

Winter 1962

What to do with the Psychopath

James J. Graham

Follow this and additional works at: <https://scholarlycommons.law.northwestern.edu/jclc>

 Part of the [Criminal Law Commons](#), [Criminology Commons](#), and the [Criminology and Criminal Justice Commons](#)

Recommended Citation

James J. Graham, What to do with the Psychopath, 53 J. Crim. L. Criminology & Police Sci. 446 (1962)

This Article is brought to you for free and open access by Northwestern University School of Law Scholarly Commons. It has been accepted for inclusion in Journal of Criminal Law and Criminology by an authorized editor of Northwestern University School of Law Scholarly Commons.

WHAT TO DO WITH THE PSYCHOPATH?

JAMES J. GRAHAM

Mr. Graham is engaged in the private practice of law in New York City. He was formerly an attorney in the New York office of the National Labor Relations Board.

Should the psychopathic criminal receive special treatment by the law? Some states have said "no," while others have said "yes." In the following article, Mr. Graham reviews the current scientific theories about the causes and treatment of psychopathic behavior, discusses the various legal approaches made by the states to meet the problem of the psychopathic criminal, and weighs, in particular, the value of the Maryland "defective delinquent" statute, which prescribes an indeterminate sentence for the psychopathic criminal, together with detention in a penal-mental institution for treatment.—EDITOR.

It is no secret that the courts and legislatures have been reluctant to date to accord the same prestige to psychiatry as to the other sciences. The roots of the conflict run wide and deep and to a great extent are entwined with philosophical biases as to questions of guilt and innocence. But no one should deny that psychiatrists can aid the legal process by shedding light on some age-old mysteries of human behavior; despite widespread divergencies of opinion among them in many areas of their study, psychiatrists *have* been able to define and diagnose certain categories of mentally sick individuals. For example, the so-called criminal psychopath, discussed herein, presents a subject on which psychiatrists, lawyers, and moralists may find themselves in agreement more often than not.

To begin with, the term "psychopath" is a vague one; it is used as a catch-all expression by many authorities. Traditionally, the term meant "moral" insanity. According to Guttmacher and Weihofen,¹ Dr. Benjamin Rush in 1776 referred to the psychopath when he postulated a congenital defect of the moral sense in conjunction with normal or even superior intellectual powers. It may be said that psychopaths are groups of abnormals who do not fit into the generally accepted categories of neurotics, psychotics, or intellectual deficients. Psychiatrists differ in assigning various sub-groupings, but most agree that psychopathic personality disorders are manifested primarily by aberrant social conduct and by non-conformity to generally accepted standards of behavior.²

Many individuals who are described as psycho-

¹ GUTTMACHER & WEIHOFEN, *PSYCHIATRY AND THE LAW* 87 (1952).

² WEIHOFEN, *MENTAL DISORDER AS A CRIMINAL DEFENSE* 22 (1954).

paths, especially sex offenders (sexual psychopaths), actually suffer from neurotic character disorders. The repetitiveness of their offenses is one indication of their neurosis. The anxiety present in such an individual's makeup may cause him on occasion to seek relief through anti-social acts. This disturbance thus manifests itself in *outward* behavior and differs accordingly from the ordinary neurosis syndrome. The victim of the latter condition is acutely aware of the symptoms and will seek psychiatric help, while the neurotic psychopath is usually baffled by or unconscious of his strange impulses.

The term "psychopath" more aptly applies to a second group of antisocial abnormals who are characterized by Dr. Harvey Cleckley, in his book *The Mask of Sanity*³ as having superficial charm and good intelligence, no delusions or psychoneuroses, no reliability or truthfulness or remorse, and no sincerity. Their acts differ from the ordinary criminal's (and from the neurotic psychopath's) in that the end product is not intelligible to the average person. They usually do not gain in any substantial, material way from their offenses. Their satisfaction derives from a certain defiance of society, for which they pay a disproportionate price under the law.

