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NEW YORK'S NEW INDETERMINATE SENTENCE LAW FOR SEX OFFENDERS

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proceedings benefit dissenting shareholders and corporation alike. The dissenter's choice to secede is fully effected by prompt restitution of the fair value of his investment. For the corporation, settlement meets its statutory obligation to buy him out, but avoids costly proceedings, adverse publicity, and unwelcome probing of books or official valuation of assets. Moreover, this saving furnishes a theoretical extra margin for payment of dissenters' claims.

No doubt difficult valuation problems will continue to provoke unpromising disagreement necessitating appraisal. In those cases the revised New York statute apportions costs fairly. Whenever neither party is guilty of unfair dealing, the statute imposes the major cost burden on the party ordinarily better able to pay.³⁹

The model cost principles adopted by New York advance fair solution of intracorporate conflict. Broadened cost provisions cut down bargaining inequalities. At the same time, flexible allocation polices the fairness of the bargaining. A party no longer can use the threat of costs to force concessions. And fair settlements will solve cost problems by ridding both parties of financial burdens altogether. Although an effective appraisal statute may intensify judicial apathy toward intracorporate readjustments, the statute is not to blame. Fair recapitalization and effective appraisal should not be alternatives, but rather go hand in hand.

NEW YORK'S NEW INDETERMINATE SENTENCE LAW FOR SEX OFFENDERS

ORDINARY penal codes are inadequate to solve the problem of dangerous sex criminals.¹ Many such individuals are neither deterred by fear of punishment nor reformed by prison terms.² And mandatory release at the end of

39. The New York State Bar Association Committee, *supra* note 38, believes that imposition of appraisers' fees and interest on the corporation is "probably justifiable" in the "usual case."

1. The term "dangerous sex criminals" includes persons who commit forcible or violent sexual crimes against others, *e.g.*, first-degree rape or sodomy, or incest with small children and also individuals who carnally abuse children. Persons who commit non-violent, non-coercive sex crimes such as statutory rape are not usually regarded as "dangerous." On sex offenders and sex offenses generally, see Hirning, *The Sex Offender in Custody*, HANDBOOK OF CORRECTIONAL PSYCHOLOGY 233 (Lindner & Seliger ed. 1947); East, *Sexual Offenders—A British View*, 55 YALE L.J. 527, 530-55 (1946); Leppmann, *Essential Differences Between Sex Offenders*, 32 J. CRIM. L. & CRIMINOLOGY 366 (1941); Wile, *Sex Offenders and Sex Offenses, Classification and Treatment*, 3 J. CRIM. PSYCHOPATHOLOGY 11 (1941).

"Ordinary codes" refers here to penal laws fixing maximum sentences for specified crimes, *e.g.*, N.Y. PENAL LAW § 2010, making second-degree rape punishable by imprisonment for not more than ten years.

2. See FEDERAL PRISONS—1949, 3 (U.S. Dept. of Justice, Bur. of Prisons 1950); Note, 96 U. OF PA. L. REV. 872-6 (1948).

short maximum sentences frequently exposes society to offenders likely to return to violent crime.³

During the past twelve years an increasing concern over sex crimes has led fifteen jurisdictions to pass special statutes intended to control "sexual psychopaths."⁴ Typically, these laws provide that a state's attorney may initiate proceedings to determine if any person charged with crime is a "criminal sexual psychopathic person."⁵ The individual is examined by court-appointed psychiatrists, and a hearing, often without a jury, follows.⁶ If the court finds that he is a psychopath, it may suspend criminal proceedings and order "civil"⁷ commitment to a mental hospital for an indefinite period. The psychopath is released when "recovered."⁸

Despite their widespread adoption, the sexual psychopath laws have proven ineffectual. Some states provide no facilities to care for individuals committed.⁹ Prosecutors are reluctant to use the statutes, and many persons

3. See Reinhardt & Fisher, *The Sexual Psychopath and the Law*, 39 J. CRIM. L. & CRIMINOLOGY 734-7 (1949); Comment, 37 MICH. L. REV. 613-14, 616-17 (1939).

4. The following jurisdictions had sexual psychopath laws as of January, 1950: California, District of Columbia, Illinois, Indiana, Massachusetts, Michigan, Minnesota, Missouri, Nebraska, New Hampshire, New Jersey, Ohio, Vermont, Wisconsin, and Washington. Note, 2 WESTERN RESERVE L. REV. 69 n.3 (1950). For descriptions of the various laws see also Notes 39 COL. L. REV. 534 (1939); 25 IND. L.J. 186 (1950); 40 J. CRIM. L. & CRIMINOLOGY 186 (1949); 29 NEB. L. REV. 506 (1950); 96 U. OF PA. L. REV. 872 (1948); 1 STANFORD L. REV. 486 (1949).

