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# Law Review

## SEPARATION AGREEMENTS AND CHANGED CONDITIONS

• Harold F. McNiece and John V. Thornton

## DECLARATIONS OF DEATH — A NEW INTERNATIONAL CONVENTION

## THE HUMAN RIGHTS PROVISIONS OF THE U. N. CHARTER AND LOCAL COURTS

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first trial started on Saturday and the court lost jurisdiction by holding over into Sunday, on which day defendant was found guilty by a jury and sentenced. The loss of jurisdiction did not change the fact that he had been placed in jeopardy.<sup>68</sup>

#### CONCLUSION

The authorities show that the double jeopardy clause, like the other clauses of the Fifth Amendment, was designed to afford an accused a maximum amount of security from arbitrary or tyrannical acts of government. It was not meant to serve as a suit of armor which might be indiscriminately used to clothe a wrongdoer and thereby prevent just and proper punishment for his crime. Thus the double jeopardy prohibition must be read in the light of judicial interpretation of its meaning and when so read, it is clear that an act which offends two sovereigns may be punished by each; that closely related, though distinct, offenses may be separately punished; and that above all, the provision may not be invoked until jeopardy has once truly attached.

<sup>68</sup> *People ex rel. Meyer v. Warden*, 269 N. Y. 426, 199 N. E. 647 (1936). See 11 ST. JOHN'S L. REV. 120 (1936); 5 BROOKLYN L. REV. 337 (1936); 5 FORD. L. REV. 359 (1936); 13 N. Y. U. L. Q. REV. 616 (1936).

## CONTROL OF THE SEX CRIMINAL

FREDERICK J. LUDWIG †

Of all aspects of this problem of sex offenses there is none that can stir the observer more deeply than the age of the victims. The records of the cases embraced in this study give the ages of 1,395 victims. . . . With a range from 2 to 68 years, the average age of these 1,395 victims was 13 years, 8 months. Seventy-three of them were under 6; 260 were between 6 and 10; 655 were between 10 and 16. Two of the victims were 2 years old; eight were 3, twenty-three were 4, forty were 5, thirty-eight were 6, seventy-two were 7, seventy-four were 8, and seventy-six were 9. The largest number of victims of forcible rape fell in the 17-year-old group; of statutory rape in the 15-year group; of attempted rape in the 10-year group; of carnal abuse in the 8-year group; and of impairing morals in the 11-year group.

—*Citizens Committee on the Control of Crime, Problem of Sex Offenses in New York City* 9 (1939).

COUPLED with this data, the same report covering the period (1930-1939)<sup>1</sup> indicated what happened to the offenders. Of the 3,295 defendants convicted in New York City, of those charged with any of the seven major sex felonies (abduction, carnal abuse, incest, forcible rape, statutory rape, seduction and sodomy), only one-third (1,140) were convicted for the felony charged and this third was restrained from five to twenty years, depending on the crime and manner in which the judge exercised his discretion. The remaining two-thirds (2,155) of those so charged were permitted to plead guilty to misdemeanors. These could be restrained for no more than a year, by statute, although in

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<sup>1</sup> See Ploscowe, *The Sexual Psychopath, Some Suggestions for Control*, PRISON WORLD 18, 19, 24, 25, 30 (July-August 1947).

New York City, an indeterminate sentence of up to three years is possible in these misdemeanor cases. The most popular choice of "bargain pleas" for these indicted sex felons was assault in the third degree (1,895, or 57 per cent). Most of the remainder pleaded guilty to the crime of impairing the morals of a minor. Similar data was uncovered in other jurisdictions, and our daily press raised the hue and cry that women and children were in omnipresent danger from "sex fiends" roaming the streets.<sup>2</sup> An assortment of psychiatrists and sociologists jumped on the bandwagon that legislative change—not mere improvement—was needed to provide adequate protection. It was their expert opinion that nearly all sex crimes were committed by "psychopathic personalities"; that such psychopathic personalities will continue to commit sex crimes until they are "cured"; that they can be identified even before they commit such crimes; that they should not be punished because they have no control over their impulses and are not really responsible for what they do; and that their diagnosis, segregation, treatment and release are the exclusive function of the psychiatrist. While most of this criticism of existing statutes was directed at the treatment of persons who commit sex crimes, a more recent study of the sex habits of 5,300 males has been interpreted as signifying that the lines of the criminal law have been drawn too tightly around sex behavior; that literal enforcement of penal sex statutes would have 5 per cent of the population guarding the other 95 per cent in jails. This agitation in the press, and the recent studies have now again raised the question explicitly: does the penal law make criminal sex behavior which it should not make criminal? Implicitly the further question is also raised: Is there sex behavior which ought to be made criminal which the penal law does not make criminal as of this time?

<sup>2</sup> See Gerber, *Homosexuals*, 65 AM. MERCURY 123 (June 1947); J. Edgar Hoover, *How Safe Is Your Daughter?*, 144 AM. MAG. 32 (July 1947); Waldrop, *Murder as a Sex Practice*, 66 AM. MERCURY 144 (Feb. 1948); Whitman, *Biggest Taboo*, 119 COLLIER'S 24 (Feb. 15, 1947); Wittels, *What Can We Do About Sex Crimes?*, 221 SAT. EVE. POST 30 (Dec. 11, 1948); *Horror Week*, 34 NEWSWEEK 19 (Nov. 28, 1949); *A New Report on Sex Crimes*, 22 CORONET 3 (Oct. 1947).

The District of Columbia, and fourteen states, have enacted "sexual psychopath" statutes in the past two decades. Primarily, this legislation was concerned with treatment, but it also created new kinds of criminality in sex behavior. New York, which first resisted such a statute by gubernatorial veto, has also recently amended its penal sex statutes along these lines.<sup>3</sup>

The purpose of this article is to explore the respective roles of criminal law and of psychiatry in controlling sex behavior. What should be the goal of penal statutes in this area? What means are best adapted and most likely to attain the end selected?

#### I. THE PROBLEM IN TERMS OF MEANS AND ENDS

Proper evaluation of a body of law can best be realized by considering it as a means to an end. Accordingly, some rational choice of an end or ends must be made for penal sex legislation. This is necessary if sex control statutes and their administration are to be consciously directed in a uniform attack on the problem. Once this is done, the particular statutory provisions, considered as a means to this end, may be selected or rejected according as they serve or disserve the end. If the end is the prevention of undesirable sex behavior, then the means, embracing the entire criminal law machinery, must be appropriately adapted. This includes not only the statutes and the legislators who draft them, but their administration and the personnel entrusted with carrying out the statutes: the judges, prosecutors, police, psychiatrists, psychologists and guidance counselors, and the probation, parole and correction officers. Penal sex statutes are a small but significant part of this machinery. And the criminal law system is not the only, nor the best means of serving this end. Moral and religious education, wholesome home life and parental guidance, and a fair chance to make a decent living, all are factors probably better adapted to achieve it. Nor is the end of preventing sex crimes the only one worthy of attainment. Being phrased

<sup>3</sup> Laws of N. Y. 1950, c. 525.



in somewhat negative terms, it may nonetheless be desirable, not necessarily in and for itself, but only as a partial means to more remote and valuable ends; e.g., a society dedicated to the preservation of the family, the institution of monogamous marriage, and the proper procreation of succeeding generations. Consequently it is important that the means selected to serve the end of preventing sex crimes do not in and of themselves disserve other ends which are equally or even more valuable in the long run.

Considered thus as a means, the function of the criminal law in preventing sex crime is considerably restricted. It may operate to attain this end only by the manner in which it proposes to treat, and in operation does treat, persons who actually commit sex crimes. The criminal law undertakes their treatment for various purposes, any one of which may serve the goal of prevention.

