Journal of Criminal Law and Criminology

Volume 59 | Issue 2 Article 11

1968

Analysis of the Illinois Sexually Dangerous Persons Act

Lawrence T. Burick

Follow this and additional works at: https://scholarlycommons.law.northwestern.edu/jclc

Part of the Criminal Law Commons, Criminology Commons, and the Criminology and Criminal Justice Commons

Recommended Citation
Lawrence T. Burick, Analysis of the Illinois Sexually Dangerous Persons Act, 59 J. Crim. L. Criminology & Police Sci. 254 (1968)

This Article is brought to you for free and open access by Northwestern University School of Law Scholarly Commons. It has been accepted for inclusion in Journal of Criminal Law and Criminology by an authorized editor of Northwestern University School of Law Scholarly Commons.

there seems to be no sufficient reason why the accused should be unconditionally released merely because of some error committed at trial unless such a retrial would violate the basic policies supporting the double jeopardy guarantee.

One author has argued that allowing a defendant to be retried after reversal of a prior conviction exposes him to the same evils that the Court denounced so vigorously in *Hentenyi*, i.e., harassment, inordinate vexation and excessive expenses, and only because of an error by the prosecution.[53] The point we are logically led to is, if we are willing to say that the defendant should not be retried for first-degree murder after a second-degree murder conviction is reversed because of the evils of repeated prosecutions, then it must also be a violation of due process to retry him at all for any crime. The trouble with this contention is that logic is only a tool by which justice is achieved and not an end in itself. In this case the courts have decided that they are only willing to go so far in protecting the defendant's interest in being free from these evils; that society demands that he not be released until he has a trial free from error for some offense. Furthermore, this still leaves open the possibility that the appellate court might find the prosecution's conduct so outrageous that to retry the defendant would be unconstitutional. But, this decision should be left to the courts.

[53] *Abstract, supra* note 39, at p. 62.

This right of reprosecution, however, should be limited to the offense of which the defendant was convicted at the first trial. In the usual case of a lesser-included offense it seems that it would be grossly unfair to force the defendant to submit to a trial for an offense of which he was impliedly acquitted, since the jury by convicting him of the lesser offense must have felt that the facts did not warrant a conviction of the greater. In any case, as stated in *Green*, the jury was given full opportunity to render a verdict on the greater offense and no extraordinary circumstances prevented it from doing so. The rationale expounded by many courts to support reprosecution for the greater offense is no solution because of the separability of the two crimes and the inherent unfairness in forcing a defendant to "waive" a prior acquittal of one offense in order to appeal a conviction of another. Finally, it was noted that the decision in *Green* was based impliedly on the deterrence to the defendant's post-conviction remedies which exist under these circumstances and which, in the Courts' opinion, outweigh any societal interest in conviction for the greater offense.[54] If this is the true basis for the Court's conclusion, then it can be logically extended to the case of greater penalty on retrial even though the notion of implied acquittal is inapplicable there.

[54] Green v. United States, 355 U.S. 184, 191 (1957). *Cf.* Wade v. Hunter, 336 U.S. 684 (1948).

AN ANALYSIS OF THE ILLINOIS SEXUALLY DANGEROUS PERSONS ACT

LAWRENCE T. BURICK

The complex legal problems posed by the sex offender present nearly insuperable difficulties and the solutions are far from clear. The object of this article is to explore one attempted solution, the Illinois Sexually Dangerous Persons Act.[1] The statute's key provisions, its purposes, and its implementation in practice will be examined; the constitutional and policy ramifications will be discussed; and legislative proposals for revision will be suggested.

[1] ILL. REV. STAT. ch. 38 §§105-1.01-12 (1965) (hereinafter references to Chapter 38 of the Criminal Code of Illinois will be by section number only).

THE STATUTE AND ITS PURPOSES

The statute provides that if a person has "... demonstrated propensities toward acts of sexual assault or acts of sexual molestation of of children,"[2] and if he has been suffering from a mental disorder for at least one year prior to the filing of a required petition,[3] then he is considered a sexually dangerous person[4] and will be com-

[2] §105-1.01.

[3] *Id.*

[4] *Id.* Most state statutes call the mentally ill sex offender a sexual psychopath. *E.g.*, D.C. CODE ch. 22 §3503 (1967). By adopting the label "sexually dangerous person," the Illinois Legislature presumably hoped to

mitted to the custody of the Director of Public Safety for an indefinite period of time until he has recovered from his illness.[5]

This statutory scheme reflects two purposes of the act. First, the requirement that the person must demonstrate criminal propensities to commit sex offenses reflects the Illinois Legislature's exercise of the State's police power to protect the community from dangerous sex offenders.[6] That the mentally ill offender is committed to a mental institution reflects the second purpose of the act—rehabilitation.[7] Ordinarily, the sex offender is fined or imprisoned to punish and rehabilitate him. Psychiatrists, however, urge that these conventional forms of punishment will not help the mentally ill offender. Instead, they believe that the mentally ill sex offender should be hospitalized and given special psychiatric treatment in order to maximize the rehabilitative effort. It is for this reason that the mentally ill sex offender, who is also sexually dangerous, is singled out from the other sex offenders for special therapy in a mental hospital.[8]

Furthermore, consistent with this rehabilitative purpose, the person is confined until he has "recovered." [9] The period of confinement is not for a fixed period of time related to the seriousness of his offense; rather, it is for an indeterminate period of time, a period related to the individual's needs and responses and to the time necessary to cure him.[10]

In addition, the rehabilitative purpose is reflected in the procedural framework of the statute. To prevent persons from being punished for crimes committed while suffering from a mental disorder, the statute provides that the State's Attorney may initiate a civil proceeding prior to indictment to determine whether the individual is a sexually dangerous person.[11] If he is declared a sexually dangerous person, then he is confined to the state hospital.[12] If, however, he is found not to be a sexually dangerous person, then he may be tried for the crime for which he is charged.[13]

Implementation of the Statute

The statute, as implemented, may be criticized on two grounds. First, although the statute was presumably enacted in response to violent sex offenders who pose a serious menace to society,[14] the Illinois data indicate that over 50% of those hospitalized are non-violent persons—for example, Peeping Toms or exhibitionists—whose acts are passive and merely morally offensive.[15] Appar-

avoid the problems of a vague definition based on the now rejected psychiatric term, "psychopath." But see text at n. 108–124, *infra*.

[5] §105-8.

[6] People v. Juergens, 407 Ill. 391, 397, 95 N.E.2d 602 (1950); Report of the Illinois Commission on Sex Offenders to the 68th Assembly of the State of Illinois 1 (1956) (hereinafter cited as Illinois Report); Note, *Confinement of the Sexually Irresponsible*, 32 J. Crim. L. & C. 196 (1941); Minow, *The Illinois Proposal to Confine Sexual Psychopaths*, 40 J. Crim. L.C. & P.S. 186, 196–97 (1949).

