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Constitutional Law-Equal Protection and Due Process-Missouri's Criminal Sexual Psychopath Statute

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like the Kiwanis and Sertoma Club probably would not qualify for the exemption, while clubs such as the Moose, Masons and Shriners would qualify. The former organizations do not have rigorous admissions requirements and procedures as do the latter. The former are service and professional organizations which accept anyone who shares their common interest, while the latter are highly private clubs which are selective as to admission. Should the private club and establishment exemption not apply to § 1981, then it is questionable whether the constitutional right of privacy would protect them. The right of privacy has been limited to highly personal situations, and it may not constitute a limitation on § 1981 except in such situations.

The decision in *Runyon* indicates that the extension of the 1866 Civil Rights Act to private discrimination, as begun in *Jones v. Alfred H. Mayer Co.*, will be continued. However, the application of § 1981 to private discrimination is not without limits. It is possible that the private club and establishment exemption contained in the 1964 Civil Rights Act will bar the application of § 1981 to private clubs. Even without the statutory exemption, the countervailing constitutional interests of privacy and freedom of association remain. The courts will be faced with the task of balancing the state's interest in prohibiting discrimination against these constitutional rights. In highly personal areas the constitutional interests will prevail. In more public areas, the scales may tip in favor of § 1981. However, it will remain for future courts to determine the precise line to be drawn.

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CONSTITUTIONAL LAW—EQUAL PROTECTION AND DUE PROCESS—MISSOURI'S CRIMINAL SEXUAL PSYCHOPATH STATUTE

State v. James[1]

Leroy James was charged with molesting a minor.[2] The prosecution then sought to commit him to a state mental hospital pursuant to Missouri's Criminal Sexual Psychopath Act.[3] A jury found James to be a criminal sexual psychopath.[4] After this finding the trial judge exercised his statu-

1. 534 S.W.2d 41 (Mo. 1976).
2. Brief for Respondent at 3.
3. §§ 202.700-.770, RSMo 1969. The accused must be charged with a criminal offense before he can be committed under the statute. § 202.710, RSMo 1969. However, it need not be a sexual offense. State *ex rel.* Sweezer v. Green, 360 Mo. 1249, 1255, 232 S.W.2d 897, 901 (En Banc 1950).
4. Section 202.700, RSMo 1969, provides:
All persons suffering from a mental disorder and not insane or feeble-

tory discretion,[5] electing to commit James rather than ordering him to be tried on the original criminal charge. Five years later James petitioned for release under section 202.740, RSMo 1969.[6] After a hearing the petition was denied, and James appealed to the Missouri Supreme Court, contending that the sexual psychopath statute deprived him of equal protection of the law. The supreme court affirmed, holding that the statute did not violate equal protection.[7]

Sexual psychopath statutes were passed by many states in the 1930's and 1940's in response to a highly publicized apparent increase in sex crimes and the generally recognized ineffectiveness of criminal punishment as a deterrent.[8] By committing dangerous sex offenders, legislatures hoped to achieve both the protection of the community and the rehabilitation of the offenders. Early cases upheld the constitutionality of such statutes from a variety of attacks, often by simply labeling the commitment procedure as "civil" and thereby holding inapplicable the protections afforded the criminally accused.[9]

The state's power to commit dangerous sex offenders is grounded in two separate legal bases: *parens patriae* and preservation of public order and safety. Under the former, sex offenders are confined for the purpose of receiving care and treatment; under the latter they are confined for the purpose of protecting the community. Missouri's sexual psychopath statute reflects both of these purposes.[10]

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minded, which mental disorder has existed for a period of not less than one year immediately prior to the filing of the petition provided for in section 202.710 coupled with criminal propensities to the commission of sex offenses, and who may be considered dangerous to others, are hereby declared to be "criminal sexual psychopaths".

5. Section 202.730, RSMo 1969, provides in part:

If the person is found by the court or the jury to be a criminal sexual psychopath, the court may commit him to State Hospital No. 1 at Fulton where he shall be detained and treated until released . . . or may order such person to be tried upon the criminal charges against him, as the interests of substantial justice may require.

6. Section 202.740, RSMo 1969, provides that the criminal sexual psychopath may file a petition showing that he "has improved to the extent that his release will not be incompatible with the welfare of society," whereupon a hearing like the original commitment hearing is held. The court then either releases the defendant on probationary status or returns him to the state hospital.

7. 534 S.W.2d at 43.

