U.C. DAVIS LAW REVIEW

University of California Davis

VOLUME 18 FALL 1984 NUMBER 1

ARTICLES

The "Discovery" of Sexual Abuse: Experts' Role in Legal Policy Formulation

*D. Kelly Weisberg**

At different times in this century, legislators have grappled with the problem of sexual abuse of children. Instinctively, these legislators have turned to experts for guidance in the formulation of policy. The experts relied upon, however, have differed depending on the time period. Three distinct types of experts — psychiatrists, psychologists, and social workers — have each influenced society's response to the social problem. This Article examines the role of these different experts in policymaking and the reasons for society's reliance on them.

INTRODUCTION

Despite evidence of sexual abuse of children throughout history,[1] the labeling of this phenomenon as a pervasive social problem is relatively

* Associate Professor, University of California, Hastings College of the Law. B.A. 1971, Ph.D. 1976, Brandeis University; J.D. 1979, University of California, Berkeley. The author wishes to express gratitude to Professors Bernard Diamond, Jules Gerard, Sheldon Messinger, and Louis B. Schwartz for their helpful comments on earlier drafts of this manuscript.

[1] Sexual abuse of children has been noted to occur as far back in history as ancient Greece and Rome. *See* L. DEMAUSE, THE HISTORY OF CHILDHOOD 43-47 (1974).

HeinOnline -- 18 U.C. Davis L. Rev. 1 1984-1985

recent. The phenomenon has received so much attention that it has been labeled several times in the past half century. In the 1930's, psychiatrists labeled the offense "sexual psychopathy."[2] Psychiatrists again labeled it in the 1950's using different nomenclature.[3] In the early 1970's, the offense was again relabeled, now termed "sexual abuse,"[4] but this time by different behavioral experts. By 1980 another defini-

---

deMause writes:

> The child in antiquity lived his earliest years in an atmosphere of sexual abuse. Growing up in Greece and Rome often included being used sexually by older men. The exact form and frequency of the abuse varied by area and date. In Crete and Boeotia, pederastic marriages and honeymoons were common. Abuse was less frequent among aristocratic boys in Rome, but sexual use of children was everywhere evident in some form. Boy brothels flourished in every city, and one could even contract for the use of a rent-a-boy service in Athens. Even where homosexuality with free boys was discouraged by law, men kept slave boys to abuse . . . .

Id. at 43 (citations omitted).

[2] The term "sexual psychopath" first appeared in legal nomenclature in statutes enacted during the late 1930's. *See, e.g.*, Act of June 6, 1939, ch. 447, 1939 Cal. Stat. 1783 (codified at then CAL. WELF. & INST. CODE §§ 5500-5516) (repealed 1963, 1965); Act of July 6, 1938, 1938 Ill. Laws 1st Spec. Sess. 28 (codified at then ILL. REV. STAT. ch. 38, §§ 820-825) (revised 1955); Act of June 6, 1939, No. 165, 1939 Mich. Pub. Acts 323 (codified at then MICH. COMP. LAWS §§ 780.501-.509) (repealed 1966, 1968); Act of Apr. 21, 1939, ch. 369, 1939 Minn. Laws 712 (codified at then MINN. STAT. §§ 526.09-.11) (amended 1969).

One such statute defined the offender as follows:

> As used in this chapter, "*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.

Act of June 6, 1939, ch. 447, § 1, 1939 Cal. Stat. 1783, 1783 (codified at then CAL. WELF. & INST. CODE § 5500) (amended 1945; repealed 1963) (emphasis added).

The role of psychiatrists in the formulation of sexual psychopath legislation has been previously noted. *See* M. FORST, CIVIL COMMITMENT AND SOCIAL CONTROL 19-22 (1978); Sutherland, *The Diffusion of Sexual Psychopath Laws*, 56 AM. J. SOC. 142, 144-45 (1950). This Article examines the influence of psychiatrists in greater detail than prior research and from a different theoretical perspective (using a social construction approach to social problems). This Article also compares the role of psychiatrists with that of other professionals — comparisons that the preceding articles do not draw — and attempts further to explain the social forces that influenced these experts to enact their roles during particular historical periods.

[3] This nomenclature is discussed *infra* text accompanying notes 76-79.

[4] The label "sexual abuse" first appeared in federal and state statutes in the late 1960's and 1970's. *See infra* text accompanying notes 144-46.

HeinOnline -- 18 U.C. Davis L. Rev. 2 1984-1985

tion surfaced, formulated by still other policymakers.[5] In each period a definition or redefinition of criminal behavior appeared. A core variable in the definitional process was the orientation of the different experts who participated in legal policymaking.

This Article is concerned with the expert's role in the relationship between the labeling of a social problem and legal policy formulation. Specifically, it examines the role of the expert — first the psychiatrist, later the psychologist and social worker — in the formulation of legal policy pertaining to sexual abuse of minors. A process is suggested by which legal policy is influenced by professionals — a process of policy formulation spurred by social conditions. These social conditions enable certain professionals both to define a malaise and then to treat it as the proper subject of their ministrations.

This Article traces the process of labeling a social phenomenon as a social problem. The analysis rests on two fundamental premises. The first is that social problems are "socially constructed."[6] This approach presents social problems in an unusual manner to highlight certain aspects of the social process. The second premise is that social problems have a predictable "natural life history."[7]

---

[5] The current label, "sexual assault," appeared in the early 1980's when law-and-order advocates urged more severe criminal sanctions. *See infra* text accompanying notes 225-54.

[6] On the social construction approach to social problems, see M. SPECTOR & J. KITSUSE, CONSTRUCTING SOCIAL PROBLEMS (1977). The theoretical work advanced by Spector and Kitsuse is a reformulation of the sociology of social problems. They abandon the concept of social problems as a condition, in favor of a more process-oriented view of social problems as an activity. They explain:

> Our definition of social problems focuses on the process by which members of a society define a putative condition as a social problem. Thus, we define social problems as *the activities of individuals or groups making assertions of grievances and claims with respect to some putative conditions.* The emergence of a social problem is contingent upon the organization of activities asserting the need for eradicating, ameliorating, or otherwise changing some condition. *The central problem for a theory of social problems is to account for the emergence, nature, and maintenance of claims-making and responding activities.*

Id. at 75-76 (emphasis in original).

[7] The natural history model of social problems was first presented in a sociological study of the origins of the Detroit trailer camp problem between 1920 and 1937. Fuller & Myers, *The Natural History of a Social Problem*, 6 AM. SOC. REV. 320 (1941). Fuller and Myers point out several successive stages in the identification of this social problem: (1) public awareness focused on unsightliness, crime, and property depreciation surrounding the camps, was followed by (2) policy formulation by various interest groups, culminating in (3) legislative reform restricting trailer camps to certain loca-

HeinOnline -- 18 U.C. Davis L. Rev. 3 1984-1985

Before social conditions can be considered a social problem, they must be defined as such. The existence of a condition or activity does not, in itself, always lead to societal recognition of a social problem. For example, anonymous phone calls may constitute a common irritant to the city resident. Yet, no widespread public outcry calls for greater law enforcement or for new legislation. Thus, before a problem gains public recognition, certain activities or behavior must be perceived as a subject of considerable concern, accompanied by a clarion call for "something" to be done. Individuals, civic groups, and other members of the public clamor for recognition of and solutions to the problem. Experts may be mobilized to study the issue and recommend the direction of change. These series of events constitute the types of acts or "claimsmaking activities"[8] through which social problems are constructed.

In addition, social problems exhibit a developmental process or a natural life history. Different stages appear during the labeling of the condition or activity as a problem. The process may be marked by several temporal stages, each distinguishable from its predecessor by contrasting activities, participants, and dilemmas.[9] Certain explanations for the activities or behavior ultimately yield to alternative accounts. Initial explanations of the situation are rendered obscure and are undermined as new reformulations take precedence in legal policy.

The formulation of legal policy occurs as a stage in the natural history of the social problem. As part of the construction of a social condition as a social problem, alterations occur in the legal system. Legislation may be enacted.[10] Such legislation formulates new definitions of

---

tions and subjecting them to licensing and inspection requirements. *Id.* at 323-27. That research provoked an exchange with another sociologist, Edwin Lemert, who questioned the existence of the natural history perspective of social problems. Lemert, *Is There a Natural History of Social Problems?*, 16 AM. SOC. REV. 217 (1951). Spector and Kitsuse criticize the natural history approach to social problems and formulate their own natural history model. *See* M. SPECTOR & J. KITSUSE, *supra* note 6, at 130-58.

[8] M. SPECTOR & J. KITSUSE, *supra* note 6, at 73-96 *passim* (describing "claimsmaking" and "responding" activities).

[9] *Id.* at 148.

[10] Sociologists have previously explored the role legislation has played in the construction of such social problems as marijuana use and prostitution. *See generally* H. BECKER, OUTSIDERS: STUDIES IN THE SOCIOLOGY OF DEVIANCE 121-63 (1963); A. LINDESMITH, THE ADDICT AND THE LAW (1965); Cook, *Canadian Narcotics Legislation, 1908-1923: A Conflict Model Interpretation*, 6 CAN. REV. SOC. & ANTHRO. 36 (1969); Dickson, *Bureaucracy and Morality: An Organizational Perspective on a Moral Crusade*, 16 SOC. PROB. 143 (1968); Galliher & Walker, *The Puzzle of the Social Origins of the Marijuana Tax Act of 1937*, 24 SOC. PROB. 367 (1977); Holmes,

HeinOnline -- 18 U.C. Davis L. Rev. 4 1984-1985

behavior, makes the condition or activity illegal, specifies sanctions, establishes specialized agencies, and allocates funding to address the problem. Revisions or amendments to legislation render obsolete previous definitions and sanctions. Thus, legal policy becomes the subsequent visible solution addressing the problem.

Legal policy directed at sexual abuse of children has undergone several successive reformulations in the past half century. In each stage, a new definition of criminal behavior and proscribed sanctions were enacted into law. Different participants were involved in each successive stage of the labeling process. Psychiatrists first played a role in the definition of the social problem and in the formulation of responsive legislation. In two periods — 1930-40 and 1950-60 — psychiatrists labeled adult sexual misconduct with children as a mental condition.[11] They diagnosed the offenders as mentally ill and viewed them as patients. Psychiatrists played an active role in the formulation of sexual psychopath statutes, and later, a variety of mentally disordered sex offender statutes. Psychiatrists' influence signaled a trend away from punishment as a criminal justice system objective and a movement toward rehabilitation and treatment of the offender.

In the 1970's, a different cast of characters participated in the definitional process. Although rehabilitation and treatment continued as the primary goal for the new legislation, psychologists and social workers now addressed the problem of adult sexual misconduct involving children. Several changes in perspective appeared as these experts labeled the misconduct "sexual abuse," and viewed the family, rather than the individual, as the focus of treatment.[12] The revised perspective necessitated a different treatment modality. The father and stepfather abuser gained increasing attention,[13] and, for the first time, the system focused

---

Reflections by Gaslight: Prostitution in Another Age, 7 ISSUES CRIMINOLOGY 83 (1972); Roby, *Politics and Criminal Law: Revision of the New York State Penal Law on Prostitution*, 17 SOC. PROB. 83 (1969). For an examination of the role physicians played in identifying the social problem of the battered child and in shaping responsive legislation, see Pfohl, *The "Discovery" of Child Abuse*, 24 SOC. PROB. 310 (1977). Pfohl suggests several factors that contributed to the discovery by radiologists of physical abuse. These include, among others: (1) the opportunity to advance in a marginal medical status, and (2) the opportunity for coalition with more prestigious segments of the medical profession. Similar to the role of psychiatrists and the formulation of sexual psychopath legislation, physicians influenced the shaping of legal policy directed at the battered child. *Id.* at 320 (committees dealing with abuse almost always chaired by a pediatrician).

[11] *See infra* text accompanying notes 19-30, 76-111.

[12] *See infra* text accompanying notes 142-73.

[13] Articles in popular magazines in this period focused on the intrafamilial sexual

HeinOnline -- 18 U.C. Davis L. Rev. 5 1984-1985

on the child victim.

The latest stage in the natural history of this social problem began in 1980. Earlier legislation was repealed and new statutes reflecting a different approach were enacted. The current trend signals a return to punishment of sex offenders as a goal of the criminal process and a movement away from rehabilitation and treatment.[14] The influence of psychiatrists has waned significantly; law-and-order experts are now the primary actors in formulating legal policy. This Article will examine the role of these different experts in each stage of policymaking.

I. Era of the Sexual Psychopath: From "Badness to Sickness"[15]

The first comprehensive legal labeling of child molestation appeared in the 1930's, and psychiatrists were the first experts relied upon to define the problem. Their initial reaction was to label such sexual crimes as indicative of an "illness," one they were uniquely qualified to treat. The impetus for this labeling came from several sexually-motivated murders of children in the late 1930's.[16] These crimes generated tremendous public concern for protecting society, and especially children, from sex offenders. The hysteria and fear these sex murders produced were contributing factors to the definition of the criminal act as a

---

abuser. *See, e.g.*, Armstrong, *Kiss Daddy Goodnight*, Cosmopolitan, Feb. 1979, at 167, 179; Kinkead, *The Family Secret*, Boston Mag., Oct. 1977, at 100, 172; Ramsey, *My Husband Broke the Ultimate Taboo*, Fam. Circle, Apr. 8, 1977, at 42; Stucker, *I Tried to Fantasize That All Fathers Had Intercourse with Their Daughters — The Story of Mary C.*, MS. Mag., Apr. 1977, at 66, 105.

[14] *See infra* text accompanying notes 224-54.

[15] The term was coined by two sociologists in their social historical analysis of the transformation from religious and criminal to medical designations of deviance. *See generally* P. Conrad & J. Schneider, Deviance and Medicalization: From Badness to Sickness (1980).

[16] Several of these murders occurred in New York City in 1937. In that year four young girls were murdered in connection with sexual assaults. Sutherland, *supra* note 2, at 143. The ensuing public hysteria was partially attributable to the incomprehensibility of the criminal conduct. As Sutherland explains:

> The hysteria produced by child murders is due in part to the fact that the ordinary citizen cannot understand a sex attack on a child. The ordinary citizen can understand fornication or even forcible rape of a woman, but he concludes that a sexual attack on an infant or a girl of six years must be the act of a fiend or maniac. Fear is the greater because the behavior is so incomprehensible.

Id.

HeinOnline -- 18 U.C. Davis L. Rev. 6 1984-1985

social problem.[17]

Public concern that something should be done about the problem translated into demands that law enforcement and legislatures act immediately to punish the offenders. One commentator describes some of the typical reactions: letters to the editor demanded that sex criminals be castrated and whipped; the City Council of Los Angeles adopted a resolution demanding that the legislature be called into special session to enact laws to punish sex crimes more severely and to make sex criminals ineligible for parole; the California Attorney General sent a bulletin to sheriffs and police chiefs urging them to enforce strictly laws requiring registration of all sex criminals.[18]

A. Influence of Psychiatrists in Defining Sexual Crimes

The incomprehensibility of sexual crimes involving children spurred the call for experts[19] — qualified to understand and assess the situation, to study the problem, and to make recommendations for its solution. The experts selected to make sense of both the criminal act and the offender were psychiatrists.

Several legislatures established committees comprised of psychiatrists to propose statutory changes.[20] Psychiatrists occupied these prominent positions because they were thought to possess the necessary expertise to explain and address the offender's irrational behavior. For example, a committee of psychiatrists and neurologists in Chicago drafted the bill that became the sexual psychopath law of Illinois.[21] In Minnesota, all of the members of the governor's committee, except one, were psychiatrists.[22]

The psychiatrists diagnosed child molestation as a form of mental illness, terming the illness "sexual psychopathy." They suggested a treatment for the patient: the patient should be hospitalized until

---

[17] Sutherland notes that fear was an important element in the development of sexual psychopath laws. He points out that fear is aroused by several factors: serious sex crimes committed in quick succession, protracted manhunts that follow a sexual attack, and increased publicity in newspapers and news broadcasts. *Id.* at 143-45. In this regard, Sutherland adopts a collective behaviorist perspective to the enactment of sexual psychopath legislation rather than a social problems approach.

[18] *Id.* at 144.

[19] *Id.*

[20] *See, e.g.*, Stewart, *Concerning Proposed Legislation for the Commitment of Sex Offenders*, 3 J. MAR. L.Q. 407 (1938); Sutherland, *supra* note 2, at 144-46.

[21] Sutherland, *supra* note 2, at 145.

[22] *Id.* at 145-46.

HeinOnline -- 18 U.C. Davis L. Rev. 7 1984-1985

"well" or normal again.[23] The isolation of sex offenders ensured the protection of society from such criminals; criminals would be released only when the experts determined that the offenders were no longer dangerous to the community.[24]

The influence of psychiatrists is evident not only in the composition of the committees recommending legal policy, but also in the resulting statutes. The legislation typically defined the offender in psychiatric terminology. California enacted one of the first such laws in 1939; it illustrates the psychiatric description employed:

> As used in this chapter, "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.[25]

Statutes utilized medical terminology and labeled the offender with psychiatric nomenclature. The terminology was made applicable specifically to child molesters.[26]

Proper identification of the mental illness of sexual psychopathy necessitated the use of trained experts. Psychiatrists were required to interview the alleged perpetrator to determine both the malady's existence and the proper treatment. These dual functions of the psychiatric expert were embodied in the sexual psychopath legislation. Specifically, statutes provided that after criminal proceedings commenced, court-appointed psychiatrists would examine the alleged offender.[27] The court

---

[23] The disease terminology and medical treatment model, as well as procedures for treatment and release, are illustrated in the sexual psychopath statutes. *See, e.g.*, Act of June 6, 1939, ch. 447, § 1, 1939 Cal. Stat. 1783, 1785 (codified at then CAL. WELF. & INST. CODE § 5502) (repealed 1963); Act of June 6, 1939, No. 165, § 5, 1939 Mich. Pub. Acts 323, 323 (codified at then MICH. COMP. LAWS § 780.505) (repealed 1968).

[24] *See, e.g.*, Act of June 16, 1941, ch. 881, § 1, 1941 Cal. Stat. 2459 (codified at then CAL. WELF. & INST. CODE § 5502.5) (repealed 1967) (certification that patient is no longer a menace to others); *see also* A. BROOKS, LAW, PSYCHIATRY AND THE MENTAL HEALTH SYSTEM 484 (1974); M. FORST, *supra* note 2, at 19.

[25] Act of June 6, 1939, ch. 447, § 1, 1939 Cal. Stat. 1783, 1783 (codified at then CAL. WELF. & INST. CODE § 5500) (amended 1945; repealed 1963).

[26] *See, e.g., id.* In subsequent years the diagnosis was broadened to include other sex offenders; the 1945 statutory amendment referred to "sexual offenses" instead of to "sexual offenses against children." Act of Apr. 27, 1945, ch. 138, § 1, 1945 Cal. Stat. 623, 623 (amending then CAL. WELF. & INST. CODE § 5500) (repealed 1963).