[7] Swanson, *Sexual Psychopath Statutes: Summary and Analysis*, 51 J. Crim. L., C. & P.S. 215 (1960); Hacker & Frym, *A Sexual Psychopath Act in Practice: A Critical Discussion*, 43 Calif. L. Rev. 766 (1955); Tappan, *Some Myths About the Sex Offender*, 19 Fed Prob. 7 (June, 1955); Illinois Report, *supra* note 6 at 1; Michigan Report on the Deviated Sex Offender 3 (1951).

[8] *Id.*

[9] §105-8.

[10] Tappan, Crime, Justice and Correction 345 (1960). See text at n. 46–54, *infra*.

[11] §§105-3-3.01; People v. Capoldi, 10 Ill.2d 261, 139 N.E.2d 776 (1957); People v. Sims, 382 Ill. 472, 47 N.E.2d 703 (1943).

[12] §105-8.

[13] Compare Ohio: Baldwin's Ohio Rev. Code Ann. ch. 29 §2947.27 (1964). (The statute is invoked after conviction; if the person was confined for a period less than the maximum sentence for the offense of which he was convicted, then he is transferred to a penal institution to serve the remainder of his term.); New Jersey: N.J. Stat. Ann. ch. 2A:164-3 (1953). (Offender is released after being confined for the maximum time he would have served if imprisoned.); Michigan: Mich. Stat. Ann. ch. 287 §28.967 (1954). ("Psychopathy" is a defense to the crime charged.).

[14] Tappan, *supra* n. 7 at 7.

[15] Illinois Report, *supra* n. 6 at 14. The data was based upon an examination of the sixty-two commitments between 1938 and 1952: thirty-one persons were non-violent offenders (twenty-three, indecent exposure; eight, contributing to the delinquency of a minor); the balance were violent offenders (ten, crime against nature; five, rape; three, assault to rape; one, assault to kill; three, incest). The total does not equal sixty-two; apparently the committee counted the category contributing to the delinquency of a minor twice. Based on a later study, Dr. Groves B. Smith, Director of the Psychiatric Division of the Illinois Department of Safety, reported that over two-thirds of those committed were non-violent. Smith, Their Therapeutic Possibilities and the Legal Difficulties Encountered in a 20 Year Experience in the Psychiatric Division, Illinois, Department of Public Safety, Menard, Illinois (1963) (hereinafter cited as Smith Report). Dr. Kelleher, Director of the Behavioral Clinic associated with the Municipal Court, Cook County, Illinois, indicated in an interview with the author that today, for the most part, in Cook County, the statute is used only to commit the most violent offenders. Only during the 1950's was the act used with any frequency to commit non-violent offenders. Interview with Dr. Kelleher, April 4, 1967.

Unfortunately there is no data available to indicate how many violent offenders are not committed under

ently non-violent offenders are being committed under the act because in practice only recidivists are hospitalized[16] and non-violent offenders are much more recidivistic than violent offenders.[17] The statute does not explicitly compel this result. It provides only that those persons who have been suffering from a mental disorder for at least one year prior to the filing of the required petition can be committed.[18] However, since psychiatrists cannot determine how long a person has been mentally ill, to implement this statutory provision, the State's Attorneys require that persons must have committed a sex offense one year prior to the petition's filing.[19] Thus, since a prior crime must have been committed, only recidivists are hospitalized. And since non-violent offenders are very recidivistic, many are hospitalized.

The statute has also been criticized for failing to fulfill the rehabilitative purpose. As stated initially, the sexually dangerous person was singled out from the other sex offenders because it was felt that he would benefit more from hospitalization than from imprisonment.[20] It does not follow from this premise, however, that all sex offenders who are dangerous within the statutory terms and who are mentally ill will benefit from this psychiatric treatment. Psychiatrists tell us that not all mentally ill sex offenders are treatable.[21] Those persons who are too old, whose condition has seriously deteriorated or who have no desire to be cured will not benefit from psychiatric treatment no matter how long they are confined in a hospital.[22] Only those persons who will respond to treatment and who want to be cured will benefit.[23]

For this reason, hospitalization for an indeterminate period, the rehabilitative alternative to imprisonment, can only be justified if the persons committed are deemed treatable. However, in practice, the State's Attorneys, when they file the sexually dangerous persons petition, do not initially consider whether or not the person is treatable.[24] Instead, if they feel that they have enough evidence to establish their criminal case beyond a reasonable doubt, they do not file a petition, and instead proceed to trial. Only when they feel they do not have enough evidence to convict, do they file a petition under the statute.[25] Hospital commitment under the act is still possible even though there is not enough evidence to convict under the criminal law, since the sexually dangerous persons proceeding is a *civil* hearing and does not require proof of the elements of the crime beyond a reasonable doubt. Moreover, at the hearing itself, psychiatric testimony of the person's amenability to treatment at a mental hospital is not permitted; instead, the examining psychiatrist can only testify whether the person is "... suffering from a mental disorder... coupled with criminal propensities to the commission of sex offenses...."[26] Thus, since treatability is not a factor considered by the State's Attorneys when they file a petition, since the psychiatrist cannot testify whether the person will benefit from treatment at a mental hospital and since all sexually dangerous persons are not treatable, it is very likely that non-treatable persons are committed under the statute.

Based on this initial analysis of the implementa-

---

the act. However, Tappan, who has conducted extensive research in the area, states that:

> Most of the cases committed under the legislation [in the various states] are minor varieties of sex deviates: peepers, exhibitionists, homosexuals, and the like. The menacing varieties of sex criminal are rarely touched in the operation of these laws. Tappan, supra n. 10 at 414.

[16] Interview with Dr. Kelleher; ILLINOIS REPORT *Supra* n. 6 at 17.

[17] ELLIS & BRANCALE, PSYCHOLOGY OF SEX OFFENDERS 33–37 (1956). For example, the Ellis-Brancale Study in New Jersey indicated that of eighty-nine exhibitionists, thirty-one (34%) were charged with a prior sex crime and sixty (67%) admitted prior sex offenses with or without arrest. And of forty-nine homosexuals, nineteen (30%) were charged with prior sex offenses and thirty-six (73%) admitted previous sex offenses with or without arrest. Compared to this, of twenty-one sexual assaults, three (14%) had prior arrests and five (24%) admitted to such acts previously. Only one of eight forcible rapists was recidivist; of sixty-one statutory rapists, only seven (11%) were recidivists. *Id.*

[18] §105-1.01.

[19] Interview with Dr. Kelleher.

[20] See text at n. 7–8, *Supra.*

[21] The Ellis-Brancale study indicated that of the 257 sex offenders in the mentally disordered categories (mild and severe neurotic, borderline psychotic, psychotic, organic brain impairment, psychopath and mentally deficient), eighty-four were found committable; 173 were found non-committable. ELLIS & BRANCALE, *Supra* n. 17 at 46.

