INSTITUTE ON TREATMENT CONCEPTS IN THE CRIMINAL LAW

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Participants and their topics:

THE CONCEPT OF TREATMENT IN THE CRIMINAL LAW
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DANGEROUSNESS AND THE MENTALLY ILL CRIMINAL
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TREATMENT CONCEPTS AND PENOLOGY — A SOCIOLOGIST'S VIEW
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The materials which follow constitute papers presented for discussion at the Institute on Treatment Concepts in the Criminal Law, a symposium held at the University of South Carolina, March 29, 1969.

THE CONCEPT OF TREATMENT IN THE CRIMINAL LAW

SOL RUBIN

I. INTRODUCTION

When I first entered this field of work, that is, the field of dealing with criminals, I, like others, accepted the idea of *treatment*, efforts to rehabilitate criminals, as being not only essential, but almost the motivating spirit of all I wanted to do. The concept of "treatment" is, in effect, an article of faith for most people in the correctional field. It is not a bad article of faith. But in recent years I have come to feel that it is not enough as a guide, and standing alone it may be wrong.

Some years ago in a book on crime and delinquency I had an introductory chapter on philosophy in dealing with criminals. In the book I took what I believe was, and is, a humanitarian point of view. After going on for a while about rationalism, science, and humanitarianism, I said: "In brief, in the human sciences, to be scientific one must be humanitarian; to be anti-humanitarian is to be unscientific."[1]

It is still not a totally bad statement. In fact, it is not a bad statement at all. After all, what is more humanitarian than treatment? But if I were to say it again, I would not say it that way. For me, at least, bad things have been done and are being done under the guise of treatment. "Treatment" is giving humanitarianism a bad name. Let me make clear that I am most concerned with the wide use of commitments, whether in a sentence or the so-called "civil" commitment of law violators.

If I were to rewrite the statement I would be careful to say that treatment may *not* be humanitarian, that treatment may be an invasion of civil rights, that treatment may be harmful. I would be sure to say that before one decides on treating a person, even a convicted criminal, one must consider whether leaving him alone may not be better, better for him and better for society.

1. S. RUBIN, CRIME AND JUVENILE DELINQUENCY, A RATIONAL APPROACH TO PENAL PROBLEMS 24 (2d ed. 1961).

It may seem strange, and possibly disquieting, for a person who considers himself humanitarian to be uttering this statement, when only now is the concept of a right to treatment receiving any recognition.[2] I agree it is an important right, and it must become a protection for individuals. But it must *not* become a cover for depriving people of their liberty.

On reviewing recently what I had written in that book, I see that I was led into the use of the word "treatment," not in isolation, but as contrasted to "punishment." In general, in sentencing a criminal, the preference would be for probation, which we like to call treatment, as opposed to imprisonment, which we call punishment, although recognizing that therapeutic efforts should be made in prison.

Again, what especially troubles me is that we freely commit people, and call it treatment. But even probation as treatment must be examined. There are many instances when I would say —this defendant should be left alone, not placed on probation.

II. UNDER THE GUISE OF TREATMENT

My first experience with the concept of "treatment" in correction being distorted, with destructive effect on individuals and correctional systems, came in my encountering the so-called indeterminate sentence.[3] For many years, and it is still so, people dealing with this field, including legislators, judges, and experts of various kinds, talk about the indeterminate sentence as though it was the answer to the main problems in sentencing, including the problem of disparity in sentences, and proudly rationalize the whole thing under the guise of treatment.

The indeterminate sentence is said to be the sentence under which treatment can take place, since it incorporates the idea that release is dependent on the success of the prisoner's readjustment and rehabilitation.

But it does not work out that way at all. In practice, the indeterminate sentence has usually meant establishing minimum terms of parole eligibility and lengthening maximum terms of imprisonment. In many jurisdictions the concept of the indeterminate sentence means that every offender committed is committed for the maximum term. All of this has resulted in both terms of commitment and terms of actual incarceration becoming longer. The length of sentences and terms of incarceration have steadily lengthened in this country. The detrimental effect of long sentences, on correctional systems as well as on prisoners, is generally accepted, and I believe I do not have to elaborate that here.[4]

2. *See* Note, *The Nascent Right to Treatment*, 53 VA. L. REV. 1134 (1967).
3. Rubin, *The Indeterminate Sentence—Success or Failure?*, FOCUS, March 1949, at 42. This article is brought up to date in S. RUBIN, note 1 *supra* at ch. 8.

It must come as a surprise to many, as it did to me when I first encountered it, that the severity of criminal penalties has steadily increased over the years in this country.[5] Whereas in the middle of the nineteenth century the ratio of state prisoners to the general population was 1 to 2,436, in the middle of the twentieth it was 1 to 1000. By contrast, the number of prisoners in custody in England in 1930 was less than half what it was 100 years before, although the population of England had doubled.[6]

There were a number of factors, but one was surely the introduction of the indeterminate sentence. The detrimental impact of the spread of the indeterminate sentence came not only in the longer maximum terms, but in the establishment of minimum terms of parole eligibility. By this time in most states a defendant who is committed to prison must serve a term before even being considered for parole. Many times the minimum term is so high that in effect it completely defeats the theory of parole. A sentence of 19 to 20 years, 19 being the minimum term that must be served, is an obviously outrageous instance, but such sentences are handed down, and they are upheld by the courts.

Far more common are sentences of 7 to 10 years, or 5 to 10. But even quite common sentences, 3 to 10 years, for example, establish minimum terms of parole eligibility that are so long that a parole board, if it fulfills its function, must release upon the expiration of the minimum term, since in many instances release earlier would have been indicated, and would have been used except for the minimum term.

In brief, this "treatment" idea, indeterminate sentences, has had as its principal effect increasing terms of imprisonment.

4. *See* S. RUBIN, H. WEIHOFEN, G. EDWARDS & S. ROSENZWEIG, THE LAW OF CRIMINAL CORRECTION 137-42 (1963) [hereinafter cited CRIMINAL CORRECTION].
5. S. RUBIN, *supra* note 1, at 132.
6. CRIMINAL CORRECTION, *supra* note 4, at 41.

Paradoxically, it has deterred flexible and—most important—early releases.

There is another instance of a treatment concept that boomerrangs. The youth authorities were introduced as a solution to the youth crime problem, or at least a solution to the way convicted youths should be sentenced. But there is evidence that the result has simply been to increase the percentage of commitments for youthful offenders, and to increase the terms of commitment. In part it is the attraction of the idea that a youth authority represents "treatment" that induces some liberal minded judges to commit to youth authorities in cases in which they might have used probation.[7]

A good instance of this development is what has happened under the youth correction act in the federal system. It is very clear that those sentenced under the federal youth correction act serve longer terms than those sentenced under the ordinary penal statute. In 1959-60—the latest statistics I have—the average time served prior to release by all offenders—youth, delinquents, adults—was 16.4 months. Youth Correction Act offenders served an average of 19.7 months; juvenile delinquents served 18 months; the average time served was smallest for adults. The actual disparity is even greater than these figures show, since the high figures for juveniles and youths are included in reaching the average for *all* offenders.[8]

Has there been an improvement in treatment for these offenders? Is the extra term used for some treatment purpose that would not have been available under the shorter term? There is none that I can discover. Their treatment is the same as for prisoners committed under the regular penal laws.

III. PRISONS

Well, what about commitments to prison under the regular penal law? Are those related to treatment? Recently I was asked to speak at a conference whose theme was "Reducing Opportunities for Crime." My instructions were to discuss "the need for various levels of *confinement* to reduce opportunity for crime." The theme of my own remarks was different from that suggestion. I said that it was a delusion to look for ways of reducing opportunities for crime by treatment in prison, that

7. S. RUBIN, *supra* note 1, at ch. 7.
8. *Id.*

the wiser effort on the part of the entire criminal justice system is to avoid commitments to institutions when that can be done with safety to the community.[9]

The theme suggested to me, however, is a common one; otherwise, we would not have the big prison system that we have in this country. With all the attacks on imprisonment, the correctional field is still far from an abolish-prisons movement. What has happened is that, as in other fields, the "treatment" rationale has been placed over the ancient system of locking people up. It is true that there is less brutality in prisons—although it is still far from gone, even in some reputedly modern systems.[10] It is true that some of the harsher forms of discipline—striped uniforms, lockstep, silence—are pretty much gone.

But it is also true that the essence of imprisonment, which is the loss of liberty, the loss of contact with the world of work, family, freedom of movement, is still in operation. More than that, there has been a steady *worsening* in the use of imprisonment, once one sees it as loss of liberty with all its consequences, and here again I cite the lengthened terms of imprisonment.

The gloss of "treatment" is put on modern imprisonment, and I for one do not accept it; that is, I do not accept rationalizing imprisonment by the uses of treatment. A good illustration is a very broad study[11] made of imprisonment in the federal system. It is a study of the measure of effectiveness of different forms of treatment in prison, measured by recidivism rates, exactly the same test as was proposed to me in the conference just mentioned.