[27] Act of June 6, 1939, ch. 447, § 1, 1939 Cal. Stat. 1783, 1784 (codified at then CAL. WELF. & INST. CODE § 5504) (repealed 1965), provided that the medical exami-

HeinOnline -- 18 U.C. Davis L. Rev. 8 1984-1985

would appoint two or three psychiatrists to examine the individual and determine whether the individual qualified as a sexual psychopath within the statute's meaning.[28] Each psychiatrist submitted these findings to the court in the form of a report. The report included two determinations: 1) the expert's opinion as to whether the offender was a sexual psychopath, and 2) the expert's opinion as to whether the offender was likely to respond to care and treatment in a state hospital.[29]

Statutes also required another psychiatric recommendation after the offender's hospitalization in a state mental institution for some indefinite period. The psychiatrist was to report to the court whether the offender would benefit from continued care and treatment and whether the offender was still a danger to the health and safety of others.[30]

The psychiatrist's role in the enactment of sexual psychopath legislation in the 1930's to 1940's has been previously noted in the literature.[31] However, two important questions remain unanswered. First, why did these specific experts, rather than other scientists or behaviorists, play such an important role in the formulation of this legislation? Second, why was the role of psychiatrists enacted at this time in

---

nation should be performed by not less than two nor more than three psychiatrists, at least one of whom is from a state or county hospital, who hold certificates and whose practice has been directed to the diagnosis and treatment of mental and nervous disorders for not less than five years. The Illinois statute provided that " 'Qualified psychiatrist' means a reputable physician licensed to practice in Illinois who has specialized in the diagnosis and treatment of mental and nervous disorders for a period of not less than five years." Act of July 6, 1938, 1938 Ill. Laws 1st Spec. Sess. 28 (codified at then ILL. REV. STAT. ch. 38, § 823a) (revised 1955).

[28] *See, e.g.*, Act of May 27, 1935, No. 89, 1935 Mich. Pub. Acts 143 (held unconstitutional in People v. Frontczak, 286 Mich. 51, 281 N.W. 534 (1938); repealed 1939). A new statute was adopted, Act of June 6, 1939, No. 165, 1939 Mich. Pub. Acts 323 (codified at then MICH. COMP. LAWS §§ 780.501-.509) (repealed 1966, 1968), and held constitutional in People v. Chapman, 301 Mich. 584, 4 N.W.2d 18 (1942). The 1939 Act provided that upon the filing of a petition, the court should appoint two qualified psychiatrists to make a personal examination of the offender and file with the court a report in writing of the results of their examination together with their conclusions and recommendations.

[29] *See, e.g.*, Act of June 6, 1939, ch. 447, § 1, 1939 Cal. Stat. 1783, 1784 (codified at then CAL. WELF. & INST. CODE § 5505) (amended 1952; repealed 1963).

[30] *See, e.g., id.* at 1783-84 (codified at then CAL. WELF. & INST. CODE § 5502) (repealed 1965). When the superintendent of the state hospital believed that the offender has recovered so as to no longer be a menace to the health and safety of others, or if no further treatment will benefit the sexual psychopath (although not cured), the offender was to be returned to the custody of the court. Act of June 16, 1941, ch. 881, § 1, 1941 Cal. Stat. 2459 (codified at then CAL. WELF. & INST. CODE § 5502.5) (repealed 1967).

[31] *See* M. FORST, *supra* note 2; Sutherland, *supra* note 2.

HeinOnline -- 18 U.C. Davis L. Rev. 9 1984-1985

history?[32] The answers to these questions may be found by examining social conditions in the early decades of the twentieth century.

B. Recognition of Psychiatry as a Science

At the turn of the century, there was a growing recognition of psychiatry's importance as a science. Perhaps the single most important contribution to the field in this century was the work of Sigmund Freud. Freud suggested that mental symptoms were the result of an individual's conflicts between internal impulses, such as sex and aggression, and sociocultural forces.[33] Freud disagreed with the prevailing somatic concept of mental disease, perceiving his patients not as victims of organic brain disease, but as troubled human beings with ambitions, hopes, and fears. The treatment method he advocated was psychoanalysis through which the patient could relive and resolve internal conflicts by a series of conversations with a trained therapist.[34]

Freud's influence took hold gradually. Although many of Freud's classic works were written in the late 1890's and early 1900's,[35] years passed before the importance of his discoveries was recognized.[36] Psychologist Stanley Hall notes, for example, that Freud's *Interpretation of Dreams*,[37] first published in German in 1900, was ignored initially

---

[32] Sutherland addresses the second question, in part, by pointing to the trend toward treatment and away from punishment. However, this explanation fails to reveal why the legislation was enacted specifically in the 1930's since, as Sutherland himself points out, "*For a century or more* two rival policies [treatment and punishment] have been used in criminal justice." Sutherland, *supra* note 2, at 147 (emphasis added).

[33] *See generally* S. FREUD, THE COMPLETE INTRODUCTORY LECTURES ON PSYCHOANALYSIS (J. Strachey trans. 1966); S. FREUD, THE EGO AND THE ID (J. Riviere trans. 1962); S. FREUD, AN OUTLINE OF PSYCHOANALYSIS (J. Strachey trans. 1949); S. FREUD, A GENERAL INTRODUCTION TO PSYCHOANALYSIS (J. Riviere trans. 1935).

[34] Freud was first introduced to the psychoanalytic method while a student of another Viennese physician, Dr. Joseph Breuer, who was experimenting with methods of treating hysterical patients in 1880-82. Dr. Breuer requested a patient to voice the thoughts associated with the traumatic situation and to give free vent to the aroused emotions. Freud, *The Origin and Development of Psychoanalysis*, in A GENERAL SELECTION FROM THE WORKS OF SIGMUND FREUD 5, 6 (J. Rickman ed. 1957). The patient referred to the new treatment as "talking cure." *Id.* at 5. Within a few years, Freud began using Breuer's treatment on his own patients. *Id.* at 7.

[35] Freud's earliest scientific contribution was published in 1877. However, the first major statement of his theories was his work on the interpretation of dreams, published in 1900. 6 INTERNATIONAL ENCYCLOPEDIA OF SOCIAL SCIENCE 1, 2 (D. Sills ed. 1968).

[36] C. HALL, A PRIMER OF FREUDIAN PSYCHOLOGY 16 (1954).

[37] S. FREUD, INTERPRETATION OF DREAMS (1900) [hereafter cited as S. FREUD, DREAMS].

HeinOnline -- 18 U.C. Davis L. Rev. 10 1984-1985

by medical and scientific circles; the first European printing of six hundred copies took eight years to sell.[38] Recognition of Freud's work in America came later. In 1909 Freud was invited to Clark University in Worcester, Massachusetts, by its psychologist-president to give the first lectures on psychoanalysis.[39] Translations of Freud's writings also appeared that year, making them accessible to the English-speaking public.[40] Two of Freud's works *Interpretation of Dreams*,[41] and his *Three Essays on Sexuality*,[42] considered by many to be his most influential works, were translated during this period.

The effect of Freud's theories on American psychiatry and the public was considerable. Following the First World War, his name became known to millions:

> Psychoanalysis was the rage, and its influence was felt in every theater of life. Literature, art, religion, social customs, morals, ethics, education, the social sciences — all felt the impact of Freudian psychology. It was considered fashionable to be psychoanalyzed and to use such words as subconscious, repressed urges, inhibitions, complexes, and fixations in one's conversation. Much of the popular interest in psychoanalysis was due to its association with sex.[43]

The first psychoanalytic institute was founded in New York in 1931, eventually followed by a dozen psychoanalytic centers in major cities.[44] Psychoanalysts became an elite of the American Psychiatric Association. The treatment of the mentally ill via psychoanalysis was monopolized by specially trained physicians, specifically, psychiatrists.[45]

Freud's work fostered growing interest in psychiatry. Freud and his early followers (for example, Adler, Jung, and Ferenczi) infused the

---

[38] C. HALL, *supra* note 36, at 16.

[39] The Clark University president invited Freud to deliver five lectures on psychoanalysis on the occasion of the university's twentieth anniversary. Bunker, *American Psychiatry as a Specialty*, in AMERICAN PSYCHIATRIC ASSOCIATION, ONE HUNDRED YEARS OF AMERICAN PSYCHIATRY 494 (1944) [hereafter HUNDRED YEARS]. Technically, the invitation was bestowed by both the university president and James Jackson Putnam, a neurologist. *Id.*

[40] The first of Freud's works to be translated was *Studien über Hysterie*, translated as *Selected Papers on Hysteria* and published in 1909. *Id.*

[41] S. FREUD, DREAMS, *supra* note 37. This work was translated from the German *Die Traumdeutung* (first published in 1900) and published in English in 1913.

[42] S. FREUD, THREE ESSAYS ON SEXUALITY (1905). This was first translated from the German *Drei Abhandlungen zur Sexualtheorie* (first published in 1905) and published in English in 1910.

[43] C. HALL, *supra* note 36, at 17.

[44] P. CONRAD & J. SCHNEIDER, *supra* note 15, at 54.

[45] *Id.* The authors note that the monopoly was not encouraged by Freud, who advocated the training of lay (nonmedical) analysts.

HeinOnline -- 18 U.C. Davis L. Rev. 11 1984-1985

study of mental disease with a new sense of optimism.[46] Freud's theories and techniques presented hope for understanding as psychological illnesses madness, homosexuality, alcoholism, and, especially, sexual deviation. The new medical experts thought that sexual deviation, as a psychological illness, was amenable to treatment.[47] Thus, Freud's influence in America contributed to increasing public awareness that psychiatrists were able to offer valuable assistance in addressing social problems, especially those of a sexual nature.

In addition, other factors accelerated the growth of psychiatry and its liaison with the law in this era. The First World War provided an impetus to the recognition of the importance of psychiatry by dramatizing the need for mental health services on the battle front and at home. The development of military machinery and chemical warfare reached a new peak in World War I. In addition to the expected physical effects of warfare on the soldier, the new technological onslaught inflicted unanticipated psychic wounds on the human nervous system.[48] A division of Neurology and Psychiatry was created in the Office of the Surgeon General to address these psychiatric needs. This division served as the springboard for a comprehensive plan including: psychiatric screening of recruits in the mobilization camps to detect those psychologically unfit for military service; plans for facilities and methods of treatment for those soldiers in the American Expeditionary Forces afflicted with psychiatric disabilities; the establishment of facilities for the observation and care of mentally ill soldiers pending discharge; and rehabilitation of returning soldiers suffering from brain damage, shell shock, and other mental disorders.[49] Thus, World War I served as a catalyst for the development of psychiatry and underscored in the public mind the utility of the discipline.

This is not to suggest that psychiatry was a twentieth century science. In fact, the American Psychiatric Association had been in exis-

---

[46] *Id.*

[47] *Id.*

[48] Thomas W. Salmon, chief of psychiatry in the American Expeditionary Forces, remarked: "The present war is the first in which the functional nervous diseases ('shell-shock') have constituted a major medico-military problem. As every nation and race engaged is suffering from the symptoms, it is apparent that new conditions of war are chiefly responsible for their prevalence." Strecker, *II. Military Psychiatry: World War I, 1917-18*, in HUNDRED YEARS, *supra* note 39, at 385. Strecker further wrote that in World War I, "the terrorizing and lethal properties of machines of war for the first time approached the saturation level of human nervous resistance." *Id.*

[49] *Id.* at 386.

HeinOnline -- 18 U.C. Davis L. Rev. 12 1984-1985

tence for seventy-five years by the 1920's.[50] However, it is suggested here that psychiatry developed into a respected and accepted field only in this postwar period when Freud's influence finally took hold. In the period immediately following World War I, more financial support flowed to psychiatric research than in any preceding period.[51] In these same years, two influential psychiatric periodicals were founded, the *American Journal of Psychiatry*, in 1920,[52] and the *Psychiatric Quarterly*, in 1927.[53] A concomitant spate of psychiatric research and literature appeared,[54] reaching its peak in the following decade.[55]

---

[50] The American Psychiatric Association was founded in 1844 under the name, "Association of Medical Superintendents of American Institutions for the Insane" by 13 physicians, all superintendents of hospitals for the mentally ill. The group voted at its first meeting in Philadelphia on October 16, 1844, that the "medical superintendents of the various incorporated or other legally constituted institutions for the insane now existing, or which may be commenced prior to the next meeting be and hereby are elected members of this Association." Overholser, *The Founding and the Founders of the Association*, in HUNDRED YEARS, *supra* note 39, at 45-47. Subsequently, the founders extended membership to trustees and managers of insane asylums. The emphasis was on the administration of hospitals and the effect of such organizations upon patient care rather than the promotion of scientific psychiatry. *Id.* at 47. The association changed its name to the American Medico-Psychological Association in 1892 before adopting its present name. Malamud, *The History of Psychiatric Therapies*, in HUNDRED YEARS, *supra* note 39, at 320.

[51] Whitehorn, *A Century of Psychiatric Research*, in HUNDRED YEARS, *supra* note 39, at 174.

[52] Technically, a new journal was not created. Rather, the *American Journal of Insanity*, first published in 1844, changed its name to the *American Journal of Psychiatry* in 1921. Bunker, *American Psychiatric Literature During the Past One Hundred Years*, in HUNDRED YEARS, *supra* note 39, at 269. The change of name reflects the shift in emphasis of the organization toward greater acceptance and recognition of the discipline of psychiatry.

[53] *Id.* at 270.

[54] One study of the growth of psychiatric research from the founding of the Association in 1844 to the Second World War notes the increasing numbers of contributions presented at the Association's annual meeting as indicative of this trend. The presentations increased after World War I and peaked in the 1930's and 1940's. The researcher commented:

> As one views . . . the gradually increasing number of contributions presented at the annual meetings of the Association, one notices the impressive rise toward the end of the third and the beginning of the fourth decade of this century in the number of papers in general, and more specifically the rise in those dealing with treatment. This increase was not only limited to the programs of the Association but was also reflected in the publications in the then existing journals, the development of new journals, the appearance of an increasing number of monographs and books, and the generally larger amount of work done in hospitals.

Malamud, *supra* note 50, at 315.

[55] *Id.*

HeinOnline -- 18 U.C. Davis L. Rev. 13 1984-1985

C. Application of Psychiatry to Criminal Problems

The 1920's were characterized by increasing interest in the application of psychiatry to the problems of crime.[56] In the early postwar years, psychiatry expanded into many fields, especially juvenile delinquency and penology.[57] One salient factor in the growth in forensic psychiatry was the Leopold-Loeb murder trial in 1924.[58] The incom-

---

[56] *See, e.g.*, Adler, *The Interests of Psychiatry in Criminal Procedure*, 47 REP. [45TH] ANN. MEETING A.B.A. 629 (1922); Bahr, *Psychiatry in Relation to Crime*, 42 MEDICO-LEGAL J. 149 (1925); Farnell, *The State, the Psychotic and the Criminal*, 72 J. NERVOUS & MENTAL DISEASE 34 (1930); Gault, *Facilities for Medical and Psychiatric Examination in Courts*, 14 J. AM. INST. CRIM. L. & CRIMINOLOGY 6 (1923); Glueck, *Psychiatric Examination of Persons Accused of Crime*, 36 YALE. L.J. 632 (1927) [hereafter Glueck, *Examination*]; Glueck, *Psychiatry and the Criminal Law*, 14 VA. L. REV. 155 (1928) [hereafter Glueck, *Criminal Law*]; Jacoby, *The Psychopathic Clinic in a Criminal Court: Its Uses and Possibilities*, 2 MICH. ST. B.J. 129 (1923); Karpman, *Psychoses in Criminals: Clinical Studies in the Psychopathology of Crime*, 70 J. NERVOUS & MENTAL DISEASE 520 (1929); Nelson, *Need for Statutory Psychiatric Examination in Criminal Cases*, 11 ST. LOUIS L. REV. 284 (1926); Overholser, *Psychiatry and the Courts in Massachusetts*, 19 J. AM. INST. CRIM. L. & CRIMINOLOGY 75 (1928); Shaw, *Types of Criminal Insane*, 4 PSYCHOLOGY Q. 458 (1930); Stearns, *Psychiatry's Part in the Proper Care and Treatment of Prisoners*, 201 NEW ENG. J. MED. 1238 (1929); Turner, *Criminally Insane: Discussion of Etiologic Factors and Need for State Hospitals*, 26 TEX. ST. J. MED. 255 (1930); Unsworth, *Relationship of Feeblemindedness to Criminality*, 82 NEW ORLEANS MED. & SCI. J. 156 (1929); Wigmore, *The Relation Between Criminal Law and Criminal Psychiatry*, 16 J. AM. INST. CRIM. L. & CRIMINOLOGY 311 (1925); Note, *Psychopathic Clinics as a Source of Expert Testimony on Mentality*, 36 HARV. L. REV. 333 (1923).

[57] Whitehorn, *Century*, in HUNDRED YEARS, *supra* note 39, at 184.

[58] The kidnapping and murder of Robert Franks by Richard Loeb and Nathan Leopold, Jr. in Chicago, Illinois, on May 21, 1924, attracted worldwide attention. Leopold, a 19-year-old law student at the University of Chicago, and Loeb, 18 years old, were both well-educated and from wealthy families. The two youths premeditated and executed the crime (murdering a 12-year-old boy with a chisel) to verify their Nietzchean philosophy of the permissibility of the perfect crime. Clarence Darrow served as the chief defense counsel. After the admission of extensive psychiatric testimony, the youths were convicted and sentenced to life imprisonment. Zilboorg, *Legal Aspects of Psychiatry*, in HUNDRED YEARS, *supra* note 39, at 575-76. For further details of the case, see H. HIGDON, THE CRIME OF THE CENTURY: THE LEOPOLD AND LOEB CASE (1975); K. TIERNEY, DARROW: A BIOGRAPHY 320-51 (1979). Transcripts of the psychiatric testimony are found in *The Loeb-Leopold Murder of Franks in Chicago, May 21, 1924*, 15 J. AM. INST. CRIM. L. & CRIMINOLOGY 347, 360-90 (1924). The authors of that note stated that the case aroused such widespread interest for several reasons, in part due to the psychiatric testimony:

> [F]irst because of the contrast between the social status of the murderers

HeinOnline -- 18 U.C. Davis L. Rev. 14 1984-1985

prehensibility and sensationalism of this criminal act precipitated the call for psychiatrists in the criminal justice process. Psychiatrists testified as expert witnesses to explain a murder by two middle-class, seemingly well-adjusted young boys.[59] Daily journalistic accounts[60] of the trial fanned the public's interest in the application of psychiatry to criminal behavior.

In subsequent years, the liaison between law and psychiatry was increasingly documented. For example, the American Psychiatric Association appointed a special committee, the Committee on the Legal Aspects of Psychiatry, to report at its annual meeting about psychiatry's practical application to criminal law problems and to reinterpret the function and objectives of the psychiatrist as they concerned criminal behavior.[61] The Committee's report was presented to the Psychiatric

---

> and the callous cruelty of the deed, but afterwards because of the psychiatric testimony offered by the defense at the hearing for a mitigated sentence . . . . this is probably the first instance of the offer of elaborate psychiatric analyses as the basis for remitting the law's penalty for a calculated, cold-blooded murder, committed by persons not claimed to be insane or defective in any degree recognized by the law as making them not legally responsible.

Id. at 347; *see also* Note, *The Judge's Sentence in the Loeb-Leopold Murder*, 19 ILL. L. REV. 167 (1924).

