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great solution to the problems of delinquent misconduct. Instead, there is a need to reassess our views of youthful "problems." Stop-gap measures which should be expedited include the closing of brutal, overcrowded prisons and jails, an increased use of diversion, and any other pragmatic means of reducing the cruelties of the juvenile justice system imposed upon those unfortunate children caught up in it.

Although the radical theorists may not have all the answers for dealing with juvenile justice, some of their suggestions have been implemented. These changes have moved the system closer to the legal ideals upon which this country rests, but the shrinking economy and the resulting political drift to the right may seriously impede the kind of sweeping changes which radical criminologists support.

The Emergence of Determinate Sentencing

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THE EMERGENCE of determinate sentencing is a relatively recent phenomenon. It has only been since the U.S. Parole Commission (formerly Board of Parole) adopted parole guidelines in 1973 that several states have followed suit. Although this trend has been less pronounced for juveniles, a number of states have enacted or are considering legislation requiring determinate sentencing for juveniles as well as adults.

In this article we will explore several issues related to the movement toward determinate sentencing. Besides examining some of the definitional issues, the discussion will focus on an overview of this trend, arguments and counterarguments for determinate sentencing, types and methods for formulating sentencing guidelines, and future prospects for determinate sentencing. While scant evidence is available for assessing the impact of determinate sentencing, there is some recent research which deals with issues related to it and this evidence will also be scrutinized.

Defining Determinate Sentencing

There is considerable disagreement over how to define determinate-indeterminate sentencing. For example, Dershowitz (1974:298) has stated, "A sentence is more or less determinate to the extent that the amount of time to be served is decided not by the judge at the time the sentence is imposed, but rather by an administrative board while the sentence is being served." This definition is deficient in at least one important respect. All sentences imposed by parole boards would automatically be excluded as determinate even if an inmate's sentence was determined shortly after incarceration. An alternative definition of determinate sentencing systems is: "(1) with explicit and detailed standards specifying how much convicted offenders should (i.e., ordinarily be punished), and, (2) to the extent they use imprisonment, with procedures designed to ensure that procedures designed to ensure that prisoners are informed early of their expected dates of release" (Von Hirsch and Hanrahan, 1981: 294). Like the previous definition offered, a problem with this one is the idea that sentences must be relatively fixed is ignored.

This leads to our proposed definition: *A sentencing system is determinate to the degree that* (1) *it is based upon explicit standards or guidelines which specify how much punishment an offender will generally receive,* (2) *the offender is notified of the punishment imposed before a large portion of the sentence is actually served,* and (3) *the sentence is relatively fixed* (i.e., although it may be altered, the sentence served corresponds closely with the original sentence). Examples of extreme forms of sentencing should further illustrate the difference between determinate and indeterminate penalty systems. At one extreme the convicted offender would receive a fixed sentence imposed by a judge which could not be altered. In other words, the actual sentence would be identical to the expected sentence. At the other end of the spectrum an offender would receive a sentence of one day to life and the actual time served could be anywhere within this range. The former is similar to determinate sentencing schemes in several states today, while the latter approximates indeterminate

sentencing for adjudicated delinquents in most jurisdictions because often incarcerated delinquents can be held to any point up to their age of majority. Thus, determinate-indeterminate sentencing can be viewed as on a continuum, although we would be hardpressed to find actual examples of the extremes. Instead, relative to one another, sentencing schemes are more or less determinate.

Determinate sentencing should not be confused with mandatory sentencing. Many states have recently enacted legislation requiring minimum sentences for offenders convicted of certain crimes. States which have passed laws mandating minimum sentences for criminals convicted of offenses committed with firearms are prominent examples. However, mandatory sentencing laws are not necessarily determinate because an offender could receive a sentence of 3 years to life, for example, under some of these statutes. This violates our definition because sentences such as this are not relatively fixed and imposed shortly after conviction. Likewise, guidelines or standards are not necessarily part of mandatory sentencing laws.

Impetuses for Determinate Sentencing

The promise of reducing sentencing disparity and the demise of the "rehabilitative ideal" coupled with the return to classical conceptions of punishment have probably been the primary reasons for the movement toward determinate sentencing, although several other impetuses will also be mentioned. These forces have not only led to growing disillusionment with indeterminate sentencing, but determinate sentencing has been increasingly viewed as an alternative.

