Sex and Sentencing

Mark C. Clemments

Follow this and additional works at: https://scholar.smu.edu/smulr

Recommended Citation
Mark C. Clemments, Sex and Sentencing, 26 Sw L.J. 890 (1972)
https://scholar.smu.edu/smulr/vol26/iss5/5

This Comment is brought to you for free and open access by the Law Journals at SMU Scholar. It has been accepted for inclusion in SMU Law Review by an authorized administrator of SMU Scholar. For more information, please visit http://digitalrepository.smu.edu.
SEX AND SENTENCING

by Mark C. Clements

The sentencing of a convicted offender is a crucial step in the criminal process. The judge may be given discretion to choose between several methods of punishment, or the decision may be pre-empted by the dictates of the state legislature. In either case, discrimination on the basis of the sex of the offender exists. Despite the physical differences between the sexes, it has not been shown that women uniformly rehabilitate any faster or slower than men. Yet, discrimination exists not only in circumstances involving more severe treatment for women, but less severe treatment as well.

The varying treatment of the sexes by sentencing judges and statutes may be an expression of the American view of the female in society. Generally, legislatures have enacted statutes providing her with "needed" protection, while sentencing judges have viewed her as having powers of rehabilitation far beyond the average male offender.

This Comment combines two areas of prime concern in the American society: treatment of convicted offenders and treatment of women. If a convicted offender is a female, even though society has condemned her by the same method as her male counterpart, she is not always faced with the same consequences. In short, because of a difference in sex, two persons with identical backgrounds, convicted of the same crime, are not always treated equally.

Initially, consideration will be given to the status of the American female at the turn of the century. It was at that time that most of the sentencing statutes pertaining solely to women were enacted. Second, consideration will be given to sentencing attitudes, practices, and theories. Third, potential methods of reform and sources of relief will be explored.

I. THE VIEW OF THE FEMALE CIRCA 1900

While women became more socially and economically independent in the early twentieth century, in the eyes of the law, they were yet to be emancipated. Perhaps the most widespread view was that women needed to be "protected." Thus, the Supreme Court of the United States at the turn of the century stated that American women were in a disadvantaged position, such that even if all

---


2 See, e.g., D. WARD & G. KASSEBAUM, WOMEN'S PRISON—SEX AND SOCIAL STRUCTURE (1965). This was a comprehensive study of the California Institution for Women at Frontera, California. Although originally directed at homosexuality in a women's prison, research indicated that women, even though treated less severely than men, reacted to prison with more psychological pain. Id. at 56-79. See note 121 infra.

3 See notes 6-7 infra, and accompanying text.

4 See notes 7-24 infra, and accompanying text.

5 In 1848, the first meeting of the Women's Rights Convention was held. E. ROOSEVELT & L. HICKOK, LADIES OF COURAGE 1-4 (1954). Even though a Declaration of Women's Rights was prepared at the meeting, the legal status of women remained unaffected. However, the changes in the American culture—changes which came about through social rather than legal means—were a prime factor in the beginning of social and economic independence for women. "On the whole she was more profoundly influenced than the man because many of the inventions [during this period] brought her vocational openings that did much to establish her economic independence." E. GROVES, THE AMERICAN WOMAN 246 (1937).
restrictions on political, personal, and contractual rights were removed, women would still "rest upon and look to [men] for protection." However, if protection was really what women required, as the Supreme Court asserted, it would be hard to reconcile the satisfaction of that requirement with the disparate treatment they actually received.

The Early Statutory Scheme. Until 1869 women were convicted and imprisoned under the same statutory provisions as male offenders. During the period between the Civil War and World War I, however, ten states enacted legislation creating separate facilities for women convicted of criminal acts. In 1869, Indiana became the first state to provide by statute for a separate correctional institution for female offenders. By 1915 the other nine states had enacted similar legislation. These acts were the result of "steadily increasing demand for legislation establishing women's reformatories." Although these statutes were generally addressed to the problem of separate facilities for women offenders, they often extended into the area of sentencing. These statutes establishing separate facilities for imprisonment also established the use of the indeterminate sentence for women offenders. Seven of the ten states used solely an indeterminate sentence, two used both the determinate and the indeterminate, and one gave the trial judge discretion to use either.

All of the original ten states made some use of the indeterminate sentence. Actually, the sentence was only "indeterminate" within limits set by law or by the court. Eight of the ten required no minimum sentence for misdemeanor convictions; five required no minimum in felony cases; two required both a maximum and a minimum in felony cases; and two required both in misdemeanor cases. Of course, once the mechanism for differing treatment had been created by way of these statutes, discrimination according to the sex of the offender in terms of sentence duration was not far behind.

The Problems and Theories of Sentencing. Two major theories have developed in the area of sentencing. Although these viewpoints have been developing for quite some time, neither has proven superior to the other, and neither, as yet, has become established as being free from major flaws. Perhaps the major reason for the failure of one of the two theories to become established to the exclusion of the other is the indecisiveness of the American society with regard to the goals to be achieved by way of the sentencing decision.