[59] William A. White, Thomas Healy, and Sheldon Glueck were the chief expert witnesses; Karl Bowman and Harold S. Hulbert conducted the preliminary study of the two defendants and prepared the preliminary clinical report. Zilboorg, *supra* note 58, at 575.

[60] *See, e.g., Leopold Examined Again*, N.Y. Times, July 9, 1924, at 17, col. 3; *Won't Seek Acquittal*, N.Y. Times, July 11, 1924, at 16, col. 2; *Seats for Loeb Trial: Court Flooded with Requests*, N.Y. Times, July 16, 1924, at 3, col. 4; *Loeb's Brother on List of Victims*, N.Y. Times, July 17, 1924, at 7, col. 1; *Editorial on Defense on Insanity Plea*, N.Y. Times, July 18, 1924, at 12, col. 6; *Loeb Slayer, He Admits*, N.Y. Times, July 19, 1924, at 4, col. 3; *Counsels for Defense Move for Delay in Trial*, N.Y. Times, July 20, 1924, at 2, col. 5; *Slayers of Franks Both Plead Guilty; Judge Holds Fate*, N.Y. Times, July 22, 1924, at 1, col. 1; *Editorial*, N.Y. Times, July 23, 1924, at 14, col. 5; *Parents of Franks to Face Slayers*, N.Y. Times, July 23, 1924, at 5, col. 1; *Mrs. Franks Heard as Counsel Fights for Son's Slayers*, N.Y. Times, July 24, 1924, at 1, col. 1; *Thirty-three Witnesses Link Chain of Evidence on Franks' Slayers*, N.Y. Times, July 25, 1924, at 1, col. 3; *Defense Pleads Mental Irresponsibility; Dr. W.J. Healy and Dr. B. Glueck, Alienists, Called; Darrow Takes Exception to Gortland's Testimony; Statement by Leopold*, N.Y. Times, July 27, 1924, at 1, col. 1. Almost daily coverage continued through September 1924. The journalistic accounts were so pervasive that they prompted articles in the legal literature on the evils of newspaper publicity. *See, e.g.*, Spector, *The Influence of Journalism on Crime*, 15 J. AM. INST. CRIM. L. & CRIMINOLOGY 155 (1924); Note, *The Leopold Loeb Case*, 97 CENT. L.J. 327 (1924).

[61] Menninger, *The Psychiatrist in Relation to Crime*, 43 MEDICO-LEGAL J. 165,

HeinOnline -- 18 U.C. Davis L. Rev. 15 1984-1985

Association, and psychiatrist Dr. Karl Menninger later delivered an address on the report to the Criminal Law Section of the American Bar Association in 1926.[62]

Courts increasingly utilized psychiatrists. Previously, psychiatrists' influence was confined to insanity pleas. For the first time their influence expanded to include testimony regarding general criminal behavior.[63] For example, Massachusetts' Briggs Act[64] made psychiatric examinations compulsory in cases of crimes committed by mental defectives and the feeble-minded. The 1920's witnessed a rapid expansion of the use of psychiatric testimony in Boston, Chicago, Cleveland, Baltimore, and New York.[65]

Psychiatry also began to play a role in correctional institutions. In 1916 the first psychopathic clinic opened in Sing Sing Prison — a pioneer enterprise used as a demonstration of psychiatry's potential when applied to incarcerated offenders.[66] The venture was so well received that a decade later, the New York Legislature appropriated funds to establish a permanent psychopathic clinic at the prison.[67]

The proliferation of legal articles and books[68] in this period serves as additional documentation of the liaison between law and psychiatry. Many articles stressed the importance of psychiatry's application to the problems of the criminal law.[69] In addition, psychiatrists presented ad-

---

165 n.1 (1926).

[62] *Id.*

[63] *Id.* at 167-68 ("rapid extension of psychiatry to the courts").

[64] Act of June 27, 1911, ch. 595, 1911 Mass. Acts 467.

[65] Menninger, *supra* note 61, at 167.

[66] On the early history of Sing Sing Prison, see Gault, *Developments at Sing Sing*, 7 J. AM. INST. CRIM. L. & CRIMINOLOGY 322 (1916); Kirchwey, *Recent Developments in Sing Sing Prison*, 7 J. AM. INST. CRIM. L. & CRIMINOLOGY 463 (1916); *see also* Gault, *Reformatory Results in New York*, 5 J. AM. INST. CRIM. L. & CRIMINOLOGY 1 (1914) (progress in reform); *Reform at Sing Sing*, 18 L. NOTES 182 (1915).

[67] The legislature appropriated funds for a permanent psychopathic clinic at Sing Sing in 1929. *See* Act of Apr. 2, 1929, ch. 242, 1929 N.Y. Laws 533; *see also* Collins, *N.Y. Court Requests Psychiatric Service Clinic for Criminals Supplemental Memorandum*, 19 J. AM. INST. CRIM. L. & CRIMINOLOGY 337 (1928) (efforts by New York City).

[68] *See, e.g.*, Adler, *supra* note 56; Adler, *The Criminologist and the Courts*, 11 J. AM. INST. CRIM. L. & CRIMINOLOGY 419 (1920); Bahr, *The Need of Mental Health Clinics*, 45 MEDICO-LEGAL J. 87 (1928); Glueck, *Examination*, *supra* note 56; Glueck, *Criminal Law*, *supra* note 56; Menninger, *supra* note 61; White, *Need for Cooperation Between Lawyers and Psychiatrists in Dealing with Crime*, 13 A.B.A. J. 551 (1927).

[69] *See, e.g.*, Adler, *supra* note 56; Collins, *supra* note 67; Glueck, *Examination*, *supra* note 56; Overholser, *supra* note 56; Perkins, *Psychiatric Service in Criminal*

HeinOnline -- 18 U.C. Davis L. Rev. 16 1984-1985

dresses on criminal subject matter to professional groups.[70] The proliferation of this literature in the 1920's, if utilized as data on the construction of social problems,[71] provides valuable evidence of the developing links between psychiatry and the law.[72]

Professional factors also contributed to psychiatrists' support for sex offender legislation. First, many psychiatrists hoped that legislatures would allocate funding to subsidize research.[73] Such research, in which psychiatrists desired to play a major part, would hopefully lead to bet-

---

Courts, 16 A.B.A. J. 672 (1930).

[70] *See, e.g.*, Menninger, *supra* note 61; Glueck, *Examination*, *supra* note 56; Overholser, *What Immediate Practical Contribution Can Psychiatry Make to Criminal Law Administration?*, 55 REP. [53D] ANN. MEETING A.B.A. 594 (1930); White, *supra* note 68. Menninger and White delivered addresses before the Criminal Law Section of the American Bar Association; Glueck addressed the section on Economic and Social Problems of the American Society for the Advancement of Science.

[71] Spector and Kitsuse suggest the applicability of subject indices to the study of social problems:

> These subject headings and the cross-references linking them are themselves historical data indicating what categories were in use during the time period of each volume. These categories change over time — new headings appear and old ones disappear. A subheading may become a main entry, indicating its increasing importance, and entries may subdivide into many finer distinctions. Cross-references (i.e., *see also* instructions) may change, indicating which items are seen as related to each other. In short, the system of subject entries constantly in revision, provides the student of social problems with data on how definitions and categories change over time.

M. SPECTOR & J. KITSUSE, *supra* note 6, at 166-67 (italics in original).

[72] From research conducted by the author, no heading "Psychiatry" appears in the *Index to Legal Periodicals* in the volume for 1918-19. The few existing entries are listed under the heading of "Psychology." *See* 11 INDEX TO LEGAL PERIODICALS (1919) [hereafter INDEX]. Similarly, in the volumes for 1920-21 and 1922, no heading for psychiatry exists. The heading first appears in the volume for 1926-28: 9 entries are listed. *See* 19 INDEX 497 (1926-28). (Significantly, the heading appears with the following cross reference: "See also Criminal Law"). The appearance of this subject heading furnishes valuable historical data. The change in categories over time, specifically the appearance of the new category "Psychiatry," provides added documentation of the increasing importance of psychiatry in the law in this period.

[73] Letter from Professor Bernard Diamond, Boalt Hall School of Law, University of California, Berkeley (May 1979). He writes:

> A major enticement for many big names in psychiatry (like Menninger, Guttmacher, Bowman, etc.) to support the sex psychopath laws was the promise that these programs would emphasize research leading to a more scientific understanding and treatment for the sex offender. All the early statutes promised such research, but seldom was the promise fulfilled, and . . . money was hardly ever forthcoming. Hence, there was much psychiatric disillusionment. . . . [Often] at the institutions to which these pa-

HeinOnline -- 18 U.C. Davis L. Rev. 17 1984-1985

ter understanding and treatment of the sex offender. Several statutes allocated funding for this purpose.[74]

Psychiatrists' role in policy formulation may also be explained by financial and prestige-related factors. Psychiatrists derived monetary benefits from their employment in the legal system.[75] As explained above, sexual psychopath laws typically specified that diagnosis of the offender's "illness" should be made by several court-appointed psychiatrists who would also recommend a disposition of the case. The offender would later be released when the psychiatrists, after additional consultations, declared the individual ready to re-enter society. These legal procedures provided new positions for psychiatrists and some economic gains. More importantly, however, the new positions and increasing public recognition enhanced the prestige of the profession. With the 1930's came an opportunity for psychiatrists to extend their influence to a special field of criminal behavior — sexual offenses. The role psychiatrists played in the sexual psychopath legislation during the 1930's and 1940's may be viewed as an attempt by experts to increase the legitimacy and expand the influence of their fledgling science by the establishment of a new link between psychiatry and the law.

In short, the call for these experts came at a time when the public was increasingly aware of the promise of psychiatry. Social conditions made the public receptive to psychiatrists' input. Specifically, Freud's writings in the early twentieth century stimulated interest in the use of psychiatry to explain the irrational. World War I increased public awareness of psychiatry's value in treating war casualties. The Leopold-Loeb trial revealed that psychiatry could have specific applica-

---

> tients were committed, there would be not a single psychiatrist on the staff. This was true of Atascadero State Hospital until quite recently.

Psychiatrists have continued to play an active role in research on sex offenders. *See, e.g.*, Abel & Blanchard, *The Role of Fantasy in the Treatment of Sexual Deviation*, 30 ARCHIVES GEN. PSYCHIATRY 467 (1974); MacDonald & Di Furia, *A Guided Self-Help Approach to the Treatment of the Habitual Sex Offender*, 22 HOSP. & COMMUNITY PSYCHIATRY 310 (1971); Peters, Pedigo, Steg & McKenna, Jr., *Group Psychotherapy of the Sex Offender*, 32 FED. PROBATION, Sept. 1968, at 41; Serber & Keith, *The Atascadero Project: Model of a Sexual Retraining Program for Incarcerated Homosexual Pedophiles*, 1 J. HOMOSEXUALITY 87 (1974).

[74] *See, e.g.*, Act of Apr. 8, 1953, ch. 153, § 1, 1953 Cal. Stat. 1027, 1028 (codified at then CAL. WELF. & INST. CODE § 5650) (repealed 1965); J. Res. 5, 173d Leg., 1949 N.J. Laws 1009 (repealed 1978).

[75] As Sutherland suggests, "since the sexual psychopath laws usually specify that the diagnosis for the court shall be made by psychiatrists, they have an economic interest in the extension of this procedure [sponsoring bills, lobbying for and monitoring legislation]." Sutherland, *supra* note 2, at 146.

HeinOnline -- 18 U.C. Davis L. Rev. 18 1984-1985

tion to criminal law. These factors contributed to the emergence of psychiatrists in legal policymaking. When the public voiced concern about sex crimes, the actors were ready. The stage had been set for these experts to enact their roles.

II. THE FIRST RELABELING: THE 1950'S

Legislation in the 1950's reflects the reconstruction and relabeling of child molestation by psychiatrists. Several states repealed or amended their sexual psychopath statutes and enacted different legislation dealing with sex offenses. The new legislation renamed the patient's "illness." However, in contrast to the previous definitional process, no consensus on the new label emerged. Instead, there was merely consensus on the inadequacy of the former label.

The sexual psychopath became the "mentally disordered sex offender" in California,[76] the "sexually dangerous person" in Illinois,[77] and the "sexual deviate" in Wisconsin.[78] Not all jurisdictions adopted an entirely new label. Some jurisdictions merely modified and shortened the former label to "psychopathic offenders."[79] One trend was evident: psychiatric terminology was less apparent in the revised statutes. Although the new legislation perpetuated a view of the criminal offender as a "patient" rather than "criminal," more attention was paid to the criminal aspects of the offense. Medical nomenclature was deemphasized, and criminal terminology became more prominent.

A. Inadequacy of the Former Label

Several factors were responsible for the relabeling. Once again, the public became aware of sexual offenses involving children. Attention was focused on several brutal sexually motivated murders of children; a

---

[76] Act of July 19, 1963, ch. 1913, §§ 1-20, 1963 Cal. Stat. 3906, 3906-15 (codified at then CAL. WELF. & INST. CODE §§ 5500-5522) (repealed 1965). The California statute, enacted in 1963, was repealed within two years. The replacement legislation, however, retained the phrase "mentally disordered sex offender." Act of May 25, 1965, ch. 391, § 5, 1963 Cal. Stat. 1629, 1644 (codified at then CAL. WELF. & INST. CODE § 5500) (repealed 1967).

[77] Act of July 7, 1955, 1955 Ill. Laws 1144 (currently codified at ILL. ANN. STAT. ch. 38, §§ 105-1.01. to 105-12 (Smith-Hurd 1980)).

[78] Although the statute passed by the Wisconsin Legislature did not explicitly label the offender a "sexual deviate," the popular name of the legislation was the "1951 Sexual Deviate Act," Note, *Criminal Law — Wisconsin's Sexual Deviate Act*, 1954 WIS. L. REV. 324, 324. *See* Act of July 6, 1951, ch. 542, 1951 Wis. Laws 401.

[79] Act of June 8, 1951, 1951 Ohio Laws 382 (codified at then OHIO REV. CODE ANN. §§ 2947.24(n)-.28 (Page)) (repealed 1978).

HeinOnline -- 18 U.C. Davis L. Rev. 19 1984-1985

call for legislation quickly ensued.[80] In addition, psychiatrists became dissatisfied with the term "sexual psychopathy." Previously, legislators, with the help of psychiatrists, had enacted into law a medical condition. The courts expected psychiatrists to diagnose the illness of sexual psychopathy. Yet, the psychiatric profession widely disagreed about the symptoms and nature of the illness.[81] Sexual psychopathy came to be recognized as a "catch-all" diagnosis. Two psychiatrists complained: "The term has become the wastebasket of psychiatry, serving as a cover-all for all persons who indulge in anti-social conduct."[82]

Although some experts argued that the old label was devoid of meaning,[83] others differed in their application of the label. One court-appointed expert might report that the offender was a sexual psychopath, while another reported the opposite conclusion. This lack of consensus explains the anomalous result in New York City where 15.8 percent of the sex offenders diagnosed by the Court of General Sessions Psychiatric Clinic were reported to be psychopathic, while 52.9 percent of sex offenders diagnosed by psychiatrists in New York's Bellevue Hospital were diagnosed as psychopathic.[84]

Insufficient psychiatric knowledge about sex offenders also complicated the problem. Some experts reported to the court an inability to determine sexual psychopathy based solely on their knowledge and the defendant's background.[85] Given the state of knowledge of psychiatry

---

[80] In 1957 two young boys were sexually assaulted and murdered in Boston. The alleged offender had been recently released from prison after serving a sentence for another sexual offense. The Massachusetts Legislature acted promptly with legislation directed at sex offenders. N. KITTRIE, THE RIGHT TO BE DIFFERENT: DEVIANCE AND ENFORCED THERAPY 176 (1971).

[81] One law revision commission report stated, "Much of the difficulty in definition arises out of the fact that psychiatrists themselves are in wide disagreement as to the connotations of the term psychopath." NEW JERSEY COMMISSION ON THE HABITUAL SEXUAL OFFENDER, THE HABITUAL SEX OFFENDER 37 (1950) [hereafter N.J. COMMISSION]. That report cited 29 different definitions of the condition by 29 medical authorities. *Id.* at 40-42.

[82] *Id.* at 41 (quoting Arieff & Rotman, *Psychopathic Personality*, 39 J. AM. INST. CRIM. L. & CRIMINOLOGY 158 (1948)). Criticisms of the terminology persisted. Kittrie notes that "[p]sychopathy is one of the most criticized words in the psychiatric vocabulary." N. KITTRIE, *supra* note 80, at 170. Similarly, Halleck writes, "Even within psychiatry there is widespread disagreement as to whether psychopathy is a form of mental illness, a form of evil or a form of fiction." S. HALLECK, PSYCHIATRY AND THE DILEMMAS OF CRIME 99 (1967).

[83] *See* N. KITTRIE, *supra* note 80, at 170.

[84] Sutherland, *The Sexual Psychopath Laws*, 40 J. CRIM. L. CRIMINOLOGY & POLICE SCI. 543, 550 (1950).

[85] N.J. COMMISSION, *supra* note 81, at 40.

HeinOnline -- 18 U.C. Davis L. Rev. 20 1984-1985

and the complexity of human behavior, psychiatrists now admitted difficulty in performing the task they had earlier mandated.

Psychiatrists were also disillusioned because they felt constrained in the performance of their role by legal formalities and technicalities. Lawyers viewed expert testimony as essential to determine whether the defendant conformed to the statutory definition of the sexual psychopath. Psychiatric testimony was limited to specific answers to narrow questions. Psychiatrists criticized the use of their testimony, as the following statement, formulated by the Committee on Forensic Psychiatry of the Group for the Advancement of Psychiatry, makes clear:

> Although the framers of the proposed and enacted legislation aimed at the sex offender recognize that sex offense may be a symptom of a kind of mental disorder, they have not succeeded in lifting the recommended procedures of trial and disposition out of the traditional criminal process. In such procedures the psychiatrist continues to be confined to a precarious definition (i.e., What is a psychopath?), as he is in most criminal procedures, and it does not seem likely that under such circumstances the psychiatrist can hope to bring a fuller measure of understanding to our courts.[86]

Moreover, psychiatrists became disillusioned with the legislation because their therapeutic goals were not being realized. Psychiatrists, in conformity with their legal duty, recommended treatment to the court that would benefit the offender. Yet, when sexual psychopath legislation was enacted, most states had inadequate treatment facilities.[87] Legislation had been passed without allocations for appropriate facilities. Commitment of sexual psychopaths resulted in burdening already overtaxed mental hospitals and correctional institutions.[88] Furthermore, few qualified personnel were available to administer treatment programs.

---

[86] COMMITTEE ON FORENSIC PSYCHIATRY, GROUP FOR THE ADVANCEMENT OF PSYCHIATRY, REP. NO. 9, PSYCHIATRICALLY DEVIATED SEX OFFENDERS 1 (1950) [hereafter COMMITTEE ON FORENSIC PSYCHIATRY].

[87] M. PLOSCOWE, SEX AND THE LAW 235 (1951). One commentator specifically notes that inadequate facilities contributed to the ineffectiveness of the Wisconsin sexual psychopath law:

> WIS. STAT. § 51.37(3) (1947) provided that any person determined by the court to be a sexual psychopath was to be committed to an institution designated by the County Board of Supervisors of Milwaukee Hospital. As no facilities were available in Milwaukee County for the care and hospitalization of sexual psychopathy and no facilities were set up, the law was completely ineffective.