The problem of what to do with the psychopath stems initially from the need for a more accurate definition of this particular syndrome. Unfortunately, psychiatrists are uncertain as to causation and proper treatment, but the immediate concern of potential legal reformers relates to the difficulty of identifying those psychopaths who are not re-

³ P. 355 (1950). See also Lipton, *The Psychopath*, 40 *J. CRIM. L. & C.* 584, 591 (1950).

sponsible, in the traditional sense, for their crimes. It is quite apparent, as most psychiatrists agree, that among those diagnosed as "psychopathic" can be found individuals who are not far removed from ordinary criminals and who should be treated accordingly; then at the other end of the scale are some so closely akin to psychotics that they perhaps should be exonerated of guilt for their crimes. In between is the group we have been discussing.⁴

The problem is illustrated in a recent study of the defense of insanity in New York which concluded by recommending a liberalization of the *M'Naghten* rules⁵ and at the same time seemed to close the door in that state on special treatment for the psychopathic offender, as was noted in the "Governor's Conference Report on the Defense of Insanity."⁶ The Governor's Committee agreed with the drafters of the Model Penal Code of the American Law Institute⁷ that "the terms mental disease or defect do *not* include an abnormality manifested only by repeated criminal or otherwise anti-social conduct."⁸ The Committee explained the distinction in the following language: "it is wholly circular in reasoning, as many psychiatrists agree, to define the concept of disease solely by reference to the phenomena which must be the product of disease for irresponsibility to be established. . . . [T]he diagnosis of psychopathy shall not suffice to lay the basis for a claim of irresponsibility. . . . [I]n the present state of knowledge we are satisfied that there is no escape from treating persons of this order as subject to con-

viction and a problem for the organs of correction."⁹

The Committee's findings, though negative, impliedly acknowledge the existence of a vaguely-defined group of individuals whose criminal conduct is mentally abnormal. But a more appropriate example, for the purposes of this paper, of legal recognition of the psychopathic syndrome can be found in the Maryland "defective delinquent" statute.¹⁰ It applies to "an individual who by demonstration of persistent, aggravated anti-social or criminal behavior evidences a propensity toward criminal activity and who is found to have either such intellectual deficiency or emotional unbalance or both, as to demonstrate clearly an actual danger to society so as to require confinement and treatment under an indeterminate sentence subject to being released only if the intellectual deficiency and/or the emotional unbalance is so relieved as to make it reasonably safe for society to terminate the confinement and treatment."¹¹ This statute will be discussed below at greater length.

CAUSATION

The problem of definition (and, of course, treatment) is colored by the uncertainty among psychiatrists regarding the etiology of the psychopathic syndrome. It is true that the cause of other mental disorders also defies explanation, but with psychoses, for example, the need to explain is not so acute. There, the abnormality, the "irrationality," makes itself manifest in actions that leave no doubt as to irresponsibility. But the psychopath reveals his mental disease, if any, by conduct which could be the product of self-seeking, lust, or sheer perversity.

Early German psychiatrists described them as "constitutional psychopathic inferiors." The expression indicates the emphasis at that time on constitutional deficiency, rather than environment, as cause. Today, the constitutional theory has been largely abandoned in favor of a theory of predisposition at birth to psychopathic behavior coupled with later exposure to various harmful influences.¹²

Most psychiatrists seem to agree that personality development occurs very early in life, prob-

⁴ See Odenwald, *Punishment from the Viewpoint of Psychiatry*, 6 CATHOLIC LAW. 126, 133 (1960). Dr. Odenwald, in a sympathetic treatment of the problem, states that psychopaths may be found among idealists, scholars, artists, etc., as well as among the criminal and derelict elements of society.