[22] People v. Willey, 128 Cal.App.2d 148, 275 P.2d 522 (1954); SMITH REPORT *Supra* n. 14; ELLIS & BRANCALE, *Supra.* n. 17 at 79.

[23] *Id.*

[24] Interview with Dr. Kelleher April 4, 1967. This also seems to be the practice in other jurisdictions. TAPPAN, *Supra* n. 10 at 414; PRELIMINARY REPORT OF THE SUBCOMMITTEE ON SEX CRIMES OF THE ASSEMBLY INTERIM COMMITTEE ON JUDICIAL SYSTEM AND JUDICIAL PROCESS, CALIFORNIA LEGISLATURE 47 (1950).

[25] *Id.*

[26] §105-1.01.

tion of the statute's purposes, in the balance of this article the following will be suggested: 1) The statute is constitutional in so far as it permits commitment of treatable offenders, thus effectuating the rehabilitative purpose. However, to the extent that non-treatable persons are committed, the statute, as implemented, violates the Due Process and Cruel and Unusual Punishment Clauses of the United States Constitution and is unconstitutional as applied. 2) So long as non-violent offenders are treatable, the state police power permits their commitment; however, for policy reasons non-violent offenders should not be committed. In addition, it will be suggested that the Illinois statute be repealed and be replaced by a post-conviction commitment proceeding that would be part of the judge's sentencing power.

Commitment of Non-treatable Sex Offenders

It is well settled that the state legislature can act within its police power to single out for special treatment the sexually dangerous person from the larger class of all sex offenders.[27] In *Pearson* v. *Probate Court*,[28] the United States Supreme Court held that the class selected, be it the sexual psychopath or the sexually dangerous person, would constitute a dangerous element which the state legislature in its discretion could put under appropriate control.[29] Although the sexual psychopath is not the entire class of sex offender, the legislature is free to recognize degrees of harm and it may confine its restrictions to those classes of cases where the need is the clearest.[30]

The state's police power is not unlimited, however; its scope is limited by the Equal Protection[31] and Due Process requirements[32] of the Fourteenth Amendment. Thus, the Equal Protection Clause permits special treatment of some persons who are part of a larger group only so long as the classifications are reasonably related to the objectives of the legislation.[33] In addition the Due Process Clause requires that the administrators' exercise of their power must be reasonably related to the purposes of the act.[34] Once both requirements are met, the person cannot object that he is unreasonably deprived of his liberty.[35]

Applying this analysis to the Illinois act, the statutory differentiation between mentally ill sexually dangerous persons and all other sex offenders satisfies the Equal Protection requirements that the classification be reasonable and related to the objectives of the legislation. There are mentally ill sex offenders who do not respond to the traditional criminal sanctions[36] who would benefit from psychiatric treatment in a mental hospital.[37] Furthermore, assuming treatability, there are psychiatric methods available which will benefit such a person.[38] Therefore, singling out the mentally ill offender for special treatment is reasonably related to the rehabilitative purpose of the act. In addition, some dangerous offenders are mentally ill and, therefore, their commitment is reasonably related to the protective purpose of the statute.[39]

[27] Pearson v. Probate Court, 309 U.S. 270 (1940). *See also* Sweezer v. Green, 360 Mo. 1249, 232 S.W.2d 897 (1952); People v. Sims, 382 Ill. 472, 47 N.E.2d 703 (1943); People v. Chapman, 301 Mich. 584, 4 N.W.2d 18 (1942).

[28] Pearson v. Probate Court, 309 U.S. 270, 275 (1940).

[29] *Id.*

[30] *Id.*

[31] Morey v. Doud, 354 U.S. 457 (1957). Although this case discusses equal protection in an economic context, the general principles enunciated should also apply here.

[32] Pearson v. Probate Court, 309 U.S. 270, 276–77 (1940).

[33] Morey v. Doud, 354 U.S. 457, 463 (1957); Swanson, *supra* n. 7 at 220.

[34] Pearson v. Probate Court, 309 U.S. 270, 276–77 (1940).

[35] Swanson, *supra* n. 7 at 220.

[36] See text at n. 7–8, *supra.*

[37] Guttmacher & Weihofen, Psychiatry and the Law 112–22 (1952). For example, the pedophiliac (child molester) is often a passive, immature and insecure individual who lacks courage to make sexual sontact with his contemporaries. *Id.* at 115. And some of the acts of the forcible rapist have been explained as explosive expressions of pent-up impulses. *Id.* at 116–17.

[38] For example, Dr. Smith has stated that:

> A major treatment procedure is a concept called socio-shock therapy, or the impact felt by the inmate when transplanted from the free community at the onset of diagnostic studies. . . . For the first time they realize the seriousness of their behavior and the association with a group of degenerated sex offenders makes them realize the direction in which their lives were headed. Smith Report, *supra* n. 15.

Other recommended treatment is electroshock therapy, brain surgery, tranquilizers, and, in some states, sterilization and castration. Guttmacher & Weihofen, *supra* n. 37 at 134. Many question the effectiveness of any treatment. See, *e.g.*, Swanson, *supra* n. 7 at 224. However, for the purposes of this article, it will be assumed that, if a person is deemed treatable, then there is treatment that can be given.

If the sex offender is not receiving such treatment, additional constitutional questions arise which are beyond the scope of this paper. For a good general discussion, see Note, Due Process for All: Constitutional Standards for Involuntary Commitment and Release, 34 U. Chi. L. Rev. 633 (1967).

[39] Ellis & Brancale, *supra* n. 17 at 46.

Moreover, the statute is not deficient because the legislature specified that only those mentally ill sexually dangerous persons who" . . . demonstrated propensities toward acts of sexual assault or acts of sexual molestation of children . . ." [40] should be singled out for special psychiatric treatment. Even though there are other dangerous sex offenders who would benefit from psychiatric treatment, the legislature is permitted to underclassify, that is, to single out only some from a larger class of persons all of whom are tainted "with the mischief at which the law aims." [41]

Thus, the statute appears to satisfy the Equal Protection requirements of the United States Constitution. The United States Supreme Court, however, in *Pearson* v. *Probate Court*[42] while upholding the constitutionality of the Minnesota statute on its face, suggested that it was still an open question whether the statute, in its application, might violate the Due Process Clause and be unconstitutional as applied. The Court stated:

> We fully recognize the danger of deprivation of due process . . . and the special importance of maintaining the basic interests of liberty in a class of cases where the law though fair on its face and impartial in appearance may be open to serious abuses in administration.[43]

It is arguable that the Illinois act, "though fair on its face and impartial in appearance," [44] is unconstitutional as applied. As stated, the administrators' exercise of their power must be reasonably related to the purposes of the act.[45] Therefore, both the protective and rehabilitative purposes of the statute must be fulfilled. The person must not only be deemed sexually dangerous to effectuate the protective purpose but, to promote the rehabilitative purpose, the person must also be deemed amenable to psychiatric treatment. If either purpose is not satisfied, the act, as implemented, must be considered unconstitutional as applied.

