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A SOCIO-LEGAL HISTORY OF THE PSYCHOPATHIC OFFENDER

LEGISLATION IN THE UNITED STATES

DISSERTATION

Presented in Partial Fulfillment of the Requirements for
the Degree Doctor of Philosophy in the Graduate
School of The Ohio State University

By

Aldo Piperno, J.D.

* * * * *

The Ohio State University
1974

Reading Committee:
Professor Simon Dinitz
Professor Edward McDonagh
Professor Joseph Scott

Approved by

Simon Dinitz
Adviser
Department of Sociology
It is always difficult to remember specifically the names of all the persons who have contributed directly or indirectly to the realization of this work. This is true, especially in consideration of the fact that one's prior intellectual experiences bear upon those of the present.

My teachers at the University of Rome Law School taught me first the skills of legal analysis. However, without my encounter with American social sciences and without the numerous contacts with the professors at The Ohio State University, my writing of this work would never have been possible.

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VITA

May 8, 1943 . . . . . . Born - Rome, Italy

1969 . . . . . . . . . . . J.D., Law School, University of Rome, Rome, Italy

1970-1971. . . . . . . Graduate School of Sociology and Social Research, Faculty of Statistics, University of Rome, Rome, Italy

1970 . . . . . . . . . Assistant Lawyer, Rome, Italy

1971-1972. . . . . . Assistant, Institute of Criminology, Tel Aviv University, Israel

1972-1974. . . . . . Research Associate, Program for the Study of Crime and Delinquency, The Ohio State University

1971-1974. . . . . . Research Fellow, National Research Council, Italy

PUBLICATIONS

Struttura Sociale e giurisdizionale in Palestina (Social Structure and Jurisdiction in Palestine) Law School, University of Rome, 1969, (Mimeographed).

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"Indefinite Commitment in a Mental Hospital for the Criminally Insane: Two Models of Mental Health Administration", Journal of Criminal Law and Criminology, (Forthcoming), 1974.


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FIELDS OF STUDY

Major Field: Sociology

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INTRODUCTION

Within the past 40 years, several of the states have enacted special legislation to deal with anti-social personality type violators and sexual psychopath offenders. Initial attempts to formulate such legislation were made in Michigan beginning in 1935. At present, (1974), 26 states and the District of Columbia have such legislation in their criminal codes.

These laws--called psychopathic and sexual psychopathic offender statutes--were intended to operate through the establishment of a special delivery system for the psychopathic offender. This management and treatment entailed the organizational "cooperation" between the criminal justice and mental health systems. In particular, the statutes provide specific legal criteria for the identification, commitment, and release of the psychopathic offender. The statutory provisions cover the three main stages of the process of identifying, committing and releasing the psychopathic offender. They are:

1. Identification: After the commission or conviction of any offense or certain very special offenses, a temporary referral to a psychiatric facility is made to determine if the subject is a psychopathic personality and subject to the indeterminate sentence provided by law.
2. **Commitment**: Upon a diagnosis of psychopathy, the court may order the commitment of the person for an indefinite period in a state facility—often in the so-called mental hospital for the criminally insane—designated for the control and care of the psychopathic offender.

3. **Release**: Upon the subject's recovery, certified as such by the professional staff of the institution, or upon any other event considered relevant by law, the court may provide for the release of the person or for his transfer to a penal institution.

Serious disputes have raged about this special legislation during the entire period in which it has been in existence. The very first psychopathic offender statute enacted in Michigan in 1937 was declared unconstitutional in the same year. Furthermore, the legal, psychiatric, and sociological foundations of these statutes have been severely questioned in the psychiatric literature no less than in judicial decisions. With regard to the substance of this criminal psychopath legislation, Dr. Philip Roche in his Isaac Ray Award lecture said: "the pursuit of demons disguised as sexual psychopaths affords a glimpse of a 16th century approach to mental illness". When substantive issues have not been questioned, the implementation of these statutes has been questioned, as well as the efficacy of the entire delivery system for psychopathic offenders. Recently, a monograph published by the National Institute of Mental Health recommended the repeal of this criminal psychopath legislation from the codes of the states.

Criticism, however, has not appeared to be strong enough or adequate to impede the enactment, amendment and implementation of these statutes. This lag between professional assessments and the creation
and persistence of this legislation through time, leads us to ask fundamental historical questions. Through which historical process did these statutes originate? What social and cultural forces were behind the conception, development and enforcement of this legislation? What role have these statutes played in the American legal tradition? In essence, how did these statutes emerge and how did the present state of affairs develop?

There are now few socio-historical accounts which deal with these questions in the existing literature. The only major exception is a paper published by Edwin Sutherland in 1950. Sutherland suggests that the enactment of the psychopathic offender legislation resulted from the interaction between an intensive campaign conducted by the mass media and the activity of certain categories of professionals, especially psychiatrists. He fails to delve into the substantive issues suggested by this "suspicious" involvement of the media and the psychiatrists in the legislative process. Instead, Sutherland focuses on the description of the "social movement" leading to legislative action and calls his approach to the subject a "collective behavior" point of view. In Sutherland's own words, the diffusion of the sexual psychopathic offender laws occurred under the following conditions: "a state of fear developed, to some extent, by a general, nation-wide popular literature and made explicit by a few spectacular sex crimes; a series of scattered and conflicting reactions by many individuals and groups within the community; the appointment of a committee, which in some cases has been guided by
psychiatrists, which organizes existing information regarding sex crimes and the precedent for their control and which presents a sexual psychopath law to the legislature and to the public as the most scientific and enlightened method of protecting society against dangerous sex criminals. Sutherland also commented that "the organization of information in the name of science and without critical appraisal seems to be more invariably related to the emergence of a sexual psychopath law than is any other part of this genetic process".

Students of law and sociology have quoted Sutherland with approval upon his "collective behavior" analysis of the psychopathic offender legislation. Often, Sutherland's "collective behavior" account has been erroneously referred to as an historical analysis. Indeed, Sutherland's paper does not constitute an historical investigation, although it contains the most insightful suggestions for the reader who wants to undertake such an historical investigation. In point of fact, Sutherland hints at the existence of a trend in criminal justice and criminal law in the first half of this century which made possible the conception of such legislation. The trend which Sutherland describes in his paper is a "trend toward treatment and away from punishment" in the field of criminal justice reflecting the general cultural orientation of American society. Unfortunately, students tended to ignore these suggestions of Sutherland with regard to the historical genesis of this legislation and have failed to pursue his approach.

Indeed, what has happened to the analysis of this offender
legislation has reflected the general orientation of American sociology and criminology. Scholars have complained that contemporary sociology has moved away from the models and analysis suggested by the authors of the classical period of sociology. Thus, sociology of law was a major field in classical sociology. Richard Schwartz and Jerome Skolnick argue that legal phenomena and institutions should be of great and continuing concern to sociologists. Sociology is committed to the understanding of the social order; law provides the formal norms which establish and testify to that order. In the field of law, criminal law is certainly the most visible instrument through which order is created and maintained, and social control is implemented. In the last few years, socio-cultural investigations of criminal law have received much more attention from criminologists. It has been argued that the origin of crime resides in law which creates social reality rather than in the internal processes in the minds of individuals. This being the case, it has been argued that criminologists should look more carefully at the entire spectrum of the criminal justice process in order to gain insight about the nature of the crime problem.

Historians have suggested that institutional transformations arising from social action and legislative intervention (e.g., the discovery of the asylum and the creation of the juvenile court) have their basis in macrosocial contexts where interests and cultural attitudes play their historical role.

The present work draws inspiration from these sociological
and historical traditions in the sociology of law. It deals with the
socio-legal history of the psychopathic offender legislation in America.
Our central thesis is that this legislation resulted from the conscious
and dedicated efforts of mental hygienists, social science-oriented
lawyers and judges, and "moral entrepreneurs" to create a system of
control, for specific categories of offenders, who were excluded from
the traditional system of management and control already established
for the criminally insane. The implementation of this legislation also
reflected the success of these social action groups in favor of this
legislation in the framework of the general developments occurring in
the field of criminal justice and mental health.

Chapter I examines the development of the "insanity defense"
from its earliest formulation in England to its incorporation and
development in American criminal law. Special attention is paid to
(1) the long-term expansion of the insanity defense from a cognitive
disease of the mind (intellectual insanity) to the recent concept of
mental illness as an affective disorder; (2) the establishment of the
historical pattern of hospital commitment for those who successfully
won an insanity defense.

Chapter II discusses the contribution of psychiatry to the
creation of a category of mental disease--called emotional insanity--
which came to include almost any type of "disease of the mind" not
properly classifiable in the category of intellectual insanity. The
character of "residuality" of such a new category and its consequent
nosological ambiguity are discussed in the context of problems since raised with regard to the psychiatric validity of emotional insanity or psychopathy--the psychiatric foundation of this legislation.

Chapter III examines the legal system for dealing with psychopathic offenders before the enactment and diffusion of the special sex psychopath statutes. We also discuss the contribution of the ideology of the mental hygiene movement and the predominance of positivism in American jurisprudence in relation to the creation of an emerging social need for such legislation.

Chapter IV examines the legislative history of the psychopathic offender legislation in America and discusses the inconsistencies which originate from the placement of these statutes in an ambiguous legal tradition.

Chapter V delves into the social history of the Ohio psychopathic offender statute (the Ascherman Act) and discusses, in detail, the role played by psychiatrists and lawyers in the creation and implementation of this statute and its various amendments in Ohio.

Chapter VI analyzes how the socio-legal history of this Ohio psychopathic offender statute has determined the phenomenology of its implementation. Special attention is paid to the implication that "official" psychopathy mirrored the social, historical, legal and institutional developments in the Ohio system for the control and care of criminals and the mentally ill.

Chapter VII discusses the present trend in criminal justice and
mental health and the movement towards deinstitutionalization as it affects the current developments in regard to the psychopathic offender legislation and its enforcement.
NOTES TO THE INTRODUCTION


3 National Institute of Mental Health, Civil Commitment of Special Categories of Offenders, (Washington: U.S. Government Printing Office, 1971). This monograph contains a list of the major works on the psychopathic offenders.


5 Ibid., p. 146.

6 Ibid., p. 146.

7 Nicholas Kittrie, The Right To Be Different (Baltimore: The Johns Hopkins University Press, 1971), pp. 169-209. This book contains an excellent presentation of the issues concerning the psychopathic offender legislation. Furthermore, a complete bibliography on this subject is presented in Kittrie's book. However, none of these works adds to the historical suggestions given by Sutherland in 1950.
8 Edwin Sutherland, *op. cit.*, pp. 147-148.


CHAPTER I

THE DEVELOPMENT OF "INTELLECTUAL INSANITY" AS AN EXCEPTION TO CRIMINAL RESPONSIBILITY

The lack of legal responsibility of persons suffering from certain forms of mental illness or mental defect has always been recognized by law. Even in early Roman law (1st century B.C.), the mentally ill person was considered, in 20th century terminology, as lacking free will and incapable of voluntary action. He was regarded, therefore, as being unable to assume his civil rights and responsibilities. His property was usually placed under control of a guardian or curator. During the early middle-age in England, the lands and estates of idiots and lunatics were annexed to the Crown through the law of the King's prerogative. Similar provisions also existed in other countries of Europe. Western civilization, from early Rome until recent history has shown greater concern for the protection of the property of the mentally ill than for his person.

In English law, mental illness began to be recognized as a defense in criminal cases in the early 13th century. Biggs traces the origin of the defense of insanity in English law to the reign of Henry III (1216-1272), when persons who committed homicide were pardoned if
they were believed to be of unsound mind. By the reign of Edward I (1272-1307), complete madness became acceptable as a defense to a criminal charge.5

The relationship between the lack of a guilty mind or a felonious intent and the lack of criminal responsibility was established by 1581. In that year, William Lambard, a famous legal authority, published a handbook for the justices of peace which became a standard reference for a long time. The author stated:

"If a madman or a natural fool, or a lunatike in the time of his lunacie, or a childe y apparently hath no knowledge of good nor evil do ki a ma, this is no felonious acte, nor any thing forfeited by it .. for they cannot be said to have any understanding wil."6

Biggs indicates that "knowledge of good and evil" as a test of criminal responsibility originated with this reference by Lambard. The following history of insanity as a defense and excuse of criminal responsibility has been marked by this original statement which phrased the problem in cognitive terminology.7

The history of legal tests between the 16th and 19th century does not contain any major case comparable to the developments ushered in by the M'Naghten rule.8

In early 1843, Daniel M'Naghten bought a pistol and proceeded to Downing Street with the intent of killing the Tory Prime Minister, Sir Robert Peel. Not knowing what Peel looked like, he mistook Peel's secretary, Henry Drummond, for the Minister and killed him. Mental unsoundness was introduced as a defence and the evidence indicated
a highly systematized trend of delusions and feelings of persecutions. Consequently, M'Naghten was found not guilty on the ground of insanity.\textsuperscript{9}

The verdict was very unpopular. Queen Victoria, the House of Lords, and the newspapers of the day disapproved of the verdict in bitter tones. So much conflict was engendered that the House of Lords called the fifteen judges of England before it to answer a series of five questions in order to clarify the problem of the relationship between insanity and criminal responsibility (for all time). The answers of the judges may be summarized as laying down two rules regarding the responsibility of persons pleading insanity as a defense to crime: \textsuperscript{10}

1. "... to establish a defense on the ground of insanity, it must be clearly proved that, at the time of committing the act, the party accused was labouring under such a defect of reason, from disease of the mind, as not to know the nature and quality of the act he was doing, or if he did know it that he did not know he was doing what was wrong".

This rule was amplified with the explanation that:

a. The knowledge of right and wrong referred to means with respect to the act charged rather than in abstract;

b. It also refers not merely to legal right and wrong, but rather to moral right and wrong.

2. Where a person "labours under partial delusions only and is not in other respect insane" and commits an offense in consequence thereof, "he must be considered in the same situation as to responsibility as if the facts with respect to which the delusions exist were real".

Two characteristics of this formulation should be noted. First, the alternative tests--not knowing the nature and quality of the act or
not knowing that the act is wrong--apply only in cases where the defendant has a defect of reason from disease of the mind and either alternative must flow from this disease of the mind. Second, if the defendant was otherwise sane but acted under an insane delusion in which the facts, as they appeared to the defendant, would constitute a defense to the crime charged, he is not responsible for the crime.

From 1843 until the present, every case heard in English courts was, and still is, decided according to the principles established by the judges' responses to the House of Lords interrogation. 11

The test of responsibility as expressed in M'Naghten has been generally applied in the United States. Some decisions speak of knowledge of right and wrong in general, some of right and wrong as to the particular act involved, many employing these concepts interchangeably. Some states have adopted the right and wrong test from the point of view of knowledge of moral wrong, some from that of knowledge of legal wrong. Some include both. Some quote the nature and quality elements in the tests disjunctively with the right and wrong, some conjunctively. 12

Twenty years after the M'Naghten case, one state in America, New Hampshire, adopted a rule that was an expression of a new approach to the problem. In 1868, Joseph Pike was tried for the murder of Thomas Brown. Pike's defense was insanity. Judge Parley instructed the jurors along the following lines:

"If . . . (the jury) found that a defendant killed Brown in a manner that would be criminal and unlawful if the defendant were sane--the verdict should be 'not guilty by reason of insanity'. If the killing was the offspring
or product of mental disease in the defendant, that neither delusion nor knowledge of right and wrong nor design nor cunning in planning and executing the killing and escaping or avoiding detection, nor ability to recognize acquaintances, or to labor or transact business or manage affairs, is, as a matter of law, a test of mental disease; but that all symptoms and all tests of mental disease are purely matters of fact to be determined by the jury."

Under such instructions, the issue of the accused's mental condition, if he had the capacity for criminal intent, became a question of fact not of law. This approach stated in State v. Pike was supported by later decisions. In State v. Jones the key words in Judge Doe's instructions to the jury were: "if the killing was the offspring or product of mental disease, the defendant should be acquitted". The court also added:

"Whether the defendant had a mental disease seems as much a question of fact as whether he had a bodily disease; and whether the killing of his wife was the product of that disease was also a clearly matter of fact as whether thirst and a quickened pulse are the product of a fever".

The decisions in State v. Pike and State v. Jones were incorporated in the law in New Hampshire. But the New Hampshire rule had little effect outside that state, and failed to gain adoption in any other jurisdiction for almost a century. Other states continued to adhere to the M'Naghten "right and wrong" formula. For example, in State v. Palmer a twenty-year-old defendant was found to be feebleminded and executed in the state of Mississippi. The court held: "if the defendant knows the difference between right and wrong, he is criminally responsible . . . weakness of reason should not shield
one who has committed a crime." In 1907, Frank Willar was convicted of murder although he had been committed previously to a mental hospital for the criminally insane. A Court of Appeals in Georgia also confirmed the conviction ruled in a lower court in Bridges v. State. The court said:

"The evidence amply authorize a finding that (the accused) was an idiot (and a dangerous one at that); but under all the facts of the case as disclosed by the record, this court cannot say the jury were not authorized to determine from certain parts of the evidence, and the legal inference arising therefrom, that the accused had sufficient reason to know that the act he was about to commit . . .".

Nevertheless, there was growing tension between the cognitive moral emphasis of the M'Naghten rule and the emotional-clinical concerns of modern psychiatry. Professor Glueck summarized the feeling of the medical profession in 1928 along the following lines:

"It is evident that the knowledge tests unscientifically abstract out of the mental make-up but one phase or element of mental life, the cognitive, which, in this era of dynamic psychology, is beginning to be regarded as not the most important factor in conduct and its disorders. In brief, these tests proceed upon the following questionable assumptions of an outworn era in psychiatry: (1) that lack of knowledge of the 'nature or quality' of an act (assuming the meaning of such terms to be clear) or incapacity to know right from wrong, is the sole or even the most important symptom of mental disorder; (2) that such knowledge is the sole instigator and guide of conduct, or at least the most important element therein, and consequently should be the sole criterion of responsibility when insanity is involved; and (3) that the capacity of knowing right from wrong can be completely intact and functioning perfectly even though a defendant is otherwise demonstrably of disordered mind".
The reaction of the courts in this cognitive-emotional (clinical) dispute, on the other hand, was shown dramatically in the case of Fisher v. United States\(^{23}\) in 1946. Julius Fisher had a history of alcoholism and syphilis; there was also evidence of organic brain damage. He was working as a janitor in the Cathedral of St. Peter and Paul in Washington. He quarrelled with the Cathedral's librarian and killed her. At the trial he was found impulsive, aggressive and emotionally disturbed. Despite his clinical state, Fisher was found guilty and this decision was upheld by the Court of Appeals for the District of Columbia and subsequently by the Supreme Court.

Justice Frankfurter, however, dissented and observed that:

"... the justification for finding first degree murder premeditation was so tenous that the jury ought not to have been left to founder and flounder within the dark emptiness of legal jargon. The instructions to the jury on the vital issue of premeditation consisted of threadbare generalities, a jumble of empty abstractions equally suitable for any other charge of murder with none of the elements that are distinctive about this case; mingled with talk about mental disease."\(^{24}\)

Out of this continuing conflict in psychiatry and law, the United States Court of Appeals for the District of Columbia created a new rule in Durham v. United States\(^{25}\). This decision was intended to determine legal responsibility--drawing upon a tradition different from M'Naghten.\(^{26}\)

In 1954, Monte Durham was arrested and convicted for housebreaking. He was found guilty by a lower court although his criminal and mental health history showed that he was psychotic. Acting on his appeal, the U. S. Court of Appeals for the District of Columbia overturned
the previous sentence and established a new principle. Speaking for the court, Judge David Bazelon stated:

"The rule we now hold must be applied on the retrial of this case and in future cases is not unlike that followed by the New Hampshire court since 1870. It is simply that an accused is not criminally responsible if his unlawful act was the product of mental disease or mental defect. We use 'disease' in the sense of a condition which is considered capable of either improving or deteriorating. We use 'defect' in the sense of a condition which is not considered capable of either improving or deteriorating and which may be either congenital, or the result of injury, or the residual effect of a physical or mental disease. . . Under the rule now announced, any instructions should in some way convey to the jury the sense and substance of the following: if you the jury believe beyond a reasonable doubt that the accused was not suffering from a diseased or defective mental condition at the time he committed the criminal act charged, you may find him guilty. If you believe he was suffering from a diseased or defective mental condition when he committed the act, but believe beyond a reasonable doubt that the act was not the product of such mental abnormality, you may find him guilty. Unless you believe beyond a reasonable doubt either that he was not suffering from a diseased or defective mental condition, or that the act was not the product of such abnormality, you must find the accused not guilty by reason of insanity. Thus, your task would not be completed upon finding, if you did find, that the accused suffered from a mental disease or defect. He would still be responsible for his unlawful act if there was no causal connection between such mental abnormality and the act. These questions must be determined by you from the facts which you find to be fairly deducible from the testimony and the evidence in this case".

Concerning the M'Naghten rule, Judge Bazelon said:

"By its misleading emphasis on the cognitive, the right-wrong test requires court and jury to rely upon what is, scientifically speaking, inadequate, and most often, invalid and irrelevant testimony in determining criminal responsibility. The fundamental objection to the right-wrong test, however, is not that criminal
responsibility is made to rest upon an inadequate, invalid or indeterminable symptom or manifestation, but that it is made to rest upon any particular symptom. In attempting to define insanity in terms of a symptom, the courts have assumed an impossible role, not merely one for which they have no special competence . . . (It) is dangerous 'to abstract particular mental faculties and to lay it down that unless these particular faculties are destroyed or gravely impaired, an accused person, whatever the nature of his mental disease must be held to be criminally responsible . . .' In this field of law as in others, the fact finder should be free to consider all information advanced by relevant scientific disciplines".

The adoption of the Durham rule in the District of Columbia was widely praised in most psychiatric and some legal circles as the beginning of a new era. It was regarded as a sign that the law would recognize the growing prestige and knowledge of psychiatry, and would work with it in the disposition of criminal cases, especially those in which the issue of insanity was introduced. Others, however, remained very skeptical in regard to the validity and value of the rule. Diamond pointed to the problem that the extension of the rules of criminal responsibility, as it is accomplished in Durham, could subvert the basic principles of "humanitarian penal reform". Under the new rule, Diamond argued, "large numbers of offenders can be labeled as insane, then confined for indeterminate periods up to life in institutions called mental hospitals, which are really prisons in disguise, with only a pretense of treatment and with a gross disregard of civil liberties and due process . . ." In practice, Diamond raised the crucial problem of the disruptive effects of hospital commitment in comparison with
incarceration, which became the main issue of discussion in the field of law and psychiatry.

As of 1971, only two jurisdictions—aside from the District of Columbia and the State of New Hampshire—had adopted the Durham rule: the Virgin Islands in 1956 and Maine in 1963. On June 23, 1972, the United States Court of Appeals for the District of Columbia overturned the Durham rule in Brawner v. U. S. The rule was also specifically overturned in 20 states and most of the federal circuit courts.

The repeal of Durham represents the apparent abandonment of a position mainly supported by psychiatrists. The Durham rule, in fact, says to the defendant: "you are not a criminal, you are sick". This statement implies that if the defendant is seen as being ill, he belongs in a special class necessitating disposition and treatment entirely different from that utilized in the customary approach to criminality. Sol Rubin has captured the point made against Durham. He says that "in going from insanity to the more modern mental illness, Durham loses mens rea. Mental illness may support the defense of insanity, but it is not a defense standing alone . . . when we jump from insanity to mental illness we are dealing with a different thing . . . Thus, the end product, in the Durham decision, is that mental illness has been substituted for mens rea, not merely for insanity". In short, the Durham rule adds: "we will also excuse the crime if mens rea was present but mental illness caused it. Mental illness is held to supercede intent."
The ultimate implication of the Durham rule, the very implication on which it was repealed, was that *mens rea*, the mental element of crime, was abandoned, giving psychiatrists and other clinicians the power to incorporate their ideology in the criminal process. Psychiatrists, according to Hakeem, have been engaged for a long time in a relentless and extensive campaign to extend the scope and power of their influence in the administration of justice, in the disposition of offenders, and in the policies and practices of correctional institutions and agencies. This campaign, says Hakeem, has now reached "reckless and irresponsible proportions". In repealing Durham, the court seemed to support the Hakeem arguments against psychiatrists. The court, which repealed the Durham rule, pointed out that Durham had opened the door to "trial by label". With this expression, the court meant that since Durham did not specify the kind or degree of abnormality of mind intended with the words "mental disease" and "defect", psychiatrists attached to the words the medical connotations that occurred to them. The result was that the psychiatrist was, in fact, deciding the ultimate issue, adding his own concepts of legality and morality disguised in the medically appropriate language that satisfied Durham.

After having repealed the Durham rule, the District of Columbia adopted the formula of a test recommended by the American Law Institute in 1962. This test is based upon an earlier recommendation by Judge Biggs of the Third Circuit Court of Appeals of the United States in the case of *U. S. v. Currens* in 1961. In this case, Judge Biggs wrote
a decision holding that (to be considered not responsible) "the jury must be satisfied that at the time of committing the prohibited act the defendant as a result of mental disease or defect lacked substantial capacity to conform his conduct to the requirements of the law which he is alleged to have violated". The model Penal Code introduced by the American Law Institute proposed consequently the following statutes with regard to the determination of criminal responsibility.

1. "A person is not responsible for criminal conduct if at the time of such conduct as a result of mental disease or defect he lacked substantial capacity either to appreciate the criminality (wrongfulness) of his conduct or to conform to the requirements of the law".46

2. "As used in this article the terms mental disease or defect do not include an abnormality manifested only by repeated criminal or otherwise antisocial conduct"47

This definition is very similar to that of Currens proposed in 1961. It includes language in the term of the M'Naghten defense--"lacks substantial capacity either to appreciate the criminality of his conduct or . . .--as well as terms borrowed from Durham--"mental disease" and "defect". The designers of this new test claim that it takes into account the volitional as well as the cognitive capacity of the individual. It also requires substantial impairment rather than total impairment. As of 1972, ten states and eight of the eleven federal circuits had adopted the test either verbatim or with minor modifications. Seven states have incorporated the rule statutorily and three others have adopted it by judicial decision.48
Criticism of this last development in the history of the legal tests for the determination of criminal responsibility has also been severe. It may be seen, Brackel and Rock argue, that in abandoning some words and replacing them with others the Code points to the promised land. But a real change can scarcely be effected by the use of words which bear a dictionary synonymity with those erased. Thus, it is argued, that "result of" is the same as "product" in Durham, and "appreciation of the criminality of his conduct" is the same as M'Naghten emphasis on cognitive variables.

Brakel and Rock, after having reviewed most of the literature on the insanity defense, suggest that a crystal-clear definition of responsibility may be impossible and perhaps undesirable, but an operational definition is not out of reach. First, the problem is one of articulating a test of criminal responsibility which will enable the judicial process to discriminate effectively between those cases where a punitive-correctional disposition is thought to benefit society and those in which a medical-custodial disposition is believed to be proper. They go on and say that such a test would presently be premised on the rationality of man, i.e., on the concept that man is a being who has free choice--and would retain irrationality as a minimum criterion of insanity. Second, such a test should harmonize law and medical science, thus enabling the psychiatrist to make a maximum contribution unhampered by moral and legal abstractions and over simplifications. Third, the test should be stated in such a manner that is is readily applicable
and easily understood by a jury of laymen. Fourth, any test of criminal responsibility should relieve from responsibility all those whose imprisonment in the traditional manner would not satisfy the purposes of the penal law, while at the same time making certain that the accountability of other persons for their actions is in no way undermined.51

The recent attempts to formulate new tests of criminal responsibility which could attenuate the dissatisfaction with the previous legal formulas seem to be far behind solution. It may well be that such a solution will hardly be reached in the context of the trend in criminal law and criminal justice which has been developing from the time of M'Naghten and which only during the last decade seems to undergo subsequent changes. This trend, according to Kittrie, consists in the "divestment of criminal jurisdiction by the social decision to remove a growing class of offenders from criminal sanctions, by reason of their mental condition, and to subject them to hospitalization instead".52 Szasz also points to the origin of this trend of divestment of criminal law with the case of M'Naghten. Indeed, the philosophy of the Enlightenment and the discovery of the Asylum constituted the ideological and institutional prerequisites behind the process of shift of control from criminal law to mental health. Historically, the pattern established for the criminally insane, namely his commitment in the hospital, started to expand toward other types of mental disorders. Among them, the psychopathic offenders were the more problematic "category" for which
a system of social control could be established. But first, the category itself had to be identified, created in official psychiatry and then introduced into law.
NOTES TO CHAPTER I

1 The guardian, usually a close relative of the person who needed care, was nominated by a magistrate. In earlier periods of Roman history (4th Century B.C.), control of the person and his goods did not depend on a judicial pronouncement. The fact that the person did not act like a "sane" individual was sufficient for his relatives to assume such control. Carolus Bruns, *Fontes Juris Romani Antiqui: Editio Alterata Aucta Amendata* (Tubingae: Libraria Lauppiana, 1871), pp. 23-24.

2 A legal commentator says: "The King as the political father and guardian of his kingdom, has the protection of all his subjects, and of their lands and goods; and he is bound, in a more peculiar manner to take care of those who, by reason of their imbecility and want of understanding, are incapable of taking care of themselves". Leonard Sheldr, *A Practical Treatise on the Law Concerning Lunatics, Idiots, and Persons of Unsound Mind* (London: S. Sweet, 1883), Vol. 2, p. 9.


4 In early English law, a person charged with a crime and found to be a madman was not acquitted, but a special verdict was given that he was mad and then the King pardoned him. See James F. Stephen, *History of Criminal Law of England* (London: MacMillan, 1883), Vol. 3, pp. 371, et seq.


6 Quoted in John Biggs, *op. cit.*, ibid.

7 The concept of good and evil expressed in the quotation by Lambard seems to be the first expression of what later came to be known as the right and wrong test. Francis Wharton and Moreton Stille, *Medical Jurisprudence* (Rochester: The Lawyers' Cooperative Publishing Company, 1905), Vol. 1, p. 522.
A major work which presents a detailed account of the history of the legal tests of criminal responsibility preceding the famous M'Naghten case is Sheldon Glueck, Mental Disorder and The Criminal Law (Boston: Little Brown and Co., 1925).

M'Naghten's Case, 10, Clark and Fin., 200.

A complete account on the legal antecedents and the events which accompanied the trial of M'Naghten is found in Henry Weihofen, Insanity As A Defense in Criminal Law (New York: The Commonwealth Fund, 1933), pp. 26-32.

Henry Weihofen, op. cit., pp. 31-32.

Henry Weihofen, op. cit., pp. 32-44; See also Sheldon Glueck, op. cit., pp. 187-231. Both authors refer to, and quote at length from, the most important cases which marked the acceptance and the development of the insanity defense along the tradition established with the M'Naghten case.

State v. Pike, 49 N.H., 399 (1870).

50 N.H., 369 (1871).

Ibid., p. 369

Only a few reported cases have been found in which the lawyers asked the adoption of the New Hampshire rule, and it was definitively rejected. See Henry Weihofen, The Urge to Punish (New York: Farrar, Straus and Codahy, 1956); People v. Hubert, 119 Cal. 216, 51 Pac. 329 (1897); State v. Craig, 52 Wash. 66, 100 Pac. 167 (1909); Eckert v. State, 114 Wis. 160, 89 N.W. 826 (1902).

161 Mo. 152, 61 S.W. 651 (1901).

161 Mo. at 168, 61 S.W. at 655.

State v. Willard, 150 Cal. 543, 89 Pac. 124 (1907).


43 Ga. App. at 214, 158 S.E. at 359.


328 U.S. 463 (1946).

In its adoption of the Durham rule, the court followed the New Hampshire law. The principle however, has an older origin which goes back to 1800. In the Hadfield case (27 State Trials 1281, 1800) Sir Thomas Erskine suggested that a man could know right from wrong but if his mental condition produced or was the cause of the criminal act, he should not be considered legally responsible for the act.


Samuel Brakel and Robert Rock, *op. cit.*, pp. 381-390. elaborate upon the recent developments with regard to the tests of criminal responsibility.

471 F. Rep. 2d 969 (D.C., 1972). The Court said that the principal reason for departing from the Durham rule was that it permitted undue dominance by psychiatrists and psychologists called to give expert testimony. Too often their testimony--the Court stated--contained ethical and legal judgments that were properly the domain of the jury.
36 See for example the reaction of a psychiatric journal as it is expressed in an editorial dedicated to the question of the repeal of Durham. "Editorial", Hospital and Community Psychiatry, Vol. 23, (1972), pp. 6-7.