The study came up with a number of findings, concluding that some things done with prisoners were better or worse than others, but much good was being done. For example, one part of the study deals with relationships among inmates. Interviews were had with 250 successful releasees. They were asked: "When would you say you changed most permanently from being interested in committing crime?" Four percent said they had changed before sentencing, 13 percent placed the change at the time of sentencing or between sentencing and imprisonment.

But the bulk of prisoners thought their prison experience was pretty good. Fifty-two percent said that they changed their

9. Indiana Conference on Crime and Prevention Proceedings, Indiana University, Jan. 18, 1968.
10. *See* Jordan v. Fitzharris, 257 F. Supp. 674 (N.D. Cal. 1966) (horrible conditions in a disciplinary cell at the California Correctional Training Facility at Soledad).
11. D. GLASER, THE EFFECTIVENESS OF A PRISON AND PAROLE SYSTEM (1964).

attitudes during imprisonment, and 16 percent said they changed after release. Only 10 percent denied that they had ever changed, and they were mainly people who claimed they were either innocent or were only unwittingly involved in their offense.

Other similar findings seemingly favorable to imprisonment were reported. Why was imprisonment so good? Wouldn't it be nice if it were mainly because of staff work? The author writes:

> Of the 131 who reported that they changed during imprisonment, 65, or about half, credited a staff member with being influential in their reformation. Only 11, or 8 percent, credited the influence of fellow inmates as a factor in their change. The others who reported that their shift from criminal interests occurred in prison credited their own maturation, the deterrent effects of imprisonment, or the influence of persons outside the prison who wrote or visited them.[12]

I do not buy that. The author suggests that these data "all suggest that much reformation of criminals does occur with imprisonment, even though prisons certainly have deficiencies and may make some of their inmates more criminal."[13] It does not necessarily suggest this at all. What if many of these people succeeded *despite* imprisonment? Certainly comparative statistics with people of exactly the same kind demonstrate that their success rate would be at least as good if they had been placed on probation. Does inmate interpretation of their change validate the proposition that imprisonment and the forces connected with it effected the change? I doubt that the author would contend that. The impulse to credit imprisonment with a change would be attractive especially to those determined never to commit crime again. Their imprisonment would at most be interpreted by them as a reinforcement of a life orientation they would have even without imprisonment. There is also the possibility of a conscious or subconscious wish to cooperate with the prison authorities, or prison researchers.

Other prison experiences are interpreted in the same fashion. These inferences are not warranted. They all stem from an initial assumption—that these people were in prison because they needed imprisonment to change their attitudes. This basic

12. *Id.* at 141.
13. *Id.* at 89.

proposition is not at all examined in the study. The implication of the study is that (more or less) persons sentenced to prison are those who ought to be there. But that is hardly the situation.

In fact, what if one examined prisoners on the presumption that most should not have been committed? What if one tested this hypothesis: if only one of ten convicted felony defendants had been committed, what would the success and failure rate be? I believe the success rate would be at least as good as it was, without any loss in public protection, deterrence, or rehabilitation, and with a saving in money and people. There is nothing in this study, or any study I know of, that negates such an assumption.[14]

There are a number of things that support this contention. James V. Bennett, then director of the Federal Bureau of Prisons, analyzed the nature of the offenders annually committed to state prisons as follows:

> The largest number of these men by far are those who have been convicted of acquisitive crimes—burglary, larceny, forgery, automobile theft, and the like. In this category fall about 65 percent of the major offenders who are committed to state prisons during a typical year. The next largest number are robberies, 11.7 percent, and then come the aggravated assault cases and the drug violators, with 10.7 percent. Homicides, rapes and kidnappings together account for about 9 percent. The remainder are for miscellaneous crimes like arson, gun-law violations, and I suppose adultery. These figures are in rather startling contrast with generally held views. The general public has the notion that most criminals and convicts are rapists, robbers, or murderers. This is not the case.[15]

Specific data also point to the potential of a much increased rate of probation. Surveys always show a great disparity in the use of probation from judge to judge, sometimes with a spread as great as from 5 to 80 percent, and the success record of the latter group is as great as the former.[16] Rhode Island for many

14. *See* Letter from Sol Rubin to Daniel Glaser, Feb. 9, 1965, in 29 FED. PROB. 56-59 (1965); Letter from Daniel Glaser to Sol Rubin, Feb. 25, 1965, in *id.* at 59 (reply).
15. Address by J. Bennett, Sterling Lecture Series, Yale University Law School, Feb. 15, 1960.
16. CRIMINAL CORRECTIONS, *supra* note 4, at ch. 6, § 28.

years has used probation in approximately 75 percent or more of its convictions. A three-year demonstration project in Saginaw, Michigan, resulted in cutting state prison commitments in half, to 17 percent. The reduction was achieved by increasing the use of probation, to 68 percent, and the use of suspended sentences, fines, and local institutions—all with an improved success rate.[17] It does not take any great improvement over the Rhode Island, Saginaw, and the individual judge's rates to reach 90 percent.

An improvement of only 7 percentage points in the Saginaw rate would achieve our suggested goal of a 10 percent limit on prison commitments. There is no doubt this could be achieved. It must be remembered that 17 percent was for the 3 years of the project, not its highest rate. Also, in this project, a demonstration project in the public eye—one that was looked on with suspicion in some quarters—presumably an excess of caution was exercised, a wider safety margin than would be suitable in ordinary situations. And it is known that in a number of cases of atrocious acts—including rape—where success on probation seemed likely, it was not granted as a concession to community pressure, actual or surmised. As a result of greater use of probation in Hawaii, prison commitments dropped from 28.3 percent in 1959 to 9.2 percent in 1963.[18]

The author of the federal study concedes that imprisonment has destructive effects, and that some of the failures may well be attributed to imprisonment. The fact is that the worsening of the condition of prisoners may also be true of the successes. They succeeded on release, and hence it is assumed that prison helped them; but they may well have been hurt by imprisonment, either in impairments of personality that did not lead to crime, or adverse effects on their families.

But it is commonplace also to speak of prisons as training schools for criminals. Crime is learned there. I will cite one report that substantiates such a process. William L. Jacks, statistician for the Pennsylvania Board of Parole, reported on convicted parole violators returned to prison over a 10-year period. He examined the crime for which the parolee was returned as compared with his previous criminal experience. During this period 3,424 parolees were returned to prison for new

17. Martin, *The Saginaw Project*, 6 CRIME & DELINQUENCY 357 (1960).
18. Letter from William G. Among, Director, Department of Social Services, Hawaii, to Sol Rubin, May 17, 1965.

crimes. Eighteen of them had been originally committed as drug and narcotic offenders; 11 of the 18 were returned to prison for new drug crimes—plus 103 others returned for drug offenses. Had prison experience helped them to learn the new crime? Another example: Thirteen had been originally convicted for carrying weapons—but 101 of those returned were returned for this crime. "Where did the parolees acquire this habit of carrying weapons, or were they smarter in that they 'beat the rap' for a more serious crime?" asks Mr. Jacks.[19]

The same question may be asked for the 9 parolees who had originally been sentenced for receiving goods who did not repeat this crime on parole—but 51 others of the parolees did. And the same question may be asked of the recidivists in the Glaser study.

IV. CIVIL COMMITMENTS

Even more than in prison commitments, the concept of "treatment" is greatly relied on in "civil" commitments in cases in which the criminal law might be used, that is, civil commitments, as a substitute for criminal procedure. Juvenile delinquents are one group dealt with in a so-called civil procedure. Delinquents are people who violate the law,[20] but because of their youth are dealt with in what is called a non-criminal proceding. The principal characteristic of the juvenile court procedure, under which young law violators are dealt with as delinquents, is that the procedure is called non-criminal, and the statutes say—although it is not so in practice[21]—that the adjudication, which shall not be deemed a conviction of crime, shall not be used against the child.

