn. Code Ann. §§ 33-1303 to -1305 (Supp. 1974).

173. Ga. Code Ann. § 77-539 (1973) and Tenn. Code Ann. §§ 33-1303 to -1305 (Supp. 1974) mandate that a person convicted of certain sexual crimes be imprisoned in a correctional facility. Once the psychopath is criminally committed these two states differ in their procedures. The Georgia offender must serve his time before he is examined for possible treatment. Ga. Code Ann. § 77-539 (1973). The Tennessee offender, however, is examined "as soon as practicable after admittance to the penal institution." Tenn. Code Ann. § 33-1303 (Supp. 1975). If the psychopath can be successfully treated he will be so treated in prison for the duration of his sentence. *Id.* § 33-1304. In this sense, the Tennessee statute is somewhat similar to the alternative sentence commitment statutes. It differs from those statutes in that the offender must remain in prison.

174. Ga. Code Ann. § 77-539 (1973); Tenn. Code Ann. § 33-1305 (Supp. 1975).

175. Ga. Code Ann. § 77-539 (1973); Tenn. Code Ann. § 33-1305 (Supp. 1975). An examination is also given at time of eligibility for parole to determine if the prisoner is a sex offender.

176. Tenn. Code Ann. § 33-1305 (Supp. 1975).

177. The statute does provide for a jury trial upon a petition for release after actual commitment. *Id.*

178. See pt. III *supra*. Like the Special Proceeding Commitment, the Tennessee statute is subject to the equal protection clause. This is because the psychopathic proceedings parallel those of insanity commitment. See notes 101-13 *supra* and accompanying text. It is interesting to note that in cases of commitment under the Tennessee Alcohol and Drug Treatment Law, the defendant is allowed notice, cross-examination, counsel, and a right to appeal. Tenn. Code Ann. § 33-811 (Supp. 1975).

Furthermore, since the procedure involves a separate proceeding, new findings of fact, potential for indeterminate commitment, and a deprivation of liberty, Tenn. Code Ann.

The Georgia statute, on the other hand, provides for novel procedures. The sex offense involved in the prior criminal action is simply the catalyst for initiation of mental illness proceedings. The order of commitment is made not upon a finding of propensity to commit sex crimes or a finding of psychopathic sexual behavior, but upon a general finding of mental illness.<sup>179</sup> Such a statute, therefore, would be subject to the standards for insanity commitment proceedings.<sup>180</sup>

Into this miscellaneous category also fall states which have repealed their psychopathy laws or have never enacted such.<sup>181</sup> The history of New York law on the subject, while not necessarily representative, is illustrative of the complex problems surrounding the issue of sex offender commitment. The New York legislature passed a sex offender statute in 1947.<sup>182</sup> Governor Thomas E. Dewey vetoed that statute<sup>183</sup> and the state has never re-enacted a psychopathy statute. The Governor disapproved this bill on four bases: the statute allowed a finding of psychopathy by the lowest criminal court,<sup>184</sup> it placed responsibility for a determination of the psychopath's recovery upon the Commissioner of Corrections,<sup>185</sup> it did not provide adequate procedural safeguards for the alleged sex offender,<sup>186</sup> and it did not distinguish different types of psychopathy.<sup>187</sup> While aspects of the first three objections have been analyzed above,<sup>188</sup> and some have been effectively dealt with in some states, the fourth basis—classification among psychopaths—is an infirmity which has not been cured.<sup>189</sup>

New York uses its existing criminal laws to deal with psychopaths and their special needs.<sup>190</sup> While the judge cannot order a psychopathic examination he has the discretion to adjust the offender's sentence within limits prescribed by

§ 33-1305 (Supp. 1975), the due process requirements of the Special Proceeding Commitment would also be applicable. See pt. III *supra*.

179. Ga. Code Ann. § 77-539 (1973) provides: "Should the hearing result in a finding that the offender is mentally ill within the purview of section 88-507.1, the district attorney shall . . . cause the offender to be hospitalized . . ."

