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P. Thomas Wall

Wylie P. Chalmers

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# INSTITUTIONAL AND POST-INSTITUTIONAL TREATMENT OF THE SEX OFFENDER

Thomas P. Wall, Jr.\* and Chalmers P. Wylie †

The problem of the sex offender is as old as society itself. Today, as in the distant past, man is more concerned, in the first instance, with protecting himself and his loved ones from the corrupting touch of the so-called "sex-fiend" than he is with the punishment; treatment or cure of such persons. This phenomenon of social psychology still prevails in spite of the growing preachments of the doctor, psychologist, criminologist and more recently, of the lawyer prosecutor, the lawyer law-maker and the lawyer practitioner,<sup>1</sup> to the effect that the primarily desirable end of protecting society can best be achieved by a greater emphasis on penological, therapeutic and hygienic techniques applicable in the institutional and post-institutional treatment of such offenders.<sup>2</sup>

Much of what is herein proposed in the way of legislative and administrative improvement is generally applicable to the whole field of correction, but the special problem of the sex offender requires that it be underlined.<sup>3</sup>

## NEED FOR SPECIALIZED INSTITUTIONAL TREATMENT

There are three principles essential to the development of any kind of proper penological system: (1) classification, (2) segregation and (3) differential treatment.

It is necessary to know a problem before steps can be taken toward its solution. This involves classification. There must, therefore, be a recognition of the types of persons who commit sex offenses, and there must be a continuing and effective institutional and post-institutional application of the principle in sub-classification.

Sex offenders consist of a variety of types,<sup>4</sup> ranging from that of the

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\* Member, Nashville, Tennessee Bar.

† Assistant Attorney General of Ohio, State House Annex, Columbus, Ohio.

1. From the very beginnings of legal theories of punishment certain cases were considered "unmeet for punishment" and penal provisions useless where the offense was involuntary as where the "physical faculties . . . are not in a condition to follow the determination of his will." BENTHAM, *RATIONALE OF PUNISHMENT*, bk. 1, c. 4 (1830). Cf. Dession, *Psychiatry and the Conditioning of Criminal Justice*, 47 *YALE L. J.* 319, 322 (1937).

2. GLOVER, *THE SOCIAL AND LEGAL ASPECTS OF SEXUAL ABNORMALITY* 1 (1947); Dession, *supra* note 1; Comment, *Toward Rehabilitation of Criminals*, 57 *YALE L. J.* 1085, 1102 (1948).

3. For a discussion of commitment procedure see Glueck, *Principles of a Rational Penal Code*, 41 *HARV. L. REV.* 453, 475 (1928); Nordskog, *Psychiatry in Criminal Trials*, 17 *SO. CALIF. L. REV.* 371 (1944); Note, *The Legal Disposition of the Sexual Psychopath*, 96 *U. OF PA. L. REV.* 872 (1948). Constitutional problems are discussed in Note, 37 *MICH. L. REV.* 613 (1939); cf. *People v. Frontczak*, 286 *Mich.* 51, 281 *N. W.* 534 (1938).

4. East, *Sexual Offenders—A British View*, 55 *YALE L. J.* 527, 530-543 (1944).

criminal who has finally plumbed the depths of moral degradation, whose responsibility and consequent culpability are undeniable and indefensible, to the opposite extreme of the psychotic personality, who is totally irresponsible for his behaviour. Neither of these extremes poses a difficult theoretical problem. From the one, society can be protected by the proper operation of the existent system of criminal law; from the other, protection is afforded by statutory commitment procedures applicable to the mentally defective and insane in general. It is in the intermediate area between the moral and criminal degenerate and the mentally defective that the problem lies.<sup>5</sup> Psychiatrists, applying their attention to this problem, have not solved it, but have, in some degree, specified it by the designation of the category of the aggressive psychopathic personality,<sup>6</sup> whom they have defined as a person not insane, but suffering from a mental illness with tendency toward the commission of aggressive offenses.

Experience has indicated that mere incarceration for a term does not have the effect of deterring sex offenders of this category from continuing their abnormal assaults upon society;<sup>7</sup> experience also teaches that it is neither practical nor conscionable to mix offenders of this type with non-psychopathic inmates for such mingling greatly increases the danger of sex offense against innocent victims in the future. Recognition of the classification requires application of the principle of segregation.