At long last the Supreme Court of the United States, anticipated by some state courts[22] and legislatures [23] has said that

19. Jacks, *Why are Parolees Returned to Prison as Parole Violators?*, 19 AM. J. CORRECTION 23 (1957).
20. However, children who do not violate the law are also processed as delinquents, when they fall within the category of incorrigible, wayward, or beyond the control of their parents. This common type of jurisdiction is condemned in Rubin, *Legal Definition of Offenses by Children and Youths*, 1960 U. ILL. L. FORUM 512.
21. Rubin, *The Juvenile Court in Evolution*, 2 VAL. U.L. REV. 3, 14-18 (1967).
22. ADVISORY COUNCIL OF JUDGES, PROCEDURE AND EVIDENCE IN THE JUVENILE COURT (1962).
23. STANDARD JUVENILE COURT ACT (1959). This act is drawn heavily upon by various state legislatures. *E.g.*, Ch. 443, [1967] Colo. Stats. 993; ch. 215, Iowa Stats. 338 (1965); ch. 165, [1965] Utah Stats. 595.

the juvenile court procedure, which theoretically should provide greater protection for the child, in reality often does not. In one case it said:

> There is evidence, in fact, that there may be grounds for concern that the child receives the worst of both worlds: that he gets neither the protections accorded to adults nor the solicitous care and regenerative treatment postulated for children.[24]

Accordingly, said the Supreme Court in the next case, many of the protections of criminal procedure must be accorded to the juvenile in juvenile court.[25]

In other quasi-criminal commitment procedures the Supreme Court has been less able to see through the fiction. A notable instance is the sexual psychopath statute under which a person who commits a sexual crime—or sometimes even when he does not—may be dealt with civilly and may be committed, often for life. The fiction in these cases has been recognized by many. The errors are principally that the pretext of treatment is not carried out in practice; persons under civil commitment for sexual psychopathy receive no more therapy than they would in prison.[26] But the difference between these civil commitments and criminal procedure is that, like the juvenile delinquent, they receive the worst of both worlds—they do not receive the procedural protections, and their loss of liberty is much worse. In most jurisdictions they are committed for life terms, often where the underlying offense is very minor, and might well have resulted in probation if sentenced under the penal law.

In these cases there is a little progress procedurally; that is, procedural protections are being required before a man may be committed as a sexual psychopath.[27] But there is a big question as to the validity of the statutes altogether. They have been sustained by a Supreme Court decision that goes back to 1939, *Minnesota ex rel. Pearson v. Probate Court*,[28] upholding a Minnesota statute for civil commitments of sexual psychopaths, so-called. Here the court accepted the "fiction" of a treatment procedure. The decision notes that the statute four times calls the defendant a "patient." It is clearly implied that a statute

24. Kent v. United States, 383 U.S. 541 (1966).
25. *In re* Gault, 387 U.S. 1 (1967).
26. 12 VILL. L. REV. 183 (1966).
27. Specht v. Patterson, 386 U.S. 605 (1967).
28. 309 U.S. 270 (1940).

that calls a man a "patient" will deal with him as such, will "treat" him, and hence is valid. There is no more in the decision than that.[29]

In my opinion the decision is wrong, and if reread today, its weakness is not hard to discover. Not only is there no examination in the case of what was done with the defendant, the kind of examination of "treatment" that the Supreme Court made in the recent juvenile court cases, but there is not even a real requirement of sexual misbehavior. There is not one word in the Supreme Court's decision, nor in the state Supreme Court decision,[30] as to what the defendant is charged with having done, except that it was said to be sexual misconduct.

A recent reminder of the acceptance of this illusion is the Supreme Court case upholding deportation of an alien who was a homosexual under a statute applying to "psychopathic personalities." Is a homosexual a "psychopathic personality?" Yes, said the Supreme Court, if Congress says so, and it inferred from the legislative history of the Act that Congress had said so.[31] Several judges dissented.

29. On the use of magical words in the correctional field, Mencken provides an interesting background:

> Some time ago, in the *Survey*, the trade journal of the American uplifters, Dr. Thomas Dawes Eliot, associate professor of sociology in Northwestern University, printed a solemn argument in favor of abandoning all such harsh terms as *reformatory, house of refuge, reform school,* and *jail.* "Each time a new phrase is developed," he said, "it seems to bring with it, or at least to be accompanied by, some measure of permanent gain, in standards of viewpoint, even though much of the old may continue to masquerade as the new. The series, *alms, philanthropy, relief, rehabilitation, case work, family welfare,* shows such a progression from cruder to more refined levels of charity." Among the substitutions proposed by the learned professor were *habit-disease* for *vice, psychoneurosis* for *sin, failure to compensate* for *disease, treatment* for *punishment, delinquent* for *criminal, unmarried mother* for *illegitimate mother, out of wedlock* for *bastard, behavior problem* for *prostitute, colony* for *penetentiary, school* for *reformatory, psychopathic hospital* for *insane asylum,* and *house of detention* for *jail.* Many of these terms (or others like them) have been actually adopted. Practically all American insane asylums are now simple *hospitals,* many reformatories and houses of correction have been converted into *homes* or *schools,* all *almshouses* are now *infirmaries, county-farms,* or *county-homes,* and most of the more advanced American penologists now speak of criminals as *psychopatic personalties.*

H. MENCKEN, THE AMERICAN LANGUAGE 292-93 (4th ed. 1937).

30. Minnesota *ex rel.* Pearson v. Probate Court, 205 Minn. 545, 287 N.W. 297 (1939).
31. Boutilier v. Immigration & Naturalization Service, 387 U.S. 118 (1967).

The Court is very shaky on civil commitment of drug addicts, which it approved in dictum in the much cited case of *Robinson v. California*.[32] I share with others the view that the dictum is not well thought out, that it justifies civil commitments based on a fiction of treatment that is contradicted by reality.[33] In the principal jurisdictions using civil commitment of drug addicts (California and New York), realistically what they have is no different from prison systems.

The doubts about the *Robinson* dictum greatly increase with the Supreme Court decision in *Powell v. Texas*.[34] Again the Court indulged in quite non-legal dictum, this time on the treatability of chronic alcoholics, concluding that civil commitments for treatment are not really better than short jail terms for chronic alcoholics. So it holds—contrary to much medical opinion—that chronic alcoholism, unlike drug addiction, is not an illness, and that a man can be imprisoned for public drunkenness although to some degree he is compelled to drink. *Robinson v. California* and *Powell v. Texas* are both unsatisfactory. Proper concepts still have to be worked out.

As is shown by this brief discussion of the cases, the courts are torn by the concept of treatment. Does it justify commitment? Recognition of a "right to treatment" is not enough. Even if there is going to be treatment, and even if there is a need for treatment, it does not justify commitment. I have ailments, and I am one who if possible avoids medical treatment that others turn to. May I be committed and treatment imposed upon me if my ailment is not contagious? Certainly not. If I am dying and refuse a blood transfusion that might save me, a court has no power to order it. There is a right *not* to be treated.

I have implied that treatment may be punitive. Indeed it often is. I have elaborated this in considering the *Durham* rule in the District of Columbia, the decision in 1954 that replaced the *M'Naghten* rule of criminal responsibility. I have pointed out elsewhere that committing a criminal to a mental hospital does not insure him better treatment than he would receive in a prison; that the prison environment is a more normal one than the mental hospital, and usually has better activity and training programs; that the term of commitment in a mental hospital,

32. 370 U.S. 660 (1962).
33. *Id.* at 679. (dissenting opinion). *See generally* S. RUBIN, PSYCHIATRY AND CRIMINAL LAW, ILLUSIONS, FICTIONS, AND MYTHS 139-70 (1965).
34. 88 S. Ct. 2145 (1968).

being indefinite, that is, potentially for life, is longer than a prison sentence; that the release procedure is demoralizing for its lack of due process; and finally, that the defendant committed as mentally ill is automatically committed, whereas if convicted in a criminal court, he may well be placed on probation.[35]

The greater punitiveness of the "treatment" oriented people is not an accident of law, or an unfortunate by-product of the struggle for treatment. It is a product of their view that institutionalization, if used for treatment, is good.

The philosophy is well represented by Judge Bazelon, not only in his decisions, but in his other writings. Last year, on the occasion of the 50th Anniversary of the Judge Baker Guidance Center in Boston, he gave a paper entitled "The Promise of Treatment."[36] In it he cites the case of a severely disturbed 17 year old who sought a judicial hearing on his claim that he was being illegally held in the receiving home without receiving any psychiatric assistance.

> He had been at the home for eight months awaiting disposition of a pending charge in the juvenile court. The judge did not hold a hearing to learn what the facts were—because, in his opinion, whether or not the child was receiving psychiatric assistance 'was not germane to the lawfulness of [the juvenile's] confinement.'[37]

Judge Bazelon says that he can "scarcely imagine anything more 'germane' than the fact that the boy was receiving no treatment."[38]

To me it is striking that Judge Bazelon does not say anything at all about the fact that the boy having been held for eight months without treatment should be freed. He does not say that he deserves to be freed, but only complains that psychiatry should be involved. Presumably, if this boy was seen once a month by a psychiatrist, the detention would be justified.

Judge Bazelon says: "The central justification for assuming jurisdiction over a child in any informal, non-adversary proceeding is the promise to treat him according to his needs."[39]

35. S. RUBIN, *supra* note 30, at 23-51.
36. Address by Judge Bazelon, Judge Baker Guidance Center 50th Anniversary, Apr. 14, 1967, in THE NEW REPUBLIC, Apr. 22, 1967, at 13.
37. *Id.* at 16.
38. *Id.*
39. *Id.* at 14.

Not exactly. Rather, the juvenile court proceeding must be described as "non-criminal," because the essential purpose is to avoid a criminal court prosecution and a conviction, but without the sacrifice of due process of law.

Further along Judge Bazelon says: "I do not find it objectionable to deprive the child of some procedural safeguards if the individualized treatment he is supposed to get requires the sacrifice and if the new procedures are reasonably fair."[40] No, I know of no situations in the juvenile court where a child's actual treatment is enhanced by depriving him of procedural safeguards.

