

Fall 1951

Sentences for Sex Criminals

Paul W. Tappan

Follow this and additional works at: <https://scholarlycommons.law.northwestern.edu/jclc>

 Part of the [Criminal Law Commons](#), [Criminology Commons](#), and the [Criminology and Criminal Justice Commons](#)

Recommended Citation

Paul W. Tappan, Sentences for Sex Criminals, 42 J. Crim. L. Criminology & Police Sci. 332 (1951-1952)

This Article is brought to you for free and open access by Northwestern University School of Law Scholarly Commons. It has been accepted for inclusion in Journal of Criminal Law and Criminology by an authorized editor of Northwestern University School of Law Scholarly Commons.

SENTENCES FOR SEX CRIMINALS

Paul W. Tappan

The author is Professor of Sociology in New York University and Technical Consultant to the New Jersey Commission on the Habitual Sex Offender.—EDITOR.

The indeterminate sentence is one of the numerous nostrums that some criminological theorists have recommended from time to time over the past century as a method to resolve the problems of criminal treatment. The principle has been rejected by practical penology in its idealized form of the *open-ended sentence*, except for psychotic and feeble-minded offenders—types that are rather clearly problems of medical treatment and long-term custody. For other criminals the wholly indeterminate sentence has appeared an inappropriate correctional device, not merely because of the reluctance of the bench to relinquish its control over disposition of the offender but, more especially, because of the grave dangers of injustice. In clinical theory it is highly desirable to retain the delinquent in custody until—and only until—the causes of his behavior are resolved so that he can return to the community rehabilitated and no longer dangerous. Our ability, however, to apply this theory to good effect must depend upon a combination of skills: to discover the causes of the delinquency, to apply effective treatment methods according to the requirements of the particular offender, to secure the necessary personnel and other resources for treatment, and—most of all, in the interest of justice—adequate criteria for release.

Until now we have lacked the knowledge, techniques and personnel to attempt this wholly clinical, positivistic approach to the criminal. With good reason we have feared that in actual practice we should err frequently in both directions of releasing too soon individuals who are a serious danger to the community and in retaining too long others whose threat to security is small, whose rehabilitation is difficult or impossible to determine while they are confined in an abnormal institutional environment. The reality of these dangers has been attested often enough in our handling of the defective and insane. As a consequence we have preferred the compromise of partially indefinite sentences in which minimum and maximum terms are fixed, with the time of release determined by a paroling agency.

This method is not wholly satisfactory for various reasons, and it is subject to unjust distinctions that come out of the fallibility of human decisions on treatment and release. It has represented, however, a rather ingenious compromise of our objectives in the treatment of the

criminal: It provides, within the limitations of our knowledge and skills, a useful method to protect the community against the threat of the offender over a time period that is proportional to his dangerousness, a period that is long enough, moreover, in the case of felonious crimes to offer some deterrent influence upon others who may be tempted to similar behavior. At the same time, the indefinite term permits the duration of confinement to be guided to a considerable extent by the apparent effectiveness of the treatment. It appears safe to assume that where the individual is amenable to rehabilitation, the maximum sentence provides sufficient time to attain this goal in nearly every instance. In addition, the partially indefinite term offers considerable motivation to the offender to cooperate in the process of reformation in order to secure earlier release.

Generally throughout the United States today when the dangerousness of the criminal and the difficulties of producing his rehabilitation are evidenced by recidivism, he may be retained in custody for life. It should be noted, relative to our subsequent discussion, that the greatest flaws in the operation of these indefinite sentence laws have related to our deficiencies in treatment technique and in gauging the time when the offender should be discharged. Our practice falls considerably short of what we hope to attain in rehabilitation and release.

In the past decade we have departed for the first time from this indefinite sentence compromise by establishing in some fifteen states a completely indeterminate sentence for a single category of offenders: the sex criminal. These new statutes are generally rationalized in terms of either the need for community protection from sex deviates or possibilities of clinical rehabilitation, sometimes both. In six jurisdictions they have gone so far as to provide for an indefinite period of treatment for individuals who have not even committed offenses. The writer has noted elsewhere the failure of these laws to accomplish their projected goals. Here our central interest is in the open-ended sentence provisions that have already been widely adopted and which have been commonly recommended for legislation in other states. Let us explore the implications of this policy.

It appears clear that the open-ended sentence, as applied to the sex deviate, is based upon several implicit *assumptions* that must be frankly faced and explored. The writer believes that unless one or more of these can be shown to be true the sentencing technique is indefensible:

1. That the behavior of the sex offender is more dangerous than that of other types of felonious criminals: robbers, burglars, thugs, kidnapers, arsonists, or murderers.

2. That the sex criminal is more disposed to repeat his offenses or, in the alternative, to progress to more serious ones.

3. That effective treatment measures are known and, given an indefinite period of time in which to work, can be applied to sex criminals. Moreover, that there is greater need for an indefinite treatment period for sex offenders than for other types of criminals.

4. That we have treatment personnel and resources, including institutional facilities—or can and will provide them—to apply these efficacious treatment methods.

The striking thing is that in any honest appraisal of the facts, and by the consensus of those authorities, clinical and correctional, who are realistic in the matter, none of these assumptions is true. The proofs have been cumulative and clear that the mass of sex offenders is far less dangerous and recidivous than other felons. Even the few most serious sex criminals are no more dangerous than other criminals. Sex offenders, when they do commit mayhem, homicide, or other aggressions are subject to severe criminal laws that can protect the public quite completely. Moreover, experience both here and abroad has shown that sex offenders do not tend to become more serious in their types of criminal expression. Most pertinent to the wishful thought of prophylaxis against possible future sex crime, our psychiatrists have no uniform criteria for predicting dangerous behavior in non-criminals—and most of them refuse to guess about the matter.

