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Criminal Law - Insane Persons - Influence of Mental Illness on the Parole Return Process

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CRIMINAL LAW — INSANE PERSONS — INFLUENCE OF MENTAL ILLNESS ON THE PAROLE RETURN PROCESS — Defendants in the criminal process are divided into rigidly exclusive categories of mental health. The competent to stand trial are first separated from the incompetent.[1] Then the competent are divided on the basis of their mental state at the time of their acts between the "sane" and the "insane."[2] As long as these rigid categories are administered in an adversary trial system, some misdirection of victims of serious mental illness[3] into the penal system is almost inevitable. Even where mental illness might otherwise prevent conviction, those accused of non-capital felonies are not likely to raise the question,[4] and few courts are likely to do so for them.[5] Once such misdirection has taken place at trial, the possible inappropriateness of imprisoning the mentally ill remains largely beyond the reach of legal examination. After conviction there are

1 See generally Comment, *Criminal Law — Insane Persons — Competency To Stand Trial*, 59 MICH. L. REV. 1078 (1961).

2 See generally PERKINS, CRIMINAL LAW 738-76 (1957).

3 A discussion of the sanity test arguments of M'Naghten's case, 10 Cl. & F. 200, 8 Eng. Rep. 718 (H.L. 1843), and Durham v. United States, 214 F.2d 862 (D.C. Cir. 1954), is beyond the scope of this study. Literature on the subject is extensive. Any test, no matter how enlightened, forces a decision that a defendant at the time of his act was *either* sane and altogether responsible *or* insane and altogether irresponsible. The cases of twelve convicts returned from parole described in the appendix appear to the authors to defy any such attempt to provide precise categories for a phenomenon as complex as human behavior. Categorization is judicial "magic" — see generally FRANK, COURTS ON TRIAL 50-61 (1949) — tending to gloss over the appalling difficulty of regulating human behavior. Such "magic" induces abandonment of concern for the mental health of those who fall on the "sane" side of whatever line is drawn. Although one or two of the cases described might have fallen within the "insane" category had the matter been seriously litigated, the responsibility of each of the twelve appears sufficiently diminished to cause uneasiness about continued imprisonment in a penal system not primarily devoted to the care and treatment of mental illness. The solution may be greatly reduced concern with the legal definitions of sanity and competency at the trial stage and correspondingly greater concern with post-trial institutionalization.

4 The initiative for raising an insanity defense rests exclusively with the defendant. A minor felon will likely submit to a determinate prison sentence rather than volunteer for the indeterminate commitment to a mental hospital which a successful insanity defense entails in some jurisdictions. Thus the insanity defense seems almost entirely the product of the death penalty. See WEIHOFEN, THE URGE TO PUNISH 146-48 (1956); Szasz, Book Review, 21 PSYCHIATRY 307, 317 (1958). The defendant's denial of his own illness as well as a pathological desire for punishment may prevent a decision even this rational. See Goldstein, *Police Discretion Not To Invoke the Criminal Process: Low-Visibility Decisions in the Administration of Justice*, 69 YALE L.J. 543, 544 n.4 (1960).

5 The prosecution and the court usually share the initiative with the defense to raise by motion the question of competency to stand trial. See Comment, 59 MICH. L. REV. 1078 (1961). Even if prosecutors, judges, and defense counsel might otherwise be perceptive of problems of mental illness, a complex interaction of forces centered on desires to punish and to be punished tends to dominate the criminal trial process and obscure such perception. See WEIHOFEN, *op. cit. supra* note 4, at 138-46; ZILBOORG, THE PSYCHOLOGY OF THE CRIMINAL ACT AND PUNISHMENT 77-87 (1954).

few occasions which one might call "justiciable events"[6] when the balanced considerations of criminality and mental illness stand precisely defined for flexible, dispassionate examination. The questions which might be asked are obscured in the vague penumbra of post-conviction due process,[7] and the issues are further blurred by the fact that present prisons and mental hospitals both tend to be thought of as primarily custodial.[8] Hence, mentally ill convicts generally percolate through the penal system[9] and eventually become eligible for parole. At that stage, their mental illnesses may not be recognized[10] or, if recognized, not thought to present an unreasonable risk under a liberal parole policy.[11] Many

6 Compare the concept of "visibility" developed in Goldstein, *supra* note 4, at 551-52.

7 See generally Tappan, *The Legal Rights of Prisoners,* 293 ANNALS 99 (1954).

8 See Note, 36 MINN. L. REV. 933 (1952); Birnbaum, *Some Questions That a Lawyer Might Ask a Psychiatrist Concerning "The Psychopath Before the Law,"* 261 NEW ENGLAND J. MEDICINE 1220 (1959).

9 Some states provide for administrative transfers between penal and mental institutions, thereby theoretically accomplishing what trial courts fail to do. See, *e.g.,* GA. CODE ANN. § 77-310 (Supp. 1958) (assignment to hospital based on classification when entering prison); CONN. GEN. STAT. ANN. § 17-194 (1960); IOWA CODE § 246.16 (1958); MICH. COMP. LAWS § 330.66 (1948) (transfer to mental hospital on advice of prison physician). These administrative transfer statutes affect only the remaining term of imprisonment, with further custody dependent upon civil commitment on completion of sentence. All but three of thirty jurisdictions replying to a questionnaire stated that administrative transfers were available and convenient. This questionnaire was directed to parole board chairmen in all federal and state jurisdictions. 60.7% returned answers. Originals of all answers are on file in the offices of the *Michigan Law Review.*

Michigan, however, should be included among those jurisdictions lacking an effective administrative transfer process. Although there is the transfer statute cited above, overcrowding at Ionia State Hospital for the Criminally Insane has made such transfers possible only on an ineffectual body-for-body basis. See "200 Psychotics To Quit Prison," Ann Arbor News, Jan. 6, 1961, p. 2, col. 4, for an example of such an exchange proposed on an extraordinary scale. A 1952 census indicates that few qualified personnel are available in penal institutions to make the evaluations on which such transfers would be based. See Wille, *Psychiatric Facilities in Prisons and Correctional Institutions in the United States,* 114 AM. J. PSYCHIATRY 481 (1957).

10 Twenty-six of thirty replies to questionnaires (note 9 *supra)* answered affirmatively the question, "Have you noticed any significant number of prisoners come up for parole whom you considered to be mentally ill?" Two of these questionnaires also reported subsequent manifestations of mental illness among parolees. At the other extreme, one answer quoted a parole board psychologist: " 'The number of cases of dynamical schizophrenia functionally able to carry on both in prison and in society constitutes about 15% of all the cases I see in any given month. Most of these are diagnosed as passive-aggressive or schizoid personalities. Psychopathic personalities form a relatively high percentage of cases and are, of course, regarded to be without mental illness.' "

11 Administrative standards for the granting of parole are far from uniform in the various jurisdictions. See Krasner, *Hoodlum Priest and Respectable Convicts,* Harper's Magazine, Feb. 1961, p. 57, at 60. Michigan statistics indicate that 85% to 90% of all prisoners released are first released on parole. See Killinger, *Parole and Services to the Discharged Offender,* in TAPPAN, CONTEMPORARY CORRECTION 361, 365 (1951), for arguments in favor of a liberal parole policy. In contrast, one state replying to the questionnaire, *supra* note 9, reported that its conservative parole policy precluded parole for the mentally ill and hence avoided the problem of their return. Another indicated that it

such convicts are therefore granted parole. Thus the criminal process thrusts upon parole administrators the problem of handling these victims of serious mental illness. This study by a psychiatrist and a law student is based upon the case histories of twelve such parolees with whose mental illness the Michigan parole administration was forced to deal. These case histories are contained in the appendix.[12]

I. THE MENTALLY ILL IN THE PAROLE SYSTEM

When he begins parole, the mentally ill parolee returns to an environment which provides greater scope for manifestations of his illness than did the severely circumscribed routine of prison life. He may return to the same surroundings that bred his initial disturbance,[13] and he may face these surroundings after possible deterioration in prison.[14] Thus the chances for the appearance of bizarre manifestations of his mental illness increase. In dealing with these manifestations, parole administrators — especially parole officers — must fill difficult and conflicting roles of counselor and policeman,[15] one role emphasizing the individual welfare of parolees, the other emphasizing public safety. Unlike participants

had just twelve penitentiary parolees, all of whom seemed quite sane. It should be pointed out, however, that denial of parole to those of marginal mental illness merely forestalls the problem of dealing with them effectively, leaving them in the meantime as an administrative problem within the prisons and perhaps contributing to their deterioration.

