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EQUAL PROTECTION AND COMMITMENT OF THE INSANE IN WISCONSIN

The recent case of *Baxstrom v. Herold*¹ has raised several questions in regard to the constitutionality of Wisconsin procedure for commitment of the insane. The petitioner had been found to be insane while he was serving a two-and-one-half to three-year sentence in a New York prison. In situations of that nature, section 384 of the New York Correction Law provided that within thirty days prior to the expiration of the prisoner's sentence, when in the opinion of the director of the hospital the prisoner continues insane, "the director shall apply to a judge of a court of record for the certification of such person as provided in the mental hygiene law for the certification of a person not in confinement on a criminal charge."² In subsequent proceedings, medical certificates were submitted by the state which stated that in the opinion of two of its examining physicians, Baxstrom was still mentally ill and in need of hospital and institutional care. The assistant director at the hospital testified that in his opinion Baxstrom was still mentally ill. Baxstrom, appearing alone, was accorded a brief opportunity to ask questions. The court then signed a certificate indicating he was satisfied that Baxstrom "may require mental care and treatment" in a mental institution. On appeal, petitioner argued he was denied equal protection of the laws by a statutory procedure under which a person may be civilly committed at the expiration of a penal sentence without the jury review available to all other persons civilly committed in New York. The Court, speaking through Chief Justice Warren, agreed:

All persons civilly committed, however, other than those committed at the expiration of a penal term, are expressly granted the right to *de novo* review by jury trial of the question of their sanity under §74 of Mental Hygiene Law. Under this procedure any person dissatisfied with an order certifying him as mentally ill may demand full review by a jury of the prior determination as to his competency. If the jury returns a verdict that the person is sane, he must be immediately discharged. It follows that the State, having made this substantial review proceeding generally available on this issue, may not, consistent with the Equal Protection Clause of the Fourteenth Amendment, arbitrarily withhold it from some.³

The State had argued that Baxstrom was not denied equal protection because the legislature had created a reasonable classification differentiating the civilly insane from the "criminally insane" which the State defined as those with dangerous or criminal propensities. The Court did not concur:

¹ 86 Sup. Ct. 760 (1966).

² N.Y. CORRECTION LAW §384 (1961).

³ 86 Sup. Ct. 760, 762-63 (1966).

Equal protection does not require that all persons be dealt with identically, but it does require that a distinction may have some relevance to the purpose for which the classification is made. Classification of mentally ill persons as either insane or dangerously insane of course may be a reasonable distinction for purposes of determining the type of custodial or medical care to be given, but it has no relevance whatever in the context of the opportunity to show whether a person is mentally ill *at all*. (Citation omitted. Emphasis in the original.)⁴

The Court further held that petitioner was denied equal protection of the laws because he was retained in an institution created for the dangerously insane when he wasn't afforded a judicial determination of this fact, which judicial determination was afforded all other civilly insane persons by the New York law.⁵

Because of the rule enunciated in *Baxstrom* by the Supreme Court, it becomes appropriate to examine the Wisconsin statutes providing for a determination of sanity *vel non*. Four procedures will be discussed: (1) the Wisconsin procedure directly parallel to that in *Baxstrom* set forth in section 51.21(3) of the Wisconsin Statutes; (2) commitment after acquittal by reason of insanity provided in section 959.11; (3) commitment after determination of nontriability by reason of insanity provided in section 959.13; (4) post expiry commitment procedure of sex deviates under section 959.15(14)(a). The literature in this field is exhaustive and the author can only hope to point out some of the possible ramifications of a case which may well signal a need for re-examination of the distinctions between civil and criminal commitments so-called, and the justifications for these distinctions.

It is necessary first to delimit the extent to which *Baxstrom* may be applied by reason of its facts alone. The New York statute held to be invalid applied (1) to prisoners found to be insane while imprisoned and (2) expressly to civil commitments. The parallel Wisconsin procedure is found in section 51.21(3) of the Wisconsin Statutes which provides for removal of prisoners found to be insane to central state hospital, which is the hospital in Wisconsin for the dangerously insane.⁶ Section 51.21(3)(b) incorporates section 51.01, the general civil commitment section, and thus appears to afford the prisoner the same proceeding other civilly committed persons are entitled to. The only apparent difference between the two sections is that under section 51.21(3)(b) no physician connected with a state prison, Winnebago, or central state hospital or county jail shall be appointed as an examiner. However, this would not be a denial of equal protec-

⁴ *Id.* at p. 763.