5. No two laws are exactly alike. Thus, in some states any person may initiate proceedings. Some laws are limited to persons convicted of sex crimes. Several jurisdictions do not even require a criminal charge. See TAPPAN, *THE HABITUAL SEX OFFENDER*, appendix (Report and Recommendations of the New Jersey Commission on the Habitual Sex Offender, 1950) (comparison in tabular form of statutory provisions of thirteen states). Two of the more common statutory definitions of "criminal sexual psychopath" are summarized by Tappan as follows:

(A) "Irresponsible for sexual conduct and thereby dangerous to himself and others because of 1. Emotional instability; or 2. Impulsiveness of behavior; or 3. Lack of customary standards of good judgment; or 4. Failure to appreciate consequences of acts; or 5. Combination of above."

(B) "1. Mental disorder 2. Not insane or feeble-minded 3. Existing for period of one year 4. Coupled with criminal propensity toward the commission of sex offenses (all four required)." *Ibid.*

6. A few jurisdictions do not require that the examining physicians be psychiatrists. In some states the "psychopath" is not entitled to have a jury hear his defense. Elsewhere there is a full jury hearing. *Ibid.*

7. Calling the proceedings and confinement "civil" avoids constitutional difficulties. Criminal punishment could not be imposed without a jury trial on a definite charge, but an individual can be civilly committed as a ward of the state with far less due process protection. See Notes 32 J. CRIM. L. & CRIMINOLOGY 196, 198-9 (1941); 2 WESTERN RESERVE L. REV. 69, 75-7 (1950).

8. In a number of states the individual must then stand trial for the offense originally charged. See TAPPAN, *op. cit. supra* note 5, appendix.

9. If psychopaths are placed in state hospitals in those states, they receive only custodial care. *Id.* at 32-3.

consider them too severe.¹⁰ As a result, the laws of many states are now nearly or wholly inoperative.¹¹

The latest approach to the sex crimes problem has been made by New York. There, after a sexual psychopath bill met with a veto in 1947, a research program was undertaken to aid in framing a better statute.¹² One hundred and two prisoners convicted of serious sex offenses were intensively studied, and all were found to be suffering from mental or emotional disorders.¹³ Experiments with psychiatric therapy indicated that many could be successfully rehabilitated.¹⁴ Others could not be treated by any known method and would continue to be dangerous when released.¹⁵ The re-

10. Apparently prosecutors prefer to get criminal convictions, and use the psychopath laws only when there is insufficient evidence to convict. See *id.* at 30; Sutherland, *The Sexual Psychopath Laws*, 40 J. CRIM. L. & CRIMINOLOGY 543, 552-4 (1950).

11. According to a survey by Tappan, the laws of Wisconsin, Michigan, Massachusetts and Washington are inoperative, and the laws of Illinois, New Hampshire, Indiana and Vermont are rarely used. TAPPAN, *op. cit. supra* note 5, appendix. California, on the other hand, committed a total of 522 sexual psychopaths to mental hospitals from 1939 to 1949. SEXUAL PSYCHOPATH LAW OF CALIFORNIA 1 (mimeographed release of California Dept. of Mental Hygiene, 1950).

12. This bill resembled the "sexual psychopath" laws of other states. Governor Dewey vetoed it because of procedural defects. N.Y. Times, April 12, 1947, p. 15, col. 5. The research program is described in REPORT ON STUDY OF 102 SEX OFFENDERS AT SING SING PRISON (conducted under the auspices of the New York State Commissioner of Mental Hygiene and the Commissioner of Correction as submitted to Governor Thomas E. Dewey, 1950).

13. The main characteristics of these disorders were lack of rational motivation for criminal acts, hostility toward others, resentment against authority, and alcoholism. Most of the convicts studied had histories of emotional deprivation in childhood. *Id.* at 13-22. As causes of sex crime, emotional factors were found to be more important than intellectual deficiency. *Id.* at 22. For case histories of each individual, see *id.* at 66-95.

