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# CONSTITUTIONAL LAW - VALIDITY OF SEX OFFENDER ACTS

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CONSTITUTIONAL LAW — VALIDITY OF SEX OFFENDER ACTS — The sex offender has become an acute problem. Sociologists, psychiatrists, and lawyers sensing the imperative need for action have devoted much time and thought to the questions involved. Experience has shown that the sex offender is generally a recidivist; he has to be arrested and committed repeatedly for the same type of crimes. The point is graphically illustrated by the case of a man, fifty-nine years of age, arrested recently in Detroit for a sex offense involving a youth. An examination of his record showed that he had been arrested in 1899, when twenty-one years of age, on charges involving a seven year old girl, and had been sent to the Detroit House of Correction to serve ten months sentence. A year later he was again arrested for molesting a young girl, and was sentenced for three and one-half years. After his release in 1903, he was convicted and sentenced to life imprisonment in Marquette prison for attacking a nine year old girl in Highland Park. In 1923 this same man was paroled and thereafter was arrested twice on similar charges. No less shocking is the English case[1] of the man sixty-seven years of age who, having been sentenced in 1898 to forty years imprisonment for rape, was released after serving eleven years of this sentence. In 1929 he was again convicted and imprisoned for six months in the second division of Old Bailey for an assault on a girl of fifteen. Then last autumn he pleaded guilty to two assaults on young girls and received twelve months, the maximum at

[1] Mullins, "How Should the Sexual Offender Be Dealt With?" 2 MEDICO-LEGAL & CRIM. REV. 236 at 244 (1934).

Lambeth Police Court. In both these cases it is evident that when the defendant is released there will be no assurance that some other child will not become his innocent victim.[2] Confinement in a prison for a limited term does not meet the need in these situations. Such offenders should be segregated and kept in custody until it is reasonably safe to permit their return to society.

Though the need is real, it is doubtful whether there is an actual increase in crimes of this type.[3] Any apparent increase may be explained by publicity. The notoriety attached to each such offense has produced a vociferous agitation for new and stringent laws.[4] A number of statutes have been passed.[5] But in the past we have seen that it is one matter to secure passage of social legislation, another matter to secure its enforcement, and quite a different matter to justify such legislation constitutionally.[6]

The present discussion will consider the following points: (1) public safety as a basis for legislation; (2) the inadequacy of conventional methods of treatment of sex offenders; (3) statutory provisions; (4) the constitutionality of the Michigan act.

[2] SCALLEN, THE ALARMING INCREASE OF SEX CRIMES (1937) (Report Compiled by Recorders Court, Detroit). In this report the following statistics are to be found:

| | 1930 | 1931 | 1932 | 1933 | 1934 |
|---|---|---|---|---|---|
| Assault with intent to commit rape | 12 | 7 | 18 | 4 | 10 |
| Rape | 149 | 47 | 81 | 61 | 42 |
| Indecent liberties | 33 | 31 | 51 | 47 | 45 |
| Contributing to delinquency | 61 | 56 | 46 | 40 | 83 |
| Accosting and soliciting (by men) | 69 | 113 | 135 | 82 | 126 |
| Indecent and obscene conduct (men) | 104 | 100 | 138 | 100 | 145 |

The writer has also found by conversation with the manager of a movie theatre in a town of 25,000 that the sex offender is a serious problem in theatres, compelling the management to adopt protective measures—requesting persons changing seats twice to leave, and four known individuals are refused admission.

[3] Strecker, "The Challenge of Sex Offenders," 22 MENTAL HYGIENE 1 (1935): "It is somewhat doubtful, quite doubtful whether there is any actual statistical increase in the number of sex crimes. . . . in fact, being rather interested in the subject, I believe it is true that there have been periods in the history of the world when there was much greater incidence of sex criminalism." See, however, SCALLEN, THE ALARMING INCREASE OF SEX CRIMES (1937) (Report Compiled by Recorders Court, Detroit).

[4] Overholser, "The Challenge of Sex Offenders—Legal and Administrative Problems," 22 MENTAL HYGIENE 20 (1938).

