RECENT LEGISLATION

PENNSYLVANIA'S NEW SEX CRIME LAW

The new Pennsylvania legislation [1] making possible the imposition of an indeterminate life sentence on certain kinds of sex offenders reflects the increasing legislative desire to achieve additional security from sex criminals.[2] The disproportionate newspaper publicity given this kind of criminality and the dire pronouncements of some national authorities [3] have greatly augmented the fear and revulsion naturally aroused by a brutal sex attack,[4] and the Pennsylvania law is typical of a growing number of jurisdictions which have gone beyond previous criminal sanctions and attempted to identify and incapacitate or cure *potentially* dangerous sex offenders.

Legislative Background.—This special legislation has been of two types. A few jurisdictions, like Pennsylvania, achieve incapacitation with an indeterminate life sentence. More widespread have been the "sexual psychopath" or related statutes, enacted in fifteen jurisdictions since 1938.[5] The latter typically provide for examination and diagnosis by the medical profession [6] of persons charged with or convicted of sex offenses, although in some jurisdictions a person can be found a sexual psychopath in the absence of any criminal charge.[7] Commitment proceedings are called "civil" and not "criminal"; [8] those adjudged to fall within varying defini-

1. Act of Jan. 8, 1952, P.L. 495.

2. Tappan, *Sex Offender Laws and Their Administration,* 14 FED. PROBATION 32 (Sept. 1950).

3. *E.g.,* Hoover, *How Safe Is Your Daughter,* 144 AM. MAG. 32 (July, 1947) (". . . depraved human beings, more savage than beasts, are permitted to rove America almost at will.")

4. " 'The impact of these two similar crimes [child sex murders] upon the public mind was terrific. The people throughout the City were outraged. Not only were they outraged but they were terrified.' " Maryland v. Baltimore Radio Show, 338 U.S. 912 (1950) (opinion of Mr. Justice Frankfurter respecting denial of certiorari).

5. CAL. WELFARE & INSTITUTIONS CODE § 5500 *et seq.* (Deering, Supp. 1949); D.C. CODE tit. 22, § 22-3501 *et seq.* (Supp. VII 1949); ILL. ANN. STAT. c. 38, § 820 *et seq.* (Smith-Hurd, Supp. 1950); IND. ANN. STAT. tit. 4, c. 34, § 9-3401 *et seq.* (Burns, Supp. 1951); MASS. ANN. LAWS c. 123A (1949); MICH. STAT. ANN. tit. 25, § 28.967(1) *et seq.* (Supp. 1949); MINN. STAT. c. 526 § 526.09 *et seq.* (1947); Mo. REV. STAT. ANN., tit. 19, § 9359.1 *et seq.* (Supp. 1949); Neb. Laws 1949, c. 294; N.H. Laws 1949, c. 314; N.J. REV. STAT. tit. 2, c. 192, § 1.13 *et seq.* (Cum. Supp. 1950); 10 OHIO GEN. CODE ANN. § 13451-19 *et seq.* (Page, Cum. Supp. 1950); VT. REV. STAT. § 6699 *et seq.* (1947); Wash. Laws 1947, c. 273, as amended, Wash. Laws 1949, c. 198; WIS. STAT. c. 51, § 51.37 *et seq.* (1947).

6. Examination is by two or more psychiatrists with five years experience (California, Illinois, Ohio); two or more psychiatrists (District Columbia, Michigan, New Hampshire, New Jersey, Washington); two physicians (Wisconsin, Minnesota, Missouri, Indiana); two physicians certified by Department of Mental Health (Massachusetts); diagnosis by state institution (Vermont).

7. District Columbia, Massachusetts, Minnesota, New Hampshire, Wisconsin.

8. People v. Chapman, 301 Mich. 584, 4 N.W.2d 18 (1942); State *ex rel.* Sweezer v. Green, 360 Mo. 1249, 232 S.W.2d 897 (1950); *In re* Moulton, 96 N.H. 370, 77 A.2d 26 (1950); Malone v. Overholzer, 93 F. Supp. 647 (D.C. 1950).

tions of sexual psychopathy are confined in mental hospitals or prisons for an indefinite period. Release may be mandatory after a prescribed maximum, or may come only after the deviant is found sufficiently cured to be no longer dangerous.[9]

These sex psychopath statutes have proved to be generally ineffective, and in a number of jurisdictions they are inoperative.[10] Illinois, first to enact one, committed only 18 persons under it in twelve years;[11] the largest number of commitments have been in California (485 in ten years, 1940-49)[12] and Michigan (369 from 1939 to 1950).[13] In Wisconsin a special commission advocates the repeal of that state's inoperative act,[14] and New Jersey's was drastically limited after one year's operation.[15]

The failure of jurisdictions having such legislation to use it extensively has been attributed to dislike of the vague definition of sexual psychopathy, the lack of treatment in overcrowded mental hospitals and the cumbersome commitment machinery. The laws have also been opposed for civil liberties shortcomings; in 1947 Governor Dewey vetoed a proposed New York sexual psychopath act because of the danger that it would "demolish the important safeguards that surround personal liberty in our state."[16] The New Jersey Commission believes that under these laws "some extremely dangerous precedents have been established,"[17] and the Michigan Commission is concerned lest "a lack of procedural and substantive due process of law" prove "more menacing to society than the menace represented by the occasional dangerous sex offender."[18]

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9. For chart comparing provisions of these statutes see COMM. ON FORENSIC PSYCHIATRY, GROUP FOR ADVANCEMENT OF PYSCHIATRY, REPORT No. 9, PSYCHIATRICALLY DEVIATED SEX OFFENDERS 4 (1950); REPORT, N.J. COMM. ON THE HABITUAL SEX OFFENDER 68 (1950).

10. N.J. REPORT, note 9 *supra*, at 34.

11. Braude, *The Sex Offender and the Court*, 14 FED. PROBATION 17, 21 (Sept. 1950).

12. CAL. ASSEMBLY, SUBCOMMITTEE ON SEX CRIMES, COMMITTEE ON JUDICIAL SYSTEM AND JUDICIAL PROCESS, PRELIMINARY REPORT 258 (1950).

13. MICH. STUDY COMMIS. ON THE DEVIATED CRIMINAL SEX OFFENDER, REPORT 2 (1951).

14. CITIZENS COMMITTEE ON SEX OFFENSES, WISCONSIN DEPT. OF PUBLIC WELFARE, REPORT 1 (1951).

15. *Compare* N.J. REV. STAT. tit. 2, c. 192, § 1.4 *et seq.* (Cum. Supp. 1949) with *id.*, § 1.13 *et seq.* (Cum. Supp. 1950). See N.J. REPORT, *op. cit. supra* note 9, at 9.

16. N.Y. Times, Apr. 12, 1947, p. 15, col. 5.

"Proceedings under the [Michigan sexual psychopath] statute are not criminal in nature and, therefore, are not circumscribed by the constitutional and statutory limitations surrounding a person accused of, or tried for, a crime." People v. Chapman, *supra* note 8, at 603, 4 N.W.2d at 26. But many of the protections given criminal defendants may be given by statute; see notes 34 (trial by jury) and 44 (right to counsel, opportunity for cross-examination) *infra*. There is no privilege against self incrimination in sexual psychopath proceedings. People v. Redlich, 402 Ill. 270, 83 N.E.2d 736 (1949) (Defendant who claimed constitutional privilege and refused to submit to psychiatric examination sentenced to jail for contempt until he complied).

17. N.J. REPORT, *op. cit. supra* note 9, at 16.

18. MICH. REPORT, *op. cit. supra* note 13, at 123.

The weight of these criticisms has been reflected in recent legislation. A variant method for identification and incapacitation of dangerous sex offenders was enacted in New York, in a statute staying within the bounds of conventional criminal procedure.[19] Under the New York procedure, those convicted of certain sex offenses where force has been employed or the victim is a child [20] must be given a pre-sentence psychiatric examination, after which the court may impose either the sentence otherwise prescribed or an indeterminate sentence up to life. A similar law is proposed in Wisconsin.[21]

The Pennsylvania Statute.—The 1951 Pennsylvania legislature had bills of both the sexual psychopath commitment and the New York types before it, and on October 1 unanimously enacted the latter.[22] But the Pennsylvania law is more loosely drawn than New York's, and affects a much wider range of sex crimes. It provides that a person convicted of incest,[23] indecent assault,[24] assault with intent to commit sodomy [25] or rape,[26] sodomy,[27] or solicitation to commit sodomy,[28] after psychiatric examination may be sentenced to an indeterminate term of one day to life.

Procedural Variations

Despite differences in terminology and the shift of the commitment process from the civil to the criminal docket, the Pennsylvania and New York laws are strikingly similar to the sexual psychopath laws in other

19. N.Y. Stats. 1950, c. 525.

20. The New York indeterminate sentence is limited to those convicted of the following crimes: Assault in second degree, N.Y. Penal Code § 243 (Supp. 1951) (assault with intent to commit rape, sodomy or carnal abuse); Carnal Abuse, *id.*, §§ 483a, 483b; Sodomy in First Degree, *id.*, § 690 (with force); Rape in First Degree, *id.*, § 2010 (with force); Sexual Abuse While Committing a Felony, *id.*, § 1944(a); Certain Second or Subsequent Offenses, *id.*, § 1940.

