

The Ungovernable Citizen: Psychopathy, Sexuality, and the Rise of Medico-Legal Reasoning

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There is likewise a form of mental derangement in which the intellectual faculties appear to have sustained little or no injury, while the disorder is manifested principally or alone, in the state of feelings, temper, or habits. In cases of this nature, the moral and active principles of the mind are strangely perverted or depraved; the power of self-government is lost or greatly impaired; and the individual is found to be incapable, not of talking or reasoning on any subject proposed to him . . . but of conducting himself with decency and propriety in the business of his life.

—J.C. Prichard¹

It is necessary here to impress the fact that the true sexual pervert is not a master of his will

—Alfred W. Herzog²

I. GOVERNING THE UNGOVERNABLE

While law and the behavioral sciences operate on generally disparate, and often incommensurable, assumptions about human character, they have found occasions for collaboration nonetheless. One such occasion arose in the middle decades of the twentieth century around the problem of

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1. J.C. PRICHARD, *TREATISE ON INSANITY* 4 (1835).
2. ALFRED W. HERZOG, *MEDICAL JURISPRUDENCE* 538 (1931).

regulating antisocial behavior in subjects who did not meet conventional criteria for insanity, and yet seemed undeterred by existing legal sanctions. This Article undertakes a genealogical analysis that focuses on rhetoric and reasoning to illuminate the evolving relationship between two authoritative disciplines. It also offers an historical account that links the rise of medico-legal reasoning to new forms of sexual regulation and the emergence of sexual identities.

A. Disorders of self-government

“Psychopath”: the word inspires dread, contempt, revulsion. It evokes images of serial killers and cannibals, leering pedophiles and, in a recent twist on the category, ruthless CEOs who cruelly and shamelessly plunder their employees’ pensions for their own selfish gain. From Norman Bates to Hannibal Lector and Jeffrey Dahmer to Tom Ripley, the psychopath has cut a riveting figure in the popular culture of the last century. His (for the most recognizable incarnations have been largely male) particular power to inspire terror and loathing derives in part from his ability to pass as “normal.” Cunning, seductive, and utterly devoid of remorse, he flouts morality and flaunts his indifference to the bonds of sociality. As we have seen in longstanding debates about the relationship of psychopathy to criminal responsibility, the psychopath confounds traditional legal categories of sanity and insanity. Without a conscience or superego, he remains incapable of self-government, and yet with his manipulative prowess he frequently eludes external regulation as well.

Such an ungovernable subject presents special challenges to a democratic society organized around the rule of law, challenges that require new mechanisms of control and containment. The ability to govern the self plays a critical role both in conceptions of democracy and in understandings of the individual citizen who makes democracy possible. Just as the nation governs itself with mechanisms of moderation—the checks and balances inhering in our separation of powers—and rules of law that guard against tyranny, so too the good citizen must exercise reason, industry, and self-restraint to remain worthy of participation in and protection from the governing body.

This view of the self as capable of and responsible for acting upon these principles continues to undergird American jurisprudence despite challenges from a variety of disciplines. Most forceful, most tenacious, and most heeded among these challenges has been the one issuing from psychiatry, for psychiatry in all its diverse incarnations operates upon the premise that the health of the human mind is fragile at best, and self-government an immensely fraught enterprise. Over the course of the last century, psychiatrists have persuaded us that hereditary, intrapsychic and chemical forces dictate our actions and our personalities, frequently

eclipsing reason and self-control. As one psychiatrist wrote in the mid-twentieth century: “Man is far from having the logical mind he is supposed to have; he is more swayed by emotions and impulses than by mature intellect and ripe judgment.”³ Psychiatric insights—especially those derived from psychoanalysis, but also those gleaned from biomedicine and most recently neuroscience—thus have troubled ideals of self-government and rationality.

In particular, psychoanalytic psychiatry in the first half of the twentieth century diagnosed failures of self-government as a formidable challenge to the rule of law, claiming a specialized knowledge essential to surmounting this challenge. Doctors located such failures in the newly identified personality known as the psychopath, whose pathologies exhibited themselves above all in the realm of sexuality. Beginning at the turn of the twentieth century, the burgeoning theory of psychoanalysis placed psychosexual development at the core of the self and its social trajectory. Psychiatrists linked sexuality and its disorders to crises of self-government while advocating a new medical model of deviance to supplant existing legal ones.

Psychiatric and legal professionals whose interests and assumptions about human behavior remained divergent through the nineteenth century saw these interests converge around the question of sexual deviance, particularly that of homosexuality. Indeed, as I shall argue below, homosexuality among all non-normative sexualities became a privileged site for negotiating issues of responsibility and culpability, which took on a new urgency with the psychiatric turn in medico-legal reasoning. As the psychiatrist Wladimir Eliasburg wrote in his 1947 article “Irresistible Impulse and Crime,”

[t]he controversy here has been whether a deed should be punished severely because it is obviously in keeping with the character and thus proves the moral turpitude of the perpetrator or whether just because it is obviously a produce of the evildoer’s nature and nothing more, should be dismissed as free of guilt. Cases where such controversies arise are those of sexual perversions, particularly of homosexual misdemeanors and felonies.⁴

This fundamental dilemma, whether and how to punish or restrain persons whose “nature” potentially compelled them to behavior at odds with cultural norms, defined collaborative endeavors between members of the legal and psychiatric communities.

The fraught partnership between law and psychiatry has had broad and profound cultural implications too diverse to address thoroughly here. My

3. BENJAMIN KARPMAN, *THE SEXUAL OFFENDER AND HIS OFFENSES* 218 (1954).

4. Wladimir Eliasburg, *Irresistible Impulse and Crime*, *PSYCHIATRIC Q. SUPPLEMENT* 108, 109 (1947).

purpose, in part, is to trace the beginnings of this relationship. In so doing, I will argue that the collusion of these disciplines, marked by the rise of medico-legal reasoning,⁵ permitted participants to negotiate the nature and limits of the ideal legal subject of liberal democracy, and to attempt to manage the psychical and social forces that threatened to undermine this subject. Recently, the United States Supreme Court reflected upon this partnership in reviewing a due process challenge to Arizona's test for insanity. In *Clark v. Arizona*, the court upheld Arizona's narrow insanity defense – one focusing solely on a defendant's inability to apprehend the wrongfulness of his criminal act – as well as its exclusion of expert testimony on the defendant's mental disorder as it bore on his capacity to form the particular mens rea required for the offense at issue. Justice Souter, writing for the majority, recognized a state's prerogative to adopt its own formulation of the insanity defense, and indeed potentially to adopt no formulation at all, by emphasizing the malleable and contested nature of psychiatric knowledge. Moreover, he justified the exclusion of mental disease testimony from the evidentiary consideration of a defendant's mental state at the time of the crime as a logical response to the dangers that “arise because of the imperfect fit between the questions of ultimate concern to the law and the information contained in a clinical diagnosis.”⁶

Yet despite this “imperfect fit,” psychiatric knowledge has evolved with an eye toward questions of law and legal regulation, just as law has at times made psychiatric insights central to its development. Thus law and psychiatric medicine, as well as the behavioral sciences more generally, have developed in a dialectical relationship, one in which what scholars have called the “juridification” of medicine⁷ occurs alongside the medicalization of law.⁸ In what follows, I examine a period in which legal and psychiatric endeavors intersected in mutually constitutive ways around the problem of certain subjects whose social deviance appeared to elude traditional regulatory mechanisms. With the invention of psychopathy as a category of mental disorder, particularly in its sexual incarnations, psychiatry offered to law a figure demanding a new sort of medico-legal regulation. The psychopath found its most salient incarnation in the homosexual, whose deviance, whether express or

5. This collusion also exemplifies the emergence of the modern administrative state and its new mechanisms of regulation. My analysis, however, proceeds largely within a discursive rather than an institutional context.

6. *Clark v. Arizona*, 126 S. Ct. 2709, 2735 (2006).

7. Jose Brunner, *Trauma in Court: Medico-legal Dialectics in the Late Nineteenth-Century German Discourse on Nervous Injuries*, 4 THEORETICAL INQUIRIES L. 697, 701 (2003).

8. Brunner makes a “historiographical argument that in the course of its interaction with medicine, law does not remain law in its original form but becomes a kind of medicine, while, in one way or another, medicine turns into a discipline using legal procedures and making legal recommendations.” *Id.* at 703.

incipient, required a shift in emphasis from antisocial acts to ungovernable identities. Paradoxically, though, the psychopath proved deeply unstable as an object of inquiry and regulation: too indistinct to locate or define with certainty, it thwarted the authority of both psychiatry and law.

The remainder of Part I offers a 1946 case, *People v. Barnett*, to illustrate the emergent form of legal reasoning that medicalized the problem of self-discipline. To trace the evolution of this reasoning, Part II briefly revisits tensions between psychiatry and law in the nineteenth and early twentieth centuries. Psychiatry has been implicated in legal reasoning since its inception as a medical discipline, even as the two disciplines have remained in contention with one another. Here I focus on early psychiatric contributions to debates about free will and contours of legal subjectivity. Since the psychopath soon would become a central figure in these exchanges, I consider in Part III the concept of psychopathy as it emerged in medico-legal discourse. My analysis emphasizes the influence that psychiatric elaborations of psychopathy exercised over legal culture, illuminating in particular the psychiatric construction of the “criminal sexual psychopath.” I turn in Part IV to the legal appropriation of this category, its statutory codification and its incipient discontents within both the medical and the legal communities. Cases and commentaries addressing these developments suggest that the homosexual emerged for a time as the paradigmatic psychopath. Finally, Part V elaborates the medico-legal treatment of homosexuality in this period, contending that the medical model of deviance organized a new jurisprudence of identity. I conclude with a brief reflection on the misgivings that arose around this fraught collaboration between law and psychiatry.

B. People v. Barnett: departures from “normal mentality”

In 1946, the California Supreme Court reversed two lower court decisions denying a special hearing to a defendant on trial for unnamed sexual offenses with a variety of adolescent boys.⁹ Under the California Welfare and Institutions Code, such a hearing was available to a defendant who convinced the court through affidavit that he fell under the state’s definition of a “sexual psychopath,” as specified in section 5500.¹⁰ This section provided that, if a court received an affidavit alleging sexual psychopathy on the part of any person charged with a crime, the judge might adjourn the proceeding or suspend the sentence and direct a warrant for the defendant’s appearance to conduct a hearing (analogous to one on insanity) and examination. If the court deemed the person a “sexual psychopath,” the statute mandated indefinite institutionalization in a state

9. *People v. Barnett*, 166 P.2d 4, 9 (Cal. 1946).

10. CAL. WELF. & INST. CODE §§ 5500-5501 (1945).

hospital for the mentally ill or insane. According to section 5500, “sexual psychopath means any person who is affected, in a form predisposing to the commission of sexual offenses (against children), and in a degree constituting him a menace to the health or safety of others, with any of the following conditions: (a) Mental disease or disorder. (b) Psychopathic personality. (c) Marked departures from normal mentality.”¹¹ As the *Barnett* court explained parenthetically, however, “[t]he words ‘against children’ which appear in brackets in the above section were in effect at the time of the trial of this case but were deleted by amendment in 1945.”¹² This qualification related directly to the case under review, since none of the defendant’s alleged victims was fourteen or younger, the age to which California courts had construed the word “children” in the statute to refer.

In compliance with the statute, the defendant’s brother submitted an affidavit to the trial court averring, among other things, that the defendant’s “departures from normal mentality” encompassed disorders “concerning all things sexual . . .”¹³ The affidavit opined that the defendant’s “innate organic inability to profit by experience, to fit into social patterns of behavior, or to respond to self discipline, together with the whole mental picture, indicate the presence of a psychopathic personality . . .”¹⁴ His brother first described the defendant as a homosexual who engaged in sexual offenses with boys ranging in age from thirteen to eighteen. He then concluded, “but . . . the central core of his sexual aberration and variation consists of the fixation of attraction, ideation in both consciousness and in his dreams, of boys of 14 or immature years.”¹⁵ What emerges from this final statement is a portrait of the defendant’s *interior* world: not specific offenses or acts, nor even a predilection to commit such offenses or acts, but rather the contents of a fantasy life, both conscious and unconscious, that revolved around pre-adolescent boys. Indeed, his fantasies take on more legal significance than does his actual conduct.

While the brother’s affidavit characterized the defendant’s sexual condition in general terms, focusing on his “departures from normal mentality” insofar as they led to or suggested the involvement of children as sexual objects, a medical statement, signed by two physicians and submitted with the affidavit, concentrated instead on the defendant’s homosexuality.

He suffers from a congenital condition technically known as

11. *Barnett*, 166 P.2d. at 5-6 (quoting CAL. WELF. & INST. CODE § 5500 (1945)).

12. *Id.* at 6.

13. *Id.* at 7.

14. *Id.*

15. *Id.*

inversion. He is an Invert, a type of individual in whom not only is there defective microscopic brain structure, but in addition to this brain defect a congenital variation [sic] in the structure of endocrine glands which have a determining effect upon character. Such persons all have psychopathic personalities and when their sex life is considered, are Sexual Psychopaths. . . . He is in sexual matters an Invert: i.e. one whose interest sexually has been turned congenitally by a power outside of him and apart from any consideration of free will to a condition where he is interested in, attracted by and obtains sexual satisfaction from his own sex. When this results in obvious and unlawful, as well as shocking and indecent, anomalies in sexual behavior, such acts should be considered not as vicious manifestations of a perverted free will, but rather as the unfortunate and destructive results of a congenitally bad brain and glandular makeup under the influence of the bad habits of a corrupt environment.¹⁶

In this highly deterministic medical account, the defendant was a “type of individual,” someone with both a “brain defect” and a glandular one, an “Invert” whose acts originated not from some “perverted free will,” but rather from his organs and his glands, whose inherent flaws are exacerbated by a “corrupt environment.” Elsewhere in the opinion, another physician pointed to external manifestations of the defendant’s internal defects: a broadened pelvis, a feminine manner of “associat[ing] words one with the other,” likes and dislikes properly belonging to a woman.¹⁷ The defendant’s gender nonconformity and same-sex desires, attributed to a diseased endocrine system, seemed to manifest symmetrically in corporeal and psychical deviance—a condition amounting to psychopathy.

The appellate court held that the trial judge abused his discretion in denying the defendant a hearing to determine his status, although the statute expressly permitted the trial court to decide whether or not to order such a hearing based on the persuasive value of the affidavit and other documents. Here, in the court’s view, the physicians’ statements left virtually no ambiguity: their diagnostic evidence rendered a hearing on the defendant’s status compulsory. Hence, the focus of the legal process against the defendant shifted inexorably from an adjudication of the criminal charges against him to an adjudication of his status.

C. Medico-legal reasoning and “the homosexual”

In the years leading up to *Barnett*, medico-legal experts launched the field of sexual psychopathology, diagnosing and regulating as

16. *Id.*

17. *Id.* at 7-8.

psychopathic an assortment of non-normative sexual inclinations and practices.¹⁸ This medical and legal category was not unique to California, but rather gained national currency in the mid-twentieth century, resulting in the enactment of special laws in approximately half of the states. Sexual psychopathy found its most salient incarnation in the figure of the homosexual. Thus *Barnett* dramatizes several issues that became central to medico-legal discourse during this period, particularly with respect to sexuality. First, homosexuality emerges as an identity category with clearly distinguishing features that putatively reflect a lack of self-control, an inability to exercise free will, and the absence of a stable, coherent self capable of conforming to social mandates. In *Barnett*, evidence of homosexuality as a psychological, neurological and endocrinological condition became sufficient to indicate that the defendant was most likely a “sexual psychopath,” in need of indefinite hospitalization.

Moreover, courts imputed specialized knowledge and insight to medical experts on the question of a defendant’s status. Indeed, by 1946 the understanding of homosexuality as a mental disorder had so eclipsed other models that the court identified an abuse of discretion in the trial judge’s lack of deference toward the physicians. Those who previously had been simple criminals, violators of legal and social strictures, had become medical enigmas, too complex for all but the most highly trained doctors. Finally, the defendant’s identity, quite apart from the acts he committed, emerged as the gravamen of the decision. Here the legal category of “sexual psychopath” diverted the focus from actual acts to a “predispos[ition]” to commit those acts such that the acts themselves became nearly irrelevant in the face of a weak or nonexistent will.

Indeed, the emergence of “the homosexual” as a juridical category in this period came to stand for the very irresistible impulses and ungovernability that mark the dissolution of the rational, bounded subject of law. This figure bears the legacy of a conversation between law and psychiatry about the possibilities and limits of a partnership between the two disciplines, one in which sexuality played an increasingly significant role. While this partnership addressed social ills of various kinds, from criminality to mental disorder, sexuality and its apparent misdirections took on particular significance. Psychiatric reasoning focused on the

18. See, e.g., Samuel J. Brakel & James L. Cavanaugh, Jr., *Of Psychopaths and Pendulums: Legal and Psychiatric Treatment of Sex Offenders in the United States*, 30 N.M. L. REV. 69 (2000); Deborah W. Denno, *Life Before the Modern Sex Offender Statutes*, 92 NW. L. REV. 1317 (1998); John Pratt, *Sex Offender Law in Historical Context: The Rise and Fall of Homophobia and Sexual Psychopath Legislation in Postwar Society*, 4 PSYCH. PUB. POL. & L. 25 (1998); William N. Eskridge, Jr., *Law and the Construction of the Closet: American Regulation of Same-Sex Intimacy, 1880-1946*, 82 IOWA L. REV. 1007 (1997); Estelle Freedman, “Uncontrolled Desire”: *The Response to the Sexual Psychopath, 1920-1960*, 74 J. AMERICAN HIST. 83, 87 (1987); Alan H. Swanson, *Sexual Psychopath Statutes: Summary and Analysis*, 51 J. CRIM. L. CRIMINOLOGY 215 (1960); Edwin H. Sutherland, *The Sexual Psychopath Laws*, 40 J. CRIM. L. & CRIMINOLOGY 543 (1950).

individual and on assigning and elaborating upon an identity for that individual, effectively diverting the popular and legal gaze from deviant acts to deviant persons. Indeed, medico-legal discourse followed the insights of psychoanalysis to forge a link between sexual and criminal impulses that posed a significant challenge to the traditional approach of American criminal law and penal policy.

Scholars of sexuality have demonstrated convincingly how sexual taxonomies, in existence since the late nineteenth century, that have attempted neatly to divide the world into homosexuals and heterosexuals operate according a logic of suspicion and contagion that belies such neat categorization. As Eve Kosofsky Sedgwick explained in her groundbreaking *Epistemology of the Closet*, “[t]o be gay, or to be potentially classifiable as gay . . . is to come under the radically overlapping aegises of a universalizing discourse of acts or bonds and at the same time of a minoritizing discourse of kinds of persons.”¹⁹ In other words, homosexuality is at once a quality constitutive of and confined to a discrete subculture *and* a contagious condition or tempting set of practices threatening to infect the rest of the population, within whom its potential remains incipient. But the ostensibly minoritizing approach that characterized medico-legal accounts of deviance threatened frequently to erode the boundary separating normality from deviance or pathology, and thus to become universalizing in scope.

II. PSYCHIATRIC EXPERTISE AND THE UNFREE WILL

Below I offer a brief account of the relationship between psychiatry and law as it evolved around questions of criminal responsibility and legal insanity. With the evolution of new categories of mental disorder on a continuum between insanity and putatively normal psychic life came a new prominence for professional communities intent on classifying and investigating psychological abnormalities.

A. Psychiatry and law: early affinities and antagonisms

Psychiatric involvement in legal processes traverses a venerable history that encompasses far more than the invention of the sexual psychopath and the general medical concern with sexual pathologies. But in the annals of psychiatric jurisprudence, the turn to sexuality marked a significant step in expanding the field of influence for a somewhat beleaguered medical discipline. From its inception as a specialized field of medicine in the 1820s and 1830s, psychiatry occupied the margins of the medical

19. EVE KOSOFSKY SEDGWICK, *EPISTEMOLOGY OF THE CLOSET* 54 (1990). See generally Janet E. Halley, *Reasoning About Sodomy: Act and Identity In and After Bowers v. Hardwick*, 79 VA. L. REV. 1721 (1993).

profession, which itself had yet to ascend to the level of professional prestige it has occupied since the beginning of the twentieth century.²⁰ While quickly seizing institutional jurisdiction over the insane, psychiatry did not enter into a direct conversation with law regarding the legal consequences of madness until well into the nineteenth century.²¹

Questions of legal sanity, which arose in the context of wills, contracts and guardianship proceedings as well as criminal offenses, previously had not called for particularly *medical* expertise.²² By the mid-nineteenth century, however, psychiatric concerns were evolving in a dynamic relation to legal ones: both converged around issues of legal, and especially criminal, responsibility. In 1844, hospital directors established the Association of Medical Superintendents of American Institutions for the Insane, later to become the American Psychiatric Association. Doctor Isaac Ray, a founder of the Association, generated one of the first attempts to influence the development of the law on the part of a still juvenile profession with his 1838 treatise *Medical Jurisprudence of Insanity*. Ray's treatise urged recognition of a version of moral insanity²³—a volitional disorder that putatively diminished or even eradicated impulse control—to supplement the reigning conception of insanity as an inability to tell right from wrong:

[W]e see the faculty thus affected, prompting the individual to action by a kind of instinctive irresistibility, and while he retains the most perfect consciousness of the impropriety and even enormity of his conduct, he deliberately and perversely pursues it. With no extraordinary temptation to sin, but on the contrary, with every inducement to refrain from it, and apparently in full possession of his reason, he commits a crime whose motives are equally inexplicable to himself and to others.²⁴

Here Ray effectively articulated a dissonance between conscious knowledge and unconscious motivation, decades before the unconscious and its desires would ground a novel conception of the self in psychoanalytic thought.

20. See generally ELIZABETH LUNBECK, *THE PSYCHIATRIC PERSUASION: KNOWLEDGE, GENDER, AND POWER IN MODERN AMERICA* 27 (1994).

21. See, e.g., THOMAS MAEDER, *CRIME AND MADNESS: THE ORIGINS AND EVOLUTION OF THE INSANITY DEFENSE* 36-51 (1985).

22. See *id.* at 27; see also Robert E. Mensel, *Feeling Right and Knowing Right: Insanity in Testators and Criminals in Nineteenth Century American Law*, 58 OKLA. L. REV. 397 (2005) (contrasting evolving doctrines of insanity in nineteenth-century criminal and inheritance cases).

23. In his 1835 *Treatise on Insanity*, the English physician James Cowles Prichard coined the term "moral insanity" to describe a disorder of the sphere of emotion and impulse as an alternative to intellectual, or cognitive, insanity. He linked this disorder specifically to a failure of self-government. J.C. PRICHARD, *TREATISE ON INSANITY* 15 (1835); see also HENRY WERLINDER, *PSYCHOPATHY: A HISTORY OF THE CONCEPTS* 35 (1978).

24. ISAAC RAY, *MEDICAL JURISPRUDENCE OF INSANITY* 139-40 (Winfred Overholser ed., 1962) (1838).

As mid-twentieth-century psychiatrists were quick to point out, however, psychiatry's direct involvement in shaping legal standards was severely attenuated in the century that gave rise to the "M'Naghten" test of legal insanity in 1843. This judge-designed test privileged cognitive factors over volitional ones, asking whether a defendant "knew" the nature and wrongfulness of her acts.²⁵ One later critic of that test asserted that "[t]he point to be emphasized here . . . is that, while current medico-psychological ideas were obviously used by the [M'Naghten] judges, the concept was the product of the judiciary only."²⁶ A voluminous literature exists documenting and analyzing the evolution of the insanity defense in Anglo-American jurisprudence, and it is not within the scope of this article to contribute to that project.²⁷ What is significant for the purpose of my discussion here is the extent to which psychiatrists, while participating in debates about the nature of insanity in the context of the criminal law, were nonetheless limited in their ability to shape legal standards.²⁸ Members of the medical community complained that the M'Naghten test disregarded modern research on human psychology and, later in the century, neurology suggesting the existence of "moral" or volitional disorders.²⁹ Nonetheless, this test dominated Anglo-American law, with few exceptions, until well into the last century and has resumed its privileged position over the past few decades.³⁰

25. The House of Lords opined "that the jury ought to be told in all cases that every man is to be presumed to be sane, and to possess a sufficient degree of reason to be responsible for his crimes, until the contrary be proved to their satisfaction; and that, to establish a defence on the ground of insanity it must be clearly proved that, at the time of committing the act, the party accused was labouring under such a defect of reason, from disease of the mind, as not to know the nature and quality of the act he was doing, or if he did know it that he did not know he was doing what was wrong." Daniel M'Naghten's Case, (1843) 8 ENG. REP. 718, 722 (H.L.).

26. Gregory Zilboorg, *Misconceptions of Legal Insanity*, 9 AM. J. ORTHOPSYCHIATRY 540, 542 (1939).

27. See generally Christopher Slobogin, *An End to Insanity: Recasting the Role of Mental Disability in Criminal Cases*, 86 VA. L. REV. 1199 (2000); MICHAEL PERLIN, *THE JURISPRUDENCE OF THE INSANITY DEFENSE* (1994); RITA J. SIMON & DAVID E. AARONSON, *THE INSANITY DEFENSE: A CRITICAL ASSESSMENT OF LAW AND POLICY IN THE POST-HINCKLEY ERA* (1989); DONALD H. J. HERMANN, *THE INSANITY DEFENSE: PHILOSOPHICAL, HISTORICAL AND LEGAL PERSPECTIVES* (1983); Alan Stone, *The Insanity Defense on Trial*, 33 HARV. L. SCH. BULL. 15 (1982).