[5] The field is not lacking in statutes: some existing but not fully utilized—Mass. Gen. Laws (1932), c. 123, § 113; 34A N. Y. Consol. Laws (McKinney Supp. 1938), "Mental Deficiency Law," §§ 124-126; others adequate in their provisions but denied effectiveness because of their declared unconstitutionality—Mich. Pub. Acts (1937), No. 196; and still others of such recent passage as to have not yet been put to the test—Ill. Laws (1st Spec. Sess. 1938), p. 28; Rev. Stat. (Supp. 1938), c. 38, § 820 ff.

[6] In re sterilization statutes, see Shartel, "Sterilization of Mental Defectives," 24 MICH. L. REV. 1 (1925).

I.

In general effect, the sex delinquency statutes seek to segregate the offender for an indeterminate period, that is, until cured.[7]

Is such a deprivation of personal liberties beyond the power of the state? Authority and precedent are abundant for the proposition that persons dangerous to the public safety may be deprived of their freedom in the interests of the state. Justice Holmes has aptly stated:[8]

> "We have seen more than once that the public welfare may call upon the best citizens for their lives. It would be strange if it could not call upon those who already sap the strength of the State for these lesser sacrifices, often not felt to be such by those concerned, in order to prevent our being swamped with incompetence."

The power of the public to guard itself against imminent danger has manifested itself in a varied number of situations. First, there is the unquestionable power to commit to institutions insane persons who are dangerous to the peace and safety of the community.[9] Two other common occasions to safeguard the public are met by compulsory vaccination laws[10] and quarantine regulations.[11] Closely related and to be justified on a similar basis is the sterilization of the feeble-minded.[12] In commenting on the validity of the Virginia statute providing for such sterilization, Justice Holmes said,[13]

[7] Glueck, "Mental Examination of Criminals," 8 MENTAL HYGIENE 1 at 15-16 (1924). "In all such cases and in most of the cases of defective offenders, the best of laws can do but little, until society, through its machinery for legal regulation of the social order decides to take the radical step of incarcerating such unstable offenders for a wholly indeterminate period, its actual length to depend not upon the wishes of the trial judge—who has had little opportunity, if any, to study the offender and his development under penal and correctional treatment—but on the judgment of highly trained prison officials who can study the behavior of the offender over a long period of time and who are logically the ones to say when such offenders can reasonably be expected to make good in society."

[8] Buck v. Bell, 274 U. S. 200 at 207, 47 S. Ct. 584 (1927).

[9] State ex rel. Thompson v. Snell, 46 Wash. 327, 87 P. 931 (1907); In re Brown, 39 Wash. 160, 81 P. 552, 1 L. R. A. (N. S.) 540 (1907).

[10] Jacobson v. Massachusetts, 197 U. S. 11 at 29, 25 S. Ct. 358 (1904): "But it is equally true that in every well-ordered society charged with the duty of conserving the safety of its members the rights of the individual in respect of his liberty may at times, under pressure of great dangers, be subjected to such restraint, to be enforced by reasonable regulations, as the safety of the general public may demand." See also Zucht v. King, 260 U. S. 174, 43 S. Ct. 24 (1922).

[11] Compagnie Francaise de Navigation a Vapeur v. Louisiana State Board of Health, 186 U. S. 380, 22 S. Ct. 811 (1900).

[12] Buck v. Bell, 274 U. S. 200, 47 S. Ct. 584 (1927); Smith v. Wayne Probate Judge, 231 Mich. 409, 204 N. W. 140 (1925); Shartel, "Sterilization of Mental Defectives," 24 MICH. L. REV. 1 (1925).

[13] Buck v. Bell, 274 U. S. 200 at 207, 47 S. Ct. 584 (1927).

"The principle that sustains compulsory vaccination is broad enough to cover cutting the Fallopian tubes."

