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LEGAL PERVERSIONS: THE CREATION OF THE SEXUAL CARCERAL STATE

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For my parents

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ABBREVIATIONS

ACLU	American Civil Liberties Union
ESP	Emotional Security Program
SVP	Sexually Violent Predator

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one to spend years thinking and writing about, especially while experiencing the isolation of a pandemic. Without Camila's presence in my life, these would have been much darker years.

ABSTRACT

This dissertation documents the rise of what I term the "sexual carceral state," a network of laws, civil regulations, and institutions developed in the twentieth-century United States to punish and control people considered sexually deviant and dangerous. Most prominently, in the midcentury, states across the country passed sexual psychopath laws—also called psychopathic personality, sexually dangerous person, and mentally disordered sex offender laws—which allowed for the indefinite civil detention of people deemed mentally abnormal and dangerous. Although the sexual psychopath laws adopted the language of medicine and treatment, they were, I argue, a means to circumvent constitutional rights granted to defendants in prosecutions and statutory limits on sentences. They enabled the indefinite preventive detention of people accused of serious sexual violence but also of queer people who engaged in consensual sex, Black men who crossed racial boundaries, and people accused of minor transgressions.

This dissertation shows that the construction of the sexual carceral state began in the 1910s and 1920s, decades earlier than has been established in existing scholarship, as the public grew alarmed at newspaper coverage of sex crimes committed by so-called "morons"—people who were thought to suffer from intellectual, affective, or moral defects. These panics drew attention to male sexual violence and sexual variation, which authorities sought new ways to control. During this period, psychopathic laboratories looked for deviants hidden among the populations passing through courts, police departments, and prisons while police departments in major cities developed lists of suspected deviants who might be dangerous. Starting in the 1930s, states across the country passed sexual psychopath laws. Finally, a few decades later, some states developed special institutions to confine people accused of sex offenses.

This dissertation also reveals how the people targeted by the sexual carceral state contested its rise—particularly the sexual psychopath laws. It explores previously unexamined evidence, including case records, correspondence between lawyers and people detained as sexual psychopaths, and detainees' writings. I show that by the 1970s, litigation brought by people detained under sexual psychopath laws had established rights to greater procedural protections in psychopath proceedings, to treatment, and against detention in prisons. These changes, I argue, made the sexual psychopath laws less useful to prosecutors, more expensive for states, and less attractive to those who wanted a more punitive approach to sex crime. As a result, throughout the 1970s and 1980s, many states repealed their sexual psychopath laws or stopped using them, which led indirectly to the passage of new sex offender regulations in the 1990s. Despite the complicated nature of its legacy, the litigation against sexual psychopath laws forced courts to begin to regulate mental hospitals, brought attention to psychiatric abuse and neglect, and weakened a tool that states had used to regulate queer sexuality.

This dissertation offers new insights into the origins of sex offender legislation, prisoner and patient rights activism, the relationship between law and psychiatry, the regulation of sexuality, and the criminal legal system in the twentieth-century United States.

INTRODUCTION: THE SEXUAL CARCERAL STATE

In early 1954, Embra Maddox filed a petition for a writ of habeas corpus, without the assistance of counsel, from his jail cell in the State Prison of Southern Michigan. Maddox had been incarcerated in the state prison since 1952 without being convicted of a crime. In the spring of 1952, police arrested Maddox, a Black man, for attempted assault based on a phone call he made to a white woman from whom he was attempting to rent a room.[1] The record does not reveal what he said during the call or why it led to his arrest. Maddox testified that when police officers were preparing to release him, they discovered that his romantic partner was a white woman. They became furious, beating him and calling him a racial slur.[2] Rather than charge him with a crime, authorities charged him with being a "criminal sexual psychopath." Michigan's sexual psychopath law allowed for the indefinite civil detention of persons with a mental disorder coupled with "criminal propensities to the commission of sex offenses." Because sexual psychopath proceedings were not criminal, Maddox enjoyed few procedural protections, and a court found him to be a criminal sexual psychopath and committed him to Ionia State Hospital. Within four months of his arrival at Ionia, administrators transferred him to prison because he refused to admit that he had committed a crime and was a sexual deviant.[3]

Maddox, now represented by a local attorney who had taken an interest in the cases of people detained as sexual psychopaths, brought his case up to the Michigan Supreme Court. He argued that his incarceration in a prison violated a provision of Michigan's sexual psychopath law that required detention in an "appropriate state institution."[4] In a hearing ordered by the

[1] Record on Appeal at 1-3, 90, *In re Maddox*, 88 N.W.2d 470, 471 (Mich. 1958); *In re Maddox*, 88 N.W.2d 470 (Mich. 1958).
[2] Record on Appeal at 90, *In re Maddox*, 88 N.W.2d 470 (Mich. 1958).
[3] Brief for Appellant at 3a, Appendix to Brief for Defendant Appellee, *In re Maddox*, 88 N.W.2d 470 (Mich. 1958); *In re Maddox*, 88 N.W.2d 470, 472 (Mich. 1958).
[4] *In re Maddox*, 88 N.W.2d 470, 474 (Mich. 1958); Record on Appeal at 21, *In re Maddox*, 88 N.W.2d 470 (Mich. 1958).

Michigan Supreme Court, Perry C. Robertson, the medical superintendent of Ionia State Hospital, argued that incarceration in prison was itself a form of treatment, useful in forcing sexual psychopath detainees to admit both the facts of the crimes they were accused of committing and also that they were deviant.[5] The Michigan Supreme Court rejected this argument. Maddox, the court declared, was "serving potentially a life sentence in our biggest State prison, treated in all respects similarly to other criminals therein confined." The court required the state to transfer Maddox back to Ionia or another "appropriate state institution."[6] His win was, from one perspective, quite modest. Yet the ruling cut off an avenue by which the state could incarcerate people in prison without a criminal trial and established a precedent for setting standards for the detention of people designated as sexual psychopaths.

Sexual psychopath laws—also called psychopathic personality, sexually dangerous person, or mentally disordered sex offender laws—were enacted nationwide from the mid-1930s to the 1960s.[7] They were particularly common in the Midwest and Northeast and on the West Coast, but states in every region of the country passed them. Scholars today sometimes claim that the laws were nullified after passage or used rarely.[8] In fact, though the sexual psychopath laws only applied to a subset of sexual offenders who were considered mentally abnormal, thousands of people like Maddox were detained under the laws—sometimes for decades.

There was considerable variation in the sexual psychopath laws. Some states required a conviction before proceedings could begin. Others, like Michigan, required merely a criminal charge, and some required neither. Some statutes also allowed states to classify already

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[5] Record on Appeal at 22-23, *In re Maddox*, 88 N.W.2d 470 (Mich. 1958).
[6] *In re Maddox*, 88 N.W.2d 470, 475 (Mich. 1958). Newspapers reported that Maddox subsequently escaped. "Berrien Pair Seized After Ionia Escape," *South Bend Tribune*, August 20, 1959, 2.
[7] The first major historical study of the sexual psychopath laws was Estelle B. Freedman, "Uncontrolled Desires: The Response to the Sexual Psychopath, 1920-1960," *The Journal of American History* 74, no. 1 (1987): 83–106.
[8] See e.g., Christopher Seeds, "Historical Models of Perpetual Penal Confinement: Theories and Practices before Life Without Parole," *Law and Social Inquiry* 44, no. 2 (2019): 320.

incarcerated people as sexual psychopaths to detain them after they completed their sentences. Scholars, prosecutors, and politicians who championed the laws framed them as a civil measure meant not to punish past acts but to protect both society and potential offenders themselves, justifying them as valid under the state's police power and its role as *parens patriae*. As civil regulations, the laws provided few of the rights and protections granted to criminal defendants, such as the right to trial by jury, to confront witnesses, the requirement of *mens rea*, the privilege against self-incrimination, protection of the Double Jeopardy Clause, the requirement of legality (*nulla poena sine lege*), the standard of proof beyond a reasonable doubt, and the prohibition against cruel and unusual punishments.[9]

The sexual psychopath laws created a new legal form, though one that drew on the old police power. This legal form occupied a liminal space between criminal punishment and civil regulation. Previously, Maddox would have been accused of a specific crime and tried. The state would have had to prove beyond a reasonable doubt that he had committed a prohibited act with a guilty state of mind. If convicted, the length of his detention would have borne some relation to his crime. Though the state might have had future-oriented aims like the prevention of crime, the trial would have revolved around the prior acts and mental state of the accused.[10] In Maddox's case, the Michigan Supreme Court could not even determine what he was alleged to have done. Was the phone call threatening? Was it obscene? All the state had proved in the original proceeding was that Maddox was a particular type of person with dangerous proclivities and desires.

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[9] See chapter 3.III-VI for more detail on the statutes.

[10] According to the legal philosopher H.L.A Hart, "criminal punishment … is *not* mere social hygiene." Hart pointed out that, "It differs from such a forward-looking system in the stress that it places on something in the past: the state of mind of the accused at the time, not of his trial, but when he broke the law." H.L.A. Hart "Changing Conceptions of Responsibility," in *Punishment and Responsibility: Essays in the Philosophy of Law*, 2nd ed. (1968; Oxford: Oxford University Press, 2008), 194.

Thus, the laws also created a new legal subject. Sexual psychopaths were located somewhere between the responsible, rational legal subjects punished by the criminal law and insane people who were excused from responsibility because they could not control their actions. People determined to be sexual psychopaths could be both punished for their crimes as well as detained for their mental illnesses. The category of the sexual psychopath encompassed people accused of a wide variety of acts, including non-criminal transgressions, minor offenses like disorderly conduct, non-sexual offenses like passing bad checks, and grave crimes such as the sexual assault of children.[11] As a categorization, it thus collapsed the difference between sexual variation and sexual violence, equating a person who engaged in consensual sodomy with someone who committed rape, thereby solidifying the concept of the "sex offender."

The sexual psychopath laws were central to a growing sexual carceral state during the period I chronicle—roughly the turn of the century to the 1970s. During the 1910s and 1920s, psychopathic laboratories attached to courts, police departments, and prisons directed the state's gaze at abnormal individuals, looking for early signs of sexual variation. During the 1920s and 1930s, police departments in major cities developed lists of known and suspected perverts who could be monitored and quickly hauled in for questioning. Police departments and prosecutor's offices established informal sex crime units. In 1947, California passed the first compulsory sex offender registration law. Starting in the 1950s, states established special institutions for sex offenders.[12]

This dissertation documents the rise of the sexual carceral state and the people who challenged it, focusing especially on the sexual psychopath laws. The sexual carceral state is

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[11] These cases all come from a single jurisdiction—Washington, D.C. "A collection of about 205 cases of sexual offenders hospitalized here," box 5, folder 1, Benjamin Karpman Papers, Jean Nickolaus Tretter Collection in GLBT Studies, University of Minnesota Library.
[12] See Chapter 1.VI, 2.II, 3.V, 4.IV below.

defined by a preemptive logic that prioritizes preventing imagined future danger.[13] It blends criminal punishment with civil regulation, often developing new legal forms to augment the criminal legal system. But this obsession with developing new ways to control sexual variation has often been coupled with indifference to sexual abuse—to the acceptance of a range of "tolerated illegalities."[14] This permissiveness is evidenced throughout this dissertation by police officers who did not investigate sex crimes, prosecutors who did not prosecute sex crimes, and juries who seemed reluctant to convict—at least in cases involving white men. I examine previously unexplored evidence—including case records, correspondence detainees sent to legal groups like the ACLU, detainees' journal entries, and publications written by people detained as sexual psychopaths—to shed new light on the world of the sexual psychopath regime. This dissertation reveals for the first time how sexual psychopath detainees experienced their detention and how they challenged it.

The sexual psychopath laws used the language of medicine and spoke of cure, but they were, first and foremost, a tool to circumvent the already meager restraints on the state's ability to punish and to demonstrate that the state was doing something to prevent sex crimes, without having to overhaul the criminal legal system. First, they skirted constitutional protections provided to defendants in criminal trials. Cook County state's attorney Thomas J. Courtney, who led the committee that devised Illinois's influential sexual psychopath law stated, "we want a board of skilled medical men to pass on cases of sexual psychopaths before they commit serious crimes" so that "those afflicted can be put in an institution for life." "We believe," Courtney said,

[13] In this way, the sexual carceral state resembles the national security state and counterterror state. See e.g., Joseph Masco, *The Theater of Operations: National Security Affect from the Cold War to the War on Terror* (Durham, N.C.: Duke University Press, 2014).
[14] The phrase comes from Michel Foucault, *Discipline and Punish: The Birth of the Prison*, trans. Alan Sheridan (New York: Vintage, 1977), 87.

"that society shouldn't have to wait for a crime to be committed."[15] Second, they allowed the state to avoid proportionality constraints on punishment. Since they were putatively not punitive, they were outside the moral economy of punishment—the notion that punishment should reflect the gravity of the crime, that a person convicted of a crime owes something to society, and that what society can do to that person is (at least theoretically) limited by what that person has done to society.[16] William J. Hickson, the director of Chicago's Psychopathic Laboratory and an intellectual and practical leader in the push for civil detention, complained in the early 1920s that criminal penalties "cannot be increased very much, for experience has taught us that where the penalty is made too severe juries will not convict because of the quid pro quo theory on which the law bases punishment … and because of the eighth amendment." Hickson pointed out that civil commitment did not face the same constraint.[17]

By the 1970s, however, litigation, like that brought by Maddox, had fundamentally transformed the sexual psychopath laws, as courts imposed treatment requirements and required enhanced rights for the accused in sexual psychopath proceedings. I argue that these changes made the laws less useful to prosecutors as a workaround in cases where a criminal conviction might be too difficult to secure or the sentence deemed insufficiently long. Court-imposed requirements that detainees be held in non-penal environments and be given treatment made them more expensive for states, and, crucially, made them appear to conservative critics as a get-out-of-jail-free card for sex offenders, rather than a tool to put people away for years. As a result,

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[15] "Drive Against Sex Morons is Begun," *The Edwardsville Intelligencer* (IL), August 24, 1937; "Preventive Legislation," *The Decatur Review*, August 30, 1937.
[16] For more on the moral economy of punishment see Didier Fassin, *The Will to Punish, with Commentaries by Bruce Western*, ed. Rebecca M. McLennan and David W. Garland (Oxford: Oxford University Press, 2018).
[17] William J. Hickson, "Report of the Psychopathic Laboratory of the Municipal Court of Chicago," in *Fifteenth Annual Report of the Municipal Court of Chicago, For December 6, 1920 to December 4, 1921* (Chicago: Severinghaus, n.d.), 181.

throughout the 1970s and 80s, many states repealed the laws.[18] Within a period of about fifty years, the central node in the nation's first experiment with a regulatory regime aimed at sexual offenders had spread across the country and then collapsed.

This is by no means a story of unambiguous victory in the fight against carceral approaches to sex crimes. Despite the trend toward repeal, the Supreme Court declared sexual psychopath laws constitutional in 1986.[19] The unraveling of the sexual psychopath regime at the state level led to the contemporary sex offender regime in the 1990s. The wide and unaccountable discretion of the sexual psychopath regime has been replaced by a system with no room for discretion. States traded costly indefinite detention for the cheaper alternative of indefinite surveillance. Using the same reasoning that it used to uphold sexual psychopath laws, the Supreme Court has held registration and notification requirements to be nonpunitive.[20]

Nonetheless, the victories of people accused of being sexual psychopaths were significant. I show that they expanded sexual freedom by weakening states' power to preventively detain people considered abnormal or deviant. Litigants convinced courts to look past legalistic distinctions between civil regulation and criminal punishment in order to recognize the impact of indefinite detention on the individual, a move that seems extraordinary in the contemporary era of sex offender notification and registration requirements. Those accused of being sexual psychopaths also highlighted abuses in state institutions and were able to win public support despite the disturbing accusations against them.[21]

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[18] See Chapter 4.IX below.
[19] *Allen v. Illinois*, 478 U.S. 364 (1986).
[20] *Smith v. Doe*, 538 U.S. 84 (2003). While contemporary Sexually Violent Predator laws, which permit the indefinite detention of people convicted of sex offenses, are far more narrowly tailored and provide greater procedural protections than the sexual psychopath laws did, there are obviously similarities to the old sexual psychopath laws. For info on these laws, see Tamara Rice Lave, "Throwing Away the Key: Has the Adam Walsh Act Lowered the Threshold for Sexually Violent Predator Commitments Too Far?," *University of Pennsylvania Journal of Constitutional Law* 14, no. 2 (2011): 391-430.
[21] See Chapter 4.VI-VIII below.

This dissertation is about an unconventional process of constitutional change. As such, it resembles and takes inspiration from Risa Goluboff's "messy history" of efforts to dismantle vagrancy laws in *Vagrant Nation*. Goluboff shows that the successful campaign against vagrancy laws had no central direction, initially "lacked a unified theory of attack," and started from below.[22] The litigation against sexual psychopath laws was even more disorganized. As Hendrick Hartog has pointed out, rights struggles "readily become a focus for group organization and identity."[23] This powerful source of energy and support was not available to people accused of sex crimes. With some exceptions, most people did not identify with the label "sexual psychopath" or "sex offender."[24] Although they sometimes won the support of ACLU branches and lawyers who were troubled by the laws, accused sexual psychopaths mostly challenged the laws without outside assistance. Detained people wrote applications for habeas writs and represented themselves in court. They advocated for fellow detainees threatened with experimental surgeries. They took risks to bring their experiences to light and to help those still detained. Lawyers and movements are largely absent from this narrative. The campaign—and I use the term loosely—against sexual psychopath laws was even less coherent than that against vagrancy laws. It not only lacked a theory of attack but challenged the laws from opposite directions. Some litigants, like Maddox, argued that the sexual psychopath statutes were like mental health laws and should function as such. Others argued that the laws were punitive and should provide the full panoply of criminal procedure rights.[25] Moreover, there was no happy

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[22] Risa Goluboff, *Vagrant Nation: Police Power, Constitutional Change, and the Making of the 1960s* (Oxford: Oxford University Press, 2016), 7, 338.
[23] Hendrick Hartog, "The Constitution of Aspiration and 'The Rights That Belong to Us All,'" *Journal of American History* 74, no. 3 (1987): 1023.
[24] In Chapter 4.IV, I discuss a group in California that tried to resignify the term "sexual psychopath" so that it did not have such a negative association.
[25] See Chapter 4.VI below.

ending to the story, as the Supreme Court never declared the laws unconstitutional. Quite the opposite. But these victories mattered for people like Embra Maddox.

I shift the focus from the body of the sex offender to the body of law. Scholarship on sex offender laws has long been concerned with the cultural representations of the sex offender, as monstrous, perverse, uncontrollable, and different from other people convicted of crimes. I am interested in this process of figuration too. I trace conceptions of the sexual deviant as uniquely uncontrollable and dangerous back to expected sources, like the work of nineteenth-century sexologist Richard Krafft-Ebing, and less expected sources, such as nineteenth-century psychophysics and twentieth-century eugenic theory.

However, I found that reporting on sex crime often focused on the everyday failures of the criminal legal system: the indignities of adversarial trials for victims; the reluctance of police officers to properly investigate cases; the biases and prejudices of juries; the false promises of deterrence and rehabilitation; and the sexual violence and isolation of prison life. One might, following the work of Michele Foucault, Mariame Kaba, and others, see these not as failures but as serving essential functions within the criminal legal system.[26] One might suppose, with Foucault, that punishment is a "way of handling illegalities, of laying down the limits of tolerance, of giving free rein to some, of putting pressure on others, or excluding a particular section, of making another useful, of neutralizing certain individuals and of profiting from others."[27] This certainly seems true in the realm of sexual crime, where it is hard not to notice the differential application of punishment to white and Black people and the way that many offenses go unpunished. However, when the criminal legal system's mode of operation led to particularly

[26] Michel Foucault, *Discipline and Punish: The Birth of the Prison* (New York: Vintage, 1977), 272; Mariame Kaba, *We Do This 'Til We Free Us: Abolitionist Organizing and Transforming Justice* (Chicago: Haymarket Books, 2021).
[27] Foucault, *Discipline and Punish*, 272.

horrific crimes, newspapers, citizens groups, and others called for change. These periods held both promise and peril for legal authorities. They were an opportunity to increase their power, but they also threatened business as usual. Rather than fundamentally change the criminal legal system itself or, as some suggested at the time, work to change a sexual ideology that encouraged abuse and the shame of victims, authorities endorsed civil detention, a greater role for psychiatrists in the legal system, and biological solutions.[28] These supplementary measures not only increased the power of the state but also allowed the criminal legal system to continue functioning as usual. Ultimately, I argue, civil detention and similar practices surrounding it served as a sort of escape valve for the pressures building up within the criminal legal system.[29]

The focus of this dissertation differs substantially from prior work by placing legal contestation at the center. I have benefited from a number of studies that examine sex offender laws in a single jurisdiction. Chrysanthi Leon's *Sex Fiends, Perverts, and Pedophiles: Understanding Sex Crime Policy in America* is a sociological study of sex crime policy, national in scope but focused on California. Regina Kunzel and Molly Ladd Taylor have written about the passage of sexual psychopath laws in Washington, D.C. and Minnesota, respectively. These works provide helpful studies of sexual psychopath statutes, but they do not examine the sexual psychopath jurisprudence.[30]

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[28] For an example of someone arguing for this more radical approach, see Edward Strecker, "The Challenge of Sex Offenders: Introduction," *Mental Hygiene* 22, no. 1 (January 1938): 1-3.

[29] This interpretation also helps explain what Chrysanthi Leon has called "one of the central mysteries of sex offender punishment in the twentieth century," namely the "relative stability of sex offender imprisonment during the public panic of the sexual psychopath era." Chrysanthi S. Leon, *Sex Fiends, Perverts, and Pedophiles: Understanding Sex Crime Policy in America* (New York: New York University Press, 2011), 161.

[30] Ibid; Regina Kunzel, "Sex Panic, Psychiatry, and the Expansion of the Carceral State," in *The War on Sex*, ed. David M. Halperin and Trevor Hoppe (Durham: Duke University Press, 2017); Molly Ladd Taylor, "'Ravished by Some Moron': The Eugenic Origins of the Minnesota Psychopathic Personality Act of 1939," *Journal of Policy History* 31, no. 2 (2019), 192-216.

Historians who have surveyed sex offender laws have often examined these laws as a means to study other areas, whether it be the history of sexuality, gay rights, culture, or psychiatry and psychology. For instance, Estelle Freedman's foundational article on sexual psychopath laws is structured around "three levels of analysis: of psychiatric ideas, of political mobilization, and of sexual boundaries."[31] Subsequent work has followed her lead in focusing on psychiatry, politics, and sexuality, rather than law. Several books concerned with aspects of sex offender laws illuminate changing conceptions of childhood, theories of psychosexual development, and constructions of the child molester. These include Philip Jenkins's book *Moral Panic: Changing Concepts of the Child Molester in Modern America*, Stephen Robertson's *Crimes Against Children: Sexual Violence and Legal Culture in New York City, 1880-1960*, and Paul Renfro's *Stranger Danger: Family Values, Childhood, and the American Carceral State*.[32] Other scholars, such as William Eskridge and Marie Amelie-George, discuss the impact of early sex offender laws on the history of gay liberation and the legalization of sodomy.[33] Another strand of scholarship explores the cultural representation of sex criminals, including George Chauncey's article "The Postwar Sex Crime Panic" and anthropologist Roger Lancaster's *Sex Panic and the Punitive State*.[34] Articles by legal scholars Susan Schmeiser and Simon Cole explore the relationship between law and psychiatry through the lens of sexual psychopath

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[31] Freedman, "Uncontrolled Desires: The Response to the Sexual Psychopath, 1920-1960," 87.

[32] Philip Jenkins, *Moral Panic: Changing Concepts of the Child Molester in Modern America* (New Haven: Yale University Press, 1998); Stephen Robertson, *Crimes Against Children: Sexual Violence and Legal Culture in New York City, 1880-1960* (Chapel Hill: University of North Carolina Press, 2005); Paul Renfro, *Stranger Danger: Family Values, Childhood, and the American Carceral State* (Oxford: Oxford University Press, 2020).

[33] William N. Eskridge, Jr., *Gay Law: Challenging the Apartheid of the Closet* (Cambridge: Harvard University Press, 1999); Allan Bérubé, *Coming out Under Fire: The History of Gay Men and Women in World War II* (Chapel Hill: University of North Carolina Press, 1990); David K. Johnson, *The Lavender Scare: The Cold War Persecution of Gays and Lesbians in the Federal Government* (Chicago: University of Chicago Press, 2004); Marie-Amelie George, "The Harmless Psychopath: Legal Debates Promoting the Decriminalization of Sodomy in the United States," *Journal of the History of Psychology* 24, no. 2 (May 2015): 225-261.

[34] George Chauncey, "The Post-War Sex Crime Panic," in *True Stories from the American Past*, ed. William Graebner (New York: McGraw-Hill, 1993); Roger N. Lancaster, *Sex Panic and the Punitive State* (Berkeley: University of California Press, 2011).

laws.[35] Using the law as a lens to understand other aspects of society and culture has been fruitful, as the outstanding work of these scholars demonstrates. However, it tends to portray the law as primarily reactive—to sexual panic, to new ideas in the field of psychiatry, to cultural change—or as a mirror that simply reflects what is outside of it.[36]

Law is reactive, but it is also creative. It is constitutive of social relations.[37] Joseph Fischel has noticed the same tendency to see law as reactive in sex offender scholarship, arguing that "law ought to be more explicitly theorized as a productive, anatomizing force in the creation of sexual subjects and the constitution of (what is recognizable as) sexual violence, rather than as a final, unfortunate episode or effect of moral panic."[38] Law categorizes what sexual harms are recognized by the state and which people are deemed dangerous. Danger itself is a legal category, as some of the sexual psychopath jurisprudence makes explicit. The productive power of law is particularly evident in the case of sexual psychopath laws. These laws created a new medico-legal subject. Sexual psychopathy was not a recognized medical category; it was a mental illness created by statute. Scholarship that presents the law as primarily reactive to external forces also passes over causes of change internal to the law itself, particularly legal challenges brought by the people detained under sexual psychopath laws. Legal challenges changed who was considered a sexual psychopath and how courts understood danger. This dissertation charts the influence of psychiatry and moral panic on the law in detail, while also bringing the courts to the center of the story.

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[35] Susan R. Schmeiser, "The Ungovernable Citizen: Psychopathy, Sexuality, and the Rise of Medico-Legal Reasoning," *Yale Journal of Law and the Humanities* 20, no. 2 (2008); Simon Cole, "From the Sexual Psychopath Statute to 'Megan's Law': Psychiatric Knowledge in the Diagnosis, Treatment, and Adjudication of Sex Criminals in New Jersey, 1949-1999," *Journal of the History of Medicine and Allied Sciences* 55, no. 3 (July 2000): 292–314.
[36] An important exception is Stephen Robertson's *Crimes Against Children*.
[37] Robert W Gordon, "Critical Legal Histories," 36 *Stanford Law Review* 36 (1984): 109.
[38] Joseph J. Fischel, *Sex and Harm in the Age of Consent* (Minneapolis: University of Minnesota Press, 2016), 26.

In addition, this dissertation has a different temporal focus than most scholarship on sex offender laws. It begins in the late nineteenth century. The longer timeframe reveals previously unexplored influences on sex offender laws. I demonstrate that both sex crime panics and the first steps toward special sex offender laws began in the 1910s and 1920s, earlier than is generally supposed. In these decades, newspaper coverage, particularly in Chicago, drove panic over crimes committed by so-called "morons"—a term that originated in eugenic thought and came to designate accused sexual criminals who were believed to suffer from intellectual, affective, or moral defects. The "moron" was, I contend, the precursor to the "sexual psychopath" who would emerge as a nationwide concern in the 1930s. Around the same time as the moron panics, reformers in Chicago and scholars nationwide built on the work of European theorists, arguing that abnormal people, especially sexual deviants, should be preventively detained. In the 1910s and 1920s, concern over the sex moron led authorities in Chicago, including the police department and the Municipal Court's Psychopathic Laboratory, to preventively detain so-called mental defectives, with a special focus on people who committed sexual crimes. Authorities also attempted to pass "farm colony" or "segregation" plans that would allow authorities to indefinitely detain people with perceived intellectual, emotional, and moral defects on a farm colony, plans which provided a model for the sexual psychopath laws passed the next decade.[39]

By demonstrating the varied effects of the sexual psychopath laws, this dissertation also intervenes in a debate about whether the sexual psychopath laws had a positive or negative effect on sexually variant people, especially queer men. Early work by scholars like George Chauncey, and David K. Johnson claimed passage of the sexual psychopath laws was driven by gay panic

[39] See Chapter 2 below. My use of terms like "moron" and "feebleminded" should be read with implied scare quotes throughout.

and that the laws targeted gay men especially.[40] Recent work by Chrysanthi Leon and Anna Lvovsky has argued instead that the sexual psychopath regime softened the harshness of the criminal law, and that the laws did not represent a "crackdown" on sexual difference.[41] Data I have examined supports Leon and Lvovsky's claim that the sexual psychopath laws were not used primarily against men engaged in consensual sodomy but also that such usage of the laws was not rare, especially in their early decades. The sexual psychopath laws were most commonly used against people accused of crimes against children. Yet others were also committed for their masturbation habits, for consensual sex with someone of the same sex, for "institutional homosexuality," cross-dressing, lewdness, "unnatural acts" with a spouse, and other minor transgressions.[42]

The laws themselves also varied, a significant fact that is often passed over in the existing literature. In some jurisdictions, the laws diverted people away from the criminal legal system—though, as I argue, this was not necessarily preferable to normal incarceration. Elsewhere, however, they functioned as a supplement to punishment, allowing the state to detain people after they had finished serving their sentence or to proceed with criminal charges or sentencing after a person had been released from detention. In these states, the laws did not soften punishment but instead extended the time people could be detained. In many states, prison administrators could use the laws against incarcerated people, increasing their power to police

[40] Chauncey, "The Post-War Sex Crime Panic"; Johnson, *The Lavender Scare: The Cold War Persecution of Gays and Lesbians in the Federal Government*, 57.
[41] Anna Lvovsky, *Vice Patrol: Cops, Courts, and the Struggle over Urban Gay Life Before Stonewall* (Chicago: University of Chicago Press, 2021), 11, 120-121; Leon, *Sex Fiends, Perverts, and Pedophiles: Understanding Sex Crime Policy in America*, 103; George, "The Harmless Psychopath: Legal Debates Promoting the Decriminalization of Sodomy in the United States," 226; Kunzel, "Sex Panic, Psychiatry, and the Expansion of the Carceral State."
[42] People v. Chapman, 4 N.W.2d 18 (Mich. 1942); *Dittrich v. Brown County*, 9 N.W.2d 510, 511, 512 (Minn. 1943); People v. Ross 95 N.E.2d 61 (Ill. 1950); People v. Earl, 216 Cal. App. 2d. 607 (Cal. App 1963); In re Moore, 108 A.2d 212 (N.H. 1954); People v Martinez, 278 P.2d 727 (Cal. Ct. App. 1955); "Report of the Illinois Commission on Sex Offenders To The 68th General Assembly of the State of Illinois" (Springfield, Il.: March 15, 1953), 15; Elias S. Cohen, "Administration of the Sexual Psychopath Statute in Indiana," *Indiana Law Journal* 32 (1957): 453.

sex within prisons. In states that did not require a conviction or criminal charge before the law could be used, they dramatically increased the power of prosecutors in cases where evidence was weak. In most states, detention was indefinite, increasing the power of the state to detain people beyond the length of an ordinary prison sentence.[43]

The testimony of people detained as sexual psychopaths reveals that indefinite detention induced a distinctive feeling of powerlessness and hopelessness. Commitment as a sexual psychopath was, as the *Maddox* case illustrates, often designed to break down a person's will. When detention alone did not achieve this, doctors sometimes experimented with painful techniques, such as electroconvulsive therapy, to compel compliance. As the D.C. Circuit Court of Appeals put it in a 1970s decision on the District of Columbia's sexual psychopath law, the "promise of treatment has served only to bring an illusion of benevolence to what is essentially a warehousing operation for social misfits."[44]

Though this dissertation is primarily about civil regulation of accused sexual criminals, it is also a history of ideas about punishment. Debates about what to do with people accused of sexual crimes turned on fundamental questions about the nature of punishment. Throughout this period, scholars, journalists, and reformers debated what punishment was supposed to accomplish, who it was for, and how one measured its success. Courts and scholars considered how to draw the line between civil regulation and criminal punishment and treatment and punishment and whether these categorizations even made sense. Was punishment necessarily directed at an act? Did it require a certain state of mind in the defendant? Did it necessarily contain an element of moral condemnation? Did it assume a responsible subject? Did the infliction of pain have to be intentional, an end in itself?

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[43] See Chapter 3.V below.
[44] *Cross v. Harris*, 418 F.2d 1095, 1107 (D.C. Cir. 1969).

The point in exploring these debates is not to claim that the sexual psychopath laws, sex offender registration, and painful forms of treatment were punishment, for this would itself buy into the idea that it matters whether something is called a punishment or a regulation. Nor is it clear that this question makes much sense conceptually. In some ways, these laws seem obviously punitive. They inflicted pain administered by the state, and they contained an element of moral condemnation, a feature of punishment that seems to distinguish it from mere regulation. On the other hand, as the legal philosopher H.L.A. Hart has stressed, punishment seems to fundamentally contain a backward-looking element—even when retributivism is abandoned and punishment is justified by purely forward-looking aims. One of the elements of punishment, according to Hart, is that "it must be *for* an offence against legal rules."[45] Particularly in states that did not require even a conviction before declaring a person a sexual psychopath, these laws, at least, seemed to lack this definitional requirement of punishment. Ultimately, however, this dissertation shows how little such distinctions matter for the people on whom state power is exercised.

It is necessary to say something here about my engagement with the work of Michel Foucault, who looms over any scholarship that sits at the intersection of the history of punishment, sexuality, and psychiatry.[46] Like Foucault's work, this dissertation tracks the emergence of the abnormal individual as an object of penal intervention. In one sense, the development of measures like the sexual psychopath laws represents a clear example of what Foucault calls disciplinary power—a power that individualizes, normalizes, anatomizes,

[45] H.L.A. Hart, "Prolegomeon to the Principles of Punishment," in *Punishment and Responsibility: Essays in the Philosophy of Law*, 2nd ed. (1968; Oxford: Oxford University Press, 2008), 5.
[46] Not just *Discipline and Punish* and the first volume of his *History of Sexuality* but also Foucault's *Abnormal* lectures have been helpful to this project. Foucault, *Discpline and Punish*; Michel Foucault, *The History of Sexuality Volume 1: An Introduction*, trans. Robert Hurley (New York: Vintage, 1978); Michel Foucault, *Abnormal: Lectures at the Collège de France 1974-1975*, ed. Graham Burchell, Valerio Marchetti, and Antonella Fontana (New York: Picador, 2003).

examines, classifies, and corrects.[47] In another sense, however, the history of the sexual psychopath laws actually challenges some of Foucault's more sweeping claims about the nature of power in modern society. For Foucault, disciplinary power is extensive, effective, precise, subtle, and cunning. As mentioned above, Foucault reminds us that what look like the failures of power are sometimes its strategies. But I argue that the development of sexual psychopath laws, when viewed from another angle, demonstrates the limits of disciplinary power in modern society and the persistence of repressive and abstract punishment.

Sexual psychopath laws were developed in part in response to the fact that the disciplines had not penetrated the criminal legal system as deeply as one might expect, and even to head this off. When the laws were devised, criminal trials had not actually changed that much. They remained focused on the criminal act rather than the history or nature of the defendant. Psychiatric experts played at most an ancillary role. And defendants still had, at least putatively, a variety of abstract rights they could assert against the state. Moreover, the length of detention was still related to the gravity of the crime rather than the dangerousness of the accused. Punishment was more individualized than it had been in the nineteenth century, but individualization was quite limited. If disciplinary power had transformed the criminal legal system as comprehensively as Foucault claims, these special civil measures—which applied to a subset of a subset of people accused of crime, the most abnormal of the abnormal—would not have been necessary.

More striking, sexual psychopath detention sometimes itself functioned more as a form of punishment or old-fashioned exclusion than as a means of disciplinary correction. Foucault argues that "what is odd about modern criminal justice is that, although it has taken on so many

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[47] Foucault, *Discipline and Punish*, 193, 215.

extra-juridical elements, it has done so not in order to be able to define them juridically and gradually to integrate them into the actual power to punish: on the contrary, it has done so in order to make them function within the penal operation as non-juridical elements."[48] I argue that rather than punishment being reinscribed into a system of psychiatric knowledge, psychiatric knowledge was reinscribed into punishment. "Sexual psychopath" was itself defined juridically. Even the "treatment" of people committed as sexual psychopaths often focused on the criminal act. The archives show that doctors were obsessed with getting people committed as sexual psychopaths to confess their offenses and to acknowledge their wickedness, as in the case of Maddox. The old-fashioned modalities of repentance and expiation played a role even in the treatment regime.

More often than not, however, people held as sexual psychopaths received little treatment. Foucault describes a process by which the application of punishment was transformed by the introduction of disciplinary mechanisms that sought to cure people convicted of crimes and transform them into useful, docile subjects. The genesis of Foucault's project, he tells us, was contemporary prison revolts, which were often revolts against "model prisons, tranquilizers, isolation, the medical or educational services."[49] Certainly, in the archives, I found fierce resistance to treatment, to indeterminate sentences, and to model institutions. But I also found a great deal of agitation for treatment. That people had to fight for treatment in the 1950s and 1960s, during the height of the so-called era of the rehabilitative ideal, challenges the idea that the state was as interested in rehabilitation, cure, or in the "soul" of offenders as Foucault and others have argued. It also illuminates the extent to which the subjects of power, who are often absent in Foucault's work, had a role in the creation of this regime—and its dissolution.

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[48] Ibid, 22.
[49] Ibid, 30.

It is important to acknowledge what this dissertation does not do. The "moron" panics, the sexual psychopath laws, and special sex offender institutions were directed almost exclusively against men and people categorized by the state as men. In fact, this dissertation is partly an examination of the gendering of the sex offender as male. People categorized as women were rarely found to be sexual psychopaths or even examined under the laws, and the laws were rarely used against people accused of sex work. As such, there are numerous important topics relevant to the growth of the sexual carceral state that I cannot cover, including the regulation of sex workers, sexual delinquency, vice crime, the sexual policing of Black women, the substantive criminal law, including rape law, and more.[50]

It is also necessary to acknowledge that not all the protagonists of this story are as sympathetic as Embra Maddox. Some of the protagonists are Black men accused of crossing the

[50] Though these subjects certainly deserve much more attention, there is already excellent work on these topics. See e.g., Kali N. Gross, *Colored Amazons: Crime, Violence, and Black Women in the City of Brotherly Love, 1880–1910* (Durham: Duke University Press, 2006); Kali N. Gross, *Hannah Mary Tabbs and the Disembodied Torso: A Tale of Race, Sex, and Violence in America* (Oxford: Oxford University Press, 2018); Cheryl D. Hicks, *Talk with You Like a Woman: African American Women, Justice, and Reform in New York, 1890-1935* (Chapel Hill: University of North Carolina Press, 2010); Cynthia M. Blair, *I've Got to Make My Livin': Black Women's Sex Work in Turn-of-the-Century Chicago* (Chicago: University of Chicago Press, 2018); Kevin J. Mumford, *Interzones: Black/White Sex Districts in Chicago and New York in the Early Twentieth Century* (New York: Columbia University Press, 1997); Estelle B. Freedman, *Redefining Rape: Sexual Violence in the Era of Suffrage and Segregation* (Cambridge, Mass: Harvard University Press, 2013); Estelle B. Freedman, *Their Sisters' Keepers: Women's Prison Reform in America, 1830-1930* (Ann Arbor: University of Michigan Press, 1984); Joanna Bourke, *Rape: A History from 1860 to the Present* (London: Little Brown, 2007); Jessica R. Pliley, *Policing Sexuality: The Mann Act and the Making of the FBI* (Cambridge: Harvard University Press, 2014); Mara Laura Keire, *For Business and Pleasure: Red-Light Districts and the Regulation of Vice in the United States, 1890–1933* (Baltimore: Johns Hopkins University Press, 2010); Chad Heap, *Slumming: Sexual and Racial Encounters in American Nightlife, 1885-1940* (Chicago: University of Chicago Press, 2008); Mary E. Odem, *Delinquent Daughters: Protecting and Policing Adolescent Female Sexuality in the United States, 1885-1920* (Chapel Hill: University of North Carolina Press, 2000); Lvovsky, *Vice Patrol*; Saidiya Hartman, *Wayward Lives, Beautiful Experiments: Intimate Histories of Riotous Black Girls, Troublesome Women, and Queer Radicals* (New York: W. W. Norton & Company, 2019); Regina G. Kunzel, *Fallen Women, Problem Girls: Unmarried Mothers and the Professionalization of Social Work, 1890-1945* (New Haven: Yale University Press, 1993); Ruth M. Alexander, *The Girl Problem: Female Sexual Delinquency in New York, 1900-1930* (Ithaca: Cornell University Press, 1995); LaShawn Harris, *Sex Workers, Psychics, and Numbers Runners: Black Women in New York City's Underground Economy* (Urbana: University of Illinois Press, 2016); William J. Novak, "Morals, Sex, Crime, and the Legal Origins of Modern American Social Police," in *Intimate States: Gender, Sexuality, and Governance in Modern US History*, ed. Margot Canaday, Nancy F. Cott, and Robert O. Self (Chicago: University of Chicago Press, 2021), 65–84; Joseph J. Fischel, *Sex and Harm in the Age of Consent* (Minneapolis: University of Minnesota Press, 2016).

color line or queer or gender variant people who were considered deviant but posed no danger to anyone. But others were credibly accused of child molestation and other horrendous acts. It may be disquieting to see people accused of abusing children as protagonists in a legal struggle resisting state power. In this dissertation, resistance sometimes includes people who acted in violent and harmful ways but were desperate to change their behavior taking risks to force the state to provide therapy and other treatment. In other cases, however, resistance includes men who were credibly accused of sex crimes refusing psychotherapy or other treatment to which they did not consent. I read moving letters from detainees and notes from therapy, but I also encountered people who tried to minimize what they had done, to my own frustration, rage, and disgust. But resistance is not a resource that exists only in the virtuous. Saidiya Hartmann, Walter Johnson, and others have warned against viewing agency, in Hartmann's words, as "a gift dispensed by historians … to the dispossessed."[51] This perspective allows us to discuss agency and resistance without moralizing or valorizing. The struggle of people accused of sex crimes deserves attention not because they were necessarily virtuous or sympathetic but because it had a significant effect on the history of sexuality, state building, and jurisprudence in the twentieth century.

Chapter 1, "Liberal Subjects, Perverse Subjects, and the Crisis in Punishment," begins by arguing that the origins of specialized sex offender laws, like the sexual psychopath laws, reaches back to a turn-of-the-century crisis in penal theory and debates over the individualization of punishment. Criminologists, prison reformers, and administrators confronted the fact that incarceration was not preventing crime or reforming incarcerated people. The problem,

[51] Saidiya V. Hartman, *Scenes of Subjection: Terror, Slavery, and Self-Making in Nineteenth-Century America* (New York: Oxford University Press, 1997), 54; Walter Johnson, "On Agency," *Journal of Social History* 37, no. 1 (Autumn 2003).

according to prison reformers and criminologists, was the abstraction of the criminal law and its focus on the criminal act rather than the nature of the accused. Individualized treatment aimed only at rehabilitation or incapacitation should replace criminal punishment, the more radical of these reformers and criminologists contended. Others stressed that it was abnormal people—the morally insane, "defective delinquents," and uncontrollable sexual deviants—who were causing the biggest problems and who should be subject to special measures of control. This approach could be seen in the Municipal Court's Psychopathic Laboratory, which diverted so called defective people into hospitals for the insane and feebleminded. Since these were police power measures, they did not have to meet the procedural burdens imposed by the Constitution on criminal prosecutions and imprisonment, while the retention of these protections for normal people allowed the state to claim a commitment to liberal constitutional principles.

Chapter 2, "'Moron' Panics, Psychopaths, and the Beginning of the Sexual Carceral State," argues that the beginnings of the sexual carceral state can be traced to Chicago in the 1910s and 1920s. Contrary to existing histories, which situate the first sex crime panics in the 1930s, I examine the intermittent sex crime panics of the 1910s and 1920s, particularly in Chicago. These panics are easily missed because they were not directed at "sexual psychopaths" or "sex offenders," terms that came into use later, but, rather, were directed at "morons," a term that originated in eugenic thought and came to designate sexual criminals who were believed to suffer from an intellectual, affective, or moral defects. In response to panics over sex morons, authorities began to implement measures that would come to be associated with the modern sex offender regime. Doubts about the capacity of the criminal legal system to do anything about the problem led reformers to introduce widely popular but ultimately unsuccessful legislation for the preventive detention of people considered intellectually, emotionally, or morally defective.

Despite the failure of these bills, the intellectual framework they established laid significant groundwork for the sexual psychopath laws that would be passed a few years later.

Chapter 3, "The Rise of the Sexual Psychopath Regime," focuses on the passage of sexual psychopath laws from 1935 up to the 1960s. Whereas the Illinois efforts discussed in the previous chapter were directed at all "mental defectives," reformers and officials had more success in the mid-1930s with laws directed at sexual criminals in particular. During sex crime panics in the mid-1930s, Michigan and Illinois passed the first sexual psychopath laws, and more than twenty states followed suit.

Chapter 4, "'A Warehousing Operation for Social Misfits:' Contesting the Sexual Psychopath Laws," explores the experience of sexual psychopath detention through detainees' own testimony that appears in sources ranging from letters to the ACLU to personal journals. It focuses on four locations: The Psychiatric Division of the Illinois State Penitentiary, at Menard, Illinois, Ionia State Hospital in Michigan, St Elizabeths Hospital in Washington, D.C., and Atascadero State Hospital in California. The chapter also details the legal campaign waged by people held as sexual psychopaths. I argue that detainees' legal victories were key to the growing disuse of the sexual psychopath laws and many states' decision to abolish them.

Chapter 1: LIBERAL SUBJECTS, PERVERSE SUBJECTS, AND THE CRISIS OF PUNISHMENT

In a 1904 essay he wrote for the International Congress of Arts and Science held in St. Louis, Missouri, Frederick Wines, one of the U.S.'s most influential prison reformers, took issue with the entire criminal legal system. In the essay, entitled "The New Criminology," Wines claimed that the "failure of lawgivers and of judges to secure and establish criminal justice" was due to the attempt "to establish a mathematical proportion between the guilt of every offense and its appropriate penalty."[1] According to the classical liberal theory of punishment Wines was critiquing, the severity of punishment ought to be, in Locke's formulation, "so much as may serve for reparation and restraint."[2] Proportionate penalties would deter most from violating the law, and in cases in which deterrence failed, would serve as just retribution. Moreover, if penalties were fixed, public, and applied equally, there would be little room for arbitrariness, favoritism, or abuse. At least, this was the theory.[3]

Wines was a member of the National Prison Association, a prison reform group his father had co-founded in 1870. The group, made up of influential wardens, amateur reformers, chaplains, and social scientists—set the agenda for prison reform for decades. Members rejected punishment, understood as retribution for or expiation of wrongdoing. They were highly skeptical even that punishment could, or should, serve as deterrence.[4] They were what David Garland has called penal modernists, who believed in treating crime scientifically, and correctionalists, who believed that criminal law should aim at the rehabilitation of people who

[1] Frederick Howard Wines, *The New Criminology* (New York: J. Kempster Print. Company, 1904), 11.
[2] John Locke, *Second Treatise of Government*, in *Two Treatises of Government*, Student Edition, ed. Peter Laslett (Cambridge: Cambridge University Press, 1988), 272 (§8).
[3] I use the terms "classical liberal," "classical," and "liberal" interchangeably to refer to the view that punishment should be proportional to the offense, determinate in length, applied equally, and specified clearly and publicly.
[4] Zebulon R. Brockway, "The Ideal of a True Prison System for a State," in *Transactions of the National Congress on Penitentiary and Reformatory Discipline 1870,* ed. Enoch Wines (Albany: Argus, 1871), 41.

violated the law first and foremost.[5] Or, in Foucault's formulation, they advocated replacing punishment with discipline.[6] Though many members were religious, they were skeptical of talk about the moral responsibility of prisoners. Criminal acts were important only as symptoms of a larger problem. Criminals should be treated like the insane or sick, with the treatment based on the particularities of each individual. Those that could be cured, should be released as soon as they were better; those that could not recover should never be released to prey on the public.[7]

This meant that sentences could not be fixed by the nature of the offense or uniformly applied; all incarcerated people, Wines and other members of the association claimed, should be "committed for treatment under the indeterminate sentence," with the time of release determined not by the offense but by expert judgment.[8] Trials themselves, advocates of the correctional approach argued, should focus not on proving the elements of the crime but on discovering the life history of the accused, which would allow institutional administrators to decide what to do with incarcerated people. The idea that a punishment could be measured by the crime was metaphysical nonsense. "Justice is an abstraction," claimed Wines, "elusive as a sunbeam, imponderable as a shadow." More people, he believed, were realizing that the existing system of criminal law and incarceration had failed to materially reduce crime, giving rise to a trend of "progressive disuse of the prison."[9]

Defenders of punishment—who tended to be jurists and legal scholars rather than wardens, criminologists, and amateur reformers—presented a different conception of the

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[5] David Garland, *The Culture of Control: Crime and Social Order in Contemporary Society* (Chicago: University of Chicago Press, 2012), 8.

[6] Foucault, *Discipline and Punish*.

[7] *Transactions of the National Congress on Penitentiary and Reformatory Discipline 1870,* ed. Enoch Wines (Albany: Argus, 1871), 105, 229; *Transactions of the National Prison Reform Congress*, *1873* (Washington, DC: Government Printing Office, 1874), 374; *Transactions of the Third National Prison Reform Congress*, *1874* (New York: Office of the Association, 1874), 247.

[8] Wines, *The New Criminology*, 16.

[9] Ibid, 9, 11–12.

purposes of punishment. There were reasons for punishment aside from retribution and deterrence. It was vital to the formation of liberal subjectivity and the reinforcement of social bonds. According to a leading turn-of-the-century criminal law treatise, the criminal law constituted people as "responsible, self-determining being[s] with rights common to members of the same community."[10] This argument echoed the theory advanced by Durkheim, whose explanation of punishment presupposed that criminal law equated fault and punishment. For Durkheim, however, the amount of punishment was measured not by some transcendent notion of justice but by what satisfied the community's outrage at the offense. Outrage at crime and its expiation through incarcerated people's suffering bound the community together.[11] This social defense of punishment was ignored by the reformers of the National Prison Association.[12]

This chapter explores the penal regime that began to emerge during the Progressive Era as a result of the conflict between defenders and critics of the existing system of punishment. While existing scholarship often presents the correctionalists as victors, this chapter offers a more complex portrait of the outcome of this debate. By the late Progressive Era, reformers had succeeded in replacing determinate punishments with a system of partially indeterminate sentences, probation, and parole. In this system, medical experts also took on a more significant role in directing the criminal law system. Prisons might not have gone into disuse, but, so the thinking goes, the penal reformers won the war. Regardless of whether one called it the "medical model," the "rehabilitative approach," or "disciplinary power," a new system was ascendant.[13]

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[10] Francis Wharton, *A Treatise on the Criminal Law*, 11th ed., James M. Kerr (San Francisco: Bancroft-Whitney, 1912), 8.

[11] Emile Durkheim, *The Division of Labor in Society*, trans. W.D. Halls (London: Macmillan, 1984), 45-64.

[12] For an insightful analysis of the law's role in subject formation and creating social cohesion, see Sonja Buckel, *Subjectivation and Cohesion: Toward the Reconstruction of a Materialist Theory of Law*, trans. Monika Vykoukal (Boston: Brill, 2021).

[13] Rothman, *Culture of Control*, 35. See also, David Rothman, *Conscience and Convenience: The Asylum and Its Alternatives in Progressive America* (1980; repr., New Brunswick: Aldine Transaction, 2012); Jonathan Simon, "The Return of the Medical Model: Disease and the Meaning of Imprisonment from John Howard to *Brown v.*

Recent scholarship, however, has begun to explore the limitations and failures of this reform project, complicating the traditional picture of success.[14] By the 1910s, the limits of the reform project were already clear. Though states had adopted probation, parole, partially indeterminate sentences, and many aspects of the National Prison Association program, no state had adopted a truly indeterminate sentence. Statute books continued to rank offenses in terms of their gravity, and trials remained focused on proving the elements of the act. Reformatories had popped up across the country but had certainly not replaced penitentiaries.

In the 1910s, a more limited but still ambitious reform project emerged—one that blended punishment with preventive measures distinct from punishment. It was easier—politically, legally, and philosophically—to introduce practices like indefinite detention in cases where people accused of offenses were deemed abnormal, defective, or perverted, especially if these practices were not considered punishment at all. This approach was not often explicitly theorized by U.S. advocates, who tended to rely on the work of European scholars like Gabriel Tarde, Raymond Saleilles, and Ugo Conti for more theoretical discussions.[15] But such an approach could be seen in, for example, the Municipal Court of Chicago's Psychopathic Laboratory, founded in 1914. The laboratory inspected a subset of people who passed through the court and were considered abnormal. It provided reports to judges and produced research, but it also committed people it deemed defective to institutions, including those deemed to be potential future sex criminals. Notably, the laboratory only selected a subset of those accused of

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Plata," *Harvard Civil Rights-Civil Liberties Law Review* 48, no. 1 (2013): 217; Michel Pfierri, *Reinventing Punishment: A Comparative History of Criminology and Penology in the 19th and 20th Century* (Oxford: Oxford University Press, 2016), 63-75; Foucault, *Discipline and Punish*.

[14] Michele Pifferi, ed. *The Limits of Criminological Positivism: The Movement for Criminal Law Reform in the West, 1870-1940* (New York: Routledge, 2022).

[15] French scholar Marc Ancel notes in his famous book on social defense that the U.S. adopted social defense measures, such as the sexual psychopath laws, without using terms like social defense. Marc Ancel, *Social Defence: A Modern Approach to Criminal Problems*, trans. J. Wilson (London: Routledge & Kegan Paul, 1965), 62.

crimes for this special treatment. As a Municipal Court report from 1915 put it: "The offender who is normal in mind and body reacts to punishment in such a way that the theory of deterrent effect is seen to be valid. Not so the defective."[16] These measures supplemented the existing criminal legal system rather than replaced it. It was less revolutionary than that of giving true indeterminate sentences to all incarcerated people because it preserved the appearance of legality, formal equality, and proportional punishment for "normal" prisoners. At the same time, it consigned abnormal or irresponsible persons, including juveniles, "defective delinquents," people accused of repeat crimes and sex crimes, who could be easily ignored and dismissed, to a system in which they enjoyed few rights or protections because they were not being "punished."[17]

This chapter focuses not just on the emergence of these special techniques of control but also on why punishment persisted when many leading reformers, like Wines, thought it was on its way out. If Wines were transported to the mid-twentieth century U.S., he likely would not have been particularly surprised by the development of sexual psychopath laws, but he probably would have been shocked at the continuing use of criminal punishment. Understanding the persistent appeal of the classical conception of punishment requires understanding its origins and motivations, particularly its entanglement with capitalist social relations. From this starting point, I then explore how theories, advanced by alienists, of partial insanity, moral insanity,

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[16] Municipal Court of Chicago, *Eighth and Ninth Annual Reports, For the Years December 1, 1913 to December 5, 1915* (Cameron, Amberg & Company, 1913), 15.

[17] Markus Dubber has likewise characterized the United States as a "dual penal state," which combines a system of legal punishment of formal equals with a system of police discipline of othered subjects. My work builds on Dubber's scholarship, but it differs in important ways. Dubber is concerned with the relationship between law and police as broad modes of state power, which have been present throughout U.S. history. I am concerned with the emergence of security measures at a particular point in time, which fall under the category of "police power" but are historically specific. During this period, states developed genuinely new uses of the police power. Markus D. Dubber, *The Dual Penal State: The Crisis of Criminal Law in Comparative-Historical Perspective* (Oxford: Oxford University Press, 2018).

psychopathy, and sexual perversion motivated critiques of the liberal theory of punishment, casting doubt on its abstract conception of humanity, its idea of responsibility, and its attempt to establish an equivalence between crime and punishment. I focus, in particular, on the moral economy of punishment—the idea that the severity of punishment must relate somehow to the gravity of the wrong.[18] In doing so, I am building on the work of many historians who have explored critiques of the classical theory.[19]

This chapter differs, however, in highlighting the importance of sexual crime to these debates. I highlight, for instance, how theories of sexual perversion motivated critiques of the classical liberal theory of punishment and set the stage for security measures applied against perceived sexual deviants, that is, putatively non-penal measures like indefinite civil detention. The founder of modern sexology, Richard von Krafft-Ebing, remarked at the turn of the century that many people who committed sexual crimes were likely constitutionally defective and not responsible for their actions. At the same time, Krafft-Ebing and other sexologists acknowledged that normal, responsible people could also commit atrocious sexual crimes. Judges had to have the help of alienists in sorting between the cases of vice, in which punishment was justified, and those of pathology, where it was pointless.[20]

This chapter also presents a different history of the origins of sex offender laws by highlighting the importance of debates on indeterminate sentencing and broader transformations in criminology. Histories of sex offender laws tend to focus on psychiatry and culture, which are

[18] Fassin, *The Will to Punish*.
[19] Pfierri, *Reinventing Punishment*; Michael Willrich, *City of Courts: Socializing Justice in Progressive Era Chicago* (Cambridge: Cambridge University Press, 2003); Thomas Andrew Green, *Freedom and Criminal Responsibility in American Legal Thought* (Cambridge: Cambridge University Press, 2014); David Garland, *Punishment and Welfare: A History of Penal Strategies* (New Orleans: Quid Pro Books, 2018).
[20] Richard von Krafft-Ebing, *Psychopathia Sexualis with Especial Reference to Contrary Sexual Instinct: A Medico-Legal Study*, from the 7th German Edition, trans. Charles Gilbert Chaddock (Philadelphia: F.A. Davis, 1893), 378-381; Allan McLane Hamilton and Lawrence Godkin, *A System of Legal Medicine*, Vol. 2 (New York: E.B. Treat, 1894), 559.

important, of course.[21] But so, too, were debates about the problems with determinate sentences and the need for individualizing punishment.

I. *The Classical Liberal Theory of Punishment*

To its critics at the turn of the last century, the classical liberal theory of punishment was marked by abstraction and impersonality. It was preoccupied with juridical equality and uniformity and focused on the criminal act rather than the concrete person.[22] Such abstraction, as Andrew Sartori, William Sewell, and others have shown, was a product of the impersonal character of capitalist social relations, a world in which relations between commodities and systems of abstract equivalence, rather than personal ties, increasingly mediated social life.[23] As Amy Dru Stanley and others have argued, this abstract form of social interdependence had long been undergirded by concrete exercises of state power such as enclosures, forced labor, anti-vagabondage laws, and the threat of the workhouse.[24]

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[21] See the introduction for examples.
[22] Discussed later in the chapter.
[23] Andrew Sartori, *Liberalism in Empire: An Alternative History* (Oakland: University of California Press, 2014); William Sewell, *Capitalism and the Emergence of Civic Equality in Eighteenth-Century France* (Chicago: University of Chicago Press, 2021). See also Anita Chari, *A Political Economy of the Senses: Neoliberalism, Reification, Critique* (New York: Columbia University Press, 2015), 108; Steven Pincus, "Neither Machiavellian Moment nor Possessive Individualism," *The American Historical* Review 103, no. 3, 707. This understanding of the nature of capitalism comes from Moishe Postone, *Time, Labor, and Social Domination: A Reinterpretation of Marx's Critical Theory* (Cambridge: Cambridge University Press, 1993), 148-151. Similar formulations of the nature of capitalism appear in Werner Bonefeld, *Critical Theory and the Critique of Political Economy* (New York: Bloomsbury, 2014), 386-387; Graham Burchell, "Peculiar Interests: Civil Society and Governing 'The System of Natural Liberty," in *The Foucault Effect: Studies in Governmentality* (Chicago: University of Chicago Press, 1991), 132-33. For a discussion of liberalism's abstraction in relation to punishment specifically see Markus Dubber, "The Right to be Punished: Autonomy and its Demise in Modern Penal Thought," *Law and History Review* 16, no.1 (1998): 113-146. Extensive empirical data in support of this thesis can be found in Paul Bouscasse, Emi Nakamura, Jón Steinsson, "When Did Growth Begin? New Estimates of Productivity Growth in England from 1250 to 1870," *NBER Working Paper* 28623, March 2021, Revised 2021, https://www.nber.org/papers/w28623.
[24] Nicos Poulantzas, *State, Power, Socialism*, trans. Patrick Camiller, with an introduction by Stuart Hall (London: Verso, 2014); Foucault, *Discipline and Punish*; Jairus Banaji, "The Fictions of Free Labor: Contract, Coercion, and So-Called Unfree Labor," *Historical Materialism* 11, no. 3, 69-95; Robert J. Steinfeld, *The Invention of Free Labor: The Employment Relation in English and American Law and Culture, 1350-1870* (Chapel Hill: The University of North Carolina Press, 1991), 79-80; Stuart Hall, et al., *Policing the Crisis: Mugging, The State, and Law and Order* (London: MacMillan Press, 1978), 172-173; Dario Melossi and Massimo Pavarini, *The Prison and the Factory: Origins of the Penitentiary System*, 40th anniversary ed., (London: Palgrave, 2017), 27-32; Amy Dru Stanley, "Beggars Can't Be Choosers: Compulsion and Contract in Postbellum America," *Journal of American History* 78,

The social life capitalism produced was the starting point for liberal theorizing about punishment, no less than other areas of governance.[25] The standard image of human beings in liberal theory was, in Uday Singh Mehta's words, "anthropologically minimal," shorn of history, culture, or status.[26] In the state of nature, Locke and other liberal theorists hypothesized, people were born free, equal, and independent and were motivated by rational self-interest.[27] The model of freedom and equality was contractual exchange, in which bearers of equivalent rights engaged in consensual transactions.[28] Starting from the state of nature, people obtained security and rights

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no. 4 (1992), 1265-1293; Saidiya Hartman, *Scenes of Subjection* (New York: Oxford University Press, 1997), 115-124.

[25] Of course, ideas never arise *ex nihilo*. Liberal philosophers built on ideas that had appeared in germinal form before. Roman jurisprudence was an important precursor to ideas about the liberal subject. For instance, the Roman jurist Ulpian had claimed that "everyone would be born free by the natural law," though he accepted slavery as justified by the law of nations and argued that one's status determined the amount of punishment one received for committing a crime. Alan Watson, *The Digest of Justinian* (Philadelphia: University of Pennsylvania Press, 2009), 359–64. The spiritual equality of all men was, of course, an important Christian doctrine, and Biblical notions of the equality of men were sometimes seized upon by peasants in the medieval period. But the idea of prelapsarian equality sometimes served to justify hierarchy in the fallen world. Paul H. Freedman, *Images of the Medieval Peasant* (Stanford: Stanford University Press, 1999), 59–66. Finally, Brian Tierney has argued that the conception of rights as a form of property, justifications of government grounded in consent, and thought experiments about the state of nature had appeared in the work of medieval canon lawyers and theologians who had been thinking through the problems posed by the commercial revolution they had been living through. Brian Tierney, *The Idea of Natural Rights: Studies on Natural Rights, Natural Law, and Church Law, 1150-1625* (Grand Rapids, MI.: Wm. B. Eerdmans Publishing, 2001), 131. What was unique about liberalism was the particular assemblage of views its theorists had compiled, the unqualified nature of ideas that had appeared in more qualified terms earlier, the contexts in which the views were deployed, and their wide acceptance and political power.

[26] Uday Singh Mehta, *Liberalism and Empire: A Study in Nineteenth-Century Liberal Thought* (Chicago: University of Chicago Press, 1999), 55.

[27] Richard Tuck describes the "state of nature" as a state "in which agents [are] defined in minimal terms—that is possessing an extremely narrow set of rights and duties." Richard Tuck, *The Rights of War and Peace: Political Thought and the International Order from Grotius to Kant* (Oxford: Oxford University Press, 1999), 6. John Dunn describes the state of nature in Locke as a "jural condition of equality and freedom uncontaminated by history." John Dunn, *The Political Thought of John Locke: An Historical Account of the Argument of the "Two Treatises of Government"* (Cambridge: Cambridge University Press, 1982), 110.

[28] The literature on the juridical complexity of commodity exchange and contract is enormous. I have been influenced by Georg Wilhelm Fredrich Hegel, *Elements Philosophy of Right*, trans. H.B. Nisbit (Cambridge: Cambridge University Press, 1991), §§ 71-81; Karl Marx, *Capital: A Critique of Political Economy, Volume 1* (London: Penguin, 1991), 178-179; Karl Marx, *Grundrisse: Foundations of the Critique of Political Economy*, trans. Martin Nicolaus (London: Penguin, 1993), 239-250; Max Weber, "The Market: Its Impersonality and Ethic" in *Economy and Society: An Outline of Interpretive Sociology*, eds. Guenther Roth and Claus Wittich (Berkeley: University of California Press, 1978), 635-639; Evgeny B. Pashukanis, *The General Theory of Law and Marxism* (New Brunswick, NJ: Transaction, 2003), 120; Lucio Colletti, "Bernstein and the Marxism of the Second International," in *From Rousseau to Lenin: Studies in Ideology and Society* (London: Monthly Review Press, 1974), 92-97; Poulantzas, *State, Power, Socialism*; Postone, *Time, Labor, and Social Domination*; Carole Pateman, *The Sexual Contract* (Stanford: Stanford University Press, 1988), 57–58. Amy Dru Stanley, *From Bondage to Contract: Wage Labor, Marriage, and the Market in the Age of Slave Emancipation* (Cambridge: Cambridge University Press,

through mutually beneficial agreements. The state was justified by consent rather than the personal power of a patriarch, master, or lord.[29] Society was, as political theorist Carole Pateman observed, one of "contract all the way down."[30]

Like any contract, the social contract was only as good as its enforcement mechanism, and thus it was grounded in the ability to punish those who defaulted on its conditions. Though liberal theorists, starting with Locke, often minimized or ignored the violent and racist disciplinary processes that sustained contractual and exchange relations—empire, slavery, forced labor—they acknowledged the importance of punishment. The first clause of Locke's definition of political power was "a right of making laws with penalties of death." Locke believed that people were born free and rational, but "not that we have actually the exercise of either." As Uday Singh Mehta has argued, people needed to be "molded and transformed" into free, equal, and rational subjects through discipline and the threat (or imposition) of punishment.[31]

Liberal theorists held that punishments, even those that involved penalties of death or slavery, did not violate a person's rights so long as certain formal conditions were met. The state should punish people equally for the same crime (though, of course, personhood was not universally conferred by the white male theorists of liberalism).[32] Crimes and the severity of punishment should be knowable ahead of time so that people could rationally calculate the costs

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1998); Sianne Ngai, *Theory of the Gimmick: Aesthetic Judgment and Capitalist Form* (Cambridge: Harvard University Press, 2020), 179–86; China Miéville, *Between Equal Rights: A Marxist Theory of International Law* (Chicago: Haymarket Books, 2006).

[29] Stanley, *From Bondage to Contract*; Pateman, *The Sexual Contract*; C.B. McPherson, *The Political Theory of Possessive Individualism: Hobbes to Locke* (Oxford: Oxford University Press, 1962), 269; Robert J. Steinfeld, *The Invention of Free Labor: The Employment Relation in English and American Law and Culture, 1350-1870* (Chapel Hill: University of North Carolina Press, 1991), 91–92.

[30] Pateman, *The Sexual Contract*, 59.

[31] Locke, *Second Treatise*, 268 (§3), 308 (§6); Uday Singh Mehta, *The Anxiety of Freedom: Imagination and Individuality in Locke's Political Thought* (Ithaca: Cornell University Press, 1992), 85.

[32] For more on the equality of subjects under the social contract see Thomas Hobbes, *Leviathan*, ed. Richard Tuck (Cambridge: Cambridge University Press, 1996), 100-101, 237.

and benefits of their acts. Even Hobbes had argued that if the state imposed a penalty more severe than that specified in the law, it was not punishing but engaging in revenge.[33] Determinate punishments established ahead of time and administered equally were a defense against arbitrary and tyrannical power and discretion.[34]

According to liberal theorists, punishment could be measured by the offense itself, a method that would reduce arbitrariness, favoritism, and the potential for tyranny. As Montesquieu put it: “It is the triumph of liberty when criminal laws draw each penalty from the particular nature of the crime. All arbitrariness ends; the penalty does not ensue from the legislator’s capriciousness but from the nature of the thing.”[35] Punishment, for liberal philosophers, should function like a pricing mechanism.[36] It had to be sufficiently harsh to make committing a crime, in Locke’s formulation, an “ill bargain to the offender” but no more. Locke claimed that a person’s punishment should be “proportionate to his transgression; which is so much as may serve for reparation and restraint.”[37] Equivalence was thus key to just punishment

The most influential and systematic statement of this theory of punishment was eighteenth-century Italian political economist Cesare Beccaria’s slim volume *On Crimes and Punishment*. Beccaria argued that criminal law had to be stripped of the vestiges of personal power and arbitrariness. Legal punishments should be publicly announced, general, clear, and

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[33] Hobbes, *Leviathan*, 215.
[34] See e.g., Locke, *Second Treatise*, 284 (§22), for an instance of the liberal fear of arbitrary discretion.
[35] Montesquieu, *The Spirit of the Laws*, (Cambridge: Cambridge University Press, 1989), Book 12, Ch. 4, p 189.
[36] The idea that punishment resembled a commercial exchange was ancient. Judith Resnik and Dennis Curtis, *Representing Justice: Invention, Controversy, and Rights in City States and Democratic Courtrooms* (New Haven: Yale, 2011), 19. Legal theorist Evgeny Pashukanis argued that the legal form itself developed out of commodity exchange. Evgeny B. Pashukanis, *The General Theory of Law and Marxism* (New Brunswick: Transaction, 2002). See also Horkheimer and Adorno’s discussion of equivalence “regulating punishment and reward within civilization” and its basis in exchange. Max Horkheimer and Theodor W. Adorno, *Dialectic of Enlightenment: Philosophical Fragments*, trans. Edmund Jephcott, edited by Gunzelin Schmid Noerr (Stanford: Stanford University Press, 2002), 12. See also Frank Engster “Subjectivity and Its Crisis: Commodity Mediation and the Economic Constitution of Objectivity and Subjectivity,” *History of the Human Sciences* 29, no. 2 (2016): 77-95.
[37] Locke, *Second Treatise on Government*, 272(§ 8), 274-275 (§12).

applied in a formal, syllogistic manner.[38] Criminal law should be designed with the equal, abstract, and rational subject of the contract in mind. [39] In Beccaria's system, the subject nearly disappeared. A punishment should be determined only by the offense, with no consideration for the particularities of the accused, even their mental state or intentions. Any allowance for discretion, anger, or mercy was an opening for arbitrariness and tyranny. [40] Despite sometimes being considered purely a utilitarian, Beccaria's philosophy contained a strong retributive element. Punishment was not merely a means of deterrence but also a form of repayment for violating the social contract. In writing about the punishment of theft, for instance, Beccaria wrote that "the most fitting punishment shall be the only sort of slavery which can be called just, namely the temporary enslavement of the labour and person of the criminal to society, so that he may redress his unjust despotism against the social contract."[41] Like Locke, Beccaria saw no conflict between deterrent and retributive aims.

Beccaria and classical penal theory were particularly influential in Revolutionary America. Armed with Montesquieu, Beccaria, and a mix of religious and Republican ideologies, Thomas Jefferson, Benjamin Rush, and many others critiqued the excessiveness and irrationality of sanguinary penal codes. These American thinkers argued that old regime penal codes were characteristic of monarchical forms of power. Many early state constitutions in the U.S. instantiated the principles of classical penal theory and did away with sanguinary punishments.

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[38] Cesare Beccaria, *On Crimes and Punishment* in *Crimes and Punishment and Other Writings*, trans. Richard Davies and Virginia Cox (Cambridge: Cambridge University Press, 1995), 12-17.
[39] Piers Beirne, *Inventing Criminology: Essays on the Rise of 'Homo Criminalis,'* 31-32; Pasquale Pasquino, "Criminology: The Birth of a Special Knowledge," in *The Foucault Effect: Studies in Governmentality* (Chicago: University of Chicago Press, 1991), 238 ("*Homo penalis* is nothing more or less than the citizen, the man of the contract.")
[40] Beccaria, *On Crimes and Punishment*, 22-23, 51-52.
[41] Beccaria, *On Crimes and Punishment*, 19, 53. My reading of Beccaria on this point is informed by Beirne, *Inventing Criminology*, 31-33 and Richard Bellamy, "Introduction" in Beccaria, *On Crimes and Punishments*.

Several state constitutions incorporated the principle of proportionality, as did the U.S. Constitution, albeit in quite limited form, in its prohibition on cruel and unusual punishment. [42]

II. *The Classical Theory in Crisis*

This classical system of punishment offered administrative advantages, specifically less room for discretion and arbitrariness in sentencing, in addition to greater domination and control of incarcerated people. However, it came into crisis in the early Republic, as incarcerated people challenged the brutality of prisons through rebellions and riots. Workingmen's associations organized against competition from goods incarcerated people produced through forced labor. Penal reformers, like those that founded the National Prison Association, lamented that prisons did not produce the docile, reformed subjects they envisioned but instead seemed to foster rebelliousness. Finally, imprisonment seemed to not be very effective at deterring crime in the first place.[43]

By the Progressive Era, critiques of the classical theory had become more pervasive. This shift was partly due to the ascendance of the liberal project; without the old regime as a foil, the value of classical theory's abstraction, formalism, and uniformity was less apparent.[44] The influential French jurist Raymond Saleilles spoke for many across the Atlantic World at the turn of the century when he critiqued "abstract impersonal justice, which was the ideal of a former generation, but which we reject because we know its results."[45]

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[42] Rebecca M. McLennan, *The Crisis of Imprisonment: Protest, Politics, and the Making of the American Penal State, 1776-1941* (Cambridge: Cambridge University Press, 2008), 19-21.
[43] McLennan, *The Crisis of Imprisonment*, 67; Ian Taylor, Paul Walton, and Jock Young, *The New Criminology: For a Social Theory of Deviance* (London: Routledge, 1973); Pashukanis, *General Theory*, 181-182.
[44] See Pifferi, *Reinventing Punishment*, 34-35, who notes the change in "legal culture and social needs" that motivated the critique on the classical school, though he does not share my interpretation of the cause of this change.
[45] Raymond Saleilles, *The Individualization of Punishment*, trans. Rachel Szold Jastrow (Boston: Little, Brown, and Company, 1911), 265.