38 Sol Rubin, op.cit., p. 53.

39 Ibid., p. 54.

40 In the early 1960's, intellectuals began to achieve consciousness of the extraordinary role played by institutional psychiatry in American social history with regard to legal and institutional change. G. Corer, speaking of psychiatry and psychoanalysis, asked, "Are we by Freud obsessed?", New York Times Magazine, July 30, 1961; Jerome Hall observed in "The Scientific and Human Study of Criminal Law," Boston University Law Review, Vol. 42 (Summer, 1962), pp. 267-280 that "it is a curious and thought provoking fact that in no country in the world has psychiatry assumed the gargantuan proportions attained in the United States. Nor the propaganda of rich psychiatric institutions carried on elsewhere to any degree remotely approaching that in this country". In particular, the implication that the application of psychiatry in the field of criminal law as well as of civil law is ideologically biased has been developed by Thomas Szasz in all his publications. (see especially Psychiatric Justice (New York: Collier Books, 1965). The same argument with regard to psychiatry as well as general medicine has been introduced by Ronald Leifer, In Name of Mental Health (New York: Science House, 1969) and by Eliot Friedson, The Professor of Medicine (New York: Dodd, Mead and Company, 1970), pp. 203-302.


42 See note 36, p. 7.


44 290 F.2d 751 (1961).

45 See note 44.

46 See note 43.
See note 43.


Michel Foucault, *Madness and Civilization* (New York: Vintage Books, 1973), elaborates mainly upon the philosophical antecedents which brought to the invention of the asylum. He contends that the asylum was the attempt of Enlightenment attitudes to bring madness under the rigid control of reason. On the other hand, David Rothman, *The Discovery of the Asylum* (Boston: Little Brown and Company, 1971), focuses more on the relationship between social and cultural structure and the discovery of the asylum. Both, however, point to the importance of these institutional innovations for the patterns of management of deviancy adopted in the post-Enlightenment period in Europe and America.
CHAPTER II

THE CREATION OF "EMOTIONAL INSANITY"

IN PSYCHIATRIC NOSOLOGY

The history of the legal tests for the determination of criminal responsibility has oscillated between Scylla and Charybdis. The historical debate has been plagued by a conflict between a minimalistic and maximalistic position. The supporters of M'Naghten, or a modernized version of it, have aimed at keeping the use of the insanity defense at a minimum. Those who have favored the Durham rule, have attempted to extend the "benefit" of the insanity defense to a larger category of offenders. Rubin was right in saying that, if we were to apply the logic of Durham, we would have to excuse practically all criminals, i.e., those who were led to their crimes by mental illness, physical illness, or social illness. Jerome Hall also commented that "no lawyer can view with equanimity . . . the irresponsible expansion of the concept of mental disease".

The historical trend from M'Naghten to Durham shows a dialectic movement going on between the two rules. Nevertheless, the major tendency of this movement has been toward the expansion of the range of activity of the insanity defense. The last development of
the Model Penal Code assumes an in-between position, but still incorporates the language and spirit of Durham. The historical movement has also been characterized by a fear that this expansion of the insanity defense, actualized in Durham, might involve the decline of the Rule of Law as opposed to the Rule of Man. Consequently, "authority takes the place of law, and law no longer governs", graphically states Rubin. The advent of the so-called "therapeutic state", as an historical trend, may well serve as an illustration of, and give substance to, the argument that there is an expansion of social control exercised in the name of mental health rather than in the name of criminal sanctions.

This "authoritarian" tendency of the historical movement suffers, however, a major disadvantage—or advantage, depending on personal ideology. There has always been awareness of the problems involved in shifting from the position of cognitive incapacity to that of mental illness in the insanity defense. Or at least some lawyers and clinicians have been sensitive to the substitution of mental illness for mens rea. This is not true of the psychopath. The psychopath has been considered not insane, but criminally responsible. Thus, he has been denied the possible advantages and has been subjected to all the disadvantages of those subject to the rule of the insanity defense.

Apprehension, conviction and institutionalization of the psychopath has meant control over a large class of persons left out of the jurisdiction of the insanity defense. The history of the term psychopath in psychiatric nosology will clarify this aspect and contribute
to understanding the connection between the insanity defense and the psychopath legislation in an historical framework.

The clinical identification of the psychopath was properly established as a problem of psychiatric classification by G. Partridge in 1931. The question was, according to Partridge, "whether we may . . . give psychopathic personality a place coordinate with the major mental deviations in our classification". After having reviewed some of the problems in providing adequate criteria for classification, Partridge suggested that "if we consider the whole class in terms of socialized behavior, we do find a conspicuous number who . . . may justly be termed sociopathic". Consequently, "we may use the term sociopathy to mean anything deviated or pathological in social relations, whether of individuals with one another, or within or towards groups, and also in the relations of groups to one another . . .". This connotation of the psychopath or sociopath as somebody essentially incapable of having a "normal" social relationship has been the leitmotif in the history of the term until recently.

The use of the term sociopath in the sense given by Partridge in 1931, however, represents an advanced stage in the development of psychiatric classification in relation to this disturbance. The original nosological terminology is much older and its history is useful in helping to discover latent assumptions as well as in suggesting the establishment of ideological connections in the field of psychiatry and law.
In the late decades of the 18th century, it was almost universally believed that the intellect was always impaired in insanity. Pinel, a French doctor and an early reformer in the mental health field in the period of 1745-1826, undermined this defective intellect hypothesis and thereby initiated a flurry of psychiatric speculations germane to the concept of psychopathy. When Pinel took charge of the Bicêtre, he found a patient, son of a "weak and indulgent mother", who came from a "noble family". As a child he had been given everything he wanted; as an adult he had inherited a fertile estate. Although highly privileged, Pinel noted that "the patient could never satisfy his desires"... "Obstacles aroused terrible fury: when a dog got in his way, he kicked it to death; when his horse jerked (of) the reins, he whipped it unmercifully". The patient's mania had worsened until "in a fit of exasperation", he had "precipitated" a peasant woman into a well. Concerning the patient, Pinel wrote: "I was a little surprised to find many maniacs who at no period gave evidence of any lesion of the understanding, but who were under the dominion of instinctive and abstract fury, as if the active faculties had sustained injury". Since none of the usual psychiatric terms seemed to describe the symptoms, Pinel concluded that this patient suffered from "manie sans delirie".

In America, Benjamin Rush also observed such cases and wrote: "the will might be deranged even in many instances of persons of sound understanding and some uncommon talents, the will becoming the
involuntary vehicle of vicious actions through the instrumentality of passions". Rush was a believer in the derangement of the moral faculty, conscience and the "sense of deity". He called those cases "the cases of total perversion of the moral faculties".

A distinction between the intellectual, cognitive, knowing aspects of man's mental life, and the feeling, conative, emotional part was gaining wider acceptance. A disorder of the emotions was called moral insanity, of cognition, intellectual insanity. J. Prichard was the first to give popularity to the term "moral insanity". He defined moral insanity as a:

"madness consisting in a morbid perversion of the natural feelings, affections, inclinations, temper, habits, moral dispositions, and natural impulses, without any remarkable disorder or defect of the intellect or knowing and reasoning faculties, and particularly, without any insane hallucination or illusion".

Prichard's definition was highly intuitive and vague. He made, however, several observations which later became points of great importance. He noticed, for instance, that a propensity to theft was a feature of moral insanity, and sometimes, it was its leading, if not the sole, characteristic. He also felt that the prognosis of moral insanity was often more unfavorable than any other form of mental derangement.

The earliest use of the term moral insanity contained in clinical records in America was in the report of Dr. Samuel Woodward, Superintendent of the Massachusetts State Lunatic Hospital in 1836. Woodward wrote that one-fourth of the patients in the hospital were victims of
moral insanity, being characterized neither by delusions nor by hallucinations but by a highly excited state of the feelings, by the uncontrollable passions, by a derangement of the moral powers, and having perverted habits of life". 17

It remained, however, for Issac Ray in 1838 to present the first treatise on the relation between moral insanity and crime. He wrote of moral mania in the following terms:

"In this form of insanity, the derangement is confined to one or a few of the affective faculties, the rest of the moral and intellectual constitutions preserving its ordinary integrity. An exaltation of the vital forms . . . may even be carried to such a pitch as to be beyond the control of any other power, like the working of a blind instinctive impulse. Accordingly, we see the faculty thus affected, prompting the individual to action by a kind of instinctive irresistibility, and while he retains the perfect consciousness of the impropriety and even enormity of his conduct, he deliberately and perseveringly pursues it . . . In the full possession of his reason, he commits a crime whose motives are equally inexplicable to himself and to others". 18

In the decade following Prichard and Ray, there had been little disagreement over the condition described as moral insanity. In 1844, the American Journal of Insanity began publication. A. Brigham, the first editor, accepted the doctrine of moral insanity and until his death in 1849 he gave it favorable presentation in the Journal. 19

In the second half of the 19th century, there was growing opposition to the concept of moral insanity. John Ordronaux, Professor of Medical Jurisprudence in the Law School of the Columbia College, expressed the view of the opponents in the following way:
"The symptoms of moral insanity as given by Dr. Ray are all striking delineations of what common sense, enlightened by revelation, would call depravity . . The very conditions, in fact, which God thundered against . . and learned devines and authorative moralists have all agreed upon as constituting sin, the defenders of moral insanity term disease . . Under this new gospel petty larceny is a crime, while murder or arson are diseases;—and the more perfect in lying, stealing, cheating or murdering a man becomes, the more indubitably is he irresponsible".  

Kiernam wrote of those who supported the doctrine of moral insanity that they were supporting a doctrine which was a natural "outgrowth of a school of psychology, first systematized in the theology of St. Augustine and later expressed in the theology of Wickliffe and Calvin. Although the opponents to moral insanity assembled extensive and severe critiques, this concept gained recognition by the end of the 19th century. Maughs', who reviewed all the literature on psychopathy to 1900, concludes his study points out that the approach to the subject was very limited in the 19th century. Very few papers were devoted to the etiology of psychopathy and hardly any to its psychology. The McCords' also noticed that throughout the 19th century, investigations into the field of psychopathy were buried in speculative dispute. All those who thought, worked and wrote about the problem, were concerned with almost theological questions like: "Can the moral sense be diseased and the intellectual faculty remain unimpaired?"  

The turn of the century witnessed a metamorphosis in the definition of psychopathy which emphasized more and more the component of social maladjustment among the symptoms of this disturbance.
Naecke, writing in 1906, proposed the term "moral idiocy". Steel (1913) distinguished between congenital and moral insanity and characterized the latter as consisting in the "absence of a moral centre in the brain". Mercier (1917) invented a term for the British Mental Deficiency Act and emphasized the presence of "vicious propensities" in "moral imbeciles". B. Glueck (1918) investigated 608 prisoners at Sing Sing and found that 18.9 percent of the group were psychopaths. The psychopathic group showed "a distinct tendency toward habituation to alcohol, drugs, and excessive gambling". Glueck also claimed that in every psychopath there was a marked absence of sexual morality.

Three studies conducted by Wisher in 1922, Karpman in the early 1930's and Henderson in 1939 pointed out the psychopath's fundamental incapacity of social integration and antisociality, which had been noted by Partridge and was fundamental in his earlier term sociopath.

Wisher said that the psychopath was characterized by "emotional instability and impulsiveness (which) lead (him) to conflict with his environment and society and to the development of eccentric ideas". Karpman's main emphasis was the selfishness of these individuals who are heartless, conscienceless, unprincipled, and without any sense of guilt. "Crude gratification of instincts and an inability to form emotional attachments to others are essential concomitants". Henderson gives the following description:

"Psychopath state is the name we apply to those individuals who . . . have exhibited disorders of conduct of an antisocial or asocial nature . . which in many instances, have proved difficult to influence by methods of social penal and medical
care... The failure to adjust to ordinary social life is not a mere willfulness or badness which can be threatened or trashed out... but constitutes a true illness.\textsuperscript{32}

Harvey Clekley (1941) developed the most systematic description of the psychopath as an antisocial personality.\textsuperscript{33} The psychopath may be characterized, according to Clekley, in terms of "his actions" and his "apparent intentions" by a set of characteristics as follows:

1. Superficial charm and good "intelligence"
2. Absence of delusions and other signs of irrational thinking
3. Absence of "nervousness" or psychoneurotic manifestations
4. Unreliability
5. Untruthfulness and insincerity
6. Lack of remorse and share
7. Inadequately motivated antisocial behavior
8. Poor judgment and failure to learn from experience
9. Pathologic egocentricity and incapacity for love
10. General poverty in major affective reactions
11. Specific loss of insight
12. Unresponsiveness in general interpersonal relations
13. Fantastic and uninviting behavior with drink and sometimes without
14. Suicide rarely carried out
15. Sex life impersonal, trivial and poorly integrated
16. Failure to follow any life plan.

The point made by Clekley is that the psychopath looks and behaves like everyone else. The difference is that psychopaths are not, while most others are, genuine in their internal and external relations. The typical psychopath will seem "particularly agreeable and make a distinctive impression when he is first encountered". But his good appearance is only "superficial". His thinking is rational, but "his convictions impress even the skeptical observer as firm and binding".\textsuperscript{35,36} The psychopath is likely "to give an early impression of being a
thoroughly reliable person"; but soon it will be found that "he shows no sense of responsibility whatsoever". He gives "the impression to be sincere and trusty, but actually he shows a remarkable disregard for truth. The psychopath denies emphatically all responsibilities and it is correct to say that "if the true dignity of man is his ability to despise himself, that psychopath is without a means to acquire true dignity". "Not only is the psychopath undependable but, also in more active ways, he cheats, deserts, annoys, brawls, fails, and lies without any apparent compunction ..." "The psychopath seldom shows anything that ... would pass even in the eyes of the lay observer as object love". "In addition to his incapacity for object love, the psychopath always shows general poverty of affect". "No matter how well he is treated, no matter how long-suffering his family, his friends, the police, hospital attendants, and others may be, he shows no appreciation except superficial and transparent protestations". The psychopath's failure to make an adjustment to conventional life is due, according to Cleckley, to his inability to grasp emotionally any of the ordinary components of meaning or feeling implicit in the thoughts which he expresses or the experiences he appears to undergo. The psychopath suffers from a "semantic dementia". Affected by this semantic disorder he is similar to the patient suffering from semantic aphasia: his words and sentences and all of his production are empty of emotional meaning. He does not speak the conventional language of society. He is a foreigner to his world.
The American Psychiatric Association has incorporated, since 1957, a definition of psychopathy which resembles the description given by Cleckley. The psychopathic personality is:

"a person whose behavior is predominantly amoral or characterized by impulsive, irresponsible actions satisfying only immediate and narcissistic interests without concern for obvious and implicit social consequences accompanied by minimal outward evidence of anxiety or guilt".44

In the Manual of 1968, the term psychopath is replaced by antisocial personality. This term is reserved by the American Psychiatric Association's Manual for:

"individuals who are basically unsocialized and whose behavior pattern bring them repeatedly into conflict with society. They are incapable of significant loyalty to individuals, groups or social values. They are grossly selfish, callous, irresponsible, impulsive, and unable to feel guilty or to learn from experience and punishment. Frustration tolerance is low. They tend to blame others or offer plausible rationalization for their behavior".45

This definition of the American Psychiatric Association marks the most recent development in the history of the term psychopathic personality and, as such, it is currently used for classification and diagnosis.

A careful look at the overall trend of development of this term, however, has showed a major fallacy in the nosological identification of psychopathy in psychiatric classification. In this area, psychiatric classification still looks immature. In point of fact, Hempel, the philosopher of science, delivering a fundamental paper at the 1959 Conference on Mental Disorders held in New York, made the
point that the development of a scientific discipline proceeds from an initial "natural history" to a "theoretical" stage. This development from stage to stage implies a progression from an initial attempt to describe the phenomena under study and to establish simple empirical generalizations concerning them, to subsequent more and more "theoretical" stages in which increasing emphasis is placed upon the attainment of comprehensive theoretical accounts of the empirical subject matter under investigation. In medical science, including psychiatry, this development, according to Hempel, is reflected in the transition from a largely symptomatological to a more and more etiological point of view.

The nosological definitions of psychopathy, from the time of Pinel to the American Psychiatric Association's Manual of 1968, are in fact an apparent failure in their lack of realization of this progression from a primitive to a modern theoretical stage. The modern definitions substantially resemble the early definitions of psychopathy. Changes have been essentially in vocabulary rather than in semantics, i.e., moral insanity has become asocial or antisocial personality. The asocial personality of today is the morally insane one of the last century. Today, as in the past, the asocial person is not, using an old Aristotelian term, a "social animal": that is to say, he is not "human".

A reasonable hypothesis which may account for this inadequacy in classification essentially consists of the peculiar nature of the
definition of psychopathy and to the social meaning of the classificatory scheme.

Historically, the definition of psychopathy has been characterized, borrowing from Scheff's terminology, as a **residual definition** reflecting a residual psychiatric entity. In other words, the definition of psychopathy has been negative in its nature, lacking positive identification. In 1931, Fink had already noticed that "the term had been identified by one writer or another and at one time or another as almost any form of mental abnormality", and "despite the efforts at exact definitions, it (the term) became the repository of the unclassifiable". This characteristic of residuality in the definition of psychopathy is better expressed by Fink in the following sentence: "As each form of mental disease became more sharply and precisely defined, the residual had been labeled moral insanity". In 1944, Preu reiterated this argument and made explicit the underlying assumption as well as the nature of the method used in psychiatry to arrive at a definition of psychopathy. He said that the term:

"psychopathic personality ... is useless in psychiatric research. It is a diagnosis of convenience arrived at by a process of exclusion. It does not refer to a specific behavioral entity. It serves as a scrap-basket to which is relegated a group of otherwise unclassified personality disorders and problems".51

Tredgold, Burt and others comment upon what they call the peculiar "American usage" of the term psychopath in contrast to the British and continental use. He suggests that in America, the
term psychopath is being made to cover a wider range of behaviors than it does in England and include all those mentally affected persons who are not mentally deficient and not insane. Even before Preu and Burt, Southard and Jarrett well expressed this tendency which appears to have been prevalent in America. He asserts that "when a case ... does not strike us as definitively epileptic, psychoneurotic, schizophrenic or cyclothimic, one is likely to let it fall into a group for which the favorite psychiatric designation of the present day is psychopathic personality".

In brief, the original problem during the period from Pinel to the end of the 19th century was to differentiate a "moral" from an "intellectual" insanity: the latter already having its legal "protection" within criminal law as actualized in the M'Naghten rule. With the beginning of this century, the nosological effort was to isolate from the mentally ill those persons not properly classifiable as mentally ill, but nevertheless antisocial or asocial personalities. In both periods, the aspect of residuality incorporated in the classificatory attempt was responsible for the ambiguity of the definition as well as for the nosological inadequacy and immaturity.

An additional consideration concerns the social meaning of psychiatric classification in relation to psychopathy. In this regard too, psychiatry fails to meet the common taxonomic standard prescribed by the philosophy of science. Hempel indicates that it may be worth considering whether criteria with valuational overtones are used in
the specification of psychiatric concepts. Commenting on the definition of "inadequate personality" given by the Diagnostic and Statistical Manual of the American Psychiatric Association, Hempel points out that such notions as "inadequacy of response", "inadaptability", "ineptness", and "poor judgment" clearly have valuational aspects. Their use in concrete cases, argues Hempel, will be influenced by the idiosyncrasies of their investigator and will reduce the reliability of the concepts. The same holds for the terms and attributes used in past and current definitions of psychopathic personality. The only addition to Hempel's analysis worth noting is that classification in science also implies a potentiality and a realization of control. To separate, for example, things that are edible from those that are not, argue Szasz, aids survival; to separate the woman with whom one may have licit sexual intercourse from those with whom one may not aids social cooperation; and so forth. The act of naming or classifying, as anthropology has abundantly shown, is related to the human need for control or mastery. In psychiatry, the classificatory act functions as a definition of social reality.

The final point, then, is that historically psychopathy has emerged and remained as a residual undifferentiated category of behavioral disturbances. Although contemporary definitions--for example, Clekley's--give the appearance of being able to identify positive classificatory characteristics sociopathy or psychopathy remains an ambiguous concept clinically and legally. This residuuality element
as well as the social use of psychiatric classification established a potentiality for controlling a vast class of persons falling outside the range of jurisdiction of the insanity defense.
NOTES TO CHAPTER II


This terminology is introduced by Thomas Szasz and it is intended to mean the rule (or personal criteria) of human discretion as opposed to rule (willingness, justice) of law. See "Politics and Mental Health," American Journal of Psychiatry, Vol. 115 (December, 1958), 508.

4 Sol Rubin, op.cit., p. 82.

5 The definition, characterization, historical development in law, psychiatry and social science of the therapeutic state is well presented and discussed in Nicholas Kittric, The Right To Be Different (Baltimore: The Johns Hopkins University Press, 1971), pp. 1-45.

6 This argument will be developed in Chapters III and IV of this work.


8 Ibid., p. 55.

9 Ibid., p. 55.

10 Michel Focault describes the main ideas of 18th century physicians in Europe with regard to madness or insanity in Madness and Civilization (New York: Vintage Books, 1973), pp. 117-138. The prevalence of Rationalism and the deification of Reason in the Enlightenment period account for the philosophical background of such psychiatric beliefs. The relevance of "feelings" and "affects" in the causation of mental diseases was introduced with the development of Romanticism and Romantic philosophy. Erwin Ackerknecht, Professor
of the History of Medicine at the University of Zurich, (A Short History of Psychiatry (New York: Hafner Publishing Co., 1968), pp. 60-73) asserts that 19th century psychiatry in Europe, especially in Germany, was dominated by the Romantic ideas and this led to profound modifications of the existing psychiatric beliefs with regard to the classification or identification of mental diseases. Norman Dain, (Concepts of Insanity in the U.S.:1789-1865 (New Brunswick, N.J.: Rutgers University Press, 1964), pp. 3-27) suggests that the development of psychiatry with regard to the importance of emotions and environment was linked in America with the institutionalization of "moral treatment". Moral treatment in practice consisted in the belief that the removal of the insane from the environment and conditions which caused insanity in the first place, and the consequent treatment of the diseased person in a "same" environment would help in removing the disturbance. In essence, moral treatment was the belief that pathological conditions could be erased or modified by corrective experience. (Ruth Caplan, Psychiatry and the Community in the 19th Century America (New York: Basic Books, Inc., 1969), p. 9). According to Norman Dain (op.cit., p. 14) the new idea of moral treatment was conceivable because American physicians believed that the mind and the body (Intellect and Emotion) were so closely related that what affected one must affect the other. In America, Romantic attitudes were translated in a fundamental optimism in relation to the curability of mental diseases. This optimism encouraged "many leading psychiatrists to broaden the scope of mental illness to include 'moral insanity', a step that abounded in social, legal, and moral implications". (Norman Dain, op.cit., p. 58). These developments in psychiatry and cultural (philosophical) attitudes in America led in their turn to the discovery of the asylum. See also George Rosen, Madness in Society (Chicago: The University of Chicago Press, 1968), especially Chapters 5, 6, and 10 for an excellent presentation of this topic in the context of its historical development in Europe and America.


13 Benjamin Rush, ibid.


Arthur Fink, *op.cit.*, p. 56.


Sidney Maughs', *op.cit.*, ibid.


An emphasis upon the rise of a sociological approach with regard to the history of the concept of psychopathy as well as the presentation of a sociological theory is discussed and elaborated in Harry Gough, "A Sociological Theory of Psychopathy," American Journal of Sociology, Vol. 53 (March, 1948), 359-366.


David Henderson, Psychopathic States (New York: W. Norton, 1939).

Harvey Clekley, The Mask of Sanity (St. Louis: The C. V. Mosby Company, 1964). By far the most extensive treatise on the subject in the last half of this century. The impact of Clekley's description of psychopathy has almost intact been incorporated in the legal statutes which were created to deal with the psychopathic offender. This treatise, which went numerous subsequent editions, also indicates better than any other text on this topic the existence of a relationship between psychiatry, ideology and criminal law.

H. Clekley, op.cit., pp. 362-363

Ibid., p. 364.

Ibid., p. 366.

Ibid., p. 368.

Ibid., p. 372.

Ibid., p. 373.

Ibid., p. 379.

Ibid., p. 380.

Ibid., p. 387.

Ibid., p. 412-423.


47 Carl Hempel, ibid.

48 Thomas Scheff, Being Mentally Ill (Chicago: Aldine, 1966), pp. 31-54.

49 Arthur Fink, op.cit., p. 74.

50 Ibid.


54 Carl Hempel, op.cit., ibid.


56 Thomas Szasz, op.cit., ibid., The definition of a phenomenon as an act of creation of the phenomenon itself as a general concept in sociology has been developed by Peter Beger and Thomas Luckman, The Social Construction of Reality (London: Penguin Books, 1966). The philosophical antecedents of this position in its version of a critical approach to the understanding of society are found in the existentialistic philosophy developed by J. P. Sartre in L'Eté et le neant" and in the "critique de la raison dialectique".
CHAPTER III

"EMOTIONAL INSANITY" AND CRIMINAL LAW
BEFORE 1937

By the turn of the 20th century, psychiatry had already made its major contribution to the description of the psychopath, his attitudes, and behavior. Isaac Ray's book, The Medical Jurisprudence of Insanity (1838), contained a detailed analysis of the psychopath and of the legal implications of his behavioral characteristics. Therefore, it is legitimate to ask how the psychopath offenders were dealt with by law, before the enactment of the special psychopath statutes in the late 1930's and 1940's. What processes were taking place in the social structure which brought changes in the old legal codes and modified the traditional outlook of American jurisdictions? This section addresses these questions and attempts to detail the social movements and changes necessary for understanding the legal history of the psychopath legislation.

In 19th century psychiatry, "moral insanity" was gradually being differentiated from "intellectual insanity" and gaining recognition as an autonomous clinical entity, despite numerous contrary arguments. In the legal system, however, "moral insanity" was not accepted as a
defense against a criminal charge and no special treatment was reserved for such offenders. That "moral insanity" was known to judges, however, was largely demonstrated by an appeal case which occurred in 1876 in the "Supreme Court of Errors" of New Haven County, Connecticut. In this case, J. Anderson had been convicted of murder in the first degree. Judge Carpenter, discussing the appropriateness of the insanity defense in this case, showed considerable clinical appreciation of "moral insanity". He said that one "form of insanity is the derangement of the moral faculties. In this (form) there is usually, though not always, an entire absence of delusions . . ." "The subject of 'moral mania' will generally be found to have experienced a great change in temper, disposition and moral qualities . . . (and) will rarely exhibit any sign of derangement in his conversation. He will often be regular, systematic and methodical in all his business transactions and, to all appearance, regular in the use of his intellect". Consequently, the charge of murder against J. Anderson was confirmed but the problem of "moral insanity" and criminal responsibility had emerged and entered into American courts.

In 1881, the assassination, by C. Guiteau, of James A. Garfield, President of the United States of America, brought the issue of "moral insanity" to public attention. During the trial, Guiteau's family history, childhood socialization and personality were carefully investigated in order to determine if the defendant were insane or not at the time of the commission of the criminal act. The defense attorneys
attempted to establish that the criminal act was the result of an "insane deranged" mind. The prosecution battled to prove the defendant committed willful murder. Both sides marshalled a formidable team of specialists in order to support their respective views. The case quickly became a battleground for opposing schools of psychiatry, as attention shifted from the defendant to the issue of "moral insanity". The verdict of the jury was that the defendant was guilty and responsible for his acts.

In later years there were several attempts in criminal courts to link "moral insanity" with the test of the "irresistible impulse". This approach gained some support in a few American jurisdictions.

In 1887, the Supreme Court of Alabama was called upon to judge a dramatic case of murder. Nancy and Joe Parsons were accused of having killed Bennett Parsons by shooting him with a gun. The defendants' counsels stated to the court in writing as follows: "if the jury believes from the evidence that the prisoners or either of them were moved to action by an insane impulse controlling their will or their judgment, then they are the one so affected, is not guilty of the crime charged. The court refused to give such instruction to the jury and the defendants were found guilty of murder in the second degree. The sentence was appealed and Judge Sommerville, although recognizing the importance of the concept of irresistible impulse for criminal responsibility, denied any substantial value to "moral insanity". He stated that "a mere 'moral' or 'emotional insanity', so called, unconnected with
disease of the mind, or irresistible impulse resulting from mere obliquity, or wicked propensities and habits, is not recognized as a defense to crime in our courts". Judge Stone dissented with Judge Sommerville and was even more rigid in rejecting the relevance of "moral insanity" even when accompanied by irresistible impulse. He argued that "this kind of insanity, if insanity it can be called . . ., is properly rejected by the authorities generally . . . It may serve as a metaphysical or psychological problem to interest and amuse the speculative philosopher, but it must be discarded by the jurist and the law-giver in the practical affair of life".

In California, "moral insanity" was strongly rejected by the court in People v. Kerrigan. It was asserted that the problem of "moral insanity" in criminal law "is not an open question in this State . . ." "If the defendant had sufficient mental capacity to appreciate the nature of her act; if she knew and understood that she was violating the rights of another . . . she is responsible to the law for the act thus committed, and must be judged according, regardless of any perversion of the moral senses however great. For if great moral depravity should be taken as a test of insanity, then the highest degree or enormity of crime would, by virtue of its own atrocity, furnish the best evidence of insanity on behalf of the one who committed the act". In the State of New York, "moral insanity" or, in the language of the penal code, "any morbid propensity to commit prohibited acts", in the absence of an incapacity to know right from wrong, was not a
legal defense for criminal responsibility.

By the end of the 19th century, then, courts had accumulated considerable negative evidence and experience with cases which attempted to build the insanity defense on the grounds of "moral insanity". American courts, in general, were denying that "moral insanity", with or without an irresistible impulse, vitiates criminal responsibility. Furthermore, American courts not only rejected the possibility of extending the insanity defense to the morally insane, but also seemed unwilling to recognize that some kind of special arrangement should be found for this class of offenders.

The problem was that the American judiciary in the 19th century, although familiar with basic knowledge of the major mental diseases, was still rejecting the influence of psychiatry. Psychiatry itself was not an organized discipline; most psychiatrists were hospital men and spent their time in institutions. The mental hospitals also had developed in almost complete isolation from the main streams of community life, as well as from other medical specialties. Often situated in rural areas they were difficult to reach, even when the development of rapid transportation and communication systems shortened the physical distances between the rural and urban districts. In more than one sense, Deutsch comments, "the typical institution was aptly termed a monastery of the mad". This fact of the physical isolation from the centers of social and scientific activities tended to create a corresponding feeling of cultural isolation in the medical staff of mental hospitals.
Legislators and judges were not reached by the "visibility" of the mental hospitals. Their psychiatric knowledge was almost exclusively based on the reading of major psychiatric treatises. There were few institutions where judges could be materially approached by psychiatrists, in the sense of establishing normal and usual social relationships. Judges were not taking part in psychiatric sessions even in occasional conversations, since there were no institutionalized channels of interaction. Judges were almost always closeted in their ivory towers, among the books of law which transmitted the judges' wisdom from one generation to another.

American criminology also was inadequately developed in the last century. Criminology was essentially a practical affair dominated by an indiscriminating electism. Educated amateurs, physicians, and clergymen were the experts on crime. Before 1870, there were only a few American textbooks on crime and even the various philanthropic organizations lacked specialized journals. Departments of Law and Sociology in the universities were rarely concerned with more than the formal description and classification of crimes.

Only after the turn of the century and in the first decades of the 20th century did the new scientific and institutional developments in the social sciences, particularly in psychiatry and criminology, as well as in law bring pressure to the legislatures and courts and stimulate new legislative and judicial action. This new orientation in the cultural organization of American science was a response to
the second wave of industrialization and urbanization which took place in the country at the beginning of the 20th century. 20

The first editor of the Journal of Criminal Law and Criminology—the organ of the newly created American Institute of Criminal Law and Criminology—expressed the opinion that "a new era in the history of American jurisprudence" was imminent. The new era will bring new programs based upon the continuous cooperative attack on all fronts of crime (its prevention, detection, judicial disposition, and penal treatment), with the contribution of "all sciences and arts that had anything of value to contribute". "The scientific study of crime" was the "avowed objective" of the newly-created Institute of Criminal Law and Criminology. In one of the first editorials, William Garner, Editor of the Journal pointed out that "very recently there has been a remarkable awakening of interest in the scientific study of crime and penal methods—an interest which is beginning to manifest itself in a productive criticism of antiquated methods and in constructive proposals for reform".