Note, *Criminal Law — Wisconsin's Sexual Deviate Act*, 1954 WIS. L. REV. 324, 327 n.29.

[88] M. PLOSCOWE, *supra* note 87, at 235.

HeinOnline -- 18 U.C. Davis L. Rev. 21 1984-1985

Offenders were only infrequently treated by prison psychiatrists.[89] Dissatisfaction quickly grew as professionals realized that the legislation failed to live up to their therapeutic expectations.

Legal professionals joined in criticizing the psychiatrists' role in the criminal system. Lawyers began criticizing psychiatrists' methods in handling sex offenders. In particular, lawyers disliked the lack of agreement, uniformity, and specificity of the psychiatric diagnoses and recommendations. They complained that psychiatrists confused the issues and rendered legal determinations rather than medical diagnoses.[90] In 1961 the American Bar Foundation summarized the problem by stating: "It would appear that the law is looking to medical knowledge for solutions to problems in this area only to find that such knowledge is as yet non-existent or imprecise."[91] Some legal personnel worried that such imprecision made sexual psychopath statutes unconstitutionally vague.[92] They advocated changing the legislation to focus not on the defendant's psychological make-up but on his criminal behavior.[93]

Civil libertarians also played a part in spurring reform legislation by decrying the psychiatrists' role in the legal process. Reformers charged that psychiatric evaluations did not safeguard the offender's rights. They argued that although the offender was called a "patient," he was treated as a criminal in derogation of his constitutional rights. Their criticisms focused on: 1) abuse of the privilege against self-incrimination in the psychiatric interview;[94] 2) possibility of double jeopardy in hospitalization followed by incarceration for the same offense;[95] 3) absence of a jury trial in the determination of sexual psychopathy and dangerousness to the community,[96] 4) abuse of the fifth amendment

---

[89] *Id.*

[90] *See, e.g.*, Mihm, *A Re-Examination of the Validity of Our Sex Psychopath Statutes in the Light of Recent Appeal Cases and Experience*, 44 J. CRIM. L. CRIMINOLOGY & POLICE SCI. 716, 732 (1954); Comment, *Sexual Psychopathy — A Legal Labyrinth of Medicine, Morals and Mythology*, 36 NEB. L. REV. 320, 337 (1957) [hereafter Comment, *Legal Labyrinth*].

[91] THE REPORT OF THE AMERICAN BAR FOUNDATION ON THE RIGHTS OF THE MENTALLY ILL, THE MENTALLY DISABLED AND THE LAW 308 (F. Lindman & D. McIntyre eds. 1971).

[92] *See, e.g., id.* at 309.

[93] *Id.* at 311.

[94] Comment, *Legal Labyrinth*, *supra* note 90, at 334-36; *see also* Mihm, *supra* note 90, at 728-30.

[95] Comment, *Sexual Psychopath Statutes: Summary and Analysis*, 51 J. CRIM. L. CRIMINOLOGY & POLICE SCI. 215, 220, 222 (1960) [hereafter Comment, *Sexual Psychopath Statutes*].

[96] *Id.* at 220; *see also* Mihm, *supra* note 90, at 730-31.

HeinOnline -- 18 U.C. Davis L. Rev. 22 1984-1985

right to confront and cross-examine witnesses in the psychiatric hearing;[97] and 5) infliction of cruel and unusual punishment.[98]

B. The Emergence of a New Label

Reformers offered several proposals to solve these problems. First, the imprecise medical terminology of "sexual psychopathy" was to be replaced by more general descriptions of the offender's behavior. Thus, in California, the statutory medical terminology was changed to include any person who is "predisposed to the commission of sexual offenses to such a degree that he is dangerous to the health and safety of others."[99] In Illinois, the new legislation was redirected at "sexually dangerous persons."[100]

Reformers also suggested that treatment facilities be improved and new facilities built. The Governor's Study Commission in Michigan recommended that the State Department of Mental Health create research and treatment programs for sexual deviates and enlarge the psychiatric division of the Department of Corrections to allow the segregation and treatment of sex offenders.[101] Similarly, the Illinois Commission suggested the establishment of a Socio-Psychiatric Diagnostic Service to provide courts with diagnoses of sex offenders.[102]

The new legislation remedied some of the constitutional deficiencies raised by the civil libertarians. Commitment proceedings were restricted to previously convicted offenders,[103] and procedural rights were extended to post-conviction commitments. However, not all constitutional defects were cured. In an act of legal legerdemain, many courts emphasized that criminal safeguards were inapplicable because the statutes were essentially "civil" rather than criminal.[104] By labeling the offender

---

[97] Comment, *Sexual Psychopath Statutes*, *supra* note 95, at 220.

[98] Mihm, *supra* note 90, at 727-28.

[99] Act of May 25, 1965, ch. 391, § 4, 1965 Cal. Stat. 1629, 1631 (codified at then CAL. WELF. & INST. CODE § 5500) (repealed 1967).

[100] Act of July 7, 1955, § 1, 1955 Ill. Laws 1144, 1144 (currently codified at ILL. ANN. STAT. ch. 38, § 105-1.01 (Smith-Hurd 1980)).

[101] REPORT OF [MICHIGAN] GOVERNOR'S STUDY COMM'N ON THE DEVIATED CRIMINAL SEX OFFENDER 138-39 (1951) [hereafter MICHIGAN REPORT].

[102] ILLINOIS COMM'N ON SEX OFFENDERS, REPORT TO THE SIXTY-EIGHTH GENERAL ASSEMBLY OF THE STATE OF ILLINOIS (1953) [hereafter ILLINOIS REPORT].

[103] N. KITTRIE, *supra* note 80, at 184.

[104] *Id.* at 201. For cases holding that sexual psychopath proceedings were civil in nature, see *In re* Keddy, 105 Cal. App. 2d 215, 233 P.2d 159 (1951); People v. Capoldi, 10 Ill. 2d 261, 139 N.E.2d 776 (1957); State *ex rel.* Sweezer v. Green, 360 Mo. 1249, 232 S.W.2d 897 (1950). In 1967 the United States Supreme Court held that

HeinOnline -- 18 U.C. Davis L. Rev. 23 1984-1985

a "patient," and subjecting him to hospitalization as opposed to incarceration, he was not being "punished" for his criminal behavior. Thus, this "civil" treatment did not give rise to the constitutional protections afforded to criminals.

Psychiatrists were active in shaping this second stage of legal policymaking. By 1950, psychiatrists began recommending abandonment of the label "sexual psychopathy," and the term was declared psychiatrically unacceptable. In 1952 the American Psychiatric Association revised its Diagnostic and Statistical Manual and abolished the term "psychopathic personality."[105] Psychiatrists urged revision of previously enacted legislation. The Committee on Forensic Psychiatry of the Group for the Advancement of Psychiatry stated:

> The committee cautions against the use of this appellation 'sexual psychopath,' in the law on several grounds. There is still little agreement on the part of psychiatrists as to the precise meaning of the term. Furthermore, the term has no dynamic significance. The Committee believes that in statutes the use of technical psychiatric knowledge and terminology are in a state of flux. Once having become a part of public law such a term attains a fixity unresponsive to newer scientific knowledge and application. It is advisable that nosologic labels be avoided and in place the offender's behavior be so described . . . .[106]

As with the creation of earlier legal policy, psychiatrists were directly involved in drafting the new legislation. For example, psychiatrists served as members of the Governor's Study Commission and proposed legislation in Michigan.[107] Of the two official liaison representatives to this commission, one was a psychiatrist, the other a representative of the State Bar. Psychiatrists also proved influential in the enactment of legislation in Illinois. Mental health personnel — members of Chicago's Mental Hygiene Committee — were appointed technical advisers to the Illinois Commission.[108] When the Illinois Study Commission held open hearings, testimony was taken from psychiatrists of the United States and England. These hearings were held at the Chicago Hilton in November 1951 "to take advantage of the psychiatrists who

---

commitment to a mental hospital was criminal in nature and necessitated procedural due process protections. The Court held that a sexual psychopath proceeding must include the right to counsel, an opportunity to be heard, the right to confront witnesses, the right to cross-examination, and the right to present evidence on one's behalf. Specht v. Patterson, 386 U.S. 605 (1967).

[105] COMMITTEE ON NOMENCLATURE AND STATISTICS, AMERICAN PSYCHIATRIC ASS'N, DIAGNOSTIC AND STATISTICAL MANUAL: MENTAL DISORDERS 38,039 (1952).

[106] COMMITTEE ON FORENSIC PSYCHIATRY, *supra* note 86, at 1.

[107] MICHIGAN REPORT, *supra* note 101, at iii.

[108] ILLINOIS REPORT, *supra* note 102, at iv.

HeinOnline -- 18 U.C. Davis L. Rev. 24 1984-1985

were attending a meeting of the National Association of Mental Health at that time."[109]

This new wave of legislation with its relabeling of child molestation heralded another chapter in the history of the liaison between law and psychiatry. The offender was still regarded as a patient requiring treatment for an illness. The legislation advocated the continued use of psychiatrists in the legal process. Psychiatrists still examined sex offenders and determined if they conformed to the new statutory label. They submitted their findings to the court and participated in the subsequent treatment of convicted sex offenders. The new legislation also allocated limited additional funds to improve existing psychiatric facilities and to establish new facilities.

Although the offender received additional procedural protections requested by civil libertarians, the legislation nonetheless signaled a victory for psychiatrists. Legislators publicly applauded and expanded the role of psychiatrists in the legal process. For example, the Michigan Study Commission in its report on legislative recommendation stated: "The Committee endorses in the strongest terms the use of psychiatric skills at the pre-sentence level in the disposition of sex criminals."[110] Some state statutes enlarged the role of psychiatrists. Several statutes provided for psychiatric diagnosis and treatment of additional categories of sex offenders.[111] By relabeling the offender and eliminating the former sexual psychopath terminology, the legislation facilitated the tasks of psychiatrists. Simultaneously, the abandonment of imprecise medical terminology pacified legal critics. Thus, the new legislation further cemented the liaison between law and psychiatry — adding to the "glue" that was brushed on by the sexual psychopath legislation of an earlier decade.

Several factors explain the relabeling of this social problem in the 1950's. First, the 1950's reflected a resurgence of interest in the application of psychiatry to legal problems. The proliferation of psychiatric

---

[109] *Id.*

[110] MICHIGAN REPORT, *supra* note 101, at 159.

[111] *See, e.g.*, Act of July 6, 1951, ch. 542, 1951 Wis. 401 (codified at then WIS. STAT. §§ 340.485, 351.66). Convictions for child molestation, rape, attempted rape, and statutory rape automatically triggered examination for sexual deviancy; discretionary examination of other sex offenders was subsequently enacted for cases in which the crime was believed to have been motivated by a desire for sexual gratification. The amendment to extend discretion to these other offenses was made in 1955, Act of July 14, 1955, ch. 375, 1955 Wis. Laws 454 (codified at then WIS. STAT. § 340.485(2)). *See* Comment, *Repeal of the Wisconsin Sex Crimes Act*, 1980 WIS. L. REV. 941, 944 n.27 (1980) [hereafter Comment, *Wisconsin Sex Crimes*].

HeinOnline -- 18 U.C. Davis L. Rev. 25 1984-1985

and legal literature on this subject[112] illustrates the influence of psychiatry on the law.[113] Writers continued to urge psychiatric treatment and rehabilitation rather than punishment for offenders. This same period witnessed the creation of a prize honoring scholarly contribution to the field of psychiatry and the law. In 1952 the American Psychiatric Association established the Isaac Ray Award to be given annually for contribution to improved relations between law and psychiatry.[114] The recipient was to lecture at a university, thus providing academic stature to the new interdisciplinary field. Interest in the application of psychiatry to the law also centered on the use of the *M'Naughten*[115] test in insanity pleas. Criticisms of the test finally resulted in an expansion of the definition of criminal insanity.[116]

---

[112] *See, e.g.*, M. GUTTMACHER & H. WEIHOFEN, PSYCHIATRY AND THE LAW (1952); W. OVERHOLSER, THE PSYCHIATRIST AND THE LAW (1953); P. ROCHE, THE CRIMINAL MIND: A STUDY OF COMMUNICATION BETWEEN THE CRIMINAL LAW AND PSYCHIATRY (1958); H. WEIHOFEN, THE URGE TO PUNISH (1956); G. ZILBOORG, THE PSYCHOLOGY OF THE CRIMINAL ACT AND PUNISHMENT (1954); Guttmacher & Weihofen, *Sex Offenses*, 43 J. CRIM. L. CRIMINOLOGY & POLICE SCI. 153 (1952); Roche, *Criminality and Mental Illness — Two Faces of the Same Coin*, 22 U. CHI. L. REV. 320 (1955).

[113] In the Index to Legal Periodicals covering 1955 to 1958, 25 entries exist under the heading "Psychiatry." *See* 11 INDEX 459-60 (1955-58). Interest in psychiatry's application to the law rose in the 1960's. The number of entries almost doubled within a few short years. Entries for 1961 to 1964 numbered 47. *See* 13 INDEX 630-31 (1961-64). In the next volume, the number again almost doubled to 78. *See* 14 INDEX 637-38 (1964-67).

[114] The American Psychiatric Association sought to improve relations between lawyers and psychiatrists; the creation of the Isaac Ray Award reflects this concern. *See* H. HUCKABEE, LAWYERS, PSYCHIATRISTS AND CRIMINAL LAW: COOPERATION OR CHAOS? 112 (1980); K. MENNINGER, THE CRIME OF PUNISHMENT vi (1966). The Award, was named after Isaac Ray (1807-81), founder of the field of forensic psychiatry. In 1838 Ray published the first discussion of this subject. For a further discussion of Isaac Ray, see H. HUCKABEE, *supra*; K. MENNINGER, *supra*; Overholser, *The Founding and the Founders of the Association*, in HUNDRED YEARS, *supra* note 39, at 67-68. Subsequent recipients of the prize include: Karl Menninger, Henry Weihofen, Philip Q. Roche, Manfred S. Guttmacher, David Bazelon, and Sheldon Glueck.

[115] Under the *M'Naughten* test, a defendant is responsible for unlawful actions if, at the time of commission, the individual understood the nature and quality of the act and was capable of distinguishing right and wrong with respect to the act. M'Naughten's Case, 8 Eng. Rep. 718 (1843). Evidence of mental illness is irrelevant under this test unless mental illness can be shown to have impaired the ability of a defendant to distinguish right from wrong.

[116] The District of Columbia, for example, adopted the *Durham* rule in this period. Durham v. United States, 214 F.2d 862 (D.C. Cir. 1954). In addition, in this period the Model Penal Code of the American Law Institute proposed a new formulation of the traditional *M'Naughten* test for insanity. The Model Penal Code introduced a new

HeinOnline -- 18 U.C. Davis L. Rev. 26 1984-1985

This renewed interest in forensic psychiatry in the 1950's may be explained in part by the role of psychiatry in World War II. The Second World War, like World War I, spurred the growth of psychiatry.[117] During World War II, the Selective Service system rejected 850,000 inductees because of psychiatric problems.[118] Psychiatric disabilities accounted for forty-three percent of all Army discharges.[119] As a result, millions of Americans came into contact with psychiatric services during military service. When they returned home after the war, many sought psychiatric help for themselves and their families.[120]

The government's concern over the magnitude of mental illness and the increasing demand for psychiatric services resulted in the enactment of new policy. The National Mental Health Act of 1946[121] authorized the development of a national mental health institute and a program for training psychiatric professionals, supporting psychiatric research, and providing aid to states to develop mental health programs.[122] This period was marked by the recognition, once again, that psychiatry could make an important contribution to the resolution of social problems.

Societal recognition of psychiatry's shortcomings may also explain the relabeling process.[123] Psychiatry was in a more advanced stage of development than in the 1930's; the legislation of the 1950's reflected a more realistic appraisal of the answers psychiatry could and could not supply. The realization was dawning that psychiatry was not an exact science nor one able to furnish precise solutions upon demand. The act

---

test for insanity (the ALI test), which stated that "A person is not responsible for criminal conduct if at the time of such conduct as a result of mental disease or defect he lacks substantial capacity either to appreciate the criminality of his conduct or to conform his conduct to the requirements of law." MODEL PENAL CODE § 4.01(1) (Proposed Official Draft 1962). The ALI test expanded the role of psychiatrists in the criminal process by broadening the scope of inquiry into the mental condition of the defendant in the insanity defense.

[117] M. GUTTMACHER & H. WEIHOFEN, *supra* note 112, at 6.

[118] M. JONES, SOCIAL PSYCHIATRY IN PRACTICE 9 (1953).

[119] *Id.*

[120] *Id.*

[121] Ch. 538, 60 Stat. 421 (1946) (codified as amended at 42 U.S.C. §§ 201, 209, 210, 215, 218, 219, 232, 241, 242a, 244, 246 (1982)).

[122] National Mental Health Act, § 2, defined the Act's purpose. *See* 42 U.S.C. §§ 232, 242a (1982).

[123] Scholars were especially critical concerning the contribution of psychiatry to law. Critics included both psychiatrists and jurists. *See, e.g.*, F. WOOTON, SOCIAL SCIENCES AND SOCIAL PATHOLOGY (1959); Hall, *Psychiatry and Criminal Responsibility*, 65 YALE L.J. 761 (1956); Szasz, *Some Observations on the Relationship between Psychiatry and the Law*, 75 A.M.A. ARCHIVES NEUROLOGY & PSYCHIATRY 297 (1956); Wertham, *Psychoauthoritarianism and the Law*, 22 U. CHI. L. REV. 336 (1955).

HeinOnline -- 18 U.C. Davis L. Rev. 27 1984-1985

of diagnosing an offender was not as simple as the weighing of a chemical compound. Nor could psychiatry permanently and completely "cure" sex offenders. With inadequate facilities, psychiatrists could barely hope to treat even a small number of patients.

The acute shortage of psychiatric personnel in public institutions after World War II frustrated hopes of treatment for sex offenders. The problem was compounded by the fact that many psychiatrists went into private practice where greater financial rewards were available.[124] Thus, in 1952 the American Psychiatric Association revealed that only 7500 psychiatrists practiced in the United States, and only half of these practiced in public institutions potentially serving sexual offenders.[125] This shortage contributed to the limited number of trained professionals able to treat sex offenders in state hospitals.

The second wave of legislation clearly recognized the problem of psychiatric supply and demand. Many new statutes provided for centralized diagnostic facilities in which offenders could be examined and psychiatrically evaluated.[126] This centralization of psychiatric talent eased the personnel shortage. Other statutes, such as the legislation replacing Michigan's Goodrich Act,[127] recommended that psychiatric evaluations be discretionary and that the need to have three psychiatric opinions be eliminated, citing "[s]everely limited manpower, the urgent necessity to use it at the most indispensable points, and the cost."[128]

Another explanation for the relabeling process may be found in sexual behavior research. An important influence on policymakers was Alfred Kinsey[129] whose research revealed that the sexual deviate was perhaps not so deviant after all. Kinsey's research encompassed sexual

---

[124] M. JONES, *supra* note 118, at 42.

[125] *Id.* The psychiatrists were equally divided between those in hospital psychiatry and those in private practice. *See* M. GUTTMACHER & H. WEIHOFEN, *supra* note 112, at 7.