Not only did the abstraction of liberalism appear to be without contemporary purpose, but its notion of formal equality increasingly appeared to be illusory. In 1912, the legal scholar Roscoe Pound pointed out that the law's "abstractions, proceeding upon a theoretical equality, do not fit at all points a society divided into classes by conditions of industry."[46] By putatively treating people equally through the application of general rules, the law, in fact, treated people unequally. A leading progressive reformer G. Frank Lydston, a professor of criminal anthropology at Chicago-Kent College of Law, argued that "the equality of under and upper dog before the law is more theoretic than real." In reality, he explained, "the underdog has an equal chance if he has money enough to hire as good a lawyer." In large cities, especially, putatively "fair and impartial" laws, he argued, were "administered with an evil eye and an unequal hand."[47]

Notably, however, most criminal law reform efforts of the period were not directed at equalizing punishment or achieving more substantive equality but instead at doing away with juridical equality and the general application of criminal laws altogether. The watchword of the period was "individualization." The crucial innovation was the idea that punishment had to be made to fit not the crime but individual in all their complexity—including, of course, identity based on race, gender, and class position. A legislature or even a sentencing judge could not determine the time necessary to reform each individual. Only prison administrators and experts, like prison doctors, who had intimate knowledge of each incarcerated person could determine the punishment. Already in the 1870s, reformers, including wardens and prison administrators, had

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[46] Roscoe Pound, "The Scope and Purpose of Sociological Jurisprudence, III," *Harvard Law Review* 25, no. 6 (1912): 502. Of course, this point could serve both progressive and regressive ends. For Pound, it meant that the law must recognize the disadvantages faced by the lower classes. For some reformers, it meant that it was unjust to punish a sensitive member of the upper class with the same severity as a "habitual offender" from the lower classes.

[47] G. Frank Lydston, *The Diseases of Society: The Vice and Crime Problem* (Philadelphia: J.B. Lippincott Company, 1904), 59, 108; see also Frederick Howard Wines and Winthrop David Lane, *Punishment and Reformation: A Study of the Penitentiary System* (New York: T. Y. Crowell, 1910).

begun to campaign for indeterminate sentences, wherein incarcerated people would be released as soon as, but only when, they had been "reformed," as determined by the administrators themselves.[48] This gave the power to the penal expert, not the judge or legislature.

In 1870, Enoch Wines, a prominent member of the New York Prison Association, Zebulon Brockway, warden at the Detroit House of Correction, and Franklin Sanborn, a Massachusetts journalist and social scientist, organized the first meeting of the National Congress on Penitentiary and Reformatory Discipline (later called the National Prison Association). The most important wardens, penologists, and penal reformers in the country gathered with politicians in Cincinnati in October 1870 for the first meeting. They were eager to distinguish punishment from slavery in the wake of Emancipation, but they also worried about the failing system of prison discipline, rising crime in industrializing cities, and the resistance of workingmen's associations to contractual penal labor. The aim of the group was to reorient the prison system toward the goal of reforming prisoners rather than punishing them. At that first meeting, the association endorsed a reform program that called for a wholesale transformation in the system of punishment. The central plank was indeterminate "sentences limited only by satisfactory proof of reformation." This aim was to be accompanied by the professionalization of prison administration, the classification of incarcerated people, preventive institutions such as truant schools, juvenile detention, state supervision of released prisoners, longer sentences for people accused of repeat offenses, and a rejection of retribution as the goal of punishment. This program would serve as the basis for penal reform thinking for more than half a century.[49]

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[48] Wines, *Transactions, 1870*, 54.
[49] Wines, *Transactions, 1870*, 541-547. Nicole Hahn Rafter has stated that this Declaration launched prison reform thought on the course it would follow for the next 100 years. Nicole Hahn Rafter, *Creating Born Criminals* (Urbana: University of Illinois Press, 1997), 97. Reformers started implementing these ideas in the mid-1870s.

Whereas the principle that a punishment should fit the crime was the foundation of the classical system of criminal law, the prison reformers of the National Prison Association argued that this principle was the basis of all the failures of incarceration. Members of the organization and associated reformers would hold this position for decades. In a 1904 work, Frederick Wines, who was Enoch Wines's son, contended that the attempt to "establish a mathematical proportion between the guilt of every offense and its appropriate penalty" was the "underlying cause of the failure of lawgivers and of judges to secure and establish criminal justice."[50] The lawyer Eugene Smith, who was on the executive committee of the National Prison Association, agreed in 1910, calling it the "most dangerous feature" of the "punitive system."[51] Experience and practice, reformers claimed, had demonstrated that there was no relationship between the time needed to reform someone and the gravity of their crime. Eugene Smith stated that "it is often found that those convicted of grave felonies are more amenable to reformative influence than some who are sentenced for minor misdemeanors." Moreover, a set release date encouraged an attitude of resistance and independence.[52] The penal reformers often criticized the classical theory's "commercial view" of crime and punishment, granting people their freedom once they paid off their debt to society, regardless of their potential for future danger. Reformers favored a more paternalistic approach. Administrators needed both the stick of continued detention and the carrot of early release to adequately reform incarcerated people.[53]

In addition to practical arguments for individualization, reformers made a philosophical argument against the idea that the punishment should "fit" the crime, namely that crime and

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[50] Wines, *The New Criminology*, 11. Eugene Smith, "Criminal Law in the United States," in *Correction and Prevention Vol. I*, ed. Charles Richmond Henderson (Philadelphia: Russell Sage Foundation, 1910), 61.
[51] Smith "Criminal Law in the United States," 61.
[52] Ibid, 60, 67.
[53] Robert Fletcher, "The New School of Criminal Anthropology," *The American Anthropologist*, 6 no. 3 (1891): 210; Smith, "Criminal Law in the United States," 67.

punishment were incommensurable. There was something unscientific, even theological, in the idea that punishment and wrong could be weighed against each other.[54] As Oliver Wendell Holmes, Jr. sardonically remarked in 1875, "right or wrong cannot be weighed in a grocer's balance."[55] Even with an ordinal scale, one had to arbitrarily choose the scale of punishment, criminologists pointed out. Should the gravest punishment be death, life in prison, or ten years of incarceration?[56]

As biological and psychiatric notions of criminality became prominent by the late nineteenth century, this body of theory rationalized the failures of incarceration to reform prisoners and the threat of punishment to deter crime and lent theoretical support to efforts at individualization and indefinite detention, even if, as is sometimes forgotten, many critics of the classical theory rejected biological explanations of crime.[57] Already, a century earlier, Philippe Pinel and Benjamin Rush had argued that people could suffer from affective and behavioral impairments without suffering from delusions. Locke held that insanity always involved cognitive delusions. Challenging the reigning Lockean conception of insanity, Pinel argued that cases of "mania sans delirium" were possible. Pinel illustrated the idea with examples of people seized by irresistible impulses to violent, sexual, and other inappropriate acts.[58] Benjamin Rush,

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[54] Henry Maudsley, *Responsibility in Mental Disease* (London: Henry S. King, 1874), 126. See also HLA Hart, "Punishment and Elimination of Responsibility," 163.
[55] Oliver Wendell Holmes, "Crime and Automatism," *The Atlantic*, 35, no. 210 (April 1875): 467.
[56] Enrico Ferri, *The Positive School of Criminology: Three Lectures Given at the University of Naples, Italy* (Chicago: C. H. Kerr, 1906), 12–13.
[57] Historians have often explained Gilded Age and Progressive Era reforms by pointing to the emergence the science of criminology and especially of biological and deterministic theories of criminality in the late nineteenth century. See, e.g., Michael Willrich, *City of Courts*, 75; Craig Haney, "Criminal Justice and the Nineteenth-Century Paradigm: The Triumph of Psychological Individualism in the Formative Era," *Law and Human Behavior* 6, no. ¾ (1982): 210-216; Stuart Hall, *Policing the Crisis*, 173-174; James J. Beha, II., "Redemption to Reform: The Intellectual Origins of the Prison Reform Movement," *NYU Annual Survey of American Law*, no. 63 (2007): 795-96.
[58] Philippe Pinel, *A Treatise on Insanity, In Which are Contained, the Principles of a New and More Practical Nosology of Maniacal Disorders, Than Has Yet Been Offered to the Public, Exemplified by Numerous and Accurate Historical Relations of Cases from the Author's Public and Private Practice: With Plates Illustrative of Craniology of Maniacs and Idiots*, trans. D.D. Davis (Sheffield: W. Todd, 1806), 150-156.

a leading prison reformer, had described a condition he called "moral derangement," an impairment of either the willpower or the conscience that was not necessarily accompanied by cognitive delusions and could compel a person to commit criminal acts. Such people should be, Rush argued, objects of compassion, and it was the task of medicine to help them. Though "compassion," for Rush, meant incarceration and forced labor.[59]

Phrenology produced a picture of the mind that was particularly conducive to the idea of partial forms of insanity. The founder of phrenology, François Joseph Gall, whose work was translated into English in the 1830s, claimed that the functions of the mind could be localized to specific areas of the brain, which he called organs. This meant that partial forms of insanity and partial forms of imbecility were possible.[60] People with defective organs that recreated uncontrollable impulses were particularly dangerous, especially if they had strong sexual propensities. "Though these partially imbecile individuals are not moral beings, nor consequently, punishable, the care of watching them no less pertains to the police, and it is indispensable to separate from social commerce, all kinds of weak-minded persons, in whom strong indications of evil dispositions are perceived," his book advised.[61] Gall was especially important in developing the idea of "erotic mania" as a disorder that drove people to sexual

[59] Benjamin Rush, *Medical Inquiries and Observations Upon the Diseases of the Mind*, 5th ed. (Philadelphia: Grigg and Elliot, 1835) 261-268, 355-365; Jan Verplaetse, *Localising the Moral Sense: Neuroscience and the Search for the Cerebral Seat of Morality* (New York: Springer, 2009), 192.
[60] François Joseph Gall, *Organology or An Exposition of the Instincts, Propensities, Sentiments, and Talents or of the Moral Qualities, and the Fundamental Intellectual Faculties in Man and Animals and the Seat of their Organs*, vol. 4, trans. Winslow Lewis, Jr., (Boston: Marish, Capen and Lyon, 1835), 117, 137-138; François Joseph Gall, *On the Origin of the Moral Qualities and Intellectual Faculties of Man, And the Conditions of Their Manifestation,* vol. 1 (Boston: Marsh, Capen & Lyon, 1835), 319. Verplaetse's *Localising the Moral Sense* provides a thorough history of the quest to localize morality.
[61] Gall, *On the Origin of the Moral Qualities*, 321.

excess.[62] Erotic mania, Gall argued, was based not in the sexual organs but in the cerebellum.[63] Gall's theories led him to advocate quite early on for the individualization of punishment. His claim that "the measure of the punishment should not be derived either from the matter of the illegal act, nor from any determinate punishment, but solely from the situation of the individual acting" would be cited ad nauseam by later biological theorists of crime.[64]

In the mid-nineteenth century, the debate over the existence of partial manias or mania without delirium grew in intensity, and the terminology proliferated. In 1835, James Cowles Prichard coined the term "moral insanity," describing it as a condition "in which the intellectual faculties have sustained little or no injury while the disorder is manifested principally or alone, in the state of the feelings, temper, or habits." The morally insane, Pritchard claimed, do not have the "power of self-government" and are incapable of "conducting [themselves] with decency and propriety."[65]

Pritchard and many other authors used "moral insanity" as a general term for behavioral, emotional, or affective disorders without delusional symptoms. But the term also took on a more specialized meaning, different from Prichard's definition. Some authors used "moral insanity" to describe the inability to distinguish right from wrong, a sort of moral colorblindness.[66] Adding to the linguistic confusion, other authors used slightly different terms to designate the condition that

[62] Isaac Ray, the founder of forensic psychiatry in the United States, would credit Gall with having first discovering and describing the "true nature" of erotic mania. Isaac Ray, *A Treatise on the Medical Jurisprudence of Insanity* (Boston: C. Little and J. Brown, 1838), 193.
[63] François Joseph Gall, et. al, *On the Functions of the Cerebellum* (Edinburgh: Maclachlan & Stewart, 1838), 55-66.
[64] François Joseph Gall, *On the Functions of the Brain and of Each of Its Parts: On the Origin of the Moral Qualities and Intellectual Faculties of Man, and the Conditions of Their Manifestation* (Boston: Marsh, Capen & Lyon, 1835), 275.
[65] James Cowles Prichard, *A Treatise on Insanity and other Disorders Affecting the Mind* (Philadelphia: E.L. Carey and A. Hart, 1837), 4, 7, 16.
[66] Verplaetse, *Localising the Moral Sense*, 201-202. Somewhat confusingly, by the term "moral" Pritchard meant "the feelings, affections, and habits," not ethics. Prichard, *A Treatise on Insanity*, 4, 7, 16.

Prichard had described, including “moral mania,” “moral idiocy,” and simply “irresistible impulses.”[67]

The distinguishing features of the morally insane were their lack of conscience and their inability to control their impulses. The leading figure in the field of medical jurisprudence, Henry Maudsley, claimed that the morally insane were pure egoists, with no moral feeling at all.[68] Cesare Lombroso maintained that the morally insane “lack of any sense of morality” and that crimes are irresistible to them.[69] Psychiatrist Richard von Krafft-Ebing described it as a condition in which “civilization and moral and public order appear to be only an embarrassing obstacle for egoistic sentiment and effort.” The morally insane, Krafft-Ebing asserted, did not understand either morality or the law, which “has for them only the significance of a police ordinance.”[70] The morally insane lived outside the bounds of the social contract.

Moral insanity remained a controversial diagnosis for much of the nineteenth century, and its effect on the law was somewhat limited. It did not fit well with classical liberal legal culture. The clarity of the Lockean, or cognitive, conception of insanity, with its hard and fast rules for determining legal responsibility worked far better with the formal categories of the criminal law. Moral insanity was difficult to diagnose. In fact, its symptomatology was incredibly vague. More problematically, it threatened to dramatically expand the number of people who could use the insanity defense to avoid being held criminally responsible for their

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[67] Nicole Hahn Rafter, *Creating Born Criminals*, 78-79. For a sense of the variety of terms that were used see Isaac Ray, *A Treatise on The Medical Jurisprudence of Insanity* (Boston: Charles C Little and James Brown, 1938), 170-200.

[68] Maudsley, *Responsibility in Mental Disease*, 171–72.

[69] Mary Gibson and Nicole Hahn Rafter, “Editor’s Introduction” to *Criminal Man* by Cesare Lombroso (Durham, Duke University Press, 2006), 8; Lombroso, *Criminal Man,* 83, 219.

[70] Richard von Krafft-Ebing, *Textbook of Insanity: Based on Clinical Observations for Practitioners and Students of Medicine*, from the 7th German Edition, trans. Charles Gilbert Chaddock (Philadelphia: F.A. Davis Company, 1904), 623.

actions.[71] This problem became particularly evident when the existence and legal implications of moral insanity emerged as a central issue in the trial of President James A. Garfield's assassin Charles Guiteau.[72]

Meanwhile, biological explanations of crime became more influential. As the historian Nicole Hahn Rafter has pointed out, the work of criminal anthropologists was inspired by, but distinct from, the discourse of moral insanity. The theories of the criminal anthropologists were more hereditarian and focused more on intelligence than sanity.[73] The founding document of the field of criminal anthropology, Cesare Lombroso's *L'Uomo Delinquente*, first published in 1876, posited that a significant percentage of people convicted of crimes were not just mentally abnormal but essentially a distinct type of human being, born destined to become criminals and identifiable by their physical abnormalities.[74] Born criminals were not morally insane, strictly speaking. They were relics of earlier stages of evolution, or what Lombroso called "savages" and "the colored races." But moral insanity became increasingly important to Lombroso's theory, with later editions of *L'Uomo Delinquente* placing more and more emphasis on the concept.[75]

The Italian School, led by Lombroso, was the most well-known, but biological theories of crime were transnational. Many of these theories focused on heredity and contributed to the discourse of biological degeneration, an idea developed by French psychiatrist Benedict August

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[71] Sydney Maughs, "A Concept of Psychopathy and Psychopathic Personality: Its Evolution and Historical Development" *Journal of Criminal Psychopathology* (1941): 335; Nicole Hahn Rafter, *Creating Born Criminals* (Urbana: University of Illinois Press, 1997), 6. For a discussion of some important early cases, see Isaac Ray, *A Treatise on the Medical Jurisprudence of Insanity*, 5th Edition, With Additions (Boston: Little, Brown, and Company, 1871), 341–44. For a flavor of the discussion over the criminal law implications of the theory, see "Moral Insanity," *American Journal of Insanity* 14 (1857), 311-322.

[72] Charles Rosenberg, *The Trail of the Assassin Guiteau: Psychiatry and Law in the Gilded Age* (Chicago: University of Chicago Press, 1968); Chelsea Diane Chamberlin, "Why Wait Until They Commit a Crime: Moral Imbecility and the Problem of Knowledge in Progressive America, 1880-1920," (master's thesis, University of Montana, Missoula, 2015), 15-17.

[73] Hahn Rafter, *Creating Born Criminals*, 6-7.

[74] Cesare Lombroso, *L'Uomo delinquente: studiato in rapporto all'antropologia, alla medicina legale ed alle discipline carcerarie* (Milano: Ulrico Hoepli, 1876).

[75] Gibson and Hahn Rafter, "Editor's Introduction" to *Criminal Man*, 8.

Morel in the 1850s to describe a heritable disease of the body and mind that caused a wide assortment of abnormalities.[76] In 1877, American sociologist and prison reformer Richard L. Dugdale published what would become a landmark work, *The Jukes: A Study in Crime, Pauperism, Disease and Heredity*. Tracing one family back generations, Dugdale's study claimed that the Jukes had produced a disproportionately large number of criminals, paupers, prostitutes, and illegitimate children.[77] The conclusion that heredity played a large role in causing criminality and pauperism seemed inescapable to Dugdale, but he believed that environment and heredity interacted. He also cautioned that his conclusions were tentative.[78] Nonetheless, his study became extraordinarily influential as a demonstration of the hereditary basis of criminality.[79]

Austrian neurologist Moriz Benedikt's *Anatomical Studies upon Brains of Criminals* argued that "[t]he brains of criminals exhibit a deviation from the normal type, and criminals are to be viewed as an anthropological variety of their species." Benedikt contended that this proposition should "create a veritable revolution in Ethics, psychology, jurisprudence, and criminalistics." However, like Dugdale, Benedikt warned that his conclusions should be treated with caution.[80] The English statistician and eugenicist Francis Galton developed a method of composite portraiture, which he believed demonstrated the representative criminal face, thus stressing the hereditary and somatic aspects of criminality.[81]

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[76] Daniel Pick, *Faces of Degeneration: A European Disorder 1848-1918* (Cambridge: Cambridge University Press, 1993), 50.
[77] R.L. Dugdale, *The Jukes: A Study in Crime, Pauperism, Disease and Heredity* (New York: Putnam's, 1877); Hahn Rafter, *Creating Born Criminals*, 38.
[78] Dugdale, *The Jukes*, 65-66.
[79] Hahn Rafter, *Creating Born Criminals*, 38.
[80] Moriz Benedikt, *Anatomical Studies upon Brains of Criminals: A Contribution to Anthropology, Medicine, Jurisprudence, and Psychology*, trans. E.P. Fowler (New York: Wm. Wood, 1881), 157.
[81] Francis Galton, *Inquiries into Human Faculty and Its Development* (London: MacMillan, 1883), 8-9, 63.

Although sometimes used interchangeably, the morally insane and the born criminal had slightly different profiles. The contrast between the impoverished Jukes family and the Lombrosian atavistic throwback to an earlier stage of evolution illustrates the difference. Moral insanity was a more elastic diagnosis, one that was applied to lower-class white people and Black, Indigenous, and people of color but that could also be used to explain, or explain away, the criminality of upper-class white people with "good" family backgrounds.[82]

There was fierce debate about whether moral insanity could exist in the absence of intellectual defect. Many theorists, perhaps a majority, believed they were nearly inextricable.[83] In the last edition of his *Textbook of Insanity*, Krafft-Ebing argued that "intellectual defect is never wanting in these ethically deficient individuals." "Many of them," he wrote, "are actually feebleminded."[84] Other theorists understood the two to be extricable, reasoning that class status distinguished the morally insane from the ordinary criminal. Moral insanity was the preferred diagnosis when one could not obviously point to, in the words of Isaac Ray, "the faults of education, to evil example, or to innate depravity" to explain criminality.[85] It was, as Foucault put it, motiveless crime, crime that seemed to be unexplainable.[86]

Moral insanity allowed for the disavowal of upper-class criminality, converting it from ordinary criminality into a symptom of disease. W.P. Spratling, pathologist at the New Jersey State Insane Asylum, explained that it was precisely the intellectual and cultural superiority of the morally insane that separated them from normal criminals. "There is one broad distinction between moral imbeciles, or the subjects of moral insanity, and the lower strata of mankind who

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[82] See for example Daniel Hack Tuke, *Prichard and Symonds in Especial Relation to Mental Science: With Chapters on Moral Insanity* (London: J. & A. Churchill, 1891), 66–67.
[83] Havelock Ellis, *The Criminal* (London: W. Scott Publishing Company, 1914), 291.
[84] Krafft-Ebing, *Textbook of Insanity*, 623-625.
[85] Ray, *Jurisprudence of Insanity*, 186.
[86] Michel Foucault, *Abnormal: Lectures at the Collège de France, 1974-1975*, trans. Graham Burchell (New York: Picador, 2007), 122.

willingly and with deliberate purpose do misdeeds; and that difference lies in the comparative intellect of the two," Spratling held. The morally insane were "oftentimes brilliant" and may "bear the polish of good society."[87] Daniel Hack Tuke made social status an explicit part of the diagnosis of moral insanity: "each case must be decided in relation to the individual himself, his antecedents, education, surroundings, and social status."[88] Commenters recognized the classist dimensions of moral insanity at the time. One critic mocked the doctrine for treating delinquents who had been raised with every advantage of wealth and culture with sympathy while denying it to those who had been raised in poverty, surrounded by temptation.[89]

Theories of biological criminality, and especially the notion of moral insanity as a sort of criminality that seemed uncaused and undeterrable, posed a challenge for the classical liberal conception of criminal law. Liberal theory had worked under the assumption that human beings, excepting those who suffered from insanity, were rational and could be deterred from crimes by appropriately priced punishments. Punishment proportioned to the gravity of the crime satisfied requirements of justice as well as goals of deterrence and reformation because the moral blameworthiness of the act, its danger to society, and the depravity of the person who committed the act were linked, for the most part.[90] Biological theories appeared to sever every link in this chain, seemingly demonstrating that a significant number of people who were not legally insane were nonetheless undeterrable and not morally responsible for their acts.

Oliver Wendell Holmes pointed out that an implication of the doctrine of moral insanity was that the more heinous the crime, the less likely a person was to be responsible for it: "the

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[87] W.P. Spratling, "Moral Insanity," *Medico-Legal Journal* 8, no. 3 (1890): 224-225.
[88] Daniel Hack Tuke, "Moral or Emotional Insanity," *The Journal of Mental Sciences* 31, no. 131 (April 1885): 190.
[89] Richard Brown, "Insanity in its Relations to Punishment for Crime," *Proceedings of the Philosophical Society of Glasgow* 95 (1897-98): 127-128.
[90] For an explicit statement of this view see Francis Wharton, *A Treatise on Criminal Law*, 11th ed., with additions by James M. Kerr (San Francisco: Bancroft-Whitney, 1912), 12-13.

most frightful crimes, committed with no sign of compunction, and leaving not a shadow of regret are without any moral character whatever, from which it follows that the unfortunate subject of moral idiocy is just as innocently acting out the tendencies he inherits as the rattlesnake"[91] Isaac Ray, a founder of the field of medical jurisprudence in the U.S., argued that in some cases of mania, the person perversely desired punishment.[92] To measure the punishment by the act—in fact, to punish the person at all—would not be merely unjust or ineffectual but nonsensical, a category error.

At the core of the discussion of moral insanity and monomania lay concern with sexual crime. Early in the history of moral insanity, Isaac Ray had pointed to seemingly uncontrollable sexual acts as the clearest proof of the existence of moral insanity, writing that "if morbid action in the brain inducing a deprivation of moral liberty ever exists, it does in what is called erotic mania."[93] Krafft-Ebing argued that the morally insane were particularly likely to engage in sexual perversity and that sexual perversions were "usually based upon moral insanity."[94]

By the late-nineteenth century, both the popular press and academic work were devoting more attention to sexual crimes. Panics about rings of homosexual men who gathered in urban centers, rich and powerful men who abused children, and similar stories ignited people's imaginations.[95] The emerging field of sexology demonstrated just how pervasive and varied sexual perversions were. The new field of sexology described these phenomena in medical language. In 1886, German psychiatrist Richard von Krafft-Ebing published his field-defining

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[91] Holmes, "Crime and Automatism," 472.
[92] Isaac Ray, *Treatise on the Medical Jurisprudence of Insanity*, 265-266.
[93] Ibid, 195.
[94] Krafft-Ebing, *Textbook of Insanity,* 625.
[95] See Francis W. Anthony, "The Question of Responsibility in Cases of Sexual Perversion," *Boston Medical and Surgical Journal* 139 no. 12 (1898): 288-291.

book *Pyschopathia Sexualis*.[96] "Sexuality is the most powerful factor in individual and social existence," he claimed, "the strongest incentive to the exertion of the strength and acquisition of property, to the foundation of a home, and to the awakening of altruistic feelings."[97] Perversion threatened both the home and the capitalist market. Krafft-Ebing gave detailed descriptions of a wide variety of sexual perversions including sadism, lust-murder, masochism, homosexuality, and necrophilia. In the worst cases, the perverse were "psycho-sexual monsters" with unbounded impulses and no contrary moral feeling to oppose those impulses. His book helped to found the new field of sexology, which sought to apply the methods of science to the study of human sexuality.[98]

Sexologists argued that many cases of perversion were hereditary. Krafft-Ebing argued that a perversion like sadism, for example, could be due to "original ethical defect, hereditary degeneracy, or moral insanity."[99] U.S. sexologist G. Frank Lydston asserted that sexual perversion demanded special attention because "it is probable that few bodily attributes are more readily transmitted to posterity than peculiarities of sexual physiology." According to Lydston, "acquired sexual perversion in one generation may thus be a constitutional and irradicable aberrancy in the next."[100]

The new understanding of sexual perversion posed its own problems for the liberal theory of punishment. Crimes of passion, in which an extraordinary situation occasioned a strong emotion that in turn overwhelmed reason, had been a long-standing puzzle for punishment

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[96] Richard von Krafft-Ebing, *Psychopathia Sexualis*, 7th ed., trans. Charles Gilbert Chaddock (Philadelphia: F.A. Davis, 1894). Heinrich Kaan's 1844 treatise *Psychopathia Sexualis* explained a variety of sexual aberrations in medical, rather than religious or moral terminology. Kaan's text, however, was in Latin, which limited its popular impact. Michel Foucault, *Abnormal*, 275.
[97] Ibid, 1.
[98] Ibid, 59.
[99] Ibid, 61.
[100] Lydston, *Diseases of Society*, 378.

theory. Was a person fully responsible for an action that seemed to be irresistible and lacked premeditation? Even the classical criminal law treated perpetrators of such crimes as less culpable than those who committed premeditated crimes. In a similar way, experts believed that sexual crimes were driven by strong, biological impulses in response to immediate stimuli. Hamilton Wey, the influential physician at Elmira Reformatory and perhaps the Gilded Age's most influential U.S. criminal anthropologist, maintained that the motive for every rape he had investigated was immediate stimuli, rather than premeditation. He believed that "imprisonment has not the slightest effect upon the subject or operates as a deterient (sic) upon others similarly constituted" because people who committed sexual crimes did not rationally consider whether to commit their crimes.[101] Likewise, Krafft-Ebing postulated that "the infraction of the laws by so powerful a natural instinct can be but little influenced by punishment."[102]

In fact, sexual crimes seemed to present an even stronger case than crimes of passion for the relaxation of ascriptions of responsibility, since sexologists posited that many of the people who committed sex crimes were constitutionally defective.[103] Krafft-Ebing concluded from his study that because "neuropathic, and even psychopathic, states are largely determinate for sexual crimes" therefore "nothing less than the responsibility of many of the men who commit such crimes is called into question."[104] American sexologist G. Frank Lydston argued that nothing could stop a child with a hereditary perversion from following their "own inherent inclinations."[105]

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[101] Hamilton Wey, "Morbid Sensuality in a Reformatory," *The Chicago Medical Recorder* 10 (January 1896): 144.
[102] Krafft-Ebing, *Psychopathia Sexualis*, 378.
[103] The view that sexual vice was caused by a bodily defect was not new. Plato, for instance, believed that sexual overindulgence was caused by a bodily defect, and thus was not something a person should be blamed for. Plato, *Timeaus*, trans. Donald J. Zeyl (Indianapolis: Hackett, 2000), 82c-e.
[104] Krafft-Ebing, *Psychopathia Sexualis*, 379.
[105] Lydston, *Diseases of Society*, 378.

Thus, neither deterrence nor retribution seemed to justify the punishment of many people convicted of sexual crimes. But what about rehabilitation? Things looked even worse for this justification of punishment. Perhaps if sexual misbehavior was the result of a weak will or immorality, incarceration could solve this problem through discipline that strengthened the will and isolation that gave an incarcerated person time to consider their actions. But if biological perversion caused sexual misconduct, what positive effect could sitting in a prison cell have? To the extent that sexual perversions were treatable at all, sexologists believed that they required diagnoses and sustained attention from a professional alienist, who could employ expert techniques like hypnotic suggestion.[106] Moreover, the unnaturalness of prison life, reformers increasingly acknowledged, was a site that induced perversion even in people who were not previously perverted. How, then, could it cure a person who was already perverted? Imprisonment only led to further physical and moral decline.[107]

Sexologists also argued that perversion, whether pathological or acquired, was particularly dangerous because it was a progressive disease, further setting sex crimes apart from other types of crime. In a striking illustration of this idea, Dr. Austin Flint, a physician and lawyer from New York claimed that the difference between a person who imagined sadistic acts, like spanking or whipping, and a person who mutilated and murdered people was "only a difference of transition and degree."[108] Theorists often cited a psychological law as evidence for the progressive nature of perversion: the tendency of nerves to fatigue or adapt to repetitive

[106] Krafft-Ebing, *Psychopathia Sexualis*; Albert von Schrenck-Notzing, *Therapeutic Suggestion in Psychopathia Sexualis, with Especial Reference to Contrary Sexual Instinct*, trans. Charles Gilbert Chaddock (Philadelphia: F.A. Davis Company, 1901).
[107] Hamilton Wey, "Morbid Sensuality in a Reformatory," 142-143.
[108] Austin Flint, "The Case of Thaw-Sexual Crimes," *Indianapolis Medical Journal* 16, no. 1 (December 1913): 399–405.

stimuli.[109] A leading figure in the field of psychophysics, German Hermann von Helmholtz had formulated the principle that "any powerful excitement of a nerve deadens its excitability."[110] This was an adaptive response to stress, and under normal conditions the nerve would recover after a period of rest. But if the excitement was excessive or continuous, the fatigue could become pathological. Nerve fatigue—and its pathological manifestation, neurasthenia—was a powerful and multivalent concept in the U.S. by the early twentieth century. With the birth of competitive industrial capitalism, large and loud urban centers, and the dizzying variety of new forms of amusement, there was widespread worry that nerve exhaustion had become a pervasive condition.[111]

Physicians often claimed that nerve exhaustion contributed to perversion. This gave a scientific gloss to a moralistic explanation of perversion. A leading American sexologist, James Kiernan, declared in an 1892 address to the Chicago Medical Society that "[i]n accordance with the well-known physiological law, that too frequent excitation of a nerve exhausts the reaction of that nerve to that excitant, sexual excess exhausts the normal reaction, whence it occurs that abnormal stimulus is required and vice type of sexual perversion results."[112] Excessive sexual stimulation would lead to reduced sexual excitement but not necessarily reduced sexual desire, meaning that the person would have to resort to abnormal means of gratification.[113] Lydston claimed that "excess brings in its train a deterioration of normal sexual sensibility, often with an increase in sexual appetite," resulting in perversion. This situation, alienists warned, could lead

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[109] For an early statement of this principle see Johann August Unzer, *The Principles of Physiology*, trans Thomas Laycok (1771; London: C and J. Adlard Printers, 1851), 231-232. For a history of psychophysics, see Edward Boring, *Sense and Perception in the History of Experimental Psychology* (New York: D-Appelton-Century, 1942).
[110] Hermann von Helmholtz, *On the Sensations of Tone as a Physiological Basis for the Theory of Music*, trans. Alexander J. Ellis (London: Longmans, Green, 1875), 169.
[111] See e.g., George Miller Beard, *American Nervousness, Its Causes and Consequences* (New York: Putnam, 1881).
[112] Jas. G. Kiernan, "Responsibility in Sexual Perversion," *The Chicago Medical Recorder* 3 (May 1892): 186.
[113] William Alexander Hammond, *Sexual Impotence in the Male and Female* (Detroit: George S. Davis, 1887), 29–31, 303–4.

previously normal men to attempt sex with children.[114] This explanation was sometimes seen as one that applied not just to the nerves but to all matter—a fundamental, almost Newtonian law. American neurologist George M. Beard, an early developer of the theory of neurasthenia, stated that "physical facts suggest a law which runs through all nature, which the inanimate as well as animate world obeys: reaction follows action, and as a necessary result of action: violent and excessive exercise of any function finds relief only in the opposite condition—in perversion."[115]

The concept of perversion as a naturally progressive disease helped to solidify the notion that it was unusually dangerous to release any person convicted of a sexual crime. A petty thief might go on to commit a murder, but there was no physiological law that compelled a petty thief to graduate to robbery, then to assault, and finally to murder. Moreover, a person who might risk a short period of incarceration for petty theft and one who might risk the death penalty for committing a grisly murder were not necessarily the same. But a sadist who liked to imagine violent sexual acts was only a few steps away from committing a lust murder. The backward-looking nature of punishment seemed to be particularly dangerous when applied to sexual criminals whose future danger was not necessarily commensurate with their past actions.

What then to do with someone who could not be deterred, reformed, and might not even be morally responsible for their actions? The quandary posed by the sexual pervert was longstanding. As Doctor F.E. Daniel, editor of the Texas Medical Journal, asked in an 1893 article, "Who in the present state of our knowledge of sexual perversion and its relation to insanity, shall pronounce—and let go a responsible human brute, a constant menace to a community, or send to the gallows or stake, an *eroto-maniac*, possibly an irresponsible person?

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[114] Lydston, *Diseases of Society*, 379-380; Lawrence Godkin, *A System of Legal Medicine*, Vol. 2 (New York: E.B. Treat, 1894), 543-544.
[115] George M. Beard, *Sexual Neurasthenia: Its Hygiene, Causes, Symptoms, and Treatment*, *with a Chapter on Diet for the Nervous* (New York: E.B. Treat, 1884), 106-107.

or hang an idiot?" This was the paradox of the perverted person convicted of a sexual crime. The state could not justly execute such a person but neither could it ever release this person back into the community.[116]

Medical experts tended to differentiate between pathological and non-pathological cases of sexual perversion, between the "abnormal" and the "immoral." Krafft-Ebing argued that people who suffered from pathological sexual perversions—i.e., those due to "mental defect, degeneration, or disease"—were different from those who chose to act immorally. The immoral person could be influenced by punishment, the abnormal person could not. In pathological cases, either the impulse was so strong it could not be overridden, or the person was morally insane and lacking any moral notions that opposed the impulse. The immoral, Krafft-Ebing argued, should instead be isolated from society for life, rather than punished.[117]

But sexologists acknowledged that differentiating the abnormal from the merely immoral was not so easy. A heinous act might indicate pathology, but it was not a sure sign of it. Krafft-Ebing pointed out that even people "of sound mind" were "capable of the most monstrous and perverse sexual acts." In his *A System of Legal Medicine*, the prominent alienist Allan McLane Hamilton wrote that "the sexual acts springing from disease and those prompted by vice may be in many cases identical."[118] The relevant question, both Krafft-Ebing and Hamilton believed, was not how abnormal the act was or even whether the perversion was hereditary or acquired but whether the perversion resulted from a diseased state such as a neuropathic or psychopathic

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[116] F.E. Daniel, "Castration of Sexual Perverts," *Texas Medical Journal* 9, no. 6 (December 1893): 262. For Daniel, sexual criminals, particularly Black men accused of rape, needed not punishment but "something higher, nobler, and more in keeping with an advanced civilization than revenge." But for Daniel, this higher, nobler treatment was castration, a topic to be discussed in more detail in the next chapter. Ibid, 262.
[117] Krafft-Ebing, *Psychopathia Sexualis*, 378-381.
[118] Allan McLane Hamilton and Lawrence Godkin, *A System of Legal Medicine*, Vol. 2 (New York: E.B. Treat, 1894), 559.

constitution.[119] The classical theory of punishment, with its focus on the criminal act rather than the individual, certainly lacked the resources to differentiate these cases. Krafft-Ebing believed that distinguishing the cases of immorality from the truly pathological required the cooperation of judges and experts. Determining whether a person was immoral or abnormal could require, as another commenter put it, a "life history of the person in question to the minutest detail." [120]

Assistance in distinguishing the abnormal from the immoral cases would come from the development of the idea of psychopathic inferiority or psychopathic personality. In the late 1880s, the German psychiatrist Julius Koch first used the term "psychopathic inferiority" to refer to a large variety of psychological disorders.[121] Koch believed that some of the people who had this condition were compelled toward criminality and could not be held fully responsible for their actions. For Koch, this condition explained how intelligent members of the upper classes could commit crimes.[122] Psychopathy began to play a role similar to moral insanity and even born criminality as a popular explanation of criminality. An influential 1907 textbook, Emil Kraepelin's *Clinical Psychiatry: A Text-book for Students and Physicians* (abridged and adapted from his German textbook) used the terms "born criminality," "moral insanity," "moral imbecility," "degeneracy," and "psychopathic personality" as overlapping and complementary explanations of criminality. According to the textbook, moral insanity was a subset of a broader category, psychopathic personality, itself a form of degeneration due to hereditary factors in the parents, and moral insanity manifested not just mentally but also in physical stigmata on the

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[119] Krafft-Ebing, *Psychopathia Sexualis*, 380.
[120] Ibid, 379-381; Francis W. Anthony, "The Question of Responsibility in Cases of Sexual Perversion," *Boston Medical and Surgical Journal* 139, no. 12 (September 22, 1898): 291.
[121] James Horley, "The Emergence and Development of Psychopathy," *History of the Human Sciences* 27, no. 5, (2014): 96.
[122] Richard Wetzell, *Inventing the Criminal: A History of German Criminology* (Chapel Hill, University of North Carolina Press, 2000), 55-56.

body.[123] German psychiatrist Theodor Ziehen used "psychopathic constitution" to describe a wide variety of mental illnesses short of insanity. One of his subtypes of the psychopathic constitution was the degenerative type, which included physical stigmata like those Lombroso discussed.[124]

"Psychopath" was a remarkably flexible term, applicable to anyone who did not seem to fit in society. The "objective" tests psychologists developed for psychopathy demonstrated this fact. One test, for instance, utilized the Kent-Rosanoff word association. People who gave idiosyncratic responses to prompts rather than more common associations (e.g., to the prompt "boy," the association "girl") were more likely to be psychopathic. Another utilized Stanford-Binet intelligence tests. Experts thought that while a tester could predict how a feebleminded person might answer incorrectly, a psychopathic individual would answer questions in unpredictable ways. Psychopaths thought differently from the average person.[125]

Dementia praecox also distinguished the immoral from the abnormal. As Emil Kraepelin developed the diagnosis, dementia praecox was a breakdown in the personality and the patient's psychic unity, affecting both the patient's emotions and volitions.[126] Patients could experience a wide variety of symptoms, including lethargy, loss of interest in life, hallucinations, disturbed thoughts, impulsive actions, violent outbursts, lack of judgment, unusual sexual sensations and sexual delusions, lack of sympathy for others, and weakened moral sentiments (often leading to

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[123] Emil Kraepelin, *Clinical Psychiatry: A Textbook for Students and Physicians*, abstracted and adapted by A. Ross Diefendorf, Revised and Augment Edition (New York: The MacMillan Company, 1902), 515-521.

[124] Theodor Ziehen, "On the Theory of the Psychopathic Constitution: Bodily Symptoms," trans. James C. Hassall, *The Alienist and Neurologist* 34, no. 4 (November 1913): 379-388; J. Victor Haberman, "The Psychopathic Constitution," *Medical Review of Reviews* 18, no.3 (March 1912): 170-173.

[125] Henry Goddard, "Psychopathy and Delinquency," *Proceedings of the Annual Congress of the American Prison Association, Columbus, Ohio, October 14-19, 1920* (New York: Wynkoop Hallenbeck Crawford Co., Printers), 407-408.

[126] Emil Kraepelin, *Dementia Praecox and Paraphrenia*, From the Eighth German Edition of the "Textbook of Psychiatry," Translated by R. Mary Barclay, Edited by George M Robertson (Edinburgh: E & S Livingston, 1919), 1, 53.

criminal acts).[127] While the connection between the disease and criminality was clear in Kraeplin's formulation, the association became even closer in the U.S., as the meaning of dementia praecox evolved in American psychiatric thought.[128] For example, William J. Hickson, of the Psychopathic Laboratory of the Municipal Court of Chicago, called dementia praecox the "criminal psychosis par excellence" in a report covering the Lab's work from 1914 to 1917.[129] A later report claimed that people with dementia praecox lacked "all the social emotions," "moral qualities are submerged or actually absent," and "there is no guiding conscience." The report predicted that "such people will violate social rules under any conceivable environment short of absolute control." Nearly repeating the language of moral insanity, the report argued that "they are types which may well be called moral defects."[130]

Psychopathy, moral insanity, degeneracy, born criminality, and sexual psychopathy were all distinct concepts, but as psychiatrists of the Progressive Era sought to explain criminality, these ideas tended to intersect, overlap, and blend together. Each diagnosis contributed to a eugenic explanation of criminality and provided a second life to biological theories of criminality. The reductionist determinism of figures like Lombroso came under harsher attack, and more criminologists came to doubt that criminality itself was heritable. But theories of feeble-mindedness, psychopathy, sexual perversity, sexual psychopathy, and moral insanity provided a more sophisticated version of the same idea. Criminality was not heritable, but these

[127] Ibid, 1-73.
[128] For more on the history of dementia praecox in the United States and how it diverged from Kraepelin's conception, see, Richard Noll, *American Madness: The Rise and Fall of Dementia Praecox* (Cambridge: Harvard University Press, 2011).
[129] Hickson, "Report of the Psychopathic Laboratory, May 1, 1914 to April 30, 1917," 138.
[130] "The Psychopathic Laboratory," Municipal Court of Chicago, *Twelfth, Thirteenth & Fourteenth Annual Reports for the Years December 2, 1917 to December 6, 1920* (Chicago: Fred Klein Co., Printers), 34-35.

conditions were. Though a condition like psychopathy was not synonymous with criminality, it was, criminologists argued, statistically associated with it.[131]

This matrix of categories of abnormal psychology strengthened the push for indeterminate sentences. People who were compelled to commit crimes by basic biological impulses were not fully responsible for their actions and should not be released into society at set times to progress in their perversion, according to this view. Those who could be cured in prison should be released as soon as they were no longer a threat to safety. Those who were not had to be held indefinitely. A judge could not determine who might be reformed ahead of time at sentencing. This was work for prison administrators, doctors, and other experts, according to this view.

The first experiment with partially indeterminate sentences was conducted on sex workers in the late 1860s. Michigan's "three years" law sentenced sex workers to three-year sentences with the possibility of early release based on "good behavior."[132] The Elmira Reformatory, which applied a form of partially indeterminate sentence and a system of parole to people between sixteen and thirty, opened in 1876 under the leadership of National Prison Association leader Zebulon Brockway, and it served as a model for other reformatories, even after it had been investigated by Congress in the 1890s for brutal and systematic beatings of incarcerated people, often conducted by Brockway himself.[133]

[131] See e.g., Edith Spaulding and William Healy, "Inheritance as a Factor in Criminality," *Journal of the American Institute of Law and Criminology* 4, no. 6 (1914): 837-858.
[132] Edward Lindsey, "Historical Sketch of the Indeterminate Sentence and Parole System," *Journal of the American Institute of Criminal Law and Criminology* 16, no. 1 (1925): 18.
[133] See Piscotta, *Benevolent Repression* for more on Elmira. The Act establishing Elmira is quoted in Lindsey, "Sketch of the Indeterminate Sentence," 21-23.

III. *The Challenges of Individualization*

Advocacy of completely indeterminate sentences was deeply controversial. Unsurprisingly, jurists and legal scholars defended the classical theory of punishment. Wharton's influential *Treatise of Criminal Law* stated that the state could not be guided only by the purposes of society but "has a conscience of its own to assert, moral principles to vindicate."[134] Even some leading alienists and sexologists defended the old system. The prominent sexologist James G. Kiernan, for instance, stated in his 1892 address that that there were already resources in the common law sufficient to determine responsibility in cases of sexual perversion, and there was therefore no need for special legislation.[135]

Exponents of the moral aspects of punishment argued that punishment had tasks other than crime prevention and rehabilitation. There was a moral economy to punishment.[136] Wharton's *Treatise* stated that "penal discipline undoubtedly is expedient." "But," it claimed, "the jurisdiction is exercised, not because it is expedient, but because it is right." In his 1893 book *The Division of Labor in Society*, Emile Durkheim, pointed out that despite all the contemporaneous discussion that treated the criminal law as if it were merely a way to prevent crime, "punishment has remained an act of vengeance." Durkheim wrote: "It is claimed that we do not make the guilty person suffer for the sake of suffering. It is nonetheless true that we deem it fair that he should suffer." Durkheim believed that the continuing insistence that there be an equilibrium between punishment and crime (i.e., that the punishment fit the crime) proved that punishment remained primarily about expiation for the past.[137]

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[134] Wharton, *Treatise on Criminal Law*, 11.
[135] Kiernan, "Responsibility in Sexual Perversion," 210.
[136] Fassin, *Will to Punish*.
[137] Durkheim, *Division of Labor in Society*, 45-47.

Durkheim acknowledged that punishment was a fetishized social form. He noted that crimes appear as "attacks on something transcendent" and thus "require of us a higher sanction than the mere reparation we content ourselves with in the sphere of purely human interests." But he conceded that this idea was an illusion, a projection of social interests and desires outward, making what was immanent to human relationships appear transcendent and absolute. However, Durkheim held this was an illusion that kept society functioning. Theories of punishment that denied that a person should suffer in proportion to their crimes—measured by the degree of social outrage their crimes provoked—threatened to destroy moral consciousness itself. [138] Punishment promoted social cohesion.

The scientific discussions about perverse, undeterrable people were, in a sense, beside the point of this discussion. The criminal law reinforced social bonds and the moral consciousness of ordinary people by inflicting suffering on those who violated the social contract. Influential historical scholarship has framed the debate between the classical system and the new biological and sociological approaches as one between a view that stressed the individual will and one that stressed the interconnected nature of modern society.[139] But proponents of the classical conception were just as concerned with the interconnected nature of modern life as the critics. They saw in punishment a source of solidarity and ideological discipline that was, if anything, more important in an interconnected, industrialized world.

Critics of the classical system tended to be prison administrators, penal reformers, and alienists—rather than jurists—and courts were initially skeptical of the reform proposals, including even partially indeterminate sentences, probation, and parole.[140] For instance, in 1891,

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[138] Emile Durkheim, *Division of Labor in Society*, 52, 62-63.
[139] See e.g., Michael Willrich, *City of Courts*, 84.
[140] See the helpful discussion in Michele Pifferi, *Reinventing Punishment*, 70.

the Michigan Supreme Court struck down a partially indeterminate sentence law for unconstitutionally delegating the judicial and executive power to a prison board. While the Court stuck the law down because it violated the separation of powers, it was clear that broader concerns motivated the ruling. The law gave the prison board "despotic power" and made the incarcerated person the "servant and slave of the prison board," the court declared.[141] While some courts upheld these early experiments in individualization, the Michigan Supreme Court was not alone in striking down such laws out of a fundamental discomfort with the deviations from the classical theory.[142]

Despite these setbacks, many states across the country adopted *partially* indeterminate sentence laws, probation, and parole during the period.[143] Their adoption was a profound change in the U.S. system of punishment, one that should not be minimized. But states did not pass true indeterminate sentence laws as reformers had envisioned them. [144] Instead, statute books continued to rank crimes in terms of their gravity, and states favored partially indeterminate sentences, often with minimum and maximum terms set by the statutory definition of the offense or by the judge at sentencing. Surprisingly much of the old idea of penality survived in the Progressive Era.

Reformers had achieved a great deal, but they were hardly satisfied with the way U.S. states adopted only partially indeterminate sentences. In a 1910 address to the American Prison Association (previously the National Prison Association), a founder of the indeterminate sentencing movement, Zebulon Brockway, called these sentences "bastardly indeterminate

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[141] *People v. Cummings*, 88 Mich. 249, 254-255 (Mich. 1891).
[142] Pferri, *Reinventing Punishment*, 70.
[143] Edward Lindsey, "Historical Sketch," 9-126.
[144] Amos Butler, "Operation of the Indeterminate Sentence and Parole Law: A Study of the Record of Eighteen in Indiana," *Journal of Criminal Law and Criminology* 6, no.6 (1916): 893.

sentence[s]" because they were only partially indeterminate, with minimum and maximum set by statute.[145] University of Chicago professor Charles Richmond Henderson, a leader of the National Prison Association, argued in a 1910 publication that it was a misnomer to call these sentences "indeterminate" at all, complaining that "the metaphysical dogma of measured retribution for guilt" continued to restrict reform efforts.[146] Harvard criminologist Sheldon Glueck noted in his 1925 textbook that the country's partially indeterminate sentences laws were in fact determinate sentence laws in an "easily pierced disguise."[147]

In their studies of the workings of partially indeterminate sentence laws, probation, and parole, reformers and scholars found that the desired shift in focus from the act to the individual had not occurred. Reformers complained that parole boards worked in a perfunctory manner, with little study of the individual. In New York and New Jersey, studies in 1916 and 1917 claimed that nearly all incarcerated people were released once they had served their minimum sentence, with no examination of the individual.[148] Yet, this was not the case everywhere. In Indiana, Illinois, and Minnesota, studies showed that partially indeterminate sentences were longer than determinate sentences for the same crime, particularly for sexual offenses. Nonetheless, there was a general sense among the public, administrators, authorities, and incarcerated people that indeterminate sentences were in fact determinate sentences for the minimum period specified by the statute or sentencing judge.[149]

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[145] Paul U. Kellogg, "The International Prison Congress, As a Layman Interprets It," *The Survey: A Journal of Constructive Philanthropy* 25, no. 6 (Nov. 5, 1910): 204.
[146] Henderson, *Correction and Prevention*, xv-xvii, xix.
[147] Sheldon Glueck, *Mental Disorder and the Criminal Law: A Study in Medico-Sociological Jurisprudence* (Boston: Little, Brown, 1925), 67.
[148] Edward Lindsey, "What Should the Form of the Indeterminate Sentence Be," *Journal of Criminal Law and Criminology* 12, no. 4 (1922): 539-541.
[149] Lindsey, "What Should the Form of the Indeterminate Sentence Be," 539-541; Butler, "Operation of the Indeterminate Sentence and Parole Law," 885-893; Lindsey, "Historical Sketch," 77.

Trials too had not changed in any significant way. They remained adversarial affairs in which defendants possessed certain abstract rights against the state. Trials remained focused on the act—whether it happened, the accused's intent, etc.—rather than the future danger the defendant posed. Guilt and responsibility were still paramount. This focus was precisely what the founders of the American Prison Association and the indeterminate sentencing movement wanted to do away with. For the reformers, the length of time a person served should have nothing to do with their crime, only with the time it took to rehabilitate them. In Brockway's 1910 address, he lamented that it was only when "prisoners are committed because they are dangerous if left at large" and only discharged "when they are really safe" that the penitentiary would actually work to repress crime.[150]

The younger generation of reformers agreed with Brockway that the reform project had not gone far enough. Charles Richmond Henderson protested the fact that trials remained focused, above all else, on establishing the elements of the criminal act, with little study of the accused.[151] Reformer Eugene Smith noted that modern criminal law continued to "*assume* that crimes are susceptible of general definitions that can be practically applied to concrete cases."[152] In 1921, complaints still filled the pages of the *Journal of Criminal Law and Criminology* that the present criminal law reflected, in the words of one lawyer, a "repayment theory" of punishment: "our penal codes today, like their predecessors are, in effect, catalogues raisonnès [sic] of crime, with the price marked opposite each crime in plain figures."[153] A criminologist

[150] "Address by Hon. Z.B. Brockway, Elmira, New York," in *Proceedings of the Annual Congress of the American Prison Association, Washington, D.C., September 29 to October 8, 1910* (Indianapolis: WM. B. Burford, n.d.), 165.
[151] Henderson, *Correction and Prevention*, xviii.
[152] Smith, "Criminal Law in the United States," 59.
[153] John Alan Hamilton, "Making the Punishment Fit the Crime," *Journal of the American Institute of Criminal Law and Criminology* 12, no. 2 (1921): 172-173.

writing in the 1930s noted the country's failure to develop "the implications of the principles enumerated" in the National Prison Association's 1870 Declaration of Principles.[154]

Part of the problem was that already by the turn of the century, wardens, reformers, and scholars were losing confidence in the idea that punishment could reform, which was the fundamental premise of the indeterminate sentencing movement in the U.S. Of course, theoretically, the state could simply use indeterminate sentences to detain people indefinitely. Already at an 1883 meeting of prison officers and directors organized by the National Prison Association, with biological theories of crime just coming into view for U.S. reformers, members debated what the implications would be for the indeterminate sentence would be if a significant number of prisoners were not reformable. While some were comfortable with potential life detention for people convicted even of minor offenses, others were not so sure.[155]

People who committed sexual crimes seemed to be particularly difficult to reform, even according to the leading experts working at the most advanced reformatories. Even Hamilton Wey, the physician at the Elmira Reformatory, which was founded by Zebulon Brockway and considered the leading reformatory in the country, did not know what to do. In an 1896 address to the Medico-Legal Society of Chicago, Wey recounted the various techniques he had attempted on people accused of sexual misconduct, particularly masturbation, such as "physical activity to the point of absolute fatigue, mechanical restraint of hands and genital organs, chemical irritation and inhibition." But none of these tortures worked, and he ultimately concluded that only "asexualization or sterilization of certain sexual perverts and criminals" could have any effect.[156]

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[154] Nathaniel Cantor, "Conflicts in Penal Theory and Practice," *Journal of Criminal Law and Criminology* 26, no. 3 (1935): 330-350.
[155] National Prison Association, *First Annual Report (Second Series), 1883* (New York: C.G. Burgoyne, 1884), 45-61.
[156] Hamilton Wey, "Morbid Sensuality in a Reformatory," 144. On Elmira see Pisciotta, *Benevolent Repression*.

Experts worried that the public would not accept the very long criminal sentences that might be necessary to reform or detain some prisoners, not to mention practices like castration. The historiography often presents the persistence of punishment as a concession on the part of experts to the public's thirst for vengeance, but experts were just as worried that juries would nullify in cases where finding a defendant guilty of a minor crime would mean putting the person away potentially indefinitely.[157] At that 1883 meeting organized by the National Prison Association, its cofounder, the journalist and social scientist Franklin Sanborn noted that the "ordinary mind" reeled at the idea of sentencing people who committed very different offenses to the same indeterminate term since people were attached to the idea of proportional penalties.[158] This was a continuing problem. The director of Chicago's Psychopathic Laboratory, William J. Hickson, noted in 1921 that penalties "cannot be increased very much, for experience has taught us that where the penalty is made too severe juries will not convict because of the quid pro quo theory on which the law bases punishment—the punishment shall be proportionate to the crime—and because of the eighth amendment to the constitution, which declares 'excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted."[159] There seemed no way to implement indeterminate sentences given the public's (and even some reformers') attachment to the economy of punishment.

IV. *The Reception of Continental Theory*

In a 1914 article in the *Journal of the American Institute of Criminal Law and Criminology,* the political philosopher Horace Kallen eloquently summarized the interregnum in

[157] See e.g., Garland, *Culture of Control*, 35.
[158] National Prison Association, *First Annual Report, 1883*, 48.
[159] Hickson, "Report of the Psychopathic Laboratory," in *Fifteenth Annual Report of the Municipal Court*, 181.

which criminal law scholars found themselves. Society, in general, was caught between the discredited old doctrines and new untested methods:

> contemporary society is undergoing a sort of moral interregnum. The dogmas of the ancient tradition are worm-eaten and moldering…. New principles that shall be sound enough to do the work of the old have not yet been discovered, although everybody who tries his hand at smashing the old code messes up a new and private one, unfounded in common experience.[160]

Not coincidentally, Kallen was summarizing the views of French jurist Gabriel Tarde. In seeking a way out of this interregnum, U.S. jurists and scholars received assistance from the scholarship of major European jurists. The American Institute of Criminal Law and Criminology (which had grown out of the 1909 National Conference on Criminal Law and Criminology held at Northwestern University) and the Association of American Law Schools undertook major translation projects.[161] Both groups were more academic than the National Prison Association and sought to popularize important continental theory. A number of European theorists, like the Italian criminal anthropological school, advocated replacing criminal punishment with detention of the dangerous and treatment where possible. Others European theorists, however, especially French scholars like Gabriel Tarde and Raymond Saleilles, whose work was translated by the Institute, were more comfortable with the blending of punishment and preventive measures like detention and seemed to offer a third way between the classical school and their modernist critics.

The influence of European theorists on Americans should not be surprising. This was the era of "Atlantic Crossings" as Daniel Rodgers has called it—a time when ideas were

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[160] Kallen was summarizing the views of the French philosopher Gabriel Tarde, who is discussed below. H.M. Kallen, Review of *Penal Philosophy* by Gabriel Tarde, *Journal of the American Institute of Criminal Law and Criminology* 5, no. 4 (1914): 613.

[161] "The American Institute of Criminal Law and Criminology," *Journal of the American Institute of Criminal Law and Criminology* 1, vol. 1 (1910): 2-5; Editorial Committee, "General Introduction to the Series," in Rudolf von Jhering, *Law as a Means to an End*, trans. Isaac Husik (Boston: Boston Book Company, 1913), v-x.

disseminated through international conferences, scholars studied abroad, and serious translation projects were undertaken.[162] If American criminal law scholars and criminologists produced less systematic theory, it was because, as they acknowledged themselves, they relied on the work of European theorists who had already done this labor.[163]

One important contribution that some of these European scholars made was to explain the persistence of punishment focused on the act. A number of European theorists pointed to the importance of the appearance of formal legal equality as a barrier to complete individualization. In his enormously influential book *The Individualization of Punishment*, French legal scholar Raymond Saleilles noted the "difficulty of divesting the ordinary conception of justice from a kind of abstract mathematical equality."[164] The problem was not that ordinary people were attached to a silly outdated notion. The abstraction of equality was vital to maintaining social cohesion in a capitalist society. The founder of the German sociological jurisprudence movement, Rudolf von Jhering, had argued that equality had no value for its own sake and that substantive inequality would always "find its way back again by a thousand paths."[165] In a 1913 translation of his major work *Law as a Means to an End*, he noted that the *perception* of juridical equality—that there was an equivalence between "an act and its consideration" and "uniformity in the application of the norm to all cases"—was essential. Some modernists had in a sense taken

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[162] Daniel T. Rodgers, *Atlantic Crossings: Social Politics in a Progressive Age* (Cambridge: Belknap Press, 1998).
[163] For example, in *The Individual Delinquent*—which is discussed below—William Healy acknowledged that he skipped over philosophical reflection because this work had already been done by figures like Saleilles and Tarde. In the section of his book that defended punishment, Healy made no philosophical arguments and instead cited Conti as an authority. William Healy, *The Individual Delinquent: A Text-Book of Diagnosis and Prognosis For All Concerned in Understanding Offenders* (Boston: Little, Brown, and Company), 15-16, 167. Likewise, Tarde was cited in multiple chapters of leading reformer Charles Richmond Henderson's book *The Cause and Cure of Crime* (Chicago: A.C. McClurg & Co., 1914).
[164] Saleilles, *The Individualization of Punishment*, 13.
[165] Histories of criminology rarely discuss Jhering's contribution in any detail because he was not primarily concerned with criminal law, but his influence can be seen in the work of his student Listz and the many people he influenced, such as Roscoe Pound.

the classical liberals too literally. The classical liberals no more believed in substantive human equality than Jhering, but all saw the value in the appearance of formal equality. Hence Locke's claim that though people are born free and equal, they not do not necessarily have the "exercise of either."[166] The idea of equality was an abstraction in the same way that equivalence in matters of exchange was a necessary abstraction. People had to believe they were getting the equivalent value for their contribution or harm to society, or they would stop contributing. Worse, they might become radicals who sought the overthrow the whole system, Jhering claimed. The person who violated the law had to pay the appropriate price for violating the social contract.[167]

Legal scholars like Jhering realized that, as Horkheimer and Adorno later argued, society viewed justice as a matter of equivalence and exchange.[168] People who violated the law owed something to society whether or not they had been reformed. Any legal system had to take this into consideration. For French jurist Gabriel Tarde, whose book *Penal Philosophy* was translated in 1912, society itself was "nothing more than an interlacing and a tissue of the following two kinds of facts: the production or exchange of services and the production or the exchange of injuries."[169] Tarde wrote that, "every society, unconsciously, in establishing its system of punishment has yielded up to a certain point to the need of modeling this system upon its system of recompenses." In a capitalist society there was a "tendency to reduce everything to

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[166] Locke, *Second Treatise*, 268 (§3), 308 (§61); Uday Singh Mehta, *The Anxiety of Freedom: Imagination and Individuality in Locke's Political Thought* (Ithaca: Cornell University Press, 1992), 85.
[167] Rudolf von Jhering, *Law as a Means to an End*, trans. Isaac Husik (Boston: Boston Book Company, 1913), 100, 276-278.
[168] Max Horkheimer and Theodor W. Adorno, *Dialectic of Enlightenment*, ed. Gunzelin Noeri, trans. Edmund Jephcott (Stanford: Stanford University Press, 2002).
[169] Gabriel Tarde, *Penal Philosophy*, trans. Rapelje Howell (Boston: Little, Brown, and Company), 424. Exchange was, as Adorno said later, a conceptuality that society obeyed "*tel quel*, and it provides the objectively valid model for all essential social events." Theodor W. Adorno, "Sociology and Empirical Research," in *The Positivist Dispute in German Sociology*, ed. Theodor Adorno et al., trans. Glyn Adey and David Frisby (London: Heinemann, 1976), 80.

measurements," "to look upon penalties as prices reversed."[170] Others agreed. "Punishment," Raymond Saleilles wrote, "may be looked upon as a reparation, a kind of compensation through the suffering of the individual for the injury that has been done."[171] Jhering argued that, like price, punishment "gives the standard of values for social goods." These European theorists offered a warning to their American readers: it would not be so easy to do away with this element of punishment. Proportional punishment was not, as the critics argued, a metaphysical absurdity or atavistic holdover. It was part of the logical structure of capitalist society.[172]

Some continental theorists pointed out that this notion of equivalence between crime and punishment was essential to the solidaristic function of the law. If the criminal law did not make people who committed crimes suffer as compensation, the rule of law would suffer and vigilantism would result. Tarde argued that society's "profound antipathy against the criminal by reason of his crime and apart from any thought of the crimes which he is capable of committing or that his example is capable of committing" must be expressed in the law.[173] In an article published in the *Illinois Law* Review in 1918, the influential Italian legal scholar Ugo Conti wrote that "punishment is in its nature a reassertion of law, of the state's authority, of never-ending social coercion." If the state did not respond proportionally to violations of the juridical order, it would lose its authority.[174]

Americans who were influenced by these arguments also claimed that purely punitive sentiments were legitimate. Law Professor Roscoe Pound, an exponent of sociological

[170] Tarde, *Penal Philosophy*, 489.
[171] Raymond Saleilles, *The Individualization of Punishment*, trans. Rachel Szold Jastrow (Boston: Little, Brown, 1913), 5, 13.
[172] Tarde, *Penal Philosophy*, 489. Following the lead of Pashukanis, David Garland has similarly argued for the necessity of preserving the idea of the responsible subject in capitalist society. Garland, *Punishment and Welfare*, 189.
[173] Tarde, *Penal Philosophy*, 37.
[174] Ugo Conti, "The Concept of Punishment," *Illinois Law Review* 13 (1918-19): 242, 250.

jurisprudence, believed it was necessary to retain "many things in the criminal law which are purely retributive" to satisfy the moral views of the community and thereby repress vigilante violence.[175] Among those in the U.S. who saw no necessary conflict between punishment and medical expertise were leading psychiatric experts. This included William Healy, whose influential book *The Individual Delinquent* highlighted the value of psychiatric criminology. A section of the book, which was one of the most influential criminological texts of the time, was titled "Punishment Is Necessary." Healy, who was Director of the Psychopathic Institute of the Juvenile Court of Chicago when the book came out in 1915, noted his agreement with Ugo Conti that a penal system could not be premised solely on reformation and that legal retribution remained a legitimate goal of punishment.[176] Healy was not the only advocate of psychiatric criminology who defended punishment. Henry Goddard, who perhaps did more to popularize intelligence testing and eugenic explanations of crime than any other American in the Progressive Era, put the point more bluntly. "Is it possible," he asked rhetorically in a 1920 article published in the *Journal of the American Institute of Criminal Law and Criminology*, "that the wisest policy is to have a thorough examination into the question of responsibility, to segregate and control the feebleminded and psychopathic offender, but upon those who are not *clearly* irresponsible, to visit the severest penalty?"[177] For Goddard, it was not that there was no conflict between older conceptions of punishment and new theories and techniques. Rather, they complimented each other.

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[175] Roscoe Pound, "Preventative Justice and Social Work," in *Proceedings of the National Conference of Social Work, Washington, D.C., 1923* (Chicago: University of Chicago Press, 1923), 156; Roscoe Pound, "Criminal Justice and the American City," in *Criminal Justice in Cleveland*, ed. Roscoe Pound and Felix Frankfurter (Philadelphia: Wm. F. Fell, 1922), 576, 582.
[176] Healy, *The Individual Delinquent*, 166-167; Hahn Rafter, *Creating Born Criminals*, 176-177.
[177] Henry H. Goddard, "In the Light of Recent Developments What Should be Our Policy in Dealing with the Delinquents—Juvenile and Adult," *Journal of the American Institute of Criminal Law and Criminology* 11, no. 3 (1920): 432 (emphasis in original).

European theorists pointed out another obstacle to doing away with punishment and replacing it with treatment—the important notion of moral responsibility. The view that punishment should be replaced by treatment and training jettisoned any notion of treating people as responsible moral agents. European theorists offered a way to retain a defensible notion of responsibility despite philosophical and scientific critiques of the free will. One that was informed by, but not reducible to, the findings of science, psychology, and philosophy.

While largely forgotten today, the French jurist and philosopher Gabriel Tarde's reinterpretation of responsibility was highly influential in the decades after his book *Penal Philosophy* was translated into English in 1912.[178] In the book, Tarde sought a basis for responsibility outside the notion of the abstract free will. He maintained that society held people responsible for their actions so long as they had a sufficiently stable personal identity and were sufficiently similar to the rest of society.[179] On the first prong, as U.S. philosopher Horace Kallen put it in his review of *Penal Philosophy*, "since responsibility depends upon identity, it becomes of fundamental importance to determine the nature rather than the freedom of the responsible individual."[180] The second prong was a question of the accused's relationship to society. Tarde held that "it is to the extent that the malefactor reflects our own image that we do him the honor to be indignant against him or feel pity toward him." He presented a more flexible notion of responsibility since both personal identity and social similarity came in degrees. Abnormality

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[178] Piers Bierne has noted that despite his profound influence on criminology, histories of criminology have tended to neglect Tarde. Piers Bierne, *Inventing Criminology: Essays on the Rise of 'Homo Criminals,'* (Albany: State University of New York Press, 1993), 7. For an earlier appreciation of Tarde's influence see, Margaret S. Wilson, "Pioneers in Criminology: I—Gabriel Tarde (1843-1904)," *Journal of Criminal Law and Criminology* 45, no. 1 (1954), 11. Wilson argued that "such inroads in court and prison methods as the juvenile courts, testimony of psychiatrist and other experts at trials, the Youth Authority Act, the lessened use of the jury trial and classification and differential treatment of prisoners are concrete evidence of the application of Tardeian philosophy.")
[179] Tarde, *Penal Philosophy*, 91-92, 215.
[180] Kallen, "Review of *Penal Philosophy*," 614.

took precedence over abstract conceptions of freedom.[181] People who were sufficiently abnormal were beyond indignation and pity, outside of the moral economy of punishment with its system of proportional exchange of injury for injury.[182] They were more like foreign enemies or dangerous animals. They owed nothing to society, and society owed nothing to them.

The most influential theorist of the individualization of punishment in the Atlantic World, the French scholar Raymond Saleilles, built on Tarde's understanding of responsibility.[183] In his book *The Individualization of Punishment*, translated in 1913, Saleilles viewed the preservation of belief in moral responsibility as essential, whether or not it existed in some philosophical sense. Without responsibility, punishment would appear to people as a pure system of repression. The "conception of responsibility is a principle to be preserved at all costs," Saleilles argued.[184] For Saleilles, liability to punishment indexed humanity: "Without [responsibility] the criminal is a creature despised, ostracized, abnormal, and even monstrous; with it self-esteem remains, or at least may be regained."[185] Again, punishment, in this view, was the path by which people who committed crimes regained their place within the community. Saleilles held that responsibility was a social concept—and a racialized one. Slipping between the multiple meanings of "responsibility," Saleilles wrote that, "the farther apart men are in race and environment, the less feeling of responsibility they experience toward one another." The less a person could be held responsible for their actions, the less responsibility society felt toward them.[186] Society did not hold people who were sufficiently different responsible for their actions. Thus, responsibility "is

[181] Tarde, *Penal Philosophy*, 155-156, 176-177n.
[182] Tarde, *Penal Philosophy*, 88-89, 152. Tarde emphasized that his interpretation was not normative, but descriptive. He claimed that he wished that human beings felt responsible towards all living beings, but that this was not the case. *Penal Philosophy* 95n.
[183] Saleilles, *Individualization of Punishment*.
[184] Ibid, 153-154.
[185] Ibid, 275-276.
[186] Ibid, 155.

resolved into the idea of normality."[187] The advantage was that responsibility and punishment could be preserved for the "normal" while the "abnormal" were subject to a different mode of control.