(1) It may concern itself primarily with the mass of potential sex offenders and accordingly subject an actual one to unpleasant treatment for the sake of deterring the rest of them.

(2) It may ignore potential offenders and concern itself only with the actual one. If so, it may undertake his treatment, (a) by punishing him in the hope that through intimidation he will not behave again in such an undesirable manner, or (b) by restraining him in an institution for so much time as he is dangerous and likely to commit such crimes, or (c) by attempting to rehabilitate him, if he is corrigible. It will be pointed out (III, *infra*) that today's controversy appears to center about which of these purposes, deterrence of potential offenders or reform of actual ones, should predominate. All parties substantially accept the goal of prevention. Two basic questions must be answered in order to determine the rôle of criminal law in controlling harmful sex behavior: (1) What sort of socially undesirable sex behavior should be made criminal, and (2) what kind of treatment should be given a person who commit such sex crimes?

## II. CRIMINAL AND NON-CRIMINAL SEX BEHAVIOR

### *Basic Policy Considerations*

The criteria for determining whether or not certain socially undesirable sex behavior should be made criminal ought not to vary greatly from those generally used to delineate criminal from non-criminal behavior.

1. The behavior should be productive of serious social evil;
2. It should be of a type possible to deter by the threat of punishment;
3. It should be indicative that the persons who engage in it are dangerous and more likely than the average person to commit crimes;
4. It should be capable of unambiguous statutory definition; and, finally,
5. The social attempt to prevent such behavior should not be productive of more harm than good.

We shall examine the factors in that order:

1. *Sex behavior productive of serious social evil.* Whether any certain sex behavior falls within this criterion of criminality depends on the answer to two inquiries: (1) What ends are served by this sexual behavior, and (2) are these ends undesirable? The first question is obviously one of fact and the second question is one of social values and moral standards. Clearly sex behavior which serves desirable ends, such as the preservation of the family, the encouragement of the institution of monogamous marriage, and the proper procreation of the succeeding generations, should not be made criminal. There remains the question whether all sex behavior which does not subserve these valuable ends ought to be subject to penal treatment. Phrased in another way: Should all immoral sex behavior be made criminal? An emphatic negative has come from interpreters of the Kinsey-Pomeroy-Martin report. "85% of the younger male population could be convicted as sex offenders if law

enforcement officials were as efficient as most people expect them to be."<sup>4</sup>

Accordingly, it has been urged that criminal legislation in the sex field must only aim at expressing "the judgment of the average conscience as to the minimum standard of Right."<sup>5</sup> It is argued in support of this view that criminal law depends for its enforcement upon the "average men" who serve as complainants, witnesses and jurors. The argument continues that when criminal statutes postulate moral standards higher than those of the community, sympathy for the accused will cause the statutes to be nullified, or enforced only occasionally and indifferently. This line of argument has a core of truth in that excessive severity impairs the preventive efficacy of a criminal statute, because increasing the severity of punishment seriously diminishes the certainty of its infliction.

But the danger of nullification in the field of sex crime has been over-emphasized. First, it is usually the application of unduly severe punishment for criminal behavior rather than the making of certain kinds of behavior criminal that leads to non-enforcement of penal statutes. Second, the selective enforcement of penal statutes dealing with sex and other conduct makes improbable their nullification when they seek to uphold standards far above average community behavior.<sup>6</sup> Third, even assuming *arguendo* the validity of studies reporting widespread sex behavior which is defined as criminal under existing statutes, no valid case is thereby made for the statutes' repeal. Individuals who report wayward sex conduct to interviewers do not thereby declare their preferences for such behavior in others.<sup>7</sup> Indeed, far from condoning such behavior in others, such deviates might well be more severely critical than those whose sex behavior accords with official standards. Consequently, there appears to be no great probability of nullification of existing sex statutes from this source. Finally, even if there were, no

<sup>4</sup> KINSEY, *SEXUAL BEHAVIOR IN THE HUMAN MALE* 224 (1948).

<sup>5</sup> KENNY, *OUTLINES OF CRIMINAL LAW* 26 (13th ed. 1929).

<sup>6</sup> See Horack, *Sex Offenses and Scientific Investigation*, 44 ILL. L. REV. 149, 152-3 (1949).

<sup>7</sup> See Sorensen, Book Review, 29 NEB. L. REV. 156 (1950).

positive peril has been shown to result from the fact of nullification of penal sex statutes as can be seen in the case of adultery.

Moreover, and of crucial importance, the criminal law system should not abdicate its function as an instrument of moral education. In addition to subjecting actual offenders to compulsory treatment, the criminal law also has the function of indicating to the greater mass of potential offenders what is right and wrong in sex behavior.<sup>8</sup> Penal statutes are an important determinant of a state's public policy which in turn often provides the framework of reasoning for judicial controversies which arise in areas outside of the criminal law. Repeal or amendment of penal statutes simply because of their disregard by some portion of the population might well be construed as a fundamental alteration of the state's public policy.

In short, while the law must consider the mores of the community in defining the criminal, there is no requirement that the law adopt as its standard of legality the standards of the strayed. Yet it is clear that not all immoral sex conduct should be made criminal. Trivial offenses that burden the administrative machinery and offenses that foreshadow harm only to the actor himself, are not serious enough to justify official intervention. Such behavior, if it is to be controlled at all, must be regulated by the home, church and school, and by similar non-criminal agencies.<sup>9</sup>

2. *Sex behavior possible to deter.* One of the crucial issues between positivists and classical criminologists turns about the question of which of the many ends of treatment of sex criminals should predominate. Positivists who urge the sexual psychopath type of statute insist the proper end is that of the restraint of dangerous persons and their re-

<sup>8</sup> See BECCARIA, *CRIMES AND PUNISHMENTS*, c. xxiii.

<sup>9</sup> Answering the question whether human law should repress all vice, St. Thomas Aquinas points out: "Now human law is framed for a number of human beings, the majority of whom are not perfect in virtue. Wherefore human laws do not forbid all vices, from which the virtuous abstain, but only the more grievous vices, from which it is possible for the majority to abstain; and chiefly those that are to the hurt of others, without the prohibition of which human society could not be maintained: thus human law prohibits murder, theft and suchlike." DE SUMMA THEOLOGICA Ia, IIae, Q. 96, Art. 2.

habilitation, if they are corrigible. Many of them insist that most sex crimes are the product of irresistible impulse on the part of psychopathic personalities. The so-called classicists, on the other hand, advocate punitive treatment to intimidate actual offenders and deter potential ones. They dispute the contentions of the positivists, and urge that sex crimes are committed by deterrable but not always undeterred offenders. Since both groups agree that compulsory treatment should be given sex criminals whether or not it is possible to deter them by threat of punishment, resolution of the issue affects only the kind of treatment and not the determination of the criminality of the sex behavior. Accordingly, this matter will be discussed under III, *infra*.

3. *Sex behavior indicative of a dangerous person.* There is only one type of sex offense which indicates that the actor is probably more likely than the average person to engage in it again in the future and which does not fall either within the first category (sex behavior socially undesirable) or second category (sex behavior possible to deter). This type of sex offense is the seriously undesirable sex behavior of a person suffering from a well-defined mental disorder which renders him legally insane and criminally irresponsible for his acts. That such persons, although not deterrable by the threat of punishment, should be incapacitated for so long as they are dangerous, is a conclusion which is not disputed. The only issue is whether the selection of persons for compulsory treatment should be made upon the basis of their potentiality for harmful behavior rather than upon the demonstrated harmfulness of their actual behavior. The former method of defining criminality has been employed abroad.<sup>10</sup> It is also employed in many of our sexual psychopath statutes. Certainly its widespread adoption in our criminal law administration would raise grave political questions in a society dedicated to the principles of individual freedom.