⁵ *M'Naghten's Case*, 10 Cl. & Fin. 200, 8 Eng. Rep. 718 (H.L. 1843). The rule is embodied in N.Y. PEN. LAW §1120:

"A person is not excused from criminal liability as an idiot, imbecile, lunatic, or insane person, except upon proof that, at the time of committing the alleged criminal act he was laboring under such defect of reason as:

1. Not to know the nature and quality of the act he was doing; or

2. Not to know that the act was wrong."

⁶ The report, dated April 22, 1958, was submitted by Dr. Richard V. Foster on behalf of the Study Committee of the Governor's Conference. Copies of the report, which apparently has not yet been published in *New York Legislative Documents*, may be procured from the Temporary Commission on Revision of the Penal Law and the Criminal Code, 155 Leonard Street, New York City.

⁷ MODEL PENAL CODE §4.01 (Tent. Draft No. 4, 1955).

⁸ *Supra* note 6, at 6.

⁹ *Id.* at 7.

¹⁰ MD. ANN. CODE art. 31 B (1961 Cum. Supp.), originally enacted in 1951.

¹¹ *Id.*, at §5.

¹² See GUTTMACHER & WEIHOFEN, *op. cit. supra* note 1, at 107.

ably in the first and second years. The influence of Freud is apparent in this area.¹³ Dr. Robert Lindner offers a somewhat extreme Freudian rationale to explain the psychopath: "his personality has been traumatized before the oedipal conflict has been worked through and forever after, the father (hence society) is regarded as an enemy."¹⁴ The psychopath, says Lindner, frequently commits acts which seem purposeless and which invite detection because he is burdened with guilt for his parricidal and incestuous fancies and hence goes out of his way to seek punishment.¹⁵

A more reasonable explanation of the syndrome in Freudian language has been presented by Dr. Edward Hoedemaker.¹⁶ He speaks of the Id as the unconscious aspect of the mind, the source of the basic animal drives. The Ego represents consciousness, the Super-Ego, the "conscience." In mental health there exists a harmonious inter-relationship among all three aspects of the mind. The Ego, guided and strengthened by a set of moral dicta furnished by the Super-Ego, regulates the appearance of instinctual forces into the consciousness. In the psychopath, however, we find a weak Ego, markedly disturbed to such a degree that sexual and aggressive impulses meet slight resistance in the consciousness and pass into activity which frequently clashes with the demands of his own conscience and of society.

According to Dr. Dwight D. Palmer,¹⁷ the Ego absorbs the external world and causes the individual to identify himself with his environment. Because of various traumatic disturbances in the process of identification, the psychopath never accepts his acts as a reflection on himself. His crime

remains something apart from him, his spirit contemplates a particular deed as if from a distance.¹⁸ Since his intellect, his reasoning faculty, is not impaired, the psychopath knows right from wrong, but he cannot *feel* the difference.¹⁹

Assuming the validity of the above dynamic theories, the failure to identify surely most often occurs in the home. Rejection by the parents leads to narcissism. Over-indulgent, vacillating parents produce ethical instability in the child. Sadistic parents generate aggression in their children, etc. These are the traumata which complement a predisposition to the psychopathic disorder. It follows, logically, that traumata of this sort are not restricted by economics. Statistics establish that many psychopaths develop in upper-income homes where, for example, the child may have only a professional nurse to identify with. A study made by Dr. William Goldfarb²⁰ indicates that many orphanage children may be "embryo" psychopaths. It was this writer's impression during a visit to a Philadelphia orphanage a few years ago that children in such a place have a great hunger for attention and affection. The young girls particularly seemed pale and lifeless and in need of a home and parents on which to anchor their emotions. The institutional attendants, in this case the Daughters of Charity, could not possibly be mothers to all their charges. The nuns told me at that time that an alarming number of the girls drifted into devious ways after "graduation."

If psychopathic behaviour cannot be traced to unconscious conflicts of some kind, most psychiatrists even today stress the constitutional factor.²¹ Heredity may offer a partial explanation. Some psychiatrists advance the theory that brain lesions, not detectable by our present methods, may account for many psychopaths. The "brain injury" school points out that the frontal cortex of the brain controls the hypothalamus, which area is the seat of the higher mental faculties and of course plays a large role in personality development. Dr. George Thompson²² states a forceful case for an organic over a psychogenic etiology. Though

¹³ See STERN, *THE THIRD REVOLUTION—A STUDY OF PSYCHIATRY AND RELIGION*, ch. 7 at 101.