Perhaps most importantly, these conceptions of responsibility paved the way for a more flexible notion of criminal responsibility. Responsibility was not something that inhered in subjects as a result of their free wills. It was constituted by an assemblage of social relations, state classifications, racial ideologies, philosophical distinctions, and medical nosologies. People were not responsible or irresponsible; people were *held* responsible or irresponsible by society. Punishment, in this conception, was a benefit to people convicted of crimes, reconstituting them as responsible subjects.[188]

This new conception of responsibility was influential among some of the most esteemed U.S. scholars and reformers. William Healy, who acknowledged the influence of Tarde and Saleilles on his thinking, believed that defining responsibility in some precise legal formulation was nearly hopeless. Instead, what mattered was separating the cases of mental abnormality in which people had abnormal compulsions, or lack of self-control, from the normal.[189] In his widely read 1925 book *Mental Disorder and the Criminal Law*, Sheldon Glueck likewise recognized his debt to Tarde and Saleilles's ideas about responsibility. Glueck stressed that "no one has more ably punctured the balloon of the alleged indissoluble relation between freedom of

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[187] Ibid, 163-164.
[188] He acknowledged that people who experienced "moral madness" or "moral imbecility" have "nothing in common with us excepting his features and his external appearance." It would seem, according to a straightforward application of his theory, that such a person should not be held morally responsible for their actions. Certainly, a person who constitutionally cannot understand morality or ethical codes is far less socially similar than a foreigner who, at most, has a somewhat different ethical code. When moral madness is part of a more general condition, Tarde accepted it as excusing. But when it is not part of, or the start of, a more general illness, he did not want to accept this conclusion, and he argued that having the same features and external appearance is enough to hold the person, if not fully responsible, at least sufficiently responsible to punish. Tarde, *Penal Philosophy*, 181-160-161, 182.
[189] William Healy, *The Individual Delinquent*, 15-16, 30.

the will and moral responsibility" than Tarde. Following Tarde, he argued that "our notion of responsibility is not necessarily dependent on our views as to the metaphysical problem of human freedom." He claimed that "we begin to excuse from responsibility when we see that the mental equipment of the actor was so different from that of the general run of men that he could not have approached the moral problem presented to him in the same way that most persons, under similar conditions, would have met it."[190] The Tardeian conception of responsibility as an interplay between individual psychology and social facts fit well with diseases like psychopathy, which was as much social as individual. A person who suffered from psychopathic personality—which Glueck defined as, "a generic term (perhaps more social than medical in its connotation) applied to those who, while not having a major psychosis, present a mental constitution and a habitual reaction to life's experiences that are, for one reason or another not normal or average or effective"—could not approach moral problems like normal persons.[191]

The partially responsible needed special forms of preventive measures. In the past, irresponsibility had functioned primarily as a defense against punishment, which is why moral insanity was such a controversial diagnosis in the nineteenth century. Its acceptance would have created a category of people who could not be punished but could not be committed as insane. The modernists did not want this. Some, like William Healy, denied that punishment was completely ineffective against such people. But in cases where punishment did not work, or worked only marginally, they argued for alternative preventive measures directed at dangerous individuals, which were not intended to punish people for past actions but detain them based on

[190] Glueck, *Mental Disorder and the Criminal Law*, 89, 93, 93n.2.
[191] Ibid, 379.

predictions of future danger. These would not replace but would supplement the traditional system of punishment.[192]

European theorists were early advocates for an approach that separated people deemed especially dangerous or abnormal so that they would be given special forms of treatment and preventive detention. The Swiss jurist Carl Stoos had proposed a "dual-track" system of classical proportionate punishment augmented by security measures aimed at the particularly dangerous in a draft Swiss penal code he produced in the 1890s.[193] Raymond Saleilles argued that people who committed certain types of difficult-to-deter offenses or had conditions like neurosis and degeneracy should be placed on separate tracks from the general population of incarcerated people. People whose criminality was "bound up with their temperament," as in the case of neurotic and degenerate people, and were thus only partially responsible for their actions, required "medical care in special institutions which combine hospital with prison treatment."[194] Saleilles also proposed that reclassification could occur after sentencing. If prison administrators discovered that an incarcerated person was of the incorrigible type, the person could be reclassified and given a "protective punishment" to prevent release.[195] Italian jurist Ugo Conti's formulation of "complements of punishment" was particularly clear. Conti hoped that the threat of punishment would deter crime and that the imposition of punishment would reform incarcerated people, but this was not its main purpose. It restored the authority of the state and the law. Punishment, "above everything else, has jurisdiction over a past state of affairs," Conti claimed.[196] While punishment is focused on the prior act and necessarily proportional to it,

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[192] William Healy, *The Individual Delinquent*, 166-167.
[193] René Pahud de Mortanges, *Swiss Legal History* (Berlin: Peter Lang, 2020), 287-288; Leon Radzinowicz, *Adventures in Criminology* (London: Routledge, 2002), 33.
[194] Saleilles, *Individualization of Punishment*, 285-286.
[195] Ibid, 304.
[196] Ugo Conti, "The Concept of Punishment," *Illinois Law Review* 13, no. 2 (1918): 97.

complements of punishment focus on “the inherent criminal dangerousness, or the corresponding tendency of the individual to commit new crimes.”[197] Conti argued that such complements could be used both to supplement a criminal punishment and also in cases where abnormal people presented a danger but were not liable to punishment because they had not yet violated the law.[198]

As the limits of the indeterminate sentencing movement in penal reform were becoming evident and faith in the ability of punishment to reform was waning, the appeal of supplementing, but not replacing, criminal punishment with police or security measures was obvious to U.S. lawyers and reformers. The key advantage of these measures was that they did not require changing the criminal legal system in any fundamental way. In fact, the perspective offered by figures like Conti rationalized what might seem like the failure of the criminal legal system to prevent crime or reform incarcerated people. Defenders of punishment saw the appeal. In a 1918 address to the state bar association that was reprinted in the *Journal of the American Institute of Criminology*, a South Carolina judge, W.H. Townsend, referenced Conti and stated that “the principle of the indeterminate sentence conflicts with the fundamental conceptions of retributive justice taught in the Holy Scriptures and upon which our criminal law has rested from time immemorial, and should only be used as complementary to the administration of punishment.”[199] Even the most adamant critics of punishment, who advocated completely indeterminate sentences, began to argue for the adoption of complements of punishment. Charles Richmond Henderson, a leader of the National Prison Association, claimed in a review of

[197] Ibid, 93.
[198] Ibid, 104.
[199] W.H. Townsend, “Punishment of Crime,” *Journal of American Institute of Criminal Law and Criminology* 10, no. 4 (1919): 546.

Conti's work that his proposal for complements of punishment would offer the advantages of the indeterminate sentence "perhaps in a better way."[200]

Legal scholars and criminologists in the U.S. were introduced to such approaches not just through the translation projects discussed above, but also through the International Prison Congress, which brought together reformers, jurists, and administrators every five years, in an attempt to achieve international consensus. The 1900 and 1910 meetings were particularly important for debates about the general adoption of the indeterminate sentence and alternative measures.[201] At these meetings, the more radical reformers of the National Prison Association, rather than jurists, tended to represent the U.S. These reformers pushed indeterminate sentences. European countries tended to submit reports written by jurists, like Conti and Saleilles, who advocated a more cautious approach. At its 1900 meeting, the Congress voted to reject the indeterminate sentence but resolved that "in the case of irresponsible delinquents and those affected with mental disease, the duration of restraint must necessarily be indeterminate; but measures taken with reference to this class have no penal character." For these groups, incarceration was intended not to punish but merely to incapacitate or treat.[202]

At the 1910 meeting, held in Washington D.C., participants agreed to more proposals targeted at the abnormal and dangerous.[203] In remarks designed to begin the discussion by summarizing the various reports participants submitted, an American actually set a conservative

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[200] Charles Richmond Henderson, Review of *La pena e il sistema penale del codice italiano*, *American Journal of Sociology* 17, no. 1 (1911): 127-128.
[201] Pifferi, *Reinventing Punishment*, 117.
[202] Samuel J. Barrow, *The Sixth International Prison Congress Held at Brussels, Belgium, August, 1900, Report of its Proceedings and Conclusions* (Washington: Government Printing Office, 1903), 39.
[203] The 1910 meeting is sometimes portrayed as the triumph of the indeterminate sentence, but Michele Pifferi convincingly argues that the application of the indeterminate sentence was so qualified that it can hardly be called a victory. Pifferi, *Reinventing Punishment*, 137; Paul U. Kellogg, "The International Prison Congress, As a Layman Interprets It," *The Survey: A Journal of Constructive Philanthropy* 25, no. 6 (Nov. 5, 1910), 187-213; Negley K. Teeters, "The International Penal and Penitentiary Congress (1910) and the Indeterminate Sentence," *Journal of Criminal Law and Criminology* 39, no. 5 (1949): 618-628.

tone by defending determinate sentences. Yale Law professor Gordon E. Sherman began by noting that few U.S. states had even contemplated, much less implemented, a true indeterminate sentence. Sherman argued for the retention of determinate sentences with indeterminate reformatory sentences for young people accused of crimes and supplementary security measures aimed at the dangerous. Ultimately, the representatives adopted resolutions that declared that "the congress approves the scientific principle of the indeterminate sentence" and that "the indeterminate sentence should be applied to moral and mental defectives." They then went on to debate and adopt a resolution stating that the indeterminate sentence should "be applied as an important part of the reformatory system" so long as certain conditions were met, such as that the indeterminate sentence was compatible with "prevailing conceptions of guilt and punishment."[204] This stance was, then, a much more limited embrace of the indeterminate sentence, fitting it within the prevailing moral economy of punishment but allowing for a true indeterminate sentence for "moral and mental defectives." Hidden within these resolutions, too, was the notion that people deemed defective were outside of this moral economy—that "prevailing conceptions of guilt and punishment" did not apply to them.

V. *Criminal Punishment and the Police Power*

What was the legal justification for giving a subgroup of people accused of crime, those deemed abnormal, a truly indeterminate sentence and giving normal people a partially indeterminate or even a determinate sentence? Or even more confoundingly, as Ugo Conti had proposed, applying both punishment and security measures to the same person? For some theorists, the distinction between punishment and these preventive measures was reducible to the

[204] Charles Richmond Henderson, "Report of the Proceedings of the Eighth International Prison Congress, Washington, D.C. September and October 1910" 63rd. Congress, 1st Session, Document No. 52 (Washington: Government Printing Office, 1913), 35-36.

distinction between criminal law and police measures. “Punishment is a legal sanction, just as the measure of security is an administrative precaution for the sake of prevention (a police regulation),” Conti explained.[205]

The notion of police regulations has a long and complex history. “Police” is both a noun and a verb, a means and end of state power. The eighteenth-century legal scholar Emer de Vattel defined “internal police” as “the attention of the prince and magistrates to preserve everything in order.” “By a wise police,” he explained, “the sovereign accustoms the people to order and obedience, and preserves peace, tranquility, and concord among the citizens.”[206] As Santiago Leggarre has pointed out, this conception of police was premised on the idea of the sovereign as a “tender and wise father” in Vattel’s words. This was also the premise of the related common law doctrine of *parens patriae*, which gave the sovereign power to care for dependents. Many legal writers who followed Vattel also associated police with the sovereign’s patriarchal authority.[207] As discussed above, liberal thinkers rejected this notion of the sovereign as patriarch. Continental liberal legal theorists thus often contrasted rule of police (Polizeistaat) with rule of law (Rechtsstaat).[208] In the U.S. context specifically, the state’s power to punish falls under the “police power,” and thus there has been a less robust tradition of contrasting rule of law with rule of police.

[205] Markus Dubber, *The Dual Penal State*, 8; Conti, “The Concept of Punishment,” 104.
[206] Emer de Vattel, *The Law of Nations, Or, Principles of the Law of Nature Applied to the Conduct and Affairs of Nations and Sovereigns*, trans. Joseph Chitty (Philadelphia: T & J.W. Johnson, Law Booksellers, 1854), 83 (I.31.174).
[207] Santiago Legarre, “The Historical Background of the Police Power,” *Journal of Constitutional Law* 9, no 3 (2007): 753-754.
[208] Mark Neocleous, *The Fabrication of Social Order: A Critical Theory of Police Power* (London: Pluto Press, 2000), 28.

Nonetheless, the concept of police power has been important in the U.S., and it justified the use of preventive measures aimed people accused of being abnormal or dangerous.[209] In his 1904 monograph on police power, legal scholar Ernst Freund defined "police" as "at the same time a power and function of government, a system of rules, and an administrative organisation and force."[210] The "police power aims directly to secure and promote the public welfare, and it does so by restraint and compulsion," he explained. The police power, Freund wrote, was "an expression of social, economic and political conditions," and as such it was elastic and ever-changing.[211] Legal scholar Markus Dubber has argued that law and police can be viewed as distinct modes of governance. Law, at least ideally, is a system of rules for juridically equal, autonomous individuals, whereas police is a paternalistic and discretionary form of government power.[212] In this sense, the distinction between law and police was important even when it was not articulated explicitly. Roscoe Pound often spoke of the conflict between law—which placed "fundamental limitations" on government power and sought the "elimination of the personal equation in all matters affecting the life, liberty of fortune of the citizen"—and the view that politics should take precedence over jurisprudence, executive over judiciary power, administration over judicial decision, and "justice without law" over "justice according to law." This was the distinction between law and police.[213]

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[209] William J. Novak, *The People's Welfare: Law and Regulation in Nineteenth-Century America* (Chapel Hill: University of North Carolina Press, 2000); Christopher L. Tomlins, *Law, Labor, and Ideology in the Early American Republic* (Cambridge: Cambridge University Press, 1993), 47; Neocleous, *The Fabrication of Social Order*, 4. Markus Dubber has argued that Black, Indigenous, and other people of color have always been subject to the rule of what he calls "penal police" rather than "penal law." Dubber, *The Dual Penal State*, 141-153

[210] Ernst Freund, *The Police Power: Public Policy and Constitutional Rights* (Chicago: Callaghan and Company), 2.

[211] Freund, *The Police Power*, 4.

[212] This is the way that Markus Dubber has articulated the difference between law and police. See *The Dual Penal State*.

[213] Roscoe Pound, "Justice According to Law," *The Mid-West Quarterly* 1, no. 3 (1914): 223–25.

Most importantly, when a state engaged in a police measure rather than punishment, it could ignore the procedural protections and rights criminal law provided. While a punishment could not be indeterminate (except for the most serious offenses), a police measure was almost necessarily indeterminate. Freund stated that "indefinite terms of imprisonment can be justified only where the offense is sufficiently grave to deserve a life term, or where the offender is treated as a person deficient in moral responsibility, who is to be guarded rather than punished."[214] Indefinite incarceration as punishment might have been forbidden except in the most serious cases but indefinite detention as a police measure was not. Moreover, where punishment was backward-looking, police measures could be preventive, allowing the state to act even before a crime had been committed. Freund defined this feature as the primary difference between criminal law and police power. "The criminal law deals with offenses after they have been committed, the police power aims to prevent them."[215]

The more radical penal reform proposals, like those advanced by members of the National Prison Association, ignored the distinction between criminal law and police power measures thereby seeming to threaten principles of legality. This is not surprising given that many penal reformers were officials, criminologists, and alienists, rather than jurists or legal scholars. The more radical members like Zebulon Brockway, Eugene Smith, and Charles Richmond Henderson wanted the criminal law to function like police power measures, acting in anticipation of risk, allowing a judge to consider the crime as merely a symptom, and holding people indefinitely until they were cured and safe to be at large. These reformers saw no sense in the criminal law's preoccupation with proving the elements of the crime or proportioning the punishment to the gravity of the crime. This was all metaphysical nonsense. Dangerous people

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[214] Freund, *The Police Power*, 105.
[215] Ibid, 87.

should simply be detained until they were no longer dangerous. But they seemed not to grasp, or care, that the liberal scheme of government rested on the distinction between criminal punishment and police power measures, however artificial it might have been. The theory was that by punishing people only for past acts, the state allowed people to act in ways that avoided punishment. This was not necessarily the case with police power measures. One might, for instance, be subject to a quarantine not because of what one did but simply because of where one lived or who one was. Saleilles claimed that the proposals to replace punishment with treatment and preventive detention would establish a universal "regime of suspicion."[216] The approach that punished "normal" people and detained "defective" people under the police power seemed less radical. It did not abolish or ignore the distinction between legal punishment and police power measures. Instead, it expanded the category of people to whom police power measures could apply. It was akin to redrawing the boundaries of a quarantine. The blending of punishment and preventive police measures thus seemed to preserve principles of legality.

Some theorists believed that destroying certain formal protections of the law to introduce flexibility into a rigid system would help achieve greater stability. For Pound, the effort to "introduce an administrative element into punitive justice," through juvenile courts, medical experts, and so on, was a necessary supplement to law that had become too formalistic and arcane for the contemporary world. Juvenile courts—which offered wide discretion to judges under the state's role of *parens patriae*, provided alternatives to incarceration, and, putatively at least, focused on correction rather than punishment—were a model for this sort of administrative flexibility.[217] In allowing for a degree of flexibility, Pound believed such measures would in fact

[216] Saleilles, *The Individualization of Punishment*, 138.
[217] On juvenile courts and juvenile justice see Anthony M. Platt, *The Child Savers: The Invention of Delinquency*, Expanded 40th anniversary (New Brunswick, N.J: Rutgers University Press, 2009); Odem, *Delinquent Daughters*; David Tanenhaus, *Juvenile Justice in the Making* (Oxford: Oxford University Press, 2004); Tera Eva Agyepong,

protect legality.[218] Bending legality was better than breaking it. On this point, Pound was echoing Rudolf von Jhering, who argued that strategic deviations from principles of legality "may be designated as the safety valves of the law," letting out some pressure so that the entire system did not explode.[219]

Preventive measures were also assumed to be free of the moral baggage of criminal punishment. Raymond Saleilles explained that punishment required a responsible subject because it contained a moral dimension, but police measures did not contain this dimension.[220] Krafft-Ebing, recall, had defined moral insanity as a condition in which even the gravest crimes appear as a "simple infraction of a police ordinance."[221] It was therefore appropriate to respond to such people with police measures. William Healy argued that there was "prodigious difficulty" in deciding whether people with abnormally powerful compulsions or weak self-control could be held legally responsible for their actions. He sought to sidestep this difficulty through the state's role as *parens patriae* and its police power. He stated that these people "for their own welfare and the protection of society need appropriate physical, educational, or even disciplinary treatment under highly individualized surveillance." This disciplinary treatment was for the person's own good.[222]

This is not to say that proposals to extend measures that had traditionally been applied to the insane to those deemed abnormal and dangerous was not radical in its own way. To be sure,

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The Criminalization of Black Children: Race, Gender, and Delinquency in Chicago's Juvenile Justice System, 1899–1945 (Chapel Hill: University of North Carolina Press, 2018); Naama Maor, "Delinquent Parents: Punitive Welfare and the Creation of Juvenile Justice, 1899-1927," Ph.D. diss., (The University of Chicago, 2020); Michael Willrich, *City of Courts: Socializing Justice in Progressive Era Chicago* (Cambridge: Cambridge University Press, 2003).

[218] Pound, "Justice According to Law," 233. I am following Michael Willrich's argument that Pound was in fact a defender of legality. Willrich *City of Courts*.

[219] Jhering, *Laws a Means to an Ends*, 318.

[220] Saleilles, *The Individualization of Punishment*, 139.

[221] Krafft-Ebing, *Textbook of Insanity*, 623.

[222] Healy, *The Individual Delinquent*, 30.

the exclusion of certain groups from the supposedly universal provisions of liberalism was nothing new. The traditional liberal strategy was to exclude certain groups because they were not fully rational and therefore lacked the capacity for consent, the fundamental precondition for membership in political society. Madmen, lunatics, and juveniles were favorite examples, not to mention Black people, Indigenous people, and others.[223] But the approach extended this exclusion to people who were not insane. They were merely considered to be dangerous and abnormal. The problem was that one might think that these were precisely the type of people punishment should deter. The claim of theorists of punishment going back to Hobbes was that through appropriate training and the fear of appropriately calibrated and administered punishment, people could be induced to act with self-restraint.[224] A common retort to the argument that people with irresistible impulses could not be held responsible for their actions was that it was precisely those impulses that seemed most irresistible that the criminal law was designed to counteract.[225] In the face of the manifest inability of punishment to achieve these goals, theorists retreated from the more ambitious justifications of punishment. It was not that the criminal legal system had failed, but that certain perverse subjects were simply not deterrable or reformable, and it was costly and foolish to try to deter or reform them.

U.S. states and the federal government never explicitly adopted security measures as some European countries did, and scholars often contrast the differing paths of the US and European punishment systems during the early twentieth century.[226] The U.S.'s adoption of such measures was indeed more ad hoc and less systematic than many European countries. U.S.

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[223] Uday Singh Mehta, "Liberal Strategies of Exclusion," *Politics and Society* 18, no. 4 (1990): 436; David Armitage, "John Locke, Theorist of Empire," in *Empire and Modern Political Thought* ed. Sankar Muthu (Cambridge: Cambridge University Press, 2012), 95.
[224] Mehta, *The Anxiety of Freedom*, 105-106, 112.
[225] Jau Don Bell and A.M. Kidd, "The Relation of Law and Medicine in Mental Disease," *California Law Review* 9, no. 1 (1920): 5.
[226] Pifferi, *Reinventing Punishment*, 100-101, 123.

advocates also tended to rely less on the supposed importance of calling something a punishment versus a security measure, and more on the distinction between responsible and abnormal subjects. Nonetheless, as the next chapters explore in more detail, preventive security measures became increasingly important to the U.S. system of crime control. The fact that many of the people who have been subject to security measures—juveniles, people with intellectual disabilities, people convicted of repeat crimes, people convicted of sexual crimes—are considered outside of the social contract even today might in part explain why the U.S.'s extensive use of security measures has not been sufficiently appreciated.[227]

VI. *Implementing Preventive Measures*

One of the most significant early examples of this new approach to perceived abnormal and dangerous people was the development of what were called psychopathic laboratories or psychopathic clinics in the 1910s and 1920s, which engaged in the mental testing of people who passed through state institutions. Psychiatric clinics or labs attached to courts, police departments, and prisons were established in Chicago, Philadelphia, Boston, Detroit, and at Sing Sing prison.[228] The psychiatric clinics/labs were each structured differently but in broad outline functioned in similar ways. In the clinics attached to courts, judges would send people they believed might have psychological issues to psychiatrists and psychologists. The experts would then conduct an examination, diagnose the person, and submit a recommendation to the judge, who could then decide between a range of options including incarceration, commitment to a

[227] Obviously, Markus Dubber is an important exception. Dubber, *The Dual Penal State*.
[228] Sheldon Glueck, "State Legislation Providing for the Mental Examination of Persons Accused of Crime, *Journal of Criminal Law and Criminology* 14, no. 4 (1924): 573-588; Sheldon Glueck, "A Study of 608 Admissions to Sing Sing Prison," *Mental Hygiene* 2, no. 1 (1918): 85-151; Detroit Bureau of Governmental Research, *An Appraisal of the Recorder's Court of Detroit During Its Second Year, 1921-1922* (August 1922); Louis E. Bisch, "A Police Psychopathic Laboratory," *Journal of the American Institute of Criminal Law and Criminology* 7, no.1 (1916): 79-88.

facility for the insane or feeble-minded, or probation.[229] The diagnostic categories were loose, borrowing freely from European clinicians like Ziehen and Kraepelin.[230] An article written by the director of the Psychopathic Laboratory of the New York City Police Department, Dr. Louis E. Bisch, explained how his lab worked: "Cases are selected each morning from the 'line-up' and in addition Desk Lieutenants have been instructed to send for special examination all persons brought before them who seem to be peculiar." More than 10% of people examined were sent to special institutions rather than prisons.[231] These clinics and examinations covered people accused of a range of offenses. Chicago's lab primarily dealt with people accused of low-level offenses, or even people from non-criminal courts. Detroit's psychopathic clinic—which employed a psychiatrist, two psychologists and two social workers—had jurisdiction over felony cases. Massachusetts's psychiatric examination law only applied to people accused of capital offenses and people accused of repeat offenses. The laboratory of the New York City Police Department examined people who had not yet been tried.[232]

Rather than replacing the entire criminal code with an indeterminate sentence law, the labs allowed courts to pick out for special treatment people who were deemed psychologically abnormal. A report covering the Municipal Court of Chicago's work from 1915 to 1917 assured readers that institutions like the Psychopathic Laboratory were not seeking to replace punishment but only to supplement it in the case of defective offenders who were not amenable to

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[229] Detroit Bureau of Governmental Research, *An Appraisal of the Detroit Recorder's Court*, *1921-1922*; Willrich, *City of Courts,* 262.
[230] Hickson, "The Psychopathic Laboratory," in Municipal Court of Chicago, *Twelfth, Thirteenth & Fourteenth Annual Reports* 32-33.
[231] Bisch, "A Police Psychopathic Laboratory," 88.
[232] Willrich, *City of Courts*, 245; Hickson, "Report of the Psychopathic Laboratory, 1914-1917," 17; Detroit Bureau of Governmental Research, *An Appraisal of the Detroit Recorder's Court*, *1921-1922*, 6; "An Act Providing for the Department of Mental Diseases as to the Mental Condition of Certain Persons Held for Trial," *Acts and Resolves Passed by the General Court of Massachusetts in the Year 1921* (Boston: Wright and Potter 1921), 507; Bisch, "A Police Psychopathic Laboratory."

punishment.[233] William J. Hickson, director of the Municipal Court's Psychopathic Laboratory, stated that "the possibility of the deterrent effect of our present laws on the commission of the *fundamental* crimes by normals, and to a certain extent on borderland cases, is admitted, but whether it is the best and only way is not settled, whether, for instance, the causal association of criminality and defectiveness, with its concomitant double stigmata and double stigmata and isolation would not be more effectual." "Normals" could be deterred and held responsible, while people with defects needed to simply be isolated.[234] A report covering the Detroit Recorders Court's work during the first two years after the Psychopathic Clinic became operational in 1920 noted that the court had imposed more severe penalties in the previous two years than it had previously. Whether that was due to the clinic is impossible to tell, but, at the least, the clinic was not noticeably decreasing sentences.[235]

These labs employed psychiatrists and used medical terminology, but security was the overarching aim, not rehabilitation. [236] Psychiatry was meant to identify and restrain the abnormal, who could then be institutionalized. Its primary value was not in offering new ways to reform prisoners but new ways to spot the dangerous. A report from the Municipal Court of Chicago from 1915 to 1917 claimed that the "practical failure of all attempts at reformation in a large portion of cases is fully accounted for now that we know that a large proportion of all inmates of penal institutions are defective mentally." The goal of the laboratory was discovering such people and institutionalizing them indefinitely. The report called for the creation of a "farm

[233] Municipal Court of Chicago, *Tenth and Eleventh Annual Reports for the Years December 6, 1915 to December 2, 1917,* Inclusive (Chicago: Fred Klein Co. Printers), 15-17.
[234] Ibid, 125.
[235] *An Appraisal of the Detroit Recorder's Court*, 1921-1922, 5; Alan Canty, "The Structure and Function of the Psychopathic Clinic, Recorder's Court, Detroit, Michigan," *Ohio State Law Journal* 14, no. 2 (1953): 142–53.
[236] The sociologist David Showalter has also recently argued against the medicalization framework. David Showalter, "Misdiagnosing Medicalization: Penal Psychology and Psychiatric Practice," *Theory and Society* 48, no. 1 (2019): 67-94.

colony" where large numbers of people could be detained.[237] The director of the Psychopathic Laboratory William Hickson, explained the benefits of using incapacitative and rehabilitative measures: "Many times we have committed dangerous individuals who were defective where the legal evidence was not sufficient to make a case and the individuals would have been turned out to continue their menace to the life and property of the public."[238]

The partially indeterminate sentencing laws did not allow indeterminate confinement; the state still had to prove a criminal offense was committed. But psychiatric laboratories could detain people in an asylum or institution for the feebleminded without needing to prove beyond a reasonable doubt that a crime had been committed. The directors of psychopathic laboratories made clear that concerns about danger could take priority over medical diagnoses. In one case, a seventeen-year-old who had been referred to the New York City police psychopathic laboratory was found to have no "gross psychological defects," but he did have a "gang spirit." He was thus given "special treatment and attention in the institution," even though he met none of the lab's medical criteria.[239] Bernard Glueck, the brother of Sheldon Glueck and director of the Psychiatric Clinic at Sing Sing, reported that there were cases in which people seemed to behave well in prison but potentially posed a danger once released and should be permanently held in a hospital for the insane. Glueck illustrated this claim with the case of a man who had been "getting along very well in Sing-Sing" but who was alleged to have delusions that made his release dangerous. "It was for this reason that it was considered advisable to transfer the man to a hospital for the insane," Glueck explained, "and not because his mental condition interfered with his capacities to adjust himself to the requirements of the penal institution."[240] The U.S. might

[237] Municipal Court of Chicago, *Tenth and Eleventh Annual Reports*, 15-17.
[238] Hickson, "Report of the Psychopathic Laboratory, for December 6, 1920 to December 4, 1921," 180.
[239] Bisch, "A Police Psychopathic Laboratory," 86- 87.
[240] Sheldon Glueck, "A Study of 608 Admissions to Sing Sing Prison," *Mental Hygiene* 2, no. 1 (1918): 85-151.

not have had official security measures that allowed for the continued detention of people after they had served their sentence, but psychiatric labs could function in much the same way, allowing administrators to skirt around the requirements of the criminal law.

A primary function of these psychopathic laboratories was the production of studies of people who passed through the court system, prisons, and police departments, and those associated with labs used these documents to argue for the expansion of their authority to detain people.[241] In particular the employees of the labs tended to press for the power to detain people who were not feebleminded or insane but were dangerous and abnormal. As detailed in the next chapter, the officials of Municipal Court of Chicago and its Psychopathic Laboratory were leaders in this effort. The Psychopathic Clinic of the Detroit Recorder's Clinic claimed in its report for the year that there was "an urgent need in Michigan for an institution for borderline cases, those that hospitals for the insane and institutions for the feebleminded do not accept."[242] The studies produced by or with the cooperation of these labs tended to highlight the significant number of people who had mental disorders and were therefore dangerous. In a study of 608 people admitted to Sing Sing prison published in 1918, Bernard Glueck found that 12% were "mentally diseased," 28.1% were "intellectually defective," and, most troubling to Glueck, 18.9% were psychopathic.[243] A Boston study found even higher percentages. 77% of examinees had some form of mental deviation, and 36.8% were psychopathic.[244] A study conducted in 1923 of a sample of people from the Psychopathic Clinic at the Detroit Recorders Clinic reported

[241] For instance, Sheldon Glueck's influential study was conducted through the psychopathic laboratory at Sing Sing. Ibid.
[242] *An Appraisal of the Detroit Recorder's Court*, *1921-1922*, 10.
[243] Glueck, "A Study of 608 Admissions," 86, 123.
[244] Theophile Raphael, et al., "Socio-Psychiatric Delinquency Studies from the Psychopathic Clinic of the Recorder's Court, Detroit," *American Journal of Psychiatry* 3, no. 4 (1924): 775-776.

similar findings. It claimed that 36.8% of the people studied suffered from psychopathic personalities. [245]

The reports from these labs emphasized the danger that psychopathic people posed, and the need for a law that would allow for their indefinite detention. Glueck argued in his study that the psychopathic group had very high recidivism rates. Many were "total economic failures," and they lacked "all conception of sexual morality." He argued that administrators must be given the power to continually detain individuals who presented a future danger, irrespective of their particular sentences.[246] The authors of the Detroit study, too, argued that laws needed to be passed to allow for the long term isolation of "psychotic offenders" who fell through the cracks of existing laws because they were "psychiatrically deviant but not actually insane."[247] William Hickson, the director of the Chicago Psychopathic laboratory, in a report on the work of his lab from fiscal year 1915 to 1917, argued for the creation of a "farm colony" or "internment camp" where such people could live apart from "the harsh competition of our modern industrial world" while still contributing "their quota to the public's total of production." He wrote that "for the majority of cases it will mean for life," but for other cases, they could be sterilized and then released on parole.[248]

A similar approach, and one that provided precedent for the sexual psychopath laws, was exemplified in the defective delinquent laws, which allowed for the institutionalization of people

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[245] Ibid, 776. Unlike the other studies, this one included a racial analysis. Interestingly, Black people were diagnosed with psychopathy at a much lower rate, 14.7%, perhaps reflecting the larger racialization of the disorder. But the study highlighted something important. It found that Black people were referred to the clinic at a rate almost triple their representation in the population. The authors noted that Black people "may be more subject to arrest" "due to prejudice." Thus, even if psychopathic personality was associated with whiteness, the disproportionate number of Black people caught by the criminal legal system meant that in raw numbers, many would be diagnosed with the disorder, even if the rate of diagnosis was lower. Ibid, 768.
[246] Glueck, *A Study of 608 Admissions*, 86, 88, 123.
[247] *Socio-Psychiatric Delinquency Studies for the Psychopathic Clinic of Detroit*, 777.
[248] Hickson, "Report of the Psychopathic Laboratory," 274-275.

charged or convicted of a crime who were deemed to have intelligence defects.[249] Massachusetts passed the first of these laws in 1911, but it did not use the law until the early 1920s.[250] New York opened a special institution for defective delinquents in Napanoch that became a model. New York's defective delinquent law specified that "a male mental defective over sixteen years of age charged with, arraigned for, or convicted of a criminal offense may be committed to the state institution at Napanoch." A judge or justice made commitments based on a "certificate of mental defect made by two qualified examiners." Examiners at Napanoch interpreted this definition to apply to someone with a mental age from 6 to 11.2 years who exhibited signs of delinquency. Napanoch administrators reported that 85% of the people incarcerated under the law "showed the characteristic reactions of the psychopathic personality."[251] People detained at Napanoch continually took risks and challenged the authority of administrators through riots and escape attempts that intermittently rocked Napanoch. The coordination and sophistication of some of these escape attempts embarrassed administrators by publicly demonstrating that detainees were more capable than administrators made them out to be.[252]

Commitments under the New York law were indefinite and did not require a conviction until the passage of an amendment in 1931. The law also allowed the state to hold imprisoned people that "qualified examiners" declared defective delinquents beyond the length of their

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[249] Walter N. Thayer, "The Establishment and Management of an Institution for the Segregation of Defective Delinquents," in *Proceedings of the Annual Congress of the American Prison Association, Jacksonville, Florida, October 28, 1921—November 3, 1921* (New York: Wynkoop Hallenbeck Crawford Co., Printers), 80; Louis N. Robinson, "Institutions for Defective Delinquents," *Journal of Criminal Law and Criminology* 24, no. 2 (1933): 352-399; Kate E. Sohasky, "'Safeguarding the Interests of the State' from Defective Delinquent Girls," *Journal of the History of the Behavioral Sciences* 52, no. 1 (2016): 20–40. Kate Shohasky has demonstrated that commitment criteria were interpreted more loosely in the case of women.
[250] Sohasky, 33.
[251] Robinson, "Institutions for Defective Delinquents," 358-359, 362.
[252] "Delinquents Rebel, One Dead, Guard Dying, Eight Keepers are Injured in an Outbreak of Napanoch Inmates, Lone Pistol Awes Them," *New York Times*, July 25, 1923; "3 Slayers Escape Naponoch Asylum," *New York Times*, Nov 8, 1926; "Jumps into Guard's Arms; Napanoch Prisoner is Caught as He Tries to Escape," *New York Times*, Sept 3, 1928.

sentence.[253] The law gave extraordinary power and flexibility to administrators to determine when and under what conditions a person might be released. The Superintendent of Napanoch, Walter Thayer, stated, "[w]e never discharged a case." Discharged patients would report back as "frequently as we desired, for as long as we desired," he explained. Even after that, patients were not free. Thayer bragged that he warned them: "We will go and get you ten years later, if it is necessary; if you get into trouble, we will bring you back on this old commitment without any further court procedure."[254] This was the sort of administrative discretion that many penal modernists had dreamed of.

Still, discretion was somewhat limited by the requirement of an intelligence defect. As the next chapter details, leaders at the Municipal Court of Chicago did not want to have to climb this barrier, particularly given that sexual deviants, who authorities were eager to preventively detain, often had normal intelligence. Thus, Municipal Court officials, prosecutors, and reformers, spurred by public fear of sex criminals, attempted to pass preventive detention bills that included an even more expansive list of criteria that could lead to detention, including not just intelligence but also affective and moral defects.

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[253] Ch. 483, *Laws of New York, One-Hundred and Forty-Fourth Session, 1921, Vol II*, 1495-96.
[254] Quoted in, Robinson, "Institutions for Defective Delinquents," 388.

CHAPTER 2: "MORON" PANICS, PYSCHOPATHS, AND THE BEGINNING OF THE SEXUAL CARCERAL STATE

In August 1926, newspapers across the country reported on the latest "epidemic of sex offenses" committed by so-called "morons" in the city of Chicago. "Moron" was a remarkably slippery term. The eugenicist Henry Goddard introduced it in 1910 to designate people on the border between feeblemindedness and normality. Though it was strictly intended to refer to intelligence, psychologists like Goddard believed that these borderline cases were particularly likely to commit crimes and engage in sexually deviant behavior. Newspaper reporters stretched the term to apply to anyone who committed a sexual crime. "Morons," the papers reported in August 1926, had assaulted fifteen young girls in just one week. Chicago's Chief of Police, Morgan Collins, claimed that it was the most dangerous period in the city's history for girls and that sex criminals were even more ferocious than the city's famed gangsters. City officials campaigned for special powers to intern suspected morons, in special "farm colonies" or "moron farms" where they could be segregated from the rest of society. This August episode was one of many sex crime panics that had gripped the city of Chicago—and sometimes spread across the nation—during the previous decade.[1]

During the 1910s and 1920s, Chicago officials experimented with different ways to detain accused sex criminals and to press for legislation that would expand the state's authority to preventively detain "defectives" in colonies. Police chiefs, prosecutors, and members of the Municipal Court proposed initiatives that would become hallmarks of the sexual carceral state,

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[1] "Chicago Cops War on Sex Orgies," *The Buffalo Times*, August 19, 1926; "'Motor Morons Stir Chicago Police Seek Girl Attackers," *Illustrated Daily News* (Los Angeles), August 16, 1926; "Collins Warns Women Against Auto Lifts" *Southtown Economist* (Chicago), August 20, 1926; "Motor Morons," *Knoxville News-Sentinel*, August 24, 1926; "For a Moron Farm," *Southtown Economist*, March 25, 1926, 4; American Association for the Study of the Feeble-Minded, "Report of the Committee on Classification of Feebleminded," *Journal of Psycho-Asthenics* 15, nos. 1, 2 (1910): 61-67.

including special prosecutors, sex crime units in police departments, and lists of known sex criminals. The leaders of Chicago's famed Municipal Court, influenced by continental penal theory, were particularly aggressive in detaining people, even without clear statutory authority.

Scholars have not yet explored in any detail the history of the perverse "moron" panics. Existing scholarship claims that sex crime panics and sex crime wars began in the 1930s, noting how "the predatory male psychopath who would haunt the public's imagination in the 1930s was not yet a major concern." [2] It is certainly true that the war on sex offenders became more intense and national in the 1930s with the emergence of the "psychopath." But I argue that the war on sex offenders emerged in Chicago more than a decade earlier. Moreover, while it is true that the term "psychopath" was not in wide circulation at the time, "moron" designated a similar set of attributes. The "predatory male psychopath" might not have been a source of fear in the 1910s and the 1920s, but the predatory male moron certainly was.

During the 1920s, the modern conception of the "sex offender" began to emerge. Estelle Freedman has argued that the *response* to the midcentury sexual psychopath "was to expand the public discourse on sexuality" and to "focus attention on male sexual violence."[3] I argue, on the contrary, that it was the earlier discourse surrounding the moron that encouraged public discussion of sexuality and put a spotlight on sexual violence committed by men. However, it must be foregrounded that what constitutes sexual violence is culturally constructed. In this

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[2] Scott De Orio, "Bad Queers: LGBTQ People and the Carceral State in Modern America," *Law and Social Inquiry* 47, no. 2 (May 2022): 691-711; Sohasky, "Safeguarding The Interests of the State," 27. See also, Gerald V. O'Brien, *Framing the Moron: The Social Construction of Feeble-Mindedness in the American Eugenic Era* (Manchester: Manchester University Press, 2013). The lack of attention to sex morons does not mean that scholars have not acknowledged the existence of sex moron panics. A number of works mention these panics in passing. Elizabeth Dale, *Robert Nixon and Police Torture in Chicago, 1871-1971* (DeKalb, IL: NIU Press, 2016), 44; B.J. Daniels and Michail Takach, *A History of Milwaukee Drag: Seven Generations of Glamour* (Charleston, SC: The History Press, 2022), 60-61; Jim Elledge, *The Boys of Fairy Town: Sodomites, Female Impersonators, Third-Sexers, Pansies, Queers, and Sex Morons in Chicago's First Century* (Chicago: Chicago Review Press, 2018), xviii-xix, 210.
[3] Freedman, "Uncontrolled Desires," 89.

period, it excluded marital rape, for instance. At the same time, men who solicited sodomy were seen as potential future violent violators of children. One illustration of the transformation that occurred in the 1920s is the way that the word "sex offender" changed. In the 1910s and into the 1920s, the term often referred to female sex workers and others who committed related vice crimes. By the 1930s, the term often referred to men who committed crimes like sexual assault and rape, but also more minor offenses, as the interests of policymakers and reformers shifted to male sexual violence and deviation.[4] It was during this period that the sex offender became gendered as male.

Appreciating how fears of sexual criminals and deviance recurred throughout the 1920s complicates the interpretation of that era as one of relative sexual liberation. Most notably, George Chauncey reveals that Prohibition era New York had a thriving and visible gay subculture. Likewise, Philip Jenkins argues in *Moral Panic: Changing Concepts of the Child Molester in Modern America* that activism over sex crimes diminished in the early 1920s. Jenkins claims that sex crimes "lost their earlier power to fascinate" during the era of Prohibition gangsterism and that "homosexual underworlds were far more visible and acceptable than ever before." [5] This chapter does not challenge Chauncey's interpretation of gay life in the 1920s, a topic beyond the scope of this dissertation. It does show, however, that the sex moron lurked on

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[4] Kevin Mumford argues that interest in vice decreased in the 1930s because reformers pushed it into Black neighborhoods. Mumford, *Interzones*, 44–45. Of course, there are many exceptions to this rule, but for some examples of the use of "sex offender" to refer to prostitution and sexual immorality see, Jean Weidensall, *The Mentality of the Criminal Woman: A Comparative Study of the Criminal Woman, the Working Girl, and the Efficient Working Woman in a Series of Mental and Physical Tests*, Educational Psychology Monographs, No. 14 (Baltimore: Warwick & York, 1916), 295-304; Marion Collins, "Case Studies in Mental Defect," *Eugenics and Social Welfare Bulletin* 14 (Albany: New York State Board of Charities, 1918), 137; Shepherd Ivory Franz, "Rehabilitation and Reeducation—Physical, Mental and Social," *Mental Hygiene* 3, no. 1 (1919): 44. For some later examples of the use of "sex offender" to refer to men who committed crimes like rape and sexual assault, see Lowell S. Selling, "A Psychiatric Technique for the Examination of Criminals," *American Journal of Psychiatry* 93, no. 5 (March 1937): 1106-1108; Edward Strecker, "The Challenge of Sex Offenders: Introduction," *Mental Hygiene* 22, no. 1 (1938): 1-3.
[5] Chauncey, *Gay New York*; Jenkins, *Moral Panic*, 45-46.

the edges of this period of sexual liberation, and it suggests that discomfort with the visibility of the gay world was sublimated into panics over perverse morons who populated cities. Moreover, it shows that sex crimes did not lose "their power to fascinate" during this time and that activism over sex crimes did not subside.

The image of the sex criminal in this period was marked by racist and homophobic constructions, but sexual criminality was also intimately linked with disability—intellectual, affective, and sometimes physical. Even when the term "sex moron" was used to describe people with no perceived intellectual disability, these associations still lingered. Sex morons were perceived to lack moral reasoning or considered affectively disabled, essentially equivalent to the old idea of the morally insane. Scholarship on the history of feeble-mindedness and disability has largely passed over this story. An exception is historian Molly Ladd Taylor's study of Minnesota's 1939 psychopath law, which explores the law's roots in a 1917 eugenic law aimed at people considered to be morons. At the same time, the article does not discuss in any detail the moron panics of the 1910s and 1920s but instead argues that the panic over sexual criminals began with the end of Minnesota's gangster era in 1936. James Trent's *Inventing the Feeble Mind* discusses the efforts to link feeblemindedness and crime but does not explore the fears of the sexual moron of the 1910s and 1920s. In his monograph *Framing the Moron,* Gerald O'Brien argues that "hysterical fear of the moron … lost impetus between 1915 and 1930." O'Brien's claim is certainly not inaccurate, as he does not focus on the sex moron specifically, which was a particular cultural construction. But anxiety about the sex moron was important fuel for the eugenics movement, particularly for Chicago's Municipal Court, a leader in eugenics research

during the 1920s. This chapter demonstrates how tightly theories of intellectual disability and sexual perversity were intertwined. [6]

The history of notions of sexual criminality in the early twentieth century is marked by ambiguities, contradictions, and quick reversals. New ideas about sexual disorder, especially as it related to disability, were confidently put forth, but empirical realities quickly challenged them. Meanwhile, newspaper publishers and reporters had both a symbiotic and antagonistic relationship with experts and officials, as each group jostled over the authority to define and profit from the problem of sexual violence. Legally, the 1910s and the 1920s were a period of contestation over how to address the problem of the sexual degenerate.

Perhaps the one point of consensus was that criminal prosecutions and incarceration did little to prevent sexual crimes. Police officials and prosecutors, rather than changing the way they investigated and prosecuted sex crimes, argued for more authority to detain people without having to prove a criminal offense. Some of the key figures of the Municipal Court tried to figure out how to implement measures that would allow them to preventively detain people deemed abnormal and dangerous. One challenge was how to balance criminal punishment with these preventive measures. In the 1920s, officials in Illinois repeatedly attempted to pass legislation that was too broad. Despite their failure, unsuccessful attempts would provide lessons for the more focused efforts to target the sexually abnormal in the 1930s.

I. *The Morally Insane, "The Moron Menace," and the Sex Pervert*

At the turn of the twentieth century, medical experts debated the nature of human sexuality in medical journals, textbooks and conferences. Richard von Krafft-Ebing had

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[6] James Trent, *Inventing the Feeble Mind: A History of Intellectual Disability in the United States* (Oxford: Oxford University Press, 2017); Molly Ladd Taylor, "'Ravished by Some Moron': The Eugenic Origins of the Minnesota Psychopathic Personality Act of 1939," *Journal of Policy History* 31, no. 2 (2019): 201; Brien, *Framing the Moron*, 9.

demonstrated that it was possible to discuss sexual behavior in a scientific fashion. Medical experts were particularly interested in how to classify the large variety of sexual behaviors that deviated from heterosexual sex between married partners. Following Richard von Krafft-Ebing's schema, American sexologists such as Cornell University's Allan McLane Hamilton, author of the two volume *A System of Legal Medicine*, often distinguished between two broad categories of sexual disorders. The first was pathologically intense libido or sexual desire, what Krafft-Ebing called *hyperaesthesia sexualis*. The second was sexual desire directed at an "unnatural" object choice or means of satisfaction, which Krafft-Ebing called *paraesthesia sexualis*. The latter were the perversions proper, such as sadism, masochism, pedophilia, inversion (homosexuality), and fetishism (which was abnormal in its object choice or its exclusivity). Sexologists believed these two conditions often went hand in hand, but not always.[7]

First, a person could have an abnormally strong libido and still desire heteronormative sex. Many sexologists believed that this phenomenon was distinct from perversion. Thus, commenters often distinguished rape from other sexual crimes. As one doctor put it, the rape of adult women was "in accordance with, and not in violation of, nature."[8] The leading U.S. sexologist G. Frank Lydston likewise declared that rape of adult women was not a perversion because it was not, strictly speaking, an "aberration of the sexual passion."[9] Acts of rape, physicians sometimes acknowledged, could be incredibly violent, but if the violence was the necessary means rather than the end of the act, this too was different from perversion. Dr. Elliot T. Brady, who had been the assistant physician at Southwestern Lunatic Asylum in Virginia,

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[7] Richard von Krafft-Ebing, *Psychopathia Sexualis*, 7th ed., trans. Charles Gilbert Chaddock (Philadelphia: F.A. Davis, 1894), 48-57; Allan McLane Hamilton and Lawrence Godkin, *A System of Legal Medicine*, Vol. 2 (New York: E.B. Treat, 1894), 557-560.
[8] F.E. Daniel, "Castration of Sexual Perverts," *Texas Medical Journal* 9, no. 6 (December 1893): 260.
[9] Frank G. Lydston and Hunter McGuire, *Sexual Crimes Among Southern Negros* (Louisville, KY: Renz & Henry, 1893), 5.

wrote that rapes, though often violent, were "*rarely marked by excessive cruelty*, only sufficient violence being used to overcome resistance, and when murder accompanies the act it is unintentional." Such "simple rapes," as Brady called them, were not an instance of perversion, even when they resulted in death.[10] A person with hyperaesthesia might even engage in a "perverse act," but if they did this only because their preferred "normal" sexual object was unavailable, this was still not necessarily indicative of perversion, according to sexologists.[11] Like criminal law, sexology placed a great deal of weight on the intent of an act.

Second, although sexologists held that perversions and hypersexuality went hand in hand, a person might have a perversion without hyperaesthesia sexualis. Some people with sexual inversion might, for instance, have sexual desires no stronger than the average heterosexual's, and they might be able to restrain themselves from acting on their desires. Some perversions were more linked with hypersexuality than others. For instance, professor Allan McLane Hamilton, who was also a consulting physician to the insane asylums of New York, believed that sadism was never present without hyperaesthesia sexualis. The salient point, however, is that physicians considered these two forms of deviance distinct, which produced divergent responses, including for how the sexual psychopath laws would be used.[12]

Ascriptions of hypersexuality and perversion were also raced, classed, and gendered. Regarding gender, sexologists claimed that a level of sexual excitement considered normal in a male would be pathological in a woman. Hamilton wrote that because women typically had lower sexual desire than men, "when a woman shows a predominant sexual inclination the

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[10] Elliot T. Brady, Perversion of Sexual Instinct--Sadism in Southern Negroes, Its Remedy, Castration," *Virginia Medical Monthly* 20, no.3 (June 1893): 278-279.
[11] Krafft-Ebing, *Psychopathia Sexualis*, 188; Hamilton and Godkin, *A System of Legal Medicine*, 543.
[12] Krafft-Ebing, *Psychopathia Sexualis*; Hamilton and Godkin, *A System of Legal Medicine*, 559-560, 570.

suspicion that it is pathological is at once excited."[13] Regarding class, experts associated some perversions, particularly inversion and pedophilia, with the upper classes. Many sexologists believed that perversion resulted from nerve exhaustion, itself the result of excessive stimulation that dulled typical sources of excitement. Nerve exhaustion led not only to acquired perversion but also to hereditary degeneration in later generations.[14] Sexologists like Krafft-Ebing believed that people with decreased *vita sexualis* (especially cases leading to impotence) but intact libidos were particularly likely to engage in crimes like the assault of children.[15] The wealthy and powerful had the greatest access to stimulation, and thus turn-of-the-century sexology declared that they were particularly likely to suffer from perversion. Journalism seemed to confirm this picture, such as the *Pall Mall Gazette*'s famous 1880s reports on upper-class abuse of prostituted children in the streets of London and stories of networks of gay men who lived in major cities.[16] Sexologist G. Frank Lydston boasted that news of sexual depravity among the upper classes did not surprise "students of neurology" because it was consistent with the claim of degeneration theory that "refinements of civilization and luxurious living bring refinements of vice in their train." "When races begin to degenerate, they begin 'at the top,'" Lydston claimed.[17]

Race was also central to the construction of ideas about sexual perversion. Certain perversions, especially pedophilia and inversion, were associated with whiteness. In 1893, Lydston and Hunter McGuire, the president of the American Medical Association published an exchange on the merits of lynching. McGuire indicated his approval of lynching and asked

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[13] Hamilton and Godkin, *A System of Legal Medicine*, 557.
[14] Kiernan, "Responsibility in Sexual Perversion," 186; Krafft-Ebing, *Psychopathia Sexualis*, 378.
[15] Krafft-Ebing, *Psychopathia Sexualis*, 402; Hamilton and Godkin, *A System of Legal Medicine*, 543-544.
[16] Judith R. Walkowitz, *City of Dreadful Delight: Narratives of Sexual Danger in Late-Victorian London* (Chicago: University of Chicago Press, 1992). For an example of how medical experts received this reporting, see T. Griswold Comstock, "Alice Mitchell of Memphis: A Case of Perversion or Urning," *Journal of Orificial Surgery* 1, no.1 (1893): 477-78.
[17] Lydston, *Impotence and Sterility*, 49, 388; Lydston, *The Diseases of Society*, 388.

Lydston to explain the imagined prevalence of sexual criminality among Black men. Lydston replied that the typical Black man "compares quite favorably as regards sexual impulses—taking all abnormalities into consideration—with the white race."[18] This view—not unique to Lydston—was certainly not a product of anti-racist views. Lydston was also a virulent white supremacist. Though he did not make it explicit, his reasoning seems to have been that Black people were not civilized enough to suffer from perversion in high numbers since it was a disease of civilization—of excessive refinement, overstimulation, and overwork.

White physicians like G. Frank Lydston associated hypersexuality with the lower classes and with Black men in particular. If the pervert was effeminate, overcivilized, and neurasthenic, the hypersexual criminal was, in the racist imaginary of the period, an atavistic throwback, a "savage" with powerful desires and little power to control them. Lydston claimed that Black men had an "excessively-developed sexual propensity" and desires that were stronger, more primal, and more uncontrollable than white men but less likely to be aberrant.[19] The author of a racist 1914 study of Black Americans likewise declared that Black people "do not satisfy their passions unnaturally by preference, but only in default of the preferable." He continued, "It is the result of overmastering desire and a low undeveloped taste and moral sense rather than a perversion in the psychological sense."[20]

Other alienists emphasized that the hypersexual criminal could also engage in perverse acts, particularly sadistic ones. Dr. Elliot Brady, for instance, agreed with Lydston that rape was not perverse and that Black men did not commit rape more frequently than white men. However, Brady claimed that Black men frequently engaged in lust murders or sadistic rapes, in which the

[18] Lydston and McGuire, *Sexual Crimes Among Southern Negros*, 6.
[19] Ibid, 6.
[20] Charles Harvey McCord, *The American Negro as a Dependent, Defective and Delinquent* (Nashville: Benson Printing, 1914), 218.

source of pleasure was derived not primarily from the sexual act but from the cruelty and violence itself. Such men were in a psychopathic state, Brady argued. Cruelty of all kinds, he claimed, was characteristic of primitive groups.[21] Commentators used the violence white vigilantes perpetrated against Black men accused of sexual crimes as evidence not for the perversion of the lynchers but of their Black victims. Doctor F.E. Daniel wrote that given the threat of lynching, a Black person who raped a white child was "prima facie" insane.[22]

A third category of the sexual criminal that drew increasing commentary was the feebleminded sexual criminal. This category was somewhat orthogonal to that of the hypersexual and the perverse criminal, and it has received less scholarly attention. Physicians believed that feebleminded people could be hypersexual and perverse, but what distinguished them was the lack of mental capacity to restrain themselves or understand the immorality of their actions. Whereas hyperaesthesia sexualis was associated with excess desire and paraesthesia sexualis with disordered desire, feebleminded offending was associated with cognitive deficiency.

Krafft-Ebing had argued in the late nineteenth century that sexual delinquency and feeblemindedness were related, though his views on this topic were ambivalent and not entirely consistent. In *Psychopathia Sexualis*, he wrote that "idiots" were not fully sexually developed but could violently lash out if their sexual desires were frustrated. He claimed that those at the next level of development, "imbeciles," were normally developed sexually. This combined with their weaker moral sense made them more likely to act out sexually than "idiots." But he argued that the "weak-minded" were unlikely to suffer from perversion or hypersexuality proper.[23] In his *Textbook of Insanity*, however, he stressed that moral insanity often caused sexual

[21] Brady, "Perversion of Sexual Instinct," 279-280.
[22] Daniel, "Castration of Sexual Perverts," 261.
[23] Krafft-Ebing, *Psychopathia Sexualis*, 358-359.

perversions and, further, that many of the morally insane were feebleminded, thereby drawing a close connection between feeblemindedness and perversion.[24]

During the 1910s and early 1920s, as the eugenics movement reached new heights of popularity, intellectual defect became the leading explanation for all crime. This reasoning was advanced especially in the *Journal of Psycho-Asthenics*, established at the turn of century to study people deemed feebleminded, and at meetings of the American Association for the Study of the Feeble-Minded. In a 1909 article in *Psycho-Asthenics*, Walter Fernald, the eugenicist Superintendent of the Massachusetts School for the Feebleminded, argued that "imbeciles" displayed a propensity for perversion even at an early age.[25] In his 1922 eugenicist tract *Race Decadence*, surgeon William S. Sadler maintained that "sex perverts" were often of average intelligence but that "sex perverts who perpetuate most of our outrageous crimes of this nature are a class belonging to the feeble-minded group as a whole."[26] Because they occupied a liminal status that upset the binary of "normal" and "disabled," high-grade feebleminded people were particularly problematic for experts. As a report on mental deficiency for the state of California put it, "high-grade defective[s]" were "of sufficient intelligence that they may pass among us undetected." "Only," it claimed, "through evidence in the nature of crime, debauchery, prostitution, delinquency, etc. do they finally come to the attention of public authorities."[27]

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[24] Krafft-Ebing, *Textbook of Insanity,* 625.

[25] Walter E. Fernald, "The Imbecile with Criminal Instincts," *Journal of Psycho-Asthenics* 14, nos. 1-4 (1909-1910): 18.

[26] William S. Sadler, *Race Decadence: An Examination of the Causes of Racial Degeneracy in the United States* (Chicago: A.C. McClurg, 1922); see also Healy, "The Mentally Defective and the Courts," 53-54.

[27] Fred C. Nelles, et al., State of California, *Report of 1915 Legislature Committee on Mental Deficiency and the Proposed Institution for the Care of Feebleminded and Epileptic Persons* (Whittier State School Department of Printing Instruction, 1917), 40. This section of the study was glossing a New York Commission on the mentally deficient. Ibid, 37.

Walter Fernald stated in 1908 that "every imbecile, especially the high-grade imbecile, is a potential criminal."[28]

At the 1910 meeting of the American Association for the Study of the Feeble-Minded, eugenicist Henry Goddard, along with a committee formed to devise a classification for mental deficiency, introduced the term "moron" to designate this problematic group. The term applied to people whose measured intelligence was equivalent to that of an eight to twelve-year-old child.[29] Goddard believed that children aged nine to twelve developed powerful anti-social instincts, including sexual perversion. They were essentially equivalent to "moral imbeciles" who had no understanding of morality or how to conform to it. In normal development, however, this was only a brief stage, and one that occurred when the child was still controllable.[30] However, people in the "moron" category never emerged from this developmental stage, and they had all the physical strength of an adult. This combination made them especially dangerous. Moronic sex criminals were like uncontrollable adolescents, who were not fully responsible for their actions but menacing, nonetheless. The director of Chicago's Psychopathic Laboratory, William J. Hickson, contended that the high-grade feebleminded were dangerous because they "have the minds of 10 to 12-year-old children, and the instincts of adults," which, of course, included sexual instincts.[31]

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[28] Fernald, "The Imbecile with Criminal Instincts," 33; see also William Healy, "The Mentally Defective and the Courts," *Journal of Psycho-Asthenics* 15, nos. 1, 2 (1910): 53-54.
[29] H.H. Goddard, "Four Hundred Feeble-Minded Children Classified by the Binet Method," *Journal of Psycho-Asthenics* 15, nos. 1, 2 (1910): 26-27; "Minutes of the Association," *Journal of Psycho-Asthenics* 15, nos. 3, 4 (1911): 134; American Association for the Study of the Feeble-Minded, "Report of the Committee on Classification of Feebleminded," *Journal of Psycho-Asthenics* 15, nos., 1, 2 (1910): 61-67. For more on the history of the term "moron," see Trent, *Inventing the Feeble Mind*, 157; O'Brien, *Framing the Moron*; Nicole Hahn Rafter, *Creating Born Criminals*, 137-139. 29-30.
[30] Goddard, "Four Hundred Feeble-Minded Children."
[31] Fernald, "The Imbecile," 18; "Would Isolate all Morons: Dr. Hickson Urges State Colony for Defectives," *Chicago Sunday Tribune*, September 27, 1914.

The linkage between mental disability and sexual delinquency was significant, as "moron" became synonymous with "pervert" or "degenerate" as a popular designation for people accused of sexual crimes into the mid-twentieth century. The identification of feeblemindedness with sexual delinquency and perversity bolstered eugenic arguments. What better way to amplify fear of the disabled than to accuse them of a tendency towards rape and pedophilia? This theory also helped to make sense of incomprehensibly abhorrent sexual crimes. "Moronic" people quite literally did not understand what they were doing, making the appalling nature of their acts more intelligible.

Like the nineteenth-century discourse on moral insanity and moral imbecility, connecting feeblemindedness with sexual criminality discounted the normative significance of sexual violence. Both the discussions of moral insanity and feeblemindedness constituted the sexual delinquent as an irresponsible subject. Neither the morally insane nor the feebleminded person could grasp the significance of their acts. They could not help acting perversely. Punishment of such people was useless. Restraint and paternalistic care were more appropriate. In practice, there was little limit to the violence and restraint the state could impose in the name of safety and care or treatment.

II. *Containing the Pervert: Castration or Segregation*

By the end of the nineteenth century, many physicians who worked in the field of medical jurisprudence had concluded that hypersexuality and perversion could be cured only by castration or penile mutilation.[32] In an 1892 address to the New York Society of Medical Jurisprudence, W.A. Hammond proposed the castration of murderers as a substitute for

[32] They were not the first to do so. In 1849, a Texas legislator introduced a bill that would have made castration a punishment for certain crimes. Mark A. Largent, *Breeding Contempt: The History of Coerced Sterilization in the United States* (New Brunswick: Rutgers University Press, 2011), 11–12.

execution. Based, he claimed, in part on the testimony of Black men who had been castrated in Missouri, Hammond concluded that castration induced more fear than execution. Still, paradoxically, he thought juries would be less squeamish about imposing castration than the death penalty. By contrast, he believed that ovary removal was too common to function as a punishment. Two medical journals that reported on Hammond's address, including the *Journal of the American Medical Association*, argued that doctors should experiment with the procedure first on people convicted of sexual crimes, a group even lower than murderers.[33] In the 1893 *Virginia Medical Monthly* correspondence mentioned above, G. Frank Lydston proposed that castration and perhaps "penile mutilation according to the Oriental method" could serve as a putatively more humane alternative to lynching Black men accused of sexual crimes. The benefits of castration were numerous, he claimed. The person would not be able to have offspring, which would prevent a parent from passing on their perversion to children. Emasculation would remove the desire to repeat the offense, and penile mutilation would remove the physical ability to do so. Castration would also have a deterrent effect, particularly on Black people, Lydston argued. "Executed, they would be forgotten; castrated and free, they would be a constant warning and ever-present admonition to others of their race."[34] In an address made the same year to the World's Columbian Auxiliary Congress, Dr. F.E. Daniel of the Medico-Legal Society also championed the castration of people convicted of sexual crimes. Daniel believed that castration of all people who engaged in sexual misconduct, including even masturbators,

[33] "Castration Recommended as a Substitute for Capital Punishment," *Journal of the American Medical Association* 18, no. 16 (1892): 499-500; "A New Punishment for Murder," *The New York Medical Times* 20, no. 2 (May 1892): 48-49.
[34] McGuire and Lydston, *Sexual Crimes Among Southern Negroes*, 22.

was the best alternative to traditional punishment because it would theoretically avoid the challenge of holding the supposedly insane responsible.[35]

Some physicians were not content to merely discuss castration as a treatment for perversion. Dr. Hoyt Pilcher of the Kansas School for the Feebleminded performed castrations and hysterectomies on fifty-eight people as a "treatment" for masturbation. His successor at the school touted the success of Pilcher's procedures, which did not merely halt reproduction but caused complete impotence and loss of sexual desire.[36]

In the early twentieth century, enthusiasm for the vasectomy procedure eclipsed enthusiasm for state-sponsored castration. First invented in the late 1890s, Harry C. Sharp popularized the vasectomy and led a campaign that resulted in the passage of the first sterilization law in Indiana in 1907.[37] The vasectomy was less dangerous and had far less drastic results than castration. It rendered a person sterile without rendering them impotent or affecting their testosterone levels and libido. It was likely more palatable to the public and the courts, making it feasible to sterilize large numbers of people and prevent the perceived increase in hereditary degeneration. Proponents could also argue that the procedure was not a punishment but a police power measure, like compulsory vaccination or quarantine laws, that the state could use without needing to clear all the procedural hurdles of criminal law.[38] The popularity of the vasectomy was a problem, however, for the experts who were as concerned with preventing sex crimes as they were with eugenics. The fact that the procedure did not render the patient

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[35] Daniel, "Castration of Sexual Perverts," 264-265. For more on the relationship between castration and lynching see Melissa N. Stein, *Measuring Manhood: Race and the Science of Masculinity, 1830-1934* (Minneapolis: University of Minnesota Press, 2015), 217-250 and Dorothy E. Roberts, *Killing the Black Body: Race, Reproduction, and the Meaning of Liberty* (New York: Vintage, 1997), 56-103.
[36] F.C. Cave, "Report of Sterilization in the Kansas State Home for the Feebleminded, *Journal of Psycho-Asthenics* 15, no 1,2 (1910): 123-125; Largent, *Breeding Contempt* 12, 22.
[37] Largent, *Breeding Contempt*, 28.
[38] "The Constitutionality of the Compulsory Asexualization of Criminals and Insane Persons," *Harvard Law Review* 26, no. 2 (1912): 163-165.

impotent or reduce libido meant that it would have little effect on sex crimes. Though some still believed that sterilization itself could prevent sex crimes, medical experts worried that sterilized people might be more likely to commit sexual crimes and spread venereal disease because they could do so without fear of inducing pregnancy. Eugenic and crime control goals might conflict.[39]

In the 1910s, G. Frank Lydston proposed an even more unconventional treatment for sexual deviation and other maladies: testicular implantation. Lydston saw the glandular organs as the key to overall health. He was also a degeneracy theorist convinced that the overstimulation and decadence of contemporary society enervated the glands.[40] Never afraid of following a fallacious idea to its logical conclusion, he came to believe that implanting new sex glands into patients with poorly functioning glands could cure a variety of mental and physical illnesses that afflicted modern society, such as senility, sexual perversions and homosexuality, and dementia praecox.[41] Lydston tested the experiment on himself by inserting a testicle he extracted from a dead body into his scrotum. After this test, he experimented on many subjects, including institutionalized patients and volunteers.[42]

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[39] Harry C. Sharp, "The Sterilization of Degenerates," *Indiana Board of State Charities* (National Christian League for Promotion of Purity, 1908); Thomas Speed Mosby, *Causes and Cures of Crimes* (St. Louis: C.V. Mosby, 1913), 112, 128-130; Fred C. Nelles, et al., *Report of 1915 Legislature Committee on Mental Deficiency and the Proposed Institution for the Care of Feebleminded and Epileptic Persons* (California: Whittier State School Department of Printing Instruction, 1917), 40. "Sterilizing No Cure for Crime, Says Local Medic," *Waukegan Daily Sun* (Illinois), October 14, 1916. Lydston was one person who continued to advocate for castration even after vasectomies had been invented. *The Diseases of Society*, 562-568.

[40] Lydston, *The Diseases of Society*, 86-87.

[41] If Lydston believed castration was a cure for sexual perversion, how could he also think that implanting extra testicles—a procedure designed to increase libido—might also be a cure? Lydston likely conceived of castration as a cure (and punishment) for the hypersexual type of offender, particularly Black men, and gland implantation as a cure for the enervated pervert. For the hypersexual, impotence would be an effective treatment. In the pervert, impotence may have led them to commit perverse acts. This distinction played into tropes of the hypermasculine Black man and the effeminate cultured white man.

[42] G. Frank Lydston, "Implantation of the Generative Glands and its Therapeutic Possibilities," *New York Medical Journals* C., no.16 (October 17, 1914): 745-753; G. Frank Lydston, "Implantation of the Generative Glands and its Therapeutic Possibilities," *New York Medical Journals* C, no. 17 (October 24, 1914); 812-819; G. Frank Lydston, "Implantation of the Generative Glands and its Therapeutic Possibilities," *New York Medical Journals* C., no. 18 (October 31, 1914), 862-870; G. Frank Lydston, "Implantation of the Generative Glands and its Therapeutic

Leo L. Stanley, the powerful chief surgeon at San Quentin Prison from 1913 to 1951, implemented Lydston's theory of testicular implantation in 1918. A committed eugenicist, Stanley performed thousands of testicular implantations on incarcerated people, sometimes stealing the testicles from people the state had executed. More often, though, he inserted sections of animal testicles into his test subjects. Stanley claimed that incarcerated men happily volunteered for the surgery on the false promise of increased vitality, virility, and energy. Still, given Stanley's power at the prison, consent was illusory, and he certainly did not receive consent from the people whose bodies he plundered for organs.[43] In part, as historian Ethan Blue argues, Stanley used incarcerated men as practical test subjects for a procedure that he believed would have broad application throughout society. But Stanley also thought that the "gland cure" could help prevent crimes, particularly those committed by people with psychological disorders like dementia praecox, feeblemindedness, and perversion.[44] And he was not the only one. Newspapers presented the technique as "a solution to the Moron problem" and a cure for criminality.[45] Even William Hickson, chief of Chicago's Psychopathic Laboratory, expressed hope that the procedure might be a helpful crime prevention method.[46]

Possibilities," *New York Medical Journals* C, no.19 (November 7, 1914): 913-918; G. Frank Lydston, "Sex Gland Implantation: Additional Cases and Conclusions to Date," *Journal of the American Medical Association* 66, no. 20 (1916): 1540-1543; G. Frank Lydston, *Impotence and Sterility with Aberrations of the Sexual Function and Sex Gland Implantation* (Chicago: The Riverton Press, 2017), 50-51.

[43] "Charge 'Buck' Kelly's Body is Mutilated," *Oroville Mercury-Register*, May 14, 1928; "Transplant Glands Executed in Calif.," *The Morning Call* (Allentown, Pennsylvania), August 31, 1928, 5.

[44] Again, one might wonder, how would increasing energy, vitality, and sexual desire help to prevent sexual crimes? In fact, the theory makes a strange sense if one accepts the idea that perversion was often caused by exhausted nerves that sought release in unusual forms of stimulation, particularly in cases of old men who abused children. In such cases, increased vitality and sexual desire might help the recipients desire and find pleasure in "normal" sexual objects. For instance, Stanley proudly reported on the increased post-procedure virility and energy of a 73-year-old incarcerated man who had been convicted of a sex crime committed against children. Stanley reported the transplant recipient had never been married but now wanted to be released on parole so he could get married. United Press, "Glands Make Pep and Jazz," *Pratt Daily Tribune*, November 14, 1919, 1; Ethan Blue, "The Strange Career of Leo Stanely: Remaking Manhood and Medicine," 231.

[45] Edward Boyden, "Criminality is Cured," *Los Angeles Times*, December 11, 1922, 1 cited in Blue, "The Strange Career, 235; Arthur Benington, "Modern Surgery's Most Daring Exploit," *Omaha Daily News*, March 28, 1920, 8.

[46] "Chicago Crime to be Fought by New System," *Belvidere Daily Republican*, September 17, 1927, 1.

This work reinvigorated a debate about whether the origin of sex crimes could be located in the genital organs themselves or in the mind. The founder of phrenology, Franz Joseph Gall, had influentially cast doubt on the efficacy of castration, arguing that erotic mania was a brain disorder.[47] But physicians like Lydston continually floated the idea that procedures on the sex organs alone could solve sexual disorders.

The willingness of so many to promote practices from castration and sterilization to quack cures like testicle implantation as solutions to sex crimes reveals their lack of faith in the threat of punishment and incarceration to do the job and a hope that a scientific alternative was possible. For instance, a 1916 editorial in an Illinois newspaper criticized a judge's decision to offer freedom to a man who attacked a young girl if he agreed to get sterilized. The editorial nonetheless claimed that the decision could not be "lightly dismissed." "Such decisions," the editorial noted, "are a very important indication that the best minds dealing with the problem of [sex] delinquency are becoming dissatisfied with the old outworn methods of punishment because they do not work."[48] The arguments for castration and testicular implantation were important in establishing a new common sense about people accused of sex crimes—that their biological abnormality rendered punishment ineffective against them.

Segregation of feebleminded people and people with sexual pathologies in "colonies" was often proposed as a more feasible alternative to sterilization or castration. In part, this was a disciplinary divide. Physicians who worked in the field of medical jurisprudence often favored castration and sterilization, while wardens and administrators of institutions for people deemed defective or delinquent favored the segregation plans. At the 1903 meeting of the National Conference of Charities and Correction, a Committee on Colonies for Segregation of Defectives

[47] Gall, et al., *On the Functions of the Cerebellum*, 61-62.
[48] "Sterilizing No Cure for Crime, Says Local Medic," *Waukegan Daily Sun* (Illinois), October 14, 1916, 3.

recommended the permanent segregation of degenerates "who either physically, or morally, are so far below the normal that their presence in society is hurtful to their fellow citizens, or that their unhindered natural increase is a menace to the well-being of the state." For the committee, segregation both prevented propagation and crime. The degenerate class included "the chronic insane, the epileptic, the paralytic, the imbecile and idiotic of various grades, the moral imbecile, the *sexual pervert*," and many more. The committee recommended that as many degenerates as possible be placed in "colonies" where they could labor to support the colony and would be unable to reproduce. This institution would not be a site of punishment or even fundamentally one of treatment but would exist primarily for segregation.[49] Farm colonies grew in popularity because they could serve both eugenic purposes and safety goals that sterilization could not. Experts believed that the public would not accept the level of sterilization—especially of morons, who were nearly normal—they believed was necessary to put a dent in delinquency. At the 1912 meeting of the American Prison Association, Hastings Hart director of the Department of Child-Helping of the Russell Sage Foundation, argued that segregation was the most effective path to the "extinction of the defective delinquent."[50]

III. *Defective Detention in Chicago*

Chicago was a center of advocacy for the preventive detention of people considered defective. As the birthplace of the American Institute of Criminal Law and Criminology and the Municipal Court of Chicago, this was not a coincidence. Throughout the 1910s and 1920s, Chicago also experienced periodic panics, driven by the press and city officials, over crimes

[49] Alexander Johnson, "The Segregation of Defectives: Report of Committee on Colonies for Segregation of Defectives," *Proceedings of National Conference of Charities and Correction at the Thirtieth Annual Session Held in the City of Atlanta, May 6-12, 1903*, ed. Isabel C. Barrows (Press of Fred J. Heer, n.d.).
[50] Hastings H. Hart, "The Extinction of the Defective Delinquent: A Working Program," *Proceedings of the Annual Congress of the American Prison Association, Baltimore, Maryland November 9 to 14, 1912* (Indianapolis: WM Buford Printer, 1913), 208-209; Hahn-Rafter, *Creating Born Criminals*, 150-151.

allegedly committed by morons and sex degenerates. Chicago police often pinned unsolved crimes on morons and vigorously publicized law enforcement's efforts to round up morons for questioning.[51] This practice of preventive arrests led to criticism that the police were not proactive enough. Why, panicked residents might wonder, if these people were identifiable and dangerous, had they not been restrained before they committed crimes? The *Chicago Tribune*, for instance, warned of the dangers of "morons," who were released from hospitals for the insane.[52] By linking sexual deviancy with disability rather than an (invisible) weak will or sinful nature, experts implied that sexual perverts were identifiable. And by arguing that perversion was progressive, they implied that before committing a serious sex crime, most people would commit less serious ones or engage in other abnormal behavior. Hypothetically, then, authorities could prevent many terrible sexual crimes by recognizing perverts early in their careers, catching them as they passed through the juvenile court or other institutions.