In view of the sex deviate's great potential harm to society, need we look further in order to justify his segregation and confinement? To paraphrase the language of Justice Holmes, it would seem that the principles which sustain compulsory vaccination, cutting the Fallopian tubes, and segregation of the insane, are broad enough to cover the confinement of sex deviates. It is not necessary to deal with them as criminals or to resort to a criminal basis for their segregation.[14]

The prerequisite of criminal conviction could be entirely eliminated and special proceedings substituted, providing in effect for the indeterminate confinement of persons with marked sex deviations dangerous to the public. These proceedings should be initiated upon the complaint of designated parties and heard by a specially trained board; and they should guarantee to the respondent notice and hearing. Although no legislation has gone so far, this would seem justifiable constitutionally.[15] All the statutes so far passed provide for commitment of persons convicted of, or at least shown guilty of, sex offenses. However, if a criminal conviction (proof of an offense) is to be retained as a prerequisite of commitment, it should be realized that this is done not for constitutional, but for practical, reasons. Proof of commission of a sex offense is probably the simplest and clearest basis for commitment.[16]

2.

Common methods of dealing with the criminal and the insane are not adequate for dealing with sex deviates. Persons convicted of sex crimes are sentenced to prison for a term of years fixed by our penal laws. In many cases these terms are ridiculously short in relation to the gravity of the offense, and in every case the judge imposing the sentence is hampered by a maximum upper limit beyond which confinement cannot be continued. After having served his sentence, the prisoner is released into society irrespective of his mental or physical condition, perhaps a greater menace to society than before his incarceration. As illustrated by the two case histories found above, the sex offender has a definite tendency towards recidivism. In many cases his first offense is minor in character; it carries a small penalty, but

[14] Therefore such acts as the Michigan act, Mich. Pub. Acts (1937), No. 196, could be removed from the criminal code with little or no objection. See discussion of this act in the latter part of this comment.

[15] The writer understands that a national committee of lawyers, psychiatrists and sociologists is now working upon a proposal along these lines.

[16] In 1931, the New York legislature amended the Mental Hygiene Law making conviction a prerequisite to commitment. See note 32, infra.

probably no provision for treatment. It cannot be over emphasized that at this point treatment could be most effective. Effective treatment requires segregation for an indeterminate period,[17] such as is extensively used in other fields.[18] No one today would advocate the confinement of the insane for a term of years. The indeterminate segregation of the insane is based upon the fact that they are a serious menace to society when allowed to remain at large, and must be confined until it is reasonably certain that they are cured. Are not sex offenders also afflicted with a mental disorder calling for the same treatment?

In the past the law has placed too much emphasis on the criminal act[19] and brushed aside any understanding of the personality back of the act. With the exception of insanity, mental disorders are not recognized. To be sure, new psychiatric classifications cannot furnish a cure-all for our social problems. There are legal as well as psychiatric problems.[20] But as psychiatric knowledge increases it can aid in meeting behavior problems. Today psychiatrists recognize a large intermediate[21] group of psychopathic personalities, persons neither strictly sane nor insane by conventional standards. In this group fall a large share of our criminals. Particularly, most of those convicted of sex crimes must be regarded not as insane, but as psychopathic personalities. The law has so far taken little account of the peculiar needs of this intermediate group.[22] Unless a person is insane, he is punishable criminally for misbehavior. As one writer has recently said:[23]

> "The laws of the several states are in general agreement in providing for the segregation in special institutions of those offenders

[17] Long, "Punishment v. Treatment in the Cure of the Criminal," 2 JOHN MARSHALL L. Q. 560 (1937).

[18] Insanity proceedings for the confinement of the insane are to be found in every state. See Mich. Comp. Laws (1929), §§ 6888, 17241 [amended by Pub. Acts (1931), No. 317].

[19] McCarty, "Mental Defectives and the Criminal Law," 14 IOWA L. REV. 401 (1929); Glueck, "Mental Examination of Criminals," 8 MENTAL HYGIENE 1 (1924); Glueck, "Psychiatric Examination of Persons Accused of Crime," 36 YALE L. J. 632 (1926); Menninger, "Psychiatry and the Prisoner," 44 MEDICO-LEGAL J. 24 (1927).

[20] Wertham, "Psychiatry and the Prevention of Sex Crimes," 28 J. CRIM. L. 847 (1938); Glueck, "A Tentative Program of Cooperation Between Psychiatrists and Lawyers," 9 MENTAL HYGIENE 686 (1925); Bahr, "Psychiatry in Relation to Crime," 42 MEDICO-LEGAL J. 149 (1925).