V. If Not Treatment, What?

Well, where does all this leave me? Do I reject commitments altogether? I would reject commitments for purposes of treatment. Even in the prisons best served by therapeutic services, when one balances whatever positiveness they achieve against the destructiveness of the prison environment, it is difficult to contend that *except for the person whose incarceration is called for in the interest of public safety*, the balance favors commitment.[41]

Account must also be taken of the damage to the family. A federal judge released a prisoner from an 18-month prison sentence because of what was happening to his family. His 7-year-old son had refused to receive first communion since his father was imprisoned; his 8-year-old daughter fell to the bottom of her class; his 9-year-old daughter began suffering from insomnia; his wife had become a "disorganized woman;" three of his six children were seeing a psychiatrist.[42]

I see commitments justified only for the purposes of public safety, and I would not be extravagant in defining public safety. I do not mean that people who are incarcerated should not be treated, whatever the word means. No, in fact, most people who might justifiably be committed would be people who are not only violent offenders but people whose violence is attributable to serious mental illness. Yes, they should be treated, but the decision to incarcerate should be based upon security needs.[43]

40. *Id.* at 15.
41. NATIONAL CONFERENCE OF STATE TRIAL JUDGES, RECOGNIZING AND SENTENCING THE DANGEROUS OFFENDER 35, 45-49 (1966) (Proceedings, 9th annual meeting).
42. Chicago Daily News, Dec. 2, 1966 (unreported case).
43. MODEL SENTENCING ACT (1963) embodies this concept.

That means that far fewer people would be incarcerated than are incarcerated today, and it would mean that institutions could be closed down.

Earlier I mentioned the demonstration project in Saginaw, Michigan. The project was directed by Paul Kalin, a valued colleague of mine, now director of the midwestern office of the National Council on Crime and Delinquency. I discussed with him the theme of the paper I am now presenting. Among other things he wrote me as follows:

> Toward the end of the Saginaw experience I proposed we go beyond the project expectations and use some cases to illustrate the direction. One judge supported the idea, but all the citizens to whom I presented the idea were cautious because the "public won't accept it."
>
> We worked with an offender who had done time at prison on two or three occasions and had other arrests—virtually all (if not all) for assault with a knife in which the victim was seriously hurt. There was serious consideration given to trying him as a habitual criminal. We recommended probation. He completed it without any violation, and I suspect is still a free citizen in the community. The investigation revealed the victims had "provoked" his reaction by remarks about his promiscuous common law wife. Basically, the treatment plan suggested divorce, placement of the children with his mother, and acceptance of the fact that his wife was in fact "a whore."
>
> In another situation, a first offender charged with assault with intent to do serious bodily harm (with a gun), we recommended divorce, remarriage, and getting rid of the gun. Also worked out.
>
> However, we recommended commitment for a young (19-20) first offender charged with purse-snatching. The boy had no court record, but a careful presentence investigation revealed that his pattern of response to anxiety-provoking situations was assaultive. The judge, who had told me he could not accept our recommendation, interviewed the boy himself and then committed him for a longer term than he might otherwise have done, because the boy responded in the way we had predicted he would.

> I would not defend the latter disposition in theory—knowing what could happen to him in prison—but do believe it was a sound disposition in view of the alternatives available. Obviously, there may be some rationalization here—due to my anxiety not to risk a serious violation which might create problems for the project.[44]

By and large what I have said may appear to be an attack on the prison system, which it is. But please note that the test of public security (rather than treatment) may lead to a proper preference for commitment of a 19-year-old first offender rather than probation.

Is it simply a matter of finding new ways of attacking prisons as against probation? No, if probation is treatment, probation is also an invasion of one's autonomy, and should be used only if necessary. Does that mean I advocate less probation? The answer is that a lot of people on probation should receive an outright discharge, or be fined, if that is appropriate in their case, or a suspended sentence, but that probation is for many a burden rather than an aid, and a burden on probation services. Before I go into some detail about that, let me add that probation has to be used in more effective ways and for people who are now being committed.

This is not as far out as it may appear. If there is a lesson for an offender in the criminal law process, a deterrent to his future violation, and that of others, and there certainly are both of these, much of it comes in the very process of being arrested—or even receiving a ticket, and going through a process that leads to conviction. Conviction of crime is a very serious stigma that people want to avoid if possible.

For example, on the question of suspended sentence without probation, may I quote from Judge Bolitha J. Laws:

> Probation is fairly well developed in many communities and states, but even there the trend to greater use of imprisonment continues. Why? One answer may be that increases in probation grants are made up largely of the obviously safe cases, those for whom fines and suspended sentences were previously used. If that is so, the increased incidence of probation would not reduce the number of prison commitments. In any event, as I see it, we can reduce the prison population only by

44. Letter from Paul Kalin to Sol Rubin, Mar. 8, 1968.

> (a) checking carefully to determine whether we judges should grant probation to many persons now being committed to prison, and (b) increasing the use not only of probation, but of the other forms of community treatment—fines and suspended sentences—as well.
>
> Extensive use of the fine in England has demonstrated its value in a remarkable reduction of institutional commitments . . . .
>
> More frequent use of suspension of sentence without probation, like the fine, is part of the answer to the prison problem. The national average use of probation is probably about one-third of felony convictions. Many of our informed students of crime tell us it can safely be two-thirds, and that public security would not be damaged with that percentage of usage.
>
> We achieve success even now with many probationers who receive little or no actual help or guidance from their overworked probation officers. Can we not assume that these offenders would have been equally successful if they had received suspended sentences, without probation? When we speak of trying to achieve greatly increased use of probation, we are really referring to both probation and suspended sentence.[45]

Probation has to be refined if it is to be used properly. There is a lot more knowledge that we have to acquire about the effective use of probation. I will cite a few instances of such searching.

It is thought that the intensive use of supervision will be more therapeutic than very occasional contacts between officer and probationer. The following is a summary of a parole research study, but I believe it would be just as applicable to probation.

> In order to evaluate the effects of a special selection and training program of parole officers on recidivism reduction of male delinquents, two control groups of 157 . . . and 152 . . . parolees, all of whom were supervised by regular parole officers, were compared with 95 Experimental Group parolees, who were supervised by 12 specially trained counselors. The three groups were initially matched for background and offense variables.

45. Laws, *Criminal Courts and Adult Probation*, 3 NAT'L PROB. & PAROLE ASS'N J. 357 (1957).

> However, when comparison was made for delinquent acts committed during the six-month postparole period of this study, no significant differences were found in the percent of type of recidivism among the groups. Results should be cautiously interpreted because of the relatively short observation period, factors contributing to the selection of the Experimental Group parolees, and the increased opportunity for the counselors of these parolees to observe maladaptive behavior.[46]

Another study: The San Diego Municipal Court conducted a study of different ways of dealing with chronic alcoholics. It found that probation with supervision by Alcoholics Anonymous, or probation with clinic supervision, produced no better results than no treatment at all.[47]

A similar study of traffic law violators was conducted by the Anaheim-Fullerton (California) Municipal Court. The judge of the court, Judge Claude M. Owens, writes:

> Until about four years ago, the judges of this court were satisfied that our drivers improvement school was effective, because California's Department of Motor Vehicles records showed about 44% of the students had no record of any moving violation convictions in California in the year following completion of school, whereas in the year before attending the school they had at least three such convictions. Then along came an iconoclast who suggested that chance could account for that result; that perhaps the students would have had the same change if they had been placed on probation instead of having to attend the school, or had neither been placed on probation nor sent to school.[48]

So they researched it. By now the reader will not be surprised at the results. Very roughly, among those who were fined only —no traffic school and no probation—about 25 percent had a single violation, and a smaller number had more than one. In the first year following court appearances, drivers school defendants without probation, had about one-third fewer convictions than those who were only fined; probationed defendants—no traffic school—about the same. Defendants receiving *both* drivers school and probation did not do as well as either of these, although still a bit better than those only fined.

46. Schwitzgebel & Baer, *Intensive Supervision by Parole Officers as a Factor in Recidivism Reduction of Male Delinquents*, 67 J. PSYCHOLOGY 75 (1967).
47. Ditman, Crawford, Forgy, Moskowitz & Macandrew, *A Controlled Experiment on the Use of Court Probation for Drunk Arrests*, 124 AM. J PSYCHIATRY 2 (1967).
48. Owens, *Report on a Three Year Controlled Study of the Effectiveness of the Anaheim-Fullerton Municipal Court Driver's Improvement School*, VII MUN. CT. REV. 7 (1967).

That was within the first year. Within the second year, it was different. Drivers school continued to reduce convictions more than just a fine, but probation did not. Instead, once probation's one year term expired, its previously good effect disappeared, and the results were not significantly different from a fine.[49]

The federal probation service in 1932 consisted of 63 officers, having under supervision 23,200 probationers and 2,013 parolees, for an average caseload of 400 per officer. They had a very low violation rate, better than probation departments with much lower caseloads.[50] That was, of course, an archaic, primitive period, and with caseloads like that, how much casework could be done?