Though the greater percentage of sex offenses seems to have been committed by the aggressive sexual psychopathic personality,<sup>8</sup> no state has provided a separate institution for the incarceration and treatment of such persons, and only a handful have attempted segregated treatment within the walls of existing facilities.<sup>9</sup> In 1937, Illinois pioneered by the statutory definition of the "criminal sexual psychopathic personality."<sup>10</sup> This statute was the model for similar legislation in other states,<sup>11</sup> a first step toward the recognition of psychopathic states relative to the commission of crime.<sup>12</sup> With recognition of the classification have come attempts at segregation and specialized treatment

5. Werthan, *Psychiatry and the Prevention of Sex Crimes*, 28 J. CRIM. L. & CRIMINOLOGY 848, 849 (1938).

6. HENDERSON, *PSYCHOPATHIC STATES* 18 (1939); HENDERSON & GILLESPIE, *TEXT BOOK OF PSYCHIATRY* 311 (5th ed. 1943); Kahn, *The Psychopathic Personalities*, in *PSYCHIATRY FOR PRACTITIONERS* 239 (Christian ed. 1938). But cf. Comment, 57 YALE L. J. 1085, 1096 (1948).

7. AICHORN, *WAYWARD YOUTH* 167 (Eng. trans. 1944).

8. East, *supra* note 4 at 540. Cf. Comment, 57 YALE L. J. 1085, 1105 (1948).

9. MacCormick, *Adult Offenders*, *SOCIAL WORK YEAR BOOK* 33, 38 (1943).

10. ILL. ANN. STAT., c. 38, § 820 (Smith-Hurd, Supp. 1938).

11. CALIF. PENAL CODE § 6102 (Deering, Supp. 1945); MASS. ANN. LAWS c. 123a (Supp. 1947); MICH. STAT. ANN. § § 28.967(1)—28.967(9) (Supp. 1947); MINN. STAT. ANN. § § 526.09—526.11 (1947); Vt. Pub. Acts 1943, No. 100, as am'd by Vt. Pub. Acts 1945, No. 116. For discussions of the various statutes, see Legis, 39 COL. L. REV. 534 (1938); Notes, 96 U. OF PA. L. REV. 872, 876-88 (1948), 37 MICH. L. REV. 613 (1939), 3 JOHN MARSHALL L. Q. 407 (1938).

12. Patterson, *Psychiatric Aspects of New Procedures in the State of Michigan*, 31 J. CRIM. L. & CRIMINOLOGY 684, 689 (1941).

of persons committed under such statutes, but without the corollary provision of sufficiently separated and specialized places for such activity. Having created a classification which is new and recognized by statute that the psychopathic offender is neither a normal prison problem nor a proper patient for an insane asylum, such jurisdictions have either ordered persons so classified to be treated within prison walls or in psychiatric hospital wards. Neither type of institution is today so comprehensive in its treatment and environmental facilities to be adjustable to the requirements of the aggressive psychopath who is at once a medical and a penal problem. Classification, in order to be effective, must accomplish true segregation, and true segregation can only be recognized by the specificity of the treatment applicable. This certainly does not mean a mere multiplication of correctional buildings, nor a mere enlargement of security, medical or other personnel facilities. Instead it implies that the new institution or that part of existing institutions devoted to this problem must consist of a wholly new type of plant, personnel and treatment facility, one which will at once serve to protect society both as a place for the segregated incarceration of such dangerous psychopaths, and as a laboratory in which refined treatment techniques may be developed, and prognostic data can be obtained not only for the treatment of like future cases but also for the use of other agencies of social control in necessary preventive work.

It is generally characteristic of aggressive psychopathic personalities that they possess a varying capability for knowing society's laws and the consequences of their violation, but their impulse or will reactions to situations have been so warped that they cannot help committing the particular offense. They are, in effect, morally insane. It is customary to understand that a person whose rational function has failed is insane. However, the mind comprises the function of will as well as reason and in the case of the psychopath the disease of his mind is one primarily affecting his will function. By means of differential treatment—that is, procedures related to the peculiar condition of the individual,—new impulse or will reactions, founded upon moral consciousness and mental hygiene, may be developed. Financial outlay presently earmarked for deterrence of this type of offense could be used in no better way than for the construction of the specialized institutional facilities and for the acquisition of competent personnel for the application of such treatments.

Classification and its consequent corollary principles of segregation and differential treatment should be more than an initial procedure,<sup>13</sup> but rather a continuing program effective within the confines not only of the specialized institutional facilities herein proposed, but also of the conventional reformatory and prison as well, where other sex offenders, not initially classified

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13. BARNES & TEETERS, *NEW HORIZONS IN CRIMINOLOGY* 616 (1944).