---

7 Rogers, A Digest of Laws Establishing Reformatories for Women in the United States, 8 J. CRIM. L.C. & P.S. 518, 520 (1917). Those 10 states were Indiana, Iowa, Maine, Massachusetts, Minnesota, New Jersey, New York, Ohio, Pennsylvania, and Wisconsin.
8 Law of May 13, 1869, ch. 32, § 1, [1869] Ind. Laws 61.
9 See Rogers, supra note 7, at 538.
10 Id. at 518.
11 Id. at 526.
12 See notes 56-65 infra, and accompanying text.
13 See, e.g., D. BESCCARIA, AN ESSAY ON CRIMES AND PUNISHMENTS (2d ed. 1793). Professor Bessarria favored identical disposition of all persons convicted of the same offense. See also B. Rush, An Inquiry into the Effects of Public Punishments Upon Criminals and Upon Society (1787). Dr. Rush favored indeterminate sentencing based on rehabilitation progress.
The first theory is that offenders should be sentenced to identical terms for the same offense. This would seem to present the most equitable situation because equality of treatment would seem to be the converse of discrimination. However, it has been charged that the theory results in harsh and rigid treatment. Two individuals who commit an identical crime are not likely to have the same temperament, disposition, or rehabilitative capacity. Consequently, these differences in personality create tremendous problems in terms of equality of treatment. Just as no two individuals are likely to commit a crime with the same motivating influence, so are no two individuals likely to react to incarceration in the same way. Imprisonment may protect society temporarily, and it may give society retribution to a degree, but once the offender has been rehabilitated, continued detainment serves no purpose but to deny society a producing member. Once rehabilitated, further imprisonment can only leave prisoners embittered and laboring under the feeling that they have been mistreated. The problem is how to find the point of rehabilitation, and at the same time avoid unequal sentencing.

The second theory is individualized disposition based on the character and personality of the offender. An early advocate of this model favored indeterminate sentencing based on the offender's rehabilitation progress, so that when an offender entered prison neither he nor the sentencing court could project what length his term would be. The term would be based on a constant reevaluation by an administrative authority. Obviously, for a sentencing judge to make an individualized disposition would require his having widespread discretion. It is this discretion that disturbs critics of this model. They contend that where there is discretion, there is abuse of that discretion. While judges are influenced by many factors when sentencing, it appears that few sentencing decisions are motivated by a sincere desire to rehabilitate the offender. Therefore,

---

18 See D. BECCARIA, supra note 14. Professor Beccaria did not favor the same range being applicable to every person convicted of the same offense. He favored the exact punishment being given to each offender. However, in the context of this Comment, identical sentencing, or equality of sentencing, refers to having each offender subject to the same sentencing standard.
19 See, e.g., P. TAPPAN, CRIME, JUSTICE AND CORRECTION 430 (1960).
20 Not only has this statement received a great deal of support, it almost seems axiomatic.
21 See, e.g., Note, Appellate Review of Primary Sentencing Decisions: A Connecticut Case Study, 69 YALE L.J. 1453 (1960). The author lists the following objectives which are to be achieved by way of the sentencing decision: rehabilitation of the offender, isolation of the offender from society, deterrence of other potential offenders, community condemnation, and retribution—which he defines as the "satisfaction of the community's emotional desire to punish the offender." Id. at 1455.
23 See note 15 supra.
24 B. RUSH, supra note 14.
25 George, Comparative Sentencing Techniques, 23 FED. PROB., Mar. 1959, at 27. George contended that the mere threat of abuse of discretion is reason enough to avoid individualized sentencing.
26 See, e.g., the studies done on sentencing judges, notes 25-44 infra. No two studies seem to agree as to the same variables which affect sentencing. This can partially be attributed to the slightly different purposes of the studies. Compare Comment, Texas Sentencing Practices: A Statistical Study, 45 TEXAS L. REV. 471 (1967) [hereinafter cited as Texas Study], with Martin, The Defendants and Criminal Justice, Univ. of Texas Bulletin No. 3437; Bureau of Research in Social Sciences, Study No. 9 (1934). The Texas Study, the most recent, found the sex of the offender to be relevant. Texas Study at 496. The older study found that sex was not significant statistically. Martin, supra, at 239.
this theory faces the difficulty of having an objective—individualized rehabilitation—which is not dependent upon the motivations of the sentencing decision-makers.44

II. SENTENCING JUDGES AND THE DISCRETION MODEL

A. The Studies of Sentencing Judges

The Gaudet Study. In 1933 a study was undertaken using 7,442 criminal cases in one county in New Jersey.45 The purpose of the study was to determine what factors influenced a sentencing judge. The investigators began their study with the idea in mind that “one of [society’s] greatest fallacies” was the belief that “men do not differ widely in their natural mental abilities.”46 The investigators also stated that there was a well-recognized opinion among recidivists in the county that sentencing tendencies differed among the judges.47 The investigators used cases tried by six judges over a nine-year period.48 It was found that the sentencing tendencies of a judge were determined before he came to the bench.49 Generally speaking, the education, religion, profession, and social experiences of the judge determined his sentencing tendency.50 The differences between the sentences given by the six judges were striking.51

The Martin Study. A year later a study was released evaluating ten percent of the felony cases disposed of by Texas district courts in 1930.52 The prime purpose of the study was to investigate the relationship between the sentence and the social traits of the defendant. The tendencies found were that judges favor white citizens over Negroes, Mexicans, and “others”; married men over single