The research of Lombroso and others of the "Italian School", as well as the attacks made upon them, stimulated clinical research into the mental and physical make-up of delinquents and criminals. William Healy, the American pioneer of the clinical study of juvenile delinquency, had some limited influence with his anthropological approach to offender classification. This approach was based on consultation with experts in criminal anthropology, as well as in
psychology, psychiatry and general medicine. The wide range of topics embraced in Healy's program of investigation, including also psycho-analysis, was one of the earliest expressions of the breakdown of uni-lateral theories of criminal etiology and the substitution of the concept of "complexity of causation". After Healy had created the Chicago Psychopathic Clinic in 1909, the interest of criminologists, as well as of the public, grew and influenced legislative and judicial attitudes and actions.

The most powerful impetus for this new development came from the mental hygiene movement, which spread the doctrine of the prevent-ability of mental disorders and the need for understanding rather than punishing human deviation. The mental hygiene movement, founded by Clifford Beers, a former mental patient, in 1908 served well as a point of juncture between criminology and psychiatry. Members of the movement came mostly from the ranks of criminology, psychiatry, social work and from the social sciences in general. As outlined in one of the early publications of the National Committee for Mental Hygiene, the chief objectives of the movement were:

"To work for the protection of the mental health of the public; to help raise the standard of care for those in danger of developing mental disorders or actually insane; to promote the study of mental disorders in all their forms and relations and to disseminate knowledge concerning their courses, treatment and prevention; to obtain from every source reliable data regarding conditions and methods of dealing with mental disorders; to enlist the aid of the Federal Government so far as was seen desirable; to coordinate existing agencies
and help organize in each state in the Union an allied, but independent, society for mental hygiene . . "28

World War I and the post-war period also witnessed a development of interest in mental hygiene, arising largely from the serious problems in mental health caused (and detected) in the conscription for the war. Public attention was directed to the problem of eliminating preventable mental disorders and of improving existing methods of treating such disorders. Within a few years after World War I, the mental hygiene movement had had an impact in fields such as education, public health, 29 general medicine, criminology, penology and social work. The influence of the mental hygiene movement on Social Work in the 1920's led to the professionalization of Social Work. Instead of well-meaning charismatic leaders motivated by a sense of humanity and brotherhood, such as Jane Adams, Florence Kelley, and others, leadership was assumed by bureaucrats and executives. The early method of casework developed into a mature approach to the problem of working with the individual.

These new developments in psychiatric social work had an immediate impact in criminology. Greater numbers of social workers were employed to work in the various sectors of the criminal justice administration. Their expertise was utilized to obtain better background knowledge and personal history information for each inmate. The inmate's early relationships with his parents and siblings, his childhood and adolescence were all believed to have played a fundamental role in the development of antisocial and illegal behavior. This new approach to dealing with inmates represented, indeed, an extension of
the doctrine of the mental hygiene movement in the field of criminal justice. The creation of the first "prison clinics" in America was a major realization of this new approach which also stimulated the undertaking of important studies. Under the sponsorship of the National Committee for Mental Hygiene, a psychiatric study of prisoners was undertaken by B. Glueck at Sing Sing prison in 1917. The Sing Sing study showed the need for a scientific approach to the problem by the courts and penal administrators. The study pointed to the necessity of specializing the institutions on the basis of mental-social types of offenders; the need for institutional psychiatrists who had to be not only diagnosticians but therapists; the organization of the prison curriculum toward the definite aim of turning out better men from the institutions than had entered there; the need for psychiatrists in courts to aid in determining which persons shall be placed on probation; and to prevent the expensive and painful trial of the mentally ill or defective who might be committed to appropriate hospitals without trial.

The doctrine of the mental hygiene movement and the numerous innovations in the field of criminal justice corresponded to the development of new concepts about mental illness. Up to the 1920's, psychiatry had been almost exclusively organic and neurological. Under the influence of Bleuler, Freud and Jung in Europe, and Adolph Meyer, William White and Ely Jelliffe in America, psychodynamic concepts began to appear extensively in the psychiatric literature. The central
idea of this new development postulated what mental illness and other symptoms of mental pathology were produced by mental and emotional instead of organic factors. Consequently, the problem became one of reconstructing the psychological history of the individual as a key to the understanding of his present condition. The intent was to find the point at which the individual psyche experienced trauma and provoked diversion from its "normal" development. Once the point of disjuncture between "normal" and "pathological" development was found, a program of "mental rehabilitation" was believed possible. The step toward the assertion that healthy family and social relationships had to be maintained in order to establish the basis for personal and public mental hygiene was indeed very short—it was soon realized and propogated by the mental hygiene movement.

The influence of psychodynamic psychiatry on the mental hygiene movement was efficacious because it had several concomitant points of impact. First, the mental hygiene movement was supported by the same persons introducing Freud and psychodynamic theories to into American psychiatry. C. Beer was strongly encouraged by Dr. Meyer and H. Phipps, Professor of Psychiatry at the Johns Hopkins University. It was Dr. Meyer who actually suggested the term "mental hygiene" for the new movement. Secondly, psychodynamic psychiatry was congenial to American social science of the early decades of this century. Early American sociologists, e.g., L. Ward, A. Small, E. Ross, F. Giddings, W. Thomas) emphasized the role of individual motivation for the type
of social association. Giddings proclaimed that "sociology is a psychological science"; Small declared "nothing is social which is not psychical". When the techniques of Freud were introduced into American psychiatry, there was already a favorable attitude for his acceptance in the field of social science. Another aspect of early American sociology influenced the feasibility of the intellectual acceptance of psychodynamic psychiatry into the doctrine of the mental hygiene movement. Early American sociology emphasized social reform and social intervention as instruments of social policy and social change. The doctrine of the mental hygiene movement rested, indeed, upon the very idea that intervention by appropriate agencies was the only real force to stimulate and guarantee mental hygiene and provide social order. Third, psychodynamic psychiatry offered the mental hygiene movement a scientific foundation for the validation and implementation of its programs, especially social action and prevention. In other words, psychodynamic psychiatry was congenial with American social science and with its positivistic, reformistic and pragmatistic assumptions. Because of this compatibility, its sphere of influence became extensive, especially in fields like criminology and criminal justice where application made possible the interdisciplinary collaboration and the permeability of reciprocal impacts.

Sheldon Glueck, in 1930, summarized the major transformations in American criminology and in the system of criminal justice which had already taken place or were in the process of being established
as a consequence of the Mental Hygiene and other social movements.

Among them he listed:

1. The improvement of the judicial procedure in criminal cases by the employment of persons trained in sociology, psychology and psychiatry in the determination of the type of sentence suitable in the individual case.

2. The constitution of special treatment boards for each judicial district in order to establish collaboration with the trial court.

3. The organization of special institutional arrangements for the defective delinquents and other "difficult" categories of deviants.

4. The organization of preventive programs in order to interrupt the development of misbehavior into patterns of delinquency and criminal careers.

5. The application of the indeterminate sentence against the application of the pure dictates of codes and the mechanical enforcement of legal rules.

This last point leads to the consideration of other changes in the socio-cultural structure which are sometimes ignored in the study of legal changes. In point of fact, the new scientific developments in the behavioral sciences and the successful action on social policy exerted by the mental hygiene movement represented only part of the story. New attitudes and orientations were developing among legal scholars and judges which made possible the reception of social science assumptions into law.

In the first decades of the 20th century, positivism was already integrated in jurisprudence. Law, as a fixed mechanical guide, as a given set of rules that a judge could easily discover in the accepted codes, was shattered by the scientific impact of positivism. Judge
Oliver Holmes, rejecting the validity of the mechanical approach in law laid the groundwork for the various schools of "legal realism" that followed him into the 20th century. The following statement by Holmes was the hallmark of American legal realism:

"The life of the law has not been logic; it has been experience. The felt necessities of the times, the prevalent moral and political theories, institutions of public policy, avowed or unconscious, even the prejudices which judges share with their fellow-men, have had a good deal more to do than the syllogism in determining the rules by which men should be governed . . . ."44

Once the classical assumption of mechanical legal rules was shattered, and Justice Holmes' positivistic approach to law had gained popularity, other areas of the law became subject to analysis. Law as an institutional method or social device that men created for their own social good came into prominence. Roscoe Pound, as a law teacher and as a publicist, carried legal analysis into the field of sociology. Sociological jurisprudence became an autonomous field in legal theory and investigation. In 1930, the publication of Jerome Frank's first book, Law and the Modern Mind, more than any other in modern American legal literature infused law with a psychological approach. There is not legal certainty, according to Frank. "The widespread notion that law either is or can be made approximately stationary and certain is irrational and should be classed as an illusion or a myth". Largely quoting from J. Piaget, the famous psychologist, Frank asserted that law served as a "father-substitute". In point of fact, "as to the child the father is the Infallible Judge, the Maker of definite rules
of conduct" so the Law "a body of rules apparently devised for infallibly determining what is right and what is wrong and for deciding who should be punished for misdeed-inevitably becomes a partial substitute of the Father-as-Infallible-Judge". Furthermore, this myth of the legal rule, Frank suggested, must be challenged; legal rules, in fact, could serve only as guides to future decisions. This simple statement implied a profound change in the classical conception of the role of judges and was revolutionary in regard to the legal tradition. The mature judge, in fact, is the judge who could recognize the provisional nature of legal rules and avoid their harmful effect. For this type of judge, rules were but--"psychological pulleys, physical levers, mental bridges or ladders, means of orientation, modes of reflection, as-ifs, convenient hypostatisations . . ." Legal rules had to be accepted only for what they are worth. Precedents, according to Frank, should be viewed realistically: "for precedential purposes, a case, then, means only what a judge in any later case says it means. Any case is an authoritative precedent only for a judge who, as a result of his reflection, decides that it is authoritative . . ."

Sociological jurisprudence, legal realism, marked a profound change in American legal history. Under the pressure of scientific advances and positivism, the new philosophy of law was predicing a new role for law itself and for its human manipulators: the judges. This new role implied the necessity of increased collaboration between legal scholars and other scientists. In the late 1920's, R. Hutchins
and his colleagues at Yale University Law School began to suggest and implement the closer cooperation between the courts and other professions. Psychologists, in particular, were progressively being coopted in the experimentations of methods which could help judges in the assessment of evidence during the trial. Psychiatry began to play a greater role in the field of criminal justice. In many of the largest cities, psychiatrists served as officers of the court, or of the court's probation offices. Criminal court judges started to adopt the practice of granting probation on condition that the convict undergo private psychiatric treatment. Institutional changes also occurred in the major centers of American education. A legal research center, the Institute of Law, was created at Johns Hopkins University to study legal problems through field research guided by the current theories of behaviorism in psychology. Some attempts were made at the Columbia Law School to restructure courses so that they could rest on the discoveries of the various social sciences. Several law schools in the country added scientists to their faculties.

In summary, during the late 1920's and 1930's, and even more in the subsequent decades, all fields of law, its theory and practice, its philosophers and practitioners, had undergone a metamorphosis. The fundamental theoretical assumptions and orientations had become penetrable to the influence of science, and in particular of social science. This new philosophy made possible different institutional arrangements in the administration of law, reaching the point of
inducing transformation in the educational system. The role of the court and judges became a more active role, which imposed upon them the necessity of increasing social participation. The classic, aristocratic, and mastodonic figure of the judge became more "human" and, in a sense, a more democratic figure. The possibility of social encounters between judges, legal scholars, and social scientists, became more and more the usual practice.

New developments in the social structure of the country as well as in the main orientations of social science and law were also emerging during the first decades of the 20th century. The action of the mental hygiene movement, the professionalization of social work, the expansion and "socialization" of psychiatry, which meant above all its emergence from its traditional isolation, were responsible for new experimentation in corrections. Changes occurred in the legal field, particularly in the new attitudes of judges who sought help and collaboration outside of their field, in social science and psychiatry more often than in other fields, and made possible new arrangements and social relationships. These new institutional channels created some interaction between judges and social scientists and made the judges realize the inadequacy of some of their traditional (classical) approaches in the administration of justice. The mental hospital, the prison, became finally "visible" to the judges and some of them became aware of the gap between law and science. In this "new era" the courts, more than ever, experienced the drama and the consequences
of sentencing according to the legal tradition and opposition to the new scientific developments. As for the morally insane, now called psychopaths, constitutional inferior, etc., were concerned, the legal provisions and the judicial decisions which had been followed in the past, began to crumble. A few cases occurred between 1910-1930 suggesting the impending conflicts among jurors and courts as well as a feeling of uneasiness in the judges when they dealt with the adjudication of the psychopathic offender. Innovation in the legal system became an urgent need.

In 1914, a court in Massachusetts convicted a Mr. Cooper of first degree murder. During the process of empanelling the jury, a juror declared that, while he was "desirous of doing his duty fully", he was not ready in this case, "to send a man to the chair". At this point, Judge Braley said: "none of us want to, but the question is whether we are willing to do what the law stands for, and be content to do our duty ... It is not a desirable task for the judge or jury to sit upon capital cases, but for the safety of the community it is our duty to act". Mr. Cooper was affected by a mental disorder called "constitutional inferiority", but he was, nevertheless, found guilty in relation to the charge of murder.

In 1922, the Supreme Court of Alabama affirmed a charge of robbery against L. Anderson. The defense attorneys attempted to introduce the "insanity defense" on the basis that Mr. Anderson was affected by "constitutional psychopathy".
In 1928, a defendant by the name of Moran was defined as a "psychopathic inferior, a man of low and unstable mentality" in a court of the state of New York. Moran was found guilty of murder, and this finding was confirmed in appeal. Judge O'Brien, however, dissented with the majority decision and stated that "a request to instruct the jury that they might consider defendant's low mentality condition in relation to his power to deliberate" had to be granted to the defense during the trial of the case.

In the early 1930's, a case occurred before Judge Joseph Ulman of Maryland which was not especially important or different in itself from all the cases narrated here. The Duker case, however, became paradigmatic for the kinds of problems and preoccupations inherent in sentencing and disposing psychopathic offenders.

Duker's life was referred to as "a record of badness, perversion and delinquency". When Duker was 16 years old, he ran away from home and wound up in the Hampton Farms Reformatory of New York City. He was sentenced to six months for petty larceny, paroled and then returned to Baltimore. Shortly afterwards, he was arrested for robbing apartment houses and in 1928 was committed to the Maryland Training School for Boys. Dr. J. R. Oliver, Chief Medical Officer of the Supreme Bench, made a written report to Judge G. Salter upon Duker. Dr. Oliver went thoroughly into Duker's family environment and history and pronounced him sane from a legal standpoint, but "rebellious", "antisocial", "emotionally unstable", acting "on the spur of the moment, without any
adequate understanding or realization of the consequences of his actions". Dr. G. Partridge also testified in this case and in 1928 he made a report in which he concluded that "we should place him under the class of psychopathic personality". Subsequently, Partridge used the Duker case in one of his papers and of Duker he said that "we should regard him as a psychopath of the chronic delinquent type, with a marked tendency towards the runaway reaction". Arrangements for the treatment of Duker were not made by the Maryland School for Boys. Consequently, Duker ran away and went to New York. In June, 1928, Duker was sentenced to 18 months in the New York State Reformatory at Elmira and again was diagnosed as "a psychopathic personality". Dr. Williams, Medical Director of the Mental Hygiene Society of New York, recommended that Duker, upon his release from Elmira, be sent to Sheppard and Enoch Pratt Hospital for observation and treatment. Once again, this was not done. On the morning of April 20, 1931, in Baltimore, Duker with his friend, D. Lambert, attempted to rob J. Anderson, the driver of a milk wagon, who was on the sidewalk delivering milk. Anderson resisted and there was a brief struggle. Duker pulled out a pistol and shot Anderson who died later in the day from the wounds.

At his trial, Duker stood before the court in "guiltless defence". On advice of counsel, he pleaded guilty to murder. His lawyer did not use the insanity defense, because Duker "knew the difference between right and wrong". The testimony of five psychiatrists and voluminous reports on his past life marked the defendant as a
pathologically deformed person. Dr. Guttmacher, among the examining physicians, said that "Duker is potentially one of the most dangerous types of individuals that society knows and that in a penal institution he would be among the leaders in rebellion". Judge Ulman also interrogated Dr. Truitt specifically as to how Duker would respond to the discipline of life imprisonment in the Maryland Penitentiary. Dr. Truitt replied that in this case, "the outlook would be unfavorable". Judge Ulman expressed the serious burden put upon the court in this case in the following words:

"The court had, then, to decide between life imprisonment and hanging for a man who is legally sane, medically of abnormal psychology, and socially extremely dangerous. Moreover, he is socially dangerous and a menace to the life of others whether he be at large or confined in prison. And it must not be forgotten that prison guards are human beings--and that administration of law for the protection of society applies to them as well as to other citizens. For these reasons, the Court has sentenced Duker to death. This action is, let it be added, a confession of social and legal failure. The best available medical opinion is to the effect that men of this type can be restrained adequately and efficiently in institutions designed and intended for the permanent or long time segregation of defective delinquents of this type. If it had one, Duker could not be confined in it for life, which is what should be done with him, what should have been done with him years ago--because in the eyes of the law, he is not insane. This is not said in bitterness--but in the hope that this case may help to bring nearer the day when our State will deal with this problem realistically and humanely...It would transcend the proper limits of a judicial opinion--already too long--to discuss in detail the legal, medical and penological problems here suggested. One thought only should be stressed. Whatever is done should be done after the most thorough study and upon a comprehensive basis. There should be no tinkering with existing laws, no half-baked and half-way legislation dealing with mere details of procedure. Instead, there should be set up legal standards, legal
procedures, and proper places of detention, all carefully planned and thoroughly integrated—and all designed to protect society from crime by reducing the opportunities for its commission . . . The Court, circumscribed by the paucity of choice afforded by our (present) laws and our institutions, is compelled—in order to protect society and to prevent further probable homicides—to sentence a man to be hanged who is not wholly responsible for his acts . . . This Court is doing it knowingly and with a realistic conception of the tragedy of it—because there is no workable alternative.70

The Governor of Maryland, A. Rithchie, questioned the fairness of hanging a man not "wholly responsible" and said:

"I do not think Duker should be hanged because this State does not maintain a State institution for his confinement . . . neither do I think he should be hanged because the Court's prediction that he will be a dangerous prisoner".71

Acknowledging "great respect" for the "learned" judge, the Governor decided to commute Duker's sentence to life imprisonment.

The Duker case had immediate repercussions for the number of persons and issues involved. In 1932, the Journal of the Justices of Peace, made the point that the lack of legislation for the psychopathic offender was a serious gap in the legal system. "What is the court to do?", asked the Editor of the Journal, "send the accused person to prison with the probable aggravation of his bad mental condition, or let him loose again to play silly or wicked pranks?"73 Another organ representing the attitudes of the legal circles, the Solicitors' Journal, reiterated this argument in 1934, focusing on the issue of dangerousness with regard to the psychopath. The Editor wrote that "there are many men . . . not certifiable as insane (who) cannot, therefore, be kept
under restraint against their will, but must be released as soon as their temporary relapse is over. When released, they almost inevitably give away to some depraved passion and commit an offense..."

The Duker case was thus a blatant illustration of the inadequacy of existing legal provisions for dealing with the psychopathic offender. In fact, there were not special provisions: psychopathic offenders were considered legally sane and sent to penal institutions when not executed. This case, more than any other, showed how much psychiatric doctrines had penetrated the language and practices of the American courts. "If modern thought has taught us anything", exclaimed Judge Ulman, "it is that the penalties of the law must be chosen and imposed upon an individual case. They must be made to fit not the crime, but the criminal". It was not chance that Drs. Partridge, Christian, Gutt-macher and Truitt were among the physicians who took part in the Duker case. All of them had largely contributed to the study of psychopathy and held key offices in the organization of institutional psychiatry.

The overall narration of the case by Judge Ulman, literally corresponds to what Psychiatry, the Mental Hygiene and other related movements had argued with regard to psychopathy and mental illness. The case of Duker, however, was more than a criminal case. It was an appeal for urgent legislative action to be undertaken, if paradox and injustice were to be avoided. Judge Ulman expressed psychiatric judgment in relation to the psychopathic offender. In point of fact, what really seemed to bother Judge Ulman was the scandalizing aspect of the
case. Duker's last crime—the homicide of J. Anderson—was viewed by Judge Ulman not as an isolated act, but as the logical and necessary consequence of a life dedicated to delinquency and crime. Why was an individual, whose lack of social adjustment, antisocial behavior, and dangerousness were already apparent from, and implicit in, his first offense left free to persist in his antisocial and illegal activities? Was not Duker's diagnosis of psychopathy, when he first ran away from home, the sign of the beginning of a criminal career? Implicit in the narration of Judge Ulman, there was, first of all, the acknowledgment that the psychopath, by definition, is a recidivist. But a particular type of recidivist. Duker's antisocial acts were a manifestation of the existence of psychopathy and progressed from slight, minor almost insignificant deviations to the most cruel of crimes. Duker's criminal career, then, had to be properly stopped in its earlier stage by the intervention of the State. "What should have been done with him years ago?" asked Judge Ulman. In this question, there was the acceptance of the psychiatric doctrine that a proper program of prevention with regard to the psychopath had to focus on, and penalize minor antisocial activities. In fact, the minor initial offenses of the psychopath only announced later serious crimes. The crimes of the psychopath had to be looked upon in their potentiality for the future, in their inner meaning and symbolic significance. The psychopath as a person had to be viewed by projecting his material realizations to the future: in other words, from predictions made upon his present dangerousness.
Strange enough, the Governor did not recognize the validity of the sentence which was based upon Duker's predicted dangerousness. The Governor declared that "Duker had to be hanged because the Court's prediction of evil and dangerous consequences". However, he did not find "substantial evidence on which this prediction could be justified".

The Governor concluded with an expression of melancholia that "if it (the evidence) there had been, it was at most a mere prediction".

The Governor's reaction, however, was paradigmatic of the numerous medical and legal arguments which were raised in later periods in relation to the issue of dangerousness. Also, Duker's dangerousness was so crucial in Judge Ulman's decision that Duker could not be imprisoned in the available facilities. Duker, the psychopath, needed to be committed in a special institution designed for the protection of society.

There was, consequently, court support for the creation of special facilities to be established under sound legislation, not "a half-baked and half-way legislation". In these facilities, the criminal activities of the psychopath could be prevented for the security of society.

Recidivism, dangerousness, prevention, control, protection of society, commitment, special institution were the new words which had emerged from the previous social and legal developments. Those words were also new words in the vocabulary of law and in the language of the judges. They represented new acquisitions to the legal jargon, at least in the sense of their new meaning and usage, and sounded
very different from the old "right and wrong" and "sane" and "insane" concepts of the previous century. The new vocabulary was borrowed from the various mental health and social sciences and testified to the impact of these disciplines in the realm of law. As such, the new words were to constitute the conceptual ingredients upon which psychopath legislation was soon to be built in 1937 in Michigan, in 1938 in Illinois and shortly thereafter in state after state.
NOTES TO CHAPTER III


3 Ibid., pp. 524-525. Judge Carpenter had certainly read the current literature on "moral insanity". He analyzes the concept of "moral insanity" with the same care of a medical treatise: "Moral mania, like intellectual, is of two kinds; partial and general. Instances of the former are cleptomania, or propensity to steal, pyromania, or propensity to destroy by fire, and homicidal mania. General moral mania consists in a general exaltation, perversion, or derangement of function, of all the affective or moral powers... those who labor under it... are violent, and suddenly taken; their suspicious unjust and severe, and their propensities strong and eagerly indulged".

4 Ibid., p. 525.


6 There was, however, widespread feeling among both European and American psychiatrists that despite a lifelong history of marked irrationality, Guiteau could not possibly be judged insane. His symptoms were so bizarre and varied that they did not conform to those of any clinical category! See, The American Journal of Insanity, Vol. 38 (1882-83), 61.

7 The theory of the "irresistible impulse" test is that a person acts under an insane, irresistible impulse when, from disease of the mind, he is incapable of restraining himself, though he may know that he is doing wrong. This rule probably had its genesis in the year 1834 in Ohio in the case of State v. Thompson, Wright's Ohio Rep. 617 (1834).

9 Parsons v. State, 81 Ala. 577, 2 So. 854.

10 Ibid., p. 856.

11 Ibid., p. 865.

12 Ibid., p. 872

13 People v. Kerrigan, 73 Cal, 222, 14 Pac. 849.

14 Ibid., p. 851.

15 An excellent digest of cases which pertain to the rules adopted in each state is found in Henry Weihofen, Insanity As A Defense in Criminal Law (New York: Commonwealth Fund, 1933), pp. 109-147.


17 The characteristics of early American psychiatry and its development are well illustrated in Albert Duetsch, op.cit., pp. 272-299.

18 A brief but insightful sketch of the early relationship between law and psychiatry is presented in Manfred Guttmacher and Henry Weihofen, Psychiatry and the Law (New York: W. Norton and Co., 1952), pp. 3-12.


22 Ibid., p. 4

23 Ibid., p. 5.

24 Ibid., p. 6.


27 Albert Deutsch, op.cit., pp. 300-331.


31 Albert Deutsch, op.cit., pp. 316-327.

32 The findings of this study are reported in three sources: Bernard Glueck, A Study of 608 Admissions to Sing Sing," Mental Hygiene, Vol. 2 (1918), 85-151; "Concerning Prisoners," Mental Hygiene, Vol. 2 (1918), 177-218; "Psychiatric Aims in the Field of Criminology," Mental Hygiene, Vol. 2 (1918), 546-556.

33 Nina Ridenour, Mental Health in the United States: A Fifty Year History (Cambridge, Mass: Commonwealth Fund, 1961), pp. 87-94. For the particular impact of Freudianism in American psychiatry, see


37 Herman and Julia Schwendinger, *op.cit.*, p. 337.

38 The Schwendingers elaborate at length upon the relationship between early American sociology and Freudianism, especially in relation to the sociological orientation of William Thomas. See Herman and Julia Schwendinger, *op.cit.*, pp. 355-382.


40 Albert Duetsch, *op.cit.*, pp. 300-331.


43 Legal realism represented one of the trends in jurisprudence which developed in America around the turn of this century. Legal realism much reflected the influence of social science for its emphasis upon the antagonism to abstract and formal law. The central assertion was that judges make law rather than find it; the role of judges in the process of creation of law and the interference of the judges' personal opinions in such a process were indicated as main topics of research and study. For a summary of the different schools of legal thought which spread in America at the beginning of the century and their interrelations, see Wilfrid Humble, "Legal Realism, Sociological Jurisprudence, and Mr. Justice Holmes," *Journal of the History of Ideas*, Vol. 26 (1965), 547-566.

45 Pound argued that law is not merely a complex of rules and procedures, but a system of interrelations between such rules and social interests. The presence of interests in law was a major point in Pound's sociological jurisprudence and upon this assertion Pound indicated the necessity to study "law in action" as distinguished from the law in the books. The influence of early American sociology on Pound's sociological jurisprudence is evident and indicative of the transformations taking place in both disciplines. This aspect is discussed in Gilbert Geis, "Sociology and Jurisprudence: A Mixture of Lore and Law," Kentucky Law Journal, Vol. 52 (Winter, 1964) 267-293.


47 Jerome Frank, op. cit., pp. 11-12.

48 Ibid., pp. 18-19.

49 Ibid., p. 167.


51 Norton White called the transformations in American legal thought from Justice Holmes on "the revolt against formalism": Social Thought in America: The Revolt Against Formalism (New York: Viking, 1949).


The Duker case referred in this chapter represents an example of the problem originating from the gap between scientific advances in psychiatry and the status of law.


56 Ibid., p. 2.

57 Ibid.

58 Anderson v. State, 209 Ala. 36, 95 So. 171.


60 People v. Moran, 249 N.Y. 179, 163 N.E. 553.

61 Ibid., p. 182.

62 This case is narrated in Joseph Ulman, A Judge Takes the Stand (New York: Knopf, 1933), pp. 211 et seq.

63 Joseph Ulman, op. cit., p. 211.

64 Ibid., p. 277.

65 Ibid., p. 277.

66 Ibid., p. 277.

67 Ibid., p. 278.


69 Ibid., p. 218.

70 Ibid., p. 218-220.

71 Ibid., p. 284.

72 Ibid., p. 284.


75 Joseph Ulman, op.cit., p. 228.
76 Ibid., p. 219.
77 Ibid., p. 284.
78 Ibid., p. 284.
79 Ibid., p. 220.
80 Ibid., p. 220.
CHAPTER IV

THE PSYCHOPATHIC OFFENDER STATUTES:

LEGISLATIVE HISTORY

Judge Ulman's appeal for the creation of special legislation to deal with the psychopath offender was not in vain. From 1937 until the early 1950's, approximately half of the states enacted ad-hoc statutes. Other states, which did not create special laws, modified provisions in their existing laws in a way to take care of the psychopath, according to the current theories of psychiatrists and mental hygienists. Michigan was first to undertake the new legislative enterprise. The Michigan psychopath offender law was enacted in 1937. Earlier attempts to draft such legislation had been made in Michigan from 1935 to 1937. This law was soon repealed as unconstitutional, but its modified version was again introduced to the legislature and approved in 1938. Following Michigan, Illinois, Minnesota and other states, particularly in the midwest approved similar legislation.

The legal history of these laws was a conflictual history from its very beginning. The attacks which soon invested the psychopath statutes were violent ones. It was not a matter of obtaining minor textual modifications. The issue was, from the very beginning, the foundation and legitimacy of the laws; namely, their constitutionality.
The battles which took place in the legislatures and courts were an expression of the problems, passions, and conflicts which plagued America at the time. More directly, they were a reflection of the several, sometimes contradictory, programs which were proposed and implemented in the field of mental health and corrections. Almost in no other period of American history were so many various and contradictory types of legislation enacted, repealed, re-enacted and not enforced—or enforced in very minor measure.

Furthermore, the semantic structure of the psychopath statutes—recidivism, dangerousness, responsibility, commitment, etc.—had antecedents in the legislative tradition of America. The psychopath laws, although billed as a new and unique program for the diagnosis and commitment of the psychopathic offender, built upon this tradition and, hence, inherited its spirit and ideological implications.

The idea of the indefinite commitment to a special institution—other than that properly called prison—for a specific class of offenders, not insane but of abnormal mentality, originated with the statutes for the defective delinquents.

In 1911, Massachusetts was the first state to recognize the existence of defective delinquents as a separate class of offenders, and to establish new substantive rules and procedures for them. The original law provided that "a mentally defective (who) is not a proper subject for the schools of the feeble minded, or for commitment as an insane person" could be committed to a special department for defective
delinquents. In 1928, after several years of trial, this law was amended to include recidivists and recidivism-prone first offenders. The new provisions were:

"At any time prior to the final disposition of a case . . . if the court finds the defendant to be mentally defective and, after examination into his record, character and personality, that he has shown himself to be a habitual delinquent or shows tendencies toward becoming such and that he is not a proper subject for the school of the feeble-minded or for commitment as an insane person . . . ."6

The Massachusetts law, then, created a new legal system for the defective delinquents which was based on the evidence of a peculiar mental status and a criminal status. The criminal status involved the emphasis upon recidivism or recidivism-proneness. A first offender could not be committed as a defective delinquent unless he appeared to be a potential and dangerous repeater. A recidivist, however, was eligible for this type of commitment which could be made either before or after conviction. Persons accused of an offense punishable by death or life imprisonment were excluded. Commitment to the institution for defective delinquents was an indefinite commitment and could be made directly from the courts or by transfer from a penal institution. As far as mental status was concerned, the Massachusetts law did not provide a definition of a mentally defective delinquent. The psychologists, however, adopted the practice of diagnosing as a mental defective those persons whose I. Q. was below 75--a mental age of 12 years--in the standard revision of the Binet-Simon test.
The Massachusetts defective delinquent statute was used as a model for similar laws adopted in the 1920's in other states. New York established a defective delinquent law in 1921 and was the first state to attempt to segregate, i.e., in a separate institution of their own, prisoners who were not insane and yet could not be classed as mentally normal. New Jersey, Pennsylvania, Virginia and other states, even the Federal Government, had some special provisions, although not as fully developed as in New York and Massachusetts, for the care of defective delinquents.