Restriction of the act to these offenses follows the recommendations of the Committee on Forensic Psychiatry. ". . . the following general criteria . . . singly or in combination shall be the guide of the psychiatrist who is required to give an opinion as to the existence of mental disorder:

"1. Repetitive compulsive acts having a (dynamic) pattern of similarity and carried out to the point of community intolerance. Such acts manifest heedless disregard of consequences . . .

"2. Forced relations . . . [which] may be either hetero-or homosexual.

"3. Age Disparity (relations involving one adult.)" Comm. on Forensic Psychiatry, *op. cit. supra* note 9, at 2.

21. Wis. Laws 1951, c. 542 (proposed).

22. S. Bill 104; see note 1 *supra*. The constrasting sexual psychopath measure is H. Bill 61.

23. Pa. Stat. Ann. tit. 18, § 4507 (1945) (felony $2,000 or 5 years).

24. *Id.*, § 4708 (misdemeanor, $1,000 or 2 years). Indecent assault is comprehended within assault and battery, and is the taking by a man of indecent liberties with the person of a female without her consent and against her will, but with no intent to rape. Commonwealth v. Gregory, 132 Pa. Super. 507, 1 A.2d 501 (1938) (Doctor of theology, falsely pretending to be doctor of medicine, obtained view of and touched prosecutrix's unclothed body).

25. *Id.*, § 4502 (felony, $1,000 or five years).

26. *Id.*, § 4722 (felony, $2,000 or five years).

27. *Id.*, § 4501 (felony, $5,000 or ten years).

28. *Id.*, § 4502 (felony, $1,000 or five years) ("Whoever . . . incites another to permit and suffer such person to commit sodomy with him or her.")

jurisdictions in both purpose and method. Both kinds of legislation are seeking to identify and incapacitate the same type of person, and both depend upon psychiatry for the crucial element of identification. The difficulties inherent in such identification and the advisability of singling out sex offenders for this experiment, which make *future* dangerousness the criterion for prolonged and possible lifelong imprisonment, are discussed below. First it should be noted that if the advisability of this legislative experiment should be established, there are serious procedural defects in the Pennsylvania law compared with the sexual psychopath statutes. The most important difference between the two types of legislation is the diminution of protection against abuse which results from placing the psychiatric examination and diagnosis in the sentencing phase of criminal procedure instead of in a "civil" commitment proceeding.

A comparison of the rights accorded defendants by these two methods of achieving indefinite incapacitation of the potentially dangerous sex offender will illustrate the extent of these procedural differences. Under the sexual psychopath statutes the commitment process has been labelled "civil" [29] and thus the due process protections afforded criminal defendants are not applicable. But the process has been described as analogous to that against persons alleged to be mentally ill [30] and the protections of that procedure apply.[31] Thus in California the defendant receives a hearing at which he is entitled to counsel, to see the psychiatric report, to cross-examine the state's psychiatrists and to introduce evidence in his own behalf, including expert testimony of his own psychiatrists.[32] Both courts and legislature in California seem to be recognizing that the proceedings are at least "semi-criminal" [33] and are giving the defendant greater protection.[34]

29. See note 8 *supra.*

30. People v. Chapman, *supra* note 8, at 596, 4 N.W.2d at 25; *In re* Mundy, 85 A.2d 371, 374 (N.H. 1952) (sexual psychopath statute "does nothing save expand the definition of insanity to keep pace with the discoveries of science. . . .").

31. "We fully recognize the danger of a deprivation of due process in proceedings dealing with persons charged with insanity or, as here, with a psychopathic personality as defined in the statute, and the special importance of maintaining the basic interests of liberty in a class of cases where the law though 'fair on its face and imparital in appearance' may be open to serious abuses in administration and courts may be imposed upon if the substantial rights of the persons charged are not adequately safeguarded at every stage of the proceedings. But we have no occasion to consider such abuses here . . ." Minn. *ex rel.* Pearson v. Probate Court, 309 U.S. 270, 276-277 (1940).

32. CAL. WELFARE & INSTITUTIONS CODE, § 5500 *et seq.* (Deering, Supp. 1949).

33. *Cf.* Evans v. United States, 20 U.S.L. WEEK 2166 (D.C. Mun. Ct. App., Oct. 23, 1951) (Proceeding in lunacy inquisition of person charged with criminal offense is semi-criminal, and looking at substance rather than form is a step in the criminal proceeding against the accused).

34. In Application of Keddy, 233 P.2d 159 (Cal. App. 1951), petitioner was released on bail pending the determination of whether or not he was a sexual psychopath. The decision is an important departure from the many holdings that these proceedings are "civil," see note 8 *supra,* and may herald a more realistic appraisal of the essentially criminal nature of proceedings under these statutes.

The original California act provided for a jury trial on demand within five days of commitment. This was repealed, Cal. Stat. 1949, c. 1325, § 5; but has been re-enacted, Cal. Stat. 1951, c. 677, § 2. For other added protections extended to defendants in these proceedings by the 1951 California legislature see note 44 *infra.*

After commitment, treatment for the mental disorder is supposed to be given; some courts have intimated that habeas corpus would lie if none is provided.[35]

Under the new Pennsylvania law incapacitation is by penal sentence and the psychiatric examination and report are made part of the post-conviction, pre-sentence procedure, with the result that almost all of the foregoing protections against medical, judicial or administrative abuse are wiped out. The lack of any clearly defined right of the defendant to see, let alone challenge, the pre-sentence report[36] allows a much wider use of unchecked psychiatric and judicial discretion than obtains in sexual psychopath proceedings. The examination of the defendant is to be by a single psychiatrist or by the Department of Welfare, with no special qualifications required,[37] and no requirements as to the throughness of the examination.[38] That there is real danger of abuse here is indicated by a recent investigation of commitments under the Massachusetts Defective Delinquent Act,[39] where the psychiatric examination has sometimes consisted of no more than "superficial questioning" and is "so brief as to point to the conclusion that the defendant's rights are frequently ignored." [40]

As the report of this psychiatric examination is submitted to the judge as a part of the pre-sentence procedure, the defendant probably has no right to see it.[41] Although the Greenstein Act[42] provides that a copy of pre-

35. *See In re* Kemmerer, 309 Mich. 313, 317, 15 N.W.2d 652, 653 (1944) and *In re* Moulton, *supra* note 8 at 375, 77 A.2d at 29: "When and if abuse is shown the courts will be open to remedy it. There may be a vast gulf between the objectives of the act and its actual operation if adequate facilities and personnel are lacking to effect its objectives. But that question is not before us."

36. Williams v. New York, 337 U.S. 241 (1949). *But cf.* Townsend v. Burke, 334 U.S. 736 (1948).

37. ". . . a complete psychiatric examination shall [be] made . . . through the facilities of the Department of Welfare . . . or by a psychiatrist designated by the court . . ." Sex Crimes Bill, *supra* note 1, § 2. Compare the requirements of the alternative sexual psychopath act introduced in the same session of the legislature: "The court . . . shall appoint a board of psychiatrists composed of not less than two nor more than three psychiatrists each of whom shall be holder of a valid and unrevoked physician's and surgeon's licensure certificate who has directed his professional practice primarily to the diagnosis and treatment of mental and nervous disorders for a period of not less than five years . . ." H. Bill 61, § 3(a). This follows the language recommended by a model statute, Note, 96 U. OF PA. L. REV. 872, 885 (1948).

38. Compare the more elaborate procedure of the New York law, N.Y. CRIM. CODE § 661.

39. Gordon and Harris, *An Investigation and Critique of the Defective Delinquent Statute in Massachusetts,* 30 B.U.L. REV. 459 (1950).

40. *Id.* at 466, 497. "Experience and intuition are of great importance to the psychiatrist; they are not a sound basis for lifelong imprisonment." *Ibid.* Compare Kinsey, quoted in CAL. REPORT, *op. cit. supra* note 12, at 118: "I think there is grave danger in the recommendations made by psychiatrists and some other clinicians of transgressing human rights."

41. See note 36 *supra.* The following sentence, proposed by the Advisory Committee on the Federal Rules of Criminal Procedure, was eliminated by the Supreme Court before submission of the rules to Congress: "After determination of the question of guilt the [pre-sentence] report shall be available, upon such conditions as the court may impose, to the attorneys for the parties and to such other persons or agencies having a legitimate interest therein as the court may designate." *Compare*

sentence psychiatric examination there provided for shall be submitted to the defendant, this new law makes no such provision.[43] There is no provision for a hearing on the report, no requirement that the psychiatrist be in court, and any attempt to cross-examine him or produce conflicting expert testimony doubtless would be barred by the doctrine that "no convicted person has a constitutional right to produce proof to try out the issue of what his punishment shall be." [44] The court is not bound by the psychiatric recommendation in deciding whether or not to impose the indeterminate life sentence,[45] nor is any review of its discretion available.[46] Differences in sentencing practices by different judges for the same crimes are very marked,[47] and the circumstances upon which the much more drastic sanc-

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Rule 32(c)(2) *with* SECOND PRELIMINARY DRAFT, ADVISORY COMMITTEE ON RULES OF CRIMINAL PROCEDURE, Rule 34(c)(2) (1944).

42. PA. STAT. ANN. tit. 19, § 1153 *et seq.* (Supp. 1950). See notes 162-163 *infra* and text.

43. "Whenever a court after psychiatric examination of and report on a person convicted of any one or more of the crimes ennumerated in section one of this act shall be of the opinion that it would be to the best interests of justice to sentence such person under the provisions of this act he shall cause such person to be arraigned before him and sentenced to such State institution as shall have been designated by the Department of Welfare in its report to the court." Sex Crime Bill, *supra* note 1, § 5.