⁵ N.Y. MENTAL HYGIENE LAW §§86, 135 (1961).

⁶ Male prisoners are transferred to central state hospital in Waupun, female prisoners are sent to Winnebago state hospital. WIS. STAT. §51.21 (3)(a) (1963).

tion, but rather an additional safeguard for the protection of the prisoner.

Since equal protection demands similar commitment procedures, presumably the re-examination procedures must be the same also. The re-examination language of sections 51.11 and 51.21 is not similar, however, as apparently required by *Baxstrom*. Under the general re-examination procedure of 51.11, the court may order the patient's discharge if it finds that the "patient is no longer in need of care and treatment."⁷ The re-examination provisions of section 51.21 provide for discharge if the patient is "found not to be mentally ill, infirm, or deficient."⁸ However, these differences are minor and, in addition, may be compensated for by section 51.21(3)(f) which states that, "Should the prisoner remain at the hospital after expiration of his term he shall be subject to the same laws as any other patient."

The other holding in *Baxstrom*, viz. detention of the petitioner in an institution for the dangerously insane without the judicial determination afforded all other civilly committed persons, does not raise problems under Wisconsin law either. The Wisconsin Statutes, section 51.21(2), do not provide for such a judicial determination. A mere departmental order, by the department of public welfare, is all that is necessary to transfer a dangerously insane patient to the central state hospital. Thus, there can be no denial of equal protection because the procedure under section 51.21(3) would amount to the same type proceeding. In both cases, a departmental order is the method of transfer.

Thus, we see that in large measure the post expiry commitment procedure of a prisoner in Wisconsin meets the constitutional test of equal protection set forth in *Baxstrom*. It becomes interesting, however, to ponder whether *Baxstrom* could ever be extended to those commitments flowing from the criminal processes. A literal reading of *Baxstrom* could be so interpreted:

Classification of mentally ill persons as either insane or dangerously insane of course may be a reasonable distinction for purposes of determining the type of custodial or medical care to be given, but it has no relevance whatever in the context of an opportunity to show whether a person is mentally ill *at all*. (Emphasis in the original.)⁹

Professor Weihofen has stated that the criminally insane are indistinguishable from the other mentally ill:

'Mentally ill people who have committed violent and serious offenses against society are not a group apart from other mentally ill persons who have not translated their emotional conflicts into overt assault upon others.' They run the same

⁷ WIS. STAT. 51.11(5) (1963).

⁸ WIS. STAT. 51.21(3)(e) (1963).

⁹ 86 Sup. Ct. 760, 763 (1966).

gamut of psychiatric disorders as do psychiatric patients in general. Psychotic murderers respond to the same methods of care and treatment as do other mental hospital patients. These conclusions were reached in a study of eighty-one persons charged with or convicted of murder in 1925-1951. They are supported by other studies and opinions of experts.¹⁰

If indeed the criminally insane are indistinguishable from the civilly insane, it can be forcefully argued that both groups should be accorded identical procedures when their sanity is being determined.

Since *Baxstrom* held that petitioner was entitled to equal re-examination and discharge proceedings as well, this dual extension of the doctrine of equal protection to criminal commitment proceedings would have far reaching ramifications in Wisconsin criminal procedure. Section 957.11(1) provides for *mandatory commitment* of the defendant "if the jury finds that the defendant was insane or feeble-minded or that there is *reasonable doubt* of his sanity or mental responsibility *at the time of the commission of the alleged crime.*"¹¹ (Emphasis added). Since commitment is mandatory upon this finding being made, defendant may be committed when he *de facto* is sane.¹² He is not afforded a determination of his present sanity as those committed under the general commitments section, sections 51.01 *et seq.*, are. In addition, section 957.11(4) provides that a person committed because of an acquittal by reason of insanity may not be discharged, *even if sane*, until it is also found by the court that "he is not likely to have a recurrence of insanity or mental irresponsibility as will result in acts which but for insanity or mental irresponsibility would be crimes." This is a different standard than that found in the general re-examination section 51.11(5), which provides that a patient may be discharged when he is "no longer in need of care and treatment."

Commitment of a person acquitted by reason of insanity who is presently sane has been justified on several grounds. One is that by pleading not guilty by reason of insanity the defendant has voluntarily accepted his commitment by raising the defense.¹³ But does this not place the defendant on the horns of a cruel dilemma? He is forced to choose between standing trial for a crime for which he cannot be lawfully punished or subjecting himself to unfair commitment procedures.

¹⁰ RUBIN, *THE LAW OF CRIMINAL CORRECTION* §21, p. 540 (1963).