The Commonwealth of Massachusetts also added in 1921 an additional provision—the so-called Briggs Law—which partially overlapped with the older defective delinquent statute. In fact, the Briggs Law provided that a person indicted for a capital offense or any person known to have previously been indicted more than once, or been previously convicted of a felony, should be automatically examined by the Department of Mental Diseases "with a view to determine his mental condition and the existence of any mental disease or defect which would affect his criminal responsibility". A large number of mentally defective delinquents were routinely disposed of under the jurisdiction of the Briggs Law which, however, addressed the issue of insanity and criminal responsibility rather than the commitment of criminally responsible offenders.

The Briggs Law and, in particular, the defective delinquent statutes marked one legislative approach to the problem of defective
recidivist offenders, namely, their indefinite institutional commitment on the basis of an abnormal mental status. The innovation introduced by these laws was, in fact, the idea that "something special" should be done for this class of persons which is on the borderline between sanity and insanity and consequently have to be held socially dangerous. However, other legislative approaches to recidivism--the habitual offender laws--were also introduced in the 1920's and were partially incorporated in some psychopath statutes.

Following World War I, many states enacted recidivist or habitual offender statutes in reaction to the apparent increase in crime. The Baumes Law of 1926 in the State of New York established a sophisticated system for dealing with recidivists and served as a model for legislation in other states. The courts, however, were vehement in their criticism of these statutes on the grounds that they exacted overly severe penalties. Consequently, judges attempted to find legal loopholes in order to avoid the practical application of the recidivist provisions. It is quite probable that the vested discretionary power of the courts was invaded by the mechanism of automatic application of more severe penalties and that this automatic aspect was regarded as outrageous stimulating the courts' opposition.

The recidivist laws were founded on assumptions different from the defective delinquent statutes. They assumed that habitual criminals are not reformable and should be segregated from the community "for the good of society" for the rest of their lives. In other words, these
states were an expression of a more punitive approach to the problem of the dangerous offender. Ten of these statutes, for example, allowed the sterilization of recidivists. This provision passed into some psychopath statutes almost without any modification. California was one of the states leading in the sterilization and eugenios movement. The California recidivist law stipulated that offenders having been twice committed to prison for rape or seduction, and who show "perversion in prison" should be sterilized. The remaining statutes established that prisoners described as degenerate or having criminal sexual tendencies shall be eligible for sterilization.

The Briggs Law, the defective delinquent, and the recidivist statutes were attempts to create legal alternatives for types of offenders which medical and social experience indicated as offenders in need of "special treatment". This legislation was the antecedent of the legal and psychiatric provisions which were later to be used in the psychopath statutes. However, these laws did not specifically involve the psychopath, whose psychological identity was one of a normally "intelligent" but emotionally unstable person prone to commit and repeat antisocial, dangerous activities. Special psychopath legislation, as the Duker case showed, was still necessary. Furthermore, the legal provisions of the Briggs Law, and of the defective delinquent statutes contained the germ of the idea of psychiatric treatment as justification of the commitment itself. These statutes, hence, aimed at being "benevolent" laws. The mental hygiene movement and its
ideology focusing on the care of the mentally ill favored the enactment of such statutes. Vernon Briggs, for example, was one of the most prominent psychiatrists in Massachusetts and the organizer of the lobby in support of his law. On the other hand, the recidivist statutes rested more on a punitive approach to crime and were "deterrent-oriented" rather than "benevolent" laws. The paradox was that the psychopath statutes inherited this dualistic legal tradition of punishment and treatment and incorporated this built-in ambiguity into their specific provisions. The absorption of the recidivist statutes' vocabulary also provided the psychopath legislation with a strong emphasis on the control of dangerous behavior.

The flood of psychopath legislation started in the late 1930's and crested in the following decade. The first laws were primarily directed toward the sexual psychopath offender. In point of fact, the commission of a few spectacular sex crimes was everywhere manipulated by the media and psychiatric circles to obtain ad-hoc legislation under the pressure of public opinion. In response to this revulsion against the sex offender, the first statutes established the legal foundation of a distinct sub-class of psychopath: the sexual psychopath offender. However, the entire class of antisocial and dangerous personalities was included under the provisions of the psychopath legislation.

The original Goodrich Act--the Michigan psychopath statute--was passed as a direct reaction to a brutal crime. The mutilated body of a young school girl named Corinne Gallagher was found in a trunk
in a Detroit apartment where Merton Goodrich had lived. Goodrich, who had a criminal record and had once been committed to a mental institution after a sex offense, was arrested in New York, identified by his fingerprints, and returned to Michigan to stand trial. Public Act 88 was passed to take immediate effect on May 27, 1935. This Act, however, was not invoked in the Goodrich case for procedural reasons and it was again amended and broadened by Public Act 196 of 1937. This latter Act came to be considered the first psychopath statute and established a model for successive legislation. The statute provided that:

"In any court of record having jurisdiction of criminal offenses . . . when a person who has been convicted of abduction, incest . . . willful indecent exposure . . . any disorderly conduct involving a sex offense . . . shall, though not insane, appear to be a sex degenerate . . . or to be suffering from a mental disorder with marked sex deviation and with tendencies dangerous to public safety . . . a thorough examination and investigation of such a person . . . (will be ordered by the court). If it is proved . . . that such person is a sex degenerate or is suffering from a mental disorder . . . and possessed of tendencies dangerous to public safety, then the court shall adjudge . . . (that) the person . . . shall be removed and committed to such suitable state hospital or to such state penal or correctional institution as is or may be provided and equipped with facilities for the care and treatment of cases of this nature, the sentence or judgment to remain suspended or held in abeyance . . . Said person (shall) thereto remain until the court, upon application by the superintendent . . . shall find that such person has ceased to be a menace to public safety because of such tendencies and mental condition. . . . Upon such finding, the court shall release such person from the custody of such hospital or institution, and after making allowance for the time already spent in confinement . . . the court may impose sentence and comit
such person to prison for the remainder of the term provided by law for the particular offense. . . . If the total time spent in confinement shall equal or exceed the maximum sentence allowed by law, such person shall be discharged from further custody. . . .23

This statute created all the elements used thereafter in other states to establish special arrangements for the psychopath. Specifically, it provided:

1. Initiation of proceedings after a conviction for a crime
2. A mental status—"though not insane"—eliciting a prediction of future dangerous behavior
3. A criminal status following the commission of serious and non-serious offenses
4. An indefinite commitment terminable at the disappearance of the patient-inmate's dangerousness
5. A possibility of the commitment's duration beyond the maximum term of the sentence
6. A suspension of the criminal sentence and its re-institution after commitment.

The ambiguity between punishment vs. treatment was, in fact, incorporated in all these provisions. Why, for example, should the criminal sanction be reintroduced after a commitment for treatment? Why was the major criterion for terminating commitment the disappearance of "dangerousness" which, in practice, did not imply medical recovery? Why was a conviction for a crime deemed necessary before establishing provisions for treatment?

On the whole, then, this statute seemed to aim at the control of the offender rather than his welfare. These issues were taken up,
in the language of a legal dispute, during the first case tried under the new statute in Michigan, *People v. Frontczack*. The legal problem concerned both the criminal nature of the statute and its civil nature. The substance of the case was the issue of punishment, treatment, and control.

In April, 1937, George Frontczack was convicted of the crime of "gross indecency" and sentenced to a minimum term of 30 days and a maximum term of five years in the Detroit House of Correction. While Frontczack was thus confined, the psychopath law became effective. In July, 1937, the State Commissioner filed a petition, invoking action under the new statute to have the defendant committed to a State hospital. Frontczack appealed the disposition on the grounds of the statute's unconstitutionality, and the Supreme Court of Michigan, in October, 1938, affirming the right of the appellant, in effect, repealed the newly-enacted law.

The majority of the court held the act invalid because it provided for a criminal proceeding and therefore violated the Constitution of Michigan in not observing certain rights (trial by jury, witness cross examination, counsel's assistance, etc.) guaranteed by the Constitution to the defendant in a criminal prosecution. The real issue at stake, however, was that the new psychopath statute was actually directed to the control of special offenders and hence a criminal law. The contrast between the majority opinion expressed by Judge Wiest and the minority opinion represented by Judge Butzel speaks to the substance of the dispute.
Judge Wiest justified the decision of repeal asserting that the psychopath statute "is more than an inquest relative to the mental condition of a prisoner". "Under this act, (the) defendant is under sentence for an overt sex deviation offense and, as a potential like offender, it is sought to keep him in confinement under exercise of the police power. The police power, under such circumstances, is not a civil proceeding . . ." On the other side, Judge Butzel expressed the opinion that the statute was a humanitarian, benevolent and non-punitive law. He said that psychopathic offenders, indeed, "present an acute problem". "They are pitiable objects sadly in need of hospitalization or institutionalizing for their own cure and safety as well as for the protection of the public". "Such proceedings do not involve trials for crime, but are merely inquests". "The mental and physical disorder with which sex degenerates are afflicted require their segregation . . . (and) to effect such segregation no more than an inquest is required. The prisoner is not being committed as punishment for a crime and the proceedings do not constitute a criminal trial".

Public Act 165 of 1939 reintroduced the psychopath statute in the Michigan legal system. The ambiguity of punishment v. treatment and the emphasis upon control, previously raised with the legal dispute on the civil v. criminal nature of the statute, were partially by-passed in this second psychopath statute. The initiation of proceedings was, in fact, made possible upon a criminal charge and before conviction. Furthermore, the medical recovery of the prisoner and his release from commitment were emphasized rather than the mere protection of society.
Section 3 of the new statute provided that "where any person is charged with a criminal offense", the prosecuting attorney or the attorney general may start the psychopath proceedings. Section 7 established that "such criminal sexual psychopathic person shall be discharged only after he shall have fully recovered from such psychopathy".

In 1942, the issue of constitutionality of the statute was once again brought before the Michigan courts in *People v. Chapman*. In this case, too, the defendant was charged with gross indecency, but the constitutionality of the Act was upheld by the Court. Judge Starr stated that:

"We are satisfied that the present statute is distinguishable and contains none of the constitutional infirmities of the previous statute... The present statute is not contained in either the code of criminal procedure or the penal code. It makes sex deviators subject to restraint because of their acts and condition, and not because of conviction and sentence for a criminal offense".

The defendant argued that the State Hospital Commission did not have legal jurisdiction over psychopathic offenders nor over any State institution for the confinement of such persons. The court rejected this point as a valid reason for upholding the unconstitutionality of the statute and quoted a previous case to justify its decision.

In *Smith v. Wayne*, Probate Judge Justice McDonald said:

"The Michigan statute is not perfect. Undoubtedly, time and experience will bring changes in many of its workable features. But it is expressive of a state policy apparently based on the growing belief that due to the alarming increase in the number of degenerates, criminals, feeble-minded and insane, our race is facing the greatest peril of all time. Whether
this belief is well founded is not for this court to say. Unless for the soundest constitutional reasons, it is our duty to sustain the policy which the State has adopted. As we before have said, it is no valid objection that it imposes reasonable restraints upon natural and constitutional rights. It is a historic fact that every forward step in the progress of the race is marked by an interference with individual liberties. 35

Judge Starr concluded that the statute was, in fact, imposing only "reasonable restraints" upon the natural and constitutional rights of the defendant. Therefore, "his detention in the Ionia State Hospital does not warrant our declaring the statute unconstitutional or his commitment unlawful". 36

The transformation of the psychopath statute into a civil proceeding was an apparent victory of the mental hygiene movement supporters, achieved through a procedural mechanism and legal jargon. Why worry about a criminal conviction? The psychopath's mental status and his potential dangerousness for society were at stake—generations of mental hygienists had so argued and succeeded in obtaining the support of, at least, part of the judiciary. This transformation, however, was more apparent than real. The statute did not lessen its emphasis on, and capacity for, the control of the psychopath. It made easier, in fact, the implementation of control since all the constitutional rights guaranteed to the criminal offender were not applicable in a civil procedure. It was recognized, however, that this was "an interference with the individual's liberties" justified in the name of the "progress of the race". 37 The link between the psychopath statute and the punitive approach of a decade before exemplified in the recidivist
laws is not far from the reality.

The repeal of the first psychopath law in Michigan, because of its ambiguity in regard to a criminal v. a civil proceeding, strongly influenced the type of legislation enacted in other states. In 1938, the State of Illinois established an "act or provide for the commitment and detention of criminal sexual psychopathic persons". The statute provided that "when any person is charged with a criminal offense and it shall appear . . . that such person is a criminal sexual psychopathic person . . .", then a special procedure, before trial, shall be held "to ascertain whether or not the person charged" is a criminal psychopath. Upon determination of this finding, "the court shall commit such person to . . . the Psychiatric Division of the Illinois State Penitentiary . . . until such person shall have fully and permanently recovered from such psychopathy". After recovery, "the court shall order that such person be discharged . . . to stand trial for the criminal offense charged . . ." The Illinois statute maintained this double nature of commitment for medical care and punishment upon release. It also provided for the initiation of the proceeding before conviction and, hence, avoided the constitutionality issues raised against the first Michigan law.

The legislative model adopted in Michigan and Illinois, established the general character of the first psychopath statutes. Almost all the laws enacted between 1937-1950 followed a pre-conviction model with the major thrust of moving toward the borderline between the criminal justice and mental health systems. Some states enacted laws
beyond the borderline and in the framework of the mental health system.

In doing so, they moved farther away from the realm of criminal law.

In April, 1939, Minnesota established an "Act relating to per-
sons having a psychopathic personality". Section I of the Act reads:

"The term psychopathic personality as used in this
Act means the existence in any person of such con-
ditions of emotional instability, or impulsiveness
of behavior, or lack of customary standard of good
judgment, or failure to appreciate the consequences
of his acts, or a combination of any such conditions,
as to render such person irresponsible for his conduct
with respect to sexual matters and thereby dangerous
to other persons".

The Act also provided that the facts tending to demonstrate the existence
of psychopathy should be submitted to the Probate Court—a civil court—
which was given jurisdiction over the matter.

Indeed, neither a conviction nor a criminal charge was deemed
necessary by the Minnesota statute for the initiation of the proceed-
ings. Furthermore, the generic definition of psychopathic personality
adopted in the statute increased the possibility of ambiguity and
increased the potential of control in the name of prevention. This
statute, in fact, made possible the earlier exercise of the State police
power upon a finding of a certain mental status before the commission
of any act. As such, this statute represented a departure from the
original standards—a criminal status coupled with a mental status—
set by the defective delinquent laws and expanded the jurisdiction
of the statute within the range of action proper to other legislation.

The issue of ambiguity and expansion was soon brought before
the United States Supreme Court in State v. Probate Court in 1939.
The petitioner challenged the constitutionality of the Minnesota Act on the grounds that (1) it violated the constitution of Minnesota which reads: "No law shall embrace more than one subject, which shall be expressed in its title"; and (2) the Act "is void because it is uncertain and indefinite", thereby constituting invalid legislation.

The petitioner aimed at raising the problem of the danger implicit in giving the State the power of being able to institutionalize almost any person on the grounds of psychopathy. The petitioner, in attempting to invalidate the statute, certainly had in mind the problems and the implications related to vagueness and residuality feature of the definition of psychopathy. The United States Supreme Court actually ignored the substance of the appeal and adopted a position of strict legalism in upholding the interpretation of the statute given by the highest court of Minnesota. In fact, the Supreme Court stated that (1) "if the term psychopathic personality gives sufficient notice that the act relates to sexually irresponsible persons, the class embraced by the terms of the statute is adequately named in the title, and (2) if the act affects such persons in a manner and by a mode reasonable to be associated with laws of this type, the fact that the title fails to mention such provisions does not render it too general from a constitutional viewpoint". The court concludes that "the constitutional mandate is not violated by the title" and eventually "its defects may offend the principle of legislative draftsmanship but not those of constitutional law".

The failure of the appeal against the Minnesota law was, in
fact, the failure to stop the indiscriminate adoption of psychiatric nosology into the law. It represented the victory of certain orientations in psychiatry and their legitimization by the highest judicial institution of the United States. Above all, the failure of the appeal laid down the grounds for the legitimate transformation of an ambiguous type of mental disease into the jargon certainly proper to criminal law.

These substantial shortcomings in the "draftsmanship" of the statutes and the adoption of the pre-conviction model characterized the legislative history of the first psychopath laws. In the 1940's, other states enacted psychopath offender statutes which did not establish the commission of a crime as a prerequisite of jurisdiction. Massachusetts, in 1947, and the District of Columbia, in 1948, provided for the commitment of the sexual psychopath to a mental hospital only on the grounds of dangerousness and probability of future sexual misconduct. In 1949, Nebraska enacted a statute under which the proceeding could be initiated by the county attorney "whenever facts are presented . . . which satisfy him that good cause exists for judicial inquiry". California (1939 and 1945), Indiana (1949), Missouri (1949) and New Hampshire (1949) all established the initiation of the psychopath determination proceedings after a criminal charge but before conviction.

In the late 1940's and early 1950's, newer approaches were attempted to remedy defects in the sexual psychopath laws without giving up the idea of special legislation. Some states modified their
provisions and established the conviction of a crime as a prerequisite for the initiation of the proceedings. Other states enacted new statutes based on a post-conviction model and attempted to improve their substantial and procedural provisions. These changes were partially stimulated by the recommendations forwarded in the reports of the various Commissions created around 1950 to study the problem of the psychopathic offender. California, Michigan, New York, Illinois, New Jersey and other states conducted extensive inquiries into the state of affairs of psychopathic legislation and implementation. The New Jersey investigation was directed by Professor Paul Tappan and was extremely effective in establishing the fundamental empirical wrongness of the sociological and psychiatric assumptions upon which the statutes were built. In particular, the Committee attacked the assumptions that psychopaths often recidivate, progress to more serious crimes, constitute a clinical entity and, once institutionalized, receive actual treatment. Furthermore, the composition of these Committees of Inquiry was characterized by an attenuated presence of psychiatrists and greater participation of jurists or professionals with a legal background. This fact did not have an immediate impact but represented the beginning of a different equilibrium between law and psychiatry with regard to the organizational relations between courts and mental health agencies. In the 1960's, the numerous constitutional issues raised in the field of criminal justice materialized in the so-called "due-process revolution" and strongly influenced the state of affairs with regard to psychopath legislation and its implementation.
The second wave of psychopath statutes (1950 ff.) showed enormous impact of psychiatry and did not much alter the degree of ambiguity and emphasis on control. The 1950-1951 New Jersey law created provisions for persons convicted of rape, carnal abuse, indecent exposure, other sex offenses and of an attempt to commit any of these offenses. A mandatory mental examination, to be made at the State Diagnostic Center, was to be the basis for disposition and commitment. The definition of mental illness still was broad enough to permit the incorporation of psychiatric opinion. Release, under the New Jersey statute, was arranged when there was reasonable certainty that repetition of the offense was unlikely.

In New York, the Governor's veto--"we should not demolish the important safeguards that surround personal liberty in our State"--of a 1947 bill initiated a research program designed to help create a better statute. The 1950 New York law neither delayed nor stopped criminal proceedings nor established a specific definition of a sexually dangerous person, but required a pre-sentence examination of all persons convicted of any of seven specified sex felonies or a misdemeanor involving children as victims. Upon psychiatric examination, the court could impose appropriate legal penalty or an indeterminate sentence of one day to life.

In line with the New Jersey and New York approach, Virginia, in 1950, and Alabama, Pennsylvania, and Wyoming, in 1951, adopted statutes that required conviction of a criminal offense prior to a hearing on sexual abnormality.
In 1952, California revised its law in order to make conviction of any criminal offense, sex crime or not, a possible basis for mental examination. Conviction of any sex offense involving a child under 14 by a felon or by a misdemeanant with a prior sex offense record, required a pre-sentence examination. Two other states, Michigan, in 1950 and 1952 and Wisconsin, in 1951, also revised their statutes. Michigan redefined the condition of sexual psychopathy and added conviction of a criminal offense as a basis of jurisdiction. Wisconsin substituted the conviction of a sex crime for the basis of no-crime or charge, requiring medical examination upon conviction of rape and related crimes. It also permitted commitment in cases of conviction of other than sex offenses, if the facilities could allow it. Minnesota, in 1945, added three sections to its' 1939 law, while Vermont enacted laws in 1943, 1945 and again in 1951. Illinois supplemented its law in 1947 and again revised it in 1953.

Despite differences in terminology and the shift of the commitment process from the civil to the criminal law jurisdiction, these laws were strikingly similar to the first psychopath statutes both in purpose and in method. Both kinds of legislation sought to identify and incapacitate the same type of person, and both depended upon psychiatry for the crucial element of identification. The difficulty in such identification, the advisability of singling out sex offenders from the larger class of psychopathic personalities, and the adoption of future dangerousness as the criterion for prolonged or lifelong imprisonment still remained the main features in the substance and
and implementation of the statutes. Furthermore, the heavy legacy of the legal tradition started in the 1920's with the defective delinquent and recidivist statutes, still exerted its influence on the provisions of the Maryland statute, defined as the most sophisticated and advanced system to deal with the special class of offenders labeled psychopaths.

In March, 1948, the State of Maryland appointed a "Commission to Study Medico-Legal Psychiatry". Manfred Guttmacher, M.D., J. Skeen, Esquire, and Dean G. Grant were among the members of the Committee. A report was submitted to the Governor and General Assembly in December, 1948. The Committee found that the so-called defective delinquents represented a sizable percentage of all those who came into contact with the criminal law in Maryland. The Committee also suggested that they could best be dealt with through a special procedure and institution. The Commission went on to define the term "defective delinquent" in the following words:

"... defective delinquents would be those individuals, who, by demonstration of persisted aggravated antisocial or criminal behavior, evidence of propensity toward criminal activity and who, on the evidence of standard test and clinical procedures, reveal either intellectual deficiency or emotional disorder or both".

The Maryland Legislature adopted and extended the definition recommended by the Committee. In section 5, a defective delinquent was defined as an individual who evidences a propensity toward criminal activity and "clearly demonstrates an actual danger to society so as to require such confinement and treatment, when appropriate, as may
make it reasonably safe for society to terminate the confinement and
70
treatment".

The Maryland statute created a factual connection with the past
legal tradition adopting the language of the previous defective delin-
quent statutes. It also emphasized the control of dangerousness and
public safety and, hence, removed the treatment vs. punishment duality
of the legal tradition. This aspect is better indicated in some state-
ments of the Commission report. "The fundamental approach to the
problems considered has not been primarily on behalf of the criminal
and/or mental defective person who has run afoul of the law. On the
contrary, the paramount interest is and must always be the welfare of
the community as a whole . . ." In the introduction to the research
report, Dr. Reiblich reiterated the following concept: "the primary
purpose of such legislation is to protect society from this segment
of the criminal population who probably will again commit if released
on the expiration of a fixed sentence; and thus they should be detained
and specially treated unless and until cured . . . if they cannot be
cured, the indeterminate sentence accomplished their confinement for
life which the protection of society demands . . . The treatment may,
and in many cases would, involve incarceration for life . . . not
because of guilt, but to protect the defective himself and society".

The Maryland statute, enacted in 1951, thus closed a historical
legislative cycle, returning to the earlier defective delinquent term-
inology. The law attempted to create a broad program of social control
which extended to all persons convicted of a felony or misdemeanors, if
they were found in a state of "emotional unbalance".

The legislative history of the psychopath laws which followed the enactment of the Maryland statute and the creation of a formidable institution--the Patuxent institution--did not show any substantial attempt to establish a new model of legislation. The pre-conviction and the Maryland model represented the only legal patterns which were used in the last forty years. They did not represent only legal patterns. They were the material realization of specific approaches to the problem and rested on specific psychiatric and sociological assumptions. Those patterns were also the result of the preponderance of psychiatric knowledge and attitudes in the field of mental illness and psychopathy, in particular. More recent history, however, has been characterized by the increase of legal attacks which have tried to bring previous and new issues of constitutional law into psychopath offender legislation. This new development eventually led in the 1960's to several legislative innovations which reflected a new state of affairs in the field of law and psychiatry. The next chapter will explore, in detail, the original contribution of psychiatry and law as well as their changing relationship in the context of the socio-legal history of one of these legislative programs: the Ohio psychopath statute.
NOTES TO CHAPTER IV


2 The legislative history of the psychopathic offender statutes of Michigan, Illinois, Minnesota will illustrate this point.


4 Consider f.i., the Baumes Law, the Public Enemies Laws, the Recidivist Laws, the Mentally Defective Laws, the Drugs and Food Laws, the Prohibition Laws, etc., A good summary of these different types of legislation is provided in Richard Quinney, The Social Reality of Crime (Boston: Little, Brown and Co., 1970), pp. 73-97.

5 Mass. Acts and Resolves, Ch. 595,§ 1, (1911).

6 Annotated Laws of Massachusetts, Ch. 123,§ 113 (1928).


General Laws of Massachusetts, Ch. 123, § 100A. The law took the name of the man who originally drafted the text. Vernon Briggs was a prominent physician in Massachusetts, active member of the state charitable associations and president of the Massachusetts Psychiatric Society. For biographic information, see Who Was Who in America, Vol. 1, (1942).

Annotated Laws of Massachusetts, Ch. 123, § 100A.


These laws were named after Senator Caleb Baumes, then Chairman of the Crime Commission, in the State of New York. See Julia Johnsen, The Baumes Law (New York: H. Wilson Co., 1929).

George Brown, op.cit., p. 661.


George Brown, op.cit., pp. 654-656.


Ibid.


286 Michigan 51, 281 N.W. 534.

Ibid., p. 57.

Ibid., p. 59.

Ibid.

Ibid.

Ibid.


Section 2 of Public Act No. 165 reads: "Jurisdiction of criminal sexual psychopathic persons charged with criminal offense is vested in the circuit courts of the State . . ."

301 Mich. 584, 4 N.W. 2d 18.

Ibid., pp. 602-603.

Ibid., p. 607.

Ibid., p. 607.

Ibid., p. 607.


Illinois Statutes Annotated (Jones Supp., August, 1938), 37.665; section 3.

Ibid., section 5.

Ibid., section 5.

Ibid., section 6.


Minnesota Laws Annotated, Ch. 369 (1939).

Ibid., section 7.

Ibid., section 2.


Ibid., p. 299.

Ibid., p. 299.

Ibid., p. 301.

Ibid., p. 302.

A summary of the development of the psychopathic offender statutes is provided in Karl Bowman, *op. cit.*, pp. 33-39.


58 Report of Mayor's Committee for the Study of Sex Offenders, (New York City, 1943), Bulletin No. 9.


60 Report and Recommendations of the Commission on the Habitual Sex Offender, (State of New Jersey, 1950).

61 Ibid., pp. 13-16.

62 See the list of the persons appointed to be members of the several state committees in the specific reports of each state.

63 Budd Rigg, op.cit., 567-568.

64 New York Times, April 12, 1947, p. 15, col. 5.


67 Annotated Code of Maryland, art. 31B, sec. 1-19.

68 The findings of the 1948 Commission as well as the following history of the Maryland Act are referred in Maryland's Defective Delinquent Statute: A Progress Report (Department of Public Safety and Correctional Services, 1973).

69 Ibid., p. 8-9.

70 Annotated Code of Maryland, art. 31B, sec. 5.


72 Ibid., p. 11.
CHAPTER V

THE PSYCHOPATHIC OFFENDER STATUTE IN OHIO:

A CASE OF SOCIAL HISTORY OF LAW

The Psychopathic Problem in Ohio

Prior to the 1930's, before the great depression, the duty of the Ohio Department of Public Welfare was primarily concerned with the administration of the state institutions for socially maladjusted and mentally diseased persons. The depression greatly increased the number of dependent persons needing public assistance and, consequently, stimulated the undertaking of new programs. In brief, this new socio-economic state of affairs changed the character of the Ohio Department of Public Welfare from a merely administrative agency to an entrepreneural one.

The institutional changes within the Ohio bureaucratic apparatus also influenced the creation and reorganization of several voluntary associations which operated in the field of health and welfare. The Ohio Hospital Association, the Physical and Health Education Association, the Public Health Association, and the Women's State Committee for Public Welfare, were among the most active associations in "promoting" new legislation, in "cooperating" with state and national agencies and in "protecting" the welfare of the community.
On February 19, 1930, the Ohio Mental Hygiene Association was organized and Ohio became one of the "leading states in the field of mental hygiene". The purpose of the new association was "to conduct general education in mental hygiene, (and) to promote adequate service by state and local agencies, public and private, especially in the care, treatment and supervision of the mentally deficient". The new association emphasized from the very beginning that, in the field of mental hygiene "as in other fields of public health, other professions whose concern is chiefly with Man . . . (had) much to contribute". However, "the leadership" had "to remain in the hands of the medical professions".

One of the first investigations of the association was to examine whether in Ohio there were adequate facilities, both public and private, for the proper care and treatment of those already ill. The conclusion was that "Ohio (was) lax in meeting these needs" contrary to the publicity at the time of the creation of the Mental Hygiene Association. In May, 1930, in response to this indictment, Governor Cooper appointed a Welfare Advisory Commission to study the situation. The Commission found that there was "serious overcrowding in the existing institutions" and that "Ohio was caring for fewer patients in proportion to population than in similar institutions in the country as a whole". The Commission also estimated that an additional 2,500 beds were necessary to meet the increasing population and that the facilities "for the care and treatment of the feeble-minded and epileptic persons were indeed very meager". The most serious charge was that "for the defective delinquent there (was) no provision at all" in Ohio.
The problem of the defective delinquent received considerable attention in the following years. In October, 1933, at the meeting of the Managing Officers' Association of the Ohio State Welfare Department, held at the Boys' Industrial School in Lancaster, Ohio; Dr. Bushong, Superintendent of Lima State Hospital, "suggested a discussion of the pressing problem of defective delinquents and an examination of "the possibility . . . (of) defining the concept of psychopathic personality".

The discussion on psychopathy at the Boys' Industrial School included almost all the superintendents of the Ohio institutions for the feeble-minded and mentally ill offenders as well as the President of the Managing Officers' Association. The discussants reported their experience with defective delinquents, psychopathic offenders and, in particular, emphasized the difficulty of a satisfactory and universal definition of psychopathic personality. One outgrowth of this discussion was the appointment of a committee, selected from the members of the Association, to study psychopathic personality. This committee was composed, among others, of Dr. W. Pritchard of the Columbus State Hospital, Dr. E. Hooper of the Dayton State Hospital, Dr. C. Kirk of the Orient Institute for the Feeble-Minded and Dr. R. Bushong. The committee focused on the practical aspect of nosology where, by necessity, agreement had to be reached by these eminent physicians. The committee established a 12-point scale of symptoms for the diagnosis of psychopathic personality. It described the types of behaviors (drug addicts, alcoholics, prostitutes, hobos, pathological liars, recidivists,
etc.) most recurrent in psychopathic states and complained about the lack of specific interest, among professionals and the public, proportional to the seriousness of the disease. The committee emphatically concluded: "looking at the matter from a legalistic standpoint, what is to be done about the question of responsibility in these cases? How long are we going to continue to regard the psychopath as semi-responsible and semi-irresponsible?" The committee urged immediate legislative action and argued that a passive "attitude was untenable" in this matter. The report of this committee apparently had considerable success. So many requests for the report were received that it was published in 1934, 1938 and again in the Managing Officers' Association Bulletin issue of March, 1944.

The concern with the psychopath was progressively spreading out of the medical and psychiatric circles. In 1935, the Governor of Ohio appointed Colonel C. Sherril to conduct an investigation of the status of the penal and correctional institutions. S. Asch and Dr. E. Reed were among the members of their committee. Their report strongly criticized the management of the institutions in Ohio. "Their administration", the committee wrote, "can be regarded only as a disgrace to the commonwealth". "The great majority of prisoners are, of necessity, sooner or later released. Unhealthy conditions, overcrowding, and unskilled mass treatment in our penal institutions is shortsighted economy, and in the end is both expensive and dangerous to society". With regard to the defective and psychopath offenders, the committee found that they
respectively constituted 10 percent and five percent of the adult penal population. Their behavior was by far more serious than their number. The committee emphasized, indeed, that "some of the worst and most persistent criminals belong to these groups". It also quoted the case of Merton Goodrich--the man whose name and vicissitudes originated the Michigan psychopath statute--who was diagnosed as a psychopath, detained in Lima State Hospital but was soon released on habeas corpus, because Ohio did not have legal provisions to justify Goodrich's continued commitment. The final recommendation was that "the emotionally insane, or psychopathic criminals . . . should be permanently confined in suitable institutions equipped especially for their care". Since "none such exist in Ohio at the present time", the report recommended that "a new law was needed to make possible the permanent detention of psychopaths". Furthermore, the construction of "proper facilities" for this group of offenders was suggested among the priorities for the immediate future.

