APPENDIX D

Segregation During Dangerousness

CONFINEMENT and segregation from society of persons who are "insanely" dangerous has long been a commonplace procedure. Similar segregation of persons who, though they do not fall within the conventional significance of insanity are nevertheless "criminally" dangerous to society, is anything but commonplace. An individual who has offended for twenty, thirty, fifty, or even one hundred times despite as many repeated punishments may perhaps not be insane, in any accepted legal connotation of that term, but he seems manifestly as dangerous to the peace, if not to the actual safety, of society as though he were fit material for an "asylum," or "hospital." Yet no legislation now on the statute books makes such segregation possible.

The few provisions looking in that direction require that in addition to demonstrating a tendency toward repeated criminality he must also be in some way mentally deficient. They do not, however, set up a specific distinction between the "mental deficiency" so required and the "insanity" or "idiocy" or other mental abnormalities which would normally, of itself, justify segregation in an institution for the insane or feeble-minded. The Illinois statute, for example, provides for segregation of "sexual psychopathic persons" until cured. It defines a psychopathic person as one who "is suffering from a mental disorder, and not insane or feeble-minded." But wherein the distinction lies, and whether the effect of the statute is in reality broader than the possibility of segregation under the state laws concerning insanity has not been decided. It is a fair guess that the medical profession would suffer considerable perturbation about differentiating a person so "in-
sane" as to be sexually dangerous, hence confinable under the insanity laws; one so "mentally defective" as to be sexually dangerous but confinable only under this statute; and one in fact sexually dangerous, as indicated by repeated offenses, but yet not so mentally defective as to be confinable under either this statute or the insanity laws, hence confinable only under the criminal law and only for a relatively short period. The Minnesota statute, however, might possibly be satisfied by a simple showing of persistence in repetition of sexual offenses.

Though most of these few statutes limit their application to mental defectives who have a tendency to sexual crimes, the Massachusetts and New York statutes cover the field of criminality in general. But the New York statute raises even more doubt than the others as to whether it does in fact cover any persons who could not be confined under the general mental abnormality laws, since it defines a mental defective, somewhat inconsistently, as one "who for his own welfare or the welfare of others or of the community requires supervision, control or care and who is not insane or of unsound mind to such an extent as to require commitment to an institution for the insane."

An earlier Michigan statute to the same effect as the present one was held unconstitutional.\(^{107}\) The opinion leaves one uncertain whether the majority of the court thought there was something inherently unconstitutional in confining a person merely because his freedom would be dangerous to the public, without additional proof of insanity, or condemned the statute only because of certain formal defects. The Minnesota court's decision in respect of that state's statute\(^ {108}\) indicates clearly its belief that segregation as a necessary method of social protection need not depend for its constitutionality upon a finding of what is commonly called insanity.

\(^{107}\) People v. Frontczak, 286 Mich. 51, 281 N. W. 534 (1938).

\(^{108}\) State ex rel. Pearson v. Probate Court, 205 Minn. 545, 287 N. W. 297 (1939), affirmed 309 U. S. 270 (1939).
California. Codes, Gen. Laws and Const. (1939 supp.) Welfare and Institutions Code, sec. 5500 ff. When it is properly alleged to the court that a person charged with crime is a "sexual psychopath" the court must postpone trial or sentence and investigate the truth of the allegation. A sexual psychopath is defined as "any person who is affected, in a form predisposing to the commission of sexual offenses against children, and in a degree constituting him a menace to the health or safety of others, with any of the following conditions: (a) Mental disease or disorder. (b) Psychopathic personality. (c) Marked departures from normal mentality." If the court finds him to be such a person, it may adjourn the criminal proceeding, or suspend the sentence, and commit him to a state hospital for the insane, where he must remain until "he has improved to such an extent that he will not be benefited by further treatment and is no longer a menace to the health or safety of others."

Sec. 7050 ff. A "defective or psychopathic delinquent" is defined as a minor who is mentally defective or psychopathic and who is habitually delinquent, or tends to become so, to the extent that he is a menace to the health, person, or property of himself or others. If such a person is not properly subject for commitment to the state correctional school, or home for feeble-minded, or hospital for the insane, he is to be committed to "a state institution for defective or psychopathic delinquents" "for an indeterminate period" and his attainment of the age of twenty-one years does not terminate his confinement. He must remain in custody until he ceases to be a defective or psychopathic personality.

After his discharge, the court may "proceed with the trial, or impose sentence, as the case may be."