[21] Papurt, "The Classification of Defective Delinquents," 26 J. CRIM. L. 421 (1935); Meagher, "The Psychopathic Criminal," 42 MEDICO-LEGAL J. 33 (1935); also see Robinson, "Institutions for Defective Delinquents," 24 J. CRIM. L. 352 (1933).

[22] "Mentally Defective Criminals (A Gap in the Law)," 78 SOL. J. 396 (1934).

[23] Overholser, "The Challenge of Sex Offenders—Legal and Administrative Problems," 22 MENTAL HYGIENE 20 at 23 (1938).

denominated as 'insane,' and two states—namely New York and Massachusetts—have special provisions for the truly indeterminate commitment of the so-called defective delinquent—that is, the offender who is definitely a mental defective. No state in this country, however, and only one or two European countries have special provisions relating to the offender suffering from what is known as 'psychopathic personality.' It is this group that constitutes a considerable portion of the so called 'sex offenders' and which not improbably makes up a fair percentage of the total criminal population."

The legislation to be discussed under the next head is a definite recognition of the problems raised by one type of psychopathic personality; it recognizes that the sex deviate requires indeterminate segregation for his own good and the public safety.

3.

Massachusetts in 1911[24] was the first to recognize defective delinquents as a separate and distinct class. A commitment procedure was outlined and special departments were authorized for the class of offenders newly defined. Following the redrafting of the act in 1921, whereby a prior conviction clause was inserted, the law was put into actual operation by the establishment of the present department for men. Although many amendments have been engrafted on the original statute, the tenor of that act is essentially unchanged. Today, after twenty-seven years' experience, the law allows commitment as a defective delinquent on first offense if the court is of the opinion that the individual has a tendency to recidivism of a serious type.[25] The term of commitment is indefinite,[26] and the procedure is carefully outlined by the law. Authority to initiate proceedings is given specifically to

[24] See generally, on subject of the Massachusetts and New York statutes, Robinson, "Institutions for Defective Delinquents," 24 J. CRIM. L. 352 (1933); Glueck, "Psychiatric Examination of Persons Accused of Crime," 36 YALE L. J. 632 (1926).

The original law in Massachusetts ran in part as follows: "If in any case where a court might by way of final disposition commit an offender to the state prison, the reformatory for women, or any jail or house of correction, or to the Massachusetts reformatory, the state farm, or to the industrial school for boys, the industrial school for girls, the Lyman school, any truant school, or the custody of the state board of charity, for an offense not punishable by death or imprisonment for life, it shall appear that the offender has committed the offense with which he is charged, is mentally defective, and is not proper subject for the schools for the feeble-minded, or for commitment as an insane person, the court may commit such offender to a department for defective delinquents, hereinafter established, according to the age and sex of the defendant as hereinafter provided." Mass. Acts and Resolves (1911), c. 595, § 1.

[25] Mass. Gen. Laws (1932), c. 123, § 113.

[26] Ibid., § 117.

several classes of persons, namely, district attorneys, probation officers, officers of the department of correction, officers of the department of public welfare, and officers of the department of mental diseases, any one of whom may initiate the petition. The hearing is conducted by the court, and the only limitation placed on the judge is that "no person shall be committed . . . unless there has been filed with the judge a certificate by two physicians qualified as provided in section fifty-three, that such person is mentally defective. . . ."[27] Although the Massachusetts act contains no definition of the term, "mental defective," the actual policy pursued has attached a fixed meaning to the phrase. One of the decisive factors in determining mental status has been the use of the Binet-Simon test. The examiners have accepted an "intelligence quotient of .75—i.e., a mental age of 12 years—as the dividing line between normal and subnormal."[28]

The New York statute[29] in its essentials is not different from the Massachusetts act. When it opened the Institution for Defective Delinquents at Napanoch in 1921, New York made "the first attempt in this country to segregate completely—i.e., in a separate institution of their own—prisoners who were not insane and yet could not be classified as mentally normal."[30] The offender eligible to admission to this institution as a defective delinquent[31] is "any mental defective over 16 years of age convicted of a criminal offense." Formerly the act provided for commitment "before or after conviction," but apparently this provision was subject to much abuse, especially when feeble-minded persons were brought into court on trumped-up charges for the purpose of relieving their relatives and friends of their support.[32] As a

[27] Ibid., § 115.

