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# New Sentencing Proposals and Laws in the 1970's

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NOT SINCE the proliferation of indeterminate sentencing laws started about 60 years ago in the United States has there been introduced as striking a change in sentencing legislation and philosophical views as has come on the scene within the last few years. Briefly put, the acts and philosophical statements support the repeal of the indeterminate sentence and the abolition, or near abolition, of parole.

### *Myths About the Indeterminate Sentence and Parole*

The movement to repeal the indeterminate sentence and parole presents arguments for their repeal that are almost wholly mythical. Thereby the arguments seek to avoid the realities of the modern experience with the indeterminate sentence and parole. By this avoidance it is hoped that the realities will not be recognized, or that if they are, they will be obscured by the "repeal the indeterminate sentence" theme.

If we see through the myths, if we recognize the realities, we find that the substitutes for the indeterminate sentence that are said to "reform" it, do not reform the ills of the current system at all, however they may change the form of the sentencing structure. Rather, the new acts and proposals serve to *perpetuate* the ills, as is very likely well known to many who support the changes. Legislative changes are indeed needed, but of quite another order than the current proposals. We deal first with the myths.

The myths about the indeterminate sentence and parole have long been recognized.[1] We do not refer here to the original concept of the indeterminate sentence, which no longer prevails in the adult correctional field. The original concept, applied in Elmira Reformatory in New York almost 100 years ago, was a relatively short commitment (2 or 3 years), with parole eligibility at any time (no mandatory minimum term of parole eligibility).

But the modern indeterminate sentence is quite different. Almost without exception the modern indeterminate sentence embraces (1) a mandatory minimum term of parole eligibility, usually of several years or many years duration; (2) a maximum term that often lengthens terms of imprisonment over what existed before, often by requiring that the statutory maximum be routinely, automatically imposed in all commitments; (3) repudiation of individualized sentencing, the basis of rehabilitation efforts in correctional treatment, including parole. The repudiation of individualized sentencing is derived, of course, from the first two points—mandatory minimum parole terms are a denial of individualization, as is the automatic imposition of the maximum statutory term in all commitments.

Despite the obvious nature of these ingredients of the indeterminate sentence, it is said—and these are the myths: (1) that the indeterminate sentence equates with rehabilitation; (2) that the modern prison, operating under the indeterminate sentence, is a failure; (3) that the indeterminate sentence and parole hang together; (4) that rehabilitation/indeterminate sentence is a failure; (5) that the opposite of the indeterminate sentence—said to be determinate sentences and abolition or near abolition of parole—are a needed reform.

(1) *That the indeterminate sentence equates with rehabilitation.*—The asserted basis for this claim is that the indeterminate sentence provides flexibility for a parole system to operate under which a professional parole board, exercising a scientific expertise, is empowered to release a prisoner at the optimum time for him to succeed in the free community. It is evident at once that this assumes individualized treatment. But, in fact, individualized treatment is negated by (as already noted) the almost universal prevalence of mandatory minimum terms (no matter how much earlier an individual prisoner is suitable for re-

[1] Sol Rubin, *Law of Criminal Correction* (1963; 1973), chapter 4 § 17; Note, "Indeterminate Sentence Laws—The Adolescence of Penological Legislation," 50 Harvard Law Review 677 (1937); and more recently—Jessica Mitford, "Kind and Usual Punishment in California," *Atlantic Monthly*, March 1971; Bernard C. Kirby, "Doubts About the Indeterminate Sentence," 53 *Judicature* 63 (August-September 1969).

lease, the board does not have the power to release him), and by statutory provisions in many indeterminate sentence states requiring the automatic imposition of the maximum statutory term in all commitments. The latter provision ousts the judge who sentences from exercising discretion in fixing the length of a commitment, and the automatically fixed maximum term makes it difficult for a parole board to grant early releases even when indicated.