28. This territorialism on the part of lawmakers with respect to medico-legal issues was not confined to the area of psychiatry; on the contrary, lawmakers were, and have remained, reluctant to abdicate authority on a wide range of medico-legal questions. See JAMES C. MOHR, *DOCTORS AND THE LAW: MEDICAL JURISPRUDENCE IN NINETEENTH-CENTURY AMERICA* 252 (1993).

29. See MAEDER, *supra* note 21, at 46-48. Indeed, even before the adoption of the M'Naghten rule, Isaac Ray dismissed as arrogant and uninformed any definition of insanity measured solely against rationality: "that the insane mind is not entirely deprived of this power of moral discernment, but in many subjects is perfectly rational, and displays the exercise of a sound and well balanced mind is one of those facts now so well established, that to question it would only betray the height of ignorance and presumption." RAY, *supra* note 24, at 32.

30. Following the verdict of not guilty by reason of insanity in the 1981 trial of John Hinckley for the attempted assassination of President Reagan, many states and the federal government reinstated a narrow test for insanity in place of the more expansive ones reflected in the ALI and "product" rules. Indeed, a majority of jurisdictions now limit insanity verdicts to defendants who meet the M'Naghten standards or even more stringent criteria, and a few have eliminated the defense altogether. See Clark

Judicial resistance to the irresistible impulse approach rested in part on the sense that law existed precisely to discourage and ultimately to punish capitulation to those impulses that threatened social order. Moreover, judges and others perceived an insurmountable difficulty in identifying persons in whom mental disorder prevented the exercise of self-restraint—as opposed to “normal” criminals. Such convictions lay behind the skeptical pronouncement that the proverbial “policeman at one’s elbow”³¹ would rid us of the problem of so-called irresistible impulse: one may resist under legal surveillance what seems irresistible without it. For example, in 1908 a Canadian judge elaborated this position as follows: “The law says to men who say they are afflicted with irresistible impulses: If you cannot resist an impulse in any other way, we will hang a rope in front of your eyes, and perhaps that will help.”³² This reasoning demonstrated both a faith in law’s efficacy and a well entrenched belief that legal subjects are capable of adhering to the law, although some have failed adequately to internalize discipline and still require the threat of punishment. Otherwise any number of deviations from the codes of appropriate behavior might be deemed insanity and insanity thereby implicated in daily life.

In the 1860s, Ray collaborated with Justice Charles Doe of the New Hampshire Supreme Court to formulate a more elastic test of legal insanity that aspired to move beyond *both* M’Naghten *and* irresistible impulse, one that focused on whether the defendant’s mental disease produced her behavior rather than on the precise nature of the defendant’s mental state.³³ Yet this test—dubbed the “product test”—remained unique to New Hampshire until Judge David Bazelon of the District of Columbia Court of Appeals, famously a champion of psychiatric insights and protector of the mentally ill, embraced it in the 1954 case *Durham v. United States*.³⁴ Largely due to the fluidity of psychiatric knowledge and the instability of its categories, however, Bazelon abandoned this approach some years later while concurring in a 1972 opinion³⁵ that adopted the Model Penal Code’s formulation for insanity. This test, which once prevailed in federal law as well as many of the states, looks to whether as

v. Arizona, 548 U.S. 736, 126 S. Ct. 2709, 2721-22.

31. A Michigan court recently glossed this test thus: “would defendant have committed the crimes had there been a policeman at his elbow at the time?” *People v. Jackson*, 627 N.W.2d 11, 12 (Mich. Ct. App. 2001).

32. *King v. Creighton*, [1908] 14 Canadian Criminal Cases 349 (Can.).

33. This collaboration resulted in the decisions *State v. Pike*, 49 N.H. 399 (1870) (excusing a defendant from criminal responsibility “if the homicide was the offspring or product of mental disease”), and *State v. Jones*, 50 N.H. 369 (1871) (“No man shall be held accountable, criminally, for an act which was the offspring and product of mental disease.”).

34. *Durham v. United States*, 214 F.2d 862, 874-75 (D.C. Cir. 1954), held that “an accused is not criminally responsible if his unlawful act was the product of mental disease or mental defect.”

35. See *United States v. Brawner*, 471 F.2d 969, 1010-11 (D.C. Cir. 1972) (Bazelon, J., concurring in part and dissenting in part).

a “result of mental disease or defect” the defendant lacked “substantial capacity either to appreciate the criminality of his conduct or to conform his conduct to the requirements of law.”³⁶ No formula to determine legal insanity has met with widespread approbation, since every test potentially proves both too much and too little. Prevailing standards for insanity may demand the acquittal of defendants popularly deemed responsible, while simultaneously permitting defendants with evident mental disturbances to languish in prison or to receive heavy doses of psychotropic medications in order to meet competency requirements.

Legal determinations of insanity derive their importance from the need to ascertain culpability, a quality predicated on principles of autonomy and central to conceptions of the juridical subject and to our legal and political cultures more generally. Before many states replaced the M’Naghten test for legal insanity with ones incorporating psychiatric insights, an American psychiatrist noted in 1939 that many small children would fail the M’Naghten test, and yet we would never impose comparable criminal liability on children.

The law automatically assumes that a child committing a felony does not know the nature and quality of the act and does not know that it is wrong. Yet a child of moderate brightness will say that he hit his sister on the head, that she bled and then she fell; he will even admit that she died or that he killed her and will perhaps say that he was wrong to kill his sister. The criminal code does not accept this knowledge as valid; without knowing it the law itself recognizes here a fundamental medico-psychological distinction between the purely verbal knowledge which characterizes the child and the other type of knowledge which characterizes the adult.³⁷

This analogy between children and the legally insane, although not a new one in cultural responses to madness, illuminates a fundamental question that subtended, and continues to inform, legal debates about the nature and parameters of legal insanity: Who is a legal subject, bound and entitled by law? Which qualities are required of this subject? The example of the canny but impulsive child here suggests a more restrictive purview for the legally sane, and thus for the legal subject, than did reigning legal models. In this sense, debates about insanity retained the potential to refine the definition of the legal subject even as they wrestled with expanding the purview of criminal irresponsibility.³⁸ Indeed, to the

36. A.L.I., MODEL PENAL CODE § 4.01 (1955).

37. Zilboorg, *supra* note 26, at 552. Of course, this view eroded significantly in the late-twentieth century as ever-younger children were tried as adults.

38. Professor Stephen J. Morse, one of the most prolific advocates of reason and responsibility as predicates of legal personhood, contends that “[t]he law’s concept of responsibility follows logically from its conception of the person and the nature of law itself. As a system of rules that guides and governs human interaction, law tells citizens what they may and may not do, what they must or must not do . . . and what consequences will follow from their conduct. Unless human beings were rational

extent that the object of these debates *was* a more precise definition of this subject, lawyers and judges held jealously to the project and its terms as their own.

The difference between the cognitive and volitional approaches to the determination of criminal responsibility turns on two premises critical to post-Enlightenment legal thought: the presumption of reason, of the immanence of logic and the priority of cognition; and the presumption of free will, of the ability to choose one's movements and to control one's actions.³⁹ In his 1927 treatise on psychiatric jurisprudence *Mental Disorder and the Criminal Law*, Sheldon Glueck, a prominent figure in the early twentieth-century dialogue between psychiatry and law, approvingly cited Lord Chief Justice of England Matthew Hale's eighteenth-century treatise *Pleas of the Crown* for its precocious appreciation of the significance of mental and emotional capacity to the tenets of law.⁴⁰ In particular, he lauded Hale's recognition of the "psychological and ethical fundamentals of the criminal law, so often ignored by writers and judges . . ."⁴¹ On the question of incapacity and exemption from culpability, Hale's treatise underscores the centrality of rationality and free will to conceptions of the legal subject underlying the Enlightenment vision of law:

Man is naturally endowed with these two faculties, understanding and liberty of will, and therefore is a subject properly capable of a law properly so called, and consequently obnoxious to guilt and punishment for the violation of that law, which in respect of these two great faculties he hath a capacity to obey: The consent of the will is that, which renders human actions either commendable or culpable; as where there is no law, there is no transgression, so regularly where there is no will to commit an offense, there can be no transgression, or just reason to incur the penalty or sanction of that law instituted for the punishment of crimes or offenses. And because the liberty or

creatures who could understand the good reasons for actions . . . and could conform to legal requirements through intentional action, the law would be powerless to affect human action." Stephen J. Morse, *Crazy Reasons*, 10 J. CONTEMP. L. ISSUES 189, 192 (1999).

39. American jurisprudence has repeatedly confirmed the significance of these tenets to the functioning of our legal system. For instance, *Morissette v. United States*, 342 U.S. 246, 250 (1952) affirmed a "universal and persistent" belief in "freedom of the human will and a consequent ability to choose between good and evil" that characterizes "mature systems of law." See also *United States v. Brawner*, 471 F.2d 966, 968 (Ct. App. D.C. 1972) ("The courts have emphasized over the centuries that 'free will' is the postulate of responsibility under our jurisprudence."); Michelle Cotton, *A Foolish Consistency: Keeping Determinism Out of the Criminal Law*, 15 B.U. PUB. INT. L.J. 1 (2005) (arguing that free will is more firmly ensconced in American criminal law now than at any time since the first half of the twentieth century); Ronald J. Rychlak & Joseph F. Rychlak, *Mental Health Experts on Trial: Free Will and Determinism in the Courtroom*, 100 W. VA. L. REV. 193 (1997) (contending that the deterministic view of many social scientists is incompatible with the requirements of the legal system).

40. See S. SHELDON GLUECK, *MENTAL DISORDER AND THE CRIMINAL LAW: A STUDY IN MEDICO-SOCIOLOGICAL JURISPRUDENCE* 132 (1925).

41. *Id.*

choice of the will presupposeth an act of the understanding to know the thing or action chosen by the will, it follows that, where there is a total defect of the understanding, there is no free act of the will in the choice of things or actions.⁴²

Notwithstanding what he called Hale's "simplified psychology," Glueck applauded Hale for evincing a more nuanced understanding of mental incapacity and its vicissitudes than did some of his nineteenth-century successors.⁴³ Hale's account of law and "proper" legal subjects here suggested an approach extending beyond mere cognition in its search for legal responsibility; it conceived of the will as a separate, though related, faculty. Indeed, Hale rhetorically analogized the will to law itself: where there is no will, as where there is no law, there can be no transgression. One whose will is compromised, whether by a lack of cognition or by some other force acting upon it, is in effect lawless, outside of the law. But despite Lord Hale's apparent recognition of its significance, this volitional conception of insanity, embraced by many psychiatrists, generally remained foreign to legal rulemaking in the centuries that followed.

Neither members of the legal profession nor doctors have arrived at a consensus definition of legal insanity; indeed this question has proven vexing to doctors as well as to lawyers, legislators, and judges precisely because of the tenacity of these Enlightenment ideals.⁴⁴ Nonetheless, when psychiatry was attempting to achieve institutional legitimacy, the problem of insanity offered its professionals one arena of potential expertise and influence. Given the difficulties that attend any definition of insanity compatible with an unshakable faith in free will *and* with the opacity of mental processes, however, psychiatric expertise in diagnosing insanity failed to provide a bulwark that would ensure professional prestige and authority. What one historian refers to as a kind of "medico-legal nightmare" was the early but enduring progeny of this collaborative venture between psychiatry and law.⁴⁵

42. M. HALE, 1 PLEAS OF THE CROWN 14-15 (1736).

43. See Glueck, *supra* note 40, at 132.

44. What Glueck identified in 1925 as "chaos" in the field of insanity jurisprudence, see *id.* at 188, found a more recent echo in an article by prominent mental health law scholar Christopher Slobogin. The article commences with the observation that "[i]nsanity defense jurisprudence has long been in a state of chaos." Christopher Slobogin, *An End to Insanity: Recasting the Role of Mental Disability in Criminal Cases*, 86 VA. L. REV. 1199 (2000).

45. MOHR, *supra* note 28, at 254. Despite its shortcomings, many commentators have suggested that even an imperfect insanity defense (most likely unavoidable, since "insanity" has been solely a legal category since psychiatrists essentially abandoned it in the late nineteenth century) remains necessary for the criminal law to be perceived as legitimate.

B. The new face of psychiatry

1. Beyond the asylum

Consigned to treating the insane in the ghettoized world of the asylum, psychiatry as a profession was in crisis by the end of the nineteenth century.⁴⁶ Psychiatrists functioned primarily as custodians of the institutions where those suffering from mental illness were sequestered, segregated from the majority of American society. They progressed little in their scientific inquiry and could no more explain the origins of insanity than they could offer a cure.⁴⁷

As the nineteenth century neared its end, psychiatry began to refashion itself as a profession more concerned with problems affecting the population at large than with those solely affecting its most marginalized members. The science of neurology, which gained ascendancy during the second half of the nineteenth century among professionals interested in mental processes, informed the psychological research of the young doctor Sigmund Freud and others. This focus on the brain would soon yield to an even more influential theory of the mind, which departed in large part from the biologism that dominated nineteenth-century understandings of human behavior.⁴⁸ The early decades of the twentieth century saw a shift in the psychiatrist's focus toward the world beyond the asylum, an institution which itself declined in importance, giving way to hospitals, clinics, and eventually to private practice. Psychiatric interest turned toward mental problems short of insanity, ones that potentially affected everyone; thus the psychiatric purview expanded to include society at large rather than merely the alternative world of severe mental illness.

The mental hygiene movement in America emerged out of a concern for and an interest in mental health as an issue of public health.⁴⁹ Founded in 1909, the movement coincided with the disciplinary and therefore normalizing—as opposed to strictly punitive—Progressive-era approach to deviance.⁵⁰ Psychiatry and psychology, as burgeoning fields of study and

46. See EDWARD SHORTER, *A HISTORY OF PSYCHIATRY: FROM THE ERA OF THE ASYLUM TO THE AGE OF PROZAC* 65 (1997).

47. See *id.*; see also NICOLE HAHN RAFTER, *CREATING BORN CRIMINALS* 169 (1997).

48. See Arnold Davidson, *Closing up the Corpses: Diseases of Sexuality and the Emergence of the Psychiatric Style of Reasoning*, in *MEANING AND METHOD: ESSAYS IN HONOR OF HILARY PUTNAM* 295 (George Boolos ed., 1990), for a fascinating discussion of this late-nineteenth-century shift from brain to mind in the context of sexuality and the origins of sexual deviance.

49. See LUNBECK, *supra* note 20 at 22-23; see also GERALD GROB, *MENTAL ILLNESS IN AMERICAN SOCIETY 1875-1940*, 145 (1983).

50. See, for example, Jonathan Simon's description of Progressive-era penology and its disciplinary legacy, in Jonathan Simon, *Ghosts of the Disciplinary Machine: Lee Harvey Oswald, Life-History, and the Truth of Crime*, 10 *YALE J. L. & HUMAN.* 75, 82-83 (1998); see also John Chynoweth Burnham, *Psychiatry, Psychology and the Progressive Movement*, 12 *AM. QUART.* 457 (1960); Herbert Hovorkamp, *The Marginalist Revolution in Legal Thought*, 46 *VAND. L. REV.* 305, 330 (1993).

practice, exemplified the Progressive conviction that people were products of their social environments. Students of the human psyche believed that their subjects could learn to adapt better to those environments and ultimately exercise control over them in ways that would vanquish most social ills. In a departure from older models of psychiatry and from the perspective represented by the American Psychological Association, founded at roughly the same time (1910), mental hygiene was interested less in psychopathology per se and more in devising measures to ensure a more mentally “hygienic” population. Unlike other movements in this period that were changing the face of psychological investigation, most notably psychoanalysis, mental hygiene focused on removing the pathogens that produced illness and promoting healthy social and familial interactions.⁵¹ In this way, mental hygiene also reflected the Progressive-era investment in childhood as a means to intercept potential delinquency and more developed forms of criminality.⁵² Creation of the Orthopsychiatric Association in 1924 further signaled a growing interest in the relationship between psychiatric goals and techniques and broad social concerns.

Criminality presented an area of particular interest for the psychological and psychiatric professions, since therein lay a field of inquiry with great potential for influence over public policy and social regulation.⁵³ Indeed, a kind of professional battle over jurisdiction in this area ensued between the disciplines of psychiatry and psychology, the latter of which defined itself as a profession specializing in large-scale quantitative diagnosis and testing along the lines of the burgeoning social sciences. As a result of this battle, the intelligence-testing techniques of psychologists ultimately yielded to the new “life-history” approach of psychiatry, influenced by psychoanalysis, with respect to the treatment and diagnosis of criminality. Within the individualized focus this approach represented, the figure of the “psychopath,” first in circulation in the nineteenth century but not prominent until the early twentieth, gained a certain celebrity.

The concept of psychopathy, or diseases of the mind, suggested that disorders other than strictly neurological ones, or ones detectable by

51. PHILIP CUSHMAN, *CONSTRUCTING THE SELF, CONSTRUCTING AMERICA: A CULTURAL HISTORY OF PSYCHOTHERAPY* 152 (1995) (describing mental hygiene’s central paradigm as “typically American” in this sense); see also Leonard S. Cottrell & Ruth Gallagher, *Important Developments in American Social Psychology During the Past Decade*, 4 *SOCIOMETRY* 107, 122 (1941).

52. See, e.g., Anne C. Dailey, *Developing Citizens*, 91 *IOWA L. REV.* 431, 440 (2006); Barry Field, *The Juvenile Court Meets the Principle Offense: Punishment, Treatment and the Difference it Makes*, 68 *B.U. L. REV.* 821 (1998); Martha Minow, *What Ever Happened to Childrens’ Rights?* 80 *MINN. L. REV.* 267, 278-80 (1995); David J. Rothman, *The State as Parent: Social Policy in the Progressive Era in W. GAYLIN ET AL., DOING GOOD: THE LIMITS OF BENEVOLENCE* (1978).

53. See Herman Adler, *Psychiatry Applied to Criminology in the United States*, 24 *J. Crim. L. & Criminology* 50, 51 (1933) (“One thing stands out as the result of the past twenty-five years of work in psychiatry in this country, and that is that the disorders of human behavior, which include criminal behavior, must claim an important share of the interest and responsibility of psychiatry.”).

psychological testing, lay behind much antisocial behavior. Since the Italian criminologist Cesare Lombroso had linked criminality to a hereditary weakness that manifested itself in mental disorder, psychopathy and crime had seemed productively entwined.⁵⁴ Later, the psychiatrist Adolf Meyer was largely responsible for acquainting his American colleagues with the concept of psychopathy and its European elaborations (psychopathic inferiority, psychopathic constitution, and psychopathic personality).⁵⁵ The study and diagnosis of psychopathy seemed to require an interpretive approach, one that took account of a variety of factors, including individual development, heredity, and recognizable symptom-formation. This approach found one early exemplar in the Viennese physician Richard von Krafft-Ebing's tome *Psychopathia Sexualis*,⁵⁶ a compendium of case studies and taxonomies relating B.A. Morel's theory of degeneration⁵⁷ to sexual deviance, first published in the United States in 1894 and widely available by the 1920s.

2. *The illnesses of war*

The First World War provided a significant occasion for the expansion of psychiatric authority. The manifold neuroses with which soldiers returned from their experiences in battle, as well as the difficulties many of them suffered in their attempts to reintegrate into society, all contributed to a newly influential psychiatric culture.⁵⁸ In the recollection of an eminent psychiatrist trained during this period, "the force that catapulted the need for, and the growth of, a new psychiatry came chiefly from World War I with its military tragedies, social dislocations, and psychological pressures."⁵⁹ Among these psychological pressures were

54. See CESARE LOMBROSO, *THE BORN CRIMINAL* (1st ed. 1876); see also RAFTER, *supra* note 47 at 183; Jonathan Simon, *Positively Punitive: How the Inventor of Scientific Criminology Who Died at the Beginning of the Twentieth Century Continues to Haunt Crime Control at the Beginning of the Twenty-first*, 84 TEX. L. REV., 2135, 2142-65 (2006).

55. See HENRY WERLINDER, *PSYCHOPATHY: A HISTORY OF THE CONCEPTS* 142-43, 145 (1978).

56. RICHARD VON KRAFFT-EBING, *PSYCHOPATHIA SEXUALIS* (1886).

57. Psychiatrist Morel began propounding the idea of degeneration, or the hereditary progression of mental illness, in 1857. See generally BÉNÉDICT MOREL, *TRAITÉ DES DEGENERESCENCES PHYSIQUES, INTELLECTUELLES ET MORALES DE L'ESPECE HUMAINE* (1857). The concept of degeneration achieved immense popularity in Europe over the succeeding decades, and was deployed to explain everything from criminality to the decline of the aristocracy to sexual deviance. For discussions of degeneration, see SHORTER, *supra* note 46, at 93-99; *DEGENERATION: THE DARK SIDE OF PROGRESS* (Sander L. Gilman & J. Edward Chamberlin eds., 1985); SANDER L. GILMAN, *DIFFERENCE AND PATHOLOGY: STEREOTYPES OF SEXUALITY, RACE AND MADNESS* 191-216 (1987).

58. For example, the notion of "shell shock" first emerged during this period in England, becoming one basis for a newly authoritative psychoanalytic culture. See BEN SHEPARD, *A WAR OF NERVES: SOLDIERS AND PSYCHIATRISTS IN THE TWENTIETH CENTURY* (2001); FREUD, ET AL., *PSYCHOANALYSIS AND THE WAR NEUROSIS* (1921); TED BOGACZ, *War Neurosis and Cultural Change in England, 1914-22: The Work of the War Office Committee of Enquiry into 'Shell-Shock.'* 24 J. CONTEMP. HIST. 227 (1989). War neuroses affecting soldiers who returned from the front inform the plots of Rebecca West's *THE RETURN OF THE SOLDIER* (1918) and Virginia Woolf's *MRS. DALLOWAY* (1925).

59. WALTER BROMBERG, *PSYCHIATRY BETWEEN THE WARS: A RECOLLECTION* 5 (1982).

antisocial tendencies whose origins remained obscure, requiring the detection of a trained professional.

Following World War I, then, psychiatrists and psychologists developed a particular interest in irresistible impulses manifesting themselves in soldiers returned from battle.⁶⁰ Glueck alluded to the effects of the Great War in *Mental Disorder and the Criminal Law*. In the section entitled "Disorders of the Impulses," he described "the case of a soldier in the World War who, after his return to civilian life, was afraid to go out for a walk with one companion, for fear of being seized with an impulse to kill him . . ."⁶¹ Such impulses, consuming a reluctant actor, confirmed once again the limitations of the M'Naghten model of insanity, with its exclusive focus on cognition.

In addition to reinforcing the existence and significance of volitional disorders, the war, combined with the importation and Americanization of psychoanalysis,⁶² facilitated the shifting of psychiatric inquiry from madness *qua* madness to a whole variety of mental and emotional maladies. The image of the soldier, emasculated by wounds that were as much psychic as they were corporeal, informed the newly charged interest in the figure of the psychopath, the man (almost invariably) who outwardly resembled his peers but inwardly hosted a variety of antisocial and potentially dangerous inclinations.⁶³

C. Criminality without reason

As psychiatry departed from its focus on insanity and began studying and treating a broader range of psychological ailments, then, it embraced a methodology informed by psychoanalysis and more interested in a person's life history than in her cognitive functions. What one contemporary called the new "dynamic psychology"⁶⁴ gained national prominence during the widely covered and closely followed Chicago trial

60. A series of medico-legal case studies that appeared in the *California Law Review* in 1921 included one of a former soldier, returned from battle, who suffered from an irresistible impulse toward flight. The article listed this case under an analysis of psychopathic personality, detailing the effect of the war, and shell shock in particular, in triggering latent or incipient psychopathy. See *The Relation of Law and Medicine in Mental Disease*, 9 CAL. L. REV. 276, 293 (1921).

61. GLUECK, *supra* note 36, at 306.

62. Freud made his fateful visit to the United States in 1909 to deliver a series of lectures at Clark University, leaving behind many disciples. See generally NATHAN G. HALE, JR., FREUD AND THE AMERICANS: THE BEGINNINGS OF PSYCHOANALYSIS IN THE UNITED STATES, 1876-1917 (1971); THE RISE AND CRISIS OF PSYCHOANALYSIS IN THE UNITED STATES: FREUD AND THE AMERICANS, 1917-1985 (1995).

63. Carolyn Dean describes warfare in the First World War as no longer a proving ground of manhood, but rather "a rationalized, dehumanized process in which men sat in miles of trenches up to their necks in water with dead comrades and rats and passively awaited gunfire from an enemy they could not see." Carolyn Dean, SEXUALITY AND MODERN WESTERN CULTURE 39 (1995).

64. See Editorial, *The Crime and Trial of Loeb and Leopold*, 19 J. ABNORMAL PSYCHOL. & SOC. PSYCHOL. 223, 224 (1924).

of Nathan Leopold and Richard Loeb in 1924.⁶⁵ Leopold and Loeb were the eighteen and nineteen-year-old killers of a neighborhood boy, Leopold's younger cousin. According to their confession, they committed the murder for no other reason than "to experience a hitherto untasted 'thrill' and to plan and carry out a 'perfect crime.'"⁶⁶ News coverage of the case kept national attention riveted on its developments.⁶⁷ Upon the advice of their distinguished lawyer Clarence L. Darrow, the defendants pled guilty, declining to offer a complete defense of legal insanity (the standard for which would have followed the M'Naghten rule); yet the defense nonetheless made the defendants' psychological conditioning and pathologies the gravamen of its case to combat the prosecution's request for the death penalty.⁶⁸ During a mitigation hearing before the judge, the defense team engaged a variety of medical and psychological experts to argue for the defendants' diminished capacity in light of their "abnormal" mental condition.⁶⁹ Darrow's strategy thus shifted the focus from legal insanity to the more elastic category of mental abnormality.