Illinois. Rev. Stats. (1935) ch. 38, sec. 820 ff. (Jones Ann. Stats. 37.665 (1) ff.) "All persons suffering from a mental disorder, and not insane or feeble-minded, which mental disorder has existed for a period of not less than one year, immediately prior to the filing of the petition hereinafter provided for, coupled with criminal propensities to the commission of sex offenses, are hereby declared to be criminal sexual psychopathic persons."

When a person charged with a criminal offense appears to be such a sexual psychopath, he is to be examined in accord with certain
stipulated procedure. If found to be such a criminal psychopathic person, he must be committed to the control of the state department of public safety to be kept safely by it "until such person shall have fully and permanently recovered from such psychopathy."

Massachusetts. 4 Ann. Laws (1933) ch. 123, sec. 113 ff. At any time prior to final disposition of a criminal case in which the defendant if convicted could be punished otherwise than by life imprisonment or death, certain officials may petition that he be committed as a mentally defective delinquent. If he is determined to be so mentally defective, or habitually delinquent, or likely to become so habitually delinquent that he "may become a menace to the public," but is also found not to be so far mentally defective as properly to be committed to an institution for the insane or school for the feeble-minded, he may be committed to a reformatory, or other state institution there to remain until he becomes "mentally and physically capable of taking his place in the community."

Michigan. 2 Comp. Laws (1929) sec. 6991-1 ff. (Mich. Stats. Ann. §28.967 (1) ff.) "Any person who is suffering from a mental disorder and is not insane or feeble-minded, which mental disorder has existed for a period of not less than one year and is coupled with criminal propensities to the commission of sex offenses is hereby declared to be a criminal sexual psychopathic person."

“When any person is charged with a criminal offense and it shall appear that such person is a criminal sexual psychopathic person” the prosecuting attorney may institute proceedings to have him so declared. If he is declared so to be, “then the court shall commit such person to the state hospital commission to be confined in an appropriate state institution under the jurisdiction of either the state hospital commission or the department of corrections until such person shall have fully and permanently recovered from such psychopathy.”

No person who has been so dealt with may thereafter be tried upon the original criminal charge.

Minnesota. 3 Mason’s Stats. (1927) sec. 8992–184a ff. Psychopathic personality “means the existence in any person of such conditions of emotional instability, or impulsiveness of behavior, or lack of
customary standards of good judgment, or failure to appreciate the consequences of his act, or a combination of any such conditions, as to render such person irresponsible for his conduct with respect to sex matters and thereby dangerous to other persons.”

If a person is found to be such a sexual psychopath he is subject to the laws concerning insane persons. A distinction between such a state of mind and insanity in its usual connotation is indicated by another section of the statute:

Sec. 8992-184c. The fact that one is a psychopathic personality is not a defense to any criminal charge “unless such person is in a condition of insanity, idiocy, inbecility, or lunacy within the meaning of the laws relating to crimes and criminal procedure.”

New York. 10B McKinney’s Consol. Laws Ann. (1938) sec. 438 ff. “Male mental defectives over sixteen years of age charged with, arraigned for or convicted of a criminal offense may be committed to the state institution for defective delinquents at Napanoch,” after certain examination and certification. If such persons have been committed to a penal institution, they may be transferred from there to the Napanoch institution. They may be kept at Napanoch until the terms of the penal sentence have expired. They may then be kept in continued confinement there upon examination and certification that they are still “mentally defective” to such extent that they are not “reasonably safe to be at large.”

Inasmuch as the statute does not define “mental defective” in such a way as to include persons who could not be confined in non-penal institutions regardless of their criminality, it seems to be of a different type from those of Illinois and Michigan. In other words, it does not even purport to segregate convicted criminals beyond the term of deserved punishment because they are dangerous, but only

109 Of this statute the Minnesota supreme court (State ex rel. Pearson v. Probate Court, 205 Minn. 545, 287 N. W. 297 (1939), affirmed 309 U. S. 270 (1939)) said, “While the abnormalities of the group placed under the jurisdiction of the probate court by this act differ in form from those which characterize inebriates, idiots, and insane persons, the need for observation and supervision is the same. . . . In the interest of humanity and for the protection of the public, persons so afflicted should be given treatment and confined for that purpose rather than for the purpose of punishment. This we believe to be true even though their mental deficiencies might not be such as to require absolving them from the effects of the criminal statutes.”
to regulate the procedures in applying to a particular group the rule (38A Consol. Laws Ann. sec. 123; 10B ibid. sec. 383) that all mentally defective persons, whether criminal or not, may be segregated.