14. Among the methods tried were superficial guidance, psychoanalytic treatment of varying depths, and group therapy. Narcosynthesis (use of drugs to induce personal relationships) and antabuse treatment of alcoholics (antabuse is a drug which makes alcohol distasteful) were used to help establish rapport. *Id.* at 31-2. For an interesting example of a promising case, see *id.* at 33-4. This patient had served four years in prison for carnal abuse of a small girl. He was given psychiatric treatment while on parole. The treatment revealed that he had a deep distrust of women, and feared rejection by them. This had led him to seek sexual satisfaction with a child who could not refuse his attentions. As he grew to understand the causes of his crime, the patient developed a more mature attitude toward himself and others. This indicated a strong possibility of successful readjustment.

15. The study divided the prisoners into four categories in order of increasing receptivity to treatment:

"A. Offenders who are predisposed to crimes of violence, are likely to commit new attacks if released, and are not treatable by present known methods.

"B. Offenders who, because of personality make-up, age or alcoholism are not suitable for treatment at present and who are likely after release to continue as a danger to public morals and to women and children.

"C. Offenders who, because of their treatability, could be placed in a treatment center with a good prospect of improvement before release.

"D. Offenders who, because of their treatability, could be released on parole and treated on an out-patient basis." *Id.* at 24.

searchers, in their report, recommended legislation that would provide for psychiatric treatment of sex offenders and prevent premature release of the dangerous group.¹⁶ Passage of a new law followed swiftly.¹⁷

New York's statute differs in several respects from the sex psychopath laws of other states. It does not attempt to define a sexually dangerous person, and it does not apply to persons merely accused of crime. Instead, the act provides that before sentence can be imposed or probation granted, persons convicted of specified sex felonies or certain second offenses must be given psychiatric and physical examinations. Thereafter the court may impose on any person so convicted any penalty previously allowed, or an indeterminate sentence of one day to life.¹⁸ This sentence is criminal, not civil.¹⁹

16. *Id.* at 41-6. Similar recommendations had previously been made following a study in New York City. REPORT OF MAYOR'S COMMITTEE FOR THE STUDY OF SEX OFFENSES 9 (New York City, 1943).

17. It took effect April 1, 1950. N.Y. Laws 1950, c. 525, § 26.

18. The examination is by two qualified psychiatrists from the staff of a publicly supported hospital. N.Y. CODE CRIM. PROC. § 659 (1945). The defendant may be committed to a hospital for a reasonable period for observation and examination. N.Y. CODE CRIM. PROC. § 660 (Supp. 1950). The psychiatrists may subpoena and examine witnesses under oath, and compel the production of relevant documents. N.Y. CODE CRIM. PROC. § 661 (1945). The psychiatrists must submit to the court "a complete written report" which "shall include all facts and findings necessary to assist the court in disposing of the case." N.Y. PENAL LAW §§ 2188, 2189-a (Supp. 1950). Until he receives this report the judge has no power to impose sentence, suspend sentence, or place a defendant on probation, if the defendant has been convicted of a crime punishable by indefinite sentence. N.Y. PENAL LAW §§ 2188, 2189-a (Supp. 1950). However, once the judge has the report, he is under no obligation to respect its findings; whether he imposes an indefinite sentence, a fixed sentence, or no penalty at all is entirely within his discretion. The law does not even suggest psychiatric standards which would make indefinite sentence advisable. It should be noted that indefinite sentence may mean extremely brief as well as extremely long confinement.

Whether or not it is wise to allow judges this broad discretion will be determined only after the law has been in operation for some time. Probably most psychiatrists will welcome a law that allows them to make recommendations without requiring those recommendations to fit a statutory formula.

Indeterminate sentences may be imposed only on conviction of one of the following crimes: (1) assault in the second degree with intent to commit rape, sodomy, or carnal abuse of a child, N.Y. PENAL LAW § 234 (Supp. 1950); (2) carnal abuse of a child under ten years of age by a person over eighteen, *id.* § 483-a; (3) carnal abuse of a child aged ten to sixteen by a person previously convicted of a sex offense or an attempt to commit a sex offense, *id.* § 483-b; (4) first degree sodomy, *id.* § 690; (5) first degree rape, *id.* § 2010; (6) any felony or attempt to commit a felony (sexual or non-sexual) where the defendant has previously been convicted of first or second degree rape, sodomy in the first degree, the felony of carnal abuse of a child, assault in the second degree with intent to commit one of the above sex felonies, or an attempt to commit any of the above crimes, *id.* § 1940; (7) any felony or attempt to commit a felony, except murder in the first degree, where the act was accompanied by (a) sexual abuse of a child, or (b) sexual abuse of any person if such person was subjected to grievous bodily injury, or if a dangerous weapon or instrument was used, or if a dangerous or intoxicating drug or medicine was administered, *id.* § 1944-a.