Local journalist Maureen McKernan, who covered the trial for the *Chicago Herald and Examiner*, collected her observations of the case in *The Amazing Crime and Trial of Leopold and Loeb*. In her account, as well as in other contemporary reflections on the case, "[t]he trial became a contest in psychology and for days the air was thick with terms—'split personalities,' 'phantasies,' 'subconscious influence,' 'basal metabolism'—which the alienists and neurologists of the two sides of the case hurled back and forth before the judge."⁷⁰ While this was by no means the first prominent American trial in which expert psychiatric testimony provided the hermeneutic framework for understanding the crime and its perpetrators,⁷¹ it did occasion the first popular dissemination

65. See generally Scott W. Howe, *Reassessing the Individualization Mandate in Capital Sentencing: Darrow's Defense of Leopold and Loeb*, 79 IOWA L. REV. 989, 994-1012 (1994); Denno, *supra* note 18 at 1223-36.

66. M. Hamblin Smith & Anne Fairweather, *The Case of Richard Loeb and Nathan Leopold*, 71 J. MENTAL SCI. 80, 81 (1925). See also *The Plea of Clarence Darrow*, reproduced in MAUREEN MCKERNAN, *THE AMAZING CRIME AND TRIAL OF LEOPOLD AND LOEB*, 160-237 (1924).

67. See generally Paula S. Fass, *The Making and Unmaking of an Event: The Leopold and Loeb Case in American Culture*, 90 J. AM. HIST. 923 (1993).

68. Darrow's decision to offer a guilty plea derived from his sense that a jury would likely be moved by a spirit of vengeance and disgust against the defendants with their privileged backgrounds and apparent lack of remorse; a judge, on the other hand, might be more receptive to a defense strategy that would spare their lives if not exculpate them altogether. His prediction proved to be correct. See Howe, *supra* note 65, at 1000-1001.

69. For an account of why Freud refused the opportunity to testify on the defendants' behalf, see Brett Kahr, *Why Freud Turned Down \$25,000: Mental Health Professionals in the Witness Box*, 62 AM. IMAGO 365 (2005).

70. MCKERNAN, *supra* note 66 at 129.

71. Over forty years earlier, the 1881 trial of President Garfield's assassin Charles J. Guiteau similarly staged a dramatic debate over the meaning of insanity among a variety of prominent psychiatrists and neurologists, but this case did not bring the technical aspects of psychiatric diagnosis into the popular imagination as did the Leopold and Loeb trial. In Guiteau's trial, the defendant ultimately failed to meet the criteria of insanity, which followed the M'Naghten rules almost exactly;

of these arcane concepts in the context of a shocking and otherwise incomprehensible crime.⁷² Media coverage of the case acquainted the public with the vocabulary of psychiatric diagnosis and the relevance for this diagnosis of the intimate details of a person's life. But the interpretive framework itself, though uniformly psychiatric, proved to be a bifurcated one. As the authors of a contemporaneous editorial in one psychology journal put it,

the alienists on the two sides represented two different schools of psychiatry—the older formal orthodox school and a new school of what may be called dynamic psychology. . . . The examinations of the criminals by the State's experts were limited to the traditional inquiries into the mental processes, such as 'orientation in time and space', 'memory', 'stream of thought', 'judgment', attention, responsiveness of answers, 'reasoning', knowledge of right and wrong, conduct, superficial motives, etc. . . . The second group entered intensively into the inner mental life of the criminals, into a genetic study of their mental processes, thus taking into consideration and laying emphasis upon an entirely different and additional class of alleged facts.⁷³

The editorial concluded that the problem lay with the role of expert testimony in an adversarial system "under which experts are obliged to arrive at conclusions and testify."⁷⁴ An evolving discipline such as psychiatry, the authors suggested, remained incompatible with the requirements of a legal regime that asks for definitive answers. While individual doctors might regard their diagnoses as conclusive rather than speculative, the field as a whole had not yet coalesced, still caught between those who represented the rationalist approach of M'Naghten and those who embraced the more unsettling claims of psychoanalysis.

Based on the evidence and testimony presented in the case, two British doctors offered their own diagnosis of the two defendants. Citing portions of the extensive report generated for the defense by two physicians, which documented among other things the defendants' sexual development, the content of their fantasies,⁷⁵ their physiological attributes, and their

he was subsequently hung, thereby occasioning outrage among some in the psychiatric community both at the time and in later years. See William J. Curran, *Legal Psychiatry in the Nineteenth Century*, in *PSYCHIATRISTS AND THE LEGAL PROCESS: DIAGNOSIS AND DEBATE* 4, 6-8 (Richard J. Bonnie ed., 1977).

72. As two British doctors who had closely followed the trial proceedings and testimony related in a psychiatric journal, "The explanations offered by the defence may be summed up as (a) split personality, (b) psychopathic personality, (c) constitutional inferiority, (d) glandular disorder, or inferiority, (e) dementia praecox." Smith & Fairweather, *supra* note 66 at 89.

73. *The Crime and Trial of Loeb and Leopold*, *supra* note 64, at 224.

74. *Id.* at 225. In *The Reconciliation of the Legal and Psychiatric Viewpoints of Delinquency*, 17 *J. AM. INST. CRIM. L. & CRIMINOLOGY* 173, 175 (1926), V. C. Branham also contended that the problems with expert psychiatric testimony in the Leopold-Loeb case and elsewhere were exacerbated by the requirements of the adversary system.

75. Writing on the importance of fantasy in the lives of the defendants, these physicians described Leopold as spending "a considerable part of the time each day in the weaving of phantasies. These

academic and literary interests, these authors followed the diagnostic case study formula that gained popularity as both a literary and a scientific genre toward the late nineteenth century. Of Leopold, the “genius” of the pair whose fascination with Nietzschean ideas⁷⁶ inspired him to play slave to Loeb’s putative superman, they wrote:

It is clear that we have here a lad of high intellectual capacity, but with a strong inferiority complex. There are, obviously, marked homosexual traits, with masochistic tendencies, and feminine fantasies are apparent. Such fantasies, in which the subject pictures himself as a woman, are much more common than is generally known. Leopold may certainly be regarded as a psychopathic personality.⁷⁷

This diagnosis pursued a kind of Freudian formula upon which many psychoanalytic psychiatrists relied: his “high intellectual capacity,” a quality that would have featured prominently in a nineteenth-century psychiatric evaluation, here recedes before aspects of sexuality and gender as manifested in Leopold’s fantasy life.⁷⁸ Further demonstrating an eminently twentieth-century perspective, they claimed:

“in these cases we always get some sex bond between the parties, either some actual sex connection, or the joint possession of some sex secret. This was borne out here. The two had been concerned in some mutual sex perversions, either on four occasions, or as seems more likely, of four different varieties.”⁷⁹

At the center of the psychopathy that led to such an otherwise inexplicable crime was a factor that exceeded the old analysis of insanity and reason—sex: “Even Freud’s opponents will, we think, be disposed to admit that the complex, in such a case as this, will be found to be of a sex character.”⁸⁰

The homoerotic element of this “complex” or “bond” between Leopold and Loeb did not escape notice on this side of the Atlantic. Walter

daydreams, which have persisted continuously and with great vividness up to the present, have been indulged in to a tremendous extent and variety” Doctors White, et al., *Joint Medical Report*, reproduced in MCKERNAN, *supra* note 66 at 112. They continued that the psychological danger of such extensive “intrusion of this kind of abnormal imaginative life . . . is very great, since it has the power of eventually leading to the confusion of reality with unreality—as was the case here.”

76. His apparent susceptibility to Nietzsche’s philosophy became an important element of his defense strategy: such early exposure to Nietzsche on the part of a fanciful and impressionable boy was more than likely to augment any incipient mental abnormalities. This association of Nietzschean ideas with madness and consequent criminality had a venerable history by the 1920s. Sander Gilman describes a turn-of-the-century German murder trial in which Nietzschean philosophy ostensibly incited nihilism and misogyny in the law-student defendant accused of killing his girlfriend. SANDER L. GILMAN, *DIFFERENCE AND PATHOLOGY* 61-66 (1985).

77. Smith & Fairweather, *supra* note 66, at 85.

78. *Id.*

79. *Id.* at 82.

80. *Id.*

Bromberg, an influential American psychiatrist who combined a scholarly treatment of psychiatric history with autobiographical reminiscences of his own career, wrote in *Psychiatry Between the Wars*: “I remember that during my second medical year at the University of Cincinnati rumors trickled down from Chicago that homosexuality and crime bore a shadowy relationship to each other.”⁸¹ This sexual aspect, however, did not emerge explicitly in most contemporaneous American appraisals of the case, which generally confined themselves to intimations of “perversion” and unnatural rituals, all in the service of demonstrating the defendants’ “abnormality.” According to historian Paula Fass, who documents the shifting meanings of the trial in the context of American culture more generally, media representations of the case employed innuendo, rather than explicit description, to convey the putatively homoerotic nature of Leopold and Loeb’s relationship.⁸² Still, a general understanding of its erotic contours sexualized both the crime and its incitement for a closely watching public.

Bromberg’s recollection about the apparent connection between homosexuality and crime as it emerged from this case dramatizes two features of American medico-legal thought in its post-World War I incarnations: an increased interest in homosexuality generally and the apparent centrality of sex to crime. This relationship between sex and crime extended beyond actual “sex crimes.” Rather, it encompassed potentially all crime, for which sex instincts, perversions, desires, “complexes,” and above all early psychosexual development, had become essential contributors.⁸³ Indeed by the 1930s, “[s]exuality and psychology began to dominate the public memories and representations” of the Leopold and Loeb case.⁸⁴ For instance, when in 1936 a fellow prisoner murdered Loeb in prison, many commentators attributed his demise to persistent sexual advances on the murdering inmate, a theory for which there appears to have been little corroboration.

In the end, the judge agreed with the defense that “the boys,” as their lawyers referred to them throughout the case, should be spared death based upon their psychological conditions.⁸⁵ It is unclear, though, to what extent the experts succeeded in persuading him of the defendants’ mental disturbances and to what extent the nature of the crime—whose sole motive was its commission—offered psychopathy as its only explanation.

81. BROMBERG, *supra* note 59, at 103.

82. See Fass, *supra* note 67, at 940-941.

83. Stephen Robertson’s *Separating the Men from the Boys: Masculinity, Psychosexual Development, and Sex Crime in the United States, 1930s-1960s*, 56 J. HIST. MED. & ALLIED SCI. 3 (2001), argues persuasively that the psychoanalytic concept of psychosexual development and its dangerous misdirections proved central to the evolving discourse on psychopathy.

84. *Id.* at 942.

85. See Howe, *supra* note 65, at 1036.

While influenced by their youth, the judge was also “obliged to dwell upon the mass of data produced as to the physical, mental and moral condition of the two. They had been shown to be abnormal in essential respects. Had they been normal they would not, he said, have committed the crime.”⁸⁶ Certainly his reasoning in deeming the defendants abnormal evinced a departure from a world view in which crime was the product of a wicked and therefore culpable will, a view that accepted diminished culpability only if its perpetrator could not distinguish right from wrong. Throughout the trial, Darrow’s team had argued that what marked these young men as abnormal was their total lack of remorse for the crime and the striking absence of what one psychiatric report termed “appropriate emotional response” with respect to this and other matters.⁸⁷ These factors seemed symptomatic of the kind of moral disturbance psychopathy represented, but not of proper legal insanity.

Above all, this case brought the new, psychiatric paradigm closer to the mainstream of American society: one focused on unconscious processes rather than on cognition, one clearly indebted to psychoanalytic thought. In addition, the case left those in the psychiatric community optimistic about their profession’s role in assisting the adjudication of cases involving potentially disturbed defendants.⁸⁸ The individual diagnosis and life-history approach was beginning to prevail among psychiatrists, who maintained that this, rather than an ability to determine legal insanity, was the signal achievement of their profession. Yet this attention to the individual was precisely what rendered psychiatric and legal concerns potentially incommensurable.

III. PSYCHIATRY TO THE RESCUE!

Psychiatry purported to offer law a novel understanding of human behavior and its determinants, one bearing the promise of scientific precision and efficacy. In what follows, I describe the increasingly warm reception psychiatric insights garnered in legal culture and contemplate the starring role for the psychopath in the new era of medico-legal regulation.

86. Smith & Fairweather, *supra* note 66, at 91.

87. Doctors Hulbert & Bowman, *Medical Report*, reproduced in MCKERNAN, *supra* note 66, at 81. See generally Martha Grace Duncan, “*So Young and So Untender*”: *Remorseless Children and the Expectations of the Law*, 102 COLUM. L. REV. 1469 (2002).

88. In the words of Sheldon Glueck, responding to criticism of some of the defense experts’ techniques: “At the present stage of development of psychology and psychiatry, the best possible instrumentality at the command of the legal order . . . is a thorough psychological, neurological, and psychiatric examination along the lines employed by the defense experts in the Leopold-Loeb hearing.” GLUECK, *supra* note 40, at 467.

A. Psychiatry and the criminal mind

Following Leopold and Loeb, psychiatric professionals were poised to exercise considerable influence in legal matters. A spate of highly publicized sex crimes in the early 1930s, many involving children, galvanized politicians and others to call for measures beyond extant laws to address the newly dramatized problem of the “sex criminal.”⁸⁹ The invention of the “sexual psychopath” as a category of person constituted, to a large extent, an attempt on the part of psychiatrists to occupy an entire field of legal regulation (one they deemed generally too complex for lawyers): that of “deviant” sexual behavior. It also accomplished, for some time at least, the identification of a whole class of people who required psychiatric intervention and who were poorly served by a legal system that understood only their bad acts and not their ill minds. Before I discuss this process in more detail, though, I want to provide a sketch of the tensions and prospects of overlap that existed between the two disciplines in the period on which I will be focusing.

Just as the Leopold and Loeb trial was contributing to a new prominence for psychiatric expertise in criminal matters, it also illuminating the dissension within the psychiatric community, eminent members of the legal community advocated increased recognition for psychiatric insights on the part of those interested in the criminal law. For example, Dean Roscoe Pound of Harvard Law School wrote: “We know that criminals must be classified as well as crimes. We know that the old analysis of act and intent can stand only as an artificial legal analysis and that the mental element in crime presents a series of difficult problems.”⁹⁰ In his separation of criminal from crime, Pound captured the quintessential division between the two disciplines as they endeavored to reckon with transgressions of the social and legal orders. Whereas the law had concentrated almost exclusively on the nature of the offense, and only on the offender herself insofar as it was necessary to determine the requisite *mens rea*, psychiatry illuminated the mind of the criminal—from her mental capacities to the unconscious emotional forces driving her behavior. Within this latter framework, locating intent was no longer such a straightforward business. The elaborate classificatory system in which intent to commit a crime contributed to the definition of the crime itself began to seem less relevant as the conscious mind faded in importance

89. See Freedman, *supra* note 16, at 91. Denno contests the centrality of media reports that sensationalized sex crimes in contributing to the enactment of sexual psychopath legislation, specifically disagreeing with Freedman’s emphasis on so-called “sex-crime panics.” See Denno, *supra* note 16, at 1355-66.

90. Roscoe Pound, *Criminal Justice in the American City—A Summary*, in *CRIMINAL JUSTICE IN CLEVELAND* 559, 586-87 (Roscoe Pound & Felix Frankfurter eds., 1922); see also Thomas A. Green, *Freedom and Criminal Responsibility in the Age of Pound: An Essay on Criminal Justice*, 93 *MICH. L. REV.* 1915, 1998 (1995).

compared to the unconscious, to emotions, and to various developmental factors. With a certain prescience Pound heralded the revolutionary effects of the new psychological understandings of human behavior:

Within a generation psychology has risen to a practical science of the first importance, with far-reaching applications on every side. Psychopathology has overturned much that the criminal law of the past had built upon. Indeed, the fundamental theory of our orthodox criminal law has gone down before modern psychology and psychopathology. The results are only beginning to be felt.⁹¹

In his account of the two disciplines, psychopathology, or the study of mental illness beyond traditional categories of sanity and insanity, posed a momentous challenge to the “orthodox criminal law,” one that was sure to have resounding consequences.

Justice Benjamin Cardozo also saw room for psychiatric and psychological intervention in areas of criminal law that were beginning to seem hopelessly antiquated and myopic in the face of recent medical claims about human personality and behavior. He expressed particular concern about the patent inadequacy of the insanity defense as it operated in most jurisdictions. In a nod toward the increasing legitimacy of psychiatric discourses and a call for more collaboration between legal and psychiatric professionals to reformulate this category in keeping with recent scientific developments, Justice Cardozo announced in a 1928 address before the New York Academy of Medicine that members of the legal community must rethink the question of criminal responsibility in partnership with their psychiatric counterparts.

Of this at least I am persuaded: the medical profession of the state, the students of the life of the mind in health and in disease, should combine with students of the law in a scientific and deliberate effort to frame a definition, and a system of administration that will combine efficiency with truth. If insanity is not to be a defense, let us say so frankly and even brutally, but let us not mock ourselves with a definition that palter with reality. Such a method is neither good morals nor good science nor good law.⁹²

Although Cardozo specifically addressed the problem of adjudicating criminal insanity, his call for a joint effort between the two disciplines found other areas of application, particularly in matters affecting juveniles.⁹³

91. Pound, *supra* note 90, at 588.

92. Manfred S. Guttmacher, *Psychiatry and the Courts*, 3 AM. J. ORTHOPSYCHIATRY 161, 165 (1933) (quoting Justice Benjamin Cardozo, Address Before the New York Academy of Medicine (1928)).

93. Indeed, the years preceding Cardozo's address already had witnessed a significant growth in the number of psychiatric clinics attached to criminal courts, both among newly instituted juvenile courts and among adult courts. See generally Adler, *supra* note 53, at 51-53. For example, when in

Psychiatry's most striking contribution to the legal treatment of criminals derived from its primary focus on the individual offender and his or her psychic condition. This individualized approach to understanding criminality, however, one that was captured in the oft-repeated mantra "[t]reat the criminal rather than the crime,"⁹⁴ also marked psychiatry's seemingly insurmountable difference from law. As interwar psychiatrist Manfred Guttmacher remarked in 1932, "[o]ne of the fundamental conflicts between modern psychiatry and the law is that psychiatry deals with personalities and as such it is necessarily individualistic. Law, on the other hand, deals with generalizations. Psychiatry analyzes humanity into its amorphous elements; law synthesizes into complex, stereotyped, organic compounds."⁹⁵ This disparagement of law's "stereotyping" function, its reliance on general categories seemingly oblivious to the specificity of individual psyches, reverberated throughout many psychiatric commentaries during this period.⁹⁶ Where in the nineteenth and early twentieth centuries lawmakers and judges might have derided psychiatry for its overly permissive attitude toward human failings, an attitude that largely informed receptions of the irresistible impulse approach to legal insanity, by the 1930s psychiatrists expressed disapproval of—and even thinly veiled contempt for—a legal process that demonstrated little understanding of the factors animating human behavior.⁹⁷

These psychiatrists viewed their own intervention as the sole means of renewing an outdated and inhumane legal system. Guttmacher concluded his 1932 address before the National Probation Association by asserting:

1909 Dr. Healy's Psychiatric Clinic was founded in connection with the Juvenile Court of Chicago, that clinic constituted the first organization of its kind. Yet according to one survey, by 1928 approximately one third of the juvenile courts and ten percent of adult criminal courts boasted official psychiatric involvement, whether through clinics or through court psychiatrists. Guttmacher, *supra* note 92, at 164. In the words of Manfred Guttmacher, an interwar psychiatrist, "[c]ompared with the centuries since individual factors were first feebly recognized, this is indeed a phenomenal growth in less than two decades." *Id.* Bromberg located another shift in the early 1930s when what he calls "[t]he polite coolness between the two disciplines" which had prevailed for almost a century "began to thaw . . ." BROMBERG, *supra* note 59, at 105.

94. Guttmacher, *supra* note 92, at 162.

95. *Id.* at 161.

96. See generally, GLUECK, *supra* note 40; GEORGE W. JACOBY, *THE UNSOUND MIND AND THE LAW* (1918). A small sampling of articles advocating psychiatric involvement in criminal processes as a means to individualize an otherwise mechanistic system includes: Clara Bassett, *Mental Hygiene and Law*, 22 J. CRIM. L. & CRIMINOLOGY 819, 832 (1932); V. C. Branham, *The Reconciliation of the Legal and Psychiatric Viewpoints of Delinquency*, 17 J. AM. INST. CRIM. L. & CRIMINOLOGY 173, 179 (1926); Sheldon Glueck, *Psychiatry and the Criminal Law*, 14 VA. L. REV. 155, 156 (1928). Bassett decried the inattention to psychiatry and other human sciences in legal education, deeming it "fantastic to find that the huge, intricate superstructure of the law should receive exclusive attention in training, when the only importance of the law is in relation to individuals or groups of human beings. It would seem indubitably clear that at least an equal consideration should be given in the training of lawyers to the scientific understanding of the human material to which law is applied." Bassett, *supra*, at 832.

97. One psychiatrist described the rift as an "ideological struggle" that entailed "mutual suspicion and even open hostility." Zilboorg, *supra* note 26, at 543.

“I see the opportunity of liberalizing and modernizing the attitudes of the law through the vehicle of psychiatry.”⁹⁸ Another advocate of psychiatric jurisprudence in the area of criminal law insisted at the 1934 meeting of the New York Neurological Society’s section on neurology and psychiatry that “the only hopeful approach to the problem of criminal conduct lies in the application of scientific individualized [treatment] . . . in place of . . . the mechanical procedure that characterizes the legal approach.”⁹⁹ The language of these assertions partook of the logic of progress and enlightenment: psychiatry liberalizes and modernizes; science replaces mechanistic simplicity with individualized complexity. In these remarks science and medicine supported democratic liberalism by illuminating the individual, whereas law subsumed individuality under rigid categorization. A striking articulation of this logic appeared in Dr. Gregory Zilboorg’s 1939 article “Misconceptions of Legal Insanity”:

Let me repeat: the issue is fundamentally not between the basic intent of the law and psychiatry, but between a revengeful, suspicious and instinctive hatred of the criminal which is more unconscious than conscious on the part of society on the one hand and science on the other; between a tradition of superstition whether it is couched in terms of the fifteenth or the twentieth century and enlightenment; between the centuries old doctrine of free will (a basic human megalomaniac superstition) and that scientific humility which knows that man is human.¹⁰⁰

Zilboorg here performed a brilliant rhetorical maneuver, whereby the law came to stand for irrationality in the form of revenge, suspicion, hatred, and superstition, incapable even of cognition, but rather subject to instinct and unconscious forces. Science, on the other hand, a counterpart to psychiatry, came to stand for enlightenment and humility.

Above all, psychiatrists objected to the persistent legal adherence to an ideology of free will, which became in Zilboorg’s account “a basic megalomaniac superstition.” For the discoveries of modern psychiatric inquiry, particularly those of psychoanalysis but also theories of endocrinology, neurology, and others that together made up the psychiatric canon, had accomplished nothing if not a thorough debunking of this belief. Zilboorg wrote derisively and emphatically about the general attachment to this fiction of free will, linking it to the fifteenth-

98. Guttmacher, *supra* note 92, at 174.

99. Proceedings of the New York Neurological Society, *Psychiatry and the Criminal Law*, 82 J. NERVOUS & MENTAL DISEASE 192, 192 (1935). Instead of the “battle of the experts” that took place in criminal trials where a defendant’s mental condition was at issue, one commentator advocated the universal adoption of procedures for committing all such defendants to psychiatric hospitals for evaluation before trial, thereby obviating the need to try those who warranted long-term commitment rather than punishment. See Hary Weihofen, *An Alternative to the Battle of the Experts: Hospital Examination of Criminal Defendants Before Trial*, 2 LAW & CONTEMP. PROBS. 419 (1935).

100. Zilboorg, *supra* note 26, at 549.

and sixteenth-century notion that mental disease signaled a person's willing submission to the devil: "It is less obvious today, less blatant, less destructive; it has lost the attributes of the mass psychosis which held sway for almost three centuries, but the inner fear of mental disease, the inner hatred of the criminal, the megalomaniac conviction that our will is free and that man is full master of his own fate remain almost unchanged except in advanced quarters of psychiatry."¹⁰¹ Here Zilboorg again fashioned a distinction between the primitive, even psychotic, idea that "man is full master of his own fate," an idea intimately tied to fear and hatred, and the enlightened thought confined to "advanced quarters of psychiatry." Not only was it up to the psychiatric elite to educate the rest of the world about the fallacy of their most cherished beliefs, but to the extent these beliefs represented psychosis (perhaps were even products of sick minds), only a man or woman trained in the sciences of the mind could diagnosis their maladaptive origins.¹⁰²

B. The rise of the psychopath

While psychiatrists gathered clinical data through a process that elevated biography to the status of core evidence, wherein everything in the subject's life from her genetic legacy to her family dynamics to her sexual fantasies became fodder for diagnosis, they also operated, by necessity, in impersonal diagnostic categories. When taken up by the legal system, these categories took on a rigidity that fixed individual subjects into identity categories to which severe regulatory consequences attached, a process that emerges starkly in the case of the sexual psychopath. Although the figure of the psychopath made his European debut in the nineteenth century as a kind of corollary to the insane, but one who suffered solely from moral or volitional insanity rather than from cognitive insanity, he did not gain prominence in American psychiatric discourse until the 1920s and 1930s.¹⁰³ Late nineteenth-century

101. *Id.* at 547.