Dr. Philip Q. Roche, chairman of the Committee on Forensic Psychiatry of the Group for the Advancement of Psychiatry, regards submission of the psychiatric report to the defendant "as a therapeutic necessity. The defendant cannot possibly participate in his rehabilitation unless he is a party to the same facts in the possession of the psychiatrist or his counsel. Treatment can never be a secret." (Personal communication to the writer, Dec. 26, 1951.)

44. *Ex parte* Boyd, 73 Okla. Cr. 441, 463, 122 P.2d 162, 172 (1942). *But cf.* State v. Harvey, 128 S.C. 447, 454, 123 S.E. 201, 203 (1924) ("Where the liberty of the defendant is concerned and he is to be sentenced by the judge, he has a right that everything appertaining to the case . . . be open and above board and public. . . .").

Compare this summary procedure of the Pennsylvania law with some of procedural protections recently added to the California law. At the hearing "the person shall be entitled to present witnesses in his own behalf, to be represented by counsel and to cross-examine any witnesses who testify against him." Cal. Stat. 1951, c. 448, § 2. The examining psychiatrists must be at the hearing, hear all the testimony, testify themselves and "shall be subject to all legal objections as to competency and bias and as to qualification as an expert." The parties may bring in "any other expert evidence as to the mental condition of the alleged sexual psychopath." If the person is committed after all this he may then demand a new hearing before a jury. Cal. Stat. 1951, c. 677, §§ 1, 2. It is significant that the state which has committed more sexual psychopaths than any other jurisdiction now feels it necessary to invoke so many protections against summary psychiatric and court commitment.

45. See note 43 *supra.*

46. See note 36 *supra.* "Whether the trial court, in fixing a penalty it had power to impose, was influenced by circumstances which ought or ought not to enter into the consideration may not be inquired into by this court, which is not empowered 'to make the punishment fit the crime.'" Bailey v. United States, 284 Fed. 126, 127 (7th Cir. 1922).

47. *E.g.,* sentences imposed on narcotics violators in Federal Courts covered a wide range. In 1948 the Northern District of California gave 26 violators average sentences of 41.5 months; the Southern District of the same state gave 35 defendants average sentences of 18.1 months. FEDERAL PRISONS 81 (U.S. Bur. Prisons 1948). In 1949 average sentences for the same offense ranged from 7.6 months (Mass.) to 48 months (W.D. Ark.). FEDERAL PRISONS 84-86 (U.S. Bur. Prisons 1949).

See also Gaudet, *Differences Between Judges in the Granting of Sentences of Probation,* 19 TEMP. L.Q. 471, 474 (1946).

tion permitted by this act are actually imposed probably will vary widely with different judges. Particularly where sex is concerned, the attitudes of the judges will depend in considerable degree upon their moral and religious outlook and background,[48] and there is real danger that extra-legal considerations will often be the determinative factor. After commitment, failure to provide any treatment would not be grounds for habeas corpus,[49] as it might be under the sexual psychopath laws.[50] Release is solely in the discretion of the Board of Parole,[51] whose determination is final and not reviewable.[52] Because of *Commonwealth ex rel. Banks v. Cain*,[53] the Parole Board has no authority to give a final discharge,[54] and thus a person sentenced under this act and released from prison will remain on parole for the rest of his life[55] unless he can obtain a commutation or pardon.[56] The

48. "On sex cases, the decisions of the judge on the bench are often affected by the mores of the group from which he originated. . . . Their severe condemnation of sex offenders is largely a defense of the code of their own social level . . . [They] come from that segment of the population which is most restrained on nearly all types of sexual behavior, and they simply do not understand how the rest of the population actually lives." Kinsey *et al.*, SEXUAL BEHAVIOR IN THE HUMAN MALE 390-392 (1948).

49. Platek v. Aderhold, 73 F.2d 173, 175 (5th Cir. 1934) ("The court has no power to interfere with the conduct of the prison or its discipline, but only on habeas corpus to deliver from prison those who are illegally detained there.").

50. See note 35 *supra*.

51. Sex Crimes Bill, *supra* note 1, § 8. The bill originally provided for appeal from denial of parole and for a petition for discharge. S. Bill 104, Printer's No. 571, § 10. The provision was eliminated just before final passage and the Board of Parole given "exclusive control."

Compare the proposal of the Michigan Commission that, on failure of the Parole Board to discharge after five years, the prisoner should be able to appeal to the sentencing court, with additional appeals permitted at five years intervals. MICH. REPORT, *op. cit. supra* note 13, at 126. The proposed Wisconsin law would require release not later than the expiration of the maximum term prescribed for the offense for which the prisoner was convicted, unless a new hearing and order is obtained from the committing court. At such hearing the defendant shall have counsel, witness, and a psychiatrist of his own choosing. Wis. Laws 1951, c. 542, §§ 12-15 (proposed).

52. "This petitioner is in legal custody under a valid sentence, and this court cannot review the actions of the Parole Board in denying him a parole . . . neither can we pass on the fairness and impartiality of the hearing he had before the Parole Board." Commonwealth *ex rel.* Biglow v. Ashe, 348 Pa. 409, 410, 35 A.2d 340, 341 (1944).

53. 345 Pa. 581, 28 A.2d 897 (1942).

54. "The fixing of the term of the sentence is exclusively a judicial function. . . . The Board of Parole, therefore, cannot discharge a convict from parole before the expiration of the maximum term for which he has been sentenced. . . ." *Id.* at 589, 28 A.2d at 901. In New York the action of a parole board is a "judicial function," and the board can discharge absolutely those serving an indeterminate sentence. N.Y. CORRECTION LAW §§ 212, 220(3) (Supp. 1951). The board's discretion is absolute; ". . . the statutory scheme is such that no judical review of the merits in any case is possible." Hines v. State Board of Parole, 293 N.Y. 254, 257, 56 N.E.2d 572, 573 (1944).

55. While parole is "an amelioration of punishment, it is in legal effect imprisonment." Anderson v. Corall, 263 U.S. 193, 196 (1923). A parolee under this law would be in lifetime jeopardy of recommitment, not only for commission of a new crime but for violation of parole conditions which have been described as "rules that extend far into the realm of uptopian perfection. The great majority of people in free life do not observe them." Von Hentig, *Degrees of Parole Violation and Graded Remedial Measures*, 33 J. CRIM. L. & CRIMINOLOGY 363, 365 (1943).

same irrational elements that are so likely to given undue emphasis where sex offenses are concerned play their part with parole and pardon boards as well as judges, and will reduce the likelihood of obtaining either of these releases.

Advisability of Special Sex Crime Legislation

The danger of abuse because of these procedural defects is the more serious because of doubts as to the wisdom of any such special sex crime legislation even if careful protection of defendants' rights were assured. Such doubts stem from the very limited extent of present psychiatric knowledge about sexual deviation. Under both the Pennsylvania law and the sexual psychopath statutes the legislative standards employed to delimit the class of individuals who are to be subjected to indefinite confinement are necessarily vague. Thus the New Hampshire Act defines a sexual psychopath as "any person suffering from such conditions of emotional instability or impulsiveness of behavior, or lack of customary standards of good judgment, or failure to appreciate the consequences of his acts, or a combination of any such conditions, as to render such person irresponsible with respect to sexual matters and thereby dangerous to himself or to other persons." [57] The Pennsylvania act, while not becoming enmeshed in an attempt to define a medical term about which there is no medical consensus,[58] is almost as vague; the indeterminate life sentence is to be invoked whenever "the court is of the opinion that any such person if at large constitutes a threat of bodily harm to members of the public or is an habitual offender and mentally ill." [59] Such a standard is so broad that, coupled with the very limited opportunities for judicial review already noted, it could include almost anyone convicted of one of the specified offenses.[60] If any precision can be given this legislative grant of power, and if any limits are to be imposed upon the discretion given the court, they must come from psychiatry. Both methods of legislation are trying to find the same type of dangerous potential recidivist by the same diagnostic means, and both depend for their efficacy upon accurate psychiatric examination, diagnosis and prognosis. If there are no clearly defined medical standards of identification, this legislation opens the way to abuse and serious infringement of individual liberty. Unless there is scientifically sound and practically available treatment the new laws merely substitute for the definite penalties otherwise applicable an indefinite custody terminable only

56. A commutation of pardon can be granted by the Governor only upon recommendation of at least three members of the four member Board of Pardons, consisting of the Lieutenant Governor, Secretary of the Commonwealth, Attorney General and Secretary of Internal Affairs. PA. CONST. Art. IV, § 9.

57. N.H. Laws 1949, c. 314. *See In re* Moulton, *supra* note 8, at 374, 77 A.2d at 2 (part of this definition "may mean all things to all men and entirely different things to different groups of men").

58. See text at notes 70-71 *infra.*

59. Sex Crimes Bill, note 1 *supra,* § 1.

60. See notes 23-28 *supra.*

by secret, unreviewable administrative discretion. But this legislation is important not only because it attempts to grapple with one of the most puzzling problems in criminal behavior. As an essentially preventive law which measures incapacitation not by past criminal conduct but by an estimate of potential future social dangerousness, the practical problems it raises are of the profoundest significance for the future of the criminal law.