<sup>10</sup> See THE PENAL CODE OF THE RUSSIAN SOCIALIST FEDERAL SOVIET REPUBLIC, Art. 16 (U. M. Stationery Office, 1934).

4. *Capability of unambiguous statutory definition.* Closely related to the ideal of protection of the individual's civil liberty is the principle of Anglo-American criminal justice that there can be no punishment for behavior unless it is prohibited by pre-existing law (*nulla poena sine lege*). This principle is in sharp contrast to the totalitarian doctrine that there can be no wrong committed against the state which is incapable of being punished (*nullum crimen sine poena*).<sup>11</sup> Under our system of law, accordingly, the criminal "law" must be declared in advance either by the legislature in the form of statutory crimes, or by the courts in the form of common law crimes, the statutory crimes, of course, always being subject to judicial interpretation. New York<sup>12</sup> and fourteen other states have only statutory crimes.<sup>13</sup> Indeed, where statutory crimes are involved, the use of ambiguous language in and of itself raises the question of denial of due process of law. While all language has some inherent ambiguity, the rationale of this requirement is that advance notice be given "so far as possible," and has been stated in the following terms by Mr. Justice Holmes:

Although it is not likely that a criminal will carefully consider the text of the law before he murders or steals, it is reasonable that a fair warning should be given to the world in language that the common world will understand, of what the law intends to do after a certain line is passed. To make the warning fair, so far as possible the line should be clear.<sup>14</sup>

5. *Attempted prevention as causing more harm than good.* Assuming that a certain course of sex conduct is socially undesirable, that it is possible to deter, that it is indicative that the person engaging in it is dangerous, and that

<sup>11</sup> See, e.g., Comment of German Minister of Justice on Nazi Criminal Code of September 1, 1935: "We have substituted for the outworn maxim *nulla poena sine lege* the more efficacious doctrine *nullum crimen sine poena*, regardless whether or not some specific existing law has been broken." The Soviet Criminal Code (Jan. 1, 1927) provided: "Every act or failure to act is a social danger if it is directed against the Soviet regime or when it injures the order established by the Workers' and Peasants' authority."

<sup>12</sup> N. Y. PENAL LAW § 22; *People v. Ingber*, 248 N. Y. 302, 162 N. E. 87 (1928).

<sup>13</sup> Cal., Ill. (at least for felonies), Ind., Iowa, Kan., La., Mich., Mont., Neb., Ohio, Okla., Ore., S. D. and Tex.

<sup>14</sup> *McBoyle v. United States*, 283 U. S. 25, 27 (1931).

it is capable of unambiguous statutory definition, it may still be imprudent to make such conduct criminal if by so doing the harmful consequences of making it criminal counterbalance the desirable ones. For instance, making such behavior criminal might serve the desirable end of preventing sex crimes, but at the same time disserve other ends of equal or greater value. Such counterbalancing ends might be diserved in the undue infringement of individual privacy or in the tendency toward the corruption of public officials charged with enforcement. Our recent experiment with Prohibition is an example in itself that in attempting to prevent one evil, many others far more serious may be created.

### III. TREATMENT OF SEX OFFENDERS

Some fourteen states and the District of Columbia now have sexual psychopath statutes of one type or another on their books. These statutes vary considerably in procedure and in the elements of their definitions of the condition to be treated. Some of the statutes make criminal behavior which theretofore was not criminal, *e.g.*, an habitual course of sex misconduct. All of the statutes prescribe new types of treatment, usually left to the discretion of an administrator, which treatment departs from the traditional legislative definitions of imprisonment in terms of minima and maxima. The administrators in a number of these jurisdictions report in the following terms concerning the enforcement of these statutes.

California (1939)<sup>15</sup>

"Leaves much to be desired; an ineffectual law."

District of Columbia (1949)

Fourteen cases in 1949. "A Star Chamber procedure, with inadequate diagnostic and treatment facilities."

Illinois (1938)

Sixteen cases in ten years. "... requires change; little interest in administering present statute."

<sup>15</sup> The date after each of the states is the year in which the statute was enacted.

- Indiana (1949) One case. "Undesirable in principle, ineffective in operation: no solution to the problem."
- Massachusetts (1947) Inoperative. "... hurriedly enacted, not completely satisfactory; courts do not like it."
- Michigan (1939) Law inoperative.
- Minnesota (1939) Under 200 cases in ten years. "... no triumph for justice or for the protection of society."
- New Hampshire (1949) No commitments. "These cases should not be sent to a state hospital. No treatment facilities."
- New Jersey (1949) Thirty-five cases in six months. "A temporary measure, inadequate to handle problem."
- New York (1950) Fourteen cases in nine months. No releases.
- Washington (1947) Inoperative.
- Vermont (1943) Virtually inoperative.
- No data is available from the following states with such statutes: Nebraska, Ohio, Pennsylvania.<sup>16</sup>

The most recent of these statutes is that of New York, and because of its importance we shall examine it in some detail. This recent New York statute does not make criminal any sex or related behavior not theretofore defined as criminal. Thus, it does not create any new criminal status such as "sexual psychopath." The changes effected in New York are purely ones of treatment.

<sup>16</sup> *Psychiatrically Deviated Sex Offenders* 4-9 (Feb. 1950), published by the Group for the Advancement of Psychiatry, 3617 W. 6th Ave., Topeka, Kansas.



(1) Psychiatric examination of offenders convicted of certain sex crimes is now mandatory before sentence.<sup>17</sup> Prior to this change in the law, such examination was discretionary with the sentencing judge, but it usually was ordered.

(2) When the defendant is convicted of certain specified sex crimes, an indeterminate sentence of imprisonment in a state prison is prescribed, within the discretion of the sentencing judge, ranging from a minimum of one day to a maximum of the defendant's natural life. The sentencing judge now has the choice of suspending sentence or placing the defendant on probation or imposing the traditional sentence prescribed for the crime, as he formerly might have done, or of imposing the new indeterminate sentence.<sup>18</sup>

(3) Certain changes are effected in the parole of defendants receiving the new indeterminate sentence.<sup>19</sup> They enjoy certain advantages over prisoners receiving the traditional straight-term sentences:

(a) Prisoners sentenced in the traditional way are eligible for parole only upon the completion of the minimum of their sentence, which might, under the old law, be indeterminate in a more limited sense. Those prisoners, however, who receive the new indeterminate sentence are mandatorily eligible for parole within six months after their conviction and at least once every two years thereafter.<sup>20</sup>

(b) If a prisoner sentenced in the traditional way is released on parole and commits a felony while on parole, he is compelled, in addition to any new sentence imposed for the second crime, to serve the remainder of the original maximum sentence. Those persons receiving the new indeterminate sentence and released on parole are exempt from this requirement.<sup>21</sup>

<sup>17</sup> N. Y. PENAL LAW § 2189-a. Added by Laws of N. Y. 1950, c. 525, § 23.

<sup>18</sup> *Id.* § 2188. Added by Laws of N. Y. 1950, c. 525, § 22.

<sup>19</sup> N. Y. CORR. LAW § 212.

<sup>20</sup> *Id.* § 214, subd. 3. Added by Laws of N. Y. 1950, c. 525, § 6.

<sup>21</sup> *Id.* § 219.