These facts alone should be enough, it would seem, to negate the theory of the open-ended sentence. We are faced, however, with additional difficulties. We have not developed effective treatment methods for handling sex deviates curatively. Indeed, there is very little even of experimental work in the U. S. in this peculiarly difficult area of medical- and psycho-therapy. There are not a dozen psychiatric authorities generally recognized as specialists in this field, while, unfortunately, this is an area to attract the activities of the charlatan. Whatever disagreement may be encountered in regard to the nature of the sex offender and his dangerousness, on this point there can be no disagreement: we have neither the methods nor the personnel to deal with the problem therapeutically, nor is there any substantial effort to develop them.

Looking further, we encounter still another difficulty as great as those already named in nullifying the good intent of the open-ended sentence. The truth is that we lack criteria for the release of the sex deviate. Experience under the statutes enacted in recent years has revealed a terrific responsibility vested in the authority who must make

the decisions on discharge of the sex offender. The problems of paroling the criminal are subtle enough, guided as they are by law and administrative practice that have developed through the years. The sex deviate, however, who is confined in an abnormal institutional situation is a more difficult subject for release decisions than other offenders. Psychiatrists have expressed their great reluctance to release the alleged "sex psychopath" at all on the ground of the public reaction should any such person prove not to have been cured. Even in instances where the individual is believed not to be a true deviate, there is always the possibility that he may again at some time violate the sex mores, with ruinous effect upon the reputation of an institution and its administrative officers.

In light of the difficulties mentioned it will not seem strange that our institutions are most unwilling to receive sex deviates. Lacking treatment methods and personnel to deal with them, mental institutions find that such offenders merely add to the already heavy burden of problems. Quite consistently the authorities resist the state's efforts to commit nonpathological persons who are not amenable to the existing treatment methods. There is very little real doubt but that the active and varied programs of correctional institutions are more apposite to the needs of sex criminals than are mental hospitals. However, if experimental and therapeutic methods were to be applied to these offenders, a new type of specialized treatment and research center would be required. This need has been recognized by commissions in several states, including New Jersey, that have studied the problem of handling the sex criminal. Some of these commissions have forcefully recommended the establishment of a treatment and correctional institution for serious sex deviates. Thus far, however, no state in this country has seen fit to provide for such a facility.

To conclude our comments on the fallacies that have been employed to rationalize our treatment of the offender, we can only assert the obvious. This problem cannot be solved by concealing sex deviates for indefinite periods behind hospital or prison walls in the vain hope thus to forget about them. Mere legislation and indeterminate sentences do not touch the difficulty at all. Let us turn then to what may be a more honest and realistic searching of the facts.

In the face of the patent fallacies used to support indefinite treatment of the sex deviate, is it not apparent that in reality other motives have guided most of the recent legislation? Perhaps the anxiety and guilt feelings that are associated with sex in the American mentality? Invidious treatment by open-ended sentences reflects our under-

lying need to punish the sex deviate more severely than other criminals. Our wishful thinking about therapy is a seemingly benevolent rationalization to cover fear and hate. It has been supported by the unfortunate notion that contemporary psychiatry possesses some mysterious omniscience in resolving behavior problems, a myth that reputable authorities in that field are at pains to destroy. Unhappily, they have not been so audible in regard to the sex offender problem as certain rabid journalists have.

The facts, documented by the study of careful authorities, as contrasted with the unsupported assumptions we noted at the start, are these:

1. There are very few aggressive and dangerous sex offenders in the criminal population. Most of the deviates are mild and submissive, more an annoyance than a menace to the community. From a psychological point of view they represent widely varied types.

2. Our sex offenders are among the least recidivious of all types of criminals. They do not characteristically repeat as do our burglars, arsonists, and thugs.

3. The more serious and dangerous sex criminals receive long sentences and in many jurisdictions parole is arbitrarily withheld from them. Deviates that are curable by methods we know and use can be treated fully within the time provided by the maximum sentences under our traditional law. Where they repeat they may be held still longer under our habitual offender laws.

4. For those sex criminals who are not curable because we lack the methods, the personnel, and the institutional resources, there is no greater justification for the open-ended sentence than is true for other categories of felons. If our purpose be to extend the unproductive confinement of sex deviates, we should do so frankly by the direct establishment of longer sentences, not indirectly through futile pretense at psychotherapeutic or medical treatment that is in fact non-existent.

Finally, and particularly, it should be stressed that insofar as we may aim at something more ambitious than custodial confinement of the sexual offender, we can do so only through employing facilities and personnel for research. The need is for a specialized treatment center that can in time work out methods of therapy, diagnostic standards, criteria for release, and personnel training. Unless and until we possess a well-developed institutional facility of this sort, our methods of indeterminate incarceration in hospitals and prisons will not work justice, correction, or psychic rehabilitation. Such centers as this have developed for some years at Herstedvester, Denmark, and in Utrecht,

Holland, where good results come from their intensive treatment programs. Other countries of Europe are looking in similar directions. It is time that the states stopped trying to solve the problem by a combination of fantastic statutory specifications and Utopian criminological precepts that have no relation to the facts of criminal treatment. We need time, research, and treatment personnel, not the open-ended sentence!