12 This sample was taken over a nine-month period. It includes all parolees who were returned during that time either on medical warrants or on violation warrants with immediate referral to the Psychiatric Clinic. Individual cases are arranged within the appendix alphabetically by last initial. The trial record, prison reports, clinical history, and parole record of each individual were examined, and this examination was supplemented in each case by psychiatric interviews. This material was also supplemented by questionnaires. See note 9 *supra*.

13 See especially *J.B.*, *A.C.*, *N.E.*, *C.J.*, *E.T.*, and *N.W.*, appendix.

14 "'Your hands are tied. You just sit and look at those poor devils getting worse every day. . . .'" Dr. David P. Phillips, M.D., psychiatrist in the Michgan Department of Corrections, quoted in MARTIN, BREAK DOWN THE WALLS 65 (1954). "'At least five hundred men in Jackson now should be in a hospital. . . . Thousands more should be treated and rehabilitated. We're sending men out worse than they came in.'" Gregory F. Miller, former staff psychologist at State Prison of Southern Michigan, quoted *id.* at 65. See the appendix histories of *N.E.* and *A.K.*

15 See Johnson, *The Parole Supervisor in the Role of Stranger*, 50 J. CRIM. L., C. & P.S. 38 (1959); GIARDINI, THE PAROLE PROCESS 241-48 (1959). Politics and adverse newspaper publicity increase this difficulty. See MARTIN, *op. cit. supra* note 14, at 195-97. The parole officer often must face the ethical problems created by parolee's offering information in confidence. See *P.H.* and *C.J.*, appendix. A breach of professional confidence in the conviction process of a capital case may be a violation of due process. See People v. Leyra, 302 N.Y. 353, 98 N.E.2d 553 (1951). A similar conclusion has been reached in the commitment of a criminal sexual psychopath, People v. Wasker, 353 Mich. 447, 91 N.W.2d 866 (1958). See generally Little & Strecker, *Moot Questions in Psychiatric Ethics*, 113 AM. J. PSYCHIATRY 455 (1956).

in the trial process who may categorize an individual and send him away, parole administrators must continue to live with their decisions.[16] Although parole officers commonly deal, often quite perceptively, with the degree of mental illness which apparently underlies most criminality,[17] few are professionally equipped to cope with a parolee displaying an extreme manifestation of mental illness such as catatonic schizophrenia.[18] The parole officer's lay reaction to such a parolee seems often to be one of anxiety and alarm, occasionally fed by unprofessional counsel from psychiatric institutions.[19] By initiating, as did the parole officers in the appendix cases, the summary administrative process to return the alarm-producing parolee safely to prison, parole officers may at least forestall whatever immediate harm might occur, thus utilizing administrative routine as an escape from anxiety. The rationale for such returns is strikingly similar to that for a mental commitment; an individual's freedom is taken away because of possible danger to himself and his community arising from his mental illness. The methodology, however, is strikingly dissimilar, both in its lack of professional guidance and of procedural safeguards, and in its use of inappropriate penal institutions as places of detention.

II. THE MENTALLY ILL IN THE PENAL SYSTEM

Alone this problem of mental parole returns appears persistent but relatively insignificant;[20] nevertheless, it is important for bring-

16 For a discussion of similar problems faced by psychiatrists in the release of persons committed under criminal insanity statutes, see Goldstein & Katz, *Dangerousness and Mental Illness—Some Observations on the Decision To Release Persons Acquitted by Reason of Insanity*, 70 YALE L.J. 225 (1960).

17 In support of this view, see Roche, *Criminality and Mental Illness—Two Faces of the Same Coin*, 22 U. CHI. L. REV. 324 (1955); Showstack, *Preliminary Report on the Psychiatric Treatment of Prisoners at the California Medical Facility*, 112 AM. J. PSYCHIATRY 821 (1956).

18 See appendix case *C.S.*

19 See, *e.g.*, *P.H.* and *C.J.*, appendix.

20 During the period 1956-1960, there were from 9 to 18 such returns each year in Michigan. The responses to questionnaires, note 9 *supra*, indicate that occasional problems of mental illness among parolees are almost universally experienced and that suspension or revocation of parole is an available solution in most jurisdictions. Of the jurisdictions responding 26 answered affirmatively and only 4 answered negatively the question, "Has your board experienced incidents among parolees of mentally disturbed behavior that does not amount to a violation?" Nineteen answered affirmatively the question, "Is it customary in your jurisdiction to issue return warrants for parolees behaving in a manner that suggests mental illness?" Several of these jurisdictions stated that such returns were rare or were used only in the event of inability to have the parolee committed to a mental institution. Twelve indicated that returns actually caused by manifestations of mental illness were formally based on "technical violations" of parole rules which might otherwise have been ignored. See notes 79-81 *infra* and accompanying text. Seven jurisdictions followed a special "medical" or "psychological" return procedure.

ing into sharp relief the questions which lie behind it. No more than twenty known psychotics or borderline psychotics are among Michigan's parole returns each year, but some 300 to 500 more remain behind walls in the Michigan penal system.[21] Because it appears that trial courts will inevitably continue to feed more victims of various degrees of mental illness into the penal system,[22] there is little likelihood that their numbers will decrease. Although the problem is enormous, it has been the subject of little serious attention from the courts, the legal profession, or the behavioral scientists. The mental parole return process, however, presents on a more manageable scale the paradox of all mentally ill convicts — criminality and mental illness mixed in a manner which often defies simple categorization.[23] In addition to protecting a relatively small number of parolees from possible injustice, judicial intervention into such returns would forcefully direct legal thinking toward this intermixture in a setting which is devoid of a criminal trial's emotionalism, rigidity, and compulsion to categorize, but which provides an element of justiciability otherwise lacking in the mentally ill convict's course through the penal system. Although the retention of the mentally ill in possibly inappropriate penal institutions may be beyond direct judicial examination, its conscious perpetuation by means of mental parole returns is not. Invalidation of such returns, if in fact they are illegal, would at the very least provide penal and mental health administrators with a judicial formulation of aims for dealing with problems of intermixed criminality and mental illness. By releasing individuals who, under immediate considerations, should not go free, courts might encourage less accessible legislative and administrative bodies to provide more acceptable facilities, personnel, and administrative machinery for the handling of mentally ill convicts.[24]

The final answer to the question whether a mentally ill parolee should be returned to the penal system — and more broadly, of course, whether mentally ill convicts should be there at all — de-

21 See generally MARTIN, *op. cit. supra* note 14, at 48, 62-80; MacCormick, *Behind the Prison Riots*, 293 ANNALS 17 (1954).

22 See text accompanying notes 3-5 *supra*.

23 A similar paradox may be encountered in the mixed consideration of treatment and public safety which bear upon the decision to release an individual committed to a hospital as criminally insane. See Hough v. United States, 271 F.2d 458 (D.C. Cir. 1959). *Compare* Szasz, *Civil Liberties and Mental Illness*, 131 J. NERVOUS AND MENTAL DISEASES 58 (1960), *with* Goldstein & Katz, *supra* note 16.

24 Compare the use of direct negative judicial action to achieve an indirect positive result under the federal exclusionary rule, Weeks v. United States, 232 U.S. 383 (1914); *cf.* Wolf v. Colorado, 338 U.S. 25 (1949), in which the Court recognized as largely illusory the proposition that civil and criminal sanctions would prevent search and seizure abuses.

pends in part upon an examination of the aims and capabilities of the institutions within the penal system itself. Theorists generally advance four aims to justify the forms of imprisonment traditionally meted out to those convicted of crimes: retribution, deterrence, rehabilitation, and incapacitation.[25] Acceptance of one aim does not preclude acceptance of the others and, unfortunately, the various aims often dictate conflicting results even in the handling of more mentally-normal convicts.

In spite of the vogue of minimizing the importance of retribution in most contemporary rationales of penology, this is the aspect of imprisonment of which convicts themselves seem most aware — and which they may even pathologically demand.[26] In the abstract retribution seems entwined with the existence of free will: society punishes an individual because he has consciously chosen to commit a forbidden act.[27] Even if there is in fact an element of free will in some criminal behavior, when mental illness has limited an individual's will to at most only a token range of rational choice, retribution for prohibited choices becomes difficult indeed to justify.[28] Furthermore, as Professor Weihofen suggests, most members of society probably have little desire to punish the mentally ill, but the wrong-doer's derangement must be extreme to overcome darker, less rational forces directed toward punishment.[29] Perhaps some rationally-conceived punishment may be justifiable to deter or to reform.[30] But the retribution which sends mentally ill convicts to prison seems directed more toward society's fears of its

25 See generally MICHAEL & WECHSLER, CRIMINAL LAW AND ITS ADMINISTRATION 6-16 (1940). Some foreign jurisdictions attempt to diversify their institutions according to the purpose each is supposed to accomplish. See Radzinowicz, *The Persistent Offender*, 7 CAMB. L.J. 68, 72-79 (1939).