(2) *That the modern prison, operating under the indeterminate system, is a failure.*—The failure of prisons today is attributable to prison policies and practices, well documented in numerous court decisions finding violation of constitutional rights of prisoners, particularly in extensive violation of the Eighth Amendment prohibiting cruel and unusual punishment. But the indeterminate sentence is also said to contribute to that failure, in its weakening of prisoner morale, for example in prisoners not knowing what course of behavior on their part will gain them parole. In jurisdictions with maximum terms automatically fixed, prisoners resent the resultant inequality of sentences (prisoners guilty of crimes of different gravity receiving identical commitments) and excessive sentences (automatic maximum terms). In jurisdictions in which the automatic maximum is subject to sentence-fixing by the parole board, prisoners are uncertain as to what their sentence is, until fixed by the board—and sometimes subject to being refixed (revised upwards).

These features of the sentencing system are indeed destructive of morale; but the failures are not particularly attributable to the "indeterminate sentence." Indeterminate sentence provisions vary. The defects are the provision for minimum terms of parole eligibility, sometimes fixed by the court, sometimes by the board, sometimes automatically by the statute; the automatic maximum, in statutes providing for it; and sentence fixing powers in parole boards.

(3) *That the indeterminate sentence and parole hang together.*—It is strange indeed that this assertion continues to be made. The fact is that all states have parole systems, whether the sentencing system is "indeterminate" (so-called), or some other system, usually called "definite," not a very descriptive term. If it denotes a judge-fixed maximum term of commitment, that is also found in some so-called indeterminate sentence states. Similarly the ingredient of minimum term of eligibility, variable or fixed, is not consistently of one form in the indeterminate sentence states, nor in the definite sentence states.

(4) *That rehabilitation/indeterminate sentence is a failure.*—If correctional treatment is to have any chance of success, some necessary ingredients would be avoiding imprisonment for nondangerous offenders; and where commitment to prison is the sentence, to avoid destructive processes in the prison-parole experience. That clearly calls for prison programs quite different from the common programs today, at least in high security institutions. It calls for nonpunitive, active facilities (work, recreation), making constructive use of time. It calls for parole process unhampered by mandatory minimum terms or other mandatory aspects. It calls for generally shorter terms than we have today.

(5) *To point to indeterminate sentence laws as a key to the prison failure is to miss the mark.*—The sentence form is irrelevant to prison practices and programs. It *is* related to parole, and in its current forms contains impediments we have already identified. Any remedy should aim at these ingredients.

### *Are Determinate Sentencing and Abolition of Parole Appropriate Remedies?*

It would be a mistake to believe that the move to replace the indeterminate sentence by a "determinate" (or "definite" or "fixed") sentence, and to abolish or reduce the use of parole, stemmed from a philosophical analysis of what was wrong with the prison/sentencing system, with legislation incorporating the recommendations of the reformers. The basis of the change is to be found in a law-and-order atmosphere that grew considerably when it became a political asset. The issue of crime and its repression became a national political issue in the presidential election campaign of 1964, and has never been dropped. Everyone was against crime, and the easiest political stance was to be for strong punishment. The history of the period since then is well delineated in an article by James O. Finckenauer, "Crime as a National Political Issue: 1964-1976."[2]

The civil rights atmosphere of the 1960's could still produce liberal, nonrepressive studies like *The Challenge to Crime in a Free Society,* by the President's Commission on Law Enforcement and Administration of Justice (1967), and in similar vein the American Bar Association's *Standards Relating to Sentencing Alternatives and Proce-*

[2] *Crime and Delinquency,* January 1978.

*dures* (1968), calling for shorter prison sentences and liberalized parole eligibility. But by the 1970's the balance had changed, and even without any philosophical works supporting sentencing changes of a more mandatory nature, judges were increasing their use of prison sentences and prison populations were increasing steadily.