8. Annot., 34 A.L.R.3d 652 (1970), 24 A.L.R.2d 350 (1952).

9. *E.g.*, State *ex rel.* Sweezer v. Green, 360 Mo. 1249, 232 S.W.2d 897 (En Banc 1950) (no violation of ex post facto, self-incrimination, or due process); *Ex parte* Keddy, 105 Cal. App. 2d 215, 233 P.2d 159 (1951) (no violation of equal protection, due process, or double jeopardy); People v. Chapman, 301 Mich. 584, 4 N.W.2d 18 (1942) (no violation of equal protection, due process, ex post facto, self-incrimination, or cruel and unusual punishment). Language in *Sweezer* that the self-incrimination privilege applies only in criminal cases has been overruled. State *ex rel.* North v. Kirtley, 327 S.W.2d 166, 168 (Mo. En Banc 1959). *But cf.* State v. Crabtree, 458 S.W.2d 292, 296 (Mo. 1970).

10. State v. McDaniels, 307 S.W.2d 42, 44 (K.C. Mo. App. 1957).

If sex offenders are committed for the purpose of receiving treatment, they arguably have the right to be treated. Missouri's statute, in fact, contains language that can be fairly construed to guarantee this right.[11] Yet the hard fact remains that for many sex offenders, no known treatment is available.[12] While treatable offenders, assuming they are in fact treated, have at least some chance of being rehabilitated and released, the nontreatable offenders are by definition sentenced to lifetime commitment. As one court has observed, ". . . [the] promise of treatment has served only to bring an illusion of benevolence to what is essentially a warehousing operation for social misfits."[13]

Missouri's sexual psychopath statute, however, does not require a finding of treatability as a condition precedent to commitment. This may raise constitutional problems, for the United States Supreme Court has held, in the context of criminal defendants committed as mentally incompetent to stand trial, that due process requires that the nature and duration of commitment bear some reasonable relation to the purpose for which the individual is committed.[14] Insofar as the purpose of commitment of sexual psychopaths is treatment, and treatment is not provided, the nature of the commitment bears no reasonable relation to its purpose.[15] Thus, if nontreatable sex offenders are to be constitutionally committed, it must be solely on the basis of dangerousness.[16] Whether persons committed on grounds of dangerousness nevertheless enjoy the right to treatment is a question that remains unresolved.[17]

But, even assuming that it is consistent with due process to commit dangerous, nontreatable sex offenders, Missouri's statute remains suspect inasmuch as it requires only a finding that the accused "*may be* considered dangerous to others."[18] Psychiatrists' predictions of dangerousness are notoriously unreliable,[19] and it is not uncommon for nonviolent sex of-

11. Section 202.730, RSMo 1969 provides that sexual psychopaths "shall be detained and *treated* until released" and that the hospital shall periodically examine those committed in order to determine "the progress of treatment" (emphasis added).

12. *See* Burick, *An Analysis of the Illinois Sexually Dangerous Persons Act*, 59 J. CRIM. L.C. & P.S. 254, 256 (1968); Tappan, *Some Myths About the Sex Offenders*, 19 FED. PROB. 7, 11 (June 1955).

13. Cross v. Harris, 418 F.2d 1095, 1107 (D.C. Cir. 1969).

14. Jackson v. Indiana, 406 U.S. 715, 738 (1972).

15. Donaldson v. O'Connor, 493 F.2d 507, 521 (5th Cir. 1974), *vacated on other grounds*, 95 S. Ct. 2486 (1975).

16. Davy v. Sullivan, 354 F. Supp. 1320, 1329 (M.D. Ala. 1973).

17. *See* O'Connor v. Donaldson, 95 S. Ct. 2486, 2491 n.6 (1975). The court of appeals had ruled that regardless of the basis for commitment, it must be justified by a *quid pro quo* in the form of treatment. 493 F.2d at 522. Chief Justice Burger, however, disapproved of the *quid pro quo* theory in his concurring opinion. 95 S. Ct. at 2497.

18. *See* statute quoted note 4 *supra* (emphasis added).

19. *See* Laves, *The Prediction of "Dangerousness" as a Criterion for Involuntary Civil Commitment: Constitutional Considerations*, 3 J. PSYCHIATRY & L. 291, 295 (1975); Tappan, *supra* note 11, at 9-10.

fenders, such as exhibitionists and "peepers," to be committed as sexual psychopaths.[20] Surely, then, due process requires a more certain prediction of dangerousness than is provided for in the Missouri statute.[21]