(c) A prisoner sentenced in the traditional way may not be discharged from parole until the expiration of the full maximum term of his fixed sentence, unless he is an honorably discharged war veteran.<sup>22</sup> Those receiving the new indeterminate sentence, however, may be either conditionally or absolutely discharged prior to such expiration,<sup>23</sup> a necessary provision in view of the extensive nature of the maximum.

The single disadvantage in a parole sense of the new indeterminate term prisoner is his lack of eligibility for reduction of his minimum term, as is given to traditionally sentenced prisoners, by the amount of ten days off out of each month for good conduct.

An additional treatment advantage, however, for those receiving the new indeterminate sentences is that they are not considered "sentenced to life imprisonment" in such a way as would result in their being declared civilly dead,<sup>24</sup> or as to prevent their maintaining civil actions, as long as the actions are not connected with the arrest.<sup>25</sup>

The new treatment in New York is available only upon conviction of any one or more of the following specified eight types of sex or sex-based crimes:

| New York<br>Penal Law | Criminal Behavior   | Alternate Maximum Punishment             |
|-----------------------|---|--|
| § 243                 | Assault in the second degree if committed with the intent to commit rape in the first or second degree, sodomy in the first or second degree or carnal abuse. | 5 years imprisonment and/or \$1,000 fine |
| § 483-a               | Carnal abuse of a child ten years or under by a defendant eighteen or older.  | 10 years imprisonment                    |

<sup>22</sup> *Id.* § 220, subd. 2. Added by Laws of N. Y. 1950, c. 525, § 8.

<sup>23</sup> *Id.* § 230, subd. 2. Added by Laws of N. Y. 1950, c. 525, § 9.

<sup>24</sup> N. Y. PENAL LAW § 511. Added by Laws of N. Y. 1950, c. 525, § 14.

<sup>25</sup> *Id.* § 510. Added by Laws of N. Y. 1950, c. 525, § 13.



New York  
Penal Law

Criminal Behavior

Alternate Maximum Punishment

- § 483-b Carnal abuse of a child over ten and under sixteen by a defendant previously convicted of rape in the first or second degree, abduction, sodomy, incest, endangering the morals of a child or the carnal abuse of a child (§ 483-a, *supra*), attempt to commit any of these crimes, or an assault in the second degree with an intent to commit any of them. 10 years imprisonment
- § 690 Sodomy in the first degree. 20 years imprisonment
- § 2010 Rape in the first degree. 20 years imprisonment
- § 1944-a Sexual abuse while committing a felony. Carnal abuse or indecent or immoral practice with the sexual organs of a child of sixteen or under.
- § 1940 The conviction of any felony where the defendant has a prior conviction anywhere of the crimes of rape in the first or second degree, carnal abuse, sodomy in the first degree, assault in the second degree with intent to commit any of the above crimes, or an attempt to commit any of the above crimes.

In the nine months since its adoption in 1950, 14 sex offenders have been given this indeterminate treatment in the discretion of trial judges. Of these, two have since appeared before the parole commission, and have been denied release. In addition, for the first two months of 1951, while official figures are not readily available, it is estimated that an additional 14 sentences have been rendered.<sup>26</sup> This indicates a far more enthusiastic reception of the sexual psychopath program in New York than has been reported elsewhere.

But regarding the New York and related statutes as threshold legislation, in anticipation of that day when such treatment shall be mandatory for all sex offenders—and possibly for all persons convicted of crime—its proponents rely upon three basic propositions:

(1) Persons who commit sex crimes belong to a more or less well-defined group, distinguishable from the generality of criminals by the peculiar nature of their mental disorder. They are not mere criminals but "psychopaths", "psychopathic personalities", "psychiatrically deviated" persons, "constitutional psychopathic inferiors" or, in the less stilted nomenclature of our public press, "perverts and degenerates."

(2) The existing rules concerning the legal responsibility of mentally disordered persons are inadequate to meet the treatment needs of the sex offender. These rules are claimed to be too stringent, and based upon a defective and unreal psychology. Under them, the proponents of the new legislation point out, sex offenders constitute a *tertium quid*, neither irresponsibly insane nor fully responsible.

(3) Whether or not sex offenders do belong to a special class, the proponents continue to argue, there is no reason why all criminal offenders should not receive completely indeterminate sentences. Social protection against dangerous persons, it is argued, and the reformation of corrigible criminals, make the old-fashioned term sentence obsolete, and the indeterminate sentence the proper form of criminal treatment. We shall examine the arguments in that order.

<sup>26</sup> Information obtained from the New York State Parole Commission and Department of Correction, March, 1951.

1. *Sex Offenders as a Special Class*

Special treatment for sex offenders is based upon the assumption that sex offenders constitute a well-defined group who are more likely than the generality of criminals to repeat their crimes, regardless of the punishment which is imposed. No doubt some cases of habitual sex offenders exist. The important inquiry in connection with this argument, however, is whether the rate of recidivism for sex offenders is higher than that for criminals generally. Available evidence indicates that such may well not be the case.

The most intensive and recent study was that of 102 offenders in Sing Sing who were either in prison for conviction of sex crimes, or else were in prison for the commission of non-sex crimes but had prior sex crimes in their records. The findings can be summarized as follows:<sup>27</sup>

| Reason in Prison           | PREVIOUSLY ARRESTED |              |                |
|----------------------------|---------------------|--------------|----------------|
|                            | Total               | Sex Offenses | Other Offenses |
| Convicted of Sex Offense   | 87                  | 27           | 53             |
| Convicted of other offense | 15                  | 5            | 11             |
| Grand Total                | 102                 | 32           | 64             |

Thus twice as many of the inmates who were in Sing Sing because of conviction for a sex crime had been previously arrested for non-sex crimes as had been arrested for sex crimes. A full third of those who were in prison, on the other hand, because of conviction for non-sex crimes had previously been arrested for sex offenses. This hardly bears out the contention of the proponents of the new legislation that sex offenders are a specialized and well-defined group. Moreover, a further analysis of the 87 convicted sex offenders in terms of the number of their previous arrests rather than in terms of figures based on the individuals, indicates an

<sup>27</sup> REPORT ON STUDY OF 102 SEX OFFENDERS AT SING SING PRISON 66-95 (1950).

even wider disparity. All told, the 87 individuals committed for sex crimes had a total of 54 prior arrests for sex crimes and 140 for other crimes.

The most extensive study ever made of sex offenders, covering a decade in New York City, shows that of 555 convicted sex offenders in 1930, for example, only 31—or slightly more than 5 per cent—were convicted again of sex crimes within the next dozen years. Of this small percentage who were re-convicted, only 6 of the 31 were convicted more than once, chiefly for indecent exposure, a non-violent form of sexual mal-behavior.<sup>28</sup>

In the same city, another recent study limited to juvenile offenders shows that of 108 boys accused of delinquency arising out of sex offenses, only three of them were charged with delinquency again, and none of these three re-delinquencies involved sex offenses. On the other hand, of 148 boys charged with general types of delinquency, of a non-sexual character, 109 of them turned out to be subsequent offenders.<sup>29</sup>

That these findings are not confined to New York is indicated by national data on recidivism. Of the twenty-five types of crimes committed by males, the rank of each is indicated each year by the Uniform Crime Reports according to the proportion in each of offenders who have prior criminal records. To select a typical pre-war year, for example, in 1937 drug addicts ranked first in terms of recidivism, but rapists were nineteenth, and other sex offenders, seventeenth.<sup>30</sup>

As criminals, sex offenders are in no sense specialists such as safe crackers or pickpockets. Nevertheless, it is urged that sex criminals are distinguishable from the generality of criminals on the basis of the peculiarity of their mental disorder. To understand this, it will be necessary to examine briefly the field of mental disorder. Such disorders have been classified in the following terms, in order of decreasing seriousness:

<sup>28</sup> REPORT OF MAYOR'S COMMITTEE FOR THE STUDY OF SEX OFFENSES, NEW YORK CITY 92-95 (1939).