Applying this analysis to the Illinois practice, it is arguable that since treatability is not a factor considered as part of the commitment procedure and since the act appears to be invoked only when the State's Attorneys feel they cannot get a criminal conviction, only the protective purpose is satisfied and the statute serves only as a convenient expedient to confine non-convictable persons. Therefore, to the extent that the rehabilitative purpose is not satisfied, the statute violates the Due Process Clause and is unconstitutional as applied.

Moreover, it is arguable that the commitment of non-treatable offenders for an indeterminate period of time also violates the Cruel and Unusual Punishment Clause of the Eighth Amendment. While this provision ordinarily is used to contest assertedly torturous and agonizing punishment,[46] it may be applicable in this context as well.

Society as a whole has four interests which justify punishing an offender for his crime.[47] First, there is the interest in confining an offender to protect the community from his future offenses. Second, there is an interest in deterring others from committing the same crime. Third, society is interested in rehabilitating an offender so that when he is ultimately released he will no longer pose a danger to the community. Finally, society has an interest in confining a criminal to exact retribution—to require him to pay his debt to society for his criminal conduct.

When punishment is prescribed for various offenses, the legislators consider these societal interests. At the same time, however, they also must consider the interest of the defendant not to be unreasonably deprived of his freedom.[48] Therefore, the interests of society and of the individual must be balanced and the length of confinement must be reasonably related to the nature and seriousness of the offense.[49] In practical effect this means that the state legislature must fix a maxi-

[40] §105-1.01.

[41] [This] piecemeal approach to a general problem, permitted by under-inclusive classifications, appears justified when it is considered that legislative dealing with such problems is usually an experimental matter. It is impossible to tell how successful a particular approach may be, what dislocations might occur, what evasions might develop, what new evils might be generated in the attempt to treat the old. Legislators may wish to proceed cautiously, and courts must allow them to do so. Tussman & tenBroek, *The Equal Protection of the Laws*, 37 CALIF. L. REV. 341, 346, 349 (1949).

[42] 309 U.S. at 270 (1940).

[43] *Id.* at 276–77.

[44] *Id.*

[45] Swanson, *supra* n. 7 at 220.

[46] Black v. United States, 269 F.2d 38 (9th Cir. 1959), *cert. denied*, 361 U.S. 938 (1960).

[47] Weems v. United States, 217 U.S. 349, 367 (1910); Williams v. United States, 157 F.Supp. 871, 876 (D.C.D.C. 1958); Note, *The Cruel and Unusual Punishment Clause and Substantive Criminal Law*, 79 HARV. L. REV. 636–37 (1966); TAPPAN, *supra* n. 10 at 238. The theory in this and the next two paragraphs is adapted from these sources.

[48] *Id.*

[49] *Id.*

mum term of confinement for each statutory or common law offense.[50] The more serious the crime, the greater the term of confinement because of the greater need to protect society, to deter others, to exact retribution and to rehabilitate the criminal completely.[51] In this manner, the rights of the individual are balanced with the rights of society, so that the offender is not unreasonably deprived of his liberty, while society is still protected.

The Illinois Sexually Dangerous Persons Act, however, departs from this approach. The length of institutional confinement is not proportionate to the nature and seriousness of the offense. The hospitalization is for an indeterminate period of time since the person is not released until he has recovered.[52]

This departure may be justified as the best way to promote the rehabilitative purpose of the statute.[53] Thus, since it is impossible to determine initially how much time is necessary to rehabilitate a particular person, no fixed term is set; rather, the length of hospitalization is ultimately dependent upon the individual's particular needs and his response to treatment.[54] However, it is submitted, if the mentally ill offender is not treatable and would not benefit from psychiatric treatment, then the departure from the conventional fixed term approach would violate the Cruel and Unusual Punishment Clause.

Before this argument can be made, however, it must first be determined whether the clause is applicable to a state civil commitment. It is well settled that the clause itself applies to the states.[55] But other points are not so clearly settled. For example, it can be argued that the clause applies only to post-conviction confinement in criminal cases, and is not applicable here since the sexually dangerous persons proceeding is a *civil* hearing prior to indictment.[56] This may no longer be true in Illinois, however, since the Illinois cases have been gradually departing from this civil-criminal approach.[57] The courts, recognizing that the person is deprived of his liberty when involuntarily confined, require that procedural due process guarantees be a part of the sexually dangerous persons proceeding.[58] Thus, in *People* v. *Capoldi*,[59] the Illinois Supreme Court held that even though the proceeding was civil, the Due Process Clause required that a confession could not be admitted into evidence until the State had proven to the judge out of the jury's presence that the confession was voluntary. The court stated:

> Insofar as the present requirements of due process are concerned, it is of little significance that the proceedings are civil in nature. A defendant found to be a sexually dangerous person under the act is deprived of his liberty as a consequence, and must be accorded the protections of due process at his trial.[60]

On the other hand, because only procedural Due Process guarantees have been incorporated into the civil proceedings, it is arguable that the Cruel and Unusual Punishment clause does not apply since it is concerned with punishment, not procedure. However, an extension of the *Capoldi* doctrine

[50] TAPPAN, *supra* n. 10 at 432.

[51] *Id.*

[52] §105–8.

[53] People v. Kaganovitch, 1 App.Div.2d 680, 146 N.Y.S.2d 565 (1955), *affd*, Kaganovitch v. Wilkins, 305 F.2d 715 (2d Cir. 1962), *cert. denied*, 371 U.S. 929 (1962).

[54] TAPPAN, *supra* n. 10 at 435.

[55] Robinson v. California, 370 U.S. 660 (1962); Francis v. Resweber, 329 U.S. 459 (1947).

[56] Smith v. Wayne Probate Judge, 231 Mich. 409, 204 N.W. 140 (1925).

[57] People v. Beshears, 65 Ill.App.2d 446, 201 N.E.2d 35 (5th Dist. 1965); People v. McDonald, 44 Ill.App.2d 348, 194 N.E.2d 541 (2d Dist. 1963); People v. Nastasio, 19 Ill.2d 524, 168 N.E.2d 728 (1960); People v. Capoldi, 10 Ill.2d 261, 139 N.E.2d 776 (1957). *Compare* People v. English, 31 Ill.2d 301, 201 N.E.2d 455 (1964).

[58] *Id.*

[59] 10 Ill.2d 261, 139 N.E.2d 776 (1957).

[60] *Id.* at 267, 139 N.E.2d at 779.
In *People v. English*, 31 Ill.2d 301, 201 N.E.2d 455 (1964), however, the court departed from the *Capoldi* decision. In that case, the court limited the alleged sexually dangerous person's self-incrimination privilege. The holding was that the individual was not required to disclose to the examining psychiatrist prior unpunished crimes but must disclose non-incriminatory information. The court said:

> [I]t is natural that some of the safeguards which are applicable in a criminal prosecution be applied to the [civil] proceedings . . . [T]his does not mean, however, that the commitment proceeding is a criminal prosecution or that criminal procedure as a whole must be followed. *Id.* at 304, 201 N.E.2d. at 458.