as psychopathic, have been confined. Sexual abnormality is probably one of the most difficult problems to cope with in prisons today. If the hardened criminal is irreformable by reason of an initially concealed psychopathy, it is inevitable that he will, like the proverbial rotten apple, corrupt the entire barrel if his presence is not seasonably detected and eliminated through some program of constant observation, classification and further segregation.<sup>14</sup> Practical reformation of this type cannot be accomplished in the generally demoralizing atmosphere of a prison, where even the personality of the normal or near normal has a distinct tendency toward disintegration; and penal and reformatory treatment generally seems to make this class of inmates only a greater menace to society on their release.<sup>15</sup> The modern prison or reformatory is well suited to the infliction of punishment; but conceding punishment a place in the reform of the offender of normal reactions, punishment and reformation are unrelated concepts in the proper treatment of the psychopathic offender.<sup>16</sup> Since most psychopaths committed to institutions on conviction for an offense are subject to eventual release, it seems only logical that their mental aberration should be treated and, if possible, cured, rather than aggravated by ordinary prison treatment.<sup>17</sup>

Some of the states which have recognized the psychopathic classification by statute seem to feel that offenders of this class should be made to feel the immensity of their wrong by subjection to punishment after a cure has been certified. Despite the merits of the punishment theory of crime deterrence based upon culpability and the feeling of guilt in the individual, there is no logic in the application of such a theory as a reformatory procedure in the treatment of the morally unconscious. Upon the revival of the moral consciousness culpability does not attach for actions of an immoral and anti-social nature committed during the period of the subject's moral coma.<sup>18</sup> The reasons for the incarceration of the morally culpable may be primarily to protect society and to punish the offender; the reasons for the incarceration of the morally irresponsible should be (1) to protect society and (2) not to punish, but to treat and cure the offender.

#### ADMINISTRATION AND PROGRAM

Once the need for the specialized institutional segregation and differential treatment of the aggressive psychopathic offender is recognized, it becomes

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14. NELSON, PRISON DAYS AND NIGHTS 143 (1936); cf. Karpmann, *Sex Life in Prison*, 38 J. CRIM. L. & CRIMINOLOGY 475 (1948).

15. COON, *Psychiatry for Lawyers*, 31 CORN. L. Q. 327, 466 (1946).

16. HENDERSON, PSYCHOPATHIC STATES 18 (1939); Dession, *supra* note 1 at 335.

17. CLECKLEY, THE MASK OF SANITY 258, 293 (1941); GLUECK & GLUECK, FIVE HUNDRED CRIMINAL CAREERS 182 *et seq.* (1934) (indicates a recidivism rate of nearly eighty percent of their sample).

18. GLOVER, THE SOCIAL AND LEGAL ASPECTS OF SEXUAL ABNORMALITY 1 (1947) (recommends the abandonment of the view that "illness is reprehensible or that it serves the sufferer right."); Comment, 57 YALE L. J. 1085, 1106 (1948).

necessary to consider standards for the selection of the proper and competent personnel for the administration of such programs. The equally important requirements of personnel and of system are always inherent in the accomplishment of any desirable organizational plan. As to personnel, the first of these elements, little is to be gained if the appointments of the administrator and staff require professional standards and then permit leeway for political bases of choice with tenure dependent on continued political acceptability to determine the selections. Furthermore, the administrator should have authority to encourage the initiative of expert judgment, while at the same time restrained by the necessary minimum standards of law, both for the reason of the public interest in security and for the no less important reason that the object of administrative action here dealt with is that of human life, no matter how degraded.

The administrative head or superintendent of this specialized institution or institutional division for the treatment of psychopathic sex offenders should be a person thoroughly trained for this work by reason of a background broad enough to encompass at once an understanding of both the penological problems involved and the problems of the specialized treatment of a medical, psychological and moral nature. Negatively, he should not be primarily a doctor, a psychologist or other narrowly specialized professional person; for with all due respect and admiration for these callings, administration is in itself a profession calling for broad education, experience and peculiar talents.<sup>19</sup> Positively stated, his background should be that of an administrative coordinator.

Concerning the procedure of selection, while a multitude of methods of making it objective and non-political may be conceived, it is suggested for consideration that the selection be made by the governor of the state on the recommendation of a board of advisors appointed for this purpose by the governor and consisting of nine public spirited citizens, at least six of whom should be required to be active executives having the direction of not less than five hundred persons. The other three should be chosen from other professions, the only requirement being that they be leaders in their particular professions. This suggested membership is based upon the practical consideration that experienced executives, dependent for their own positions upon efficient and profitable administration of their own organizations, usually have developed a judgment in this kind of matter which is not otherwise attainable.