<sup>29</sup> DOSHAY, L. J., *THE BOY SEX OFFENDER*, c. 9-12 (1943).

<sup>30</sup> SUNDERLAND, *Sexual Psychopath Laws*, 40 J. CRIM. LAW & CRIMINOLOGY 543, 547 (Jan.-Feb. 1950).

(1) Psychosis; (2) psychoneurosis;<sup>31</sup> (3) psychopathic personality;<sup>32</sup> (4) anxiety state;<sup>33</sup> and (5) mental defectiveness.<sup>34</sup> There is relatively less disagreement among the various schools of psychiatry with respect to the definition of psychosis than there is with reference to psychoneurosis, psychopathic personality or anxiety state. The term psychosis represents the most deep-seated mental disorder, which constitutes a devastating disorganization of the entire personality. Normal adjustment to social environment is impossible for the psychotic person. A number of types of psychosis have been recognized by the generality of psychiatrists: schizophrenia,<sup>35</sup> manic depressive psychosis,<sup>36</sup> paranoia,<sup>37</sup> general paresis,<sup>38</sup> senile dementia,<sup>39</sup> alcoholic psychosis,<sup>40</sup> epilepsy<sup>41</sup> and, less commonly, traumatic, ar-

<sup>31</sup> Characterized by emotional conflict and maladjustment. Unlike psychosis, there is no organic causation, no reality distortion, no impairment of intellect and no pathological moodiness.

<sup>32</sup> Principal characteristics associated with this questionable category are frequent emotional instability, poor ethical perspective and general judgment. Intellect may nevertheless be unimpaired, e.g., drug addicts, chronic alcoholics.

<sup>33</sup> A stage of unusual and prolonged tension characterized by fear without reason which precedes panic. Soldiers under fire and civilians in bombed areas provide numerous cases.

<sup>34</sup> Usually persons of retarded mental development, especially intellect, e.g., idiots, imbeciles, morons.

<sup>35</sup> A form of mental disorganization usually appearing during adolescence (hence, also called *dementia praecox*) characterized by introverted, shut-in, seclusive, impulsive and negativistic behavior. Emotions are blunted, judgment defective and volition definitely injured. Illusions, hallucinations and delusions are common. Catatonic, paranoid, hebephrenic (most common) are some of the recognized forms of this disorder.

<sup>36</sup> A psychosis where the patient experiences successive periods of unusual excitement and elation with flight of ideas, morbid feelings of happiness, impulsive reactions and unusual mental activity (*mania*) alternating with depressive stages where he is sad and retarded mentally. In between there is usually a normal period (lucid interval).

<sup>37</sup> Mental disorder characterized by an orderly arrangement of chronic delusions, often ones of persecution. The patient is vain, suspicious and fearful. Usually there is little mental deterioration no matter how long the condition has persisted.

<sup>38</sup> An organic disease of the brain resulting from advanced syphilitic infection. In advanced stages there are alternate periods of euphoria and depression, delusions of greatness and general deterioration of memory, perception and orientation.

<sup>39</sup> A condition resulting from deterioration of brain tissue which sometimes occurs with advanced age. Memory, perception and judgment are impaired.

<sup>40</sup> A mental disorder resulting from excessive use of alcohol. Three recognized forms are *delirium tremens*, chronic alcoholism and Korsakow's psychosis.

<sup>41</sup> A disorder characterized by loss of consciousness and involuntary movements. It may be traumatic resulting from scar tissue near the brain or idiopathic when it arises spontaneously without apparent cause.

teriosclerotic, toxic and involuntional psychoses.

The question is: Are sex offenders more frequently afflicted with such profound mental disorders than are other criminals? The New York State study of sex offenders in Sing Sing found all of them suffering from some sort of "mental or emotional disorder, though not usually so pronounced [as psychosis]. . . . In many cases the behavior patterns could not be fitted into any clear-cut psychiatric classifications. . . . there is no known mental disorder that presupposes the commission of sex crimes."<sup>42</sup>

Ten years before this study of the 2,022 sex offenders examined in the decade-long survey in New York City, 246 likely cases, including persons who committed the crimes of carnal abuse, sodomy, indecent exposure and impairing morals, were specially selected for mental examination. Of these 246 persons, 160 were found neither insane nor mentally defective, 35 were adjudged insane and 51 were adjudged mentally defective.<sup>43</sup> These are by no means staggering ratios of mental disorder. It is also significant that the data concerns only a *ratio*—that is, of psychotic sex offenders compared with all sex offenders, and not a *proportion*, or the ratio of psychotic sex offenders to all sex offenders as compared with the ratio of psychotic criminals to all criminals. Indeed the group for Advancement of Psychiatry recently concluded "that only a small proportion of males convicted of sex offenses have been involved in behavior which is materially different than that of most males in the population. This small group, which numbers in the neighborhood of 5 to 10 per cent, is that which engages our attention as psychiatrists."<sup>44</sup>

With respect to the significance of non-psychotic mental disorder in sex crime, there is wide variation in points of view among psychiatrists. At the psychiatric clinic of the Court of General Sessions in New York County, only 15.8 per cent of the sex felons examined were found to be psychopathic personalities. At Bellevue Hospital, psychiatrists

<sup>42</sup> REPORT ON STUDY OF 102 SEX OFFENDERS IN SING SING 13 (1950).

<sup>43</sup> PROBLEM OF SEX OFFENSES IN NEW YORK CITY 10 (1939).

<sup>44</sup> *Psychiatrically Deviated Sex Offenders* 1 (Feb. 1950), published by the Group for the Advancement of Psychiatry, 3617 W. 6th Ave., Topeka, Kansas.



found 52.9 per cent of the sex felons to be psychopathic personalities.<sup>45</sup> From the psychiatric viewpoint sexual behavior is either normal or abnormal. Much that is considered normal, in a psychiatric sense, such as non-violent, hetero-sexual behavior, may nonetheless be considered immoral, as adultery or statutory rape. On the other hand, much sexual behavior which is considered abnormal in a psychiatric sense may not be criminal at all. For instance, this is true in the case of masochism<sup>46</sup> and onanism<sup>47</sup> and often in the case of sadism,<sup>48</sup> fetishism<sup>49</sup> and voyeurism.<sup>50</sup> Probably most sex behavior which is abnormal when viewed in psychiatric perspective is also criminal, such as necrophilia,<sup>51</sup> bestiality,<sup>52</sup> paedophilia<sup>53</sup> and homosexuality. But this is not always so. "Homosexuality is often found in persons who show no other marked mental or physical abnormality."<sup>54</sup> A more or less well-defined relationship between non-psychotic mental disorder on the one hand and abnormal sex behavior on the other, has not yet been developed on the basis of the existing state of psychiatric knowledge. The psychiatrist who directed the New York State study of sex offenders in Sing Sing has admitted elsewhere that "there is no real psychiatric insight into criminalistic behavior."<sup>55</sup> Under all of these circumstances, it is difficult to see how it can be argued that non-psychotic mental disorders have more significance in the case of sex offenders than do the full-scale psychotic ones; or how it can be argued that either the psychotic or non-psychotic forms of mental disorder is more frequently associated with sex crimes than with crimes in general.

<sup>45</sup> Frosch and Bromberg, *Sex Offender—A Psychiatric Study*, 9 AM. J. ORTHOPSYCHIATRY 761 (Oct. 1939).