The existence of the Municipal Court of Chicago made it conceivable that a preventive approach was actually workable given the records it kept on abnormal people who passed through the Court. The court's Psychopathic Laboratory examined abnormal-seeming people who passed through all the divisions of the court, even non-criminal ones like the Domestic Relations Court. In 1916, during a moron panic, Chief Justice Harry Olson showed reporters the court's "borderland file," case files of people who allegedly had mental difficulties and were dangerous but not arrestable under current law. Olson campaigned for an internment camp where such "morons and defectives" could be detained.[53] Women's clubs, social agencies, and other

[51] "Broker's Wife and Boy Slain, Moron Again," *Chicago Tribune*, May 7, 1915.
[52] "Paroled Moron Attacks Woman," *The Chicago Daily Tribune*, July 14, 1915.
[53] "'Crank File' Shows 100 Put City in Peril," *The Chicago Daily Tribune*, July 20, 1916; "Curb 'Harmless' Slayers—Judge Olson," *The Chicago Daily Tribune*, July 19, 1916; "Favors Public Farm for Morons, as in the East," *The Auburn Community Booster*, March 14, 1917.

groups also got involved in the effort to detain people deemed feebleminded and paranoid.[54] A committee, headed by Judge Thomas F. Scully, held hearings, and advocated for an extensive survey of feebleminded people in Chicago along with the construction of farm colonies.[55]

Other public officials also pushed for preventive detention. The official reports of the Chicago Municipal Court advocated for a "farm colony," or "internment camp," where those with psychopathic constitutions, dementia praecox, and feeblemindedness could be sent indefinitely. Rejecting any notion that the plan was primarily about rehabilitation, Dr. William J. Hickson of the Psychopathic Laboratory acknowledged that "for the majority, this would mean life."[56] In February 1918, Illinois Governor Frank Lowden met with Chicago law enforcement authorities and officials, including Harry Olson and William Hickson, to address the perceived crime crisis in the city. The *Chicago Tribune* reported that the Governor agreed to help pass legislation to "establish and maintain a special institution for the permanent restraint of incurable mental defectives of criminal bent," but nothing came of it.[57]

By November 1918, the shooting of three nurses and murder of one of them, Iola Almon, ignited panic about "moron" crimes. A man named Frank L. "Whitey" Clark was quickly arrested, and he allegedly admitted to breaking into the women's home and shooting them after he had been frightened. Newspapers reported that Clark had been arrested previously for following one of the women and that he had admitted to watching them dress in the early mornings. The women's independence and choice to violate racial norms by living in the city's Black Belt led to fears for their safety even before the attack, reports claimed. The case drew a

[54] "Care of the Weak-Minded, Campaign Having that Object in View," *Freeport Dailey Bulletin*, July 21, 1916, 8.
[55] "Scientists Ask Half-Wit Survey and Isolation," *Chicago Daily Tribune*, July 25, 1916.
[56] *Tenth and Eleventh Annual Reports of the Municipal Court of Chicago, For the Years December 6, 1915 to December 2, 1917* (Chicago: Fred Klein Co. Printers, n.d.), 11, 274-275.
[57] "State Power Pledged to Aid Crime Fight," *Chicago Daily Tribune*, February 19, 1918.

connection between sexual danger and the influx of Black migrants to Chicago during the Great Migration.[58] For many, this case was the perfect illustration of the danger of "morons" preying on modern, more independent women who had little protection from such fiends. John Alcock, interim superintendent of the Chicago Police, claimed that, "these crimes will continue as long as half wits, morons, and sociopaths are permitted to roam the streets." "But under the present laws," Alcock complained, "they cannot be segregated or put away until they have committed a crime." "That," Alcock claimed, "is too late."[59] Clark, too, seemed to perfectly embody the way that a "moron" with perverted tendencies could escalate from less to more serious offenses rapidly. Over the course of mere weeks, Clark went from peeping to stalking to breaking-and-entering, and, finally, in a fit of confusion and fear, to killing. Anxieties about urban crime, women's growing independence, and interracial encounters translated into the more concrete and expressible fear of "morons." [60]

Clark's arrest led to another push for preventive detention. The Chicago Tribune called the case the "shame of the law" and reported that the Municipal Court's Psychopathic Laboratory had identified 1,390 morons in the last few years. Superintendent Alcock denied that the police could do much to protect people without additional powers. "All the police can do is arrest after the crime," he claimed.[61] In fact, the Chicago Police were doing even less of that. Despite the supposed increase in sex crimes in the city, fewer people had been charged with rape than in the year before in each of the previous four years. 104 people were charged with rape in 1918, compared to 215 in 1914. The charge of crime against children, though not declining as steadily

[58] "Seek Moron as Intruder Who Shot 3 Nurses," *Chicago Daily Tribune*, November 7, 1918.
[59] "'Whitey' Clark, Moron, Admits Killing Nurse," *Chicago Daily Tribune*, November 9, 1918.
[60] "Seek Moron as Intruder Who Shot 3 Nurses," *Chicago Daily Tribune*, November 7, 1918.
[61] "Crimes of Moron Like Clark Held 'Shame of Laws,'" *Chicago Daily Tribune*, November 10, 1918.

year by year, was brought less frequently in 1918 than in 1914. 124 people were charged with a crime against children in 1918, down from 160 four years earlier.[62]

Following the murder, Chief Justice Harry Olson organized a committee to create legislation permitting the indefinite preventive detention of potential criminals with mental defects. The committee discussed a draft bill authorizing the construction of a "farm and industrial colony" at Dixon State Hospital for "mentally defective persons," defined as "persons suffering from feeblemindedness or dementia praecox, persons known as morons, and all other persons whose psychopathic constitution is so subnormal as to render them unfit to cope with the social and economic conditions of the day." The draft allowed for such people to be voluntarily or involuntarily committed. Despite the committee's efforts, however, the bill never passed.[63]

The Municipal Court did not wait for the passage of a new law to practice preventive detention of people suspected of crimes. An official report covering Chicago's Psychopathic Laboratory from 1917 to 1920 noted that "one phase of the Laboratory's work which has been growing in importance in the past two years" was due to "the tendency of police officers and others to gather in suspected persons, many of whom show signs of insanity." The report continued, "the Laboratory has thus tended to become a clearing house for psychopaths of an active and menacing sort, and for victims of outspoken insanity and other potentially dangerous psychoses." The report explained that "one of our chief deputies of our police force gives orders, as soon as certain crimes are committed, to search the district for defectives."[64]

[62] City of Chicago Police Department, *Annual Report for the Year Ending December 31st, 1918* (Chicago: Severinghuas, 1919), 23.
[63] "For an act in relation to the commitment and treatment of mentally defective persons," box 4, folder 15, Harry Olson Papers, Northwestern University Archives, Evanston, Illinois; "Olson Will Call Meeting to Urge Curb on Morons," *Chicago Daily Tribune*, November 11, 1988.
[64] William J. Hickson, "Report of the Psychopathic Laboratory of the Municipal Court of Chicago, May 1, 1917, to December 6, 1920," in *Twelfth, Thirteenth and Fourteenth Annual Reports of the Municipal Court of Chicago*, 37, 176.

An address delivered to the Women's Protective Association in 1919 by Chief Justice Harry Olson documents the loose criteria used to diagnose diseases like dementia praecox, a disease thought to contribute to criminal behavior. "This disease exhibits itself in a desire to be a nonconformist," Olson argued. He explained, "Watch out for the men who wear long hair and hats that make them noticed." In the case of women, he advised that those who caused domestic difficulties, such as accusing their husbands of being unfaithful, were exhibiting signs of dementia praecox. According to Olson, many people examined at the psychopathic hospital believed there was nothing wrong with them.[65] This resistance to psychiatric authority was itself seen as evidence of psychiatric problems. By 1921, according to official reports, the laboratory was committing "in the neighborhood of fifteen hundred defective delinquents." Director Hickson bragged that "this number is much more than that convicted and sentenced by the Criminal Court in the same time, to say nothing of the much longer time that our cases will be kept isolated, in most instances for life." And many of these commitments, he added, were instances "where the legal evidence was not sufficient to make a case."[66]

The panic over sexually motivated crimes committed by morons intensified in July 1919, when Thomas Richard Fitzgerald assaulted and murdered a six-year-old Chicago girl named Janet Wilkinson. Fitzgerald had been arrested in the past for attacking another young girl. Newspapers presented him as a moron who did not even realize he was murdering Wilkinson, emphasizing the danger of mental disability.[67] The fact that Fitzgerald had previously been arrested for assaulting children was taken as evidence of the criminal law's inability to prevent

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[65] "Hat Queer or Hair Long, You May be Insane," *Chicago Daily Tribune*, January 11, 1919.
[66] William J Hickson, "Report of the Psychopathic Laboratory December 6, 1920 to December 4, 1921," 180.
[67] "Waukegan, March 10," *Libertyville Independent*, March 15, 1917; "25 Sought for Crimes Like the Attack on Janet," *The Chicago Daily Tribune*, July 28, 1919.

degenerates' crimes.[68] The *Belleville News-Democrat* reported that the crime "was a clear case of the abnormal psychology which we read about in the 'Psychopathia Sexualis' by Krafft-Ebing and 'Human Sexuality' by Parke." The paper concluded that "Fitzgerald is clearly a moron that is to say a feeble-minded personality of the higher grade, bordering on normal, with sex pervert tendencies and inclinations."[69] In the wake of the killing of Wilkinson, the *Bismarck Tribune* warned that a degenerate might be recognizable from his "low mental development," but he may also "be a sleek and unsuspected member of society," harkening back to the trope of the civilized sexual pervert. Both papers urged the passage of laws and the construction of hospitals that would allow the detention of "mental and moral defectives" or the "moron or sex pervert and invert or maniac type" before rather than after they committed crimes. [70]

Immediately after the murder of Janet Wilkinson, Judge Scully chaired a committee to study "how to make Chicago children safe." Again, members of the group, including Harry Olson, proposed a farm colony that would allow for the preventive detention of people considered mentally abnormal and dangerous. Some committee members emphasized the need for propaganda so that "this subject of morons is kept before the public eye."[71] Authorities in Chicago worked to amplify and harness public anxiety over sex crimes, but they were frustrated that anxiety ebbed and flowed in a way that was not conducive to the passing of legislation or to longer-term state-building projects. A few months after the formation of the committee, an editorial in the *Chicago Tribune* asked, "what has become of the inquiry which punctually

[68] "Fitzgerald a Moron, Police Say—And Warn," *Chicago Daily Tribune*, July 28, 1919.
[69] Editorial, *Belleville News-Democrat*, July 29, 1919.
[70] "Protect Your Children," *The Bismarck Tribune*, August 11, 1919.
[71] "Scully Launches Meeting to End Morons' Menace," *Chicago Daily Tribune*, July 31, 1919; "Farm Colony Urged to Solve Moron Problem," *The Chicago Daily Tribune*, August 6, 1919, 16. Olson took over the committee after Scully's passing. "Judge Olson to Take Up Moron Crime Problem," *Chicago Daily Tribune*, September 19, 1919, 14.

revives with each revolting and maniacal outbreak and relapses into inaction as soon as the sensation subsides?" Recurrent panics that led to nothing were already becoming a pattern.[72]

IV. *The "Moron" Debate*

Newspapers increasingly used "moron" as a synonym for "pervert," regardless of whether the accused had any known intellectual disability. A *Chicago Tribune* article in 1919 described men accused of "taking liberties with children" as "degenerates or morons," using the terms as synonyms.[73] "Moron" and "moron attack" became euphemisms for sexual crimes, but this usage was not uncontroversial. The public health expert and syndicated columnist William A. Evans critiqued the labeling of Fitzgerald as a moron. According to Evans, "Fitzgerald may be a moron; as to that I have no information; but the fact that he is a paedophile [sic] or any other variety of sexual pervert or invert does not prove him feebleminded."[74] A 1921 editorial in the *Chicago Tribune* critiqued the practice of labeling sex crimes as "moron attacks." The author speculated that the term "moron attack" was a helpful shorthand for newspaper writers who did not want to describe terrible crimes against children in detail. The danger, the editorial warned, was that this language presented such people as if they were not responsible for their actions and should not be treated as criminals.[75] But for many who used the term, this outcome was not a danger since they believed that these people were not responsible for their crimes. As the editorial obliquely suggested, the "moron" framing was a strategy of disavowal. It was a comfort to think that a person who committed a crime like the sexual assault and murder of a six-year-old girl did not understand what they were doing.

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[72] "Morons: Innocent Bystanders," *The Chicago Sunday Tribune*, November 2, 1919.
[73] "25 Sought for Crimes Like the Attack on Janet," *The Chicago Daily Tribune*, July 28, 1919.
[74] W.A. Evans, "Fitzgerald's Crime Does Not Show Him Moron," *Chicago Tribune*, July 28, 1919.
[75] "The Moron Evil," *The Chicago Daily Tribune*, November 29, 1921.

Psychiatric experts also began to bristle at the indiscriminate use of the term "moron." A report from Chicago's Psychopathic Laboratory for the years from 1917 to 1920 complained that "in Chicago the newspapers have adopted the use of the word 'moron,' which properly means a person limited in intelligence … to describe a psychopathic person with psychoses of sexual perversion." "The perversion of the word must be combated," the report urged, pun apparently not intended.[76] Meyer Solomon of Northwestern University Medical School noted that "moron" had not just a medical meaning but a distinctive newspaper meaning. "In the newspapers of the United States it is now being used to apply to any person with a tendency to commit acts of sex delinquency, especially sexual attacks of the nature of rape and perversion, occasionally ending in the murder of the victim," he wrote. According to Solomon, "this would include persons of various mental types—alcoholics, the mentally deranged, epileptics, psychopathics, feebleminded and normal persons who commit such acts."[77] Reporters and headline writers defended their use of the term on just these grounds, arguing that everyone knew it meant different things in newspaper articles and scientific works.[78]

At the same time, many psychiatric experts partially retreated from the position that feeblemindedness was the leading cause of crime, as the explanation ran into fundamental problems in the late 1910s.[79] First, intelligence testing of U.S. service members demonstrated that, according to the standards that had been applied to incarcerated people, many adult men would be categorized as mentally defective. Clearly, those standards for intelligence were unrealistically high. Even more embarrassing for eugenicists, comparisons revealed that the

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[76] *Twelfth, Thirteenth and Fourteenth Annual Reports of the Municipal Court of Chicago*, 38-39.
[77] Meyer Solomon, "The Moron Problem," *Clinical Medicine and Surgery*, 34, no. 7 (1927): 501.
[78] "The Local Room's Bright Lexicon," *The Chicago Daily Tribune*, January 4, 1927.
[79] Hahn Rafter, *Creating Born Criminals*, 167-168.

intelligence quotients of incarcerated people and servicemembers were not so far apart.[80] Finally, prison administrators found that, as a report from the Chicago Municipal Court put it, "as a rule, the most hopeless delinquents are not those rated low by the Binet-Simon tests."[81]

Members of the Chicago Municipal Court had to admit that they had exaggerated the importance of intelligence to crime, and they began to emphasize affective or emotional defects. A report covering the court's work from 1917 to 1920 stated that the "great vogue for intelligence testing in the years 1913 to 1917" had led investigators "to look upon intelligence defect as the one overshadowing cause for delinquency." The court admitted that "a great injustice has been done to the unfortunate moron by the earlier judgment that this kind of defect accounted in the main for delinquency." The court pivoted to claim that its studies had shown that defects in affect or emotion rather than intelligence were the primary determinant of criminal behavior. "What the earlier report [of the Psychopathic Laboratory] showed, in addition to the accumulated knowledge concerning feeble-mindedness, was the entirely distinct abnormality of defect of emotions or affectivity."[82]

However, leaders of the Municipal Court still assigned intelligence defect a significant place as an explanation for delinquency.[83] In its report for the years 1917-1920, the Municipal Court denied that feeblemindedness was the primary cause of crime, yet still argued that feebleminded people were "less resistant to environment than normal persons."[84] Feeblemindedness, they continued to believe, was particularly dangerous when combined with an affective defect. In a 1923 address, Municipal Court Justice Harry Olson repeated a mantra at

[80] Calvin P. Stone, "A Comparative Study of the Intelligence of 399 Inmates of the Indiana Reformatory and 653 Men of the United States Army," *Journal of the Institute of Criminal Law and Criminology* 12, no. 2 (1921): 238-257.
[81] Municipal Court of Chicago, *Twelfth, Thirteenth and Fourteenth Annual Reports*, 33
[82] Ibid, 34.
[83] In fact, two articles attached as appendices were explicitly eugenicist tracts. Ibid, 46-54.
[84] Ibid, 33.

the court: “we found that a defective intelligence was a misfortune, a defective affective or emotion a calamity and a defective intelligence *and* affectivity, a catastrophe.” Harkening back to nineteenth-century efforts to localize morality, Olson claimed in a different 1923 address before the Eugenics Research Association that in the Psychopathic Laboratory, “we found that defects of the basal ganglia or the seat of affectivity governed behavior more than defects of the intellect.”[85]

What the newspapers seemed to mean by the term “moron” was something like moral insanity or psychopathy. Alex Hershfield, Illinois State Alienist, wrote in a 1928 newspaper column that “according to popular definition, any male person who commits a sex crime is a ‘moron.’” But the people who met the psychiatric definition were generally peaceful and law-abiding. Instead, Hershfield claimed that when newspapers, officials, and the public used the term “moron,” they were really referring to what experts called “psychopathic personality” or the “constitutional inferior.” Such people were “morally rather than intellectually defective.”[86] Psychopaths were dangerous precisely because they “show too much cunning, initiative, and skillful planning in crime to call them ‘intellectual defectives’ or ‘morons.’” Even in his defense of the feebleminded, Hershfeld engaged in an ableist discourse that painted them as too incompetent and helpless to commit a crime. Likewise, syndicated columnist Dr. William A. Evans repeatedly, and with increasing exasperation over the course of the 1920s, criticized the way that newspapers blamed “morons” for sex crimes. Evans pointed out that it was not people of low intelligence who were most inclined to commit sex crimes but the “domineering, dominating men of affairs who take women without hindrance, just as they take money and

[85] Harry Olson, “Crime and Heredity,” in *Research Studies of Crime as Related to Heredity* (Chicago: James T. Igoe, 1925), 19.
[86] Alex S. Hershfield, “The ‘Moron’ Not a Sex Criminal,” *Lansing State Journal*, January 31, 1928.

power."[87] Despite these protests, during the 1920s, the term "moron" continued to function as a shorthand for the sex criminal.

V. *"Mental Defective" Legislation in Illinois*

In 1920, Republican candidate for Illinois State's Attorney, Robert E. Crowe, who had presided over the Thomas Fitzgerald case, made the establishment of an internment camp for sexual offenders an essential plank in his campaign. Crowe argued that if Fitzgerald had been detained on one of his previous arrests for harassing women and children, Janet Wilkinson would still be alive. Crowe pledged that "if I am elected state's attorney I shall make it my business to prepare and to present to the legislature a proposed law under which it would be possible to sentence morons to a farm colony or other humanitarian institutions, and thus remove this horrid menace to the safety of our children."[88]

Chicago women's groups were particularly dissatisfied with the legal system's permissive attitude toward sexual crime. In an effort to pressure judges to give longer sentences, the Women's Protective Association initiated a pressure campaign by packing courtrooms and commending judges who gave longer sentences. The Association critiqued existing laws for not allowing for lifelong detention or the eugenic regulation of marriage, which, they argued, would better protect women and children in addition to providing salutary eugenic effects. Mrs. David Hill Danker, president of the Women's Protective Association, stated, "the thing to do with the moron is to put him away forever."[89]

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[87] W.A. Evans, "How to Keep Well: Morons Usually Not Sex Criminals," *The Chicago Daily Tribune*, October 6, 1926; W.A. Evans, "How to Keep Well: The Word 'Moron' Explained Again," *The Chicago Daily Tribune*, February 29, 1928; see also, "Word 'Moron' in Trouble Again," *The Chicago Daily Tribune*, June 15, 1928.
[88] "Crowe Urges Moron Curb," *The Chicago Daily Tribune*, October 24, 1920.
[89] "Impose Heavy Sentence Upon Chicago Moron," *The Rock Island Argus and Daily Tribune*, March 14, 1921; "Moron Given Life for Attack on Girl of 15," *The Chicago Daily Tribune*, March 14, 1921.

After winning his election, Crowe made good on his promise by forming a commission to address sex crimes. The commission, founded in 1921, included director of the Psychopathic Laboratory William J. Hickson and Judge Harry Olson. It introduced a bill in 1921 allowing the state to preventively detain people considered mentally defective.[90] Introduced by Representative William G. Thon, the bill contained a commitment procedure for people who were deemed "mentally defective." The Thon bill defined "mental defective" as:

> a) A person who has a defect of intelligence, or
> b) A defect of affectivity or emotion; or
> c) A defect of will; of such a degree that he has criminal propensities, and while at large is a menace to the person or property of others.[91]

This definition was broader than the defective delinquent laws discussed in the last chapter, which confined the meaning of "defect" to intellectual defects. It would have considerably expanded the state's capacity to detain people indefinitely.

The proposed commitment process was convoluted. After a defendant was convicted of a second offense, a State's Attorney would file a commitment petition if there was probable cause to believe the person was mentally defective. If the court agreed with this assessment, it could appoint two alienists to render their opinion on whether the accused was "a mental defective dangerous to the life or property of other persons while at large." Finally, if the court found the accused mentally defective, it could commit the person indefinitely to a farm colony. Release was only possible if the superintendent of the farm colony, or a "qualified alienist," believed that a detainee was no longer a "mental defective" and not a danger and filed a petition for the person's discharge. After a hearing with additional examinations, the person could finally be

[90] "Crowe Outlines Needed Law to Reduce Crime," February 4, 1921, 2. Crowe went on to attain fame for prosecuting Leopold and Loeb.
[91] H.B. 468, "For an Act for the Prevention of Crime by the Segregation of the Mentally Defective With Criminal Propensities," *52nd General Assembly, State of Illinois 1921*.

discharged. But the state's hold on the person would not be over yet. If a detained person was released before the maximum term allowed for the offense and no longer considered defective, the judge could sentence the person for "the balance of such period under the conviction." The bill allowed for the commitment of a person applying for parole or already out on parole who the superintendent believed was mentally defective, thus considerably expanding the category of persons who could be committed under the act. The bill also would empower a juvenile court to commit juveniles before conviction.[92]

In the 1921 session, the Thon bill allowing for the indefinite detention of "mental defectives" passed with only two votes against it in both the Illinois House and Senate, but two accompanying bills for the construction of a farm colony did not pass.[93] Thus, there was no funding for an institution where the state could detain people classified as mental defectives. This led the Governor of Illinois, Len Small, to veto the bill, despite its popularity. Though the primary reason for his veto was the funding issue, Governor Small also expressed doubt over the constitutionality of the bill and unease with the creation of a "new type of mental disease which has heretofore not been recognized by the law."[94]

Though the Thon bill failed, it demonstrated the potential popularity and advantages of preventive measures. It offered the benefit of the indeterminate sentence while still theoretically respecting the principle of proportionality and notions of desert, concepts only applicable to the domain of punishment. Moreover, there was no worry that juries would not convict people of minor offenses for indefinite sentences. If a detained person was released from a farm colony, a

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[92] Ibid.
[93] H.B. 468, H.B. 469, H.B. 470; H.B. 566*, Journal of the House of Representatives, 52nd General Assembly of the State of Illinois* (Springfield, Illinois: Illinois State Journal Co., 1921), 1208; *Journal of the Senate of the 52nd General Assembly of the State of Illinois* (Springfield, Illinois: Illinois State Journal Co., 1921), 1609.
[94] Len Small, Veto Message on H.B. No. 566, July 12, 1921, *Governor's Veto Messages* (Springfield, Ill: Schnepp & Barnes, 1921).

judge could still impose a sentence, so long as the person had not already been detained for more than the maximum term the law provided. From the state's perspective, the bill was all upside. The Thon bill represented not an effort to medicalize crime but to criminalize medicine. In the Illinois bill, dangerousness and criminality were synonymous with mental defect.

However, the bill did not offer everything that advocates for a stricter approach to sexual crime wanted. In particular, the requirement that a person engage in not one but two offenses for the commitment process to start was contrary to the goal of Municipal Court reformers who wanted to restrain abnormal people thought to be dangerous even before they committed a crime. Nonetheless, the appeal of a farm colony was strong for officials, civic groups, and women's organizations, which drove them to continue the campaign for it even after Governor Small's veto.[95]

VI. *Chicago in Panic*

Continued panics over sex crimes in Chicago gave advocates of the segregation bill a great deal of ammunition to push for such laws. In August 1925, a story in the *Chicago Tribune* pointed to the challenges authorities claimed to face when prosecuting sex crimes. "The moron menace is growing and the authorities are forced to admit they are at loss for a remedy," the paper wrote. Morgan Collins, superintendent of police, complained that many sexual crimes were not reported to the police and that even when they were, it was difficult to obtain a conviction—the newspaper cited a conviction rate of 25%. The editorial warned that crimes against children, in particular, were increasing.[96] A nearly identical article appeared a few days later in Chicago's *Liberty Bell* newspaper, which added a heated call for a solution to the problem. Prison sentences were, according to the editorial, insufficient. Instead, the editorial

[95] "Chicago Women Plan Campaign Against Morons," *The Chicago Daily Tribune*, December 9, 1921.
[96] "Moron's Crimes are Increasing; Few Convicted," *Chicago Tribune*, August 25, 1925.

called for the sterilization and indefinite detention of "morons" and the mentally deficient, the ultimate goal being the "extermination of the morons."[97]

Whether such crimes were actually increasing is impossible to determine because Chicago police did not institute a uniform offense reporting system until 1931. Police did report the number of criminal charges. While the number of rape charges had increased quite dramatically in the last five years (from 196 in 1920 to 339 in 1925), the number of people charged with "crime against children" had not increased. In 1920, 169 people were charged compared to 166 in 1925.[98]

The next August, in 1926, newspapers across the country announced that Chicago was "in the throes of a Summer epidemic of sex offenses," perhaps the worst the city had ever seen. When a young woman died after jumping from a moving car to escape two men attempting to assault her, newspapers began reporting on "motor morons," men who offered rides to young women to assault them. Reporter Paul Johnson wrote that the panic reached an exceptionally high level that month due to "city-wide agitation by clubwomen, civic leaders and police." Governor Small was forced to visit Chicago to meet with the Superintendent of Police Morgan A. Collins. [99]

Chicago officials and law enforcement aggressively pushed the panic and used the occasion to expand their authority. State's Attorney Crowe put Joseph Nicolai in charge of prosecuting sex crimes. Nicolai and Mrs. Henry Hartough, the president of the Women's

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[97] "The City's Menace," *The Liberty Bell* (Chicago), August 28, 1925, 4.
[98] City of Chicago Police Department, *Annual Report for the Year Ending December 31st, 1920* (Chicago: Severinghaus, 1921), 26: City of Chicago Police Department, *Annual Report for the Year Ending December 31st, 1925* (1926); City of Chicago Police Department, *Annual Report for the Year Ending December 31st, 1931*, 6.
[99] "Chicago Cops War on Sex Orgies," *The Buffalo Times*, August 19, 1926; "Motor Morons Stir Chicago Police Seek Girl Attackers," *Illustrated Daily News* (Los Angeles), August 16, 1926; "Collins Warns Women Against Auto Lifts" *Southtown Economist* (Chicago), August 20, 1926; "Motor Morons," *Knoxville News-Sentinel*, August 24, 1926; "Chicago Driven to Curfew Law," *The Atlanta Constitution*, September 5, 1926.

Protective League, presented a curfew plan, to Collins. It would have required "unescorted girls" to be home by midnight.[100] Instead of passing a new ordinance, officials revived and began enforcing an older Chicago curfew ordinance requiring everyone under 16 to be off the streets by 10 P.M. For extra measure, a Cook County ordinance required girls under 18 to be home by 10:30 P.M.[101] As far away as Tampa, cities and municipalities followed Chicago's lead and instituted curfews in a panic over the dangers of sex morons.[102]

Much of the alarm was thinly disguised panic about the waning of patriarchal authority and young women's new sexual freedom, mobility, and independence in the 1920s—hence the focus on the "motor morons."[103] A curfew was a logical response. Coverage positioned the home as a place of safety against the dangers and immorality of the automobile and emphasized that the curfew would strengthen the authority and control of parents over girls.[104] Curfew enforcement and news coverage focused overwhelmingly on young women. Chicago Superintendent of Police Morgan Collins blamed parents who gave their daughters too much freedom in their choice of attire and activities, as well as the malign influence of "sexy magazines" for the alleged increase in sex crimes.[105] Coverage often included an element of nostalgia for simpler times when girls were home early. Even Miss America, Faye Lanphier,

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[100] Genevieve Forbes Herrick, "Ask Collins O.K. on Curfew Law to Guard Girls," *The Chicago Daily Tribune*, August 26, 1926.

[101] "Ring Old Curfew; Girls Kept Off Street at Night," *The Chicago Daily Tribune*, September 1, 1926; "Cook County's Curfew Rule Nets 24 Couples Monday," *The Waukegan Daily Sun*, August 31, 1926.

[102] "Rockford Finds an Old Curfew Statute," *The Daily Gazette, Sterling and Rock Falls*, September 18, 1926; "Curfew Law in North Chicago Starts Tonight," *The Waukegan Daily Sun*, September 7, 1926; "Rockford Finds that it Already Has Curfew Law," *Freeport Journal-Standard*, September 18, 1926; "Garrett Trying Curfew Law," *The Baltimore Sun*, September 21, 1926; "Tampa's Curfew," *The Tampa Times*, September 15, 1926.

[103] On these broader trends, see Joanne J. Meyerowitz, *Women Adrift: Independent Wage Earners in Chicago, 1880-1930* (Chicago: University of Chicago Press, 1988); Nancy Cott, *The Grounding of Modern Feminism* (New Haven: Yale University Press, 1987), 148-150. On the rise in the use of automobiles see Dong Cheng, et. al., "Early 20th Century American Exceptionalism: Production, Trade and Diffusion of the Automobile," NBER Working Paper No. 26121 (2019).

[104] "One Good Thing about the Curfew Law," *Southtown Economist*, September 14, 1926.

[105] "24 Girls Fall in Net of Curfew Law Revived in Chicago," *Belleville Daily Advocate*, August 31, 1926.

voiced her support for the curfew. The coverage presented young women and their lax parents as being just as responsible for the sex crime epidemic as the perpetrators themselves.[106] Enforcement of the curfew once again revealed law enforcement's incompetence. Police officers indiscriminately stopped and even arrested women over the curfew age. This angered white women not used to this level of contact with police officers, who were normally far more likely to harass Black women.[107] Police officers and the press complained that enforcement was difficult because of the "'flapper' fashion of short skirts, rolled hose, and bobbed hair," which allegedly made young girls indistinguishable from older women.[108]

Ultimately, the curfew's ideological work was more important than its effectiveness (or ineffectiveness) at reducing sexual violence. It was a national story. The curfew potently proclaimed that danger was outside the home, namely in the form of the uncontrollable and undeterrable moron who frequented dance halls and popular "necking spots," offering car rides to unsuspecting youngsters. Not only was the moron himself the product of a sexually permissive culture, but the permissive culture of dates, dances, and short skirts also gave him easy access to victims. The goal of the campaign against sex criminals, the President of the Women's City Club stated, was to restore "the sanctity of the home, which in our day has been destroyed." Police Chief Collins reinforced this message by requesting that parents keep their children at home and notify law enforcement of any suspicious person in their neighborhood. According to the

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[106] "Collins Pleased Curfew; To Keep it Ringing," *The Chicago Daily Tribune*, September 2, 1926.
[107] On the history of the policing of Black women see Anne Gray Fischer, *The Streets Belong to Us: Sex, Race, and Police Power from Segregation to Gentrification* (Chapel Hill: University of North Carolina Press, 2022); Gross, *Colored Amazons*; Hicks, *Talk with You Like a Woman*.
[108] "Curfew Hard to Enforce in this Short-Skirt Day," *Alton Evening Telegraph*, September 1, 1926; "Chicago Curfew Law for Children Gives Police Job to Detect Mothers," *The Belleville News-Democrat*, September 28, 1926; "'Sweet 16' in Homes When Cops Patrol," September 14, 1926; "Flappers Must Mind New Curfew," *Woodstock Daily Sentinel*, August 31, 1926; "Flappers of 50 Ring Knell For Curfew Law," *The Daily News*, September 3, 1926. For more on the history of sexual policing, see Fischer, *The Streets Belong to Us*.

preemptive logic of the panic, anyone who appeared abnormal or seemed not to belong was a threat.[109]

That the curfew forced young people back into homes that might themselves be sites of emotional, physical, and sexual violence was obliquely referenced in some of the coverage. In one case, law enforcement arrested a father named Isaac Wolffson for disorderly conduct after witnesses saw him beating his seventeen-year-old daughter. But Judge William Fetzer released Wolffson from custody after he explained that he was disciplining her, on the advice of the "matron of a juvenile detention home" and with his wife's approval, because she would not stay home. In its reporting, the *Chicago Tribune* presented the story as lighthearted, quipping that they had found an "advocate of the curfew law."[110]

While the curfew was seen as a positive good, the fact that the state resorted to curfews and conscripted parents into surveillance was an admission of law enforcement's inability or disinterest in protecting people from sexual crimes. One columnist lamented that "when the time comes that a city the size of Chicago has to hide its children from evil-doers who prey upon the public, it is evident there is some fault in the existing law enforcement in the community."[111] Law enforcement in the city acknowledged the problem of low conviction rates in sex crime cases but were reluctant to take responsibility. Chicago Chief of Police Collins and Assistant State's Attorney Nicolai, who was put in charge of "moron" and sex crime prosecutions during the panic called for juries to include more mothers, who would presumably take sex crimes more seriously. At a meeting about the sex crime wave, Nicolai placed the blame for low conviction

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[109] "Collins, Nicolai Address Meeting to Curb Morons," *Southtown Economist*, October 29, 1926, 1-2; "Put Mothers on Juries to Curb Morons," *Southtown Economist*, October 26, 1926. This logic is much like the logic of vagrancy law. Goluboff, *Vagrant Nation*.
[110] "Sweet Sixteen Pouts, Says Older Sisters Need Curfew Most," *The Chicago Daily Tribune*, September 3, 1926.
[111] Editorial, *Alton Evening Telegraph*, September 10, 1926.

rates on juries. “In our prosecutions of morons,” he claimed, “we are often hampered by some sentimental jurist who thinks that the poor boy never had a chance.”[112]

Given the problems with securing convictions, Chicago women’s clubs and law enforcement, with the assistance of the leaders of the Municipal Court, again pushed for civil detention and a “farm colony.”[113] Like the curfews, indefinite detention was a police power measure. Both were forms of discretionary and preemptive power, in tension with legal liberalism. Governor Small stated that his worries about the constitutionality of the 1921 commitment law had partly motivated his veto. Superintendent Collins also later admitted that many people considered the curfew an “arbitrary law,” though he did not elaborate on this point.[114]

A December 1926 editorial in the *Chicago Tribune* contributed to the campaign, highlighting the case of a man who allegedly confessed to attacking fourteen women during the past year. The editorial warned that the Illinois rape statute provided for a sentence from one year to life, which meant that the man could be free within a year or two even though “there is every chance that he belongs to the class of abnormals.” The editorial articulated the familiar distinction between normal and abnormal people. “There are, of course, cases of such attacks where the perpetrator is, in the commonly accepted sense normal,” the editorial acknowledged. But “a great number of cases, however—the so-called ‘moron’ cases—occur in which the perpetrator is clearly warped in his physical and mental makeup.” “The criminal code of Illinois,” the article complained, “has yet to recognize that such cases exist, are distinguishable, and require a distinctive treatment.” According to the editorial, “these abnormal cases call not so

[112] “Collins, Nicolai Address Meeting to Curb Morons,” *Southtown Economist*, October 29, 1926.
[113] “Chicago Cops War on Sex Orgies,” *The Buffalo Times*, August 19, 1926.
[114] “Collins, Nicolai Address Meeting to Curb Morons,” *Southtown Economist*, October 29, 1926.

much for the punishment of the criminal by a set term of years, but primarily for a method of handling which will isolate the criminal and protect society permanently from repetition of the crime." The ideas discussed in the previous chapter had trickled down to newspaper columnists.[115]

Soon after the *Chicago Tribune*'s editorial, another horrific crime occurred. On December 17, 1926, a six-year-old boy was murdered. A twenty-six-year-old named Harold Croarkin allegedly confessed to killing him and to abusing other children. Croarkin, papers reported, was the son of a well-to-do family. The *Chicago Tribune* described him as an average young man whose "biography is not a chapter of neat psychological foreshadowings pointing toward this crime." But coverage tended to portray Croarkin as a degenerate and moron. His small size and unusual affect, coupled with his family background, made it easy to tap into the trope of the weak, effeminate, and wealthy pervert. One Illinois newspaper noted that "we know beyond all doubt from the case of Loeb and Leopold that mental brightness and degeneracy can go hand in hand." Worse yet, Croakin had, according to reports, been arrested three months earlier on the complaint of an eight-year-old girl he had assaulted, but the state had dropped the charges. The *Daily News* reported that "the matter was hushed through the offices of mutual friends of the families involved and police permitted Croarkin to go his way."[116]

Reformers who believed that the state should detain potential sexual criminals before they committed their first offense seized on the case as an illustration of law enforcement's permissive attitude toward sexual crime. The Southside's *Liberty Bell* reported that prosecutors

[115] "Applying Science to Law," *The Chicago Daily Tribune,* December 3, 1926.
[116] Genevieve Forbes Herrick, "Croarkin Tells of Crime That Led to Murder," *Chicago Daily Tribune*, December 21, 1926, 2; "Call Rich Moron Boy-Slayer," *New York Sunday News*, December 19, 1926; "Murderous Morons," *The Rock Island Argus*, December 22, 1926, 6. Croarkin alleged that his confession had been coerced by police in the course of fifteen hours of questioning. "Croarkin to Blame Drink for Slaying," *Belleville Daily News-Democrat* (Illinois), December 22, 1926.

were failing to prosecute cases of people "who appeared to be degenerate" because "those who complained dropped the charge or because police failed to consider the case serious."[117] In another story, the *Liberty Bell* argued that "moron attacks" were more frightening than other types of crime, such as robbery and murder, because the degenerate "fears nothing" and he "strikes at rich as well as poor," which made him uniquely dangerous.[118] With the push from politicians and the press, the effort to confine so-called morons in a detention camp intensified. The Chicago City Council adopted a measure that "resolved that this honorable board exercise as much influence as is at its command in asking the legislature to provide for the removal and segregation of men of the type of Croarkin." The city even established an experiment with a small-scale detention center for boys who were classified as feebleminded, hoping to catch boys before they matured and committed serious crimes.[119]

In January 1927, County Commissioner John Gibson invited civil leaders, judges, lawyers, and doctors to a series of meetings to discuss what to do with people accused of sex crimes. Attendees of the meetings highlighted the most shocking instances of the criminal legal system's failures or disinterest in preventing sexual crimes. William Hickson told a story about a man from a prominent family who was released from the Psychopathic Laboratory even after allegedly confessing his intent to abuse a child (a fantasy that allegedly involved choking him with a leash police found in his pocket) and, if necessary to avoid getting caught, killing him. Judge Freeman Leroy Fairbank told of another case in which the Laboratory was forced to release a man who allegedly had been attempting to lure young girls. Chief Justice Harry Olson spoke about cases in which people whom psychiatrists had predicted were dangerous had been

[117] "Morons Can be Put Away if All Help," *Liberty Bell*, December 30, 1929.
[118] "Chicago's Morons," *Liberty Bell*, January 6, 1927.
[119] "County Board Urges State Provision for Moron Segregation," *Chicago Daily Tribune*, December 21, 1926; "County Opens Hospital to Curb Morons," *Southtown Economist*, January 11, 1927.

released, only to go on to commit terrible crimes. Of course, all these cases might be taken as evidence of the Psychopathic Laboratory's failures and the criminal legal system's unequal operation. Instead, in line with a long history of deploying the failures of incarceration as evidence for reinvesting in the carceral apparatus, committee members saw these cases as evidence that psychiatrists had not been given sufficient power.[120]

Members of the committee agreed the state should pass a law permitting courts to commit a person to an institution before they offended and should build a special institution where such people could be detained.[121] The proposal was popular. The *Southtown Economist*, which had long crusaded against "sexual degenerates," reported that "while civic leaders throughout the city dissent in opinion as to the most efficient method toward the banishment of the offenders, they are unanimously in favor of the proposal that the state legislature pass a bill empowering the court to rid the communities of the morally inferior before their possible committal of crimes." While it is likely that the *Economist* was exaggerating the unanimity, there is little doubt that many civic groups supported the proposal. The president of the Auburn Park Lion's Club, Dr. R.J. Gates, said about the proposal, "Doctors can tell whether a person is liable to commit a crime of a degenerate character. There should be enough legal power to round up all suspects and whenever anyone is liable to attack society, he should be immediately sent to the institution." Gates claimed that sentimentalism and politics were the problems. Doctors would be free from both, he believed.[122]

An editorial in the same paper distinguished between "ordinary crime[s]" and the crimes of the "moral degenerate" who committed terrible acts without even realizing that they were

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[120] "Laws Urged to Confine Morons Before Attacks," January 22, 1927. On this history see Foucault, *Discipline and Punish*, 268.
[121] "Laws Urged to Confine Morons Before Attacks," January 22, 1927.
[122] "Civic Leader OKEH Plan to Segregate Morons on Colony," *Southtown Economist*, January 25, 1927.

wrong, pointing again to the need for a multi-track approach to crime. The editorial urged readers to support the effort "to establish an institution where degenerates may be treated and cared for." It painted a bleak picture of life in the city, tapping into racist and colonialist tropes. "It is a situation that reminds one of the thrilling stories told of the frontier settlement during an Indian uprising, when the womenfolk of the settlers remained close to the shelter of their cabins, fearing torture and death at the hands of the savages," it claimed.[123]

Some of reporting during this period again revealed that the home was a site of abuse and identified how the criminal legal system permitted certain forms of sexual abuse, particularly that within families. One story the *Liberty Bell* pursued concerned a man named Henry Grabinski who allegedly raped his fifteen-year-old sister-in-law Anna Piton at gunpoint. Police officers claimed that Grabinski admitted to the crime, but Piton's family tried to have the matter covered up and pressured her to change her story. A judge initially dismissed the case on the grounds that Piton had consented, and that it was a private, family matter. But Piton refused to drop the issue, talking to police, the Legal Aid Society, and telling the *Liberty Bell* of her family's pressure and threats, which forced the court to reopen the case.[124] The story was yet another instance of the criminal legal system's indifference to certain forms of sexual abuse, to its "tolerated illegalities."

VII. *Another Attempt at a "Mental Defective" Bill*

[123] "Do Not Ignore the Crimes of the Moral Degenerate," *Southtown Economist*, January 25, 1927.
[124] "Betrayer of Girl Admits Her Charges," *Liberty Bell*, January 27, 1927; "Girl Victim of Moron Fights to Punish Betrayer," *Liberty Bell*, February 10, 1927; "Court Hears Girl's Story of Betrayal," *Liberty Bell*, February 27, 1927.

In this context, multiple bills aimed at the "moron threat" were introduced at the 1927 session of the Illinois legislature. Representative Church introduced a bill that would have amended the insane commitment law to include "mental defectives." The definition of "mental defective" was similar to that of the earlier Thon bill—someone with a "defect of intelligence," a "defect of affectivity or emotion," or a "defect of will; of such a degree that he has criminal propensities and while at large is a menace to the person or property of others." But Church's bill went even further in incorporating criminality into mental illness. To be considered a mental defective, a person had to be "previously convicted of felony or misdemeanor in this state, or of felony in any other state."[125]

The other two bills emerged from the meetings called by County Commissioner Gibson, which were attended by Harry Olson, William J. Hickson, Robert Crowe, and other Chicago legal authorities and civic leaders.[126] In the Illinois House, Representative Thomas O'Grady introduced "an act for the prevention of crime by the segregation of the mentally defective with uncontrollable criminal propensities." This bill was a more streamlined version of the 1921 Thon bill, using the same definition of "mental defective." However, the new segregation bill did not require two convictions, as the Thon bill did; only one conviction of a felony or misdemeanor punishable by imprisonment was necessary. Like the Thon bill, it also included a provision allowing for the commitment of juveniles before a conviction as well as people who were out on parole or about to be released. O'Grady also introduced a companion bill that allocated one million dollars for the construction of a "farm colony" for men deemed mentally defective.[127]

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[125] H.B. 225, *55th General Assembly Illinois* (1927).
[126] "State Draft of Bill Providing Moron Colony," *Chicago Daily Tribune*, January 26, 1927; "Moron Farm Bill Ready for Solons," *Liberty Bell*, February 3, 1927; "Making it Safe for Children," *Liberty Bell*, March 24, 1927.
[127] H.B. 288, *55th General Assembly Illinois* (1927); H.B. 289, *55th General Assembly* (1927).

A wide swath of the law enforcement community, politicians, women's clubs, and civic organizations supported O'Grady's segregation bill. The *Liberty Bell* reported that "two hundred women, representing various civic and other organizations that are demanding the menace of morons and other mental irresponsible be ended" journeyed to the capital to lobby the legislature to pass the O'Grady bills. The *United Press* reported that the bills had the backing of "the Chicago Crime Commission, Chicago Bar Association, Association of Commerce, and 500 other bodies interested in crime prevention, according to those in charge of the lobbying junket."[128]

Despite the support, both the Church and the O'Grady bills proved controversial. First, some experts argued that the bills were simply not scientific. Even in the drafting meetings called by Commissioner Gibson, there had been indications that the diagnostic criteria might be a point of contention. At one of those meetings, Justice Olson claimed, "we don't want to send the feeble minded, the harmless idiots away for life." But, he said, "we do want dangerous victims of dementia praecox, those who have no emotions, no knowledge of right and wrong, no conscience, no soul" to be committed. Olson claimed that "they are easy to detect and there is no chance that mistaken diagnosis can work horrible injustice." But Herman Adler, the prominent criminologist and state alienist of Illinois, was not so sure. Leopold and Loeb, he suggested, would not have been identifiable as degenerates before their crime, and some "sex degenerates," like Oscar Wilde, were not necessarily dangerous.[129] These same issues arose in judiciary subcommittee hearings on O'Grady's bill. Herman Adler testified to the problems with the bill, causing County Commissioner John Gibson to become so agitated that the chairperson of the meeting had to ask him to restrain himself. Adler testified that though he agreed with the bill's

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[128] "Making It Safe for Children," *Liberty Bell*, March 24, 1927, 4; United Press, "To Appeal to Legislature for a Moron Colony," *The Daily Independent* (Murphysboro, Illinois) March 3, 1927;
[129] "Laws Urged to Confine Morons Before Attacks," *Chicago Daily Tribune*, January 22, 1927.

goals, he believed it was on shaky scientific ground and thus would be difficult to enforce. The neurologist Hugh Patrick was even more critical, stating that the bill's definition of "mental defective" was fatuous.[130]

A second line of critique argued that the bill would be a boon to savvy defendants. Two provisions in O'Grady's bill, which had not been in the 1921 Thon Bill, might have fed into the narrative. First, O'Grady's bill allowed for a guardian, parent, or next of kin of the defendant to raise the issue of defectivity. Defectivity appeared to be a weapon that both the state and the defense could wield. The bill also provided that once a person was committed to an institution, the prosecution was to "abate." The Thon Bill, by contrast, had been explicit that a person who was released from commitment could still be sentenced to prison for their offense. The O'Grady bill seemed to replace rather than add to the punishment. Some local press critiqued O'Grady's segregation bill for these reasons. Chicago's *Southtown Economist*, which covered the sex crime beat extensively, published an editorial warning that the accused with the "influence of money" would take advantage of the procedure to avoid spending time in prison. Somewhat less critical, a *Decatur Daily Review* editorial agreed with the aim of the bill but worried that it was too early to implement such a law without the risk of defendants abusing it.[131] These issues also came out in subcommittee hearings on the bills. Chief of Police Hughes and an assistant state's attorney named George Gorman testified that the commitment procedure created a loophole for defendants.[132] They wanted a loophole for the state. This criticism, coupled with the critiques of the bill's scientific validity, contributed to the bill's demise. Unlike the Thon bill, which had almost unanimous approval until the Governor vetoed it, O'Grady bill and the Church bill never

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[130] John Herrick, "Experts Want Moron Bill but Differ on Kind," *Chicago Daily Tribune*, May 1, 1927.
[131] "Beware this Loophole for Criminals," *Southtown Economist*, March 22, 1927; "Moron Farms," *Decatur Daily Review*, May 5, 1927.
[132] John Herrick, "Experts Want Moron Bill, But Differ on Kind," *Chicago Daily* Tribune, May 1, 1927.

made it out of committee. There was broad agreement about the desirability of preventive detention of the abnormal, but the O'Grady bill appeared to benefit defendants, which doomed its passage.

The defeat of the O'Grady bill did not indicate that enthusiasm for preventive detention was waning. The *Southtown Economist* cheered the failure of the O'Grady Bill but in the same editorial declared that "the *Southtown Economist* lends its wholehearted support to any measure that justly removes the mental defective from society, provides an effective treatment for him, but at the same time does not provide an out for desperate criminals."[133] In its September meeting, the influential Municipal League of Illinois, which represented hundreds of cities and villages, adopted a resolution that "the State of Illinois should duly enact a law establishing such a state farm for the confinement and treatment of mentally defective persons with criminal tendencies." Similarly, in 1929, the Illinois Association for Criminal Justice published the Illinois Crime Survey, with the cooperation of numerous business groups, the Bar Association, universities, and experts. The survey endorsed the "provision of an institution … for the care of persons found guilty of a crime (regardless of its nature) who present anomalies of behavior of the type described as *psychopathic personality* or psychopathic constitution."[134]

In the 1929 session, lawmakers again tried to pass a version of the mental defectives law. Introduced by Senator James J. Barbour, this bill got further because it did not include the features of the previous bill the state found problematic. Instead, this bill would have functioned like an involuntary commitment law. Barbour's bill contained the same broad definition of "mental defective" but allowed "any reputable citizen of the county in which such person resides

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[133] "The Defeat of the Moron Bill," *Southtown Economist*, May 24, 1927.
[134] "Business Session: Reports of Committees," *Illinois Municipal Review* 8, no. 10 (Oct 1928): 262; The Illinois Association for Criminal Justice, *The Illinois Crime Survey* (Chicago: Blakely Printing, 1929), 805.

or is found" to file a commitment petition. In the hearings, two physicians, at least one with training in abnormal psychology, would determine whether the person was a "mental defective dangerous to the person or property of others." If the court found that the accused was a mental defective, the state could commit the person to an appropriate institution until the person was "of normal mind and ceases to have criminal propensities and to be dangerous."[135]

The expansiveness of this provision made it more popular than the 1927 bill. This time, the bill passed the Senate unanimously. In the House, the Judiciary Committee recommended that the bill pass, but it died before a final vote.[136] The reason, again, might have been tied to the issue of funding.[137] Politicians wanted to put the mentally abnormal away for life but did not want to pay for it. Fiscal prerogatives conflicted with carceral ones. Adding to the complications, these bills were quite expansive in their definition of mental defect. It was unclear how many people might be detained indefinitely if anyone with a defect of intelligence, affectivity, or will could be detained. The public fears, newspaper sensationalism, and the agitation of officials and reformers had been directed at defectives who committed sexual crimes in particular, but these proposed laws applied to all defectives.

An even more far-reaching attempt to reform the criminal law that same year eclipsed the effort to pass the mental defectives bill. Senator Florence Fifer Bohrer introduced a bill that provided that every person convicted of a crime, excepting some serious crimes, would "for the purposes of imprisonment and treatment, be divided into classes with respect to their relative intelligence, amenability to correction, and the environment and hereditary causes and emotional

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[135] 56th General Assembly, Illinois Senate, Senate Bill No. 25, Introduced January 22, 1929.
[136] Ibid; *Journal of the Senate of the 56th General Assembly of the State of Illinois*, (Springfield: Illinois Journal Printing Co., 1929), 490; *Journal of the House of Representatives of the 56th General Assembly of the State of Illinois* (Springfield, Illinois: Journal Printing Co., 1929), 740-741, 1307.
[137] Associated Press, "Race Going Insane; Mind Doctors to be Many," *Daily Free Press* (Carbondale, Illinois), October 31, 1929, 3.

traits to which their offenses may be primarily or substantially attributed" and sorted into appropriate institutions by the Department of Public Welfare. Supporters of the bill claimed that it would allow administrators to separate individuals with "sex problems" and "mental defectives" from the general class of incarcerated persons.[138] The bill passed the senate unanimously and received 100 yeas and only 4 nay votes in the House. Nonetheless, Governor Louis L. Emmerson vetoed it after the Attorney General advised him that the bill violated the Illinois Constitution's separation of powers provision by delegating broad judicial and legislative powers to the executive branch.[139] Once again, the popularity of the bill and its failure demonstrated the simultaneous enthusiasm for segregating sexual delinquents and mental defectives, and the tenacity of the traditional conception of criminal law. This reform effort again went too far and was not precisely targeted at the real source of fear: the sexual defective.

VIII. *The National Debate over Preventive Detention*

While the crime fears public officials stoked were particularly potent in Chicago, they were also a national phenomenon. A National Crime Commission conference, held in early November, 1927 in Washington, D.C., reflected this sense of urgency. In a report on the conference, the president of the American Prison Association, E.R. Cass wrote that "the citizens of many states have been aroused because of crime, more particularly spectacular crime." A great deal of legislation relating to penal codes, he suggested, had recently been passed "as an effort to put 'teeth into the law.'" The first session of the meeting, devoted to the work of city

[138] 56th General Assembly, Illinois Senate, Senate Bill No. 405, Introduced in Senate April 11, 1929; "New Deal for Offenders," *Rock Island Argus* (Rock Island, Illinois), June 18, 1929, 6.

[139] *Journal of the Senate of the 56th General Assembly of the State of Illinois* (Springfield: Illinois Journal Printing Co., 1929), 1195; *Journal of the House of Representatives of the 56th General Assembly of the State of Illinois* (Springfield, Illinois: Journal Printing Co., 1929), 1463; 56th General Assembly, Illinois Senate, Senate Bill No. 405, Introduced in Senate April 11, 1929; Governor Louis L Emmerson, "Veto Message on Senate Bill No. 405," June 24, 1929, *Veto Messages of Louis L. Emmerson, Governor of Illinois, on Senate and House Bills Passed by the 56th General Assembly of Illinois* (State of Illinois, 1929), 13-14; Oscar E. Carlstrom, Attorney General, to Louis L. Emmerson, Governor, June 26, 1929, in *Veto Messages of Louis L. Emmerson*, 14-16.

and state crime committees, "expressed a tendency to discard some relatively new methods, namely probation, the indeterminate sentence and parole."[140]

However, one new method that advocates of a more punitive approach did not want to discard was segregating so-called degenerate and defective criminals, as well as potential criminals.[141] Richard Washburn Child, a founder of the National Crime Commission, emphasized in his alarmist book *Battling the Criminal* that the psychiatrist was not an inherent threat to law enforcement because "his findings are reasons for keeping prisoners, rather than reasons for letting them go, and finally are new reasons for the restraints of law enforcement, rather than reasons for their abandonment." Psychiatric arguments were dangerous only when they threatened punishment as a system of "plainly-marked price tags on wrongdoing" directed not at the undeterrable but those who might be tempted by crime.[142] In the estimation of figures like Child, there was a difference between psychiatrists for hire who lent their credibility to getting accused criminals off the hook and those who used their expertise for the state to increase the time people served in incarceration.

The Missouri Crime Survey, published in 1926, recommended that psychopathic people who committed repeat crimes should be given truly indeterminate sentences. "Here," the survey claimed, "the prescription of the medical professional would be a much more severe dose than even the most critical of his legal brethren."[143] The 1926 Minnesota Crime Commission found that "some of our inmates of our penal institutions who leave at the expiration of sentence ought to be, but cannot now be, placed in other institutions because of their mental condition." The

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[140] E.R. Cass, "National Crime Commission Conference," *Journal of the American Institute of Criminal Law and Criminology* 18, no. 4 (Feb 1928), 497-98.
[141] Ibid.
[142] Richard Washburn Child, *Battling the Criminal* (Garden City, NY: Double Day, 1925), 262, 266.
[143] M.A. Bliss, "Mental Disorder, Crime and the Law," in *The Missouri Crime Survey* (New York: MacMillan, 1926), 406.

Minnesota Commission recommended that an expert in mental disease advise the Board of Parole before they released any prisoners. The report emphasized the difference between "substitutes" for punishment and "supplements." To the extent that measures like parole were substituted for punishment, they had to clear a high barrier to prove their efficacy, but to the extent that they supplemented punishment, they were all upsides.[144] The rights of the incarcerated person did not have any weight in the balance. California's "Report of the Commission for the Reform of Criminal Procedure," formed in 1925, recommended the construction of a hospital for the criminal insane where the state could send people suffering from dementia praecox and similar diseases. The California Commission also suggested the appointment of medical experts who could examine all prisoners and recommend placement in the hospital, which would protect society and provide an opportunity to study criminal insanity.[145]

Prominent professional associations also endorsed the supplementation of punishment with security measures. In the late 1920s, committees of the American Bar Association, the American Psychiatric Association, and the American Medical Association established cooperating committees that proposed a resolution that all three organizations adopted. The resolution recommended that a psychiatric service be made available to all criminal courts as well as penal and correctional institutions. It advised that "there be a psychiatric report on every prisoner before he is released."[146] The recommendations were modest and reflected the view that

[144] *Minnesota Crime Commission Report 1926* (Minnesota Law Review Reprint, 1927), 13, 55, 61.
[145] *Report of the Commission for the Reform of Criminal Procedure to the Legislature*, State of California (Sacramento: California State Printing Office, 1927), 30.
[146] American Bar Association, *Report of the Fifty-Second Annual Meeting Held at Memphis, Tennessee, October 23, 24, and 25, 1929*; American Bar Association, Section of Criminal Law and Criminology, "Report of the Committee on Psychiatric Jurisprudence," in *Committee Reports To Be Presented at the Annual Meeting to be Held October 11, 1932, Washington, D.C.*, 32-33; "American Medical Association Attacks Mental Disease Problem," *Mental Hygiene Bulletin* 8, no. 8 (October, 1930): 7.

psychiatric methods were best seen not as a challenge to the autonomy of the criminal law but as a supplement. The 1930 meeting of the International Prison Congress, attended by some of the leading administrators and reformers in the U.S., also put its weight behind security measures. After two days of discussion, the legislative section unanimously agreed that "It is essential to round out the system of penalties by a system of measures of security, to guarantee the safety of the public in cases where a punitive sentence is inapplicable or insufficient." The resolution explained that "measures of security have as their aim the amendment or elimination of the delinquent or the removal from him of the possibility of further criminality." The resolution specifically recommended the "internment of insane or abnormal criminals presenting a social danger, with the view, as far as possible, of their cure and adaptation to life in freedom." The criminologist Sheldon Glueck, who was a delegate at the congress, noted that even though the U.S. did not sharply distinguish security measures from punishments, as some European countries did, the country had developed a similarly robust set of special institutions and preventive measures for the insane, defective delinquents, and others for whom short, fixed sentences were ineffective.[147]

This perspective was not uncontroversial. The criminologist Nathaniel Cantor critiqued the 1930 International Prison Congress resolution and the American attempt to integrate punishment and preventive measures more generally. In a series of articles and in his criminology textbook, Cantor argued that it was impossible to pursue both the goals of defending society through crime prevention and punishing people according to their just deserts. If the goal was prevention and treatment, then "praise and blame are irrelevant," he argued. According to

[147] Sheldon Glueck, "The International Prison Congress of 1930," *Mental Hygiene* 15, no. 4 (1931): 777; *Actes du congrès pénitentiaire international de Prague août 1930: procès-verbaux des séances* (Berne: Bureau de la commission internationale pénal et pénitentiaire, 1930), 116-117.

Cantor: “While most progressive penologists accept this newer point of view, that the aim of the criminal law should be the defense of society, they insist on retaining punishment as an essential factor in penal treatment. On the one hand there is a belief in intimidation through the efficacy of punishment and on the other support of measures of social defense in which punishment plays no role.” For Cantor, the system adopted in Italy and some other countries of sentencing people convicted of a crime to their “just deserts” and then detaining them after the sentence was a *reductio ad absurdum* of the attempt to blend punishment with security measures. [148]

But just such a system would be adopted for people accused of sex offenses soon in the U.S. The large amount of public attention on sex crimes in the late 1910s and throughout the 1920s—centered in Chicago but national in scope—had primed the public for special measures aimed at sexual deviants.

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[148] Nathaniel Cantor, “Conflicts in Penal Theory and Practice,” *Journal of Criminal Law and Criminology* 26, no. 3 (1935): 344-348.

CHAPTER 3: THE RISE OF THE SEXUAL PSYCHOPATH REGIME

A September 28, 1934 editorial in the *Detroit Free Press* entitled "Where Blame Lies" sought to apportion responsibility for the recent sexual assault and murder of eleven-year-old Lillian Gallaher, a crime that had captured the attention of readers throughout the state of Michigan and beyond. The suspect, the paper explained, was a twenty-six-year-old "sexual pervert" named Merton Ward Goodrich, who had been committed twice to Ohio's State Hospital for the Criminal Insane on allegations that he had attacked young girls. The editorial expressed outrage at Ohio's failures in the case, but it did not claim that Goodrich's hospitalization was a mistake or blame hospital administrators for his release. Law enforcement, judges, and politicians were the villains in the account, while psychiatrists were the trusted authorities who could keep people safe. "The tragedy of Lillian Gallaher would not have occurred if politics had not overridden the judgment of men trained in the diagnosis of mental diseases," the editorial declared.[1] The view that the case demonstrated the necessity of giving experts more power to restrain the dangerous was hardly unusual.

Coverage of the case more generally claimed that the murder of Lillian Gallaher was the fault of the criminal legal system and the "sentimentalists" who were in charge of it. It was reported that Dr. R.E. Bushong, superintendent of the Ohio hospital, had concluded that, though not insane, Goodrich had a psychopathic personality and was a potential menace, but a judge had released him on a habeas writ. Police did not arrest him after his release, and prosecutors did not bring charges against him. Goodrich's case was compared with that of Joe Lightsy, a Black man who was accused of murdering a young woman in Detroit. Before the killing, a Detroit Recorder's Court judge had similarly declared Lightsy a potential future danger. While there was

[1] "Where Blame Lies," *Detroit Free Press*, September 28, 1934; Freedman, "Uncontrolled Desires," 92.

little faith that psychiatric treatment could cure such men, doctors could diagnose and contain dangerous people, and they needed more authority to do so.[2] Officials in Detroit took a similar position, arguing that the state needed to give authorities more power to detain abnormal people whom experts deemed dangerous. In an interview with the *Detroit Free Press*, Dr. I.L. Polozker, director of Psychopathic Clinic of Detroit's Recorder's Court and Glover Evans, a psychologist employed by the Clinic, complained that the people whom they recommended should be institutionalized were often freed when they were sent to county court or tried on misdemeanor charges, which permitted their quick release.[3]

In the wake of the murder, Wayne County prosecutor Harry S. Toy pushed for a law that would permit the indefinite detention of sexual deviants, and Michigan passed the nation's first sexual psychopath law in 1935. The law allowed the state to continue to detain people who had completed their sentence if they were deemed "psychopathic, or a sex degenerate, or a sex pervert." In 1938, Illinois passed an even more aggressive law, one that did not require a conviction before commitment. Illinois's law was the first to use the term "sexual psychopath," which gave it a more scientific appearance. Minnesota passed a law in 1939 that was even more expansive than Illinois's, eliminating the requirement for a criminal charge. In the following decades, some form of sexual psychopath law covered more than half the country, giving jurisdictions a powerful new weapon against people considered sexually deviant.[4]

This chapter focuses on how authorities used the fear of sex criminals to pass sexual psychopath laws. Just as in Chicago in the 1910s and 1920s, the public panic was partly the

[2] "Nationwide Hunt Starts for Maniac Killer Who Lured Gallagher Girl to her Death," *Detroit Free Press*, September 27, 1934; "Suspect Freed by Ohio's Legal Bungling," *Detroit Free Press*, September 27, 1934; "Michigan Still Frees Maniacs," *Detroit Free Press*, September 29, 1934.
[3] "Michigan Still Frees Maniacs," *Detroit Free Press*, September 29, 1934.
[4] See §§1-3 below.

creation of officials like Toy, Polozker, and Evans, who claimed that morons and degenerates were roaming the streets and that authorities had little power to stop them under current law. Though the sexual psychopath laws were often enacted quickly, they were not "ad hoc responses to menace" or hasty attempts to mollify public fears, as they are often portrayed in existing histories. [5] Authorities had long desired the power to preventively detain the "borderland" cases like Goodrich who were not insane but not normal either.

Though officials helped stoke it, the panic over sexual criminals was also rooted in something real—the criminal legal system's inability to prevent sexual violence. Editorials and citizen groups complained of cases like Goodrich's, in which prosecutors and police officers failed to take sex crime seriously. The argument that authorities did not have sufficient authority to detain sexual deviants was also partly an excuse for the indifference and toleration of sexual violence. And the passage of sexual psychopath laws allowed authorities to look like they were taking action, without fundamentally changing the criminal legal system.

This chapter also explores the passage and implementation of sexual psychopath laws across the country. How states implemented sexual psychopath laws, especially the frequency and length of detention, could have a significant effect on the daily lives of people considered sexually deviant. Gay men, in particular, were aware of the threat of the sexual psychopath laws. A man named Corwin Frank Peterson wrote to the editor of the gay rights magazine *The Mattachine Review* in 1962, "I wish to live where there is the least danger, and mainly from sex psychopath laws." Peterson was interested in moving from New York City to California, but two prominent Los Angeles defense attorneys had advised against the move because of California's

[5] Jenkins, *Moral Panic*, 71; George, "The Harmless Psychopath," 233; Edwin H. Sutherland, "The Diffusion of Sexual Psychopath Laws," *American Journal of Sociology* 56, no. 2 (Sep. 1950): 142-143.

frequent use of its sexual psychopath law and the long detention that could follow.[6] The threat of a sexual psychopath commitment was a part of the calculus as gay men like Peterson made decisions regarding where and how they would live.

Finally, this chapter examines a topic that has long been ignored in scholarship on the sexual psychopath laws—jurisprudence. Courts were confronted with a type of legislation they had not seen before, and they relied on a facile distinction between criminal punishment and civil detention in order to sustain the constitutionality of the new laws. By focusing on the intent of the state, the courts ignored the conditions of confinement, with dire consequences for accused sexual psychopaths.

I. *Michigan's "Moron" Law*

On September 26, 1934, after a week-long search, authorities discovered the body of Lillian Gallaher in a trunk located in an apartment rented out to a man named Merton Ward Goodrich. Goodrich, reporters quickly discovered, had been accused of inappropriate behavior with young girls a number of times before. It was reported that he was arrested in 1928 in the town of Lorain for luring a young girl into his room. According to the police chief of Lorain, Goodrich and the girl's family "smoothed over" the case. He had also been committed more than once to Ohio's State Hospital for the Criminal Insane in Lima for allegedly attacking young girls. Most recently, Goodrich had been released in January after bringing a habeas challenge to his detention. According to the *Detroit Free Press*, the superintendent and assistant superintendent at the hospital had testified that Goodrich was in the "twilight zone" between sanity and insanity.

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[6] Corwin Frank Peterson to Harold Call, February, 1962, Homophile Movement: Papers of Donald Stewart Lucas, 1941-1976, The Gay, Lesbian, Bisexual, Transgender Historical Society, San Francisco, California, Archives of Sexuality and Gender, link.gale.com/apps/doc/BCZZYZ474839495/AHSI?u=chic_rbw&sid=bookmark-AHSI&pg=20.

The hospital administrators argued that Goodrich should remain detained because he had a psychopathic personality, but an Allen County judge determined that this diagnosis did not constitute grounds for his continued detention. Police did not arrest Goodrich after his release, and prosecutors did not charge him with a crime, leaving him a free man. After the discovery of Gallagher's body, a nationwide search for Goodrich and his wife began, but they were not discovered until the following summer.[7]

In the meantime, law enforcement officials used the opportunity to detain anyone considered abnormal or deviant. Reporting explained that Wayne County prosecutor Harry S. Toy, a leader of the campaign, reached one agreement with a judge in the court of records to expedite the trials of people accused of sexual offenses and another with a probate court judge to institutionalize so-called morons. Detroit police commissioner Heinrich Pickert announced that 200 officers had been assigned to the drive against "degenerates." Detroit authorities detained people in cases where their legal authority to do so was questionable. A seventeen-year-old named Joseph Kowalczyk, who had allegedly committed a sexual crime in the past, was detained simply because his mother believed he should not be free.[8] Dr. I.L Polozker, chief psychiatrist of the psychopathic clinic of the Detroit Recorder's Court, claimed that the clinic was handling more cases than it ever had before.[9]

Men who pursued sex with other men were a particular target. The press reported that undercover officers arrested men for soliciting sex, and "sex delinquents who frequent parks and other public places" were put away on vague charges like vagrancy.[10] Authorities also targeted

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[7] "Girl's Body, Bound and Gagged, Found Stuffed in Trunk," *The Ludington Dailey News*, September 26, 1934; "Michigan Still Frees Maniacs," *Detroit Free Press*, September 29, 1934; "The Horror Caused by Easy Paroles," *The Detroit Free Press*, July 4, 1935.
[8] "Suspects Face Mental Tests," *Detroit Free Press*, November 7, 1934.
[9] "14 Delinquents Held in Drive," *Detroit Free Press*, November 3, 1934.
[10] "Police to Rout Psychopathics," *Detroit Free Press*, October 26, 1934; "Police Hunting Sex Offenders," *Detroit Free Press*, October 28, 1934.

people with perceived mental and physical disabilities. Police looked for people who appeared mentally unbalanced. A deaf and mute person was detained on the allegation that he had molested a young girl.[11] Police officers targeted sellers of obscene literature, too. The discovery of obscene drawings by Goodrich seemed to lend credence to the theory that seeing, or even simply imagining, obscene materials could put a person on the path to lust murder.[12] Newspapers also reported on acts of vigilantism.[13]

From one perspective, Goodrich's case underscored the indifference to sexual violence not just of law enforcement and the system of criminal law, but also of psychiatric hospitals and detention facilities. But from another perspective, the circumstances of the case could be seen to confirm all the warnings of those who had been arguing for decades that the sexually abnormal needed to be preventively and indefinitely detained and that experts needed more say over who should be detained. Hospital doctors, after all, had wanted to detain Goodrich, but they lacked the legal authority to do so. The press embraced this second interpretation of the Goodrich story, seeing it as a case in which doctors were denied necessary authority.

Psychiatrists and psychologists who worked at the Psychopathic Clinic of Detroit's Recorder's Court also pushed the second interpretation, seizing on the case as evidence that their authority needed to be increased. Chief psychiatrist Dr. I.L. Polozker and psychologist Glover Evans told the *Detroit Free Press* that potentially dangerous people were often released in the county courts or tried on misdemeanor charges, rather than being institutionalized. Examiners hired by the county courts, they claimed, tended to be doctors with some connection to the judge, rather than trained psychiatrists, and their examinations were far too brief to discover defects.

[11] "Gallaher Girl's Funeral is Held as Hunt for Killer Goes On," *Detroit Free Press*, September 29, 1934.
[12] "Police Seizing Vicious Books," *Detroit Free Press*, September 28, 1934.
[13] "Boy, 14, Battles Killing Suspect," *Detroit Free Press*, October 15, 1934.

Evans told the newspaper that "we have found in our clinic, numerous individuals on whom our recommendations of commitments were denied in the County courts and who have returned several times on misdemeanor charges in the Recorder's Court. Evans warned that, "many mental defectives, some with distinctly criminal tendencies, again are turned loose upon society to continue their anti-social behavior."[14]

Michigan's official state crime commission, established in 1929, pushed for an indefinite detention law. The commission's 1934 report, released just a few months after Gallaher's murder, blamed the failures of probation and incarceration more generally on the presence of sexual perverts and other abnormal people in the general prison population. The report claimed that "no proper penal system can be developed until means are found to remove the insane, the venereally diseased, the feeble-minded, the drug addict, *the sex pervert*, the aged and the feeble from the general prison population for such permanent or temporary treatment as may be required." It was not merely that they were themselves "irreclaimable," in the words of the report, but they also impeded the reformation of normal incarcerated people.[15]

Wayne County prosecutor and candidate for attorney general Harry S. Toy held meetings in late 1934 with officials and physicians that, among other things, discussed new legislation for "borderline cases." The meeting was attended by the directors of state institutions for the psychopathic and insane as well as I.L. Polozker, director of the Detroit Recorders Court psychopathic clinic.[16] After a meeting with police chiefs, Toy laid out his vision: "Our course should be this. Where it is impossible to obtain convictions against persons of perverted tendencies, we should undertake to have them committed to institutions for mental cases." Civil

[14] "Michigan Still Frees Maniacs," *Detroit Free Press*, September 29, 1934.
[15] *Report of the Crime Commission of Michigan 1934* (Lansing, MI: Franklin DeKleine, n.d.), 10, 23.
[16] "14 Delinquents Held in Drive," *Detroit Free Press*, November 3, 1934.

commitment proceedings had a number of attractive features for a prosecutor. Prosecutors would not have to jump through the procedural hurdles of a criminal trial; in fact, they would not even have to prove that a crime had occurred. Because they were not public, they allowed the state to bypass the difficulty of procuring testimony in sex crime cases. The former police commissioner of Detroit agreed, warning authorities to act "while public opinion is aroused in favor of such a campaign." Toy continued to hold crime conferences after he took office as attorney general in January 1935 and assumed chairmanship of the state crime commission, an ex officio position of the attorney general. Out of these conferences and meetings of the state crime commission, a set of bills emerged that revised aspects of the state's criminal law.[17]

Representatives George C. Watson and James G. Frey introduced two bills in the Michigan House in March 1935 that created provisions for the indefinite detention of people convicted of sexual crimes. One provision applied to trials before a justice of the peace and the other applied to misdemeanor and felony trials in other courts of record. A trial court could examine, with the assistance of two doctors including one psychiatrist, a person convicted of a range of offenses involving sex or perceived indecency who "though not insane, feeble-minded, or epileptic, appears to be psychopathic, or a sex degenerate, or a sex pervert, with tendencies dangerous to public safety." If it was "proved to the satisfaction of said judge or a jury that such person is psychopathic, or a sex degenerate, or a sex pervert, possessed of mental tendencies inimical to society, and that, because thereof, such person is a menace to public safety" the judge could declare that the accused be committed to a state hospital or institution after serving their sentence until the court decided they were no longer a "menace to public safety." The law provided a right to a jury trial but no other significant procedural protections. The Michigan

[17] "Science to War on Delinquents," *Detroit Free Press*, November 1, 1934.