[126] *See, e.g.*, Act of July 28, 1949, ch. 1325, § 8, 1949 Cal. Stat. 2311, 2313 (codified at then CAL. WELF. & INST. CODE § 5518) (repealed 1965).

[127] Act of June 9, 1950, No. 25, 1950 Mich. Pub. Acts 40 (amending then MICH. COMP. LAWS §§ 780.501-.509) (repealed 1966, 1968).

[128] MICHIGAN REPORT, *supra* note 101, at 159. In Wisconsin, the shortage of staff led to the development of group therapy programs for offenders. A federal court upheld the group therapy program against a patient's claim that he was denied treatment because he was not receiving individual therapy, Burbey v. Burke, 295 F. Supp. 1045 (E.D. Wis. 1969). *See* Comment, *Wisconsin Sex Crimes*, *supra* note 111, at 948 n.48. The location of prisons far from major population centers also made it difficult to attract professional staff to conduct treatment programs. *Id.*

[129] On Kinsey's influence, see W. POMEROY, DR. KINSEY AND THE INSTITUTE FOR SEX RESEARCH (1972).

HeinOnline -- 18 U.C. Davis L. Rev. 28 1984-1985

histories of persons in the general population as well as convicted sex offenders. He also studied the procedures involved in the handling of sex offenders in two jurisdictions; made a statistical survey of the incidence of sex offenses on court dockets; and performed a detailed study of police and court procedures.[130] Kinsey and his associates confirmed that sexual perversions are present in the sexual life history of adults as a normal developmental phase. In short, deviant sexual behavior was not so abnormal — merely an exaggeration or distortion of normal sex behavior.[131] Kinsey's data also revealed that a large percentage of adults had engaged in illegal sexual behavior.[132] These revelations required that psychiatrists distinguish between morally reprehensible and dangerous sexual behavior. Although all might be labeled "psychopaths," sexual offenders were not a homogeneous group. Rather, they were varied individuals exhibiting a spectrum of behavior from offending morals (such as homosexuals and exhibitionists) to the more dangerous aggressive offenders (such as child molesters and rapists). Kinsey found that five percent of convicted sex offenders were involved in sexual behavior differing from the usual pattern of their particular social level.[133] Included in this figure were persons employing force in making sexual contacts. These were the persons, Kinsey argued, to whom legislative efforts ought to be addressed.[134]

Kinsey's research had far-reaching consequences, and his influence was felt in many state legislatures. In California, for example, he met with the legislature's committee on sexual legislation.[135] The governor worked with Kinsey to develop the state's mentally disordered sexual offender program.[136] California lawmakers eventually appropriated $75,000 per year to study sex offenders, supplementing Kinsey's research, and placed the study under the direction of Kinsey's colleague, Dr. Karl Bowman.[137] In 1952 Kinsey gathered factual data for an Illinois state legislative committee engaged in a revision of sexual of-

---

[130] *Id.* at 209.

[131] *Id.* at 210.

[132] *See generally* A. KINSEY, CONCEPTS OF NORMALCY AND ABNORMALCY IN SEXUAL BEHAVIOR (1949).

[133] Kinsey's research revealed that 73% of all American men had homosexual experiences and that 59% had participated in oral sodomy — conduct that brought them within the purview of some psychopathy statutes. *Id.* at 28.

[134] W. POMEROY, *supra* note 129, at 209-10.

[135] A. KINSEY, *supra* note 132, at 211.

[136] *Id.*

[137] *Id.* at 210.

HeinOnline -- 18 U.C. Davis L. Rev. 29 1984-1985

fenders legislation.[138] His biographer writes that this activity followed a pattern Kinsey "had already established with legislative committees and special research groups set up by the governments of New Jersey, New York, Delaware, Wyoming and Oregon."[139] The significance of Kinsey's findings for legal policymaking is evidenced by the salient place these findings occupied in the legislative commission reports. For example, one section of the Illinois report contains the comment: "No specific reference to the Kinsey findings is made here since these permeate all present thinking on this subject."[140]

The reconstruction of the child molestation problem in the 1950's was also aided by research debunking the "old" social problem of the 1930's. The accumulation of research, especially that conducted by Kinsey's Institute for Sex Research, helped dispel certain widespread beliefs about sex offenders. These myths included the following: Sex criminals progressed from minor sex crimes (exhibitionism and voyeurism) to major sex crimes (forcible rape and child molestation), and sex crimes were increasing.[141] Sexual psychopathy had not proved to be of the magnitude and seriousness as first thought; a different approach was in order. The efforts of psychiatrists could be devoted best to treating only the serious sexual offenders.

Thus, psychiatrists played an important role in the reconstruction of the social problem. Criticisms of and by these professionals led to the discarding of the former label of "sexual psychopathy." A new social problem of the "dangerous sex offender" or the "mentally disordered sex offender" was created. This new definition emerged because of a resurgence of interest in the application of psychiatry to legal problems. During World War II, millions of military personnel came into contact with psychiatric services, heightening public awareness of psychiatry's value. The nature and incidence of mental illness was also highlighted, spurring governmental mental health policy in the postwar years. In addition, Kinsey's research on sexual behavior revealed that deviant sexual behavior occupied a spectrum — with child molesters at one end of severity. Aided by the interaction of these social conditions, the public became aware that psychiatry had continued usefulness in addressing specific offenders' sexual disorders.

---

[138] *Id.* at 211.

[139] *Id.*

[140] ILLINOIS REPORT, *supra* note 102, at 9.

[141] Tappan, *Some Myths about the Sex Offender*, 19 FED. PROBATION, June 1955, at 7, 9.

HeinOnline -- 18 U.C. Davis L. Rev. 30 1984-1985

III. The Third Label — Policymaking in the 1970's

In the early 1970's child molestation received yet another label: "sexual abuse,"[142] or "child sexual abuse."[143] The new label appeared in both federal and state legislation. The federal Child Abuse Prevention and Treatment Act,[144] enacted in 1974, required each state to adopt a uniform definition of abuse that included "physical or mental injury, *sexual abuse* or exploitation, negligent treatment, or maltreatment"[145] in order to qualify for federal monies for the prevention and treatment of abuse. The new nomenclature appeared also in state legislation on abused children.[146]

New experts played a role in the labeling process: psychologists and social workers became preeminent in this period. These experts focused on the familial offender — the father or stepfather molester. Instead of hospitalization or civil commitment for the patient, the recommended treatment was family counseling. The experts viewed the entire family, rather than merely the perpetrator, as the source of the problem. For the first time attention was also focused on the child victim, for whom counseling was also recommended.[147]

A. The Role of Psychologists and Social Workers in Relabeling

The definitional process of sexual abuse as a family problem began simultaneously by psychologists and social workers. A West Coast psychologist, Henry Giarretto, played a prominent role in this development in the early 1970's. Giarretto, a marriage and family counselor, was asked to undertake a pilot effort limited to ten hours of counseling

---

[142] *See, e.g.*, 42 U.S.C. § 5102 (1982).

[143] *See, e.g.*, Act of Sept. 30, 1975, ch. 1234, 1975 Cal. Stat. 3126 (codified at Cal. Welf. & Inst. Code § 18275 (West 1980)).

[144] 42 U.S.C. §§ 5101-5115 (1982 & Supp. 1984).

[145] *Id.* § 5102 (1982).

[146] *See, e.g.*, Cal. Welf. & Inst. Code §§ 18950-18963 (West 1980 & Supp. 1984); Fla. Stat. Ann. §§ 415.502-.514 (West 1976 & Supp. 1984); Miss. Code Ann. § 43-21-105(m) (1981); Mo. Rev. Stat. §§ 566.100, .110, .120 (1979); N.J. Stat. Ann. § 9.6(c) (West 1976); N.Y. Penal Law §§ 130.55, .60, .65 (McKinney 1975); Pa. Stat. Ann. tit. 11, § 2203 (Purdon Supp. 1984); R.I. Gen. Laws § 40-11-2 (1977). The federal funds promised by the Child Abuse Prevention and Treatment Act served as an incentive for much of the state civil legislation containing this statutory definition.

[147] Giarretto, *Humanistic Treatment of Father-Daughter Incest*, in Child Abuse and Neglect: The Family in the Community 143, 149 (R. Helfer & C. Kempe eds. 1976).

HeinOnline -- 18 U.C. Davis L. Rev. 31 1984-1985

per week for a ten week period.[148] The pilot program, "Therapeutic Case Management of Sexually Abused Children and their Families," later called the "Child Sexual Abuse Treatment Program" (CSATP), began in July 1971 with Giarretto as the principal therapist.[149] Unlike earlier treatment efforts, CSATP advocated focusing more attention on the child victim.[150] Since CSATP was based on a psychological model, offenders were termed "clients" rather than the medical term "patients" and were "counseled" rather than "treated."[151] The treatment modality centered around the family as the client. Individual counseling of the offender occurred, but other family members were also counseled.[152] Significantly, the child victims received counseling.[153] The central notion was to address not only the offender, but the entire family, including the victim.

The CSATP director viewed the family as an organic system in which the sexually inappropiate behavior was one of many possible symptoms of a "distorted family homeostasis."[154] To reestablish a healthy family structure, the marital relationship had to be improved and better parent self-concepts developed. A better parental self-concept would in turn promote a better self-concept in the child victim. The counselor established a working relationship with family members by listening to expressions of inner thoughts such as feelings of despair,

---

[148] *Id.*

[149] *See* Child Sexual Abuse Treatment Program 3 (Sept. 2, 1975) (Mimeo) [hereafter CSATP Mimeo]. Information on CSATP is based on a number of sources, including: Giarretto, *supra* note 147; Giarretto, *The Treatment of Father-Daughter Incest: A Psycho-Social Approach*, 5 CHILDREN TODAY, July-Aug. 1976, at 2 [hereafter Giarretto, *Approach*]; Giarretto, Giarretto & Sgroi, *Coordinated Community Treatment of Incest*, in SEXUAL ASSAULT OF CHILDREN AND ADOLESCENTS 231-40 (1978).

[150] With rare exceptions, the repertory of law enforcement and judicial personnel handling child sex crimes is limited to two devices — separation [from the family] and punishment [of the offender]. From the clinically detailed case histories, one often is left with the impression that the primary interest in the child by adult judicial processes is for the testimony she can give . . . . Too often, the overall effect of community intervention in sexual abuse cases is to add to the child victim's burden of fear, shame, guilt and confusion.

CSATP Mimeo, *supra* note 149, at 2.

[151] *See* Giarretto, *supra* note 147, at 149, 150.

[152] *See* CSATP Mimeo, *supra* note 149, at 3.

[153] From the inception of the program until 1975, 240 families received treatment. An adolescent victim group was formed containing 8-12 girls, and a younger group contained 6-8 girls, ages 8-12. As of 1975, the adolescent group consisted of 15-18 juvenile girls. *Id.*

[154] Giarretto, *supra* note 147, at 151.

HeinOnline -- 18 U.C. Davis L. Rev. 32 1984-1985

shame, and guilt. Once this relationship had formed, the counselor explored clients' positive traits. Then, as the clients "gain[ed] confidence in their search for self-knowledge,"[155] the counselor examined the sexually inappropriate behavior, attempting to eliminate it. The goals were prevention of re-abuse and treatment for all family members.

This new label of child sexual abuse was effectively promoted from its West Coast origins. The psychologist-director of CSATP published articles discussing the problem.[156] The media highlighted the center,[157] and staff members appeared on local and national television and radio programs. The staff disseminated child sexual abuse information by sending information packets to persons upon request. The staff also conducted presentations and training seminars for professionals and encouraged the formation of self-help groups. One such group, Parents United, was organized to give support to abusive parents. Similarly, Daughters United was established to provide support services for child victims. The CSATP program used volunteers and established an intern program to train graduate students to help with the growing caseload.[158]

The director-psychologist also wanted the CSATP program to serve as a model for similar centers in other communities.[159] Not surprisingly, with such national publicity, similar programs were soon established in Washington, Connecticut, Georgia, New York, and Pennsylvania to provide services to sexually abused children and their parents.[160]

The Santa Clara program had a direct impact on legal policymaking in the California Legislature. The legislature promptly responded to the "new" social problem. In 1975, Assemblymember John Vasconcellos of Santa Clara County introduced legislation with funding allocations.[161] The Santa Clara program staff was instrumental in the bill's passage. Members of Parents United, as well as the CSATP staff,

---

[155] *Id.* at 153.

[156] *See, e.g.*, Giarretto, *supra* note 147; authorities cited *supra* note 149.

[157] *See, e.g.*, Anderson, *When the Whole Family Breaks Down, the Trauma of Incest*, San Francisco Chron., Apr. 16, 1974, at 18, col. 1; Anderson, *Everyone in the Family Suffers*, San Francisco Chron., Apr. 15, 1974, at 15, col. 1; Gustaitis, *Incest: Help for the Victim . . . and the Offender*, Wash. Post, June 16, 1974, at K4, col. 1, K5, col. 1; Ramsey, *supra* note 13, at 42.

[158] Giarretto, *supra* note 147, at 156.

[159] *Id.* at 150.

[160] *See* authorities cited *supra* note 149.

[161] The proposed legislation, Assembly Bill 2288, was enacted into law that same year. Act of Sept. 30, 1975, ch. 1234, 1975 Cal. Stat. 3126 (codified at CAL. WELF. & INST. CODE § 18275-18281 (West 1980)).

HeinOnline -- 18 U.C. Davis L. Rev. 33 1984-1985

lobbied in Sacramento. The Assembly, by a vote of sixty-eight to one, and a unanimous Senate approved the legislation, which was then signed into law.[162] The legislation not only assured continued funding for the Santa Clara center, but also encouraged the establishment of similar centers in nearby California counties. This legislation enacted the term "child sexual abuse" into law. It also underscored the importance of "treatment" in addressing the problem, especially the treatment modality recommended by CSATP.

Social workers as well as psychologists influenced the construction of this "new" social problem.[163] One social worker in particular, Vincent DeFrancis, played a prominent role. DeFrancis, a lawyer with postgraduate training in social work and Director of the American Humane Association,[164] a prominent child protection organization,[165] broadened the focus of national attention from battered children to sexually abused children. Early federal legislation[166] defined child abuse as intentional physical injury. DeFrancis' efforts helped expand this definition to include sexual abuse.

DeFrancis, long interested in child protective services, had a special interest in child sexual abuse. In 1965, he became Project Director of a

---

[162] Giarretto, *Approach*, *supra* note 149, at 34.

[163] A few medical personnel also participated in the construction of the social problem. *See, e.g.*, Eaton, *The Sexually Molested Child*, CLINICAL PEDIATRICS 438 (1968); Sgroi, *Sexual Molestation of Children*, 4 CHILDREN TODAY, May-June 1975, at 18. Medical personnel such as Eaton and Sgroi, however, tended to use the terms "sexual assault" and "molestation" rather than "sexual abuse."

[164] WHO'S WHO IN THE WEST 162-63 (14th ed. 1974-75).

[165] "The American Humane Association, originally organized for the protection of animals, established a children's division in 1887 to coordinate the activities of the various voluntary protective service associations that were developing throughout the country." A. KADUSHIN, CHILD WELFARE SERVICES 155 (3d ed. 1980).

[166] Several competing model acts were proposed by social welfare and medical organizations. The acts contained similar definitions of abuse as physical injury. The model acts included those by the Children's Bureau of the U.S. Department of Health, Education, and Welfare (now the Department of Health and Human Services), the Children's Division of the American Humane Association, the American Medical Association, the Council of State Governments, the New York County Medical Association, and the Committee on the Infant and Preschool Child of the American Academy of Pediatrics. *See* A. SUSSMAN & S. COHEN, REPORTING CHILD ABUSE AND NEGLECT: GUIDELINES FOR LEGISLATION 58-59 (1975). The Children's Bureau legislation served as the general model for similar statutes enacted in 20 states by 1964. *Id.* at 59. That model act defined abuse as "serious physical injury or injuries inflicted (by) other than accidental means." *Id.* at 63. The American Medical Association and the Council of State Governments similarly referred to "serious injuries" as a result of abuse or neglect, raising the inference that only physical abuse was intended. *Id.*

HeinOnline -- 18 U.C. Davis L. Rev. 34 1984-1985

research project to study sexual abuse funded by the Children's Bureau of the Department of Health, Education, and Welfare.[167] The three-year project explored the incidence and nature of sexual abuse in two counties in New York.[168] That project resulted in several publications that brought added attention to the sexual abuse problem.[169] DeFrancis' associates, also social workers, helped disseminate the project's findings and further highlighted the problem of sexually victimized children.[170]

DeFrancis' influence soon extended into the federal level. When Congress considered enacting national child abuse legislation, DeFrancis testified before the Senate.[171] He urged a broader, more inclusive definition of abuse:

> First, let me begin by broadening our consideration . . . . We are concerned about the abused child, but children are abused in many ways, not purely the battered child, we have children who are sexually abused, we have children who are psychologically abused, we have children who are neglected in a host of ways. If we are going to address ourselves to the problems of children who need help we must address ourselves to the entire problem . . . .[172]

DeFrancis attempted to put the battered child problem in its proper perspective, pointing to the lesser incidence of intentionally inflicted injuries compared with other types of abuse: "Based upon an estimate . . . there must be somewhere between 30,000 and perhaps 40,000 at the outside of truly battered children but there must be at least 100,000 children each year who are sexually abused and probably two or three times that number of children who are psychologically damaged

---

[167] *See* V. DEFRANCIS, PROTECTING THE CHILD VICTIM OF SEX CRIMES COMMITTED BY ADULTS iv (1969).

[168] *Id.* at iii.

[169] *See* V. DEFRANCIS, *supra* note 167; *infra* note 170. DeFrancis' research also influenced Henry Giarretto, the founder of the Santa Clara, California, Child Sexual Abuse Treatment Center. *See* CSATP Mimeo, *supra* note 149, at 1.

[170] Yvonne Tormes, who served as on-site director of the New York project, authored *Child Victims of Incest* in 1967. Another research affiliate also disseminated the findings. Wilson D. McKerrow, Executive Director of the Brooklyn Society for the Prevention of Cruelty to Children, provided office space and access to case records. *See* McKerrow, Protecting the Sexually Abused Child, Second National Symposium of Child Abuse (1973), *cited in* A. SUSSMAN & S. COHEN, *supra* note 166, at 65 n.53. McKerrow's and Tormes' assistance is acknowledged by DeFrancis. V. DEFRANCIS, *supra* note 167, at iii.

[171] *Child Abuse Prevention Act: Hearings on S. 1191 Before the Subcomm. on Children and Youth of the Comm. on Labor and Public Welfare*, 93d Cong., 1st Sess. (1973) (testimony of Vincent DeFrancis) [hereafter *Hearings on S. 1191*].

[172] *Id.* at 293.

HeinOnline -- 18 U.C. Davis L. Rev. 35 1984-1985

. . . ."[173] Largely because of his influence, Congress broadened the federal definition of child abuse from physical injury to include sexual abuse.

B. Reasons for Acceptance of Psychology and Social Work Theories

The work of the social worker-lawyer DeFrancis, as well as that of psychologist Giarretto, came during a time that was receptive to the influence of their disciplines. The question may be asked why were the helping professions, especially psychology and social work, the primary labelers of the "new" social problem in the 1960's and 1970's? The answer may be found in important developments taking place in these two disciplines that led to increasing interest in the contribution of social work and psychology to legal problems.