Nevertheless, the *English* case is an exception to the general rule and all the other cases have consistently incorporated due process guarantees into the Sexually Dangerous Persons proceeding; for example, the right to a speedy trial, People v. Beshears, 65 Ill.App.2d 446, 213 N.E.2d 55 (5th Dist. 1965), and the right to confront witnesses, People v. Nastasio, 19 Ill.2d 524, 168 N.E.2d 728 (1960). Apparently the court found it necessary to depart from the Capoldi approach in the English case to support the rehabilitative purpose of the statute. If the court had held that the person was not required to talk with the psychiatrist at all, then it would be impossible to determine the individual's mental condition. Thus, to permit the statute to be used at all, the court held that non-incriminating information must be given.

would be consistent with the rationale of the case. As stated, the court has been incorporating due process guarantees into the civil proceeding because of its recognition that the sexually dangerous person, when committed is deprived of his freedom.[61] Similarly, the purpose of the Eighth Amendment is also to prevent individuals from being unreasonably deprived of their freedom.[62] Therefore, on the rationale of *Capoldi* and subsequent cases the Cruel and Unusual Punishment provision should also be part of the guarantees in a civil hearing.

There are no Illinois cases directly on point. In an unrelated context, the United States Court of Appeals for the Seventh Circuit refused to apply the Eight Amendment to a civil proceeding under the Agricultural Adjustment Act.[63] But the Fourth Circuit, in an action under another civil statute did not adhere to the reasoning of the Seventh Circuit, stating in dicta that:

> [W]hile the Eight Amendment has been generally thought to apply to criminal cases, there would seem to be no basis in reason why a court could not invoke the Eight Amendment either specifically or by analogy, to prevent an abuse of the power of punishment though it be only manifested in civil form.[64]

The Agricultural Adjustment Act is clearly civil in nature since only civil penalties are imposed. On the other hand, the Sexually Dangerous Persons proceeding is potentially and in practice a source of much greater abuse of power since the consequence is not a fine but indefinite detention in a mental hospital. For this reason, the Seventh Circuit's construction of the Agricultural Adjustment Act should not be controlling. When the consequence of an act is indeterminate detention in a mental hospital, the restrictions of the Cruel and Unusual Punishment Clause should apply.

Assuming that the Cruel and Unusual Punishment Clause is applicable in a civil proceeding, a second problem remains: can confinement in a mental institution with the purpose of rehabilitation and treatment be considered punishment?

Dean Francis Allen of the University of Michigan Law School argues that involuntary confinement must be considered punitive even though the individual is institutionalized to be rehabilitated, writing:

> Measures which subject individuals to the substantial and involuntary deprivation of their liberty contain an inescapable punitive element, and this reality is not altered by the facts that the motivations that prompt incarceration are to provide therapy or otherwise contribute to the person's well-being or reform. As such, these measures must be closely scrutinized to insure that power is being applied consistently with those values of the community that justify interference with liberty for only the most clear and compelling circumstances.[65]

The United States Supreme Court, in *Specht v. Patterson*,[66] appears to have adopted this position. In *Specht*, the Court held that a *convicted* sex offender was denied due process when he was committed to a mental hospital in lieu of punishment without a hearing. In dicta, the Court commented on the nature of post-conviction commitment for an indeterminate time under a sexual psychopath law, stating:

> [T]he punishment . . . is criminal punishment even though it is designed not so much as retribution as it is to keep individuals from inflicting future harm.[67]

Concededly, *Specht* involved a post-conviction proceeding and rested on a procedural Due Process issue. However, the dicta concerning punishment may be a signal that in a well-documented case the Court may be willing to hold that the Eighth Amendment's Cruel and Unusual Punishment clause is applicable when sex offenders are committed to a mental hospital for an indeterminate period of time in a civil proceeding prior to indictment.

Assuming that the Cruel and Unusual Punishment clause is applicable to institutional confinement, it is arguable that the clause is violated to the extent that the State's Attorney invoke the statute against nontreatable persons. As noted above, indeterminate detention of mentally ill offenders has been justified since it is impossible to

[61] See text at n. 57–60, *supra*.
[62] See text at n. 47–51, *supra*.
[63] United States v. Strangland, 242 F.2d 843, 848 (7th Cir. 1957).
[64] Toepelman v. United States, 263 F.2d 697, 700 (4th Cir. 1959).
[65] ALLEN, THE BORDERLAND OF CRIMINAL JUSTICE, ESSAYS IN LAW AND CRIMINOLOGY 37 (1964).
[66] Specht v. Patterson, 386 U.S. 605 (1967).
[67] *Id.* at 608–9.

determine initially how long it will take to rehabilitate any particular individual.[68] However, it is submitted, if the mentally ill offender would not benefit from psychiatric treatment, then the departure from the conventional fixed term approach could not be justified. The individual could not be rehabilitated by psychiatric treatment, and indeterminate detention could only be construed as a camouflage to rationalize the imposition of indefinite sentences upon the non-treatable, non-convictable persons for the protection of society. This would clearly be in violation of the Eighth Amendment since commitment of a non-treatable, non-convictable person would unreasonably deprive him of his freedom.[69] If he had been convicted, he would have been confined for a specified period of time. But by being hospitalized under the statute he could conceivably be confined for the rest of his life even though he would not benefit from treatment. This result is particularly true in Illinois, since the statute requires that the patient cannot be released until he has "recovered."[70] Since the psychiatrist cannot accurately predict whether the person is no longer dangerous and therefore has recovered,[71] and since the Illinois Courts require such a showing[72] too often offenders are being confined long after their maximum term in prison would have been served.[73]

Thus, this analysis of the implementation of the Illinois statute in light of Due Process and Cruel and Unusual Punishment Clauses indicates that the act is unconstitutional as applied, to the extent that non-treatable persons are committed to a mental hospital for an indeterminate period of time. For this reason, it is recommended that the statute be amended to require that at the pre-indictment hearing the psychiatrist must testify not only whether the person is sexually dangerous but also whether he will benefit from treatment in a mental hospital. In this manner both the protective and rehabilitatative purposes will be served. If the person is found to be both sexually dangerous and treatable, he should be committed to the hospital. If, however, he is found either harmless or non-treatable, he should not be committed but rather, should be bound over for trial, and if not convicted he should be released.