Further, if the state is permitted to confine dangerous people, may it commit dangerous sex offenders while allowing other dangerous people to remain free? Equal protection requires, at the very least, a rational basis for statutory classifications that treat similarly situated people differently.[22] The sexual psychopath classification is clearly underinclusive in terms of dangerousness, and there seems to be no readily apparent rational basis for treating dangerous sex offenders differently than other dangerous people. Despite these difficulties the United States Supreme Court in 1940 held that the sexual psychopath classification did not violate equal protection, reasoning that ". . . the legislature is free to recognize degrees of harm, and it may confine its restrictions to those classes of cases where the need is deemed to be clearest."[23]

A closely related equal protection issue arises in the procedural context. Recent Supreme Court decisions have indicated that there is no rational basis for depriving one class of involuntarily committed persons of the same procedural protections that are granted to another class of involuntarily committed persons. More specifically, equal protection requires that the procedural protections guaranteed to those committed under general civil commitment statutes also be provided in commitments of prisoners nearing the end of their sentences,[24] criminal defendants mentally incompetent to stand trial,[25] and sexual psychopaths.[26] In Missouri, involuntary civil commitment procedures[27] are substantially similar to sex-

20. One study indicates that over fifty percent of those committed as "sexually dangerous persons" in Illinois are in fact nonviolent. Burick, *supra* note 11, at 255 n.15.

21. In the civil commitment context, *see* Lynch v. Baxley, 386 F. Supp. 378, 390 (M.D. Ala. 1974) (state must prove a real and and present threat of substantial harm); Lessard v. Schmidt, 349 F. Supp. 1078, 1093 (E.D. Wis. 1972), *vacated on other grounds*, 414 U.S. 473 (1974) (state must prove an extreme likelihood of immediate harm).

22. McGinnis v. Royster, 410 U.S. 263, 270 (1973). In other words, any distinctions drawn must have some relevance to the purpose for which the classification is made. Baxstrom v. Herold, 383 U.S. 107, 111 (1966). Arguably, however, the stricter "compelling state interest" standard should apply to sexual psychopath classifications. *See* Note, *Mental Illness: A Suspect Classification?*, 83 YALE L.J. 1237 (1974).

23. Minnesota *ex rel.* Pearson v. Probate Court, 309 U.S. 270, 275 (1940).

24. Baxstrom v. Herold, 383 U.S. 107, 110-15 (1966).

25. Jackson v. Indiana, 406 U.S. 715, 723-31 (1972).

26. Humphrey v. Cady, 405 U.S. 504 (1972) (remanded for hearing on whether any justification for depriving sexual psychopaths of jury trial while granting it to those civilly committed); People v. Feagley, 14 Cal. 3d 338, 352-58, 535 P.2d 373, 381-86, 121 Cal. Rptr. 509, 517-22 (1975); *In re* Andrews, 334 N.E.2d 15, 22-23 (Mass. 1975); State *ex rel.* Farrell v. Stovall, 59 Wis. 2d 148, 169-73, 207 N.W.2d 809, 819-21 (1973).

27. § 202.807, RSMo 1969.

ual psychopath commitment procedures.[28] Assuming the civil commitment procedures do not violate due process,[29] the sexual psychopath commitment procedures appear to meet equal protection requirements. However, release procedures differ in that those civilly committed may be released whenever the hospital head deems fit,[30] whereas sexual psychopaths apparently can be released only by court order.[31] This difference may be justified by the fact that sexual psychopaths are considered dangerous. However, those committed as criminally insane are considered no less dangerous, and courts have split on whether there is a rational basis for requiring court participation in the release of the criminally insane.[32] By analogy, then, it is unclear whether the release procedures in Missouri's sexual psychopath statute are valid.

In addition to meeting equal protection requirements, procedural protections for accused sexual psychopaths must comply with due process standards. The United States Supreme Court discussed the extent of these due process rights in *Specht v. Patterson*,[33] but it did not then consider the question of the burden of proof necessary to commit a sexual psychopath. The Court later held in *In re Winship*[34] that in juvenile delinquency proceedings due process requires proof beyond a reasonable doubt of the offense which would constitute a crime if committed by an adult.[35] The *Winship* rationale is applicable in sexual psychopath proceedings, where the accused, like his juvenile counterpart, is faced with indefinite loss of liberty and serious social stigmatization. Accordingly, several courts have recently held that the reasonable doubt standard must be met in sexual psychopath proceedings.[36] Proof beyond a reasonable doubt has also been

28. § 202.720, RSMo 1969.

29. Missouri's civil commitment procedure may well violate due process. *See* Lynch v. Baxley, 386 F. Supp. 378 (M.D. Ala. 1974); Lessard v. Schmidt, 349 F. Supp. 1078 (E.D. Wis. 1972), *vacated on other grounds*, 414 U.S. 473 (1974).

30. § 202.827, RSMo 1969.