First, the occurrence of several social conditions increased political activism by social workers. These conditions included: 1) an American foreign policy that highlighted discrepancies between affluent and poorer nations; 2) President John F. Kennedy's approach to social problems; 3) a mass urban movement by ethnic and racial minorities that swelled the relief rolls in the cities; 4) the civil rights movement; and 5) race riots in American cities that were fueled by unemployment and housing conditions.[174] Government programs aimed at these social conditions helped forge links between social work and law. The anti-poverty program, for example, stimulated the development of neighborhood legal services.[175] The civil rights movement promoted increasing participation by social workers in the public arena. Governmental programs exposed increasing numbers of social workers to the law.[176]

---

[173] *Id.*

[174] On these social forces, see W. TRATTNER, SOCIAL WELFARE IN AMERICA 248-64 (1974).

[175] *See* J. HANDLER, E. HOLLINGSWORTH & H. ERLANGER, LAWYERS AND THE PURSUIT OF LEGAL RIGHTS 24-29 (1978).

[176] "The multiplicity of new government programs affecting social work, each established pursuant to . . . regulations which are legally binding, and interpreted by the courts, have put social workers in an arena where law governs their basic tasks and is ever-present in their professional activities." Schottland, *Social Work and the Law — Some Curriculum Approaches*, 17 BUFFALO L. REV. 719, 720 (1968). Recognition of these national social programs as a contributing factor to the liaison between law and social work is also reflected in the memorandum leading to the development of the first law-social work joint degree. The written proposal submitted to the Washington University law faculty in 1970 stressed the parallel trends in law and social work of social action and human development programs:

> The expansion of community development activity in social work and legal aid activity in law are examples of these trends. . . . programs in the

HeinOnline -- 18 U.C. Davis L. Rev. 36 1984-1985

Social workers began to recognize the importance of utilizing the law to affect social change. Professional social work associations placed social problems on the public agenda and pressed for attention from political leaders.[177] The National Association of Social Workers (NASW) amended its bylaws to reflect this change, asserting that the profession has a dual obligation to use "both social work methods and . . . social action."[178] The NASW stationed a paid lobbyist in Washington, D.C., and appointed a committee to devise methods of translating data from practice into social policy.[179]

Social workers also increased social action directed at child welfare reform, especially child abuse. Renewed interest developed in child protective services. Although the child welfare movement originally swept through America in the mid-nineteenth century,[180] the movement

---

> urban development and public service areas, such as housing development and rehabilitation, are expanding rapidly and persons involved in these areas should have expertise in both the law and in the underlying social problems with which these programs are concerned.

Washington University Schools of Law and Social Work, Proposal for Joint Programs Leading to the M.S.W. and J.D. degrees in Four Years of Study 1 (Feb. 6, 1970) [hereafter Washington University, Proposal].

Isaac also notes the relationship between the development of legal services for the poor in the Office of Economic Opportunity and the greatly increased demand for further liaison between social work and law. He notes:

> The whole development of legal services for the poor has burgeoned in this period under the Office of Economic Opportunity, the activities of which have also enormously affected many urban relationships. No amount of slow down or so-called "back lash" will appreciably affect the thrust of this movement to eradicate poverty, to improve the condition and character of urban life and to endow the human rights promised by democracy with consequential substance. The American Bar Association has boldly aligned itself with these purposes and so, too, has every organization of and for social workers. It is obvious that this social upheaval has and will continue to challenge both lawyers and social workers to think anew and to perform anew.

Isaac, *The National Conference of Lawyers and Social Workers: A Fifth Year Accounting*, 1 FAM. L.W. 83, 89 (1967).

[177] W. TRATTNER, *supra* note 174, at 265.

[178] *Id.*

[179] *Id.*

[180] Protective services and programs for child abuse victims existed in America since the mid-nineteenth century. Early child protective services developed after the *cause celebre* case of Mary Ellen in New York in 1866. For a description of this case, see V. DEFRANCIS, THE FUNDAMENTALS OF CHILD PROTECTION 19 (1955). Several social conditions combined to generate a widespread interest in child protection. These condi-

HeinOnline -- 18 U.C. Davis L. Rev. 37 1984-1985

abated in the twentieth century[181] until medical and social science research uncovered the abused child. In the early 1960's medical professionals discovered that many children with injuries of unknown origin suffered from physical abuse by caretakers. They named the condition "the battered child syndrome."[182] Several social workers contemporaneously published their research results on physically abused children.[183]

Social workers' renewed interest in child abuse during this period may also be attributed to certain developments within their profession.

---

tions included industrialization, urbanization, immigration, and a changing concept of childhood. The early child protection movement took several forms, including the removal of dependent, neglected, and delinquent children from almshouses and other institutions and their placement in private homes; the creation of juvenile courts and probation systems; the passage of compulsory school attendance laws; and crusades against child labor. *See generally* W. TRATTNER, *supra* note 174, ch. 6 ("Child Welfare").

[181] In the first half of the twentieth century social workers turned their attention away from the public social services that characterized the earlier period. As Trattner suggests, "they [social workers] lost touch with the larger social problems of which maladjustment of the individual was only a small part." The postwar belief in mass prosperity contributed in large part to the general lack of social reform during this period. W. TRATTNER, *supra* note 174, at 244, 246. Zalba also notes the declining interest and attributes it to additional factors. He argues the decreasing interest resulted from the cross-fertilization between social work and psychiatry in the 1920's and 1930's, culminating in a questioning of the efficacy of legally mandated social services:

> During social work's intensive romance with psychoanalysis and dynamic psychiatry in the 1920's and 1930's, it became concerned more with emotional factors and treatment and greater emphasis was given to permissive, voluntarily sought services. There was confusion about the role of authority and legal sanctions in social work treatment . . . . [I]nterest in protective services (and in corrections) declined. The close working relationship between the protective agency and the court deteriorated.

Zalba, *The Abused Child: I. A Survey of the Problem*, 11 SOC. WORK, Oct. 1966, at 3, 4 (citations omitted).

[182] Kempe, Silverman, Steele, Droegemueller & Silver, *The Battered Child Syndrome*, 181 J.A.M.A., July 1962, at 17.

[183] The publications of social workers such as Elmer, Boardman, and Young, further highlighted the phenomenon of children beaten by their caretakers. *See, e.g.*, L. YOUNG, WEDNESDAY'S CHILDREN: A STUDY IN CHILD ABUSE AND NEGLECT (1964); Boardman, *A Project to Rescue Children from Inflicted Injuries*, 7 SOC. WORK, Jan. 1962, at 43; Elmer, *Abused Young Children Seen in Hospitals*, 5 SOC. WORK, Oct. 1960, at 98. Leontine R. Young, M.S.W., Executive Director of the Children's Aid and Foster Home, Newark, N.J., conducted research on child abuse in 1960-61 to explore the behavioral symptoms of abusive parents. Elizabeth Elmer, M.S.S., Assistant Professor of Casework, Graduate School of Social Work, University of Pittsburgh, conducted a study of the families of 44 abused children from 1959-62.

HeinOnline -- 18 U.C. Davis L. Rev. 38 1984-1985

As Zalba explains:

> The relatively recent interest in more aggressive (i.e., reaching-out) approaches in social work, greater clarification of the role of authority, and accumulated experience and knowledge in work with those persons psychiatrically categorized as character disordered have brought us to the place where we can meaningfully consider what we can and/or should do in the problem area of abused children.[184]

As a result of these conditions, social workers played a central role in legal policymaking directed at the abused child. Two child welfare organizations historically interested in child protective services, the Children's Division of the American Humane Society and the United States Children's Bureau, contributed model legislation.[185] Social workers not only called attention to physical abuse by conducting research and writing articles, but they also lobbied for passage of reporting statutes.[186] In Idaho, the work of a group of social workers resulted in enactment of an entire child welfare code that included child abuse reporting legislation;[187] in Connecticut, a social work student's research paper led to protective legislation;[188] in Michigan, a county welfare official and a member of the American Humane Association served as catalysts for group action;[189] and in New Jersey, a social worker served as chairperson of the battered child subcommittee of the State Youth Commission

---

[184] Zalba, *supra* note 181, at 5 (citations omitted).

[185] In 1962 the Children's Bureau initiated a project designed to estimate the incidence of child abuse. In October 1962 an advisory committee to the Children's Division unanimously endorsed mandatory reporting of suspected abuse. The committee offered several guidelines for legislation requiring medical personnel to report suspected abuse, and suggested that all reports be made to the public agency or voluntary child welfare service responsible for the child protective function in the community.

The Children's Bureau also established a coordinating committee of staff members to further its efforts in this area. A conference, attended by representatives of the Children's Bureau and others, concluded that the Bureau should "establish a permanent committee representative of social workers, juvenile courts, and doctors, to develop (1) education materials for dissemination, and (2) basic provisions of needed legislation." Paulsen, Parker & Adelman, *Child Abuse Reporting Laws — Some Legislative History*, 34 GEO. WASH. L. REV. 482, 484-85 (1966). In May 1962 the Bureau brought together professionals from social work, medicine, and law to discuss the need for legislation and to develop draft provisions. The Bureau proposed a model mandatory reporting statute that contributed to the enactment of child abuse reporting legislation. Several states quickly passed legislation modeled on this proposed statute. *Id.* at 502-04.

[186] *Id.* at 492.

[187] *Id.* at 492 n.36.

[188] *Id.*

[189] *Id.*

HeinOnline -- 18 U.C. Davis L. Rev. 39 1984-1985

that spearheaded legislative reform.[190] Social workers had developed an expertise in child abuse legislation and consequently were regarded as experts when the problem of sexual abuse was addressed. The social welfare emphasis on protective services, specifically for the child, contributed to the shift in focus of legal policy to the young victim.

Important developments also occurred in psychology that help explain the law's response to sexual abuse. In particular, certain developments led to an emphasis on treatment in federal and state legislation. Influenced by the growing social science emphasis on small group settings, clinicians and researchers began departing from the individual-oriented psychoanalytic tide in psychiatry.[191] Instead, they concentrated their efforts on examining the impact of family systems on psychopathology.

One important influence was Virginia Satir's work on conjoint family therapy.[192] Satir, a psychiatric social worker, rejected the psychiatric view that the troubled individual family member was sick. Instead, she charged the whole family with responsibility for a member's inappropriate behavior. Thus, the whole family was the client. Each family member required treatment to alter communication patterns and behavior.[193] Professional interest in family therapy came at an auspicious moment: the public was increasingly receptive to psychology. The human potential movement spurred widespread interest in psychology and in the works of psychologists Abraham Maslow,[194] Carl Rogers,[195] and

---

[190] *Id.*

[191] Hoeffer, *Family Therapy and Nursing Practice*, in NEW DIMENSIONS IN MENTAL HEALTH-PSYCHIATRIC NURSING 541 (1980). On the origins of family therapy, see Haley, *A Review of the Family Therapy Field*, in CHANGING FAMILIES 1 (1971). Research in the late 1950's and early 1960's first focused on the relationship between family type and schizophrenia, beginning with the work of Gregory Bateson. By the end of the 1950's, an increasing number of clinicians began involving the entire family in treatment. Foremost among these individuals were Virginia Satir, John Bell, and Nathan Ackerman. Hoeffer, *supra*, at 541.

Psychiatry and psychoanalysis played a role in the development of family therapy. Jackson, Riskin, and Satir point out that the psychoanalytic movement in psychiatry was a negative force in the development of family therapy. The movement toward family studies accelerated, they maintain, as a result of disappointment with the results of psychoanalysis. Jackson, Riskin & Satir, *A Method of Analysis of a Family Interview*, 5 ARCHIVES GEN. PSYCHIATRY 321 (1961).

[192] V. SATIR, CONJOINT FAMILY THERAPY (1964) [hereafter V. SATIR, CONJOINT]; *see also* Satir, *The Family as a Treatment Unit*, 8 CONFINA PSYCHIATRICA 37 (1965); Satir, *The Quest for Survival, A Training Program for Family Diagnosis and Treatment*, 11 ACTA PSYCHOTHERAPEUTICA ET PSYCHOSOMATICA 33 (1963).

[193] V. SATIR, CONJOINT, *supra* note 192, at 40.

[194] A. MASLOW, TOWARD A PSYCHOLOGY OF BEING (1962); Maslow, *Further Notes on the Psychology of Being*, 4 J. HUMANIST PSYCH 45 (1964).

[195] C. ROGERS, ON BECOMING A PERSON: A THERAPIST'S VIEW OF PSYCHOTHER-

HeinOnline -- 18 U.C. Davis L. Rev. 40 1984-1985

Fritz Perls[196] that emphasized the individual in a group milieu. Further, psychology was thought to have special usefulness to the legal process. Forensic psychology developed as a specialization in the late 1960's: "[F]rom the 1930s to the 1960s, the main empirical and theoretical contributions between the behavioral sciences and law came from anthropology, sociology, and psychiatry . . . . In the late 1960s, psychologists renewed their active pursuit of research in legal settings."[197] A central theme in the psychological literature was that the union of law and psychology could promote justice.[198]

C. Interface Between Social Work, Psychology, and Law

In the 1970's, the growing interface between psychology and law occurred with a resurgence of periodicals, lectureships, and prizes.[199] National conferences on psychology and law were held.[200] A joint J.D.-Ph.D. Program in Law and Psychology was initiated at the University of Nebraska.[201] The growing literature[202] on psychology and law also documents the liaison between the two professions. The late 1960's and 1970's were a high water mark for the association between psychology and law.

APY (1961); C. ROGERS & B. STEVENS, PERSON TO PERSON: THE PROBLEM OF BEING HUMAN, A NEW TREND IN PSYCHOLOGY (1967).

[196] F. PERLS, EGO, HUNGER AND AGGRESSION: THE BEGINNING OF GESTALT THERAPY (1969); F. PERLS, R. HEFFERLINE & P. GOODMAN, GESTALT THERAPY (1951).

[197] Tapp, *Psychology and Law: A Look at the Interface*, in PSYCHOLOGY IN THE LEGAL PROCESS 1, 2 (B. Sales ed. 1977) (citations omitted).

[198] *Id.* at 3.

[199] For example, in 1975, the American Psychology-Law Society sponsored its first "Distinguished Lecturer." *Id.* at 3. New journals devoted to psychology and law appeared, including *Law and Human Behavior* and *Criminal Justice and Behavior. Id.* at 6-7.

[200] The American Psychology-Law Society inaugurated a national convention for psychologists and lawyers. Other national conferences on psychology and law took place in 1975 when the University of Nebraska-Lincoln sponsored a conference on "Psycholegal Issues in the Criminal Justice System," and the Battelle Institute held a meeting on "Psychological Processes in the Legal System." *Id.* at 3.

[201] *Id.* at 5-6.

[202] Indices provide data on the liaison between psychology and law. Tapp's research reveals that in the 1965 edition of *Psychological Abstracts* (a reference work published by the American Psychological Association), 111 articles were listed under the categories of crime, criminal law, government, prisoners, and prisons. The number quickly climbed to 493 in 1968, and to 718 in 1972. *Id.* at 4.

HeinOnline -- 18 U.C. Davis L. Rev. 41 1984-1985

In the same period, a parallel liaison between social work and law occurred. Organizations were created and national conferences held. For example, the Board of Governors of the American Bar Association, together with the National Association of Social Workers, established the National Conference of Lawyers and Social Workers in 1962.[203] One goal of this Conference was "to do all which will promote a better understanding between lawyers and social workers."[204] A burgeoning literature in both legal and social work journals focused on the relationship between the social worker and lawyer, and advocated closer professional ties.[205] Joint institutes formed.[206] New journals appeared focusing on issues of concern common to both professions.[207] Two organizations, the National Association of Social Workers and the American Bar Association, issued joint statements outlining the relationship between the two professions.[208]

Schools such as Catholic University, Columbia University, and Brandeis University, among others, offered courses on law in their social work departments.[209] The University of California, Los Angeles, School of Social Work offered a course utilizing the case method of teaching,[210] the traditional method of legal education. The first joint degree in Law and Social Work was initiated at Washington Univer-

---

[203] Isaac, *supra* note 176, at 84.

[204] *Id.* In its first five years, the Conference held 11 meetings; published statements in a legal journal; and issued pamphlets on adult protective services, adoption, family courts, and the rights of public assistance recipients. *Id.* at 85-86. At its five-year review, a Conference member noted: "It is obvious that in the five years since 1962 a greatly increased demand has arisen for improved operation between law and social work." *Id.* at 89.

[205] *See, e.g.*, Foster, *The Law and Social Work*, 53 KY. L.J. 229 (1964-65); Handler, *The Role of Legal Research and Legal Education in Social Welfare*, 20 STAN. L. REV. 669 (1968); Isaac, *The Law and Social Welfare*, 32 UNAUTH. PRAC. NEWS, Winter 1966, at 1; Schottland, *supra* note 176; Sloane, *The Relationship of Law and Social Work*, 12 SOC. WORK, Jan. 1967, at 86.

[206] These joint institutes included: the Arthur Garfield Hays Civil Liberties Center Project on Social Welfare Law of New York University Law School and Columbia University's Center on Social Welfare Policy and the Law. Schottland, *supra* note 176, at 722.

[207] Two of these journals were *Welfare Law Bulletin*, published by the Project on Social Welfare Law of New York University Law School and *Law in Action*, a monthly journal published by the Office of Economic Opportunity, reporting on developments in legal services to the poor.

[208] Schottland, *supra* note 176, at 720.

[209] *Id.* at 725.

[210] *Id.*

HeinOnline -- 18 U.C. Davis L. Rev. 42 1984-1985

sity, St. Louis, Missouri, in 1970.[211]

The liaison between social work, psychology, and law provided for the expanded role of psychologists and social workers in child abuse legislation. The federal Child Abuse Prevention and Treatment Act authorized funding to public agencies and nonprofit organizations with training programs for professional and paraprofessional personnel in the fields of "medicine, law, education, *social work*, and other related fields."[212] State legislation mandated reports of child abuse by psychologists and social workers, among other professionals.[213] State departments of social services absorbed an increasing number of tasks.[214] Intervention by multidisciplinary teams was prescribed. Some statutes specified multidisciplinary intervention teams, including the services of psychologists and social workers.[215] State legislation mandated a range of services for children and adults, including those frequently provided by psychologists and social workers, such as protective services, caretaker services, homemaker services, and "counseling services before and

---

[211] The Washington University program offers the Masters of Social Work (M.S.W.) and Juris Doctor (J.D.) degrees after four years of study. The joint degree was first presented via a written proposal to the law faculty at a faculty meeting on February 18, 1970, at which time it was seconded and passed. Washington University School of Law, Minutes of Faculty Meeting, Feb. 18, 1970 (item number 8). The official written proposal for that joint degree program stressed the importance of training in both law and social work:

> Joint degrees in law and social work are becoming desirable in a growing number of burgeoning areas . . . . [R]ecent trends in law and social work are not so much parallel as they are converging, and a person working in these areas needs expertise in both law and social work . . . . [A] person with training in both law and social work has both a sound understanding of the deprivations of the institutionalized and the poor and a knowledge of the legal devices which form a part of the basis for reducing these deprivations. In view of the fact that expertise in both law and social work is thus necessary in several areas, the School of Law and the George Warren Brown School of Social Work of Washington University should together offer to students a joint program leading to the M.S.W. and J.D. degrees in 4 years of study.