102. By the 1950s, some psychiatrists had shifted their emphasis away from this dismantling of free will precisely because of the enormous social and legal investment in its integrity. For instance, in his 1953 volume *The Psychiatrist and the Law*, Dr. Winfred Overhoser maintained that the deterministic aspect of psychiatric insights did not contravene the core tenet of free will. WINFRED OVERHOSER, *THE PSYCHIATRIST AND THE LAW* 20-21 (1953). Overhoser was the superintendent of St. Elizabeth's Hospital and former president of the American Psychiatric Association; he also functioned as one of the primary psychiatrists in charge of diagnosing homosexuality and other mental disorders for the United States Military during World War II.

103. See Freedman, *supra* note 18, at 87. With the first edition of the American Psychiatric Association's *DIAGNOSTIC AND STATISTICAL MANUAL OF MENTAL DISORDERS (DSM-I)* in 1952, the psychopath finally retired, at least for technical diagnostic purposes, in favor of the "sociopath." The DSM labeled the disorder "sociopathic personality disturbance, antisocial reaction," referring to "chronically antisocial individuals who are always in trouble, profiting neither from experience nor punishment, and maintaining no real loyalties to any person, group or code. They are frequently callous and hedonistic, showing marked emotional immaturity, with lack of responsibility, lack of judgment, and an ability to rationalize their behavior so that it appears warranted, reasonable, and

understandings of sexual deviance as exemplified by Krafft-Ebing's *Psychopathia Sexualis* contrasted "perversity" (moral weakness, culpable for its failures, ultimately volitional) to "perversion," a compulsive, congenital anomaly that exempted its sufferer from responsibility.¹⁰⁴ Indeed, Krafft-Ebing approached the issue of sexual deviance from a background in forensic medicine and began his work in this area with the intention of separating crime from disease.¹⁰⁵ Twentieth-century elaborations of the psychopath borrowed the terms of this sexual taxonomy to construct their object of inquiry, a person whose strange proclivities extended beyond the sexual realm.¹⁰⁶ By reinvigorating the old notion of moral or volitional insanity, but refashioning it away from the fraught category of the insane, forensic psychiatrists created a new category of person: a morally diseased subject whose pathology lay in his compromised will.

By his very definition, then, the psychopath presented a legal, as well as a medical, conundrum.¹⁰⁷ Early appearances of this figure coincided with a general trend away from the strict binary opposition sane/insane (and concomitantly a broadening of the psychiatric purview to cover a wider

justified." AMERICAN PSYCHIATRIC ASSOCIATION, DIAGNOSTIC AND STATISTICAL MANUAL OF MENTAL DISORDERS 38 (1st ed. 1952). Since that shift "sociopathic personality" has in turn given way to "antisocial personality disorder." Recent work in forensic psychology and criminology, however, has firmly resurrected the psychopath as a type of particularly dangerous criminal not susceptible to rehabilitation. See, e.g., Charles Fischette, *Psychopathy and Responsibility*, 90 VA. L. REV. 1423 (2004); Grant T. Harris et al., *The Construct of Psychopathy*, 28 CRIME & JUST. 197 (2001); Grant T. Harris et al., *Psychopathy and Violent Recidivism*, 15 LAW & HUM. BEHAV. 625 (1991); Robert D. Hare et al., *Psychopathy and the DSM-IV Criteria for Antisocial Personality Disorder*, 100 J. ABNORMAL PSYCHOL. 391 (1991).

104. The title of Krafft-Ebing's book derived from an 1843 work by a Russian physician, Heinrich Kaan, who envisioned sexual perversion as a variety of moral insanity. See DEAN, *supra* note 63, at 19. Krafft-Ebing made this distinction between vice and biology emphatically, for non-normative sexual acts remained the province of law and morality, whereas his focus—diseases of the sexual instinct, perversion—properly fell under medical jurisdiction.

Perversion of the sexual instinct . . . is not to be confounded with perversity in the sexual act; since the latter may be induced by conditions other than psychopathological. The concrete perverse act, monstrous as it may be, is clinically not decisive. In order to differentiate between disease (perversion) and vice (perversity), one must investigate the whole personality of the individual and the original motive leading to the perverse act. Therein will be found the key to the diagnosis.

KRAFFT-EBING, *supra* note 56, at 53. For instance, he took pains to distinguish the two categories in his discussion of homosexuality: "The determining factor here is the demonstration of perverse feeling for the same sex; not the proof of sexual acts with the same sex. These two phenomena must not be confounded with each other; *perversity must not be taken for perversion.*" *Id.* at 247 (emphasis in original).

105. See Harry Oosterhaus, *Richard von Krafft-Ebing's 'Step-Children of Nature': Psychiatry and the Making of a Homosexual Identity*, in SCIENCE AND HOMOSEXUALITIES 67, 70 & 78 (Vernon A. Rosario ed., 1997).

106. With the advent of psychoanalytic models, however, these impulse "disorders" (in Glueck's words) never strayed far from their psycho-sexual origins. See, e.g., GLUECK, *supra* note 40, at 304.

107. In Glueck's MENTAL DISORDER AND THE CRIMINAL LAW, the entry on "Legal Significance of the Psychopathoses" contends: "It is around these types of constitutionally psychopathic offenders that the arguments between physicians and lawyers have largely centered. They constitute to a large extent the so called partially insane which the law does not exempt from responsibility." *Id.* at 382.

spectrum of maladies, as discussed above). For example, the 1918 treatise *The Unsound Mind and the Law* contained a chapter on “Psychopathic Disposition” where the author suggested that psychopathy might prove an unstable concept. He made the provocative claim that “[t]he notion of sickness, whether in the physical or psychic domain, cannot be strictly circumscribed and the boundary line between health and disease is always inconstant.”¹⁰⁸ His assertion took the subject of psychopathy as an occasion to blur the boundaries between the normal and the pathological.¹⁰⁹

When leading medical figures envisioned psychopathy as a kind of intermediate state between “normality” and legal insanity, they simultaneously conceived of its subject, the psychopath, as the quintessential criminal: cunning, canny, and amoral.¹¹⁰ Benjamin Karpman organized an entire symposium on psychopathy at St. Elizabeth’s hospital, where he practiced psychiatry in 1923; the proceedings made their way into the *Journal of Mental Hygiene* the following year. There Karpman wrote: “In the psychopaths we have unstable individuals with marked volitional and temperamental, but not obviously intellectual defects, who are the criminals *par excellence*, their criminality resulting from psychopathic difficulties and maladjustments which eventually bring them into conflict with the law.”¹¹¹ Then and in the decades that followed, Karpman and others emphasized the significance of psychopathy as an aspect of criminality that could not find adequate treatment in the traditional criminal law.¹¹² What ensued was at its extreme a movement to develop a whole separate field of psychopathology apart from conventional psychiatry, and in its more moderate form a new confidence in the diagnostic and classificatory utility of the category “psychopath.”

By 1939, an entire periodical devoted to the study of psychopathy in its relationship to crime emerged: the *Journal of Criminal Psychopathology*.

108. GEORGE W. JACOBY, *THE UNSOUND MIND AND THE LAW: A PRESENTATION OF FORENSIC PSYCHIATRY* 43 (1918).

109. Similarly, in a move avowedly informed by evolving psychoanalytic thought, another writer extended this observation to the notion of insanity itself in his 1924 volume *Insanity and the Criminal Law*, contending that the difference between sanity and insanity was a matter of degree rather than kind. See JOHN C. GOODWIN, *INSANITY AND THE CRIMINAL LAW* 98 (1924).

110. According to Glueck, “studies in recidivism have shown again and again that these offenders [the psychopaths] contribute heavily to the criminal and dependent classes, and that the apparently constitutional nature of their mental and behavioral anomalies make the ordinary penal or reformatory measures largely abortive.” GLUECK, *supra* note 40, at 382. In his textbook on criminology, sociologist Edwin Sutherland critiqued this association as essentially tautological: criminals were psychopathic, and psychopathy was defined by criminal tendencies. See EDWIN H. SUTHERLAND, *CRIMINOLOGY* 123 (1924).

111. *The Psychopathic Individual: A Symposium*, 8 *MENTAL HYGIENE*, 174, 199 (1924).

112. See generally Karl Birnbaum, *The Social Significance of the Psychopathic*, 149 *ANNALS AMER. ACAD. POLIT. & SOC. SCIENCE* 70 (1930); James J. Graham, *What to Do With the Psychopath?* 53 *J. CRIM. L. CRIMINOLOGY & POL. SCI.* 446 (1962); Harry R. Lipton, *The Psychopath*, 40 *J. CRIM. L. & CRIMINOLOGY* 584 (1950).

In its first volume, Karpman set out the method and object of criminal psychopathology as it differed from other disciplines, including conventional psychiatry. In keeping with the broader psychiatric field, Karpman stressed the extent to which, unlike other disciplines equally interested in criminality such as criminology and academic psychology that tended to study aggregates and general trends, “Criminal Psychopathology must perforce emphasize the individual aspect.”¹¹³ Calling its relationship to these other disciplines “missionary,” Karpman listed the aspects of Criminal Psychopathology from which the others stood to learn:

its emphasis on the individual and not on the mass, on the doer and not on the deed, on basic motives rather than explanations and rationalizations, an appreciation of the role of emotions in our life, especially at the unconscious level, as basic etiological factors in the productions of crime, and as corollaries to these, an entirely different approach to the problem of right and wrong, guilt and innocence, of responsibility, of confinement and punishment, etc.¹¹⁴

Its divergence from psychiatry was more complicated, however, for psychiatry had defined itself successfully as a discipline through its individualized focus. Nonetheless, Karpman wrote contemptuously of conventional psychiatry despite its interest in the individual, suggesting that many psychiatrists had succumbed to legal reasoning, “see[ing] the criminal eye to eye with the lawyer,” testifying at criminal trials “that this or that man knew the nature of the act or knew the difference between right and wrong, when a little reflection would show that merely knowing the nature of the act intellectually does not at all mean that the individual absorbed it emotionally”¹¹⁵ Criminal Psychopathology, on the other hand, took in Karpman’s account a much more enlightened view, influenced by developments in psychoanalysis: that a person’s behavior was largely the product of unconscious motivations.¹¹⁶ In other words, he suggested, if the unconscious rules our mental lives and dictates much of our conduct, then social regulation predicated on the assumption of human agency and freedom is doomed to failure. This observation held true for criminals and noncriminals alike since, as Karpman reasoned, if neuroses were but antisocial impulses repressed by the exigencies of culture, then criminality could be understood as the “overflow of instinctive energy into

113. Ben Karpman, *The Principles and Aims of Criminal Psychopathology*, 1 J. CRIM. PSYCHOPATHOLOGY 187, 189 (1939). Indeed, by many accounts Karpman’s career was increasingly defined by his preoccupation with the psychopath and his insistent attempts to legitimate the study and treatment of this figure. The journal enjoyed only a brief existence: five volumes published between July 1939 and April 1944. Its publisher, the Medical Press, then issued the periodical for another year under the significantly altered title, *Journal of Clinical Psychopathology and Psychotherapy*.

114. *Id.* at 191-92.

115. *Id.* at 192.

116. *See id.*

socially prohibited channels.”¹¹⁷

With the inauguration of Criminal Psychopathology as a separate field of inquiry with its own methodology, Karpman hoped to effect a transformation in the legal treatment of crime and criminals. If, as he claimed, this new field “denie[d] that the criminal is a responsible agent,”¹¹⁸ then traditional legal measures for dealing with criminals and the rationales of retribution and deterrence commonly marshaled to justify these measures all required reformulation. Convinced of the necessity for such a reformulation, Karpman described the pioneering role the purveyors of this new approach would play:

The criminal psychopathologist [unlike the forensic psychiatrist], convinced that criminality, being an unconsciously conditioned reaction, and therefore but a symptom of a disease over which the individual has no control, will go to court and testify in cases of rape, bigamy, pyromania, etc., that the individual is mentally sick, that though he may intellectually know the difference between right and wrong, he is unable to choose so emotionally, that he is therefore not guilty by reason of such a disease, that punishment will be of no avail, for the etiology keeps on operating after the sentence is over and that his place is not in a prison but in a psychiatric institution, and that what he needs is not a sentence, but an indefinite period of confinement until he is cured, and that treatment is psychic.¹¹⁹

Karpman’s approach was unlikely to prevail with respect to persons convicted of most crimes for which the probable motives—avarice, vengeance, hatred, even necessity—seemed both comprehensible and deserving of censure; therefore, the public and lawmakers preferred as a general rule to conceive of these offenders as bad rather than mad. But his perspective by 1940 had already exercised notable influence in the realm of sex offenders, as Karpman well knew, being a vociferous champion of research into the so-called sexual psychopath.

C. Psychopathology and the sex offender

Although in this introduction to the field of criminal psychopathology Karpman did not launch into a full-scale discussion of sexuality and psychopathy, a subject that would later preoccupy him in such works as *The Sexual Offender and His Offenses* (1954), he indicated that homosexuality in particular plays a significant role in the production of crime and predicted that further research would yield evidence to this effect.¹²⁰ Historians have linked the psychiatric interest in sex criminals

117. *Id.* at 194.

118. *Id.* at 207.

119. *Id.* at 215.

120. *Id.* at 201. In a slightly later article, Karpman focused on several case studies where the criminality at issue was, as he put it, “an expression of psychosexual infantilism.” Ben Karpman,

and the relationship between sexuality and psychopathic personality to two intellectual currents: European sexology, popularized in the 1920s and 1930s in the United States and its American progeny of sex research (such as the work of William Masters and Virginia Johnson¹²¹); and psychoanalysis, specifically Freudian concepts of psychosexual development.¹²² Both propounded a view of sexuality and sexual knowledge as integral to the self and to a robust social body. By the fourth decade of the twentieth century, it was sexual repression rather than its excess that seemed to pose the greatest danger.¹²³

For example, the title of a volume called *Social Control of Sex Expression*, published in 1931, conveyed a “modern” sexual ideology.¹²⁴ In a departure from dominant Victorian mores of chastity, masculine restraint, and feminine passionlessness, its author suggested that sex would manifest itself through “expression” were it not for various means and areas of “social control.” His book concluded that, “[e]ven where the legal control of sexual activity has been most effective, the stifled impulses have persisted and emerged in other forms. That the emergence was unconscious was none the less dangerous.”¹²⁵ Law as artifice stifled natural “impulses”; yet these forceful impulses found escape through alternative, and more dangerous, venues—not infrequently crime. Later in the same decade, while a nationwide panic about sex crimes was in progress,¹²⁶ a psychiatrist contended that the puritanical attitudes toward sexuality prevailing in American culture posed the greatest obstacle to the goal of eliminating these offenses.

It would be too much to expect anything like a solution of the

Criminality as an Expression of Psychosexual Infantilism, 3 J. CRIM. PSYCHOPATHOLOGY 383 (1942). Providing fodder for the argument that psychiatry had something unique and essential to offer to the regulation of criminality, he concluded that “[i]n cases of this type, criminality is an expression of a specific type of neurosis distinctly approachable by psychotherapeutic means.” *Id.* at 429.

121. See JOHN D’EMILIO & ESTELLE B. FREEDMAN, *INTIMATE MATTERS: A HISTORY OF SEXUALITY IN AMERICA* 312 (1988).

122. See Freedman, *supra* note 18, at 90; Robertson, *supra* note 83.

123. Even in the years leading up to the First World War, prominent medical authorities and others were beginning to construe sexuality as a wholesome and beautiful force; only the embrace of this force, rather than its repression, could forestall degradation and perversion. See DEAN, *supra* note 63, at 55. But the development of the social sciences and their “experts” between the wars brought the dangers of sexual repression into the public eye. What passed as sexual “morality,” according to one 1925 critique, actually amounted to “barbarity and imbecility in regard to the handling of sex question in present day society,” a combination responsible for most of our social and individual pathologies. Harry Elmer Barnes, *Sociology and Ethics: A Genetic View of the Theory of Conduct*, 3 J. SOC. FORCES 212, 216 (1925). A repressive approach had given rise to “a veritable sexual obsession on the part of the American population.” *Id.* at 218.

124. See GEOFFREY MAY, *SOCIAL CONTROL OF SEX EXPRESSION* (1931).

125. *Id.* at 275.

126. See Freedman, *supra* note 18, at 92. Denno, on the other hand, conducts a statistical analysis of the relationship among media coverage of sex crimes, media coverage of other crimes, enactment of sexual psychopath legislation, and FBI data on annual crime rates to challenge Freedman’s historical account of a sex-crime panic and of the media’s role in fueling the legislative response to sexual offenses. See Denno, *supra* note 18, at 1355-1366.

problem of sex offenses and sex offenders in a society which still provides inadequately for the inculcation of normal sex habits in its individual members, still often deliberately undertakes to obscure and befuddle the problem for the young or frequently denies opportunities for the practice of normal sexuality in maturity. Sex perversions are usually sex preferences, at least for want of a better, and cannot be eliminated by mere statutory regulations.¹²⁷

Like so many of his fellow doctors, this author recommended, among other things, that scientists be enlisted in the project of revising statutes related to sexual behavior. In addition, he advocated in a familiar refrain giving wider discretion to courts “so that the punishment or disposition of the case can be made to fit the criminal rather than the crime.”¹²⁸

These recommendations coincided with a national fervor about sex crimes, which, according to historian Estelle Freedman, lasted from about 1937 to 1940; another such panic took place from 1949 to 1955.¹²⁹ In 1937, FBI director J. Edgar Hoover began an article in the *New York Herald Tribune* entitled “War on the Sex Criminal” with the following battle cry: “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.”¹³⁰ Historians have since confirmed that no significant increase in the incidence of sex-related crime occasioned this heightened awareness,¹³¹ and professionals in the field of criminology appear to have maintained as much at the time (and to have convinced their psychiatric counterparts of the fallacy driving the national response to certain highly publicized cases).¹³² Nevertheless, politicians and others began to perceive the need for a novel approach to the legal treatment of sex

127. Joseph Wortis, *Sex Taboos, Sex Offenders and the Law*, 9 AM. J. ORTHOPSYCHIATRY 554, 563 (1939).

128. *Id.*

129. See Freedman, *supra* note 18, at 92. Although Denno contests Freedman’s emphasis on these sex-crime panics, many of the sources I consulted that were published during this period support the account of heightened and inflammatory national attention to sex crimes. For example, one law review article published in 1955 claimed that, in addition to the calls for scientific enlightenment, “an even more important factor in the enactment of such legislation was the ever-growing preoccupation of powerful and vociferous parts of the population with sex crimes,” giving rise to demands for action expressed with “hysterical fervor.” Frederick J. Hacker & Marcel Frym, *The Sexual Psychopath Act in Practice: A Critical Discussion*, 43 CAL. L.J. 766 (1955). Unlike Denno, I am less interested in the question of causality (i.e., did a media-fueled sex-crimes panic exist, and, if so, did it cause the turn toward sexual psychopath legislation?) than I am in the ways in which the rhetoric surrounding the sex offender constituted this figure as an ungovernable citizen.

130. J. Edgar Hoover, *War on the Sex Criminal*, N.Y. HERALD TRIB., Sept. 26, 1937, quoted in Jack Frosch & Walter Bromberg, *The Sex Offender—A Psychiatric Study*, 9 AM. J. ORTHOPSYCHIATRY 761, 761 (1939).

131. Freedman notes that no necessary correlation existed between the periods of panic around sex crimes and the incidence of violent, sexually related crime. Notwithstanding the lack of statistical or other evidence to justify the ominous rhetoric, a public inflamed by incendiary accounts of individual acts of sexual violence demanded a response from the state. See Freedman, *supra* note 16, at 92-93.

132. See Frosch & Bromberg, *supra* note 130, at 761.

offenders, a category of criminal that was beginning to grip the public imagination, fueled by inflammatory rhetoric such as Hoover's.

Following a series of "sex-killings," for example, Mayor Fiorello LaGuardia of New York City initiated a citywide investigation into the psychiatric status of sexual offenders. He ordered that all men convicted of and sentenced to prison for indecent exposure, impairing the morals of a minor, sodomy, or attempted rape be evaluated by a psychiatrist.¹³³ On the basis of this evaluation, a magistrate judge decided whether or not to send convicts upon their release to the psychiatric ward of Bellevue Hospital for additional observation that might lead to long-term psychiatric commitment.¹³⁴ The conclusion of this investigation, however, yielded the consensus that "the majority of revolting sex crimes are committed by persons who are not legally insane."¹³⁵ If not the legally insane, then what sort of person committed these "revolting" crimes? A feverish discussion about the nature and appropriate treatment of such a person ensued over the next two decades, precipitating hundreds of books and articles and a series of laws specifically addressed to the problem, both legal and psychiatric, of the "criminal sexual psychopath." Psychiatrists and psychologists took this occasion to augment their own intervention into what they perceived as an archaic and inhumane criminal law. One wrote:

Again [as with insanity] science must come to the rescue! The sex criminal is not possessed of the devil and sending him to the electric chair or imprisoning him will not cure him nor will it deter others from becoming sexual psychopaths. Although we do not yet know too much concerning this complex problem, we do know that the sex criminal or sexual pervert is suffering from an illness—a distorted emotional state—and although not as tangible or visible as a broken arm, yet is just as real.¹³⁶ [Author: check last line of this quote; missing a word?].

As they did in more general discussions of criminal responsibility, commentators juxtaposed the penal approach to sex crimes against a scientific one. Whereas they construed the penal approach as superstitious and therefore both irrational and ineffective, they took medical science to promise both enlightenment and efficacy.

If this trope of enlightenment attended critiques of traditional criminal justice and advocacy of scientific advances in the understanding and management of human behavior, it also inflected efforts to move away from Victorian distaste for the public treatment of sexual matters. For

133. Richard A. McGee, *Introduction* to BERTRAM S. POLLENS, *THE SEX CRIMINAL* 14 (1938). McGee was warden at Riker's Island.

134. *See id.*

135. Wortis, *supra* note 127, at 554 (citation omitted).

136. POLLENS, *THE SEX CRIMINAL*, *supra* note 133, at 25.

instance, the “open and frank discussion” of sex crimes that took place in 1937—as exemplified by Hoover’s sensationalist warning—was, as the author of a 1938 volume entitled *The Sex Criminal* asserts, “one more indication of our gradual emergence from darkness into light.”¹³⁷ In the preface to his 1939 collection *Sex and the Statutory Law*, subtitled “A comparative study and survey of the legal and legislative treatment of sex problems,” lawyer Robert Veit Sherwin remarked that

[t]he healthy outlook in regard to the subject of Sex is a thing of the present, and even more of the future. . . . Assuming such progress as having been accomplished, the question now arises: Has the Law in regard to topics concerning Sex made the same progress? Does the Court’s judgment always coincide with the doctor’s prescription?”¹³⁸

Although Sherwin claimed in this preface that his book would merely present the statutory material without editorial evaluation, the ensuing pages suggest that the law lagged behind medical and popular discourse on sex.

Other commentators supported reform of the existing approach to sexual offenses while pursuing a slightly different logic. One author’s analysis resembled that of Freud’s later works such as *Civilization and its Discontents* to the extent that it understood prohibition and constraint on sexual expression as a necessary concomitant of a stable and thriving culture, at the same time that it declined to offer moral or other normative justifications for penalizing certain sexual practices and elevating others.¹³⁹

It should be clear that if we regard our normal sexuality as good, it must be socially applauded and encouraged, as indeed it is; and if abnormal sexuality is bad, it must be socially reprovved and discouraged, as undoubtedly it is. You cannot at the same time applaud, encourage, or even accept both normal and abnormal sexuality; the social taboos against abnormal sexuality are essential to the preservation of our normal sexual tradition.¹⁴⁰

The role of law, for this author, was therefore to codify and reinforce social taboos, which themselves represented a kind of cultural consensus rather than some natural or divinely ordained regimen of appropriate behavior.¹⁴¹ Contriving to inform his readers that sexual norms are

137. *Id.* at 20.

138. *Preface* to ROBERT VEIT SHERWIN, *SEX AND THE STATUTORY LAW* (1939).

139. In *Civilization and Its Discontents*, Freud describes love as either “genital” or “aim inhibited” and asserts that love “on the one hand comes into opposition to the interests of civilization; on the other, civilization threatens love with substantial restrictions.” SIGMUND FREUD, *CIVILIZATION AND ITS DISCONTENTS* 50 (James Strachey ed. & trans., 1961) (1930).

140. Wortis, *supra* note 127, at 561-562.

141. *See id.* at 564. It bears noting that doctors’ relativist appreciation of sexual behavior as culturally and historically diverse did not prevent them from writing of homosexual practices with the utmost distaste and disparagement. Erin Carlston points to this inconsistency with respect to the

culturally contingent, he advocated efforts to inculcate these norms as thoroughly as possible.¹⁴² Each of these authors thus shared in common with the others, and indeed with the reigning medical discourses of the time, both an avowed commitment to widespread sexual education and the conviction that secrecy and reticence in sexual matters contribute to the creation of sex criminals.