26 See Goldstein, *supra* note 4, at 544 n.4. See generally text accompanying notes 38-40 *infra*.

27 See MICHAEL & WECHSLER, *op. cit. supra* note 25, at 8 n.15.

28 For recent capital cases in which alleged mental illness did not prevent execution, see Caritativo v. California, 357 U.S. 549 (1958); United States *ex rel.* Smith v. Baldi, 344 U.S. 561 (1953); Solesbee v. Balkcom, 339 U.S. 9 (1950); Phyle v. Duffy, 334 U.S. 431 (1948). Note especially the dissents in all four cases by Mr. Justice Frankfurter. *But cf.* Forthoffer v. Swope, 103 F.2d 707, 709 (9th Cir. 1939) (dictum). See generally Michaelsen, *Post-Conviction Due Process Regarding Insanity Claim Prior to Execution*, 41 J. CRIM. L., C. & P.S. 639 (1951). If insanity does not stand in way of execution, which is surely punishment in its barest form, then it apparently does not raise due process questions about imprisonment, in which punishment is but one of several elements. Furthermore, imprisonment does not foreclose defenses which an individual might raise upon recovery of his rationality.

29 See WEIHOFEN, *op. cit. supra* note 4, at 136.

30 See *id.* at 146.

own impulses than toward those of the convicts.[31] Aside from the broad question of the initial justifiability of retribution, however, the very act of granting parole seems an admission that the need of retribution has been spent. It then appears especially irrational to remobilize this retribution upon manifestations of mental illness during parole.

The darker motivations of retribution are often rationalized in terms of deterrence of criminal behavior, a negative attempt at rehabilitation. Fear of more retribution is thought to deter not only the recipient but also others who observe. However, serious doubt has been cast on the effect of deterrence upon any potentially criminal mind, which readily rationalizes that only ineffectual criminals get caught.[32] Imprisonment is especially unlikely to deter the mentally ill convict himself, whose manner of connecting cause and effect may be irrational and who may even pathologically seek to be punished. The deterrent aspect of imprisoning the mentally ill, weak as it is at the outset, is weaker still in the mental parole return. The immediate cause for return is mental illness, from which the parolee obviously cannot be deterred. Although the state has gained its power over the parolee through his criminal conviction for an act which may arguably have been deterrable, the causal connection between the past deterrable act and the parole return is too tenuous to have serious impact on an irrational mind. The result upon others may be the very reverse of a deterrent; a legal act whose caprice provides potential criminals with an example of real or apparent unfairness helps them to turn their ordinary criminal acts against a capricious society into acts of imagined gallantry.[33]

At once the most humanitarian and utilitarian aim of penology is rehabilitation,[34] which is supposed to benefit the convict him-

31 See STEPHEN, A GENERAL VIEW OF THE CRIMINAL LAW OF ENGLAND 99 (1863); STEPHEN, A HISTORY OF THE CRIMINAL LAW OF ENGLAND 478, and 2 *id.* 81-82 (1883). See generally WEIHOFEN, *op. cit. supra* note 4, at 138-46.

32 See REDL & WINEMAN, CHILDREN WHO HATE 126, 205 (1951); WEIHOFEN, *op. cit. supra* note 4, at 150-51.

33 See REDL & WINEMAN, *op. cit. supra* note 32, at 165-77.

34 Attempts to rehabilitate appear not to be mandatory even in a commitment avowedly for treatment. See *In re* Kemmerer, 309 Mich. 313, 15 N.W.2d 652 (1944), *cert. denied,* 329 U.S. 767 (1946); Kemmerer v. Benson, 165 F.2d 702 (6th Cir.), *cert. denied,* 334 U.S. 849 (1948); cases under the Michigan Criminal Sexual Psychopath Act, MICH. COMP. LAWS §§ 780.501-.507 (Supp. 1956). Similar cases are collected in Annot., 24 A.L.R.2d 350 (1952). *But see In re* Maddox, 351 Mich. 358, 88 N.W.2d 470 (1958), which invalidated the use of prisons as places of detention for those committed under the Michigan Criminal Sexual Psychopath Act, possibly in recognition of the role played by the mentally ill in the 1952 Jackson riots. See text accompanying notes 41-42 *infra.*

self, the community to which he will return, and in the meantime even the prison society in which he is kept. More a goal than a present reality on any appreciable scale,[35] rehabilitation presents difficult challenges even with relatively normal prisoners. It appears that retribution dominates most prisoners' conception of prison, whatever their degree of sanity.[36] The sullen submissiveness engendered by an atmosphere of retribution[37] interferes with rehabilitative counseling in a prison setting, both in cases of extreme mental illness and in those more normal. The greater the barrier of hostility and negativism between prisoner and counselor, the less likely the counselor will be to disturb the irrationally delinquent patterns of the prisoner's mental processes, and the more illusory rehabilitation therefore becomes.[38] Likewise, the more irrational the administrative process by which a mentally ill person is brought into, or back into, prison, the more easily he may throw this irrationality into the face of attempts to reorient him to the rational community. Those responsible for rehabilitation regard the burden of "feeding and watering" the hopelessly disturbed as an undesirable distraction from dealing effectively with the more salvable general prison population. Although mental parole return warrants are often worded in terms of treatment of the parolee, the returnee's prospects of success in a prison setting, like those of mentally ill convicts in general, are quite slim.[39]

Even if rehabilitation is illusory, it may be argued that imprisonment and parole returns of mentally ill convicts at least fulfill the final aim of preventing them from harming their neighbors. Even if the possible harm has been realistically appraised, whatever utilitarian force this argument carries in the short run fails when it is considered that this incapacitation is no more than a stopgap limited by the length of the convict's maximum sentence. Release after a flat maximum sentence bears no relationship to the prisoner's ability to cope with life in responsible society. He may even have deteriorated during his sentence.[40] It may be argued that

35 See MARTIN, *op. cit. supra* note 14, at 231-44. *But cf.* Showstack, *supra* note 17.

36 See generally Johnston, *Sources of Distortion and Deception in Prison Interviewing*, 20 Fed. Prob., March 1956, p. 43.

37 See McCorckle & Korn, *Resocialization Within Walls*, 293 ANNALS 88 (1954).

38 For a discussion in terms of the "delinquent ego," which by its nature throws up barriers against any attempt to penetrate its delinquency, see REDL & WINEMAN, *op. cit. supra* note 32, at 165-77.

39 Unavailability of personnel or lack of prospect for success may bring about abandonment of treatment. See *A.C.*, *P.H.*, and *N.W.*, appendix.

40 See note 14 *supra*. Weihofen points out that if the length of time spent in detention provides the public with any comfort, mental commitments generally last longer than prison sentences actually served. WEIHOFEN, *op. cit. supra* note 4, at 134-35.

civil commitment upon completion of a full maximum sentence is not an uncommon practice, and that this practice reduces the spectre of unjustified end-of-sentence releases. On the other hand, this practice strongly suggests what might better have been done in the first place.[41] Whatever disposition is made of mentally ill prisoners at the end of their sentences, as long as they remain in an inadequately diversified penal system they present serious administrative problems—a burden both on the more nearly normal prisoners who must live with them and on prison administrators, for whom mentally ill prisoners are a source of constant volatility giving rise both to irritating incidents of petty friction and to explosive outbursts like the Jackson Prison riots of 1952.[42] By any test, the seriously disturbed do not belong in contemporary prisons. The courts may begin to face this problem by attacking the mental parole return process which consciously perpetuates the imprisonment of the mentally ill. The final goal, however, should be the formulation of an entire system of justice which will deal more adequately with those who are *both* "criminal" *and* "insane."

III. THE ADMINISTRATIVE PAROLE RETURN PROCESS

The parole systems, presenting the observer with an opportunity for further examination of these questions, deal with both normal and disturbed parolees in an almost total vacuum of safeguards against administrative caprice. Statutory delegations of power to parole boards are universally broad and it is the parole board itself which usually formulates the basic regulations governing the behavior of parolees.[43] Required standards of behavior may be varied to fit the nature of individual parolees, and in practice parole officers exercise discretion in choosing whether to enforce particular regulations against individual parolees.[44] Legisla-

[41] Michigan is especially hampered in this respect by MICH. COMP. LAWS § 330.40 (1948) which requires that any person who has ever been convicted of a crime may only be committed to the overburdened State Hospital for the Criminally Insane. It is doubtful that this provision is always observed. See the cases of *J.B.*, *E.T.*, and *N.W.*, appendix.

[42] See MacCormick, *Behind the Prison Riots*, 293 ANNALS 17 (1954). There were probably about 300 committable psychotics in the Jackson Prison in 1952 and 200 more who were borderline psychotics. See MARTIN, BREAK DOWN THE WALLS 48, 62-80 (1953). See generally *id.* at 3-106.