44 See notes 25-44 infra.
45 Gaudet, Harris, & St. John, Individual Differences in the Sentencing Tendencies of Judges, 23 J. CRIM. L.C. & P.S. 811, 812-13 (1933) [hereinafter cited as Gaudet Study]. This study has been called the "most widely cited and probably the most influential of all American studies of disparity in sentencing . . . ." See Wechsler, supra note 1, at 535.
46 Gaudet Study at 811. The classic experiment laying bare this fallacy was noted by the investigators as a case in which 116 high school mathematics teachers were asked to grade identical geometry tests. The scores ranged from 28% to 92%. MONROE, DE Voss & REAGAN, EDUCATIONAL PSYCHOLOGY 322 (1930).
47 Gaudet Study at 812.
48 Id. at 813.
49 Gaudet tentatively concluded the single most relevant factor was the judge’s “environment.” When using this term, Gaudet was referring to the entire personal history of the judge—in effect, what had made the personality of the judge.
50 Gaudet Study at 814.
51 Id. at 816-17. The bar graphs representing the data collected by the investigators show how marked the differences can be between two judges who have been sitting on similar cases for approximately the same period. A summary of the results is reflected in the following table:

<table>
<thead>
<tr>
<th>PERCENTAGE OF TYPES OF SENTENCES GIVEN</th>
<th>Judge 1</th>
<th>2</th>
<th>3</th>
<th>4</th>
<th>5</th>
<th>6</th>
</tr>
</thead>
<tbody>
<tr>
<td>Imprisonment</td>
<td>35.6%</td>
<td>33.6%</td>
<td>53.3%</td>
<td>57.7%</td>
<td>45.0%</td>
<td>50.0%</td>
</tr>
<tr>
<td>Probation</td>
<td>28.5%</td>
<td>30.4%</td>
<td>20.2%</td>
<td>19.5%</td>
<td>28.1%</td>
<td>32.4%</td>
</tr>
<tr>
<td>Fine</td>
<td>2.5%</td>
<td>2.2%</td>
<td>1.6%</td>
<td>3.1%</td>
<td>1.9%</td>
<td>1.9%</td>
</tr>
<tr>
<td>Suspension</td>
<td>33.4%</td>
<td>33.8%</td>
<td>24.3%</td>
<td>19.7%</td>
<td>25.0%</td>
<td>15.7%</td>
</tr>
<tr>
<td># of cases</td>
<td>1235</td>
<td>1693</td>
<td>1869</td>
<td>1489</td>
<td>480</td>
<td>676</td>
</tr>
</tbody>
</table>

Id. at 816. A cursory look at the imprisonment percentages will confirm the opinion, which Gaudet found was held by many of the recidivists in this county, that differences existed in the sentencing tendencies of these judges.
52 Martin, supra note 23.
men; taxpayers over tax delinquents; widowed persons over divorced persons; and those with children over those without. Factors found to be not statistically significant upon the severity of the sentence were the age, sex, and amount of education of the defendant.

The Texas Study. A more recent study done in 1967 showed that the identity of the trial judge was statistically significant. This would confirm the results of the Gaudet Study. The purposes of this study were to define those factors that might influence the sentencing decision, and to determine which the personal characteristics of the offender might have on the decision. The investigators accumulated 1,720 felony cases from twenty-seven courts in nineteen large Texas counties. Those factors found to be statistically significant with regard to the administration of criminal justice were pretrial freedom, counsel, and the trial court—those who were not able to obtain pretrial freedom were generally sentenced more severely; those with appointed counsel tended to receive more severe treatment than those with retained counsel; and those sentenced by the judge rather than by the jury were subject to sentencing disparities due to the personal background of the trial judge. Relevant characteristics of the offenders which influenced the severity of sentence were prior convictions, marital status, age, educational level, and sex. Women were found to receive much better treatment than male offenders, the judges showing "something of a chivalrous attitude toward women." The investigators also pointed out that "a substantially higher percentage of women offenders receive sentences involving nonimprisonment than do their male counterparts." The investigators further attributed sentencing differences to the popular belief that women commit crimes of passion, and are "seldom possessed of pervasive criminal tendencies that more often characterize male criminals." This study, being more inclusive in its scope and more current than the Martin Study, is probably more accurate as well.

The extent of disparity in sentencing because of sex and other classifications is dramatic. The studies discussed above show that women do not uniformly...

---

38 Id.
34 A fourth factor found to be not relevant was the presence or absence of parents at sentencing. Id. at 96.
35 Texas Study at 489.
36 The Gaudet Study used the term "environment" of the trial judge when referring to his character traits derived from experience. See note 29 supra. The Texas Study used the term "identity" of the trial judge, but was referring to substantially the same thing.
37 Texas Study at 481-82.
38 Id. at 485-90.
39 Id. at 489-99.
40 Id. at 496.
41 Id. at 497.
42 Id. at 496; see note 104 infra.
43 For example, in 1965 the Florida Civil Liberties Union did a study and found that between 1940 and 1964, 54 men were sentenced to death in Florida. Six were white and 48 were Negroes. One of the white men was actually executed, while 29 of the 48 Negroes were executed. In New York between 1957 and 1962, 50 persons were sentenced to death—40 were Negroes and Puerto Ricans. Eleven were actually executed, all of whom were Negroes or Puerto Ricans. Rubin, Disparity and Equality of Sentences—A Constitutional Challenge, 40 F.R.D. 55, 67-68 (1966). The sexual difference in sentencing is just as striking. In 1967, the Federal Bureau of Investigation compiled data from 3,985

---
receive longer sentences than men. Quite the contrary, the results of the Texas Study seem to indicate a more lenient attitude toward women. One commentator has stated: "Our society is disproportionately soft on the female offender . . . throughout the whole legal process . . . . This represents a male-dominated society's showing deference to the symbol of woman . . . .""  