Another aspect of this conviction entailed a more inclusive understanding of the illness or maladjustment deemed to characterize sex offenders. According to lawyer and psychologist Bertram Pollens, author of *The Sex Criminal*, the problem of sex crime extended beyond the incidents that reach courts and newspapers. Not only are there people whose “sexual peculiarities” are confined to their homes, sheltered from the gaze of the law, but

“we must also add the numerous individuals in whom the sexual deviation is present in a latent form; those who have not expressed their pathological tendencies in any overt abnormal sexual behavior but who have expressed it in the language of the unconscious—hysteria, neurosis, drug addiction, chronic alcoholism or psychosis.”¹⁴³

Indeed, continued Pollens, this comprehensive view enabled us to see that the problem “reaches down to the home of our best friend and next door neighbor, and that we may even find it lurking in a corner very close and proximate to our own hearth—the unknown skeleton in the closet.”¹⁴⁴ Pollens’s description here echoed the language of many psychiatrists and social scientists writing about psychopathy, in both its overtly sexual and its apparently nonsexual manifestations.¹⁴⁵ Others conveyed the elusiveness of the sexually “normal” by defamiliarizing, through technical description, the very sexual conventions upon which Americans relied to differentiate sanctioned from proscribed behavior.¹⁴⁶ Their efforts to find continuities between psychopathic persons and those considered “normal,” and to understand sexual deviance as a widespread, if not desirable, component of Americans’ sexual lives and fantasies, constituted a kind of

function of ancient Greek culture in these writings: while psychiatrists cited Greek sexual practices to advance the case that homosexual behavior, so reviled in this culture, was celebrated in others, they described such practices elsewhere in the same work in the most disapprobatory tones. See Erin G. Carlston, *‘A Finer Differentiation’: Female Homosexuality & the American Medical Community, 1926-1940*, in *SCIENCE AND HOMOSEXUALITIES*, *supra* note 105, at 177, 184-185.

142. Wortis, *supra* note 127, at 555.

143. POLLENS, *supra* note 133, at 22.

144. *Id.* at 22-23.

145. See, e.g., Birnbaum, *supra* note 110, at 71; Lipton, *supra* note 110, at 585.

146. For example, Wortis wrote that “the sex offender is an adult individual who engages in any sexual practice (except masturbation) that falls outside the socially acceptable scope of normal sexuality. And normal sexuality in our culture means heterosexual relations voluntarily and privately practiced in the normal manner by responsible adults (not too closely related) who are either married to each other or (possibly) who are not married at all.” Wortis, *supra* note 127, at 555.

universalizing gesture. This gesture contravened—sometimes unwittingly—dominant discourses about ridding American society of perverts and freaks. If its citizens were all potentially perverts and freaks, then how could a nation effectively combat transgressions of its laws and social mores?

In addition to broad sex education and a more open discussion of sexual matters, a general consensus emerged among commentators on the subject that the solution to sex offenses and their perpetrators lay not in more punitive regulation of specific acts, but in more extensive and concerted concentration on the individual offender, or the potential offender. Since psychiatrists had defined themselves for several decades by their individualized focus and their ability to illuminate, identify, and potentially cure maladapted and psychopathic persons through psychotherapy and careful study, they appeared to offer a more informed alternative to the existing statutory regime. Members of both the psychiatric and legal professions called for greater involvement on the part of doctors and greater deference to their expertise in shaping laws that would address the so-called illness itself rather than merely its most destructive symptoms.

But this call for a medicalized approach to sex crimes remained fraught from the beginning. On the one hand, psychiatric professionals generally understood sexual illness and maladjustment as a condition affecting a broad range of people and manifesting itself in a variety of symptoms, some overt and most others well disguised as more benign-seeming neuroses. Indeed, the extreme version of this view held that sexual maladjustment was endemic to the self in the modern age. Yet, on the other hand, psychiatrists' mandate to focus on the individual offender, both actual and incipient, rather than on his acts or offenses necessitated a legal regime that emphasized specific kinds of persons with specific qualities considered to be manifestations of an illness, and hence not amenable to conventional penal remedies. As Pollens wrote, "it is not the act performed which is important, but the motive underlying it. That is the psychological and scientific approach."¹⁴⁷ This emphasis on classifying the individual operated according to the very minoritizing logic doctors warned against in their efforts to soften the boundary separating the normal and the pathological in sexual and other matters.

D. Toward curing sexual psychopathy

Psychiatrists' initial challenge was to persuade the legal and criminological communities that a person's acts warranted less attention than did her psychological makeup. This perspective seemed

147. POLLENS, *supra* note 133, at 27.

incompatible with a criminal justice system that operated according to impersonal categories, apparently inflexible rules, and, most of all, antiquated notions of responsibility. Pollens argued that the goal of treatment for sex offenders to cure their disease required a wholly different legal approach from one that imposed penal sentences for specific acts according to their perceived severity:

[The laws] should conform with modern, scientific knowledge, and the old traditional notions of sanity and insanity should be discarded. A code should be drafted which would provide for the adequate study of each defendant and the sentence imposed should be for treating and not punishing him. This would, of course, necessitate taking into consideration his entire makeup—physical, mental, emotional, as well as his social environment—and it would necessitate the establishment of a psychiatric and psychological clinic for each court.¹⁴⁸

In Pollens's vision of a modernized legal response to the problem of sex crimes, the mental health professions became not merely adjuncts to the legal one, but indeed co-partners in each stage of the legal process.

Doctors and others advanced the cause of reorienting the legal focus away from particular acts and toward certain identities in the domain of sex by arguing for the inefficacy of conventional penal remedies, for the opportunity to prevent future and more gruesome offenses on the part of past and potential offenders, and for the need to differentiate these offenders from fellow criminals and noncriminals alike. In the first line of argument, they claimed that, since sexual offenses were symptoms of an underlying illness, the appropriate treatment of their actual and likely perpetrators should take a medical, rather than a penal, form. Their prevention argument in turn pursued a logic suggesting that, since these crimes represented symptomatic manifestations of an essential pathology, the correct approach was to identify and treat the pathology *before* the symptoms emerged or escalated. Finally, discussions that began to conjure up the figure of the sexual psychopath took up the old discourse of irresistible impulse and made evident its newly sexual predicate.

Ira Wile's 1942 article *Sex Offenders and Sex Offenses: Classification and Treatment* represents a paradigmatic instance of the anti-penal stance.¹⁴⁹ It advanced the principal argument for an individualized, personality-based rather than acts-based, approach to viewing sexual offenders, suggesting that, since sexual offenses only offend because of particular social arrangements and norms, we should not mete out

148. *Id.* at 18.

149. See Ira S. Wile, *Sex Offenders and Sex Offenses: Classification and Treatment*, 3 J. CRIM. PSYCHOPATHOLOGY 11 (1942).

punishment by offense but rather provide treatment for the offenders.¹⁵⁰ Wile also generalized the inadequacy of the penal approach in the context of sex to apply to all human behavior, suggesting that regulation alone could never reach the myriad factors that contribute to peoples' violations of the law:

“Society is wont to believe that behavior can be controlled by an awareness of the consequences of behavior. Our punitive system proves the doubtfulness of this procedure. Behavior is controlled by forces more driving than mere social regulation. The individual must be recognized as the basic factor in whatever he does.”¹⁵¹

Indeed, with this observation he implicitly questioned the very premise of statutory law. Developments in the behavioral sciences, particularly those informed by psychoanalysis, pointed toward the inefficacy of law as a regulatory instrument; transgressive behavior often seemed either designed precisely to thwart legal prohibition, or governed by an unconscious logic fairly immune to and ignorant of statutory law.¹⁵²

Sympathetic legal commentators also contributed to this campaign against the punitive tradition. In some versions the logic of the cure retained a rationalist premise, diminishing the challenge psychopathy posed to free will and reason, while conceding the job to doctors. For Sherwin, sexual deviants were most properly understood as “patients,” in need of medical treatment to rehabilitate their diminished capacity for self-restraint.

Formerly a person was either normal or he was a degenerate, if he were sexually perverted in anyway [sic], and it is now realized that no magic tonic of any sort will drive the wickedness instilled by the Evil One out of the victim. Instead, to remove the ‘mal’ from maladjustment, an analysis of the ailment, and understanding of the person who is the patient, and a sufficiency of aid from without will help to create the necessary strength deep within and thereby substitute conversion for perversion.¹⁵³

Medicine offered Sherwin both industry and the tools to repair a weakened will. Recognizing the reality that certain persons suffer from a pathological condition that severely erodes their reason and their self-control, that they lack the capacity to adhere to social norms and indeed

150. Wile wrote that “[t]reatment for a symptomatic sex offense should be based upon the personality needs of the arrested offender. It should not be based primarily upon punitive values socially assessed upon the offense.” *Id.* at 26.

151. *Id.*

152. Freud’s psychoanalytic theories that supported such frameworks for understanding transgressive behavior include the diagnosis of “criminality from a sense of guilt” (one among “Some Character Types Met with in Psycho-analytic Work,” the title of a 1916 essay in 14 STANDARD EDITION OF THE COMPLETE PSYCHOLOGICAL WORKS OF SIGMUND FREUD 309, 332-33); *see also* Susan R. Schmeiser, *Punishing Guilt*, 64 AM. IMAGO 317 (2007).

153. Sherwin, *supra* note 138, at 4-5.

seem compelled to transgress them, he nonetheless expressed faith that medicine could restore these qualities.

Since sexually psychopathic persons were allegedly capable of acting out their psychopathy in a variety of ways ranging from the relatively harmless to the violent and dangerous, commentators on the subject emphasized the need for prophylactic measures to ferret out such persons before they became a menace. Prevention became a crucial goal of which traditional punitive approaches fell far short, since these largely took effect after their subjects already had met with trouble. In his introduction to Pollens' *The Sex Criminal*, the warden of Rikers Island Penitentiary put it thus: "If society is to be protected against the sex criminal, the sexually maladjusted must be identified before they progress to the point of committing overt criminal acts."¹⁵⁴ The need to target and treat these potential offenders seemed especially significant because of the compulsive nature of their disorder; Wile made this connection most explicitly when he asserted that only a medicalized approach could eradicate the condition underlying an offender's behavior. Wile concluded that

[t]herapy must therefore be individual, although the crime may be social. The offense may admittedly be generic in nature but each offender is a specific person. An offender may be legally punished for his offense but he should be cured in the medical sense, if possible. Only thus is he likely to be freed from his inclination or tendency, his compulsion or desire to be an offender.¹⁵⁵

As one of the most, if not *the* most, powerful forces driving the individual citizen, sexuality and its misdirections could not be reined in by mere punishment or prohibition, only dissected and hopefully redirected through extensive medical treatment. In this realm compulsion and volition no longer stood opposed, but rather collapsed into a single channel: that of desire, which seemed equally unresisted and irresistible.

Over the next decade, writers outside of the medical and psychological fields took up the cause of preventive treatment more widely. In a 1949 article, "The Sexual Psychopath and the Law," a social scientist and a municipal court judge petitioned against conventional penal remedies and for a more prophylactic program than the one most criminal jurisprudence offered.¹⁵⁶

It is not intended to suggest that all recidivous sex offenders are physically dangerous, but experience shows that some of them are

154. Richard A. McGee, *Introduction* to POLLENS, *THE SEX CRIMINAL*, *supra* note 133, at 13. Pollens also recommended that the treatment of convicted sex offenders undergo revision to reflect the goal of prevention. *Id.* at 179.

155. Wile, *supra* note 149, at 31.

156. See James M. Reinhardt & Edward C. Fisher, *The Sexual Psychopath and the Law*, 39 J. CRIM. L. & CRIMINOLOGY 734 (1949).

compulsively so, and that most of them are driven by uncontrollable impulsions that do not respond to customary legal procedures. . . . [R]ealism is an absolute essential in any attempts to control sex 'inebriates'. Reliance upon traditional juridical procedures has taken us no where [sic].¹⁵⁷

Like Wile's language, their description of the sexual psychopath evokes a state of compromised or even immobilized volition: he is drunk on perverse sexual desire, unable to resist every opportunity to consume more.

Yet, despite their rhetoric about the need to structure medico-legal efforts around a category of identity rather than categories of offenses—to locate, identify, and direct treatment toward a certain kind of person—psychiatrists remained strikingly unable to describe this person with any specificity. Doctors' recognition of the cultural contingency and socio-legal construction of sexual offenses, as well as the nature of an offender whose culturally proscribed acts or desires rendered him a criminal, oriented their focus toward the offender's relationship to reigning social norms and their legal expression. Indeed, this focus facilitated the ascription of one essential quality to these offenders in the face of a system doctors perceived as potentially repressive and unjust: their inability to conform their behavior to those norms despite enormous cultural pressure to do so. The authors of "The Sexual Psychopath and the Law" defined their object of inquiry thus: "Our attention is on the sex aberrant who has demonstrated not merely a complete lack of social responsibility for his sex acts, but also inability to achieve it. Such a one is referred to in this paper as a 'sexual psychopath'."¹⁵⁸

The categories deployed to characterize the sex offender as a subject in need of and susceptible to medical treatment rather than punishment suffered from a certain instability that was to become increasingly evident. American psychiatry in the first half of the last century represented a dynamic field, newly recharged on the one hand by the values and goals of the indigenous mental hygiene movement and on the other by the methodology of the imported, though Americanized, psychoanalytic school. Although psychiatrists saw in sex offenders the need for a medically informed alternative to existing legal mechanisms, their ability to articulate this need remained more certain than their ability to diagnose and treat the figure over whom they were seeking jurisdiction.¹⁵⁹ The result was a psychiatric discourse on sexual psychopathy that magnified in

157. *Id.* at 734.

158. *Id.* at 736.

159. For example, Karl Bowman and Milton Rosen noted "considerable disagreement about what conditions or symptoms should be included under this classification [of sexual psychopath], and even as to whether it really serves any useful purpose as a diagnostic category." *A Criticism of the Current Usage of the Term "Sexual Psychopath,"* 109 AM. J. PSYCHIATRY 177, 178.

insistence and influence in the absence of either precision or a concrete plan of action. Despite the apparent mutability of the categories upon which psychiatrists newly relied, efforts to reform the existing legal regime deployed these categories with remarkable confidence.

IV. THE STATUTORY PSYCHOPATH

Despite alarmist rhetoric conjuring up rapists and child murderers around every corner, an approach that identified desire with disease quickly lost sight of violence and instead displaced anxieties about social decay onto same-sex attraction. This section addresses the legislation and adjudication of sexual psychopathy, demonstrating how fluid psychiatric concepts underwent reification when imported into law.

A. *Legislating sexual psychopathy*

Legislators began importing the category of sexual psychopathy into law in the mid-1930s. By 1939, nine states had enacted laws dealing specifically with sex criminals that departed from the old offense-based regime, and still others were considering their passage.¹⁶⁰ Not only did these statutes move away from the criminal law's traditional classificatory schema, but moreover they substituted for conventional legal language a psychological one that heralded a new authority for psychiatrists and their ilk. This language conjured up a shadowy figure, defined less by acts he did or might commit than by the challenge he allegedly posed to legal authority.¹⁶¹ In prescribing indefinite psychiatric commitment for persons identified as criminal sexual psychopaths, these laws also occupied a kind of liminal zone between the criminal and the civil systems, substituting segregation and ostensibly treatment for punishment.

Two examples of the early laws were those enacted in Michigan and Minnesota in 1937 and 1939, respectively. The Michigan law first materialized in 1935, underwent revision in 1937, and in 1939 finally evolved into the Sex Behavior Law Act 165.¹⁶² It provided that a person guilty of illegal sexual behavior for a period of more than one year was determined to be a criminal sexual psychopath, and as such should be committed to the Department of Mental Health for confinement in a suitable institution under the Department's supervision until cured of his psychopathy. When both the Department and the committing court deemed the person cured, he would be released immune from prosecution for any offenses he may have committed during his psychopathic period. Commitment, as well as parole when applicable, took on uncertain

160. See SHERWIN, *supra* note 138, at 58-59.

161. See Freedman, *supra* note 18, at 98.

162. MICH. STAT. ANN. § 28.967(1)-(9), enacted 1939, amended 1945, 1953.

parameters under the sexual psychopath laws; since no separate facilities yet existed to house this class of persons, commitment occurred usually in a state hospital. Unlike Michigan's law, which gave courts recourse to an alternative channel when a person was charged with a crime, several—including Minnesota's—*did not even require a criminal charge* for sexual psychopathy proceedings. These proceedings might ensue merely upon the initiative of a government attorney after someone in the community brought a suspected sexual deviant to her attention. Other states required a criminal conviction to introduce these proceedings, yet the prescribed commitment bore an uncertain relationship to a defendant's criminal sentence.

The law directed toward those who were suggestively designated "Sexual Irresponsibles" in Minnesota¹⁶³ survived a series of challenges on the grounds of vagueness, equal protection, and due process that reached the United States Supreme Court in 1940. By defining its target in broad and indefinite language, the Minnesota law both invited and evaded these charges: it described a variety of psychological conditions in fairly imprecise terms, while linking these to danger in an immediate way.¹⁶⁴ In the words of the statute,

The term "psychopathic personality" as used in this act means the existence in any person of such condition 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.¹⁶⁵

Thus, the "Sexual Irresponsibles" law deployed the precise symptomology of irresistible impulse together with the peculiar "lack of customary standards of good judgment" language that had taken on new significance in discussions of the sexual psychopath; through their combination it suggested that such qualities rendered a person both irresponsible *and* dangerous. The power of this association becomes evident in the Minnesota Supreme Court's construction of the statute. The court interpreted these words to

"include those persons who, by a 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

163. MINN. STAT. §§ 526.09-11, enacted 1939, amended 1950, 1952.

164. Demonstrating the expansion of medical influence in legal matters that these laws represented, the Minnesota Senate adopted a resolution that state bar and state medical associations jointly appoint a committee to study psychopathic personalities on the same day that it passed the sexual psychopath law. See James E. Hughes, *The Minnesota "Sexual Irresponsibles" Law*, 95 MENTAL HYGIENE 76, 85 (1941).

165. MINN. STAT. § 526.09.

inflict injury, loss, pain or other evil on the objects of their uncontrolled and uncontrollable desire.”¹⁶⁶

On the basis of this construction, which annotated the original language of the statute with extreme rhetoric and elaborated “danger” as violence, the United States Supreme Court concurred with the Michigan court that the statute was sufficiently precise to withstand challenge.¹⁶⁷

Sexual psychopath laws found an early critic in James Hughes, who compiled state laws for the Division of Mental Hygiene of the U.S. Public Health Service. He wrote in 1941 of the possible dangers attending the Minnesota law shortly after it was upheld by the Supreme Court. Hughes began his review of the decision and its lingering uncertainties by remarking that the question of whether the law’s benefits would outweigh its dangers “is of interest to all who meditate on the weakness of the flesh”¹⁶⁸ This comment is suggestive in at least two ways: first, it acknowledges the ever-expanding community of commentators interested in sexuality and its relationship to social order; and second, it implies that the “weakness of the flesh” itself may implicate a far broader range of people than the label “sexual psychopath” suggests, including the author and his audience. This latter suggestion may have heightened the perceived necessity to delimit the potential boundaries of the law’s application. Hughes recognized the double valence of the Supreme Court’s decision to uphold the Minnesota law, since the statute apparently evinced medical sophistication at the same time that it potentially issued from a desire to punish severely. In one respect, according to Hughes, the decision’s “greatest importance to mental hygienists is the fact that it provided the setting for a recognition of a connection between the sphere of sex and that of mental health.”¹⁶⁹ In another respect, he worried that although “the legislation could be viewed in its patent aspects as a laudable effort to treat rather than to punish the mentally ill, . . . what about the possibility of a latent or unconscious effort on the part of the drafters to punish for conduct that might otherwise be unpunishable, or at any rate not punishable by life confinement?”¹⁷⁰ Therein lay the paradox of efforts to link sex to mental health: however humane they might seem, they threatened, as Hughes indicated, to escalate rather than curtail its punitive regulation.

166. *State ex rel. Pearson v. Prob. Ct.*, 205 Minn. 245, 247 (1939).

167. *See Minn. ex rel. Pearson v. Prob. Ct.*, 309 U.S. 270, 272 (1940). The Court went on to dismiss an equal protection challenge because, while identifying a group within a larger class, the state court did so “in terms which clearly show that the persons within that class constitute a dangerous element within that community which the legislature in its discretion could put under appropriate control.” *Id.* at 275.

168. Hughes, *supra* note 164, at 76.

169. *Id.* at 79.

170. *Id.* at 81.

Specifically, in reorienting the legal remedy away from punishment and toward treatment at the hands of the psychiatric profession, proponents of this approach also risked expanding the remedy's purview and severity. Indeed, to the extent that sexual psychopath laws proceeded heedless of particular acts, they could be wielded even more capriciously and to greater harm than could the old statutory regime. With respect to the Minnesota law, Hughes provided one salient example of an interpretation that would orient its focus away from violent offenders and toward sexual deviants of another sort.

To illustrate the vagueness of the law in the matter of the type of sexual delinquent with which its proponents intended it to deal, it might be mentioned that the present author first understood the language of the act and of the two court decisions as referring exclusively to those 'untalkables' who are more sinned against than sinners—the homosexuals—particularly since the Minnesota court had incidentally referred to the individuals subject to the law as "unnaturals."¹⁷¹

Such an application, though seemingly incompatible with the judicial construction of the statute, would nonetheless not have been unusual in the cultural context of those years; indeed it would become still more likely in the years following the Second World War.¹⁷²

B. Adjudicating sexual psychopathy

In 1942, a case that arose on appeal under the Michigan statute seemed either oblivious or indifferent to the medical ambiguities surrounding the category of "sexual psychopath." Thus it shared with *People v. Barnett* a wholesale adoption of the emergent medico-legal lexicon. The court announced: "We recognize that criminal sexual psychopathic persons for whom the statute seeks to provide, are *a definite abnormal type*, recognized by the medical profession, who require confinement, treatment, and care, both for their own protection and for the protection of the public."¹⁷³ *People v. Chapman* demonstrates the kind of reasoning that upheld sexual psychopath laws in the face of a series of constitutional

171. *Id.* at 79-80.

172. Hughes concluded his article with a universalizing gesture that served as a kind of warning. Calling for more research and training of researchers into the problem ineptly targeted by the Minnesota law, he predicted that this research would yield not so much more knowledge of sexual psychopathy as an indictment of social practices that engender such maladjustment.

Such scientists would undoubtedly locate within increasingly narrower limits the sources of contamination of the river of life; and the world would probably be surprised to learn from them how much crime, alcoholism, drug addiction, prostitution, self-destruction, marital failure unhappy celibacy, economic distress, social and political unrest, and 'physical disease' are caused by psychological maladjustment, and how much of this maladjustment flows from the way in which society handles the problems that arise from the instinct known as sex.

Id. at 86.

173. *People v. Chapman*, 4 N.W.2d 18, 27 (Mich. 1942) (emphasis added).

challenges, despite the indeterminate nature of the commitment to which a so-called “sexual psychopath” was subjected. In response to due process and other concerns, the Michigan Supreme Court understood the proceedings involved to be civil rather than criminal, and the restraint imposed on the subject of those proceedings to constitute treatment rather than punishment. Charged with an act of gross indecency, defendant Chapman underwent at the behest of the circuit court a psychiatric examination and subsequent hearing on the question of his sexual psychopathy. Based upon the charge under which Chapman entered the criminal justice system, the psychiatric report, and testimony that various witnesses presented at his hearing describing his involvement in other acts of gross indecency over a period of years, the court not surprisingly determined that Chapman was in fact a “criminal sexual psychopathic person within the meaning of Act 165 of the Public Acts of 1939.” Accordingly, the court committed him to a state hospital until he recovered “fully and permanently” from his condition.¹⁷⁴

The psychiatric report that figured prominently in the disposition of Chapman’s case specified a diagnosis as follows: “1. Psychosexual deviation, homosexual (sexual psychopath). 2. Intellectual level within average limits but impaired by emotional regression. 3. Suggestive symptoms of schizophrenia.”¹⁷⁵ It went on to recommend “[s]egregation in an appropriate institution for the treatment of disorders” because, the doctors warned, “[h]e 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).”¹⁷⁶ Notwithstanding an orientation that appeared to focus exclusively on adult sexual objects, the prospect of incipient pedophilia in such a man seemed all but certain. In the words of the court, “[a]lthough denying any advances toward children, that possibility must be gravely considered. There is little likelihood that his desire for sexual gratification by abnormal methods can be overcome soon and further activity of a similar nature may be expected if he is allowed freedom of access in a free community.”¹⁷⁷ The court’s reasoning here was symptomatic both of currents of homophobia running through mid-century America that conflated male homosexuality with pedophilia, and of concerns about the nature of sexual compulsion as it putatively operated upon sexual psychopaths. If left to its own devices, a psychopathic person’s compulsion might permeate every aspect of his behavior and

174. *Id.* at 23.

175. *Id.* at 22.

176. *Id.*

177. *Id.*

escalate to the most gruesome heights.

Some confusion over the line delineating sexual psychopathy from insanity appeared to motivate the defendant's claim on appeal that, since the psychiatric report described him as insane, under the statute at issue the court lacked jurisdiction to commit him as a criminal sexual psychopath. Although the report explicitly declined to make a diagnosis of insanity at that time, the qualities its authors ascribe to the defendant bear some resemblance to those associated with certain versions of insanity: "The psychiatrists' report indicates defendant's long indulgence in perverted sex behavior, his lack of inhibitions, peculiarities, flights of fancy, numerous abnormalities, and symptoms of schizophrenia."¹⁷⁸ In distinguishing these qualities from a finding of insanity, however, the court adhered to a stricter definition of that category, one that appears to align itself with the cognitive models of the previous century. At the same time, the court relegated the volitional disorders suggested by this description of the defendant to the murky yet confidently wielded category of "criminal sexual psychopathy."