Another experience contributed importantly to proposals for change in the indeterminate sentence/parole laws. This was particularly true in California, where the archtype indeterminate sentence existed, its parole board (Adult Authority) exercising even more sentencing power than in other indeterminate sentence states. A great volume of prisoner litigation challenging decisions of the Adult Authority was bringing a response from more and more courts supporting prisoners' claims and critical of the Authority.[3]

The philosophical works appearing in the 1970's were responsive to the law-and-order atmosphere, but they contained a mixture of ethical criticism and nonpunitive recommendations. The attack on disparity of prison sentences and the inconsistent policies of parole boards led to the suggestion that commitments be more or less fixed by statute, the range of discretion as to the term being reduced greatly or made entirely mandatory, according to the crime committed. Similarly, the abolition of parole boards, or their greatly reduced authority, was aimed at reducing the disparity in their decisions.[4]

It would be hard to find better examples of throwing the baby out with the bath water. A sound discretion exercised by judges and parole boards is a valuable part of efforts at individualized treatment and rehabilitation. Below I suggest ways in which the sound exercise of discretion can be supported, without abolishing the possibility of discretion.

Most of the writers included a very important recommendation in addition to their views on the indeterminate sentence and parole: that the very long prison terms common in the United States be markedly reduced, a recommendation long before made in the Model Sentencing Act and in the American Bar Association standards cited above. But it was this most important recommendation that the legislatures ignored. Let us turn to the legislation enacted.

### *The New "Determinate Sentence" Statutes*

The movement in California to abolish the indeterminate sentence started some years before the writings cited appeared,[5] principally because of the legal attacks already noted. Its act (1976 statutes chapter 1139) establishes a 3-year range of terms for each crime, the sentencing judge being required to choose the middle term, unless mitigating or aggravating circumstances, established in a hearing, are found; and the judge may increase the maximum by one or more years if the crime was accompanied by specified circumstances, such as carrying a gun. The terms required to be imposed were no shorter than the previously existing terms, being based on terms fixed in practice by the Adult Authority, one of the sources of prisoner protest. The act's limitation on the use of parole, attached to a system of long terms, can hardly improve the morale of prisoners. It can be expected that the California prisons (like others) will continue to be places of great violence. The principal effect would appear to be giving some respite to the authorities from legal attacks on the former system of commitments and their fixing and refixing by the Adult Authority.

The Maine act, passed in 1976 (Revised Statutes, Title 17 chapters 4-53), was directed principally at parole, abolishing it, while leaving with sentencing judges discretion to fix maximum terms at less than the statutory maximums. On petition of the Bureau of Correction the judge may reduce the sentence. Thus the former authority to discharge on parole is now in the hands of the prison administration and the judge, with parole supervision being eliminated. Except for elimination of supervision, there is little practical change in discharges, since almost all inmates were paroled at the time of eligibility. Thus here too, as in California, the legislation does not improve the lot of prisoners, but is an accommodation to administrative factors.

An act in Indiana (Laws of 1976, Public Law 148) retains judicial discretion in imposing maximum sentences, and provides for one year of parole supervision. The act, pushed by the state's

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[3] *Kerr* v. *United States*, 511 F.2d 192 (9th Cir. 1975), affirmed 96 S. Ct. 2119 (1976); In re Olson, 37 Cal. App. 3d 783, 112 Cal. Rptr. 579 (1974); In re Wilkerson (Cal. Ct. App., Jan. 14, 1977); Rodriguez on Habeas Corpus, 14 Cal. 3d 639, 122 Cal. Rptr. 552, 537 P. 2d 384 (1975); etc. Fay Stender, "The Need to Abolish 'Corrections,' " 14 Santa Clara Lawyer 792 (1974); Charles E. Larsen, "California's Unconstitutional Control of Prisoners Through a Bill of Attainder," 2 New England Journal on Prison Law 1 (1975).