Male offenders far outnumber women at every level of judicial administration.  

B. The Discretion Model

"No possible punishments can deter women from heaping crime upon crime. Their perversity of mind is more fertile in new crimes than the imagination of a judge in new punishments.""  

Despite the above view, the studies and percentages indicate that where discretion exists, the female fares well. This is not true individualization of sentencing, which is the objective of the discretion model, since women as a group are less likely to be imprisoned than their male counterparts convicted of the same crime.  

If discretion is given by statute to a judge, it must be exercisable with both male and female defendants. For example, in Commonwealth v. Daniels, 275  

Jane Daniels was convicted of robbery. A Pennsylvania statute provided that women were to be given an indeterminate term, 28 while males guilty of the same offense would have been sentenced under another statute. 29 The superior court stated: "This court is of the opinion that the legislature reasonably could have concluded that indeterminate sentences should be imposed on women as a class, allowing the time of incarceration to be matched to the necessary treatment in order to provide more effective rehabilitation." 30 The dissenting judge stated: "[U]nder the guise of special rehabilitation treatment for women, the legislature, in the Muncy Statute, has adopted a system which accomplishes little more than the imposition of harsher punishment for women offenders." 31  

The Supreme Court of Pennsylvania agreed with the dissenting judge. Daniels was decided with Commonwealth v. Douglas, 32 in which Daisy Doug-
las and a male co-defendant were both convicted of aggravated robbery and conspiracy. The male defendant was sentenced to four to ten years, while Daisy received an indeterminate sentence as ordered by the Muncy Act. The court stated that an indeterminate sentence must be deemed to be the maximum term decreed by law for the crime. A judge could exercise discretion in sentencing a man by considering extenuating circumstances. However, under the Muncy Act the judge had no such power when he sentenced a woman. The sentencing judge, under the Muncy Act, had no power to impose a minimum or maximum shorter than the maximum provided statutorily. Thus, as the court pointed out, women were not given the right to have the judge (1) impose a shorter maximum than that provided by law, or (2) impose a minimum-maximum sentence, both of which could be done where men are sentenced. This resulted in an invidious discrimination, because discretion allowed the judge when sentencing men was not available to the judge when sentencing women. Therefore, if the discretion model is to be used, Daniels and Douglas teach that it must be exercised with both sexes. The problem, however, is that it is not applied equitably. Women uniformly fare much better than men when the trial court has discretion. Give that discretion to the judge to be exercised with both sexes in order to avoid discrimination, and the studies indicate that women as a group will receive softer treatment, which is an end result altogether different from the one sought.

III. STATUTORY SENTENCES AND THE UNIFORMITY MODEL

A. The Statutes

"Protecting" women has resulted in women, in many cases, being denied equality of treatment. Such is the case with sentencing statutes enacted to apply solely to women. Generally, sentencing statutes fall into several categories, based on the amount of discretion given the court in setting the minimum and maximum sentence. The statutes dealing with sentences for women are usually of the variety which set the limits and compel the judge to give an indeterminate sentence within those limits.

See notes 49 supra. The court cited Commonwealth v. Kalck, 239 Pa. 533, 541, 87 A. 61, 64 (1913), in which the court said: "A sentence for an indefinite term must be deemed a sentence for the maximum term described by law as a punishment for the offense committed."

"Regardless of the facts and circumstances involved in each case, whether extenuating or otherwise, a Judge in sentencing a woman has no discretion. . . . On the other hand, a judge in sentencing a man . . . may and does consider extenuating facts and factors. It is clear, therefore, that an arbitrary and invidious discrimination exists . . . ." 243 A.2d at 403.

"The pedestal upon which women have been placed has all too often, upon closer inspection, been revealed as a cage." Sail'er Inn, Inc. v. Kirby, 95 Cal. Rptr. 329, 485 P.2d 529, 541 (1971).

Note, Statutory Structure for Sentencing Felons to Prison, 60 COLUM. L. REV. 1134 (1960), defines these categories and gives a detailed analysis of sentencing statutes. The categories are defined as: (1) minimum and maximum term both set by the court; (2) maximum term fixed by statute and minimum term set by the court; (4) maximum term set by the court and minimum term fixed by statute; (5) maximum and minimum term both fixed by statute.

See notes 48-56 supra, and accompanying text. See also Note, 20 RUTGERS L. REV.
A Kansas sentencing statute took from the trial judge the power of imposing a minimum sentence on women. An Indiana statute allowed male persons accused of a felony to plead insanity, but was silent as to female persons accused of the same crime. In Maine, the sentence for intoxication for men was two years; for women, it was three years. Fourteen states had or have sentencing statutes applicable to women calling for indeterminate sentences, usually resulting in more severe sentences for women than men guilty of the same offense.

B. Case Law

The Unsuccessful Equal Protection Challenges. In Daniels and Douglas the court ordered that discretion be exercisable with both sexes. The appellants there had argued that the lack of discretionary sentencing for women violated the equal protection clause. But what about cases in which sentences for women are provided by statute, leaving no discretion at all to the trial court? These too have been subjected to the equal protection challenge.