[28] Robinson, "Institutions for Defective Delinquents," 24 J. CRIM. L. 352 at 371 (1933).

[29] 34A N. Y. Consol. Laws (McKinney Supp. 1938), "Mental Deficiency Law," §§ 124-126.

[30] Robinson, "Institutions for Defective Delinquents," 24 J. CRIM. L. 352 at 353 (1933).

[31] People ex rel. Beldstein v. Thayer, 121 Misc. 745 at 746, 202 N. Y. S. 633 (1923), stating that mental defectiveness, within the mental deficiency law, "is a condition of mind which is a departure from the general normal, but which is not a diseased condition, or insanity." For other cases under this law, see People ex rel. Stolofsky v. Supt. of State Institution for Male Defectives at Napanoch, 259 N. Y. 115, 181 N. E. 68 (1932); People ex rel. Romano v. Thayer, 229 App. Div. 687 at 689, 242 N. Y. S. 289 (1930), where it was said, "one who is directly committed to [an] institution as a mental defective delinquent is committed for an indefinite term. . . ." In Parker v. Bernstein, 125 Misc. 92, 210 N. Y. S. 594 (1925), it was held that an alleged mental defective is entitled to notice and hearing.

[32] Robinson, "Institutions for Defective Delinquents," 24 J. Crim. L. 352 at 354, note 10 (1933), citing Thayer, "Institutions for Defective Delinquents," PENAL AFFAIRS 6 (May, 1930).

result, in 1931 the legislature made prior conviction a prerequisite for confinement. New York, unlike Massachusetts, has attempted to define a mental defective. The statute provides that the examiners' report must show that the alleged mental defect of the person examined is of such a nature that, for his own welfare and the welfare of others, he should be placed in the institution for defective delinquents.[33] This type of definition is desirable since it does not require an analysis of intelligence quotients and provides for the segregation of the abnormal as well as the subnormal, i.e., the intelligent psychopath as well as the mentally deficient psychopath.[34] Although neither the mode of initiating the proceedings nor the length of the commitment are specifically stated in the statute, the practice is much the same as is found in the Massachusetts law.

In 1937 Michigan passed what has since been called a "sex offender act."[35] The act provides that in case any person who has been convicted of or who has pleaded guilty to any one of a number of stated sex crimes, although not insane, appears to be a sex degenerate or sex pervert, or appears to be suffering from a mental disorder with marked sex deviation and with tendencies dangerous to the public safety, the court may before pronouncing sentence, but after conviction, institute a thorough examination and investigation of such person, and shall call in two or more reputable physicians including one psychiatrist, and if it is proved to the satisfaction of the judge and jury that such person is a psychopathic personality, the court may then commit such a person to a suitable state hospital for an indeterminate period. The act further safeguards the person by entitling him to a jury trial unless waived. In the first case[36] to reach the Michigan Supreme Court under

[33] 34A N. Y. Consol. Laws (McKinney, 1927), "Mental Deficiency Law," § 125. New York has defined a mental defective as follows: " 'Mental defective' means any person afflicted with mental defectiveness from birth or from an early age to such an extent that he is incapable of managing himself and his affairs, 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 his commitment to an institution for the insane." 34A N. Y. Consol. Laws (McKinney, 1927), "Mental Deficiency Law," § 2.

[34] In New Jersey the classification of criminal offenders has gone further than in any other state. The term, "psychopathic delinquent" as used in the New Jersey statute is undefined, making no direct reference to intelligence level; it thus allows the institution to handle not only offenders of the "sub-normal mentality coupled with mental instability," and "intelligent offenders of unstable personality," but a third group, by far the most important, "the psychopathic offenders of average or above average intelligence." See Robinson, "Institutions for Defective Delinquents," 24 J. CRIM. L. 352 at 372 (1933).