Premises of this legislation.—Three assumptions are implicit in the adoption of such legislation, and the wisdom of both the sexual psychopath statutes and of the new Pennsylvania law depends upon their validity. *First,* both the growing public awareness of sex criminality and a belief that it is increasing have led to the widespread conviction that the threat to social security from the presence of potential sex offenders at large in society is not being met by present legislation and that new security measures are required. *Second,* the legislation assumes that persons likely to commit serious sex crimes in the future can be identified by psychiatric examination. *Third,* it assumes either a present ability to treat and cure sex deviates, or, if incurable, that such sex deviates should be permanently segregated because they constitute a particularly dangerous class of potential offenders. These assumptions are the basis of both the Pennsylvania law and the sexual psychopath statutes, and in examining them both types of legislation will be treated together. It is submitted that these premises are invalid, that such legislation is inadvisable in the absence of more knowledge about sex deviations, and that therefore the new Pennsylvania law should either be cautiously and sparingly employed by the courts, or repealed..

1. Prevalence of Sex Crimes.—More than any other type of crime, sex violations frequently are not reported to the police because of the victim's desire to avoid unsavory notoriety.[61] The excessive publicity given this type of crime undoubtedly has impeded effective enforcement of the law; families of child victims in particular may well hesitate before subjecting the victim to an ordeal of investigation, publicity and trial that could inflict greater psychological damage than the original molestation.[62] But judging by reported offenses and conviction rates, there is no substantial rise in sex crimes measured in proportion to population or to other forms of crime. Recent investigations emphasize two facts: (1) Genuine sex murder is very rare. The nationwide publicity accorded each such offense creates a "crime-wave-by-association" which leads the public to mistake "waves of news for waves of crime."[63] There are very few "sadistically

61. See CAL. REPORT, *op. cit. supra* note 12, at 26 (disparity between actual and and reported sex crimes believed very large).

62. Kinsey believes that parental and public reaction to molestation often does more psychological damage than the offender himself. See *id.* at 121.

63. Levy, *Interaction of Institutions and Policy Groups: The Origin of Sex Crime Legislation,* 5 LAW. & L. NOTES 3, 5 (1951). Levy quotes a Connecticut newspaper: "The fearful memory of tiny Joyce Glucoft *of Los Angeles* remains strongly implanted in parents' minds. No, we don't want a repetition of that brutal slaying *in the New Haven area." Ibid.* (emphasis added). Thus a single crime may be enough to touch off the legislative machinery. See Legis., 29 NEB. L. BULL. 506 (1950).

inclined, extremely assaultive sex deviates, who commit personal crimes of great violence." [64] Sutherland's study of murders of females found that the great majority were perpetrated by the victim's husband, suitor, father or other close relative; only 17 out of 324 cases involved rape or suspicion of rape.[65] (2) Other sex offenses form a very small proportion of reported crime, and studies in a number of states all conclude they are either decreasing or have shown no marked or disproportionate increase.[66] In Pennsylvania the conviction rate for all sex crimes per 100,000 population dropped from 20.2 in 1939 to 17.0 in 1949; the conviction rate for rape (both statutory and common law) for the same years has decreased from 3.7 to 1.8.[67] Convictions for sex crimes for the years 1939-1948 ranged between 7.3% and 9.8% of all criminal convictions, and in 1948 were 8%.[68]

To the extent, then, that public demand for additional sex crime control measures stems from belief that serious sex crimes are very common or are increasing, it is mistaken. The growing concern rather appears to be the product of newspaper publicity. Such a concern is valuable so far as it speeds research and experimental work in the diagnosis and treatment of sex deviates, and promotes reexamination of existing criminal machinery. But such an exaggerated concern about the relatively rare violent sex crime should not be the premise of sweeping legislation covering the whole field of sexual deviations and criminality.

2. Diagnosis of Dangerous Sex Deviates.—The examination of sex offenders under both types of legislation is designed to weed out and incapacitate those who appear most likely to recidivate. "Accurate identification of the dangerous sex offender before he has committed an atrocious crime constitutes the core of the problem," the Massachusetts Commission reported, adding, "We cannot overemphasize the difficulties of such identification." [69]

It is highly significant, therefore, that the present ability of psychiatry to assume this awesome responsibility is vigorously challenged within that profession itself. This is evident, first, in professional dislike of the statutory terminology [70] and reluctance to use the term "psychopath" because

64. MICH. REPORT, *op. cit. supra* note 13 at 4. See N.J. REPORT, *op. cit. supra* note 9, at 14 (most such offenders are insane).

65. Sutherland, *The Sexual Psychopath Laws,* 40 J. CRIM. L. & CRIMINOLGY 543, 545 (1950). Sutherland used as a sample all reports of murders of females reported in the New York Times for the years 1930, 1935 and 1940.

66. SPECIAL COMM. INVESTIGATING THE PREVALENCE OF SEX CRIMES, FINAL REPORT, MASS. H. Doc. No. 2169 at 4, 5 (1948) (proportion of sex crimes to all crimes uniform since 1900); [NEW YORK CITY] MAYOR'S COM. FOR STUDY OF SEX OFFENSES 10 (1943) (no wave of sex crimes in nineteen-thirties); CAL. REPORT, *op. cit. supra* note 12, at 72; MICH. REPORT, *op. cit. supra* note 13, at 4; Braude, *supra* note 11, at 17 (no recent increase in Chicago); Levy, *supra* note 63, at 4.

67. SEX OFFENDERS, REPORT, JT. STATE GOV'T COMM. TO PA. GEN. ASSEMBLY 1 (1951).

68. *Id.,* at 12, 13.

69. MASS. REPORT, *op. cit. supra* note 66, at 6, 7.

70. Although "sexual psychopath" is used in most of the statutes, it is not used by the N.J. Diagnostic Clinic; see PSYCHIATRIC CHARACTERISTICS OF SEX OFFENDERS,

it "has been used indiscriminately and because it is difficult to define with precision." [71] But this imprecision goes much deeper than mere terminology and is symptomatic of disputes and uncertainties among psychiatrists [72] that cannot but raise serious misgivings about these statutes. Thus the Michigan Commission reports that a study of "more than 500 books and articles" from the professional literature "does little more than to make glaringly apparent the present confused state of psychiatric, psychological and sociological theory in the sex deviation field." [73] A poll of "75 prominent psychiatrists" conducted by the New Jersey Commission indicated that a majority agreed "that there is no substantial agreement among medical authorities as to the characteristics of sexual psychopathy," and that "our conceptions of the sexual psychopath are varied and confused and . . . are not clear enough to constitute a good foundation for legal enactments." [74]

This poll further reveals "a consensus that it is impossible to predict the occurrence of serious crime with any accuracy." [75] Some of these psychiatrists thought they could be 75% to 90% accurate in predicting future criminality among sex deviates; but others thought they could make a definite prognosis in only 5% of the cases, and "a number of the authorities expressed the belief that no accurate prediction could be made at all." [76] It is no wonder that Ploscowe believes that the basic difficulty is "trying to get at a category of individuals . . . who are elusive even to the psychiatrists." [77]

Yet under such statutes, and under the new Pennsylvania law, a man's liberty, perhaps for the rest of his life, hangs upon the result of investigations beset by "treacherous uncertainties in the present state of psychiatric knowledge." [78] Clearly the prognosis in any given case may turn upon which school of psychiatry claims the particular examiner's allegiance, or whether the examiner believes himself 90% accurate or is one of those humbled by doubts about psychiatry's ability to prejudge future criminality.

N.J. DEPT. OF INSTIT. & AGENCIES (1950). The clinic found a wide variety of psychological types, including 27.6% "situational" or normal offenders. See also Tappan, *supra* note 2, at 33.

71. REPORT ON STUDY OF 102 SEX OFFENDERS AT SING SING PRISON 5 (1950). For 29 different definitions of sexual psychopathy by various authorities see N.J. REPORT, *op. cit. supra* note 9, at 40-42. Thus institutional psychiatrists vary widely in their diagnoses; one psychiatrist at Illinois State Prison diagnosed 98% of the inmates as psychopathic personalities, while another in a similar institution found only 5%. Slough and Schwinn, *The Sexual Psychopath*, 19 U. OF KANS. CY. L. REV. 131, 138 n. 24 (1951).

72. "Psychiatric knowledge *and* terminology are in a state of flux." COMM. ON FORENSIC PSYCHIATRY, *op. cit. supra* note 9, at 1 (emphasis added).

73. MICH. REPORT, *op. cit. supra* note 13, at 38.

74. N.J. REPORT, *op. cit. supra* note 9, at 57, 58.

75. *Id.* at 14.

76. *Id.* at 58.