House passed the bill unanimously and the Senate nearly unanimously in May. The governor signed them on May 27, 1935, and they went into immediate effect.[18]

With that, Michigan passed the nation's first sexual psychopath law—at the time it was often called the "moron law."[19] At a crime conference held at Michigan State College in October of 1935, following passage of the bill, its driving force, Harry Toy, adopted the familiar stance of the humble American who could not compare to the great European criminologists—Toy cited Beccaria, Lombroso, Saleilles, and Tarde—but who was willing to experiment. Toy argued that the intelligent way forward for the study of crime was to chart a middle path between those who denied the existence of criminal responsibility and the traditionalists who believed criminal responsibility was fundamental. Toy claimed that the measures the crime commission sponsored, including the recently passed sexual degenerate law, exemplified this middle path. These measures would "strengthen immeasurably the substantive and procedural criminal law of Michigan and provide additional security for citizens." They were, in other words, supplementary to the criminal law.[20]

It is worth comparing this law to the many attempts to pass similar laws in Illinois in the 1920s, which were also borne out of a desire to indefinitely detain so-called morons or sex perverts. These bills were often very popular, passing the Illinois House and Senate with numbers comparable to those of the Michigan law. Still, each time, the governor vetoed the bills out of concern about administrative costs or their constitutionality. Many factors could explain the failure of the Illinois bills and the success of the Michigan law. Perhaps the most obvious is

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[18] *Journal of the House of Representative of the State of Michigan 1935*, vol. 1 (Lansing, MI: Franklin DeKleine, 1935), 522-23, 807-809; Journal of the House of Representative of the State of Michigan *1935*, vol. 2 (Lansing, MI: Franklin DeKleine, 1935); *Journal of the Senate of the State of Michigan 1935*, vol. 2 (Lansing, MI: Franklin DeKleine, 1935), 1189-1191, 1802-1803; Public Acts 87-88, *Public and Local Acts of the Legislature of the State of Michigan Passed at the Regular Session of 1935* (Lansing, MI: Franklin DeKleine, 1935), 139-143.
[19] *Report of the Crime Commission of Michigan 1936* (Lansing, MI: Franklin DeKleine), 20.
[20] Ibid, 27-28.

the increased state capacity occasioned by the New Deal.[21] One noticeable difference, however, was that the Michigan law was more narrowly tailored to apply only to people convicted of sex crimes. Targeting people convicted of sex crimes was less controversial and less costly than subjecting potentially any person with a loosely defined defect to indefinite detention. Moreover, defendants could not use the Michigan laws to avoid punishment, which had sometimes been a source of concern about the proposed Illinois bills. Finally, these laws supplemented, rather than replaced, punishment. Since indefinite detention started after the person had served their sentence, it could only extend a person's incarceration.

By the next year, 1936, authorities were already agitating to expand and amend the commitment law. The parole department sought to enhance its power by allowing the department to remove "sexual degenerates" and "sexual perverts" currently incarcerated at state prisons and commit them indefinitely to hospitals or other institutions. The 1936 report of the state crime commission likewise argued that the law should be amended to apply retroactively to people who were sentenced before its passage. The commission's 1934 report had claimed that prisons would be dysfunctional until "sex-perverts" were removed from the general population. But under the 1935 law, a person who was declared a sex degenerate or sex pervert would be sent to prison to serve their sentence *before* commitment. If the goal was to remove sexual perverts from the general prison, the law as it stood in 1935 was counterproductive.[22]

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[21] The literature on the New Deal is extensive. See e.g., Steve Fraser and Gary Gerstle, *The Rise and Fall of the New Deal Order, 1930-1980* (Princeton University Press, 2020); Gary Gerstle, Nelson Lichtenstein, and Alice O'Connor, *Beyond the New Deal Order: U.S. Politics from the Great Depression to the Great Recession* (Philadelphia: University of Pennsylvania Press, 2019); Brent Cebul, Lily Geismer, and Mason B. Williams, *Shaped by the State: Toward a New Political History of the Twentieth Century* (Chicago: University of Chicago Press, 2019); James T. Sparrow, *Warfare State: World War II Americans and the Age of Big Government* (Oxford: Oxford University Press, 2011); Margot Canaday, *The Straight State: Sexuality and Citizenship in Twentieth-Century America* (Princeton: Princeton University Press, 2009).

[22] "Seek to Halt Moron Paroles," *Lansing State Journal*, October 9, 1936, 1,9; *Report of the Michigan Crime Commission 1934*, 10.

In early 1937, a committee appointed by Governor Frank Murphy recommended amendments to the existing sexual psychopath law.[23] Representatives George C. Watson, a Republican, and C. Clyde Stout, a Democrat, introduced a bill to amend the law in line with these suggestions, making detention the first destination of people committed under the law and allowing for retroactive commitment. The 1937 bill, often referred to as the Watson-Stout Bill, was popular. Reporting portrayed it as a reform that would strengthen the commitment law.[24] A letter to the editor published in the *Detroit Free Press* urged that the bill be "passed without any opposition."[25] An editorial in the *Ann Arbor News* stated that "the Watson-Stout bill, or something like it, has long been needed in this state and in many other states. Children are entitled to the protection of such a law. Mad dogs are less of a menace than the human degenerate, yet they are dealt with summarily. The degenerate must be placed where he can do no harm, the sooner the better."[26] This editorial was the latest in a long line of writing positing that sexual degenerates were outside the moral economy of punishment.

With this support, the Michigan House passed the bill with only one vote against and the Senate with no opposition before the governor signed it into law.[27] The revision removed the provision that the "psychopath" not be feebleminded or epileptic, requiring only that the person not be insane. This change reflected the still common view that there was a connection between mental disability and sex crime. The statute also now allowed a prosecutor or a sheriff to institute

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[23] *Report of the Crime Commission of Michigan 193*8 (Lansing, MI: Franklin DeKleine, 1939), 3.
[24] "Watson Asks More Stringent Laws for Sex Crime Offenders," *Port Huron Times Herald*, March 4, 1937; "House Advances Watson Bill to Jail Degenerates," *Port Huron Times Herald*, March 19, 1937.
[25] R.A. Laurie, "Anti-Parole Law Urged," (letter to the editor), *Detroit Free Press*, March 11, 1937.
[26] "State Press Comment," *Lansing State Journal*, March 23, 1937.
[27] *Journal of the House of Representatives of the State of Michigan 1937 Regular Session*, vol. 1 (Lansing, MI: Franklin DeKleine, 1937), 481-482; *Journal of the Senate of the State of Michigan 1937 Regular Session*, vol. 2 (Lansing, MI: Franklin DeKleine, 1937), 1475; *Journal of the House of Representatives of the State of Michigan 1937 Regular Session*, vol. 2 (Lansing, MI: Franklin DeKleine, 1937), 2366; "House Passes Measure Advocating Examining of Sex Degenerates," *The Escanaba Daily Press*, March 23, 1937.

commitment proceedings. Significantly, under the new version of the law, someone found to be a sex pervert or sex degenerate would be committed immediately to a "suitable state hospital or to such state penal or correctional institution as is or may be provided and equipped with facilities for the care and treatment of cases of this nature." This feature accomplished the goal of removing sexual "perverts" from the prison population. Once in an appropriate institution, the person could only be freed when a court found they were longer a "menace to the public safety." In the meantime, the sentence would be held in abeyance and, after making allowance for the time served in any institution, the court could "impose sentence and commit such person to prison for the remainder of the term provided by law for the particular offense."[28]

Most significant, however, was the revision allowing the law to apply retroactively. The revised statute allowed the commissioner of pardons and paroles to initiate commitment proceedings against an incarcerated person before their discharge, pardon, or parole. The state could commit an incarcerated person indefinitely if the person met the same conditions as those laid out in the pre-sentence provision.[29] This gave the state a potent new tool to police sex within prison and to target men who had sex with other men. Hilmer Gellein, Michigan's commissioner of pardons and paroles, stated that "our new moron law will be a deterrent." It would be a sort of punishment on top of a punishment. "Convicts," he stated, "are aware they are being watched." He continued, "they know that those suspected of degeneracy will be tried under the new retroactive law, and that those convicted have no chance for release from prison until the

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[28] Public Act No. 196, *Public and Local Acts of the Legislature of the State of Michigan Passed at the Regular and Extra Sessions of 1937*, 306; *Journal of the House of Representatives of Michigan 1937*, 2366; *Journal of the Senate of Michigan 1937*, 1475.
[29] Public Act No. 196, *Acts of the Legislature of Michigan*.

psychiatrists have decided they are not a menace to society."[30] Michigan's law was intended as much to regulate sex in prison as much as sex on the outside.

II. ***Illinois's Sexual Psychopath Law***

Michigan was not alone in taking a more carceral approach to people accused of sex crimes in 1937, as a panic over sexual crime spread nationwide. As was true in the 1920s, Chicago was at the center of the discussion. The heightened anxiety had begun in November 1936 when police arrested Andrew Capoldi for the murder of five-year-old Antoinette Tiritilli. The press identified Capoldi as "feebleminded" and a "moron," and an angry crowd nearly lynched him while he was in police custody. Other "moron" crimes were reported that month including the rape and mutilation of Anna Brasy, and the *Chicago Tribune* reported that a "general roundup of morons" was underway. In December, Capoldi was declared feebleminded and committed to the Illinois Security Hospital, without ever facing a criminal trial. That same month, the press reported that the kidnapper of a young boy had escaped from the Lincoln State Home for the Feebleminded years prior. Both stories contributed to the construction of the mentally disabled as sexually dangerous.[31]

In January 1937, Thomas J. Courtney, Cook County state's attorney, established a sex crimes unit in his office and compiled a file of all "known sex offenders in the county." He also proposed the creation of a special sex crimes court but to no avail. There was agitation to do more. David B. Rotman, a psychiatrist who worked for the Municipal Court, complained that "no legislative notice has been taken of the so-called border line moron." "Border line morons," he

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[30] "Parole Chief Finds Evidence of Favoritism," *Lansing State Journal*, August 15, 1937.
[31] Associated Press, "Fat White Man Admits Slaying 5 Year Old Girl," *Jacksonville Daily Journal*, November 17, 1936; "Ward Workers Join Hunt for Torture Moron," *Chicago Tribune*, November 24, 1936; "Roger's Park Moron Confesses Crime," *Chicago Tribune*, February 2, 1937; "Find Missing Boy; Arrest Peddler as His Kidnapper, *Chicago Tribune*, December 28, 1936; "Life Sentence Starts Court Moron Drive," *Chicago Tribune*, February 5, 1937, 1, 6. Capoldi's case is discussed in the next chapter.

claimed, "seem innocent enough, but they are responsible for a large percentage of our sex crimes." Editorials in newspapers outside of Chicago called for the preventive detention of "morons." Some wanted an even more extreme solution. Women's groups and reformers managed to get a bill introduced in the Illinois House that would allow for the "emasculation" of people who committed sex crimes against children, though the bill ultimately failed.[32]

Chicago experienced an intense sex crime panic in the summer of 1937. Whether there was an increase in sex crimes is impossible to know, but in their annual reports, the Chicago Police Department acknowledged a more than 10% increase in reports of rape in both 1936 and 1937, while other major crimes reportedly decreased.[33] Regardless, the frequency of these public moron wars had become almost comical. A letter to the editor published in the *Chicago Tribune* in late August stated that "I come to Chicago four or more times each year, and any time I arrive, the city's powers that should be are either deeply engaged in, or just starting, a war against the moron." "Is it the one continual war, or a new one I run into each time?" the writer asked sardonically.[34]

The panic that particular summer focused on crimes against adult women, often those who enjoyed a degree of independence by working outside the home or living independently, and it posited Black men as a threat to white women. On August 21, 1937, a man entered the hospital room where a young nurse named Anna Kuchta was sleeping on a break. He then raped her and killed her with a brick. The next day, another nurse, Florence Swanson, was attacked in

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[32] "Urge New Laws as Sole Hope of Curbing Morons," *Chicago Tribune*, January 20, 1937; "Life Sentence Starts Court Moron Drive," *Chicago Tribune,* February 5, 1937; 60th General Assembly, Illinois House, Introduced February 9, 1937; *Journal of the House of Representatives of the 60th General Assembly of the State of Illinois,* 1937 (Illinois), 1500-1501; *Official Proceedings of the Board of Commissioners of Cook County, Illinois for the Fiscal Year 1937-1938* (Chicago: Calumet Publishing), 27.

[33] Chicago Police Department, *Annual Report for the Year Ending December 31st, 1936* (Chicago: Police Department Printing Section, 1937), 9; Chicago Police Department, *Annual Report for the Year Ending December 31st, 1937* (Chicago: Police Department Printing Section, 1938), 9.

[34] O.S.R., "Voice of the People: The Moron Drive," *Chicago Tribune*, August 27, 1937.

the hospital lounge where she worked. The press reported that the attacker in both cases was a large Black man. City officials and news reports linked these crimes with cases where women had been attacked with a brick in their rooms over the last few years.[35] Officers arrested dozens of Black men as suspects. They arrested one man merely for passing a note to a beauty contest winner expressing his interest in a date, which supposedly raised suspicion that he was the brick attacker. Any suggestion of interracial intimacy was enough to make a Black man a suspect. A United Press report captured the racist tropes of the Black sex criminal that drove the panic. The report began, “Attacks on four more women and a Negro’s attempt to date a 19-year-old national beauty contest winner today spurred Chicago’s 6000 police in their search for the ape-like Negro who murdered and assaulted Anna Kuchta, 19, a student nurse.” Racism and fears of interracial sex were a potent source of the fear of the sex offender.[36]

City and state authorities contributed to the fear in order to expand their power. The police department announced that it would monitor hotels, hospitals, and similar places with fire escapes that could be used to enter buildings and would establish a sex crimes unit in the department. The mayor offered a $1,000 reward for any information that led to arrest in “a serious moronic case such as criminal assault or murder.” The head of the Chicago Police Department’s Bureau of Identification announced plans for the expansion of a sex offenders file held at police headquarters, which would include suspected as well as convicted sex offenders.[37]

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[35] Associated Press, “Second Nurse in Chicago Attacked,” *Hanover Evening Sun*, August 23, 1937. On the rise of independent women in Chicago, see Joanne J. Meyerowitz, *Women Adrift: Independent Wage Earner In Chicago 1880-1930* (Chicago: University of Chicago Press, 1988).

[36] “3rd Assault in Days Spurs Moron Drive,” *Chicago Tribune*, August 23, 1937; Associated Press, “Chicago Maps War on Degeneracy In Wake of Repeated Sex Crimes,” *Indianapolis Star*, August 24, 1937; United Press, “4 New Attacks are Reported,” *Indianapolis Times*, August 23, 1937; “City Puts Price of $1,000 on Sex Criminals,” *Chicago Daily Tribune*, August 24, 1937.

[37] Associated Press, “Chicago Maps War on Degeneracy in Wake of Repeated Sex Crimes,” *Indianapolis Star*, August 24, 1937; “Police Seek all Chicago Sex Morons,” *Belvedere Daily Republican*, August 24, 1937; “Assign Special Guards in War on Sex Crimes,” *Chicago Tribune*, August 25, 1937.

Most importantly, Thomas J. Courtney, the Cook County state's attorney who had established a sex crimes unit, formed a committee composed of some of the state's most prominent experts in mental illness and the law to devise a law for the detention of degenerates. Included on the committee was David B. Rotman, a psychiatrist at the Municipal Court who had been calling for a law permitting the detention of morons. Other members also held positions within the state's growing mental illness and criminal law apparatus, including Francis J. Gerty, superintendent of the Cook County Psychopathic Hospital, Harry R. Hoffman, director of the Behavior Clinic of the Criminal Court of Cook County, and Paul L. Schroeder, director of the Illinois Institute for Juvenile Research and criminologist at the Department of Public Welfare. The committee also included a number of prominent scholars in psychiatry and psychology, including past and future presidents of the American Psychological Association, the American Psychiatric Association, and the American Neurological Association.[38]

After its first meeting in late August, there was little doubt about what the committee would propose—a law similar to the "mental defective" measures that were proposed continually throughout the 1920s in Illinois. Courtney stated that: "there has been talk of such laws before. This time we mean to put them on the books. We want a board of skilled medical men to pass on cases of sexual psychopaths before they commit serious crimes. Then those afflicted can be put in an institution for life." Speaking for the committee, Courtney said, "we believe that society shouldn't have to wait for a crime to be committed."[39] In October 1937, the committee announced that it had a bill ready for a special session of the legislature. The *Chicago Tribune* reported that "life imprisonment for incurable psychopathic persons of sexually criminal

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[38] "Chicago to War on Degenerates," *The News and Observer* (Raleigh, NC), August 24, 1937; Psychiatrists Begin Study to Curb Degenerates," *Chicago Tribune*, August 29, 1937.
[39] "Drive Against Sex Morons is Begun," *The Edwardsville Intelligencer*, August 24, 1937; "Preventive Legislation," *The Decatur Review*, August 30, 1937.

tendencies, even before they commit crimes, is provided in a state law proposed yesterday by State's Attorney Thomas J. Courtney and eleven leading alienists." The text of the proposed bill provided a procedure for the indefinite detention of all "criminal sexual psychopathic persons," which the bill defined as "all persons suffering from a mental disorder, and not insane or feebleminded, which mental disorder has existed for a period of not less than one year, coupled with criminal propensities to the commission of sex offenses."[40]

The committee's decision to use the term "sexual psychopath" was somewhat curious. It was not a well-known classification at the time. Of course, the foundational work in the field of sexology was Richard von Krafft-Ebing's book *Psychopathia Sexualis*, but Krafft-Ebing did not use "sexual psychopath" in his nosology. Sexual psychopathy was an umbrella term that covered the wide variety of sexual deviations he discussed in his book. Cesare Lombroso used the term occasionally. Max Nordau had also used it in his turn-of-the-century work *Degeneration*.[41] But the term was rarely used and was less a diagnostic category than a term of abuse. However, by the early 1920s, Illinois's Department of Criminology began classifying some people as "sexual psychopaths." The Department, headed by Dr. Herman Adler, was formally established in 1917 but only became operational in 1919. It examined and classified people incarcerated in the state's institutions and made recommendations for their management and treatment. "Sexual psychopath" appeared in the early 1920s in the department's reports as a subcategory of psychopathic personality.[42] Dr. Paul L Schroeder, who was a member of the committee that

[40] "Seek to Put Sex Criminals Back of Bars for Life," *Chicago Tribune*, October 28, 1937; "Sex Criminal Bill," *Journal of the American Institute of Criminal Law and Criminology* 28, no. 4 (November-December, 1937): 617.
[41] Cesare Lombroso, *L'uomo di genio*, sesta edizione (Turin: Fratelli Bocca, 1894), 141, 706; Cesare Lombroso, "Puberty and Genius," trans. James G. Kiernan, *The Alienist and Neurologist* 23, no. (1902): 261. Max Nordau, *Entartung Vol. 2,* (Berlin: C. Dunder, 1893), 447; Max Simon Nordau, *Degeneration* (New York: D. Appleton, 1895), 7.
[42] Herman Adler, "Report of the Criminologist," in Illinois Department of Public Welfare, *Report of the Department of Public Welfare, July 1, 1919 to June 30, 1920* (Springfield, Illinois: State Printers, 1921), 68-69; Herman Adler,

devised the sexual psychopath law, became the state criminologist in 1930 and used the classification in his reports during the 1930s.[43]

The proposed law was not uncontroversial. In a 1938 article in the *John Marshall Law Quarterly*, William Scott Stewart, a former prosecutor in the State's Attorney's office, advised against the passage of the law. Stewart warned that the law would "give the prosecutor power to lock up any person on suspicion, and the subsequent proceedings would not be what is regarded as a trial but rather an *ex parte* investigation." The proposed law, Stewart claimed, would violate numerous constitutional provisions, and:

> would appear to be a denial of equal protection of the laws, to be retroactive, a denial of due process of law, an impairment of the right of trial by jury, contrary to the constitutional guarantee against cruel and unusual punishment, violating the constitutional provisions that all penalties shall be proportional to the nature of the offense and that the accused shall have the right to be informed of the nature of the charge against him, to be confronted by the witnesses and tried in the county or district where the offense is alleged to have been committed.[44]

Stewart's protests, however, did not slow down the effort to pass the law.

Governor Henry Horner called a special session of the legislature in 1938 partly to pass the bill. In his message to the opening of the special session, he stated that "the alarming prevalence of so-called sex crimes indicates that the punishment provided for such offenses in our criminal laws does not act as a deterrent against such continued anti-social acts." Horner claimed that "this is understandable when it is recognized that we have to deal not with normal

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"Division of Criminology," in the Illinois Department of Public Welfare, *Sixth Annual Report of the Department of Public Welfare*, *July 1, 1922 to June 30, 1923*, 88.

[43] Paul L. Schroeder, "Division of Criminology," in the Illinois Department of Public Welfare, *Fourteenth Annual Report of the Department of Public Welfare July 1, 1930 to June 30, 1931* (Illinois: Students in Printing and Binding, Illinois State Reformatory), 54, 56. Paul L. Schroeder, "The Criminologist and Institute for Juvenile Research," in the *Fifteenth, Sixteenth, Seventeenth, and Eighteenth Annual Report of the Department of Public Welfare*, June 30, 1935 (Allied Printers), 218, 229.

[44] William Scott Stewart, "Concerning Proposed Legislation for the Commitment of Sex Offenders," *John Marshall Law Quarterly* 3 (1938): 419-420.

individuals capable of adjusting their behavior to society but persons with a sexual psychopathy though neither insane nor feebleminded."[45]

In late May 1938, days before the sexual psychopath bill was introduced, Robert Nixon, 18, and Earl Hicks, 19, were arrested for the murder of Florence Johnson, who had been killed with a brick. Nixon was immediately suspected of similar murders and rapes in which the weapon had also been a brick, including the killing of Anna Kuchta that had dominated headlines last August. Police officers quickly extracted a confession from Nixon to five murders and numerous rapes, though he later stated that he was innocent and had been tortured into confessing.[46] Coverage of the arrest of Nixon, a Black man, tapped into racist constructions of the sex criminal. He was called an "ape," a "jungle beast," and "an earlier link in the species."[47] He was later executed by the state of Illinois despite his credible claims that he had been tortured into confessing.[48]

Nixon figured prominently in the legislative debates over the sexual psychopath law that June. According to reporting, House minority leader Elmer Schnackenberg argued during the debate that "the bill is dangerous because it comes to us in the guise of a bill to prevent sex crimes," but it actually "takes down the bars and exposes women to risks they do not now have under the law." Schnackenberg claimed that the sexual psychopath law would allow Nixon to avoid murder charges and would place him in an institution. The bill's sponsor, Representative Adamowski, contended that the bill would "keep sex morons off the streets" by allowing for the

[45] *Journal of the House of Representatives, Sixtieth General Assembly, First Special Session* (State of Illinois), 16.
[46] "Chief Suspect Baffles Police by Mixed Tales," *Chicago Tribune*, May 28, 1938; "Slayer Admits Rape; Another in Prison for It," *Chicago Tribune*, June 07, 1938. Nixon admitted to a rape for which another man had been convicted. The man had signed a confession but insisted on his innocence at the trial, claiming that the police had forced him to sign the confession. Ibid. For more on this case, see Elizabeth Dale, *Robert Nixon and Police Torture in Chicago, 1871-1971* (DeKalb, IL: NIU Press, 2016).
[47] "Brick Slayer is Likened to Jungle Beast," *Chicago Tribune*, June 5, 1938.
[48] Dale, *Robert Nixon and Police Torture*.

incarceration of people accused of sex crimes before they committed more serious crimes. Ultimately, the racist panic Nixon's arrest generated contributed to a favorable environment for the passage of the bill. It passed the House on June 7th with ninety-nine votes in favor, twenty-one against, and one person voting present. After some amendments, the Senate passed the bill unanimously on June 28th, and Governor Horner signed it into law on July 6, 1938.[49]

The statute defined a sexual psychopath as someone "suffering from a mental disorder, and not insane or feeble-minded, which mental disorder has existed for a period of not less than one (1) year, immediately prior to the filing of the petition hereinafter provided for, coupled with criminal propensities to the commission of sex offenses." The one-year requirement was meant to limit the statute to people who committed repetitive acts, rather than opportunistic or one-off offenders.[50] The attorney general or state's attorney could file a petition against any person charged with a criminal offense (not necessarily a sexual crime) when it appeared that the person was a sexual psychopath. In not requiring a conviction before detention, Illinois's was a true preventive detention law. By giving exclusive authority to file a petition to prosecutors, the statute ensured that the law was a weapon of the state and only the state. Upon the filing of the petition, "two qualified psychiatrists" would examine the accused. Specifically, the law required an examiner be "a reputable physician licensed to practice in Illinois, and who has exclusively limited his professional practice to the diagnosis and treatment of mental and nervous disorders for a period of not less than five years." The psychiatrist would submit a written report of the

[49] "Advance Moron Bill," *Rock Island Argus*, June 7, 1938; "Bill Aimed at Sex Criminals," *Rock Island Argus*, June 3, 1938; *Journal of the House of Representatives of the State of Illinois, Sixtieth General Assembly, First Special Session*, (State of Illinois), 63-64.
[50] Illinois Rev. Stat. 1939, Chap. 38, Sec. 820-825.

findings and recommendations. A jury trial on the issue of the person's sexual psychopathy would then follow in which the accused's prior crimes could be submitted as evidence.[51]

If the jury found that the accused was a sexual psychopath, the court would commit the person to the Department of Public Welfare. After commitment, release required the filing of a petition "setting forth facts showing that such criminal sexual psychopathic person has recovered," followed by a jury trial which would determine if the detainee had "fully recovered" from psychopathy. The person could then be committed to the custody of a sheriff to stand trial for the originally charged offense. What constituted full recovery from a "propensity to commit sex offenses" was not clear.[52]

Illinois's sexual psychopath law offered a model for future state legislation, and it is not difficult to understand its appeal from the perspective of legislators and law enforcement. Illinois's law had several advantages over Michigan's law. Given the fact that many states would use the same language, it seems that there was something about the term "sexual psychopath" that appealed to people. It had a scientific veneer, giving the law legitimacy while still being evocative and alarmist. The Illinois law also allowed for detention without needing to first convict a person of an underlying crime first. It offered the state another opportunity, in addition to criminal prosecution, to incarcerate people accused of crimes. In cases where the evidence was weak or witnesses were reluctant to testify, as often happened in sex crime cases due to police indifference and shame, it gave the state another chance to detain an accused person, without having to change how the criminal legal system dealt with sex crimes or to change society's attitude toward the victims of sexual violence. A sexual psychopath trial would focus on the abstract category of mental illness and the imagined realm of future danger. The specifics of the

[51] Ibid.
[52] Ibid.

crime and the victim could recede to the background. This could be particularly useful in crimes involving children, whose parents were reluctant to subject them to the shame of a court proceeding and whose testimony was often questioned even when they did participate. Instead, a male expert would testify to the menace of the accused. The imaginations of the expert, the jury, or judge could substitute for an investigation into the facts of a particular case.

Law enforcement and reformers had also complained of juries' leniency toward accused sexual criminals. The new law put more authority in the hands of experts who knew the potential dangers of even minor accused sexual criminals and who would presumably not hesitate to confine a person for long periods. As previous chapters have demonstrated, reformers worried that juries would be reluctant to impose truly indeterminate sentences if it could mean lifelong incarceration for committing a minor crime. But juries might be more comfortable rendering a verdict that resulted in an indeterminate sentence if it was not seen as punishment. The state, the jury, and expert witnesses could all disavow the imposition of punishment.

There were also potentially significant limitations to the sort of preventive detention authorized by Illinois's law. If the goal was spotting deviance or danger before it manifested itself in serious criminal conduct, this required significant state capacity. It required that a state's gaze be extensive enough to spot the signs of deviance. It is likely no coincidence that the first two states to pass sexual psychopath laws had significant psychopathic laboratories attached to their largest cities' municipal courts. Not only did these labs provide an interest group to lobby for such laws, but they also made it conceivable that this preemptive approach was workable. Other elements of the growing sexual carceral state played a similar role, such as the lists of deviants that some police departments had started keeping. Juvenile courts also made it conceivable that the state could spot deviance early on and were an essential part of the program.

The approach also required significant state capacity in another sense. There had to be enough institutions in a state to detain people. Recall that reformers in Chicago in the 1920s realized that practicing the sort of preventive detention they wanted would require large internment camps. As will become clear, these were significant challenges for states wishing to practice preventive detention.

III. *The Spread of Sexual Psychopath Laws*

Passage of a sexual psychopath law in Illinois occurred against a backdrop of national agitation to do more about sex crimes. Just before Thomas J. Courtney's committee announced its proposal for a sexual psychopath law, in September 1937, influential criminologist Sheldon Glueck, whose views on criminal responsibility were discussed in the first chapter, published an article in *The Nation* on sex crimes. In it, Glueck argued that additional security measures were needed to supplement punishment. He wrote that the recent spate of sex crimes "should convince even solid skeptics that the threat of punishment is not as deterrent a force as is generally believed; that at all events it needs to be greatly supplemented by other methods." "In not a few instances," he noted, "intensive analysis shows that the aggressive sex offender is more a problem for psychopathology than for criminal justice." Current law was inadequate to deal with the problem in part because "'indeterminate' sentences at present are really limited sentences." Glueck argued that sentencing should instead be entrusted to a "treatment tribunal" which would have the "power to impose a *wholly indeterminate* sentence, so that manifestly dangerous individuals might be kept under control within institutions and on parole for long periods—if necessary throughout life—without the need of reinvoking the slow-moving machinery of prosecution and trial; while those rapidly rehabilitated might be released, at least experimentally." Glueck's work thus translated for a popular audience some of the ideas about

security measures discussed in the first chapter and would influence the passage of Minnesota's psychopath law, which also became a model for other states.[53]

By the autumn of 1937, J. Edgar Hoover, the director of the FBI, gave the imprimatur of the federal government to the war on the sex criminal. Hoover published an editorial jointly in the *Los Angeles Times* and the *New York Herald Tribune* declaring that "the sex fiend, most loathsome of all the vast army of crime, has become a sinister threat to the safety of American childhood and womanhood." Hoover's editorial reiterated much of what had become conventional wisdom about the sex offender since the late-nineteenth century. "The sex fiend is a progressive criminal," he claimed. He warned that the "'harmless pervert of today can and often is the loathsome mutilator and murderer of tomorrow." Hoover also repeated the view that the sex criminal was *sui generis*. He called for the study of "laws designed specifically for the handling of a type of offender different from the general run." Hoover saw no conflict between a more punitive approach to sex crime and the delegation of greater authority in the criminal legal system to medical experts. He requested "recommendations from medical men of high standing as to what can be accomplished through treatment and even surgery." "Men's and women's clubs," he suggested, "could demand that every person arrested for a sex crime be examined by an official board of capable psychiatrists." This board "would make recommendations to the court so that the prisoner could be dealt with in a way that would keep him from further menacing society."[54]

In November 1937, the National Committee for Mental Hygiene held a symposium on the "Challenge of Sex Offenders." The symposium was split between advocates for a carceral

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[53] Sheldon Glueck, "Sex Crimes and the Law," *The Nation*, September 25, 1937, 319-320.
[54] J. Edgar Hoover, "War on the Sex Criminal!," *Los Angeles Times This Week*, September 26, 1937; J. Edgar Hoover, "War on the Sex Criminal!," *New York Herald Tribune*, September 26, 1937.

approach to sex crime and those who favored a less repressive approach. The late 1930s was a period of reaction but also one in which more liberatory perspectives on sexuality emerged. Though psychoanalysis was a conservative field that upheld heterosexuality as the ideal of sexual development, Freud's theories of psychosexual development and the nature of sexual repression could be used to critique society's repressive attitude toward sex. Anthropological findings, such as those of Bronislaw Malinowski and Margaret Mead, demonstrated the astonishing variety of sexual expression worldwide, offering a new perspective on Western sexual morality.[55]

Dr. Edward A. Strecker, a professor of psychiatry at the University of Pennsylvania, delivered a remarkable opening statement representing the more liberal position. Strecker pointed out that despite the growing anxiety about sexual crimes, there was no indication that such crimes were in fact increasing. He argued that there was a "charmed circle of 'normal sexuality'" bordered by abnormal sexuality. In coining the phrase "charmed circle," Strecker anticipated by nearly fifty years queer theorist Gayle Rubin's influential conceptualization of normative sexuality as a "charmed circle," bordered by various forms of disfavored sexualities. Like Rubin, Stecker argued that it was a matter of luck whether one was in the "charmed circle" or outside it, as the boundaries between normal and abnormal sexuality changed and were quite arbitrary. Strecker warned that "The line of demarcation between 'normal' and 'abnormal' sex is certainly in places rather faint. Those of us who are fortunate enough to be within the charmed circle of 'normal sex' had better not curse too vehemently those who are outside the circle, because we might be cursing ourselves."[56] In the address, Strecker took the unusual step of

[55] See Edward Strecker, "The Challenge of Sex Offenders: Introduction," *Mental Hygiene* 22, no. 1 (1938): 1-3.
[56] Ibid, 3; Gayle S. Rubin, "Thinking Sex: Notes for a Radical Theory of the Politics of Sexuality," in *Deviations: A Gayle Rubin Reader* (Durham: Duke University Press, 2011), 151-152.

trying to understand the people who committed sexual crimes. In doing so, he imagined a conversation between people who committed sex offenses in which they lamented that they had been born too soon, at a time when sexual taboos prevented people from seeking help, and they were punished instead.[57]

The eminent psychiatrist Karl Bowman also advocated for a more liberal approach to sexual crimes. Citing the work of Freud, Malinowski, and Mead, Bowman argued that the U.S.'s approach to sex crimes was repressive and contradictory. He critiqued the double standards applied to male and female sexuality and argued that gender itself was largely a cultural construction. Bowman challenged the common idea that people deemed feebleminded committed sex offenses at a higher rate than other groups. Troublingly, however, Bowman also downplayed the significance of sexual violence committed against children, maintaining that sexual encounters between children and adults were common and that children sometimes initiated this sexual contact. He held that the solution to sex crimes was not "passing more laws or making penalties more severe." Instead, society needed to adopt less repressive and contradictory social attitudes toward sexuality. [58]

Other members of the conference agreed that the current anxiety about sex crimes did not reflect an actual increase in sex offenses though they still advocated for carceral approaches. New York City's commissioner of correction Austin H. MacCormick favored the sterilization and castration of people convicted of sex offenses but believed that the public would not yet accept this proposal. Instead, he called for legislation expanding the definition of insanity to detain people who did not meet current definitions.[59] Winfred Overholser, the superintendent of

[57] Strecker, "The Challenge of Sex Offenders," 2.
[58] Karl Bowman, "Psychiatric Aspects of the Problem," *Mental Hygiene* 22, no. 1 (1938): 13-14, 18-19.
[59] Austin H. MacCormick, "New York's Present Problem," *Mental Hygiene* 22, no. 1 (1938): 4-6, 9.

St. Elizabeths Hospital in Washington, D.C., stated that "for the present, at least, we must look to the correctional institutions for the prolonged segregation of the psychopathic and persistent offender."[60] But Overholser also believed that there was too much disagreement in the diagnostic criteria for "psychopathic personality" to allow for legislation implementing specialized treatment.[61] Such caution, however, did not stop other states from passing psychopath laws.

The next state to pass a psychopath law was Minnesota. Just as Illinois had gone further than Michigan by not requiring a criminal conviction, Minnesota's law went further than Michigan's by not even requiring a criminal charge. Historian Molly Ladd-Taylor's article on the origins of the Minnesota law reveals its roots in the state's eugenics movement. However, Ladd-Taylor does not explore the periodic panics over "moron" sex crimes that Minnesota, like Illinois, experienced in the 1920s. During this period, women's groups, law enforcement, and reformers campaigned for the indefinite confinement of people deemed to be morons, the construction of a psychopathic hospital, as well as registries of all degenerates and morons.[62]

The precipitating event for the passage of the psychopath law was the murder of Laura Kruse in March 1937. The eighteen-year-old beauty student was raped, strangled, and murdered outside her home. As in Michigan and Illinois, newspaper editorials complained that Minnesota's antiquated laws did not give psychiatrists enough authority to detain potential sex criminals. Several committees were established to study the problem. The most influential, according to Ladd-Taylor, was Hennepin County's Committee of 25 on Prevention of Crime by Defective

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[60] Winfred Overholser, "Legal and Administrative Problems," *Mental Hygiene* 22, no. 1 (1938): 20-24.
[61] Ibid.
[62] "Girl's Assailant Confesses," *Minnesota Daily Star*, February 07, 1922; "Prison System Found Backward by Prosecutor," *Minnesota Daily Star*, September 29, 1922; "Confinement of Dangerous Types Sought," *Minnesota Daily Star*, November 25, 1926, 1; "Protect the Children," *The Winona Republican-Herald*, August 17, 1929, 10; "Worst Criminals Loosed in Shortest Time by Parole Board, Commission Reveals," *Minneapolis Daily Star*, March 16, 1927, 1; "Club Women Seek Law to Protect Girls," *Minneapolis Tribune*, August 16, 1929, 10.

Delinquents. Sheldon Glueck's work heavily influenced the committee, which appended his *Nation* article on "Sex Crimes and the Law" to its report.[63]

In 1938, a new governor, Harold Stassen, took office and appointed a new sex crime committee chaired by University of Minnesota criminologist George Vold. Vold and three other members had also been members of the Committee of 25. This new committee of ten included psychiatrists, neurologists, and superintendents of the state hospital for the insane. The committee recommended, "a change in the presents laws relating to the care of defectives dangerous to the public to make possible the control of dangerously psychopathic persons without having to wait for them to commit a shocking crime."[64] Vold's committee advocated the expansion of a 1917 commitment law, which allowed for the civil commitment of the insane, inebriate, and feebleminded, to include people with psychopathic personalities. The committee supplied a breathtakingly broad definition of "psychopathic personality" as "any person who, because of emotional instability or impulsiveness of behavior, or lack of customary standards of good judgment, or failure to evaluate the consequences of his acts, or combinations of these conditions, is socially or morally irresponsible, sexually or otherwise, and who as a result of such conduct becomes a menace to the public good and requires supervision."[65] "A serious limitation in present procedure is the inability of officials to deal with such persons before they commit criminal acts. The proposed changes will remedy this situation," the committee wrote in its report.[66] In addition, the committee recommended more study of the situation and consideration of the desirability of sterilization laws.[67]

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[63] Molly Ladd Taylor, "'Ravished by Some Moron."
[64] "Report of the Governor's Committee on the Care of Insane Criminals and Sex Crimes," *Journal of the House of the Fifty-First Session of the Legislature of the State of Minnesota* (St. Paul: Perkins-Tracy, State Printers, 1939), 1394.
[65] Ibid.
[66] Ibid, 1396.
[67] Ibid, 1397.

Five weeks after the committee submitted its report, in 1939, Minnesota passed a law that expanded the categories of people who could be involuntarily committed. Minnesota's law was expansive and straightforward. It declared that all laws relating to the insane would henceforth also apply to persons with psychopathic personality, defined as "such conditions of emotional instability, or impulsiveness of behavior, or lack of customary standards of good judgment, or failure to appreciate the consequences of his acts, or a combination of any such conditions, as to render such person irresponsible for his conduct with respect to sexual matters and thereby dangerous to other persons." This definition was quite similar to the one the Vold Committee had recommended, though it was somewhat narrowed to apply to people irresponsible in "sexual matters." Originally, the Vold Committee had recommended it apply to all people who were "socially or morally irresponsible, sexually or otherwise." The law provided for a probate court hearing, in which the court could, at its discretion, appoint counsel for the "patient" and issue subpoenas. The court was to appoint two medical doctors to examine the patient. The statute specified that the existence of a psychopathic personality could not be used as a defense to a crime or to relieve someone from being tried for a crime.[68]

California passed a psychopath law in the summer of 1939. California had embraced an increasingly draconian approach to sex crimes in previous years. In 1937, the legislature amended the penalty for lewd and lascivious acts against children under the age of fourteen, setting the sentence at one year to life.[69] Early the next year, the Board of Prison Terms and Paroles announced that it would not parole anyone convicted of a sexual crime against children and would impose the maximum sentence, life, when a definite sentence had not been set. In its

[68] Ch. 369, H.F. No. 1617, *Session Laws of the State of Minnesota Passed Fifty-First Session of the State Legislature* (1939), 712-713.
[69] Ch. 545, *Statutes of California Fifty-Second Session of the Legislature, 1937* (California State Office), 1562.

report on the new policy, the board declared that "the best medical and psychiatric evidence, and our own practical experience, indicate that most of these offenders are incurable mental cases and while they are not necessarily insane they should never be released upon society."[70] In 1937, San Diego County began a decades-long program to castrate people accused of crimes against children and sex crimes with other men.[71] The following year, the state passed a sexual psychopath law, allowing courts to institute proceedings against anyone charged with a crime. If the court found the accused to be a sexual psychopath, the person could then be detained indefinitely at a hospital for the insane, and could, if released, be tried for the crime or made to serve their sentence.[72]

Ohio also passed a law in 1939 permitting the preventive detention of people deemed to have psychopathy. Ohio's statute was unique. It more closely resembled the mentally defective detention laws reformers had tried to pass in Illinois in the 1920s. The law provided for the indefinite commitment of all mentally defective prisoners, defined as anyone convicted of a felony who "is afflicted with a mental disease or disorder, or is in a psychopathic condition, which renders such prisoner likely to be a habitual criminal, and therefore renders the imposition, or the continued enforcement, of a penal sentence for a particular crime committed by such prisoner an inadequate protection to the community against possible future criminal conduct of such prisoner." The law equated a lack of response to penal incentives with mental defect. Though the law did not exclusively apply to people accused of sex crimes, fear of sexual criminals drove its passage. The bill was framed as a measure to protect against "morons," a term

[70] United Press, "No Paroles For Cal. Sex Offenders," *Tulare Advance Register*, January 17, 1938, 1.
[71] "Report of the Subcommittee on Sex Crimes of the Assembly Interim Committee on Judicial Systems and Judicial Processes," (Assembly of the State of California, August 1952). By 1952, San Diego had performed castrations on nearly 60 people.
[72] *Senate Final History*, California Legislature, Fifty-Third Session, 1939, 101; Ch. 447, *Statutes of California, Fifty-Third Session of the Legislature*, 1939, 1783-1787.

synonymous with sex crime. Furthermore, over time, the statute was amended to target people convicted of sex crimes by requiring, rather than permitting, the mental examination of any person convicted of certain sex crimes.[73]

New York is notable because it did not pass a sexual psychopath law in these years despite the heightened panic about sexual crimes. Like Chicago, New York City had experienced a particularly intense sex crime panic in 1937, with similar calls for preventive detention. The murder of nine-year-old Einer Sporrer in March fueled anxieties. When it was discovered that the accused murderer, Salvatore Ossido, had been arrested for sex crimes previously, people called for the modernization of laws relating to sex crime, specifically measures that would allow for the indefinite detention of people presumed to be degenerates or perverts. The case generated enormous publicity and Sporrer's funeral became a public spectacle, with reports of attendance in the thousands. Levels of panic increased dramatically on August 1 when newspapers reported the discovery of the body of eight-year-old Brooklyn resident Paula Magagna six blocks away from where Sporrer's body had been discovered in March. Newspapers reported in detail the lurid and horrific specifics of the crime. The *Daily News* reported that "a morbid crowd of 2,000 surrounded the tenement where the child lived."[74]

An intense climate of fear emerged, despite the evidence that sex crimes were not actually increasing. New York's commissioner of correction described the atmosphere that

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[73] The bill had wide support. In 1938, the Ohio League of Women Voters had endorsed the principle of indefinite detention of mentally defective criminals. The Cleveland Bar Association endorsed the bill, and newspaper editorials argued that it was a necessary measure to catch "moronic" criminals who did not fit within either the category of "normal" criminals who could be punished or the insane who could be committed. "The Moronic Criminal," *The Cincinnati Enquirer*, January 11, 1939; "Authority Needed," *Lima News* (Ohio), January 18, 1939; "Springfield Woman Named on Legislative Committee," *Springfield Daily News* (Ohio), December 8, 1938; 1940 Ohio Revised Code Annotated § 13451-19-23. For the amended version of the statute, see 1948 Ohio Revised Code Annotated § 13451-19-23.

[74] "Albany Acts to End Sex Crimes; 2,500 Fight to Attend Girl's Rights," *Daily Eagle* (Brooklyn), March 23, 1937, 1,3; "Girl, 8, Attacked and Strangled," *Daily News*, August 1, 1937. For a more detailed discussion of the New York panic and the response to it, see Robertson, *Crimes Against Children*.

August as one in which: "it was utterly unsafe to speak to a child on the street unless one was well-dressed and well-known in the neighborhood. To try to help a lost child, with tears streaming down its face, to find its way home would, in some neighborhoods, cause a mob to form and violence to be threatened." In late August, a newspaper reported that a crowd nearly lynched a man on the subway after a woman accused him of being a "sex maniac."[75]

Mayor LaGuardia announced a plan that month to detain people perceived to be sexually dangerous within the strictures of the current law. LaGuardia directed authorities to examine all prisoners convicted of sexual crimes while they were incarcerated and commit them to Bellevue Hospital after their sentence, where experts could determine whether they were insane. As soon as the plan was announced, however, critics pointed out that many "sexual perverts" were not insane.[76]

Just as LaGuardia's plan was publicized, yet another horrific child rape and murder dominated the headlines, this time of a four-year-old girl named Joan Kuleba. This event spurred further action on a proposal to establish a sex crime bureau in the New York City Police Department, which would surveil a list of "known degenerates." John A. Lyons, the assistant chief inspector who was put in charge of the division, explained that the file was "both preventive and punitive." "Whenever a sex crime is committed, we will round up every one on the list," he announced. However, one did not need to actually commit an offense to be placed on the list. Lyons urged parents to call in any suspicious behavior because "even if there is not sufficient evidence against the suspect to hold him, his name will be placed in the file and his

[75] Austin H. MacCormick, "New York's Present Problem," *Mental Hygiene* 22, no. 1 (1938): 4-10; United Press, "Molester is Beaten by Subway Crowd," *Detroit Free Press*, August 29, 1937.
[76] "City to Hold Degenerates Until Sane," *Daily News* (NY), August 11, 1937; George Dixon, "Science Lags in Detecting Sex Criminal," *Daily* News, August 11, 1937; Stephen Robertson, *Crimes Against Children*, 218.

movements thereafter will be watched."[77] New York was building a preventive apparatus even before an official law had been passed.

The 1940 *Report of the Mayor's Committee for the Study of Sex Offenses* recommended that "a sexual psychopath law should be enacted which would make it possible to retain convicted sex offenders who are not reasonably safe to be at large, in institutional confinement after the expiration of sentence." At the same time, the committee's findings contradicted many of the premises of the sexual psychopath legislation. The committee found that though there had been an increase in certain sex crimes in the previous decade, there was "no wave of sex crime in New York City during the 1930s." The committee's analysis of cases also revealed that most sex crimes were committed by first-time rather than repeat offenders and that sex crimes were not habitual for most people. In addition, the committee acknowledged that many sex crimes were not reported. The report generated publicity, but a sexual psychopath law would not make it out of the legislature for seven years.[78]

IV. *Sexual Psychopath Jurisprudence*

The sexual psychopath laws were a significant departure from prior commitment laws. Though the legislation certainly resembled commitment laws for the insane, feebleminded, and especially defective delinquents, they significantly expanded the population of committable people. The concepts of insanity and feeblemindedness were, of course, cultural constructions leaden with ableist and racist assumptions, but these categories also had the air of objectivity. But how could one delimit the category of persons who, in the words of Minnesota's statute, lacked "customary standards of good judgment?" Moreover, the sexual psychopath laws were

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[77] George Dixon, "New Murder Spurs Bureau of Sex Crime," *Daily News*, August 14, 1937.
[78] Mayor's Committee for the Study of Sex Offenses, New York, *Report of the Mayor's Committee for the Study of Sex Offenses* (1940), 9, 11, 37; Robertson, *Crimes Against Children*, 221. As discussed below, the bill that did make it out of the legislature was vetoed by the governor.

expressly designed to skirt the burdensome requirements of the criminal law, especially the requirement that a person violate the law before being incarcerated. There were thus significant constitutional questions about such laws from the beginning.

The most fundamental question was whether the laws were criminal punishments or civil regulations. This distinction was abstract, not to mention philosophically and jurisprudentially ambiguous, but it was nevertheless consequential. Each of these abstractions constituted the subject in a different way—either as a (putatively) free and responsible subject, or as a dependent, irresponsible object of state power. Many of the most fundamental limitations on state violence applied only if the state was punishing. For instance, the legality principle, *nullum crimen sine lege*, *nulla poena sine lege* states that a state cannot punish a person for actions it has not legally proscribed, a principle recognized in the U.S. Constitution's prohibition of ex post facto laws. But this foundational liberal principle applies only to punishment. Likewise, the prohibition on cruel and unusual punishment applies exclusively to *punishment*, not to state-inflicted violence. Other rights, such as the right to a standard of proof beyond a reasonable doubt, trial by jury, to confront witnesses, right to counsel, the right against self-incrimination, and the right not to be tried twice for the same crime all applied only to punishment.[79]

It is helpful to keep in mind that the very framing of the distinction between criminal punishment and civil regulation is biased towards the state. Austin Sarat, Lawrence Douglas, and Martha Merrill Umphrey point out that by focusing on the question of whether something is punishment rather than a pain or loss for the victim: "the courts associate themselves with those who exercise state power rather than those on whom state power is exercised. For them, what is crucial is the perspective of those who authorize or administer the state's regulatory or punitive

[79] Though, of course, the fact that a law is deemed civil in nature does not mean there are no limits on state action. Due process and equal protection requirements, for instance, limit the actions the government can take.

power."[80] If the perspective of those on whom the state's power is exercised mattered, the relevant inquiry would not be whether the act was punishment or a police power regulation, but the impact of the government's action on the individual.

The first case challenging a sexual psychopath law illustrated the difference between a court that considered the effects of a law on the individual versus one that considered only the perspective of the state. Days after Michigan's amended 1937 sexual psychopath law went into effect, Hilmer Gellein, the commissioner of pardons and paroles, filed a petition to commit George Frontczak, who was serving a sentence of 30 days to 5 years for gross indecency. The case came before circuit court judge Royal Hawley. Frontczak was not represented by counsel and was not even present at hearing. On his own motion, Judge Hawley considered the constitutionality of the law and declared it unconstitutional.[81]

In his opinion, Hawley declared the law fundamentally incoherent. Under the law's procedure, a person was "sane for the purpose of arraignment and plea and trial on the merits, yet insane for the purpose of fixing responsibility and imposing penalties."[82] Hawley also noted the conclusory nature of the commitment petition. The petition for a hearing simply stated that "your petitioner further shows to this court on information and belief that the respondent, George Frontczak, though not insane, appears to be a sex degenerate, and appears to be suffering from a mental disorder characterized by marked sex deviation, with tendencies dangerous to public safety."[83] The petition cited no evidence for these conclusions. Hawley ruled that this violated the Michigan Constitution's due process guarantee.[84]

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[80] Austin Sarat, Lawrence Douglas, and Martha Merrill Umphrey, "One the Blurred Boundary Between Regulation and Punishment," in *Law as Punishment/Law as Regulation*, ed. Austin Sarat, Lawrence Douglas, and Martha Merrill Umphrey (Stanford: Stanford Law Books, 2011), 5.
[81] Record on Appeal at 3-5, *People v. Frontczak*, 281 N.W. 534, No. 39775 (Mich. 1937).
[82] Ibid at 14.
[83] Ibid at 7-8.
[84] Ibid at 16-17.

The statute violated virtually the entirety of the Michigan Constitution's criminal procedure right guarantees, Hawley ruled. "This statute," he declared:

> makes no provision for notice to be given to the accused or his friends or relatives of the hearing, nor for the accused to be informed of the charge against him or against his mentality; nor of his right to frame an issue and have a trial thereon, or of any right on his part to be present at the hearing either in person or by counsel; nor is provision made in such statute in respect to his right to have the assistance or advice of counsel at such hearing; or to have and enforce by proper process the attendance of witnesses in his behalf at the hearing.[85]

Although the statute provided for calling witnesses, including at least one psychiatrist, Hawley pointed out that "it is the Court who determines the number of witnesses to be called, who may all be physicians or psychiatrists, and may be biased or disinterested according to the whims or wishes of the Court." "It is difficult to imagine," he wrote, "a statute more ingeniously drawn to authorize a Star Chamber Court or to provide for a Star Chamber investigation."[86] Though the statute provided for a jury trial, unless waived, the trial was to take place where the accused was detained. This provision violated a Michigan requirement that a jury be in the vicinage or county where the accused resided. Even this seemingly minor criminal procedure right was fundamental. Hawley quoted an opinion from Justice Thomas Cooley that pointed out that the vicinage requirement was particularly important for poor defendants who could not afford to pay for their witnesses to travel to a location far from their residences.[87]

Notably absent from Hawley's detailed repudiation of the sexual psychopath statute was any discussion of whether the law was criminal or civil in nature. Hawley's opinion seemed unconcerned with this question. What mattered was that the law imposed a serious deprivation of

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[85] Ibid at 17.
[86] Ibid at 18.
[87] Ibid at 20-21. Record on Appeal at 14, *People v. Frontczak*. For reporting on the case, see "Decision Awaited in Sex Law Test," *Lansing State Journal*, August 23, 1937; "State Sex Law Ruled Invalid by Ionia Judge," *Detroit Free Press*, August 29, 1937; "New Sex Degenerate Act Denounced by Court," *Lansing State Journal*, August 29, 1937.

liberty and was directed at people because they were thought likely to commit crimes. Thus, the opinion assumed from the start that all the state's criminal procedure requirements applied.

On appeal, the state of Michigan argued that criminal sentences were inadequate to deal with sex crimes because they included upper limits on incarceration no matter how dangerous the person was. The state argued that its police power encompassed the capacity to detain people for the protection of society.[88] The state pointed to laws authorizing the detention of the insane and feebleminded as precedent. The state's brief extensively cited sterilization laws, including in support of the state's claim that the statute's terminology, specifically the term "sex pervert," was not unconstitutionally vague because such terminology had been used in the state's sterilization laws.[89] The state also argued that Michigan's 1929 habitual criminal law, which required a person convicted of four felonies to be sentenced to life imprisonment, was additional precedent for the law.[90] Most fundamentally, the state argued that the law was not "a criminal proceeding to administer punishment for the commission of a crime."[91]

The Supreme Court of Michigan affirmed Judge Hawley's ruling, while both limiting its application to the 1937 amendment specifically and shifting the relevant question from the effect of the statute on accused people to the legislature's intent in passing the law. The court declared the law void because it subjected "an accused to two trials and convictions in different courts for a single statutory crime." The justices also ruled that "when the law penalizes an overt act it cannot, under criminal procedure and under the guise of hospitalization, in another court and a different jurisdiction, try him on the footing of his conviction elsewhere and add to or subtract or change his sentence." The court's rationale for this ruling, however, was fundamentally

[88] Appellant's Brief at 9-11, *People v. Frontczak*, 281 N.W. 534, No. 39775 (Mich. 1937).
[89] Ibid at 29-30.
[90] Ibid at 24-25.
[91] Ibid at 27.

legalistic. “This enactment is more than an inquest relative to the mental condition of a prisoner because the company in which it is found is a part of criminal procedure following conviction of a criminal offense,” the court argued. The court, then, seemed to offer a way out for the state. If the statute was dressed in civil garb, it might survive constitutional scrutiny.[92]

Immediately after the court issued its ruling, newspapers urged the passage of a revised statute, and the state set about doing just that. The *Detroit Free Press* reported that the rationale for the decision was procedural and that the 1939 legislature would likely be asked to pass a new version of the law.[93] An editorial assured readers that the court’s decision was not a “permanent setback,” that much of the sexual psychopath law was still operational, and that the next legislature would be able to craft an appropriate statute.[94] State authorities, nonetheless, warned that the ruling posed a threat to the public. Hilmer Gellein, the commissioner of pardons and paroles who had helped draft the 1937 law, warned that thirty to forty prisoners with “records of sexual deviation” would have to be freed under the court’s ruling.[95] In its 1938 report, the Michigan Crime Commission emphasized the importance of the 1935 law and urged the legislature to consider amendments that would satisfy the Michigan Supreme Court’s worries about the 1937 Amendment.[96]

In 1938, Senator Joseph Baldwin, a Republican, introduced a bill to replace the 1935 and 1937 psychopath laws. The *Lansing State Journal* reported that the law was designed to catch people like Merton Goodrich, the man whose story begins this chapter, and that the bill was introduced on behalf of the state crime commission.[97] The new law appeared more like a civil

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[92] *People v. Frontczak*, 281 N.W. 534, 536 (Mich. 1937).
[93] “Law to Prevent Sexual Crimes is Ruled Void,” *Detroit Free Press*, October 6, 1938.
[94] “Must Try Again,” *Detroit Free Press*, October 8, 1938.
[95] “State Forced to Let Forty Uncured Sex Criminals Go Free,” *Detroit Free Press*, October 11, 1938; “Parley Called on Sex Crimes,” *Detroit Free Press*, October 12, 1938.
[96] *Report of the Crime Commission of Michigan 193*8 (Lansing, MI: Franklin DeKleine, 1939), 3.
[97] “Both Houses O.K. Deadline on Bills,” *Lansing State Journal*, March 02, 1939.

commitment law. In order to do this, the new statute actually removed some of the protections from the old law. Most importantly, whereas the prior statute required a conviction before proceedings could start, the new statute required only a criminal charge. In addition, the new statute applied to someone deemed a “criminal sexual psychopathic person” (borrowing Illinois’s term and definition), rather than a “sex degenerate” or “sex pervert,” giving the law a more scientific veneer. One important feature of the new law, however, was that it did not allow for a trial on the original charge in the case of anyone committed as a sexual psychopath. Perhaps most important for avoiding the constitutional problems was that the new statute was placed in the Public Health Administration section of the code, rather than the criminal code.[98]

While Michigan was waiting to see whether its law would pass constitutional scrutiny, the Minnesota Supreme Court ruled on the constitutionality of that state’s law. Minnesota began commitment proceedings against Charles Edwin Pearson for “his conduct with respect to sexual behavior with several young girls.” The petition did not include any details about the alleged victims or what factual basis existed for classifying Pearson as a sexual psychopath. Pearson filed a writ of prohibition, and his case made it to the Supreme Court of Minnesota, where he was represented by attorneys Otis H. Godfrey and Joseph F. Cowern.[99]

The Minnesota court upheld the law, though it did so by narrowing the statutory language. Minnesota’s sexual psychopath law, recall, was particularly vague and broad, defining “psychopathic personality" to mean “the existence in any person of such conditions of emotional instability, or impulsiveness of behavior, or lack of customary standards of good judgment, or

[98] *Journal of the House of Representative of the State of Michigan 1939 Regular Session*, vol. 2 (Lansing, MI: Franklin DeKleine, 1939), 1726; *Journal of the Senate of the State of Michigan 1939 Regular Session*, vol. 2 (Lansing, MI: Franklin DeKleine, 1939), 1222-1223; Public Act No. 165, Public Act No. 199, *Public and Local Acts of the Legislature of the State of Michigan Passed at the Regular Session of 1939* (Lansing, MI: Franklin DeKleine, 1939); Mason’s 1940 Cumulative Supplement to the Compiled Laws of Michigan, 1929 §6991-1-9.
[99] Transcript of Record at 5, *Minnesota ex Rel. Pearson v. Probate Court*, 309 U.S. 270 (1940), No. 394.

failure to appreciate the consequences of his acts, or a combination of any such conditions, as to render such person irresponsible for his conduct with respect to sexual matters and thereby dangerous to other persons." The state supreme court specified that the language of the statute could apply only to "those persons who by an habitual course of misconduct in sexual matters have evidenced an utter lack of power to control their sexual impulses and who as a result are likely to attack or otherwise inflict injury, loss, pain, or other evil on the objects of their uncontrolled and uncontrollable desire." The court explained that "it would not be reasonable to apply the provisions of the statute to every person guilty of sexual misconduct nor even to persons having strong sexual propensities." Narrowed in this way, the court declared the law constitutional.[100]

The case reached the United States Supreme Court, where Pearson's counsel, Joseph Cowern, argued that the sexual psychopath law violated a number of constitutional provisions. Pearson's arguments did not depend on whether the law was classified as civil or criminal. Even if the law was properly considered a civil regulation, the brief maintained that it still violated the Constitution. Pearson argued that the law violated equal protection because it did not apply to all sexually irresponsible persons but only to certain members of this class who suffered from emotional instability and impulsiveness. Pearson's equal protection argument capitalized on homophobia. Gay men, the brief stressed repeatedly, could be dangerous but were not necessarily included within the statute's provisions if these men did not suffer from emotional instability and impulsiveness.[101]

Pearson argued that the law also violated the Due Process Clause. The brief claimed that even if the law was a civil regulation, it should receive the same level of scrutiny as a criminal

[100] *State ex rel. Pearson v. Prob. Court of Ramsey Cty.,* 287 N.W. 297, 302 (1939).
[101] Appellant's Brief at 14, 19-20, *Minnesota ex Rel. Pearson v. Probate Court*, 309 U.S. 270, No. 394 (1940).

law, if not greater. The sexual psychopath law was in fact more restrictive of liberty than ordinary criminal laws because it allowed no release on bail and amounted to a potential life sentence. The brief emphasized that terms like "dangerous," "irresponsible," "emotional instability," and "customary standards of good judgment" were inherently vague and subjective. Even police power regulations had to be reasonable to be constitutional. Finally, the brief argued that the statute violated the Privileges and Immunities Clause.[102]

In its brief, the State of Minnesota argued that the law was within the state's authority as *parens patriae*, under the police power. The state's brief cited a long line of authority establishing the state's right to involuntarily commit people who "are unable to care for or control themselves, and who thereby become burdensome or dangerous to society," including the insane, feebleminded, inebriates, and juveniles. In addition, the brief relied on the precedent of compulsory vaccination and sterilization laws.[103] The state's brief also attempted to counter the claim that the law was vague or indefinite by citing experts who identified psychopaths as a subset of "moral imbeciles" who lacked a moral sense or self-control. The brief assured the court that the law was "broad enough to include all the various forms of sexual perversion which appellant says are excluded," which included homosexuality. Moreover, the brief argued that the Supreme Court was bound to interpret the law in the way the state supreme court had, and this interpretation put a narrower construction on the law.[104]

The Supreme Court ruled that the Minnesota statute was constitutional. The Court explained that as a state law, the state supreme court's construction of the law was binding. The Minnesota supreme court's interpretation had significantly narrowed the meaning of the statute's

[102] Ibid at 29-30, 47.
[103] Appellee's Brief at 3, 6-7, 26, *Minnesota ex Rel. Pearson v. Probate Court*, 309 U.S. 270, No. 394 (1940).
[104] Ibid at 15, 17.

broad language to people whose “habitual course of conduct” and “utter lack of power to control their sexual impulses” made them likely to harm others. Based on this interpretation, the Supreme Court rejected the argument that the statute was too vague or indefinite. The Court also rejected the equal protection argument, reasoning that its equal protection jurisprudence had established that “the legislature is free to recognize degrees of harm, and it may confine its restrictions to those classes of cases where the need is deemed to be clearest.”[105]

The Court dedicated most of its ruling to the due process argument. It pointed out that the statute provided for a hearing and examination by two doctors, in addition to providing accused people with counsel, and also allowed them to call witnesses, appeal, and petition for release at any time. The Court ruled that this was sufficient process to meet constitutional requirements.[106] Still, the Court expressed skepticism of the statute. It declared, “We fully recognize the danger of a deprivation of due process in proceedings dealing with persons charged with insanity or, as here, with a psychopathic personality as defined in the statute, and the special importance of maintaining the basic interests of liberty in a class of cases where the law though ‘fair on its face and impartial in appearance’ may be open to serious abuses in administration and courts may be imposed upon if the substantial rights of the persons charged are not adequately safeguarded at every stage of the proceedings.”[107] Because Pearson had challenged the statute *in limine*, the Court could not consider the actual application of the statute.[108] Sexual psychopath laws now had the imprimatur of the Supreme Court.

This result was not necessarily surprising. Pearson’s privileges and immunities argument was dead on arrival. In the *Slaughter-House Cases*, the Supreme Court had essentially read the

[105] *Minnesota ex rel. Pearson v. Probate Court of Ramsey* County, 309 U.S. 270, 273 (1940).
[106] Ibid, 275-277.
[107] Ibid, 276-277.
[108] Ibid, 275.

Privileges and Immunities Clause out of the Constitution.[109] His equal protection argument was also on shaky ground. Civil rights jurisprudence had not yet reinvigorated the Equal Protection Clause.[110] Not long before the case, Justice Holmes had famously declared that equal protection arguments were "the usual last resort of constitutional arguments." Not coincidentally, he made this declaration in *Buck v. Bell*, a case in which the Court declared involuntary sterilization of the "feebleminded" constitutional.[111]

Still, there were reasonable grounds for the Court to declare the law unconstitutional. There was a reasonable claim to be made that the sexual psychopath laws violated equal protection by treating people who committed sexually deviant acts differently from other people whose acts were just as violent and destructive to society. Such a classification might fail even the permissive rational basis test. [112] On the other hand, experts had long positioned sexual crimes as uniquely progressive and difficult to deter. On this basis, the equal protection argument would be hard to prove. The due process claim had more weight. Yet even here Pearson's brief had not dwelled on the argument that a person subject to this law should receive the same process as a person in a criminal trial, nor did the brief attempt to make the case that the law was actually a criminal punishment, thus leaving a plethora of arguments on the table.

In 1942, the Michigan Supreme Court declared the state's new sexual psychopath law constitutional in *People v. Chapman*. Bert Chapman, a white man in his mid-thirties, was arrested in September 1940 and charged with gross indecency for engaging in sexual activity with a seventeen-year-old male (the age of consent for heterosexual sex was 16 at the time in

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[109] *Slaughter House Cases*, 83 U.S. 36 (1872).
[110] Erwin Chemerinsky, *Constitutional Law*, 6th ed. (Frederick, MD: Aspen, 2019), 683.
[111] *Buck v. Bell*, 274 U.S. 200, 208 (1927).
[112] In fact, the next year, the Court declared a sterilization law that applied to "habitual criminals" who had committed felonies of "moral turpitude" unconstitutional on equal protection grounds. *Skinner v. Oklahoma ex rel. Williamson*, 316 U.S. 535 (1942).

Michigan.)[113] Before prosecutors tried Chapman, the county's prosecuting attorney filed a petition to have him examined for sexual psychopathy. Two psychiatrists then examined him and filed their report.[114] In it, the doctors claimed that Chapman had “immature, illogical, and bizarre ideation.” They noted that he engaged in “perverted sex practices,” by which they meant that he had sex with people of the same sex. They concluded that “the fact that he so readily revealed the details of his acts without apparent embarrassment or emotional display, appears to indicate emotional regression seriously suggestive of a psychotic mechanism possibly simple schizophrenia (dementia praecox).”[115] Chapman was diagnosed with “psychosexual deviation, homosexual (sexual psychopath).” Though Chapman denied any attraction to children and there was no evidence he had ever engaged in sexual activity with children, the fact that he was homosexual made him a risk to children, according to the report. The report declared that he “must be considered a distinct sexual menace and a source of serious concern in a free community not only because of his homosexual practices but also his psychosexual deviation is very likely to assume a much more ominous manifestation, that of pedophilia (the use of children as sexual objects).” [116] On the basis of this report and testimony that he had engaged in other “acts of gross indecency,” Chapman was declared a criminal sexual psychopathic person and committed to Ionia State Hospital.[117]

On appeal, Chapman argued, with the assistance of an attorney, that the sexual psychopath law was invalid class legislation on multiple grounds. Specifically, he claimed that the state’s law used a narrow and arbitrary classification. In addition, Chapman argued it was an

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[113] Mason’s 1940 Cumulative Supplement to the Compiled Laws of Michigan, 1929 §17115-145a; §17115-340. Rape could only be committed on females. §17115-520.
[114] Record on Appeal at 6-7, *People v Chapman*, 4 N.W.2d 18, No. 41753 (Mich. 1942).
[115] Ibid at 11-12.
[116] Ibid at 11, 13.
[117] Ibid at 7.

ex post facto law because it punished him for his conduct before the law was passed. He also cited other constitutional problems. By labeling Chapman a *criminal* sexual psychopathic person without having to prove he ever committed a crime, the law violated his due process rights. Moreover, the examination to determine whether he was a criminal sexual psychopathic person had also unconstitutionally compelled Chapman to be a witness against himself.[118] Against the claim that the statute was a police power regulation, the brief argued simply that "the proceedings against Chapman start out with his arrest in a criminal case and wind up in the same case with a judgment that he is a criminal." To declare such a proceeding non-criminal would be "doing violence to the word itself," the brief concluded.[119]

The state of Michigan argued that the law was non-criminal and not a violation of either the Equal Protection or the Due Process Clauses. As in the *Pearson* case, the state's arguments relied on existing decisions that upheld the confinement of people deemed insane and feebleminded as well as juvenile delinquents. The brief pointed out that a line of jurisprudence had established that people who were considered defective in various ways could be appropriately dealt with outside of the criminal law. It quoted a large portion of Holmes's opinion in *Buck v. Bell* in which he stated that it is better to prevent the propagation of the "unfit" than to wait and execute "degenerate offspring" for their crimes. Holmes reasoned that if the government could draft "the best citizens" for war, then it could certainly force "those who sap the strength of the State" to undergo sterilization. Paraphrasing Holmes, Michigan's brief argued that "it is better for all the world, if instead of waiting to punish specific offenses of this kind, including rape and murder, society can prevent those who are manifestly unstable from

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[118] Brief for Bert Chapman, Appellant at 4-18, *People v Chapman*, 4 N.W.2d 18, No. 41753 (Mich. 1942).
[119] Ibid. at 18.

continuing their depredations."[120] The preventive logic of eugenic sterilization was an important precedent for the preventive logic of sexual psychopath laws. Of course, the state also argued that *Pearson* was controlling on the Equal Protection and Due Process Clause claims.[121]

The Michigan Supreme Court affirmed the constitutionality of the statute. The basis on which the court distinguished the current sexual psychopath law from the earlier unconstitutional versions was almost comic in its reliance on formal distinctions. The two statutes were in substance quite similar, but the Michigan court distinguished between them based on their relative location in the codebook. The previous law was found in the penal code. Because the new statute was in the civil code, the new law was civil in nature, the court declared.[122] While the location of the statute was important, the court also relied on a philosophical distinction. The statute "makes sex deviators subject to restraint because of their acts and condition, and not because of conviction and sentence for a criminal offense."[123] Here again was the idea that punishment was inherently directed at the prior act, while police power regulations could take into consideration future danger. In practice, though, this distinction meant that a law that offered fewer protections to the accused by doing away with the requirement of a conviction was more likely to be declared constitutional since it would appear less directed at the prior act.

The Michigan Supreme Court was reluctant to second guess the state's broader eugenic project. Quoting an earlier decision that upheld a law authorizing the compulsory sterilization of the "mentally defective," the Court stated that the sexual psychopath law "is expressive of a State policy apparently based on the growing belief that, due to the alarming increase in the number of degenerates, criminals, feeble-minded and insane, our race is facing the greatest peril of all

[120] Appellee's Brief at 19-20, *People v Chapman*, 4 N.W.2d 18, No. 41753 (Mich. 1942).
[121] Ibid. at 26.
[122] *People v Chapman*, 4 N.W.2d 18 (Mich. 1942), 26.
[123] Ibid.

time." "It is," the court declared, "an historic fact that every forward step in the progress of the race is marked by an interference with individual liberties."[124] The sexual psychopath law was thus justified as a piece of eugenic legislation. The result of the Court's legalistic analysis was disastrous for Chapman. Thirty-one years later, it was reported that a sixty-eight-year-old Chapman had finally been released from detention.[125]

V. *The Development of Sexual Psychopath Legislation*

Following the victories in the courts, states were still figuring out how to use the sexual psychopath laws. Illinois rarely invoked its law. The state only committed a handful of people between 1938 and 1946. Cook County did not commit anyone until 1946.[126] A report from the Illinois Commission on Sex Offenders sought to understand why the law was used so infrequently. Dr. Groves B. Smith, of the psychiatric division at Menard, claimed that the Cook County prosecutor's office had doubts about the statute's constitutionality, which prevented it from vigorously using the law. Prosecutors also did not understand how to use the law—in what cases it could be invoked, when in the proceedings, and other quite basic matters. The report also indicated the resistance of accused people to examinations complicated the implementation of the statute. Finally, the commission found that officials were reluctant to use the statute because invoking it could mean lifetime incarceration.[127] Perhaps most important, prosecutors might have viewed the requirements of the statute as too onerous. Because Illinois's statute required proof of

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[124] Ibid at 28. The author of a *Michigan Law Review* comment on the law also cited Holmes's opinion in support of the constitutionality of the new legislation. William K. Jackson, "Comment: Constitutional Law—Validity of Sex Offender Acts," *Michigan Law Review* 37, no. 4 (Feb. 1939): 615-616.