Such a challenge to a sentencing statute was made in 1919. In State v. Heitman, Mrs. L. O. Heitman was convicted of keeping a liquor nuisance. She was sentenced under a Kansas statute providing that every female shall be sent to the women's industrial farm, and that the court "shall not fix the limit or duration of the sentence." The court acknowledged that if the defendant had been a man she would have had a definite sentence. However, the court reasoned that, since both sexes are subject to the same maximum sentence, giving Mrs. Heitman an indefinite sentence did not violate the equal protection clause.

756 n.3 (1966), in which the author defined the indeterminate sentence: "The term . . . is applicable to any sentence that results in incarceration in prison for an indefinite period of time. . . . Such sentences permit parole boards to observe the adjustments of the inmate in order to determine when release is appropriate."


76 Morgan v. State, 179 Ind. 300, 101 N.E. 6 (1913).
77 See Ex parte Gosselin, 144 Me. 412, 44 A.2d 882 (1945).
78 Id.
79 See notes 7, 8 supra, and accompanying text. See also ALA. CODE tit. 52, § 575 (1960); ARK. STAT. ANN. § 46-804 (1964); CAL. PENAL CODE § 1168a (West 1970).
80 Kanowitz, Constitutional Aspects of Sex-Based Discrimination in American Law, 48 NEB. L. REV. 131, 151 (1968).
81 105 Kan. 139, 181 P. 630 (1919). The statute read: "Every female person . . . who shall be convicted of any offense against the criminal laws of this state . . . shall be sentenced to the state industrial farm . . . but the court . . . shall not fix the limit or duration of the sentence." 181 P. at 631.
83 See note 66 supra. The court, after setting out these unique qualities of womanhood, concluded that the legislature was reasonable in treating women differently. Another Kansas statute, Law of Aug. 1, 1917, ch. 215, § 1, [1917] Kan. Laws was challenged on the same grounds in Ex parte Dunkerton, 104 Kan. 481, 179 P. 347 (1919). The petitioner claimed the sentencing statute took away the court's discretion to impose a minimum sentence on women. The court held that the legislature was not unreasonable in determining that women should be more or less severely punished than men. For those who believe that imprisonment should have a deterrent effect on those contemplating crime, the Supreme Court of Kansas offered some interesting insights into prison life. It stated: "Under the act women are not subject to the debauching influence of the county jail and of the penitentiary and of close confinement therein, but are placed in a field where labor is pleasant and restraint is limited, and where the evil influence of other persons convicted of crime is minimized.
A convicted prostitute challenged a California statute in *Ex parte Carey.* She claimed the statute was more severe on the prostitute than on her male partner. The court held the classification valid, stating: "The fact that the fallen woman carries on the business of commercialized vice justifies whatever discriminations may be found in the statute."

A statute in Massachusetts provided that any "female convicted of a crime punishable by imprisonment shall be sentenced to the reformatory for women," and the court "shall not prescribe the limit of the sentence unless it is for more than five years." Ruth Platt was found guilty of fornication and sentenced to the reformatory "until discharged in due course of the law." The statute was upheld in the face of a challenge on the basis of equal protection. The court stated that the legislature was reasonable in classifying on the basis of sex for the purpose of punishment.

As these and other illustrative cases show, equal protection challenges generally failed. When a court concluded the classification had a reasonable relationship to a legitimate legislative end, such as rehabilitation of a criminal offender, the statute was upheld. Even though sentencing statutes usually have a legitimate legislative end, the real problem is whether women can be treated differently due to the differences in rehabilitative capacity between the sexes. If no difference exists, then presumably no classification based on it could be reasonable. These cases fail to resolve the basic issue of whether women rehabilitate faster than men.

The Equal Protection Door Begins To Open. Although the older cases indicate that differences in sentencing based on sex are acceptable because women are different from men, in more recent years the Supreme Court of the United States, in cases dealing with other issues, has given several clues as to its attitude on unequal sentencing. The Supreme Court in 1942 struck down an Oklahoma statute which provided for sterilization of habitual criminals.

...The Legislature may very properly determine that women convicted of crime shall be less severely punished than men convicted of the same crime." 179 P. at 348. The act, however, generally resulted in women being more, rather than less, severely punished.


The court stated: "The relation sustained by the fallen woman to her business and society at large is altogether unlike that sustained by her partner in crime. She follows a business that can be carried on only by women. The most casual observer cannot fail to see a vast difference between fallen women as a class and the balance of human kind." 207 P. at 274.

17 Id.

152 N.E. at 915.

14 Id.

Another court reached the same conclusion in *Ex parte Gosselin,* 144 Me. 412, 44 A.2d 882 (1945), in which the defendant was convicted of intoxication. The maximum sentence for women was 3 years, while for men it was 2 years. The court stated that its duty was to decide only if the legislature had acted reasonably in setting the different maximum sentences. The court concluded that the statutory distinction was reasonable.

In *Ex parte Brady,* 116 Ohio St. 512, 157 N.E. 69 (1927), and State v. Beddow, 32 N.E.2d 34 (Ohio Ct. App. 1939), two statutes providing for indeterminate sentences for women were also upheld. In both cases it was held that the maximum sentence was applicable to men, as well as women, and the only difference was that the women were sent to a different place of confinement.


See D. WARD & G. KASSEBAUM, supra note 2, at 56-79.