¹¹ There are approximately twelve states that have mandatory commitment statutes similar to Wisconsin's. See Note, *Releasing Criminal Defendants Acquitted and Committed Because of Insanity*, 68 *YALE L. J.* 293 (1958).

¹² See 38 *OPS. ATT'Y. GEN.* 181, 182 (1949) where it is stated: "Since no person can be tried for a crime unless he is sane at the time of the trial, a verdict of not guilty because insane will *in every case* result in the commitment of a person who is presently sane."

¹³ Goldstein & Katz, *Dangerous and Mental Illness: Some Observations on the Decision to Release Persons Acquitted by Reason of Insanity*, 70 *YALE L. J.* 225, 238 (1960).

A second ground is that having successfully claimed insanity to avoid punishment, the accused should then bear the burden of proving he is no longer subject to the same mental abnormality which produced his criminal acts.¹⁴ However, is there not a countervailing presumption that defendant is in fact sane, since if he was presently insane he would have been declared non-triable under section 957.13 (which provides that if defendant is found to be insane anytime before sentencing, he must be committed because he cannot understand the charges brought against him)?

A third ground for justifying mandatory commitment upon acquittal is that the legislature might consider it appropriate to provide compulsory commitment for those who successfully invoke an insanity defense in order to discourage false pleas of insanity.¹⁵ However, this again puts the defendant in a dilemma and he may be induced to not plead insanity in order to avoid unfair commitment procedures, a choice he should not be forced to make. His right to plead insanity should remain unfettered.

In addition to *Baxstrom*, other federal cases have left implications that it may no longer be constitutional to distinguish procedurally between the civilly and criminally insane. Presumably, a criminally insane person is confined on the basis of a two-fold justification: in his own interest and in the interest of society.¹⁶ The retributive theory of punishment does not logically justify the detention of acquitted criminal defendants because there is no guilt for which the defendant can be punished.¹⁷ The deterrent theory of crime prevention does not justify his confinement because the very irrationality of those mentally ill precludes their deterrence.¹⁸ Presumably, then, the major justification for the difference in treatment of the civilly and criminally insane is that the latter are more likely dangerous to the public because they have exhibited criminal proclivities.¹⁹ Of course, civil commitments can also be grounded on dangerousness, but this does not change the civil nature of the commitment.²⁰

However, it may just be that dangerousness can no longer be grounds for commitment. In *Robinson v. California*,²¹ the Supreme Court, in holding a California statute making it a criminal offense to be addicted to narcotics inflicted cruel and unusual punishment, also

¹⁴ *Lynch v. Overholser*, 369 U.S. 705, 715 (1962).

¹⁵ *Ibid.*

¹⁶ *Lynch v. Overholser*, 369 U.S. 705 (1962); note, 1 L. R. A. (N.S.), p. 540 *et seq.*

¹⁷ *Bishop v. United States*, 350 U.S. 961 (1956) holds that conviction of an accused person while he is legally incompetent violates due process.

¹⁸ WEIHOFEN, MENTAL DISORDER AS A CRIMINAL DEFENSE 483, 484-89 (1954).

¹⁹ *Lynch v. Overholser*, 369 U.S. 705, 715-17 (1962).

²⁰ Note, 79 HARV. L. REV. 1288 (1966).

²¹ 370 U.S. 660 (1962).

said the law would be valid if it were a civil statute providing for confinement in an institution purporting to treat addicts. The Court did say, in dicta, that the state could compulsorily confine victims of "human affliction," but this is apparently said only in contemplation of the State assuring treatment for its ill citizens.²² Commitment because one is dangerous is not meant to insure treatment for the individual, however, but is to afford protection for society. Thus, under *Robinson's* implications, if a case arose in which medical testimony, for one reason or another, indicated that a patient could not be helped by treatment, the Court might very well hold that the State was punishing the patient for an illness and thus inflicting cruel and unusual punishment. By the same token, confining a person merely because he is dangerous, even though sane, which is possible under sections 957.11(1) and 957.11(4), may constitute cruel and unusual punishment under *Robinson*.²³

Moreover, concern over the constitutionality of confining a person *solely* on the grounds that he is dangerous has not been limited to discussion over the wake of unchartered law left by *Robinson*. One author has contemplated the possibility that a person may be confined, even though sane, only because he is dangerous:

[H]ospitalization of persons acquitted by reason of insanity is not intended as punishment—it is designed for treatment and rehabilitation and to detain a 'sane' person in a mental institution is plainly punitive. In addition, the argument that such persons can be confined to protect the public because they may be potentially dangerous will not withstand the slightest scrutiny. To deprive a person of liberty because of 'evil or criminal propensities he may be thought to have' would offend due process; it 'would transform the hospital into a penitentiary where one could be held indefinitely for no convicted offense.' A defendant found *guilty* and imprisoned cannot be further [sic] detained after he has served his sentence, even though there may be every indication that he will repeat his antisocial behavior following release. (Citation omitted. Emphasis in the original.)²⁴

At least one court has taken a similar view. In *In re Williams*, a case involving a civil commitment, the psychiatric report said that "at the present time [the petitioner] shows no evidence of active mental illness but . . . he is potentially dangerous to others and if released is likely to repeat his patterns of criminal behavior, and might commit homicide."²⁵ The Court said:

²² 370 U.S. 660, 666 (1962); Note, *Civil Commitment of the Mentally Ill: Theories and Procedures*, 79 HARV. L. REV. 1288 (1966).

²³ Note, *The Cruel and Unusual Punishment Clause and the Substantive Criminal Law*, 79 HARV. L. REV. 635 (1966).

²⁴ Krash, *The Durham Rule and Judicial Administration of the Insanity Defense in the District of Columbia*, 70 YALE L. J. 905, 945 (1961).

²⁵ 157 F. Supp. 871 (D.D.C. 1958).

Many persons who are released to society upon completing the service of sentences in criminal cases are just as surely potential menaces to society as is this petitioner, having a similar pattern of anti-social behavior, lack of occupational adjustment, and absence of remorse or anxiety; yet the courts have no legal basis of ordering their continued confinement on mere apprehension of future unlawful acts and must wait until another crime against society is committed or they are found insane in proper mental health proceedings before confinement may again be ordered.²⁶

If dangerousness is no longer a valid criterion for confinement of the criminally insane and if Professor Weihofen's view is correct,²⁷ what remains to distinguish the criminally insane from the civilly insane? Should they not both be afforded the same procedural regularities presently only afforded the civilly insane in Wisconsin, viz., commitment only on a finding of present insanity and release upon restoration to sanity? The answer will not come easily for it necessarily will involve the juxtaposition of society's right to protection from persons who by definition have not been deterred by the usual criminal sanctions and the right of the individual to be free from confinement because of alleged evil propensities, a precept fundamental to Anglo-Saxon law. to Anglo-Saxon law.

Research for the purpose of justifying the dichotomy in the treatment of the civilly and criminally insane has not proved fruitful. Many of the states have statutes in regard to the confinement of one acquitted by reason of insanity existing at the time the offense was committed; but the question as to the right to confine one so acquitted, or as to the validity of the statutes authorizing such confinement, has seldom been before the courts. One would naturally think, though, that certain policy considerations would flow from criminal commitments, so as to make them a class separate and distinct from civil commitments. Indeed, in *Overholser v. Leach*, the court stated:

The test . . . is not whether a particular individual, engaged in the ordinary pursuits of life, is committable to a mental institution under the law governing civil commitments. . . . This [criminal commitment] statute applies to an exceptional class of people—people who have committed acts forbidden by law, who have obtained verdicts of "not guilty by reason of insanity," . . . People in that category are treated by Congress in a different fashion from persons who have somewhat similar mental conditions, but who have not committed offenses or obtained verdicts of not guilty by reason of insanity at criminal trials.²⁸

²⁶ 157 F. Supp. 871, 876 (D.D.C. 1958); See also, Goldstein & Katz, *Dangerousness and Mental Illness: Some Observations on the Decision to Release Persons Acquitted by Reason of Insanity*, 70 YALE L. J. 225, 237 (1960).

²⁷ See note 10, *supra*.

²⁸ 257 F. 2d 667, 669-70 (D.C. Cir. 1958), *cert. denied*, 359, U.S. 1013 (1959).

The United States Supreme Court, in *Lynch v. Overholser*,²⁹ seems to have recognized that different policy considerations may obtain for those commitments arising out of the criminal processes. The Court expressly approved legislation enacted in the District of Columbia in response to *Durham v. United States*.³⁰ Apprehension that *Durham* would result in a flood of acquittals by reason of insanity and fear that these defendants would be immediately set loose led to agitation for remedial legislation. The primary purpose was protection of the public safety and the statute was designed to "guard against imminent recurrence of some criminal act" by a person who presumably is not significantly influenced in his conduct by punitive sanctions.³¹

However, notwithstanding this apparent condonation of the separate treatment of the criminally insane in *Lynch*, it still remains a fact that both *Robinson* and *Baxstrom* were decided after *Lynch*, and that language in both *Robinson* and *Baxstrom* can be construed to have significant impact on criminal commitment procedures.