[125] "Released After 31 Years," *The Root* (Grand Rapids, MI), March 16-31, 1972, 3.

[126] Illinois Legislative Council, "Commitment and Release of Sexual Deviates," Publication 103 (Illinois Legislative Council, 1951), 14. It is difficult to determine the precise statewide numbers. "Convict Morals Defendant as Sex Psychopath," *Chicago Tribune*, May 02, 1946, 21; Illinois Department of Public Safety, *1965 Annual Report* 73.

[127] Illinois Commission on Sex Offenders, "Report of the Illinois Commission on Sex Offenders to the General Assembly of the State of Illinois," (Springfield, IL: March 15, 1953), 14; Illinois Legislative Council, "Commitment and Release of Sexual Deviates," Publication 103 (Illinois Legislative Council, 1951), 14.

a mental disorder that “has existed for a period of not less than one year, coupled with criminal propensities to the commission of sex offenses,” some prosecutors apparently believed that the statute essentially required proving two offenses.[128] Nonetheless, the statute could still be a forceful tool for prosecutors when it was invoked. In one early case, for example, a rape trial resulted in a hung jury. Instead of retrying the accused and risking a not-guilty verdict, the state successfully committed him as a sexual psychopath.[129]

Minnesota was more willing to use its sexual psychopath law during these early years. It committed 248 of the 266 people examined as psychopathic personalities from 1939 to July 1, 1950. It released 106 of these people on parole or provisional discharge by July 1, 1950. Ten people died during their confinement. The law overwhelmingly targeted men; only five women were examined under the law during this time. Minnesota was a very white state, and only two Black people and one Indigenous person were examined during this period. The most common offense listed was indecent liberties. There were seventy-one cases of “sodomy; homosexuality,” making it the second most common offense. Indecent exposure was also a common offense, comprising forty-one cases. In line with the longstanding view that rape was not an indication of perversion, the state infrequently invoked the law in rape cases. Only five people accused of rape were examined during these years, while twenty-six people were committed under the loose category of “over-sexed, indecent writing, etc.”[130]

[128] Illinois Legislative Council, “Commitment and Release of Sexual Deviates,” 15.
[129] *People v. Clymer*, 62 N.E.2d 129 (Ill. App. Ct. 1945).
[130] Minnesota Bureau of Criminal Apprehension, *Annual Report to the Governor and the Legislature, For the Year Ending December 31, 1939* (St. Paul, MN: Bureau of Criminal Apprehension), 54; Minnesota Bureau of Criminal Apprehension, *Annual Report to the Governor and the Legislature, For the Year Ending December 31, 1940* (St. Paul, MN: Bureau of Criminal Apprehension), 57; Minnesota Bureau of Criminal Apprehension, *Annual Report to the Governor and the Legislature, For the Year Ending December 31, 1941* (St. Paul, MN: Bureau of Criminal Apprehension), 64; Minnesota Bureau of Criminal Apprehension, *Annual Report to the Governor and the Legislature, For the Year Ending December 31, 1942* (St. Paul, MN: Bureau of Criminal Apprehension), 75; Minnesota Bureau of Criminal Apprehension, *Annual Report to the Governor and the Legislature, For the Year Ending December 31, 1943* (St. Paul, MN: Bureau of Criminal Apprehension), 76; Minnesota Bureau of Criminal

The Supreme Court of Minnesota affirmed the constitutionality of committing an "over-sexed" person in *Dittrich v. Brown County*. The case concerned a forty-two-year-old farmer who was "emotionally unstable with respect to sexual matters and had an uncontrollable craving for sexual intercourse and self-abuse by masturbation." The two doctors who examined him disagreed about whether the appellant was dangerous. One believed that he was not a threat. The other believed that because of the separation from his wife, the man's sexual desires "would be like steam under pressure." The opinion obliquely alluded to the fact that, "as a result of his sexual excesses committed upon his wife her health was impaired." Based only on the testimony of a single doctor, the Minnesota Supreme Court ruled that this was sufficient evidence to commit him.[131] The case illustrates not only the breadth of the conduct that could result in commitment as a sexual psychopath but also the way that the laws focused on danger outside rather than within the home. Whatever the man actually did to his wife was irrelevant to the law, but the possibility that he might pursue other women outside his marriage was enough to get him committed.

California, too, began to make more extensive use of its sexual psychopath law in the 1940s, when it led the nation in sexual psychopath commitments. By June 30, 1950, the state had

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Apprehension, *Annual Report to the Governor and the Legislature, For the Year Ending June 30, 1944* (St. Paul, MN: Bureau of Criminal Apprehension), 51; Minnesota Bureau of Criminal Apprehension, *Annual Report to the Governor and the Legislature, For the Year Ending June 30, 1945* (St. Paul, MN: Bureau of Criminal Apprehension), 48; Minnesota Bureau of Criminal Apprehension, *Annual Report to the Governor and the Legislature, For the Year Ending June 30, 1946* (St. Paul, MN: Bureau of Criminal Apprehension), 19; Minnesota Bureau of Criminal Apprehension, *Annual Report to the Governor and the Legislature, For the Year Ending June 30, 1947* (St. Paul, MN: Bureau of Criminal Apprehension), 18; Minnesota Bureau of Criminal Apprehension, *Annual Report to the Governor and the Legislature, For the Year Ending June 30, 1948* (St. Paul, MN: Bureau of Criminal Apprehension),17; Minnesota Bureau of Criminal Apprehension, *Annual Report to the Governor and the Legislature, For the Year Ending June 30, 1949* (St. Paul, MN: Bureau of Criminal Apprehension), 14; Minnesota Bureau of Criminal Apprehension, *Annual Report to the Governor and the Legislature, For the Year Ending June 30, 1950* (St. Paul, MN: Bureau of Criminal Apprehension), 13.

[131] *Dittrich v. Brown County*, 9 N.W.2d 510, 511, 512 (Minn. 1943).

committed over 500 people as sexual psychopaths.[132] Of the 302 people listed in the institutional record as sexual psychopaths for the year ending June 30, 1950, only three were women.[133] California's patterns of commitment also reveal the classed dimensions of sexual psychopath commitment. For a few of these years the state kept records of the economic status of committed people, and very few sexual psychopaths were placed in the category of comfortable.[134]

Michigan also made more extensive use of its law. It committed 369 people as sexual psychopaths by December 1, 1950. A commission appointed by the governor in 1949 studied a random sample of 220 of these people and interviewed eighty-three. The commission found that sexual psychopath detainees tended to be older and convicted of less violent crimes than the people who were sentenced to prison for sex crimes. In fact, of the sample of 220 people, the commission found that 30.9% were accused of "gross indecency," a vague charge which could be used against people engaged in public or same-sex relations, and similar offenses. Another 25% were accused of indecent exposure. People who were committed as sexual psychopaths had lower socio-economic status and less education than the general population, but the committee did find that they had higher socioeconomic status than people sentenced to prison terms for sex

[132] Department of Institutions of the State of California, *Statistical Report*, *Year Ending June 30, 1940* (Sacramento: California State Printing Office, 1940), 36-37; Department of Institutions of the State of California, *Statistical Report*, *Year Ending June 30, 1941* (Sacramento: California State Printing Office, 1941), 32-33; Department of Institutions of the State of California *Statistical Report*, *Year Ending June 30, 1942* (Sacramento: California State Printing Office), 27, 36; *Statistical Report of the Department of Institutions of the State of California*, *Year Ending June 30, 1943* (Sacramento: California State Printing Office), 32-33; Department of Institutions of the State of California, *Statistical Report*, *Year Ending June 30, 1944* (Sacramento: California State Printing Office), 42; Department of Institutions of the State of California, *Statistical Report*, *Year Ending June 30, 1945* (Sacramento: California State Printing Office), 38; Department of Institutions of the State of California, *Statistical Report*, *Year Ending June 30, 1947* (Sacramento: California State Printing Office), 32; Department of Institutions of the State of California, *Statistical Report, Year Ending June 30, 1948* (Sacramento: California State Printing Office), 35; Department of Institutions of the State of California, *Statistical Report*, *Year Ending June 30, 1949* (Sacramento: California State Printing Office), 48; Department of Institutions of the State of California, *Statistical Report*, *Year Ending June 30, 1950* (Sacramento: California State Printing Office), 50.
[133] Department of Institutions, *Statistical Report*, 1950, 50.
[134] Department of Institutions, *Statistical Report*, 1944, 63; Department of Institutions, *Statistical Report*, 1945, 59; Department of Institutions, *Statistical Report*, 1946, 65.

crimes. The committee also found that many of the people interviewed had come from homes with "punitive and abusive" parents. People committed as sexual psychopaths were detained for an average of thirty-five months, while people convicted of sex crimes who were sentenced to prison were incarcerated for an average of forty months. However, considering that the study found that people committed as sexual psychopaths tended to be accused of less violent crimes, this difference was significant. Moreover, some people committed as far back as 1936 were still detained in 1950. The study also found that people committed as sexual psychopaths were less likely to be released on parole. "The criminal sexual psychopath's chance of being judged fit for parole seems to be little more than one-half that of sex criminal's chance of freedom," the commission found. Crowding at Ionia State Hospital and confusion among prosecutors about how to use the law prevented greater use of it by prosecutors.[135]

Elsewhere in the nation, states drew on the early legislation to enact new sexual psychopath laws.[136] In the late 1940s, renewed fears of sex crimes again led to intense criticism of the indifference of the criminal law to sexual abuse and calls for the preventive detention of people considered deviant and sexually abnormal. Scholars have generally interpreted this 1940s panic as the result of a confluence of factors connected to the end of the Second World War. In this interpretation, the panic was part of an attempt to force women back into the home, a reaction to increased sexual freedom during the war, including the growing visibility of gay people, and the beginning of the Cold War obsession with the nuclear family.[137] These causes all likely contributed to the new wave of legislation, but so too did frustration at the criminal legal

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[135] State of Michigan, *Report of the Governor's Study Commission on the Deviated Criminal Sex Offender* (1951), 32, 36, 79, 93, 218.

[136] Between 1939 and 1947 only one additional state passed a psychopath law—Vermont. Act No. 100, S.B. 16, *Acts and Resolves Passed by the General Assembly of the State of Vermont at the Thirty-Seventh Biennial Session, 1943* (Burlington, VT: Free Press Printing), 120-121.

[137] Chauncey, "Post-War Sex Crimes Panic," 175-177; Freedman, "Uncontrolled Desires," 96-97.

system's tendency to excuse sexual violence. New legislation, as in the earlier period, often followed the occurrence of a crime in which the legal system had permitted sexual violence.

In this atmosphere, sexual psychopath laws were popular enough to be a campaign issue. In Washington State, in 1947, Lloyd Shorett, the prosecuting attorney of King County, campaigned on the passage of a sexual psychopath law. The press pushed the issue too, emphasizing the need for such a law in the state. That year, Washington passed a sexual psychopath law.[138]

Massachusetts, too, passed a sexual psychopath law in 1947. The pattern that led to passage of the law is familiar—a terrible crime that illustrated the inability of the existing legal system to prevent sex crimes committed by abnormal individuals. The Massachusetts media publicized the murder of an eleven-year-old girl that March. The alleged culprit, Robert Coombes, had recently been released from a reform school. The trustees of the reform school issued a statement saying that Coombes had been diagnosed as a "psychopathic personality" but had to be released in accordance with the law. Coombes's parents agreed that he never should have been released, and they, along with the parents of the victim, urged the governor to do more to prevent sex crimes. Massachusetts politicians and civil leaders also pointed to the case as a demonstration of the inadequacy of the criminal law in sex crime cases.[139]

A legislative commission appointed the year before released a report that month recommending the state pass a sexual psychopath law. The commission's report highlights the continuing influence of eugenic theory on the movement for sexual psychopath laws, as well as

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[138] Suspect Confesses Attack on Two North End Sisters," *The Seattle Star*, September 17, 1946; "Medical, Mental Care is Vital Need in State," *Seattle Star*, January 17, 1947; Ch. 273, S.B. 179, *Session Laws of the State of Washington, Thirtieth Session, 1947* (Olympia, Washington: State Printing Plant, 1947), 1167.
[139] "Girls Death Due to State Freeing Boy, His Parents Say," *Boston Globe*, March 4, 1947; "Malden Sex Case Starts State Probe," *Berkshire County Eagle*, March 05, 1947; "Bill Filed to Bar Paroles Until Psychopaths 'Cured,'" *Boston Globe*, March 7, 1947; "Ely Says Penalty Cannot Prevent Sex Violence," *Greenfield Recorder-Gazette*, March 5, 1947.

the continued lack of faith in medicine or rehabilitation among supporters of such laws. The commission found that “generally speaking, feeble-minded women are, potentially, prostitutes, and feeble-minded men are, potentially, six [sic] offenders and potential users of brute force.” “However,” the commission went on to claim, “we are dealing today with the border-line case which cannot be classified as feeble-mindedness, nor can such a person be classified as insane.”[140] The committee noted that, “advances in medicine and surgery may at some time in the future bring some hope of reclamation of these types; but since the cure is not available at the present time, and, in all case histories studied, your Commission learned that once a male becomes an adult physically and shows a tendency toward becoming a sexual psychopath, a mere prison sentence for a definite time results only in the release of these dangerous person upon the public until they are again apprehended.”[141] The committee recommended that Massachusetts follow the Minnesota sexual psychopath law and provided a draft of a bill. That summer, Massachusetts passed a sexual psychopath law.[142]

Wisconsin also passed a sexual psychopath law in 1947. The captain of the Milwaukee Police Department, the Wisconsin Chiefs of Police Association, the District Attorneys Association, the Milwaukee League of Women Voters, and other civic associations all supported the bill. But previewing what would become a serious problem with the implementation of sexual psychopath laws across the country, a representative of the Public Welfare Department

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[140] “Report of the Special Commission Established to Make an Investigation and Study of the Law Relating to Pardons and Paroles and to Defective Delinquents,” Massachusetts Senate Document No. 520 (1947), 2-3.
[141] Ibid, 3.
[142] Ibid, 3-4; Ch. 123A, *Acts and Revolves Passed by the General Court of Massachusetts in the Year 1947* (Boston: Wright & Porter, 19470; “Indefinite Confinement of Dangerous Perverts Urged by State Body,” *Boston Globe*, March 28, 1947, 1. Another committee rejected the idea of a special approach for people who were accused of committing sexual crimes. *Preliminary Report of the Special Commission Investigating the Prevalence of Sex Crimes*, Massachusetts House Report No 1169, December 1947 (Boston: Wright and Potter, 1948). The final version of the bill that became law differed from the one recommended by the commission. One difference was that the recommended bill used the expansive language of Minnesota’s sexual psychopath law, while the enacted statute used the Minnesota Supreme Court’s more narrow reading of the statute.

warned that there was no room to care for the people who would be committed as sexual psychopaths. Supporters of the bill argued that it would allow the state to detain people who previously were sentenced for short terms under the criminal law for much longer. The department's concerns certainly seemed justified. Yet this concern did not halt passage of the bill, and it became a law that summer.[143]

In 1947, Illinois added an additional sexual psychopath law, seeking to supplement the existing law, which had not been used much. The state added a separate statute allowing the Department of Public Safety to periodically examine incarcerated people to determine if any had become sexual psychopaths. If the Department deemed someone a sexual psychopath, it could move the person to the psychiatric division for detention. The statute provided no procedural protections to incarcerated people against reclassification. The statute also required that before the release of any person convicted of rape, incest, crime against nature, taking indecent liberties with a child, or an attempt to commit one of these crimes, the Department of Public Safety would determine if the person was a sexual psychopath and subject to commitment. A physician from the Illinois State Penitentiary and one or two "qualified physicians" would conduct the examination.[144]

1947 was a significant year for the construction of the modern sex offender regime not only because of the revitalization of the sexual psychopath laws but also because California passed the first mandatory sex offender registration law. The list of registered sex offenders was not public but was instead a more official version of the lists of suspected degenerates, morons,

[143] "Management and Labor Confer on New Legislation," *Oshkosh Northwestern* (WI), April 17, 1947; "Urge Sexual Psychopaths be Treated as Ill," *The Capital Times*, April 17, 1947; "Segregate Them," *The Oshkosh Northwestern* (WI), June 03, 1947.

[144] "An Act to amend Section 8 of "An Act in relation to the Illinois State Penitentiary and to repeal certain parts of designated Acts", approved June 30, 1933, as amended," *Laws of the State of Illinois Enacted by the Sixty-Fifth General Assembly at the Regular Biennial Session* (1947), 1347-1348.

and sex criminals that some police departments had been keeping for the last few decades. It was, however, another step in the campaign to set apart people who committed sexual crimes as uniquely dangerous, prone to recidivism, and in need of special forms of state supervision.[145]

Pockets of opposition to the sexual carceral state also emerged that year. When New York's legislature finally passed a pair of sexual psychopath laws in 1947, Governor Thomas Dewey vetoed them. In his veto message, Dewey pointed out that "a justice of the peace, who need not be a lawyer, and whose civil jurisdiction is limited to cases involving not more than $500 could stigmatize a person by his finding as a sexual psychopath and cause confinement for the rest of his life."[146] The focus on abnormality rather than violence, a common feature of sexual psychopath laws, also puzzled him. New York's bill applied to a variety of different sex offenses including sodomy and "the offense of disorderly conduct of soliciting men in a public place for the purpose of committing a crime against nature" but not to first degree rape. "The bill," Dewey wrote, "does not distinguish between the different degrees of social harm that may result from the acts of sexual psychopaths." Articulating an emerging conception of privacy, he claimed that incarceration for life for engaging in a private sex offense would be "unnecessarily inhuman."[147]

In addition to Dewey's rebuke of New York's sexual psychopath bill, Alfred Kinsey's research also appeared in 1947, revealing the extent to which American men engaged in sex acts that were considered deviant. Kinsey noted that "if American sex codes and laws were enforced,

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[145] Ch. 1124, *Statutes of California, 1947* (California State Printing Office), 2562-2563.
[146] Thomas E. Dewey, "Memorandum filed with Senate Bill, Introductory Number 1432, Printed Number 2790, entitled: 'An Act to amend the code of criminal procedure, in relation to the definition, examination, sentencing and rehabilitation of sexual psychopaths," *Public Papers of Thomas E. Dewey, Fifty-First Governor of that State of New York 1947*, 255.
[147] Ibid, 255-256. On privacy see, Sarah E. Igo, *The Known Citizen: A History of Privacy in Modern America* (Cambridge: Harvard University Press, 2020); Leigh Ann Wheeler, *How Sex Became a Civil Liberty* (Oxford: Oxford University Press, 2013); Clayton Howard, *The Closet and the Cul-de-Sac: The Politics of Sexual Privacy in Northern California* (Philadelphia: University of Pennsylvania Press, 2019).

more than half of the male population would be considered criminal and be imprisoned at some time between adolescence and old age." Kinsey's study also included controversial findings on the sexuality of children that could be used to minimize the seriousness of adult sexual contact with children. The *San Francisco Examiner* quoted Kinsey as saying, "It is now clear that a child who happens to make sexual contacts, even at an early age, is quite capable of being aroused sexually, and may respond in a fashion not fundamentally different from the sexual responses of an adult."[148] Kinsey's findings indicated that people who committed sex crimes were not necessarily strange and deviant monsters. They could be perfectly normal people.

However, those invested in expanding the carceral state kept the public afraid of sex criminals. Just as he had a decade earlier, J. Edgar Hoover wrote an alarmist article warning of the dangers of sex criminals. Hoover's article ran as the cover story of *American Magazine*'s July 1947 issue. On the cover was a picture of a young, white girl blowing up a balloon next to the headline "How Safe Is Your Daughter?" A picture of three young white girls running away from a large, dark hand attempting to snatch them accompanied the article itself.[149] Hoover warned in the article that "the most rapidly increasing type of crime is that perpetrated by degenerate sex offenders." "Should wild beasts break out of circus cages, a whole city would be mobilized instantly," Hoover claimed. "But," he wrote, "depraved human beings, more savage than beasts, are permitted to rove America almost at will." Hoover argued that "with few exceptions, long before a sex fiend reaches his eventual crime of violence there is ample evidence of his tendencies." He assailed existing laws and their enforcement. In many cases of crimes against children, all authorities could do was charge the perpetrators with disorderly

[148] Howard Blakeslee, "Study Discloses Wide Violation of Sex Code," *San Francisco Examiner*, November 19, 1947.
[149] J. Edgar Hoover, "How Safe Is Your Daughter," *American Magazine*, July 1947, 33.

conduct, releasing them quickly and not subjecting them to any mental examination. According to Hoover, the solution was simple: "When sex offenders are identified there are only two courses of satisfactory action: cure through medical attention or the more drastic step of depriving the offender of his freedom to continue such activity."[150] Though Hoover did not mention sexual psychopath laws specifically, he clearly endorsed the philosophy embedded in them.

Jurisdictions across the country passed sexual psychopath laws in the following years.[151] Some state commissions also continued to recommend the passage of sexual psychopath laws.[152] Congress passed a sexual psychopath law for the District of Columbia in 1948, known as the Miller Act.[153] The imprimatur of the federal government was important, and supporters presented the Miller Act as a successful model for addressing sexual crime. Soon after the law's passage, *The Evening Star* contrasted the effective operation of the Miller Act with ineffective rape and carnal abuse prosecutions.[154]

Indiana, Missouri, Nebraska, New Hampshire, and New Jersey passed sexual psychopath-style laws in 1949.[155] That same year, California, which already had a sexual psychopath law, added another law allowing for the commitment of "mentally abnormal sex offenders" upon the person's own petition or that of a parent, spouse, or child so long as the

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[150] Ibid, 32.
[151] "The Legal Disposition of the Sexual Psychopath," *University of Pennsylvania Law Review* 96 (1948): 872-887.
[152] See e.g., *Report of the Interim Commission of the State of New Hampshire to Study the Cause and Prevention of Serious Sex Crimes* (Concord, N.H.: Concord Press, 1949).
[153] "A Bill to Provide for Treatment of Sexual Psychopaths," Public Law 615, H.R. 6071, *United States Statutes at Large, 80th Congress, 2nd Session, 1948*, vol. 62, part 1 (Washington, D.C.: Government Printing Office, 1949).
[154] "13 Convictions in 134 Reports of Sex Crimes," *The Evening Star* (D.C.), February 27, 1950.
[155] Ch. 124, H.B.2, *Laws of the State of Indiana, Passed at the Eighty-sixth Regular Session of the General Assembly 1949* (Indianapolis: The Bookwalter Company, 1949), 328-332; H.B. 228, 239, 261, *Laws of Missouri Passed at the Session of the Sixty-fifth General Assembly 1949* (Jefferson City, MO: Mid-State Printing), 252-255; Ch. 294, Legislative Bill 344, *Laws Passed by the Legislature of the State of Nebraska, Sixty-First Session*, *1949* (Lincoln, Nebraska: Cornhusker Printing), 999-1003; Ch. 314, *Laws of the State of New Hampshire Passed January Session, 1949* (Manchester, NH, Granite State Press), 422-429; Ch. 20, *Acts of the One Hundred and Seventy-third Legislature of the State of New Jersey* (Trenton, NJ: MacCrellish & Quigley, 1949), 65-67.

person consented to the examination.[156] In 1950, South Dakota and Virginia passed sexual psychopath laws.[157] In 1951, Alabama, Pennsylvania, Utah, and Wyoming passed their own laws, spreading them to the South and West.[158]

There were notable differences between some of these laws. New Jersey's law did not use the term "sexual psychopath" but instead referred to "abnormal mental illness" that resulted in the commission of one of a wide variety of sex crimes including "uttering or exposing obscene literature or pictures" and "indecent communications to females of any nature whatsoever." More importantly, the New Jersey statute did not allow for indefinite commitments and specified that a person could not be committed for a period of time longer than the maximum sentence of the crime for which they were convicted.[159] South Dakota's law required the mental examination of people convicted of the crime of "indecent molestation of children." People convicted of this crime and found to be "mentally ill" could be hospitalized during their sentence.[160] South Dakota's law was therefore much less draconian than most states' laws. Virginia's law allowed judges to order the mental examination of a person convicted of a sexual offense that "indicates sexual abnormality," but the statute was not clear about what a finding of sexual abnormality would mean for the accused.[161]

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[156] Ch. 1457, *Statutes of California 1949* (California State Printing Office), 2539-2541.
[157] Ch. 3, S.B. 6, *The Laws Passed at the Special Session of the Thirty-First Legislature of the State of South Dakota*, 1950 (Pierre, S.D., 1950), 5-6; Ch. 463, S.B. 224, *Acts and Joint Resolutions of the General Assembly of the Commonwealth of Virginia*, *Session 1950* (Richmond: Division of Purchase and Printing, 1950), 897-898.
[158] Act No. 981, H. 817, *Alabama Laws of the Legislature of Alabama Passed at the Special Session of 1950, Organizational Session 1951, Special Session 1951, Regular Session 1951*, Vol. 2 (Montgomery, AL: Brown Printing Company), 1655-1657; No 495, *Laws of the General Assembly of the Commonwealth of Pennsylvania, Passed at the Session of* 1951, Vol 2 (Harrisburg, P.A., 1951), 1851-1854; Ch. 22, H.B. No. 173, *Laws of the State of Utah, 1951, Passed at the Regular Session of the Twenty-Ninth Legislature* (Kaysville, UT: Inland Printing) 52-55; Ch. 25, H.B. No. 32, *Session Laws of the State of Wyoming Passed by the Thirty-First State Legislature* 1951 (Sheridan, WY: The Mills Company), 35-39.
[159] Ch. 20, *One Hundred and Seventy-third Legislature, New Jersey*, 65-67.
[160] Ch. 3, S.B. 6, *Special Session of the State of South Dakota*, 1950, 5-6.
[161] Ch. 463, S.B. 224, *General Assembly of the Commonwealth of Virginia*, *Session 1950*, 897-898.

New York passed a law sometimes characterized as a sexual psychopath law, but which had some particularly crucial differences. In response to Governor Dewey's rejection of the earlier sexual psychopath bill, New York's law did not allow for indeterminate civil commitment. Instead, it provided for a true indeterminate criminal sentence for people convicted of specified sex offenses, provided that they were given a psychiatric examination first. The most significant difference, then, was that the New York law did not deprive the accused of the traditional criminal procedure rights.[162]

VI. *Critique of the Sexual Psychopath Laws*

The sexual culture of the 1950s was different from that of the 1930s and 1940s, both more reactionary and more liberal. Perhaps even more so than before, there were deeply reactionary elements of 1950s sexual culture. During the "Lavender Scare," a pernicious federal government campaign targeted employees presumed to be gay or lesbian. During the Boise homosexuality scandal, a sex panic resulted in the arrests and harassment of numerous gay men in Idaho. The notion that preservation of the white heteronormative "nuclear family" was integral to winning the Cold War fed both the Lavender Scare and the Boise homosexuality scandal.[163] Sexual psychopath laws were central to this sexual regime, helping to forge a link between same-sex relations and other socially disfavored types of sexuality and violence. These laws provided the government with a powerful tool to police sexual difference and induced fear in people who engaged in variant sex that they might be deemed a sexual psychopath.[164]

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[162] Ch. 525, *Laws of the State of New York Passed at the One Hundred and Seventy-Third Session* (Albany: 1950), 1271-1284; Deborah Denno, "Life Before the Modern Sex Offender Statutes," *Northwestern University Law Review* 92, no. 4 (1998): 1390.
[163] David K. Johnson, *The Lavender Scare: The Cold War Persecution of Gays and Lesbians in the Federal Government* (Chicago: University of Chicago Press, 2004); Elaine Tyler May, *Homeward Bound: American Families in the Cold War Era* (New York: Basic Books, 1988).
[164] A good example of the way that sexual psychopath laws were important to this sexual regime is the Sioux City, Iowa sex crime panic documented by journalist Neil Miller. During a panic over the murder of two children,

But in other ways, the culture was less reactionary that it was in earlier decades. Kinsey's 1948 book *Sexual Behavior in the Human Male* and his 1953 *Sexual Behavior in the Human Female* fundamentally changed ideas about the prevalence of sexual deviation. Numerous historians have argued that by the mid-twentieth century, psychology and psychoanalysis were powerful cultural forces, contributing to a more psychotherapeutic and a less moralistic understanding of sexuality.[165] I have argued elsewhere that historians have exaggerated the hegemony of psychology in the midcentury U.S. and that traditional understandings of guilt and responsibility persisted during this period.[166] Nonetheless, many elites and experts accepted Freud's theories of repression and sexual development (or at least the more conservative interpretations American neo-Freudians offered). This psychoanalytic understanding of perversion as a complex result of development and cultural repression was certainly different than the older ideas of perversion. Experts now saw sexual deviation as the outcome of psychodynamic factors like castration anxiety, oedipal conflict, and subconscious guilt.[167]

In this environment, some experts began to push back against aspects of sexual psychopath laws. In 1950, the Group for the Advancement of Psychiatry released the final version of its report on "Psychiatrically Deviated Sex Offenders." The committee found fault

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authorities used the state's new sexual psychopath law to detain twenty gay men. Neil Miller, *Sex-Crime Panic: A Journey to the Paranoid Heart of the 1950s* (Los Angeles: Alyson Books, 2002).

[165] On the history of psychology and psychoanalysis in the U.S. see, Elizabeth Lunbeck, *The Psychiatric Persuasion: Knowledge, Gender, and Power in Modern America* (Princeton: Princeton University Press, 1994); Alan Petigny, *The Permissive Society, America 1941-1965* (Cambridge: Cambridge University Press, 2009); Eli Zaretsky, *Secrets of the Soul: A Social and Cultural History of Psychoanalysis* (2004; repr., New York: Vintage, 2005); Nathan G. Hale, Jr. *The Rise and Crisis of Psychoanalysis in the United States: Freud and the Americans, 1917-1985* (Oxford: Oxford University Press, 1995); Jonathan Engel, *American Therapy: The Rise of Psychotherapy in the United States* (New York: Gotham Books, 2008); Jason W. Stevens, *God Fearing and Free: A Spiritual History of America's Cold War* (Cambridge: Harvard University Press, 2010).

[166] Corbin Page, "Preserving Guilt in the 'Age of Psychology': The Curious Career of O. Hobart Mowrer," *History of Psychology* 20, no. 1 (2017): 1–27.

[167] See e.g., Benjamin Karpman, *The Sexual Offender and His Offenses: Etiology, Pathology, Psychodynamics and Treatment* (New York: Julian Press, 1954).

with the use of the term "psychopath" in these statutes, as there was not yet sufficient agreement among psychiatrists about its meaning. The report argued that "it is advisable that nosologic labels be avoided and in place the offender's behavior be so described as to come under the purview of mental disorder."[168] At the same time, the group endorsed a proposal that looked very much like the sexual psychopath laws, albeit more narrowly tailored to more serious offenses. It recommended the civil commitment of "psychiatrically deviated sex offenders" based on an expert diagnosis of mental illness characterized by "repetitive, compulsive acts," "forced relations," and situations with an "age disparity" between the parties, rather than consensual, private acts. The basis of jurisdiction would be a criminal conviction or charge.[169]

State-sanctioned reports also began to criticize the sexual psychopath laws. The criminal law and even the new sexual psychopath laws seemed to be failing to prevent sexual crime and the spread of sexual deviance, and states were eager to find out why. A report to the General Assembly of Pennsylvania criticized both the vague term "sexual psychopath" and laws that allowed for the indefinite detention of "sex deviates" without a criminal conviction on the basis that they might commit a crime in the future. Not only would this practice violate civil liberties, but it was also not feasible given Kinsey's findings on the commonness of sexual deviation.[170]

The same year, a "Commission on the Habitual Sex Offender" established by the New Jersey legislature released an influential report that criticized sexual psychopath laws. New York University criminologist Paul Tappan headed this commission. It investigated the existing sexual psychopath programs and consulted with leading experts, including Kinsey, the superintendent

[168] Committee on Forensic Psychiatry of the Group for the Advancement of Psychiatry, *Psychiatrically Deviated Sex Offenders*, Report 9 (Topeka, KS: Group for the Advancement of Psychiatry, 1950), 1. The first version of the report was released in May 1949.
[169] Ibid, 2-3.
[170] Joint State Government Commission, *Sex Offenders: A Report to the General Assembly of the Commonwealth of Pennsylvania* (1951), 11.

of St. Elizabeths Hospital, Winfred Overholser, and criminologist Edwin Sutherland. The commission's report "The Habitual Sex Offender" was remarkably different from the Massachusetts report that had been released in 1947. The Massachusetts report, steeped in eugenic theory, could have been written in the 1910s, but the New Jersey report represented something new—a post-Kinsey understanding of sex crime.

The New Jersey Commission thoroughly critiqued sexual psychopath laws and the fallacies that supported them. The first was the belief that "homicidal sex fiends" were common. In fact, the commission pointed out, the murder of women was more commonly committed by a family member or a person known to the victim than by an unknown sex fiend. Moreover, the commission cited Kinsey's claim that most people convicted of sex crimes were not "violent," defined as "exercising force or injury upon a victim." The commission rebutted the claim that people who committed sex crimes were often recidivists who progressed to more serious crimes. It also pointed out that it was not possible to predict whether a "sex deviate" would commit a crime and that there was no widely agreed-upon definition of the "sexual psychopath." Even if there were a workable definition, there was no known effective treatment for sexual abnormality, and the commission found that people committed as sexual psychopaths under existing law were not receiving any treatment. The investigation also revealed that most of the people held under the sexual psychopath laws were convicted of minor offenses. According to the report, the last fifty or sixty years of conventional wisdom was bunk.[171]

Within the report itself, however, there was ample evidence that physicians were not prepared to allow diagnostic problems or other conceptual difficulties to get in the way of a perceived solution to the problem of sex deviation. The commission sent a survey to seventy-five

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[171] Paul Tappan, *The Habitual Sex Offender: Report and Recommendations of the Commission on the Habitual Sex Offender* (Trenton, NJ: New Jersey Committee for the Study of the Habitual Sex Offender, 1950), 13-16.

authorities across the country, the vast majority of whom were psychiatrists. Of those surveyed, fifty-five believed that the number of sexual psychopaths in the country justified special legislation concerning this group, while only eleven disagreed. Nine gave no opinion. The commission was particularly surprised to find that "49 out of 62 psychiatrists … favored longer periods of segregation for psychopaths in spite of recognizing (1) that there is no consensus about this disorder as a diagnostic entity, (2) that the patients who are adjudicated do not receive treatment, and (3) that there are not a sufficient number of trained psychiatrists available to provide such treatment."[172] While we are limited in what we can take from an unscientific survey sent to an unknown set of experts, the idea that many experts were comfortable with preventive detention with no promise of treatment is certainly consistent with the history of sexual psychopath legislation up to the point. In this way, the commission pushed back against the momentum of mainstream expert opinion.

In 1950, based on the findings of the Commission on the Habitual Sex Offender, New Jersey repealed its 1949 law and replaced it with a revised one.[173] The committee was distressed at the broadness of the 1949 law, and it found that many cases adjudicated under the law were minor offenses. Of the first 100 cases adjudicated, twenty-nine were for "open lewdness."[174] The 1950 amended law limited the category of offenses that made a person eligible for commitment as a sexual psychopath to "rape, carnal abuse, sodomy, or impairing the morals of a minor or of an attempt to commit any of the aforementioned offenses." It also narrowed the diagnostic criteria from "abnormal mental illness" to conduct characterized by "a pattern of repetitive, compulsive behavior; and (b) either violence; or (c) an age disparity from which it shall appear

[172] Ibid, 57, 59.
[173] Cole, "From the Sexual Psychopath to 'Megan's Law'," 297.
[174] Tappan, *The Habitual Sex Offender*, 29.

that the victim was under the age of fifteen years and the offender is an adult aggressor." The new law, in line with the committee's recommendations, also added a provision allowing a person to be released on parole and receive outpatient treatment.[175]

Though the revised New Jersey law was less draconian and more scientifically sophisticated than most sexual psychopath laws, the committee's approach was not rehabilitative. "It should be stressed," the report said, "that the recommendations are designed only as a *supplement* to the traditional body of criminal law, that these are designed to provide for new and special treatment approaches only where such change appears feasible and necessary in the public interest."[176] In fact, the committee was skeptical that effective methods of treatment for people convicted of sex crimes existed. Committee members believed in the effectiveness of punishment as a deterrent and as a means of instilling responsibility in subjects, even those who experienced sex deviations.[177] Very soon after the law was amended to make it narrower, New Jersey began adding more categories of offenses to the law. Lawmakers included open lewdness and indecent exposure in 1951 and "assault with intent to commit rape, carnal abuse and sodomy" in 1954. The legislature amended the law to remove the requirement of violence or age disparity in the case of open lewdness or indecent exposure in 1956.[178]

New Jersey's approach, however, did not have much influence nationwide. Wyoming's 1951 sexual psychopath law used New Jersey's definition and also limited detention to the maximum sentence provided by law for the initial crime.[179] Other states were not eager to follow

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[175] Ch. 207, *Acts of the One Hundred and Seventy-fourth Legislature of the State of New Jersey and Third Under the New Constitution* (Trenton, NJ: MacCrellish & Quigley, 1950), 454-457.
[176] Tappan, *The Habitual Sex Offender*, 8, 45-46 (emphasis in original).
[177] Tappan, *The Habitual Sex Offender*, 45-46.
[178] Ch. 44, *Acts of the One Hundred and Seventy-fifth Legislature of the State of New Jersey* (Trenton, NJ: MacCrellish & Quigley Co., 1951), 161-162; Ch. 151, *Additional Acts of the One Hundred and Seventy-Fifth Legislature of the State of New* Jersey (Trenton, NJ: MacCrellish & Quigley, 1954), 655; Ch. 37, *Acts of the One Hundred and Eightieth Legislature of the State of New Jersey* (Trenton, NJ: MacCrellish & Quigley, 1956), 80-81.
[179] Ch. 25, H.B. No. 32, *Session Laws of the State of Wyoming*, *1951*, 35-39.

New Jersey's lead in moving away from indeterminate sentences for mentally abnormal sex offenders. However, the critique of the sexual psychopath laws in the New Jersey report reflected a growing uneasiness among some elite experts over the sexual psychopath laws.

In 1951, a Michigan commission released a report that was also critical of the sexual psychopath laws. In its "Report of the Governor's Study Commission on the Deviated Criminal Sex Offender," the commission advocated for the introduction of rehabilitative and psychiatric methods into the criminal law. Like its New Jersey counterpart, the Michigan commission rejected many of the common tropes, namely that "sex deviates" were fiends who generally progressed to more grave crimes, were especially likely to reoffend, and often attacked strangers. According to the commission, "the rapists and child-attackers of the future will come in the main not from today's minor sex offenders but from today's reserve army of seriously traumatized children and youth, many of whom have not yet committed a sexual offense of any kind."[180] The report even critiqued the repressive attitudes toward sexuality that Christianity and Victorian culture fostered and recommended a number of quite radical responses to sexual violence. These included measures aimed at reducing shame and trauma, such as encouraging police and courts to be more sensitive to victims, providing counseling to parents, and offering sex education in schools. The commission also endorsed efforts to reduce the ostracism of people convicted of sex offenses who had served their sentences so that they might be reintegrated into the community. A rejection of the idea that people who committed sexual crimes should be allowed to do their time and then return to society had partly driven the passage of the sexual psychopath laws.[181] The commission was also highly critical of the term "sexual psychopath."[182]

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[180] *Report of the Governor's Study Commission on the Deviated Sex Offender* (Michigan, 1951), 4, 23.
[181] Ibid, 9, 15, 17, 33.
[182] Ibid, 129-130.

Despite all that criticism, the recommendations of the Michigan commission were not significantly different from existing sexual psychopath laws. It embraced a blend of punishment and treatment. "The program recommended by the committee has some aspects of the treatment accorded to psychotic persons … and, at same time, aspects of the present processing of sex offenders as criminals," the report stated.[183] The commission advised that judges be permitted to give a true indeterminate term to people convicted of sex crimes, alongside treatment. This would of course provide more protections than Michigan's existing sexual psychopath law, which did not require a conviction. The commission also proposed expanding Michigan's Hospitalization Act to allow for the involuntary commitment of "sex deviates." How this would differ from the existing sexual psychopath law was hard to see. If and only if these provisions were enacted did the commission endorse repeal of the state's sexual psychopath law. The committed stated that even though the sexual psychopath law was a crude tool, "at this time the criminal sexual psychopath law is the closest approach to the principle of the indeterminate sentence."[184] The inconsistency between these recommendations and the rhetoric of respecting due process did not go unnoticed. One member submitted a dissenting report pointing this out and assailing the commission's recommendations.[185]

Similarly, an Illinois legislative commission, under the leadership of criminal law scholar Francis Allen, echoed the criticism of other bodies but did not recommend abolition of the state's sexual psychopath law. The commission was critical of the term "sexual psychopath" and repeated many of the same points as the New Jersey and Michigan commissions regarding the falsity of many myths about people who committed sex crimes. The commission emphasized that

[183] Ibid, 122.
[184] Ibid, 10, 14-15.
[185] Ibid, 167-168.

attention should be focused on "conduct involving the use of force" and "a substantial age disparity between offender and his victim." The commission recommended other liberalizing reforms, including that "punishments for homosexual acts be modified to discriminate between socially distasteful and socially dangerous conduct."[186] Nonetheless, the commission stated that "amendment of the [sexual psychopath] act is being recommended rather than its repeal."[187] The commission suggested replacing the problematic term "sexual psychopath" with "sexually dangerous person."[188] The legislation establishing the commission had used the term "sexually dangerous persons," and the Committee on Criminal Law of the Chicago Bar Association had proposed it as an alternative to the term "sexual psychopath."[189]

The drafters of the American Law Institute's Model Penal Code also criticized the sexual psychopath laws in 1955. They included eminent legal scholar Herbert Wechsler, Paul Tappan, who led the New Jersey Commission on the Habitual Sex Offender, and Francis A. Allen, chair of the Illinois Commission on Sex Offenders. In a comment in a tentative draft released in 1955, the drafters leaned heavily on the work of Tappan and the New Jersey Commission on the Habitual Sex Offender to critique the sexual psychopath laws. The comment stated that "the so-called sex psychopath laws, which have been adopted in fifteen states, are seriously questionable insofar as they prescribe or permit long or indefinite sentences until 'cure,' especially where the commitment is or may be to a purely custodial institution, or where finances or scientific personnel are unavailable or inadequate for a realistic program of study and treatment." But the comment's critique of the psychopath laws was qualified in the next two sentences: "On the

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[186] Illinois Commission on Sex Offenders, *Report to the General Assembly of the State of Illinois* (Springfield: Ill: March 15, 1953), 1-2
[187] Ibid, 1.
[188] Ibid, 4.
[189] Ibid; *Laws of the State of Illinois Enacted by the Sixty-Seventh General Assembly* (1951), 1687-1688; "Meeting of the Crime Prevention Bureau on Sexual Offenders," December 5, 1949, 4-5, Ernest Watson Burgess Papers, 1886-1966, box 7, folder 1, Special Collections Research Center, University of Chicago.

other hand, provision must be and generally is made by other laws for the commitment of mentally deranged and dangerous persons. The difficulty with many of the sex psychopath laws is that they permit too ready an inference of public danger from relatively minor episodes of deviate sexuality."[190] In fact, the final draft of the Model Penal Code included a provision for the extended detention of a defendant convicted of a felony who is "a dangerous, mentally abnormal person whose commitment for an extended term is necessary for protection of the public." Another provision allowed for extended imprisonment for a defendant convicted of a misdemeanor if the defendant was a "person of abnormal mental condition who requires rehabilitative treatment for a substantial period of time."[191]

Perhaps the most prominent individual critic of the sexual psychopath laws was the Indiana University sociologist Edwin Sutherland.[192] Sutherland argued that the laws were the product of hysteria following highly-publicized crimes committed against children. He pointed out that these fears were misdirected at the unknown stranger, when victims were far more likely to be subject to violence from someone they knew. According to Sutherland, while psychiatrists had often been instrumental in the passage of sexual psychopath laws, many were opposed to the laws.[193] He saw precedent for the sexual psychopath laws in the security measures that some European countries had adopted to supplement the criminal law. In the U.S., "the trend away from punishment and toward treatment of criminals as patients is to some extent a 'paper' trend," he wrote. "Laws are enacted which provide for treatment rather than punishment; but the

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[190] American Law Institute, *Model Penal Code*, Tentative Draft 4 (Philadelphia: American Law Institute, 1955), Comment to § 207.5.
[191] American Law Institute, *Model Penal Code: Official Draft and Explanatory Notes* (Philadelphia: American Law Institute, 1985), § 7.03 (3), § 7.04 (3), 102-105.
[192] John F. Galliher and Cheryl Tyree, "Edwin Sutherland's Research on the Origins of Sexual Psychopath Laws: An Early Case Study of the Medicalization of Deviance," *Social Problems* 33, no. 2 (Dec. 1985): 100-113.
[193] Sutherland, "The Diffusion of Sexual Psychopath Laws," 146; Edwin H. Sutherland, "The Sexual Psychopath Laws," *Journal of Criminal Law and Criminology* 40, no. 5 (1950): 546.

treatment goes on within a framework of punishment, and in many respects the punitive policies continue, despite changes in legislation," Sutherland noted.[194] Perhaps the biggest problem with the sexual psychopath laws in Sutherland's view was that there was simply no such thing as a sexual psychopath. The term did not designate a diagnostic category, and there was wide disagreement about its meaning. As a result, almost everyone was in danger of being labeled a sexual psychopath.[195]

Although their underlying worries about civil liberties and flawed science meant that many critics of sexual psychopath laws were far more sympathetic than others to the struggles of gay people, those who engaged in public sex, and other nonconformists, they also tended to downplay the significance of sexual violence and violation more generally. For example, Sutherland wrote:

> On the one hand, females frequently conceal the fact of forcible rape rather than undergo the shame of publicity. On the other hand, charges of forcible rape are often made without justification by some females for purposes of blackmail and by others, who have engaged voluntarily in intercourse but have been discovered, in order to protect their reputations. Physicians have testified again and again that forcible rape is practically impossible unless the female has been rendered practically unconscious by drugs or injury; many cases reported as forcible rape have certainly involved nothing more than passive resistance.[196]

Sutherland also minimized the significance of statutory rape, claiming that it "is frequently a legal technicality, with the female in fact a prostitute."[197] Likewise, Paul Tappan argued that the danger of sexual offenses "has been grossly exaggerated and that the possible traumatizing of the individual is almost always a product of cultural and individual responses to the experience rather than because of the intrinsic emotional value of that experience itself."[198] The Illinois

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[194] Sutherland, "The Diffusion of Sexual Psychopath Laws," 148.
[195] Sutherland, "The Sexual Psychopath Laws," 551-552.
[196] Ibid, 545.
[197] Ibid.
[198] Paul Tappan, "Some Myths About the Sex Offender," *Federal Probation* 19, no. 2 (1955): 8.

commission that had recommended distinguishing consensual from nonconsensual sodomy had also proposed that in rape cases "provisions should be enacted to protect defendants in situations in which the female involved is married, a prostitute, or promiscuous."[199]

Historians have argued that one of the positive effects of the sexual psychopath laws was that by stigmatizing sexual violence, they helped to legitimize nonviolent sexual acts like consensual sodomy.[200] In an insightful article, Marie-Amelie George has demonstrated how the sexual psychopath law commissions contributed to the argument for the decriminalization of consensual sodomy.[201] These decriminalization arguments, as admirable as they were, were also rooted in a tendency to erase the significance of sexual violation. More subtly, this tendency to critique the sexual psychopath laws for unduly punishing people accused of minor offenses was premised on an affirmation of the validity of the moral economy of punishment. The idea was that it was possible to determine the right amount of punishment for certain offenses and that serious offenses deserved more serious punishment.

Those who believed in the legitimacy of the moral economy of punishment were, in fact, some of the harshest critics of the sexual psychopath laws. In the now classic article "The Aims of the Criminal Law," published in 1958, legal scholar Henry M. Hart defended the methods of the criminal law from "the leading alternative" of "curative-rehabilitative treatment."[202] He argued that the curative-rehabilitative approach departed from the criminal law in significant ways, namely by focusing on the offender rather than the crime, providing treatment or detention rather than punishment, jettisoning many requirements of due process, and violating any notion

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[199] Illinois Commission on Sex Offenders, *Report to the General Assembly*, 3.
[200] Estelle B. Freedman, "Uncontrolled Desires," 85
[201] George, "The Harmless Psychopath."
[202] Henry M. Hart, "The Aims of the Criminal Law," *Law and Contemporary Problems* 23 (Summer 1958): 406-407.

of proportionality.[203] Similarly, the century's most influential Anglophone legal philosopher, H.L.A. Hart identified in a 1964 address, a growing "skepticism of the whole institution of criminal punishment" in some quarters and argued that the purely forward-looking "social hygiene" approach violated the most basic elements of the criminal law.[204] According to both men, laws that authorized the detention of criminal "psychopaths" were the leading edge of this new approach to crime. Henry Hart warned that the "rash of so-called 'sexual psychopath' laws which disgrace the statute books of many states illustrate the possibilities to which this streak of cruelty may lead."[205]

The Harts' worries mirrored those of defenders of punishment who, at the turn of the century, worried that the modernist approach threatened the legitimacy of basic notions of responsibility and blame.[206] The Harts believed that by failing to fulfill the necessary ideological function of criminal punishment, this approach conflicted with the very foundations of society. According to H.L.A. Hart, attempts to abandon the notion of criminal responsibility conflicted with beliefs about personhood and responsibility that "not only underly morality but pervade the whole of our social life." Rather than treating subjects as free, equal, and responsible beings, this approach treated them as "alterable, predictable, curable, or manipulable things."[207] For Henry Hart, the abandonment of the traditional view of punishment would "undermine the foundation of a free society's effort to build up each individual's sense of responsibility."[208]

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[203] Ibid, 404-407.
[204] H.L.A. Hart, "Punishment and the Elimination of Responsibility," in *Punishment and Responsibility*, 160; H.L.A Hart, "Changing Conceptions of Responsibility," in *Punishment and Responsibility*, 193. Hart was speaking in the British context specifically, but his comments were applicable to the Anglophone world more generally.
[205] Hart, "Changing Conceptions of Responsibility," 198; Hart "The Aims of the Criminal Law," 407n19.
[206] Note that the Harts had quite different conceptions of the aims of punishment. HLA Hart completely rejected retributive justifications of punishment, unlike Henry Hart, though he argued that retribution could guide the distribution of punishment. Hart, "Prolegemon to the Principles of Punishment," in *Punishment and Responsibility*, 8-12.
[207] Hart, "Punishment and the Elimination of Responsibility," in Hart, *Punishment and Responsibility*, 183.
[208] Hart, "The Aims of the Criminal Law," 410.

These critiques did not stop the passage of more sexual psychopath laws in the 1950s, but states were less likely to use the problematic term "sexual psychopath." In 1953, Colorado, Kansas, and Oregon all passed sexual psychopath-style laws that did not reference "sexual psychopaths" and that required a criminal conviction for commitment. However, these laws still provided for indefinite commitment.[209] In 1955, Illinois revised its sexual psychopath laws by changing the designation from "sexual psychopath" to "sexually dangerous person." The new term narrowed the scope of the statute to people with "a mental disorder" and "demonstrated propensities toward acts of sexual assault or acts of sexual molestation of children." The new Illinois law did not require a criminal conviction, however. Moreover, a companion statute required the Department of Public Safety to examine incarcerated people to determine if they were "sexually dangerous persons" and required an examination before the release of any person who was convicted of "rape, incest, crime against nature, or taking indecent liberties with a child or for an attempt to commit either of said crimes."[210]

In 1957, additional states passed sexual psychopath-style laws. Connecticut passed a law that permitted the detention of people who were deemed to be mentally ill in a security treatment center, though Connecticut's law did not allow detention beyond the maximum length of the sentence.[211] Florida passed a sexual psychopath law allowing for indefinite detention, which could be filed against any person charged with a crime.[212] Tennessee passed a law allowing for

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[209] Ch. 89, H.B. No. 265, *Laws Passed at the First Regular Session Thirty-ninth General Assembly of the State of Colorado* (Denver: Bradford Robinson, 1953), 249-252; Ch. 186, H.B No. 14, *Kansas Session Laws, 1953* (Topeka, KS: Fred Violand Jr. State Printer, 1953), 334-335; Ch. 641, H.B. 712, *Oregon Laws Enacted and Joint Resolutions, Concurrent Resolutions, and Memorials 1953*, 1177-1178.

[210] S.B. 490, S.B. 491, *Laws of the State of Illinois Enacted by the Sixty-Ninth General Assembly at the Regular Biennial Session* (General Assembly of the State of Illinois), 1144-1146, 1236-1238.

[211] Public Act. No. 650, *Public Acts Passed by the General Assembly of the State of Connecticut, 1957* (Hartford, Conn: 1957), 1025-1033.

[212] Ch. 57-1989, H.B. 93-X, *General Acts and Resolutions Adopted by the Legislature of Florida at its Thirty-sixth Regular Session* (1957), 24-27.

the indefinite detention of "sex offenders," including after the expiration of a sentence.[213] The last state to pass a sexual psychopath law that year was West Virginia. The West Virginia law required release at the maximum sentence, unless the Board of Control applied to hold the person longer.[214]

VII. *Sexual Psychopath Commitment Numbers*

These critiques also did not stop states from using sexual psychopath laws. Into the 1950s, Minnesota continued to commit roughly twenty people per year under its psychopathic personality law.[215] The Bureau of Criminal Apprehension stopped reporting on the individual offenses people were accused of committing. However, in the early 1950s, the state still focused much of its attention on same-sex-attracted men. Between 1952 and 1953, for example, nearly a third of all people committed under the law were committed for "sodomy; homosexuality."[216]

By the mid-1950s, Wisconsin was making over 100 commitments a year and conducting over two hundred examinations under its sex offender law, enacted in 1951 to replace the original sexual psychopath law. Of the 1,114 commitments between 1951 and 1962, 55% were for indecent behavior with a child, 12.5% for sexual perversion, 7% for lewd and lascivious conduct, 6% for disorderly conduct, 5% for attempted rape and sexual intercourse with a child, 4% for rape, and 10.5% for other offenses. Nearly all the people committed were identified as men.[217] The focus of the law was thus on people who were alleged to have committed crimes

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[213] Ch. 288, H.B. 737, *Public Acts of the State of Tennessee, Passed by the Eightieth General Assembly, 1957* (Nashville: Rich Printing), 938-941.
[214] Ch. 43, H.B. 146, *Acts of the Legislature of West Virginia, Regular Session, 1957, First Extraordinary Session, 1957, Regular Session, 1958, First Extraordinary Session, 1956* (Charleston, WV: Jarrett Printing), 162-169.
[215] Minnesota Legislative Commission, *Report on Public Welfare Laws*, *Sex Psychopath Laws,* Submitted to the Legislature of the State of Minnesota, January, 1959, 10-11.
[216] Minnesota Bureau of Criminal Apprehension, *Annual Report to the Governor and the Legislature, For the Year Ending June 30, 1953* (St. Paul, MN: Bureau of Criminal Apprehension), 13.
[217] Wisconsin State Department of Public Welfare Bureau of Research, *Wisconsin's First Eleven Years of Experience with its Sex Crimes Law* (Madison: 1965), 5n1, Table 4. Under the new law, a person held as a sex offender had to be discharged after serving the maximum term for the crime of which the person was convicted, but

against children. Still, however, people were being committed for less serious acts. Of the 139 commitments for sexual perversion, the majority were accused of committing acts against people under eighteen. But the state made 49 commitments for acts of "sexual perversion" with someone eighteen years old or over, and twelve where the age of the victim was unknown. 10 people were committed for "circulation of obscene matter."[218] The Department of Public Welfare regarded the program as successfully serving its "dual purpose of treatment for the treatable and public protection by way of possible permanent segregation for those who are presently incapable of responding to known therapeutic procedures."[219]

Illinois made between thirty-one and eighty-two commitments a year under its sexual psychopath and sexually dangerous persons laws in the 1950s. This included people who were committed from a court proceeding, incarcerated people who were reclassified as sexually dangerous persons, and those who were committed as sexually dangerous persons after the expiration of their sentence. A 1959 report from the Department of Public Safety contained a breakdown of the 225 sexual psychopath or sexually dangerous person commitments. The commitments directly from court differed from those committed from the penitentiary in the racial makeup of committees. Of the 103 court commitments, 85 people were classified as white, and 18 were classified as Black. Of the 122 committed from a penitentiary, 79 were classified as white, while 43 were classified as Black. Of the 225 that were institutionalized as sexually dangerous persons in 1959, the most common accused crime listed was indecent liberties with a child, and the fourth most common was "crime against nature." Again, the long legacy of the idea that rape was not an indication of perversion was evident, as very few people who were

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this could be extended for multiple five-year terms, making the law effectively an indefinite detention law. One woman was found to need treatment under the law by 1961.

[218] Ibid, Table 14.

[219] Wisconsin State Department of Public Welfare, *Biennial Report 1956-1958*, 25.

accused of rape were committed from court—only three (though 26 people were committed from the penitentiary). Also evident in the statistics was the legacy of the idea that sexual violence within the home was less likely to be a sign of deviation, as the report noted that courts and administrators committed very few people accused of incest as sexually dangerous persons.[220] In the late 1960s, the state began to classify fewer and fewer people as sexually dangerous. By the end of the 1960s, the state had made 985 commitments.[221]

In Illinois, the state reclassified more incarcerated people as sexual psychopaths than were committed from court, demonstrating how the law was used to regulate sex within prison. As a result, many people committed as sexually dangerous persons were initially incarcerated for non-sexual crimes like auto larceny and drug crimes. Moreover, even after Illinois decriminalized consensual sodomy in 1962, same-sex sexual relations continued to be a target of administrators. A 1964 Psychiatric Division report stated that, "although a revision of the Illinois Criminal Code in 1962 does not define mutually acceptable homosexual acts that do not offend the public decency as a crime, the Classification Board considers such an individual to be an institutional containment and after thorough study to determine if other aspects of personality and history meet the criteria, may classify such an individual as sexually dangerous, on an institutional level and thus place him in Group V [sexually dangerous persons] with recommendation for transfer to the Psychiatric Division for appropriate care and treatment."[222]

California used its mentally disordered sex offender law very frequently in the 1950s and 1960s. In 1950, it made 105 commitments. In 1955, that number had jumped to 415. The number

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[220] Illinois Department of Public Safety, *Annual Report for the Fiscal Year Ending June 30, 1959* (Springfield: State of Illinois), 196.
[221] Illinois Department of Public Safety, *1969 Annual Report* (Springfield: State of Illinois), 117-118.
[222] Arthur V. Huffman and Wilson M. Meeks, *The Psychiatric Division Illinois State Penitentiary System: Its Purpose, Administration, Classification Procedures, Legal Aspects, Admissions and Extromissions* (Menard, Illinois: Illinois State Penitentiary, 1965), 24.

of commitments remained around that level for the next decade. In one prolific year, 1963, the state made 551 commitments under its mentally disordered sex offender law. The number of commitments initiated by a family member or someone else under the mentally abnormal sex offender law also increased from 11 people a year in 1950 to 101 a year in 1960.[223]

New Jersey examined all people convicted of sex offenses to determine whether they should be civilly committed and established a diagnostic center for this purpose. With the exception of 1950 to 1951 and 1951 to 1952, New Jersey examined over 300 people a year under its sexual psychopath law from 1949 to 1965. Examiners found 1,665 deviant and committed 1,117 to institutions. During this period, it placed another 545 on parole. The state only committed one woman during this period.[224] A dissertation on the law's operation during the fiscal year 1959-1960 found that the state examined 389 people under the law and found 106 deviant. The study noted that "paradoxically," the examiners found only 1 of the 26 people examined for rape met statutory criteria but found that 50% of those convicted for "open lewdness" met the criteria. Again, this was not so paradoxical given the history of thinking about perversion. In New Jersey, it does seem that white men were diverted into the civil system more frequently than Black men. 12% of people examined were non-white, double the state's population, while less than 5% of the people the state determined were deviant were non-white. A determination of deviancy did not necessarily mean commitment, as the diagnostic center could recommend probation with treatment, and the court did not have to follow the recommendation. That year, courts ordered 53 people committed, and only three of those were nonwhite.[225] 35% were committed for homosexual acts—14 people for an act with a minor and 5

[223] California Department of Mental Hygiene, *Statistical Report*, *Year Ending June 30,* 1965, 41.
[224] Alfred B. Vuocolo, "The Administration of the New Jersey Sex Offender Program," Ph.D. diss. (New York University, 1967), 104, 131.
[225] Ibid, 68, 100, 121-122.

for an act with someone over 16.[226] The New Jersey study stated that "in general, medical superintendents have been very cautious in recommending release from the hospitals and there is no doubt that the average sex offender remains in custody longer under the special handling than if he had been sentenced to the usual prison term."[227]

The author of the New Jersey dissertation communicated with administrators of sexual psychopath laws nationwide and visited facilities, providing valuable information on how often other states used their sex offender laws. Florida, for instance, had a Child Molester Law, which permitted the indefinite civil detention of a person convicted of a crime against children, with review every two years. When a hospital returned the detainee to court, the person would then be criminally sentenced. From 1951 to 1956, it committed 117 people under the law. Indiana made 442 commitments under its psychopath law between 1949 to 1964. Indiana could use its law against people merely charged with a crime and people placed on probation. Maryland made 287 commitments under its defective delinquent law, 30% for sex crimes. From 1958 to 1963, Massachusetts made 144 commitments under it sexually dangerous persons law, which permitted indeterminate civil commitments. By July 1, 1964, Michigan had made 1,111 commitments under its sexual psychopath law, with 296 people in residence at that time. Missouri made 74 commitments under its sexual psychopath law, which required only a criminal charge, between 1959 and 1964. Ohio made 596 commitments under its psychopathic offender law, which permitted indefinite civil commitments, between 1943 and 1964. From 1952 to 1963, Pennsylvania sentenced 126 people under its Barr-Walker Act, which permitted a court to

[226] Ibid, 124.
[227] Ibid, 91.

sentence a person convicted of specified sex crimes to an indeterminate term. Washington used its sexual psychopath law infrequently, making 53 commitments from 1961 to 1965.[228]

Some states that committed fewer people still subjected many to the demeaning and damaging examination process. For example, a study of New Hampshire's sexual psychopath law, which did not require a conviction, found that between 1958 and 1960, the state only committed 12 people as sexual psychopaths and referred another 43 for other forms of treatment or supervision. But the examining board examined 161 people during this period, and the report documented the trauma of the examination process itself, particularly in juvenile cases. In one case, the board examined a thirteen-year-old boy who was referred because "he had been seduced by an adult to indulge in a homosexual relationship." While the boy was not found to be a sexual psychopath, he was detained for six weeks at the State Industrial School, and, of course, had to undergo further examination before being declared not psychopathic. According to the report, "another of the several juvenile cases was that of a 12-year-old boy who was being examined as a 'sexual psychopath' because he and a 9-year-old boy compared the length of their genitalia and the 9-year-old boy reported this to his mother." In other cases, the study found that the board examined people whose guilt was doubtful, especially in cases where both parties consented.[229]

Though states like California, Michigan, and New Jersey used their sex offender laws very frequently, other states used them less often. Taken together, however, thousands of people were committed under the laws. They were certainly not nullified, as scholars have sometimes argued.[230] Though a few Southern states, like Tennessee, Florida, and West Virginia passed

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[228] Ibid, 180, 183, 187-189, 192, 198.
[229] G. Donald Niswander, "Some Aspects of 'Sexual Psychopath' Examinations in New Hampshire," *New Hampshire Bar Journal* 4, no. 2 (January 1962): 67, 74.
[230] Seeds, "Historical Model of Perpetual Confinement," 320.

sexual psychopath laws, there was a distinct coastal and especially midwestern bias to the laws. This likely reflects a number of factors, including a distrust in the South of what appeared to be a medicalized approach to crime, particularly given the racist focus on sex crimes committed by Black men and the long legacy of lynching.

Another important factor was the significant state capacity required to implement sexual psychopath laws, which included surveillance, experts, and special institutions. Sex crime panics were largely an urban phenomenon, meaning that there was more agitation to pass such laws in states with large cities. This pattern likely also reflected some of the historical factors discussed earlier in this dissertation. Chicago was the center of a number of early sex crime panics, and the site of agitation for the indefinite detention of people considered to be sexual deviates. Michigan and Illinois were also the first states to pass such laws. The midwestern bias, then, is not so surprising.

This more detailed analysis has also revealed that the sexual psychopath laws allowed states to put people away on flimsy grounds or for minor offenses. Recent scholarship on the sexual psychopath laws has argued that they did not represent a "crackdown" on deviant sex and that they "softened" the harshness of the criminal law for queer and sexually variant people. Chrystanthi Leon notes, for example, that people who were civilly committed in California spent less time incarcerated than people convicted of crimes.[231] But this was certainly not the case everywhere, as the New Jersey study found.[232] While it is true that the sexual psychopath laws were not used primarily against gay men, the laws were regularly used against people accused of minor offenses. Moreover, comparing sexual psychopath commitments to prison sentences can

[231] Leon, *Sex Fiends, Perverts, and Pedophiles*, 103; Lovovsky, *Vice Patrol*, 11.
[232] Vuocolo, "The Administration of the New Jersey Sex Offender Program" 91. It is notable that this was the case in New Jersey given that New Jersey was one of the few states that only allowed detention for the length of the criminal sentence.

be difficult. If people who were committed as sexual psychopaths tended to be accused of less serious crimes, then the comparison is not valid. Further, this conclusion ignores the jurisdictions in which people could be committed without a criminal conviction, wherein prosecutors could use a psychopath law in cases where they might not have otherwise brought a prosecution or where the prosecution was likely to fail. It also neglects the jurisdictions where people could be committed after serving their sentence, lengthening their incarceration. More problematic, however, for this argument, is the actual experiences of people detained as sexual psychopaths. These people, as will become clear in the next chapter, did not view the sexual psychopath laws as more lenient than criminal sentences.

CHAPTER 4: "A WAREHOUSING OPERATION FOR SOCIAL MISFITS;" CONTESTING THE SEXUAL PSYCHOPATH LAWS

In 1969, Thomas Cross, who was confined at St. Elizabeths Hospital as a sexual psychopath, appealed a denial of his habeas corpus petition to the D.C. Circuit Court of Appeals in a case that seemed designed to illustrate everything wrong with the sexual psychopath laws. Cross had been committed to St. Elizabeths for the first time in 1952 when he was eighteen for engaging in indecent exposure, a crime that carried a maximum sentence of ninety days. He was finally freed in 1967. Once released, he married a fellow patient he met at St Elizabeths, with whom he had a child. Only a few months after his release, however, he was again accused of exhibitionism and again committed to St. Elizabeths as a sexual psychopath—despite the fact that at his hearing, the psychiatrists who examined him testified that outpatient therapy would be better for him. His case revealed not just the possibility of prolonged detention for offenses normally considered minor but also the failure of treatment to "cure" people held as sexual psychopaths.[1]

In a decision authored by Judge David Bazelon, a leading expert on psychiatry and the law, the D.C. Circuit acknowledged that "no court can afford to ignore the very real constitutional problems surrounding incarceration predicated only upon a supposed propensity to commit criminal acts." "Incarceration may not seem 'punishment' to the jailors, but it is punishment to the jailed," the court stated.[2] The court noted that the sexual psychopath laws falsely claimed to offer treatment: "'Non-criminal' commitments of so-called dangerous persons have long served as preventive detention, but this function has been either excused or obscured by the promise that, while detained, the potential offender will be rehabilitated by treatment."

[1] *Cross v. Harris*, 418 F.2d 1095, 1096 (D.C. Cir. 1969).
[2] Ibid, 1101.

"Notoriously," the court declared, "this promise of treatment has served only to bring an illusion of benevolence to what is essentially a warehousing operation for social misfits."[3] The court remanded the case to the lower court and instructed it to consider whether Cross's detention was justified under the statute. The D.C. Circuit instructed the lower court to consider two questions. The first was the magnitude of harm posed by the accused, and the second was the likelihood of harm. The court warned that if on remand Cross was found to be a "sexual psychopath," it would raise serious questions about the constitutionality of the act, indicating quite clearly that exhibitionism alone did not justify indefinite detention.[4]

Strictly speaking, since the court remanded the case without deciding any constitutional questions, this was all just guidance for the lower court. Still, the case represented a significant victory for people detained as sexual psychopaths. Judge Bazelon, perhaps the nation's most influential jurist on issues at the intersection of mental health and the law, had recognized that sexual psychopath commitment was equivalent to criminal punishment and that the laws were a form of preventive detention. More concretely, the logic of the decision threatened to undermine the rationale of the sexual psychopath laws. The notion that detention had to be justified by the magnitude of harm that was likely to result from the accused's actions, as measured by prior actions, bore a striking resemblance to the notion that punishment had to be proportional to the gravity of the criminal act. But the idea that justified sexual psychopath laws in the first place was that past actions were not always a good predictor of future danger. Experts were better able to predict who might be dangerous based on abnormalities that might seem innocuous or merely

[3] Ibid, 1107.
[4] Ibid, 1100-1103.

a nuisance to the average observer. This new test, however, meant a reintroduction of proportionality constraints into the sexual psychopath regime.[5]

The D.C. Circuit's decision highlights the harm to the people warehoused under the sexual psychopath laws, and this chapter explores the experiences of people like Cross and their resistance to their warehousing. The first part of this chapter explores the nature of commitment in four locations: The Psychiatric Division of the Illinois State Penitentiary at Menard, Illinois; Ionia State Hospital in Michigan; St. Elizabeths Hospital in Washington, D.C.; and Atascadero State Hospital in California. The four locations I focus on represent the different forms detention and treatment could take. St. Elizabeths represented the most "humane" and advanced approach. The St. Elizabeths staff were some of the country's leading experts in sexual deviation and were themselves skeptical of much of the thinking that supported sexual psychopath laws. Atascadero also represented a new, advanced approach that was much more aggressive in the treatments pursued. In contrast, people confined at Ionia State Hospital and the Psychiatric Division at Menard experienced neglect and a lack of treatment that did not differ materially from other incarcerated people.

The evidence reveals features of the sexual psychopath laws obscured in existing histories. People civilly detained spoke of a distinct feeling of hopelessness and uncertainty. They claimed that they were denied the limited dignity afforded even to ordinary incarcerated people. Moreover, detainees recognized that their freedom depended largely on the favor of institutional doctors and administrators. They were in a uniquely precarious position that made any resistance or assertion of autonomy dangerous. This abjection and despair do not appear in court cases, institutional reports, or statistical analyses of the average time served. The testimony

[5] Ibid, 1097-1098.

in detainees' letters to the ACLU, their journals, and open letters rebuts any notion that the sexual psychopath laws were a more humane approach to crime than ordinary incarceration.

The second part of this chapter chronicles detainees' litigation against the sexual psychopath laws. Historians of sexuality and legal scholars have largely ignored this litigation, even though it involved such vital issues as the extent of the state's police power, the distinction between punishment and preventive detention, constitutional limits on status offenses, the meaning of equal protection and due process, and the role that predictions of dangerousness could play in the criminal legal system. The litigation was messy. People detained as sexual psychopaths often had difficulty securing assistance from civil liberties groups. Without any direction, detainees pursued different strategies. Though the struggle was largely carried out in the courts, the more radical parts of the gay liberation and anti-psychiatry movements allowed people detained as sexual psychopaths to publicize their plight in the early 1970s.

While the campaign was haphazard, it was quite successful. I argue that by bringing legal challenges, people committed as sexual psychopaths played a crucial role in dismantling the sexual psychopath regime. Appeals and lawsuits made the laws increasingly challenging and expensive for states to administer. Lawsuits revealed the lack of treatment and the deplorable conditions of confinement. But perhaps the most important effect of these challenges was an unintentional one. The increased legal process that courts began to require in sexual psychopath proceedings and court-imposed rights to treatment made the laws increasingly unpopular with advocates of a tough-on-crime approach. The laws no longer appeared as a supplement to the

criminal legal system but as a competitor to punishment. Under this pressure, many states began to repeal their laws or stopped using them.[6]

The consequences of ending the sexual psychopath regime were enormous. Clearly, with the rise of sex offender notification and registration requirements and Sexually Violent Predator laws, the campaign was hardly an unambiguous victory against carceral approaches to sexual violence. Still, the campaign against sexual psychopath laws deserves attention for its own sake. It provides insights into the problems with indeterminate sentences that contributed to the determinate sentencing revolution. It was an important, though ignored, part of the vibrant prisoner and patient rights movement of the late twentieth century. Finally, the campaign against sexual psychopath laws provides a model of constitutional change in which making a law difficult to use can be an effective strategy for abolition. It thus contains lessons for other abolition efforts, such as those against the death penalty.

I. *Commitment in Illinois*

The disorienting process of commitment itself emerges clearly from letters people committed as sexual psychopaths in Illinois sent to the state chapter of the American Civil Liberties Union (ACLU) during the 1950s and 1960s. These letters illuminate how people committed as sexual psychopaths thought about the process. Because the Illinois ACLU was particularly interested in process issues, these sources also provide detailed information about the mechanics of commitment. The testimony reveals how little the accused understood about the commitment process or the consequences of being declared a sexual psychopath. This offered an advantage to prosecutors. As the cases of Howard Rose and Frederick Dockree will demonstrate,

[6] For info on repeal, see George E. Dix, "Special Dispositional Alternative for Abnormal Offenders: Developments in the Law," in *Mentally Disordered Offenders: Perspective from Law and Social Science*, ed. John Monahan and Henry J. Steadman (New York: Plenum Press, 1983).

a lack of knowledge about the process and its consequences made the accused more willing to cooperate and less able to challenge the proceedings.