19. See note 7 *supra*. Designation of the sentence as criminal eliminates the unfortunate practice under some "psychopath" laws of releasing a man as cured and then subjecting him

Psychiatric examination and parole board review of all persons indefinitely sentenced is mandatory after the first six months, and every two years thereafter.²⁰ The Board has full discretion to grant conditional or absolute release at any time.²¹ The Department of Mental Hygiene is to furnish psychiatric services to the Department of Correction, which may set up in its institutions clinics for the diagnosis and treatment of convicts.²²

Enactment in New York of what is probably this country's first fully indeterminate criminal sentence²³ is an important move toward an enlightened penology. Fixed sentences represent a legalistic view of crime. They imply either arbitrary punishment for a given act, or, at best, the attempt of a judge who lacks adequate information and skill to guess when and if a criminal will reform.²⁴ Indefinite sentences, on the other hand, permit a psychiatric approach by making possible individualized treatment of offenders.²⁵ In theory at least, the length of these sentences depends not on the original crime but on expert analysis of each convict's personality, response to therapy, and tendency to recidivate.²⁶

to a criminal trial. See note 8 *supra*. Although an indefinite sentence may last a lifetime, the individual is not deemed civilly dead as would a person sentenced for a life term. N.Y. PENAL LAW § 511 (Supp. 1950).

20. N.Y. CORRECTION LAW § 214 (Supp. 1950).

21. *Id.* §§ 212, 220.

22. N.Y. MENTAL HYGIENE LAW § 11-a (Supp. 1950); N.Y. CORRECTION LAW §§ 148, 149 (Supp. 1950).

23. In this note, "indeterminate" and "indefinite" are used synonymously, and refer specifically to sentences of "one day to life."

On the history and objectives of the indeterminate sentence, see Sellin, *Indeterminate Sentence*, 7 ENCYC. SOC. SCI. 650 (1932); Finlay, *The Indeterminate Sentence*, 15 N.Z.L.J. 233 (1939); Comment, 50 HARV. L. REV. 677 (1937). Early penal codes in this country provided for indeterminate sentences only within fixed minimum and maximum limits. Aside from New York's new indeterminate sentence law for sex offenders, the state which has gone the farthest in providing for indeterminate sentences is California. In that state a three-man administrative board is given the power to determine and redetermine the length of imprisonment within the maximum and minimum prescribed by law for the offense. CAL. PEN. CODE §§ 1168, 3020 (1941); *id.* § 3000 (Supp. 1947).

24. The fact that different judges give widely dissimilar sentences for identical crimes is in part an illustration of the difficulty of making such decisions. See Gaudet, Harris & St. John, *Individual Differences in the Sentencing Tendencies of Judges*, 23 J. CRIM. L. & CRIMINOLOGY 811 (1933); McGuire & Holtzoff, *The Problem of Sentence in the Criminal Law*, 20 B.U.L. REV. 423 (1940).

25. Reformation has replaced punishment as the objective of progressive penal science. For the modern view holds that criminals are not "wicked" but "socially sick." Law and prison administration have slowly adjusted to this change in attitude. See generally, Lukas, *Peno-Correctional Philosophy in Retrospect*, NATIONAL PROBATION AND PAROLE ASSOCIATION YEARBOOK OF 1948, 15-33; Long, *Punishment v. Treatment in the Care of the Criminal*, 2 JOHN MARSHALL L.Q. 560 (1937); Schilder, *The Cure of Criminals and the Prevention of Crime*, 2 J. CRIM. PSYCHOPATHOLOGY 149 (1940).

26. See the summary of principles underlying a good criminal procedure in Glueck, *Principles of a Rational Penal Code*, 41 HARV. L. REV. 453, 475 (1928): "(1) The treatment (sentence-imposing) feature of the proceedings must be sharply differentiated from the guilt-finding phase. (2) The decision as to treatment must be made by a board or tribunal

By making conviction a prerequisite to indeterminate confinement, and by eliminating any definition of psychopathic personality, New York has cured at least three defects of prior sex offender laws. First, New York avoids using as a standard for grave judicial action²⁷ a "psychiatric" term so vague that psychiatrists cannot agree on its meaning.²⁸ Second, unlike some other states, New York gives "accused" persons the benefit of the procedural safeguards of the criminal law.²⁹ Third, by confining only persons who have already committed a socially dangerous act, New York minimizes the injustice of those sexual psychopath laws which fail to distinguish ab-

specially qualified in the interpretation and evaluation of psychiatric, psychological and sociologic data. (3) The treatment must be modifiable in the light of scientific reports of progress. (4) The rights of the individual must be safeguarded against possible arbitrariness or unlawful action on the part of the treatment tribunal."