The selective process will be insufficient if the position to be filled does not provide sufficient attractions to the qualified candidate. Such attractions should include a salary commensurate with the importance of the work to be performed. It is false economy to equip an expensive and important organization

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19. Stone, *A Top Management View of the Public Service*, 13 *ADVANCED MANAGEMENT Q.* J. 108 (Sept. 1948).

with cheap administration. In addition to salary, security of tenure has universal appeal. This position, having been filled by prudent selection, ought to be permanently held by the incumbent with removal for cause only, and then with hearing and the right to present evidence on his own behalf as part of the prerogative. This rare removal hearing procedure might be the secondary function of the advisory selection board referred to above.

Adequate administration requires adequate staffing. The administrator's authority should be broad enough to permit him to make the necessary personnel selection and should be governed by statutory minimum requirements. The staff should include, of course, resident general medical practitioners and surgeons, as well as a resident psychiatric research and treatment staff. There should also be provision for the necessary psychologists, security personnel, social workers, clerical and statistical employees and others. As far as practicable the work of the administration should be aided by statutory provision for security of tenure and adequate salary in all of these positions. There should also be sufficient leeway in the administrator's authority to permit him to establish incentive and other systems for the maintenance of high morale among his staff. Finally, staff membership should be specific enough and numerous enough to free the administrator from the burden of too much detail so that he can devote his fullest energies to the broad over-all purpose of his position.

Medical, psychiatric and other programs of treatment should be developed by each specific professional staff involved, but the problem of coordinating these programs should be the responsibility of the administrator. Some types of program are worth emphasis. They include vocational guidance and training. Psychologists and psychiatrists seem to agree, at least on this one point, that careful and encouraged guidance of the self-expression of social, emotional and intellectual desires is a great aid to the sublimation of unhealthy and unnatural tendencies. Institutional education should be adjusted, as far as possible, to the individual's needs. Some few may display sufficient intellectual potential to warrant higher training, but for the most part it is to be anticipated that most patients will get the greatest benefit by application to the mechanical arts, where they should be encouraged particularly to specialize in those skills most in current demand.<sup>20</sup>

No institutional program would be complete unless it included provision for the moral reeducation of the subjects for treatment. Only the most biased partisan of modern science would have the temerity to assert that moral education is exclusively within the province of the psychiatrist or psychologist, no matter how inescapable may be the moral implications of their accomplishment. There are other forms of social control affecting the conduct of men.

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20. LINDNER, *STONE WALLS AND MEN* 476 (1946) (recommends training in occupation where there are labor shortages).

Principal among these in the past have been religion, the family, community custom and the law. Not a little of the dilemma confronting us is assignable to the breakdown of the influence of one or more of these forms.<sup>21</sup> Nor has the more enlightened element in our society, not excluding the legal profession, been without fault in this regard. Perhaps as the result of a disproportionate reliance upon one or the other of the forms of social control at the expense of neglecting others, or perhaps out of the sheer perversity of human nature's eternal seeking after panaceas, we have tended to attempt a substitution of external controls of public regulation and of laws for the internal restraint developed by religion as a deterrent to crime, or, again, to fill the gaps created by the abandonment of the controls of family discipline with a sociological substitute. The failures of our generation, of which the increasing number of those afflicted with psychopathy is but one manifestation, ought to prompt us not lightly to overlook the readily available experience guides and the century-tested techniques of older and perhaps wiser forms of social ordering. Lessons have been learned during the past and accumulated in centuries of experience in dealing with the conduct problems of men that ought not to be ignored. The long experience of organized religious bodies has been such that it would seem that few persons should be better qualified to employ such knowledge with greater effect than thoroughly trained ministers of religion. Their peculiar talents and opportunities for rapport with patients who are at least nominally members of their particular denominations present opportunities for intelligently keying in their doorway to an otherwise inaccessible side of the patient's personality with the treatment procedures of the cooperative team of psychiatrists, psychologists and social workers.<sup>22</sup> Programs for moral training, or retraining as the case may be, under the guidance of qualified ministers and priests of religion should be a part of any intelligent program, but should be so regulated as not to perform a function of proselytizing for the particular denominations. In the case of inmates who are neither nominally nor formally members of denominational groups, moral education is no less important, and a program should be provided to instill in them a system of social ethics or consciousness based upon an exposition of the natural correlation of rights, duties and obligations existent between men in an organized community. This plan is no substitute for the religious program of moral

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21. Dr. Alexander R. McLean, of the Mayo Clinic, Rochester, Minnesota, quoted by Msgr. Fulton J. Sheen, in the *New York Times*, July 21, 1947, p. 8, col. 5, as follows: "Can we through some distorted psychiatric concepts, excuse the loss of civilian virtues . . . morals; should we disguise our psychiatric failures and thus lose the scientific virtue . . . truth?"