<sup>46</sup> A feeling of need for punishment and suffering of pain which may result in sexual gratification. Suicide is an extreme form.

<sup>47</sup> Self-abuse.

<sup>48</sup> The reverse of masochism in which aggression and pain is directed at others for the actor's gratification.

<sup>49</sup> Worship of some object as a substitute for some original object or experience, such as a shoe or a lock of hair.

<sup>50</sup> Looking or peeping at sexual objects.

<sup>51</sup> Desire for copulation with a dead human body.

<sup>52</sup> Desire for copulation with animals.

<sup>53</sup> Desire for copulation with children.

<sup>54</sup> East, *Sexual Offenders—A British View*, 55 YALE L. J. 527, 545 (1946).

<sup>55</sup> ABRAHAMSEN, CRIME AND THE HUMAN MIND 26 (1944).

## 2. Legal Responsibility of Sex Criminals

In 1843, an assassin intent on taking the life of the Prime Minister, Lord Peel, succeeded only in killing Lord Peel's secretary. He was acquitted at trial on the grounds of insanity. A number of questions about this defense were propounded to the Lord Justices. After lengthy deliberation they formulated the now famous M'Naghten rules on the effect of insanity as a defense in a criminal prosecution.

... it must be clearly proved that, at the time of the committing of the act, the party accused was labouring under such a defect of reason, from disease of the mind, as not to know the nature and quality of the act he was doing; or, if he did know it, that he did not know he was doing what was wrong.<sup>56</sup>

The Lord Justices further held that a person, otherwise sane, who committed a crime under an insane delusion, not running to the nature and quality of the act, was responsible for having committed the act if it were established at trial that he knew what he was doing was wrong. Such a person is to be judged at trial as if the facts were as he believed them to be.

The overwhelming number of Anglo-American jurisdictions have accepted this right and wrong test. "Wrong" has been interpreted in a moral sense rather than in a legal one so that, for example, an insane belief on the part of the accused that the criminal act was ordered by God would constitute a defense.<sup>57</sup>

Although English psychiatrists find these rules quite workable,<sup>58</sup> many American writers have criticized them. First, it is urged that the rules are formulated in terms which are unintelligible to students of the human mind. "When they ask me whether the defendant in the dock is in my opinion insane, I must candidly state . . . first, that I do not understand the question, and second, since I don't understand the question I do not know whether the defendant is

<sup>56</sup> M'Naghten's Case, 10 C. & F. 200, 210, 8 Eng. Rep. 718, 722 (H. L. 1843).

<sup>57</sup> See *People v. Schmidt*, 216 N. Y. 324, 329-340, 110 N. E. 945, 946-950 (1915).

<sup>58</sup> HALL, PRINCIPLES OF CRIMINAL LAW 477 (1947).

insane or not."<sup>59</sup> But the question of insanity must be recognized as a legal one running to responsibility, and not as a psychiatric one. The purpose of the rule is to determine which offenders, including those mentally disordered, are to be subjected to punitive treatment for the purpose of deterring potential offenders and *not* to determine which ones should have medical or psychiatric treatment for their individual rehabilitation. The latter form of treatment is readily available and is compulsory in most jurisdictions, whether the defendant is adjudged sane and responsible or irresponsibly insane. Moreover, since a jury of laymen must determine this matter as an issue of fact, the simple terms "knowledge", "nature" and "quality" must be used as symbols which are perhaps more understandable to the jury than the specialized jargon of the psychiatrist. Certainly little could be accomplished by borrowing from the vocabulary of psychoanalysis and have the trial judge instruct the jury on the defendant's criminal liability in terms of Freudian "reality-principle", the *id*, *ego* and *super-ego*.

A second objection which has been made to the M'Naghten rules is concededly valid, *viz.*, that their formulation ignores the unity of the human mind. The M'Naghten rules consider only impairment of the cognitive and rational processes. It is erroneously assumed that these processes are unaffected by disorders of volition and emotion. But enlightened trial judges have overcome a construction of the test which might be misleading and have properly caused it to function as a rule of responsibility. Those persons incapable of being deterred by the threat of punishment, and who are suffering from well-defined mental disorders, are not responsible and the test is not limited to a disorder of "reason". Those persons who were capable of being deterred at the time of commission of the crime are deemed sane and responsible, although they may or may not have been afflicted with some sort of mental disorder.<sup>60</sup> Rarely

<sup>59</sup> ZILBOORG, *MIND, MEDICINE AND MAN* 274 (1943).  
<sup>60</sup> See Lindberg, *Rationale of Responsibility for Young Offenders*, 29 *NEB. L. REV.* 521, 537-8 (1950).

where there is general psychiatric agreement on the existence of a psychotic mental disorder in a person will the person be found to be legally responsible.

The most serious complaint of the psychiatrists about the M'Naghten test, so far as sex offenders are concerned, is that the test fails to take into consideration the number of sex offenders who are unable to control their behavior. "... any number of the obviously and unquestionably mentally ill and insane have a keen perception of right and wrong; in fact, frequently a perception more keen and more puritanical than that of the average run of normal people."<sup>61</sup> Distinction between right and wrong "is not an important factor in deciding a question of mental illness."<sup>62</sup> The theory that some individuals lack a conscience but are otherwise unimpaired in their mental processes, stems from the compartmentalized psychology of the early nineteenth century with its emphasis on the concepts of "moral sanity," "amorality" and the belief in the existence of "moral imbeciles."<sup>63</sup> The birth of the doctrine of the "irresistible impulse" came with Maudsley's thesis on "impulsive insanity."<sup>64</sup> Its recrudescence in the twentieth century is due principally to the modern popularity of Freudian psychoanalysis in America. Much human behavior was now explained in terms of drives originating in the subconscious which are postulated as being completely outside of the advertent control of will or intellect. These modern theories, of course, parallel the doctrine of psychological determinism with the rejection of the freedom of the individual's will.

Some oblique judicial support for this doctrine came from Stephen who stated that he believed that there were cases of madness which interfered with the power of self-control. But Stephen was also of the opinion that a man who could not control himself also did not know his act was

<sup>61</sup> MCCARTHY & MAEDER, *INSANITY AND THE LAW* (1928); 136 *THE ANNALS* 131, quoted by HALL, *op. cit. supra* note 58, at 497.

<sup>62</sup> WHITE, *INSANITY IN THE CRIMINAL LAW* 502, n. 8 (1923).

<sup>63</sup> PRITCHARD, *A TREATISE ON INSANITY* (1835); RAY, *A TREATISE ON THE MEDICAL JURISPRUDENCE OF INSANITY* (1838). See also ZILBOORG AND HENRY, *A HISTORY OF MEDICAL PSYCHOLOGY* 240 ff. (1941).