The second commitment procedure that might be affected by *Baxstrom* is that provided by section 957.13 of the Wisconsin Statutes where a defendant must be committed after an inquiry conducted in a "summary manner" wherein the court finds "defendant as a result of mental illness or deficiency lacks capacity to understand the proceeding against him or to assist in his own defense. . . ." ³² Also, the discharge provisions of section 957.13(4) are more stringent than the general provisions of Chapter 51 because not only must the person be sane, but his insanity or feeble-mindedness must not be chronic. Thus, such a person could conceivably meet the discharge requirements of Chapter 51 but not those of section 957.13.

The Wisconsin Supreme Court has held that section 957.13-commitment procedure is radically different from civil commitments. In *Cullen v. State*,³³ the court held that the appointment of a general practitioner to determine defendant's sanity *vel non* was lawful because section 957.13(1) expressly says "summary manner." The general practitioner spent twenty minutes examining the defendant and declared him sane.³⁴ Presumably, the court would have also upheld the procedure had he been declared insane in the same amount of time. Since the basis of the court's decision was that the "method of making inquisition is left to the discretion of the court,"³⁵ civil commitments

²⁹ 369 U.S. 705 (1962).

³⁰ 214 F. 2d 862 (D.C. Cir. 1954).

³¹ See *Committee on Mental Disorder as a Criminal Defense, Report to the Council on Law Enforcement of the District of Columbia*, in S. Rep. No. 1170, 84th Cong., 1st Sess. 5, at 12-13 (1955), cited in Krash, *supra* note 22, at 942.

³² See Wis. Laws 1965, ch. 132.

³³ 26 Wis. 2d 652, 133 N.W. 2d 284 (1965), *cert. denied*, 382 U.S. 863 (1965).

³⁴ Brief for Plaintiff in Error, p. 10, *Cullen v. State*, 26 Wis. 2d 652, 133 N.W. 2d 284 (1965) *cert. denied*, 382 U.S. 863 (1965).

³⁵ See *Crocker v. State*, 60 Wis. 553, 557, 19 N.W. 435 (1884).

and section 957.13-commitments cannot be any more polaric. The civil proceedings are carefully prescribed by Chapter 51.

Since anyone committed under section 957.13 is still benefited by the presumption that he is innocent until proven guilty, it is difficult to perceive, in the light of *Baxstrom*, how his status at the time of commitment puts him in a different class than those civilly committed. Especially would this be true of one charged with check forging or some other criminal proclivity not involving physical danger to others. Is society's interest in preserving property so great that one can be confined solely because it is suspected he may damage property?³⁶ Yet this could result because under section 957.13(4), a patient may presently be sane, yet confined because it was determined that his insanity was chronic, i.e. likely to recur.

Also, the interpretation of *Robinson*, discussed *supra*, would have even greater significance here for this person is not being confined because he is dangerous, but because it is *suspected* he is dangerous.

The third commitment procedure that *Baxstrom* may have relevance to is section 957.15, popularly and professionally called the "sex deviate" law. It provides a method for dealing with sex offenders whose conduct is impelled by "mental or physical aberrations"³⁷ which require "specialized treatment." Briefly, the statute provides for the following commitment procedure:

(1) When a person is convicted of certain sex crimes,³⁸ he *must* be committed by the court to the state department of public welfare for a 60-day⁴⁰ presentence examination, conducted at the sex deviate facility at the state prison in Waupun.⁴¹

(2) If the department recommends that specialized treatment is not necessary, the offender is sentenced in the normal manner.⁴² If the department recommends specialized treatment, the recommendation is binding on the court and the court is required to do one of two things: place defendant on probation on the condition that he receive treatment either as an outpatient or at an institution or, commit defendant to the department for treatment.⁴³

³⁶ See note, *supra* note 20.

³⁷ WIS. STAT. §959.15(6) (1963).

³⁸ *Ibid.*

³⁹ The presentence investigation is mandatory for those convicted under section 944.01 (Rape), section 944.02 (Sexual Intercourse without Consent), section 944.11 (Indecent Behavior With a Child), or for attempted rape or attempted sexual intercourse without consent covered by section 939.32. WIS. STAT. §959.15(1) (1963). For other crimes, except homicide or attempted homicide, directly motivated by sexual desire, the presentence investigation is discretionary. WIS. STAT. §959.15(2) (1963).