[35] Mich. Pub. Acts (1937), No. 196.

[36] People v. Frontczak, 286 Mich. 51, 281 N. W. 534 (1938).

this act, the statute was declared invalid for reasons which are to be discussed under the next head.

In July 1938, Illinois enacted a bill [87] entitled "An act to provide for the commitment and detention of criminal sexual psychopathic persons." The act is clearly and concisely set forth under several paragraph headings, namely, definition of criminal sexual psychopathic persons, jurisdiction, petition, examination by a psychiatrist, hearing and commitment, and discharge. The fundamental distinction between the Michigan and Illinois acts respectively is that in Illinois, "before trial on the criminal offense a hearing on the petition shall be held. . . . If the jury by their verdict determine that said person is a criminal psychopathic person, then the court shall commit such person to the Department of Public Welfare." While the individual is so segregated, the criminal charge is held in abeyance. Upon a verdict of a jury that such a person has recovered, the court shall order such person to be returned to the custody of the sheriff of the county from which he was committed to stand trial for the criminal offense charged against such person.

In summary we can say of the above statutes:

(a) All make provision for a special (intermediate) group, suitable for indeterminate segregation but not punishment.

(b) All except Illinois [88] make conviction of an offense a prerequisite to proceedings.

(c) All attempt to liken the proceedings for segregation to inquests for committing the insane rather than to criminal trial.

(d) All make detailed provisions for notice and hearing, expert testimony, and periodic re-examination in reference to discharge.

4.

In *People v. Frontczak* [89] the Michigan statute was held invalid by a divided court—five justices to three. However, there seems to be nothing in this decision which vitiates the argument above made in favor of the validity of legislation to provide for the indefinite confinement of sex deviates. The majority opinion by Judge Wiest apparently takes this possibility for granted, and the minority opinion by Judge Butzel expressly asserts the validity of such legislation. The majority of the court held the act invalid upon the premise that the act provided for a criminal proceeding and therefore violated article

[87] Ill. Laws (1st Spec. Sess. 1938), p. 28; Rev. Stat. (Supp. 1938), c. 38, § 820 ff.

[88] The noticeable absence of any prerequisite criminal conviction in the Illinois act will perhaps sufficiently satisfy the Illinois Supreme Court that this is not strictly a criminal proceeding, and thus avoid the difficulty encountered by the Michigan act.

[89] 286 Mich. 51, 281 N. W. 534 (1938).

2, section 19, of the Constitution of Michigan of 1908, in not observing certain rights guaranteed by said article 2 to the accused in a criminal prosecution.[40] Of course, if this premise be granted, then all of the rest of what the majority opinion says follows: right of the accused to a trial by jury of the vicinage, double jeopardy, etc. And the same must be said of the argument made by one author relative to proposed legislation in Illinois:[41]

> "If called upon to brief the subject, the proposed legislation would appear to be a denial of the equal protection of the laws, to be retroactive, a denial of due process of law, an impairment of the right to trial by jury, contrary to the constitutional guarantee against cruel and unusual punishment, violating the constitutional provisions that all penalties shall be proportional to the nature of the offense and that the accused shall have a right to be informed of the nature of the charge against him, to be confronted by the witnesses and tried in the county or district where the offense is alleged to have been committed."

On what grounds did the court treat the Michigan statute as providing for a criminal proceeding? First, because it was contained in the criminal procedure code; and second, apparently, because the indefinite confinement was regarded as an added penalty for crime. Both grounds could probably be eliminated if the statute were redrafted. The provision could be removed from the criminal code,[42] and commitment could be authorized as in Illinois, "before trial on the criminal offense."

[40] "In every criminal prosecution, the accused shall have the right to a speedy and public trial by an impartial jury, which may consist of less than twelve men in all courts not of record; to be informed of the nature of the accusation; to be confronted with the witnesses against him, to have compulsory process for obtaining witnesses in his favor; to have the assistance of counsel for his defense; and in courts of record, when the trial court shall so order, to have such reasonable assistance as may be necessary to perfect and prosecute an appeal." Mich. Const. (1908), art. 2, § 19.