¹⁴ LINDNER, *STONE WALLS AND MEN* 153 (1946).

¹⁵ Albert Camus, in his essay on Capital Punishment, has made the following observations, which are pertinent to this discussion: "[I]f the instinct to live is fundamental, it is no more so than another instinct . . . the death instinct, which at certain moments calls for the destruction of oneself and of others. . . . So it happens that the criminal wants not only the crime but the suffering that goes with it, even (one might say, especially,) if the suffering is exceptional. When that odd desire grows and becomes dominant, the prospect of being put to death not only fails to stop the criminal, but probably even adds to the vertigo in which he swoons. Thus, in a way, he kills in order to die." CAMUS, *REBELLIONS ON THE GUILLOTINE, RESISTANCE, REBELLION AND DEATH* 175, 191-92.

¹⁶ Hoedemaker, "Irresistible Impulse" as a Defense in Criminal Law, 23 WASH. L. REV. 1, 5 (1948).

¹⁷ PALMER, *Conscious Motivations in Psychopathic Behavior*, 2 PROCEEDINGS OF AM. ACADEMY OF FORENSIC STUDIES 146, 149 (1954).

¹⁸ Baney & Krumbiegel, *The Aggressive Psychopath*, 2 PROCEEDINGS OF AM. ACADEMY OF FORENSIC STUDIES 134, 141 (1954).

¹⁹ LINDNER, *op. cit.* supra note 14, at 155.

²⁰ Goldfarb, *Effects of Psychological Deprivation in Infancy and Subsequent Stimulation*, 102 AM. J. PSYCHIATRY 18 (1945).

²¹ See EAST, *SOCIETY AND THE CRIMINAL* 181, 207 (1951).

²² THOMPSON, *PSYCHOPATHIC DELINQUENCY AND THE CRIMINAL* 12 (1953).

he admits the supporting evidence is not scientifically conclusive, he suggests that latent, undetected encephalitis or brain lesions may be causes of psychopathic behaviour. Parallel behaviour patterns occur among individuals in a state of drunkenness, shell-shock, etc.

For the purposes of this paper, the above exposition of causation theories, though sketchy, may be sufficient. But one further comment needs to be made. The problem of explaining mental disorders, particularly the psychopathic syndrome, seems to be unnecessarily complicated by philosophical biases among the psychiatrists.²³ Unquestionably, many if not most of them are categorically opposed to the traditional belief in freedom of the will which underlies our system of law. This psychiatric rejection of tradition probably stems from the rationalistic currents of 19th century thought, but a more immediate influence in this area is the young science of psychoanalysis, which apparently has a dual aspect as a therapy and a philosophy of being.²⁴ But whatever the reason, philosophy need have no place in an objective, scientific appraisal of an individual's capacity to control his wrongful conduct. Is he mentally ill to that extent? The answer to the question should be based on scientific data alone.²⁵

Psychiatrists would probably have made greater impact on legal thinking (traditional and conservative as it is) if lawyers and judges felt that psychiatrists were solely empirical in their approach to criminal responsibility. Furthermore, though paradoxical, it should be quite possible to adhere to a theory (though it prove eventually to be scientifically unsound) that all criminals are "sick" because of mental disorder, without reject-

²³ See, e.g., Overholser, *Criminal Responsibility: A Psychiatrist's Viewpoint*, 48 A.B.A.J. 527; even non-psychiatrists have a right to quarrel with Dr. Overholser's statement "just as Copernicus and Galileo shattered men's notions that the earth was the center of the universe and just as Darwin showed that man is after all not a special order of creation but a product of evolution, so Freud demolished the idea that man is entirely a reasoning animal . . ." (Emphasis supplied.) *Ibid.*

²⁴ Dr. Karl Stern, himself a convert to Catholicism, makes an interesting and lucid case for the reconciliation of psychoanalysis with orthodox religious belief. He notes that, even according to Freud, "psychoanalysis, purely isolated as a therapeutic method, is philosophically neutral, that it helps to free the patient from his neurotic shackles and enables him to rediscover his basic set of beliefs, whatever they may be." Dr. Stern admits, however, that in actual practice, this "neutrality" is not always attainable. STERN, *op. cit. supra* note 13, at 99.