"Habitual criminal" was defined as a person having been convicted two or more times of crimes "amounting to felonies involving moral turpitude." The petitioner had been convicted once for stealing chickens and twice for robbery. The Court struck down the statute on equal protection grounds. Although the decision appears to be based on the holding that procreation is a fundamental right, the Court was obviously not pleased with the different sentences the statute permitted. "[W]hen the law lays an unequal hand on those who have committed intrinsically the same quality of offense and sterilizes one and not the other, it has made as invidious a discrimination as if it had selected a particular race or nationality for oppressive treatment." A similar issue was presented in McLaughlin v. Florida. A Florida statute prohibited an unmarried interracial couple from habitually living together in the same room at night. No other statute penalized the same conduct when engaged in by members of the same race. The Court held that the racial classification violated the equal protection clause and invalidated the statute. The Court, however, also stated: "It is readily apparent that § 798.05 treats the interracial couple made up of a white person and a Negro differently than it does any other couple . . . ." The language of these cases indicates that unequal statutory sentencing is susceptible to the equal protection challenge. While the two cases did not strike statutes down solely because of unequal sentencing—but rather because there was a fundamental right (procreation) and a suspect criterion (race) involved—the sentencing aspect was mentioned in both cases. If Skinner and McLaughlin represent a crack in the door of challenging disparity in sentencing on equal protection grounds, in 1968 the door opened a few inches more. Commonwealth v. Daniels was followed by an important federal district court case in the same year.

In United States ex rel. Robinson v. York a Connecticut statute was challenged. The statute provided that women over sixteen who (1) plead guilty or are convicted of felonies, or (2) plead guilty or are convicted of a misdemeanor, or (3) are unmarried, between sixteen and twenty-one, and are in manifest danger of falling into habits of vice, or (4) are sentenced to jails, may be committed to the state farm for women for an indefinite period up to three years. Carrie Robinson claimed that this statute permitted women to be incarcerated for periods in excess of the maximums provided for men found guilty of the same crimes. The court cited Korematsu v. United States and Loving v. Virginia, which involve protection of racial groups, and stated: "It is difficult to find any reason why adult women . . . should have a lesser measure
of protection than a racial group. The court also stated that there was no showing that women take a longer time to rehabilitate than men. This fact has never been shown in any case where indeterminate sentencing has been upheld. Usually, it would appear that the legislature has made a determination that women have psychological characteristics which make longer periods of imprisonment for rehabilitation necessary; the usual judicial response to that determination has been that the legislature acted reasonably. The holding in Robinson indicates a closer judicial scrutiny of statutes providing for unequal sentencing.

Is Sex Suspect? The Supreme Court has yet to hold sex to be a suspect criteria, which would place the burden on the state to show a compelling interest in the classification in order to justify it. However, the Supreme Court of California recently held a classification on the basis of sex to be suspect, thereby making such classifications subject to close scrutiny. In Sail'er Inn, Inc. v. Kirby a California statute forbidding women to tend bar except under narrow circumstances was struck down because the state not only failed to establish a compelling interest served by the discrimination, but failed to establish any interest at all. The court reasoned:

Sex, like race and lineage, is an immutable trait, a status into which the class members are locked by the accident of birth. What differentiates sex from

---


The growing demand for different treatment for women at the turn of the century was not prompted by any growing recognition of the differences, either psychological or otherwise, between men and women. The main force behind the demand for separate legislation was the changing view of women. See Rogers, supra note 7, at 518. "The state has failed to carry its burden in support of the proposition that a greater period of imprisonment is necessary for the deterrence of women than for men." 281 F. Supp. at 16. Thus two major reasons for imprisonment, deterrence and rehabilitation, were not shown to present a valid justification for discrimination on the basis of sex. The third major reason for imprisonment, protection of society, is not likely to operate against the woman. Although women constitute 51% of the populace, they account for only 13 to 20% of the arrests, as the following table shows, and only 4% of the prison population.

<table>
<thead>
<tr>
<th>Crime</th>
<th>Male</th>
<th>Female</th>
</tr>
</thead>
<tbody>
<tr>
<td>Robbery</td>
<td>95.1%</td>
<td>4.9%</td>
</tr>
<tr>
<td>Burglary</td>
<td>96.7%</td>
<td>3.3%</td>
</tr>
<tr>
<td>Auto Theft</td>
<td>96.3%</td>
<td>3.7%</td>
</tr>
<tr>
<td>Assault</td>
<td>86.0%</td>
<td>14.0%</td>
</tr>
<tr>
<td>Larceny</td>
<td>81.0%</td>
<td>19.0%</td>
</tr>
<tr>
<td>Embezzlement</td>
<td>82.1%</td>
<td>17.9%</td>
</tr>
<tr>
<td>Murder</td>
<td>81.9%</td>
<td>18.1%</td>
</tr>
</tbody>
</table>

W. Lunden, supra note 43, at 102.

See notes 66-77 supra, and accompanying text.

In United States ex rel. Sumrell v. York, 288 F. Supp. 955 (D. Conn. 1968), the same statute was again called into question. The difference in the two cases was that the petitioner in Robinson was over 21 and in Sumrell she was not. Under a Connecticut statute a minor male convicted of breach of the peace may be committed for a maximum of 2 years. Under the statute in question, a minor female convicted of the same offense must be sentenced to an indeterminate period of up to 3 years. The court held, therefore, that the imposition of an indeterminate sentence violated the equal protection clause.


In CAL. BUS. & PROF. CODE § 25656 (West 1971) the special circumstances were expressed as: "The provisions of this section do not apply to the dispensing... by the wife of any license... or... when she is the sole shareholder or when she and her husband are the sole shareholders of the corporation which holds the on-sale license..." 485 P.2d at 531 n.2, 95 Cal. Rptr. at 331 n.2.