[4] Andrew von Hirsch, *Doing Justice: The Choice of Punishments* (1976), that the goal of sentencing should be punishment, meted out in legislatively fixed "presumptive sentences" graded according to the severity of the crime: no imprisonment except for serious offenses, and then none over 5 years except for murder. David Fogel, *We Are the Living Proof* (1975), would abolish parole boards, establish a single sentence ("flat time") for each class of felony, but only offenders dangerous to the public subject to imprisonment. Alan Dershowitz, *Fair and Certain Punishment* (1976), presumptive sentences.

[5] Stephen Gettinger, "Three States Adopt Flat Time; Others Wary," *Corrections Magazine*, September 1977, at 21, 25.

prosecutors, was opposed by citizen groups because of its increase in sentence lengths. Illinois passed an act in 1977 (H.B. 1500) continuing judicial discretion to set maximum terms, which must be served without parole granting, but with service of a one-year mandatory parole supervision. Other states passed new criminal codes in the 1970's without affecting the nature of the sentencing system that existed, but continuing—or worsening—the length of prison terms (Pennsylvania, Arkansas, Ohio, Hawaii, Colorado, and Delaware).

These changes in the statutes, whether they change the sentencing/parole system or not, must not be taken in isolation from the period in which they were enacted. To do so would be to obscure the fact that a change in the correction system occurred in the 1960's, in the direction of more humane dealing with criminals. Judges used probation more, prison less, so that substantial reductions in inmate populations occurred in most states. Although that spirit is not dominant, it still persists and was evident in the opposition to most of the statutes on the part of prisoners and, at least in some states, the public. As already noted, it was the spirit of governmental and bar bodies. I agree that we now have a failing correction system, and I believe in some proposed reforms, but they are not in the direction of the new statutes.

### *Needed Sentencing Reform*

The sentencing reforms that are needed cannot be described by a particular term. "Indeterminate" sentence and "determinate" sentence do not explain themselves. Instead, the ingredients of a sentencing system must be spelled out. The philosophers of the 1970's have done so. They have called for substantially shorter prison sentences, and some have called for the use of prisons only for "dangerous" offenders,[6] or only for "serious" offenders (Andrew von Hirsch, *Doing Justice*).[7]

Abuses in the exercise of discretion by judges and parole boards do not warrant removing or substantially removing that discretion. In fact, legislation limiting such discretion serves only to move it from one place to another—usually to prosecutors, in bringing charges and negotiating for pleas; or, as in the new Maine Act, to the Bureau of Correction. The greatest abuse comes not in the exercise of discretion but in the imposition of unduly long terms on a selective basis, by judges and parole boards. If maximum terms are strongly controlled by statute or by governing constitutional or decisional holdings, there is little room for abuse in the exercise of judicial discretion within the maximum. Similarly, if prison terms are reasonably related to the needs of public protection, allowing parole (or discharge) at any time in the discretion of a board this will not undercut that protection, and still allow individualization of the offender.

With respect to decisional or constitutional concepts governing sentencing, we mention these: (1) Requiring the judge to state the reason for his sentence, based on findings in the record (so required in the Model Sentencing Act). (2) Requiring the judge to use the least restrictive alternative in choosing the mode of sentence.[8] (3) Establishing a right to equal sentencing, not in the sense of a uniform sentence for particular crimes, but calling on the sentencing judge to take into account sentences imposed on other defendants similarly situated and for the same crime.[9] (4) Sentencing panels (recommended in the Model Sentencing Act).

### *Needed Parole Reform*

If parole discretion is abused, to abolish authority to grant discharges before the maximum term has been served is hardly the only or most rational corrective. Parole granting remains the most autocratic, least regulated, phase of correction. The reforms needed include: (1) Changing the current interview with the prisoner to a fair hearing, including representation of the prisoner by counsel. (2) There should be no minimum term of eligibility for parole. (3) Criteria for parole or other discharge should be spelled out in the statute, other than the vague provisions now existing, giving absolute discretion to parole boards. Contract parole provisions now existent in several states afford usable precedents for such criteria.