Washington University, Proposal, *supra* note 176, at 1.

[212] 42 U.S.C. § 5103 (1982) (emphasis added).

[213] *See, e.g.*, Act of May 24, 1963, ch. 576, 1963 Cal. Stat. 1453 (codified at then CAL PENAL CODE § 11161.5) (repealed 1980) (reporting requirement now codified at CAL. PENAL CODE § 11166 (West 1982)).

[214] These tasks ranged from receiving reports of suspected abuse to investigating such reports to initiating juvenile court hearings to declare abused children wards of the state, and providing follow-up services to abused children and their families.

[215] *See, e.g.*, CAL. WELF. & INST. CODE § 18951(d)(1), (4) (West 1980).

HeinOnline -- 18 U.C. Davis L. Rev. 43 1984-1985

after a crisis."[216]

Professional interest in abuse was reflected in the law by the insertion of the social welfare and psychological objectives of prevention and treatment. This dual emphasis is apparent both from the title of the new legislation and its language.[217] Moreover, the legislation voiced a concern for not merely the abusive parent but the entire family unit. Broad purpose clauses of state legislation were directed at strengthening the family. The aim was "to assist those children and their parents or those persons legally responsible for them, in their own home, to aid in overcoming the problem leading to abuse and neglect, thereby strengthening parental care and supervision and enhancing such children's welfare and preserving family life whenever feasible."[218]

A constant refrain of the federal and state legislation was the emphasis on treatment and counseling. This emphasis may be traced to the growth and acceptance of family therapy in legal circles. In the mid-1960's social work professionals[219] first advocated treating the whole family with conjoint family therapy techniques.[220] These techniques were rapidly adopted in legal settings. Probation officers and parole officers began treating juvenile delinquents and their families.[221] Soon, scholars were suggesting that family-focused counseling should be utilized more frequently in the legal process.[222] Social workers began advocating its use not only for delinquent children, but also for abused children and their families.[223]

Thus, the new legal label emerging in the 1970's depended on the

---

[216] *Id.* § 18951(c)(2); *see also id.* § 18960 (West Supp. 1984).

[217] For example, 42 U.S.C. § 5101 (1982) and CAL. WELF. & INST. CODE § 18951 (West 1980 & Supp. 1984), constantly refer to prevention, identification, and treatment of child abuse and neglect.

[218] DEL. CODE ANN. tit. 16, § 901 (Supp. 1980).

[219] *See, e.g.*, Zalba, *supra* note 181, at 11.

[220] *Id.*; *see also* Jackson & Weakland, *Conjoint Family Therapy: Some Considerations in Theory, Technique, and Results*, 24 PSYCHIATRY 30 (1961); authorities cited *supra* notes 191-93.

[221] California Youth Authority parole officers in a Community Treatment Project also used this treatment technique. *See* M. GRANT, M. WARREN & J. TURNER, COMMUNITY TREATMENT PROJECT REPORT NO. 3 (1963). Zalba notes that probation officers in San Mateo County, California utilized family therapy as well. Zalba, *supra* note 181, at 11 n.12.

[222] *See, e.g.*, Blackburn, *When Your Client Needs Family Service Counseling*, 4 FAM. L.Q. 71 (1970); Fike, *Family-Focused Counseling: A New Dimension in Probation*, 14 CRIME & DELINQ. 322 (1968); Trevvett, *Treatment Planning for Multiproblem Families*, 13 CRIME & DELINQ. 307 (1967).

[223] Zalba, *supra* note 181, at 11.

HeinOnline -- 18 U.C. Davis L. Rev. 44 1984-1985

influence of both psychologists and social workers. The social problem was constructed in the 1970's, after it had been labeled initially in the 1930's and again in the 1950's. Now the problem was termed "child sexual abuse." Attention was focused for the first time on the child victim. To help the child victim and prevent recurrent abuse, the entire family and not merely the criminal offender received treatment.

IV. Reform in the 1980's: From "Sickness to Badness"

In the 1980's the social problem has again been relabeled. Beginning in the late 1970's, a number of states repealed their sex offender legislation[224] and replaced it with more punitive statutes. New experts advocated law-and-order interests as primary goals for the new legislation. Psychiatrists no longer occupy a central role in policymaking or in handling of sex offenders. The pendulum's swing has reversed; current legal policy signals a movement away from rehabilitation and treatment and a return to more severe punishment of the sex offender. The current reform movement was spurred once again by sex crimes involving children.[225] Law reform was fueled by public and legislative concern about these crimes, as well as concern that existing legislation allowed parole of still dangerous persons.

---

[224] *See, e.g.*, Act of Sept. 27, 1981, ch. 928, 1981 Cal. Stat. 3484 (repealing Cal. Welf. & Inst. Code §§ 6300-6331); Iowa Criminal Code, Ch. 1245, ch. 4, § 526, 1976 Iowa Acts 549, 774-75 (repealing Iowa Code §§ 225A.1-.15); Act of June 9, 1980, § 1, 1980 Mo. Laws 503, 504 (repealing Mo. Stat. §§ 202.700-.770); New Jersey Code of Criminal Justice Act, ch. 95, § 2C:98-2, 1978 N.J. Laws 482, 687-92 (repealing N.J. Rev. Stat. §§ 2A:164-2 to 2A:164-13); Act of Jan. 16, 1978, § 2, 1978 Ohio Laws 2937, 2962 (repealing Ohio Rev. Code Ann. §§ 2947.24-.29); Utah Code of Criminal Procedure Act, ch. 15, § 1, 1980 Utah Laws 110, 111 (repealing Utah Code Ann. §§ 77-49-1 to -8); Act of Feb. 29, 1980, ch. 117, 1979 Wis. Laws 812 (repealing, amending Wis. Stat. §§ 975.01-.18).

[225] In California, the *cause celebre* was the case of Theodore Frank. Theodore Frank had a lengthy history of sex crimes against children when he came to California from Missouri in 1973. He had been twice imprisoned and twice hospitalized in Missouri after 15 arrests and seven convictions. In California, after abducting and sexually assaulting a six-year-old Bakersfield girl, he entered a guilty plea and was sent to Atascadero State Hospital as a mentally disordered sex offender in November 1974. After the Atascadero staff determined he had responded well to various types of treatment, he was granted early release in January 1978. Six weeks after his release, he became a suspect in the death of a two-year-old girl who had been abducted, sexually molested, and mutilated, and in the subsequent molestation of an eight-year-old girl. He was convicted and sentenced to death in February 1980. Prager, *"Sexual Psychopathy" and Child Molesters: The Experiment Fails*, 6 J. Juv. L. 49, 56-57 (1982).

HeinOnline -- 18 U.C. Davis L. Rev. 45 1984-1985

A. The 1980's Experts

Experts now influential in policymaking represent a law-and-order constituency. In California, the movement to abolish the legislation was spearheaded by a deputy district attorney in charge of sex crimes who personally prosecuted the case of a child molester-murderer.[226] Shortly after successfully prosecuting the offender, this district attorney organized a citizens group in the area where the murder victim lived. The citizens group, named SLAM (Concerned Citizens for Stronger Legislation Against Child Molesters), with the district attorney as its vice president, organized widespread support for the repeal of the California mentally disordered sex offender legislation.[227] The group drafted and proposed legislation that mandated lengthy terms of imprisonment[228] and prohibited probation for child molesters.[229] SLAM also supported legislation that allowed inspection of criminal records of applicants for "special trusts"[230] vis-a-vis children; extended the statute of limitations in molestation cases from three to six years;[231] and provided funds to police and prosecutors for specializing training.[232] All the proposed legislation was enacted into law, effective January 1, 1982, after an eighteen-month campaign.[233]

---

[226] Irving Prager was Deputy District Attorney of Ventura County. Sometimes the call for reform involves a curious coalition. A recent example of this phenomenon was the major revision of rape laws throughout the country. Law-and-order advocates found themselves aligned with women's organizations and even some civil libertarians. *See* Bienen, *Rape III — National Developments in Rape Reform Legislation*, 6 WOMEN'S RTS. L. REP. 170, 171-72 (1980).

[227] Prager, *supra* note 225, at 57.

[228] SLAM originally proposed mandatory prison terms of three, six, or eight year terms. (California's determinate sentencing scheme proposes three gradations of penal sanctions.) The penalties as enacted, effective January 1, 1982, were three, five, or seven years. CAL. PENAL CODE § 288 (West 1982).

[229] SLAM proposed eliminating probation in child molestation cases in which either the seriousness of the offense or the likelihood of repetition would justify lengthy imprisonment. Prager, *supra* note 225, at 57.

[230] Act of Sept. 23, 1981, ch. 681, 1981 Cal. Stat. 2480 (codified at CAL. PENAL CODE § 11105.2 (West 1982)); *see also* Prager, *supra* note 225, at 59 n.47. For a definition of positions of "special trusts," see *infra* note 241.

[231] Act of Sept. 27, 1981, ch. 901, 1981 Cal. Stat. 3427 (codified at CAL. PENAL CODE § 800 (West Supp. 1984)); *see also* Prager, *supra* note 225, at 59 n.47.

[232] Act of Sept. 30, 1981, ch. 1062, 1981 Cal. Stat. 4090 (codified at CAL. PENAL CODE §§ 13516, 13836, 13837 (West 1982)); *see also* Prager, *supra* note 225, at 59 n.47.

[233] Prager, *supra* note 225, at 59 n.47. SLAM's efforts were successful for several reasons. First, they were spearheaded by a "moral entrepreneur" representing law-and-order forces who had the legal expertise to propose legislation and advocate effec-

HeinOnline -- 18 U.C. Davis L. Rev. 46 1984-1985

Law reform in Wisconsin also was aided by a law-and-order coalition. The director of the sex offender program began working for repeal of the earlier legislation.[234] In 1979, he found an ally in the legislature, State Senator Lynn Adelman.[235] The bill first introduced by Adelman and two other senators closely paralleled the director's suggestions.[236] A coalition of legislators concerned about law-and-order, as well as state officials anxious to eliminate a troublesome program, supported the drive to repeal the legislation.[237] The program director himself characterized the legislative perception of the bill as a "law-and-order" measure.[238] Support was so strong that the repeal bill generated no opposition and passed both houses of the Wisconsin state legislature with virtually no debate.[239] The bill was signed into law by the Gover-

---

tively for its passage. Second, the movement in California was nurtured by media exposure and by spokespeople from the entertainment field. Third, the reform movement capitalized on public sentiment by its organization of citizens who resided in the neighborhood where one of the victims resided. As Prager himself describes the formation of SLAM:

> Within one year after its formation, S.L.A.M. became an effective statewide coalition of concerned citizens of diverse political leanings. By utilizing the force of critical conclusions reached by noted psychiatrists and psychologists, the assistance of legal advisors, the publicity value of effective spokespeople from the entertainment field [actor Robert Vaughn and his wife Linda became active advocates of S.L.A.M.'s legislative efforts], the advantage of sympathetic media exposure and, most importantly, the power of thousands of ordinary citizens, S.L.A.M. prompted the Legislature to action.

Prager, *supra* note 225, at 59.

The term "moral entrepreneur" was coined by sociologist Howard Becker. *See* H. BECKER, *supra* note 10, at 147-63. Becker defines a "moral entrepreneur" as a crusading reformer who works for the creation of new rules:

> The prototype of the rule creator . . . is the crusading reformer. He is interested in the content of rules. The existing rules do not satisfy him because there is some evil which profoundly disturbs him. He feels that nothing can be right in the world until the rules are made to correct it. He operates with an absolute ethic; what he sees is truly and totally evil with no qualification.

Id. at 147-48. The term is equally applicable to many of the experts involved in sex offender policy formulation.

[234] Comment, *Wisconsin Sex Crimes*, *supra* note 111, at 945 n.33, 949.

[235] *Id.* at 949.

[236] *Id.*

[237] *Id.* at 950.

[238] *Id.* at 950 n.73.

[239] There were no appearances or opposition to the bill, and no dissenting votes. *Id.* at 950.

HeinOnline -- 18 U.C. Davis L. Rev. 47 1984-1985

nor one month later.[240]

B. The Punitive Approach of the New Legislation

The most recent legislation reflects a harsher approach to the sex offender. Punishment has become the focus with treatment and rehabilitation receding into the background. In California, the legislature replaced the mentally disordered sexual offender statutes with long mandatory imprisonment terms for convicted child molesters[241] and al-

---

[240] *Id.*

[241] Roberti-Imbrecht-Rains-Goggin Child Sexual Abuse Prevention Act, ch. 1064, 1981 Cal. Stat. 4093 (amending CAL. PENAL CODE §§ 288, 1203.065; adding §§ 667.51, 1203.066); Act of Sept. 30, 1981, ch. 1043, 1981 Cal. Stat. 3994 (amending CAL. PENAL CODE §§ 266h, 266i, 311.4, 1203.065, adding § 266j). Imprisonment is now mandatory upon conviction where the molester

> (1) [Used] force, violence, duress, menace or threat of bodily harm.
> (2) . . . caused bodily injury on the child victim . . . .
> (3) . . . was a stranger to the child victim or made friends with the child victim for the purpose of committing [child molestation] . . . unless the defendant honestly and reasonably believed the victim was 14 years old or older.
> (4) . . . used a weapon during the commission of [the crime].
> (5) . . . had a prior conviction of . . . [rape, rape by object, incest, child molestation, sodomy or oral copulation by force, assault with intent to commit these crimes or a conviction for prostitution offenses] . . . .
> (6) . . . kidnapped the victim for the purpose of committing [child molestation].
> (7) . . . is convicted of [molesting] . . . more than one victim at the same time or in the same course of conduct.
> (8) . . . has substantial sexual conduct with a victim under the age of 11 years.
> (9) [Is a] person who occupies a position of special trust and commits an act of substantial sexual conduct. "Position of special trust" means that position occupied by a person in a position of authority who by reason of that position is able to exercise undue influence over the victim. Position of authority includes, but is not limited to, the position occupied by . . . [an] adult youth leader, recreational director who is an adult, adult athletic manager, adult coach, teacher, counselor, religious leader, doctor, or employer . . . .
>
> "Substantial sexual conduct" means penetration of the vagina or rectum by the penis of the offender or by any foreign object, oral copulation or masturbation of either the victim or the offender.

CAL. PENAL CODE § 1203.066(a), (b) (West 1982). Prison is also mandatory where the defendant "gives, transports, provides, or makes available" a child to be molested. CAL. PENAL CODE § 1203.065 (West 1982) (incorporating CAL. PENAL CODE § 266j).

HeinOnline -- 18 U.C. Davis L. Rev. 48 1984-1985

lowed hospitalization only during these prison terms.[242] Hospitalization is no longer an alternative to a prison sentence. Furthermore, in order to receive hospital treatment at all, the offender must meet certain criteria. He must desire and consent to the treatment,[243] must have served two years of his sentence, and must have no more than two prior felony convictions for a non-sex crime.[244] Finally, the Director of Mental Health must conclude that the offender requires treatment.[245] The offender cannot be released on an out-patient status or otherwise, prior to completion of his prison term.[246]

In Wisconsin, the repeal bill provides for the phasing out of the former sex offender legislation.[247] The only persons confined under the

---

[242] CAL. PENAL CODE § 1364 (West 1982) now provides, in part:

> [W]hen any person is convicted of a sex offense against a person under the age of 14 years or of a sex offense accomplished against the victim's will by means of force, violence, duress, menace, or fear of immediate and unlawful bodily injury on the victim or another person there shall be no hearing to determine whether the person is a mentally disordered sex offender.
>
> The court after imposing sentence for such a conviction shall order the delivery of the convicted person to the Department of Corrections. The Department of Corrections shall inform such convicted persons of the state hospital program established pursuant to this section.
>
> If the convicted person has no more than two prior felony convictions for a non-sex crime, consents to evaluation, and has a sentence of three or more years, the Department of Corrections at the beginning of the third year prior to release shall transfer the person to an appropriate state hospital for an evaluation of up to thirty (30) days duration. At any time during the thirty (30) day evaluation the director of the state hospital shall provide a diagnostic report to the Director of Corrections with a recommendation for or against placement of the person in a treatment program.
>
> The Director of Corrections shall, if he or she receives a recommendation for such treatment, and with the consent of the convicted person, transfer the person to an appropriate state hospital designated by the Director of Mental Health for treatment. In no event shall the person be placed on outpatient status pursuant to such treatment. In no event shall the person be released prior to his or her determinate sentence date, nor shall treatment pursuant to this section exceed the term of imprisonment imposed. The Director of Mental Health shall make a recommendation prior to the person's release date whether the person should receive outpatient treatment as a condition of parole.

[243] *Id.*

[244] *Id.*

[245] *Id.*

[246] *Id.*

[247] Sex Crimes Law, ch. 975, 1969 Wis. Stat. 671 (codified at then WIS. STAT. §§ 975.01-.18) (repealed 1979). The development of recent legal policy in California and

HeinOnline -- 18 U.C. Davis L. Rev. 49 1984-1985

former legislation are those sentenced before the effective date of the repeal.[248] Persons presently committed may petition the committing court for resentencing under the new criminal legislation.[249] Judges currently sentence persons convicted of "sexual assault"[250] directly to prison without an examination to determine whether the person is in need of specialized treatment for sexual deviance.[251] No longer can treatment at a designated facility be required.[252]

With the new legislation, psychiatric treatment of sex offenders is significantly curtailed. Child molestation is now being redefined by the criminal label of "sexual assault."[253] Medical influence over child molesters has yielded to criminal jurisdiction. Child molestation, originally defined as "badness," and later as "sickness," has been labeled again as "badness."[254]

C. Factors Behind the Emerging Punitive Policy

The emergence of the new legal policy on sex offenses in the 1980's may be explained in part by the growing reform movement to curtail the influence of psychiatrists in the law. Although psychiatrists have played a considerable role in sex offender policy since the 1930's, a number of events have contributed to the waning of their influence. First, psychiatric testimony on evaluation of defendants' mental state, in general, has come under increasing attack. A burgeoning literature has assailed psychiatry and psychiatrists. Some critics charged that psychiatric authority lacks legitimacy.[255] Considerable debate also has raged on the inability of psychiatrists to predict dangerousness

---

Wisconsin is especially interesting in light of the fact that these states are more progressive than many other states in the areas of social welfare and mental illness.

[248] Comment, *Wisconsin Sex Crimes*, *supra* note 111, at 950.

[249] *Id.* at 950.

[250] *Id.* at 941.

[251] *Id.*

[252] *Id.* Treatment is at the discretion of the Division of Corrections.

[253] *See, e.g.*, COLO. REV. STAT. § 18-3-405 (1978 & Supp. 1983) ("sexual assault on a child"); N.H. REV. STAT. ANN. § 632-A:2 (1983) ("aggravated felonious sexual assault" — if actor is member of the same household of victim, or with victim less than 13 years of age); *id.* § 632-A:3 ("felonious sexual assault" — if victim is between 13 and 16 years of age).

[254] *See supra* note 15.