²⁵ *Id.* at 175.

ing the concept of free will; contrariwise, it is not only possible, but obviously a practice among psychiatrists who reject freedom of the will, to hold that certain individuals such as psychopaths, along with *normal* criminals, i.e., "those who have been reared in homes and neighborhoods with defective social standards and have incorporated these standards as their own,"²⁶ should not only be segregated from society but punished as well!

TREATMENT

To return to the format of this discussion, it may be well to discuss briefly what treatment, if any, can be utilized to "cure" the psychopath. Most psychiatrists agree that a true psychopath, one whose problem does not stem from neuroses, is an extremely difficult subject for treatment. He defies psychoanalysis and proves resistant even to hypnoanalysis. Dr. Thompson, of the "brain injury" school, recommends neurological examination of the cranial nerves, prior to the advent of delinquent tendencies. But apparently neither he nor anyone else proposes brain surgery as a treatment, until more satisfactory techniques have been developed.²⁷ Conceivably, a brain operation could also aggravate the condition. The drastic remedy of castration has been used to some extent in Scandinavia for the treatment of sexual psychopaths. American psychiatrists, including Thompson,²⁸ dispute the medical effectiveness of castration, since the sex drive emanates from the brain, is fed by the imagination, etc. Some practitioners have reported scattered success with drugs, among them insulin and thyroid substance.²⁹

Prolonged therapy, preferably on a group basis, has been generally and successfully applied. Since at least part of the psychopath's problem lies in a faulty image of himself, group discussion and criticism must necessarily aid in the process of re-evaluation and re-education. This method has been utilized with great success in Army Disciplinary Barracks and Rehabilitation Centers. Doctors Banay and Krumbiegel³⁰ treated ten patients having histories of psychopathic behavior, by means of electrocoma and psychotherapy combined, and were successful in six cases. The other four patients discontinued the treatments. By

²⁶ See GUTTMACHER & WEIHOFEN, *op. cit. supra* note 1, at 87.

²⁷ THOMPSON, *op. cit. supra* note 22, at 140.

²⁸ *Id.* at 139-40.

²⁹ *Id.* at 128.

³⁰ *Supra* note 18.

success, Banay and Krumbiegel meant that the six individuals, with backgrounds of psychopathic delinquency, managed to come to grips with themselves and to pursue respectable and useful life patterns.³¹ The method of treatment consisted of prolonged therapeutic applications of electrocoma and psychotherapy, aided by intermittent periods of hospitalization and the cooperation of the patient's family. Banay and Krumbiegel concluded from their experiment that the therapeutic failure of the psychopath is due not so much to the intrinsic nature of the disturbance as to the inadequacy of the approach in length of time, circumstances, and the inevitable expense involved. Of course, by way of comment, it is apparent that these named-obstacles are quite formidable. The circumstances are usually such that the patient is also a prisoner of the law, and/or neither he nor his family may be interested in his "cure."

The majority of psychiatrists believe that the psychopathic delinquent should be incarcerated (after the commission of a crime) in a prison or a mental institution or in an institution which combines the features of both. According to Sir Norwood East,³² prison adds force to psychological treatment in some cases and assists in adjusting the psychopath to his environment. Dr. Paul Tappan believes that, today, the average correctional institution has more facilities available for psychiatric, psychopathic rehabilitation than the mental hospitals.³³

In the prison or similar institution, facilities should be available for application of various forms of psychiatric treatment. Social workers and psychologists should be on the staff to prepare case histories, interviews for counseling purposes, etc. The length of treatment, of course, may well depend on the period of incarceration. A short sentence for a minor offence may frustrate successful treatment and return a potentially dangerous criminal into society. On the other hand, a heavy sentence could hang like a dark cloud over rehabilitation efforts. An indeterminate sentence is the answer proposed by many specialists in the field.