[43] *E.g.*, MICH. COMP. LAWS § 791.233 (Supp. 1956). The statute of South Dakota, S.D. CODE § 13.5307 (Supp. 1960), is unusual in its provision of specific detailed regulations, but the parole board is empowered to provide additional regulations.

[44] *Compare* von Hentig, *Degrees of Parole Violation and Graded Remedial Measures*, 33 J. CRIM. L., C. & P.S. 363 (1943), *with* Bates, *On the Uses of Parole Restrictions*, 33 J. CRIM. L. C. & P.S. 435 (1943). See also Goldstein, *supra* note 4, for a discussion of the analogous question of police officers' discretion in the enforcement and non-enforcement of laws.

tive standards for parole revocation are often worded in a manner which encourages subjective prediction of the parolee's future behavior, thereby providing few objective criteria upon which judicial review might be founded.[45] One state's statute expressly forbids judicial review of revocation proceedings.[46] Statutorily prescribed procedural requirements for revocation vary between complete absence of any provision for hearing at one extreme[47] to provision for full hearing with the right to be represented by counsel and to present witnesses at the other.[48] Intermediate jurisdictions prescribe personal appearance by the parolee before the board, but without counsel and in many jurisdictions without witnesses.[49]

[45] Five states provide the very general standard "to have lapsed or to be about to lapse into criminal ways." ARIZ. REV. STAT. ANN. § 31-415 (1956); IND. ANN. STAT. § 13-249 (1956); N.J. REV. STAT. § 2A:167-9 (1951); *but see* N.J. REV. STAT. § 30:4-111 (1937); N.Y. CORREC. LAWS § 216 (Supp. 1960); TENN. CODE ANN. § 40-3617 (1955). In California the board must show "cause," CAL. PEN. CODE § 3063; in Minnesota its purpose must be to prevent escape or "enforce discipline," MINN. STAT. ANN. § 637.06 (Supp. 1960). Some other states set no verbal standard at all. CONN. GEN. STAT. ANN. § 54-126 (1960); IOWA CODE § 247 (1958); NEV. REV. STAT. § 213-150 (Supp. 1959); UTAH CODE ANN. § 77-62-17 (1953); WIS. STAT. § 57.06(3) (1959); WYO. STAT. ANN. § 7-326 (1957).

[46] S.C. CODE § 55-616 (1952).

[47] ARK. STAT. § 43-2808 (1947); CAL. PEN. CODE § 3060; COLO. REV. STAT. ANN. § 39-18-4 (1953); CONN. GEN. STAT. ANN. § 54-126 (1960); IOWA CODE § 247.9 (1958); ME. REV. STAT. ANN. ch. 149, § 49 (1954); MASS. GEN. LAWS ANN. ch. 127, § 149 (1957); MINN. STAT. ANN. § 637.06 (Supp. 1960); MO. ANN. STAT. § 549.265 (Supp. 1960); NEB. REV STAT. § 29.262 (Supp. 1959); NEV. REV. STAT. § 213.150 (Supp. 1959); N.J. REV. STAT. § 2A:167-11 (1951); N.C. GEN. STAT. § 148-61.1 (1958); N.D. REV. CODE ANN. § 12-55-25 (1960); OHIO REV. CODE ANN. § 2965.21 (Baldwin 1958) (board may, however, establish its own hearing requirement); OKLA. STAT. ANN. tit. 57, § 346 (1950); ORE. REV. STAT. § 144.370 (Supp. 1959); R.I. GEN. LAWS ANN. § 13-8-18 (1956); S.D. CODE § 13.5307 (Supp. 1960); TEX. CODE CRIM. PROC. art. 781d, § 22 (Supp. 1960); UTAH CODE ANN. § 77-62-17 (1953); VT. STAT. ANN. tit. 28, § 904 (1959); VA. CODE ANN. § 53-262 (1958); WIS. STAT. § 57.06(3) (1959); WYO. STAT. ANN. § 7-326 (1957). In a few of these states there may be a right to hearing not based on the statute. See Annot., 29 A.L.R.2d 1074 (1953). DAVIS, ADMINISTRATIVE LAW TREATISE § 7.16 at 489 n.9 (1958), suggests that this tendency may be increasing. 9 W. RES. L. REV. 234 (1958) argues that summary return procedures desirably encourage the parole of marginal candidates, although no data is cited in support of this contention. Certainly Michigan, with one of the most liberal return hearing requirements also has one of the highest proportions of parole grants. See note 11 *supra*.

[48] ALA. CODE tit. 42, § 12 (1940); FLA. STAT. § 947.23 (1959); MD. ANN. CODE art. 41, § 115 (1957); MICH. COMP. LAWS § 791.240 (Supp. 1956); MONT. REV. CODES ANN. § 94-9835 (Supp. 1959); W. VA. CODE ANN § 6291 (26) (Supp. 1960); D.C. CODE ANN. § 24-206 (1951). Failure to explain the right to counsel invalidated revocation proceedings in Moore v. Reid, 246 F.2d 654 (D.C. Cir. 1957). Interviews with the Michigan Parole Board indicate that Michigan returnees rarely exercise their statutory right to counsel.

[49] ARIZ. REV. STAT. ANN. § 31-417 (1956); DEL. CODE ANN. tit. 11, § 7714 (1953); GA. CODE ANN. § 77-519 (Supp. 1958); IDAHO CODE ANN. §§ 20-228-29 (1947); ILL. REV. STAT. ch. 38, § 808 (1959); IND. ANN. STAT. § 13-251 (1956); KANS. GEN. STAT. ANN. §§ 62-2248-50 (Supp. 1959); KY. REV. STAT. § 439.440 (Supp. 1960); LA. REV. STAT. ANN. § 15:574.9 (Supp. 1960); MISS. CODE ANN. § 4004-13 (1956); N.H. REV. STAT. ANN. § 607:46 (1955); N.M. STAT. ANN. §§ 41-17-27, 28 (Supp. 1959); N.Y. CORREC. LAW § 218 (Supp. 1960); PA. STAT. ANN. tit. 61, § 331-21a (Supp. 1960); TENN. CODE ANN. § 40-3619 (1955); WASH.

Since the inception of parole late in the nineteenth century as an extension of the pardoning power,[50] courts have made few equal protection or due process inroads upon the statutory scheme of parole. Parole is generally treated as an act of administrative grace, an extramural continuation of imprisonment, or a contract between the parolee and the state, subject under any theory only to the most limited review.[51] However, occasional remedies may be given for departures from statutory standards for parole revocation, either by habeas corpus in state or federal courts[52] or by mandamus in a court having supervisory jurisdiction over the parole board.[53] Nevertheless, even where there are no substantive or procedural guarantees contained in statutes, courts have suggested at least in dicta a willingness to intervene upon a showing of capriciousness.[54]

IV. JURISDICTIONAL ATTACKS

The most legitimate legal attack against a parole return brought about by mental illness appears to be based on equal protection. Such returns are very closely analogous to commitment

REV. CODE § 9.95.120 (Supp. 1959); 18 U.S.C. § 4207 (1958). Denial of a request to be represented by counsel in a revocation hearing has been held not to be a denial of due process under the fifth amendment. Lopez v. Madigan, 174 F. Supp. 919 (N.D. Calif. 1959); 108 U. PA. L. REV. 423 (1960).

50 See generally GIARDINI, THE PAROLE PROCESS 5-16 (1959). Michigan was probably the first state to experiment with parole. See Pub. Acts 1869, No. 145, § 5, providing indeterminate sentences for prostitution. The more general successor to the 1869 legislation, Pub. Acts 1889, No. 228, was declared unconstitutional under the 1850 Michigan Constitution because of its asserted invasion of the pardoning power, People v. Cummings, 88 Mich. 249, 50 N.W. 310 (1891). Article V, section 28, of the 1908 constitution annulled this decision.

51 See, *e.g.*, *In re* Casella, 313 Mich. 393, 21 N.W.2d 175 (1946), in which the Michigan court reversed a lower court's habeas corpus decision which had released a returnee on the grounds of the parole board's failure to show cause for his arrest. *But see In re* Colin, 337 Mich. 491, 60 N.W.2d 431 (1953), in which the discharge of a returnee was upheld after his arrest on a return warrant for a parole violation twenty-seven years earlier, during which period the state had twice failed to exercise its right of detainer while the prisoner was held in other jurisdictions. See generally Note, 65 HARV. L. REV. 309 (1951); Annot., 29 A.L.R.2d 1074 (1953).