22. Report of the Special Committee on Sex Offenders of the New York State Association of Magistrates, p. 2, September 19, 1947, citing the apparently successful experiment conducted by the Magistrates Courts in conjunction with the Quaker Emergency Service in New York City. Cf. Eliasberg, *Repentance and Remorse in Rehabilitation*, in LINDNER & SELIGER, *HANDBOOK OF CORRECTIONAL PSYCHOLOGY* 463 (1947).



education, however, for common experience indicates that the denominationally attached can most readily be reached through the ministerial means provided by their religious affiliation.

To permit the most efficient operation of the specialized-treatment staff, provision should be made that they be equipped with the special devices increasingly utilized in the treatment of mental disorders. Since there is no simple over-all method of treating and curing those afflicted with psychopathy, every possible tool, whether fully accepted or experimental, should be available. For example, some patients may be aided to recovery by use of male hormone injections or through the employment of pentothal sodium.<sup>23</sup> Other advanced, though still experimental, methods of treatment requiring special equipment in addition to skill, include hypo-analysis, electro-shock therapy and prefrontal lobotomy or lobectomy.<sup>24</sup>

#### POST-INSTITUTIONAL TREATMENT

Special provision for classification, institutional set-up and scientific treatment mean little if a danger persists that persons not fully cured of their dangerous tendencies will continue to be released upon society. Psychopaths are difficult to diagnose, to treat, to declare fully cured. In addition, the danger is as great in the release of convicted sex offenders sentenced for terms in regular penal institutions under the criminal statutes as it is in the release of those committed under psychopathy statutes to special types of institutional treatment. Continued observation backed by a power to reclassify and to return for renewed segregation and treatment should be provided during the critical period of conditioned release or parole.

There are more difficult concepts to define and understand than parole, but it is doubtful if there are many notions more abused. First of all, parole is not, or should not be, merely a device for the lessening of institutional congestion, freely to be employed when the solution of additional construction seems too remote.<sup>25</sup> Secondly, it is short-range wisdom to utilize parole as an economy measure, since dollars saved by such a procedure may well mean not only greater dollar expense in the near future, but what is worse, the burden of irretrievable human bankruptcy as well. Thirdly, parole ought not to be the instrument of either maudlin leniency or a purely automatic acceleration of sentence or commitment termination.<sup>26</sup>

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23. LINDNER & SELIGER, HANDBOOK OF CORRECTIONAL PSYCHOLOGY 229, 641 (1947).

24. *Id.* at 542, 632. Cf. Mayer, *Prefrontal Lobotomy and The Courts*, 38 J. CRIM. L. & CRIMINOLOGY 576 (1948).

25. See *Declaration of Principles of American Parole Association*, 24 J. CRIM. L. & CRIMINOLOGY 788 (1934).

26. Werthan, *supra* note 5.

Perhaps its abuse is caused by the comparative modernity,<sup>27</sup> or at least the immaturity, of the conception and practice of parole; but if the theory of protecting society by the reform or cure of the subjects for release has any merit in modern penological and corrective thinking, then the use of parole or conditional release must be looked upon as an integral part of the sentence or treatment term. Certainly this view is more consonant with legislative purpose. The decision to grant a parole, then, ought to rest primarily in a choice between institutional and extra-institutional instruments of reform as such; and wherever legal mechanics may be imposed for the attainment to eligibility, actual release ought to be dependent upon its being expertly judged to be the circumstantially preferable tool for reform.<sup>28</sup>

These are the general considerations applicable to any consideration of granting parole. In every case the protection of society,<sup>29</sup> dependent on final individual reformation, is of inherent importance, and when it concerns the special problem of the sex offender it ought to be italicized.<sup>30</sup> Extreme caution must be the watchword of the paroling authorities but not the untutored caution of a blind man wandering in a strange and hazardous terrain. The area of their consideration should be well charted by organized experience, well lighted by the expert means and devices now available. In short, those selected for the exercise of such difficult judgments should be carefully chosen for their trained ability to understand and evaluate the complexities of the factors presented and fully to utilize the available devices predictive of result.<sup>31</sup>

Sex offenders constituting a type requiring special ethical and moral training and development, being generally in need of the prophylaxis of mental hygiene and usually amenable to the good offices of psychiatry,<sup>32</sup> and programs dictated by these considerations having been institutionally commenced, release should not be their premature conclusion. Release should be both a continuation in extra-mural surroundings of out-patient therapies and development and a transitional opportunity for testing and proving the reform or cure, subject at all times to return in the event of deviation from the reformatory pattern.

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27. For a general discussion of this aspect, see MORAN, *POST WAR PLANNING IN PROBATION AND PAROLE* (1945) (pamphlet published by the Executive Division of Parole, State of New York). See also, BARNES & TEETERS, *NEW HORIZONS IN CRIMINOLOGY*, c. 34 (1945).