Today the U. S. Probation Office is conducting a project in one of their offices with a caseload of 350 men to one officer. During the first six months not one violation was reported.

I could go on and on like this but there is no need to. I do not want to give the impression that probation is a failure. I do not by any means think it is, but I do share the opinion of others—one of them being the federal probation service—that probation is not being properly used. One poor use is in cases where a fine or suspended sentence would be either just as good, or better. We have to find out which cases they are.

The other thing we have to find out—by trying it—is which serious cases are better off under probation than in prison. On this I have already quoted Paul Kalin. I will quote one more passage from his memo:

> Recently in North Dakota, in talking about regional jails and knowing the prison warden was there, I suggested that in their planning they should consider eliminating the state prison. With a prison population of less than 200 and the lowest "crime rate" in the country, they might find that a few regional detention centers

49. *Id.*
50. Chappell, *The Federal Probation System Today*, 14 FED. PROB. 30 (1950)

might be more effective in helping offenders and would encourage development of better "out-patient" services. The very few truly dangerous offenders might be confined on a purchase-of-care basis in a federal or another state institution. When the warden spoke that afternoon, he said to the group that he was initially shocked and resentful of my suggestion. As he had thought about it, he believed it had merit and should be explored.[51]

It is fine that the warden got over his initial shock. The fact is that the system of dealing with offenders needs changes, not shocking new changes, but the old goal of releasing people from institutions, whether prisons or mental hospitals, and not putting them there in the first place, and the perhaps newer goal of confining people for shorter periods.

What I have tried to do is explain why in my judgment that effort is being deterred by the new concept of treatment. Yes, people have a right to treatment. But commitment of criminals is seldom useful for treatment; probation must be used selectively; and it, and other forms of dealing with criminals in the community, namely fines and suspended sentences, are the preferred form of "treatment." Committing them is the last. But whatever we do with law violators—including mentally ill law violators—let us not sacrifice due process of law to illusions of treatment.

51. Letter, *supra* note 44.

DANGEROUSNESS AND THE MENTALLY ILL CRIMINAL

JONAS R. RAPPEPORT, M. D.

A quote from the book, "Psychiatry and the Dilemmas of Crime" by Seymour Halleck:

> Psychiatry holds an unstable position in the field of criminology. For every zealot who heralds psychiatric concepts and treatment as the only answer to the crime problem, there is a critic who believes that psychiatric contributions to criminology are unscientific and misleading. A realistic assessment of the value of psychiatric criminology must lie somewhere between these two extremes.[1]

In 1967 the President's crime commission reports: "It is true, of course, that many kinds of knowledge about crime must await better understanding of social behavior. It is also true that research will never provide the final answers to many of the vexing questions about crime."[2]

Today I shall speak of the role of psychiatry in the entire area of criminology and our involvement in the treatment of all types of offenders. Unfortunately, I have no specific formulas to offer, but I shall touch on some work that has been done in treating offenders, and I shall then discuss some research I have done on the dangerousness of the mentally ill.

In thinking of the treatment of the criminally ill we must remember that this term is used differently by different people at different times. Judges, juries, lawyers, probation officers, correctional personnel—all think of the ill criminal in a different way. The late Dr. Benjamin Karpman of the St. Elizabeth's Hospital in Washington, D. C. felt that all criminals were insane. He felt that to commit a crime was tantamount to insanity, at least a social insanity. I do not believe that we can freely subscribe to such a definition if we are going to maintain some order to our thinking, and I certainly do not think that the psychiatrist should be responsible for the treatment or rehabilitation of all social offenders. On the other hand, I think we

1. S. HALLECK, PSYCHIATRY AND THE DILEMMAS OF CRIME xii (1967).
2. PRESIDENT'S COMMISSION ON LAW ENFORCEMENT AND ADMINISTRATION OF JUSTICE, THE CHALLENGE OF CRIME IN A FREE SOCIETY 273 (1967).

should not limit our responsibility or efforts to that small group who are clearly so ill as to be held "not responsible by reason of insanity." In Baltimore, Maryland, in 1966 such a plea was filed in less than 2 percent of all criminal cases, and less than 1 percent were actually found so at trial.[3]

Let us stop for a moment, however, and focus on the obviously psychotic offender who is found "not guilty by reason of insanity." Our treatment programs for them seem reasonably clear cut. I do not think we need to treat a paranoid schizophrenic patient other than to insure more security for his and our protection until he is well. Of course, it is understood that some of these patients might never respond to treatment and always present a threat; it is here that we have a problem—that is, in deciding when he is to be released. Many times we err on the side of caution and consider patients more dangerous than they are. Then we are in trouble as far as what we are doing to and for the patient. Dr. Thomas Szasz has eloquently pointed out some of the shortcomings which occur when psychiatry is given too much responsibility. He says:

> This is a callous game. The court plays by the rule: Heads-I-Win, Tails-You-Lose. If guilty, the defendant is sent to prison. If not guilty but insane, he is sent to a hospital for the criminally insane. Why do I consider this callous? Because were it the intention of the court, or of society, to provide psychiatric treatment for certain offenders, this could be provided in prison. [I doubt this, at least now.] The psychiatric disposition of offenders seems to me a colossal subterfuge. It provides the "offender-patient" neither absolution from criminal guilt nor treatment. It is nothing more than an expedient method for "disposing" of persons displaying certain kinds of antisocial conduct.[4]

I do not completely agree with Szasz, although unfortunately, he may be all too correct in many instances. As you know, Dr. Szasz operates from an entirely different premise than most of us, and I will not go into a discussion of his ideas. But he causes us to pause and think when we are tempted to keep a patient in the hospital longer than may be absolutely necessary.

3. Personal communication, Mr. Charles Moylan, Jr., State's Attorney, Baltimore, Maryland.
4. T. SZASZ, LAW, LIBERTY AND PSYCHIATRY 114 (1963).

I see forensic psychiatry not merely as an evaluation of the criminal responsibility of the "insane" offender, but as a subspecialty of general psychiatry, which applies the expertise of psychiatry and its related fields to the diagnosis, prognosis, and treatment of all who come into contact with the law. I see this as being carried out either directly by diagnosis and treatment or indirectly by consultation, supervision, and training of others more directly involved with the offender. There remains a large area of what I might call practical research-treatment or controlled treatment in which much needs to be done, both in terms of supplying a service, as well as in trying to develop more adequate treatment techniques for these special populations. There are some offenders whom we can treat by our well used individual and group methods. Since 1955 Dr. Joseph Peters has been treating sex offenders on probation via group therapy in conjunction with the Temple University forensic unit at the Philadelphia General Hospital. They are now conducting a controlled study of the effectiveness of this program versus probation only, *i.e.*, without therapy. They have several homogeneous groups—heterosexual pedophiles, exhibitionists, sexual assailants, and homosexuals—and one heterogeneous group. Treatment lasts for 40 weeks with thorough evaluation before and after plus long term follow-up. Cases are assigned to the treatment or no treatment group on a random basis. Although it is too early to determine the results of this controlled experiment, their previous years of experience have indicated that out-patient group therapy can be a useful treatment for such offenders.

For others, however, we need to develop different methods. For instance, what of a project using some of the techniques described by Dr. Marks of the Maudsley Hospital in England. Dr. Marks treated transvestites with an aversion (mild electric shock) treatment and compared his results with a control group therapy program. While his results were not outstanding, there was evidence that such treatment had a place in our armamentarium. Might not such a treatment be applied to voyeurs or pedophiles, or in some unique way to arsonists and kleptomaniacs, or maybe even forgers, robbers, or car thieves? At least this represents a new approach—granted a unique one—but at least they are trying. There seems much to be learned from the proponents of behavior therapy that might be applicable to our criminal offenders.

A more practical application of behavioral techniques might be that suggested to me by Dr. Robert Schwitzgebel. In the case of a man who beat his wife repeatedly, Dr. Schwitzgebel had recommended to the court that the man be placed on probation and that one-half of his weekly salary of $85 be placed in escrow each pay day. This money would be returned to him at the next pay day, provided that during the ensuing week he did not beat his wife. Since they had a young child and half salary was certainly not very easy to live on, it was hoped that this would provide motivation to the wife not to enrage her husband to beat her and to assist him in controlling his anger if so aroused by such game playing. It is my understanding that this proposal was found a little too far out for the local court to accept. I do think, however, that it represents the kind of new approach and variation that we should seriously begin to consider.

The courts would like to look to us for help. They would like to find a substitute for simple incarceration, which they recognize as being of limited use for the future protection of society.