52 Fleenor v. Hammond, 116 F.2d 982 (6th Cir. 1941); habeas corpus to a state prisoner on the theory that parole is a vested right and its revocation requires procedural protection. See also *In re* Colin, *supra* note 51. *Contra,* Hiatt v. Compagna, 178 F.2d 42 (5th Cir. 1949), *aff'd per curiam,* 340 U.S. 880 (1950); *In re* Varner, 166 Ohio St. 340, 142 N.E.2d 846 (1957). See generally DAVIS, ADMINISTRATIVE LAW TREATISE § 7.16 (1958).

53 See United States *ex rel.* Nicholson v. Dillard, 102 F.2d 94, 96 (4th Cir. 1939); United States *ex rel.* Rowe v. Nicholson, 78 F.2d 468, 471 (4th Cir.) *cert. denied,* 296 U.S. 573 (1935). Robbins v. Reed, 269 F.2d 242 (D.C. Cir. 1959), is an unusual case involving use of declaratory judgment procedure to review a departure from statutory form.

54 *E.g.,* Anderson v. Alexander, 191 Ore. 409, 440, 229 P.2d 633, 642 (1951).

for mental illness since both are based on the possible danger that the parolee's mental illness creates for himself and his community. Yet the mental health issue was either not raised at the parolee's initial conviction or, if it was raised, the state successfully asserted at least a minimum degree of mental health.[55] In contrast, at the juncture of parole revocation the state has reversed its ground by asserting in effect that the parolee's mental health is in serious doubt. The result, as in a commitment proceeding based on considerations of public safety, is custody but, unlike commitment, custody in a penal institution. In contrast to summary administrative re-imprisonment, Michigan law, which is typical in this respect, provides four statutory procedures under which a mentally ill member of the general population may be placed into indeterminate custody: civil commitment,[56] criminal commitment on a finding of incompetence to stand trial on a criminal charge,[57] criminal commitment after a successful criminal defense of insanity,[58] and commitment as a criminal sexual psychopath collateral to a criminal proceeding.[59] The first of these procedures generally results in placement in any of several state hospitals;[60] the last three, in the State Hospital for the Criminally Insane at Ionia. Whether he is adjudged "civilly" or "criminally" insane, an individual committed under any of these four laws is placed under the jurisdiction of the Department of Mental Health, not the Department of Corrections.[61] Each of these statutes attempts to provide definite substantive standards, administered by rigid procedures. Because of the availability of statutory grounds for release of persons improperly committed under the statutes,[62] the Michigan court has never reached due process arguments in mental

[55] See text accompanying notes 4-6 *supra*. A conceivable exception would be where the court raises a competency question, the defendant successfully asserts his competency, and a conviction follows.

[56] MICH. COMP. LAWS §§ 330.20-.21 (Supp. 1956).

[57] MICH. COMP. LAWS § 767.27 (1948).

[58] *Ibid.*

[59] MICH. COMP. LAWS §§ 780.501-.507 (Supp. 1956).

[60] If an individual who is civilly committed has been convicted of a crime at any time, it is required by statute that he be committed to the State Hospital for the Criminally Insane. MICH. COMP. LAWS § 330.40 (1948). *But see* note 41 *supra*.

[61] MICH. COMP. LAWS § 330.11 (Supp. 1956), § 330.40 (1948).

[62] Civil commitment: *In re* Allison, 336 Mich. 316, 58 N.W.2d 90 (1953); *In re* Fuller, 334 Mich. 566, 55 N.W.2d 96 (1952); People v. Backhaut, 312 Mich. 707, 20 N.W.2d 780 (1945); *In re* Gordon, 301 Mich. 224, 3 N.W.2d 253 (1942). Criminal Sexual Psychopath Act: People v. Wasker, 353 Mich. 447, 91 N.W.2d 866 (1958); *In re* Irvine, 351 Mich. 1, 87 N.W.2d 103 (1957); *In re* Carter, 337 Mich. 496, 60 N.W.2d 433 (1953); *In re* Kelmar, 323 Mich. 511, 35 N.W.2d 476 (1949).

commitments.[63] The very existence of statutory commitment processes for the general population would seem, however, to raise questions of equal protection in the handling of mentally ill parolees. *Is it rational to provide for mentally ill parolees a special summary procedure leading to "commitment" in prison, while similarly disordered people who are not also parolees are committed to hospitals under statutory safeguards?* If the parolee's initial conviction may be said to have related at all to his mental condition, it was an affirmation of his sanity. It seems not only unfair but also illogical to use that conviction as the basis of jurisdiction for what is in effect a special form of mental commitment. Moreover, an analogous equal protection argument was successfully used to invalidate classification aspects of the Michigan sterilization statutes, which applied only to institutionalized defectives.[64]

An additional collateral attack might be based on the differences between the commitment statutes,[65] which are specific in their grants of power to the courts and limit them in their substantive standards and procedures, on the one hand, and the Michigan legislature's general delegation of powers to the Parole Board on the other.[66] It might be argued that the legislature, not foreseeing the serious intermixture of mental illness and penal administration, intended that confinement for reasons of mental illness should be governed entirely by the specific delegation of power to the courts and not in part by the very general delegation to the Parole Board.[67] In Michigan, however, this argument lacks force, for the statutory provision for the care of mentally ill prisoners before they might be paroled[68] suggests that the legislature did in fact foresee the commingling of mental and penal problems in the parole process. So too does the existence of a separate Psychiatric Clinic within Jackson Prison. In support of an opposite conclusion, however, a Michigan Attorney General's opinion states that commitment of a parolee under the Criminal Sexual Psychopath Act,[69] which commitment was intended to stand in lieu of punishment,

[63] *But see* Shields v. Shields, 26 F. Supp. 211 (W.D. Mo. 1939).

[64] Smith v. Wayne Probate Judge, 231 Mich. 409, 204 N.W. 140 (1925). A previous version of the same statute had been invalidated in Haynes v. Lapeer, 201 Mich. 138, 166 N.W. 938 (1918).

[65] See notes 56-59 *supra*.

[66] MICH. COMP. LAWS § 791.233 (Supp. 1956).

[67] See generally 2 SUTHERLAND, STATUTORY CONSTRUCTION § 5204 (3d ed. 1943).

[68] MICH. COMP. LAWS § 791.233 (Supp. 1956). *Cf.* COLO. REV. STAT. ANN. §§ 39-18-6 to -9 (Supp. 1957), which makes the parole board responsible for initiating commitment proceedings for parole candidates whose sanity appears doubtful.

[69] MICH. COMP. LAWS §§ 780.501-.507 (Supp. 1956).

not only should prevent fresh sentencing for the acts bringing about the commitment but also should prevent parole revocation on the same grounds.[70] By invoking a statutory absolution of criminal responsibility to prevent revocation of parole, the opinion treats the two remedies as inconsistent. It is implicit in this analysis that the legislature meant parole revocation to remain primarily a sanction against responsible misbehavior, not an auxiliary means of accomplishing the same ends as commitment.

V. PROCEDURAL REFORMS WITHIN THE ADMINISTRATIVE PROCESS

Even if these collateral attacks on the board's jurisdiction to hear mental cases fail, as well they might if more appropriate mental institutions were to become available within the penal system, sound policy dictates a modification of revocation procedures to provide fair handling of victims of mental illness. Courts may be able to implement this policy by means of statutory construction or, on narrow grounds, by constitutional attack.

Analogy[71] to the specific statutes governing court commitments might require that even if the parole board may "commit" parolees back into the penal system, in doing so they must follow standards similar to those provided by the commitment statutes for the guidance of courts.[72] Although the commitment statutes establish requirements for professional guidance that are not entirely uniform — the strictest requirement being the testimony of three psychiatrists required by the Criminal Sexual Psychopath Act[73] and the minimum of two "reputable physicians and other credible witnesses"[74] required for criminal commitment — there is at least a statutory pattern requiring some competent testimony regarding mental condition in support of commitments. To be consistent with this pattern, parole boards too should be required to hear a minimum of competent evidence. Procedurally, such evidence should be of facts, not conclusions, as specifically required by

70 [1947-1948] MICH. ATTY. GEN. BIENNIAL REP. 710. This opinion seems not to have been tested in the courts, since in actual parole administration its effect has been avoided by predicating return upon a technical violation of parole regulations — failure to inform of whereabouts, excessive drinking etc. — at the time of the events leading to the Criminal Sexual Psychopath finding.

71 For a discussion of this judicial technique, see Stone, *The Common Law in the United States,* 50 HARV. L. REV. 4, 13 (1936); Frank, *Civil Law Influences on the Common Law — Some Reflections on "Comparative" and "Contrastive" Law,* 104 U. PA. L. REV. 887, 889 (1956).