³¹ Doctors Banay and Krumbiegel arrived at these conclusions when, in each case, the patient showed "adequate social adjustment, overall change of temperamental trends and freedom from criminal inclinations." *Id.* at 146. For example, a woman thief became a well-adjusted legal secretary. The doctors apparently arrived at their conclusions contemporaneous with the termination of treatment, which extended, depending on the case, from two to five years.

³² *Op. cit. supra* note 21, at 209.

³³ See Tappan, *Sentences for Sex Criminals*, 42 J. CRIM. L., C. & P.S. 332 (1951).

An interesting and perhaps significant sidenote on the question of treatment is a factual item which appears in most of the literature with very little comment, namely, there are few *old* psychopaths. The subject-individuals generally fall into the age-group of 15-30, or thereabouts. Dr. East suggests that psychopaths mellow with age.³⁴ Their values become stabilized and orthodox with the passage of years because of physiological as well as psychological influences. But there may be more validity to the theory that the psychopath merely grows more sophisticated and wary of prison sentences.

PRESENT LAW

As might be expected, American criminal law makes few exceptions in favor of the psychopath. Under the traditional tests of insanity (*M'Naghten* or otherwise) these individuals are held fully responsible and punishable for their crimes, even though it may be medically certain that punishment alone will have no therapeutic effect. *People v. Moran*³⁵ established the law in New York State for first-degree murder by a psychopath. The defendant, said the court, must face execution as sentenced, if the evidence of his mental disability fails to satisfy the *M'Naghten* rules. However, in *Moran* the court did indicate that the jury might consider evidence of mental disorder in relation to the defendant's ability to form sufficient intent and premeditation for first degree murder. Dr. Weihofen is of the opinion that since evidence of character and motive is generally admissible for sentencing purposes, evidence of mental disorder should also be admissible,³⁶ but few cases support his view.³⁷

Of course, capital punishment is a large stumbling block in this area. It is irrevocable and inexorable. It creates an emotional "either-or" climate that is not conducive to a rational appraisal of criminal responsibility. For example, even though there is good reason to believe that

³⁴ *Op. cit. supra* note 21, at 185.

³⁵ 249 N.Y. 179 (1928).

³⁶ WEIHOFFEN, *op. cit. supra* note 2, at 210.

³⁷ Evidence of mental disorder was deemed admissible for sentencing purposes in *State v. James*, 96 N.J.L. 132, 149-51 (1921), and *Commonwealth v. Scott*, 14 Pa. D. & C. 191 (1930). In *Miller v. Commonwealth*, 200 Ky. 435, 255 S.W. 96 (1923), evidence of insanity was held admissible for the purpose of obtaining life imprisonment instead of the death sentence. But see, e.g., *Morris v. State*, —Tex. Crim.—, 246 S.W.2d 184 (1951), where instructions that the jury, in fixing punishment, might take the defendant's mental condition into account, were held properly refused.

often the most heinous of sex murderers may be least responsible, in the moral sense, an outraged public opinion will accept nothing less than execution for the defendant if such punishment is available, and will reject any "quibbling" over degrees of mental incapacity.

In addition, the failure of most state legislatures to provide for mandatory committal to a mental institution after an acquittal by reason of insanity would seem to stifle a sympathetic approach to all less-than-insane defendants. Juries, obviously, would be more receptive to an insanity plea if they were assured that a sex maniac, for example, would not be returned to society until cured.³⁸