[255] Criticism began to be especially pointed in the 1960's. *See, e.g.*, R.D. LAING, THE POLITICS OF EXPERIENCE (1967); R. LEIFER, IN THE NAME OF MENTAL HEALTH: THE SOCIAL FUNCTIONS OF PSYCHIATRY (1969); T. SZASZ, LAW, LIBERTY, AND PSYCHIATRY (1963); T. SZASZ, THE MYTH OF MENTAL ILLNESS (1961).

HeinOnline -- 18 U.C. Davis L. Rev. 50 1984-1985

accurately.[256]

Articles in legal journals[257] and scientific journals,[258] as well as judicial opinions,[259] highlight the unreliability of psychiatric testimony. Commentators argue that substantial disagreement exists among psychiatrists in the diagnosis of a mental condition.[260] Critics note that even when agreement can be reached on a diagnosis, psychiatrists' ability to translate medical evaluations into legally meaningful language is doubtful.[261] One critic summarized the reasons criminal courts should

---

[256] *See, e.g.*, Dershowitz, *The Laws of Dangerousness: Some Fictions About Predictions*, 23 LEGAL EDUC. 24 (1970); Ennis & Litwack, *Psychiatry and the Presumption of Expertise: Flipping Coins in the Courtroom*, 62 CALIF. L. REV. 693, 711-16 (1974); Monahan, *Empirical Analysis of Civil Commitment: Critique and Context*, 11 LAW & SOC'Y REV. 619, 626-27 (1977); Monahan, *Abolish the Insanity Defense? — Not Yet*, 26 RUTGERS L. REV. 719, 733-38 (1973); Monahan & Monahan, *Prediction Research and the Role of Psychologists in Correctional Institutions*, 14 SAN DIEGO L. REV. 1028 (1977); Rubin, *Prediction of Dangerousness in Mentally Ill Criminals*, 27 ARCHIVES GEN. PSYCHIATRY 397 (1972); Schreiber, *Indeterminate Therapeutic Incarceration of Dangerous Criminals: Perspectives and Problems*, 56 VA. L. REV. 602 (1970); von Hirsch, *Prediction of Criminal Conduct and Preventive Confinement of Convicted Persons*, 21 BUFFALO L. REV. 717 (1972).

[257] For a review of this literature, see Comment, *The Psychologist as Expert Witness: Science in the Courtroom?*, 38 MD. L. REV. 539 (1979).

[258] *See, e.g.*, Unger, *A Program for Late Twentieth-Century Psychiatry*, 139 AM. J. PSYCHIATRY 155, 158 (1982).

[259] In Steele v. State, 97 Wis. 2d 72, 294 N.W.2d 2 (1980), the Wisconsin Supreme Court held psychiatric opinion evidence inadmissible on the intent-to-kill element required for first-degree murder. The court, reasoning that psychiatric testimony is neither competent nor relevant on the issue of a person's capacity to form the necessary criminal intent for first-degree murder, concluded that admission of such evidence would frustrate important state interests. The constitutionality of Wisconsin's exclusion of psychiatric evidence continues to be challenged in both Wisconsin state and federal courts. *See* Note, *Restricting the Admission of Psychiatric Testimony on a Defendant's Mental State: Wisconsin's* Steele *Curtain*, 1981 WIS. L. REV. 733 [hereafter Note, *Restricting the Admission*].

[260] *See, e.g.*, Ennis & Litwack, *supra* note 256, at 695, 699-734; Morse, *Failed Explanations and Criminal Responsibility: Experts and the Unconscious*, 68 VA. L. REV. 971, 1022-23 (1982); Note, *Restricting the Admission*, *supra* note 259, at 758; Note, *Criminal Law — First-Degree Murder — Psychiatric Testimony Admissible on Issue of Intent*, 1979 WIS. L. REV. 628. Morse offers several explanations for the number of different formulations by psychiatrists. First, Morse explains there are many theoretically divergent schools of dynamic psychology (e.g., Jung, Freud, Sullivan, and Adler). Even within a particular school, major theoretical differences exist. Second, the process of investigating an individual's psychodynamics and forming an opinion is entirely subjective and based on complex inferences for which no rules exist and no external checks are available. Morse, *supra*, at 1023-24.

[261] Note, *Restricting the Admission*, *supra* note 259, at 758.

HeinOnline -- 18 U.C. Davis L. Rev. 51 1984-1985

reject psychiatric accounts of causality and criminal responsibility at trials, sentencing hearings, or any other stage of the criminal process: 1) psychodynamic formulations are unverifiable and unreliable causal accounts providing the factfinder with little more than a false sense of security based on the incorrect assumption that a reasonably accurate scientific explanation has been provided; 2) cross-examination is ineffective to expose the inaccuracy of psychodynamic formulations because factfinders have no means to resolve disputes; and 3) admission of such evidence inevitably results in an unseemly battle of the experts which is costly, confusing, and inefficient.[262]

Criticism of psychiatry and psychiatrists has also come from another front. The insanity defense has been under increasing attack, and with it, greater attention has been focused on the proper role of psychiatry and psychiatrists in the criminal law. A number of prominent criminal trials recently catapulted the insanity defense to the forefront of public awareness. John Hinckley's attempted assassination of President Reagan, Mark David Chapman's murder of John Lennon, and Dan White's murder of Mayor George Moscone and Supervisor Harvey Milk spurred national debate on the effect of insanity on criminal responsibility. A number of reforms have been proposed, followed by a raft of legislative proposals redefining insanity. One proposal urges shifting the burden of proving an affirmative defense of insanity to the defendant.[263] Another reform, adopted in eight states, is the use of the verdict of guilty but mentally ill.[264] Another proposal urges precluding psychiatric testimony on ultimate legal conclusions.[265] Finally, the most radical reform proposes the abolition of the insanity defense — an approach adopted by two states and supported by the Reagan administration.[266]

---

[262] Morse, *supra* note 260, at 1026.

[263] Bandes, *Developments in the Insanity Defense*, BARRISTER, Spring, 1983, at 41, 43-44. Currently the following jurisdictions place the burden on the defense to rebut the presumption of sanity by a preponderance of evidence: Alabama, Arkansas, California, Delaware, Georgia, Kentucky, Louisiana, Maine, Minnesota, Missouri, Montana, Nevada, New Jersey, North Carolina, Ohio, Oregon, Rhode Island, South Carolina, Texas, Virginia, Washington, West Virginia, and the District of Columbia. *Id.* at 45 n.20. The House of Delegates of the American Bar Association endorsed this proposal at its February 1983 meeting. *Id.* at 45 n.19.

[264] *Id.* at 44, 45 n.21 The states include: Alaska, Delaware, Georgia, Kentucky, Indiana, Illinois, Michigan, and New Mexico.

[265] *Id.* at 44. This approach was endorsed by the American Psychiatric Association in a position paper published January 1983. *Id.* at 45 n.23.

[266] *Id.* at 44. The two states are Idaho and Montana. *See* Bonnie, *The Moral Basis of the Insanity Defense*, A.B.A. J., Feb. 1983, at 194, 195. The recent Insanity Defense

HeinOnline -- 18 U.C. Davis L. Rev. 52 1984-1985

Further, the past decade signals an end to the psychiatric influence that earlier culminated in the *Durham* rule. *Durham v. United States*,[267] decided in 1954, facilitated the task of psychiatric witnesses. Broadening the right/wrong *M'Naughten* test by adding the provision that the offender lacked substantial capacity to refrain from the wrongful act, the *Durham* rule allowed psychiatrists to convey more information to the judge and jury to assess the defendant's criminal responsibility. Although initially praised by psychiatrists as a revelation of enlightenment,[268] the *Durham* rule subsequently incurred considerable criticism. Finally, in 1972 it was rejected by a unanimous court.[269]

The current trend in sex offender legislation heralds a movement from treatment and rehabilitation and a return to more punitive dispositions. Protection of society rather than rehabilitation of the offender is the paramount concern. This trend also signals a waning in the influence of psychiatry and psychiatrists in legal policy formulation. A curtailment has occurred primarily in two roles that psychiatrists played in earlier decades in sex offender legislation. Psychiatrists are less prominent in both legal policy formulation and in the processing of sex offenders from diagnosis and sentencing through treatment.

However, the reversal of the pendulum from rehabilitation and treatment to punishment has not been without gains. The differentation among sex offenders which was first urged by Kinsey has been recognized.[270] Legal dispositions now reflect the impact of social workers and psychologists in terms of a different and more "humanistic" approach towards intrafamilial offenders compared to stranger perpetrators. Specifically, incest offenders are more likely than stranger molesters to

---

Reform Act of 1984, signed into law on October 12, 1984, Pub. L. No. 98-473, 1984 U.S. CODE CONG. & AD. NEWS (98 Stat.) 2057 (to be codified as 18 U.S.C. § 20), makes three significant changes in the insanity defense in federal prosecution: 1) shifts the burden of proof, 2) alters the quantum of proof, and 3) changes the substantive test.

Former law required the prosecution to demonstrate the defendant's sanity beyond a reasonable doubt in cases in which the defendant raised the insanity defense. Under the new law, the defendant must demonstrate insanity by clear and convincing evidence. Further, under the new legislation the defendant must prove an inability to distinguish right from wrong; the defendant cannot prevail by showing merely an inability to conform conduct to the dictates of the law. The Reform Act exemplifies the punitive trend in criminal justice, not only by its new provisions on the insanity defense, but also by those on bail, preventive detention, and sentencing.

[267] 214 F.2d 862 (D.C. Cir. 1954); *see also supra* text accompanying note 116.

[268] A. BROOKS, *supra* note 24, at 177. On the *Durham* experiment and its demise, see *id.* at 176-200.

[269] United States v. Brawner, 471 F.2d 969 (D.C. Cir. 1972).

[270] *See supra* text accompanying notes 129-41.

HeinOnline -- 18 U.C. Davis L. Rev. 53 1984-1985

benefit in many jurisdictions from the rehabilitation model: they are more likely to receive shorter sentences, probation, and counseling.[271] In addition, legal personnel now question whether commitment under sexual psychopath statutes is appropriate for intrafamilial offenders, and urge out-patient family treatment instead.[272]

Advances have also been made in treatment of sex offenders. Pioneering programs, many headed by psychiatrists, have been established across the country to treat sex offenders.[273] Institutional and community-based programs seek to change the attitudes and behaviors of sex offenders. Such programs aim to reduce recidivism rates of convicted offenders and to increase knowledge about sex offenders in general to prevent future attacks.

Further, the child victims of sex offenders receive more attention.[274] Many jurisdictions have adopted reforms minimizing the trauma of child victims in the investigation and hearing stages of the criminal process. Such reforms include special training programs for police, child protective service workers, and prosecutors for interviewing child vic-

---

[271] A survey conducted by the American Bar Association of 40 states reveals that in most jurisdictions probation with treatment may be imposed in intrafamily cases. For non-family offenders, only one-third of the jurisdictions impose sentences of probation with a condition of treatment. In jurisdictions utilizing probation plus treatment for both types of cases, respondents stated that this disposition was more frequent for intrafamily rather than nonfamily offenders. In addition, the survey responses indicate that prison or jail sentences tend to be shorter for intrafamily offenders than for all child sexual offenders. AMERICAN BAR ASSOCIATION, NATIONAL LEGAL RESOURCE CENTER FOR CHILD ADVOCACY AND PROTECTION, INNOVATIONS IN THE PROSECUTION OF CHILD SEXUAL ABUSE CASES 6 (1981) [hereafter A.B.A., INNOVATIONS]. Further, the survey reveals that pre-trial diversion programs specifically designed for intrafamily child sexual abuse cases have emerged in a number of jurisdictions. *Id.* at 9.

[272] A study sponsored by the American Bar Association, National Legal Resource Center for Child Advocacy and Protection concludes:

> It would seem that use of the sexual psychopath statutes to commit most incest offenders to mental health facilities may not be desirable. Except for those who are not amenable to outpatient treatment, the better practice seems to be to use the sanctions of the criminal justice system as incentives to treatment within the community.

AMERICAN BAR ASSOCIATION, NATIONAL LEGAL RESOURCE CENTER FOR CHILD ADVOCACY AND PROTECTION, CHILD SEXUAL ABUSE AND THE LAW 97 (1981) [hereafter A.B.A., CHILD SEXUAL ABUSE].

[273] For a discussion of many of these programs, see E. BRECHER, TREATMENT PROGRAMS FOR SEX OFFENDERS (1978).

[274] *See generally* Holmstrom & Burgess, *The Child and Family in the Court Process*, in A. BURGESS, A. GROTH, L. HOLMSTROM & S. SGROI, SEXUAL ASSAULT OF CHILDREN AND ADOLESCENTS (1978); Stevens & Berliner, *Special Techniques for Child Witnesses*, in L. SCHULTZ, THE SEXUAL VICTIMOLOGY OF YOUTH (1980).

HeinOnline -- 18 U.C. Davis L. Rev. 54 1984-1985

tims; a team-approach to interviewing children (utilizing social welfare and legal personnel); fewer investigative interviews; and videotaped testimony of the child victim.[275] This humane response is the legacy of the intervention by members of the helping professions.

CONCLUSION

This Article recounts how legal policy first adopted and later rejected a medical designation for sexual offenses involving children. This deviant behavior was first labeled by psychiatrists as the "illness" of "sexual psychopathy," and then relabeled by psychologists and social workers as "sexual abuse." The behavior's most recent relabeling as "sexual assault" marks the demise of the medical model. Evidence suggests that the rise and fall of medical designations of deviance are cyclical phenomena.[276] Prior research sheds light primarily on the rise of medical designations of deviance.[277] This research contributes to the smaller historical knowledge base on the *demise* of a medical designation of deviance.

This Article shows how professionals play a role in the formulation of legal policy. At different times, psychiatrists, psychologists, and social workers labeled a social phenomenon as a social problem. The various labels resulted in different legal consequences for the offender. Because of the respective expert's orientation, the law's response took a certain

---

[275] About 30% of the jurisdictions surveyed in an American Bar Association study report having protocols or guidelines for interviewing child victims in order to minimize the trauma of the criminal justice system on the child. A.B.A., INNOVATIONS, *supra* note 271, at 7. The prosecutor's office in Brooklyn, New York, and Hennepin County, Minnesota, use anatomically correct dolls to facilitate interviews with children. The prosecutor's office in Ventura County, California, reports that, in many instances, the prosecutor interviews the child before filing charges, sometimes at the child's home, assisted throughout the interview by a victim/witness advocate. Special training programs are provided to prosecutors, police and child protective service workers in many jurisdictions.

A significant number of jurisdictions also report having procedures for reducing the number of interviews with a child. Some use joint interviews with police, child protective service workers, and prosecutors. Another method of protecting the child from potentially traumatic court procedures is to allow the child's testimony to be taken out of the presence of the public, jury, or defendant. One third of the survey respondents indicated they had some such procedure. *Id.* On the constitutional issues posed by such testimony, see Melton, *Procedural Reforms to Protect Child Victim/Witness in Sex Offense Proceedings*, in A.B.A., CHILD SEXUAL ABUSE, *supra* note 272, at 185-87.

[276] P. CONRAD & J. SCHNEIDER, *supra* note 15, at 261. These two sociologists also present a number of interesting case histories.

[277] *Id.*

HeinOnline -- 18 U.C. Davis L. Rev. 55 1984-1985

form, reflected in statutory terminology as well as in mandated methods of addressing the problem.

The experts became involved in legal policy formulation because social conditions highlighted the utility of their discipline in solving social problems. Psychiatrists were sought and consulted after the world wars dramatized the potential of their discipline. The advice of social workers and psychologists was sought because of an increased public awareness of social maladies and also because of the growing interest in family therapy techniques to treat troubled individuals. The most recent period is characterized by a negative reaction to the influence of certain experts, particularly psychiatrists, which has led to significant curtailment of their role in legal policymaking.

The labeling of a social problem is a problematic and lengthy process. The present study reveals that the process is influenced by competing ideologies and competitive professional factions. A social problem may be labeled once, defining a particular act and actors in a certain way, only to be relabeled subsequently by different policy formulators. Thus, the primacy of a particular professional ideology in a given period appears to determine the legal response to that social problem.

Several implications can be drawn from this study of the rise and fall of medical labeling of sexual crimes involving children. One possible conclusion might be to question experts' role in legal policy formulation. Since the experts of today may be replaced by the experts of tomorrow who espouse different solutions, one might conclude that legislators should limit professionals' input into legal policy. Yet, disagreement among professionals as to the nature and resolution of a problem does not imply that the law should be oblivious to experts. The law benefits from the expertise of members of diverse disciplines. As with progress in science,[278] certain paradigms or models structure the way we construct and interpret legal reality. When a dominant explanation is challenged, a new paradigm emerges — one that profits from the accumulation of knowledge. The input of experts ultimately improves our understanding of the problem.

Two central implications of this study emerge. First, professionals as well as legislators have special responsibilities in legal policy formulation. Professionals should not promise cures and services that their disciplines and disciples are unable to deliver. Such promises raise unrealistic expectations that breed disappointment and disillusionment when

---

[278] This is the thesis of Kuhn's classic work in the philosophy of science. T. KUHN, THE STRUCTURE OF SCIENTIFIC REVOLUTIONS (2d ed. 1970).

HeinOnline -- 18 U.C. Davis L. Rev. 56 1984-1985

they cannot be met. This can lead to a rejection not only of the suggested proposals, but also of the particular professionals' influence generally. Legislators also have a special responsibility in legal policy formulation. When enacting the solutions posed by experts, legislators must consider the limitations of personnel and resources. Legislators must ensure that funding and facilities exist so that a given solution can be explored and implemented adequately. Then, if the proposed solution is subsequently rejected, the effort at least has been given a fair trial.

The renaming of deviance appears to coincide with the decline of the rehabilitative ideal and the re-emergence of retributive theory.[279] A second implication of this study is that the demise of a medical designation of deviance in legal policy reveals something profound about society. Important American values align with the medical model of deviance.[280] Specifically, this model reflects American values of experimentation, utopianism, and humanitarianism.

The current phase of law reform may be merely another stage in the cycle. Perhaps, in the near future, the medical model may re-emerge by means of a challenge by still another professional group. Although the challenge to the medical label has resulted in certain advances in treatment of sexual offenses involving children, the gains have been accompanied by a loss as well. Policymakers appear to have lost interest in alleviating the underlying causes of crime and instead demand short-term, cost-effective methods of punishing the offender. The rise of the medical model of deviant behavior reflected a society that strove toward greater social justice in assessing criminal responsibility and toward a sense of compassion. Its current ebb is cause for concern.

---

[279] On the cycles of penological reform, see generally Orland, *From Vengeance to Vengeance: Sentencing Reform and the Demise of Rehabilitation*, 7 HOFSTRA L. REV. 29 (1978); Schwartz, *Options in Constructing a Sentencing System: Sentencing Guidelines Under Legislative or Judicial Hegemony*, 67 VA. L. REV. 637, 691-92 (1981). For a discussion and rejection of the conventional assumptions underlying the rehabilitative ideal, see A. VON HIRSCH, DOING JUSTICE: THE CHOICE OF PUNISHMENTS (1976).

[280] P. CONRAD & J. SCHNEIDER, *supra* note 15, at 265.

HeinOnline -- 18 U.C. Davis L. Rev. 57 1984-1985

HeinOnline -- 18 U.C. Davis L. Rev. 58 1984-1985