31. *See* statute quoted note 6 *supra*. However, § 202.770, RSMo 1969, provides that "[a]ll laws now in force relating to the *admission* of insane persons to state hospitals, shall apply to criminal sexual psychopaths" (emphasis added). It is unclear whether this section makes the *release* provision in § 202.827, RSMo 1969, applicable to sexual psychopaths.

32. *Compare* State v. Clemons, 110 Ariz. 79, 515 P.2d 324 (1973) (equal protection violated) *with* Bolton v. Harris, 395 F.2d 642 (D.C. Cir. 1968) (equal protection not violated). *See also* State v. Kee, 510 S.W.2d 477 (Mo. En Banc 1974), *criticized in* Stoll, *Criminal Procedure—Automatic Commitment of Defendants Found Not Guilty By Reason of Insanity*, 41 MO. L. REV. 439 (1976).

33. 386 U.S. 605, 610 (1967) (due process requires right to counsel, right to be present at a hearing, right to offer evidence, right to confront and cross-examine witnesses, and right to a meaningful record for review). Missouri's statute apparently meets these requirements. § 202.720, RSMo 1969.

34. 397 U.S. 358 (1970).

35. *Id.* at 368.

36. United States *ex rel.* Stachulak v. Coughlin, 520 F.2d 931, 935-37 (7th Cir. 1975), *cert. denied*, 424 U.S. 947 (1976) (White & Powell, JJ., dissenting); People v. Pembrock, 62 Ill.2d 317, 321, 342 N.E.2d 28, 29 (1976); People v. Burnick, 14

required in civil commitments,[37] although one federal court has rejected the standard as "virtually unattainable at this state in the development of psychiatric medicine."[38]

A requirement of proof beyond a reasonable doubt would also have the salutory effect of eliminating the prosecutor's incentive to seek commitment of sex offenders when lacking sufficient evidence to convict on the original criminal charge.[39] In addition, it would presumably reduce the number of nondangerous sex offenders erroneously found to be dangerous and committed as sexual psychopaths. Moreover, the fact that the standard may be "virtually unattainable" is certainly no reason to lower the standard. Rather, where liberty is at stake, the accused must be given the benefit of doubts stemming from the inadequacies of psychiatric testimony.

In *State v. James* the Missouri Supreme Court ignored these constitutional problems and considered only the narrow equal protection issue raised on appeal. Appellant's sole argument was that the statute denied equal protection by vesting discretion in the trial judge whether to commit or try the sexual psychopath, inasmuch as there was no rational basis for treating some sexual psychopaths differently than others. In rejecting this argument, the court relied on *Marshall v. United States*.[40] In *Marshall* the United States Supreme Court found a rational basis for the automatic exclusion of drug addicts with two or more felony convictions from a rehabilitative commitment program offered in lieu of penal incarceration. In upholding this automatic exclusion provision, the Court observed that while Congress could have left exclusion to the discretion of the trial judge, equal protection did not require it to do so. The Missouri Supreme Court quoted this language and concluded without explanation that it was appropriate to vest discretion in the trial judge to determine how to detain sexual psychopaths.

In *Marshall*, however, the issue was not whether there was a rational basis for vesting discretion in the trial judge. It was, in fact, the *absence* of discretion that was challenged as denying equal protection. Hence, the Court's comment that it would have been permissible to vest discretion in

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Cal.3d 306, 310-25, 535 P.2d 352, 354-64, 121 Cal. Rptr. 488, 490-500 (1975); *In re* Andrews, 334 N.E.2d 15, 26-27 (Mass. 1975). There are no Missouri cases on the burden of proof in sexual psychopath proceedings.

37. *In re* Ballay, 482 F.2d 648 (D.C. Cir. 1973); Lessard v. Schmidt, 349 F. Supp. 1078 (E.D. Wis. 1972), *vacated on other grounds*, 414 U.S. 473 (1974).

38. Lynch v. Baxley, 386 F. Supp. 378, 393, n.12 (M.D. Ala. 1974) (requiring clear, unequivocal, and convincing evidence). *See also* Tippett v. Maryland, 436 F. 2d 1153 (4th Cir. 1971) (upholding a preponderance standard in "defective delinquent" commitments), *cert. dismissed as improvidently granted sub nom.*, Murel v. Baltimore City Criminal Court, 407 U.S. 355 (1972) (Douglas, J., dissenting, requiring reasonable doubt standard).

39. People v. Pembrock, 23 Ill. App. 2d 991, 994-95, 320 N.E.2d 470, 473 (1974), *aff'd*, 62 Ill. 2d 317, 342 N.E.2d 28 (1976).

40. 414 U.S. 417 (1974).