180. See generally Criminal Safeguards, *supra* note 5; Civil Commitment, *supra* note 5.

181. See note 22 *supra*.

182. S. 2790, 1947 N.Y. Leg.

183. New York State, Public Papers of Governor Dewey, 254-56 (1947). The Governor also vetoed a statute passed in 1952 requiring the Commissioner of Corrections to file a special report dealing with the administration, application, and enforcement of sex crimes.

184. *Id.* at 255.

185. *Id.*

186. *Id.* at 256.

187. *Id.* at 255.

188. See pts. II & III *supra*.

189. See note 161 *supra* and accompanying text.

190. A proposed bill, S. 8003, 1976 N.Y. Leg., would make New York an Alternative Sentence Commitment state. Amending the criminal procedure law, it would provide that after a sex offender's conviction, if his conduct is determined to be repetitive and compulsive, the court must order him committed for treatment.

the law.<sup>191</sup> If the offender has had a history of felony convictions involving sexual matters, the judge could invoke New York's persistent felony offender statute<sup>192</sup> and impose a longer term of imprisonment. Furthermore, the absence of a psychopathic statute does not leave New York without recourse if it desires to treat the offender. The state could institute insanity commitment proceedings and commit the psychopath to a hospital as mentally ill, if he is in fact so.<sup>193</sup> Accordingly, New York has the ability—though somewhat limited—<sup>194</sup> to deal with sex offenders without the constitutional difficulties encountered by the psychopathic statutes.

## V. CONCLUSION

Three different approaches to the nation's psychopathy laws have been examined. None of the categories of statutes provide complete or constitutionally adequate due process protections for the sex offender. The alternative sentence commitment statute fails either to provide any due process rights at all<sup>195</sup> or only a bare minimum.<sup>196</sup> Moreover, this entire approach to the commitment problem must be seriously questioned by reason of the Supreme Court's ruling in *Specht v. Patterson*.<sup>197</sup> The special proceeding commitment statutes<sup>198</sup> as well as those of Georgia and Tennessee,<sup>199</sup> while providing the greatest potential for adequate due process rights, still fail to recognize that psychopathy commitment is penal in nature and therefore subject to a full range of relevant protections. Even California, the most progressive of states within the special proceeding category, does not as yet distinguish between different degrees of psychopathy.<sup>200</sup> Finally, the New York approach,<sup>201</sup> while not subject to due process challenges, attempts to deal with the problem of sex offenders by avoiding the question of psychopathy altogether.

The law as it affects the psychopath is changing, however, and states are now beginning to recognize the potential problems involved in determination of sex offender status. Still, no adequate safeguards can be fully achieved until the basis and need for these laws are reexamined. It is suggested that psychopathy statutes must be based on an objective and realistic stan-

191. N.Y. Penal Law § 70.00 (McKinney 1975).

192. *Id.* § 70.10.

193. N.Y. Mental Hygiene Law § 70 (McKinney 1971). It should be noted again, however, that not all psychopaths are insane. See note 3 *supra* and accompanying text. See also note 107 *supra*, which indicates that rational distinctions exist between the care and custody of an insane person and that of a psychopath.

194. If a particular psychopath could not be classified as insane, New York would have serious constitutional problems in employing the mentally ill statute against him. See generally B. Schwartz, *Constitutional Law* 193-94 (1974).

195. See notes 39-41 *supra* and accompanying text.

196. See notes 56, 65 *supra* and accompanying text.

197. 386 U.S. 605 (1967). See note 66 *supra* and accompanying text.

198. See note 21 *supra*.

199. See note 22 *supra*.

200. See note 161 *supra* and accompanying text.

201. See notes 191-94 *supra* and accompanying text. But see note 190 *supra*.

dard of dangerousness. A psychopath who is not dangerous to himself or society should not be deprived of liberty because of moralistic or subjective standards which reflect a fear or hatred of sexual deviance.<sup>202</sup>

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202. Thomas Szasz writes: "For such 'dangerousness,' I maintain, is but a form of secular heresy; and, like heresy, it cannot, in the United States, be the ground for depriving a person of any human right, especially of liberty. Perhaps the Supreme Court will yet so rule." *N.Y. Times*, Aug. 4, 1975, at 19, col. 5. See generally Geis & Monahan, Controlling "Dangerous" People, 423 *Annals of the American Academy of Political and Social Science* 142, 151-52 (January 1976).