27. "[Commitment] is in effect a serious punishment in which liberty and due process are vitally involved. Reasoning to the contrary is founded in a technical legalism of the most vicious sort." TAPPAN, *op. cit. supra* note 5, at 16. Reputations may be ruined by the mere bringing of charges, even though the finding is negative. Hence the discretionary power of prosecutors to initiate proceedings may itself be used to inflict punishment. See Hughes, *The Minnesota "Sexual Irresponsibles" Law*, 25 MENTAL HYGIENE 76, 82-3 (1941).

28. See Sutherland, *supra* note 10, at 552. The sexual psychopath laws permit confinement to be based on a diagnosis by psychiatrists rather than on commission of any offense.

"[T]he concept of the sexual psychopath . . . is too vague for judicial or administrative use either as to commitment to institutions or as to release as 'completely and permanently cured.'" *Id.* at 551. Twenty-nine different but equally vague definitions by psychiatrists of "sexual psychopath" are given in TAPPAN, *op. cit. supra* note 5, at 40-2. See COMMITTEE ON FORENSIC PSYCHIATRY OF THE GROUP FOR THE ADVANCEMENT OF PSYCHIATRY, REPORT NO. 9 (1949) quoted in *id.* at 37: "The Committee cautions against the use of the appellation, psychopath, in the law on several grounds. There is still little agreement on the part of psychiatrists as to the precise meaning of the term. Furthermore, the term has no dynamic significance. The Committee believes that in statutes the use of technical psychiatric terms should be avoided wherever possible. Psychiatric knowledge and terminology are in a state of flux. Once having become a part of the public law such a term attains a fixity unresponsive to newer scientific knowledge and application."

For general discussions of psychopathic personality and its characteristics see Cleckley, *The Psychopath Viewed Practically*, HANDBOOK OF CORRECTIONAL PSYCHOLOGY 395 (Lindner & Seliger ed. 1947); Diethelm, *Basic Considerations of the Concept of Psychopathic Personality*, *id.* at 384; Arieff & Rotman, *Psychopathic Personality*, 39 J. CRIM. L. & CRIMINOLOGY 158 (1948); Karpman, *The Principles and Aims of Psychopathology*, 1 J. CRIM. PSYCHOPATHOLOGY 187, 200-7 (1940).

29. In his 1947 veto of the New York "sexual psychopath" bill, Governor Dewey said: "We should not demolish the important safeguards that surround personal liberty in our state." N.Y. Times, Apr. 12, 1947, p. 15, col. 5. See also Stewart, *Concerning Proposed Legislation for the Commitment of Sex Offenders*, 3 JOHN MARSHALL L.Q. 407, 419-21 (1938). For a contrary view, see Reinhardt & Fisher, *supra* note 3, at 741-2: "Such factors as presumption of innocence, proof beyond a reasonable doubt and all of the other valuable and ancient safeguards by which the person accused of crime has been surrounded . . . have no more logical place in the investigation of a known or suspected corrupter of the minds and bodies of little children than in the case of the insane person before the insanity board." On the procedures of a hearing under the "psychopath" laws, see Note, 2 WESTERN RESERVE L. REV. 69, 74-8 (1950).

normal persons who merely offend public morals from those who are truly dangerous. Exhibitionists, homosexuals, and peepers may fit into the definitions of "psychopath" and still be harmless individuals.³⁰ Yet under some laws they can be indefinitely confined even though the state may be unable to prove a criminal charge against them.³¹

Against these advantages must be set the fact that the New York statute, because it is confined largely to persons convicted of first-degree sex offenses, will not reach many abnormal individuals who are a menace to society. Robbery or murder may be sexually motivated, yet sexually dangerous persons convicted of these non-sexual crimes cannot be given indeterminate sentences.³² Persons predisposed to violent crime who happen to be convicted of second degree sex felonies or misdemeanors are likewise not covered.³³ Sex offenders can also avoid indefinite commitment by "plea bargains," arrangements whereby those charged with sex felonies "make a

30. There is no evidence that persons who commit minor crimes are very likely to progress to major offenses. Psychiatrists cannot with any accuracy say which individuals will probably commit major crimes. TAPPAN, *op. cit. supra* note 5, at 14. The Kinsey Report indicates that illegal sex practices are widespread among persons who could not be classified as "dangerous." See Comment, 17 U. OF CHI. L. REV. 162 (1949); Note, 39 COL. L. REV. 534, 538 (1939). In view of this, statutes which impose drastic penalties on sex deviation of a type that does not endanger other people seem both unwise and unenforceable. Laws cannot establish complete conformity in sexual matters; they should be restricted to the more modest task of preventing behavior that is clearly injurious to society.