77. PLOSCOWE, SEX AND THE LAW 228 (1951).

78. Solesbee v. Balkcom, 339 U.S. 9, 25 (1950) (dissenting opinion of Mr. Justice Frankfurter).

And under this Pennsylvania law only the psychiatrist selected by the court or the Department of Welfare, who will usually be a state employee, is to make a determination of a problem "the answers to which are as yet so wrapped in confusion and conflict and so dependent on elucidation by more than one-sided partisanship." [79]

That such "treacherous uncertainties" have been made the basis of legislation frought with peril to individual liberty is to be deplored. When "psychiatrists have no diagnostic instruments or criteria by which to arrive at demonstrable conclusions," [80] the decision of whether or not to impose the added sanction of an indeterminate life term for crimes that would otherwise carry maximum imprisonment of as little as two years [81] may rest on nothing more than a moral judgment unaided by legislative standards. In the arena of what constitutes morally permissible sexual behavior the divergences are even greater than those that separate the differing psychiatric schools of thought.[82]

3. Treatment and Cure.—The concomitants of conflicting diagnostic theories are even greater uncertainties about the cure of sexual deviations, and special sex offender legislation glibly assumes a treatment program which is totally unavailable at the present time.[83] "Little more about how these individuals can be cured is known and available in practical terms than is known about cancer." [84] Varying views of the causes of homosexuality and other sexual deviations result in contrasting opinions about the means and possibility of treatment,[85] one authority noting that "so far all these ideas are still unproven theories." [86] The most promising approach appears to be the psychoanalytic,[87] but Bowman warns that "at the present time it must be admitted that the results of treatment are, on the whole, unsatisfactory. . . . All the standard techniques of psychotherapy have been used in the treatment of sex offenders without a very impressive

79. *Ibid.* The reference is to a determination of insanity, and would be even more applicable to a determination of sexual psychopathy, where there is much greater professional controversy.

80. Sutherland, *supra* note 65, at 551.

81. See note 24 *supra.*

82. ". . . ideal sex behavior may mean to one religious group heterosexual relations within marriage; to another religious group it may mean only heterosexual relations for procreation within marriage. It is doubtful if physicians, including psychiatrists and biologists, would all agree as to what is healthy sex behavior." Bowman, *The Problem of the Sex Offender,* 108 AM. J. PSYCHIATRY 250 (1951).

83. The Pennsylvania law is to provide "the better administration of justice and the more efficient punishment, treatment and rehabilitation" of the persons so sentenced. Sex Crimes Bill, *supra* note 1, § 1. The Department of Public Welfare is authorized to establish psychiatric clinics, or use its existing facilities "for the examination, diagnosis and treatment" of such persons. *Id.,* § 6.

84. FEDERAL PRISONS 4 (U.S. Bur. Prisons, 1949).

85. See Bowman, *supra* note 82, at 251-256.

86. *Id.* at 252-253.

87. See Tappan, *supra* note 2, at 34n; STUDY AT SING SING PRISON, *op. cit. supra* note 71, at 15 (half of group classified as treatable); FEDERAL PRISONS 4 (U.S. Bur. Prisons, 1949).

result." [88] Davidson believes that "cures, if any, must be extremely rare. The demand, therefore, that these offenders be 'treated' is still a sterile one. . . . Perhaps it is time to confess that this is an area in which we may have been overselling psychiatry." [89]

Theoretical difficulties aside, intensive psychiatric treatment is completely unfeasable under the Pennsylvania indeterminate sentence bill. Such treatment is long and expensive, and neither the institutional facilities nor the medical personnel are available. In New York the state budget provides for psychiatrists in correctional institutions, but "the majority of such positions are vacant, simply because the men are not available to fill them." [90] A large professional staff would be required for an adequate program; [91] psychiatrists answering the New Jersey Commission's poll estimated one doctor for every 23 patients would be desirable.[92] There were 1,236 commitments of sex offenders to Pennsylvania prisons and county jails in 1948-1949.[93] Even if the Legislature should appropriate sufficient funds to provide the personnel and facilities for effective treatment of whatever substantial proportion of that number might be sentenced under this act, the state correctional institutions would have to compete with public and private hospitals and a lucrative and under-staffed private practice to obtain the doctors.[94]

It is not surprising, therefore, that none of the states with sexual psychopath commitment laws has evolved a treatment program.[95] The mental hospitals to which many are sent "lack the space, the personnel, the treatment methods, or even the desire to handle deviated sex offenders who are non-psychotic," [96] and hospitalization under these statutes has been characterized as "an indefinite and purely custodial confinement,

88. Bowman, *supra* note 82, at 256. See Kinsey, quoted in CALIF. REPORT, *op. cit. supra* note 12, at 107 (no known psychiatric treatment for complete homosexuals).

89. Davidson, *Comment on Legislation Dealing with Sex Offenders,* 106 AM. J. PSYCHIATRY 390 (1949).

90. STUDY AT SING SING PRISON, *op. cit. supra* note 71, at 28.

91. Prison psychiatrists must interview all new prisoners, participate in classification and disciplinary procedure, prepare reports on prisoners coming up for parole and handle routine paper work. Little time is left over for treatment unless a very large staff is contemplated. Thus San Quentin Prison's five psychiatrists are able to devote only one quarter of their time to treatment. The staff there "tried to give" group therapy to sexual psychopaths; "We see 20 men in a group, giving one hour a week for 10 weeks during one year. This gives each man only 10 hours a week of group therapy, which is much less than a minimum treatment for these problems." Schmidt (Chief Psychiatrist at the prison), quoted in CALIF. REPORT, *op. cit. supra* note 12, at 173-174.

92. N.J. REPORT, *op. cit. supra* note 9, at 59.

93. Figures compiled from Annual Statistical Reports, Pa. Dep't of Welfare, for 1948, 1949.

94. In August 1949 there were only 202 members of the American Board of Psychiatry and Neurology in Pennsylvania. PA. REPORT, *op. cit. supra* note 67, at 12.

95. N.J. REPORT, *op. cit. supra* note 9, at 15.

96. *Id.* at 16.

behind bars." [97] The California hospital to which a majority of that state's sexual psychopaths are committed has eight doctors for 8,000 patients, and it goes without saying that there is no "treatment." [98] The inability and unwillingness of the mental hospitals to treat, and the undesirability of mixing such deviates with psychotics,[99] no doubt accounts for the preference of some states for custody in prison.[100]

To the extent that the object of this legislation is the frankly incapacitative one of keeping potentially dangerous recidivists off the streets, such prison custody is logical. But at least part of the rationale of these laws is that a dangerous sex offender is the victim of a mental disorder, and that his repetitive compulsive behavior [101] is of such urgency as to obscure the deterrent effect of legal sanctions.[102] So far as the standard of diagnosis is a mental disorder and an alleged objective is medical treatment, confinement in prisons is an anomaly.[103] Present facilities for treatment in penal institutions are virtually non-existent,[104] and the mechanics of setting up an adequate prison psychiatric facility are probably more difficult to accomplish than in a non-penal institution.[105] Prison confirms existing sexual deviations and breeds new abnormalities,[106] and the atmosphere is hostile

97. Davidson, *supra* note 89, at 390.

98. CALIF. REPORT, *op. cit. supra* note 12, at 97.

99. Tappan, *supra* note 2, at 34.

100. Besides the New York and Pennsylvania statutes, see similar laws proposed in Wisconsin, *supra* note 21, and Michigan (MICH. REPORT, *op. cit. supra* note 13, at 126).

101. The New York study found an unconscious behavior rooted in "the uniformly bad childhood" of all 102 cases. ". . . they are immature and underdeveloped emotionally and sexually. Thus they often seek out small children as objects of sexual attention. Without their even being aware of it, inasmuch as the mechanism responsible for their present behavior is unconscious and the events themselves often forgotten, they in effect now commit upon others the cruelties and rejections that they experienced in childhood. . . . This uniform factor [emotional deprivation in childhood] is of great significance if society seeks to prevent the development of criminal behavior, rather than deal with offenders in prison after they have committed crimes." STUDY AT SING SING PRISON, *op. cit. supra* note 71, at 6.

102. FEDERAL PRISONS 3 (U.S. Bur. Prisons, 1949).

103. Many psychiatrists thus oppose imprisonment for sex offenders. "The Committee is unreserved in its conviction that the committed sex offender should be actively treated in a non-penal institution. . . . The stigma of sex offense officially attached to the sex offender committed to a penal institution creates a formidable obstacle to treatment." COMM. ON FORENSIC PSYCHIATRY, *op. cit. supra* note 9, at 3. See Bowman, *supra* note 82, at 256.

104. See note 91 *supra*. See also MICH. REPORT, *op. cit. supra* note 13 at 89 (one psychiatrist to cover all state correctional institutions). Three Pennsylvania prisons visited by the writer lack the staff to handle more than routine or emergency care.

105. STUDY AT SING SING PRISON, *op. cit. supra* note 71, at 28 (inability to get psychiatrists for correctional institutions attributed to inmate resistance to psychiatrists, isolation of institutions, comparatively poor pay, inability to do intensive work).

106. WILSON AND PESCOR, PROBLEMS IN PRISON PSYCHIATRY 262 (1939). For a description of the effect of the woman-less environment, see *id.* at 48; Karpman, *From the Autobiography of a Bandit*, 36 J. CRIM. L. & CRIMINOLOGY 305, 313 (1946).

to treatment.[107] The rehabilitation program of a prison often conflicts with the demands of secure custody, and custody comes first.[108] This dilemma is particularly acute with a deviated sex offender, because the psychiatric treatment he needs requires his cooperation and full confidence.[109] "Certainly his being thrown into a maximum security jail is not conducive to such a state of mind." [110]

These obstacles which the prison environment raises against psychotherapy[111] and the inability to provide personnel and facilities raise important questions about the policy behind this legislation. If treatment and attempted cure are really major objectives, then a special non-penal institution where such care can be given in the necessary "neutral environment" [112] may be desirable when medical knowledge is sufficiently advanced to offer reasonable hope of some success. To legislate as if treatment could be given now in the prisons merely embitters the offenders, many of whom sincerely desire help,[113] but has the effect of making more palatable to the public the drastically increased sanction of indeterminate life terms for sex offenders.