[41] Stewart, "Concerning Proposed Legislation for the Commitment of Sex Offenders," 3 JOHN MARSHALL L. Q. 407 at 420 (1938). Note that the act referred to was passed in July, 1938. Ill. Laws (1st Spec. Sess. 1938), p. 28; Rev. Stat. (Supp. 1938), c. 38, § 820 ff. See also Ill. Laws (1st Spec. Sess. 1938), p. 63; Rev. Stat. (Supp. 1938), c. 108, § 112, which provides for examination of criminals now in penal institutions before their release to determine if they are sexual psychopathic persons. If they are found to be sexual psychopaths, they may be committed to an institution until they have recovered.

[42] By way of comparison, the New York and Massachusetts acts referred to above are enlightening. In both these states the proceedings are regarded, not as penal, but as analogous to insanity inquests. Although in New York the Department of Correction now has jurisdiction, the institution was originally managed by a group affiliated with mental hygiene rather than with penology. This fact indicates that the commitment was regarded from a viewpoint more like that governing a commitment for insanity than that governing trial for crime.

That sex offender legislation is in the nature of a criminal proceeding is open to serious doubts. This is apparent when it is noted that the prisoner is not being subjected to a trial for a statutory crime, but that the proceedings are in the nature of an inquest. Justice Butzel, in the minority opinion, expressly adopts this view, which seems to the writer supported by the better reasons. He argues that the statute is similar in form and intent to statutes authorizing commitment in other types of cases:

> "The statute recognizes this fact and seeks only to protect and possibly to cure these unfortunate and dangerous persons. It is analogous to those statutes providing for the commitment of the insane, feebleminded, dipsomaniacs, drug addicts, and persons infected with communicable diseases. . . . Such proceedings do not involve trials for crime, but are merely inquests." [43]

The mere inclusion of the provision in the criminal procedure code cannot be conclusive, nor can the fact that it authorizes certain findings to be made after conviction. If the sex deviate, then, is not to be punished for crime, all the foregoing objections lose their force.

But even assuming, as the majority did, that this amendment to the criminal code of procedure authorizes proceedings penal in nature, certainly many proceedings are to be found in the criminal code which are not regarded as within the constitutional guarantees of jury trial, etc.

One of the most common provisions to be found in the criminal code to which the constitutional guarantees have never been held to apply is the inquiry by the court into the conditions and circumstances of the accused on which it bases its sentence.[44] To leave this inquiry to the court instead of the jury is no invasion of the accused's right of jury trial. Closely analogous to the power of the court to make inquiry prior to sentence is the power of the court under the habitual offender acts to inquire into the number of offenses already committed and to mete out special punishment to habitual offenders.[45] This hearing and determination is not subject to the constitutional guarantees of jury trial.

The Michigan code of criminal procedure provides for a sanity inquest as to persons accused of a felony who appear to be insane or who are acquitted upon trial on the ground of insanity; this pro-

[43] People v. Frontczak, 286 Mich. 51 at 61, 281 N. W. 534 (1938).

[44] Skelton v. State, 149 Ind. 641, 49 N. E. 901 (1897).

[45] People v. Palm, 245 Mich. 396, 223 N. W. 67 (1928); Levell v. Simpson, 142 Kan. 892, 52 P. (2d) 372 (1935), appeal dismissed 297 U. S. 695, 56 S. Ct. 503 (1936), rehearing denied 297 U. S. 728, 56 S. Ct. 592 (1936), noted in 35 MICH. L. REV. 143 (1936).

vision has never been held subject to the constitutional guarantee of jury trial.[46]

Along the same line, provisions in the criminal code for the revocation of drivers' licenses[47] have never been held to require trial by jury. A recent case[48] under the Michigan drivers license statute[49] has said on this point:

> "In the first place, the revocation of an operator's license under section 18 is not a criminal penalty. It is not a part of the sentence of the court and it is not a punishment for the offense. Rather, the conviction of certain offenses is declared to show—conclusively to be sure, unless called into question under section 20—the unfitness of the offender to operate a motor vehicle on the public highways and streets."