The Managing Officers Association of the Ohio Welfare Department played a major role in bringing the issue of psychopathy to the attention of the state authorities. The reports of the scientific and governmental committees constituted the material evidence which document the vacuum existing in the legislative and institutional apparatus of the state with regard to psychopathic offenders. The new entrepreneurial attitude of the Welfare Department, stimulated by the changing economic and social conditions of the country, represented an ideal platform for
pushing toward the accomplishment of the committees' recommendations. In particular, a public feeling of inadequacy and inefficiency was provoked by the no-nonsense report of Colonel Sherril. That something-must-be-done for the security of the community and, consequently, for the psychopath became an imperative. The Ohio Federation of Women's Clubs and its division of crime prevention and control, the Ohio League of Women's Voters and other associations were effective in publicizing the need for a general reorganization of the mental health and correctional systems as well as for new legislation in harmony with the progress in medicine and psychiatry. According to the general pattern occurring in other states, the commission of a few serious crimes and the extensive coverage given them in the Ohio newspapers contributed to the creation of a public fear and emphasized the inadequacy of the present state of affairs with regard to the psychopath. The issue of psychopathy became the topic of study of the Cleveland Bar Association which drafted a bill containing specific provisions for the detention and release of the mentally defective and psychopathic offenders. The bill was introduced to the 93rd General Assembly of the State of Ohio by Senator Leo Ascherman, Republican of Cuyahoga County, and was approved on June 6, 1939.

The Ascherman Act

The purpose of the new law was "to establish, for the greater protection of the community, proceedings . . . dealing with mentally defective prisoners . . . in cases in which the court having jurisdiction finds that the imposition, or continued enforcement, of the
applicable penal sentence will not afford to the community proper pro-
tection against possible future criminal conduct of such mentally de-
fective prisoners". Mental defectives was defined as "a mental disease
or disorder" or "a psychopathic condition" which renders "such prisoner
likely to be a habitual criminal". The proceedings established by the
new law were as follows: after conviction of a felony--except murder
in the first degree--if it appeared to the court that the defendant
was mentally defective, the court could, in its discretion, refer the
defendant to an institution for the purpose of ascertaining his mental
condition. Upon the finding of mental defectiveness, certified in a
report transmitted by the institution to the court, a subsequent hearing
had to be held not later than thirty days after receipt of the report.
Upon consideration of the report and "other evidence", the court could,
in its discretion, "in lieu of sentencing such prisoner for the crime
of which he has been convicted, enter an order of indefinite commitment
of such prisoner to such available institution". However, the Act
provided that "if in the opinion of the State Department of Public
Welfare, adequate facilities are not available, such department may
reject such commitment in which event the applicable penal sentence
shall apply". At any time during commitment--"but not prior to the
time when such prisoner would be eligible for parole upon sentence--
for the crime of which he was convicted"--the Superintendent of the
institution could refer the prisoner to the court noting his changed
mental condition. The court could, in its discretion, hold a hearing
and deal with the prisoner using the new findings. The Act established, however, that the prisoner must be released from the institution after his maximum term of imprisonment expired.

The Act owed much to the older defective and recidivist laws. Indeed, the statute adopted not only their terminology, but incorporated their punishment treatment ambiguity. No specification was included in relation to the treatment of the psychopath, beside general hints, and the protection of the community was emphasized as the primary purpose of the law. Contrary to statutes enacted in the same period in other states, the Ascherman Act used a post-conviction model. However, the provisions established that the proceedings, as well as the commitment to the hospital, were under the jurisdiction of the Department of Public Welfare. This feature apparently saved the Act from being attacked as unconstitutional as happened in Michigan in 1937. The major characteristic of the Ohio statute was its focus on discretion. The enforcement of the psychopath proceedings, in fact, was up to the discretion of the court and even when the court had decided to enforce the Act, the actual commitment was at the discretion of the Department of Public Welfare. This meant, in practice, that the Superintendent of Lima State Hospital could determine the measure of implementation of the law. In other terms, the power of interference of psychiatry in the legal process was legitimized in the law itself.

Turning again to the social history of the Act, it is apparent from documents that the issue of implementation of the Act was used by
the professional staff of Lima State Hospital to exert pressure on the
Department of Public Welfare and, through this channel, on the state
government. Dr. Bushong and other superintendents had supported the
creation of special psychopath legislation, but were apparently unhappy
with the failure of the department to provide funds for additional
facilities at Lima. As a result, the Superintendent of Lima and his
staff were extremely cautious in recommending commitments of psychopathic
offenders to the Hospital. There were, in fact, no commitments to Lima
between 1939-1943 under the jurisdiction of the Ascherman Act.

A few months after the enactment of this psychopath statute,
Dr. E. Crawfis of Lima State Hospital read a paper on the management
of psychopathic offenders during the meeting of the Association of
Physicians of Ohio institutions held in Toledo in October, 1939. He
complained that the legislature, in passing the statute, "had actually
accomplished little". It established new proceedings, but did not pro-
vide for a new institution. Dr. Crawfis reiterated that "textbooks
universally" speak of the need of institutionalization of the psychopa-
pathic offender and that "the State of Ohio should have a special in-
stitution" devoted to psychopaths. For the moment, Dr. Crawfis de-
clared, Lima State Hospital was compelled to adopt the policy of refus-
ing "commitments of psychopathic personalities". The major reasons
for this policy were the overcrowding of the institution and the fact
that "if the patients obtain their release, they invariably get into
trouble, and the institution receives unfavorable publicity . . ."
The issue of overcrowding in the institutions was taken by C. Sherwood, Director of the Welfare Department, to the meeting of the American Prison Association held in Cincinnati in October, 1940. The publicity concerning this problem was suposed to serve the Welfare Department as leverage for a "more rational" distribution of the state financial resources. In relation to Lima, Sherwood reported to the audience that in September, to make room for 26 psychotic prisoners transferred to Lima, they "were obliged to transfer back to civil state hospitals, also desperately overcrowded, a corresponding number of inmates". At the end of his speech, Dr. Sherwood declared that there was in Ohio an urgent "need for further setting up and expanding of medical, psychiatric, psychological, educational, recreational and social resources in our penal field". Dr. Bushong, Commissioner of Mental Diseases in 1940, specified in an article published in the Managing Officers' Association Bulletin that in the Ohio hospitals the problem of overcrowding was seriously aggravated by the lack of equipment and training programs for the staff. Furthermore, Ohio had the the most inadequate ratios of physicians to patients (1 to 316) and nurses to patients (1 to 15) in relation to the quotas recommended by the American Psychiatric Association (1 to 150 and 1 to 8, respectively) and actually maintained in all the U. S. state hospitals (1 to 214 and 1 to 13, respectively).

This public outcry of the Lima and other state mental hospital superintendents, the efficient action of the Commissioner of Mental
Diseases and the personal involvement of the Director of the Welfare Department stimulated the undertaking of new legislative programs. Dr. Sherwood, spoke at length, during the meeting of the Managing Officers' Association in January, 1941, of the necessity to present "definite plans to the legislature involving the expansion of certain institutions" during the coming years. On April 18, during the sessions of the 94th General Assembly of Ohio, Dr. Sherwood reiterated that "many problems would be solved if the present proposals being considered by the legislature were approved". "Most important of these", according to Dr. Sherwood, was "a readjustment of salaries and working hours for employees . . . and immediate action on the building program". The General Assembly was very responsive to the needs of the Welfare Department. It enacted a law intended to help the department through the creation of separate administrative divisions. It also approved several bills which provided for the department's appropriation of land and funds in order to cope with its urgent needs.

The additional funds granted to Lima State Hospital increased in the following years as a result of the general changes affecting the Welfare Department. From $309,147.32 in 1941, the operating costs of the Hospital increased to $430,450.39 in 1945. A fiscal survey of the Welfare Department accounted for the new figures by "an increase caused both by salary and wage adjustments authorized by legislative act and an increase in the number of hospital employees." Other expenditures were justified by the construction of new housing facilities for the
physicians and for numerous "repairs", "improvements" and "buildings" related to the hospital. The result of the reorganization of the Welfare Department and, in particular, of the new provisions regarding Lima, was a major change in the policy of the hospital toward the commitment of the psychopathic offender. Starting in 1943, commitments to Lima State Hospital under the Ascherman Act, appeared in the statistical reports published by the Welfare Department.

The successive developments in public health and welfare and, thus, in the Ohio social arrangements and legal provisions were influenced by the U. S. participation in World War II. The Managing Officers' Association Bulletin in January, 1943 noted that "the United States is now experiencing many of the same dislocation" which afflicted other countries in Europe. "This manifests itself in general social maladjustment, fears, worries, misconduct, delinquency and other undesirable forms of conduct. These affect both adults and children and, in some cases, become so serious that psychopathic, neurotic and other forms of mental illness result". In Ohio, there was a revival in the in the activities of the mental hygiene movement and renewed cooperation with the Welfare Department. A directory of all the agencies offering some sort of public mental health service was published; several semi-public and private mental health facilities were created ex-novo or reorganized; public services were extended to all areas of the state through capillary action by the Welfare Department and the mental hygiene branches. These new activities and the revival of concern with crime
and mental illness once again brought to the public agenda the fact of the inadequacy of existing facilities. The more intensive the community perceived to be the present needs in the field of mental health, the more inadequate appeared the existing structures and the more intense was the consequent social action. In 1944 the report of the committee on psychopathic personality was published again to point out the urgency of providing solutions to this problem. In April, 1944, Mr. L. Mayo, President of the Ohio Welfare Conference, stated that "the establishment of more adequate facilities including buildings, programs and personnel for the care of the defective delinquents . . . the mentally ill are early 'musts'". The impact of public concern and the entrepreneurial involvement of psychiatrists and mental hygienists was soon felt in the legislature. In 1945, the 96th General Assembly of Ohio approved several bills which amended, supplemented, and expanded the provisions dealing with all types of mental abnormality.

Ascherman Act Revision

Senate Bill 67 rewrote almost the whole Ohio psychopath statute. The bill was introduced to the Assembly by Senators Seibert, Metzenbaum and Hoffman and was approved in July, 1945. It introduced numerous changes which remained intact until recently. The new act was made applicable to mentally deficient offenders—a term which replaced the previously used mentally defective offenders—and to psychopathic offenders. The description of the psychopath given in the report of the committee on the psychopathic personality was completely incorporated.
in the law. It defined the psychopath as "any person . . . who exhibits
criminal tendencies and who, by reason thereof, is a menace to the
public". The Act also gave a list of the major symptoms characterizing
the psychopath according to the 12-point scale previously elaborated
by the Welfare Department Committee. Psychopathy, the Act reads,
was evidenced "by such traits or characteristics inconsistent with age
of such persons as emotional immaturity and instability, impulsive,
irresponsible, reckless and unruly acts, excessively self-centered atti-
tudes, deficient powers of self-discipline, lack of normal capacity to
learn from experience, marked deficiency of moral sense or control".
The second major innovation was a change in the discretionary power of
the courts. The Act provided that in case of a conviction for rape,
carnal knowledge and attempt at carnal knowledge of a girl under 16,
assault upon a child under 16, incest and sodomy, the court was com-
pelled to refer the defendant for psychiatric examination. The court,
however, retained the discretionary power to refer for examination in
case of any other felony conviction. In relation to the release from
the institution, the new Act added to the ambiguity with regard to the
punishment-treatment issue. It established that, if the maximum term
had not expired at the time of release, the suspended penal sentence
"shall forthwith go into effect and the person shall be transferred
to the appropriate penal or reformatory institution". The statute
also left to the Welfare Department the discretion of refusing com-
mitments from the courts.
The new legislation, on the whole, further legitimized the intervention of psychiatry in the legal process and even increased its scope. Dr. E. Humphreys of the Division of Mental Hygiene—the new name of the former Division of Mental Diseases—complained that Ohio was still behind other states in the organization of mental health services. However, he declared, there were "a number of bright spots in the total social picture". "Among those 'islands of light', there were the specific social efforts of the universities and of the clergy; efforts at social legislation . . . educational programs . . . the program of the Governor's Committee on Mental Health for Ohio; and, the pertinent legislation achieved by the recent legislature". "Pertinent" was a modest attribute to describe the recent legislation. The General Assembly had, in fact, accepted almost all the recommendations of the Managing Officers' Association.

The Interest in Delinquency and Deviancy

The years following 1945 were characterized, in Ohio as well as in the nation, by an emphasis on social reconstruction. There was the expectation that delinquency, criminality, mental illness, violence and dependency would undergo a sharp increase following the strains of the War, as indeed they did after World War I. Previous social experience taught that many social problems could be coped with most effectively before they reached massive proportions. Thus, the several legislative and administrative programs launched after the War under
the label of social reconstruction, were dictated by an attitude which
focused on prevention and control, as means suitable for facing public
stress, and realizing social defense. The Ohio legislature in 1945
established the legal grounds for this new preventive social action.
The Bureau of Prevention and Education was created in the framework
of the Division of Mental Hygiene of the Welfare Department. This
Bureau was charged by law to "make studies and investigations concerning
causes of mental diseases, mental deficiency, epilepsy and other forms
of mental deviations, practicable measures of prevention (to) . . .
promote and develop a state-wide comprehensive system of mental hygiene
and psychiatric clinics . . . and (to) disseminate information as to mental hygiene and psychiatric facilities . . ."

Mr. F. Reams, Director of the Ohio Department of Public Welfare,
reported to the Managing Officers' Association on programs in the De­
partment as of January, 1946. A new level of cooperation was established
between the Department and the post-War Planning Committee. The Ohio
legislature had appropriated to the Department five million dollars for the construction of new buildings.

Along with the new legislative and institutional programs,
there emerged the idea of the usefulness of the application of science
to social problems. As in the past, after periods of intense social
stress, the entrepreneurs charged with the moral reconstruction of
society and the community welfare, appealed to science to save society.
Mr. H. Griswold, President of the Ohio Welfare Conference, delivered a paper on the scientific approach to public welfare in 1947. He
quoted from Bacon's outline of the steps of the scientific method and indicated how these steps could also be implemented in social work. He also suggested that the application of the scientific method should become as much a way of thinking in the field of public welfare as it was in the field of law. In this regard, Mr. Griswold referred to Justice Holmes' saying that "the life of the law is not in logic but in experience" and to Dean Roscoe Pound's statement that "the common law is not a set of rules and regulations. It is a method of judicial thinking". "In the same way--added Mr. Griswold--the scientific method is not a manual of fixed procedures or of scientific hocus pocus, it is a method of investigational thinking". Once again, the application of science was believed to be the panacea for all the problems and had a major influence in the subsequent legislative and administrative programs. Mr. Griswold, furthermore, was a lawyer by training, a member of the Ohio Bar and an active participant in many public and private associations. In particular, he served as a President of the Advisory Board of the Salvation Army, Chairman of the Cleveland Red Cross, Chairman of the Children's Code Commission, the Mental Health Program, etc. The major role played by a lawyer in the activities of the Welfare Department, progressively became less an exception and more the testimony of a new state of affairs between jurists and mental hygienists, psychiatrists and doctors. This fact was another element which characterized the pattern of social action in the history of mental hygiene and corrections in Ohio. Subsequently, in 1949, two judges--J. Lamnek and H. Robinson--were appointed, respectively, as Director and Assistant
Director of the Ohio Department of Public Welfare.

Despite the development of new programs, attitudes and social relations in the field of mental health in Ohio, few areas still appeared to be, or were presented in such, as lacking necessary attention and action. In 1948, the Managing Officers' Association sponsored a conference on the subject of psychopathy. Dr. R. Bushong was appointed Chairman of the panel and Colonel Hays, Superintendent of the Boy's Industrial School, Dr. F. Bell, psychologist and member of the American Academy for the Advancement of Science, and Dr. M. Newberger, psychologist for the Franklin County Court of Domestic Relations, delivered papers on particular aspects of psychopathy. All the authors pointed to the issue of dangerousness of psychopathy, the emergence of the disease's symptoms in earlier periods of life and the importance of prevention. In particular, Dr. Bushong illustrated the problems that he was personally facing in Lima State Hospital from the lack of adequate facilities and the forced association of psychopaths with other mentally abnormal inmates. He concluded his paper with an appeal "to provide a separate and distinct institution with special facilities" for dealing with psychopath offenders. Earlier in time, Dr. Bushong had written with regard to the case of State v. Lombardelli, a letter to Judge Struble of the Common Pleas Court to explain the reasons of the release of an inmate from Lima. He wrote that "if it is seen fit by your court to give him (the defendant) an institutional sentence, it is suggested that he be sent to a penal institution rather than to
this hospital (Lima), inasmuch as we are not equipped to accommodate the many psychopathic offenders and special facilities have not as yet been created for this particular type". At the end of the meeting in which Dr. Bushong and others had participated in 1948, Dr. Baber suggested that "some plan (should) be adopted to try to persuade the 1949 state legislature" to act with regard to Lima and asked that "every effort (should) be made to present the problem in such a form that the need would be recognized" for action. The General Assembly soon provided an appropriation of $1,450,000 for the building of additional facilities to house mental defectives, psychopathic offenders and others sentenced under the Ascherman Act.

The triangular activity between the legislature mental hygienists and voluntary associations was very successful in stimulating new legislation. The general cultural milieu in the nation was also favorable to social experimentation. An immediate reason for this success was the responsive attitude which legal circles had developed to the problem of mental hygiene and public welfare. Even more direct action was exerted by the intermingling membership of the persons who sponsored these programs in the state official organizations and private associations. The role played by these associations constituted the groundwork lobby activity which backed the new legal programs and supported the need of their implementation. In substance, the lobbies played a prominent role in the creation of a social reality upon which legislature and social action was predicated by the "moral entrepreneurs".
This aspect is even more apparent from the subsequent history of the Ohio psychopath statute.

In 1949, Mr. L. Ascherman, who sponsored the original statute, began to correspond with Judge Lamnek, Director of Public Welfare, and with several other mental hygienists, psychiatrists, lawyers and private associations in relation to the psychopathic offender laws. From this involvement by Mr. Ascherman and other circumstances, the history of the Ohio act received more attention than could be expected based on the actual number of psychopaths processed every year through the legal and mental health systems of the state.

In 1947, several newspapers and magazines in the nation published an alarming article by J. Edgar Hoover, Head of the Federal Bureau of Investigation, which created a collective fear of psychopathic offenders. Mr. Ascherman brought this issue to the attention of Judge Lamnek, asked information about the situation in Lima and suggested that a revision of the Ohio psychopath statute to include misdemeanants was very much needed in view of the dangerousness of the psychopathic offender. Judge Lamnek was favorable to the proposal of Mr. Ascherman and suggested that "the only difficulty would be to write a statute that would be constitutional". In point of fact, the constitutionality of the Ohio Act was barely upheld by the Court of Appeals in Allen County in 1948. The statute was attacked because it denied due process and, in particular, because it permitted a hospital commitment longer than a detention in prison. The court decided that this issue could not be raised by the defendant because the maximum term of the sentence in this particular
case had not yet expired. The appeal was rejected, but only at the price of adopting a position of strict legalism and ignoring the substantial issue of the indefinite commitment procedure.

Following the first approach with Lamnek, Mr. Ascherman was called to serve on a committee charged with the study of mental defectives in criminal law. The committee was carefully constituted to include representatives of the legal and medical circles, members of charitable associations and editors of the major Ohio newspapers. Among the members of the committee were: Dr. Bushong; Al Glatke, Chief of Corrections of the Ohio Welfare Department; N. Howard, the Cleveland News; L. Seltzer, the Cleveland Press; G. Larcon, Director of the Citizen's League; Mrs. B. Little, President of the Junior League; Mrs. B. MacKren, Women's City Club and S. Whitman of the Mental Hygiene Association. All the members of the committee were supporters of mental hygiene activities in the state.

The committee gathered information about the legal system established in other states with regard to psychopathic offenders. Mr. Ascherman initiated correspondence with the various departments of corrections, mental hygiene, and welfare in Illinois, Michigan, New York, Pennsylvania, New Jersey, Massachusetts, etc., in order to get first-hand information on these states' experience with psychopathic offenders. Particularly welcomed was the notice that all these states extended the jurisdiction of their psychopathic statutes to misdemeanants. Mr. Ascherman and the Ohio committee were very much commended.
for their efforts to ameliorate the situation for the safety and welfare of the community. Special publicity and prestige was brought to the work of the committee from the service of Dr. Royal Grossman, Head of the psychiatric court in Cleveland. Dr. Grossman exchanged letters with Professor M. Guttmacher, Chief Medical Officer of the Supreme Bench of Baltimore Court House, Consultant of the United Nations Commission on the Study of Crime and international expert in the field of psychiatry and law, with the purpose of receiving Guttmacher's opinion on the issue of psychopathy. Similarly, Dr. Grossman wrote to the American Psychiatric Association, which at that time had elected Dr. W. Overholser, a man who had unique experience with mental defectives and with the administration of the Briggs Law in Massachusetts, to be chief consultant for the association. Professor Guttmacher was subsequently invited to preside at a banquet given in the honor of Dr. Grossman for his 30 years of service in Ohio. The notice of the event was published in the newspapers and Professor Guttmacher gave a speech on the topic of psychiatry and the law touching on the questions which the nation was facing in trying to find legal and medical solutions for special categories of offenders.

The Women's Associations of Ohio were particularly involved in the process of stimulating public opinion and in the creation of a collective feeling that psychopathic offenders constituted a very special problem. Mr. V. Mauer, President of the Cuyahoga Council of Women Voters, was called by Mr. Ascherman, to consider the inadequacy of
present legislation at the suggestion of Judge Mary Grossman. The League of Women Voters had always played an important role in support of new legislation in this area. The statutory purpose of the League even provided that the association had to participate in the governmental process and specified that "participation... (meant) active support of legislation and work on bettering the administration of laws already in the statute books". Judge Mary Grossman, wife of Dr. Royal Grossman, was a successful and influential judge in Ohio. She was a member in many charitable associations of the state and always in the forefront of the battle to improve public health and welfare.

Judge Grossman, Dr. Grossman, Judge D. Meck and Mr. Ascherman co-signed a letter sent to the Cleveland Bar Association, to the Cuyahoga County Bar Association and to the Cuyahoga Council of the League of Women Voters to ask support for the amendment of the Ascherman Act to include misdemeanants and special financial appropriations to Lima State Hospital. Copies of the letter were also sent to the state and national branches of the several professional and voluntary associations.

In 1950, the media also got very interested in the problem of psychopathy. The newspapers bewailed the fact that Ohio was "backward in sex criminal laws" and indicated an urgent need for the revision of the present laws. The Cleveland Press carried, in March, 1950, a long article on the work of the Ohio committee. The Cleveland Plain Dealer started a campaign with the theme of "safe streets for women" in March, 1950. Another magazine was very critical of the practice of release of
psychopaths from the hospital because they inevitably tended to commit other "heinous" crimes.

The activity of Mr. Ascherman and the committee seemed to have its effects. Nearly every public meeting where welfare department officers, psychiatrists and judges participated, seemed to focus on the psychopath. Nearly every charitable and women's association pointed out the necessity of improving Lima and treatment for the mentally abnormal offenders. Some clergymen made allusion to the problem in their Sunday sermons. Superintendents of schools were contacted by the women's associations in order to examine the situation and work out some practical solution for the children of Ohio. It was a snow-balling social process which magnified the problem of the psychopathic offender and left the legislature without any alternative for refusing, at least partially, the requests of the committee. The issue of the psychopath again confronted the public. By the end of 1950 the committee had terminated its work and a report was prepared with recommendations for the amendment of the Act. The Cleveland Bar Association drafted the proposal and State Senator J. Nutt introduced the bill in the 88th General Assembly of Ohio. The Cleveland Plain Dealer, the Cleveland Press and the Cleveland News were approached to give "strong editorial support" to the cause of the statute amendment. The new Act was passed by the General Assembly, signed by Governor Lausche on June 8, 1951, and became effective on September 6, 1951.

The amendment, introduced in S.B. 265 extended the jurisdiction of the Act. "Any court of record" instead of the Common Pleas Court
was given the power to commit defendants to Lima State Hospital. This amendment was intended to include specifically cases from the juvenile court. It was a last-minute modification of the bill based upon the request of Mr. Withlac, Chief Clerk of the Juvenile Court of Cuyahoga County, made to Mr. Ascherman, who apparently accepted the suggestion in order to avoid unexpected problems from members of the Cleveland Bar Association. Furthermore, the Act established that in the case "of any misdemeanor involving a sex offense, or in which abnormal sexual tendencies are displayed" the court could, in its discretion, commit the defendant for psychiatric examination.

The 1951 amendment of the Ohio psychopath statute was indeed the result of an orchestrated manoeuvre by Mr. Ascherman and by the committee on mentally defective offenders. The several voluntary association of Ohio expressing the middle and upper-middle class culture of midwestern America, and the media all contributed to the enactment of this amendment. Nobody confronted the real essence of crime with the alleged inadequacy of the present facilities and legal provisions. The alarming picture created by the media was taken for granted and was believed to mirror the real state of affairs. In other words, the history of progressive extension of the jurisdiction of the statute without any empirical evidence that such amendments were needed, or when implemented, effective.

Following the amendment of 1951, the activities of the moral entrepreneurs, especially Mr. Ascherman and those close to the Cleveland Bar Association, mainly focused their efforts on the enforcement
of the statute. In point of fact, even the implementation of the Act was believed to be inadequate in making the streets safe for women and children. Between November and December, 1952, Mr. Ascherman wrote several letters to Dr. Bushong and Judge Lamneck asking about the implementation of the law, and the status of the additional facilities in Lima. Judge Lamneck replied that he was not able at that time to promise that the money made available by the Legislature could be spent specifically for the mental defectives in Lima. Soon after this notice, Mr. Ascherman charged the Governor and the Director of Public Welfare with failure to spend the money appropriated for Lima by the 98th General Assembly. The charge was made in a public statement by Mr. Ascherman in February, 1952 at the Council of the Jewish Women in Cleveland. Automatically, the women of Ohio were brought again to the forefront of the crusade against psychopaths, in the sense of providing them a better environment in Lima. The Cleveland News gave extensive coverage to the charge against the Department of Public Welfare in a series of articles published in February. The building in Lima was completed in 1953 and the new facility began receiving inmates in 1954.

The apparent conflict between Mr. Ascherman and the women of Ohio and the Welfare Department was not due to a general lack of interest by the Department in the problems of the psychopath offender. Major social developments in Ohio, as well as in the nation, were taking place beginning in the late 1940's which, perhaps, exerted some influence on
the problems of Lima. In particular, the Ohio Department seemed to devote more and more attention to other sectors of mental health. An increasing preoccupation with juvenile delinquency and with the aged can be seen in the publications of the Department of Public Welfare.

It is hazardous to establish relationships between macrosocial events and changes in the institutional state of affairs of smaller units of the social and culture structure. However, it is possible to assert that new winds were blowing in the nation and in Ohio in the early 1950's. Those were the years which witnessed major welfare legislation: numerous provisions were made for older persons through social security. This new orientation and action also contained some emphasis on prevention and control, particularly in the field of delinquency, where it was perceived that most of the social problems could be identified and stopped before their development. The estimation of the Ohio Welfare Department and the delay in the building of the psychopathic unit in Lima were perhaps the expression of a real difference in priority between the "moral entrepreneurs" and the state bureaucracy.

The national trend in public welfare consisted in the intensification of social intervention by state and federal agencies. The need for more and better welfare programs had progressively increased the volume of activity for the Ohio Department beginning in the late 1940's. Senate Bill 155, enacted by the General Assembly in 1953, attempted to cope with the situation determined by the new policy in
public welfare, decreeing the creation of a new department—the Department of Mental Hygiene and Corrections. The Department of Welfare was restructured to cover those areas which could be dealt with without institutionalization. Its functions became primarily "those of prevention and rehabilitation, with emphasis on providing the type of service and assistance best designed to avoid the need for institutionalization". Particularly, emphasis was put upon the assistance for the aged and infirm persons, crippled children, and the blind. Judge H. Robinson, former Assistant Director of the Department, was appointed Director and took charge in July, 1954. The newly created Department of Mental Hygiene and Corrections was charged with the administration of the state's mental hygiene services and all the adult and juvenile programs. Dr. J. Portfield was elected to direct the new department.

Since the original version of 1939, the Ascherman Act had been modified many times and its jurisdiction had been extended to cover potentially almost every type of antisocial behavior. The history of the Act between 1954-1967 was characterized by a formidable struggle for the implementation of the Act conducted by the moral entrepreneurs of Ohio. The emphasis of the struggle was almost exclusively based upon the enforcement of the Act. Several attempts were also made to stimulate research and treatment of the sexual psychopaths at Lima State Hospital. The newly created Department of Mental Hygiene and Corrections seemed, in comparison with the past years, to lessen its involvement with legislative changes affecting the psychopath statute.
The active role played by the former Welfare Department was never again assumed by the new Ohio mental hygiene authorities.

After the construction of the psychopath unit in Lima, enough beds were available to sustain a higher number of commitments. In October, 1956, Dr. Bushong informed Mr. Ascherman that the old problem of lack of space had almost been solved. However, there was still the lack of qualified personnel. Mr. Gagliardo, Chief Probation Officer of the Cleveland Municipal Court, communicated to Judge Jackson that no instances of refusals of commitment on the part of Lima State Hospital had occurred since December, 1956. With the issue of commitments resolved, a campaign was started by the Cleveland News in favor of a better organization of the research and treatment unit for sex deviates or psychopath offenders. M. Strassmeyer and S. Andorn of the Cleveland News; Dr. E. Crawfis, Hawthornden Hospital; Judge Mary Grossman, and J. Fatterman, an attorney, formed a committee and published in the Cleveland News their appeal for the creation of a new treatment center for sex offenders under the slogan "the best friends your children will ever have". In 1959, a bill for the creation of a center in Lima was introduced by Mr. H. Corkwell, who had previously procured the assent of Governor DiSalle and of Dr. Luidens, Commissioner of Mental Hygiene. The bill was approved, but Mr. Corkwell still was complaining in 1962 that because of lack of financial resources the new research and treatment center was still inadequate.

To push the case of the treatment center and the implementation
of the statute, something was needed to attract the attention of public opinion. In January, 1965, a certain W. Rehard abducted and kidnapped a seven-year-old girl. The case provoked indignation, excitement, and fear in the public. Mr. Ascherman received several letters from Ohio citizens who asked the former Senator to initiate immediate action with the state authorities. At the same time, many Ohio newspapers publicized the case of the recent kidnapping. Mr. Ascherman suggested that the Cleveland Bar Association start a study on psychopathic offenders. Mr. L. Pierce, President of the Association, formed a committee "to determine what steps the Bar should take toward the better implementation of the Act". Ohio Chief Justice Arthur Day supported the initiative and stated that "the courts' first duty (was) to protect the public and rehabilitation of offenders was a secondary aim of the law". The Student Bar Association of the Western Reserve University invited Mr. Ascherman to give a speech on the implications of the recent case of Mr. W. Rehard.

In June, 1965, the Plain Dealer described the situation in Lima as follows: "there are too few physicians, too few psychiatrists, too few nurses, too few trained attendants". "Talking is not enough"--the editor commented--"action is needed at Lima". After a few weeks, the Plain Dealer reiterated that "the Act itself may need revision in the light of experience over a quarter of a century. But the most significant results of a proper survey are certain to be in the area of implementation". Without any doubt the press echoed the position of the committee.
The positive response of academia and of the public, the involvement of the courts and the Bar, the assent of the state authorities all contributed to establish once again the basis for the existence of an urgent social problem. The statute, however, failed to reassure the community. The situation was mature enough, however, to prepare for the next General Assembly. The Cleveland Bar Association committee compiled a joint resolution to be presented to the Legislative Service Commission of the state. The report acknowledged the fact that the number of crimes committed by psychopathic personalities had already increased and was increasing even faster in Ohio. Therefore, the report recommended the Legislative Commission to undertake a new study as "to the need for additional facilities and staff and any amendments to existing legislation which would increase its effectiveness". The Ohio Legislative Service Commission welcomed the suggestion and indicated that the case of Lima was to be included in their project of reexamination of the entire body of the Ohio Criminal Law.