Some writers argue that such an approach erroneously allows non-treatable, non-convictable, but dangerous sex offenders to be released. Conviction, it is said, is often very difficult because parents of the victim of a sexual attack are reluctant to allow their young child to testify.[74] Also, the child may frequently be incompetent to testify.[75] Furthermore, a woman victim may refuse to testify in order to avoid further embarrassment.[76] Thus, to prevent the release of dangerous, non-convictable offenders the person must be committed before a criminal trial even if there is no evidence to convict him beyond a reasonable doubt and, presumably, even if he will not respond to treatment. Presumption of innocence, proof beyond a reasonable doubt and other legal theories "are perfectly proper in their correct application,"[77] it is argued,

> [but] they have no more logical place in the investigation of a known or suspect corrupter of the minds and bodies of little children than in the case of the insane person before the sanity board.[78]

Concededly, the approach wiich requires that treatability be the commitment standard may result in the release of dangerous, non-convictable, non-treatable sex offenders to society. Yet, while it may sacrifice some degree of protection to society, this approach is necessary to avoid unreasonable deprivation of the individual's liberty.

Such a societal sacrifice may at first glance seem shocking. Nevertheless, it must be recalled that this is done daily—whenever the State's Attorneys must release an alleged criminal for lack of evidence to convict, even though they feel that it is highly likely that he committed the crime and that he will commit another crime. If the State fails in its burden of proof, the criminal must go free. There is no rational reason to treat the sex offender any differently.

Furthermore, the sacrifice of societal protection may be exaggerated. First, the violent offender is

[68] See text at n. 7–8, *supra*.
[69] See text at n. 47–51, *supra*.
[70] §105–8.
[71] Tappan, *supra* n. 7 at 9–10.
[72] Interview with Dr. Kelleher, April 4, 1967.
[73] *Id.* Data collected for the years 1938–1952 indicate that only one-half of those committed were released. ILLINOIS REPORT, *supra* n. 6 at 14. No other data is available.

[74] Interview with Dr. Kelleher, April 4, 1967; ILLINOIS REPORT, *supra* n. 6 at 20.
[75] *Id.*
[76] *Id.*
[77] Reinhardt & Fisher, *The Sexual Psychopath and the Law*, 39 J. CRIM. L.C. & P.S. 734, 739 (1949); ILLINOIS REPORT, *supra* n. 6 at 23.
[78] *Id.*

seldom recidivistic, and, while the nonviolent offender is highly recidivistic, he seldom progresses to higher and more serious crimes.[79] More significant, one study indicated that less than three per cent of all sex crimes involve the use of actual force in such a way as to physically harm the victim.[80] In only twenty per cent of the cases was some element of force and duress used, and this was of a "relatively mild nature, and did not cause any physical injury to the victim of the offense."[81] Thus, releasing non-convictable, non-treatable offenders to society may not be as harmful as might be expected, and, to abide by the requirements of the Due Process and the Cruel and Unusual Punishment Clauses, this proposal should be adopted.

Some states have adopted this approach but invoke their statute *after* conviction as part of the judge's sentencing powers.[82] Thus, as part of the post-conviction sentencing procedure, there is a thorough psychiatric examination of the sex offender in a diagnostic facility to determine whether he would benefit from psychiatric treatment in a mental hospital. If the examining psychiatrist certifies that the convicted offender would benefit from treatment, then he is committed. If, on the other hand, the psychiatrist concludes that the convicted offender would not benefit from treatment, he is sentenced under normal procedures.[83]

While not constitutionally required, this approach, as a matter of policy, seems preferable to the Illinois pre-indictment proceeding. First, since the person is only confined after he has been found guilty, there is no possibility that innocent persons are being confined.[84] On the other hand, in Illinois, while the offender must have committed a sex crime, punitive consequences result even though he is not found guilty of a substantive offense.

In addition, this approach would remove the discretion of the State's Attorneys to determine whether or not to invoke the act prior to indictment. No longer would they be able to invoke the act against persons when they did not feel they had enough evidence to convict, since the act would only be used after conviction.

Moreover, the recommendation has the further advantage of clarifying the procedural purpose of the act. The Illinois courts consider the statutory sexually dangerous persons proceeding to be "not unlike the statute providing for an inquiry into the sanity of one charged with crime before trial on the indictment."[85] This comparison, however, is of doubtful validity. The purpose of the competency proceeding is to determine whether the defendant is competent to stand trial. If incompetent, then the criminal proceedings are stayed until recovery, at which time the trial is commenced.[86] On the other hand, the purpose of the Sexually Dangerous Persons proceeding is to determine the nature of past behavior, in order to prevent persons with mental disorder from being punished for crimes committed while mentally abnormal; if the offender is committed, the criminal proceedings against him are quashed upon his release.[87] Presumably, the rationale is to prevent double jeopardy objections and to avoid the criticism that it is illogical to rehabilitate the offender and then punish him for the crime that he committed while mentally disturbed. Thus, the statute's provision for commitment at the point when the offender is charged with a crime cannot be justified by a comparison with the competency proceeding.

Finally, it should be added that the post-conviction approach does not preclude the commitment of *treatable* sex offenders under a purely civil proceeding—like the Mental Health Act[88]—or under a voluntary commitment proceeding.[89] Here, protected by many constitutional guarantees, both the individual and society can benefit even though the offender was not convicted.

Length of Confinement

As stated, while indeterminate detention in a mental hospital is a deviation from the conventional fixed term approach, so long as the person is

[79] Ellis & Brancale, *supra* n. 17 at 33–37; Guttmacher & Weihofen, *supra* n. 37 at 115.
[80] Ellis & Brancale, *supra* n. 17 at 32–33.
[81] *Id.*
[82] *E.g.*, N.J. Stat. Ann. ch. 2A:164-3 (1953).
[83] *Id.* Compare California's approach: even if the convicted sex offender is found treatable, commitment to a mental hospital is within the discretion of the sentencing judge. Cal. Welf. & Inst. Code §§5501, 5512 (1966).
[84] Tappan, *supra* n. 10 at 417.

[85] People v. Sims, 382 Ill. 472, 476, 47 N.E.2d 703, 705 (1943).
[86] §§104-1-2 (person is unable because of physical or mental condition to understand the nature and purpose of the proceedings against him or to assist in his defense).
[87] People v. Sims, 382 Ill. 472, 476, 47 N.E.2d 703 705 (1943); §105-9.
[88] Illinois Report, *supra* n. 6 at 5.
[89] N.J. Stat. Ann. ch. 2A:164-13 (1953).

treatable this departure is justified to promote the rehabilitative purpose of the statute.[90] Thus, even if the confinement has extended beyond the maximum prison term, if the offender is continuing to respond to treatment, the rehabilitative purpose is being served and the Cruel and Unusual Punishment Clause requirement that the individual not be unreasonably deprived of his freedom would be satisfied.