Most of the new acts do not abolish parole supervision entirely; nor do we support abolishing parole supervision. The transition from prison to the free community requires some guidance and help for the released prisoner. But the common pattern of surveillance, often not more than a meaningless report to the parole officer, should be replaced by a system of voluntary parole. That

[6] David Fogel, *We Are The Living Proof:* National Council on Crime and Delinquency, "The Nondangerous Offender Should Not Be Imprisoned."
[7] Above, note 4.
[8] Sol Rubin, "Probation or Prison: Applying the Principle of the Least Restrictive Alternative," *Crime and Delinquency*, October 1975.
[9] Rubin, *The Law of Criminal Correction* (1973), chapter 4, section 4.

is, parole services (counseling, employment assistance, etc.) should be available to released prisoners at their request; or it could be required, but failure on the part of the released prisoner in this responsibility may not be grounds for revocation of his release. Revocation should be authorized only for a new crime, and at that point the decision as to whether to incarcerate or not should be in the hands of the sentencing judge on the new crime.[10] The current practice of authorizing revocation for violation of a condition is unrealistic, expecting a former prisoner to behave in a fashion superior to that of the average citizen.

Nor should a revocation proceeding necessarily imply reimprisonment. We support the current legal rule that in a revocation proceeding, where the violation is established, consideration must still be given to whether re-imprisonment is advisable, or whether continued liberty for the parolee is a preferred disposition.[11] Consistent with such a relationship between parole officer and parolee, the statute should require the officer to develop a plan for the court which in his opinion would support continuation of parole rather than imprisonment.

### *Needed Prison Reform*

Having said that the sentencing and parole proposals, of others and ours, should not be made in isolation from the conditions in the prisons, I turn to such proposals, to support and be supported by the recommendations already made. The basic approach, if we are to devise a sentencing and correction system that will not increase the dangerousness of criminals, would eliminate huge maximum security prisons, and solitary confinement and administrative segregation as disciplinary punishments. In positive provisions, inmates should be provided with medical aid comparable to standards in the free world, a standard not yet required by the courts or most statutes. Inmates should have a right to counsel and assigned counsel for advice and representation in matters involving prison life as well as other issues, a right not yet recognized by the Supreme Court. The Supreme Court has held prisoners' unions to be illegal if contrary to administrative ruling. Yet in prisons in which unions are recognized, they are supportive of better relations between prisoners and administration, and are in no way disruptive.

Even when finding serious violation of prisoners' constitutional rights and whole prison systems in violation of the eighth amendment, courts are hard pressed to find effective remedies. In many instances the violations continue. Such situations should be intolerable. The NCCD "Model Act to Provide for Minimum Standards for the Protection of Rights of Prisoners" includes the following provision:

"§ 6. Judicial Relief . . . .

"(c) [The court] may prohibit further commitments to the institution. (d) If the abuses are found to be extensive and persistent, it may order the institution closed subject to a stay of a reasonable period, not to exceed six months, to permit the responsible authorities to correct the abuses. If the abuses are not corrected to the satisfaction of the court, it may order those prisoners who have a history of serious assaultive behavior to be transferred to another facility, and it may order the discharge of other prisoners."[12]

Lesser measures, that strive for greater fairness in administering the present system, are a negative contribution to the cause of reform. An illustration is the American Bar Association "Tentative Draft of Standards Relating to the Legal Status of Prisoners" (1977; adoption pending). It incorporates what courts now require, and recommends some additional useful protections, but it does not move for basic changes, and unfortunately it proposes to undo some of the basic reforms recommended in its earlier sentencing standards cited above.

### *The Urgent Need for Reform*

When in the 1960's the spirit of the courts, reflecting a general spirit in the nation, turned to increased use of dispositions allowing offenders to remain in the community, using prison commitments less, so that prison populations went down, when at the same time national studies and standards developed sought substantial reforms of the prison system, I and others hoped for the continuation of that spirit and the adoption of the standards. If that had happened, a shameful aspect of our society—the prison system as we knew it then and know it today—would have been on its way to correction.