<sup>64</sup> *RESPONSIBILITY IN MENTAL DISEASE* 133 ff. (1874).

wrong.<sup>65</sup> Although it has been claimed that seventeen states today have adopted the test of "irresistible impulse,"<sup>66</sup> a careful examination of the cases makes this claim an extremely doubtful one.<sup>67</sup>

A growing number of psychiatrists have rejected the notion that moral knowledge is without significance in mental illness. "The moral attitude is a real factor in life with which the psychiatrist must reckon if he is not to commit the gravest errors."<sup>68</sup> Moreover, sharp dissent from psychoanalytic theory is frequently voiced: "no critically minded person . . . can accept psychoanalysis on the basis of the writings of Freud or of any of his followers."<sup>69</sup> And the doctrine of "moral insanity" has been explored with no discoveries. The distinguished head of the Boston Children's Clinic observes: "We have been constantly on the lookout for a moral imbecile, that is, a person not subnormal and otherwise intact in mental powers, who shows himself devoid of moral feeling. We have not found one."<sup>70</sup>

The principal deficiency in the "irresistible impulse" doctrine is the same one which its supporters themselves are quick to point out in the "right and wrong" test, namely, that it ignores the unity of the human personality. Is mental illness possible which affects the individual's power of self-control without at the same time impairing his power of cognition? Most modern clinical evidence answers this question in the negative. Most psychiatrists agree in rejecting the theory.<sup>71</sup> Intelligence and mental tests of psychotics have demonstrated the related impairment of their rational

<sup>65</sup> 2 STEPHEN, HISTORY OF THE CRIMINAL LAW OF ENGLAND 169-172 (1883).

<sup>66</sup> WEIHOFEN, INSANITY AS A DEFENSE IN CRIMINAL LAW 16, n. 6 (1933).

<sup>67</sup> See HALL, *op. cit. supra* note 58, at 510.

<sup>68</sup> KAHN, PSYCHOPATHIC PERSONALITIES 65 (1931). And see HORNEY, NEW WAYS IN PSYCHOANALYSIS 297 (1939); JUNG, ANALYTICAL PSYCHOLOGY 242 (1922); RANK, BEYOND PSYCHOLOGY 278 (1941); Schroeder, *Attitude of One Amoral Psychologist*, 31 PSYCHOANALYTICAL REV. 329-333 (1944).

<sup>69</sup> Murray, *Psychology and the University*, 34 ARCH. NEUROL. & PSYCHIATRY 803, 809 (1935). See also HORNEY, *op. cit. supra* note 68, at 8; DALBIEZ, PSYCHOANALYTICAL METHOD AND THE DOCTRINE OF FREUD 294, 301 (1941).

<sup>70</sup> HEALY, INDIVIDUAL DELINQUENT 783 (1927).

<sup>71</sup> See Waite, *Irresistible Impulse and Criminal Liability*, 23 MICH. L. REV. 443 (1925); Whitman, *Capital Punishment and Irresistible Impulse as a Defense*, 5 NOTRE DAME LAW. 188 (1930).

functions.<sup>72</sup> The classic prototype of the "irresistible impulse," kleptomania, has been shown in recent investigations to be a disorder more widespread in its mental implications than has heretofore been supposed.<sup>73</sup> Moreover the problem of legal proof presented by any common adoption of the "irresistible impulse" test is virtually insurmountable. How can one distinguish an unresisted impulse from an irresistible one?<sup>74</sup> Or how can one properly say that lack of self-control is due to some "compulsion neurosis" rather than to a simple indiscipline of the will, often a concomitant of mental illness?

Thus the same sex offender who cannot be deterred by the threat of punishment will also be the one who cannot distinguish right from wrong or who can not understand the nature and quality of his behavior. If so, he clearly belongs to a class which is made irresponsible by the M'Naghten rules. On the other hand, if he is cognitively capable of appraising the moral quality of his act, he is deterrable and there is no substantial reason why he should not be held legally sane and responsible.

### 3. Treatment of All Criminals as Patients

Even if sex offenders cannot be shown to belong to a special class, distinct from other offenders and for which traditional rules of responsibility fail to take account, it is still argued that they, like all criminals, should receive treatment solely for the sake of individual rehabilitation and the protection of society from dangerous persons. A criminal law system which employs punishment is "vengeance under a disguise, namely the disguise of deterrence."<sup>75</sup> "The time

<sup>72</sup> STODDARD, MEANING OF INTELLIGENCE 26 (1943); Bolles & Goldstein, *Impairment of Abstract Behavior in Schizophrenic Patients*, 12 PSYCHIAT. Q. 65 (1938); Vigotsky, *Thought in Schizophrenia*, 31 ARCH. NEUROL. & PSYCHIATRY 1063 (1934).

<sup>73</sup> Gutheil, *Criminal Complex in Compulsion Neurosis*, 3 J. CRIM. PSYCHOPATH. 253 (1941); Lurand, *Compulsive Stealing*, 1 J. CRIM. PSYCHOPATH. 247 (1940).

<sup>74</sup> See SMITH, PSYCHOLOGY OF THE CRIMINAL 179 (1933). "It is impossible to say, in any particular case, that an impulse was irresistible; all that can be said is that the impulse did not appear to have been successfully resisted."

<sup>75</sup> WHITE, INSANITY AND THE CRIMINAL LAW 502 (1923).



will come when stealing or murder will be thought of as a symptom, indicating the presence of a disease . . ." <sup>76</sup> "The determinist can make no distinction between the killing of a human being through criminal violence or through the toxins of a tubercle bacillus." <sup>77</sup> The adoption of such a non-punitive system makes irrelevant not only a will free to select or reject good or evil, but also the entire framework of responsibility in criminal law. The crucial question is whether such a system considered as a means is better adapted than a punitive one for the attainment of the end of preventing sex crimes.

The adoption of completely indeterminate sentences means, of course, the abandonment of legislative gradations of punishment set up according to the seriousness of behavior. In its place, treatment is based exclusively on the offender's need for rehabilitation. This may have disastrous consequences in some situations when it operates to deprive a sex offender committing one crime of a powerful incentive not to undertake another and more serious one. For example, so long as forcible rape is punished more severely than indecent assault, the perpetrator of the latter crime may stop short of committing the former one when the victim repulses his advances. But if treatment after conviction is made to depend solely on what the offender needs for his reformation rather than upon the seriousness of his behavior, clearly no motive is supplied by the criminal law to battle down the defendant's urge to consummate the act of intercourse. <sup>78</sup>

Such indeterminate treatment completely unrelated to the harmfulness of the crime committed may also deprive the criminal law of its efficacy as an instrument of education. Suppose an offensive touching and an act of sodomy are both classified as sex offenses subjecting the defendant to indeterminate sentences from one day to the duration of his natural life. The criminal may well come to regard the trivial and serious offense in the same light. On the other hand, when the legislature prescribes severe treatment for

<sup>76</sup> MENNINGER, *HUMAN MIND* 373 (1945).

<sup>77</sup> Brill, *Determinism in Psychiatry and Psychoanalysis*, 95 AM. J. PSYCHIATRY 597, 609 (1933).

<sup>78</sup> 3 BENTHAM, *THEORY OF LEGISLATION*, c. 2 (Ogden ed. 1931).

one crime and lenient treatment for the other, there cannot be any question about the relative harmfulness of the two kinds of behavior. <sup>79</sup>

When the sex crime arouses widespread public alarm, as most of them do, it may not be possible to make available to the defendant non-punitive treatment even though his personal needs indicate that he might respond most readily to it. The writer recalls two defendants who perpetrated an act of sodomy on a five-year old girl. The grand jury refused to indict on the unsupported testimony of the child. The girl's father, who was a longshoreman and former heavyweight boxer, threatened to kill them both if he ever got his hands on them. When one of them returned to the neighborhood six months later, he was found dead on the sidewalk with a fractured jaw, two blocks from the longshoreman's home. Frequently the community, justifiably or not, insists on punitive treatment. Failure to heed this cry may lead to self-help, vigilantism, lynching or what may be worse, a general indifference to the criminal law. <sup>80</sup> It is true that appeasement of such public demand may make the criminal law an instrument of private vengeance. <sup>81</sup> Prudence in charting a course consistent with the prevention of crime will often require punitive treatment in such cases.