From the foregoing it is apparent that the matter and purpose of the inquiry, not the mere location of the enactment in the statute books, should be the controlling factor. Merely because a hearing on the sex delinquent's fitness for return to society is provided for by a section of the criminal procedure code, it cannot be said that the constitutional guarantees of jury trial, etc., are necessarily applicable to this hearing.

But if this is not a criminal proceeding, are the majority correct when they say that the enactment is no amendment or addition to the code of criminal procedure, and a mere estray and nullity? The only constitutional question raised is whether this act violates article 5, section 21 of the Michigan Constitution, which provides,

> "No law shall embrace more than one object, which shall be expressed in its title."

The act involved was adopted as an amendment to the code of criminal procedure, and the issue is then whether this act can be said to be germane to the title of the code. The general rule is set out in the case of *Attorney General v. Hillyer*,[50] as follows,

[46] Mich. Comp. Laws (1929), § 17241, amended by Pub. Acts (1931), No. 317. This provision is part of the code of criminal procedure and it is submitted that if the "Sex Offender Act" is misplaced, then for the same reason this section is also in the wrong location.

[47] In re the constitutionality of such statutes, see Nulter v. State Road Comm., (W. Va. 1937) 193 S. E. 549, 194 S. E. 270.

[48] In re Probasco, 269 Mich. 453 at 457, 257 N. W. 861 (1934).

[49] Mich. Pub. Acts (1931), No. 91, as amended by Pub. Acts (1933), No. 196.

[50] 221 Mich. 537 at 539, 191 N. W. 827 (1923), quoted in People v. Palm, 245 Mich. 396 at 402, 223 N. W. 67 (1928). See also People v. Gogak, 205 Mich. 260 at 266, 171 N. W. 428 (1919), quoting Kurtz v. People, 33 Mich. 279 at 282 (1876): "This provision of the Constitution was intended to prevent legislators from being entrapped into careless passage of bills on matters foreign to the ostensible purpose of the statute as entitled; but it was not designed to require the body of

"It is sufficient, as this court said in *Loomis v. Rogers*[51] . . . 'If provisions in the body of the act not directly mentioned in the title are germane, auxiliary or incidental to the general purpose.'"

The mere fact this is not a criminal proceeding does not necessarily make this act an estray and a nullity. Many other provisions of the criminal code relate to matters not involving the trial of a person for crime, yet undoubtedly they are germane to the title. Judge Butzel refutes the majority's reasoning when he says,

"Nevertheless, the statute is properly an amendment to the code of criminal procedure. Certain other chapters of the criminal code deal with subjects properly embraced therein though not relating to the trial of any person for any particular crime. Chapter 11 deals with probation, chapter 12 with proceedings to prevent crime, and chapter 13 with proceedings for the discovery of crime. The criminal code attempts to assemble proceedings affecting or relating to crime and criminals and the act in question contains provisions which are germane, auxiliary and incidental to that general purpose. It therefore constitutes a proper amendment to the code and is embraced under the title thereof."[52]

In short, it seems that the Supreme Court of Michigan could have properly sustained the sex offender legislation despite its inclusion in the Code of Criminal Procedure. But entirely aside from this question, there should be no doubt that an independent statute authorizing commitment of sex deviates until they are suitable for return to society would be held constitutional.[53] *William K. Jackson*

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the act to be a mere repetition of the title, nor to preclude the introduction of such means as are reasonably adapted to secure the object indicated by the title."

[51] 197 Mich. 265 at 271, 163 N. W. 1018 (1917).

[52] People v. Frontczak, 286 Mich. 51 at 60, 281 N. W. 534 (1938).

[53] Mich. Comp. Laws (1929), § 6888, provides for sanity inquests in the probate court for the commitment of persons alleged to be insane, feeble-minded or epileptic. Such section might well provide that on the petition of the sheriff, or some designated person, the court would hold an inquest in the same manner and determine whether such a person was suffering from a mental disease with marked sex deviations and with tendencies dangerous to the public, and if found to be so the court could order him committed to a suitable state hospital.