Since 1937, 20 states and the District of Columbia have enacted statutes to deal with the so-called "sexual psychopaths."³⁹ The term is strictly a legal one. It has no medical justification, because medicine does not recognize a distinct line between sex offenders and other law violators. The same varying symptoms of basic difficulties are found in thieves, burglars, etc. The statutes enacted by the various states emphasize the need to protect society from the sexual criminal; they generally provide for special commitment proceedings, instead of broadening the tests of criminal insanity. Unlike ordinary commitment laws, they usually require action by a District Attorney or Attorney-General. The New York law is fairly typical.⁴⁰ It provides for a one-day-to-life sentence for a defendant convicted of first degree sodomy, first degree rape, sexual abuse while committing a felony, and for assault with intent to commit sodomy, rape or carnal abuse.⁴¹ The sentence may also be imposed on one convicted of any felony if he has previously been convicted, in any jurisdiction, of any of the sex crimes mentioned. After conviction and before

sentencing, a psychiatric examination is made and its results submitted to the court to aid in determining what the sentence should be. The law does not define sexual psychopathy, nor does it make any provision for treatment.

The New York law, like most of the others, has been upheld as constitutional on the theory that since the defendant has been tried and found guilty, the state may now exercise its broad powers to determine what to do with him.⁴² Paul Tappan,⁴³ who is a much-quoted authority in the field of the sexual delinquent, believes that the statutes in question are so vague that in many other areas they would be declared unconstitutional. Tappan disfavors the open-ended sentence, because of the present paucity of our knowledge about the treatment and cure of sex deviates. He also suggests that detention in specialized institutions and research centers would be preferable to prison incarceration. In New Jersey, incidentally, the sexual psychopath receives the same sentence as formerly, but serves his time in a mental hospital rather than in a prison.⁴⁴

The "sexual psychopath" laws, though imperfect, seem to be a step in the right direction. A statute which goes several steps further has been mentioned earlier in this paper.⁴⁵ Its constitutionality was upheld in *Eggleston v. Maryland*.⁴⁶ The "defective delinquent" statute, as it is called, provides for certain proceedings after a defendant has been convicted and sentenced by a Maryland Court for (a) a felony, (b) a misdemeanor punishable by imprisonment in a penitentiary, (c) a crime of violence, (d) a sex crime of any of three types, (e) or after two or more convictions punishable by imprisonment under Maryland law. On its own initiative, or by petition filed by the State's Attorney, the Department of Correction, or by the defendant or his attorney, which petition must state reasons why defective delinquency is suspected, the court may order an examination of the defendant at the Patuxent Institution.⁴⁷ The Superintendent there, himself a psychiatrist, submits a

³⁸ See Overholser, *supra* note 23, for a favorable view of D.C. CODE §24-301 (1961), originally enacted in 1955, which provides for mandatory committal to St. Elizabeth's Hospital (of which Dr. Overholser is Superintendent) until such time as the hospital finds and the court agrees that the offender has improved sufficiently to be released without danger to himself or others in the "reasonable future."

The District of Columbia statute has been adversely criticized in Comment, *A Logical Analysis of Criminal Responsibility and Mandatory Commitment*, 70 YALE L.J. 1354 (1961).

³⁹ WEIHOFEN, *op. cit. supra* note 2, at 196. The states are: Alabama, California, Florida, Illinois, Indiana, Massachusetts, Michigan, Minnesota, Missouri, Nebraska, New Hampshire, New Jersey, New York, Ohio, Pennsylvania, Vermont, Virginia, Washington, Wisconsin, and Wyoming.

⁴⁰ N.Y. LAWS, 1950, ch. 525.

⁴¹ WEIHOFEN, *op. cit. supra* note 2, at 202.

⁴² *Williams v. New York*, 337 U.S. 241 (1949).

⁴³ *Supra* note 33, at 332-37.

⁴⁴ N.J. REV. STAT. tit. 2, ch. 192 (Crim. Supp. 1950). See comment in WEIHOFEN, *op. cit. supra* note 2, at 203. See also *New Jersey v. Wingler*, 25 N.J. 161, 135 A.2d 468 (1957).

⁴⁵ See note 10, *supra*, and accompanying text.

⁴⁶ 121 A.2d 698.