The 107th General Assembly of Ohio opened its sessions in January, 1967. A few weeks before the first session, the WWJ Broadcasting Corporation in Cleveland notified Mr. Ascherman that some editorials would be devoted to the problem of the psychopathic offender. In August, 1967, Mr. Ascherman testified before the legislative committee of the Assembly on the psychopath statute and its problems. He elaborated upon the amendments proposed by the Cleveland Bar Association and, particularly, upon the necessity to extend the discretionary power of the
courts to ask for psychiatric examination in every case of a misdemeanor 129 whether or not involving a sex offense. Bill No. 316, containing the 130 amendments suggested, was passed and approved on September 13, 1967.

The committee on psychopath offenders, however, was not yet dismissed. It continued to perform its duties of looking after all the possibilities which would improve Lima State Hospital and the substance and above all the implementation of the statute. The committee thought that the main problem was to overcome apathy and indifference and recognized as a crucial task that of finding additional means whereby greater public awareness (could) be achieved. In point of fact, all the public attention stimulated by the committee was, indeed, an effective instrument of pressure on the legislature, the Department of Mental Hygiene and Corrections and the commitment policy adopted in Lima State Hospital.

In 1967, the establishment of the Division of Psychiatric Criminology certainly helped the implementation of the statute. The following year, 1968, witnessed the highest number of commitments to Lima under the Ascherman Act. The Division was created with the purpose "to develop new methods and programs for the care and treatment of the criminally insane, the sociopath, the sex offender and sex 132 deviate". The Division was situated in the Chillicothe Correctional Institute, formerly a federal reformatory which was leased by the State of Ohio from the U. S. Bureau of Prisons "to alleviate the overcrowded conditions at other penal institutions, to establish new areas for
vocational and occupational training and to provide . . . psychiatric care for inmates". Dr. L. Cunningham, a former Commander who retired in 1965 from the U. S. Navy, was appointed Director of the new created Division of Psychiatric Criminology.

The period 1954-1968 had been one of intense activity on the part of the moral entrepreneurs. The jurisdiction of the statute had been brought to its maximum extension and the campaign for its implementation had also been intensified and succeeded in coopting a wider number of persons and institutions. This period also represented "the era of treatment" for the psychopath and Lima State Hospital, despite the campaign on the inadequacy of the present structure and the necessity of creating new treatment facilities. After 1950, the field of mental health in the nation was characterized by a shift from custodial care to treatment. The great use of newly discovered psychoactive drugs seemed to help in the crusade for treatment. Under the influence of such a trend in mental hospitals' medical administration, Lima State Hospital organized some form of inmate self-government which was intended to stimulate responsibility, concern for other people, self-confidence, etc., and other attitudes which were thought to be lacking in psychopathic personalities. The use of drugs was intended to help in the administration and control of the inmates' self-government system. There is a record in Lima about the organization of several committees of inmates (education, hygiene, industrial, etc.) which created a system of stratification and allocation of power among inmates and attendants.
The substance of the "era of treatment" subsequently became the main issue in public discussions about the administration of Lima State Hospital.

The very recent history of the Ascherman Act is a response to the new trend in the field of mental health which has focused on the criticism of the involuntary commitment procedure and its sociological, psychological and legal implications. Since 1967, Mr. Durkin, a member of the Committee on Psychopathic Personality warned Mr. Ascherman that the efforts to amend the statute could be frustrated by charges of unconstitutionality. The U. S. Supreme Court had, in fact, adjudged in Specht v. Patterson that the Colorado psychopath statute was unconstitutional in not allowing for presence of counsel, witnesses and cross-examination during the commitment hearing, in accordance with due process. For the first time, in 1971, judges started to refuse to commit defendants to Lima. The historical cycle had reversed direction. In the first years after the creation of the statute, the superintendent of Lima refused commitments in order to force the increase of the facility as well as a budget increase. In 1971, the judges refused to implement the Act because the money which was spent in the past for Lima did not bring the expected benefits for which it had been allocated. The discrepancy between psychiatry and the law has been the major aspect which characterized the most recent history of the Ohio statute and the new trend in the nation. In 1970, in Ohio, charges of staff brutality against inmates forced a Grand Jury investigation to
determine the facts. Apparently, isolation between professional staff and inmates left the inmates under the control of the attendants. As a result, court commitments declined. Mr. Ascherman strongly criticized the courts. The Cleveland Bar Journal wrote that "the refusal to commit to Lima (had) the effect of aborting the Act". Once again, the idea of a comprehensive study of the legal and medical situation at Lima was proposed by Mr. Ascherman, but no major study followed until recently. On the contrary, Dr. Gaver, State Mental Hygiene Director in 1972, announced that Lima State Hospital was to be phased down to a small operation for the care of no more than 200 patients.

The overall history of the Ohio psychopath statute has developed according to a pattern which does lend itself readily to theoretical interpretation. The original Act and its successive amendments were the result of societal reaction to special types of crime--crimes against women and children--which provoked the moral indignation of the community. This moral resentment of the community did not arise automatically nor, indeed, was the expression of the entire society. Social groups, constituted of the upper-middle class elements of the community, elected themselves to represent the sentiments of the community, organized the arousal of public indignation and manipulated the circumstances to achieve the desired legislation and to extend it beyond its original scope. The Act started with sex offenses but eventually encompassed any type of misdemeanor. The composition of social groups, commonly called "moral entrepreneurs", and the
participation of those persons who held key positions in the community, were successful in their goals. These social groups actually represented the realization of a network of social relations which established channels of communication and interaction among the elites of the community. Not only mental hygienists, but lawyers and judges took part in this social action, with the pattern of alliances changing only in the last years. For a period of more than forty years, the banquets of the Managing Officers' Association, the meetings of the various womens' leagues of Ohio and the audiences at the trials of psychopaths were attended by the same persons or by those who inherited their social roles. Their pictures regularly appeared on the TV screens and in the newspapers of Ohio. Contrary to the phenomenology of the events—the quick succession of a few sex crimes in a short period of time—which were presented as the main reason for urgent action, our historical analysis has shown that those events were only the superficial, immediate, and precipitating elements of a social process. Indeed, action was planned with the cooperation of all the public and private organizations able to exert pressure toward the realization of the purpose. The legislative process resulted, then, in an official ceremony designed to legitimize what had been discussed, agreed upon, and prepared years before, by the citizens' lobbies and moral entrepreneurs of the state.

An important aspect, however, has emerged from the history of the psychopath legislation. The "moral entrepreneurs" actions has appeared to achieve success only to the extent that the crusade moved
in the same direction as the general trend in the nation. Old alliances have been kept alive only in the framework of a congenial social, political and economical environment. Since the late 1960's, the field of mental health and corrections, while still focusing on the realization of previous and current predicaments, has been characterized by the dialectic development of another trend toward de-institutionalization. History, in fact, does not proceed in new direction only after the old one has been exhausted. The process is dialectic and what appears, is indeed, the dominant trend. The prior medical and psychological orientation in mental health and corrections, which has dominated the field seems to be leaving more and more room for the reintroduction of legal issues. The problems which are currently most discussed are those which focus on the constitutional rights of patients and prisoners. This phenomenon proceeds together with an effort among academicians to de-mythify the welfare state. The latest appeal of the Ohio Committee on Psychopath Offenders was indeed frustrated to the extent that it attempted to assume and repeat an old pattern of action no longer in harmony with the present social and cultural framework. The construction of the reality which originated the first statute for psychopathic offenders has been replaced by a new state of affairs which presently moves in other directions.
NOTES TO CHAPTER V


2 Directory of State and Federal Agencies in Ohio (Columbus: Department of Public Welfare, 1940).


4 Henry Schumacher, op. cit., p. 10.

5 Ibid., p. 11.

6 Ibid., p. 13.

7 Welfare Advisory Commission (Columbus: Department of Public Welfare, 1930). This Commission asked itself three questions: 1. "Does Ohio possess adequate facilities for those patients who are now in State Hospitals?" 2. "Is Ohio caring for all the insane that need care" If not, how many more should now be under care?" 3. "What will be the traditional requirements for the next ten years, due to increase in the State's population?"

8 Ibid.

9 Ibid.

10 Dr. R. Bushong was considered an authority in the field of psychopathy. Between 1924-1926, Dr. Bushong received his post-graduate training at the Boston Psychopathic Hospital. Subsequently, he gained considerable experience from his work at the prestigious Chicago Institute for Juvenile Research and at the New York City Neurological Institute. Between 1926-1933, prior to his appointment to Superintendent of Lima State Hospital, Dr. Bushong was Director of the Wisconsin Mental Hygiene Clinic in Milwaukee. Biographic information is provided in Managing Officers Association Quarterly Bulletin, Vol. 24 (December, 1948), p. 8.
Lima State Hospital was built in 1915 with the purpose of serving as a custodial institution for the criminally insane. Subsequently was also designated as an institution for the commitment of psychopathic offenders. Information about the history of Lima State Hospital is provided in *Public Welfare in Ohio Today: Sesqui-Centennial Report, 1803-1952* (Columbus: Department of Public Welfare, 1952), pp. 150-152.


Samuel Asch served as Chairman to the investigation and Dr. Ellery Reed, Research Director of the Cincinnati Community Chest, was appointed to Vice-Chairman.


Information about the role of these Associations in the propaganda for the reorganization of the state correctional and mental health institutions is provided in several articles dedicated to the issue of sex offenders by the Cleveland Plain Dealer, 1938.


Ibid., § 13451.19.

Ibid., § 13451.20.

Ibid., § 13451.19.

Ibid., § 13451.22.

Ibid., § 13451.22.

See Chapter IV of this work.

The problem of Lima was raised in concert with the question of the overcrowding of the institutions in Ohio. Mr. C. Calohhon, Secretary of the Managing Officers' Association, refers that Dr. Bate-man, Commission of Mental Diseases, officially complained with the other agencies of the Government about this question in the following terms: "several of the hospitals reported an overcrowding of from 30 to 45 percent. Included in this survey was also an estimate of the number of patients who could be housed in rooms now occupied by employees". Managing Officers' Association Quarterly Bulletin, Vol. 17 (June, 1940), pp. 4-7.

This paper is published in the Managing Officers' Association Quarterly Bulletin, Vol. 17 (June, 1940), pp. 407.

Ibid., p. 5.

Ibid., p. 5.

Ibid., p. 6.

44 Ibid., p. 7.
45 Ibid., p. 11.
48 Dr. Robert Bushong, former Superintendent of Lima State Hospital, served as a Commissioner of Mental Diseases between 1940-1941.
51 Information about the bills approved by the General Assembly in the field of corrections and mental hygiene was provided in the Managing Officers' Association Quarterly Bulletin, Vol. 18 (September, 1941), p. 4.
53 Ibid., p. 98.
54 Managing Officers' Association Quarterly Bulletin, Vol. 19 (March, 1942), pp. 5-8. The need for further funds was implicit in the observation that, due to the War, there had been a general decline in public aid. See, Public Aid in Ohio, Department of Public Welfare (1943), p. 12.
58 Ohio Public Acts, 121 v 443 (1945).
59 Ibid., p. 444.
60 Ibid., p. 444.
61 Ibid., p. 444.
62 Ibid., p. 444.
64 Ibid., p. 7.
66 Ibid., p. 10.
67 Ibid., p. 6.
69 Ibid., p. 10.
70 Ibid., p. 10.
71 Ibid., p. 6.
75 Ibid., p. 170.
77 Ohio Public Act 125 v 187 (1949).
78
Ascherman File, Crime and Delinquency Program, The Ohio State University.

79
Letter of Mr. Leo Ascherman to Judge John Lamneck (December 20, 1949), Ascherman File.

80
Letter of Judge Lamneck to Mr. Ascherman (December 23, 1949), Ascherman File.

81

82
Ibid., p. 496-497.

83
Grand Jury Institute, List of the 1950 Committee for the Study of Mental Defectives, Ascherman File.

84
Letters of Mr. Ascherman to the other states' agencies, Ascherman File.

85
Letter of Dr. M. Guttmacher to Dr. R. Grossman (January 11, 1950), Ascherman File.

86

87
Newspaper clip, Ascherman File.

88
Letter of Mr. Ascherman to Mrs. V. Mauer (May 9, 1950), Ascherman File.

89
Directory of State and Federal Agencies in Ohio, p. 42.

90

91
Letter of Mr. Ascherman and others to Cleveland Bar Association, Cuyahoga County Bar Association, Ohio State Bar Association, Cuyahoga Council of League of Women Voters, Cleveland Council of League of Women Voters, Ohio State League of Women Voters, Mental Hygiene Association, etc. Ascherman File.

92

93
Cleveland Plain Dealer, March 25, 1950.

94
Newspaper clip, Ascherman File.

95
Newspaper clips, Ascherman File.
The present lack of statutory provisions for misdemeanants was criticized by William Rosenfeld, "Commitment of Sexual Psychopaths in Ohio," Western Reserve Law Review, Vol. 2 (195), pp. 69-82.

Draft of the amended Bill, Ascherman File.


Ibid., sec. 13451.19.

Letter to Mr. Ascherman to Senator Joseph Nutt, May 1, 1951, Ascherman File.

Ohio Public Acts, Senate Bill No. 265 (1951), sec. 13451.20.

Letters of Mr. Ascherman to Judge Lamneck and Dr. Bushong of November 28 and December 19, 1952, Ascherman File.

Letter of Judge Lamneck to Mr. Ascherman, February 4, 1953, Ascherman File.

L. Ascherman, Charge against the Governor and the Welfare Department Director, Ascherman File.

Letter of Mrs. Upright to Mr. Ascherman, November 16, 1952, Ascherman File.

Cleveland News, February 6, 1953; February 10, 1953; February 11, 1953.

The issues of the magazine Public Welfare Today (Columbus: Department of Public Welfare) between 1952-1953 reflect these new preoccupations with the problem of delinquency and the aged persons.


Ohio Public Acts, Senate Bill 155 (1953).

Ibid.

Letter of Dr. Bushong to Mr. Ascherman, October 10, 1956, *Ascherman File*.

Letter of Mr. Gagliardo to Judge Jackson, December 26, 1956, *Ascherman File*.

Newspaper clip, *Cleveland News*, *Ascherman File*.


Letter of Mr. Corkwell to Mr. Ascherman, December 14, 1962, *Ascherman File*.

See the several newspaper clips with regard to this case in the *Ascherman File*.


Newspaper clips, *Ascherman File*.


Newspaper clip, 1965; *Ascherman File*.

Letter of Mr. Quick to Mr. Ascherman, February 19, 1965, *Ascherman File*.

The Plain Dealer, June 6, 1965.

The Plain Dealer, June 22, 1965.

Draft of the Joint Resolution, *Ascherman File*.


Letter of Mr. Wagy to Mr. Ascherman, December 16, 1966, *Ascherman File*.
Mr. Ascherman's testimony before the Ohio Legislative Committee, Ascherman File.


Letter of Mr. Hertz to Honorable Weston, June 11, 1969, Ascherman File.

Magazine clip, Ascherman File.

Magazine clip, Ascherman File.

Ohio seminar on psychopathic offenders, Crime and Delinquency Program, The Ohio State University, 1972, pp. 147-171.

Letter of Mr. Durkin to Mr. Ascherman, May 18, 1967, Ascherman File.

See Chapter VII of this work.

The Cleveland Plain Dealer, June 22, 1971.

Magazine clip, Ascherman File.

Journal clip, Ascherman File.

The Cleveland Plain Dealer, September 20, 1972.

A good summary of the "social reaction" approach in criminological theory is provided in Ian Taylor et. al., The New Criminology (London: Routledge and Kegan, Paul, 1973), pp. 139-171.


This argument will be developed in the details in Chapter VII of this work.
Almost all the State hospitals which today constitute the large network of the Division of Mental Health in Ohio were opened on or after 1880. Among them, the Columbus State Hospital and Longview State Hospital (Cincinnati) initially became well known in the country for their advanced program of psychiatric care and treatment. Other institutions soon specialized in the care of epileptics (Gallipolis State Institute), the feeble-minded (Orient State Institute) and other categories of mentally disturbed persons. In the entire mental health system, only Lima State Hospital was designated to receive the criminally insane and subsequently the mentally defective and psychopathic offenders. Because of the type of population which it received, Lima State Hospital became the only institution where the mental health and correctional systems interacted and interfaced. The relationship between Lima State Hospital and the other institutions thus exerted a major effect on the destiny of the psychopathic offender.

Our earlier historical narration has suggested that the amount of psychopathy in Ohio, as well as its phenomenology, from 1939 until
recently has been more a reflection of legal change and social action than of the objective state of affairs in the epidemiology of crime and mental illness. The number of psychopathic offenders apprehended, officially labeled, and transformed into numbers appearing in the statistical reports, and their composition and origin appeared to depend upon the interaction between the pressure exerted by the Ohio community and its social reformers and the amount of available space in Lima State Hospital. In other words, the capacity of the mental health system to process only a certain amount of persons constituted the limits of variability in which the reformers' social action, which was behind the legislation and implementation of the Ohio psychopathic offender statute, played its historical role. Furthermore, such social action appeared to exert a feedback effect on the institutional arrangements and, consequently, led to the amplification of the legal status and size of the physical facility of the Ohio mental health system for the care of the psychopathic offender.

With regard to these statements, there are objective problems in the use of empirical data to prove socio-historical interpretations of institutional changes. In fact, the historical process does not lend itself to the restrictions inherent in the perspective of a positivistic sociology. However, there is at least enough room for ascertaining and delineating a parallelism between the socio-historical and the empirical trends in relation to institutional change and to this specific case of the psychopathic offender legislation. The
chapter addresses the question regarding the empirical substance of the socio-historical interpretation of the psychopathic offender statute. It also attempts to focus on the pattern of organizational exchanges between courts and hospitals as they affected the social reality of psychopathy.

Lima State Hospital: Policy of Admissions and Psychopathy

Lima State Hospital is located three miles north of Lima, Ohio. Construction of the hospital began in 1908 and it was opened for the reception of patients in 1915. The hospital was intended to serve the entire state. The hospital did not grant admissions to psychopathic offenders until 1943, and, consequently data are presented in this work to show the movement of the population into and out of Lima from 1943 until 1972. The data used in this work comes from three sources. Information on the general movement of the population of Lima State Hospital for the entire period 1943-1972 were obtained from the Statistical Bulletin of the Ohio Welfare Department until 1954, and from the Bulletin of the Department of Mental Hygiene and Correction from 1955 until recently. The data which describe the population examined and committed to Lima from 1943-1965 were gathered from a statistical report compiled by Dr. Christ, former Superintendent of Lima State Hospital. The data about the number and type of examinations and commitments to Lima from 1966 to 1972 were collected by members of the staff of the Crime and Delinquency Program, The Ohio State University, from the books and records of the hospital.
The operation of Lima State Hospital since 1943 appears to have been characterized by five periods which can be differentiated in relation to the policy of admission, discharge and transfer into and out of the hospital in relation to the other mental hygiene and correctional institutions of Ohio. These periods (blocks) were:

1. 1943-1958 (Block 1). This period was noted for the balance in the admission-discharge policy and the very small number of Ascherman Act examinations and commitments.

2. 1959-1962 (Block 2). This period was characterized by an increase in admissions in comparison to the number of discharges and by an increase in psychiatric examinations under the psychopathic offender statute.

3. 1963-1965 (Block 3). This period can best be described by the almost perfect balance between admissions and discharges as well as by an increase in Ascherman Act commitments to Lima.

4. 1966-1968 (Block 4). This period was characterized by a decline in the number of total admissions as well as a decline in Ascherman Act examinations. This decline, however, progressed at a lower rate than the decline in the number of total admissions.

5. 1969-1972 (Block 5). This period showed a general decrease in total admissions and in the number of examinations and commitments under the Ascherman Act.

These periods (blocks) reflect changes in the social history of the mental hygiene and psychopathic offender arrangements in Ohio. Since the effects of social events do not develop quickly, it is fair to consider that these periods only indicate the present trends over time.

The Early Period (1943-1958)

The years between 1943-1958 appear to have been characterized
by a trend consisting of a parallel number of admissions and discharges from Lima. Admissions and discharges never differed by more than 100 cases. This trend of balance, however, seems to have taken place within the context of a steady but small increase in the distribution of the average daily population. In 1943, the average daily population was 1,129 patients. It reached to 1,200 in 1950 and 1,301 in 1954. Between 1954 to 1958, the average daily population increased to about 1,400 patients. This increase did not alter, however, the balance between admissions and discharges. The greater increase in the average daily population in relation to the minimal increase in admissions is explained by the fact that patients, sent to Lima for short periods of time, in which psychiatric examination takes place are included in the calculation of the average daily population. In point of fact, the number of defendants sent to Lima for psychiatric examination under the Ascherman Act steadily increased from 7 to 319 in the period of 1943-1958. However, only 10 or 20 percent of them, in general, appear to have been committed for an indefinite period to the hospital. There are no figures which reflect the actual number of persons committed indefinitely to the hospital for reasons other than an Ascherman Act violation. It is fair to deduce that approximately 1,200 patients constituted the non-temporary population of the hospital for the period 1943-1958 and that the policy of balance between admissions and discharges was adopted to maintain such a constant number of patients.

Figure 1 better shows this policy of equilibrium between
FIGURE 1

HISTOGRAMS OF TOTAL ADMISSIONS, DISCHARGES AND CURVE OF THE AVERAGE DAILY POPULATION IN LIMA STATE HOSPITAL: 1943-1972
admissions and discharges graphically. The histograms representing the number of admissions are almost equal to those which represent the discharges for the period 1943-1958. The difference between the level of the histograms and the minimal increase of the admissions over discharges is represented in the increase of the curve for the average daily population. The increase in the level of the curve, however, is higher than the real difference between admissions and discharges for the reasons previously indicated.

The policy of balance between admissions and discharges seems also to correspond to a parallel equilibrium between the transfers to and from Lima from other correctional institutions. Only in 1954 did the transfers to Lima (N=200) outnumber the number of transfers to other institutions from Lima (N=13). The official announcement that a new treatment center was inaugurated in 1954 was possibly responsible for this increase in transfers to Lima. In Figure 1, this equilibrium between transfers out of and into Lima also appears in relation to the curve of the average daily population. In the figure, the increase of transfers to Lima in 1954 corresponded to an increase in the average daily population for the same year.

The Middle Period

The period 1959-1962 was characterized by a large increase in admissions in comparison to the number of discharges from the hospital. The difference between admissions and discharges appears to have more than tripled in a span of four years. The data in Table 1 show that
## Table 1

**Lima State Hospital: Movement of the Population, 1943-1972**

<table>
<thead>
<tr>
<th>Year</th>
<th>Total Admissions To Lima</th>
<th>Average Daily Population</th>
<th>First Admissions</th>
<th>Readmissions</th>
<th>Transfers From Other Institutions To Lima</th>
<th>Transfers From Other Institutions From Lima</th>
<th>Total Discharges From Lima</th>
<th>Examinations Under Ascherman</th>
<th>Examined But Not Committed</th>
<th>Indefinite Commitments</th>
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*Estimated total number

**Missing values for the period 1943-64: 360
in 1959, the admissions (N=842) outnumbered the discharges (N=614) by 228 cases. In 1962, the difference between admissions (N=1161) and discharges (N=362) amounted to 799 cases. The sources of the increase in this period seem to have depended on: (1) a larger number of readmissions to Lima from the courts (N=235 in 1959 and N=477 in 1962) even higher than the increase in the number of first admissions (N=440 in 1959 and N=513 in 1962); (2) an increase in the number of transfers to Lima from other institutions paralleled by a decrease in the transfers out of Lima; and (3) an increase in the absolute number of Ascherman examinations as well as in the number of indefinite commitments.

Figure 1 also shows that the period 1959-1962 was characterized by a constant level in the average daily population which appears to have peaked in 1955 and remained constant until 1962. The additional availability of 300 beds beginning in 1954 seems to be responsible for this actual increase in the population indefinitely committed to the hospital. However, the composition of this increase seems to result more from a higher number of readmissions from the courts and from the other institutions rather than from Ascherman cases (N=235, 157, 103 in 1959 and N=477, 192, 190 in 1962 respectively).

The period 1963-1965 was characterized by an almost perfect balance between admissions and discharges. The average daily population remained constant during the three years. However, a trend of decline of the population began to appear in the beginning of 1963. There appeared to be a decrease in the number of transfers to other
institutions from Lima (N=411 in 1963 and N=365 in 1965), while the transfers to Lima from the other institutions seemed to remain constant (N=191, 192, 197) for the same period of time. The available space left free by the increase of transfers to other institutions appeared to be covered by a higher number of first admissions to Lima and a higher number of indefinite commitments under the Ascherman Act. Figure 1 presents the characteristic of this period. The histograms of the admissions and discharges remain at the same level, while there is a greater discrepancy between transfers in and out of Lima. It may be that the higher number of Ascherman commitments and first admissions to Lima approved by the courts was responsible for this sudden transfer of inmates to other institutions. In other words, to make room for psychopathic offenders, the administration of Lima might have been forced to transfer a parallel amount of inmates to the institutions from where they were originally referred to Lima State Hospital.

The period 1966-1968 partially followed the pattern of the previous period. There was still an equilibrium between admissions and discharges, but the overall trend consisted in a general decline of the number of admissions (N=1,127 in 1966 and N=1,048 in 1968). The number of transfers to other institutions (N=391 in 1966 and N=242 in 1968) and this difference accounted almost completely for the decline in the general admissions. The average daily population, however, did not decline at the same rate as the admissions, because the number of Asherman examinations and commitments, although showing a trend of decline, decreased at a slower rate than the total admissions. In
other words, there were fewer and fewer people in Lima State Hospital, but the implementation of the Ascherman Act did not decrease in perfect correspondence with the total admission.

The Last Years

The last period (1969-1972) fully reflects the decline which started in the early 1960's. The total admissions steadily decreased and reached 627 in 1972; almost half the number in 1969 (N=1,101). The number of discharges increased in 1969 and 1970 and decreased in 1971 and 1972. However, they outnumbered the admissions by approximately 300 cases in the average daily population of Lima State Hospital (N=1,340 in 1969 and N=1,087 in 1972). The number of transfers out (N=190 in 1969 and N=264 in 1972) was larger than the transfers to Lima from other institutions (N=162 in 1969 and N=112 in 1972). The number of cases referred to Lima for psychiatric examination under the Ascherman Act also rapidly decreased (N=446 in 1969 and N=117 in 1972). The indefinite commitments reached a very low level (N=46 in 1972) which corresponded to the levels of the early period of the implementation of the statute.

The relationship between the Ascherman examinations and commitments to the total admissions to Lima State Hospital emerges from the data presented in Table 2 and Figure 2.

From 1945 on, the number of cases temporarily committed from the courts to Lima State Hospital steadily increased in relation to the increase in the total admissions. In 1943 the number of Ascherman
**TABLE 2**

*LIMA STATE HOSPITAL:: TOTAL ADMISSIONS, EXAMINATIONS, AND INDEFINITE COMMITMENTS: 1943-1972*

<table>
<thead>
<tr>
<th>Year</th>
<th>Total Admissions</th>
<th>Ascherman Examinations to Total Admissions</th>
<th>Indefinite Commitments to Total Admissions</th>
<th>Indefinite Commitments to Ascherman Examinations</th>
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<td>6</td>
<td>6</td>
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<td>---</td>
<td>-</td>
<td>-</td>
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<tr>
<td>1945</td>
<td>165</td>
<td>27</td>
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<td>87</td>
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<tr>
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<td>371</td>
<td>41</td>
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<tr>
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<td>45</td>
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<tr>
<td>1948</td>
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<tr>
<td>1949</td>
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<td>79</td>
<td>13</td>
<td>16</td>
</tr>
<tr>
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<td>43</td>
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<td>38</td>
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<td>Year</td>
<td>Total Admissions</td>
<td>Ascherman Examinations to Total Admissions</td>
<td>Indefinite Commitments to Total Admissions</td>
<td>Indefinite Commitments to Ascherman Examinations</td>
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<td>------------------</td>
<td>------------------------------------------</td>
<td>-------------------------------------------</td>
<td>-----------------------------------------------</td>
</tr>
<tr>
<td>1965</td>
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<td>1970</td>
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<td>40</td>
<td>35</td>
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<tr>
<td>1971</td>
<td>1072</td>
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<tr>
<td>1972</td>
<td>627</td>
<td>18</td>
<td>7</td>
<td>39</td>
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</tbody>
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FIGURE 2

HISTOGRAMS OF THE PSYCHOPATHIC OFFENDER POPULATION COMMITTED AND NON-COMMITTED TO LIMA STATE HOSPITAL AND CURVE OF THE TOTAL ADMISSION AND TOTAL ASCHERMAN EXAMINATIONS TO LIMA STATE HOSPITAL: 1943-1972
In the period 1947-1958, this percentage grew to an average of 45 percent and it peaked at 79 percent in 1949. On the other hand, the number of indefinite commitments did not exceed an average of seven percent in relation to the total admissions with the exception of 1945 and 1949 which witnessed a high level of 13 percent. The indefinite commitments represented, in this period, an average of 15 percent of the examinations under the Ascherman Act. The number of psychiatric examinations seem to have depended on the legal provisions which established in 1945 the mandatory referral to Lima after a commission of a sex offense and in 1951 the discretionary referral of misdemeanor cases. Furthermore, the number of psychiatric examinations originated from the attitude of the courts which in this period could refer to Lima a larger number of discretionary cases. It also exerted an apparent effect upon the average daily population, because it inflated its level without contributing to the increase of the committed populations.

The second, third and fourth periods witnessed the increase of indefinite commitments to Lima in relation to total admissions. From 12 percent in 1959, the indefinite commitments reached 16 percent in 1962 and 1964 and 19 percent of the total admissions in 1968. In the entire period 1959-1968, an average 16 percent of the admissions
to Lima came from the courts' referrals of psychopathic offenders. In the same period, the percentage of indefinite commitments reached an average of 36 percent in relation to the number of examinations under the Ascherman Act. This percentage more than doubled that of the previous period. The percentages of the Ascherman examinations (49 percent in 1959, 39 in 1960, 44 in 1962, 37 in 1967), however, did not increase proportionally with regard to the total admissions. This trend appears in Figure 1 where the bars representing the indefinite commitments steadily increase for the entire period. In other words, the years 1959-1968 witnessed a net increase in the indefinite commitments of the psychopathic offenders which reflected the changes in the legal structure of the statute and the social pressures in Ohio.

The period 1969-1972 was characterized by a decrease in the number of examinations and commitments. This trend also showed one other pattern which had not appeared in the previous periods. The percentage of examinations in relation to the total admissions (40 percent in 1969 and 18 in 1972) declined more rapidly than the percentage of the indefinite commitments in relation to the number of examinations (29 percent in 1967, 35 in 1970, 25 in 1971 and 39 in 1972) in comparison with percentages higher than 40 in the previous periods. In Figure 2, the decline of the curve of the examinations drops more rapidly in comparison with the less rapid and steady decline of the bars representing the indefinite commitments.
The recent wave of refusals by the courts to even commit defendants to Lima for psychiatric examinations might account specifically for this phenomenon.

**Typology of Psychopathic Offenders**

Legal changes, institutional arrangements and social events seem to play an important role in the determination of the amount of psychopathy officially discovered by, and processed through, the mental hygiene and correctional agencies in Ohio. The same socio-legal variables suggest that a variation of the typology of the psychopathic offender could be expected over the entire period 1943-1972. This period has been collapsed into five blocks of years: 1943-1958=Block 1; 1959-1962=Block 2; 1963-1965=Block 3; 1966-1968=Block 4 and 1969-1972=Block 5 according to the level of increase and decrease of the curves representing the number of Ascherman examinations, commitments and total admissions to Lima State Hospital.

**Offense**

Table 3 displays the distribution of the crimes committed by psychopathic offenders in the entire period 1943-1972. First, there appear two main groups of offenses which consist in "offenses against chastity" (commonly called sex offenses) and "offenses against property". The consistency of these two groups of offenses seems to remain intact over the entire period of time. If the offenses against chastity were included in the more general category of offenses against the person the consistency of this group appears even more clear-cut in comparison
## TABLE 3
### PSYCHOPATHIC OFFENDER POPULATION COMMITTED TO LIMA STATE HOSPITAL: TYPES OF OFFENSE BY BLOCKS

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<th>BLOCKS</th>
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<th>4</th>
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<td>81</td>
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<td>43</td>
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<td>51</td>
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<td>Shooting to kill or wound</td>
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<td>0</td>
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</table>
to the offenses against property and other types of crime.