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[10] Model Sentencing Act (1972), § 14: "Unless the judge otherwise orders, . . . when a person under suspended sentence or on probation or parole . . . is sentenced for another offense, the period still to be served on suspended sentence, probation, or parole shall be merged in any new sentence."

[11] *Caton* v. *Smith*, 486 F.2d 733 (7th Cir. 1973); *Sutherland* v. *District of Columbia Board of Parole*, 366 F. Supp. 270 (D.C. D.C. 1973).

[12] See also, Rubin, III *United States Prison Law* chapter 8 (1976).

But when that spirit was supplanted by the one current today, we saw prison populations zoom upward, already resulting in much severer overcrowding than we have ever had, and, partly as a result of the overcrowding, conditions for prisoners and prison personnel and administrations becoming worse. When in 1972 the prison riot in Attica, New York, was suppressed with considerable loss of life among prisoners and guards, shocking the nation, the trend thereafter could have gone in either of two ways. One would have been to comply with prisoners' just complaints, recognized by many courts. The other was to continue along the path of the Attica repression itself. Unfortunately, it was the latter spirit that has generally prevailed.

In a recent article, the executive director of the American Correctional Association wrote: "Many reasons have been given for the current crisis involving the courts and prisons of America. Some of the most commonly mentioned are: Renewed emphasis on the 'law and order' concept, wide ranging racial discrimination," and continuing with many others, most of which (not all) we agree have been operative. Mr. Travisono warns that the current trend and the need for new prisons that would have to house the increased number of those committed would approach the "insane" figure of 50 billion dollars in the next 24 years. He concludes: "The huge amounts of money which appear to be needed for corrections could be put to better use in the improvement of the quality of life in our country."[13]

Indeed, money spent to maintain the present prison system is wasted. The "new" sentencing statutes are all in the direction of maintaining the present system, or worsening it. A great responsibility lies on the shoulders of legislators, who can turn to standards, such as those we have recommended, for significant remedies to alter the present trend, change the current conditions, and bring some fairness and order to the system of sentencing and correctional treatment. The issue is *not* punishment or reformation, but whether we will have a prison problem in addition to a crime problem.

[13] Anthony P. Travisono, "Prison Crisis 1977," *American Journal of Correction*, May-June 1977.

# The Story of New-Gate

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"Attend all ye villains that live in the state,
Consider the caverns tunneled in stone,
Beneath the walls that encircle New-Gate,
Your place of abode, if justice were done."

This is the story of New-Gate, the first state prison in the United States and the only prison that is now a state-operated museum.* While New-Gate is considered one of the most infamous periods in the history of corrections, parts of the story sound strangely familiar. Perceiving inmates as a labor resource, sincere reform efforts that result in different but crueler practices, legislatures introducing measures that to them seem plausible but are in practice unworkable, overdependence on steel and stone with little understanding of staff, demands for administrative turnover after escapes and riots, the search for self-supporting correctional institutions, conjugal visiting, and cyclical tightening of security, etc. all lead to the awareness that there are more similiarities than we like to think. A French adage says that the more things change, the more they stay the same. While there has been real progress in corrections, it is well not to forget our roots.

### *Connecticut Corrections Before New-Gate*

Corrections in Connecticut began after early colonial experimentation with workhouses in other areas. From the beginning, the colony had to provide for the punishment of evildoers, and, up until the establishment of New-Gate Prison, other forms of punishment, including jails, corporal punishment, and the gallows served the purpose.

* The New-Gate Museum in East Granby, Connecticut, a few miles from Hartford, is operated by the Connecticut Historical Commission and is open 10:00 a.m. to 4:30 p.m. from mid-May through October.

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