⁴⁷ MD. ANN. CODE art. 31 B, §6 (1961 Cum. Supp.). Section 7(b) provides that if a party other than the defendant or his attorney makes the request, the defendant has the right to be examined by a psychiatrist of his choice, whose fee will be paid by the state.

psychiatric report to the court, a "trial" is held, and if the defendant is found "guilty" of defective delinquency, the court suspends the original sentence and sentences him anew to an indeterminate sentence at Patuxent Institution.⁴⁸ The statutory definition of defective delinquent applies to both psychopaths and mental defectives.

The Maryland Legislature appropriated funds for the erection of Patuxent Institution. Its staff includes psychiatrists, psychologists, and sociologists. Patuxent contains three centers: (1) diagnostic, where possible defective delinquents are studied; (2) minimum security, for intellectually defective delinquents; and (3) maximum security, for psychopaths and/or neurotic, habitual criminals.

Though the statute provides for a possible detention in excess of, but never less than, the original sentence, the court, in the *Eggleston* case⁴⁹ sustained its constitutionality on the ground that the state has the power to restrain the liberty of persons found dangerous to the health and safety of the people.⁵⁰ The Court also stated that the measure is one long advocated by leading psychologists and penologists!

CONCLUSION

The preliminary exposition in this paper of the problem of what to do with the psychopath logically calls for a conclusion recommending the

⁴⁸ *Id.*, §§8 and 9(b). The statute as originally enacted omitted to provide for credit against the original sentence for time spent in Patuxent. Section 7 was amended to remedy this defect.

Section 10 of the statute provides that the defendant or anyone acting in his behalf may, after serving two years as a defective delinquent or after a total period of confinement equal to two-thirds of the original sentence, petition for review by the court and for hearing and/or jury trial. If the petition fails, the defendant cannot re-file until three years later.

⁴⁹ *Supra* note 46.

⁵⁰ In *Simmons v. Director, Patuxent Institution*, 227 Md. 661, 177 A.2d 409 (1962), the court held that, since the statute is penal rather than criminal, a jury need not relate the "defective delinquency" of the defendant to a specific crime. See also *Roberts v. Director, Patuxent Institution*, 172 A.2d 884 (1961), which held that the trial court had jurisdiction over the "defective delinquency" case, notwithstanding the expiration of the original criminal sentence.

"defective delinquent" statute for New York and other states. This statute satisfies the need for an institution, both penal and mental in character, where psychopaths may be diagnosed, segregated from society, treated, and, in some cases, taught the error of their ways. Extensive research into the nature, cause, and cure of the condition is also made possible at such a center.

Some lawyers, and others, will object that the statute apparently makes no provision for a return to society of the rehabilitated psychopath whose original sentence has not yet expired. Instead, he must leave Patuxent and finish his sentence in a penitentiary.⁵¹ But as a practical matter it is quite likely that his medical records furnished by Patuxent to the penal authorities will weigh heavily in the prisoner's favor on questions of parole and pardon. Some lawyers will also object to the possibility, under the statute, of the defendant's detention for a much longer period than his original sentence called for. This objection would have merit if the place of detention were largely penal in character or de-emphasized its medical approach. But there is no reason to believe that Patuxent, or any like institution, could not sustain its high purpose and dual function of protecting society and caring for the mal-adjusted individual.

In the present state of our knowledge, the Maryland "defective delinquent" statute offers an adequate solution to the problem of what to do with the psychopath. It should mollify both the positivists in the field, who stress rehabilitation of the criminal rather than punishment, and also the traditionalists, who insist that a man be punished for his crimes, provided he is mentally responsible. Since science is uncertain as to the cause, cure, exact definition, and state of mental responsibility of the psychopath, there is no alternative under the law but to find him guilty and then detain him in an institution where his condition may be studied and treated.

⁵¹ Of course, upon expiration of the original sentence, such a rehabilitated psychopath is released, as in the usual case. See *supra* note 50 for the situation where the psychopath has not been rehabilitated by the time the original sentence has expired.