28. Comment, 57 *YALE L. J.* 1085, 1109 (1948).

29. See *Declaration of Principles of American Parole Association*, 24 *J. CRIM. L. & CRIMINOLOGY* 788 (1934).

30. For a general discussion of this problem, see MORAN, *THE SEX CRIMINAL ON PAROLE* (1940) (pamphlet published by Executive Division of Parole, State of New York).

31. Glueck, *Individualization and the Use of Predictive Devices*, 23 *J. CRIM. L. & CRIMINOLOGY* 67 (1932).

32. LINDNER & SELIGER, *HANDBOOK OF CORRECTIONAL PSYCHOLOGY*, 233 *et seq.* (1947); East, *supra* note 1 at 532.

It cannot be too strongly urged that the members of the paroling authority be subject to professional requirements by statute. Such paroling authority ought to include a rule-making parole administrator who would also serve as a minority member of the parole board.<sup>33</sup> Again, little is gained if professional standards are subject to the vitiation of dependency on political acceptability. A plan of appointment similar to the one proposed herein for the selection of the administrator of the treatment program for psychopathic offenders might be the solution. Removal should certainly be for cause only and salary ought to be commensurate with the position. The authority of the rule-making administrator should be sufficient to encourage his initiative checked only by minimum statutory standards. The parole board itself ought to be limited in its judgments by dual controls imposed by statutory and administrative regulation. Statutory restrictions might limit the authority of the board by requiring that the inmate have served out his minimum sentence, by requiring that the board be satisfied that the parolee is no longer an aggressive menace to society, and perhaps by requiring that satisfactory provisions have been made for the parolee's honest employment, or if ill or disabled for his care.<sup>34</sup>

The administrative regulation should control the pre-release investigation of every case and the methods and standards to be employed. In the case of every inmate guilty of a sex crime, there should be provision for a psychiatric examination so that a current report will be before the board at the release hearing along with all former psychiatric data compiled both before and during the term of incarceration.<sup>35</sup> In difficult cases there should be provision for the impanelling of a group of psychiatrists to make this prehearing examination and report. In addition, administrative regulation might require: (1) a case history compiled by an institutional sociologist together with a study and parole program devised and recommended by an internal institutional classification committee; (2) the past criminal record, including probation and pre-sentence reports; (3) a psychologist's evaluation and diagnosis; (4) a religious study of the candidate for release by the prison chaplain, Catholic, Protestant or Jewish, as the case may be; (5) work reports from the supervisor of the assignments on which the inmate has worked; (6) a custodial history and remarks furnished by the warden; (7) a program submitted by an institutional parole officer to be executed by a field parole officer in the event parole is granted; (8) an attitude reply from the sentencing judge; and (9)

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33. Colvin, *What Authority Should Grant Paroles, If A Board, How Should it be Composed?* 12 J. CRIM. L. & CRIMINOLOGY 545 (1922). For a statutory illustration see MICH. STAT. ANN. § § 28.2101, 28.2102 (Supp. 1947).

34. MICH. STAT. ANN. § 28.2103 (Supp. 1947).

35. Such a pattern of administrative regulation is in effect in the State of Michigan. Information furnished by the State of Michigan Bureau of Pardons and Paroles, Assistant Director in Charge, A. Ross Pascoe, 18 Nov. 1947.

some form of predictive device such as that proposed by Dr. Sheldon Glueck.<sup>36</sup>

Since parole is a release conditioned upon the continued reform of the parolee during its term, there should be ample provision for the members of a staff to provide enforcement and surveillance, who should be subject to professional and program requirements to be determined by the parole administrator referred to above. They should be numerous enough adequately to care for sustaining case work and the services of local hospitals and clinics should be at their disposal.<sup>37</sup> For more remote areas travelling clinics might well be utilized.<sup>38</sup> Policy requirements should call for the return of the parolee in case of indications of relapse rather than depending upon the commission of further overt offenses. Flexibility should be the most recommending feature of such a system under which modern therapies could be applied as rapidly as developed.

At least two states have recognized that the parole hearing constitutes a point in the inmates' career which provides an excellent opportunity for carefully screening those convicted of sex offenses to determine whether or not psychopathy may have developed during their prison terms.<sup>39</sup> The very borderline nature<sup>40</sup> of this type of crime makes it a possibility worth consideration in every such case. In both of these jurisdictions if the pre-release psychiatric examination reveals that such psychopathy has developed it is provided that commitment proceedings shall automatically be commenced, so that the status of such a prisoner can be quickly altered to that of a patient. In one of these states such a procedure is periodically applied to all inmates whether eligible for release or not.<sup>41</sup>

Up to this point attention has been directed to the system of post-institutional treatment or parole as applied to the convicted criminal in general. The ideal of a parole system flexible enough to recognize and to cope with the peculiar problems presented by special types of criminals and there-

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36. Glueck, *supra* note 31; Hakeem, *Glueck Method of Parole Prediction Applied to 1,861 Cases of Burglars*, 36 J. CRIM. L. & CRIMINOLOGY 87 (1945).

