

# Sexual psychopathy, public policy, and the liberal state

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## Abstract

This article addresses several interrelated issues. It strives to situate a class of offenders within the liberal state. The disposition of this class allows an analysis of the tensions in liberal theory. It highlights the ways liberalism attributes individual responsibility for criminal behavior and captures the limits of those attributions. It also reveals liberalism's shift away from models of responsibility toward the social control of deviancy. The disposition of this class points toward the therapeutic mask involved in the social control model. Further, the disposition of this class may well serve as a model for isolating and demonizing other disfavored classes, including political dissenters.

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## 1. Introduction

Sexual psychopathy is a heterogeneous class that ranges from pedophiles to rapists. When defined within legal frameworks, the class presents boundary problems. For example, a young male may have consensual sex with an underage girl and find himself labeled a sexual psychopath. Rapists may be further divided into a category that finds some more sadistic than others.

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The class may, in that sense, provide a wedge away from liberal adversarial jurisprudence. Where that model depends upon notions of intent and individual responsibility, the alternative model calls for delegation of social control to behavioral scientists who will be charged to predict dangerous aggressive behavior and to use that diagnostic to preventatively remove the would-be offender from society.

The rationale would be that the old time practice requiring proof of *mens rea* and the *actus reus*, traditional liberal criminal jurisprudence, insufficiently and inefficiently protects the public from dangerous actors. The rationale would

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further assert that selecting the dangerous out of society would help the class so selected by providing restorative treatment, given the conflation of predictive or diagnostic acumen with treatment capability. Both prediction and treatment claims are themselves ideological.

The rationale provides a model for treating analogous classes, notably, other dangerous classes, including alleged terrorists and nonsexual offenders. The brave new world could start in elementary school and select out children with the appropriate profile. Such a model could be sold as humane, given some school systems' zero-tolerance policies toward wrong behavior. The criminal rampages in schools and colleges today provide fertile soil for such reform or exploitation.

The tension between models of individual responsibility and social science social control goes to the heart of both liberal theory and practice. This article, in fact, was prompted by such a real world concern. Several years ago the English and to some extent the Dutch contemplated expanding their respective sexual psychopathy practices to aggressive criminal behaviors. It did not happen at that time, but the theory is in place and the tension still within the fabric of liberal legal and cultural consciousness.

Liberal state practice represses its values in the case of certain classes of people who are rendered unworthy of the respect that the theory purports to afford individuals just because they are human. Even here the "repression" is sideways. We spend significant money and therapeutic resources for little gain to keep at least some members of the class out of public sight. Yet we put other members of the class into the community, creating communal fear and anger — again a product of liberal ambivalence. Despite the fact that we put some sexual offenders in communities, we require that they make their presence officially known, perhaps creating more anxiety than safety. Others we sentence, and when their terms are complete, we continue to isolate them, pretending treatment and certainly with the goal of protecting the public.

Many articles in this symposium define the antinomy in liberal values. But rather than spending significant space on Kant and Bentham, the greater part of this article examines Wisconsin bureaucratic practice with this class of offenders. Practice must inform theory, or theory offers only flaccid symbolism. Wisconsin was chosen for several reasons. First the state has a history of progressivism. Second, it has a history that exemplifies the segregation of the sexual psychopath with a mental health bar as well as public defender commitment to protect those in the class.

Progressivism, among other reform issues, placed significant value in delegating social practice to scientific expertise. In terms of jurisprudence, the progressive movement was part of a broader commitment by American Legal Realists and others to delegate significant policy matters to agencies with particular expertise lacking in the judiciary. The attack was on what was considered a vapid formalism that could be effectively replaced by social scientific understanding.

Historically, Wisconsin has made several attempts to deal with the category, sexual offender. It has attracted international attention and may be one reason why I was invited to England to discuss a proposed British move to preventive detention. In turn, British expertise is now used in the Wisconsin system. Wisconsin spends significant resources, money and therapeutic talent to hold certain members of this class beyond the time served for the initial defense. This has disturbed advocates and constitutionalists because of the watering and waning of determinate sentencing toward indeterminate social control. Wisconsin has also had a vigilant mental health bar scrupulously monitoring the disposition of this class and others who fall within the mental health power of the state. Wisconsin practice mirrors tension in liberal theory and institutions, generating a number of questions.

Why does liberal policy persist in selecting this group out of the general criminal class? Why spend the money and precious therapeutic resources that could be used for worthy and less recalcitrant populations? Why does the liberal state undercut due process guarantees for the class or at least a part of the class? What does the policy in place say about the liberal state, its philosophic anthropology, its commitment to the autonomy and the dignity of the individual, and its commitment to protect the public?

Practice must be examined to modify any theoretical claims about what the liberal state in fact stands for. Theory is the ideal to which advocates can point to highlight and affect flaws in practice, to the extent that they may be open to modification. Looking at extreme cases has been a time-honored way of grading the responses of a political order. Criminal jurisprudence has been standard in this regard. How a state criminalizes and how a state disposes of its criminals says something about the state's commitments to justice, fairness and human dignity. Sexual psychopath policy combines both the policing and the mental health power of the state. It becomes exemplary, then, to measure the state's commitment to the most dangerous and reviled.

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