A group in California is trying to develop a model facility for the treatment of the 18 to 25 year old offender. Resocialization rather than simple incarceration is the goal. The institution is based on a community model—a therapeutic community within the community. Yes, the institution itself is seen as being right in town, in the same neighborhood from which the offender came. It is proposed to even allow the community to use the facilities of the institution, such as the gym and the auditorium. A new concept; yes, so was the community based day hospital a new concept 20 years ago, and 10 years ago so was the Community Mental Health Center. We might even try to develop a new type of correctional worker—the change agent. We have housewife therapists. Why not specially trained guards, probation officers, or new people trained in group work and other therapeutic techniques to work in correctional institutions? Many of the offenders change their behavior patterns with age. Can they be helped to make behavioral changes sooner?

I do not mean to minimize the problems one has in dealing with social offenders, and I do not want to minimize much of the naivety we have as psychiatrists in dealing with these people. There is certainly a great deal of difference between the menopausally depressed woman and the gang-moll or the addict-prostitute. There is certainly a difference between the chronic

schizophrenic and the hedonistic psychopath. But there is probably much less difference between some of our neurotic patients who have been exposed to various emotional deprivations and the auto theif or burglar who has been exposed to socio-economic and emotional deprivations. We have discovered in psychiatry that we can contribute to the desocialization of patients by keeping them in inadequate facilities too long. Also I feel that our society contributes to the recidivism of criminals by their institutionalization in punitive, non-rehabilitative prisons and jails.

I have previously mentioned that one of our goals as in all medicine is prognostication. This, of course, is one of our most difficult tasks since no one really knows how a fellow human being will act in the future. Yet, within certain limits, there is some material already available which will help us to test some of our hypotheses and enable us to establish some relevant critera for predicting behavior more accurately. Nevertheless, many unanswered questions remain. Have we clarified issues to this point? In 1960 we studied patients who requested sanity hearings or habeas corpus hearings. These were patients committed to one of our state mental hospitals. All had asked to be released, and all had been refused by the hospital and subsequently asked the court to release them. In essence, the hospital had said, we feel you are too dangerous to yourself or the person and property of others to leave. The court released one-third of them after the hearing. Of the remaining two-thirds remanded, one-third subsequently ran away, eloped as we say. The members of the remaining one-third either died, were eventually discharged or are still there. Not one of any of these patients got into any serious difficulty with the law within the 1 to 10 year follow-up period.

Seymour Halleck says: "Unlike most other medical specialists, the psychiatrist has not restricted himself to the treatment of those who seek his services but has sustained a deep involvement in the legal and social problems of controlling disturbed people."[5] As early as 1838, Isaac Ray, a founder of the American Psychiatric Association wrote his still relevant treatise *Medical Jurisprudence of Insanity.*

There was the time when Dr. Guttmacher, along with the other leaders in forensic psychiatry in this country such as Henry

5. S. HALLECK, *supra* note 1, at 205.

Davidson, Winifred Overholser, Phillip Roche, and many others, needed to devote a great deal of their time to the development of the Model Penal Code Test[6] and important appellate decisions such as the *Durham* decision.[7] The modern developments in psychiatry and the psycho-dynamic understandings of human behavior had to be communicated to the courts and lawmakers as well as all of society. The task was Herculean and despite their efforts is certainly far from being completed. The ball is rolling and, I think, moving well of its own momentum—in fact, maybe too well. Now we are asked to assist in rehabilitation of all types of offenders, and yet, our knowledge of their treatment is quite limited. Quite frequently, when a crime is committed it is immediately assumed that something must be emotionally wrong with the offender and that the psychiatrists can "cure" it. At this point the big question appears to be whether society is ready to make some changes in its attitude towards the criminal offender. Before this attitude can be changed, however, certain things need to be done. Mohr and Turner, who have worked extensively with sex offenders, say:

> A criminal process which is interested in social regulation rather than in fitting the punishment to the crime depends, however, on information by which the danger of a given offender to society, and conditions and chances of change can be assessed.[8]

What is happening in the present? We have in Maryland an institution that is unique in the United States—The Patuxent Institution. A hospital-prison devoted to the treatment of our worst, most dangerous, antisocial, psychopathic offenders. Under the direction of Dr. Harold Boslow, valiant attempts are being made to change the behavior patterns of these social predators. In Baltimore County the Juvenile Court has established a limited group therapy program for second offender delinquents and their parents, mainly using psychologists as group therapists. In addition some very excellent treatment work has been carried out by the Massachusetts Court Clinic program, and there is the work of Joe Peters at the Philadelphia General Hospital and the work of the forensic clinic of the Toronto Psychiatric Hospital of the University of Toronto. The latter group has done some very basic work on the evaluation and treatment of pedophilia and exhibitionism. Their research would indicate that the first offender heterosexual pedophile has a recidivist rate of 6 to 8 percent while in second offenders the rate goes up to 30 percent or more. Those whose sexual offenses are multiple and also have non-sexual offense records have a recidivist rate of 55 percent or more as sex offenders. The homosexual pedophile has a higher recidivist rate and is quite resistent to treatment. This looks like good, firm data upon which we can base recommendations.

6. MODEL PENAL CODE § 4.01 (Tent. Draft No. 4, 1955). For a discussion of the Model Penal Code Test as adopted in United States v. Freeman, 357 F.2d 606 (2d Cir. 1966), see Comment, *Criminal Law—Insanity—The American Law Institute Formulation and Its Implications for South Carolina*, 18 S.C.L. REV. 661 (1966).

7. Durham v. United States, 214 F.2d 862 (D.C. Cir. 1954).

8. J. MOHR & R. TURNER, PEDOPHILIA AND EXHIBITIONISM 75 (1964).

When a child is murdered, the community immediately describes this as a sex crime and assumes that all pedophiles are potential murderers. The little data that we have would indicate that, first, child murders are rare; second, child sexual murders are rarer; and third, if and when they do occur, they invariably are perpetrated by the psychotic pedophile who represents a very small part of pedophile offenders. As Guttmacher and Weihofen said with reference to the sex offender, "there is doubtless no subject on which we can obtain more definite opinions and less definite knowledge."[9]

We already are being faced with a dilemma. The alcoholic and the addict are now being considered "sick" and should be "treated." Can we effectively treat the alcoholic and addict? It seems obvious, at least to me, that our basic psychiatric treatment model is not adequate to treat these individuals. What of the others, the pedophile, voyeur, exhibitionist, arsonist, and so on? The Community Mental Health Center may well be called upon to treat these people.

Many of us when faced with a disturbed patient who threatens a serious act, become concerned whether or not he will do it. Newspaper headlines such as mental patient kills wife, do not help calm our anxiety. In order to evaluate the dangerousness of our patients, Dr. George Lassen and I undertook a study[10] which I will now discuss.

9. M. GUTTMACHER & H. WEIHOFEN, PSYCHIATRY AND THE LAW 110 (1952).

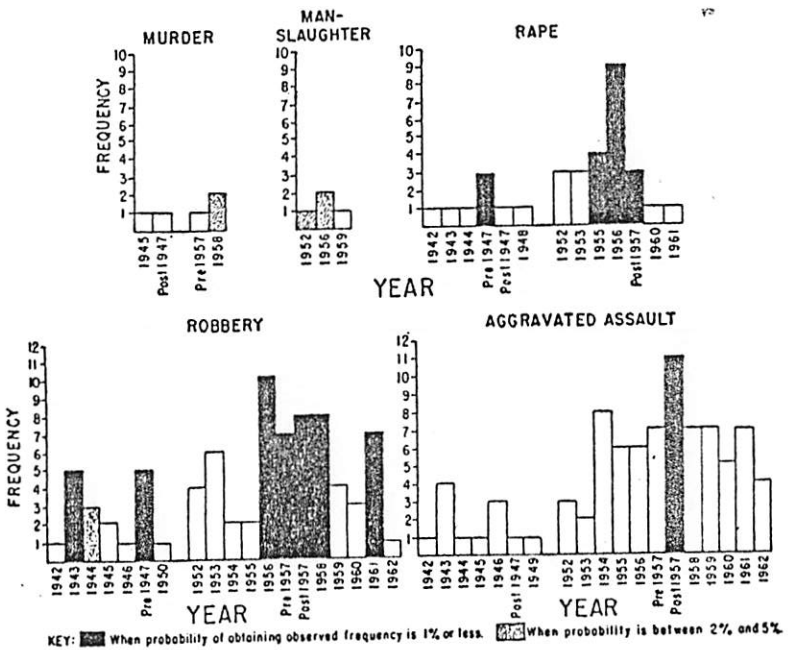
10. The following data and graphs are taken from studies conducted by Dr. J. Rappeport and Dr. G. Lassen as published in the *American Journal of Psychiatry*. The data and graphs are reprinted with the permission of the *Journal* with acknowledgements and notices of copyright as follows:

a. Evaluation and Follow-Up of State Hospital Patients Who Had Sanity Hearings. Reprinted from the *American Journal of Psychiatry*, volume 118,

This was a study of the arrest rates of all patients over 16 discharged from all psychiatric hospitals in the State of Maryland for the fiscal years of 1947 and 1957. The arrest data was obtained by searching the police files of all jurisdictions in Maryland and the District of Columbia. The data deals with the five most serious felonies committed by both men and women against persons: murder, negligent manslaughter, rape, robbery and aggravated assault.