37. Selling, *The Extra Institutional Treatment of Sex Offenders*, in LINDNER & SELIGER, *HANDBOOK OF CORRECTIONAL PSYCHOLOGY* 226-232 (1947) (general discussion of the possibilities and limitations of such treatment).

38. Mobile clinics are currently employed for this purpose in the State of Michigan. Information furnished by the State of Michigan Bureau of Pardons and Paroles, A. Ross Pascoe, Assistant Director in Charge, 18 Nov. 1947.

39. Both Michigan and Illinois follow such a plan. In Michigan by administrative regulation. Information furnished by the State of Michigan Bureau of Pardons & Paroles, A. Ross Pascoe, Assistant Director in Charge, 18 Nov. 1947. In Illinois by a recent legislative enactment, Illinois Senate Bill 504, approved 8 July 1947. Mr. T. P. Sullivan, Director of the Illinois Department of Public Safety, commented on this statute in a letter dated 17 Nov. 1947 as follows: ". . . the State of Illinois, like most other States, up until this year stood by and saw inmates discharged from the penal institutions and returned to society whom we felt still possessed dangerous and criminal tendencies toward the commission of sex offenses."

40. Werthan, *supra* note 5 at 849.

41. ILL. ANN. STAT. c. 38, § 824 (Smith-Hurd, Supp. 1947).

fore flexible enough to cope with the sex offender has been advocated in order to provide some guarantee of the safety of the community into which he may be released. Criticism of any particular jurisdiction and its handling of this problem has been avoided; but if an existing system treats all criminals as presenting a problem of a homogeneous nature, it oversimplifies and consequently fails to solve the problem.<sup>42</sup> If it recognizes that special problems exist and require special treatment and is flexible enough to meet these requirements then it seems to have some logical place in the scheme of correction.

Only a few states have requirements of professional qualification on the part of parole board members,<sup>43</sup> and while it is true that qualified persons do find their way into such positions elsewhere, if the position demands special qualification it seems logical that statutory requirements ought to specify it. There ought to be provision for supplementing the legislative framework with administrative regulation in order to provide the greatest leeway for the continual development of penological systems, and such an arrangement is of no greater value than the caliber of the personnel given the administrative authority. Under competent control its advantages are legion in dealing with a problem as complex as parole. On the other hand if the legislature tries to handle too much of this detailed regulation the result is frequently an un-integrated statutory patchwork. When legislation on this subject seems necessary from time to time it should be done by a process of review, repeal, redraft and reenactment afresh, to avoid the inconsistencies commonly inherent in the system of accretion by amendment.

Consideration of the post-institutional or out-patient treatment of the psychopathic sex offender ought likewise to be governed by the curative or reformatory motivation, underlined by a consciousness of the public interest in security. It has been emphasized in proposing a new type of special institutional handling of this kind of offender that the aggressive sex psychopath presents a problem of reformation not only in the penal sense but also in the medical sense of the term. Release of a person of this type partakes at one time of the nature of the release both of a sick person and of a prison inmate, and considerations governing both are applicable in his case. Thus, if a person, considered solely from the medical point of view, appeared most likely to attain complete recovery under out-patient therapy, and yet was still suspect of tendencies threatening to the safety of other members of society, then the public interest in security must surely prevail over such a patient's individual interest in recovery, even though this course should present a permanent bar to his full recovery and ultimate release. Furthermore, these principles applicable in the determination whether to grant a release or not should continue to

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42. BARNES & TEETERS, *NEW HORIZONS IN CRIMINOLOGY* 825 (1945).

43. MICH. STAT. ANN. § § 28.2101, 28.2102 (Supp. 1947).

govern the handling of a patient's case after his release throughout the post-institutional period, not only by continued employment of medical observation, treatment and supervision, but also by bringing to bear all of those agencies of rehabilitation and reform known to possess value in curbing human asocial tendencies.