4. Permanent Incapacitation.—There remains the alternative assumption that at least some members of the given class of sex offenders, regardless of whether or not they can be treated and cured, should be segregated permanently.[114] Undoubtedly this is a major objective of the Pennsylvania bill, and there would be little dispute with the contention that some sex offenders are so potentially dangerous as to require such drastic treatment. But there is a major obstacle to the wise administration of such an incapacitative program, resulting from the presently inadequate identification and diagnostic techniques of psychiatry. Yet a court, unless it is to rely upon "common sense hunches," must in any given case largely depend upon this inadequate and uncertain psychiatric prognosis. It would seem almost inevitable, therefore, that the selection of those to be indefinitely confined will embrace the non-dangerous along with the dangerous. The

107. "Sexual abnormality is probably one of the most difficult problems to cope with in prisons today. . . . Practical reformation of this type cannot be accomplished in the generally demoralizing atmosphere of a prison, where even the personality of the normal or near normal has a distinct tendency toward disintegration. . . ." Wall and Wylie, *Institutional and Post-Institutional Treatment of the Sex Offender,* 2 VAND. L. REV. 47, 50 (1948).

108. WILSON AND PESCOR, *op. cit. supra* note 106, at 41.

109. Werthem, *Psychiatry and the Prevention of Sex Crimes,* 28 J. CRIM. L. & CRIMINOLOGY 847, 849-850 (1938); STUDY AT SING SING PRISON, *op. cit. supra* note 71, at 15.

110. Hirning, *The Sex Offender in Custody,* HANDBOOK OF CORRECTIONAL PSYCHOLOGY 233, 255 (Lindner & Seliger ed. 1947).

111. STUDY AT SING SING PRISON, *op. supra* note 71, at 22.

112. Hirning, *supra* note 110, at 255.

113. ". . . very few of them [sex psychopaths] are satisfied with their socially unacceptable behavior, and are anxious and willing to take treatment to work out their mental, emotional and psychosexual problems." Schmidt, quoted in CALIF. REPORT, *op. cit. supra* note 12, at 174.

114. See Cal. Stat. 1951, c. 448 §§ 1, 2 (amending California law to permit such incapacitation even when cure impossible).

imperfections of parole selection [115] and the general reluctance to parole sex offenders may often perpetuate errors made in the original examinations.

In the hands of a wise judge and competent psychiatrists, who are aware of the dangerous limitations which underlie an authoritative-sounding prognosis, such a selection might be made today without too great risk of individual injustice. But this law may be administered by other judges who will not be so sparing and careful in its use. At times when the community has been aroused by a particularly brutal sex crime, sex deviates coming up for possible sentence may not receive wholly objective analysis and judgment. The examining psychiatrist, who will often be a state employee, may not be preeminent in his profession. It is unlikely, therefore, that clear standards will be developed to be used in distinguishing the particular offenders who are to be detained for life or prolonged periods of imprisonment.

The only justification for a legislative policy which is likely to operate so unequally among members within the given class of offenders is a belief that the entire class of sex offenders are sufficiently dangerous so that the necessity for their incapacitation outweighs the individual injustices which will result from inaccurate identification.[116] But comparative figures on recidivism reveal little support for a theory that sex offenders are particularly likely to commit new crimes. First, except for traffic violators, those arrested for sex offenses are less likely to have a prior criminal record than any of the other 27 criminal offense classifications tabulated in the Uniform Crime Reports.[117] New York City's study found 61% of the sex offenders had no prior records, and only 9% had a previous conviction of a sex offense.[118] This would indicate that, even if all sex offenders were permanently incapacitated under the Pennsylvania law, it would remove no more than a minority, perhaps a very small minority, of tomorow's sex offenders.[119]

Second, there is strong evidence that sex offenders do not usually "progress" from minor to more serious sex criminality. Sex crimes include many types of conduct: forcible rape, homosexuality, carnal abuse, and exhibitionism may be almost unrelated one to another. The causation of each and the type of individual involved vary markedly, and where there is

115. Monachesi, *American Studies in the Prediction of Recidivism*, 41 J. CRIM. L. & CRIMINOLOGY 268, 289 (1951) ("The effective prediction of recidivism is still to be attained"). *But cf.* Glueck, *Pre-sentence Examination of Offenders*, 41 J. CRIM. L. & CRIMINOLOGY 717, 728 (1951) (effective use of recidivism prediction tables is probably "beyond the stage of mere speculation").

116. See Glueck, *Principles of a Rational Penal Code*, 41 HARV. L. REV. 453, 469 (1928).

117. 19 UNIFORM CRIME REPORTS 119 (U.S. Dep't Jus. 1948); 20 UNIFORM CRIME REPORTS 117 (U.S. Dep't Jus. 1949); 21 UNIFORM CRIME REPORTS 112 (U.S. Dep't Jus. 1950).

118. N.Y. CITY REPORT, *op. cit. supra* note 66, at 11. This figure included statutory rape. Percentages of those arrested who had no prior record, by specific offenses, were sodomy (58%), incest (57%), carnal abuse (53%) and forcible rape (48%). *Id.* at 90, 91.

119. MICH. REPORT, *op. cit. supra* note 13, at 23.

recidivism it usually remains within one particular type of offense.[120] Thus the Michigan Commission believes that "the rapists and child attackers of the future will come in the main not from today's minor sex offenders" but from maladjusted children and youths, "many of whom have not yet committed a sexual offense of any kind." [121]

Third, those who have served a prison term for a sex offense are less likely to commit a subsequent criminal offense than most other criminal types. A pioneer study of the records of more than 90,000 parolees from 74 institutions showed that sex offenders had a more favorable parole outcome than any other offense classification.[122] Subsequent investigations have confirmed that sex offenders have a much better than average record on parole.[123] In Michigan "they have less than half the percentage of failures on parole (16.3%) that non-sex parolees have (34.1%)" [124] and of the sex offenders who failed, nearly half were returned to prison for technical violations of parole regulations; only 3.5% of the entire group of sex crime parolees had their paroles terminated because they committed another sex crime.[125] Studies of non-parole releases show similar results, and the New York City Committee regarded its figures as "convincing proof that sex crime is not habitual behavior with the majority of sex offenders." [126]

There are several explanations of this phenomenon, which is particularly interesting in view of the consensus that imprisonment worsens rather than cures sex deviations. One is that many offenders probably continue their illegal practices but avoid a second detection.[127] This is often true of consensual sodomists; indeed, in private practice "the treatment applied to the sex deviate by many psychiatrists is designed to help him accept his peculiarity without guilt feelings and to be more discreet in its expression." [128] But there is no form of "discreet expression" for forcible rape or carnal abuse, and in many cases it would seem that the only explanation for the low rate of recidivism is that many sexual deviations are transitory and self-curing. Such cure has been attributed to marriage,[129] or a

120. *Id.* at 4; N.Y. CITY REPORT, *op. cit. supra* note 66, at 11; Bowman, *supra* note 82, at 251; Selling, *The Extra Institutional Treatment of Sex Offenders*, HANDBOOK OF CORRECTIONAL PSYCHOLOGY 226, 227 (Lindner & Seliger ed. 1947).

121. MICH. REPORT, *op. cit. supra* note 13, at 23.

122. 4 ATTORNEY GENERAL'S SURVEY OF RELEASE PROCEDURES 424, table xxxix at 425-427 (1939).

123. Schnur, *Prison Conduct and Recidivism*, 40 J. CRIM. L. & CRIMINOLOGY 36, 38 (1949); CAL. REPORT, *op. cit. supra* note 12, at 112, 136.

124. MICH. REPORT, *op. cit. supra* note 13, at 34.

125. *Id.* at 224 (table 22).

126. N.Y. CITY REPORT, *op. cit. supra* note 66, at 93 (of 555 sex offenders convicted in 1930, 66% had no subsequent police record through 1942; only 7% had subsequent arrest for sex offense); Selling, *supra* note 120, at 227.

127. This is not difficult for the usual homosexual, particularly in large cities. PLOSCOWE, *op. cit. supra* note 77, at 209. But blackmail can be a real danger; New York in 1940 uncovered a ring of blackmailers who had been operating for 20 years, extorting up to $85,000 from their victims in return for silence. *Ibid.*

128. N.J. REPORT, *op. cit. supra* note 9, at 15.

129. Braude, *supra* note 11, at 19 (marriage stabilizing influence); Selling *supra* note 120, at 230 (but unhappy marriage may confirm deviation).

"spontaneous" transition from perverse to heterosexual activity.[130] The fact that most sex offenses are committed by youths or young men gives added support for this theory.[131] The prolonged imprisonment which this indeterminate sentence bill makes possible may well prevent such self-cures where they would otherwise occur.[132]

There is serious danger here of the social waste and individual tragedy of needless segregation in prison. Parole boards are cautious about releases, and tend to be especially reluctant to parole sex offenders [133]—a reluctance which, in view of the sex offender's parole outcome record, is indicative of the same irrational attitude noted above.[134] In its determinations of whom to parole, such a board is naturally guided largely by the offender's past conduct, but such a test in inappropriate if there is a tendency to self-cure.