Notwithstanding the adjective "criminal" attached to the label "sexual psychopath," this court took particular pains to distinguish the proceedings in question from criminal ones.¹⁷⁹ And yet these proceedings did not escape all due process considerations; the adjudicative role of the fact-finder remained paramount, at least in theory. Despite their central role in characterizing the individual under review, psychiatrists did not, the court insisted, make the final determination of a person's status as a "criminal sexual psychopathic person." Rather, "[t]he psychiatrists' report is only for the help and guidance of the court in determining whether further proceedings should be conducted. Only the court or a jury, if demanded, could make a final determination as to whether or not defendant was a criminal sexual psychopathic person."¹⁸⁰ As with the insanity defense then, the disposition of cases under sexual psychopath laws, while relying on medical diagnosis, also required a translation from the psychiatric classification to a legal designation. In essence, the sexual psychopath, yoked to the idea of criminality, had become a medico-legal concept.

C. THE PARADIGMATIC SEXUAL PSYCHOPATH

The defendant's homosexuality, moreover, rendered him especially vulnerable to a finding of sexual psychopathy. After the Second World War, the sexual psychopath found an exemplar in the increasingly conspicuous figure of the homosexual. The war itself brought a general diminution in popular and legal interest in and concern over sex crimes

178. *Id.* at 23.

179. *Id.* at 25. The court further emphasized that 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." *Id.* at 26.

180. *Id.* at 27.

and their perpetrators. As historians have demonstrated, the war also marked a period of increased sexual freedom and decreased vigilance around appropriate gender roles as single-sex military and civilian communities became the norm.¹⁸¹ In addition, with the national attention directed toward a foreign enemy of monstrous proportions, domestic threats such as perverted men and unruly women seemed to pale by comparison. Psychiatric authority in the military represented one exception to relative permissiveness toward behavior that hitherto had occasioned intervention and even outrage; this authority was directed in large part toward weeding suspected homosexuals out of military service, although certainly not with the force that would be directed toward this project in the years following the war.¹⁸² Moreover, this authority resulted in more mainstream acceptance of psychiatric paradigms, especially psychoanalytic ones, which now migrated from the pages of specialized journals to the center of American cultural life.¹⁸³ But in the post-war era, an enormous resurgence of interest in sexual and gender deviance facilitated renewed efforts to medicalize, stigmatize, and criminalize sexual nonconformity, in its consensual as well as its nonconsensual forms.¹⁸⁴

Within the criminal justice system, psychiatrists wielded more authority following the Second World War than ever before, an authority that became evident in two post-war developments: increased state-sponsored funding for psychiatric research into sexual offenders, and the establishment of institutions specifically designed to treat sexual

181. See, e.g., ALLAN BÉRUBÉ, *COMING OUT UNDER FIRE: THE HISTORY OF GAY MEN AND WOMEN IN WORLD WAR II* (1991); JOHN D'EMILIO, *SEXUAL POLITICS, SEXUAL COMMUNITIES: THE MAKING OF A HOMOSEXUAL MINORITY IN THE UNITED STATES, 1940-1970* 23-39 (1983).

182. For example, recruits to the United States military were not asked the question "Are you homosexual?" until World War II. The focus in prior years had been on criminal acts such as sodomy, for which violators were subject to imprisonment. But once psychiatrists became involved in ferreting out homosexuals as unfit for military service, a whole psychiatric/classificatory apparatus was brought to bear on the process. See NEIL MILLER, *OUT OF THE PAST: GAY AND LESBIAN HISTORY FROM 1869 TO THE PRESENT* 231-41 (1995); BÉRUBÉ, *supra* note 181, at 8-11; Freedman, *supra* note 18, at 92. According to Bérubé, psychiatrists succeeded in asserting unprecedented authority in the U.S. military during the Second World War largely because of the severe psychological damage the previous war was thought to have caused. Their investigation of homosexuality began as a wide-scale effort to eliminate the mentally unstable from service. The Surgeon General issued a memo in 1943 advocating procedures to deal with homosexuality in the military more sympathetic to psychiatric reasoning than to that of the criminal law, thereby prompting the War Department Circular No. 3, which recommended separation rather than court martial for the "true or confirmed homosexual." See William N. Eskridge, Jr., *Privacy Jurisprudence and the Apartheid of the Closet, 1946-1961*, 24 FL. ST. U. L. REV. 703, 734-35 (1997).

183. Psychiatric ideas also found their way into the mainstream media, and nowhere more so than in Hollywood—the 1940s and 1950s were the golden era of psychoanalytic cinema. In addition, by the end of World War II, the United States hosted more psychoanalysts than did the rest of the world combined. Psychoanalytic psychiatry became relevant to the pressing issues of immigration as well as to those of war-related neuroses in the post-war era. See EDWARD DOLNICK, *MADNESS ON THE COUCH* 58 (1998); Frederick Whiting, *Bodies of Evidence: Post-War Detective Fiction and the Monstrous Origins of the Sexual Psychopath*, 18 YALE J. CRITICISM 149 (2005).

184. See Eskridge, *supra* note 182, at 711.

offenders.¹⁸⁵ By the time California published the results of special research on “sexual deviation” in 1953, the second such publication in two years from that state, more than a third of the states in addition to the District of Columbia had special statutes addressing “sexual psychopaths” and their disposition.¹⁸⁶ These laws varied in several respects: the extent to which they attempted to describe their object; the requirements for triggering the law; and the type and scope of hearing and/or medical examination necessary to establish sexual psychopathy. For example, whereas Ohio’s law specified the qualities of a psychopathic offender in some detail,¹⁸⁷ New York’s law did not attempt to define “sexual psychopath” at all. Illinois, Indiana, and Michigan all required a criminal charge but not a conviction; California’s law permitted a hearing to determine sexual psychopath to be initiated upon conviction of any criminal offense. In Massachusetts, Minnesota, and the District of Columbia, no formal criminal charge was necessary to initiate an investigation.¹⁸⁸ New York’s law prescribed an indeterminate commitment of one day to life that technically constituted a criminal sentence, designed so that when the defendant had completed his commitment, he could not receive further confinement related to the same charges.

These discrepancies, and in particular the imprecision surrounding the definition of “sexual psychopath” in those laws that sought to identify this category of person, began to engender grave reservations among both medical and legal commentators. They worried that these laws reflected too much pseudo-medicine and too little legal reasoning. Two authors reviewing recent medico-legal opinion on such laws as part of California’s published *Sexual Deviation Research* in 1952 concluded: “The term sexual psychopath, sex offender or psychopathic offender as used to denote a special class, is not a concise medical classification. Moreover it is unwise to freeze into legal terms medical diagnoses and terminology that are likely to be changed and otherwise improved in the near future.”¹⁸⁹

185. See Freedman, *supra* note 18, at 99.

186. As of 1953 sexual psychopath laws existed in the following jurisdictions: Alabama, California, Colorado, the District of Columbia, Florida, Illinois, Indiana, Kansas, Maryland, Massachusetts, Michigan, Minnesota, Missouri, Nebraska, New Hampshire, New Jersey, New York, Ohio, Oregon, Pennsylvania, Utah, Vermont, Virginia, and Washington. Wisconsin’s sexual psychopath law, enacted in 1947, was repealed in 1951. Iowa enacted a law in 1955. See Eskridge, *supra* note 182 at Appendix 4, 825-26; see also Karl M. Bowman & Bernice Engle, *Synopses of Special Sex Psychopath Laws—United States*, in LANGLEY PORTER NEUROPSYCHIATRIC INSTITUTE, CALIFORNIA SEXUAL DEVIATION RESEARCH 41-58 (1953).

187. A person convicted of certain sex and other felonies in Ohio might trigger a hearing on his psychopathy if he evinced one or more of the following qualities: “emotional immaturity and instability, impulsive, irresponsible, reckless and unruly acts, excessively self-centered attitudes, deficient powers of self-discipline, lack of normal capacity to learn from experience, marked deficiency of moral sense or control.” Bowman & Engle, *supra* note 186, at 53.

188. See *id.*

189. Karl M. Bowman & Bernice Engle, *A Review of Recent Medicolegal Opinion Regarding Sex*

In their opinion, psychiatric knowledge could be most helpful at a later stage in the legal process for dealing with such offenders. Rather than attempting to determine their medical status in order to resolve their legal disposition, they suggested, courts should pursue a conventional legal trajectory first and only then bring in the psychiatric perspective.¹⁹⁰ In a still more emphatic statement, sociologist Edwin Sutherland displayed his misgivings over the kind of reasoning that legitimated that transfer of jurisdiction in this area from law to psychiatry: "There is no more reason for turning over to the psychiatrist the complete supervision of a criminal who is found to be psychopathic than for turning over to the dentist the complete supervision of a criminal who is found to have dental cavities."¹⁹¹ Sutherland's skepticism notwithstanding, though, such a transfer was indeed taking place; psychiatric arguments had proven effective, and now commentators were left to weigh the consequences.

In particular, the association of sexual psychopathy with homosexuality only ossified as more states adopted special legislation dealing with sex offenders after World War II. In Estelle Freedman's account, while the rhetoric surrounding the sexual psychopath laws and the sex crime panic in general purported to represent a concern over the welfare of women and children, in fact professional discussions largely elided women's interests. Rather, these discussions focused on delineating normal from abnormal male sexuality, especially white male sexuality. If earlier discourses marginalized the rapist as a "sick man," thus suggesting that sexual violence against women was exceptional and its perpetrators pathological, by the 1950s masculine virility became continuous with a certain element of aggression. As a result, pedophilia and homosexuality, rather than rape and murder, became the offenses most often associated with the diagnosis of the criminal sexual psychopath.¹⁹² Moreover, racial hierarchies that cast African Americans and other people of color as both ontogenetically and phylogenetically primitive fed a medico-legal discourse that medicalized white offenders, whose deviations putatively represented a pathological disruption of normal human development, while continuing to criminalize non-white offenders.¹⁹³ On the one hand, then, this era witnessed a more open popular discourse around sexual practices—and a concomitant acknowledgment of their diversity—with the research of Alfred Kinsey and his followers (Kinsey's landmark study of male sexuality was published in 1948, the companion volume on female

Laws, in LANGLEY PORTER NEUROPSYCHIATRIC INSTITUTE, CALIFORNIA SEXUAL DEVIATION RESEARCH 105, 120 (1952).

190. *See id.*

191. Edwin H. Sutherland, *The Sexual Psychopath Laws*, 40 J. CRIM. L. & CRIMINOLOGY 543, 554 (1950).

192. *See Freedman, supra* note 18, at 102.

193. *See Robertson, supra* note 83, at 4.

sexuality in 1953),¹⁹⁴ and thus arguably an expansion of the purview of “normal” sexuality. On the other hand, it simultaneously provoked a heightened stigmatization of sexual orientations that departed from a robust heterosexual ideal, in particular male homosexuality, which had become continuous with pedophilia in the popular imagination.¹⁹⁵

The logic of medicalization proved to be highly persuasive, casting sexual outlaws as psychiatric specimens in need of microscopic and expert investigation. In Utah, for example, where no laws directed specifically toward sexual psychopaths yet existed by 1949, the state supreme court invoked this logic in suggesting that a punitive approach toward homosexual offenses contravened modern medical knowledge.

Congenital homosexuals, and to a certain extent, psychopathic homosexuals, may be wholly irresponsible for their homosexual acts. They are motivated by biological and physiological factors which may be beyond their power to combat or control. And while such persons cannot be left to prey upon society, and particularly upon young children, the wisdom of declaring their conduct to be criminal may be seriously questioned. In the light of advanced biological and medical knowledge, the legislature might well provide for their confinement in sanatoria for necessary treatment.¹⁹⁶

No longer could these deviants be held responsible for their behavior. Homosexuals in particular were becoming the incarnation of irresistible impulse, plagued by the now-medicalized condition of being unable to abide by the law.

Third among the first fourteen cases adjudicated as sexual psychopaths in one unnamed jurisdiction was, according to one judge critical of the laws, “[a] non-aggressive homosexual convicted of passing bad checks.”¹⁹⁷ This example demonstrates not only the extent to which the sexual psychopath laws facilitated the ferreting out and subsequent isolation of a variety of sexual deviants, but also the extent to which a person’s actual conduct, the offenses for which she might come under the jurisdiction of the law, had become a kind of symptom of a deeper psychic identity and thus seemed incidental to her true status. Nowhere was this

194. See ALFRED KINSEY, *SEXUAL BEHAVIOR IN THE HUMAN MALE* (1948); *SEXUAL BEHAVIOR IN THE HUMAN FEMALE* (1953).

195. See Eskridge, *supra* note 18, at 1059-62.

196. *State v. Cooper*, 201 P.2d 764, 767 (Utah, 1949). Utah finally enacted such a law in 1951. See UTAH CODE ANN. §77-49-1 to 8 (amended 1953).

197. The other thirteen of the fourteen men committed as sexual psychopaths came before the court for the following (some without a formal criminal charge): (1) public masturbation, no indecent exposure; (2) following of a white female by a black man, no assault or approach; (4) touching of a woman’s breast in a department store; (5) addiction to indecent exposure when intoxicated; (6) indecent exposure; had been propositioned and manipulated by a “wanton female” in the movies; (7-9) habitual indecent exposure; (10-12) homosexual acts with young males; (13) assault on a young girl; (14) sex with “(experienced) juvenile females.” MORRIS PLOSCOWE, *SEX AND THE LAW* 237 (1951). See also KARPMAN, *supra* note 3, at 229, for a very close reproduction of this list.

eclipse of actual acts by claimed or ascribed identity more significant than in the area of homosexuality.

V. THE HIDDEN HOMOSEXUAL

With the identification of homosexuality as a psychopathic condition that eluded conventional channels of regulation, medico-legal culture demonstrated both the force and the limits of juridical models predicated on psychiatric categories. Below I describe a new jurisprudence of identity that emerged to accommodate psychiatric insights into sexual disorders. First, though, I situate this development within evolving conceptions of homosexuality that contributed to the mid-century efforts to contain the ungovernable.

A. The medical model of homosexuality

During the first ten years of its sexual psychopath law, Michigan committed 237 “criminal sexual psychopaths,” of whom, according one psychiatrist writing about the law in 1949, “40 per cent showed homosexual deviation.”¹⁹⁸ Why did Americans’ anxieties around sex and crime, and legislators’ regulatory efforts to contain the threat allegedly posed by the criminal sexual psychopath, get displaced onto homosexuality (especially male homosexuality)? Legal scholar William Eskridge suggests that this association originated with Freudian psychoanalysis, at least in its American incarnations. As early as the 1920s in the United States, he writes, “the homosexual was the quintessential psychopath, for he was by Freudian definition a man whose sexual development had been derailed, rendering him intrinsically perverted.”¹⁹⁹ Although I do not dispute Eskridge’s description of the degree to which the homosexual became a kind of stand-in for the psychopath in the popular and legal imaginations, I would argue that the reasoning behind this conflation was not strictly Freudian in origin. While the Freudians and those who Americanized psychoanalytic theory did in part associate homosexuality with a kind of perverse regression or digression from the normal course of (heterosexual) development, this association does not begin to account for the identity of the psychopath. For psychopaths were not merely regressives or developmental anomalies; they were, more importantly, ungovernable subjects—incapable of conforming their behavior to social norms, unable to comply with legal mandates. A psychiatric concept in its inception, the psychopath grew to

198. George E. Cook, *Problem of the Criminal Sexual Psychopath*, 10 DISEASES OF THE NERVOUS SYSTEM 137, 139 (1949). The author was the Medical Superintendent of the Ionia State Hospital for the Criminal Insane. By comparison, over the same decade California committed 522 sexual psychopaths to mental hospitals under its governing laws.

199. Eskridge, *supra* note 18, at 1063.

embody a formidable threat to law, to legal reason, and to legal remedies.

Historians of sexuality have written extensively about the shift from a crime model to a medical model of homosexuality, a shift that began in the last third of the nineteenth century and declined, at least institutionally, with the removal of homosexuality from the third edition of the American Psychiatric Association's Diagnostic and Statistical Manual (DSM-III) in 1974.²⁰⁰ Moreover, the medical professions of Western Europe diagnosed homosexuality as a pathological condition at roughly the same time that the homosexual as an identity category began supplanting the sodomite of a criminal law that proscribed a variety of nonprocreative, interspecies, and same-sex sexual practices within a nonidentitarian framework.²⁰¹ Whereas early nineteenth-century discussions of deviance sought answers to the question of its origins first in the body of the offender and subsequently in her brain,²⁰² by the latter half of the century, corporeal explanations for deviance had given way to psychological ones.²⁰³ The new science of "sexology" availed itself of both investigative modes, anatomical and psychological. Because sexology could no longer link the subject's behavior to a particular organ or body part, it wrestled with the problem of deviance as unlocalizable, invisible, and therefore difficult to detect or explain with any certainty. The "sexual instinct" was born of this psychological turn in medical reasoning; with its appearance came a field of inquiry that sought answers to the enigmas of the self in a newly posited sexual core.²⁰⁴ In Krafft-Ebing's work, the perverted manifestations of this instinct received their most extensive, though not their first, treatment; "contrary sexual instinct" figured most prominently among them.²⁰⁵

200. AMERICAN PSYCHIATRIC ASS'N, DIAGNOSTIC AND STATISTICAL MANUAL OF MENTAL DISORDERS 3d (DSM-III) (1974). See generally RONALD BAYER, *HOMOSEXUALITY AND AMERICAN PSYCHIATRY: THE POLITICS OF DIAGNOSIS* (1981).

201. See generally MICHEL FOUCAULT, *HISTORY OF SEXUALITY, VOLUME ONE* (Robert Hurley trans., 1978) (1976); JONATHAN NED KATZ, *THE INVENTION OF HETEROSEXUALITY* (1995); JEFFREY WEEKS, *SEX, POLITICS AND SOCIETY: THE REGULATION OF SEXUALITY SINCE 1900* (1981); Jean-Claude Feray & Manfred Herzer, *Homosexual Studies and Politics in the 19th Century: Karl Maria Kertbeny*, 19 J. HOMOSEXUALITY 23 (1990).

202. Doctors frequently performed anatomical research on law-breakers, including sodomites and onanists.

203. See ARNOLD DAVIDSON, *THE EMERGENCE OF SEXUALITY: HISTORICAL EPISTEMOLOGY AND THE EMERGENCE OF CONCEPTS 1-29* (2001). Davidson locates the invention of perversion as a new technology of the self in the late nineteenth century.

204. "[N]ineteenth-century psychiatry took sexuality to be the way in which the mind is represented. To know a person's sexuality is to know that person. . . . Sexuality individualizes, turns one into a specific kind of human being—a sadist, masochist, homosexual, fetishist. This link between sexuality and individuality explains some of the passion with which psychiatry investigated the perversions." *Id.* at 63-64.

205. Indeed, several English translations (the 1893, 1900 and 1906 editions) titled Krafft-Ebing's copious study *Psychopathia Sexualis, with especial reference to contrary sexual instinct: a medico-legal study*. As the inverse of normative heterosexuality, the "precise reversal" of what sexologist Albert Moll termed "Kontrektation" or the "relationship drive," homosexuality described a deviation of the sexual instinct. See Gert Hekma, *A History of Sexology: Social and Historical Aspects of Sexuality, in FROM SAPHO TO DE SADE: MOMENTS IN THE HISTORY OF SEXUALITY* 174, 179 (Jan N. Bremmer ed., 1989). Although the source of this deviation resided in the desiring subject, its

Homosexuality repeatedly traversed diagnostic parameters in the work of Krafft-Ebing, Havelock Ellis, and others, however. For instance, the distinction between perversion and perversity on which Krafft-Ebing relied complicated the distinction between homosexuality and heterosexuality. While “perversion” described subjects whose identity, either congenitally or circumstantially acquired, compelled their deviance, “perversity,” as an effort to reinscribe a model of volition, referred to moral corruption on the part of subjects who acted out of free will; the former category rendered legal intervention problematic at best. Were people who acted homosexually out of perversity then properly classified as homosexuals? Or were they more accurately understood as heterosexuals practicing, willfully and knowingly, a kind of criminal homosexuality? Since *Psychopathia Sexualis* set out in large part to delineate areas of sexuality that were susceptible to legal regulation and punitive treatment from those existing outside the realm of criminal/legal responsibility, such distinctions were wholly apposite, if incoherent. Claims about accountability that isolated acts from identities thus suffered from the slipperiness of these categories.

Further, despite the paradigm shift from crime to disease for viewing homosexuality, the medical commentators who took up the question of homosexuality’s pathological nature, its origins and its prognosis for cure, still did so largely in dialogue with legislators and judges. Indeed, most works on homosexuality that appeared around the turn of the century addressed a legal, as well as a medical, audience. Notwithstanding repeated insistence upon the need to abandon the focus on illegal sexual acts in favor of investigating homosexual identity—or the person of whose identity homosexuality constituted an essential, even if acquired, feature—this dialogue with the legal profession nonetheless both presumed and posited the homosexual as a juridical subject in his or her own right. This juridical subject, while allegedly pathological and therefore of limited responsibility for her behavior, moreover emerged as a figure with ambiguous legal status, if not as a criminal.²⁰⁶ So the homosexual entered the twentieth century as a medico-legal conundrum, occupying a netherworld between sex practices and sexual identity, between gender and sexuality, and between volition and compulsion.

When Freud wrote the first version of his *Three Essays on the Theory of Sexuality* (1905), he devoted a significant portion of his chapter on “The Sexual Aberrations” to a discussion of inversion, still the reigning paradigm for understanding homosexuality. For Freud, homosexuality

relational nature brought it uncomfortably close to heterosexuality.

206. Most of these early writers on homosexuality favored the decriminalization of homosexual acts and viewed the punitive regulation of such acts as the source of much additional crime—such as blackmail, a weapon frequently wielded against gay men during this period—as well as neurosis. See, e.g., DEAN, *supra* note 63; WEEKS, *supra* note 201, at 24-27; Oosterhaus, *supra* note 105.

was reducible *neither* to sexual acts *nor* to a pathological identity; rather, it described a kind of destination or orientation that featured same-sex objects over others. In a 1903 interview with the Vienna newspaper *Die Zeit* regarding the trial of a prominent Viennese man charged with homosexual practices, Freud championed both the decriminalization of homosexuality and a perspective on the subject that eschewed the rhetoric of pathology: "I advocate the standpoint that the homosexual does not belong before the tribunal of a court of law. I am even of the firm conviction that homosexuals must not be treated as sick people, for a perverse orientation is far from being a sickness . . ." ²⁰⁷ American doctors, although purporting to carry on a legacy whose origins lay with early sexology and Freudian psychoanalysis, actually deviated from this legacy in significant ways.²⁰⁸ In the United States, the view that understood homosexuality as an illness rather than as a deliberate flaunting of legal and moral strictures presented itself as an antidote to the reigning legal perspective as reflected in Draconian sodomy laws, laws against gross indecency and vagrancy, and others directed at least in part toward homosexuals and their sexual practices. Some members of the American psychoanalytic community sought to cure homosexuality, either by righting the wrong in psychosexual development or by strengthening the will against acting on perverse impulses; others deemed it a hopeless cause.

These pejorative and moralizing approaches to male homosexuality were in fact the particular province of the American analysts, of whose attitudes Freud disapproved strongly.²⁰⁹ Freud's disdain for American moralism with regard to sexuality did not, however, align him with the earliest proponents of homosexual rights, Karl Ulrichs and Magnus Hirschfeld. The former originated the concept of inversion and the latter perpetuated this understanding of homosexuals as a distinct species with the notion of an "intermediate sex." Unlike these men, Freud generally propounded a universalizing model of homosexuality. He observed, for example, in the famous 1915 addition to *Three Essays on the Theory of Sexuality* (1905), that homosexual inclinations constitute a pervasive force in our unconscious lives.²¹⁰

Psycho-analytic research is most decidedly opposed to any attempt at

207. Quoted in Henry Abelove, *Freud, Male Homosexuality, and the Americans*, in *THE LESBIAN AND GAY STUDIES READER* 381, 382 (Abelove et al. eds., 1993).

208. *See id.*

209. Both Abelove and Paul Robinson emphasize the extent to which the American analysts' pathologizing approach to homosexuality departed from Freud's, which, while "normalizing," did not understand homosexuality as an illness. *See* Paul Robinson, *Freud and Homosexuality*, in *HOMOSEXUALITY & PSYCHOANALYSIS* 91-97 (Tim Dean & Christopher Lane eds., 2001).

210. Sigmund Freud, *Three essays on the Theory of Sexuality*, in *7 STANDARD EDITION OF THE COMPLETE PSYCHOLOGICAL WORKS OF SIGMUND FREUD* 123, 146-46 (James Strachey ed. & trans. 1955).

separating off homosexuals from the rest of mankind as a group of a special character. By studying sexual excitations other than those that are manifestly displayed, it has found that all human beings are capable of making a homosexual object-choice and have in fact made one in their unconscious.²¹¹

Yet American psychoanalysts and analytic psychiatrists took two different, but distinctly anti-Freudian, perspectives on homosexuality: one homophobic and moralistic, advocating psychoanalysis as the most hopeful “cure” for homosexuality; the other less homophobic, promoting tolerance, but also minoritizing in a way that carved out a discrete identity for homosexuals. It was this latter perspective that prevailed in debates over whether or not to declassify homosexuality from the American Psychiatric Association’s *Diagnostic and Statistical Manual* (DSM-III) of psychiatric disorders.²¹²

B. Psychiatry and “the problem of homosexuality”

In 1937, an article published in the *American Journal of Psychiatry* quoted Ben Karpman asserting that “the problem of psychiatry will not be solved until we solve the problem of homosexuality.”²¹³ American psychiatric interest in the issue of homosexuality, although perceptible in the 1920s, began to flourish in the 1930s. Homosexuality was the sexual deviation *par excellence*: it represented a radical departure from the course of normal sexuality on the one hand, enough so that its subjects appeared to constitute a different species of person.²¹⁴ Yet on the other hand, those who deviated in this respect were difficult, if not impossible, to discern in all other respects. The task for the psychiatric community was to formulate a procedure for identifying such people, for studying their personality structures and their evolution such that others might be, if possible, rescued from this fate.