However, although indeterminate detention, assuming treatability, is constitutional, a few states, as a matter of policy, have retained a fixed term approach, requiring that the treatable offender can only be hospitalized after conviction for a period not to exceed his maximum prison term.[91] At the end of the maximum period of time, the person must be released even if it is shown that he will continue to benefit from psychiatric treatment.[92] The rationale of this approach is that since the knowledge of proper treatment is so limited and conjectural, prediction of the offender's future danger so speculative and the state's institutional and personnel resources so inadequate, a maximum term is necessary to protect the interest of the offender.[93]

On the one hand, the Illinois indeterminate detention approach has the advantage of maximizing the rehabilitative effort. On the other hand, it is true that treatment, though available, is not very advanced and prediction of future harm is impossible to estimate.[94] For this reason, a synthesis of the two approaches may be appropriate. Thus, the following proposal is suggested: To prevent unreasonable deprivation of the individual's liberty the convicted treatable sex offender should be committed to the mental hospital for a term not to exceed the maximum period he would have served if imprisoned;[95] if the sex offender recovers prior to the termination of the maximum term, he should be released on probation;[96] since he has now been rehabilitated, he should not have to finish the balance of his term in prison. If the sex offender has not recovered at the end of the maximum term, and if a psychiatrist believes that continued confinement would not be beneficial, then the offender must be released.[97] This is necessary to prevent unreasonable deprivation of his liberty. Since the person is not treatable, the departure from the fixed term requirement of the Eighth Amendment would not be justified. If, however, at the termination of his maximum term, the examining psychiatrist certifies that the sex offender is responding to treatment and would benefit from continued confinement, then, as a matter of policy to promote the rehabilitative purpose, further hospitalization should be permissible.

To prevent abuses by the hospital administration, detailed reports should be filed by the administrator with the court specifying treatment, progress and all other information that justifies continued confinement based on the rehabilitative purpose of the statute.

In addition, to protect the constitutional rights of the institutionalized offender, the initial determination as to whether continued confinement is justified should be made at a hearing with all Due Process guarantees and with the State having a heavy burden of proof.[98]

A final proposal should also be made. If during the maximum term the person is not responding to treatment and if continued hospitalization would not be beneficial, then the person should be transferred to the prison to benefit from prison rehabilitation available.[99] He should not be released to society since he did not complete his prison term and has not yet paid his debt to society. But at the end of his prison term, he must be released like all other prisoners.[100]

These proposals have many advantages. First, they properly take into account both the need to protect society and the interests of the offender. While it can be argued that such a proposal permits dangerous, unrecovered sex offenders to go free at the end of their maximum term, this problem could be alleviated by the state legislature lengthening the maximum term of confinement for the violent sex crimes.[101] Such legislation would be justifiable as long as the increase in the length of

[90] See text at n. 53–54, 68–73, *supra*.
[91] *E.g.*, N.J. STAT. ANN. ch. 2A:164-6 (1953).
[92] *Id.*
[93] TAPPAN, *supra* n. 10 at 262.
[94] Tappan, *supra* n. 7 at 9–10.
[95] N.J. STAT. ANN. ch. 2A:164-6 (1953).
[96] N.J. STAT. ANN. ch. 2A:164-8. But compare California, CAL. WELF. & INST. CODE §5518 (1966); People v. Thompson, 102 Cal.App.2d 183, 227 P.2d 272 (1951).
[97] N.J. STAT. ANN. ch. 2A:164-6 (1953). *See also* Millard v. Cameron, 373 F.2d 468 (D.C. Cir. 1966); In re Kemmerer, 309 Mich. 313, 15 N.W.2d 652 (1944), *cert. denied*, 329 U.S. 767 (1946).
[98] Baxstrom v. Herold, 383 U.S. 107 (1966).
[99] BALDWIN'S OHIO REV. CODE ANN. ch. 29 §2947.27 (1964).
[100] See text at n. 95, *supra*.
[101] TAPPAN, *supra* n. 10 at 415.

confinement is related to the seriousness of the offense.[102] Since the courts generally give the state legislature great leeway in fixing maximum penalties, this would probably result in life imprisonment for violent sex crimes. In effect, indeterminate detention would result. But it would be justified since the seriousness of the offense would warrant lenghty confinement.

Of more importance, this recommendation would minimize the primary objection to the present statute—that non-violent offenders are being confined for an indeterminate period of time.[103] Since the recommendation permits confinement only for the maximum period of time that the offender would have been imprisoned, and since the maximum term for a non-violent sex offender is minimal (often misdemeanors, with a maximum sentence of one year in jail), the non-violent offender would no longer be confined for an indefinite period unless he was responding to treatment. Furthermore, it is submitted, the legislature would not be justified in increasing the maximum term of imprisonment for non-violent offenses since such an increase would not be related to the seriousness of the offense.

Another advantage to the maximum term approach is that it properly takes into account the rehabilitative purpose of the act. Whether the offender is violent or non-violent, confinement, even beyond the maximum term, is justified so long as he is responding to treatment.

Furthermore, mandatory release of an offender confined for his maximum term eliminates one of the most difficult problems of the present statute: the psychiatrist's reluctance to release a sex offender before he is certain that the offender has "recovered."[104] As stated above, the doctor's hesitancy often is due to the impossibility of predicting the future potentiality of danger with any precision and due to the fact that courts require such provision, with the result that too often offenders are being confined long after they should have been released.[105] By requiring release of persons not responding to treatment after the maximum term has expired, this problem is eliminated.

To some extent, Illinois has solved this problem within the context of the present statute with a recently enacted conditional release provision.[106] This provision provides that:

> If the Court finds that the patient appears no longer to be sexually dangerous but that it is impossible to determine with certainty under conditions of institutional care that such person has fully recovered, the Court shall enter an order permitting such person to go at large subject to such conditions and such supervision by The Director as in the opinion of the Court will adequately protect the public.[107]

The provision allows the examining psychiatrist to supervise the sex offender for several years outside the restrictive institutional environment but under close supervision, to determine whether he has adequately adjusted to societal pressures, and whether he can now cope with his problem. But, if the offender recidivates, he is recommited.

It could be argued that this conditional release concept removes most of the objections to the Illinois pre-indictment approach and that the post conviction, maximum term proposal is unnecessary. However, it is submitted, for the reasons already discussed, that the post-conviction approach is more desirable. At the same time this does not preclude the application of the conditional release concept in the post-conviction context. Thus, if an individual, because he is responding to treatment, is confined in the mental hospital beyond the maximum term he would have served in prison, it is recommended that the hospital administrator, with court approval, be empowered to conditionally release the patient to determine whether he has sufficiently adjusted, so that he can be permanently released. If he recidivates, he can be re-committed to the mental hospital since the release is part of the rehabilitation program. So long as he is treatable, re-commitment beyond the maximum term does not violate the Cruel and Unusual Punishment Clause. However, if a patient is not responding to treatment, he must be released at the end of his maximum term and the conditional release mechanism cannot be applied to him. Otherwise if the non-treatable person recidivated, he could be re-hospitalized without being convicted of his crime. While a person on parole can be re-committed since his maximum term was not served, in this context, the patient

[102] See text at n. 47–51, *supra*.
[103] TAPPAN, *supra* n. 10 at 414. See text at n. 108–124, *infra*.
[104] §105–8.
[105] See text at n. 71–73, *supra*.
[106] §105–10.
[107] *Id.*

would have already been confined to a maximum term and the conditional release and re-commitment for committing a new crime could be used to permit indeterminate detention of non-treatable offenders. Thus, since this result would raise the constitutional problems already discussed, conditional release should only be applied to those patients who have been confined beyond their maximum term but are still responding to treatment.