Reducing Sentencing Disparity

The assertion that there is disparity in sentences imposed on "similarly situated offenders" is well documented (Bagley, 1979; Berger, 1976; Carey, 1979; Clancy, et al., 1981; Dershowitz, 1974; Forst, et al., 1979; Frankel, 1973; Greenberg and Humphries, 1980; Hoffman and Stone-Meierhoefer, 1977; Kennedy, 1979; Perlman and Stebbins; Schulhofer, 1980; Singer, 1978; Van den Haag, 1975; Von Hirsch, 1976; Wilkins, 1980).[1]

This generalization applies to variations in sentences between jurisdictions, differences in sentences imposed by judges with a single jurisdiction, and dissimilarities in sentences meted out by a single judge. Even though sentences are generally strongly associated with the seriousness of the instant offense and criminal history (Gottfredson and Gottfredson, 1980), a number of other factors play a role in sentence decisionmaking of judges, parole boards, or other legislatively designated sentencing bodies. Guidelines can serve two important functions (Von Hirsch and Hanrahan, 1981). They can have the effect of reducing unexplained variation from sentencing norms because the sentencer must choose a sentence within a recommended range or explain the reasons for deviation from that standard range. More critically, sentencing standards ensure that the basis for policy decisions (for example, factors weighed in the guidelines) become explicit. The extent to which determinate sentencing has succeeded at achieving these objectives are issues which will be explored later.

The Demise of the Rehabilitative Ideal

Alone, sentencing disparity can probably not explain the trend toward determinate sentencing. In the 1960's and 1970's rehabilitation (or treatment) was coming under increasing attack. Rehabilitation is consistent with indeterminate sentencing because a system of indefinite sentences allows criminal justice officials to prescribe treatment which corresponds to the unique characteristics of each offender.

The "rehabilitative ideal" has been challenged on several grounds, but, most fundamentally, critics have questioned the effectiveness of rehabilitation at altering the behavior of convicted criminals. More than anything, the "Martinson Report" has probably been responsible for the continuing criticism of the efficacy of correctional treatment. In a summary of the report in which over 230 treatment studies up to 1967 were evaluated, it was concluded, "*With few and isolated exceptions, the rehabilitative efforts that have been reported so far have had no appreciable effect on recidivism*" (Martinson, 1974:25, emphasis in the original). Martinson's assertion is consistent with other reviews of the efficacy of correctional treatment (Bailey, 1966; Brody, 1976; Greenberg, 1977; Robison and Smith, 1971; Romig, 1978).

The conclusion that rehabilitation has been largely unsuccessful has not escaped criticism (Adams, 1976; Glaser, 1979; Palmer, 1976). For example, the noted jurist David L. Bazelon views the current rejection of the rehabilitative ideal as "brutal pessimism" (Empey, 1979: 412):

> Rehabilitation . . . should have never been sold on the premise that it would reduce crime. Recidivism cannot be the only measure of what is valuable in corrections. Whether in prison or out, every person is entitled to physical necessities, medical and health services, and a measure of privacy. Prisoners need

[1] "Similarly situated offenders" are those convicted of comparable crimes with equivalent background characteristics (for example, criminal history).

> programs to provide relief from boredom and idleness . . . libraries, classes, physical and mental activities.

Glaser has offered other reasons for not prematurely abandoning rehabilitation as a goal of our justice system. Too often the issue of what kinds of treatment for what types of offenders under what conditions is most appropriate is ignored (Adams, 1976). In addition, methodological problems in the evaluation of correctional programs, redimentary and simplistic theorizing, and inadequate implementation may explain the failure of rehabilitation (Glaser, 1979; Palmer, 1976). However, perhaps most critically the focus has been on the *rehabilitation* rather than the *habilitation* of offenders.

> . . . most arrestees for felonies in the United States began their difficulties with the law as young teenagers, or even as preteenagers, who never, or hardly ever, led a law-abiding or self-supporting life. Thus, the central problem in recidivism reduction is to habilitate them, to help them experience legitimate adult roles long and successfully for the first time. (Glaser, 1979: 269).

In spite of the rejoinders, there has been growing support for the basic conclusion of the "Martinson Report" (Sechrest et al., 1979). Yet, even Martinson (1979) modified his original position in light of additional findings, but his research suffers from serious methodological flaws (especially because it is nonexperimental). The disillusionment with rehabilitation is not analogous with its abandonment because it is still practiced in virtually all correctional systems in the United States, even though some treatment programs have become "voluntary."