⁴⁰ WIS. STAT. §959.15(4) (1963).

⁴¹ *But see* Wis. Laws 1965, ch. 520 §1m, which has provided for a sex deviate facility to be built in the future away from the prison at Waupun.

⁴² WIS. STAT. §959.15(5) (1963).

⁴³ WIS. STAT. §959.15(6) (1963).

(3) If defendant is committed to the department, he is sent to the sex deviate facility at Waupun and will be discharged at the expiration of the maximum term provided by law for the offense, but in any event not less than one year after his confinement.⁴⁴

(4) If defendant is still considered "dangerous" at the expiration of his maximum term, the department may apply to the committing court for an order⁴⁵ extending the commitment for five years.⁴⁶

(5) When the department applies for such an order, the court notifies defendant or his guardian, affords him the opportunity to appear in court with counsel and process to compel the attendance of witnesses and the production of evidence. He may be examined by his own doctor. He is not entitled to jury review.⁴⁷

(6) This procedure of review and recommitment may be repeated as often as necessary, as long as the court finds the defendant "dangerous"⁴⁸ to the public.⁴⁹

(7) The defendant may apply for re-examination but not oftener than semiannually.⁵⁰

Therefore we see that:

Wisconsin has enacted a completely indeterminate criminal sentence of one day to life. Such an indefinite sentence permits a psychiatric, personal approach by making possible individualized treatment of offenders. The length of these sentences does not depend on the original crime, but on expert analysis of each convict's personality, response to therapy and tendency to recidivate.⁵¹

Many of the states have sex deviate laws and they have been held not to violate due process,⁵² or equal protection,⁵³ or the right to a jury

⁴⁴ Wis. STAT. §959.15(12) (1963).

⁴⁵ Wis. STAT. §959.15(13) (1963).

⁴⁶ Wis. STAT. §959.15(15) (b) (1963).

⁴⁷ Wis. STAT. §959.15(14) (a) (1963).

⁴⁸ Wis. STAT. §959.15(14) (b) (1963).

⁴⁹ Wis. STAT. §959.15(15) (a) (1963).

⁵⁰ Wis. STAT. §959.15(15) (c) (1963).

⁵¹ Note, *Criminal Law—Wisconsin's Sexual Deviate Act*, 1954 Wis. L. REV. 324, 325.

⁵² *Minnesota ex rel. Pearson v. Probate Court*, 309 U.S. 270 (1940); *Malone v. Overholser*, 93 F. Supp. 647 (1950); *Ex parte Keddy*, 105 Cal. App. 2d 215, 233 P. 2d 159 (1951); *People ex rel. Elliott v. Juergens*, 407 Ill. 391, 95 N.E. 2d 602 (1950); *People v. George*, 407 Ill. 523, 95 N.E. 2d 606 (1950); *People v. Chapman*, 301 Mich. 584, 4 N.W. 2d 18, (1942); *In re Rowan*, 305 Mich. 231, 9 N.W. 2d 528 (1943); *In re Kemmerer*, 309 Mich. 313, 15 N.W. 2d 652 (1944); *State ex rel. Sweezer v. Green*, 360 Mo. 1249, 232 S.W. 2d 897 (1950); *In re Mundy*, 97 N.H. 239, 85 A. 2d 371 (1952); *State v. Wingler*, 25 N.J. 151, 135 A. 2d 468 (1957). See Annot., 24 A.L.R. 2d 350 (1952).

⁵³ *Minnesota ex rel. Pearson v. Probate Court*, 309 U.S. 270 (1940); *Ex parte Keddy*, 105 Cal. App. 2d 215, 233 P. 2d 159 (1951); *People ex rel. Elliott v. Juergens*, 407 Ill. 391, 95 N.E. 2d 602 (1950); *People v. Chapman*, 301 Mich. 384, 4 N.W. 2d 18 (1942); *In re Moulton*, 96 N.H. 370, 77 A. 2d 26 (1950); *State v. Wingler*, 25 N.J. 151, 135 A. 2d 468 (1957); *Trueblood v. Tinsley*, 148 Colo. 503, 366 P. 2d 655 (1961); *State v. Evans*, 73 Idaho 50, 245 P. 2d 788 (1952).

trial,⁵⁴ or to impose cruel and unusual punishment.⁵⁵ Subjecting the person to compulsory psychiatric examination does not force him to incriminate himself.⁵⁶ Cases from various states have held that their acts are not too vague or indefinite,⁴⁷ do not place the person in double jeopardy,⁵⁸ do not constitute ex post facto laws or retrospective legislation,⁵⁹ and are not unconstitutional because they permit evidence of prior crimes.⁶⁰ The requirement of commitment instead of the imposition of a criminal penalty upon a finding of psychopathy does not unconstitutionally invade the judicial function.⁶¹ Nevertheless, despite this virtual cornucopia of state cases upholding the sex psychopath statutes, a recent Third Circuit case, *United States ex. rel. v. Gerchman v. Maroney*⁶² indicates these statutes may be unconstitutional.