Prevailing theories of homosexuality circulating at the time posited a fundamental distinction between “true” or “congenital” homosexuals—usually associated with some variety of gender dysphoria—and those whose condition was “acquired,” either through some flaw or unfortunate disruption of their psychosexual development or voluntarily in response to

211. *Id.*

212. Homosexuality was finally “delisted” in the 1973 edition of the DSM-III.

213. Quoted in George W. Henry, *Psychogenic Factors in Overt Homosexuality*, 93 AM. J. PSYCHIATRY 889, 906 (1937).

214. As two military psychiatrists wrote in 1944, “the homosexual is an exclusive personality type, clearly different from the psychiatric disorders under which it has been catalogued [e.g., neurotic, psychopathic, schizoid, or psychotic], and should be designated as such.” Herbert Greenspan & John D. Campbell, *The Homosexual as a Personality Type*, 101 AM. J. PSYCHIATRY 682, 682 (1944). These authors agreed with the British sexologist Havelock Ellis that homosexuality was not a disease but rather a congenital anomaly. *See id.* at 682-83.

the exigencies of their environment.²¹⁵ Since psychoanalysis had succeeded in broadly inculcating the importance of psychosexual development for adult identity, failures or interruptions in this development loomed large as potential triggers for adult deviation. Maternal behavior emerged as paramount: excessive dominance or passivity on the mother's part posed grave dangers.²¹⁶ Hence a rich array of problems occupied the psychiatric community: ferreting out the homosexuals from their heterosexual neighbors; distinguishing the true homosexuals from the circumstantial ones; describing the precise nature of the true homosexual; excavating the factors that led to homosexuality in noncongenital cases; and, finally, devising a means of dealing with homosexuals that would replace traditional criminal measures.

While Karpman was making his dramatic pronouncement regarding the coupled fates of homosexuality and the psychiatric profession, a book appeared entitled *Mentality and Homosexuality* that offered one of the first extensive disquisitions on the subject ostensibly for the general reader. The author gathered his data from psychiatric work with a group of prison inmates incarcerated for a variety of offenses. Another psychiatrist wrote a forward for the book in which he emphasized its timeliness, identifying in recent years "an increasing interest on the part of the layman . . . in homosexuality and other types of abnormal sexual behavior."²¹⁷ He attributed this interest in part to the "wide publicity given to atrocious murders committed under circumstances strongly suggesting perverted states of mind. . .," as well as "[t]he wide distribution of the standard works of Havelock Ellis, Wilhelm Stekel, Kraft-Ebbing and others,"²¹⁸ which, he noted,

has aroused in the mind of the casual observer a keen interest in the man who lives apart. Certain situations are prone to bring about a milieu in which homosexuality seems to flourish. The congregation of large masses of men with restricted liberties is the culture medium in which the bacillus homosexual, if one may be allowed the analogy, flourishes. Army and Navy barracks, construction camps and prisons peculiarly lend themselves to this situation. Nevertheless, one must

215. The military psychiatrists, for example, deployed Krafft-Ebing's taxonomy to convey the difference: "The term perversion signifies a *voluntary* turning from the correct path of truth and propriety. In contradistinction, the *true* homosexual, because of his biologic constitution, is *involuntarily* directed toward homosexuality." *Id.* at 687.

216. In one study of seven delinquent boys, all involved in destructive and even criminal behavior, the author concluded that they were all gender dysphoric and therefore passive homosexuals because of their castrating mothers: "The mothers and grandmothers of these boys are all aggressive, dominant, rejecting, punitive women. They are women who more or less despise the adult males they have known and feel themselves capable, superior and in control." Martha Wilson MacDonald, *Criminally Aggressive Behavior in Passive, Effeminate Boys*, 8 AM. J. ORTHOPSYCHIATRY 70, 71 (1938).

217. V.C. Branham, *Forward* to SAMUEL KAHN, *MENTALITY AND HOMOSEXUALITY* 5 (1937).

218. *Id.*

also recognize that the type of individual who is inclined to homosexuality gravitates to these centers. He lacks the ability and inclination to create a home environment of his own. Consequently, he must accept that created for him by others.

A discussion of a topic of this nature, however, would be incomplete if attention were not called to the fact that large numbers of homosexually inclined individuals live within the community itself. These people proceed about their daily tasks without attracting undue attention. In many instances, they are without a full realization of the limitations placed on them. While the condition of overt acts is undoubtedly common in this group, nevertheless, such manifestations are not necessary to fixate the libido at the homosexual level. The attitude taken by the individual toward his relationship to his fellow man and woman largely determines the level of his sexual development. The sexual act itself need not enter into the picture. These attitudes, of course, are patterned by unconscious motivations often so deeply rooted as to be almost non-eradicable.²¹⁹

I reproduce this lengthy passage because it dramatizes several of the most salient psychiatric tropes for representing and analyzing homosexuality in this period: contagious identity, instability, dangerous invisibility,²²⁰ and psycho-sexual fixation. First, it raises the question of etiology: do particular environments produce homosexuals, or do those existing a priori merely flock to such environments? The author suggested that the answer is both; like any germ or pathogen, the “bacillus” homosexual is attracted to certain easily infected settings, and then reproduces in those settings, rendering them still more susceptible to infection. Second, the passage points to the difficulty inherent in attempts to identify homosexuals when many of them fade into invisibility within the larger population. Such persons blend so well into their communities because, the author implied, they display no manifest differences from their heterosexual neighbors and family members, not even a different set of sexual practices. Some homosexuals do not act homosexually, indeed do nothing to draw attention to themselves; but the critical factor that, though requiring a trained scientific eye to detect, nonetheless marks their status as a species apart is their attitude, possibly unconscious and thus all the more “ineradicable.”

The logic that thus separated a homosexual essence from all manifest behavior marked the heart of psychiatric reasoning, a reasoning primarily

219. *Id.* at 5-6.

220. An example of the trope of dangerous invisibility appears in Kahn's work: “A person whom one would least suspect may be a homosexual.” KAHN, *supra* note 217, at 136. Pollens claimed that “[t]here are a very large number of homosexuals in this country. Many are married and give to the outside world a semblance of normality but they secretly carry out their real pleasures.” POLLENS, *supra* note 133, at 132.

interested in a person's fantasies and thought processes and only dimly in that person's actual acts—hence the emphasis on the criminal rather than the crime. Indeed, from the earliest sexological and psychoanalytic accounts of homosexuality, acts and practices were secondary, if not irrelevant, to the construction of a homosexual identity. When doctors did link homosexuals to various forms of criminality, these usually did not entail specific sexual practices; rather, doctors focused on such phenomena as drug addiction, blackmail, and kleptomania.²²¹ Although most of the writings on homosexuality from the 1930s and 1940s set out precisely to elaborate upon homosexuality in exact scientific terms, the definitions with which they identified their object of study proved to be impossibly elastic—a factor they largely ignored but that emerges starkly with historical hindsight. In the words of Doctor Samuel Kahn, author of *Mentality and Homosexuality*:

Homosexuality may be manifested by men's remaining bachelors or women's remaining spinsters, or by alcoholism and other addictions, or by various symptoms of neuroses and psychoses, by criminality, instability, peculiar cravings, dress, peculiar hobbies and interests and most of all by eccentric and abnormal loves. . . . Homosexuality may be passive, active, conscious, unconscious or it may alternate or it may represent any of the above traits in combination.²²²

Equally imprecise was the author's explicit attempt to define homosexuality:

For the purpose of clarity, the following definition is given. The term homosexual indicates a person whose passions and attractions are for members of his own sex rather than for members of the opposite sex; whose sentiments and emotions are directed toward members of his own sex in the same way that, normally, they would exist toward members of the opposite sex. A homosexual, then, is not only in love with a member of his own sex, but has an emotional makeup of the opposite sex so that he could attract his own sex²²³

Kahn's rhetoric here of course thwarted his professed "purpose." Rather than point to overt identifying features or behaviors, Kahn wrote of "passions and attractions," "sentiments and emotions," "love," and an

221. One humorous counterexample is a virulently anti-homosexual article appearing in a 1929 volume of the *Urologic and Cutaneous Review*, where the author suggested that the crimes to which homosexuality putatively led often had an implicit, rather than an explicit, sexual component: "We note some writers say that perversions have neither a social nor a forensic value, if the public is not injured; that they are only biological variations. But society and the law have a different viewpoint. The social must always prevail over the individual attitude. It might be interesting to note here that many homosexual kleptomaniac women are prone to steal silk underwear." John F. W. Meagher, *Homosexuality: Its Psychobiological and Psychopathological Significance*, 33 *UROLOGIC & CUTANEOUS REV.* 505, 518 (1929).

222. KAHN, *supra* note 217, at 20-22.

223. *Id.* at 14.

“emotional makeup.”²²⁴ Even when describing sexual acts performed by his homosexual subjects, Kahn allowed the elastic logic of identity to govern. Relating the circumstances of one lesbian member of the prison population, he recounted how “[s]he met a male homosexual; indulged in the rectal method, was later introduced to other homosexuals and then continued homosexual acts.”²²⁵ In an effort to acquaint the reader with this arcane world, he explained that “[a] *fish* is a male homosexual who has a mouth homosexual relation with a female homosexual.”²²⁶ Strikingly, here the identities of the actors determined the status of their acts: anal intercourse between a man and a woman became a “homosexual act” because both participants were identified as homosexual; oral sex between a man and a woman was a “homosexual relation.”

Throughout his investigation, Khan characterized what he termed “homosexual acts” as a product of “indulgence.” The rhetoric of indulgence was enormously common in the literature of these decades with respect to homosexuality. Indeed, whether wittingly or unwittingly on the part of commentators, homosexuality emerged in these writings as a great temptation to be resisted.²²⁷ Those who failed to resist in a consistent manner, even if only at an unconscious level, constituted the homosexuals.²²⁸ As with the psychopath, then, one persistent feature attached to the homosexual was a failure of self-control: she was not master of her will. Psychiatric discourse associated homosexuality with an already weakened will, or alternatively (and sometimes concomitantly) described homosexuality as leading to a further erosion of morality. In Kahn’s assessment of the homosexual inmates he encountered,

Their I.Q’s do not prove them to be definitely mentally defective. But in a sense they are moral defectives, meaning that they do not know or have not sufficient insight to realize what is right and what is wrong to the same degree as an average person. By that statement it is not meant that in general they do not know the difference between right and wrong, but it does mean that they have less emotional stability to help them choose and do the ethical and conventional act.²²⁹

224. *Id.*

225. *Id.* at 41.

226. *Id.* at 124.

227. Doctor Meagher even remarked ruefully that “[h]omosexual relations once experienced, produce a craving for repetition.” Meagher, *supra* note 221, at 512.

228. For instance, Kahn differentiated between the heterosexuals who “indulged” sparingly in such activity and the homosexuals who were unable to exercise such moderation: “It is known for a fact that a number of normal individuals indulge sparingly in homosexual acts in the active capacity and, with less frequency, in the passive capacity.” KAHN, *supra* note 217 at 135. Alfred Herzog made a similar distinction in his treatise on *Medical Jurisprudence*, whose taxonomy of sexual deviations included Number 790: “Homo-sexual practices indulged in by hetero-sexuals.” HERZOG, *supra* note 2, at 566.

229. KAHN, *supra* note 217, at 101.

If the problem with homosexuals emanated from their underdeveloped wills, or what Kahn here called “emotional stability,” then the solution was to strengthen those wills and instill sufficient hardiness to resist temptation—or at least to be able to choose their indulgences rather than be forced by compulsion to succumb.²³⁰ Treatment, he advised, should include “above all the establishment and stimulation (by various psychological methods) of the will power and tendencies towards normality.”²³¹ But that process was not so easy; it required assiduous intervention and treatment on the part of the doctor: “Of course the big problem is how to train the will. . . . By constant drilling, encouraging and hammering upon these subjects for a considerable period and in the proper environments, the ‘will’ may be made an agent for therapy in homosexuality.”²³² Far from enjoying free will and rationality, then, the homosexual remained captive to his impulses and emotions until undergoing a kind of boot-camp training which, if successful, might liberate his will from its shackles.²³³

Paradoxically enough, despite the characterization of homosexuality as a condition of self-dispossession, psychiatrists also ascribed to the homosexual an incorrigible narcissism suggesting an excess of selfhood. As painstakingly as doctors attempted to fashion a differential schema that would account for homosexual desire—for example, the attraction of a gay man’s feminine essence for a male object; the passion a feminine woman inspired in a lesbian with a male “sex-soul”—the fundamental problem was that, for all intents and purposes, homosexuality represented a turning away from difference. Deep and irreducible differences between men and women organized the ideology of gender, and thus the structures of social relations; these differences also organized the ideology of heterosexuality, which had become resexualized following World War I.²³⁴ Men desiring men and women desiring women seemed a renunciation of all that responsible, hygienic social and sexual relations required. For Kahn, this renunciation took on the proportions of complete self-adulation: “The homosexual loves or appears to love his own sex, but even a superficial examination shows this to be but a part of his narcissism. In truth, he loves neither man nor woman.”²³⁵ In this formulation, homosexuality rendered a person incapable of a sentiment deserving of the name “love” directed toward any other person. Rather, it involved base

230. *Id.* at 88.

231. *Id.*

232. *Id.* at 90-92.

233. It is particularly suggestive that the will rather than the person emerges from this boot camp as an “agent.”

234. Sexual pleasure was now privileged as perhaps the most important component of a healthy marriage. See DEAN, *supra* note 63, at 49.

235. KAHN, *supra* note 217, at 81.

impulses and wanton indulgences, all without any consideration of factors exceeding the self.

According to this account, homosexuality represented the triumph of self-indulgence over self-government; of hedonism and anti-social values over legal and social conventions; of self-interest over the greater good. Several years later, this association of homosexuality with narcissism would take on even more apparent urgency. Germany's National Socialism and its influence abroad appeared to illustrate the grave dangers inherent in the sort of egotism that forsakes difference. The analogy between fascist ideology and homosexuality found expression in some psychological accounts that emphasized the anti-democratic aspect of homosexuality—the repudiation of difference, the inability to govern the self, the triumph of passion over reason.²³⁶

C. Homosexuality through the medico-legal gaze

Identity and its perplexing logic also commanded the medico-legal perspective on homosexuality during this period. In his 1931 treatise *Medical Jurisprudence*, Alfred Herzog classified homosexuality—the identity—as a psychiatric problem, while referring to homosexuality—the sexual practice—as a potentially legal one. Under the heading “Homosexuality,” he wrote:

Whether indulgence in a certain act of homo-sexual intercourse was an irresistible or controllable impulse may be difficult to determine. We should, however, say that every homo-sexual is mentally abnormal by nature and should not be held responsible for his sexual inclinations and an occasional indulgence therein, except he thereby offends common decency or induces children to submit to his sexual practices.²³⁷

With respect to legal regulation, psychiatrists and other medical professionals approached the issue of homosexuality as they had those of criminality and the psychopath. That is, they cast their own intervention as essential to rectify or at the very least supplement a misguided and ineffectual legal strategy. Where the law offered the universalizing

236. A provocative article titled “Homosexuality in Relation to the Problem of Human Difference” argued that homosexuality reflected a weak, unbounded self, fearful of difference. “Basic in the whole homosexual problem is the inadequate and insecure feeling about the self. There is the fear of accepting and making creative use of difference because that would take one further along the road of being a unique and separate person. This involves responsibility for self and relating that self to others without loss of individual integrity.” Frederick H. Allen, *Homosexuality in Relation to the Problem of Human Difference*, 10 AM. J. ORTHOPSYCHIATRY 129 (1940). In his conclusion, the author alluded suggestively to the phenomenon of Nazism, remarking that “[n]ationalism in its narrower and more intense manifestations might well be described as cultural homosexuality.” *Id.* at 133. Wilhelm Reich contended that fascist ideology “draws its power from the suppression of genital sexuality, which, on a secondary level, entails a regression along the line of passive and masochistic homosexuality.” WILHELM REICH, *THE MASS PSYCHOLOGY OF FASCISM* 163 (1933).

237. HERZOG, *supra* note 2, at 565-66.

regime of “reasonable men” and a variety of acts those men might commit with a variety of punishments attached, psychiatry developed an elaborate classificatory system that eschewed universal norms in favor of a range of diagnosable disorders and identities. On the other hand, where the law fashioned a neat distinction between criminal offender and law-abiding citizen, psychiatry understood the two to occupy a psychic continuum of fantasies and unconscious identifications.

Some doctors simultaneously presumed that homosexuals as juridical subjects were no more than the effect of legal and social regulation, *and* posited the homosexual as a distinct category of person. The bridge between these positions emerged from the observation that “[s]ociety’s attitude toward homosexuality encourages repression and this repression results in many conflicts for the latent and overt homosexual.”²³⁸ In other words, legal regulation itself gives rise to psychiatric conditions that then require psychiatric intervention. But how to manage and contain the apparently corrosive potential of homosexuality without the attendant problems of legally contrived repression? It was in response to this quandary that psychiatry seemed to offer an alternative to the old legal regime. Yet, this avowedly more humane approach that shifted the emphasis from criminal acts to psychologically intelligible identities functioned to some extent insidiously, especially in its intersections with the more rigid frameworks of law, to stabilize homosexual identity as the cultural repository of concerns about unmanageable passions and the limitations of self-government.²³⁹

As a consequence of the confusion surrounding the status of homosexuality—whether understood as a practice, or a variety of person—the task of managing it seemed a formidable one at best. Penalize acts and you risked missing its other influences or punishing people who bore dubious responsibility, legally, for their conduct; target the putative homosexuals and direct treatment toward them and you risked overlooking a whole spectrum of persons and practices through which homosexuality might proliferate. So it is not surprising that once doctors began to conceptualize homosexuality in such terms, efforts to regulate it took on more intensity and a variety of more intrusive forms, including the sexual psychopath laws.²⁴⁰ In associating homosexuality with

238. Eugene W. Green & L.G. Johnson, *Homosexuality*, 4 J. CRIM. L. & CRIMINOLOGY 467, 470 (1944).

239. See, for example, Julius Baur, *Homosexuality as an Endocrinological, Psychological, and Genetic Problem*, 2 J. CRIM. L. & CRIMINOLOGY 188 (1940), which argued that criminology must be interested in the curability of homosexuality, since its role is to protect society against sex offenders and since incarceration and the usual penal tactics have proven to be of no avail in altering homosexuals’ behavior. A 1947 issue of the British journal *Medical Press* devoted to “The Social Problem of Homosexuality” contained a series of articles employing a medico-legal perspective, including “Some Criminological Aspects of Homosexuality”; “The Medico-Legal Problem of Homosexuality”; and “A Note on the Psychotherapeutic Treatment of Homosexuals in Prison.”

240. As John D’Emilio described some years ago, “[a] view of homosexuality as disease spelled

psychopathy, psychiatrists potentially exacerbated the prospects for those who, committing an offense such as public solicitation or sodomy, might trade a limited incarceration for an indefinite commitment. In the military context, for instance, once the regulatory regime shifted from criminal penalties for sodomy—often resulting in court martials and imprisonment—to separation on the grounds of claimed or suspected homosexuality, the number of servicemembers who fell under its purview increased at least tenfold.²⁴¹

By the post-war years the psychiatric perspective had so dominated the scene that even where authors wished in part to dispel the image of the homosexual as either a criminal or a sick person, they relied nonetheless on characterizations of homosexuality that resonated so clearly with discourses on psychopathy that their depathologizing gestures were rendered virtually inaudible. Take, for example, the criminology textbook that claimed: “The true homosexual is very much misunderstood by laymen and police. The public assumes that he is a degenerate rather than suffering from an affliction contracted through no fault of his own. Though many homosexuals are fine and sensitive characters, they are anathema to society in our culture, and we have no qualms about persecuting them.”²⁴² Despite their appreciation of homosexuals’ commendable qualities, these authors nonetheless recognized that, because of their unfortunate “affliction,” they were “anathema to society.” Moreover, in describing this affliction, the authors took recourse to the familiar medico-legal rhetoric of irresistible impulse: “Certain homosexuals, through biological factors such as inborn glandular anomalies and defects, may be irresistibly impelled to behave as they

trouble even for those who never ran afoul of the law, since some families committed their gay members to asylums.” D’EMILIO, *supra* note 181, at 18. But he also identified as a salutary effect of this medicalization the relative ease with which gay men and lesbians could embrace their newly articulated identities in order to form subcultures and communities. *See id.* George Chauncy describes the function of Repeal-era regulation to draw clear distinctions between the acceptable and the unacceptable that significantly implicated homosexuals. For example, requirements that establishments serving alcoholic beverages meet standards of “orderliness” in effect prohibited them from legally serving gay men or lesbians (or prostitutes, gamblers, etc.), who were by definition disorderly. Chauncy argues that the instability of gender roles following Prohibition and the Depression motivated much of the anxiety around homosexuality and deviant sexual behavior, anxiety that manifested itself in severe new regulations curtailing homosexual patronage and homosexual representation in films and elsewhere. Consistent with the rhetoric of “indulgence” we observed, he suggests provocatively that such anxious patrolling of boundaries bespoke a sense of homosexuality as a dangerous temptation for all. *See* GEORGE W. CHAUNCEY, *GAY NEW YORK: GENDER, URBAN CULTURE, AND THE MAKING OF THE GAY MALE WORLD, 1890-1940*, at 337, 352-54 (1994).

241. As another significant consequence of the psychiatric turn in legal regulation of homosexuality, lesbians became increasingly visible within a system that had largely ignored them through its focus on particular criminalized acts. *See*, for example, *Woman as a Sex Criminal* (first translated from the German and published in the United States in 1934), which drew a direct link between lesbian desire and crime, particularly violent crime. ERICH WULFFEN, *WOMAN AS A SEX CRIMINAL* 324 (David Berger trans., 1934) (1923).

242. HARRY ELMER BARNES & NEGLEY K. TEETERS, *NEW HORIZONS IN CRIMINOLOGY* 97 (3d ed. 1959).

do.”²⁴³ As an alternative to punitive legal measures, they advocated a system engaging psychiatric evaluation at an early stage of the proceedings and probation conditioned on ongoing psychiatric treatment for defendants charged with homosexual conduct. This by-now-familiar “treat the criminal” approach both required and then perpetuated an understanding of homosexuality as a pathological identity.²⁴⁴

In sum, the psychiatric turn in the regulation of sexuality not only engendered the sexual psychopath laws with their pseudo-medical orientation and their disproportionate application to cases involving (explicitly or not) homosexuality, but it also brought home the sense in which homosexuals posed a threat to social stability, legal order, and democratic values. The appearance in 1952 of the first *Diagnostic and Statistical Manual of Mental Disorders* (DSM-I) represented a kind of apotheosis of the incoherent logic surrounding homosexuality. It listed homosexuality among the sociopathic personality disturbances (beginning the trend to replace the designation “psychopathic” with “sociopathic”), asserting that persons so disturbed were “ill primarily in terms of society and of conformity with the prevailing cultural milieu.”²⁴⁵ Homosexuality, then, was psychiatrically speaking a type of sociopathy; yet because the diagnosis defined itself in relational terms, it offers two contradictory readings. Homosexuality as a sociopathic personality disturbance held no intrinsic pathology, but rather constituted an illness merely in the sense that it conflicted with current social and cultural values. Yet homosexuality as a sociopathic personality disturbance derived its pathology from precisely an *inability to abide by current cultural values*—the difference may seem subtle, but it is essential. In the latter version, the one that resonated more powerfully with the dominant discourse on homosexuality at the time, homosexuality presents itself as deeply anti-social and anti-legal force.

243. *Id.*

244. Even Alfred Kinsey, the first significant sex researcher in the United States, failed to escape the logic of identity. Through his study of the sexual behavior of American men, Kinsey concluded to great publicity that 37 percent of the male population had participated in at least one homosexual encounter to orgasm between adolescence and old age. He wrote that, “[i]nstead of using these terms [homosexual and heterosexual] as substantives which stand for persons, or even as adjectives to describe persons, they may better be used to describe the nature of the overt sexual relations, or of the stimuli to which an individual erotically responds.” Alfred Kinsey et al., *The Homosexual Outlet* (excerpted from *SEXUAL BEHAVIOR IN THE HUMAN MALE*) in *THE HOMOSEXUAL DIALECTIC* 3, 7 (Joseph A. McCaffrey ed., 1972). See also PAUL ROBINSON, *THE MODERNIZATION OF SEX: HAVELOCK ELLIS, ALFRED KINSEY, WILLIAM MASTERS, AND VIRGINIA JOHNSON* 67 (1989). But nonetheless Kinsey occasionally used “homosexual” as a qualifier in a context where he clearly imputed homosexual identities to his subjects—e.g., “homosexual individuals, homosexual males.” ALFRED KINSEY, *SEXUAL BEHAVIOR IN THE HUMAN MALE* 632 (1948). If the principal purveyor of an anti-identitarian model of sexuality remained beholden, at least in part, to the powerful logic of sexual identity, then it was clear that this logic had taken hold upon American culture.