485 P.2d at 543.
nonsuspect status . . . and aligns it with the recognized suspect classifications is that the characteristic frequently bears no relation to ability to perform or contribute to society.\(^{98}\)

Assuming that the Supreme Court of the United States does not hold sex to be suspect, as did the California court, the compelling interest analysis may still be required. When a fundamental right is involved, the strict scrutiny standard is also applied. Such rights as voting,\(^{97}\) traveling interstate,\(^{98}\) or procreation,\(^{99}\) have all been held to be fundamental by the Supreme Court. Imprisonment denies a great many fundamental rights. There is a denial of freedom of travel, association, and privacy. Since some sentencing statutes applicable only to women result in longer periods of imprisonment for women, there is an interim period during which the male defendant is either under consideration for parole, or, quite possibly, walking the streets. The female defendant, on the other hand, is still in prison being "protected," which at the same time involves a denial of all of these rights. It could be argued, therefore, that despite the fact the Court has not held sex to be a suspect classification, the stricter compelling interest test should be imposed on the states when called upon to justify indeterminate sentencing for women.\(^{100}\)

**IV. THE GROUND BETWEEN THE TWO MODELS**

The preceding sections reveal marked discrepancies in sentencing, depending on the sex of the offender.\(^{101}\) Even though the prevailing American trend has been to allow the judge wide discretion,\(^{102}\) it can be said that "a statutory system that leaves a wide, untrammeled discretion to judges is the doom of equality of treatment."\(^{103}\) Yet, uniformity of sentencing cannot be said to be the ideal either.\(^{104}\) No two criminal acts present the same threat to society, and no two offenders have the same need for rehabilitation. Therefore, neither model in its extreme form presents the most effective and equitable scheme possible. Potential sources for a reform of these disparities are well within the reach of the states. While varying views of the means of making such steps...
are certainly possible, the elimination of disparity should be a focal point of consensus, as an obtainable and laudable goal for all concerned.

**Appellate Review.** The American Bar Association has suggested that one method of controlling sentencing disparity is by appellate review of sentences.\(^a\) The United States is one of the very few western nations which does not provide for appellate review of sentences.\(^b\) One possible consequence of appellate review would be the establishment of more uniform sentencing criteria.\(^c\) Unequal sentencing would be held to a minimum and used only in cases where the trial court could justify the sentence.

However, before the trial court or the appellate court could make a valid decision, there would appear to be a need for information on the offender's personality.\(^d\) For example, in *People v. Wade*\(^e\) a male and female attempted a robbery. The female sat in a waiting car. Her male partner shot and killed the proprietor of the store. A presentence psychiatric report on the female showed that she became passive and submissive in times of stress.\(^f\) This would certainly appear to be a legitimate mitigating factor with respect to her culpable intent. The results of such a presentence report should be available to both the sentencing and reviewing courts.

Many commentators have called for the trial judge to be compelled to justify his sentence for the record.\(^g\) It is unlikely that the trial judge would admit that he gave a certain sentence because of his own background,\(^h\) or that he was influenced by the sex, race, or educational level of the defendant,\(^i\) despite the fact that these are the factors which have been found to influence the severity of sentences. Nevertheless, as cases came before a court with facts similar to previous cases, a pattern of sentencing would develop, and any striking deviations from it would be obvious and would require justification.

**Reform of Sentencing Statutes.** In California, thirteen different maximums are imposed for crimes defined as felonies.\(^j\) Pennsylvania and New York

---

\(^{a}\) ABA PROJECT ON MINIMUM STANDARDS FOR CRIMINAL JUSTICE, STANDARDS RELATING TO APPELLATE REVIEW OF SENTENCES (Approved Draft 1967).

\(^{b}\) George, supra note 22. See also Hearings on S. 2722 Before the Subcomm. on Improvements in Judicial Machinery of the Senate Comm. on the Judiciary, 89th Cong., 2d Sess. 86-100 (1966).

\(^{c}\) D'Esposito, supra note 19, at 183 n.8.

\(^{d}\) See Rubin, supra note 43, at 72.

\(^{e}\) 53 Cal. 2d 322, 348 P.2d 116, 1 Cal. Rptr. 683 (1959).

\(^{f}\) 348 P.2d at 121.

\(^{g}\) See, e.g., Thomas, Sentencing—The Case for Reasoned Decisions, 1963 CRIM. L. REV. 243. Mr. Thomas cited four reasons for compelling a judge to justify his sentence: (1) natural justice; (2) rationalization; (3) consistency in sentencing policy; and (4) right to challenge the decision.

\(^{h}\) This is the factor found most relevant to sentencing in the Gaudet Study. See note 29 supra.

\(^{i}\) These factors were found statistically significant in the Martin Study. See note 33 supra, and accompanying text.