72 See generally 2 SUTHERLAND, *op. cit. supra* note 67, § 4702.

73 MICH. COMP. LAWS § 780.504 (Supp. 1956).

74 MICH. COMP. LAWS § 767.27 (1948).

the civil commitment[75] and sexual psychopathic[76] statutes and as impliedly required by the word "testify" in the incompetency-insanity statute.[77] Each statute requires testimony and cross-examination in an open hearing at which the subject is present with right to counsel, a pattern with which Michigan parole revocation practice, but not that of many other jurisdictions, is consistent.[78] In general, if it must be allowed at all, a parole return because of mental illness should be by a rational process designed to protect the parolee's interests, even if his freedom is no more than a privilege.

If special procedural rights are to govern parole returns because of mental illness, returns of this kind must, of course, be identified. Lip-service to any of a number of technical parole violations may obscure the real reasons for the return of a mentally ill parolee.[79] Indeed, "Failure to keep parole officer informed of whereabouts at all times," which appears on many parole violation reports, is very nearly a blank check.[80] So also is "excessive [or in many states, "any"] use of alcoholic beverages."[81] "Leaving the assigned county," another frequently-reported violation, may be an intentional flaunting of regulations or it may be an ambiguous tendency to wander that is symptomatic of mental disturbance. To argue that the reason for a parolee's return may adequately be so characterized, and his rights thereby determined, without a requirement for a conscientious initial revocation inquiry,[82] is to ignore the obscurity of motives for urging return which arise from the complex personal forces which mental illness sets in motion among the parolee, his family,[83] his community, and the

75 MICH. COMP. LAWS § 330.20 (Supp. 1956).
76 MICH. COMP. LAWS § 780.504 (Supp. 1956).
77 MICH. COMP. LAWS § 767.27 (1948).
78 See text accompanying notes 54-55 *supra*.
79 See note 20 *supra*. Michigan generally uses a medical return, attempting thereby to emphasize the non-punitive aspects of such a suspension. In theory all medical returns are merely designed to provide treatment; for example, a parolee victim of appendicitis might be returned to the prison hospital for his appendectomy. In reality, however, it is difficult to escape the conclusion that a mentally ill parolee returned on a medical warrant has been brought back primarily for custody. Significantly, such an individual is often colloquially called a "medical parole *violator*." Treatment is not automatic. See, *e.g.*, the appendix case histories of *A.C.*, *P.H.*, *C.O.* and *N.W.*, who were released to the general prison population shortly after having been returned on medical warrants. Occasionally, however, mentally ill Michigan parolees are returned on violation warrants. See, especially, the impasse reached in the case of *J.M.* See also, *e.g.*, *C.J.*, *A.K.* and *C.O.*, appendix.
80 *But see* the appendix case history of *J.M.*
81 See von Hentig, *supra* note 44, at 369-70.
82 See generally DAVIS, ADMINISTRATIVE LAW TREATISE §§ 7.19-.20 (1958).
83 See, *e.g.*, *J.B.*, *A.C.*, *S.G.* and *N.W.*, appendix.

parole officer himself.[84] Procedural and substantive due process are as inextricably intertwined here as they are in the commercial proceedings where restraints on administrative caprice are more firmly established.[85]

A right to procedural safeguards against administrative caprice is not, however, completely dependent upon the mentally ill parolee's return being characterized as the result of mental illness. A requirement for special treatment may arise even in an outright "violation" return. Unlike participants in more conventional administrative processes, who are generally quite able to protect their own interests, a mentally ill parolee may be too irrational or self-punishing to deny or explain the facts upon which his return is founded. An administrative process involving so inept a primary participant appears grossly unfair. To prevent advantage from being taken of the parolee's mental inadequacy, the initial question should be directed toward the parolee's ability to protect his own interests. If this ability is found lacking, the parole board should not proceed further in what would be a one-sided inquiry to fix the stigma of parole violation. Instead, fairness dictates that the question of violation should be left unanswered at least until an adequate inquiry is possible, and that the parolee be treated or institutionalized by whatever process is appropriate to his mental illness. The rationale for this initial inquiry into the individual's ability to protect his own interests is, of course, identical to that of determining competency at the time of a criminal trial,[86] but with the important difference that the criminal trial deals with a defendant having a substantive right to be free, while the parolee's freedom is said to be no more than a privilege granted by administrative grace.[87] Nevertheless, even if there are in fact no substantive rights for mentally ill prisoners, there appears to be a trend among due process decisions toward imposing requirements of fairness in administrative proceedings where mere privileges appear

[84] See note 15 *supra.*

[85] *But see* Anderson v. Alexander, 191 Ore. 409, 419, 229 P.2d 633, 638 (1951) (dictum), which promises to protect the parolee against caprice even without provision for a return hearing. The forthright "medical return" used in Michigan and in several other jurisdictions, see notes 20 and 79 *supra,* is treated in Michigan as a suspension and not a revocation of parole, so that as a matter of practice the statutory return hearing is not offered. Although there is no problem of characterization of the return, the fact that there is no hearing opens the possibility of unjustified returns brought about by interpersonal pressures.

[86] See Comment, 9 MICH. L. REV. 1078 (1961).

[87] See text accompanying notes 43-54 *supra.*

to be in question.[88] Even in dealing with prisoners, the power of government begets a responsibility for it to justify its actions. Such responsibility hardly seems fulfilled by a revocation hearing for an irrational parolee accused of a violation.

Whatever precise mode of attack may succeed in eliminating or modifying the mental parole return process, it will tend to introduce into the penal process a degree of rationality heretofore lacking, benefiting both the mentally ill parolees themselves and, indirectly, the mentally ill prisoners who have not reached parole. Contrary to the proposition that due process ends with the conviction of a criminal,[89] the need for an appearance of rationality and fairness remains at least as great during imprisonment and its related processes. This is especially true for the mentally ill prisoner, for whom reality has already become distorted. Administrative caprice plays into the pathology of a prisoner, whether he is labeled "sane" or "insane." The more unfair he can make the law appear, the more easily he may justify his own battle against the society that the law represents.

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[88] *Compare* Bailey v. Richardson, 182 F.2d 46, 58 (D.C. Cir. 1950), *aff'd per curiam*, 341 U.S. 918 (1951): "Due process of law is not applicable unless one is being deprived of something to which he has a right," *with* Slochower v. Board of Educ., 350 U.S. 551, 559 (1956): "This is not to say that Slochower has a constitutional right to be an associate professor of German at Brooklyn College. The State has broad powers in the selection and discharge of its employees, and it may be that proper inquiry would show Slochower's continued employment to be inconsistent with a real interest of the State. But there has been no such inquiry here. We hold that summary dismissal of appellant violates due process of law." *But cf.* Beilan v. Board of Educ., 357 U.S. 399 (1958). See also United States *ex rel.* Acardi v. Shaughnessy, 347 U.S. 260 (1954).

"The proposition may still be perfectly sound that one who lacks a 'right' to a government gratuity may nevertheless have a 'right' to fair treatment in the distribution of the gratuity." DAVIS, ADMINISTRATIVE LAW TREATISE § 7.12, at 456 (1958). See generally *id.* § 7.12.

[89] For criticism of this notion, see Tappan, *The Legal Rights of Prisoners*, 293 ANNALS 99 (1954).

APPENDIX

Several general observations apply to all of the twelve returnees upon whose cases this study was based.[90] The crimes for which they were initially convicted were all of a uniformly low order of criminal competence, and all but *A.K.*'s were of a non-violent nature. None of the twelve were represented by private counsel. No serious consideration appears to have been given to defenses based on mental illness even in the three cases in which there is some suggestion that the possibility was recognized. Each of the twelve pleaded guilty at his trial. None has ever appealed or otherwise sought review of his conviction. Beyond these generalizations, however, the cases vary widely in the degree and nature of the maladies, the circumstances of return, and the treatment given after return.

J.B.[91]

J.B. is a twenty-five-year-old male who was born on a farm in the deep South. He had once previously been civilly committed to a state mental hospital. He had also received treatment in federal mental institutions while serving time for mail theft, his one previous felony conviction. On the advice of appointed counsel, *J.B.* pleaded guilty to breaking and entering in the daytime and he was sentenced to two to five years. After serving his minimum term, he was paroled to his matriarchal family. He was unable to hold a job. After eight months of parole his family attempted to have him civilly committed, but this proceeding failed because of a technical defect. "Rather than subject [him] to the stress of another civil proceeding," the parole officer recommended a medical return to prison which was granted. *J.B.* remains in the Psychiatric Clinic at present, although there appears to be little chance of his satisfactory recovery. In his interviews he was unable to recall his abortive civil commitment and repetitiously asserted that his return resulted from a failure to arrange properly for his driver's and chauffeur's licenses.