TABLE 4

PSYCHOPATHIC OFFENDER POPULATION COMMITTED TO LIMA STATE HOSPITAL:
SPECIFIC TYPES OF OFFENSE BY BLOCKS

<table>
<thead>
<tr>
<th>Type of Offense</th>
<th>Block 1</th>
<th>Block 2</th>
<th>Block 3</th>
<th>Block 4</th>
<th>Block 5</th>
</tr>
</thead>
<tbody>
<tr>
<td>Sex offenses</td>
<td>51%</td>
<td>54%</td>
<td>51%</td>
<td>26%</td>
<td>25%</td>
</tr>
<tr>
<td></td>
<td>(340)</td>
<td>(359)</td>
<td>(329)</td>
<td>(187)</td>
<td>(106)</td>
</tr>
<tr>
<td>Other offenses</td>
<td>49%</td>
<td>46%</td>
<td>49%</td>
<td>74%</td>
<td>75%</td>
</tr>
<tr>
<td></td>
<td>(314)</td>
<td>(295)</td>
<td>(325)</td>
<td>(509)</td>
<td>(304)</td>
</tr>
<tr>
<td>Total</td>
<td>100%</td>
<td>100%</td>
<td>100%</td>
<td>100%</td>
<td>100%</td>
</tr>
<tr>
<td></td>
<td>(654)</td>
<td>(654)</td>
<td>(654)</td>
<td>(696)</td>
<td>(410)</td>
</tr>
</tbody>
</table>

| Offenses against person | 68% | 69% | 64% | 60% | 62% |
|                         | (445)| (450)| (421)| (422)| (257)|
| Offenses against property and others | 32% | 31% | 36% | 40% | 38% |
| (209) | (204) | (233) | (274) | (153) |
| Total | 100% | 100% | 100% | 100% | 100% |
| (654) | (654) | (654) | (696) | (610) |

Total N=3068

Second, the entire distribution of offenses still shows some heterogeneity, despite the presence of clusters of offenses. A considerable number of offenses, (e.g., carrying concealed weapons, disturbing the peace, drunken driving, non-support, pick-pocketing, drug law violations, abduction, administering medicine when intoxicated), hardly classifiable with the main groups, show that the implementation of the psychopathic offender statute has been extended over the years to a broad range of illegal behavior. Certainly, the statute has not been exclusively used for the type of offenses for which it was originally enacted.
Third, the data shows the emergence of a pattern in relation to the temporal variation in the cluster of offenses. Sex offenses appear to have declined in recent years while offenses against property and other offenses showed an opposite tendency in this period of time. The number of rapes increased from 48 in Block 1 to 91 in Block 2 and to 81 in Block 3 and 43 in Block 5. The number of crimes of carnal knowledge increased from 7 in Block 1 to 51 in Block 4 and declined to 17 in Block 5. The number of incest cases declined from 15 in Block 1 to 5 in Block 5. On the other hand, the number of burglaries appear to be almost constant (59, 22, 53, 86, 50 in the respective blocks) while staying at a level as high as that of the sex offenses. The number of grand larcenies, robberies, drug offenses, etc., showed a tendency to increase in the later years. Table 4 displays the absolute figures and percentages of the types of offenses as they varied over the entire period of time. Sex offenses decreased from 51 percent in Block 1 to 26 percent in Block 4. All other offenses appeared to remain constant in each block with a peak in Block 4. This type of categorization of crimes shows that sex offenses had a net decline in comparison with all other offenses in recent years, reflecting fewer commitments in Block 5 in particular. Where sex offenses were categorized in the larger group of offenses against the person, the rate of decline appeared to be lower than the previous rate, in comparison to all other offenses. Offenses against the person decreased from 68 percent in Block 1 to 62 percent in Block 5, while the number of other offenses remained almost constant over the entire period.
Table 5 shows the distribution of the crimes in each block categorized according to distinctions between sex offenses and "other offenses" and by county of commitment. The highest number of offenses and commitments appear to come from the metropolitan counties: 20 percent from Cuyahoga, 11 percent from Lucas, 10 percent from Franklin and 9 percent from Hamilton and an average of 2.8 percent from all other counties. The distribution of sex offenses, however, displayed a different pattern from the distribution of all the other offenses over the entire period of time. There is, in general, confirmation of the decline of sex offenses and the increase of the other offenses in recent years. A few counties (Mahoning, Miami, Muskingum, Scioto, Van Wert) did not show any sex offense commitments at all in Blocks 4 or 5.

The major characteristic of this pattern of general decline, however, seems to be the differential contribution of sex offenses and "other offenses" by the counties throughout the period. First, the metropolitan counties displayed a decline in sex offenses greater than the decline in the smaller counties. In other words, the percentage of sex offenses decreased faster in the metropolitan counties in comparison with the non-metropolitan counties. For instance, Cuyahoga County showed a decline from 50.5 percent in Block 1 to 23.2, 17.1, 18.9 and 22.2 percent in the other four blocks. Hamilton County had the following declining progression: 14.0, 11.6, 12.3, 13.4 and 11.1 percent over the entire period. Other non-metropolitan counties (Richmond, Portage, Greene, Allen, Wayne, Scioto, Erie, etc.), appeared to
<table>
<thead>
<tr>
<th>County</th>
<th>Block 1</th>
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<th>Block 4</th>
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<td>S.O. O.</td>
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<td>S.O. O.</td>
<td>S.O. O.</td>
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<td>41.5%</td>
<td>23.2%</td>
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<td>100.0%</td>
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<td>100.0%</td>
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<tr>
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<td>(291)</td>
<td>(277)</td>
<td>(293)</td>
<td>(210)</td>
<td>(202)</td>
<td>(289)</td>
</tr>
</tbody>
</table>

*Counties with less than 20 commitments over the entire period.

Missing cases: 209.
remain at constant levels and even showed some signs of increase.

Second, the amount of increase in the "other offenses" category, appeared to be higher in the non-metropolitan in comparison to the metropolitan counties in recent years. Clark County, for instance, displayed an increase from .07 percent in Block 1 to 2.2 and 4.3 percent in Blocks 2 and 5. Allen County showed an increase from 0.4 percent in Block 1 and 2 to 1.0, 2.0 and 4.3 percent in Blocks 3, 4 and 5. Muskingum displayed an increase from 0.4 and 0.7 percent in the first two blocks to 1.4, 1.0 and 2.3 percent in Blocks 3, 4 and 5. Scioto, Erie and other comparable counties appeared to follow a similar tendency in the distribution of the "other offenses" category in relation to sex offenses.

In summary, commitments from the conviction of sex offenses declined faster in the largest counties than in the smaller ones. In particular, the smaller counties appeared to contribute a constant number of sex offenders. In other words, the psychopathic offender statute appears to have been steadily implemented with regard to sex offenses and more highly implemented with regard to the "other offenses" in recent years in the smaller counties.

Race

Table 6 shows the data pertaining to the comparison between the sex and other offenses by race over the entire period. Sex offenses appear to have declined over time among whites. Sex offenses decreased from 82 percent in Block 1 to 77, 73 and 70 percent respectively in
<table>
<thead>
<tr>
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<th>Block 1</th>
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<th>Block 3</th>
<th>Block 4</th>
<th>Block 5</th>
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<td>S.O 0</td>
<td>S.O 0</td>
<td>S.O 0</td>
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<td>White</td>
<td>82%</td>
<td>68%</td>
<td>81%</td>
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</tr>
<tr>
<td></td>
<td>(278)</td>
<td>(214)</td>
<td>(289)</td>
<td>(228)</td>
<td>(252)</td>
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<tr>
<td></td>
<td>77%</td>
<td>88%</td>
<td>73%</td>
<td>78%</td>
<td>70%</td>
</tr>
<tr>
<td></td>
<td>(286)</td>
<td>(136)</td>
<td>(402)</td>
<td>(74)</td>
<td>(228)</td>
</tr>
<tr>
<td></td>
<td>75%</td>
<td>70%</td>
<td>75%</td>
<td>70%</td>
<td>75%</td>
</tr>
<tr>
<td>Non-white</td>
<td>18%</td>
<td>32%</td>
<td>19%</td>
<td>23%</td>
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<td></td>
<td>(62)</td>
<td>(100)</td>
<td>(70)</td>
<td>(67)</td>
<td>(77)</td>
</tr>
<tr>
<td></td>
<td>12%</td>
<td>27%</td>
<td>22%</td>
<td>30%</td>
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</tr>
<tr>
<td></td>
<td>(39)</td>
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<td>(107)</td>
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<td>(359)</td>
<td>(295)</td>
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<td>100%</td>
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<td>100%</td>
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<td>(325)</td>
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<tr>
<td>Total N</td>
<td>3068</td>
<td></td>
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</table>
Blocks 4 and 5. The number of sex offenses thus seems to be greater among non-whites than whites in the recent years. As far as the "other offenses" are concerned, there was a steady increase from 68 percent in Block 1 to 77, 88 and 78 percent respectively in Blocks 2, 3 and 4, and subsequently, a decisive decrease from 78 to 75 percent in Block 5 among whites. On the other hand, there appeared an opposite trend among non-whites. "Other offenses" decreased from 32 percent in Block 1 to 23 and 12 percent in Blocks 2 and 3, increased again to 22 percent in Block 4 and finally increased to 25 percent in Block 5.

These data did reveal the existence of a definitive pattern. There was a greater tendency for non-whites to be committed for sex offenses in comparison to whites in recent periods. This tendency seems to be complementary to the general decline in "other offenses" registered among non-whites in relation to whites.

Age

The distribution of sex offenses and of "other offenses" by age appears in Table 7. The analysis of this table shows three major findings. First, and hardly surprising, the greatest amount of crime both sex and "other offenses" was committed by the younger age groups in each block of years. The number of offenses was especially high among psychopathic offenders who are 15-20 and 21-25 years old.

Second, there appeared a difference between sex offenses and "other offenses" by age. In Blocks 1, 2 and 3 there was an inverse relationship between age and number of offenses. This relation,
TABLE 7

PSYCHOPATHIC OFFENDER LEGISLATION COMMITTED TO LIMA STATE HOSPITAL:
AGE BY SPECIFIC TYPES OF OFFENSE AND BLOCKS

<table>
<thead>
<tr>
<th>Age</th>
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<th>Block 3</th>
<th>Block 4</th>
<th>Block 5</th>
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</tr>
<tr>
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<td>47</td>
<td>34</td>
<td>25</td>
<td>16</td>
</tr>
<tr>
<td></td>
<td>25</td>
<td>23</td>
<td>31</td>
<td>36</td>
<td>25</td>
</tr>
<tr>
<td>41-45</td>
<td>29</td>
<td>29</td>
<td>37</td>
<td>20</td>
<td>4</td>
</tr>
<tr>
<td></td>
<td>15</td>
<td>8</td>
<td>16</td>
<td>37</td>
<td>17</td>
</tr>
<tr>
<td>46-50</td>
<td>35</td>
<td>19</td>
<td>22</td>
<td>8</td>
<td>3</td>
</tr>
<tr>
<td></td>
<td>11</td>
<td>7</td>
<td>4</td>
<td>22</td>
<td>12</td>
</tr>
<tr>
<td>51-60</td>
<td>24</td>
<td>32</td>
<td>22</td>
<td>10</td>
<td>4</td>
</tr>
<tr>
<td></td>
<td>10</td>
<td>5</td>
<td>10</td>
<td>23</td>
<td>7</td>
</tr>
<tr>
<td>60+</td>
<td>18</td>
<td>19</td>
<td>6</td>
<td>1</td>
<td>0</td>
</tr>
<tr>
<td></td>
<td>7</td>
<td>3</td>
<td>3</td>
<td>10</td>
<td>2</td>
</tr>
</tbody>
</table>
however, was stronger for the sex offenses than for the "other offenses". In Block 1, the relation between sex offenses and "other offenses" is 68 to 92 for the age category 21-25; 50 to 56 for the ages 26-30; 43 to 47 for the age class 31-35; 39 to 25 for the age class 36-40 and 29 to 15 for the age class 41-45. In Block 2, the same relation was 67 to 83 for the ages 21-25 and it reached the level of 19 to 7 for the ages 46-50. In Block 3 there appeared to be a similar pattern. In summary, the rate of decline with age was less rapid for the sex offenses than for the "other offenses". This means that a greater number of relatively older people were committed to Lima for sex offenses than for "other offenses". This pattern seems to be contradicted by the distribution of data in Blocks 4 and 5. Here the decline in the number of sex offenses was greater than the decline in the "other offenses". In Block 5, this opposite trend seems to have been magnified. In the last four classes of age in this block (41-45, 46-50, 51-60, 60+), the decline in sex offenses shifted from 4 to 0 while there appeared to be the commission of a few "other offenses".

Third, an extremely high number of "other offenses" (not sex offenses) committed by very young persons led to commitments to Lima State Hospital. The upper-right corner of Table 7 displays the highest values of the "other offenses": 106 and 127 in Blocks 3 and 4 for ages 15-20; 85, 130 and 83 in Blocks 3, 4 and 5 for ages 21-25. Perhaps the increasing number of commitments for drug violations, auto theft and similar violations might account for these figures.
Diagnosis

Table 8 displays the major types of diagnoses given the population committed indefinitely to Lima State Hospital over the entire period 1943-1972. The types of diagnoses are the same used in the clinical records of the hospital and are related to the type of offense. The persons whose diagnoses are here analyzed are those committed under the psychopathic offender statute; "technically", they are psychopathic or antisocial personalities. Beside the diagnosis of "antisocial personality", all the other diagnoses may be considered to represent specific subcategories of the psychological and behavioral syndrome defined and classified in the legal statute, and in psychiatric records, as "psychopathic", "sociopathic" or "antisocial personality".

One major observation is suggested by the distribution of the data over time. First, the relationship between a sex offense and a diagnosis of sexual deviation as well as an "other offense" and a diagnosis of "antisocial personality" was quite high in each block. In Blocks 1, 2 and 3 all sex offenders were diagnosed as sexual deviates. In Blocks 4 and 5 there were, however, sex deviates (27 and 17 percent) who did not commit sex offenses; in each block, too, there were antisocial personalities (16, 29, 32, 26 and 52 percent) who committed sex offenses. The question arises as to the extent that the commission of a sex offense, in the first three blocks, determined the specific diagnosis of sex deviation. There is also the problem of the nosological validity of the existence of sexual deviation as a separate clinical sub-entity in the category of psychopathy.
### TABLE 8

**Psychopathic Offender Population Committed to Lima State Hospital:**

**Diagnosis by Specific Types of Offense and Blocks**

<table>
<thead>
<tr>
<th>Type of Diagnosis</th>
<th>Block 1</th>
<th>Block 2</th>
<th>Block 3</th>
<th>Block 4</th>
<th>Block 5*</th>
</tr>
</thead>
<tbody>
<tr>
<td></td>
<td>S.O.0</td>
<td>S.O.0</td>
<td>S.O.0</td>
<td>S.O.0</td>
<td>S.O.0</td>
</tr>
<tr>
<td>Antisocial personality</td>
<td>16% (55)</td>
<td>24% (77)</td>
<td>29% (105)</td>
<td>32% (105)</td>
<td>39% (216)</td>
</tr>
<tr>
<td>Sexual deviation</td>
<td>22 (73)</td>
<td>0 (0)</td>
<td>47 (167)</td>
<td>0 (0)</td>
<td>62 (162)</td>
</tr>
<tr>
<td>Alcoholism addiction</td>
<td>5 (17)</td>
<td>2 (8)</td>
<td>9 (30)</td>
<td>21 (41)</td>
<td>39 (62)</td>
</tr>
<tr>
<td>Mental deficiency</td>
<td>22 (77)</td>
<td>30 (97)</td>
<td>10 (36)</td>
<td>19 (38)</td>
<td>62 (325)</td>
</tr>
<tr>
<td>Psychosis</td>
<td>16 (55)</td>
<td>24 (77)</td>
<td>2 (10)</td>
<td>11 (22)</td>
<td>3 (8)</td>
</tr>
<tr>
<td>Drug addiction</td>
<td>1 (1)</td>
<td>1 (1)</td>
<td>0 (0)</td>
<td>4 (7)</td>
<td>0 (1)</td>
</tr>
<tr>
<td>Other</td>
<td>18 (62)</td>
<td>18 (54)</td>
<td>3 (11)</td>
<td>6 (11)</td>
<td>1 (2)</td>
</tr>
<tr>
<td>Total</td>
<td>100% (340)</td>
<td>100% (314)</td>
<td>100% (359)</td>
<td>100% (195)</td>
<td>100% (187)</td>
</tr>
</tbody>
</table>

**Total N=3019**

*Missing Cases: 49
Length of Institutionalization

The average length of institutionalization and the range is presented in Table 9. The average length of stay at Lima appeared to be very high in the first three years: 101 months in 1943, 46 months in 1944 and 73 months in 1945, with an average of 73 months for the period. The range in the length of institutionalization of the Ascherman population of this period is extremely high. The shortest and longest periods were also very high and the general picture for this period was one of severe implementation of the psychopathic statute by the managing staff of Lima State Hospital.

In 1946 there was a sharp decline in the mean length of institutionalization: from 73 months to 31 months in 1946 and to 28 months in 1959. This reduction in length of institutionalization indicates a change in the general policy in the management of Lima with regard to the psychopathic offenders. Both the years of 1946 and 1954 reflect previous legislative changes in the statute. The increase in the length of institutionalization in 1959 (from 15 to 28 months) occurred in a period of intense social action in Ohio. In this period, which witnessed a general decline of the length of institutionalization, the range still remained high, although at a lower level than that of previous years. The high value of the range indicates that several cases were institutionalized for long periods of time.

The third period marked a progressive reduction in the length of stay in Lima for the Ascherman population, from 20 months in 1964 to 17 months in 1969-1972. As in the previous period, however, the
range stayed high and this indicates the presence of considerable variability in the policy of reduction of the length of institutionalization. Eventually this finding may indicate the presence of a discretionary policy in the release of patients from Lima State Hospital. This hypothesis appears to be supported by a detailed analysis of the variables which influence the process of release from Lima.

**TABLE 9**

PSYCHOPATHIC OFFENDER POPULATION COMMITTED TO LIMA STATE HOSPITAL: LENGTH OF INSTITUTIONALIZATION FOR SELECTED YEARS

<table>
<thead>
<tr>
<th>Year</th>
<th>Mean Time Committed in Months</th>
<th>Shortest Time Committed</th>
<th>Longest Time Committed</th>
<th>Range of Time Committed</th>
<th>N</th>
</tr>
</thead>
<tbody>
<tr>
<td>1943</td>
<td>101.14</td>
<td>13</td>
<td>214</td>
<td>201</td>
<td>7</td>
</tr>
<tr>
<td>1944</td>
<td>43.82</td>
<td>17</td>
<td>121</td>
<td>104</td>
<td>17</td>
</tr>
<tr>
<td>1945</td>
<td>72.29</td>
<td>17</td>
<td>286</td>
<td>269</td>
<td>21</td>
</tr>
<tr>
<td>1946</td>
<td>29.66</td>
<td>9</td>
<td>178</td>
<td>169</td>
<td>29</td>
</tr>
<tr>
<td>1954</td>
<td>12.80</td>
<td>3</td>
<td>67</td>
<td>64</td>
<td>35</td>
</tr>
<tr>
<td>1959</td>
<td>27.27</td>
<td>3</td>
<td>106</td>
<td>103</td>
<td>103</td>
</tr>
<tr>
<td>1964</td>
<td>19.66</td>
<td>3</td>
<td>83</td>
<td>80</td>
<td>209</td>
</tr>
<tr>
<td>1965-1968</td>
<td>19.03</td>
<td>3</td>
<td>86</td>
<td>83</td>
<td>545*</td>
</tr>
<tr>
<td>1969-1972</td>
<td>16.65</td>
<td>3</td>
<td>103</td>
<td>100</td>
<td>224**</td>
</tr>
</tbody>
</table>

*Missing cases: 151
**Missing cases: 186

Recidivism

Table 10 contains information updated until 1973, on the recidivism rate of all the Ascherman cases paroled between 1943-1964 in comparison with the general population paroled from corrections in the same period of time. There have been 103,214 correctional parolees with an overall official rate of 29.80 percent recidivism. Among them,
1,637 cases of parole constitute the Ascherman population committed to Lima between 1943-1964. The Ascherman population had a 23.39 percent recidivism rate—lower than the recidivism rate of the general population of the correctional system of Ohio.

**TABLE 10**

PSYCHOPATHIC OFFENDER POPULATION, TOTAL POPULATION IN OHIO CORRECTIONAL INSTITUTIONS: NUMBER OF PAROLED AND PAROLE VIOLATORS FROM 1943-1973

<table>
<thead>
<tr>
<th>Paroled from 1944-1973</th>
<th>N</th>
<th>Violations</th>
</tr>
</thead>
<tbody>
<tr>
<td></td>
<td></td>
<td>%</td>
</tr>
<tr>
<td>Paroled from corrections</td>
<td>103,214</td>
<td>29.80</td>
</tr>
<tr>
<td></td>
<td></td>
<td>(30,765)</td>
</tr>
<tr>
<td>Paroled less Ascherman cases</td>
<td>101,577</td>
<td>29.91</td>
</tr>
<tr>
<td></td>
<td></td>
<td>(30,382)</td>
</tr>
<tr>
<td>Paroled and reparable: Ascherman cases</td>
<td>1,637</td>
<td>23.39</td>
</tr>
<tr>
<td></td>
<td></td>
<td>(383)</td>
</tr>
<tr>
<td>Sex offenders: Ascherman cases</td>
<td>753</td>
<td>16.33</td>
</tr>
<tr>
<td></td>
<td></td>
<td>(123)</td>
</tr>
<tr>
<td>Other offenders: Ascherman cases</td>
<td>884</td>
<td>29.41</td>
</tr>
<tr>
<td></td>
<td></td>
<td>(260)</td>
</tr>
</tbody>
</table>

The most interesting result, however, was the great difference in the percentage of recidivism between the sex offenders and the "other offenders". The sex offenders showed the lowest recidivism (16.33) rates in comparison with the rate of 29.41 percent for the "other offenders". This indicates that there were no appreciable differences in recidivism between the "other offenders", diagnosed as psychopathic personalities and committed to Lima, and the general population paroled from corrections without having been subjected to hospital treatment.
There were, however, marked differences in the recidivism rate of sex offenders and the general population of parolees. This finding confirms the results of previous investigations and goes against the widely accepted belief that sex-offenders must be dealt with through preventive programs and long periods of hospitalization because of their particular tendency to recidivate. These findings also raise the question of maintaining this particular institution for the psychopathic offender if the rate of recidivism is to be used as a criterion for evaluating the usefulness of its program. Several investigations in the past and a recent publication by the National Institute of Mental Health called for the elimination of special programs for psychopathic offenders.

Relationship Between Empirical Data and Socio-legal History

The data presented here are the only ones available on the total number of psychopathic offenders processed through the mental hygiene and correctional systems of Ohio for the entire period 1943-1972. The availability of additional information on the number of psychiatric examinations referred by the Courts to Lima State Hospital, assures that the numbers presented here reflect the exact amount of "official psychopathy" in Ohio between 1943-1972. The distribution of the number of cases over the entire period, consequently, represents the image of the history of "official psychopathy" in Ohio. Furthermore, the analysis of all the cases, according to a few major socio-biographical, legal and medical variables, may be assumed to represent the history of the basic typology of "official psychopathy" as it has
developed during the years in relation to both legal and social changes.

A major observation from the analysis of the relationship between the socio-legal history and the empirical data is the identification of the factors associated with the distribution of the number of psychiatric examinations and indefinite commitments. Psychiatric examinations appear to be the result of legal change (e.g., the provision for mandatory examinations established in 1945) and the cultural orientation of the courts (e.g., referral of greater or fewer discretionary cases for examination) which, in turn, appear to be sensitive to the degree of social pressure exerted by the social reformers or "moral entrepreneurs". On the other hand, the number of indefinite commitments seems to depend on the availability of hospital space in relation to the general movement of the population and the "psychiatric attitudes" of the medical staff toward psychopathy. Obviously, socio-legal change, social pressure and court referrals exerted an effect on the number of commitments, although the order of importance of these macrosocial variables cannot be established without some degree of ambiguity.

The data have shown the existence of a policy of balance between admissions and discharges with regard to the general Lima population for the first period, 1943-1958. Obviously, the number of admissions cannot exceed the discharges by so great an extent as to overtax the capacity of the hospital. The observation concerning this policy of balance leads, however, to the conclusion that there were only a certain number of mentally disturbed persons at any given point
in time. This number apparently corresponded to the average capacity of the mental health system of the geographic unit and, in this specific case, to the capacity of Lima State Hospital in Ohio. In 1940, Dr. Crawfis decried the fact that 20 psychotic patients had to be transferred to other institutions to make room for other patients. The theoretical implication is that "the rate of deviation found in a community is at least in part function of the size and complexity of its social control apparatus". If the size of the hospital's waiting list grows too long--Ericson notes--"the only practical strategy is to discharge its present occupants more rapidly; and conversely, if the waiting list diminishes to the point where the hospital confronts a loss of revenue . . . local practitioners are urged to send more referrals". Consequently, Ericson suggests that "the community develops its definition of deviance so that it encompasses a range of behavior roughly equivalent to the available space in its control apparatus . . ." The actual transfers of the population through the institutions in Ohio were carried out in this period in such a precise a way that any inference about the types and epidemiology of crime and mental illness based on the nature of the transfers in and out of Lima can not be valid. We can only conclude that the numbers of transfers were of necessity predetermined in the framework of the need for balance as seen by the hospital management.

The absence of commitments of psychopathic offenders before 1943 was essentially due to the discretionary nature of the legal provisions about commitments as well as to the lack of facilities.
The increase of financial allocations to Lima, the several "repairs" and "improvements" to the physical facility between 1941-1945 and the increase of social action in the war period were associated with the beginning of psychopathic commitments to Lima. The amendment of the statute in 1945, which established mandatory examinations for sex offenses, resulted in an increase in the number of psychiatric examinations. Furthermore, the frequency and intensity of social action in Ohio—especially the attempts to intensify the programs of prevention of every form of deviancy in concert with the activity of the post-war planning committee—and the development of favorable attitudes toward psychiatry and social science among judges, and the new 1951 statute amendment to include the discretionary commitment of sex misdemeanants, were all associated with the steady increase of psychiatric examinations of psychopathic offenders. However, until 1959, this increase in psychiatric examination did not correspond to a proportional increase in the number of indefinite commitments. This, indeed, reflects the interplay of the socio-legal structure and the cultural orientation of the courts and the physical environment. Until 1954, the year in which the additional facilities were built in Lima, but not until 1959, the year in which the facility was partially equipped for the care of psychopathic offenders, there was no increase in the number of commitments under the Ascherman Act. Correspondently, the creation of additional space in Lima and its use for psychopathic offenders was carried on under the pressure of social action and the effect of socio-legal change.
The interaction among the social, legal and physical environment on the psychopathic offender statute also exerted some influence on the typology of psychopathy in this first period. There was some logical relationships in the distributions of commitments according to the variables of sex, county, diagnosis and length of institutionalization. Psychopaths in this period appeared to be mostly sex offenders; they were committed mainly from the metropolitan counties; all were diagnosed as sex deviates; and, finally, they were institutionalized for long periods of time. The emphasis on the sex offender reflects the tone of the campaign for the creation of this legislation, its subsequent public support, and the arguments which have dominated scientific attitudes. However, the evidence on the low rate of recidivism did not appear to have influenced the socio-legal arguments concerning the psychopathic offender. Furthermore, social action was mainly carried on in the largest metropolitan centers of Ohio. Long periods of institutionalization reflected the custodial attitude preeminent in the 1940's. The subsequent decline in the length of institutionalization in the 1950's and early 1960's reflected the change in perspective from custodial care to an emphasis on treatment associated with the large scale use of psychotropic drugs.

The periods between 1959-1962 and 1963-1965 witnessed a great increase of admissions to Lima. General admissions, psychiatric examinations, and indefinite commitments increased up to their highest levels. There was, however, a difference in the type of admissions between the
two periods which may be illuminated by the socio-legal history of the psychopathic offender statute. In the period 1959-1962, the additional 300 beds originally established for the psychopathic offenders were apparently used to cope with the increase of general admissions and the increase of transfers from other institutions rather than for Ascher- man cases alone. In other words, the 300 extra beds in Lima were not reserved exclusively for psychopathic offenders. In the period 1963-1965, on the other hand, after the official complaint of Mr. Ascherman and the social reformers, the new facility was dedicated almost exclusively to commitments of psychopathic offenders. Correspondently, the number of transfers out of Lima increased to make room for more psychopathic offenders. Apparently the availability of the additional 300 beds was the basis for the increase of commitments in Ohio during these years. The enlarged physical environment, consequently, was the major cause of the increase in "official psychopathy" in Ohio in this period.

The typology of the psychopathic offender did not undergo radical changes in the period. Many commitments still followed the commission of sex offenses, while the amendment to include misdemeanants appears to have provoked several commitments for minor offenses. Legal changes seem to have induced a wider and more heterogeneous range of crimes to be dealt with by the statute. Smaller counties committed more psychopathic offenders. This seemed to be associated with the diffusion of information by the mass media in relation to the implementation of the statute. The decline in the length of institutionalization, as well as in the number of diagnoses other than "antisocial personality", may
reflect more accurate knowledge in the nature and prognosis of psychopathy and the effect of an incipient trend toward de-institutionalization.

The last two periods (1966-1968 and 1969-1972) showed even more clearly the effect of the interaction between the socio-legal and environmental variables and the amount and type of "official psychopathy". The increase of involvement on the part of the social reformers, in particular the campaign conducted by the Cleveland Plain Dealer and the collaboration between the psychopathic offender committee and the Ohio Legislative Commission. These combined forces pushed for a more intense implementation of the statute. The creation of the Division of Psychiatric Criminology in 1967 may also have encouraged the enforcement of the statute and the consequent regeneration of the problem of "official psychopathy". Again, the activities of this larger network of social control appears to have been connected with an increase in the number of psychopathic offenders processed through the system. Psychopathic offenders seem to have assumed some characteristics of a partially new character. They were not exclusively sex offenders or sex deviates. They appeared more and more to have committed other types of offenses. They started to come in a higher proportion from the non-metropolitan areas of Ohio. A higher number of non-whites were committed for a sex offense conviction. The period of institutionalization further declined, despite the presence of discretion in the process of release indicated by the persistence of a high range between the minimum and maximum periods of commitment. The character of these last two periods mainly reflects the new trend
in the administration of mental health and criminal justice. From 1969 to 1972, but even from 1954, with the general decline in total admissions, there appeared a new trend toward de-institutionalization which neutralized the effect of the last battle of the social reformers for the implementation of the statute. Currently, a socio-cultural trend which originated and operates at the macro-structure of the nation, appears to exert a powerful effect on a smaller unit of the social structure such as a state like Ohio.

In conclusion, the empirical evidence available on the history and phenomenology of "official psychopathy" in Ohio, appears to support the socio-historical and legal development of the statute. The construction of the social reality which produced the first statute as well as its subsequent modifications profoundly effected the quantity and quality of "official psychopathy". The number and type of psychopathic offenders in Ohio did not appear to originate from an inner development of mental illness and crime or from the objective increase of "sick minds" and psychopathic criminals in relation to the general population. On the contrary, the amount and the type of "official psychopathy" has been a process of social discovery and as such has undergone the experiences and the vicissitudes of social life in Ohio and in the nation.
NOTES TO CHAPTER VI

1 General information about the mental institutions in Ohio is provided in Public Welfare in Ohio Today: One Hundred and Fifty Years of Progress (Columbus: Department of Public Welfare, 1953).

2 Similar considerations with regard to socio-legal history are indicated in Joel Samaha, Law and Order in Historical Perspective (New York: Academic Press, 1974), pp. 109-113. With regard to the impact of social change upon legal institutions, Samaha says that "The effects of these developments have not been, and only with great difficulty might they ever be, reduced to statistical correlation coefficients. Connections between events in the larger world and the degree of their impact on the number of crimes in the county, can at this point, only be determined by inferences based on proximity in time and space." Ibid., p. 110.

3 Christ's Report, Ascherman File, Crime and Delinquency Program, The Ohio State University.

4 Data on the population committed to Lima State Hospital have been coded on IBM cards and made available for this work by the Crime and Delinquency Program of The Ohio State University.