Another probable form of abuse of the option permitted by this statute is the tendecy seen in the sexual psychopath statutes jurisdictions to commit minor varieties of sex deviates. Before the New Jersey law was narrowed, "it [was] almost entirely the minor sex cases that [were] getting attention." [135]

Two Michigan cases illustrate the danger of such abuses. In *People v. Chapman* [136] the defendant was charged with an act of gross indecency with another male, and was confined for treatment "until fully and permanently recovered." As he appears to have been a confirmed homosexual for whom there is no present cure, his confinement could be lifelong. The commitment was based on a medical report, set forth in the foonote,[137] which assumed as the basis of the unfavorable prognosis (1) that consensual

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130. Glover, *The Social and Legal Aspects of Sexual Abnormality*, 13 MEDICO-LEGAL REV. 3 (1945).

131. Braude, *supra* note 11, at 19; N.Y. CITY REPORT, *op. cit. supra* note 66.

132. "The substitution of normal heterosexual relations is necessary before such a cure can be accomplished, and this is impossible in prison." WILSON AND PESCOR, *op. cit. supra* note 106, at 262.

133. For four of the five years 1946-1950 paroles granted by the U.S. Board of Parole show a much lower percentage of sex offenders given parole than non-sex offenders; this applied to both civilian and military prisoners. See tables, "Parole Releases by Offenses," in FEDERAL PRISONS for the years indicated (U.S. Bur. Prisons).

In Michigan sex offenders serve "considerably higher percentages of their total sentences than do non-sex offenders," and most "were released only at the end of their maximum sentences." MICH. REPORT, *op. cit. supra* note 13, at 34, 36.

134. See note 48 *supra*.

135. N.J. REPORT, *op. cit. supra* note 9, at 29, 30.

136. 301 Mich. 584, 4 N.W.2d 18 (1942).

137. "The prognosis in the near future appears to be unfavorable. He must be considered a distinct sexual menace and a source of serious concern in a free community not only because of his homosexual practices but also his psychosexual deviation is very likely to assume a much more ominous manifestation, that of pedophilia (the use of children as sexual objects). *Although denying any advances toward children, that possibility must be gravely considered.* There is little likelihood that his desire for sexual gratification by abnormal methods can be overcome soon and further activity of a similar nature may be expected if he is allowed freedom of access in a free community. Segregation in an appropriate institution for the treatment of disorders appears to be definitely indicated." *Id.* at 593, 4 N.W.2d at 22 (emphasis added).

sodomists progress to the crime of child-abuse, and (2) that if left free he would continue his homosexual activity. The first is false except in very rare instances, and while the second is probably correct, if all homosexuals like Chapman were similarly committed, the construction of enough prisons to hold them would absorb all the facilities of the building trades.[138]

The kind of "treatment" Chapman probably received is set forth in *In re Kemmerer*[139] and *Kemmerer v. Benson*.[140] There the defendant had been charged with indecent exposure, a misdemeanor with a maximum imprisonment of one year. He was committed as a criminal sexual psychopathic person in 1941 and transferred to the state prison "for observation, care and treatment, so to remain until he had fully and permanently recovered."[141] In his petition for habeas corpus he alleged that "the sole distinction between his status and that of an ordinary convict is that he is called a 'visitor' . . . and that he is kept in a separate cell block used exclusively for criminal sexual psychopathic persons. He claims that his visit has been prolonged. . . ."[142] Although he was thus being treated in every respect like any other prisoner, the Supreme Court of Michigan solemnly found "that he is not being punished, that he is an unfortunate psychopath and that he is entitled to such treatment as his condition requires."[143] Seven years after his commitment this "visitor" charged with the least dangerous of sex offenses was still trying in vain to obtain release from the state prison.[144]

138. When a California legislator suggested that if confirmed homosexuals are incurable, prison is "the only place for them," Kinsey pointed out that there were 160,000 such individuals in that state, and another 160,000 who are nearly completely homosexual. "That means that you are thinking in terms, if your law is to be efficiently enforced and justly administered—you are thinking in terms of tens and hundreds of thousands of individuals." CAL. REPORT, *op. cit. supra* note 10, at 113.

Applying Kinsey's ratios to Pennsylvania, it has been said that there were at least 2,275,760 male sexual deviates in the state in 1940. PA. REPORT, *op. cit. supra* note 67, at 12. That figure is very misleading; it includes all males who *at any time* have ever committed a deviational act. But it is indisputable that incarceration of all incurable homosexuals would be completely impracticable.

139. 309 Mich. 313, 15 N.W.2d 652 (1944).

140. 165 F.2d 702 (6th Cir. 1948). These cases involved the same individual.

141. *Ibid.*

142. *In re* Kemmerer, *supra* note 139, at 317, 15 N.W.2d at 653.

143. *Id.* at 318, 15 N.W.2d at 653.

144. Kemmerer v. Benson, *supra* note 140. The New Hampshire Supreme Court recently sustained the application of that state's sexual psychopath statute in a case of consensual sodomy with two boys 14 and 16 years old. *In re* Mundy, 85 A.2d 371 (N.H. 1952). The two defendants were arrested after being implicated by the alleged victims who were being interrogated by police on another charge. At least one of the alleged victims had a reform school record for auto theft and had been in other difficulties; according to their charges both had consented to repeated homosexual acts with the defendants over a period of time. [Record 8-10.] Instead of being prosecuted on this accusation, defendants were charged as, and found to be, sexual psychopaths. The finding was based on (1) the allegations of the alleged victims and (2) the conclusions drawn by the examining board from the fact that the two defendants had shared the same hotel room and bed. The defendants denied homosexual acts, either with the alleged victims or with one another. The court accepted these hearsay allegations of controverted facts as the basis of the finding because "their commitment is not looked upon as sentence or punishment" and "the sexual psychopath [is] benefited by protection and treatment." *In re* Mundy, supra at 374.

Problem of homosexuality.—The inclusion in the indeterminate sentence law of persons convicted of sodomy and solicitation to commit sodomy makes possible the imposition of indeterminate life terms upon homosexuals like the defendants in *People v. Chapman.* Sodomy laws are very seldom enforced against adults engaging in homosexual practices by mutual consent; it has been estimated that "6 million homosexual acts take place each year for every 20 convictions." [145] The few prosecutions are usually the result of pure chance, spite informers, or an unsuccessful attempt to terminate blackmail. The impossibility of general enforcement of the sodomy law and the resulting disproportionate hardship upon the few who happen to be punished has led to the suggestion that legal prohibitions against private consensual adult homosexuality should be eliminated.[146] Wholly aside from the merits of such a proposal, such a change is so politically unlikely that it can be assumed that it will continue to be a crime; but the trend should be to reduce rather than increase the already heavy sanction against consensual sodomy (ten years). Thus New York has recently divided the crime of sodomy into degrees, making the gravity of the offense turn upon whether or not force is employed against the victim. Where no force is employed and persons under 18 are not involved, the offense is third degree sodomy, which is only a misdemeanor.[147]

A law which makes life imprisonment even remotely possible for a few consensual sodomists, whose activities are not different from those engaged in by millions of other persons, offend both basic concepts of justice and the policy considerations which should guide the criminal law. If the objective of so severe a penalty is to obtain retribution for conduct offensive to public morals, then such a sanction is out of all proportion to the injury; in any case such retributive ends of the criminal law should be minimized.[148] If the objective is deterrence, it will be ineffective with confirmed homosexuals, who are no more likely to be deterred from sexual gratification by the law than are unmarried heterosexually inclined males deterred by the statutory rape, fornication and adultery statutes. In general the deviates whom this law seeks are not deterable; they "understand the penalties but these are outweighed or obscured to the point of irresponsibility by the urgency of their desires and drives.' [149]

It is further questionable how much of a *legal* sanction is required to deter potential homosexuals and to strengthen individual resistance to widespread latent or occasional homosexuality. This situation is different from traffic law enforcement, where there also are scores or hundreds of violations for every arrest. There, spot-check enforcement has deterrent value

145. COMM. ON FORENSIC PSYCHIATRY, *op. cit. supra* note 7, at 2.

146. Deutsch, *Sober Facts About Sex Crimes,* Collier's, Nov. 25, 1950, p. 15. *But cf.* Schwartz, Book Review, 96 U. OF PA. L. REV. 914, 915 (1948) ("The test of a criminal law is not its correlation with actual behavior, but its correspondence to behavior ideals and its efficiency in promoting those ideals.").

147. N.Y. PENAL LAW § 690 (Supp. 1951).

148. ". . . this passion is not one which we encourage, either as private individuals or as law-makers." HOLMES, THE COMMON LAW 42 (1881).

149. FEDERAL PRISONS 3 (U.S. Bur. Prisons 1949).

in maintaining a law whose violation involves no social sanction or disgrace. But homosexuality is distasteful to most people, and is usually regarded as morally reprehensible.[150] The fear of publicity and disgrace is a greater deterrent than any law, and if any threat is needed to reinforce the pressure of community disapproval, a minimum sanction would be sufficient.

If the legislative policy behind the indeterminate sentence for homosexuals is to repress and eliminate homosexuality, the answer is simply that such a goal is presently unobtainable. To be effective repression would require vigorous enforcement and a resulting prison population of hundreds of thousands of incurables.[151] The reduction of the number of homosexuals to a minimum is desirable; but the way to approach it is by encouraging research and establishing experimental clinics on a wide scale, so that various treatment possibilities can be tried out on a voluntary basis in the normal community environment most conducive to a "will to be cured."