In 1954, Howard Rose was accused of molesting a woman. Instead of charging Rose with a crime, Illinois began sexual psychopath proceedings against him. Rose insisted on his innocence and demanded that he be charged with a crime and tried, but the state refused. Then, as Rose described it, "with promises of hospital care and clever means of deception I was compelled to be interviewed by two psychiatrists who asked a few questions." Once committed, Rose realized that the promise of treatment was a lie.[7] Frederick Dockree was accused of the crime of contributing to the delinquency of a minor, but Illinois did not try him. Instead, in January 1953, Illinois initiated commitment proceedings against him under the sexual psychopath law. He was provided an attorney for his trial, yet this attorney was of little help. As Dockree explained, "I did not converse with said appointed counsel; nor was I at any time ever was [sic] advised or informed of the consequences of such a hearing; nor to my rights if I had any; nor was I represented by said appointed counsel through the whole proceedings of said hearing; the court took a recess and when the hearing resumed … the defending counsel never showed up again." Dockree never even learned his attorney's name. The court committed him as a sexual psychopath, and he began to submit petitions to secure his release, to no avail.[8]

The sexual psychopath laws were a tool that could help prosecutors secure convictions in criminal cases. In 1945, Harvey Willett was accused of indecent liberties with a child. According to Willett, the prosecutor threatened that if Willett did not plead guilty, he would commence

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[7] Howard Rose to American Civil Liberties Union, Illinois Division, November 11, 1956, box 411, folder 7, American Civil Liberties Union Illinois Division Records, 1920-1982, Special Collections Research Center, University of Chicago (Hereafter Illinois ACLU Records).

[8] American Civil Liberties Case Report, Fred T. Dockree, March 15, 1951, box 411, folder 7, Illinois ACLU Records.

sexual psychopath proceedings against him. Willett pled guilty. After serving eleven years, Willett was set to be released, and he started preparing for life on the outside, including looking for employment. But shortly before his release, he was questioned by three psychiatrists. According to Willett: "I was questioned, thusly: Did I go to church? Did I have any money? Did I receive visits or letters from outsiders? Were any relatives sticking with me? About my prison record etc." His answers to these questions determined whether he would be diagnosed as a sexual psychopath. On November 18, 1955, Willet was taken to court. He assumed that he was going to another interview and was unaware that he was being taken to a commitment proceeding. Only the judge, two psychiatrists, and stenographers were present at the proceeding. No witnesses, other than the psychiatrists, attended. After the proceeding, Willett was taken back to prison to await the judge's decision. In December, a court declared Willett a sexual psychopath and transferred him to the Psychiatric Division at Menard. Again, the day that Willett was transferred, he was unaware of what was happening to him. Like many others, Willet filed handwritten and ultimately unsuccessful habeas petitions challenging his confinement.[9]

Court records and the testimony of other detained people support Willet's portrayal of the conclusory nature of the proceedings. Illinois convicted Edward A. Slater in 1942 for "crime against nature." As he wrote, "after doing my entire sentence I was taken to Randolph County Court on Feb. 15, 1949 and before one psychiatrist, 1 prison doctor, and two local doctors declared a sex psychopath without an attorney or jury." The hearing, he noted, lasted about fifteen to twenty minutes.[10] Things did not improve later. In 1963, for example, a court committed Henry Motis as a sexually dangerous person before the expiration of his sentence. He

[9] Harvey G. Willet to Donald Moore, October 12, 1956, box 411, folder 7, Illinois ACLU Records.
[10] Edward A. Slater to American Civil Liberties Union Illinois Division, October 21, 1956 box 593, folder 3, Illinois ACLU Records.

told the Illinois ACLU that his hearing was “less than five minutes,” with no lawyer present or jury present. His commitment order claimed that he had not requested either. As in other sexually dangerous person cases, the report of the examining physicians was a conclusory form document. The most detailed information about Motis appeared in the initial commitment petition. It contained a progress report from Dr. Groves Smith, the psychiatrist at Menard, that consisted of a single paragraph: “Sexually Dangerous Person. Inadequate personality structure. Average intelligence … Emotionally immature, dependent personality. He takes his hostility towards females by sexual abuse of female children. Doubtfully improvable offender. Doubtful prognosis. It is recommended he be returned to the Psychiatric Div. under the guardianship of the Director as a Sexually Dangerous Person.”[11]

The case of Alfred Schalde is particularly revealing of both the mechanics of the legal process and also the psychological toll of detention. In 1949, Schalde was given a two to five-year sentence for “crime against nature” involving an underage boy. A court sent him to the Joliet Diagnostic Depot where he was classified as a sexual psychopath and then transferred to the Psychiatric Division. Before the expiration of his sentence, the state held a hearing and determined that he was a sexual psychopath. Schalde claimed that he was not represented by counsel, was not able to call witnesses, nor cross-examine the state’s witnesses. The statute did not afford him any of these rights. He was still detained in 1956 when he began corresponding with the ACLU. Administrators determined that due to his satisfactory behavior in the institution, he could be released but only if they could secure his deportation to his native Norway. However, Schalde was a permanent resident and had been in the U.S. since he was

[11] Henry Motis to American Civil Liberties Union Illinois Division, August 25, 1963, box 593, folder 3, Illinois ACLU Records; Illinois, County of Randolph, In the Matter of Commitment of Henry Motis, No. 27947, Commitment Petition, Illinois ACLU Records; Illinois, County of Randolph, In the Matter of Commitment of Henry Motis, No. 27947, Report of Commission, box 593, folder 3, Illinois ACLU Records.

nineteen. According to Schalde, Immigration Services attempted to deport him on the grounds of "moral turpitude" but he resisted efforts to secure his cooperation, as he had two sisters, a son, and grandchildren still in the U.S.[12]

As Schalde unsuccessfully implored the ACLU to take up his case, his letters became increasingly desperate. They reveal the unique frustration that an indeterminate sentence could induce, fostering a hope that release was possible but uncertainty that it might never happen. Schalde, now in his sixties, had behaved well in the institution, according to the warden, and wanted to prove he could rehabilitate himself. He had served his sentence but was still detained. In his letters, Schalde described how time seemed to stop for people serving indeterminate sentences. He lamented that "I am doing dead time now," a term incarcerated people used to designate time that did not apply to a sentence.[13] For Schalde, this idea of doing "dead time" was both figurative and literal. In one letter he asked: "Is this to be our burial ground? I can't believe it. It is so unnatural, so unhuman." "I am old," he wrote, "also have a bad heart, records show few years left for me, but I am human."[14]

What was particularly frustrating to many people held as sexual psychopaths in Illinois was that they had already served their time and paid their debt to society. Schalde wrote that the crime he was convicted of "was paid for," yet he was still detained.[15] This sentiment that they had "paid the price" for their crime appeared in other letters from people civilly detained after

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[12] Ross V. Randolph (Warden Menard Branch, Illinois State Penitentiary) to John L. McKnight (Executive Director, American Civil Liberties Union Illinois Division), March 15, 1962, box 593, folder 3, Illinois ACLU Records; Alfred Schalde to Charles Liebman, May 13, 1956, box 411, folder 7, Illinois ACLU Records; Alfred Schalde to American Civil Liberties Union, October 15, 1956, box 411, folder 7, Illinois ACLU Records.
[13] Alfred Schalde to Charles Liebman, May 13, 1956, box 411, folder 7, Illinois ACLU Records; Alfred Schalde to George M. Leighton, April 29, 1956, box 411, folder 7, Illinois ACLU Records.
[14] Alfred Schalde to Charles Liebman, May 13, 1956, box 411, folder 7, Illinois ACLU Records; Alfred Schalde to George M. Leighton, April 29, 1956, box 411, folder 7, Illinois ACLU Records; Alfred Schalde to Charles Liebman, May 13, 1956, box 411, folder 7, Illinois ACLU Records. As will be discussed below, the ACLU refused to take his case.
[15] Alfred Schalde to Charles Liebman, May 13, 1956, box 411, folder 7, Illinois ACLU Records.

they had served their sentences. A few years later, in 1962, a man named Archie Price wrote to the Illinois ACLU that "restraining me of my liberty in prison although I have paid the penalty imposed upon me by law and said Circuit Court, is a cruelty and grave injustice." Refuting any notion that the privileged used psychopath laws to escape criminal sentences, Price noted that "It goes without saying that such is done only to the poor and underprivileged prisoner."[16]

One of the most revealing correspondences concerned the case of Rudy Barrios, whose predicament bore similarities to Schalde's. A man named Theron V. Warren, who had spent eleven years detained at the Psychiatric Division at Menard but was now free, brought Barrios's case to the attention of the Illinois ACLU. According to information Warren and the warden Ross V. Randolph provided, Barrios was born in San Francisco to Guatemalan parents. Soon after his birth, he returned to Guatemala, where he resided until he was twenty, at which point he returned to the U.S. According to Randolph, in the early 1950s, Barrios, who was himself repeatedly raped as an adolescent, was incarcerated in Wisconsin for committing a sex crime involving a child. In 1957, he was tried and classified as a sexually dangerous person in Illinois and transferred to the Psychiatric Division at Menard. Warden Randolph acknowledged that Barrios had shown no aggressiveness or "abnormal sexual interest" while institutionalized. By 1962, administrators were prepared to release him, but only if he moved to Guatemala. Because Barrios's family could not afford to bring him to Guatemala, he remained detained. Randolph explained to the ACLU that "inasmuch as the Director is the guardian and a specific program [of release] had not been made out yet," they were not prepared to release him in the U.S. Such a program would require that Barrios get a job, have no unsupervised contact with children, be able to continue to practice religion, and get "vocational rehabilitation." That Randolph

[16] Archie Price to Illinois ACLU, July 15, 1962, box 593, folder 3, Illinois ACLU Records.

explained all of this to the ACLU with little prompting indicates that there was nothing particularly unusual about the proposed arrangement. Indeed, Warren reported that Dr. Groves Smith had previously conditioned a detainee's release on his leaving the state of Illinois, though he was unaware of other cases where Smith had required leaving the country, as he did in Barrios's case.[17]

The letters also shed light on the treatment, or lack thereof, provided at Menard. Warren explained that detained people received very little counseling: "I can unequivocally state that there is no such thing as mental treatment for recovery from psychosis in Menard—unless it has been instituted since I was released." He explained that "an interview with the doctor consists, 90% of the time, of a few questions such as: 'How are you feeling? Are you getting along OK on the assignment? Are you getting along with the other inmates and the guards? OK, I'll call you later." "The doctor usually sees ten or twelve men in an hour and a half and is gone from the institution," Warren explained. The doctor might then visit a month later.[18]

The administrators at Menard acknowledged that treatment options were limited for people committed as sexually dangerous persons. In one of its reports for the fiscal year ending in 1959, the Department of Public Safety reported that "the limited staff can do little in the direction of intensive counseling and therapy" and that progress was mostly "the product of such self-reflection and maturation as sometimes does spontaneously come about under these confinement conditions."[19] Treatment mostly consisted of vocational training. The sociologist who ran the diagnostic group at Menard, Wilson Meeks, cautioned that: "therapeutic service must be interpreted broadly as no specific therapy exists for this form of mental disorder. The

[17] Ross V. Randolph to John L. McKnight, March 15, 1962, box 593, folder 3, Illinois ACLU Records; Theron V. Warren to John L. McKnight, March 12, 1962, box 593, folder 3, Illinois ACLU Records.
[18] Theron V. Warren to John L. McKnight, March 12, 1962, box 593, folder 3, Illinois ACLU Records.
[19] Department of Public Welfare, Illinois, *Annual Report For the Fiscal Year Ending 1959*, 192.

advisory-educational service consists primarily of cooperative effort between a clinic team and the administrative staff in initiating a workable program of vocational-academic training made to dovetail with the psychiatric, psychological and sociological needs of the individual."[20] Groves B. Smith, the psychiatrist at Menard, bragged of a successful case of rehabilitation, in which the detainee was "placed in leathercraft work." "Eventually," Smith claimed, "after two years of taking over the activities of that work, he disclosed a maturity that did not exist at the time of admission." In light of the cases of Schalde and Barrios, it is notable that Smith stated that the man "realized the importance of moving to another state and starting over and with the help of the religious group with which he was affiliated, [he and his wife] moved to another state and started life anew." How much coercion went into the man's decision to leave the state Smith did not reveal.[21]

In a letter to a lawyer representing a man named Duane Rankins, who had been committed as a sexually dangerous person after pleading guilty to indecent exposure, Warden Randolph offered particularly revealing details of "treatment" at Menard. He explained that administrators believed that Rankins should be detained so that he could progress in his rehabilitation, but the letter did not refer to any counseling. Instead, Randolph wrote that "Rankins is learning the fundamentals of leathercraft" and that he held different jobs at the institution. "All of this willingness to learn and to be of help speaks well of his overall adjustment on the institutional level," Randolph claimed. He also praised Rankins for seeking guidance from the pastor of his church and working on his marriage. Randolph seemed to favor

[20] William M. Meeks, "Criminal Sexual Psychopaths and Sexually Dangerous Persons," box 593, folder 3, Illinois ACLU Records.
[21] Groves B. Smith, "Sex Offenders: Their Therapeutic Possibilities and the Legal Difficulties Encountered in a 20 Year Experience in the Psychiatric Division, Illinois, Department of Public Safety, Menard, Illinois," *Conference of the International Association of Correctional Medicine, Proceedings*, *Vienna*, October 28-30, 1963, 219, box 593, folder 3, Illinois ACLU Records.

detainees who expressed an interest in Christianity. Randolph wrote that "we look upon him as one who, with a sufficiently long period of confinement and a growing awareness of the seriousness of what has transpired, will be definitely improved in the months ahead." Rankin's lawyer, who was working pro bono, had "cooperated with the States Attorney in having Duane found a sexually dangerous person and committed" because he believed that Rankins would receive treatment. After his correspondence with Warden Randolph, however, he was so disturbed at the lack of treatment that he tried to secure Rankins's release and contemplated suing the institution.[22]

Confinement and its attendant abjection were the primary modalities of "treatment" at the Psychiatric Division. "A major treatment procedure," explained the Menard psychiatrist Groves B. Smith, "is a concept called socio-shock therapy or the impact felt by the inmate when transplanted from the free community at the onset of diagnostic studies to the Psychiatric Division as a Sexually Dangerous Person." According to Smith, "for the first time they realize the seriousness of their behavior and the association with a group of degenerated sex offenders makes them realize the direction in which their lives were headed." Though Smith personally expressed liberal views about homosexuality, he also made clear that the sexuality of committed men was closely monitored. He claimed that "homosexual behavior is a major causative factor for aggressive behavior particularly on many occasions leading to threats directed toward more inadequate personalities of the group." "The regular searching of inmates and cell inspection often uncovers love notes, pornographic drawings," Smith noted.[23]

[22] Ross V. Randolph to H. Joseph Gitlin, July 13, 1962, box 593, folder 3, Illinois ACLU Records; H. Joseph Gitlin to Illinois ACLU, box 593, folder 3, Illinois ACLU Records.
[23] Smith, "Sex Offenders: Their Therapeutic Possibilities," 214, 217.

According to Theron Warren, the people confined at the Psychiatric Division supported each other not just through romantic relationships but through friendship. "I made friends of all types of individuals," he wrote, "the insane and the lunatic, the homosexuals, those with merely disturbed personalities, and others." "Those whom I could help, I helped, even if it were no more than letting them ease mental pressure by a half hour or so of talking it out without advice asked or given," he continued. The administration retaliated against him, Warren claimed, because he assisted other detainees. Warren held that "no one, be he ever so well versed in books and study, psychologist or psychiatrist, can understand the needs of men found in such places unless he has lived and associated with them day after day as an equal." Warren continued to work for the release of Barrios even after he left and despite his worries about people finding out that he had been detained, all of which attests to the sense of solidarity he felt with the people he met at the Psychiatric Division.[24]

People confined as sexual psychopaths were particularly vulnerable to retaliation, as their chances for release depended in large part on the assessment of institutional doctors. "It is well known," Warren wrote, "that the institutional psychiatrist's word is law as pertaining to the release or continued detention of the inmate." He explained, "Even when the inmate undergoes his examination before a supposedly disinterested panel of doctors for determination of his mental condition as affecting the question of release, they have the institutional report before them prior to and during the said examination; and in almost every instance the findings detailed in the report, together with its recommendations, are followed."[25]

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[24] Theron V. Warren to John L. McKnight, March 12, 1962, box 593, folder 3, Illinois ACLU Records.
[25] Theron V. Warren to American Civil Liberties Union, Illinois Division, February 19, 1962, box 593, folder 3, Illinois ACLU Records.

Detainees realized that the best way to secure release was to convince institutional psychiatrists that they had recovered by participating in treatment and agreeing with whatever their doctors said. The point of socio-shock therapy, after all, was forcing a detainee to admit that they were deviant. But to refuse to cooperate with psychiatrists was a way to assert control of one's thoughts and narrative. Rudy Barrios himself seems to have resisted treatment at great cost. According to Warren, "Dr. Smith demanded that [Barrios] make a statement that he was guilty of everything that the State's Attorney had inferred against him and … when he refused to accept guilt for any more than he had done, he was told that he could expect to remain there until he 'saw fit to do the right thing.'"[26] Because people in Illinois could be committed without having been convicted of an underlying crime, refusal to cooperate in treatment was a means of maintaining their innocence. Warren described a case in which a young man was committed without having been convicted of a crime and "served nearly three years in Menard because he would not make a statement to Dr. Smith that he was 'guilty as charged.'" Warren himself stated that "knowing that I was not lawfully committed to an insane asylum, I refused to shade my replies to interrogations to suit the doctor."[27]

II. *Detention in Michigan*

Michigan practiced a similar process of "conditioning" on sexual psychopath detainees. Michigan sent people found to be sexual psychopaths to Ionia State Hospital, an institution primarily for people deemed criminally insane. They were then either kept at Ionia or transferred to the State Prison. This practice continued for decades. Insight into the early conditions of confinement emerges from letters that detained people sent during the early to mid-1940s to the national ACLU. The state categorized the people held in state prison as sexual psychopaths—

[26] Theron V. Warren to John L. McKnight, March 12, 1962, box 593, folder 3, Illinois ACLU Records.
[27] Ibid.

often without criminal conviction—as visitors to the institution. William Kemmerer, who was incarcerated at the State Prison at Jackson, was identified as Visitor 18, though his conditions of confinement were the same as any other incarcerated person. In 1943, Kemmerer wrote a letter to Roger Baldwin, Executive Director of the National ACLU to explain the process of commitment. After being committed as sexual psychopaths, Kemmerer and the other men were: "committed to the Ionia State Hospital for the Criminally Insane, at Ionia, Michigan, where we were held for about 90 days for observation. Having been examined by the entire staff of said Hospital, and having seen that there was no evidence of psychosis we were transferred to the State prison. We have no treatment whatsoever, as there is no treatment known."[28]

The testimony of the medical superintendent of Ionia State Hospital, Perry C. Robertson, reveals that fifteen years later the state was still following the same procedure. Like Dr. Groves Smith in Illinois, Robertson believed that the key step in conditioning people held as sexual psychopaths was getting them to admit that they were a "sexual deviate" and were guilty of the alleged crime. A staff doctor testified in the same case that how much a committed person's story deviated from the police report was a key factor in their assessment, even though the police report was not necessarily tested in a trial. Administrators sent people who denied the police report or refused to admit their deviation to the State Prison at Jackson, where a psychiatrist would visit once every four months to check whether they were ready to admit their deviation. Robertson testified that "from all my reading, and my own personal experience of some forty

[28] William G. Kemmerer to Roger Baldwin, November 27, 1943, "American Civil Liberties Cases, 1944, State Correspondence, Michigan – Minnesota, Volume 2619," American Civil Liberties Union Records, The Roger Baldwin Years, 1917-1950, Seeley G. Mudd Manuscript Library, Princeton University, Princeton, NJ (hereinafter ACLU Records), link.gale.com/apps/doc/FQRROJ592048756/ACLU?u=chic_rbw&sid=bookmark-ACLU&pg=36.

years" this process was the standard treatment given to people committed as sexual psychopaths.[29]

Ionia State Hospital was primarily an institution for the detention of people with severe mental illness, those deemed criminally insane or too dangerous for detention in other state institutions. As such, it was not equipped to provide treatment for people committed as sexual psychopaths, who in the words of one attendant "were no different from [people] you see on the streets." A long-term guard at Ionia recalled that most people at the institution who were committed as criminal sexual psychopaths were sent within the first few months to the state prison.[30] Though the men transferred out of Ionia brought cases challenging these moves, it is possible that they were the lucky ones. From 1954 to 1959, the CIA, with Superintendent Robertson's participation, experimented on 142 people detained as sexual psychopaths at Ionia. The detainees were dosed with LSD and other drugs, sometimes without their knowledge, to determine whether the drugs would aid interrogations.[31]

III. *Detention in D.C.*

Other institutions offered more treatment for people with sexual disorders, including St. Elizabeths in Washington, D.C. The chief psychotherapist at St. Elizabeths was Dr. Benjamin Karpman, who was perhaps the most respected expert on sexual offenders in the midcentury U.S. Karpman was skeptical of sexual psychopath laws and in favor of decriminalizing sodomy.[32] He was interested in his patients as subjects for his research and his personal records. Journal entries

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[29] Record on Appeal at 19-21, *In re Maddox*, 88 N.W.2d 470 (Mich. 1958); *Report of the Governor's Study Commission*, 89, 92-93.

[30] Interview with Jesse Kapp, State Hospital Project, https://www.statehospitalproject.com/oral-histories/jesse-kapp; Interview with Lambert Struble, State Hospital Project, https://www.statehospitalproject.com/oral-histories/lambert-struble.

[31] "MKULTRA Briefing Book, containing brief summaries of each of the 149 MKULTRA subprojects," Subproject 39; Paul Magnusson, "Patients Stood in for Spies in Tests," *Detroit Free Press*, August 28, 1977; Paul Magnusson, "Experiments at Ionia: Judges Knew of Drug Tests," *Detroit Free Press*, August 18, 1977.

[32] Karpman criticized the proposed bill in a congressional hearing on it. Johnson, *The Lavender Scare*, 57.

written by his patients offer a uniquely intimate and detailed look into the lives of people detained as sexual psychopaths in the 1950s.[33]

Detention at St. Elizabeths might have been better than detention at most institutions where sexual psychopath detainees were held, but it was not pleasant. Many of the people committed as sexual psychopaths were detained at Howard Hall, the high-security unit. But cooperative patients were granted freedoms and privileges. The staff's family members, including children, walked the hospital grounds freely.[34] In the early years of the Miller Act (which contained D.C.'s sexual psychopath law) courts committed people for a wide range of offenses including disorderly conduct (soliciting a plainclothes policeman for sex), passing bad checks (the person's cashing of bad checks was thought to be connected somehow to their homosexuality), peeping, indecent exposure, looking up the dresses of women in public, and sexual assault of children. One nineteen-year-old Black man was classified as a sexual psychopath for following a white woman across town, even though he never approached her, again demonstrating how the laws could be used to police racial boundaries.[35]

Even at St. Elizabeths, patients felt like they were not getting the treatment that they needed. Some initially believed that treatment could cure their sexual "problems," especially same sex attraction. According to Karpman's files, one man, who was classified as a sexual psychopath for allegedly engaging in an act of coerced sodomy with another man, "asked for treatment or castration."[36] Another gay man at St. Elizabeths, whom I will call J.E., was arrested

[33] Because of the highly sensitive nature of the Karpman records, all patient names are anonymized.
[34] Benjamin Karpman Notes on KP69, box 16, folder 10, Benjamin Karpman Papers, Jean Nickolaus Tretter Collection in GLBT Studies, University of Minnesota Library (hereinafter Karpman Papers). Karpman's notes on one patient indicate that he exposed himself to the young daughters of physicians on three separate occasions before being transferred to Howard Hall.
[35] "A collection of about 205 cases of sexual offenders hospitalized here," box 5, folder 1, Karpman Papers.
[36] Ibid.

for allegedly having sexual relationships with young gay men in high school. J.E. wrote that after he learned of D.C.'s Miller Act, he initially thought it might help him with his same-sex desires:

> The idea of coming to [St. Elizabeths] had some attraction. I did not know whether anything could be done, but I used to note other people when I was out walking and look at them going about their business, with their own problems to be sure, but not as outcasts. I wondered how it would feel to be able to feel toward a female the same sex feelings that I had toward males and to know that I could then approach them openly, that no one would object or think that I was a degenerate? [37]

Once at St Elizabeths, J.E. was frustrated that Karpman did not help him but instead viewed him as a source of research for his academic work. Karpman posed seemingly endless questions to patients he was interested in, asking them to explore early sexual memories, masturbation habits, and so on. In one journal entry, J.E. wrote, "During this week, it has been with some reluctance that I have approached the answering of your questions." He continued, "in other words I am not convinced as yet that your first interest in me is in therapy as opposed to research." "At the moment," he admitted, "I have a fairly strong desire to throw the typewriter out of the window, bars and all."[38] Notes from the group therapy sessions likewise included complaints from the detainees that they were not getting the treatment they were promised. Patients also feared that what they said could harm their chances of release, which was a fundamental barrier to honesty in the therapeutic environment.[39]

Although these institutions failed to offer meaningful therapy, detainees often provided informal forms of therapy and solidarity to each other. JE's journal entries emphasized the importance of this solidarity. When he entered St. Elizabeths, he was in a particularly dark state, having attempted suicide several times. He wrote in an entry from August 26, 1954, that "when I came to Howard Hall [the high-security section of St. Elizabeths] at the end of March, I was in a

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[37] J.E., Journal Entry, July 11, 1955, box 8, folder 11, Karpman Papers.
[38] J.E., Journal Entry, September 30, 1954, box 8, folder 10, Karpman Papers.
[39] Notes from group therapy session, box 16, folder 13, Karpman Papers.

very depressed state of course, and this place doesn't do much to make you feel better." However, he wrote: "it did help to meet and mix with people—even crazy people—as I had been very lonely during the period prior to just coming here. One of the first that I met was W—another patient who came here just a week before I did and also under the Miller Act, though in his case it was for indecent exposure. So that was something in common from the first, especially when we found ourselves that first week in the same group therapy under Dr. D."[40] JE noted how he had opened up far more to W than to any doctor:

> He was quite frank in telling me about his experiences as an exhibitionist. In return, I told him about myself. This sharing of our trouble was a help to both of us, I am sure, since we were more sure of each other than of the doctor, and so told the other much more than we had probably ever told anyone else. The situation in which we found ourselves was unique, and conducive to this type of confidence as no other situation would ever be.

J.E. wrote that, "his companionship means much to me in keeping away that feeling of being alone that is the worst part of homosexuality." As in other institutions, administrators placed impediments in the way of solidarity. J.E.'s group therapy leader's desire to create a more confrontational atmosphere complicated his relationship with W. J.E. explained that: "Dr. D. was trying to make the group therapy really therapy and he wanted to stir everyone up. In this process, he used W. and another exhibitionist—telling them that some of the group such as myself were throwing in too much bullshit. … He would tell them to stir us up." Dr. D. seemed to have pressured the two men into discussing their relationship in the group sessions. Far from helping them, "we felt he had messed both of us up," J.E. wrote.[41]

IV. *Detention in California*

While J.E. was detained at St. Elizabeths, across the country, California opened its own model institution for the treatment of sexual psychopaths. Atascadero State Hospital received its

[40] J.E., Journal Entry, August 26, 1954, box 8, folder 10, Karpman Papers.
[41] J.E., Journal Entry, August 26, 1954, box 8, folder 10, Karpman Papers.

first patients in June 1954. Superintendent and medical director Reginald S. Rood sought to portray the hospital as a liberal, scientific institution that treated sex crime as a medical problem rather than a penal one. Rood was able to conscript the nascent homophile movement into his effort, publishing an article announcing the opening of Atascadero in the *Mattachine Review*, the magazine of the homophile group, The Mattachine Society. Atascadero was a maximum-security hospital that had 1,500 beds for people declared to be sexual psychopaths or criminally insane. Rood explained the rationale behind the institution: "We feel that hospital treatment for these cases [sexual psychopaths] will make them less likely to repeat their offenses than would a similar time in prison. The law also permits us to hold indefinitely any patient whose mental condition we believe would make him dangerous to be released." Uncooperative detainees could be sent to a penal institution. As for the treatments offered, Rood wrote that the institution would "emphasize, particularly industry, recreation, and group therapy." For Rood, it was the attitudes of the staff that would make a difference: "Hostility and contempt are incompatible with mental treatment. We cannot work for improvement in the person we reject."[42]

The "Emotional Security Program," (ESP) a detainee-led group that was given a putative role in the institution's governance, was a unique program at Atascadero. The group elected a council that represented the detainees to administrators and to people outside the institution. They published a newspaper, *The New Outlook*. The administrators of Atascadero used the ESP to depict Atascadero as a humane and scientific institution. The ESP published a booklet entitled "The New Approach: Sex Offender to Good Citizen," which portrayed the people held as sexual

[42] R.S. Rood, M.D., "Atascadero State Hospital," *Mattachine Review*, May-June 1955, 10-14. A far more detailed study of Atascadero and specifically its relationship with and significance to the early gay rights movement can be found in a recent dissertation that has informed my understanding of Atascadero. Paul Mark McNaughton, "Atascadero: Dachau for Queers, Examining the Transformation of the Gay Rights Movement from Accomodationism to Militancy, 1954-1974," Ph.D. diss., (University of California, San Diego, 2020).

psychopaths as potential good citizens whose psychological deviations had led them astray. It explained that after holding group therapy sessions and meetings, "the group decided to acquaint the interested public with what they, themselves, were trying to accomplish, and to sell the idea that sexual psychopaths were pretty normal people after all, and people who, they hoped, would be welcomed back into society." Through their publications and work, the group sought to portray sexual psychopaths in a more positive light.[43]

While the ESP was part of an ideological project to portray the sexual psychopath laws as humane and scientific, it seems likely that some detainees found the group helpful and meaningful, much as the people in St. Elizabeths and Menard found it invaluable to build solidarity with each other. Some of the people at Atascadero felt attraction to children or desires to commit violent acts that they needed help understanding and learning how to control. ESP documents reveal that many of the members dealt with deep feelings of remorse, shame, and self-hatred. The members seemed to help each other in processing these feelings. The group even took on the seemingly impossible task of re-signifying the word "sexual psychopath" so that it would not have as negative a connotation.[44] The ESP invited members of the Mattachine Society to their meetings and both groups expressed a sense of solidarity.[45] Dale Olson, the secretary of the Mattachine Society, wrote to the group that the Society held the ESP "in high esteem for its fine work in the emotional adjustment of the sex variant."[46]

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[43] Emotional Security Program, "The New Approach: Sex Offender to Good Citizen" (Atascadero, California, 1955), 18-19, box 3, folder 20, Mattachine Society Project Collection, ONE National Gay and Lesbian Archives, University of Southern California; "Sex Offenders Talk of Helping Themselves," (Reprint) *Mattachine Review*, November-December 1955, 12-14. Much more detail on the Mattachine Society's relationship to Atascadero can be found in McNaughton, "Atascadero: Dachau for Queers."

[44] James Phelan, "Sex Variants Find Their Own Answer," *Mattachine Review*, September-October 1955, 15-17; Emotional Security Program, "The New Approach."

[45] Ken Burns (Mattachine Society) to Jack R. Jett (Emotional Security Program), March 27, 1954, box 3, folder 20, ONE Archives, USC.

[46] Dale C. Olson to Fred Kidder, April 14, 1954, box 3, folder 20, ONE Archives, USC.

At the same time, aspects of the program seemed to encourage feelings of self-hatred, particularly for gay men. At a meeting in which the group discussed how society treated people convicted of sex offenses, one of the members of the group was reported to have defended the sex offender registration law on the ground that: “If it’s a choice of being a registered sex psychopath—and getting the help I’m getting here—and being the confused homosexual that I was when I came here, I think I’d prefer to register.” In their booklet, the group listed the most common offenses that led to detention, such as child molestation, incest, exhibitionism, peeping, and homosexuality, indicating that detention for homosexuality was hardly unusual.[47]

In fact, the rosy picture of self-governance at Atascadero promoted in the publications authored by the ESP and by Dr. Rood obscured a far darker side of the institution. As was true at other institutions, people detained at Atascadero had to submit fully to doctors or administrators to be released. A gay rights activist and artist named Sidney Bronstein was sent for observation to Atascadero in 1955 on a misdemeanor charge of lewd and lascivious conduct. Bronstein’s writings demonstrate his detailed understanding of contemporary psychology and psychiatry. He viewed the diagnostic category of “sexual psychopathy” as a scientific absurdity. Nonetheless, he wrote to a friend at the Mattachine Society that he intended “to ‘cooperate’ fully, which is the only possibility of freedom here.” Historian Paul Mark McNaugton’s research has revealed that Atascadero practiced aversive conditioning on people held as sexual psychopaths. In one case McNaughton discusses, the mother of a Black detainee named John Scott became so desperate to stop her son’s electroshock therapy in 1958, she confronted Dr. Rood and sent letters to the governor begging him to intercede but to no avail. Soon after, Scott died in the institution, with the cause of death listed as epilepsy. He was yet another victim of a tradition of experimenting

[47] Phelan, “Sex Variants Find Their Own Answer,” 15-17. This meeting was held at Metropolitan State Hospital before all the men held as sexual psychopaths were transferred to Atascadero.

on incarcerated Black men. As will be explored in more detail below, Atascadero became infamous for practicing horrific forms of treatment and experiments on detainees.[48]

V. *The Difficulty of Finding Allies*

People accused of being sexual psychopaths faced enormous obstacles in fighting their commitments at trial, regardless of whether or not they were appointed counsel. As testimony demonstrates, some people had little knowledge of the process or the implications of being committed as a sexual psychopath. Even those who were legally sophisticated could be misled. Duane Rankins's lawyer, for instance, seems to have genuinely believed that he was helping his client by getting him committed as a sexual psychopath and was disturbed when he learned of the conditions of Rankins's confinement from Warden Randolph. Sidney Bronstein was committed to Atascadero because the doctors examining him disagreed about whether he was a sexual psychopath. The judge offered him the choice of a ninety-day-period of observation at Norwalk State Hospital or incarceration. Bronstein wrote to a friend that he "reluctantly consented on the understanding that the observation would be at Norwalk (since I was aware that other institutions may vary in theory of therapy from brain surgery and shock therapy … to half-hearted 'psychotherapy')." Instead, to his surprise, he was committed to Atascadero, an institution that, unbeknownst to Bronstein at the time, did indeed practice shock therapy. His detailed knowledge of the differential treatment given to gay men at different California institutions ended up being of no help to him.[49]

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[48] Sidney Bronstein to Bill Lambert, January 29, 1955, box 1, folder 11, Sidney Bronstein Papers, 1939-1968, ONE National Gay and Lesbian Archives, University of Southern California (hereinafter Sidney Bronstein Papers); McNaughton, "Atascadero: Dachau for Queers," 61-62; Harriet A. Washington, *Medical Apartheid: The Dark History of Medical Experimentation on Black Americans from Colonial Times to the Present* (New York: Harlem Moon, 2008).

[49] Sidney Bronstein to Bill Lambert, January 29, 1955, box 1, folder 11, Bronstein Papers; See McNaughton, "Atascadero: Dachau for Queers," 21-53, for a more detailed discussion of Bronstein's detention.

The best opportunity many people had to challenge the sexual psychopath laws was through appeals and habeas petitions after they had been committed. Despite the criticism of the sexual psychopath laws, it was difficult for the accused to find allies, likely because the crimes involved ranged from the socially disfavored, such as sodomy, to the genuinely horrific, such as the sexually-motivated murder of children. The very labels applied to these people—"sexual psychopaths" "sexually dangerous persons," "psychopathic personalities," and "mentally disordered sex offenders"—were themselves barriers to sympathy or solidarity. According to these designations, these men were not just criminals but uniquely dangerous. Thus, people detained as sexual psychopaths often had to proceed without representation, writing habeas petitions from their institutions.

The two groups who might be thought to have the most sympathy for people detained under the sexual psychopath laws, the ACLU and the homophile movement, adopted the view that the sexual psychopath laws were an advance over the punitive approach. Recall that the Mattachine Society promoted superintendent Reginald Rood and Atascadero State Hospital as a humane approach to sexual crime. More broadly, two recent dissertations by scholars Paul Mark McNaughton and Scott De Orio have examined how the gay rights movement increasingly distanced itself from any association with people accused of sex offenses in the latter half of the twentieth century. Even civil rights groups, who were less likely to be accused of having sympathy for sex offenders, were wary of too close an association.[50]

Almost as soon as the laws were put into place, people detained as sexual psychopaths asked the ACLU for assistance. A number of people detained in Michigan sent letters to the ACLU pleading their case, but the group and its local representatives were reluctant to take up

[50] Scott De Orio, "Punishing Queer Sexuality in the Age of LGBT Rights," Ph.D. diss., (University of Michigan, 2017); McNaughton, "Atascadero: Dachau for Queers."

the cases. Michigan committed William Kemmerer in 1941 without a criminal trial based on an allegation of indecent exposure. In 1943, Kemmerer wrote a letter to Roger Baldwin, Executive Director of the National ACLU, asking the ACLU to fund a local attorney named Walter M. Nelson to take the cases of sexual psychopath detainees who had been transferred to Jackson State Prison. Kemmerer explained to Baldwin that the men had few options because other attorneys would not take their cases without being paid a very high fee, apparently afraid of being associated with efforts to strike down a popular law that purportedly kept women and children safe from deviants. Kemmerer summarized the men's plight: "A law that is unconstitutional; Courts that will not act upon it; attorneys who are afraid to 'bust' the law for fear they will lose their practice in Michigan." He was left without options.[51]

ACLU leadership was skeptical about taking the case. Staff counsel Clifford Forster wrote back to Kemmerer that he doubted whether the sexual psychopath law was unconstitutional, but he acknowledged that "it may well be that the procedure was not observed in your particular case."[52] In a letter to Walter Nelson, the Michigan attorney who was considering taking Kemmerer's case, Forster elaborated on his view that the law was constitutional. "Certainly, I believe," he wrote, "that it is a matter of public policy that a state may declear [sic] sexual psychopathy an offense and may provide for the commitment as quasi lunatics persons who have been charged with a criminal offence and exhibit sexual abnormalities." Forster also acknowledged "of course the difficulty involved in bringing cases of this kind."[53] Walter Nelson was a respected civil rights attorney who had represented a number

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[51] William G. Kemmerer to Roger Baldwin, November 27, 1943, "American Civil Liberties Cases, 1944, State Correspondence, Michigan – Minnesota, Volume 2619, ALCU Records.
[52] Clifford Forster to William G Kemmerer, December 15, 1943, "State Correspondence, Michigan – Minnesota, Volume 2619," ACLU Records.
[53] Clifford Forster to Walter Nelson, December 15, 1943, "State Correspondence, Michigan – Minnesota, Volume 2619," ACLU Records.

of unpopular people, including serving as co-counsel with Clarence Darrow in the defense of Ossian Sweet, a Black man who was charged with murder for defending his home against white supremacist vigilantes. Nelson would go on to support W.E.B. Du Bois and other accused communists.[54] Yet he was apprehensive about associating with accused sexual psychopaths. "The statute and its administration in Michigan," he wrote back, "has given me considerable bother, as I advised Mr. Baldwin when he was last here." "Numerous appeals have been made from Jackson and some of them I think are well grounded," Nelson continued. "However, I have hesitated to take any legal steps that would generally loosen upon Michigan the sex deviates confined at Jackson."[55]

Michael Rowan, another man confined at Jackson Prison as a sexual psychopath, wrote to Roger Baldwin imploring him for help. Rowan tried to make his case in the language of legal liberalism and civil rights. "The innocent and guilty are punished alike, as guilt or innocence is not qualified as material to the procedure," he wrote Baldwin. "Without any doubt this act is the most vicious piece of legislation ever written; it's a measure more despotic than any known to any form of government," he asserted. Rowan stressed the incredible discretion given to administrators. The law "authorizes a superintendent to keep such inmates imprisoned as long as his passions, his hates, his ambitions, or his interests dictates and upon cause or provocation as to him alone may appear sufficient." This discretion, Rowan wrote, sounding like a true Lockean, was "lawless tyranny."[56]

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[54] Walter M. Nelson to Harry S. Truman, May 17, 1951, *W. E. B. Du Bois Papers (MS 312),* Special Collections and University Archives, University of Massachusetts Amherst Libraries. http://credo.library.umass.edu/view/full/mums312-b134-i247; Carrie Sharlow, "Michigan Lawyers in History: Walter Morrow Nelson," *Michigan Bar Journal*, March 2019, 40–42.

[55] Walter M. Nelson to Clifford Foster, December 28, 1943, "State Correspondence, Michigan – Minnesota, Volume 2619," ACLU Records.

[56] Michael Rowan to Roger Baldwin, December 1943, "State Correspondence, Michigan – Minnesota, Volume 2619," ACLU Records.

Meanwhile, William Kemmerer brought his own habeas challenge to his detention, arguing his case pro se. Though it seemed to Walter Nelson that Kemmerer argued his case well, he lost.[57] In its 1944 decision *In re Kemmerer*, the Michigan Supreme Court acknowledged that if Kemmerer had been convicted of indecent exposure, he would already have been released; instead he "finds himself a prisoner for an indefinite period, possibly for life, because of the commission of a misdemeanor." Nonetheless, the court concluded that "he is not being punished for a crime but he has been placed in the care of the State hospital commission until he recovers from his uncontrollable habit of committing sex offenses." The court declared that Kemmerer "is entitled to proper care such as his condition and the good of society demands," and "if he is not receiving it and is suffering any unusual punishment, he can always present a petition for habeas corpus … where proper and full inquiry can be made into the facts." But Kemmerer's petition for release on the grounds that he had recovered did not contain, in the court's view, any factual basis for believing he had recovered. In 1946, the Supreme Court denied certiorari in Kemmerer's case.[58]

The ACLU was satisfied with this result since it meant that people confined as sexual psychopaths could bring habeas challenges to their commitments. ACLU staff counsel Clifford Forster wrote to Walter Nelson that "there are no more substantial civil liberty issues involved in the sex-devia [sic] cases with which you have apparently been plagued." "We do not believe," Forster wrote, "it is our function to determine what constitutes 'psychiatric treatment' although in clear cases such as where the state claims that a prisoner is to be beaten every hour on the hour with a club, we would take a different position." Whether the ACLU would get involved in cases

[57] Walter M. Nelson to Clifford Forster, October 10, 1944, "State Correspondence, Michigan – Minnesota, Volume 2619," ACLU Records.
[58] *In re Kemmerer*, 15 N.W.2d 652, 653 (1944), *cert. denied*, 329 U.S. 767.

where the beatings were given more intermittently Forster did not say. The sexual psychopath law "complies with what we consider to be the elements of due process, and we have no further interest in any particular cases," he concluded."[59]

It is likely that the ACLU's reluctance to take up the cause of people held as sexual psychopaths was in part based on a realistic reading of the current legal landscape, which was hardly favorable to the cause of these litigants. The Supreme Court had, after all, just declared a psychopath law constitutional.[60] At the same time, the ACLU passed up the opportunity to challenge the laws while they were new, relatively untested, and not yet a common feature of the legal landscape. In *Pearson*, though the Court upheld the Minnesota law, it noted its skepticism of the law, and Pearson had challenged the law *in limine*, meaning that the Court had not considered the constitutionality of the law as applied.[61] It is conceivable, then, that ACLU challenges might have had an impact. At the very least, the people held at Ionia demonstrated how legal challenges could make the laws costlier and more difficult to use. A 1951 state study noted that it took twice as much time for the psychiatric staff to monitor people committed as sexual psychopaths because of the legal requirements and because of "the great number of habeas corpus proceedings and court hearings."[62] Already, detainees were beginning to make use of the sexual psychopath laws more difficult.

People detained as sexual psychopaths were not much more successful in securing allies in the 1950s either, despite the increased criticism of the sexual psychopath laws discussed in the last chapter. The effect of this criticism was far more ambiguous than one might suppose. Much

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[59] Clifford Forster to Walter Nelson, October 19, 1944, "State Correspondence, Michigan – Minnesota, Volume 2619," ACLU Records.
[60] *Minnesota ex Rel. Pearson v. Probate Court*, 309 U.S. 270 (1940).
[61] Ibid, 275-277.
[62] Governor's Study Commission on the Deviated Sex Offender, *Report* (Michigan, 1951), 94.

of the criticism was muted and directed at procedural aspects of the sexual psychopath laws, rather than at the idea of indefinite, preventive detention itself. Critics of the sexual psychopath laws often argued that the laws were being misused or that institutions failed to offer treatment to the people detained as sexual psychopaths.[63] But as I have argued, the impetus for sexual psychopath laws was less a desire to provide treatment—though this motivation was not totally absent—and more a desire to indefinitely detain people outside the constraints of the criminal law, particularly people accused of low level offenses who could not be given lengthy criminal sentences or people whose crimes were hard to prove.

Critics like Paul Tappan, Francis Allen, the drafters of the Model Penal Code, and the more liberal state commissions had mistaken the promise of the laws for their actual structure. The sexual psychopath laws, they claimed, were supposed to offer treatment to people convicted of serious crimes, and they criticized the laws for failing to live up to that promise, rather than recognizing that the laws were acting just as intended, allowing for the indefinite detention of people with little legal process. Tappan's highly influential New Jersey report, for instance, argued that "it is quite probable that the kinds of cases that psychopath statutes are intended to cover—the dangerous and aggressive sex deviates—are the very sorts in which the courts are least prone to employ these non-punitive laws."[64] One could extrapolate from this logic that the sexual psychopath laws must be reformed and revised rather than abolished.[65] Perhaps the laws were even an attempt at a more scientific and advanced approach to crime. To challenge this

[63] See e.g., Tappan, "The Habitual Sex Offender," 26; Governor's Study Commission, *Report* (Michigan, 1951), 121.

[64] Tappan, "The Habitual Sex Offender," 26.

[65] Abolitionist organizer Mariame Kaba has forcefully argued that the criminal legal system is not broken or "not working" but is functioning as intended and that such arguments reinforce the legitimacy of the system. Mariame Kaba, *We Do This 'Til We Free Us: Abolitionist Organizing and Transforming Justice* (Chicago: Haymarket, 2021), 13.

process by arguing that the laws were unconstitutional full-stop was, according to this logic, to support the retributive view of punishment.

The deliberations of the Illinois ACLU over whether to represent people committed as sexually dangerous persons in the mid-1950s illustrates this dilemma well. In late 1955, people detained as sexually dangerous persons (the new term for sexual psychopaths) at the Illinois State Penitentiary at Menard contacted well-known civil rights attorney George Leighton, who then passed their correspondence on to the Illinois ACLU. In the letters, which are discussed above, a number of the men who had been classified as sexual psychopaths before their scheduled release from prison explained how they had simply been reclassified and then detained indefinitely. Staff counsel Donald Moore realized that there was a significant difference between the state's two sexually dangerous persons laws. The 1938 statute, contained in Chapter 38 of the criminal code, allowed the state to initiate commitment proceedings against a person charged with a crime, and it permitted the accused to demand a jury trial, representation, and appeal under the Civil Practice Act. The 1947 statute, located in Chapter 108 of the Penitentiaries Code, applied to people currently incarcerated and was the statute used to commit many of the men who wrote to the ACLU. It allowed the state to transfer an incarcerated person to the Psychiatric Division for indefinite detention if a commission consisting of two physicians, including one from the Illinois State Penitentiary, found that the person was a "sexually dangerous person." The penitentiaries code statute required no notice or hearing before commitment, and it did not provide for a jury trial on the issue, counsel, or any means to appeal the decision. Though the Illinois Supreme Court had previously upheld the statute as a valid exercise of the state's police power, Moore wrote a memo to the board tentatively recommending that the ACLU investigate

and possibly represent the men who had been confined under the Chapter 108 statute in habeas proceedings.[66]

The leadership of the Illinois ACLU was concerned about associating too closely with people accused of sex offenses, just as the national branch had been a decade earlier. A hand-written note on Moore's memo, likely written by Director of the Illinois ACLU Kenneth Douty, stated that, "On Action, I think the important end to achieve is amendment of the statute because the theory the law represents [is] a great advance in penology."[67] In another memo, he wondered, "in terms of protecting the public, what is the alternative?" "This we discussed but ought to think further on for it seriously involves our public posture. We need an answer to the question: 'So you would let an habitual offender against little children loose on the streets after his term is over altho [sic] the prison authorities think he is likely to repeat his offense,'" Douty wrote. [68] Concern about public backlash and a belief that the sexual psychopath laws were a step forward from traditional punitive approaches convinced the Illinois ACLU to work toward reforming rather than challenging the post-conviction statute. Moore worked with State Senator Marshall Korshak to craft a substantial revision to the post-conviction statute. Introduced in 1957, Senate Bill 297 revised the post-sentence statute by creating a right to counsel and to a jury trial before commitment as a sexually dangerous person, as well as a right to appeal and petition for release after commitment. These were significant procedural changes, which made it far more cumbersome for the state to detain people after the completion of their sentences.[69]

[66] Donald P. Moore, "Memorandum to the Board with Reference to Certain Sexually Dangerous Persons' Confined in the State Penitentiary After Their Sentences Have Been Served," box 411, folder 6, Illinois ACLU Records.
[67] Note on Moore, "Memo to the Board.
[68] "Re: Sexual Psychopath Laws," June 29, box 411, folder 7, Illinois ACLU Records. The document is signed only "Ken," but was likely Kenneth Douty.
[69] Donald P. Moore to Mary Oppenheim, April 3, 1957, box 411, folder 4, Illinois ALCU Records; Donald P. Moore to Senator Marshall Korshak, March 27, 1957, box 411, folder 4, Illinois ALCU Records; Senate Bill 297, Illinois 1957.

Nonetheless, these revisions did nothing to challenge the state's use of preventive indefinite detention based primarily on doctors' predictions about the future behavior of an individual. Law professor Francis Allen (who had served on the Illinois Commission on Sex Offenders, contributed to the Model Penal Code, and advised Donald Moore and the Illinois ACLU on the amendment of the statute) stressed this point. Allen wrote to Moore that, "the mere appointment of counsel, even competent counsel, will of course not ensure an adequate defense." The reality was that "if the defendant doesn't have funds to employ medical specialists, there may be little the lawyer can do by way of constructing an affirmative defense." "But the appointment of counsel may well have the important result of making the 'commission' act in a more responsible manner," Allen believed. This was, however, more a hope than a prediction.[70] By failing to challenge the constitutionality of the state's sexually dangerous persons laws and, in fact, working to put one of them on a firmer constitutional footing, the Illinois ACLU helped to prop up the state's sexual psychopath regime.

Problems with the laws continued to surface. When the Illinois ACLU wrote to Thomas Tourlentes, the superintendent of Illinois's Galesburg State Research Hospital, in 1963 seeking his opinion on the operation of the sexual dangerous persons laws, his assessment was not positive. Tourlentes acknowledged that his personal experience with the law was limited but in a communication that he asked the ACLU to keep confidential, he stated that it was his "strong impression that some State's Attorneys are inclined to favor this kind of case disposition in order to impose a more severe sentence on some sexual offenders." According to Tourlentes, prosecutors "shop around for psychiatrists who can give desired testimony which will assure sexual psychopath convictions, and they are angry when consulting psychiatrists make less

[70] Francis A. Allen to Donald P. Moore, December 11, 1956, box 411, folder 6, Illinois ALCU Records.

dramatic recommendations."[71] The revisions the ACLU had won did nothing to remedy this situation.

VI. *Litigation*

The notion that the sexual psychopath laws were rehabilitative might have made it difficult to find allies willing to dismantle the legal regime, but it also created an opening for people detained as sexual psychopaths to challenge the laws for not living up to this standard. This line of argument was, in a sense, calling the bluff of the laws' supporters. Decades earlier, when the laws were widely understood to be aimed primarily at the containment of dangerous people, this strategy was not particularly fruitful, as the Michigan case *In re Kemmerer* demonstrated. In fact, in 1949, California amended its sexual psychopath law to permit the indefinite detention of a person who would not benefit from treatment, following a case in which a man held as a sexual psychopath successfully challenged his continued detention after it had been determined that he would not benefit from further treatment.[72]

However, as they brought more cases, often pro se, detainees successfully argued that they had a right to be committed in a non-penal environment and even had a right to treatment.

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[71] Thomas T. Tourlentes to Jean Shanberg, February 6, 1963, box 593, folder 3, Illinois ACLU Records.
[72] *People v. Bennett*, 245 Cal. App. 2d 10, 15-19 (Cal. Ct. App.,(1966); In *re Stone*, 197 P.2d 847 (Cal. Ct. App. 3rd 1948); Ch. 1325, *Statutes of California 1949* (California State Printing Office). The details of Stone's case are interesting. Stone was initially declared a sexual psychopath in 1940 but was returned to court in 1941 when the Superintendent of Mendocino State Hospital declared that he was dangerous but would not be improved by further care and treatment. Because the evidence in the case was not preserved, the prosecutor asked the court to recommit Stone to Mendocino. Stone's lawyer requested that he be tried on the criminal charge, and Stone testified that he would prefer to be incarcerated at San Quentin rather than returned to the hospital. But the court recommitted Stone as a sexual psychopath. In 1942, he was paroled. He violated his parole and was recommitted in 1943. In 1945, the Superintendent of Mendocino again declared that Stone would not benefit from further treatment. In 1946, the court set a jury trial on the original charge, but the court suspended the proceedings when the district attorney told the court that it would be difficult to try the case. Instead, the court recommitted Stone to Mendocino. Finally, in 1948 Stone filed a writ of habeas corpus. The statute at that time stated that "when, in the opinion of the superintendent of the hospital, the sexual psychopath has not recovered from his sexual psychopathy and will not benefit by further care and treatment in the hospital, the superintendent may return him into court for further disposition of his case." A California Court of Appeals determined that the sexual psychopath law did not permit the indefinite detention of a person who would not benefit from further treatment. *In re Stone*, 197 P.2d 847 (Cal. Ct. App 3rd 1948).

As David Rothman noted in 1973, sexual psychopath detainee cases were some of the earliest successes of the movement to force courts to regulate the conditions of confinement in mental hospitals.[73] This argument had a number of plausible grounds. The most obvious was the statutory language since many sexual psychopath laws included language about mental illness and recovery. This argument, however, could be thwarted if a state decided to remove such language from its statute, as California did. Litigants could also make an equal protection claim that people categorized as sexual psychopaths should be treated like other patients. Sexual psychopath laws often provided fewer protections than involuntary commitment laws. Alternatively, litigants could point out that however expansive the police power was, it was not limitless. If the sexual psychopath laws were about protecting the public under the police power rather than punishing people who violated the law, then sexual psychopath laws should follow the model of quarantine laws and meet due process requirements of reasonableness. The idea was that the sexual psychopath laws were based on an implicit contract. Accused sexual psychopaths exchanged some procedural protections that people accused of crimes received, but in exchange they received treatment and restraint in a non-penal environment.

The success of detainees in challenging their conditions of confinement was striking, particularly given that courts seemed more reluctant to regulate mental hospitals than prisons.[74] One of the early successes was in the D.C. Circuit Court of Appeals in 1953. Robert H. Miller, with his court-appointed counsel, challenged his confinement as a sexual psychopath in Howard Hall at St. Elizabeths, the high-security wing of the hospital. Miller testified that he was confined with "many wild and violent insane persons" and in unchallenged testimony claimed that other

[73] David Rothman, "Decarcerating Prisoners and Patients," *Civil Liberties Review* 1 (Fall 1973): 17.
[74] In 1973, David Rothman noted that "judges were far more reluctant to intervene in mental hospitals, despite the obvious relevance of their decisions in criminal incarceration." Rothman, "Decarcerating Prisoners and Patients," 16.

patients had assaulted him. The D.C. Circuit Court of Appeals held that "incarceration of this petitioner in a place maintained for the confinement of the violent, criminal, hopeless insane, instead of in a place designed and operated for the treatment of the mentally ill who are not insane, is not authorized by the statute." Just as significant, it held that habeas corpus was an appropriate remedy and could be used to challenge not just the fact of confinement but also the place in which a person was confined. The court remanded the case so that the trial court could inquire into the conditions of confinement.[75]

In Michigan, people committed as sexual psychopaths also began to win cases challenging the state's practice of confining people, often in a prison, with essentially no treatment. Everett Fink, who challenged his commitment without a lawyer, was an ideal petitioner. He was charged with arson rather than a sex crime (the theory was that he received sexual excitement from starting fires) and was a veteran. Following his commitment in 1949, Fink was moved back and forth between the state prison and Ionia State Hospital. Fink claimed that he was given no treatment at either institution, not even the annual examination the statute required. The state did not challenge or deny these claims. In its opinion, the Michigan Supreme Court said that it could "see no difference between incarceration in a State prison as punishment for crime and confinement in the same prison as a psychopathic person, if the latter is treated as simply another member of the general prison population." In fact, the sexual psychopath detainee seemed to be in a worse position. "At least the criminal prisoner can look forward to his release upon the expiration of his term," the court noted, "but the psychopath has no hope of regaining his liberty until cured, a result which may be but little likelihood of attainment unless he receives the care and treatment for which he was committed." The court's comments on this were dicta,

[75] *Miller v. Overholser*, 206 F.2d 415, 417-420 (D.C. Cir. 1953).

however, as it ruled that Fink had to be discharged from custody on the grounds that the prosecutor's petition contained no facts showing that Fink was a sexual psychopath.[76]

The Michigan Supreme Court considered the issue of detention without treatment more clearly in a 1958 case, *In re Maddox*, which begins this dissertation. The litigant in the case was Embra Maddox, a Black man who had written a petition for a habeas writ in his jail cell in the State Prison of Southern Michigan. Maddox had been committed to Ionia State Hospital as a sexual psychopath and was then transferred to state prison. The Michigan Supreme Court had trouble determining why Maddox had been arrested. His attorney explained in his brief, which the state did not contradict, that he was arrested for attempted assault for a phone call he made to a white woman. According to his attorney, when he was set to be released a "picture of his wife, a white woman, fell to the floor and the authorities promptly filed a warrant and petition against the Appellant charging that he was a criminal sexual psychopath." Maddox testified that the officers were incensed when they found out he lived with a white woman and proceeded to beat him and call him a racial slur. Because Maddox did not challenge his original commitment, the Michigan Supreme Court did not inquire into it.[77]

Instead, the issue was the constitutionality of Maddox's confinement in the state prison. The medical superintendent of Ionia State Hospital, Perry C. Robertson, argued in Maddox's case that incarceration was itself a form of treatment. In a hearing ordered by the Michigan Supreme Court, Robertson maintained that Maddox had to be transferred to the state prison because he "didn't look upon himself at all as an abnormally deviated person."[78] Another doctor testified that confinement in prison did change Maddox's attitude "insofar as he said he was

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[76] *In re Fink,* 60 N.W.2d. 459, 460, 462-463 (Mich. 1953).
[77] Brief for Appellant at 3a, *In re Maddox*, 88 N.W.2d 470 (Mich. 1958); Record on Appeal at 90, *In re Maddox* (Mich. 1958); *In re Maddox*, 88 N.W.2d 470, 472 (Mich. 1958).
[78] Record on Appeal at 28, *In re Maddox*, 88 N.W.2d 470 (Mich. 1958).

going to stay away from white women" which had been "the source of his trouble."[79] The lower court denied Maddox's writ, holding that the doctors' testimony had established that transfer to state prison was a recognized treatment. Reversing, the Michigan Supreme Court held that "incarceration in a penitentiary designed and used for the confinement of convicted criminals is not a prescription available upon medical diagnosis and order to an administrative branch of government."[80] Incarceration in a penitentiary could only follow a trial in which a defendant enjoyed all the procedural protections under criminal law. The Court held that Maddox could not be held at the state prison and had to be held instead at an "appropriate state institution" or be released. Transfer back to Ionia was hardly an ideal situation for Maddox, but the case was important in cutting off a method by which the state could circumvent the entire criminal process. It became a leading case on this issue.[81]

A number of jurisdictions followed Michigan's lead in prohibiting detention in a prison. In a case in which Massachusetts brought commitment proceedings against an incarcerated person a day before his release, the Massachusetts Supreme Court ruled that, according to the statutory language, he had to be sent to a "treatment center" or released and could not simply be housed with the general prison population. The court held that "to be sustained as a nonpenal statute, in its application to the defendant, it is necessary that the remedial aspect of confinement thereunder have foundation in fact." The conditions of confinement either had to be genuinely remedial or accused sexual psychopaths were entitled to the full panoply of criminal procedural rights. Because the commitment was not remedial and the accused did not have the benefit of procedural rights, the commitment was invalid.[82]

[79] Ibid.
[80] *In re Maddox*, 88 N.W.2d 470, 476 (Mich. 1958).
[81] *In re Maddox*, 88 N.W.2d 470, 478 (Mich. 1958).
[82] *Commonwealth v. Page*, 159 N.E.2d 82, 85-86 (Mass. 1959).

In one sense, these victories were quite limited. Massachusetts soon established its "treatment center" for sexual offenders at the Massachusetts Correctional Institution at Bridgewater. Several other jurisdictions already had hospitals where people committed as sexual psychopaths could be held. Moreover, even courts that were willing to scrutinize transfers gave significant deference to administrators who claimed that detainees had been moved for safety or other reasons. In New Jersey, in 1956, Harold L. Wingler challenged his initial commitment and transfer to the New Jersey State Prison, pro se.[83] Wingler was transferred after he had complained about the shock treatments he was receiving, allegedly threatening to kill anyone who attempted to administer them. He had also organized a demonstration of people committed as sexual psychopaths and other patients of the hospital. His case made it to the New Jersey Supreme Court, where counsel was appointed to represent him.[84] Though the court remanded the case to determine whether his initial commitment and his transfer were valid, it indicated its skepticism of his claim that the transfer was invalid and emphasized the wide discretion the commissioner of the Department of Institutions had over transfers. In his dissent, Justice Heher pointed out that Winger's confinement in prison gave lie to the idea that he "was not 'sentenced' as a criminal, to expiate his crime in a penal institution, but rather was 'submitted' as a sexual psychopath, to a program of 'specialized treatment' for his 'mental and physical aberrations.'"[85] Transfer to a prison, then, was still a tool administrators could use to disrupt attempts to build solidarity between detainees or against detainees who fought back against abuse. Similarly, the D.C. Circuit Court of Appeals later held that people committed as sexual psychopaths could be

[83] *State v. Wingler*, 135 A.2d 468, 472 (N.J. 1957).
[84] Ibid.
[85] *State v. Wingler*, 135 A.2d 468, 478, 482 (N.J. 1957).

confined to Howard Hall at St. Elizabeths if there was evidence that they were a security risk, thereby limiting *Miller v. Overholser*.[86]

Still, these decisions created hurdles for prosecutors looking to use sexual psychopath laws. While certain institutions, like Atascadero in California, could house hundreds of people, other state hospitals had limited capacities. Massachusetts's new treatment center had beds for only 28 people. These institutions required psychiatrists and other specialists not necessary in prisons. The hospitals had to make some effort to show that the conditions of confinement were not as restrictive as those at a prison. Existing state hospitals were simply not designed to hold people who had a "mental illness" invented by statute, and administrators complained about the increasing number of people committed as sexual psychopaths who took up space and wasted their time by forcing them to respond to petitions for habeas writs or other legal challenges. These rulings were particularly important for people accused of low-level offenses because they changed the cost-benefit analysis of the state in deciding whether to commit such people indefinitely.[87]

Moreover, in the 1960s, some courts began to require more than detention in a non-penal environment. In 1966, the D.C. Circuit held in *Millard v. Cameron*, a decision written by Judge David Bazelon, that a sexual psychopath detainee had a right not just to be placed in a hospital environment but also to receive treatment.[88] The case centered on Maurice Millard, who had been detained since 1962 at St. Elizabeths Hospital as a sexual psychopath based on his arrest for indecent exposure. Millard challenged various aspects of his detention, including the lack of treatment. At the D.C. Circuit, his brief was prepared by Jack Wasserman, an immigration

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[86] *Clatterbuck v. Overholser*, 278 F.2d 20 (D.C. Cir. 1960).
[87] Illinois Department of Public Safety, *Annual Report for the Fiscal Year July 1, 1952 - June 30, 1953*, 140; Governor's Study Commission, *Report* (Michigan), 94.
[88] *Millard v. Cameron*, 373 F.2d 468, 471-472 (D.C. Cir. 1966).

attorney, and eminent civil liberties lawyer, David Carliner. Also on the brief was James Siena of the National Capital Area Civil Liberties Union.[89] The D.C. Circuit remanded the case, instructing the lower court to hold a hearing to determine whether the state had followed the required procedures and whether the act of indecent exposure rose to the level of conduct likely to cause "injury, pain, loss, or other evil." The court also considered Millard's claim that he was not receiving treatment at St. Elizabeths. Millard's doctor concluded that his desire to expose himself stemmed from his failure to be manly and assertive with his wife, and thus his treatment required his wife's participation. Because she refused to visit, he received virtually no treatment. Judge Bazelon wrote that "indefinite commitment under the Sexual Psychopath Law is 'justifiable only upon a theory of therapeutic treatment.'" The Court declared that if on remand, the lower court found Millard's detention valid, it had to inquire into his lack of treatment.[90]

The fact that detainees had to litigate so vociferously for treatment or even to be confined in a non-penal environment complicates the dominant characterization of the midcentury as the era of the "rehabilitative ideal."[91] To the extent that there was more treatment during this era and talk of rehabilitation was not empty rhetoric, incarcerated and detained people often had to fight for it. Courts might have been more sympathetic to arguments made in the key of rehabilitation, but detainees still had to litigate. But this strategy had terrible costs too. As will be explored

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[89] Wasserman and Carliner had a firm together. David Carliner recalled that he had been appointed to the case. David Carliner, interview by Charles Reischel, December 11, 1997, Oral History Project, The Historical Society of the District of Columbia Circuit (Washington, D.C., Historical Society of the District of Columbia Circuit, 1998) 97; Brief for Appellant at 10, *Millard v. Cameron*, 373 F.2d 468 (D.C. Cir. 1966), box 1064, folder 9, ACLU Records, The Making of Modern Law: American Civil Liberties Union Papers, link.gale.com/apps/doc/JTUVZZ311866046/ACLU?u=chic_rbw&sid=bookmark-ACLU&xid=fd00715a&pg=4.

[90] Brief for Appellant at 10, *Millard v. Cameron*, 373 F.2d 468 (D.C. Cir. 1966), box 1064, folder 9, ACLU Records; *Millard v. Cameron*, 373 F.2d 468, 473 (D.C. Cir. 1966). See also *Rouse v. Cameron*, 373 F.2d 451 (D.C. Cir. 1966).

[91] Chrysanthi Leon, for instance, periodizes her book around three eras: "The Sexual Psychopath Era" (1930-1955), "The Era of Rehabilitative Debate" (1950-1980), and "The Containment Era" (1980-Present). Leon, *Sex Fiends, Perverts, and Pedophiles*. See also Allen, *Decline of the Rehabilitative Ideal*.

below, states responded to arguments about the need for treatment by sometimes offering "treatments" that were indistinguishable from punishment and even torture.

There was a distinct strategy available to detainees. Rather than focusing on the conditions of confinement after commitment, one could challenge the commitment itself. Even early on, courts were sometimes willing to strike down commitments in which the commitment petitions included only conclusions and no supporting facts, providing an opportunity for detainees to secure their release.[92] Yet the facts that would support a finding that a person was a sexual psychopath and dangerous to the public could be ridiculous and rooted in prejudice. Allegations that a person, identified as male by the state, had worn women's clothing and engaged in "homosexual acts" were sufficient factual grounds for indefinite detention in California, for instance.[93] Nonetheless, detainees sometimes convinced courts to overturn commitments that went against the weight of the evidence or did not meet the statutory terms of commitment.[94] For instance, in a 1954 case, the Wisconsin Supreme Court held that a sexual psychopath commitment based on a charge of disorderly conduct in which a person was alleged to have used obscene language "did not fit into the legislative scheme" of the state's sexual psychopath law.[95]

People detained as sexual psychopaths also challenged procedural aspects of the sexual psychopath laws. Rather than argue that the sexual psychopath laws were essentially a mental health law in which the accused gave up certain protections in exchange for non-penal conditions of detention, this strategy argued that the sexual psychopath laws were equivalent

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[92] *People v. Artinian*, 31 N.W.2d 688 (Mich 1948); *In re Kelmar*, 35 N.W.2d. 476 (Mich. 1949); *In re Carter*, 60 N.W.2d 433 (Mich. 1953); *In re Irvine*, 87 N.W.2d 103 (Mich. 1957); *People v. McDonald*, 194 N.E.2d 541 (Ill. 1963).
[93] *People v. Martinez*, 278 P.2d 727 (Cal. App. 1955).
[94] *People v. Howell*, 138 N.E.2d 691 (Ill. App. 1956).
[95] *Wood v. Hansen*, 66 N.W.2d 722, 723 (Wis. 1954).

to criminal laws. At the least, the liberty interests involved were just as serious, and thus accused sexual psychopaths should enjoy the rights to a jury trial, to appeal, to representation, to the protection of the burden of proof beyond a reasonable doubt, against self-incrimination, and so on.[96]

In many jurisdictions, accused sexual psychopaths had to fight for the most basic procedural rights. In some jurisdictions, even the question of whether one had a right to appeal a sexual psychopath designation was an open question. In *People v. Ross*, a 1950 case involving a Black man who was committed as a sexual psychopath for "the crime against nature," the Illinois Supreme Court held that the state's sexual psychopath law included no right to appeal.[97] By contrast, the California Supreme Court read a right to appeal into that state's sexual psychopath statute in 1954.[98] In 1957, the Illinois Supreme Court reversed course and recognized the liberty interests involved in sexual psychopath commitments. The court declared that "it is of little significance that the proceedings are civil in nature" because a person found to be a sexually dangerous person was deprived of liberty. In a case brought by Andrew Capoldi, who was represented by a public defender, the court ruled that a state must provide preliminary proof of the voluntariness of a confession and that hearsay evidence had to be excluded from a hearing.[99] A few years later, the court held that an accused sexual psychopath had a right to confront witnesses against him, recognizing that "the proceedings in fact closely resemble criminal prosecutions in many critical respects."[100]

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[96] Though there was tension between these strategies, they were not necessarily in conflict. One might argue that accused sexual psychopaths should have all the ordinary criminal procedure protections and their confinement should be nonpunitive because it could be indefinite and, in several jurisdictions, could be supplementary to a criminal sentence.

[97] *People v. Ross*, 95 N.E.2d (Ill. 1950). A right to appeal was added by the 1955 revision discussed above.

[98] *Gross v. Superior Court of Los Angeles County*, 270 P.2d. 1025 (Cal 1954).

[99] *People v. Capoldi*, 139 N.E.2d 776, 779 (Ill. 1957).

[100] *People v Nastasio*, 168 N.E.2d 728, 731 (Ill. 1960).

A question central in the sexual psychopath jurisprudence was whether the accused enjoyed the privilege against self-incrimination. A willingness to cooperate with psychiatrists was key to the entire sexual psychopath regime. Rights-conscious defendants began to successfully assert this privilege in the 1960s. In 1963, Illinois began sexual psychopath proceedings against Forrest Gene English. An Illinois Court ordered English to undergo examination by two psychiatrists. English walked into each doctor's office, said that he felt the examinations would violate his constitutional rights, and was dismissed. He was then held in contempt of court, an order he appealed with counsel. On appeal, the Illinois Supreme Court reversed the contempt order, holding that "the privilege against self-incrimination protects defendants from making any statements to the psychiatrists which may tend to incriminate him."[101] Accused sexually dangerous persons could not refuse to be examined, but they could refuse to discuss anything that might be incriminating in a later criminal trial. Other states also applied the privilege against self-incrimination to sexual psychopath proceedings. These were victories on procedural issues, but they struck at the heart of the sexual psychopath legal regime by decreasing the power of psychiatrists over accused sexual psychopaths.[102]

It might be easy to see the people detained as sexual psychopaths as simply riding the wave of the Warren Court's "criminal procedure revolution," a period from 1961 to 1967 when the Court issued decisions like *Mapp v. Ohio, Gideon v. Wainwright,* and *Miranda v. Arizona* that seemed to expand the rights of people accused of crimes.[103] However, scholarship has demonstrated that there were strict limits to the Warren Court's liberalism. Already in the 1980s, law professor Yale Kamisar wrote that "despite its public reputation as a bold, crusading court,

[101] *People v. English*, 201 N.E.2d 455 (Ill. 1964).
[102] See e.g., *Sevigny v. Burns*, 227 A.2d 775 (N.H. 1967); *Haskett v. State*, 263 N.E. 2d 529 (Ind. 1970).
[103] 367 U.S. 643 (1961); 372 U.S. 335 (1963); 384 U.S. 436 (1966).

more often than not its criminal procedure decisions reflected a pattern of moderation and compromise." If there was a "criminal procedure revolution" at all, it was hardly clear that accused sexual psychopaths would benefit from it.[104] People accused of sexual psychopathy had to litigate for their rights, and sometimes at great risk.

Nonetheless, detainees began to win other significant victories during the 1960s. Pennsylvania's Barr-Walker Act allowed for an indefinite prison sentence for a person convicted of certain sex offenses who would "constitute a threat of bodily harm to members of the public, or is an habitual offender and mentally ill." Carl Gerchman pled guilty to assault with intent to ravish, and the court began Barr-Walker proceedings against him. Examiners found that he was not mentally ill but would "constitute a threat of bodily harm" if he was free. In the hearing, Gerchman was unable to cross-examine witnesses, introduce evidence, or even examine the psychiatric report. The court found that the Barr-Walker Act was applicable to him.[105]

In a sign of increasing willingness to assist people accused of sex offenses, the Greater Pittsburgh Chapter of the ACLU submitted an amicus brief in the case. The organization still made clear that it had "no special interest" in Gerchman, but was concerned about the constitutional issues involved in his case.[106] In addition to emphasizing the punitive nature of the statute, the ACLU argued in its brief that the statute obscured the potential of a life

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[104] Yale Kamisar, "The Warren Court (Was It Really So Defense-Minded?), The Burger Court (Is It really So Prosecution-Oriented?), and Police Investigatory Practices" in *The Burger Court: The Revolution That Wasn't*, ed. Vincent Blasi (New Haven: Yale University Press, 1983), 62-91. See also Yale Kamisar, "The Warren Court and Criminal Justice," in *The Warren Court: A Retrospective*, ed. Bernard Schwartz (Oxford: Oxford University Press, 1996), 116-158. For contemporary work, see Justin Driver, "The Constitutional Conservatism of the Warren Court," *California Law Review* 100, no. 5 (2012): 1101-1167; Eric J. Miller, "The Warren Court's Regulatory Revolution in Criminal Procedure," *Connecticut Law Review* 43, no. 1 (2010): 1-82.