A.C.[92]

A.C., a garrulous thirty-year-old male, probably a fourth felony offender, was charged with larceny in a building. Apparently his appointed counsel doubted *A.C.'s* competency to stand trial but abandoned the point after a conference in chambers. *A.C.* pleaded guilty and received a two and a quarter to four year sentence. He then attempted to escape from the prison farm to which he had been committed, and upon his almost-immediate recapture, received an additional year and a half to four and a half year term. While serving his combined terms, he was characterized

90 For the source of this sample, see note 12 *supra*.
91 See notes 13, 41, and 83 *supra*.
92 See notes 13, 39, 79, and 83 *supra*.

as playing a "goofy kid" role to cover an underlying manner of extreme distrust. Several incidents of friction, generally the result of clumsy attempts to be friendly, marked his stay in prison. He eventually reached the Psychiatric Clinic and, because of difficulty in receiving psychiatric clearance and in locating a home and job, was delayed in receiving parole until he had served all but two years of his combined maximum sentences. Eventually he was paroled in the custody of his mother and stepfather although he had previously asked to be paroled to his father. His mother, whom the parole officer described as "passive possessive," seemed only mildly interested in having responsibility for her son, and it appears that hostility between the two increased as his parole continued. He failed to keep employment and began drinking excessively, both technical violations of parole standards which his parole officer tolerated. Then his mother, although *A.C.* insists at his stepfather's instigation, complained to his parole officer of two episodes in which *A.C.* had smashed furniture in their apartment. The parole officer attempted to procure a psychiatric evaluation, no records of which are available. Subsequently *A.C.* described hallucinations of impending invasions from outer space and shortly afterward he was returned to prison on a medical warrant. Apparently visibly relieved to be back in prison, he received brief treatment in the psychiatric clinic and was placed in the general prison population.

N.E.[93]

N.E. is a twenty-year-old male who is infatuated with automobiles. He pleaded guilty to the unauthorized driving away of an automobile, his first felony, although his record indicates a number of prior arrests for minor offenses involving automobiles; local police regarded him as an incorrigible troublemaker. He had neither finished school nor begun any steady employment. Although there may have been discussion of his mental state between his appointed counsel and the judge in chambers, *N.E.* was convicted and received a year and a half to five year sentence in the present case. He began his term at a reformatory farm where, after an initially satisfactory adjustment, he anxiously complained about attacks from homosexual fellow inmates and expressed a fear of violent death. He was transferred to Jackson, where he received treatment at the Psychiatric Clinic, and was then returned to the farm. He was once denied parole because of his treatment status. There is also some suggestion that his family was not enthusiastic over the prospect of his return. They, however, became more receptive and *N.E.* was paroled to his parents. Almost immediately he began to drink heavily and lost his job. He technically violated parole by acquiring an automobile. He was arrested on a complaint of assault and battery and was found to be carrying a knife. The charge was dropped at the preliminary hearing stage — possibly because

[93] See notes 13 and 14 *supra.*

of the influence of his mother. A week later, however, his mother complained to the parole officer that *N.E.* had thrown an automobile generator at her when she interrupted his work and had smashed furniture in the house on other occasions. As the cumulative result of these incidents, the parole officer decided to start violation return proceedings. *N.E.* went to jail. There his behavior became extremely bizarre. "I don't care what you do, just get these bugs off me." He also constantly washed, fought, cried, and accused his jailers of having "killed my mother and father and shipped them to Canada in a golden box." He awaited his parole return, which was changed from a violation to a medical return, in solitary confinement. His bizarre behavior continued after he reached the Psychiatric Clinic at Jackson. Although in his interview, which took place three months after his return, he was initially calm, even flat in his responses, *N.E.* eventually reverted to complaints of "bugs," emotional accusations of killing his parents, excited reminiscences about his dog — punctuated by barks — and pronouncements that he was the son of Jesus Christ. Apparently having deteriorated during his parole, *N.E.* clearly appears to be civilly committable. He was aware of this possibility and indicated a desire that it take place.

S.G.[94]

S.G. is a thirty-year-old male born on a farm during the Depression. His father died when he was seven and by the time *S.G.* was ten he had been in minor juvenile scrapes for which he was placed in a boys' vocational school. There his troubles continued with run-aways, poor schoolwork — although *S.G.* is "bright-normal" — and some homosexual activity. The school released him to an aunt's farm, where he stayed only a short time before he was civilly committed to a state hospital because of complaints of his acts of bestiality with cattle. His sanity has never been officially restored since this commitment. He achieved a convalescent status from the hospital while he was in his early twenties, a status which allows increasing periods of freedom. During one of these periods, *S.G.* met and married a widow much older than himself — in his description — "to get a more normal sexual outlet." The two of them lived a withdrawn life together following carnivals around the state. Then *S.G.* was arrested for breaking and entering an automobile; he pleaded guilty without counsel. Routine psychiatric evaluation during his two-year minimum term classified him as a simple psychotic in satisfactory remission. After the minimum term he was released on parole and he eventually began to live at the home of his sister and brother-in-law. He remained there for four months and then was charged by the brother-in-law with molesting the couple's two children. *S.G.* was tried on this charge, and in contrast to

[94] See note 83 *supra*.

his initial conviction he pleaded not guilty, took appointed counsel, and despite the odds against a sexual deviate in a jury trial, was acquitted. Nevertheless, he remained in jail for another week and at the end of the week his prison parole was suspended on a medical warrant because of the episode for which he had already been tried and acquitted. Now in the Psychiatric Clinic, he explains that his medical return was for treatment of his hemorrhoids. *S.G.* denies both the fact of his previous commitment and the possibility that the child molestation charges were well-founded.

P.H.[95]

P.H. is a twenty-five-year-old male who had two previous larceny, one narcotics, and a number of drunk and disorderly, convictions. Appearing without counsel, he was convicted on a plea of guilty of larceny in a building for having stolen a bottle of wine; he was sentenced to one to four years. At the time of this conviction *P.H.* was on probation for one of his previous convictions. He served his minimum sentence at Jackson, during which his only treatment was voluntary participation in Alcoholics Anonymous. On release on parole he lapsed back into a series of drunk and disorderly arrests, a problem which he attempted to overcome by seeking treatment at a state alcoholic rehabilitation center. His therapist there, who apparently achieved little success in treating *P.H.*'s alcoholism, contacted the parole officer and recommended his return; this was effectuated by means of a medical warrant. Back in prison, however, *P.H.* was discharged to the general prison population because of the Psychiatric Clinic's present inability to offer therapy for alcoholism. Future therapy probably will be difficult in view of *P.H's* belief that his therapist at the alcoholic rehabilitation center betrayed him.

C.J.[96]

C.J. is a nervous, effeminate twenty-year-old male who violated probation for another conviction by the unauthorized driving away of an automobile. Having elected against representation by counsel—he hadn't understood, he said, that the judge had been referring to a "state lawyer" —he pleaded guilty and received a one to fifteen year sentence. Although the circuit judge had noticed *C.J.'s* curiously withdrawn manner and recommended a minimum-security camp, *C.J.* was sent to a reformatory, where he served his minimum sentence. In spite of the fact that his parents provided an undesirable home, he was paroled in their custody because of the lack of any satisfactory alternative. During the four months in which he remained on parole, *C.J.* attempted various unskilled jobs in lumberyards and restaurants. Eventually he sought help from his parole

[95] See notes 19, 39, and 79 *supra.*
[96] See notes 13, 19, and 79 *supra.*

officer for what he described as his fears of homosexuality. The parole officer persisted in questioning him and eventually coaxed out a disturbing recital of bizarre sexual behavior going back to the parolee's fourth year of age. *C.J.* confessed to acts of voyeurism and transvestitism during his current parole. Shortly after this confession *C.J.* was arrested for window-peeping and while he was in jail, the parole officer arranged for evaluation of his case by a psychiatrist in a state hospital. The latter reported that although the parolee was not overtly psychotic he was frightened of his passive homosexuality and in danger of aggressively acting out his desire to overcome it. This report indicated that treatment was not practical on an outpatient basis but suggested to the parole officer that *C.J.* might be dangerous to the community. These fears were increased by *C.J.'s* unsubstantiated story of kidnapping and abusing a woman. Faced with the psychiatrist's warning and denial of further professional help, the parole officer reported *C.J.*'s failure to inform of whereabouts and the window peeping episode as violations. As a result *C.J.* was returned to prison on a violation warrant. He was directed to the psychiatric cell block of Jackson Prison, where he remains at present. After a short period of therapy he requested to be taken out of treatment which appeared to have been relatively ineffective because of his immaturity. In several statements C.J. described a fear of being transferred to Ionia State Hospital for the Criminally Insane.