GRAPH 1.

FREQUENCY AND STATISTICAL SIGNIFICANCE OF OBTAINED ARREST RATES



pages 1078-1086, 1962. Copyright 1962, the American Psychiatric Association.

b. Dangerousness—Arrest Rate Comparisons of Discharged Patients and the General Population. Reprinted from the *American Journal of Psychiatry*, volume 121, pages 776-783, 1965. Copyright 1965, the American Psychiatric Association.

c. The Dangerousness of Female Patients: A Comparison of the Arrest Rate of Discharged Psychiatric Patients and the General Population. Reprinted from the *American Journal of Psychiatry*, volume 123, pages 413-419, 1966. Copyright 1966, the American Psychiatric Association.

The graph above indicates the frequency of arrest for our populations and its significance compared to that of the general population. The years listed represent the year of arrest for 5 years prior to hospitalization and 5 years afterwards. The bars represent the actual number of arrests for that offense. The solid bars indicate a probability of 1 percent or less, and the checked bars represent a 2 to 5 percent probability for obtaining these observed frequencies in the general population. These probabilities were determined through the use of the Poisson equation.

A comparison in the frequency of arrest between our discharged mental hospital population and the general population reveals that for the offense of robbery, both hospital groups have a significantly higher arrest rate than the general population, and therefore, probably is in some way related to some factors connected with persons who are identified with mental illness. We cannot be as statistically unequivocal for the other offenses, but the data suggests that rape has a higher incidence of occurrence in our pre-hospitalization population than in the general population. Murder and negligent manslaughter are less clear-cut, and aggravated assault offenses in the discharged mentally ill are about equivalent to the rates of the general population. (It should be noted that murder, rape, robbery and aggravated assault all show some significant incidence in the immediate post-hospital period.)

A comparison of the frequency of arrests of females between our discharged mental hospital population and the general population reveals that for the offense of aggravated assault, both the 1957 pre- and post-hospitalization groups (particularly the latter) have significantly higher arrest rates than the general population. The incidence of murder and robbery are less frequent and their statistical significance is not apparent. There were no arrests in this female population for rape or negligent manslaughter.

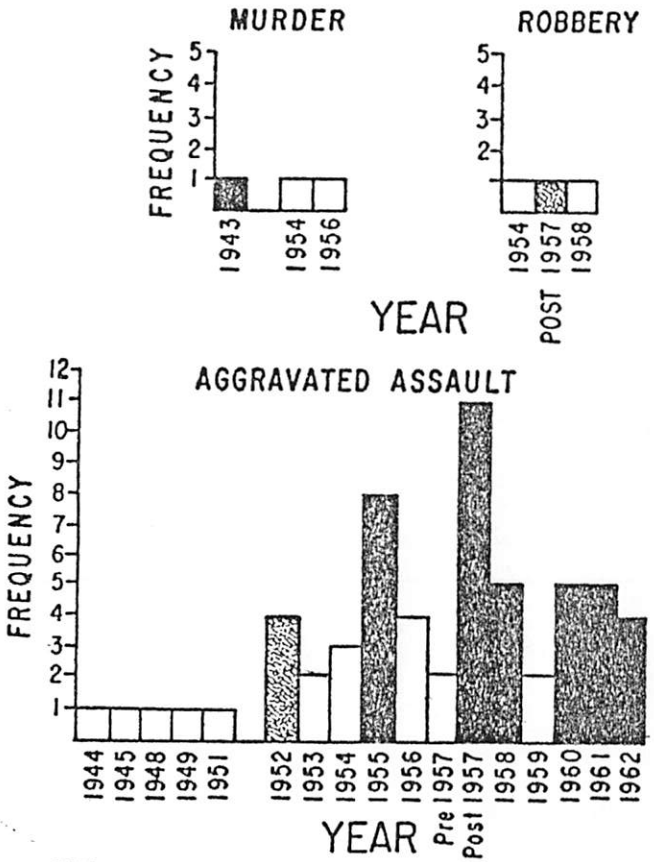
In these two studies we attempted to correlate diagnosis with arrests and generally noted that alcoholics and schizophrenics accounted for about 50 percent of the arrests both before and after hospitalization.

In considering the results recently compiled on our patients discharged in 1957 only, there seemed to be no gross differences

GRAPH 2.

DANGEROUSNESS OF FEMALE PATIENTS

Frequency and Statistical Significance of Obtained Arrest Rates



between the 1947 and 1957 groups so we have focused our attention on the latter. In the 1957 population there were 2,152 male patients and 2,123 female patients. When we view their total number of arrests, we are unable to make any comparisons with the general population (in the community) because no such data exists. The total number of patients with arrest records

is quite amazing when viewed from the relatively unarrested perch of the middle class psychiatrists. In our 1957 population there were 2,152 males, of which 58 percent had been arrested at least once. This is consistent with the general finding of females being arrested less frequently than males.

TABLE 1.

1957

MALE

TOTAL POPULATION — 2152
TOTAL OFFENDERS — 1248
} 58%

TOTAL OFFENSES — 8673 —— { PRE. HOSP. — 4365
POST HOSP. — 4308

FEMALE

TOTAL POPULATION — 2123
TOTAL OFFENDERS — 410
} 19%

TOTAL OFFENSES — 1264 —— { PRE. HOSP. — 598
POST HOSP. — 666

However, our ratio of 1 to 3, females to males, shows a much higher ratio than the F.B.I. 1966 national ratio of 1 to 7. Obviously, our female patients are more arresting. We can see that many of those arrested were arrested numerous times—the 1,248 males accounted for 8,673 arrests, an average of seven arrests per person, and our 410 arrested females accounted for 1,264 arrests, an average of three arrests per person.

Most of these arrests were in two categories—drunkenness and disorderly conduct. In the males these accounted for 71 percent of all offenses and in the females for 74 percent. It should be noted that proportionately fewer of the female arrests were for drunkenness as compared with the males.

With so few patients accounting for so many arrests, one wonders what the relationship might be between arrests and hospitalization. Derbyshire and Brody have shown that a large percentage of the Baltimore Inner City people are hospitalized via the police and the courts. Our data do not clearly show that arrests are clustered around the time of hospitalization although

TABLE 2.

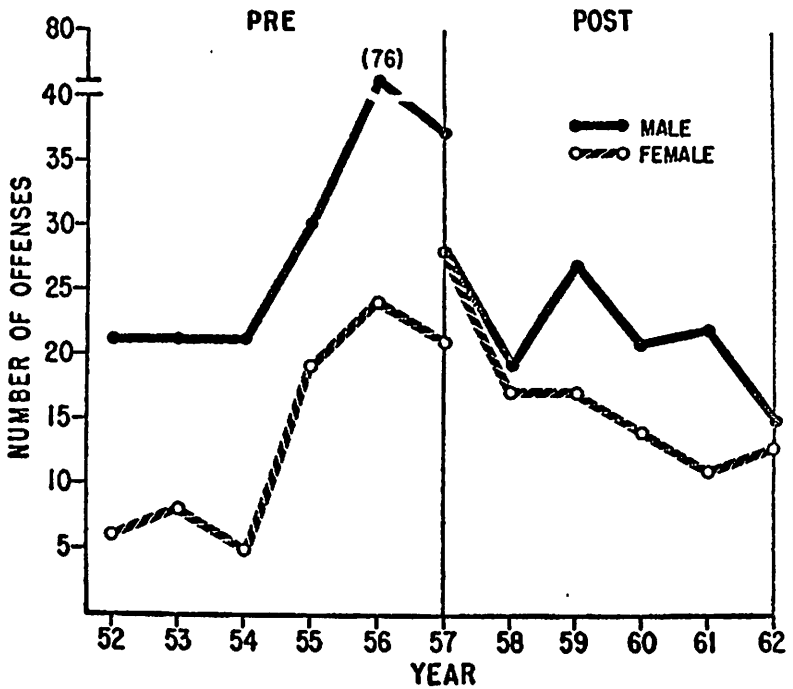
CAUSE OF ARREST 1957

	MALE	FEMALE
DRUNKENNESS OR INTOXICATION (DRIVING INTOXICATED)	3527	238
DISORDERLY CONDUCT OR BREACH OF THE PEACE	2659	709
TOTAL OFFENSES	6186	947
	71%	74%

there may be a slight tendency in this direction. Actually we are able to recognize at least five different individual groups of patients. This will become evident as the next few graphs are considered.

GRAPH 3.