31. According to Tappan, the "psychopath" laws have frequently been applied to minor sex offenders, particularly exhibitionists. TAPPAN, *op. cit. supra* note 5, at 28-9. These offenders may be confined for long periods because institutional superintendents fear they will commit new offenses if released. *Id.* at 49. Hence Tappan recommends that sex offenders be given special treatment "only where there has been a conviction in a criminal court for a serious sex crime, evidencing the danger of the offender to the security of the community." *Id.* at 46.

A fourth advantage is New York's provision for conditional as well as absolute release of prisoners. New York thus avoids the administrative difficulties of state laws which recognize no middle ground between "psychopathy" and "complete recovery." See Note, 1 STANFORD L. REV. 486 (1949).

32. Except that persons who have previously been convicted of a sex offense may be given an indeterminate sentence for any felony. See note 18, *supra*.

Karpman points out that the usual classifications of crime (against property, against the person, against chastity, etc.) obscure the motivations behind offenses. Thus, robbery may be committed by a man who needs money or by a person who collects objects as sex fetishes. Karpman describes the case of a youth whose offense was felonious assault. Sitting in a movie theater, this boy suddenly stabbed a knife into a girl in front of him. Psychiatric investigation revealed that he had abnormal sexual drives that made him desire to murder women by torture. Yet under New York's statute this extremely dangerous individual could not be confined indefinitely. See Karpman, *Felonious Assault Revealed as a Symptom of Abnormal Sexuality*, 37 J. CRIM. L. & CRIMINOLOGY 193 (1946).

33. However, there are certain exceptions to this statement: (1) Assault in the second degree with intent to commit rape, sodomy, or carnal abuse is punishable by indefinite sentence. N.Y. PENAL LAW § 243 (Supp. 1950); (2) Indeterminate sentence may be imposed for rape in the second degree or assault as in (1) *supra* where the defendant has previously been convicted of any sex felony or attempt to commit such a felony, *id.* § 1940; (3) Any

deal" with the prosecutor to plead guilty to lesser offenses.³⁴ Furthermore, indeterminate sentences are never mandatory; uncooperative judges can make the statute a dead letter.

New York's law transfers from judges to administrators full power over the future of convicted persons. Hence the success of the statute depends mainly on the facilities these penal officials have for administering it. The sexual psychopath laws of other states have failed primarily because no provisions were made for treating psychopaths during and after confinement.³⁵ Effective administration of New York's statute requires a large professional staff, thorough diagnostic examinations, use of modern therapy techniques, continuous research training for prison personnel, an expert parole board, careful supervision of parolees, and, above all, generous appropriations.³⁶ Attainment of these objectives may prove difficult, especially in view of the near-impossibility of obtaining enough qualified psychiatrists.³⁷ Yet without such implementation, the present statute will prove as sadly inadequate as its predecessors.³⁸

Sex offenders in New York will presumably be sent to state prisons. Prison life, however, impedes treatment and gives impetus to deviant sex practices even among "normal" convicts.³⁹ Sending sex offenders to state mental

felony or attempt to commit a felony is subject to indefinite sentence if it was combined with sexual abuse, *id.* § 1944-a; (4) The misdemeanor of carnal abuse of a child aged ten to sixteen is a felony punishable by indeterminate sentence if the defendant has previously been convicted of a similar crime or various other sex offenses, *id.* § 483-b.

34. Of those persons charged with sex felonies of all types and convicted of a crime in the General Sessions Court of New York City, 1930-1939, 87% pleaded guilty, and of these 74% pleaded guilty to misdemeanors. REPORT OF MAYOR'S COMMITTEE, *op. cit. supra* note 16, at 49. These figures include a large number of statutory rape cases.

35. TAPPAN, *op. cit. supra* note 5, at 32-33.

36. See generally on problems of administration and treatment: HANDBOOK OF CORRECTIONAL PSYCHOLOGY (Linder & Seliger ed. 1947) *passim*; Wall & Wylie, *Institutional and Post-Institutional Treatment of the Sex Offender*, 2 VAND. L. REV. 47 (1948); Comment, 57 YALE L.J. 1085 (1948).