Although sentencing disparity and the decline of the rehabilitative ideal have been the primary impetuses behind the trend toward determinate sentencing, there have been lesser reasons. Among others, the focus on rehabilitation has led sentencing authorities to be forward rather than backward looking and to consider factors unrelated to the offense such as employment prospects, mental condition, and attitudes (Dershowitz, 1974). Rehabilitation as a goal of our justice system places few constraints on the decisions of authorities who determine the actual sentence to be served. Thus, sentencing decisions may become capricious, arbitrary, and subjective. Again, this points to the criticism that judges and other sentencing bodies have historically been given little guidance to structure their decisionmaking.

With regard to juveniles, a number of critics have recently expressed their disenchantment with the juvenile court. This disillusionment is reflected in an oft-quoted statement by Justice Fortas in speaking for the majority in the Kent (1966) decision. He noted, "There is evidence, in fact, that the child receives the worst of both worlds: that he gets neither the protection accorded to adults nor the solicitous care and regenerative care postulated for children." Not only did the Supreme Court begin to question the doctrine of parens patriae, but the President's Commission on Law Enforcement and Administration of Justice (1967) was skeptical as well. No longer was the doctrine that the court was the benevolent surrogate parent acting in the best interests of the child blindly accepted. Instead, it was argued that juveniles should be provided with virtually all of the due process safeguards afforded adults. The juvenile justice system has become more similar to the adult system; the adoption of determinate sentencing in several states is consistent with this trend.

Some Dissenting Views

Although there are numerous proponents of determinate sentencing, the movement has also been the subject of criticism. As emphasized, one of the primary reasons for determinate sentencing is to reduce sentencing disparity, but it has not escaped criticism on this point (Alschuler, 1978; Bazelon, 1978; Clear et al., 1978; Flaxman, 1979; Greenberg and Humphries, 1980; Schulhofer, 1980). A major contention is that if discretion is largely eliminated at the sentencing stage, it will not necessarily reduce sentencing disparity unless there is concomitant structuring of prosecutorial discretion. The basic assertion is that sentencing discretion will be replaced by prosecutorial discretion in the charging decision, still leaving us in the position where similarly situated offenders do not receive comparable sentences. Limited evidence has suggested that this may be the cause (Clear et al., 1978), but research funded by the National Institute of Justice should provide further evidence on this issue (Project on Strategies for Determinate Sentencing, forthcoming). In contrast, Gotfredson (1979) found that the U.S. parole guidelines had the effect of reducing sentencing variation for similarly situated offenders. Still, at least determinate sentencing represents a beginning which could serve as a foundation for structuring prosecutorial discretion (Kennedy, 1979).

Perhaps the most common criticism of determinate sentencing is that even if sentences are more uniform, they will not necessarily be more just (Clear et al., 1978; Empey, 1979; Flaxman, 1979; Greenberg and Humphries, 1980; Miller, 1979). For example, almost certainly the sentences proposed by some advocates of determinate sentencing would be more punitive than existing sentences in most

jurisdictions (Fogel, 1975; Van den Haag, 1975, 1978; Wilson, 1975). On the other hand, the sentences proposed by Von Hirsch (1976, 1981) would be more lenient than current ones. Obviously, then, there is nothing inherent to determinate sentencing which necessarily dictates more severe or lenient sentences, for there is wide variation in the sentences postulated by different schemes. Likewise, little empirical information is presently available to adequately assess the comparative punitiveness of determinate sentencing, although preliminary evidence from a study in California has indicated that determinate sentences are no more punitive than indeterminate ones (Brewer et al., 1981). Other preliminary information has indicated that there is likely to be wide variation in the relative punitiveness of determinate penalty systems (Von Hirsch and Hanrahan, 1981); some guidelines mandate more severe sanctions while others call for more lenient ones. Too, we are reminded of a comment by Dershowitz (1973:214):

> No system of preventive confinement—even one with precise definitions, adequate procedures, and a requirement of past misconduct—will be free of substantial costs and sacrifices of other important values. All that any framework can hope to do is to help clarify and articulate the values at stake . . . a just balance must be struck between the legitimate interests of crime prevention and the equally legitimate interests of individual liberty.