Even brushing aside any possible effects on the sex deviate statute by way of *Gerchman*, it can be argued that the post expiry commitment procedure of 959.15(14)(a) is unconstitutional because it falls under

⁵⁴ *Minnesota ex rel. Pearson v. Probate Court*, 309 U.S. 270 (1940); *People v. McCracken*, 39 Cal. 2d 336, 246 P. 2d 913 (1952); *In re Moulton*, 96 N.H. 370, 77 A. 2d 26 (1926).

⁵⁵ *People v. Chapman*, 301 Mich. 584, 4 N.W. 2d 18 (1942); *State v. Evans*, 73 Idaho 50, 245 P. 2d 788 (1952).

⁵⁶ *People v. Chapman*, 301 Mich. 584, 4 N.W. 2d 18 (1942); *State ex rel. Sweezer v. Green*, 360 Mo. 1249, 232 S.W. 2d 897 (1950); *In re Moulton*, 96 N.H. 370, 77 A. 2d 26 (1950). *But see* *People v. English*, 31 Ill. 2d 301, 201 N.E. 2d 455 (1964), which upholds the right against self-incrimination in a compulsory presentence examination.

⁵⁷ *Minnesota ex rel. Pearson v. Probate Court*, 309 U.S. 270 (1950); *People v. Chapman*, 301 Mich. 584, 4 N.W. 2d 18 (1942).

⁵⁸ *Ex parte Keddy*, 105 Cal. App. 2d 215, 233 P. 2d 159 (1951).

⁵⁹ *People v. Chapman*, 301 Mich. 584, 4 N.W. 2d 18 (1942); *State ex rel. Sweezer v. Green*, 360 Mo. 1249, 232 S.W. 2d 897 (1950).

⁶⁰ *People v. Sims*, 382 Ill. 472, 47 N.E. 2d 703 (1943); *People v. Ross*, 344 Ill. App. 407, 101 N.E. 2d 112 (1951).

⁶¹ *People v. Piasecki*, 333 Mich. 122, 52 N.W. 2d 626 (1952); *State ex rel. Volden v. Hass*, 264 Wis. 127, 53 N.W. 2d 577 (1953).

⁶² 355 F. 2d 302 (3rd Cir. 1966). This case held that Pennsylvania's Barr-Walker Act, which is similar to Wisconsin's sex deviate law in that it provides for indeterminate sentencing after conviction for specified crimes, is unconstitutional because it denies defendant's rights of confrontation and cross examination. The philosophy of this case might be applied to the original commitment procedure under Wisconsin's sex deviate statute where defendant is committed solely on the basis of the presentence report. The court rejected the arguments that the statute provided a mere sentencing procedure or was civil in nature on pp. 309-10:

Its title and its text are replete with language which reveals that the proceeding is penal in nature. It may be invoked only after a precedent conviction of guilt of one of the specified crimes and prescribes a new and radically different punishment. . . .
Further:

The effort of enlightened penology to alleviate the condition of a convicted defendant by providing some elements of advanced, modern methods of cure and rehabilitation and possible ultimate release on parole cannot be turned about so as to deprive a defendant of the procedures which the due process clause guarantees in a criminal proceeding. Cf. *State ex rel. Volden v. Hass*, 264 Wis. 127 at 129, 53 N.W. 2d at 577, where the Wisconsin court held that the statute does not violate due process because, "upon conviction, he is subject to whatever loss of liberty the legislature has prescribed for his crime."

the *Baxstrom* rule. Section 959.14(b) specifically states the patient is not entitled to a trial by jury, which is afforded all civilly committed patients by section 51.03.