Finally, because treatment aimed solely at rehabilitation is compulsory and necessitates restraint for some indefinite period, the fiction that it is non-punitive becomes quite transparent. Under current indeterminate sentences life imprisonment for certain sex felonies is possible when the defendant proves incorrigible, or at least is too inexperienced to

<sup>79</sup> BECCARIA, *CRIMES AND PUNISHMENTS*, c. xxiii.

<sup>80</sup> See HOLMES, *THE COMMON LAW* 41-42 (1881): "The first requirement of a sound body of law is, that it should correspond with the actual feelings and demands of the community, whether right or wrong. If people would gratify the passion of revenge outside of the law, if the law did not help them, the law has no choice but to satisfy the craving itself, and thus avoid the greater evil of private retribution. At the same time, this passion is not one which we encourage, either as private individuals or as lawmakers."

<sup>81</sup> See WHITE, *INSANITY AND THE CRIMINAL LAW* 13-14 (1923): "The criminal thus becomes the handy scapegoat upon which [the average man] can transfer his feeling of his own tendency to sinfulness and thus by punishing the criminal he deludes himself into a feeling of righteous indignation, thus bolstering up his own self-respect and serving in this roundabout way, both to restrain himself from like indulgences and to keep himself upon the path of cultural progress."

simulate the approved response which brings early parole. This raises a serious political question of civil liberty. In addition, when more harmful behavior is treated less severely than trivial criminal behavior the inequality of such treatment suggests that it is unjust.

On the other hand, it is not correct to characterize a system which employs punishment as retributive or one which serves the end of vengeance only. Retribution as a sole end of criminal law has indeed been urged by Kant, Hegel and Kohler.<sup>82</sup> It is not, however, the view of those who would use punishment as a means to the end of preventing crime. Aristotle<sup>83</sup> and St. Thomas Aquinas<sup>84</sup> first stated this position which was later less perfectly adopted by the utilitarians, Bentham<sup>85</sup> and Von Jhering.<sup>86</sup> Moreover, the use of punishment to influence human behavior is based on sound psychology. Men seek pleasure, avoid pain. Punishing an actual offender prevents crime by the threat it makes to the potential one. Normally, certainty of punishment is more effective than its severity in influencing behavior. Assuming a given probability of its infliction, effectiveness of punitive treatment varies in direct proportion to its severity. This is certainly not the same as saying that punishment serves the end of retribution.<sup>87</sup>

One frequent criticism of the punitive system is certainly without justification: *viz.*, that it necessarily contemplates a system based on revenge. The retributionists themselves refute this: "Juridical punishment can never be administered merely as a means for promoting another good, whether with regard to the criminal himself or to civil society, but must in all cases be imposed only because the individual on whom it is inflicted has committed a crime."<sup>88</sup>

There is hardly more validity in the argument that the deterrent effect of punishment on potential offenders is in-

<sup>82</sup> KANT, *PHILOSOPHY OF LAW* 195 ff.; HEGEL, *THE PHILOSOPHY OF RIGHT* 90 ff. (Dyde ed. 1896); KOHLER, *PHILOSOPHY OF LAW* 279 ff. (1914).

<sup>83</sup> *ETHICS*, v. 1.

<sup>84</sup> "... laws are enacted for no private profit, but for the common benefit of the citizens." *DE SUMMA THEOLOGIA* Ia, IIae, Q. 90, Art. 2.

<sup>85</sup> *PRINCIPLES OF LEGISLATION*, c. i.

<sup>86</sup> *LAW AS A MEANS TO AN END*.

<sup>87</sup> See Ludwig, *supra* note 60, at 536.

<sup>88</sup> KANT, *PHILOSOPHY OF LAW* 195.

appreciable or non-existent. The fact that crime continues in spite of threats by the criminal law is far from conclusive. No jurisdiction has yet been willing to risk the experiment of determining whether the crime rate would be greater without them. But however efficacious as a deterrent to potential offenders, punishment is therapeutically ill-adapted for rehabilitation of actual ones. Experiments in animal and educational psychology have produced conflicting data on its constructive effects.<sup>89</sup> They confirm common experience that rewards supply superior motivation for human behavior. They also support the view that the efficacy of properly administered punishment is directly proportional to the subject's immaturity.<sup>90</sup> But their application to the criminal law system is extremely conjectural. Threats of electric shock to the maze rat or of teacher to pupil are not the same as legal ones to a young offender. Punitive treatment, especially when severe in the penal situation, brutalizes and embitters more often than it reforms.<sup>91</sup>

#### CONCLUSION

No radical alteration in the sex behavior content of penal statutes is necessitated by investigations purporting to demonstrate widespread disregard of traditional norms. The penal law must not abdicate as an instrument of moral education.

As for treatment of sex offenders, it may most truthfully be stated that causes have yet to be isolated. Until this is done, no final "cures" are even reasonably certain. The symptoms of such behavior are quite complicated. And the more that is written about them, the more complicated the

<sup>89</sup> Strang, *Contributions of Research to Discipline and Control*, 237TH YEAR-BOOK, NATIONAL SOCIETY FOR STUDY OF EDUCATION 216 ff. (1938) (88 studies reviewed).

<sup>90</sup> 2 SEARS, *RESPONSIBILITY* 129-154 (1932) (12 case histories).

<sup>91</sup> See RUSCHIE AND KIRCHHEIMER, *PUNISHMENT AND THE SOCIAL STRUCTURE* 138 ff. (1939); see SCHOPENHAUER, *WORLD AS WILL AND IDEA* 412 (1886): "The Penitentiary system seeks not so much to punish the deed as the man, in order to reform him. It therefore sets aside the real aim of punishment, determent from the deed, in order to attain the very problematic end of reformation. But it is always a doubtful thing to attempt to attain two different ends by one means; how much more so if the two are in any sense opposite ends."

entire problem gets. Psychiatry is a relatively recent development in man's efforts to better understand himself. In proportion, as greater insight is worked out in this discipline, much more can be expected from this approach to treatment. For the present, psychiatrists do not claim that they know all the answers. Nor is the criminal law—despite its centuries of experience—in a position to make such a claim.

In the light of these facts, the proper approach to the problem of treating sex offenders at best can be no more than a program steered by the light of a single principle. Equally absurd to claim that sex offenders must be subjected solely to non-punitive treatment for the sake of rehabilitating them and protecting society as it is to claim that their treatment must always be punitive so that others will be deterred. No scientific basis has yet been established for separating corrigible from incorrigible sex offenders or for determining when it is safe to assume that the corrigible ones have been reformed.

The control of sex offenders then remains a practical problem and at present can be handled only by practical methods. First, if a sex offender is sent to jail, he will not harm society with sex offenses while he is there. Second, if he is sent to jail, others who would be sex offenders are likely to change their minds. This is the extent of the contribution of the criminal law to the solution of the problem.

If while he is in jail, he can be helped better to understand himself, when he returns to society he will be in a superior position to avoid repeating his mistakes. This remains the job for psychiatry.

Since there is no significant difference between sex offenders and offenders committing non-sexual crimes, the recent New York statute providing special treatment for sex offenders is without theoretical experimental basis. The unfavorable experience of other states with similar statutes does not justify undertaking such legislation as a tentative experiment in treating sex criminals. Moreover, adoption of such a statute as a first step towards legislation making such treatment mandatory for sex or all offenders, would be set-

ting sail in a sea of doubt, as we have noted. If under the present statute, judges exercise their discretion extensively to sentence sex offenders indeterminate and the parole board is unduly lenient or severe in releasing such offenders, then the end of preventing sex crimes would be seriously dis-served by its retention. Its repeal therefore would result in no loss and might obviate many dangers in criminal law administration.