Ultimately, the issue is not simply whether sentences are more or less punitive under determinate penalty systems, but whether determinate sentencing promotes justice.

Another common criticism is that institutional control over the behavior of inmates will be undermined because inmates will no longer have incentives to conform to institutional rules if their sentences are prescribed prior to incarceration (Miller, 1979). However, even under determinate sentencing, inmates generally receive reduced sentences for conforming to prison rules and in some cases the original sentence can be lengthened. Although there is scant evidence on whether institutional misconduct will increase under determinate sentencing, preliminary research has suggested that the opposite may be the case (Wilkins, 1980).

In sum, even though there are critics of the determinate sentencing movement, many of the issues which they have raised await further empirical investigation. Likewise, their views are in the minority and there is no indication that the trend toward determinate sentencing will subside in the near future.

The Return to Classical Conceptions of Punishment

The objective of reducing sentencing disparity and the disillusionment with rehabilitation have culminated in a return to classical conceptions of punishment. To briefly summarize, the classical school of criminology differed from the positive school in several important respects (Jeffery, 1970). First, the positive school focused on the criminal, while the classical school focused on the crime. Second, although the positive school adopted the concept of natural crime, the classical school relied upon a strict legalistic definition of crime. Third, in contrast to the positive school which based its study of criminal behavior on scientific determinism, the classical school postulated the doctrine of free will. Finally, individualized treatment of criminals was emphasized by the positive school, but the classical school advocated a definite penalty for each crime. It is evident, therefore, that determinate sentencing is consistent with classical conceptions of punishment. Beccaria (1963:99, emphasis in the original) was one of the earliest proponents of the classical school, and, in his classical treatise entitled: *On Crimes and Punishment* which was first published in 1763, he emphasized:

> *In order for punishment not to be, in every instance, an act of violence of one or many against a private citizen, it must be essentially public, prompt, necessary, the least possible in the given circumstances, proportionate to the crimes, dictated by the laws.*

Beccaria's position corresponds with a number of contemporary advocates of determinate sentencing.

Trends in Determinate Sentencing

As noted in the beginning of the article, it was not until the U.S. Parole Commission adopted parole guidelines in 1973 that we can speak of determinate sentencing in the United States. By 1981, 16 states had adopted sentencing or parole guidelines and determinate sentencing legislation remains under consideration in several other states (Von Hirsch and Hanrahan, 1981). This number excludes states which have formulated comprehensive sentencing guidelines for juveniles such as California and Washington. Determinate sentencing for juveniles has been more restrictive than it has for adults. However, several states have moved in the direction of determinate penalties for juveniles. For example, New York passed legislation in 1976 requiring minimum sentences for certain juveniles committing Class A felonies (which are very serious offenses) and Colorado has enacted legislation requir-

ing minimum sentences for some violent juvenile offenders and offenders committing a second felony. Even though determinate sentencing legislation has been relatively limited for juveniles, one of the two most important trends in juvenile justice has been to curtail the discretion of judges and other designated sentencing authorities in setting the release dates of juvenile offenders committed to institutions (Susmann, 1978). Too, there is little indication that this movement will wane because it is consistent with the trend toward treating juveniles committing crimes more similar to adults (Empey, 1979).

As indicated in table 1, some 10 states had established sentencing guidelines while 6 states had adopted parole guidelines for adults by 1981 (Von Hirsch and Hanrahan, 1981). On the other hand, parole release has been eliminated in some six states. Although there are numerous dimensions on which guidelines could be examined, generally they have been prescribed by statute, developed by sentencing commissions, or formulated by parole boards. In some instances, they were created by a combination of these forces. For example, in some states, there may be statutory constraints on the factors which may be considered in the guidelines, although a separate body such as a sentencing commission is actually responsible for developing the guidelines. In terms of the origins of development, legislatively prescribed standards are most common while sentencing commissions are least common (Von Hirsch and Hanrahan, 1981).

However, guidelines can be examined along several other dimensions. Among others is the particular method for developing the guidelines. Basically, sentencing guidelines may be either predictive or nonpredictive. With the former, sentencing standards may reflect past sentencing patterns and/or they may be based upon factors which predict recidivism among convicted offenders. Both of these methods are predictive, but the first considers factors which have influenced past sentencing decisions while the second is designed to predict future criminal behavior.[2] Nonpredictive standards are generally limited to a set of factors which are deemed relevant to imposing sentences and do not necessarily reflect past sentencing practices.