FREQUENCY OF OFFENSES FOR SINGLE OFFENDERS



In table 3 we consider a group of patients who had one arrest each prior to hospitalization, but not after discharge, and another group who had no arrests prior to being hospitalized but subsequently had one arrest each. In the pre-hospitalization group there is a tendency for an increase in single arrests up to the time of hospitalization with no arrests after discharge. The post-treatment group started off with many of them getting arrested after discharge, but this tapered off as time went on. We would expect to see a tapering off since offenses decrease with age in our general population. Parenthetically, we can report that the average age of those arrested prior to hospitalization is older than those whose arrests first appear in the post-hospital period. The implication here is that for this post-hospitalization group there was not a clear-cut relationship between being arrested once only as a means to getting to the hospital. Why should these patients seem to respond to discharge by committing an offense? Maybe they got drunk at their "coming-out" party.

TABLE 3.

SINGLE AND MULTIPLE ARRESTS
1957

ONE ARREST

PRE HOSPITALIZATION	289
POST HOSPITALIZATION	232
	521

MULTIPLE ARRESTS

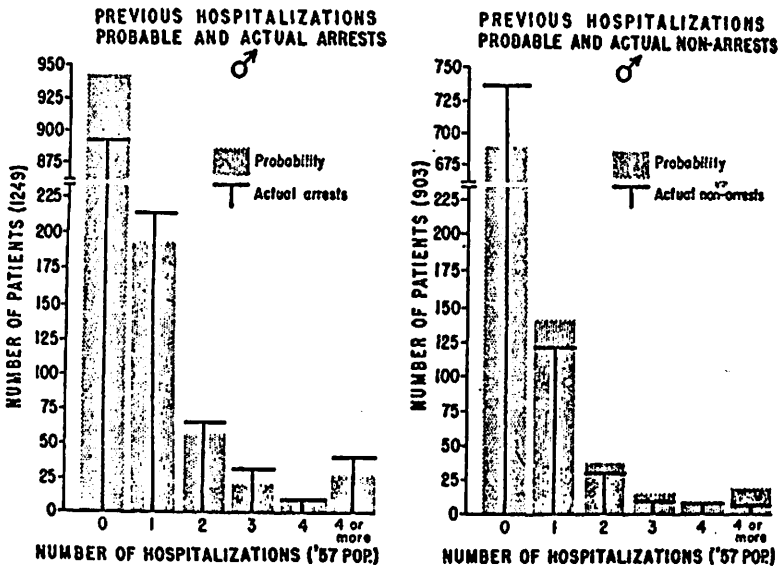
PRE HOSPITALIZATION	175
POST HOSPITALIZATION	118
PRE & POST HOSPITALIZATION	758
MULTIPLE OFFENDERS	1051
TOTAL OFFENDERS	1658

Here we see the five groups I spoke of more clearly defined with the tendency towards multiple arrests. The five groups are: single offenses prior to hospitalization, single offenses subsequent to hospitalization, multiple offenses subsequent to hospitalization and multiple offenses *both* pre- and post-hospitalization. Outstanding in these data is the fact that two-thirds of

the patients have multiple offenses and only one-third a single offense in the study period. This would seem to indicate that once a patient is arrested he is likely to be arrested again.

The next question which arises involves the relationship between a tendency to be arrested as related to the number of hospitalizations.

GRAPH 4.



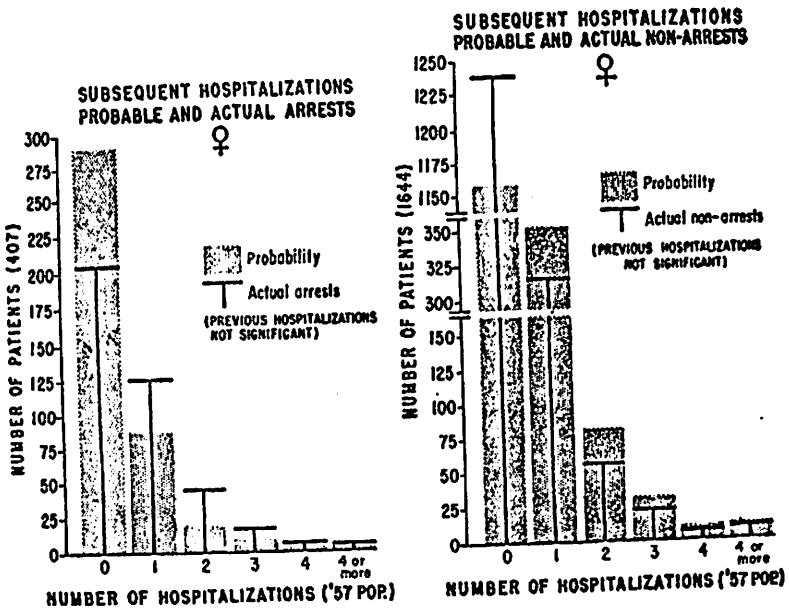
The graph above shows previous hospitalizations of males, that is prior to 1957, as related to the number of patients arrested and not arrested and their expected frequencies as derived from the chi square computation for arrested and non-arrest patients.

The following graph shows the subsequent hospitalizations of males, the number of patients arrested and not arrested, and their expected frequencies.

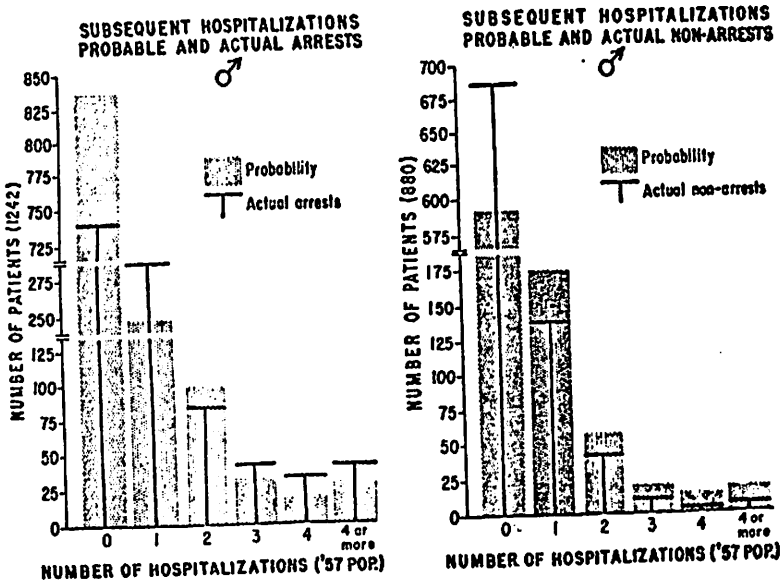
Graph 6 shows the females' subsequent hospitalizations and expected frequencies. The prior hospitalizations of the females were not significant.

In retrospect it should be remembered that in graph 2 the females showed their significant arrests for aggravated assault —post-hospital. From these data it is apparent that the arrested population is also hospitalized frequently. In essence, people

GRAPH 5.



GRAPH 6.



who have trouble seem to have double trouble despite our best efforts in our hospitals. We recognize, of course, that we are not talking about all patients, but only those who get arrested, although they are a large group.

It seems that psychiatric patients act-out a great deal, perhaps more than the rest of the community and are not substantially less dangerous as Brill and Malzberg reported in 1962.

Giovannoni and Gurel in a recent study of a 95 percent schizophrenic population of all males also found a high incidence of arrest for drunkenness. They found a higher rate than in the community for homicide, aggravated assault and robbery. In our more general psychiatric population homicide did not stand out.

We had assumed that somehow antisocial behavior and mental illness were complementary and might cancel out or replace each other. Therefore, we were surprised to see so many offenses in our patients particularly so closely associated with their time of admission or discharge.

Studies like this open the door for other work in prognostication. Much needs to be done so that, if at all possible, we can predict dangerous behavior.

We all have a responsibility. We as psychiatrists have a particular responsibility to produce something more meaningful. Those working specifically in forensic psychiatry have a responsibility to teach others both in law and psychiatry and more specifically to do research into the causes of and treatment of all types of antisocial behavior—be it clearly mental illness, or other types of antisocial behavior. It is our responsibility to develope new technoques and train new "helpers." I would hope to see the day when we can, beyond a reasonable doubt, predict when a mentally ill patient is dangerous and should be hospitalized and when he is safe to be discharged. We should also strive for the day when we can assure the courts that there is a certain treatment for an offender and that there are trained personnel to carry out this treatment and that if so carried out, there is a reasonable chance that the offender will not commit the same offense again. When that day comes, perhaps not in this millenium, then we can once again devote our efforts towards further changes in the tests of criminal responsibility. Perhaps then we will have met the requirements mentioned in my quote from Mohr, et al and be ready for the plan proposed by Dr. Guttmacher. Ideally, there would first be a trial to determine guilt, then the experts would decide what treatment is best for the true rehabilitation of the offender and where it should best be carried out. He did not think we or the law were ready for this now.

A fitting conclusion is this quote from President Johnson's "Crime" speech: "Ancient evils do not yield to easy conquest. . . . We cannot limit our efforts to enemies we can see. We must, with equal resolve, seek out new knowledge, new techniques, and new understanding."[11]

11. 112 CONG. REC. 5368, 5369 (1966) (message from the President of the United States).