5 Counties are listed according to population size by the 1970 census. When reference is made to metropolitan counties, the author is referring to those counties at the top of the list, or in other words, those with the highest population.

6 Aldo Piperno, "Indefinite Commitment in the Mental Hospital for the Criminally Insane: Two Models of Administration of Mental Health," Journal of Criminal Law and Criminology (Forthcoming).

7 Unfortunately, the author is unaware of how recidivism was operationalized. The material on recidivism was provided by a report compiled by Dr. Christ, former Superintendent of Lima, and is available in the Ascherman File. It was decided, nevertheless, that although the information on recidivism could not be verified, it was worth including in this work.

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CHAPTER VII

SOCIO-LEGAL TRENDS IN CRIMINAL JUSTICE AND
MENTAL HEALTH AND THE DESTINY OF THE
PSYCHOPATHIC OFFENDER LEGISLATION

Before discussing the more recent socio-legal history of the psychopathic offender legislation in America, it might be well to review the main lines of the argument developed in this work up to this point. A summary of the socio-legal history of psychopathy might help to clarify previous ideas and connect them with the following arguments.

Historically, in 19th century England and thereafter in America, the criminal law recognized an insanity defense which was limited only to impairment of cognitive capacity. That defense was consistent with the philosophical basis of Anglo-American criminal law which imposed criminal responsibility only on those who chose to do evil. A person who could not recognize the difference between good and evil lacked the capacity to choose and, therefore, could not be responsible for his conduct even if, in a general way, he intended to cause a proscribed result. The subsequent development of psychiatry viewed the creation of another category, originally called "emotional insanity", which was conceived to be a disease of the "moral" or "affective"
capacities of an actor. In practice, the development of "emotional insanity" in psychiatry encompassed cases excluded under "intellectual insanity" and included any residual mental disease not properly classifiable in the cognitive category. This developmental characteristic of "residuality" always accompanied further expanded conceptualizations of the disorder of "emotional insanity". As such, this disease was at first disregarded and denied any validity in American jurisprudence with regard to criminal responsibility. The nosological uncertainty of the concept of "emotional insanity", which was called "psychopathy" in the 1930's, made the judges suspicious of legitimizing such a disease in criminal law. This happened despite the trend to extend the concept of "intellectual insanity" to mean mental illness. Only in the late 1930's, with the development of the mental hygiene movement and the change of judicial attitudes in favor of psychiatry and the social sciences, did psychopathy gain legal recognition and special statutes were established for psychopathic offenders in several states. The newly enacted psychopathic offender laws were nosologically inconsistent with regard to the definition of psychopathy. Nosological ambiguity was even worse since the category or classification drew inspiration from contradictory legal traditions which focused on the opposite principles of control (recidivist laws) and rehabilitation (Briggs Laws and defective delinquent laws). While the general trend in law and psychiatry made possible the enactment of such statutes in the 1930's and 1940's, it was the well publicized commission of unusually heinous crimes which constituted the precipitating element of the social
process which led to their actual enactment. In the analysis of the Ohio psychopathic offender statute, (the Ascherman Act) we indicated, in some detail, the role played by the mental hygienists, lawyers and judges in the conception and history of this statute. In this regard, it was argued that, the social process leading to the enactment of the Ohio law as well as the erratic manner of its implementation over time, was shaped by the interaction of the Ohio social reformers' activities, the state of affairs in the institutions for the psychopathic offenders and the general trend in the mental health and criminal justice movements in the nation.

The present chapter will trace the most recent socio-legal history of psychopathic offender legislation in America and illustrate how a newly developing trend in mental health and criminal justice affects the destiny of the psychopathic offender statutes.

New Provisions for the Psychopathic Offender

A few important cases with regard to the psychopath have set the tone and character of future developments in this area.

1 In 1962, Mr. C. Gerchman was committed under the Pennsylvania psychopath offender statute--the so-called Barr-Walker Act--to an indefinite commitment in the Western Correctional Diagnostic and Classification Center in Pennsylvania. In 1963, Mr. Gerchman sought his release through a writ of habeas corpus in the state courts, but his petition was denied. Having his state remedies exhausted, the
petitioner applied for a writ of habeas corpus in the District Court, which denied his claim, but granted a certificate of probable cause for appeal. In 1964, Mr. Gerchman applied again for a writ of habeas corpus to the United States Court of Appeals. He claimed that the proceedings against him under the Barr-Walker Act violated due process because he was not charged, not indicted, was denied the right to confront and cross-examine the witnesses against him and was denied the right to trial by jury. He also claimed that the Act violated the due process clause, because it imposed cruel and unusual punishment, was vague and uncertain and conferred arbitrary power on the Pennsylvania Board of Parole. The Court of Appeals recognized that the new petitioner's right to confront and cross-examine the witnesses--the Commissioner's psychiatry testimony and report--had been violated in the previous proceedings. The superintendent of the Institution, the defendant in this case, argued that the right to confrontation and cross-examination was applicable only to criminal trials while the proceedings against Mr. Gerchman did not constitute a trial and were not criminal in nature. The Court of Appeals replied that the Act was indeed a "criminal statute" and what was imposed under its authority was "criminal punishment". The Court went on th state that "the defendant in such a proceeding (was) entitled to the full panoply of the relevant protection which due process guarantees in the state criminal proceedings". The Court concluded that the petitioner's commitment was invalid because of the violation of his constitutional rights. It also acknowledged that the Act was "unconstitutional on its face", but
deferred the issue of its abrogation on this basis to the state courts.

The same issue of the constitutionality of the psychopathic proceedings surfaced again just a year later before the United States Supreme Court. In 1966, E. Specht was confined in an institution under the Colorado Sex Offender Act. Mr. Specht challenged the constitutionality of the procedure on the grounds that the denial of a hearing and right of confrontation of witnesses and experts constituted a violation of due process. His claim was rejected by the Federal District Court and this rejection was reaffirmed by the U. S. Court of Appeals. Mr. Specht, then, applied on certiorary to the United State Supreme Court. Justice Douglas, expressing the unanimous opinion of the Court, said that Colorado's Sex Offender Act, indeed, made the conviction for a criminal offense "the basis for commencing another proceeding under another Act to determine whether a person constitute(d) a threat of bodily harm to the public". Justice Douglas stated that, in practice, the determination of dangerousness was "a new finding of fact that was not an ingredient of the offense charged". Furthermore, "the punishment under the second Act was a criminal punishment, even though it was designed not so much as retribution as to keep individuals from inflicting further harm". Justice Douglas concluded that "the invocation of the sex offender act meant the making of a new charge leading to criminal punishment" and "the failure to grant such procedural safeguards as a hearing and the right of confrontation violated the due process requirements of the Fourteenth Amendment". Consequently, the
Colorado sex offender statute was held to be unconstitutional.

These two recent cases illustrate just how high psychopathic offender legislation has been contested before the highest courts in the American judicial system. The issue of the legal nature—civil v. criminal—of the statutes was indeed an old issue in the legislative history of such laws. The original Michigan Act was at first repealed because of this ambiguity in 1937. In the following years, however, the Supreme Court of Michigan and the high courts of the States of Illinois, Minnesota and California apparently gave up their original antagonism against the statutes. Indeed, under the pressure and the promise of psychiatry, social science and the mental hygiene movement judges favored and even urged the creation of this type of legislation. The history of the Ohio statute has shown the role judges and lawyers as participants in the social movement for alterations in the psychopathic offender legal and institutional arrangements. The recent decisions of Gerchman v. Maroney and Specht v. Patterson indicate, on the other hand, a radical change of direction with regard to the state of affairs which has dominated this field since the late 1930's. These decisions to grant the defendant, in psychopathic offender proceedings, the constitutional rights of criminal trials imply that: (1) the psychopathic offender legal structure is an adversary system; (2) the psychiatrist making the diagnosis is in an adversary role; and (3) the statements contained in the psychiatric report are, in fact, used as "proofs against" and as such, those who have made the statements must
be subject to confrontation and cross-examination. Beside these legal implications, the court cases and general restiveness indicate the collapse of confidence on the part of the American judicial system, or on the part of the top members of the system, in the axiom that state institutions created for the welfare of the community, such as mental hospitals, actually "treat" those committed to them. These decisions also manifest that the obvious preoccupation of the courts with the issue of the deprivation of individual freedom by the State in the area of psychopathic proceedings for hospital commitment as much as in the case of criminal trials. Furthermore, there is growing indication of the emergence of an antagonism between the state acting on the basis of its paternal role and under freedom.

The implications arising from the statement that the psychopathic offender statutes represent an adversary system and may involve a threat to individual liberty were developed in *McNeil v. Director Patuxent Institution*. E. McNeil was convicted of two assaults in 1966 and sentenced to five years of imprisonment. Instead of committing him to prison, the court referred him to the Patuxent Institution in Maryland for examination and to determine whether he should be committed to that institution for an indeterminate period under Maryland's defective delinquent statute. In 1972, with no such determination as yet made and McNeil's criminal sentence expired, his confinement continued in the Patuxent Institution. The state contended that the defendant refused to cooperate with the examining physicians and that they were, therefore,
unable to make any assessment of his conditions. Consequently, he
should and could be confined indefinitely to the institution. The
defendant claimed that when his criminal sentence expired, the state
lost its power to hold him and that his continued commitment violated
his rights under the Fourteenth Amendment. The case was brought before
the U.S. Supreme Court in 1972. Justice Marshall delivered the opinion
of the Court and said that "the petitioner had been committed 'for
observation' for six years and on the state's theory of his confinement
there was no reason to believe it likely that he will ever be released".
Consequently, since "the commitment was permanent in its practical
effect, it required safeguards commensurate with a long-term commitment".
"In this circumstance, it was a denial of due process to continue to
hold him on the basis of an ... order committing him for observation".
Justice Marshall concluded that the defendant was presently confined
"without any authority of law" and he was entitled to be released from
Patuxent. Justice Douglas concurred with the majority opinion and
added that McNeil's refusal to submit to questioning was not "quixotic":
it was basis "on his Fifth Amendment right to be silent". Justice
Douglas also added that whatever the Patuxent procedures may be called--
civil or criminal--there was in this case "a deprivation of liberty"
and such deprivation would again occur whenever "a person is held
against his will". In this case, beside further emphasis on the idea
that there was real antagonism between the state and the individual
even when the state appeared in its benevolent role, there was a new
ground broken in granting the individual the constitutional right to refuse collaboration with the psychiatrist. As in the framework of police interrogation, the individual had a right to be silent, since his confidential declarations to the psychiatrist could damage his chance for liberty. Considering that in Gerchman v. Maroney the court had already granted "the full panoply of constitutional rights" to the psychopathic offender, the further concession of the right to be silent may revolutionize psychiatric practice in this field.

The extension of due process to psychopathic proceedings and the implications of such an extension, indicate the radical change which has taken place in the last decade in this field. This change, however, did not originate any new or specific issue. In truth, the general attitudes of American jurisprudence have changed profoundly since the 1930's towards due process and civil and criminal procedure. Other issues, however, have been raised only recently and are further upsetting the already precarious balance in the state of affairs of the psychopathic offender legislation field.

In Millard v. Cameron (1968), the defendant was charged with indecent exposure, the maximum punishment for which was imprisonment for 90 days or a fine of $300 or both. In 1968, Mr. Millard was still confined to St. Elizabeth's Hospital with a diagnosis of psychopathy. The U. S. Court of Appeals of the District of Columbia was called upon to decide this case. Judge Bazelon, expressing the opinion of the court, said that "the indefinite commitment under the sexual psychopath law
(was) justifiable only upon a theory of therapeutic treatment". So, for the first time in the history of the psychopathic offender legislation, an American court stated in 1968 that treatment represented the "quid pro quo" for hospital commitment. In other words, if the State took the stance of putting the individual in a mental hospital in lieu of a prison, causing the problem of double stigma, the state, at the very least, had to provide treatment. In Millard, the position assumed by Judge Bazelon only represented the courageous position of a very progressivist court. More recently, the development of the issue of treatment has started to cause more radical effects. In Davis v. Sullivan (1973), four patients committed to the Alabama State Hospital as psychopathic offenders started a class action suit on behalf of the persons confined in the state institution as criminal psychopaths, against the legality of their commitment. The claimed that (1) the definition of criminal psychopath was vague and, this alone, constituted a denial of due process; (2) the release requirement of "full and permanent recovery" established in the statute violated due process by creating an insurmountable barrier to freedom and denied them equal protection; and (3) the state failed to provide adequate medical and mental health care, namely treatment, and thus violated due process. The U. S. District Court recognized the legitimacy in this case of initiating a class action and stated that the statute was unconstitutional in that "it either subjects a person to two criminal proceedings, and possibly to two criminal sentences, for a single statutory crime, or, if not for a single
offense, then in one of the two proceedings for the mere crime of having a mental disorder'. The Court also held that 'once it is determined that person incarcerated under Alabama's sexual psychopathic statute cannot or will not benefit from further treatment, his release from incarceration cannot constitutionally be conditioned on full and permanent recovery'. The Court also stated that if commitment had to be continued for treatment purposes' it would have to be in a facility that provides treatment and not simply in a penal institution . . ."  

The consequences of this decision have been staggering. First, there was the implication that the internal logic of psychopathic proceedings lets a criminal prosecution start on the grounds of a "mere crime of having a mental disorder". Second, the absence of treatment was enough to declare the statute unconstitutional, but the presence of treatment was also considered a factor which could jeopardize individual freedom as much as the absence of treatment. Third, although the Constitution did not provide a specific substantive clause calling for treatment of mental patients, the Court was able to create a right to treatment on the basis of the procedural provisions of due process of law. The significance of this logic is that, under the influence of social forces which push for change, jurisprudence or "living law" could supercede its own boundaries, create a substantial right from procedure, and then become an instrument of social change.  

**General Trends**  
In summary, the substance of the transformation in psychopathic
offender legislation and implementation consisted in the change of the judicial attitudes and in actual dispositions after 1965. This transformation has involved a progressive abandonment of the implementation of the existing psychopathic offender laws or a reduction of other enforcement to a very minimal level. The effects of legal challenges have started to be felt by the management of the institutions chiefly in the last few years. The recent major decline of the psychopathic population in Lima State Hospital in Ohio has been a result of this change and reflects similar processes occurring in other states.

Indeed, what has happened, and it is still happening, in the field of the psychopathic offender management and control stems from a broader process of legal change which involves the entire system of administration of the criminal justice and mental health in the nation. This trend consists in an unprecedented involvement of American courts in re-examining the very foundation of custodial care in prisons and mental hospitals and in an attempt to bring the rule of law behind the walls of the institutions. The nature of this change may be seen by contrasting the following case with the status of the present situation: in 1951, when hearing an appeal on a prisoner's claim of a right of correspondence, one federal judge declared: "we think it is well settled that it is not the function of the courts to superintend the treatment and discipline of persons in penitentiaries, but only to deliver from imprisonment those who are illegally confined". His colleague wrote a concurring opinion just to protest the waste of time
caused by such a case to a heavy docket. "I think that a judge of a
court as busy as the one below," he said, "should not be compelled to
listen to such nonsense". The transformation which has recently occurred
may be traced as Rothman correctly suggests to "changes in the nature
of the inmate population and in the legal professions, new ideas about
the deviant, about incarceration, and about (how) our society all in-
fluenced the transformation". He also suggests that the transformation
started in the prisons and from there extended to the mental hospitals.

Legal Challenges to the Prisons

Here, the first legal breakthrough came in the early 1960's as
a direct result of Black Muslim litigation. The Black Muslims complained
of being denied religious rights, and even worse, of being punished on
the basis of their religious beliefs. Black Muslim inmates brought their
claims before the Courts under the Civil Right Act and the courts con-
firming the legitimacy of such actions, indirectly influenced the in-
crease of involvement in prison affairs by the American Civil Liberties
Union. Lawyers of the Union initiated litigations which raised the
issues of prisoners' rights, of visitation and correspondence, or rights
to medical treatment and of access to law books. Subsequently, inmates
started to complain about prison discipline and brought under scrutiny
the very nature of punishment. Convicts compelled the Courts to look
at cases of violence against inmates. Soledad and Dannemora prisoners--
Rothman argues--"taught the courts about isolation cells where prisoners
spent several weeks 'naked', 'without soap', towel . . . and under
conditions that were 'dirty', 'filthy' and 'unsanitary' . . ." Prison riots even stressed the precariousness of life in the institutions and brought the issue to public attention. In 1970, the constitutionality of incarceration, as it was practiced in Arkansas, was challenged in Holt v. Sauer. The judge observed that in this case, for the first time, "convicts have attacked the entire penitentiary system in any court".

Legal Challenges in the Mental Hospitals

With regard to mental hospitals, American courts have insisted that the institutions had to first satisfy legal standards rather than immediately confronting the substantive issues related to hospital commitment. In fact, it was easier for the judges to instruct prison wardens than to tell psychiatrists and hospital administrators how to do their jobs. Mental patients, the criminally insane, and psychopaths, were, in the last analysis, it was argued different from common prison inmates. These considerations led to an initial emphasis on the question of due process and constitutional rights in mental institutions and only very recently, substantive issues, like the right to treatment, reached American courts. In other words, judges were at first reluctant to investigate psychiatric doctrines and practices. The pressure of patients and their families, the involvement of liberal professionals in the field of psychiatry, however, pushed the courts into an examination to see whether the procedures of commitment were implemented according to the constitution. Historically, it has been a
characteristic of jurisprudence, that legal change starts mostly in the field of procedure rather than in substantive law.

The transformation which brought the constitutional issues in the field of mental health administration in general began in the last decade. It came to maturation toward the mid-sixties, and soon its influence extended toward peripheral fields of mental health like that of psychopathic offender legislation. In Lake v. Cameron (1966), the appellant, a sixty year old woman, was found wondering in the streets and was judicially committed to the D. C. General Hospital. The appellant contended that she should be entitled to an alternative confinement in light of the District of Columbia Hospitalization of the Mentally Act. This Act provided that the Court should consider "any other alternative course of treatment which . . . will be in the best interest of the persons or public". The Court stated in favor of the appellant that the procedural alternatives should in fact have been examined and that "deprivations of liberty solely because of danger to the ill persons themselves should not go beyond what is necessary for protection of both the person and the public". The significance of this case lies in the fact that the courts must require that the individual be placed in the least restrictive alternative confinement. In Rouse v. Cameron (1966), the Court stated that since "the difference (in length of confinement) rests only on need for treatment, a failure to supply treatment may raise a question of due process of law". In Tribby v. Cameron (1967), the court held that an individual in a mental institution must receive elemental due process with regard to hospital
hearings which involve factual determinations and which may result in more restrictive confinement. It is evident how these cases developed the ideas which entered into the decisions about the psychopathic offender proceedings.

The sense and amplitude of the transformation affecting the field of mental health most clearly appeared in Baxtrom v. Herold (1966). This case had the most intense effect on the question of the applicability of constitutional rights in mental commitments as well as in the actual practice of hospital management. J. Baxtrom was convicted of second degree assault in 1959 and was sentenced to a term of two and one-half to three years in a New York prison. In 1961, he was certified as insane and transferred from prison to Dannemora State Hospital. In December of 1961, the date upon which Baxtrom's penal sentence expired, custody over his shifted from the Department of Corrections to the Department of Mental Hygiene, but he was kept in Dannomora. Baxtrom filed a petition for habeas corpus, but a state court denied his petition as well as his alternative request for transfer to a civil hospital. The dismissal of the writ was affirmed without opinion by the Appellate Court and Baxtrom applied on certiorary to the U. S. Supreme Court which reversed the previous judgments. Justice Warren, expressing the view of eight members of the Court, stated that "the petitioner had been denied equal protection of the Law by the statutory procedure under which he was civilly committed without the jury review of the determination of incompetency available to all
other persons civilly committed in New York, and by his civil commitment
to an institution maintained by the Department of Corrections without
a judicial determination that he was dangerously mentally ill, as was
afforded to all other persons so committed". As an immediate effect
of Baxtrom, 992 men at Dannemora, a hospital for the criminally insane,
were transferred to civil hospitals. The staff of these civil hospitals
protested; the inmates, after all, were dangerous, certified so by psy-
chiatrists. But, few negative effects accompanied what was called
"Operation Baxtrom", an allusion to the cause of the mass transfers of
the patients to civil hospitals. Within a year, only seven of almost
a thousand inmates had to be returned to Dannemora as dangerous.

These cases mark the development of the application of due
process in the field of mental health and indicate the beginning of
the trend toward de-institutionalization. These implications were
not missed in subsequent cases. In U.S. ex rel. Shuster v. Herold
(1969), Judge Kaufman, hinting at the Baxtrom precedent, stated that
the Courts should pay less attention to public outrages that a judicial
action will lead "society over the brink and into the abyss of admini-
strative chaos". He cited with approval a New York Bar Association
report finding that the massive incarceration of persons at Dannemora
pointed to "another instance of institutional expectations putting
blinders on our perception". The interest of the courts in the con-
stitutionality of the commitment procedures, and especially in the
Baxtrom case, according to Rothman, encouraged the judges to extend
their questioning to the substantive issues connected with commitment.

Among the substantive issues, that of the right to treatment has been the most important, no less for its effects on psychopathic offender legislation. In the field of mental health, this issue was raised in Rouse v. Cameron in 1966. In this case, Judge Bazelon aruged that the mentally ill Act of the District of Columbia established a statutory right to treatment. Since Rouse contended that there was no treatment available in the institution, Bazelon acknowledged such a claim and ordered the patient's release. The effect of Rouse was soon felt in the field of psychopathy where the statutory right to treatment for the psychopath was ruled in Millard v. Cameron. The question of treatment underwent further development, and in 1971 in Wyatt v. Stickney it was established that such a right was indeed a Constitutional right. R. Wyatt had started a class action suit on behalf of approximately 5000 patients involuntarily committed to the Bryce Hospital in Tuscaloosa, Alabama. The District Court Chief Judge, Mr. Johnson, determined that "the programs of treatment in use at the State Hospital were scientifically and medically inadequate". Furthermore, the judge stated that the "failure of the State to provide suitable and adequate treatment to the mentally involuntary hospitalized . . . could not be justified by lack of staff or facilities, and to deprive any citizen of his or her liberty upon altruistic theory that confinement is for human therapeutic reasons and then fail to provide adequate treatment violates (the) very fundamentals of due process". Involuntarily committed patients,
finally declared the judge, have "a constitutional right to receive such
individual treatment". On April 26, 1974 in Donaldson v. O'Connor, the
issue of treatment received its most recent refinement. Donaldson,
involuntarily committed to the State mental institution in Florida,
contended that since he had received little or no treatment, and since
he had a right to receive treatment on the basis of previous antecedents,
he had to be released from the institution. The Court of Appeals held
that evidence supported the finding that the physicians had acted in
bad faith with respect to the treatment of the patient and were "per-
sonally liable for his injuries and deprivation of constitutional
rights". The Court reemphasized that treatment had become a right
guaranteed by the Constitution upon the basis of due process. "Govern-
ments--the court said--must afford a "quid pro quo" (treatment), when
they involuntarily confine citizens in mental institutions". Beside
the relevance of this sentence which came from a Court of Appeals, the
statement of recognizing a "personal liability" on the part of the
physicians supposed to administer treatment, represented a further step
in the overall development of this question of the right to treatment.

Change Among Academicians and
Professionals

In Donaldson, the Court had observed that all the antecedents
upon which the decision rested, were concerned with the major forms of
"nonpenal confinement". Included were those with a heavy "police power"
emphasis, such as confinement of sex offenders or defective delinquents.
Also included were persons acquitted by reason of insanity, or of
persons held incompetent to stand trial. Then there were those with a heavy emphasis on "parents patriae", such as confinement of the mentally retarded or of juveniles. Finally there were those--such as civil commitment of the mentally ill--with elements of both rationales behind them.

Lawyers had indeed contributed over the last decade to the conceptualization of this category of "non-penal confinements" presently in use among judges. In 1965, Sol Rubin brought to public attention the problems created with this category of proceedings which he called "quasi-criminal civil commitments". With this expression, Rubin stigmatized the fact that the effects of criminal sanctions were indeed produced against certain individuals in the name of their welfare. Rubin also sought to emphasize that the source of the troubles was in the hybrid nature of these proceedings. From the point of view of legal logic--Rubin argued--the error had been to make a myth of a legal fiction. Legal fictions consist in a false affirmation made with knowledge of its falsity but with no intention of deceiving others. In law, Rubin added, it may be helpful to treat, for example, a corporation as if it were a real citizen distinct from its stockholders, directors and officers, for certain purposes. On the other hand, a myth is a false affirmation made without knowledge of its falsity. The quasi-criminal civil commitments had become myths since the State lost sight of the fundamental falsity of their civil nature as well as of their "repres-
Rubin touched successfully the issue from a theoretical point of view and his arguments have received considerable attention from social scientists and professionals acting in the framework of governmental agencies. The National Institute of Mental Health has recently criticized the substance and implementation of the class of proceedings called quasi-criminal by Rubin and has acknowledged that the source of the problem was the fact of "diversion" in these cases from the criminal justice system.

Theoretical developments in criminology have also contributed to the transformation in the field of criminal justice and mental health administration. Since the late 1950's and early 1960's, there has been a decline of interest in the positivistic approach to the problem of crime. Criminologists manifested an increasing suspiciousness of the adequacy of previous etiological theories of crime and delinquency centered upon the personality of the deviant person. In 1964, Matza attempted to merge the deterministic and behavioristic position of positivism with the free-will doctrine of classicism. The labelling school, which represented an outgrowth of the earlier theoretical formulations of Tannenbaum and Lemert, contributed in the early 1960's to divert attention of criminologists from the deviant behavior to the social reaction of the community. Becker stated the central idea of this school in the following words: "deviance is not a quality of the act the person commits, but rather a consequence of the application by others of rules and sanctions to an offender: The deviant is one to whom the label has successfully been applied; deviant behavior is
behavior so labeled". From an emphasis on the social reaction of the community, as a generating factor of deviance, to the focus upon criminal law the step was short--soon the new sociology of criminal law realized the implications of the labelling school. If the origin of deviance is not in the individual but in the social process of his identification--it was argued--criminal law and its implementation might have something to do with the types of persons who come in contact with the criminal justice system. The study of the operation of discretion along the entire criminal justice front was, indeed, stimulated by these theoretical formulations. The empirical documentation that criminal justice is a discretionary, and often a discriminatory process had, in its turn, a feedback effect on criminological theory. "Crimes without victims", "crimes of status", "political criminals" were some of the new terms introduced in the literature. Their impact has gone beyond their heuristic value: these labels were proposed with an eye to their implications for social action. In brief, recent criminological theory has indicated that the dimension of politica lity can not be overlooked for an adequate understanding of the problem of crime. American courts have become more sensitive to these theoretical formulations, critical of the present system of criminal justice. Often, judges have supported such orientations and translated their implications into practice. Institutions have been closed and the operation of prisons and mental hospitals has been phased down to minimal levels.
Empirical research in criminology and deviance has also exerted a tremendous impact in the new attitude of American courts. Scholars have shown that the permanence in prisons and mental hospitals does not make criminals change into "normal" or "socially acceptable" persons. Efforts to prevent delinquency and crime outside the institutions have also been frustrated. The old as well as the new prevention programs seem to have failed in their major purposes. Furthermore, classification in criminology has been no better than similar attempts in psychiatry. Thus, the predictive aims of classificatory systems have not been supported by practical outcomes.

Governmental agencies also have shown some lack of confidence of previous orientations and, indirectly, have supported the effort toward new approaches. In 1967 the President's Crime Commission found that "until the science of human behavior matures far beyond its present confines, an understanding of delinquency is not likely to be forthcoming". "Many kinds of knowledge about crime must await a better understanding of social behavior".

All these developments in theory and research have inevitably led judges to draw their conclusions. Suspiciousness of previous practices has been traditional. Consequently, American courts have shown a firm tendency to guard that at least the process of criminal justice and mental health administration be implemented with respect to individual freedom according to the American constitution.
The Destiny of the Psychopathic Offender Statutes

The change of attitudes of American courts with regard to prisons and mental hospitals, indeed, the reversal of the traditional policy of non-intervention into the internal affairs of the total institutions and the present, almost aggressive, stances taken by judges, testify to the existence of a new trend in the administration of criminal justice and mental health. The recent formulations in criminological theory and research as well as the involvement of lawyers and other social scientists have at first stimulated such a trend and supported its development. Rothman recognizes that two major directions in the trend have emerged and are presently developing: one toward the implementation of treatment in institutions, the other towards the reduction of the population of the institutions or, in a word, towards de-institutionalization. Those who support de-institutionalization have manifested suspiciousness with regard to treatment and have predicated the existence of a right to refuse treatment. Nevertheless, there are no certain grounds, at the moment, for predicting which approach will prevail in the near future. Judges have been prone to pursue both: in Baxstrom they have stimulated de-institutionalization, in Wyatt and Donaldson they have supported institutional treatment. Over the last few years, Rothman argues, those who once thought exclusively in terms of treatment and rehabilitation have been announcing that they, too, favor de-institutionalization. However, the commitment of those who appear to favor the establishment of other forms of
community-based programs has not yet been proved. Even worse, the effects of the recent multiplication of community programs are liable of different types of manipulation. Rothman argues that someone may come up with the "bright" idea that a thousand settings are more difficult to oversee than one. "If only we would consolidate the boarding houses into a central system, put them all under one roof . . ." In essence, Rothman warns, "unless those now litigating for (diversion) think hard and clear about alternatives, we may soon rediscover the asylum". Whatever will be the future development of the trend in criminal justice and mental health, the very fact of the existence of a new trend is a reality. This reality rests on several decisions of the American courts, new interests of criminologists and new attitudes of inmates in prisons and mental hospitals and in other factors previously discussed. The destiny of the psychopathic offender is only a small part of a general process which presently--as in the past decades--involves fundamental social and cultural changes in the country. Psychopathic offender legislation has appeared to be heavily influenced (Specht, Millard, Davies, etc.) and it will continue to be influenced by whatever direction the trend in criminal justice and mental health will take in the years ahead. For the moment, a monograph published by the National Institute of Mental Health, has suggested the repeal of all psychopathic offender legislation. The content of this proposal is clear, but its social meaning and consequences will emerge in the context of the general process. Only future events will tell the sense of this history.
NOTES TO CHAPTER VII

4 Ibid., p. 312.
5 Ibid., p. 315.
6 Specht v. Patterson, 386 U.S. 605, 87 S.Ct. 1209, 18 L.Ed.2d 326.
7 Ibid., p. 329.
8 Ibid., p. 329.
9 Ibid., p. 329.
10 Ibid., p. 326.

11 Judge Freedman stated with regard to the psychiatric report the following: "... the only evidence against him was the Commissioner's report to the court containing ultimate findings of fact based upon reports of a 'confidential' psychiatric examination and a probation investigation. Neither the Commissioner nor those who reported to him appeared at the hearing. Petitioner had no opportunity to confront them, much less to cross-examine them regarding the findings of the Commissioner or the unsworn reports of the investigations on which they were based ... The judicial finding based on this incompetent hearsay cannot be recognized without doing violence to the constitutional guarantee of due process". Ibid., p. 309. Also psychiatrists have recognized that the role of the psychiatrists is an adversary role. See, Seymour L. Halleck, Psychiatry and the Dilemmas of Crime (New York: Harper and Row Publishing Co., 1967), p. 231.

12 92 S.Ct. 2083 (1972).
13 Ibid., p. 2087.


Quoted in David Rothman, ibid., p. 11.

36 364 F.2d 657.
38 *Lake v. Cameron*, 364 F.2d 660.
39 373 f.2d 453.
40 379 F.2d104.
41 393 U.S. 107,15 L.Ed. 2d 620.
44 410 F.2d 1071.
47 325 F. Supp.781.
51 *Donaldson v. O'Connor*, No. 73-1843, U.S. Ct. of App., 3127 (5th Cri. April 26, 1974).
53 Ibid., p. 3158.
54 Ibid., p. 3155.
55 Ibid., p. 3155.
56 Ibid., p. 3159.
57 Ibid., p. 3159.
60 Sol Rubin, op.cit., p. 142.
61 Ibid., pp. 142-143.
64 David Matza, Delinquency and Drift (New York: Wiley and Sons, 1964).
70 Ibid., p. 12-20.

The case of Baxstrom, Lima State Hospital and other cases in the county amply illustrated this point.


Ibid., p. 23.

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