A.K.[97]

A.K. is a thirty-five-year-old male who had been a telephone linesman and installer. Earlier records describe him as "lively" and "talkative," but at the time of his interview he had deteriorated considerably and had become withdrawn and uncommunicative. A first offender, on the advice of appointed counsel *A.K.* had pleaded guilty to assault with intent to rape. This plea appears to have been a "bargain" in a curious trial on an information for statutory rape; the complaining witness may herself have been an incompetent or at least so feeble-minded as to have been unconvincing. While *A.K.* served his minimum sentence of two years at Jackson Prison he was only a moderately satisfactory prisoner, constantly assertive and sensitive about his alleged sexual prowess. He received shock and drug therapy at the Psychiatric Clinic during this portion of his sentence. He was paroled to his wife and child in a small town in Michigan, but left after he lost his job because, he said, his employer learned that he was a parolee. At about this time his mother died. Shortly thereafter, while on an unauthorized job-hunting expedition in another state, *A.K.* attempted suicide by connecting a hose to his automobile exhaust. *A.K.* may have suffered permanent organic brain damage from this attempt. Upon his partial recovery he was placed in jail as a parole violator. While

[97] See notes 14 and 79 *supra*.

in jail he became violently emotional and was returned on a violation warrant which recited that he had failed to keep reasonable hours and had left the state without permission. Since his return *A.K.'s* recovery has been slight, and it appears that he will be placed in a Veteran's Administration Hospital after completion of his maximum sentence.

J.M.[98]

J.M. is a thirty-year-old male of doubtful legitimacy. Encouraged by his step-father to steal, he led a shadowy, disrupted childhood. As a result of his unruliness and unreceptive attitude, *J.M.* was eventually placed in a state home for the feeble-minded. There he remained for several years, indulging in a variety of sexual and homosexual activities, until authorities discovered that he actually had at least average intelligence. *J.M.* then was released and immediately relapsed into a routine of menial work, excessive drinking, and petty delinquency. This culminated in a charge of committing indecent liberties with children; he pleaded guilty without counsel. The record of the trial suggests that *J.M.'s* state home history was discussed with the trial judge but did not influence his sentencing. *J.M.* went on parole after serving his minimum sentence and immediately married a dull-witted, promiscuous woman, who soon bore two children. Squabbles over cruelty, neglect, non-support, and indecent liberties with the children brought about revocation of this first parole, and *J.M.* thereafter lost all contact with his wife. He was later re-paroled to his sister. Again he lapsed into child-molestation, and on the theory *J.M.* had not informed him that he was molesting children, his parole officer arranged his reimprisonment on a violation warrant for "failure to inform parole officer of whereabouts and activities." *J.M.* returned to Jackson and settled satisfactorily into prison routine, working in the prison cannery. On review of his return, however, the Parole Board ruled that even the broad language of "failure to inform" would not support a violation return on the theory adopted by the parole officer. Instead, the board validated *J.M.'s* return by changing it to a medical return. As a result of this formal change from revocation to suspension, *J.M.* was automatically transferred from the cannery to the Psychiatric Clinic, where he will remain until the expiration of his sentence in the spring of 1961.

C.O.[99]

C.O., a thirty-year-old male, had been sentenced to three to fifteen years for breaking and entering in the nighttime. He had a number of previous felony convictions, all, with the exception of robbery, for non-violent crimes. His present arrest was itself a violation of an outstate probation,

[98] See note 79 *supra.*
[99] *Ibid.*

and he had previously violated parole on another sentence. In his extensive prison experience, *C.O.* had acquired a considerable command of the jargon of the psychiatrists and social worker and had become a "pro" in the explanation of his own behavior in terms of hostility and aggression. He grandiosely confessed at the time of arrest that led to his present conviction — after he had called attention to himself by leaving his hat at the scene of a burglary and being quite vocal in his attempts to peddle his proceeds. At his arraignment he pleaded not guilty, but then entered a guilty plea at trial. *C.O.* served time at a prison farm — from which he tried to escape — and at two state prisons. He made one ineffectual attempt at suicide during this period but resisted psychiatric treatment. "You have to be a fairy or a switch to get anywhere." He was paroled in spite of the problematical risk. This parole, which was the shortest of the twelve studied, started inauspiciously; *C.O.* was drunk when he appeared for his initial interview with his parole officer. He refused to maintain the hours imposed by the Salvation Army dormitory to which he had been paroled. Shortly afterward, two barmaids in a seamy district complained of *C.O.'s* forcing his attentions on them, often with threats of physical abuse. Once he posed as a vice squad officer, another time as a parole officer. He was convicted of the misdemeanor — creating a disturbance — as a result of one of these complaints. This conviction, together with technical violations, was an "automatic violation" of parole. While awaiting return to prison, he ineffectually attempted suicide by slashing at his wrists with the edge of a crucifix. Although there can be little doubt about the fairness of his return, it appears that the nature of *C.O.*'s behavior cannot be clearly defined as either altogether "criminal" or altogether "insane."

C.S.[100]

C.S., a bland, stocky male of twenty-five, received two to fifteen years for breaking and entering in the nighttime. He had just returned to the state after the failure of his marriage, and at the time of his sentencing he was under detainer for armed robbery in another state. Otherwise, he had no previous felony convictions. *C.S.* began his sentence at a reformatory, but was transferred to Jackson for clinical attention after going into a catatonic state as a result of what he described as threats and innuendoes by other inmates. His reaction to treatment was good. At the completion of his minimum sentence *C.S.* was paroled under detainer. He pleaded guilty to his out-of-state robbery indictment and soon was released after treatment at a hospital in that state. He returned to Michigan and began his parole routine. After about four months he was arrested while driving a stolen automobile and placed in jail. There *C.S.* "blacked out" into another catatonic state. He was taken to a hospital and given medical

[100] See note 18 *supra*.

treatment. When he recovered consciousness and attempted forcibly to leave, he was overpowered, strapped down, and given a heavy sedative. While he was unconscious from the sedative there seems to have been a conference between his parole officer, the prosecutor, and the circuit judge who would have tried the automobile case. The three agreed upon a medical return in lieu of either trial or commitment, and local police took *C.S.* to Jackson prison before he regained consciousness. He remains there under treatment in the Psychiatric Clinic.

E.T.[101]

E.T. is a dull-witted twenty-five-year-old male who had previously been arrested for minor juvenile offenses. His father, who was similarly dull-witted, may have encouraged his petty delinquency. Unrepresented by counsel in his present trial, *E.T.*, hoping to receive probation, pleaded guilty to breaking and entering in the nighttime. Instead he was sentenced to three to fifteen years. He began his sentence in a reformatory, but was transferred to Jackson for psychiatric evaluation because of his lack of response to supervision. Evaluation seems to have been attempted, but no therapy was tried. Although once passed over because of his mental condition, *E.T.* was eventually granted parole at his parents' home. His parole officer tolerated his unemployment and a jailing on a disorderly conduct charge, but after he had been on parole for six months, he was arrested as an accessory to breaking and entering and to driving away an automobile. Unable to raise bail, *E.T.* waited in jail about six months before trial; during this time he signed a confession to the automobile incident. An appointed lawyer advised him to plead incompetence, but his parole officer — whom *E.T.* described as "a wonderful guy" — suggested that he plead guilty. The case never came to trial, for he was transferred to a state hospital for a 60-day observation period in the hope that he could be committed as feeble-minded. After his hospital stay had been extended without legal authority to almost a year, he was transferred to Jackson Prison on a medical return. Although *E.T.* remains in the Psychiatric Clinic, classified a simple psychotic, he has not yet received treatment.

N.W.[102]

Possibly at the request of his appointed counsel, *N.W.*, a twenty-five year old male, was evaluated at a psychiatric clinic before his conviction for driving away an automobile without authorization, but there were no practical results from this evaluation, and *N.W.* was sentenced to eight months to five years imprisonment. He had two previous convictions of a similar nature and three for larceny. His father had once been the com-

[101] See notes 13 and 41 *supra*.
[102] See notes 13, 39, 41, 79, and 83 *supra*.

plainant on a probation violation. *N.W.* served about a year of his sentence during which his cell block adjustment was good although he remained irresponsible in work. He was married, but his wife left him during his imprisonment. Therefore he was paroled to his father's home. There *N.W.* remained unsettled. He had no job and became involved in family arguments and drinking; allegedly he forced his attentions on his step-sister. After two or three months of conflict, his father had him committed to a state mental hospital. That institution released him in a convalescent status, and he left the state—a technical violation of parole. While out of the state he was convicted of larceny and served a short sentence. When *N.W.* returned to Michigan he was recommitted to the state hospital, possibly to avoid a parole return. Upon his discharge from the hospital, he was returned on a medical warrant to Jackson. There he seemed not to be interested in therapy and was soon discharged to the general prison population.