37. In 1949 in New York, all but two of the psychiatric positions which the budget provided for in the state prison system were vacant. One purpose of placing psychiatric services under the Department of Mental Hygiene, as is done in the New York statute, is to make the jobs more attractive so that qualified psychiatrists will apply for them. REPORT ON STUDY OF 102 SEX OFFENDERS, *op. cit. supra* note 12, at 41. Tappan questioned about sixty psychiatrists as to the proper ratio of psychiatrists to sexual psychopaths in an institution, and reports that the mean average for all the replies was one psychiatrist to twenty-three patients. Most of these same experts thought it would be impossible to get enough psychiatrists to treat any large proportion of the dangerous sex offenders. TAPPAN, *op. cit. supra* note 5, at 59.

38. See Glueck, *supra* note 26, at 463.

39. The New York researchers who studied sex offenders in Sing Sing concluded:

"The confinement of prison, and the offender's natural resentment against authority, are themselves obstacles to psychiatric treatment. In any further research program, treatment facilities should be set up outside prison, where a limited number of offenders could be given treatment in an environment more acceptable therapeutically. . . ." REPORT ON STUDY OF 102 SEX OFFENDERS, *op. cit. supra* note 12, at 30. See East, *Is Reformation Possible*

hospitals is often no better than confining them in prison; the hospitals are understaffed and hence unable to provide appropriate treatment.⁴⁰ Ultimately, it would seem more desirable to isolate sex criminals in separate correctional institutions.⁴¹

Unless assured of proper administration, conscientious New York judges may well consider indeterminate sentences less desirable than fixed terms, and refuse to impose the former.⁴² The uncertainty of an indefinite sentence demoralizes convicts and may slow their rehabilitation.⁴³ In addition, the power such sentences confer is easily abused; corruption or politics in the Parole Board or prison administration could produce a tyranny of favoritism and bootlicking beyond the effective reach of judicial remedies.⁴⁴

Implicit in some sexual psychopath laws is the assumption that sex offend-

in Prison Today, 38 J. CRIM. L. & CRIMINOLOGY 128 (1947); Von Hentig, *The Limits of Penal Treatment*, 32 J. CRIM. L. & CRIMINOLOGY 401 (1941).

Karpman describes how imprisonment causes men to turn to fetishism, homosexuality and other perversions. A "disintegration of personality" may result, with persons who formerly were sexually normal becoming permanently abnormal after a long term in prison. Karpman, *Sex Life In Prison*, 38 J. CRIM. L. & CRIMINOLOGY 475 (1948).

40. On the experience of those states which placed sex offenders in mental hospitals, see TAPPAN, *op. cit. supra* note 5, at 32.

41. See Tappan, *The Sexual Psychopath—A Civic-Social Responsibility*, 35 J. OF SOCIAL HYGIENE 354, 363-5 (1949).

42. See Dession, *Psychiatry and the Conditioning of Criminal Justice*, 47 YALE L.J. 319, 335-40 (1938). See also Tappan, *supra* note 41, at 358: "The power to hold individuals indefinitely in correctional institutions for most ordinary criminal acts is far too great a responsibility when we are still so little able to predict the convict's future course of conduct and when we have such small ground for assurance that the types of treatment we employ will be more effective if extended indefinitely. Unless it can be shown as to the sexual psychopath that it is possible not only to diagnose the condition accurately, but beyond that to make dependable prognosis of his future conduct and to employ efficacious treatment methods, there appears to be no valid rationale for more prolonged treatment than is meted out to other offenders."

Under this view, New York has been wise to make its indeterminate sentence discretionary instead of mandatory. Judges can adapt the number of indefinite sentences imposed to the treatment facilities available.

43. "If a definite maximum sentence is set within a reasonable period after conviction, the prisoner knows the worst, adjusts his attitude accordingly, and settles down to earn parole or whatever allowance the law allows for good behavior. But if he is left in complete uncertainty, neither the prisoner nor his family are able to make necessary mental adjustments, and he suffers an experience of such utter hopelessness that complete moral disintegration imperceptibly will result." Hincks, *Proposed Legislation Relating to Federal Offenders*, 16 CONN. BAR J. 97, 108 (1942).