[105] *United States ex rel. Gerchman v. Maroney*, 355 F.2d 302, 304-307 (3d. Cir 1966).

[106] Brief for American Civil Liberties Union as *Amicus Curiae* at 3-4, *United States ex rel. Gerchman v. Maroney*, 355 F.2d 302, No. 15221 (3d. Cir 1966).

sentence from defendants and juries in cases involving offenses subject to the Barr-Walker Act, including even minor charges like solicitation to commit sodomy.[107] For advocates of security measures who worried about jury nullification, this possibility had indeed been one of the upsides. The brief also pointed out that the statute permitted punishment for a status offense, which the Supreme Court had recently ruled unconstitutional in *Robinson v. California*, in addition to violating equal protection.[108]

The Third Circuit Court of Appeals found the Barr-Walker proceeding to be a criminal proceeding. It thus violated due process by depriving Gerchman of the right to confront or cross-examine witnesses. Merely because the law was not retributive and aimed at mitigating future danger did not make it any less punitive. Pennsylvania had clearly gone too far in its attempt to conceal an obvious criminal law in civil garb.[109]

In a similar case, the Wisconsin Supreme Court considered what rights a defendant sentenced under the state's Sex Crimes Act was entitled to. The law functioned much like the Barr-Walker Act and provided a procedure by which people convicted of sex crimes could be committed to Wisconsin's sex deviate facility. Strictly speaking, the commitment was not indefinite, but it could be extended past the maximum sentence for the crime. The statute provided no right to hearing on the issue. The question was whether this was simply a sentencing hearing or whether it was a separate proceeding. The distinction was significant due to the Supreme Court's earlier ruling in *Williams v. New York* that defendants did not have a right to examine a sentencing report.[110] The Wisconsin Supreme Court stated that it "considers this commitment procedure so essentially different from penal sentencing as to amount to an

[107] Ibid at 12.
[108] Ibid at 17.
[109] *United States ex rel. Gerchman v. Maroney*, 355 F.2d 302.
[110] 337 U.S. 241 (1949)

independent proceeding which determines such important rights of the defendant unrelated to the determination of guilt that due process requires a hearing thereon as much as it does for subsequent hearings on the same issue." The court held that "the defendant shall be afforded such hearing with counsel, process to compel attendance of witnesses, production of evidence, an examination by a doctor or psychiatrist of his own choosing, and if he is unable to provide counsel, he shall have counsel appointed for him at public expense."[111]

In 1967, the Supreme Court considered the constitutionality of an indeterminate sentencing law for people who committed sex offenses, and the court held the law unconstitutional. The case involved a challenge to Colorado's Sex Offenders Act. Under this law, if a trial court believed that a person convicted of "indecent liberties, incest, assault with intent to commit unnatural carnal copulation, or assault with intent to commit rape … constitutes a threat of bodily harm to members of the public, or is an habitual offender and mentally ill," the court could send the defendant to the Colorado Psychopathic Hospital for an examination and then sentence the person for an indeterminate prison term from one day to life. The law was framed as a sentencing statute.[112] Francis Eddie Specht was sentenced under the law without an open hearing, the opportunity to examine the psychiatric report, confront the witnesses against him, or call his own witnesses. In fact, in court, Specht tried to read his psychiatric report over his lawyer's shoulder and the court admonished him for doing so.[113]

In their brief to the Court, Specht's appointed lawyers pointed out that the maximum sentence for indecent liberties, the crime Specht was convicted of, was ten years, whereas, under the Sex Offenders Act, Specht could face life imprisonment and more onerous conditions of

[111] *Huebner v. State*, 147 N.W.2d 646, 656, 658 (Wis. 1967).
[112] *Specht v. Patterson*, 386 U.S. 605, 607 (1967).
[113] Transcript of Record at 7, *Specht v. Patterson*, 386 U.S. 605, No. 831 (1967).

parole. His lawyers argued that given the serious consequences of the law and the fact that it required a separate finding of fact, the sexual psychopath determination was a separate criminal proceeding rather than sentencing. As a result, Specht should have enjoyed the full panoply of criminal procedure rights, or at least the same rights given in civil commitment proceedings. The brief also pointed out the Sex Offenders Act was functionally identical to the Barr-Walker Act, which the Third Circuit had recently held was essentially a criminal proceeding.[114]

Colorado's lawyers framed the law as an "enlightened approach" that "rejects punishment and retribution and substitutes in its place control and discipline." According to the state, "it supplants rigidity with flexibility; it offers rehabilitation and treatment in lieu of the suspended deep freeze of custody alone."[115] The law represented the new approach to penology, which considered the individual rather than the act and rejected the logic that certain crimes yielded certain punishments, regardless of the particularities of the individual. "How can due process be offended by a sentence which is responsive to an enlightened approach to sentencing?" the state asked in its brief. [116] The case thus hinged on philosophical questions about the nature of punishment as much as on questions of equal protection and due process.

The Supreme Court rejected the state's argument in a unanimous decision written by Justice Douglas. The Court announced that the commitment had to satisfy the Due Process and Equal Protection Clauses, as it had decided in *Baxstrom v. Herold* in 1966. *Baxstrom* concerned New York's practice of detaining prisoners beyond the length of their sentence in a hospital for the criminally insane. The Court held that the civil commitment process was a violation of the Equal Protection Clause since it denied individuals a jury hearing, which was available to other

[114] Brief for Petitioner at 9-10, 23, *Specht v. Patterson*, 386 U.S. 605, No. 831 (1967).
[115] Brief for Respondent at 2-3, *Specht v. Patterson*, 386 U.S. 605 (1967).
[116] Brief for Respondent at 9, 12, *Specht v. Patterson*, 386 U.S. 605 (1967).

people civilly committed in the state.[117] In *Specht*, the Court relied on the Due Process Clause. "The Sex Offenders Act does not make the commission of a specified crime the basis for sentencing," the Court declared. Rather, "it makes one conviction the basis for commencing another proceeding under another Act to determine whether a person constitutes a threat of bodily harm to the public or is an habitual offender and mentally ill." This was a separate finding of fact.[118]

Most importantly, the court found that the law was punitive. On this point, the Court agreed with the Third Circuit, citing the recent *Gerchman* decision. The Court found that "the punishment under the second Act is criminal punishment even though it is designed not so much as retribution as it is to keep individuals from inflicting further harm." Therefore, the law violated due process because it did not allow the accused to be "present with counsel, have an opportunity to be heard, be confronted with witnesses against him, have the right to cross-examine, and to offer evidence of his own."[119]

Two aspects of the *Specht* decision are particularly notable. The first was the Court's pragmatic understanding of the nature of punishment. It did not matter whether the Sex Offender Act's purpose was to prevent future danger or to exact retribution or expiation for a crime. The law was obviously punitive. If the Court followed this idea to its conclusion, it was potentially deeply consequential. Jurisprudence on the boundary between civil and criminal law tended to make legislative intent determinative, ignoring the actual effects on the accused. In fact, the foundation of the sexual psychopath laws was the idea that security measures taken under the state's police power and role as *parens patriae* were distinct from punishment

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[117] *Baxstrom v. Herold*, 383 U.S. 107 (1966).
[118] *Specht v. Patterson*, 386 U.S. 605, 608 (1967).
[119] *Specht v. Patterson*, 386 U.S. 605, 610 (1967).

and could follow a different logic. While the Court did not question its early decision in *Minnesota ex rel. Pearson v. Probate Court* upholding the Minnesota psychopath law, the rationale of the *Specht* decision seemed to threaten the justification of the sexual psychopath laws.[120]

The second notable thing about the decision was its irony, namely that the Colorado law actually did away with some of the problematic elements embedded in earlier sex offender laws. The Colorado law reflected the ideas that many liberal critics of the sexual psychopath laws had advocated for in the 1950s. For example, in its midcentury report on "Psychiatrically Deviated Sex Offenders," the Group for the Advancement of Psychiatry had recommended as an alternative to sexual psychopath laws a measure that would allow judges to require an examination of people convicted of sex crimes. If the person was found to be sufficiently "mentally ill or mentally deficient," the judge could sentence the person to an indefinite term in an alternative institution, much like the Colorado law.[121] The Colorado law also did not use the term "sexual psychopath" or any other questionable nosological category. Finally, it only applied to people who had been convicted of a crime, meaning states could not use it to avoid a criminal prosecution in cases where evidence was weak. Of course, the Court did not say that such an approach was impermissible, but in requiring due process proceedings similar to a criminal trial, the Court essentially mandated two full trials, making this approach less attractive to the state.

This reflected one of the absurdities of the jurisprudence of the civil/criminal divide. Courts construed the provision of greater procedural protections to the accused—especially by

[120] Ibid at 610. The Court distinguished *Pearson* on the ground that the Minnesota law provided a hearing and other procedural protections not provided by the Colorado law. Ibid.
[121] Group for the Advancement of Psychiatry, *Psychiatrically Deviated Sex Offenders*, 2-3.

requiring a criminal conviction—as evidence that the statute was punitive in intent. In the abstract, if the question was only one of legislative intent, this made sense. A statute that only applied to people convicted of crimes appeared to be punitive in intent. In practice, this meant that the provision of more protections to the accused could make a statue more vulnerable to constitutional attack.[122]

The significance of the *Specht* ruling was immediately clear when a Pennsylvania court reluctantly struck down the Barr-Walker Act. In *Commonwealth v. Dooley*, another case in which the Greater Pittsburgh Chapter of the ACLU submitted an amicus brief, the court held that the Barr-Walker Act was "substantially identical" to the Colorado Act. The Pennsylvania Superior Court made quite clear that it disagreed with the Supreme Court but was bound by its decision and had to strike down the Barr-Walker Act.[123]

Though the *Specht* decision was a significant victory, courts were still declaring that sexual psychopath laws were civil in nature, sometimes leading to absurd results. Andrew Capoldi's case, noted above, exemplifies how states could still use sexual psychopath laws as a convenient workaround of the criminal legal system. In 1936, Capoldi had been indicted in a Cook County court for the murder of Antoinette Tiritilli—a case that motivated passage of Illinois's sexual psychopath law—and was declared incompetent to stand trial. In 1953, however, a court found him competent to stand trial.[124] But trying Capoldi would have been difficult given the passage of time and questions about the voluntariness of his confession, which was given only after two days of what papers at the time obliquely reported was "intensive questioning."[125]

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[122] See Alan Dershowitz, "Preventive Confinement: A Suggested Framework for Constitutional Analysis," *Texas Law Review* 51, no. 7 (1973): 1296-1301.
[123] *Commonwealth v. Dooley*, 232 A.2d 45 (Pa. Super. Ct., 1967).
[124] *People v. Capoldi* 139 N.E.2d 776, 777 (Ill. 1957).
[125] Associated Press, "Police Balk Lynching of Girl's Killer," *Herald and Review* (Decatur, Illinois), November 17, 1936.

Rather than try Capoldi for the crime, the State's Attorney of Cook County filed a petition to commit him as a sexual psychopath, which a jury granted. In 1957, the Illinois Supreme Court overturned Capoldi's commitment because the lower court had admitted a confession without establishing its voluntariness and had admitted hearsay evidence.[126] The state again instituted commitment proceedings against Capoldi as a sexually dangerous person in 1958. Because he could not afford to pay for a psychiatrist to testify in his favor and the state's experts' testimony was the only evidence in the trial, the trial judge directed the jury to find Capoldi to be a sexually dangerous person, and he was committed once again. Astonishingly, one of the doctors who examined Capoldi, William H. Haines, had been seeing him since the 1940s and testified that he knew early on that Capoldi was not incompetent to stand trial but did not change his classification until Capoldi "cooperated" in 1953.[127]

Capoldi sought a writ of error challenging his commitment and denials of his recovery petitions. Capoldi wrote to the Illinois ACLU urging them to take his case, likely with the help of another detainee or his lawyer since he was apparently illiterate. He emphasized, as other people held as sexual psychopaths did, that the law was biased against poor people who could not afford to hire a doctor to testify in their favor. "As long as the S.D.P. Act exists it will be used by the States' Attorneys and the Courts as an instrument of abuse and oppression against persons charged with sex crimes who are poor persons," he wrote. These facts were too egregious for the Illinois ACLU to ignore, and they submitted an amicus brief arguing that the directed verdict violated due process.[128]

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[126] *People v. Capoldi* 139 N.E.2d 776, 777, 779-780 (Ill. 1957).
[127] Abstract of Record at 39, *People v. Capoldi*, 225 N.E.2d 634, No. 38403 (Ill. 1967).
[128] Andrew Capoldi to Perry L. Weed, January 24, 1966, box 492, folder 1, Illinois ACLU Records.

The Illinois Supreme Court, however, did not even consider these arguments, ruling that Capoldi was precluded from challenging his commitment because the Sexually Dangerous Person Act was governed by the Civil Practice Code, which only permitted a sixty-day appeal period. Capoldi had argued that he should be subject to the rules that governed criminal appeals, which, he argued, would not bar his petition, but the court disagreed. He was thus precluded from making the argument that he should be protected against a directed verdict because the law was civil. Capoldi could only challenge the denial of a motion for a hearing on his recovery petition in 1963. His only chance at freedom, after having been detained for more than two decades without a criminal trial, was to prove that he had recovered.[129]

Despite the continued setbacks, sexual psychopath detainees continued to win significant victories. The D.C. Circuit Court of Appeals walked right up to the line of declaring D.C.'s sexual psychopath law unconstitutional in the late 1960s when Maurice Millard returned to the court. He had now been detained for more than half a decade for an offense that carried a maximum penalty of ninety days imprisonment.[130] In Millard's first appearance in the D.C. Circuit, discussed above, the court had remanded the case to consider whether Millard was receiving treatment, the statutory commitment procedures had been followed, and his acts of indecent exposure were likely to cause "injury, loss, pain, or other evil" to a viewer. The D.C.

[129] "Objection of Plaintiff in Error to the Motion of the People of the State of Illinois to Dismiss the Writ of Error," *People v. Capoldi*, 225 N.E.2d 634, No. 38403 (Ill. 1967), Box 492, Folder 1, Illinois ACLU Records. The court had initially held that it could not even review the 1963 recovery hearing until this error was pointed out and a rehearing granted. *People v. Capoldi*, No. 38403, September 1966, Box 492, Folder 1, Illinois ACLU Records; Perry Weed to Andrew Capoldi, March 31, 1967, Box 491, Folder 5, Illinois ACLU Records.

[130] There was a period in which Millard was permitted to leave the premises for a job and to stay with his family on weekends, but those privileges were revoked. Brief for Appellant at 10, *Millard v. Cameron*, 373 F.2d 468 (D.C. Cir. 1966), box 1064, folder 9, ACLU Records, link.gale.com/apps/doc/JTUVZZ311866046/ACLU?u=chic_rbw&sid=bookmark-ACLU&xid=fd00715a&pg=4.

Circuit had said that Millard's behavior had to involve conduct that was "not merely repulsive or repugnant, but that has a serious effect on the viewer."[131]

Millard's lawyers Armin Kuder and David Carliner, of the National Capital Area Civil Liberties Defense and Education Fund, prepared his brief. Kuder and Carliner argued that the statute was unconstitutionally vague. They maintained that committing Millard under the sexual psychopath law, rather than the 1964 Hospitalization of the Mentally Ill Act, was a denial of equal protection. The Hospitalization Act, they argued, superseded the sexual psychopath law because its expansive definition of mental illness covered people who were subject to the sexual psychopath law. This mattered because it offered more procedural protections than the sexual psychopath law and permitted outpatient therapy. Kuder and Carliner seized on the testimony of the expert witnesses, who could only speculate about the harm that might result from Millard's behavior and diagnosed Millard with passive-aggressive personality disorder. Millard's passivity and fear of women were primary themes of his diagnosis and treatment, and his lawyers argued that this showed that he was unlikely to ever attack women. Exhibitionism, by itself, would not have a sufficiently serious effect on a viewer to be covered by the statute, and if it was, then the statute was unconstitutionally vague, they reasoned.[132]

The opposing brief focused on the potential danger to children if Millard's *modus operandi* ever changed from exposing himself to women to exposing himself to children. The state's brief also stressed the fact that Millard's wife testified that he would occasionally walk around the home nude, in view of his young son. To avoid potential equal protection problems,

[131] *Millard v. Cameron*, 373 F.2d 468, 471 (D.C. Cir. 1966).

[132] Brief for Appellant at 7, 18-19, 22, 28, 36-37, *Millard v. Harris*, 406 F.2d 964, No. 21,492 (D.C. Cir. 1968).

the brief construed the sexual psychopath law to be inapplicable to the mentally ill, since the Hospitalization Act covered that category of persons.[133]

The D.C. Court of Appeals' opinion, again written by Judge Bazelon, declared that to avoid equal protection problems, the court had to read the sexual psychopath law as inapplicable to anyone who was mentally ill, since the greater procedural protections of the Hospitalization Law covered those people. The court could see no "rational reason for shading the procedural rights incident to commitment and release simply because the person's dangerous proclivities manifest themselves in the form of sexual misconduct."[134] This reading of the statute, the court acknowledged, was in danger of rendering the law meaningless and contradictory since the statute applied to people who lacked the power to control their impulses and such people were prima facie mentally ill. Still the court avoided striking down the statute on these grounds. Judge J. Skelly Wright, however, in his concurrence, argued that the statute should be struck down.[135]

Having sustained the constitutionality of the statute, the court went on to consider whether it was applicable to Millard. The court declared that the statute "is not applicable to him unless his past sexual misconduct enables us to conclude that his likely dangerousness places him within the statutory definition." Because mental illness was no longer a basis for detention, only Millard's conduct could justify his detention. The court thus had to consider a question for which there was little guidance available. What did "dangerousness" mean? Did it mean only danger of physical violence? Was psychological harm enough? If so, how much? What about people with different levels of sensitivity? After lengthy consideration, the court found Millard's conduct was not dangerous enough to justify his detention. Based on the psychiatric testimony,

[133] Brief for Appellee at 11-18, 28, *Millard v. Harris*, 406 F.2d 964, No. 21,492 (D.C. Cir. 1968).
[134] *Millard v. Harris*, 406 F.2d 964, 970 (D.C. Cir. 1968).
[135] *Millard v. Harris*, 406 F.2d 964, 972 (D.C. Cir. 1968).

the court concluded that the harm from witnessing an act of exhibitionism would pass quickly even if a person was unusually sensitive. Most women, the court reasoned, would only find the act "repulsive." The court held that Millard had to be released.[136]

The next year in *Cross v. Harris*—the case that opens this chapter—Judge Bazelon expanded on the D.C. Circuit's ruling in *Millard*. The case involved a man who was committed for exhibitionism and who had previously been detained at St. Elizabeths for fifteen years for the same crime. The court elaborated on the test of dangerousness first articulated in *Millard*. "Two questions must be answered in making this determination," the court explained. "The first is what *magnitude of harm* will justify commitment," which the court declared "must be substantial." The second question was the "*likelihood of harm*," which depended on a number of factors. And this question could not be allowed "to devolve, by default, on the expert witnesses." Lay judgments about what sort of dangers justified deprivations of liberty were essential.[137]

The court went further, questioning the constitutionality of the sexual psychopath law. It was, the court acknowledged, a status offense and a form of preventive detention. "Incarceration may not seem 'punishment' to the jailors, but it is punishment to the jailed," the court declared.[138] If preventive detention was constitutional, it had to be carefully circumscribed and the procedural protections had to be as robust as those for a criminal defendant, with periodic review to determine whether the detainee was still dangerous. It was clear in the opinion that continued litigation had revealed the reality of the laws. Bazelon wrote that "the promise of treatment has served only to bring an illusion of benevolence to what is essentially a

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[136] Ibid, 972-973, 976.
[137] *Cross v. Harris*, 418 F.2d 1095, 1100 (D.C. Cir. 1969).
[138] Ibid, 1101.

warehousing operation for social misfits." The court stopped short of declaring the law unconstitutional and instead remanded the case back to the lower court.[139]

The decision was not unanimous. Judge Warren Burger, known before his promotion to Chief Justice of the Supreme Court primarily for his conservative stance on criminal procedure issues, concurred in the remand. However, Burger disagreed with the majority's opinion that the law was a preventive detention measure and with the decision to opine on the issue at all since it was, strictly speaking, merely *dicta*. Burger also questioned the majority's assessment in the present case and in *Millard* that exhibitionism was not dangerous, citing the psychic trauma that could result.[140]

Millard and *Cross* were, of course, decisions from one appellate court, and one that was unusual in its willingness, under Judge Bazelon's leadership, to innovate in mental health jurisprudence. But it was also a highly respected court, and Judge Bazelon's decisions on mental health issues were particularly influential. Moreover, the rulings reflected a growing skepticism of the sexual psychopath laws. The logic of the court's opinion, if widely accepted, would cast doubt on the constitutionality of the entire sexual psychopath regime. Detainees' lawsuits revealed that there was little treatment given to people detained as sexual psychopaths and that conditions of detention were often as brutal as ordinary incarceration. These cases undercut the rationale that detention was for the benefit of the detainee, justified under the state's role as *parens patriae*. In the wake of *Millard* and *Cross*, the state's police power to prevent future danger was the only basis left for detention.

Judge Bazelon's discussion of the magnitude of the risk of future harm justifying detention was particularly important. Psychiatric testimony could inform the determination of the

[139] Ibid, 1107.
[140] Ibid, 1108-1109.

magnitude of risk, but the opinion indicated that prior conduct was most probative. One could not simply assume that an exhibitionist would proceed to more dangerous conduct. The length of detention, in other words, had to be proportional to the danger posed by the accused, measured by the prior actions of the accused. This would effectively mandate the introduction of proportionality constraints into the sexual psychopath regime. But the sexual psychopath laws had been designed precisely to avoid this economy of punishment. The thinking was that insofar as they provided treatment, it could not be determined ahead of time how long the course of treatment would need to last. Insofar as they protected against danger, prior conduct was not necessarily indicative of future danger, and only a trained expert would be able to determine the risks posed by a person that might not be visible to a layperson. But over the previous two decades, people held as sexual psychopaths had demonstrated in a number of cases that this testimony was inherently subjective and thus unreliable. The reintroduction of proportionality constraints also created awkward questions for courts about what type of harm justified preventive detention. Judge Bazelon had to minimize the harm that could result from witnessing exhibitionism, while Judge Burger wrote an opinion that was more sensitive to these harms.

VII. *Solidarity*

Although people committed as sexual psychopaths faced serious obstacles in the late-1960s and the 1970s, including a more conservative judiciary and the rise of law-and-order politics, they were able to tap into radical activism, including the gay liberation, antipsychiatry, and deinstitutionalization movements. As activists recognized at the time, sexual psychopath detainees brought some of the earliest successful legal challenges to the conditions of confinement in mental hospitals.[141] They therefore laid some of the foundations for the

[141] Rothman, "Decarcerating Prisoners and Patients:" 17.

movement for deinstitutionalization. More broadly, the deinstitutionalization movement took inspiration from works like Thomas Szasz's 1961 book *The Myth of Mental Illness*, which argued that mental diseases were invented rather than discovered. Activists opposed practices like electroshock therapy, brain surgery, and the use of mind-altering drugs. The gay liberation and antipsychiatry movements intersected in complicated ways.[142] On the one hand, Abram Lewis has argued, building on the work of Regina Kunzel, that "the legitimation of homosexuality during these years was secured through concerted efforts on the part of activists and allied professionals to disaggregate same-sex orientation from other varieties of social deviance, particularly disability." On the other hand, Lewis shows that other gay activists remained critical of the normalizing discourse of psychiatry and were not so quick to reject the label of madness.[143] Still, few wanted to identify too closely with people accused of sex crimes, particularly crimes against children. The people committed as sexual psychopaths had to push their way into these movements.

By the 1970s, people detained as sexual psychopaths increasingly brought their struggle out of the courts and directly to the public, using some of the tactics of civil rights and liberation movements. The people detained at Ionia State Hospital were particularly well organized. In 1967, a Michigan newspaper reported that dozens of people detained at Ionia had sent a letter to Washtenaw County Sheriff Douglas J. Harvey protesting their treatment. Harvey then received a second letter from two detained people who complained that they were threatened and beaten to force them to divulge the names of the signatories to the first letter. The allegations in the letters

[142] On the relationship between gay liberation and policing, see Timothy Stewart-Winter, *Queer Clout: Chicago and the Rise of Gay Politics* (Philadelphia: University of Pennsylvania Press, 2016).
[143] Abram J. Lewis, "'We Are Certain of Our Own Insanity': Antipsychiatry and the Gay Liberation Movement, 1968-1980," *Journal of the History of Sexuality* 25, no. 1 (2016): 86-87; Michael E. Staub, *Madness Is Civilization: When the Diagnosis Was Social, 1948-1980* (Chicago: University of Chicago Press, 2014).

were credible enough that Sheriff Harvey investigated the claims. A.A. Birzgalis, the medical superintendent of Ionia State Hospital, argued that the inmates had sent the letters to attract "sympathy and attention from the public." After visiting the institution and conducting interviews, Harvey dismissed the claims of abuse but did call for additional funding for treatment. He told the press that he would discuss his findings with Representative Roy Smith who chaired a committee that eventually recommended repealing the state's sexual psychopath law.[144]

Remarkably, some mainstream newspaper coverage even presented a sympathetic portrait of detainees. In 1970, the *Detroit Free Press* published an article about a case in which a local judge had declared that people detained as sexual psychopaths had a right to "adequate" treatment. The case involved a man named Billie Lee Bargy who had been committed, without conviction, for sexual acts with young boys. Though he was hardly a sympathetic case, the article pointed out that Bargy would have been free if he was convicted of the crime but now had "little prospect of getting out." The article quoted the judge's declaration that, "It is shocking to consider the record in this case and to realize that the things that have happened to the defendant could happen to a patient in a mental hospital in Michigan in the last half of the 20th Century." The paper also quoted from a letter signed by forty-two people held as sexual psychopaths at Ionia. The letter detailed the conditions of detention: "The only treatment that we are receiving is 'group therapy' presided over by a psychologist one hour a week. A patient is placed in one of these groups and listens to other patients tell their life story, and awaits his turn, which may be as long as two years. As a general policy, a patient is not paroled until he has at least 'told his story.'" According to the article, "a patient may wait years before he receives what the hospital

[144] "Psychos Beef at Rules, Claim Ionia Abuse," *Petoskey News Review*, July 14, 1967; "Sheriff Backs Ionia Hospital," *The News Palladium* (Benton Harbor, Michigan), July 20, 1967.

considers its chief form of therapy." Significantly, the article linked the issues facing sexual psychopath detainees with the "thousands of Michigan citizens who are in mental hospitals against their wills," making the issue more general than the concerns of people accused of sex offenses.[145]

While they were sometimes able to publicize their struggle in mainstream news sources, people detained as sexual psychopaths acquired additional avenues for publicity due to the growth of the radical and gay press in the late 1960s and 1970s. In a recent dissertation, historian Paul Mark McNaughton explores how Atascadero State Hospital in California became notorious within the gay liberation movement for using painful forms of conversion therapy on gay men who were detained there as mentally disordered sex offenders. Beginning in November 1968, Michael Selber wrote three articles for the *Los Angeles Advocate* about the conditions of detention in Atascadero. Selber was the pseudonym of a gay man who had been detained at Atascadero for having sex with a fifteen-year-old boy. McNaughton points out that Selber discussed the extensive use of electroconvulsive therapy as a treatment and punishment at Atascadero but did not claim it was used as a form of conversion therapy. Selber's primary critiques were ones that people civilly detained as sex offenders had voiced many times before—the power administrators had to transfer detainees to prison based on arbitrary criteria, the uncertainty of indefinite commitment, and the way that detention under the laws included elements of both treatment and punishment.[146]

The shocking story of a tortuous medical experiment at Atascadero stimulated more public sympathy for detainees. In October 1970, the *San Francisco Examiner* carried a front-page story of aversive conditioning experiments that were conducted on detainees at Atascadero

[145] Boyce Rensberger, "Therapy or Freedom: Inmates Victims in Dilemma," *Detroit Free Press*, May 3, 1970.
[146] McNaughton, "Atascadero: Dachau for Queers," 86-93.

State Hospital and Vacaville Prison. In July of that year, a medical journal published a paper on the results of experiments using the drug succinylcholine on detainees at Atascadero. According to the study, "succinylocholine offers an easily controlled, quickening, fear-producing experience during which the sensorium is intact and the patient rendered susceptible to suggestion." The drug induced paralysis from the fingers to the eyes to the diaphragm, halting breathing. The *San Francisco Examiner* reported that the inability to breathe led subjects of the experiments to believe that they were dying, and while they could not breathe, doctors would engage in suggestion.[147]

The clinical director of Atascadero Hospital, Michael Serber wrote an unpublished article with Carolyn Hiller that criticized his colleagues' use of succinylocholine. Serber and Hiller explained that doctors used the drug, without consent and on multiple occasions, at the hospital between 1966 and 1970 on at least ninety detainees.[148] "Among the behaviors and mental states which were subsequently treated with succinylocholine," Serber and Hiller wrote, "were masturbation, delusions, hallucinations, escape attempts, black militance, lying, homosexuality, laziness and mental retardation—just to mention a few criteria for succinylcholine treatment from the records that we have examined." For instance, Dr. Reimringer, the lead author of the published study on the experiments, stated in his notes from August 28, 1969: "This patient is increasingly agitating other patients. This involved trying to convert others to Muslims and

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[147] Robert Gillette, "'Fright Drug' in State Hospitals," *San Francisco Examiner*, October 14, 1970; Martin J. Reimringer, et al., "Succinylcholine as a Modifier of Acting-Out Behavior," *Clinical Medicine* 77, no. 7 (1970): 28-29.

[148] Michael Serber and Carolyn Hiller, "Who's Minding the Store: A Case Study of the Malfunctioning of Peer Review" (unpublished manuscript), 2, 6, accessible at https://www.documentcloud.org/documents/22066474-whosmindingthestore. The manuscript was published online by journalists Lee Romney and Jenny Johnson. For more on Serber's attempts to transform the treatment of gay people at Atascadero, see Lee Romney and Jenny Johnson, "When Gayness Was a Crime and a Mental Illness: One Man's Journey from Involuntary Confinement to Pride," *Mindsite News*, June 24, 2022, https://mindsitenews.org/2022/06/24/when-gayness-was-a-crime-and-a-mental-illness-one-mans-journey-from-involuntary-confinement-to-pride/.

involves racial problems. A course of anectine is indicated as other methods have failed." Serber and Hiller noted that "the patients at Atascadero are for the most part poor, socially deprived and have no friends in high places to support them in time of need," which made them more subject to abuse. It is likely that Black detainees were particularly vulnerable.[149]

While the people detained at Atascadero might not have had friends in high places, they did increasingly have friends in the more radical parts of the gay liberation movement. An article about the experiments that first appeared in the *Gay Sunshine Journal*, which was reprinted a number of times throughout the 1970s, was particularly influential. Written by journalist Don Jackson, the article spoke of rumors of other horrible treatments given to detainees at Atascadero. Jackson's article drew parallels between the experiments at Atascadero and Nazi experiments on concentration camp detainees. Paul Mark McNaughton points out in his dissertation that Jackson's articles presented a distorted view of what was happening at Atascadero.[150] Indeed, Jackson's articles were highly sensationalized, and his reporting relied on rumors. But the succinylcholine experiments certainly did happen, and others documented abuse at Atascadero, including the criminologist William Chambliss, who wrote an article about aversive conditioning designed to inhibit sexual arousal that he witnessed during a visit to Atascadero.[151] Interestingly, in an edited version of Jackson's article published in 1973, he explained that after his first article was published, he had received numerous letters from former detainees at Atascadero who critiqued his story. "Many complained," Jackson wrote, "that the story concentrated too much on succinylcholine, noting that it failed to inform readers of the other 'treatments' like electro-convulsive shock therapy." The detainees at Atascadero seemed to

[149] Serber and Hiller, "Who's Minding the Store," 7-8, 12.
[150] McNaughton, "Atascadero: Dachau for Queers," 99-105.
[151] William J. Chambliss, "A Visit to San Miguel," *Humanist* 31, no. 4 (July 1971): 24-25.

want more attention on their everyday abuses, but the media wanted to focus on the more sensationalistic instances of abuse.[152]

Another sensationalistic story would very soon emerge but this time in Michigan, where, in 1973, a lawyer discovered that doctors planned to perform an experimental brain surgery on a person committed as a sexual psychopath. The surgery was a project of the research institute of the Michigan Department of Mental Health. Researchers selected a man who had been detained at Ionia for eighteen years as a sexual psychopath on the allegation that he had committed first degree murder and rape, and they obtained his "consent" to the procedure. The first part of the procedure, in which electrodes were to be placed in his brain to identify the parts that were associated with aggressiveness, was scheduled for January 15, 1973. Before the surgery, local attorney Gabe Kaimowitz discovered the plans. Kaimowitz challenged the planned surgery in court on behalf of the detainee. Law professors Francis Allen and Robert Burt were appointed to the case. The court ordered the release of the man but went on to consider the constitutionality of the procedure anyway. In its opinion, the court declared that "psychosurgery should never be undertaken upon involuntarily committed populations, when there is a high risk, low benefit ratio" because obtaining informed consent was impossible in these circumstances.[153]

The case received significant media attention, especially in the gay and radical press. People committed as sexual psychopaths took advantage of a rare moment of public sympathy. Thirteen people detained as sexual psychopaths wrote a letter to Kaimowitz asking to be included in the lawsuit. A person detained as a sexual psychopath in Michigan wrote to a

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[152] Don Jackson, "California Runs an Atascadero 'Dachau' for Queers," *Los Angeles Free Press*, March 16, 1973.
[153] Kaimowitz v. Michigan, 42 USLW 2063 (Mich. Cir., Wayne County 1973), reproduced in *Prison Law Reporter* 2, no. 9 (August 1973): 433-435, 473-478. For more on this case, see Group for the Advancement of Psychiatry, *Psychiatry and the Sex Psychopath Legislation: The 30s to the 80s*, Vol. 9, No. 98 (New York: Group for the Advancement of Psychiatry, April 1977), 943-48.

Michigan magazine *The Gay Liberator* detailing why someone might consent to brain surgery. "The fact of the matter is every one of us here at the hospital are potential guinea pigs, for after being locked up for a long stretch of time anyone would grasp at any kind of hope if he or she thought we might be able to get out from behind the walls of a place as degrading and dehumanizing and depersonalizing as a state hospital," the letter writer explained. The letter writer stated that the people held at Ionia regretted their actions but should not be subject to experimental operations. The letter also alleged that after their correspondence with Kaimowitz was publicized, "a few of us are feeling the repercussions," hinting at retaliation at Ionia similar to what detainees who had brought attention to their situation the decade before had alleged. "It is next to impossible," the letter read, "to make people fully understand what it is like to spend a lot of years behind bars and at a state hospital such as this one, but I hope what I have written here will make the public more aware of what each and every one of us goes through every day."[154]

The psychosurgery case tapped into fears that psychiatric drugs were becoming a means of mind control, a concern shared on both the left and right. The preface to a Senate Judiciary Committee report on behavior modification techniques, written by Senator Sam Ervin, who was known both for his support for segregation and civil liberties (at least for white people), highlights the anxieties these technologies raised. Ervin wrote, "technology has begun to develop new methods of behavior control capable of altering not just an individual's actions but his very personality and manner of thinking as well." He continued, "the behavioral technology being developed in the United States today touches upon the most basic sources of individuality, and

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[154] "13 Mental Patients Protest Brain Surgery Experiment," *Detroit Free Press*, February 5, 1973; Anonymous, "Behind the Bars: A Letter form Ionia State," *The Gay Liberator* 26 (April-May 1973).

the very core of personal freedom."[155] Tapping into these concerns allowed people detained as sexual psychopaths to link their struggle with American values like freedom of speech and thought that were particularly potent during the Cold War. They became, for a moment, rights-bearing subjects, whose rights were being violated in frightening and un-American ways. The irony was that this was the period when the rehabilitative goals of the sexual psychopath laws had come more to the forefront, thanks in part to lawsuits from detainees. People detained as sexual psychopaths had demanded treatment, hoping for therapy as a way to understand and control their desires. But the attempts to treat people held as sexual psychopaths were sometimes far more cruel than simple containment ever had been.

VIII. *More Court Victories*

People detained as sexual psychopaths continued to win court cases, too, despite a more conservative federal judiciary. In 1972, the Supreme Court issued a decision on Wisconsin's Sex Crimes Act that again sided with committed people.[156] The Wisconsin statute allowed the state to civilly detain a person beyond the maximum sentence for an additional five-year period, which was renewable. Donald Humphrey pled guilty to contributing to the delinquency of a minor. The Department of Public Welfare then examined him and recommended he be committed under the Sex Crimes Act. Humphrey appeared in court but did not have representation, nor was there any hearing. He was then committed to the sex deviate facility at Wisconsin State Prison. At the expiration of his sentence, the Department requested that he remain in their custody. Humphrey

[155] *Individual Rights and the Federal Role in Behavior Modification, A Study Prepared by the Staff of the Subcommittee on Constitutional Rights of the Committee on the Judiciary*, 93rd Cong. (1974).
[156] *Humphrey v. Cady*, 405 U.S. 504 (1972).

refused to submit to an examination, and the court approved his commitment. Humphrey then filed a petition for habeas corpus in District Court, *pro se*. The court denied his petition and refused to hold an evidentiary hearing or appoint a lawyer to represent him. The Seventh Circuit Court of Appeals would not certify his appeal, so Humphrey petitioned the Supreme Court for a hearing.[157]

Humphrey argued that his rights had been violated, regardless of whether his was a civil or criminal proceeding. If it was civil, then he was denied equal protection of the laws because Wisconsin's Mental Health Act required a jury trial for every hearing and commitment to a mental hospital. There was no reason for denying Humphrey the same protections under the Sex Crimes Act. He argued that under the reasoning of *Baxstrom v. Herald*, the fact that the Sex Crimes Act required a criminal conviction was not a relevant distinction that justified the different procedures. On the other hand, if the law was criminal, then he was denied both equal protection and due process.[158] The state of Wisconsin stressed the differences between the Sex Crimes Act and the Mental Health Act. The Sex Crimes Act required a conviction of a crime, unlike the Mental Health Act. It also required a finding of mental or physical "aberrations" (which did not render the person irresponsible for their acts), while the Mental Health Act required a finding of incompetency. The conditions for release under the Sex Crimes Act required that the person no longer pose a danger to the public, whereas the Mental Health Act required that the person was not dangerous to themselves. Finally, the state pointed out the conditions of commitment were different for "sexual psychopathy, a new concept, then for the older concept of insanity."[159]

[157] Brief for Petitioner at 4-6, *Humphrey v. Cady*, 405 U.S. 504, No. 70-5004 (1972); Brief for Respondent at 4-5, *Humphrey v. Cady*, 405 U.S. 504, No. 70-5004 (1972).
[158] Brief for Petitioner at 4-6, *Humphrey v. Cady*, 405 U.S. 504, No. 70-5004 (1972).
[159] Brief for Respondent at 45-46, *Humphrey v. Cady*, 405 U.S. 504, No. 70-5004 (1972)

In a unanimous decision written by Justice Marshall, the Supreme Court declared that Humphrey's claims were "at least substantial enough to warrant an evidentiary hearing."[160] The Court pointed out that Wisconsin required a jury trial in civil commitment cases. "Like most, if not all, other States with similar legislation, Wisconsin conditions such confinement not solely on the medical judgment that the defendant is mentally ill and treatable, but also on the social and legal judgment that his potential for doing harm, to himself or to others, is great enough to justify such a massive curtailment of liberty," Marshall wrote. According to the Court, "the jury serves the critical function of introducing into the process a lay judgment, reflecting values generally held in the community, concerning the kinds of potential harm that justify the State in confining a person for compulsory treatment."[161] "Commitment for compulsory treatment under the Wisconsin Sex Crimes Act," the Court explained, "appears to require precisely the same kind of determination, involving a mixture of medical and social or legal judgments."[162] The Court noted that the state's argument that the proceedings were an alternative to sentencing might be relevant to the initial commitment, which lasted only for the length of the criminal sentence, but could not apply to the five-year commitment renewals which were "based on new findings of fact and are in no way limited by the nature of the defendant's crime or the maximum sentence authorized for that crime."[163]

The problem for Wisconsin was that it appeared that the conditions that would justify commitment under the Sex Crimes Act were not necessarily different from those under the Mental Health Act. The Court held that "the equal protection claim would seem to be especially persuasive if it develops on remand that petitioner was deprived of a jury determination, or of

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[160] *Humphrey v. Cady*, 405 U.S. 504, 508 (1972).
[161] Ibid, 509.
[162] Ibid, 510.
[163] Ibid, 511.

other procedural protections, merely by the arbitrary decision of the State to seek his commitment under one statute rather than the other." The Court remanded the case to allow Humphrey to develop these issues and to allow the state to develop its argument that Humphrey was procedurally barred from bringing his claims.[164]

Humphrey was a limited holding, remanding the case back to the lower court to allow the parties to develop their evidence, but it had important implications for sexual psychopath proceedings, and, in fact, for all civil commitments.[165] The mere recognition that commitment under the sexual psychopath laws was a "massive curtailment of liberty" was itself significant. The Court also observed that medical judgment alone did not justify civil commitment. A lay judgment of the potential harm must also justify it.[166] This indicated that expert predictions of risk might not be enough to justify civil detention. Commitment, it seemed, had to be proportional to the risks, according to community standards. Once again, this contradicted the key premise of the sexual psychopath laws. Experts were supposed to be able to identify a potentially dangerous person whose prior actions might not give a true indication of their future danger to a lay person. According to this logic, it was not surprising that the Wisconsin statute did not provide for a jury trial.

The opinion indicated that the Court was sympathetic to the equal protection arguments people committed as sexual psychopaths often made. Notably, Chief Justice Burger, who had been skeptical of Judge Bazelon's sexual psychopath decisions, had now joined the majority opinion. As states added more procedural protections into general commitment laws and courts

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[164] Ibid, 512.
[165] See Susan K. Jackson, "Commitment and Release Standards and Procedure: Uniform Treatment for the Mentally Ill," *The University of Chicago Law* Review 41, no. 4 (1974): 829.
[166] Ibid, 509.

required more protections in such proceedings, people detained as sexual psychopaths would benefit too. But this argument also had the potential to crack the foundation of the sexual psychopath regime. The idea that abnormal people who committed sex crimes were different from other mentally ill people was the very basis for these laws. If states had to treat allegedly mentally ill people who were accused of sex crimes the same as other mentally ill people, then the rationale for the laws would disappear.

It was not, it should be emphasized, preordained that sexual psychopath detainees would benefit from the Supreme Court's new equal protection jurisprudence. *Humphrey* was decided at a time when the Court's equal protection jurisprudence was in flux. In his famous 1971 *Harvard Law Review* foreword on this jurisprudence, law professor Gerald Gunther grouped *Humphrey* with five other cases that "found bite in the equal protection clause after explicitly voicing the traditionally toothless minimal scrutiny standard." "These are," Gunther wrote, "truly startling and intriguing developments."[167] In fact, the Court's decisions in *Specht v. Patterson* and *Humphrey v. Cady* remain controversial today, with some arguing that the Court's equal protection analysis missed an important distinction between accused mentally ill sex offenders and other mentally ill persons. The success of these arguments, then, was hardly inevitable.[168]

The equal protection argument with respect to civil commitment statutes was helpful to detainees because it did not require plaintiffs to prove that a sexual psychopath law was actually criminal in character. Yet there was still much to be gained by arguing that the laws were criminal. Even robust civil commitment statutes did not offer the rights provided in criminal trials, particularly the right to a standard of proof beyond a reasonable doubt. Naturally then,

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[167] Gerald Gunther, "The Supreme Court 1971 Term: In Search of Evolving Doctrine on a Changing Court: A Model for a Newer Equal Protection," *Harvard Law Review* 86, no. 1 (1972): 18-19.

[168] See e.g., Cary Federman, *Democracy and Deliberation: The Law and Politics of Sex Offender Legislation* (Ann Arbor: University of Michigan Press, 2021), 110-114.

detainees continued to argue that the laws were criminal laws in disguise, and they benefited in particular from developments in juvenile delinquency jurisprudence. In the 1967 case *In re Gault*, the Supreme Court held that the due process clause governed juvenile delinquency proceedings, and in 1970, the Supreme Court decided that due process required a "beyond a reasonable doubt" standard in civil juvenile delinquency hearings because the delinquent label would result in a loss of liberty and stigmatization.[169] But whether such a standard would apply in sexual psychopath proceedings was very much an open question.

In 1969, Frank Stachulak was arrested for indecent solicitation of a child, a misdemeanor in Illinois that carried a maximum sentence of one year. Rather than prosecuting him, Illinois charged him with being a sexually dangerous person and committed him to the Psychiatric Division of the Illinois State Penitentiary. Four years later, he challenged his commitment under 42 U.S.C. §1983 and the Habeas Corpus Act, arguing that Illinois's use of a "preponderance of the evidence" test in sexually dangerous person cases violated his constitutional rights. The district court agreed, finding that the state must prove the necessity for commitment beyond a reasonable doubt.[170]

On appeal, the attorney general's brief argued, quite reasonably, that given the uncertainty involved in psychiatric diagnoses, requiring proof beyond a reasonable doubt would render the Sexually Dangerous Persons Act unusable. This, the state argued, differentiated the Sexually Dangerous Persons Act from the juvenile delinquency hearing at issue in *In re Winship*, which more closely resembled an ordinary criminal trial. The brief also put forward the argument

[169] *In re Winship*, 397 U.S. 358 (1970).
[170] Stachulak v. Coughlin, 369 F. Supp. 628 (N.D. Ill 1973); Brief for Petitioner, Appellee at 6-7, *United States ex rel. Stachulak v. Coughlin*, 520 F.2d 931, No. 74-1155 (7th Cir. 1975).

that treatment during detention justified a less rigorous standard.[171] The state's attorney of Cook County submitted an amicus brief that made an admission in the form of an argument: "amicus believes that no commitments can honestly be made under the Sexually Dangerous Persons Act if the standard of proof to be applied is one of proof beyond a reasonable doubt" because "the science of human behavior has not yet evolved to a level of predicting future human behavior with sufficient accuracy."[172]

Stachulak's brief was prepared by the University of Chicago's Mandel Legal Aid Clinic, again showing how detainees were able to secure assistance in a way they had not been able to in the past. The brief pointed out that "instead of facing the difficulty of convicting Stachulak by proving to a jury beyond a reasonable doubt that he committed criminal acts, the State has sent him to prison by convincing a jury by a mere preponderance of the evidence that he has a mental disorder and propensities to the commission of sex offense." This lesser standard could not, in the wake of *In re Winship*, be justified by any claim that the statute provided treatment rather than punishment.[173]

The Seventh Circuit agreed with Stachulak and found that the beyond a reasonable doubt standard was required in sexually dangerous person proceedings. The Court found that *In re Winship* was controlling. The court reasoned that, if anything, sexually dangerous person proceedings presented a stronger case for the higher standard of proof than juvenile delinquency proceedings:

> Here, the loss of liberty is as great, if not greater, than the loss in *Winship*. The violator of the criminal law - be he an adult or juvenile - is imprisoned, if at all, in almost all cases

[171] Brief for Respondent-Appellant at 7-10, *United States ex rel. Stachulak v. Coughlin*, 520 F.2d 931, No. 74-1155 (7th Cir. 1975).
[172] Brief of the People of the State of Illinois at 2, *United States ex rel. Stachulak v. Coughlin*, 520 F.2d 931, No. 74-1155 (7th Cir. 1975).
[173] Brief for Petitioner-Appellee at 6, 11, *United States ex rel. Stachulak v. Coughlin*, 520 F.2d 931, No. 74-1155 (7th Cir. 1975).

> for a definite term. The person found to be sexually dangerous, in stark contrast, is committed for an indeterminate period and is unable to attain his freedom until he can prove that he is no longer sexually dangerous. Likewise with respect to stigma, an involuntary commitment for sexual dangerousness presents an *a fortiori* case: Unlike the delinquency proceedings in *Winship*, these actions are not confidential, and an adjudication of sexual dangerousness is certainly more damning than a finding of juvenile delinquency. [174]

The notion that treatment justified this lesser standard was "archaic." Citing Judge Bazelon's phrase in *Cross v. Harris*, the court observed that the sexual psychopath laws were "essentially a warehousing operation for social misfits." For the court, the fact that psychiatric knowledge was uncertain demonstrated the importance of a reasonable doubt standard, and thus the court required such a standard in sexual psychopath proceedings.[175] The Seventh Circuit's imposition of the beyond a reasonable doubt standard was controversial, and other courts settled on different standards.[176] The California Supreme Court also held that a proof beyond a reasonable doubt standard was required in Mentally Disordered Sex Offender proceedings, which was particularly significant given the large number of people committed under the statute.[177] The Supreme Court denied cert in *Stachulak*, but Justices White and Powell dissented, on the ground that appeals courts had applied different standards in such cases and the Court should therefore resolve the circuit split.[178]

Some detainees won even more sweeping victories. Chester Feagley had a longstanding compulsion to touch people's hair and had pled guilty to simple battery for touching the hair of two young girls. A California trial court found him to be a mentally disordered sex offender who would not benefit from treatment and confined him indefinitely. He then appealed to the

[174] United States ex rel. *Stachulak v. Coughlin*, 520 F.2d 931, 935-936 (7th Cir. 1975).
[175] Ibid, 936-37.
[176] See e.g., *Hollis v. Smith*, 571 F.2d 685, 695 (2d Cir. 1978).
[177] *People v. Burnick*, 535 P.2d 352 (Cal. 1975).
[178] *Stachulak v. Coughlin*, 520 F.2d 931 (7th Cir. 1975), *cert. denied* 42 U.S. 947, 948, No. 75-608 (1976).

California Supreme Court. Feagley was just the sort of person whom the sexual psychopath laws were originally designed to detain. He had not yet committed a serious crime but seemed to have a troubling compulsion that could possibly manifest itself in more serious conduct later. However, citing the Maddox case, the California Supreme Court held that confinement in such a case amounted to life imprisonment without the possibility of parole and violated the prohibition against cruel and unusual punishments. Once again, a court recognized that sexual psychopath detention was a form of punishment, one that had to bear some relation to the prior acts of the accused.[179] Perhaps even more striking, men held as sexual psychopaths in Alabama brought a class action suit in 1973, which led a federal district court to declare aspects of the statute unconstitutional.[180]

IX. *The Dissolution of the Sexual Psychopath Regime*

At this point, sexual psychopath laws were left without any real constituency of support. Administrators and superintendents were some of the harshest critics. In 1965, Dr. Harris F. Bunnell, the superintendent of Eastern State Hospital in Washington State, called the state's law a "two-headed monster" because it assumed that sexual psychopaths were sick and needed treatment but also that they should never be released. In 1966, Dr. Warren Burns, the superintendent of New Hampshire Hospital, said that recent cases had forced him to ask whether the state's law had sufficient procedural safeguards and to consider ways to improve the treatment given to people detained as sexual psychopaths. Burns acknowledged frankly that even if the state had adequate personnel to provide treatment to detainees, it did not have adequate facilities. "The whole structure of the (sexual psychopath) law needs review and rewriting," Burns said. In 1971, Dr. William E. Murray, Indiana's commissioner of the Department of

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[179] Ibid.

[180] *Davy v. Sullivan*, 354 F. Supp. 1320 (M.D. Ala. 1973).

Mental Health sought a drastic overhaul of the state's sexual psychopath law, requesting legislation that would separate non-violent psychopaths, who could be given outpatient care, and violent sexual psychopaths, who would be detained in a high-security institution.[181]

Professionals and administrators found the litigation increasingly burdensome. A detailed 1980 study of the repeal of Wisconsin's law noted that "the steady expansion of due process rights for incarcerated individuals, which may have reached its zenith in litigation involving the Wisconsin Sex Crimes Act, meant that professional decisions involving psychotherapeutic treatment were increasingly questioned and challenged in courts and quasi-judicial hearings."[182] In 1977, the Group for the Advancement of Psychiatry released a highly influential report calling for the repeal of sexual psychopath statutes. In 1949, the Group had published a study that supported indefinite commitment laws; though it was also critical of the terminology in sexual psychopath statutes.[183] In the 1977 report, the Group acknowledged that detainees' lawsuits had revealed sexual psychopath laws were not working as intended. The tenacity of detainees in bringing suits was also a professional concern for the Group, noting that "the future is one in which professionals working in hospitals will find themselves defendants in suits brought by patients trying to establish justification for their detention in the absence of adequate treatment."[184]

With some exceptions, conservative advocates of tough-on-crime policies no longer saw the laws as a useful workaround for the procedural protections of the criminal law. It is important

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[181] Don Rice, "Release of Sexual Psychopaths Studied," *Spokane Daily Chronicle*, July 14, 1965; "Treatment of Sexual Psychopaths Here Stirs Probe," *Concord Monitor*, December 10, 1966, 10; "Drastic Change Sought in Sex Psychopath Law," *Indianapolis Star*, January 15, 1971.
[182] Marie Therese Ransley, "Repeal of the Wisconsin Sex Crime Act," *Wisconsin Law Review* 1980, no. 5 (1980): 942.
[183] Committee on Forensic Psychiatry, *Psychiatrically Deviated Sex Offenders*, Report 9 (Topeka, KS: Group for the Advancement of Psychiatry, May 1949).
[184] Group for the Advancement of Psychiatry, *Sex Psychopath Legislation*, 926.

to remember that the new carceral mood throughout much of the nation was hardly inconsistent with laws allowing for indefinite preventive detention. After all, crime panics, critiques of "sentimentalism," and zealous prosecutors had driven the passage of the laws in the first place.[185] But there had been a number of significant changes since then. Courts now often mandated detention in a hospital rather than a prison. Those hospitals were under pressure from patients' rights groups and the deinstitutionalization movement to reduce their reliance on security measures and to be less punitive.[186] Courts imposed more stringent procedures in sexual psychopath proceedings. Finally, the laws were used more against people accused of crimes against children and crimes of violence than minor offenses. Together, this radically changed perception of the laws from a harsh measure to prevent crime to a soft-on-crime loophole for the worst offenders. The laws were no longer seen as a supplement to criminal law, but as a competitor. Moreover, the perception among legislators was that the laws allowed for much shorter periods of incarceration. Escapes from mental hospitals by people committed as sexual psychopaths did not help the perception that the laws were overly lenient, either.[187]

The classical liberal theory of punishment, especially its defense of deterrence, was also ascendant again in the scholarship. This view assumed that potential lawbreakers were rational calculators who would weigh the costs of punishment against the benefits of violating the law.[188] The more sophisticated new deterrence theory sidestepped psychological theories of criminality. Economist Gary Becker's immensely influential 1968 paper "Crime and Punishment: An

[185] Or, to cite another example, the penal populism of the 1990s was not inconsistent with the passage of Sexually Violent Predator civil commitment laws.

[186] See e.g., David B. Wexler, *Criminal Commitments and Dangerous Mental Patients: Legal Issues of Confinement, Treatment, and Release* (Washington, D.C.: U.S. Government Printing Office, 1976).

[187] Ransley, "Repeal of the Wisconsin Sex Crimes Act," 955n95; "Rapist's Escape Brews Up a Storm," *The News Tribune* (Tacoma, Washington), March 4, 1985; "Sexual Psychopath Act Might Finally Get Teeth," *Lincoln Journal Star*, August 14, 1969.

[188] Garland, *Culture of Control*, 15-16.

Economic Approach" argued for an economic approach to criminology, arguing that "a useful theory of criminal behavior can dispense with special theories of anomie, psychological inadequacies, or inheritance of special traits and simply extend the economist's usual analysis of choice."[189] Becker and other law and economics scholars argued that even very impulsive people responded to changes in prices, including the price of punishment.[190] The law and economics approach also offered an explanation for the failures of incarceration. Because apprehension and punishment were costly, it was actually inefficient to deter all crime, and thus, even high rates of crime did not necessarily imply the system was not working. The seeming failure of the criminal legal system to prevent crime, then, was not necessarily a failure. The law and economics approach essentially formalized the tolerated illegalities of the criminal legal system.[191] Deterrence theory trickled down from academic journals to popular discourse and policy makers. Sociologist Ernst van den Haag, a white supremacist writer for the *National Review*, helped to popularize deterrence theory in his 1975 book *Punishing Criminals*.[192] By the mid-1970s, policymakers too embraced deterrence as a primary aim of punishment.[193] The idea that many

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[189] Gary S. Becker, "Crime and Punishment: An Economic Approach," *Journal of Political Economy* 76, no. 2 (1968): 170.

[190] Interestingly, the new deterrence theory could be seen to validate the multi-track approach and the sexual psychopath laws. Becker pointed out that just as it was efficient for a firm to break down its large market into smaller submarkets to take advantage of different elasticities of demand, it was efficient for a system of crime control to differentiate between different types of people who responded differently to punishment. It was inefficient to give large penalties to groups like juveniles and the insane who are less influenced by the length of the punishment. This was, in fact, similar to the original arguments made in favor of security measures. Ibid, 189-190.

[191] Ibid, 190n33; Issac Ehrlich, "The Deterrent Effect of Criminal Law Enforcement," *The Journal of Legal Studies* 1, no. 2 (1972): 260-261; Richard A. Posner, "An Economic Theory of the Criminal Law," *Columbia Law Review* 85, no. 6 (1985): 1205n25.

[192] Van den Haag's view was not necessarily inconsistent with the sexual psychopath laws so long as their objective was incapacitation rather than treatment since he argued for the incapacitation of psychopathic and abnormal offenders who were not deterrable: "Some crimes are produced exclusively by exceptional people as some commodities are. If some of these people are incapacitated, production is reduced." Ernest van den Haag, "Punishing Criminals: Concerning a Very Old and Painful Question," (New York: Basic Books, 1975), 53.

[193] Elizabeth Hinton, *From the War on Poverty to the War on Crime: The Making of Mass Incarceration in America* (Cambridge: Harvard University Press, 2016), 165-166, 216.

people who committed sexual crimes were undeterrable had justified the sexual psychopath laws but now deterrence theory was back.

Prominent forces were also breathing new life into retributive and expressivist defenses of punishment and criticizing rehabilitationist theories of punishment.[194] Some of the most important early critiques of rehabilitationism came from legal scholars who were sympathetic to the theory. Already in 1959, Francis Allen published an influential article that critiqued what he termed the "debasement of the rehabilitative ideal," and he cited the sexual psychopath laws as his first example.[195] By the early 1970s, retributivism was ascendant in legal philosophy. For a growing number of prominent legal philosophers, the promise of rehabilitation had led to cruelty and injustice in the name of benevolence. Likewise, expert predictions of future dangerousness had proved too unreliable to justify deprivations of liberty. In 1968, legal philosopher Herbert Morris published an influential article arguing that people had a right to be punished, a claim that in some ways resonated with those made by the people committed as sexual psychopaths. Morris contrasted an idealized system of legal punishment, which was backward-looking and proportional, with a criminal legal system premised on treatment and prevention. He argued that the system of punishment respected the capacity of persons to make choices and allowed people who violated the law to repay their debt to society, while the system of treatment treated persons like beasts or things.[196] What was particularly striking about the revival of retributivism is that the retributivists were able to take the moral high ground against the defenders of rehabilitationism.[197] The cruelty of the sexual psychopath laws provided a useful foil for

[194] Garland, *The Culture of Control*, 8-9.
[195] Francis A. Allen, "Criminal Justice, Legal Values and the Rehabilitative Ideal," *The Journal of Criminal Law, Criminology, and Police Science* 50, no. 3 (1959): 229.
[196] Herbert Morris, "Persons and Punishment," *The Monist* 52, no. 4 (1968): 475–501.
[197] Jeffrie G. Murphy, "Marxism and Retribution," *Philosophy & Public Affairs* 2, no. 3 (1973): 217–43.

defenders of retributivism, an example of the cruelty of a criminal legal system premised on rehabilitation and prevention.[198]

The victim's rights movement and pro-carceral feminist activists saw expressive value in punishment. According to this view, punishment recognized the worth of the victim and the wrongness of the action. Punishment was an exchange, in which the value of the victim was somehow equivalent to the seriousness of the punishment. If the sexual psychopath laws supplemented punishment, then they posed no problem for the expressivist functions of punishment.[199] But to the extent that they functioned as an alternative to punishment, these expressive functions could not be fulfilled. People who committed sex crimes were not sick, they were bad.[200] This interpretation received support from sexual psychopath detainees themselves. "I take responsibility for my action," one sexual psychopath detainee in Missouri told a local paper. "I should be convicted by a court of law and sent to the penitentiary where a man knows when he's going to get out … there's more dignity there."[201] The sexual psychopath laws, in this reading, denigrated both the victim and the perpetrator of harm. The indifference of police and prosecutors to sexual abuse, the biases of juries, the indignities of trial, and so on had been an impetus for adopting sexual psychopath laws. But the mainstream feminist anti-violence movement was committed to changing the criminal legal process and doing away with the whole

[198] Norval Morris, "The Future of Imprisonment: Toward a Punitive Philosophy," *Michigan Law Review* 72, no. 6 (1974): 1167.
[199] See for example the Sexually Violent Predator laws discussed briefly in the conclusion, which were passed in the 1990s during the height of the movement to "get tough on crime."
[200] Again, there was no necessary inconsistency between preventive detention and the retributive and expressivist functions of punishment. As chapter 1 showed, a major argument in support of the multi-track model had been that it allowed the state to express its condemnation through punishment and then detain dangerous people after they had expiated their crime. What was inconsistent was preventive detention as an alternative to punishment.
[201] William Weary, "Brigg's Facility Handles State's Difficult Cases of Mental Illness," *Maryville Daily Forum* (Missouri), November 5, 1975.

system of tolerated illegalities—largely unsuccessfully as Kristen Bumiller has noted.[202] In keeping with this reinvestment in punishment, the imprisonment rate for people convicted of sex offenses, which was quite stable until 1980, increased dramatically thereafter.[203]

The critiques that the sexual psychopath laws were too lax or lenient were certainly important but so too were critiques that they were unjust, arbitrary, and vague.[204] The study of Wisconsin's Sex Crime Act noted that "even legislators who expressed 'law and order' concerns thought that although the Act was allowing some people to be released 'too early,' others were being held in custody 'too long.'"[205] Liberals too were returning to the classical theory of punishment, dissatisfied with arbitrariness and abuse in the criminal legal system.[206] The sexual psychopath laws, to their critics, were the worst of both worlds, simultaneously too harsh and too easy on people who committed sex crimes.

Another point of agreement between left and right was that experts simply could not be trusted to make predictions regarding the future dangerousness of an individual. From the 1930s to the 1950s, commenters had faith that psychiatry was progressing to the point that it would be able to make accurate predictions of future danger, but such optimism was no longer sustainable. The litigation of sexual psychopath detainees had demonstrated what little basis there was for such predictions in many cases. In addition, a growing body of research cast doubt on the

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[202] For examinations of carceral feminist approaches to sexual violence see Kristin Bumiller, *In an Abusive State: How Neoliberalism Appropriated the Feminist Movement against Sexual Violence* (Durham: Duke University Press, 2008), 11; Aya Gruber, *The Feminist War on Crime: The Unexpected Role of Women's Liberation in Mass Incarceration* (Oakland: University of California Press, 2020). For a history of feminists who campaigned for a non-carceral response to violence see Emily L. Thuma, *All Our Trials: Prisons, Policing, and the Feminist Fight to End Violence* (Champaign: University of Illinois Press, 2019).
[203] Leon, *Sex Fiends, Perverts, and Pedophiles*, 161.
[204] Charlotte Grimes, "Attacked: Sexual Psychopath Laws in Many States Questioned," *St. Louis Dispatch*, March 16, 1980; Maureen Collins, "Sex Psychopath Law Termed 'Too Vague,'" *Fort Lauderdale News*, December 3, 1967; "GOP Urges Law Purge," *Quad-City Times*, September 18, 1975.
[205] Ransley, "Repeal of the Wisconsin Sex Crime Act," 967.
[206] American Friends Service Committee, *Struggle for Justice: A Report on Crime and Punishment in America* (New York: Hill & Wang, 1971).

accuracy of expert predictions of danger. The Supreme Court's decision *Baxstrom v. Herold* had required either the release or transfer to an ordinary mental hospital of nearly 1,000 people whom New York had committed post-criminal sentence to a hospital for the criminally insane. These were people that experts had predicted were dangerous. Thus, their release or transfer to less restrictive institutions provided a unique opportunity to study the reliability of such predictions. Four years later, a study found that only 3% were in a prison or hospital for the criminally insane, demonstrating that such predictions had little predictive value.[207] While civil libertarians were concerned with false positives, they were naturally hard to spot and were less salient than the false negatives.[208] After a man who had been released under Iowa's sexual psychopath law murdered a young girl, a newspaper columnist argued that if psychiatry was a "precise science" the law would be a great idea. But presently, there were no good treatments for people who committed sex crimes and no good way to predict the safety of releasing them.[209]

What happened beginning in the 1970s, then, was in its broadest outlines the inverse of what had happened a few decades earlier. In the 1930s, the criminal legal system was the target of sustained critique for its lax attitude toward sexual crime. Critics hoped that an enhanced role for medical expertise would solve these problems. Now that that system had been implemented and failed, it was civil commitment and expert judgment that were subject to criticism. There was new hope in the possibilities of a reformed criminal legal system.

Sexual psychopath laws might also have appeared less necessary not because they were out-of-step with contemporary thinking about the criminal law but because their logic had been

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[207] Henry J. Steadman and Gary Keveles, "The Community Adjustment and Criminal Activity of the Baxstrom Patients: 1966-1970, " *American Journal of Psychiatry* 129, no. 3 (September 1972): 304–10.
[208] Bruce J. Ennis and Thomas R. Litwack, "Psychiatry and the Presumption of Expertise: Flipping Coins in the Courtroom," *California Law Review* 62, no. 3 (1974): 693–752.
[209] Bill Severin, "Restore Death Penalty?" *Waterloo Daily Courier*, December 31, 1968.

partially incorporated into the general criminal law. Certainly, aspects of the sexual psychopath laws were in tension with contemporary trends in punishment theory and practice. Deference to medical experts and institutional administrators, indeterminate sentences, psychiatric theories of criminal motivation, trust in predictions of future risk, had all fallen out of favor with the rise of deterrence and retributive theory, the feminist movement against sexual violence, and the victim's rights movement. However, among the original motivations for passage of the sexual psychopath laws were incapacitation of people who seemed to be unresponsive to the threat of punishment and prevention of future crime. As Elizabeth Hinton has shown, incapacitation, especially of Black urban youth, became a major goal of crime policy in the 1970s.[210]

Starting as early as the late 1960s, states responded to these pressures by repealing their sexual psychopath laws. Michigan, which had been the first state to pass such a law, was also one of the first states to repeal its statute. A Michigan Committee recommended repeal of the state's sexual psychopath law in 1968, on the grounds that amendments to the law and legal interpretations had turned it into a loophole to avoid punishment. Following this recommendation, the state repealed its sexual psychopath law that year. In the late 1970s and throughout the 1980s, states joined Michigan in repealing sexual psychopath statutes.[211] Only thirteen states and the District of Columbia had sexual psychopath laws on the books by the 1990s, and those states that kept the laws were not using them with any frequency.[212]

Despite this trend toward abolition, sexual psychopath laws were never declared unconstitutional by the Supreme Court. In fact, in 1986, a more conservative Supreme Court, in a

[210] Elizabeth Hinton, *From the War on Poverty to the War on Crime: The Making of Mass Incarceration in America* (Cambridge: Harvard University Press, 2016).
[211] "Repeal of Sexual Psychopath Law Sought," *Battle Creek Enquirer*, February 2, 1968, 12; Public Act No. 143, *Public and Local Acts of the Legislature of the State of Michigan Passed at the Regular Session of 1968* (Lansing: Speaker-Hines and Thomas), 203-204.
[212] Dix, "Special Dispositional Alternatives for Abnormal Offenders," 136; Lave, "Only Yesterday," 589.

five to four ruling, affirmed the constitutionality of Illinois's Sexually Dangerous Persons Act and held that commitment proceedings were noncriminal. Thus, the privilege against self-incrimination did not give a person the right to refuse to answer all questions asked in such a proceeding. According to a majority of the Court, the fact that "the State has disavowed any interest in punishment, provided for the treatment of those it commits, and established a system under which committed persons may be released after the briefest time in confinement" was enough to prove the non-punitive nature of the act. [213] The decision was an enormous step backward. The Court had returned to the view that the distinction between punishment and civil detention was of decisive importance rather than the effect on detainees. And in deciding whether an act was punitive or regulative, the Court considered only the perspective of the state. Moreover, the Court had accepted the idea that the sexually dangerous persons act provided treatment, which had long been discredited. Thus, the sexual psychopath laws were never declared unconstitutional, leaving a legacy that justified later iterations of sex offender laws.

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[213] *Allen v. Illinois*, 478 U.S. 364, 369-370, 375 (1986).

CONCLUSION

I have attempted, insofar as possible, to avoid a teleological story in which all the developments I tracked lead inevitably to the contemporary sexual carceral state.[1] It is easy to see parallels between, for instance, modern sex offender registries and the lists of perverts that authorities developed in the first half of the twentieth century or between the preventive logic that justified post-incarceration detention during the era of the sexual psychopath laws and today during the era of registration and notification requirements. I do hope that this dissertation is something of a genealogy of the contemporary sexual carceral state. However, I have tried to present this story as interesting and important in its own right and to avoid denigrating the significance of victories by the people committed as sexual psychopaths because we know, with hindsight, where those victories led.

Nonetheless, the dissolution of the sexual psychopath regime led to the creation of the contemporary sexual carceral state. Attitudes about people who commit sexual crimes have been quite persistent. People who commit or are accused of sexual crimes are still presented as mentally abnormal, unusually prone to recidivism, to progress to more serious crimes, and undeterrable. The act of committing a sex offense still morphs into a defining and inescapable identity; the identity of "sexual psychopath" has morphed into "sexually violent predator" or simply "sex offender." The favored modalities of control directed at people convicted of sex crimes continue to be shame and abjection.

Contemporary sex offender laws have hardly been less repressive than the sexual psychopath laws. Many states passed Sexually Violent Predator (SVP) laws in the 1990s during another period of sex crime panic. SVP laws closely resemble sexual psychopath laws. They

[1] Or perhaps it is more accurate to say that my advisor, Amy Dru Stanley, encouraged me avoid my own tendency to present this history as one of the origins of the contemporary sexual carceral state.

allow for the indefinite confinement of people categorized as violent sex offenders. Most SVP laws are more narrowly targeted at people who commit crimes categorized as violent and provide greater procedural protections than the original sexual psychopath laws, some requiring a beyond-a-reasonable-doubt standard of proof. However, these laws provide fewer procedural protections than criminal prosecutions. People held under SVP laws are also less likely to be released than people held under the sexual psychopath laws. On the other hand, the cost of maintaining the fiction that SVP laws are civil—including housing committed people in special facilities and employing psychiatrists and other experts—has made the laws extraordinarily expensive to use.[2] Perhaps more significant than SVP laws has been the spread of sex offender registration and notification laws, which have impacted far more people than sexual psychopath laws ever did. These laws have replaced institutional surveillance by psychiatrists with surveillance by whole communities.[3] As with the sexual psychopath laws, these extraordinary security measures have permitted states to look like they are doing something to combat sexual violence, while allowing the criminal legal system to function in its normal way, with its tolerated illegalities. Tamara Rice Lave points out, for instance, that while California was spending extraordinary amounts of money to detain a relatively small number of people as sexually violent predators, it was also allowing over ten thousand sexual assault kits to go untested, just in Los Angeles.[4]

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[2] Eric S. Janus and Robert A. Prentky, "Sexual Predator Laws: A Two-Decade Retrospective," *Federal Sentencing Reporter* 21, no. 2 (December 2008); Tamara Rice Lave, "Throwing Away the Key: Has the Adam Walsh Act Lowered the Threshold for Sexually Violent Predator Commitments Too Far?" *University of Pennsylvania Journal of Constitutional Law* 14, no. 2 (2011): 391-430. In part because of the greater procedural protections and the requirement that SVP laws provide treatment to offenders, these programs are enormously expensive. The state of Washington, for instance, pays $60,000 per offender just in legal fees for its SVP program. California's SVP program costs roughly $150,000 per year per offender, not including legal costs, which are themselves significant. Lave, "Throwing Away the Key," 422-423.
[3] Renfro, *Stranger Danger: Family Values, Childhood, and the American Carceral State*.
[4] Lave, "Throwing Away the Key," 423.

However, the complicated nature of this legacy should not take away from the significance of the struggle against the sexual psychopath laws. Challenges against sexual psychopath laws forced courts to begin to regulate mental hospitals, brought attention to psychiatric abuses and neglect, and closed an avenue through which states could put people away in prisons without having to prove a crime. Courts even seemed to be willing to question the meaningfulness of the distinction between punishment and civil regulation, shifting the focus from the intentions of legislators to the effects on people committed under the laws. More important than these individual reforms, the steady stream of litigation created a crisis for the sexual psychopath regime. People who were held as sexual psychopaths were even able to build solidarity with radical groups and generate public interest in the abuses they suffered. These victories were important for the people held as sexual psychopaths and those who would have been held as sexual psychopaths, despite the ambiguous final outcome.

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