COMMITMENT OF NON-VIOLENT OFFENDERS

As stated, a basic criticism of the Illinois act is that over 50% of those committed are non-violent offenders who at most pose a psychological danger to the community because of their morally offensive behavior.[108]

The Illinois statutory language, however, seems broad enough to include the commitment of non-violent persons. Dangerousness is defined as a demonstration of "... propensities toward acts of sexual assault and acts of sexual molestation of children. . . ."[109] "Propensities" seems broad enough to include not only actual force but also simply touching; and "sexual molestation" could include not only actual harm but simply the case of an elderly man who talks to young children while they sit on his lap.[110]

A constitutional argument could be made that such a broad definition violates the due process requirement that statutory provisions cannot be too vague and indefinite.[111] Nevertheless, the Illinois Court rejected the argument in *People* v. *Sims* holding the statute constitutional.[112] This holding is consistent with the position that the United States Supreme Court has taken. In *Pearson*,[113] the Court reviewed a Minnesota court's construction of a statute that defined sexual psychopaths as persons who:

> [B]y a habitual course of misconduct in sexual matters, have evidenced an utter lack of power to control their sexual impulses and who, as a result, are likely to attack or otherwise inflict injury, loss, pain or other evil on the objects of their uncontrolled desire.[114]

Even though "injury, loss, pain or other evil"[115] is even more vague and indefinite than the Illinois provision, the Court still held that the definition did not violate the Due Process Clause.[116]

This conclusion appears to be the prevailing view in most if not all state jurisdictions.[117] However, in the recent case of *Millard* v. *Cameron*,[118] the District of Columbia Circuit Court narrowed the concept of dangerousness. In that case, the defendant pleaded guilty to indecent exposure. Judge Bazelon, discussing the *Pearson* holding, noted that:

> Though the "likely ... injury, loss, pain or other evil" may be either physical or psychological, we think it must not involve conduct that is merely repulsive or repugnant, but that has a serious effect on the viewer. Otherwise the definition might be "too vague and indefinite" to constitute valid legislation.[119]

No other jurisdiction has adopted this view and until the United States Supreme Court rules otherwise it must be concluded that a broad construction of the protective purpose of the statute does not violate the Due Process Clause, and commitment of psychologically dangerous sex offenders to a mental hospital is constitutional

This result may not be as objectionable as it first appears. The state has the police power to protect the morals of its citizenry so long as the means used are reasonably related to the purposes sought.[120] Thus, as already stated, so long as the offender, whether violent or non-violent, is treatable, then hospitalization, which is the means used, is reasonably related to the protective and rehabilitative purposes sought.[121]

Furthermore, in addition to satisfying the constitution, committing all treatable sex offenders may be justified on a policy basis. Studies indicate that there is no correlation between increased

[108] TAPPAN, *supra* n. 10 at 414.
[109] §105-1.01.
[110] Both the toucher and the elderly man who talked with the children were committed under the statute. Interviews with Dr. Kelleher, Dr. Haines (Behavioral Clinic, Cook County Criminal Court) and Attorney Shelvin Singer (who has handled several cases involving the statute).
[111] Wright v. Georgia, 373 U.S. 284 (1963); Connally v. General Construction Co., 269 U.S. 385 (1926).
[112] 382 Ill. 472, 47 N.E.2d 703 (1943).
[113] Pearson v. Probate Court, 309 U.S. 270 (1940).
[114] *Id.* at 273.
[115] *Id.*
[116] *Id.*
[117] People v. Levy, 151 Cal.App.2d 460, 311 P.2d 897 (1957); Sweezer v. Green, 360 Mo. 1249, 232 S.W.2d 897 (1950); People v. Chapman, 301 Mich. 584, 4 N.W.2d 18 (1942).
[118] 373 F.2d 468 (D.C. Cir. 1966).
[119] *Id.* at 471.
[120] See text at n. 31–35, *supra*.
[121] See text at n. 53–54, *supra*.

dangerousness of the offender's act and his treatability; that is, both violent and non-violent offenders appear to benefit equally from psychiatric treatment in a mental hospital.[122] Therefore, there is no reason to differentiate between the categories; so long as they are treatable, all mentally ill sex offenders should be hospitalized.

On the other hand, other policy considerations could be used to support a statute that commited only violent offenders. First, because of the limited resources and personnel available, the act should be limited to the most violent offenders where the need for institutionalization is greatest.[123] Second, perhaps the act should be limited to violent offenders at this point to give the administrators an opportunity to experiment and to determine successes and failures.[124]

Since non-violent offenders can benefit from treatment, but since resources are so inadequate, it is recommended that the sentencing judge be encouraged to commit only violent offenders to the mental hospital. However, if a clear showing is made that the non-violent offender would benefit from treatment and if facilities are available, the judge should be able to commit the non-violent offender as well. In addition, it is recommended that the legislature should make intensified efforts to improve state institutional facilities so that all convicted offenders will have the oportunity to receive psychiatric treatment if they would benefit.

CONCLUSION

For constitutional and policy reasons, the following proposal is recommended:

1. To be committed to the mental hospital, the offender must be found to be both sexually dangerous and treatable.

2. The pre-indictment proceeding should be discarded and the statute amended so that commitment to a mental hospital will be one of the alternatives available to the sentencing judge at the post-conviction sentencing hearing. Thus, after conviction, the sex offender should be examined by a psychiatrist. If the psychiatrist certifies that the convicted offender would benefit from treatment, then he may be committed. If the psychiatrist concludes that the convicted offender would not benefit from treatment, then he is sentenced under normal procedures.

3. The offender should be committed for a term not to exceed the maximum period he would have served if imprisoned. If during the term of confinement the offender is not responding to treatment, he should be transferred to prison to serve the balance of his term. If the offender recovers prior to the termination of the maximum term, he should be released on probation. If the offender has not recovered at the end of the maximum term, he must be released. If at the termination of his maximum term, he is continuing to respond to treatment and would continue to benefit from continued confinement, he may continue to be confined so long as he is responding to treatment. The hospital administrator should be required to submit periodic reports to the sentencing judge stating the offender's progress, types of treatment being used and other pertinent information. Finally, if the offender is confined in the hospital beyond his maximum term because he is responding to treatment, the hospital administrator should be empowered to conditionally release him to society to determine whether he has sufficiently adjusted so that he can be permanently released.

4. If institutional and personnel resources are inadequate, only violent offenders should be committed to the mental hospital.

[122] ELLIS & BRANCALE, *supra* n. 17 at 48–49.
[123] ILLINOIS REPORT *supra* n. 6 at 19.
[124] Tussman & tenBroek, *supra* n. 41 at 346.