44. ". . . the term of imprisonment is entirely, not only at the discretion of the board of control, but at their will and pleasure. . . . When the convict, in whose interest so-called humanitarians have devised this manner of indeterminate sentence for his reform, enters the prison, he becomes the servant and slave of the prison board, and no court in the country has any power to protect his rights or redeem his wrongs. . . ." *People v. Cummings*, 88 Mich. 249, 254, 50 N.W. 310, 312 (1891) (indeterminate sentence with maximum and minimum limits held unconstitutional). "We do not think the public would at this time be willing to accept the completely indeterminate sentence. There is a very definite feeling that there should be some limit set to the imprisonment imposed for crime, and that the judiciary

ers are a distinct type of highly recidivistic criminal who can be isolated on the basis of personality and who must be given unique penal treatment. Actually, the basic causes of sexual and non-sexual criminality—family tensions, for example—are often quite similar.⁴⁵ The same types of mental disorders occur among both sorts of criminals,⁴⁶ and some individuals commit both sexual and non-sexual crimes.⁴⁷ Moreover, it has not been shown that persons who have committed sex offenses are more prone to recidivism than individuals who have committed only non-sexual offenses.⁴⁸ Persons who commit other types of crime are equally in need of rehabilitative treatment and indeed may be more responsive to it than are sex psychopaths.⁴⁹

The statutory schemes of some states to prevent sex crime by confining so-called sexually dangerous persons would, if actually put into operation, make

should not be deprived of all control over the matter." REPORT OF THE COMMITTEE ON PUNISHMENT FOR CRIME OF THE JUDICIAL CONFERENCE OF SENIOR CIRCUIT JUDGES 5 (1942).

45. Abrahamsen found that emotional deprivation and strained family relations in childhood could usually be discovered in the case histories of murderers, embezzlers, robbers, etc., whom he studied psychiatrically. Abrahamsen, *Family Tension, Basic Cause of Criminal Behavior*, 40 J. CRIM. L. & CRIMINOLOGY 330 (1949). Similar findings resulted from Abrahamsen's study of sex criminals in Sing Sing Prison. REPORT ON STUDY OF 102 SEX OFFENDERS, *op. cit. supra* note 12, at 14-16. This study led to the conclusion that "Sex offenders are in a separate classification only because of society's concern about their particular type of acts, not because they differ widely from other criminals in the basic causes of their anti-social behavior." *Id.* at 20.

46. For example, the senile and the feebleminded may be distinguished in both groups.

Compare ABRAHAMSEN, *CRIME AND THE HUMAN MIND*, 93-126 (1944) with East, *supra* note 1, at 530-43.

47. Of the sex offenders with criminal records studied in New York City, only 9% had been previously arrested for sex crime exclusively; 14% had mixed records, and 77% had been previously arrested only for non-sexual crimes. REPORT OF MAYOR'S COMMITTEE, *op. cit. supra* note 16, at 90-2. For elaborate case histories of mingled sexual and non-sexual crime, see KARPMAN, *CASE STUDIES IN THE PSYCHOPATHOLOGY OF CRIME* (4 vol., 1933-1944).

48. See TAPPAN, *op. cit. supra* note 5, at 22-4; Sutherland, *supra* note 10, at 547-8. In the period 1930-1939, 61% of sex offenders convicted in the New York City Court of General Sessions had no criminal records, as compared with 35% of all other felons. REPORT OF MAYOR'S COMMITTEE, *op. cit. supra* note 16, at 89-90. Of those convicted of sex offenses in 1930 in General Sessions only 34% had reappeared in the police line-up 12 years later. *Id.* at 93. It should be noted that these figures include a large number of statutory rape cases, an offense not necessarily indicative of dangerous sexual abnormality. If only such offenses as exhibitionism and sodomy were included, recidivism rates would be much higher.

49. Tappan suggests that sexual psychopaths may not be as responsive to treatment as other mentally disordered persons. In view of the limited facilities available, it might be unwise to allocate to sex offenders the lion's share of state psychiatric services. Tappan, *supra* note 41, at 361-2, 366. A study at the Psychiatric Clinic of the New York City Court of General Sessions indicated that relatively few offenders were mentally defective, psychotic or psychopathic; a broader psychiatric approach to criminal behavior was suggested. Thompson, *Some New Aspects of the Psychiatric Approach to Crime*, 20 MENTAL HYGIENE 529 (1936). Karpman believes that almost all criminals are "psychically sick people" who need treatment, not punishment. See Karpman, *Criminality, Insanity and the Law*, 39 J. CRIM. L. & CRIMINOLOGY 584, 605 (1939).