245. AMERICAN PSYCHIATRIC ASSOCIATION, *DIAGNOSTIC AND STATISTICAL MANUAL OF MENTAL DISORDERS* (1st ed. 1952) (DSM-I).

D. The jurisprudence of identity

Cases beginning in the 1930s displayed legal reasoning that has newly embraced this medicalized logic for understanding and representing deviant sexuality. Most relied on the minoritizing framework that psychiatric medicine and sexology—as opposed to Freudian analysis—introduced into cultural discourse. In 1936, the California Supreme Court reviewed the murder conviction and death sentence of a defendant who had admitted to killing a young woman whom he had met during his wanderings. The court wrote: “The crime is gruesome, the circumstances of its commission are unusual, and the motives which impelled its commission are too recondite to be understood by the average person and can only be accounted for by psychiatrists and criminologists, if at all.”²⁴⁶

Before the court even discussed the crime itself, however, it offered a detailed life history of the defendant, a 28-year-old man, attending particularly to his nomadic tendencies and his relationship to his parents, who had separated in the early years of his life. The court seemed to give special credence to the father’s claim that the mother was “a woman of doubtful morals” and “a lascivious person, irresponsible and undependable.”²⁴⁷ Since his adolescence, the defendant had been a restless and unstable sort who moved from city to city, job to job. About this history the court wrote:

there is no doubt in the minds of the medical experts that his restless and uncontrollable impulse to go from place to place was superinduced by a desire to consort with those who, like himself, were homosexual. . . . Homosexuality, according to the medical experts, is an overmastering and overpowering passion which may be subdued for a period of time but often rekindles itself to such intensity as to cause or produce all of the symptoms and disturbances which the evidence shows the defendant to have exhibited.²⁴⁸

The defendant confessed to killing a woman who had resisted his sexual advances; he choked her with her silk stocking and then, in the court’s words, “violated her person.”²⁴⁹ After a day of roaming around the city, he arrived at the police station and announced his crime. Asked why he thought choking her to death was “a good idea, he said ‘revenge perhaps’ for ‘all the misery I suffered.’”²⁵⁰

On appeal, the court considered whether or not to overturn the defendant’s conviction on the basis of his potential insanity. While the court agreed with the jury that the defendant was legally sane at the time

246. *People v. Walter*, 60 P.2d 990, 991 (Cal. 1936).

247. *Id.* at 993.

248. *Id.* at 994.

249. *Id.* at 995.

250. *Id.* at 993.

of the crime, it remarked that

[t]o the normal person, untrained in the science of psychosis, there seems to be no explication of his life. . . . [It] may be that the urge of resentment or for *revenge*, which is a symptom or trait of homosexuality, and which he himself gave as the motive or impulse which actuated the commission of the crime, was the overmastering passion which impelled him to his deed.²⁵¹

This “overmastering passion which impelled him to his deed,” then, was that same “overmastering and overpowering passion” that provoked his nomadic behavior. Although this passion constituted an abnormal state of mind, in the court’s view it did not rise to the level of insanity, so the death sentence stood. But how did the court reason from the murder of a woman allegedly occasioned by her refusal of the defendant’s sexual advance to a theory of the case predicated on the overmastering passion that characterized the defendant’s homosexuality? Beneath the defendant’s claimed heterosexual passion, the court suggested, lay an even more powerful passion: the passion of homosexuality, the passion of resentment and revenge that leads ineluctably to crime. Thus “overmastering passion” stands, in this opinion, both for some core homosexual aspect of the defendant’s identity and for the other antisocial sentiments and acts to which this aspect apparently gives rise.

Even in sodomy cases, where commission of the acts themselves was singularly at stake, character evidence brought in at trial recast the inquiry as one about the defendant’s identity. In *People v. Hall*, a 1939 New York sodomy case, the court wrote: “This crime is unusual and unnatural. A normal person would not commit this crime. Who would commit such a crime? It certainly is essential to inquire into the mental attitudes and physical reactions of a man charged with this crime in order to determine whether he is such a man.”²⁵² Character evidence proving the defendant’s homosexual inclinations became the *sine qua non* of a conviction for committing a criminal act.

The natural sex instinct is for the opposite sex. How then, are we going to determine the sexual attitude of this defendant toward his own sex? He is presumed in law to be a man with normal sexual desires and not possessing an abnormal perversion. It was necessary for the People to prove that the defendant was homo-sexually inclined; that he had a passion toward his own sex that was unnatural. If it be determined that the defendant was possessed of the passion, emotion and desires referred to, then he is capable of committing the crime of Sodomy and it follows that the jury could infer that he had a

251. *Id.* at 994.

252. 16 N.Y.S.2d 328, 329 (1939).

sexual force which impelled him to do it.²⁵³

“Passion, emotion, and desires” determined the legal inquiry; the presence of such features directed toward a member of his own sex would effectively establish the defendant’s deviation from the law’s normative subject—a man with “normal sexual desires.”

Occasionally the elusiveness of homosexual identity kept the target of regulation out of focus. In a case reinstating a liquor license to the proprietor of a restaurant after his license was revoked on the premise that he permitted homosexuals to congregate there, the court pointed to the difficulty of verifying such a charge. “Homosexuals are often difficult to identify, their proclivities may remain dormant for long periods of time, and be disclosed only momentarily.”²⁵⁴ In particular, reasoned the court, “[h]omosexuals are harder to identify than prostitutes, since they carry on normally in other branches of life.”²⁵⁵ But, as Eskridge has pointed out, the tentacles of identity-based regulation could reach where regulation based on sexual acts might not.²⁵⁶ While reversing the convictions of several defendants under a statute criminalizing the act of “loiter[ing] about any toilet, station or station platform of a subway or elevated railway or of a railroad . . . ,” one court found that the statute was intended to reach the conduct only of certain persons, from whose ranks the defendants might be distinguished. “It is evident that the legislature by the enactment of this statute sought to protect the decent citizens of the community from contact with those sordid individuals who infest our stations such as . . . the secretive and furtive homosexual or degenerate whose motive is plain but whose acts may not constitute a violation of the misdemeanor or felony statutes.”²⁵⁷

By the post-war years courts’ increasing embrace of psychiatric reasoning became apparent in cases involving homosexuality; indeed many such cases provided a forum for judges to invoke and defer to psychiatric insights. In 1949, a federal judge in Hawaii set aside the verdict and granted a new trial after a jury convicted the defendant of first degree murder, to which a mandatory sentence of life imprisonment attached. Lamenting his own failure to inform the jury of the mandatory sentence, the judge reasoned that the jury had given insufficient weight to psychiatric testimony describing the defendant as a “latent homosexual” who was compelled to extinguish manifestations of his repressed desire in

253. *Id.*

254. *Lynch’s Builders Restaurant v. O’Connell*, 102 N.Y.S.2d 606, 610 (N.Y. App. Div. 1951).

255. *Id.* at 612.

256. Eskridge argues that with the rise of the modern administrative state in the 1930s and 1940s came a three-pronged regulatory apparatus targeting homosexuality through a focus on acts, unconventional gender identity, and desires or homosexual tendencies. See Eskridge, *supra* note 18, at 1069.

257. *People v. Bell*, 125 N.Y.S.2d 117, 119 (1953).

the external world. Without naming a “homosexual panic” defense, the defendant’s psychiatric experts characterized homoerotic desire as a compulsion that destroyed legal sanity. According to this testimony, the defendant’s brutal murder of an older friend, mentor, and “father figure” occurred because, when this older man made sexual overtures toward the defendant,

he was not actually conscious of killing a human, but was killing some ever-present but unknown and obscure thing inherent in himself, as one would kill a poisonous snake, and which he covertly and unconsciously hated with an inspired, pent-up hatred that knew no bounds, and was prompted and controlled at the time by his rebellious subconscious mind; that at the moment of killing he was in such an uncontrollable rage that he was no longer a rational person.²⁵⁸

Although the defendant’s adolescent abuse by an older man contributed, in this account, to the rage that overwhelmed his reason in this instance—and the replication of this betrayal when a trusted friend and mentor attempted to touch him sexually—it was his own homosexual self that he wished to destroy in a kind of inverted narcissism. According to the psychiatric testimony, this abuse may have “left a deep hurt and scar in his inner consciousness which he kept secret and tried to forget, but couldn’t”²⁵⁹

Notwithstanding his heterosexual marriage and vigilant defense against homosexuality, “his inborn passiveness toward homosexuality made him a mark, and he was something akin to a moth fluttering around a flame, inviting danger but without any realization of the cause.”²⁶⁰ For instance, despite his seemingly happy relationship with his wife, “he had an irresistible impulse to frequently go out to barrooms and drink with the male habitués of such places, which were numerous”²⁶¹ In granting deference to the psychiatric testimony here, the court legitimated the irresistible impulse model of criminal irresponsibility without appending this designation to its decision. The defendant’s “irresistible impulse” to frequent bars thus becomes a metonym for his irresistible impulse to murder. This opinion demonstrates the extent to which law not only recognized psychiatric insights, but indeed appeared to have internalized them.

This paradigmatic medico-legal assessment of homosexuality as a condition of diminished will and reason found expression in numerous cases from the post-war era. Psychiatric expert witnesses declared that homosexuals suffered from compulsions that fell under the category of

258. *United States v. Parelius*, 83 F. Supp. 617, 621 (D. Haw. 1949).

259. *Id.*

260. *Id.*

261. *Id.* at 619.

irresistible impulse, although they invariably escaped the purview of M’Naghten. One doctor testified in a sodomy case “that the defendant knew any deviation from the acceptable standard was wrong, but by reason of this warping of his personality [his homosexuality] he was unable to accept and be guided by that knowledge; that he cannot control, by reason, his inability to choose between right and wrong, and that he is mentally ill and . . . should be looked upon as a weak person and not a criminal”²⁶² As the court pointed out in its opinion, “this species of criminality” may not be amenable to traditional criminal law, although it deferred on that question to the legislature.²⁶³

A 1956 Second Circuit immigration case dramatizes the tensions psychiatric jurisprudence engendered in its pervasive incarnations following World War II. Even more strikingly perhaps, this case illustrates the kind of reasoning that understood homosexuality as a condition in tension, and potentially irreconcilable with, that of being an American citizen.²⁶⁴ In 1950, Cuban citizen Roberto Flores-Rodriguez visited New York City, where he was arrested for loitering on a charge of soliciting men in a public restroom “for the purpose of committing a crime against nature.”²⁶⁵ When filling out a sworn application for an immigration visa in Havana two years later, Flores-Rodriguez omitted mention of his prior offense. Admitted to the United States as a permanent resident, he again came afoul of the law against loitering and disorderly conduct, receiving a perjury conviction in federal court when his earlier omission emerged.²⁶⁶ On the question of his admissibility into the United States as a citizen, the court of appeals deemed that omission material, since the immigration statute at issue excluded persons who had committed any crime or misdemeanor involving “moral turpitude.”²⁶⁷ Under the statute, both his conviction for such an offense and his perjured statement suggested that he likely would be denied admission.

More important to the disposition of the case, however, his homosexual identity, or what the court referred to as his “constitutional psychopathic nature,” would also strongly militate against him. Indeed, the statute contained a subsection expressly excluding those who fell under the designation “persons of constitutional psychopathic inferiority,” among other categories.²⁶⁸ When the opinion considered the government’s claim that Flores-Rodriguez fell under this subsection, it first noted that no evidence had been adduced, “nor any data to inform our judicial notice, to

262. *People v. Jones*, 128 N.E. 739, 740 (Ill. 1955).

263. *Id.* at 741.

264. *United States v. Flores-Rodriguez*, 237 F.2d 405 (2d Cir. 1956).

265. *Id.* at 407.

266. *Id.* at 408.

267. *Id.* at 409.

268. 8 U.S.C.A. § 136(a) (West 1946).

the effect that an homosexual who solicits unnatural acts in a public place comes within that category.”²⁶⁹ By invoking psychological and psychiatric theory, though, the court proceeded to make this diagnosis on its own. Since under oath “defendant stated that he was indeed an homosexual, that he had been practicing homosexuality all his life, and had engaged in such acts in the United States. . . ,” the court expressed confidence that “these facts might have led to defendant’s certification as a ‘constitutional psychopathic inferior.’”²⁷⁰ In its analysis, the court relied upon psychiatric glosses of this label, as well as the 1939 Minnesota case construing the term “psychiatric personality” in the context of the state’s sexual psychopath law—the very construction that salvaged that law in the Supreme Court. Following a synthesis of these interpretations, the opinion continued: “We understand this little-understood and rarely interpreted phrase—presumably out of the psychology books—to characterize individuals who show a life-long and constitutional tendency not to conform to group customs, and who habitually misbehave so flagrantly that they are continually in trouble with authorities.”²⁷¹ Surely, the court suggested, in enacting this statute Congress would have wanted to preclude from immigration any group of people “flagrantly” and perpetually in violation of American customs; homosexuals were likely such a group.

Moreover, reasoned the court, subsection (d) of the statute excluding “mentally defective” persons equally prevented the defendant from immigrating to the United States, since “this language was designed to exclude homosexuals with exhibitionistic tendencies and other groups with lewd proclivities similarly repugnant to the mores of our society.”²⁷² To back this assertion, the court cited the American Medical Association’s *Standard Nomenclature of Diseases and Operations* [precursor to the DSM-I] as an indication that “the medical profession regards homosexuality as a mental disorder or defect”²⁷³ If the defendant truthfully had revealed his conviction, the court continued, he surely would have been subjected to a medical examination, which likely would have found in him the kind of mental defect that would trigger subsection (d).²⁷⁴ “Finally,” insisted the court, “a sex deviate so afflicted with such a defect of mentality . . . is very likely to be brought into repeated conflict with our social customs, constituted authority, and social environment. He will find it extremely difficult to adapt himself, and to become a useful

269. 237 F.2d at 410.

270. *Id.*

271. *Id.* at 411.

272. *Id.*

273. *Id.* at 411 n.7.

274. *Id.* at 412.

member of the American community.”²⁷⁵ Thus was homosexuality manifestly incompatible with citizenship.

In a concurring opinion, one of the judges agreed that the defendant’s omission rendered him guilty of the perjury offense for which he was convicted. But this judge sharply critiqued the court’s foray into amateur psychiatry, analogizing it to an unguided journey through unnavigable waters. “I think it a mistake for my colleagues needlessly to embark—without a pilot, rudder, compass or radar—on an amateur’s voyage on the fog-enshrouded sea of psychiatry.”²⁷⁶ In particular, the concurrence took issue with the majority’s seemingly facile application of the category “constitutional psychopathic inferior” to the defendant. While this category appeared in the statute’s earlier incarnation, more recently in its 1952 revision Congress eliminated this antiquated designation for the more updated “psychopathic personality.” The relevance of this change, the concurrence suggested, derived not from the later version’s applicability to the case under review (since the events at issue occurred while the older version was still in effect), but from the majority’s gloss on the original category. That is, the majority’s interpretation of this category to include Flores-Rodriguez elided the essential qualifier “constitutional,” meaning present at birth. No evidence existed before the court to suggest that Flores-Rodriguez was a “constitutional” homosexual. With the removal of this qualifier, the concurrence continued, Congress meant to indicate that the congenital aspect was no longer relevant; but *the need to do so testified to its relevance under the original statute.*²⁷⁷ Such a misinterpretation on the majority’s part, the opinion maintained, offered evidence of judicial ineptitude with respect to psychiatric reasoning. “We would smile (I trust indulgently) at psychiatrists who thought that most legal terms possess clear, precise, stable meanings, easily to be learned by thumbing a few judicial opinions and a legal dictionary. Why should we hope to escape the smiles of psychiatrists if we behave similarly vis-a-vis psychiatry?”²⁷⁸

Notwithstanding this caveat, though, legal culture clearly had absorbed psychiatric reasoning with respect to sexual psychopathy and its apparent embodiment in the homosexual. Medico-legal reasoning constructed both the psychopath and the homosexual as irresistible impulse incarnate: both represented the dissolution of law’s bounded subject, the failure to achieve self-discipline. Whereas the ideal citizen exercised self-government through command of her will and operation of her reason, the homosexual in this view remained unable to govern his impulses. Through its

275. *Id.*

276. *Id.* (Frank, J., concurring).

277. *Id.* at 412-16.

278. *Id.* at 416.

conflation with sexual psychopathy, homosexuality thus became fundamentally inconsistent with ideals of democratic citizenship. Indeed, by 1967 the deportation of homosexuals for their status alone seemed quite uncontroversial. In *Boutilier v. Immigration and Naturalization Service*,²⁷⁹ the United States Supreme Court concluded matter-of-factly that, in the Immigration and Nationality Act of 1952, “Congress used the phrase ‘psychopathic personality’ not in the clinical sense, but to effectuate its purpose to exclude from entry all homosexuals and other sex perverts.”²⁸⁰ The utility of this psychiatric classification now rested entirely on its regulatory force to produce and police sexually deviant identities.

E. An unholy alliance

If members of the psychiatric community had been guided by a certain opportunism in seizing upon the category of the sexual psychopath as a means to expand their authority within the legal system, then they found eminently willing collaborators in legislators and jurists alike. Members of the legal community were largely content to cede authority to their psychiatric colleagues if doing so itself entailed a subtle expansion of the legal purview. Whereas the offense-based regime permitted legal regulation only of particular conduct, psychiatric jurisprudence and legislation invoking psychiatric expertise facilitated legal intervention at the level of status, a dubious prospect at best. The admixture of psychiatry and law here produced a tenuous result that offended the ideals of both cultures: a medico-legal category with little psychiatric validity and still less legal defensibility. This category, born of the evolving norms of the psychiatric discipline, was then reified by legislative and judicial decree. Legal proceedings adjudicating this category skirted the procedural checks of the criminal law while nonetheless deploying the appellation “criminal,” and offered up a nominally medical remedy that amounted to an indefinite confinement.

Some mid-century commentators began to see the sexual psychopath laws as the progeny of an unholy alliance between law and psychiatry. For instance, a 1949 editorial in the *American Journal of Psychiatry* posed a question that, though strikingly elementary, had been almost entirely absent from prior discussions of the issue within the psychiatric community: “Why do we want jurisdiction in these cases transferred from the courts to the psychiatrists?”²⁸¹ The answer, reverberating throughout the psychiatric and psychological literature of the preceding decade, was

279. 387 U.S. 118 (1967).

280. *United States v. Boutilier*, 387 U.S. at 122 (citing 8 U.S.C. § 1182(a)(4)).

281. Henry A. Davidson, *Legislation Dealing with Sex Offenders*, 106 AM. J. PSYCHIATRY 390 (1949).

of course the inadequacy of penal remedies and the manifest superiority of long-term, individualized treatment. As this editorialist acknowledged, however, the movement toward treatment rather than criminal sanctions for the sexual psychopath remained hollow as long as medicine lacked the means to heal this ailment. Since, he pointed out, few psychiatrists will be willing to vouch for a sexual psychopath's recovery in those states where the period of confinement is left to the discretion of doctors to pronounce a cure, "[t]he net result is an indefinite and purely custodial confinement, behind bars, for a patient to whom the average state hospital has nothing to offer in terms of definitive treatment."²⁸² He thus called the efficacy of sexual psychopath laws into question for their failure to make good on the reason for which they supplanted traditional legal remedies: the need to replace incarceration with medical treatment and analysis. The editorialist suggested that psychiatrists themselves were partly to blame for this precipitous shift in jurisdiction: "We have lectured and written so much and so positively about the dynamics of sexual aberration that the public has finally taken us at our word, and in many states they have turned the sex psychopath over to us to deal with."²⁸³ He concluded with unusual circumspection about the role of psychiatry in legal matters, at least those involving sexual offenders. "Perhaps it is time to confess," he wrote, "this is an area in which we may have been overselling psychiatry."²⁸⁴

When New Jersey commissioned a report on the "habitual sex offender" in 1950, its editor, sociologist Paul Tappan, agreed with this assessment of sexual psychopath legislation, calling it "ineffective" and stressing its "futility."²⁸⁵ Among the fallacies he attempted to expose in this report, Tappan wrote disparagingly of one maintaining that "'sex psychopathy' or sex deviation is a clinical entity."²⁸⁶ Far from representing a coherent psychiatric category, he argued, the notion of sexual psychopathy was in fact entirely fraught and disputed within the psychiatric community.²⁸⁷ In

282. *Id.*

283. *Id.*

284. *Id.* The sociologist Edwin Sutherland took an even stronger position on the overselling of psychiatry:

Certain psychiatrists have stated that they are interested in the sexual psychopath laws principally as a precedent; they believe that all or practically all criminals are psychopathic, that all should be treated as patients, and that psychiatrists should have a monopoly on professional advice to the courts. These laws are dangerous precisely from this point of view; they could be passed over in silence otherwise, as a product of hysteria. The question is whether psychiatrists have a monopoly of knowledge of human personality and human behavior which warrants their nomination as 'the experts' in the field of diagnosis and treatment of criminals.

Sutherland, *supra* note 18, at 554.

285. See PAUL W. TAPPAN, *THE HABITUAL SEX OFFENDER: REPORT AND RECOMMENDATIONS OF THE COMMISSION ON THE HABITUAL SEX OFFENDER 13-16* (1950).

286. *Id.* at 15.

287. Tappan wrote: "Two-thirds of the psychiatric authorities consulted by the writer pointed to the wide disagreement among psychiatrists as to the meaning of the term, sex psychopath. More than half of them maintained that this condition is not a sufficiently clear diagnostic entity to justify legislation concerning the type." *Id.*

addition to this critique, Tappan leveled other damning charges against the sexual psychopath laws, claiming as did the *American Journal of Psychiatry* editorialist that they failed miserably to deliver on the promised treatment²⁸⁸ and to reach the very “dangerous and aggressive offenders” toward whom public fears were directed. Indeed, he admonished, “[m]ost of the persons adjudicated are minor deviates, rarely if ever ‘sex fiends.’”²⁸⁹ Given these failings, and yet given that these laws nonetheless provided for indefinite confinement, they constituted a grave threat to individual rights. Despite the civil nature of the proceedings and their structural analogy to the civil adjudication of insanity, Tappan asserted, these proceedings and the confinement in which they resulted violated due process and other basic liberties. Thus indicting legal reasoning for its hubris in purporting to absorb psychiatric knowledge without any sense of its nuances, and for its reliance upon formalism—both what he dubs “a technical legalism of the most vicious sort”²⁹⁰ and the more general faith in law as a solution—Tappan took up where the editorialist left off, impugning law where the other had impugned psychiatry.²⁹¹

CONCLUSION

In part because of such critiques, sexual psychopath laws fell into general desuetude in the late 1960s and beyond. At the same time, jurisprudence returned to a more suspicious stance with respect to psychiatric and psychoanalytic insights. In the past decade and a half, new legislation directed toward “sexually violent predators” has resurrected psychiatric commitment as a means of incapacitating certain sex offenders—merely one among the new technologies for “managing the monstrous”²⁹²—but without nearly the verve for interdisciplinary collaboration that characterized this earlier era. That era, though, illustrates some of the ways in which legal culture may occlude those

288. “Methods of effective treatment have not yet been worked out. The states that have passed special laws on the sex deviate do not attempt treatment! The ‘patients’ are kept in bare custodial confinement.” *Id.* at 15.

289. *Id.* at 16.

290. *Id.*

291. The final, and perhaps most spurious, fallacy in Tappan’s list is the conviction “[t]hat the sex problem can be solved merely by passing a new law on it.” *Id.* Perhaps the most contemptuous among his critical evaluations was the following: “Some ‘authorities’, confused in their oestrus to resolve at once problems of sex control that have beset man throughout the span of human history recommend in one overheated breath the greatest possible severity of punishment for all sex deviates and in their next impetuous exhalation declare that the problem is medical and must be turned over at once and in its entirety to psychiatrists.” *Id.* at 13-14. His California counterparts Bowman and Engle synthesized these critiques in their contribution to the Langley Porter Neuropsychiatric Institute’s published *California Sex Deviation Research* (1952). They took up the issues of prevention, treatment, and diagnostic utility, evaluating the recent legislation negatively on each count and describing a general consensus that “psychiatry has been oversold . . .” Bowman & Engle, *supra* note 189, at 106.

292. See generally Jonathan Simon, *Managing the Monstrous: Sex Offenders and the New Penology*, 3 PSYCHOL., PUB. POL’Y & L. 452 (1998).

insights that appear to challenge law's integrity, such as the fraught nature of free will and the significance of unconscious motivations. At the same time, law eagerly assimilates those insights that shore up its apparent inviolability.

Yet, as the evolution of medico-legal reasoning demonstrates, the separation of these insights relies on a fundamental incoherence. In one of his lectures at the College de France, Michel Foucault describes the function of expert psychiatric opinion on the character and mental life of a criminal suspect to construct "a juridically indiscernible personality over whom, in the terms of its own laws and texts, justice has no jurisdiction."²⁹³ The psychopath became just such a figure – a subject whose essential pathology was precisely his ungovernability and hence his insusceptibility to legal regulation. Medical science purported to offer its expertise and its humane concern for the individual to supplement an antiquated, punitive, and ultimately ineffective legal regime: "The sordid business of punishing is thus converted into the fine profession of curing."²⁹⁴ But the incoherencies that plagued medico-legal reasoning around psychopathy and sexuality rendered the subject of this conversion impossibly indistinct.

293. MICHEL FOUCAULT, *ABNORMAL: LECTURES AT THE COLLEGE DE FRANCE 1974-1975*, at 21 (Valerio Marchetti & Antonella Salomoni eds., 2003).

294. *Id.* at 23.