Of the states providing for the special classification, commitment and treatment of psychopathic sex offenders, only one also provides authority to release such persons conditionally.<sup>44</sup> With this exception, these states fall roughly into two groups: (1) those which treat release of such persons as though they were merely psychotic inmates, releasable only on complete cure by process in the committing court;<sup>45</sup> and (2) those which treat the period of confinement to a mental institution merely as a stay of criminal proceedings for the originally charged offense that led to the detection of their psychopathy and commitment for treatment.<sup>46</sup> Neither of these systems permits the application of out-patient therapies. The inconsistency is especially glaring in the latter group of jurisdictions, in that commitment to a mental institution for treatment is justified on the ground of the patient's irresponsibility for the act revealing his psychopathy, while at the same time holding, in effect, that responsibility for the act attaches on restoration to some semblance of normality. Legislative thinking on this matter seems to have been influenced by the unfortunate selection of statutory terminology in defining the classification.

"Criminal" implies responsibility for commission of a forbidden act, while "psychopathic" suggests an element of moral (not legal) irresponsibility; but the two terms are linked in the definition expressed by the phrase, "criminal sexual psychopathic personality," usually employed in those states recognizing the category at all. If the subject of therapy responds by recovering control over his impulses, a subsequent sentence or confinement in prison would perhaps undo the reform accomplished. Society ought to be adequately protected by the proper operation of the first commitment from which there should be no release as long as a dangerous tendency persists, should that consume the patient's entire life span.

Extra-mural treatment of the psychopathic sex offender, is still largely a matter of theory and experimentation. In the one state where any experience data has been compiled it is considered as "still in the experimental stages,"<sup>47</sup> but at least in that state, initial release being conditional, the patient can still be treated and even recommitted without complex process in the event of

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44. *Id.* § 28,967(6).

45. MASS. ANN. STAT. c. 123a, § 5 (Supp. 1947); MINN. STAT. ANN. § § 526.09-526.11 (1947); Vt. Pub. Acts, 1943, No. 100, as am'd by Vt. Pub. Acts, 1945, No. 116, § 5.

46. ILL. ANN. STAT., c. 38, § 820 (Smith-Hurd, Supp. 1947).

47. C. F. Wagg, Acting Director of the State of Michigan Department of Mental Health, in a letter dated 12 Nov. 1947.

symptoms of his malady reappearing. While parole experience with psychopaths is limited to this state it is not the only example of extra-mural treatment of such persons, for the experiment in the probation of sex offenders conducted by the Magistrate's Court and the Quaker Emergency Service of New York City illustrates that there are possibilities in such treatment.<sup>48</sup> After a year of operation during which 414 offenders were treated there were only six violations of probation reported. These probationers were the object of treatment by a cooperating team of psychiatrists, clergy, psychologists and social workers.

#### SUMMARY

The peculiar problems presented by the aggressive sexual psychopathic person, and the dangers inherent therein, together with the possibilities of solution have been set forth in some detail. The special considerations involved in institutional and extra-mural procedures have been discussed. If it were possible to say easily that one offender is a psychopathic personality and that another is not, the dangers would be greatly reduced. Unfortunately, these strange variants of human behavior are not so conveniently pigeonholed, and if the attempt is to treat them as the problem solely of the criminal law or solely of medicine, then there is a failure to recognize the full problem, a failure that will condemn more members of society to danger and injury in the future. It is for this reason that much stress should be placed on the handling of sex offenders who are not classified as psychopathic, for in this group will be found much borderland. Both institutional and parole procedures must be designed to recognize that such an ill-defined area exists; and recognizing it, they must have the means and ability to deal with it.

In the case of those persons who are committed under special provisions for the treatment of the psychopathic there should be statutory provisions broad enough that the administrative authorities would not be limited in the means of treatment to the intra-mural method alone, but would be allowed to parole, to determine when such parole is in the best interest of the patient's recovery, to set the conditions and regulations thereof, and to rescind the parole when in their judgment the public security and the patient's condition demand it. When the curative process has been successful, whether involving treatment on an out-patient parole basis or not, it should not be subjected to the possibilities of undoing or relapse inherent in any system that subjects the cured patient to criminal proceedings and prison confinement.

In the case of persons convicted of sex crimes the system of parole ought to take into consideration the possibility that by the very nature of the crime

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48. Report of the Special Committee on Sex Offenders of the New York State Association of Magistrates, Sept. 19, 1947, p. 2. See also, Whitman, *The Biggest Taboo*, COLLIER'S MAGAZINE, Feb. 15, 1947.

there is a high possibility that persons amenable to medical, mental and other specialized treatment will be found; and having discovered them, the system can utilize such means as will help to reform them and prevent further danger to the public. Part and parcel with this is the conclusion that the more economic alternative to setting up a special parole system to handle sexual criminals is a general overhauling of present systems to provide them with the flexibility and power to deal with such special problems as are presented by the special types of criminals.

There is a certain inconsistency in deploring mob action against sex offenders so long as our institutional and release procedures are such that they engender little confidence in the community concerned with the safety of its women and children.