As discussed *supra*, the post expiry commitment procedure held invalid in *Baxstrom* was (1) civil and (2) applied specifically to insane persons. There appears to be little doubt that even though the sex deviate statute's commitment procedure appears in the criminal code it is civil in nature. There aren't any Wisconsin cases so holding but other states have uniformly and repeatedly declared the civil nature of the commitment of a sex psychopath.⁶³ Therefore, the nature of the proceeding is civil in both *Baxstrom* and under section 959.14(b). However, it is just as uniformly held by other states that a sex psychopath is not insane.⁶⁴ Again, there is no Wisconsin law on point, but the following statement seems to be universally true in all of the states that have discussed the issue:

[The sex deviate statutes] are especially designed to cope with sex offenders who, because of a psychopathic condition, commit or have a tendency to commit such offenses. They recognize that the sexual psychopath is neither normal nor legally insane, and for that reason, requires special consideration, both for his own sake and for the safety of society.⁶⁵

Therefore, on its precise facts, *Baxstrom* is not applicable to section 959.14(b). It is not likely that the philosophy of *Baxstrom* will be extended to the sex deviate statute because the United States Supreme Court in *Minnesota ex. rel. Pearson v. Probate Court*, has directly considered the issue and held that equal protection was not denied:

Equally unavailing is the contention that the statute denies appellant the equal protection of the laws. The arguments proceed on the view that the statute has selected a group which is part of a larger class. The question however is whether the legislature could constitutionally make a class of the group it did select. That is, whether there is any rational basis for such a selection. We see no reason for doubt on this point. Whether the legislature could have gone farther is not the question. The class it did select is identified by the state court in terms which clearly show that the persons within that class constitute a dangerous element in the community which the legislature in its discretion could put under appropriate control. As we have often said, the legislature is free to recognize degrees of harm,

⁶³ *People v. Chapman*, 301 Mich. 584, 4 N.W. 2d 18 (1942); *Ex parte Keddy*, 105 Cal. App. 2d 215, 233 P. 2d 159 (1951); *In re Moulton*, 96 N.H. 370, 77 A. 2d 26 (1950); *People v. Sims*, 382 Ill. 472, 47 N.E. 2d 703 (1943); *Malone v. Overholser*, 93 F. Supp. 647 (1950); *People v. Gross*, 44 Cal. 2d 859, 285 P. 2d 630 (1955).

⁶⁴ *People v. Chapman*, 301 Mich. 584, 4 N.W. 2d 18 (1942). Many statutes specifically exclude insane persons, e.g., D.C. Code Ann. §22-3503(1) (1961).

⁶⁵ Annot., 24 A. L. R. 2d 350, 351 (1952).

and it may confine its restrictions to those classes of cases where the need is deemed to be clearest. If the law "presumably hits the evil where it is most felt, it is not to be overthrown because there are other instances to which it might have been applied."⁶⁶

However, an argument could be made to support the proposition that the Supreme Court has overruled *Pearson, sub silentio*. This argument would be that since the sexual deviate is presumably institutionalized for the same reasons as the civilly and criminally insane, (rehabilitation and protection of the public)⁶⁷ there is no basis for designating them as a separate class procedure-wise. Of course, the standards for commitment and care and treatment during commitment permit separate classification.

Also, there is some authority for the proposition that the hair-line distinction between the "insane" and "psychopathic" is unreal. In a recent case, a sociopathic defendant argued that since the legislature had not defined "mentally ill," he could not be committed unless he fell within one of the categories classified as mental illness by the American Psychiatric Association. The association's categories excluded sociopaths. The court stated:

We seriously doubt that the legislature ever intended medical classifications to be the sole guide for judicial commitment. . . . Recidivism, repeated acts of violence, the failure to respond to conventional penal and rehabilitative measures, and public safety, are additional and relevant considerations for the court in deciding whether a person is mentally ill.⁶⁸

Thus, notwithstanding the views expressed in *Pearson*, it appears possible, though not very probable, that *Baxstrom* may even be applicable to Wisconsin's sex deviate law.

Conclusion

This comment has only attempted to point out, against the backdrop of the current trend of the law to safeguard the rights of the individual, what appear, viscerally at least, to be logical extensions of *Baxstrom* to Wisconsin criminal procedure. No doubt the general consensus is that, "Provisions for the commitment [of the criminally insane] are so different from those relating to the non-criminal group that they should be considered separately."⁶⁹ It is hoped that this comment has raised the question of *why* they should be considered separately.

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⁶⁶ 309 U.S. 270, 274-75 (1940).

⁶⁷ See note 16 *supra* and accompanying text.

⁶⁸ *Dodd v. Hughes*, 398 P. 2d 540, 542 (Nev. 1965).

⁶⁹ *Weihofen & Overholser, Commitment of the Mentally Ill*, 24 TEX. L. REV. 307, 328 (1946).