\(^{j}\) See Wechsler, supra note 1, at 450; There is nothing short of anarchy in the American statutes governing prison sentences that the law [authorizes] on conviction of specific crimes. ... There can be no rational defense of such a plethora of legislative judgements, the existence of which merely shows the failure of the legislature to perceive the limits—psychological and logical—of reasonable determinations of this kind. Too many distinctions of this order either must reduce the force of all
each have twelve.\textsuperscript{115} The American Law Institute Model Penal Code and the Model Sentencing Act both propose a redefinition of felonies into three categories.\textsuperscript{116} The Model Penal Code bases its classification on seriousness of the crime\textsuperscript{117} while the Model Sentencing Act focuses on the offender.\textsuperscript{118} Reform by the use of either the Model Penal Code or the Model Sentencing Act would amount to an expression of legislative intent on whether the sentencing judge should focus primarily on the seriousness of the crime or the personal history and disposition of the offender. Once that expression is made, sentencing criteria would develop, on a case by case basis, defining the limits within which a sentence should fall for a certain crime and on a certain personality. Without question, personality is not usually a definable quantity; no two criminal acts consist of the same circumstances which may mitigate or aggravate a sentence. Nevertheless, gradually signposts would emerge from which a sentencing judge could begin to consider other relevant factors.

\textit{Controlled Use of the Indeterminate Sentence.} As previously discussed, discrimination in favor of female offenders appears to exist whenever the judge has discretion. When the judge has no discretion, the female offender appears to be treated more severely than the male offender. The parole boards in the women's reformatories have their hands tied until the minimum sentence has been served. Under the Model Sentencing Act no minimum is imposed. The time for consideration for parole comes when the parole board believes rehabilitative efforts are proving successful. The American Bar Association standards allow the judge to impose a short minimum.\textsuperscript{119} The fact that this is discretionary rather than obligatory has displeased some of the commentators.\textsuperscript{120} However, interests must be balanced. Society needs reassurance of its safety and the offender needs rehabilitation. The statutorily imposed indeterminate sentence dealing with females has been shown to result in inequity. In any case, the indeterminate sentence should be used with both male and female offenders, or not at all.

\textbf{V. CONCLUSION}

There is considerable doubt that prisons rehabilitate. Some commentators have charged that prisons are much more likely to frustrate, aggravate, and thus be nullified in practice or must produce results that are unjust and an impediment to the administration of correction.

\textsuperscript{115} Id.

\textsuperscript{116} D'Esposito, supra note 19, at 187. The categories under the Model Penal Code are first degree, second degree, and third degree; first degree has a minimum of 1 to 10 years and a life maximum; second degree has a minimum of 1 to 5 years and a 10-year maximum; third degree has a 1 to 2 years minimum and a 5-year maximum. The Model Sentencing Act has the categories of first degree, atrocious crimes, and ordinary felonies. None of the categories has a minimum. The maximum for first degree felonies is life; for atrocious crimes it is 0 to 10 years; and for ordinary felonies it is 0 to 5 years.

\textsuperscript{117} See, e.g., Tappan, Sentencing Under the Model Penal Code, 23 LAW & CONTEMP. PROB. 528 (1958).

\textsuperscript{118} See, e.g., Rubin, Allocation of Authority in the Sentencing—Correction Decision, 45 TEXAS L. REV. 455 (1967).

\textsuperscript{119} AMERICAN BAR ASSOCIATION PROJECT ON MINIMUM STANDARDS FOR CRIMINAL JUSTICE, STANDARDS RELATING TO SENTENCING ALTERNATIVES AND PROCEDURES § 3.2 (c) (Approved Draft 1968).

\textsuperscript{120} See, e.g., George, supra note 21.
alienate. This Comment has assumed to a certain extent that prisons do help; that the offender is released with a greater capability to cope with society than when incarcerated.

The two models discussed have not provided a solution. A combination of the two has been suggested here as a possible scheme. From these two models a more equitable method of sentencing could be drawn. It is not fair that women have an advantage when the judge has discretion; nor is it fair that, under some statutory schemes, women can be imprisoned for longer periods than men convicted of the same crime. The scheme suggested would still give the trial judge discretion, but he would have to make his sentence with knowledge that it was subject to appellate review. He would be encouraged to make a decision based on factors more objective than his own life style or social philosophy.

If penal codes are reformed along the lines suggested in the Model Penal Code and the Model Sentencing Act, the judge would be on notice of whether the legislature wants him to focus on the crime or the offender when he makes his sentencing decision. In either case, the judge's own views would have less influence on the sentence than they presently appear to have.

---

11 See, e.g., Morris & Hawkins, Rehabilitation: Rhetoric and Reality, 34 Fed. Prob., Dec. 1970, at 9. There it was stated: "Our program thus addresses an antique, overloaded, neglected, expensive, cruel, and inefficient 'correctional' system." Id. For more detailed and comprehensive works on the psychological effects of prison, see E. Goffman, Asylums (1961); G. Sypes, The Society of Captives (1958). Goffman refers to the reception process as "role dispossession" because the inmate is stripped of almost all personal possessions. The recruit comes in to the establishment with a conception of himself made possible by certain stable social arrangements in his home world. Upon entrance, he is immediately stripped of the support provided by these arrangements . . . he begins a series of abasements, degradations, humiliations, and profanations of self. His self is systematically, if often unintentionally, mortified.


It is interesting to note that one comprehensive study has indicated that women suffer more psychological pain from imprisonment than men. The investigators pointed out that while women have less extensive experience with "real crime" such as burglary, robbery, and larceny, and less history of penal confinement, they nevertheless are subjected to greater pains in confinement.

There are, then, a variety of ways in which male and female prison inmates differ and these differences are rooted in social roles played in the free world and in psychological needs unsatisfied in the prison world. The kind of experiences women have had prior to prison have ill prepared them to cope with pains of imprisonment which include indefinite loss of affection and interpersonal support, role dispossession, and status degradation.

D. Ward & G. Kassebaum, supra note 2, at 74.