CONCLUSION

The Pennsylvania indeterminate sentence law for sex offenders employs techniques and objectives that have great reform appeal.[152] Justice Black's eulogy in *Williams v. New York*[153] of the value of thorough pre-sentence investigations represents the basic trend in the criminal law away from "sentencing by hunch." Glueck has called the indeterminate sentence "indispensable" to modern penology because it makes possible "treatment . . . individualized to meet the specific causes of [each offender's] misconduct."[154] The recognition that many sex offenders are suffering from a mental disorder which makes their compulsive acts beyond the deterrent reach of the usual criminal sanction can be the springboard for a revolutionary change in handling sex deviation.

That this indeterminate sentence act nevertheless falls so far short of being a satisfactory legislation shows, first, that the use of reform terminology does not dispense with the need for procedural safeguards and careful legislative drafting, and second, that there are still serious unresolved problems in the indeterminate sentence technique. Foremost among the latter is that the negligible due process supervision of sentencing procedures and the complete immunity from review of the determinations of parole or treatment boards acting *in camera* are totally inappropriate to a procedure in which legislative prescription of maximum terms has been delegated to psychiatrists and administrative tribunals. By providing a maximum sentence the policy of the criminal law has been that for all but

150. *But cf.* Freud: "Homosexuality is surely no advantage but it is nothing to be ashamed of, no vice, no degradation, it cannot be classified as an illness; we consider it to be a variation of the sexual function produced by a certain arrest of sexual development." qu. in Bowman, *supra* note 82, at 252.

151. See note 138 *supra.*

152. Note, 60 YALE L.J. 346 (1951).

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

154. Glueck, *Indeterminate Sentence and Parole in the Federal System,* 21 B.U.L. REV. 20, 23-24 (1941).

the most serious crimes there comes a time when prison doors must swing open to give the offender another chance. That a substantial proportion of released offenders do not decidivate, a factor we have seen to be particularly true of sex offenders, is persuasive of the wisdom of this policy and must be weighed against the criticism that criminals are thereby released to go out and commit new crimes. Heretofore the only offenses for which a life sentence could be imposed in Pennsylvania were murder, treason, kidnapping for extortion, or conviction as a fourth offender.[155] Under this indeterminate sentence law a first offender who solicits another adult to commit sodomy or who commits indecent assault could be imprisoned for the rest of his life in the discretion of a psychiatrist, a judge and the parole board. Such an extreme result may be unlikely, and in the hands of conscientious judges and psychiatrists would be almost unthinkable. It is not reassuring, however, that the sexual psychopath laws have been employed against defendants charged with minor sex offenses.[156] Under the Pennsylvania law there is no protection against such abuse save good faith of the officials involved and their intelligence in handling and weighing an extremely difficult problem on the frontiers of medical diagnosis and prognosis.

Perhaps, therefore, the best thing that can be hoped for from this law is that it will not be utilized at all, which has been the fate of a number of the sexual psychopath statutes,[157] or that it will be employed only in rare instances and with great caution. If the act is to be utilized, several steps can be taken to ensure that the psychiatric examination of the defendant meets reasonably rigid standards of professional competence and that the dangers of abuse are minimized. First, the general psychiatric standards to be employed should be developed by the Department of Welfare in consultation with a special advisory committee of the leading authorities in the field. Second, although the act requires examination by one psychiatrist, the Department of Welfare, to whom the psychiatric report must be acceptable, should insist that examination by one person alone does not meet minimum professional requirements in a field which is still so controversial and unsettled. Third, examinations should be made only by psychiatrists with experience and special competence in the diagnosis and treatment of sexual deviations. The Department of Welfare should require these same standards in those examinations which are made in its own facilities. It would appear that the Department of Welfare has the power to impose these higher standards without the necessity of amending the act.[158]

155. Contrast the careful procedure required for adjudication as a fourth offender, PA. STAT. ANN. tit. 18, § 5108(d) (1950), with the summary imposition of the indeterminate sentence upon sex offenders.

156. See text at note 135 *et seq., supra.*

157. See note 10 *supra.*

158. The psychiatric examination is to be made through the Department of Welfare facilities "or by a psychiatrist designated by the court, the results of whose examination shall be transmitted to *and accepted by* the Department of Welfare in lieu of an examination made through its own facilities. . ." Sex Crime Bill, *supra* note 1, § 2 (emphasis added).

Courts utilizing the act can also reduce the danger of misuse, first by a narrow construction of the legislative standards that the defendant "constitutes a threat of bodily harm to members of the public or is an habitual offender and mentally ill," and second by providing for a full hearing on the psychiatric report. It should be recognized that this is no ordinary pre-sentence investigation, and that therefore the pre-sentence report, which is the form in which the psychiatric findings and recommendations will be submitted to the court, should be made available to the defendant, with a full hearing thereon, including the opportunity for the submission of rebuttal evidence. For such hearing to be effective, however, the act may have to be amended. There would appear to be no way at present for the court to require that the examining psychiatrist be in court and available for cross-examination. If the law is to remain in force, this defect should be remedied, for this is the type of situation in which cross-examination is peculiarly appropriate.[159] In no other way can the court and the defendant adequately appraise the thoroughness and competence of the examiner, and the premises upon which his prognosis rests. If it be maintained that this would lead to delay and burden the court, the answer is that a life-long commitment to prison upon a prognosis of future dangerousness is no thing to be lightly passed upon without the fullest opportunity to be heard.

A far sounder alternative, which should be enacted to supplement or preferably to replace the new law, would be the inauguration of a research program similar to that started in California in 1950.[160] The present barrier to more effective control of sexual deviatiates is not a lack of penal laws but insufficient scientific knowledge. Until a great deal more is known about the causes and treatment of these disorders, and until psychiatry has achieved generally accepted and demonstrable diagnostic techniques it is premature to enact drastic and essentially punitive legislation.[161] When it does becomes possible accurately to identify the recidivist sex offender, the development of a special psychiatric institution would appear to be the most desirable method of handling this "group between crime and disease." [162]

In the meantime Pennsylvania already has the necessary legislation to permit considerable experimental work in this field. Under the Greenstein Act [163] the court can obtain a pre-sentence psychiatric medical examination of a convicted defendant, and if such report shows that he "though not

159. For provisions of the California law as to cross-examination, see note 44 *supra.*

160. California appropriated $100,000 to initiate a research program "into the causes and cures of sexual deviation, including deviations conducive to sex crimes against children, and the causes and cures of homsexuality, and into methods of identifying potential sex offenders." Cal. Stat. First Extraordinary Sess. 1950, c. 35.

161. ". . . it is clear that additional research is a pressing need and that until results of scientific studies are available punitive laws hastily enacted may do more harm than good." FEDERAL PRISONS 5 (U.S. Bur. Prisons, 1949).

162. Wertham, *supra* note 109, at 849. There is such an institution in Denmark. Tappan, *Treatment of the Sex Offender in Denmark,* 108 AM. J. PSYCHIATRY 241, 247 (1951).

163. PA. STAT. ANN. tit. 19, §§ 1153-1154 (1950).

insane is so mentally ill or mentally deficient as to make it advisable for the welfare of the defendant or the protection of the community that he or she be committed to some institution other than" a prison, the court may make such commitment in lieu of sentence.[164] Another desirable alternative would be increased use of probation with out-patient psychiatric treatment. At present this is the most hopeful approach to the cure of sex offenders.[165] It would require specially trained psychiatric social workers as probation officers, working with sufficiently small case loads to permite adequate individual attention, and the development of sufficient clinics to carry out an actual treatment program on an experimental basis.[166] Such a program has been widely endorsed,[167] and probation results in Michigan are encouraging.[168] It has been tried on a limited scale in Philadelphia Quarter Sessions Court during the last year with apparent success,[169] but for those probationers unable to afford private medical aid additional treatment facilities are needed.

Were such a program of research and intensive medical probation adopted, the Commonwealth would be advancing towards the day when legislation embodying a sane solution for the problem of sex crime could be drafted. The present indeterminate sentence law is more likely to impede than to promote such a solution.

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164. *Id.* § 1154.

165. "Whenever possible the patient should be allowed to live at his own home with or without probationary control, and, unless his existing occupation is psychologically unsuitable, encouraged to follow his usual employment. . . . In every case before even temporary measures of compulsory segregation are decided upon, the possibility of partial segregation should be considered." Glover, *supra* note 130, at 13.

166. For a New York experiment along these lines see Whitman, *The Biggest Taboo,* Collier's Feb. 15, 1947, p. 24.

167. Roche, *Sexual Deviations,* 14 FED. PROBATION 3, 10 (No. 3, Sept. 1950); WIS. REPORT, *op. cit. supra* note 14, at 8, 10; STUDY AT SING SING PRISON, *op. cit. supra* note 71, at 21 (many sex offenders can be given out-patient treatment); and see note 161 *supra.*

168. Of 146 sex offenders placed on probation in 1947 in Michigan, 23.3% still on probation; 59.6% terminated with improvement; 8.9% terminated without improvement; 2.0% absconded; 1.4% committed as technical violators; 4.1% committed new offense (of which 4/5 were non-sex offense misdemeanors); .7% died. MICH. REPORT, *op. cit. supra* note 13, at 229.

169. Crumlish, Barratt, and Stewart, *Philadelphia's New Criminal Procedure for the Abnormal Sex Offender,* Legal Intelligencer, Dec. 11, 1950.