Ohio. Throckmorton’s Code Ann. (1940) sec. 13451-19. The phrase “mentally defective” is defined to mean one afflicted with a mental disease or disorder, or in a psychiatric condition which renders him likely to be an habitual criminal, and therefore renders a penal sentence for a particular crime an inadequate protection to the community against possible further criminal conduct of such prisoner.

Sec. 13451-20. When it appears to the court that a prisoner either before or during trial or awaiting sentence is “mentally defective,” the court may “enter an order of indefinite commitment” in such available institution as the court considers most suitable, where the prisoner is to remain until the court is satisfied that he is no longer mentally defective.

Oregon. 8 Comp. Laws Ann. (1940) sec. 127-305. If any person convicted of a delinquency or crime should be judged feebleminded by an examining board, he shall be committed to an institution for feeble-minded for an “indeterminate period,” and he shall not at any time be “detained in any place provided for the detention” of criminals.

Pennsylvania. Purdon’s Stats. Ann. (1930) tit. 61, sec. 541-3. “When any person over the age of fifteen years is convicted of crime before any court, or is held as a juvenile delinquent by any juvenile court, or is detained in any prison, industrial school, workhouse, house of correction, penitentiary, or any other penal or correctional institutions under sentence, and such person is, in the opinion of the court or the superintendent, jail physician, or warden of the institution where maintained, so mentally defective that he should be cared for and maintained in the Pennsylvania Institution for Defective Delinquents, such superintendent, physician or warden shall make application. . . .” He shall be examined by two qualified physicians or a psychiatrist and if found to be “mentally defective and has criminal tendencies” the court shall transfer such person to the above institution.
Sec. 541-6. If the person's sentence shall expire before his recovery, "he shall be detained in the said institution until his mental condition has so improved as to warrant his discharge."

Federal. 18 U.S.C.A. sec. 871 ff. These sections authorize the establishment of an institution for convicts who are found to be "insane, afflicted with an incurable or chronic degenerative disease, or so defective mentally or physically (as) to require special medical care and treatment." When the term for which any such person was sentenced has expired, it is the duty of the superintendent of such hospital (sec. 878) to notify "the proper authorities of the State, District or Territory" in which such person resided or from which he was committed that such person is about to be released and that he is "still insane or a menace to the public." What the authorities so notified are to do about it, the statute does not provide.

21 U.S.C.A. sec. 227. The Attorney General may order narcotic addicts transferred to certain institutions for treatment. If any such addict is found to be not cured of his addiction, he is privileged to apply for further treatment. The statute gives no authority for the confinement of an uncured addict beyond the term of his original sentence, except at his own request.

The Swiss Federal Criminal Code of 1937 carries a clear expression of segregation for the purpose of protection against socially harmful persons, in contradistinction to imprisonment for the purpose of punishment. Article 63 provides that as a general rule "the court shall mete out penalties in accordance with the guilt of the offender, considering the motives, previous conduct and the personal situation of the convicted person." But article 42 makes an exception, or an addition, that "Whoever has already served many sentences for felonies or misdemeanors and is inclined to felonies, misdemeanors, disorderly conduct or idleness, and again commits a felony or misdemeanor punishable by confinement, may be placed under detention by the court for an unlimited period. In this instance the detention shall take the place of the sentence imposed." 110

The Spanish law of 1933, Boletín Legislativo, vol. 239, p. 385,

provides that persons guilty of certain activities may be declared (Art. 9 ff.) in a special finding by the courts to be dangerous and subject to measures of social security, and that (Art. 7) after they have served the punitive sentence for the offense committed they may be subject to further preventive detention. Most of the activities enumerated in the law upon which the court's finding of dangerousness may be predicated are not serious crimes, and, in and of themselves, would not subject the offender to more than a short period of punitive imprisonment. They are, e.g., vagrancy, pandering, receiving stolen goods, begging, gambling, habitual public drunkenness, concealment of identity, frequenting criminal resorts.

The Cuban Criminal Code in Book I, title IV, provides traditional punishments for offenses, and in addition, Book IV, sets up "measures of security" by which persons, Art. 48, showing certain predispositions toward crime and, Art. 580, adjudged dangerous by the court may be, Art. 585 ff., ordered to be under supervision or in confinement for a period of from one year to a lifetime, unless the order is subsequently revoked and a finding that the necessity for custody no longer continues.

Again, as in the Spanish law, the court's finding of social dangerousness may be predicated upon activities which would not be severely punishable merely as crimes.