Sentencing guidelines may also represent one or more of the rationales.[3] Virtually all sentencing guidelines have the express purpose of reducing

[2]Implicitly, both methods can be construed as predictive of subsequent criminal behavior of convicted offenders because sentencing officials certainly assess the likehood that offenders will engage in future crimes in making their decisions.

[3]The rationales have been discussed extensively elsewhere (Clancy, et al., 1981; Gottfredson and Gottfredson, 1980; Van der Haag, 1975, 1978; Von Hirsch, 1976, 1981; Wilson, 1975).

TABLE 1.—*Parole and Sentencing Guidelines as of 1981*

	Sentencing	Parole
*Alaska[1]	x	
Arizona	x	
*California	x	
*Colorado	x	
Florida[2]		x
Georgia		x
Illinois	x	
*Indiana	x	
*Maine[3]		
Minnesota	x	
New Jersey	x	
*New Mexico	x	
New York		x
*North Carolina	x	
Oklahoma		x
Oregon		x
Pennsylvania[4]		
Washington		x
Federal Government[5]		x

*Parole release has been eliminated in these states.

[1]The guidelines are limited to second and subsequent offenders.

[2]Legislation has been enacted calling for the development of statewide sentencing guidelines.

[3]Parole has been abolished but there are no sentencing guidelines. However, the restoration of parole and development of parole guidelines is under consideration.

[4]The development of sentencing guidelines is under consideration.

[5]The revised Federal criminal code mandates sentencing guidelines, but it awaits passage.

sentencing disparity, but they may likewise be designed to implicitly or explicitly serve the purposes of deterrence (specific or general), incapacitation, just deserts, and/or rehabilitation. The particular rationales underlying guidelines are related to their method of development. Guidelines which are nonpredictive may be modelled after a just deserts perspective (however, this would depend largely on the specific factors weighed and the sentences imposed) because the consequences of punishment for future criminal behavior are irrelevant. Conversely, predictive guidelines could serve the purposes of deterrence, incapacitation, and/or rehabilitation. In many cases, the intent of the guidelines may be implicit and it is difficult to ferret out the specific rationale(s) for developing the guidelines.

Figure 1 depicts three dimensions for examining guidelines—the origin of development, the method of development, and the rationale. Some guidelines are quite complex because they may have one or more origins, combine methods of development, and express more than one rationale. Thus, there may be several differences as well as intricacies in developing various guidelines.

FIGURE 1.

Dimensions for Examining Sentencing Guidelines

Origin of Development
- Legislatively Prescribed Standards
- Parole Board
- Sentencing Commission

Method of Development
- Predictive
  - —Past Sentencing Patterns
  - —Future Criminal Behavior
- Nonpredictive

Rationale
- Deterrence (Specific or General)
- Incapacitation
- Just Deserts
- Rehabilitation

Beyond these dimensions, there are other differences in determinate penalty systems. The recommended sentencing ranges for offenders in a particular jurisdiction may be narrow or wide. In some states, the standard range of sentences may only vary by a few months, while in others the variation allowed may be in terms of years. Virtually all sentencing guidelines also permit some deviation from the standard or recommended range of sentences if there are aggravating or mitigating circumstances. In the case of aggravating circumstances, sentencing officials can exceed the upper range of sentences if the offense was committed in a particularly heinous manner or the victim incurred serious physical injury, for example. Conversely, when it is determined that there were mitigating circumstances, such as the offender playing a minor role in the crime, sentences can be below the standard range.

However, again, there is considerable variation between states with reference to aggravating or mitigating circumstances. There are at least three differences which include: (1) the degree to which the circumstances are specified in the guidelines, (2) the amount of deviation from the standard range of sentences permitted, and (3) appellate review procedures. With regard to the degree of specification of aggravating or mitigating circumstances, with some guidelines no attempt is made to indicate what special circumstances may be considered in making the sentencing decision. At the other extreme, these circumstances may be extensively enumerated or circumstances to be excluded from consideration may be identified (even though sentencing authorities may not be limited to considering exceptional circumstances defined in the guidelines).

The amount of deviation from the guidelines permitted likewise varies widely. In many states, the amount of deviation from the standard range of sentences allowed is explicit, but in others no upper or lower boundaries are specified.

Finally, in most states some form of appellate review is provided if the sentencing officials determine that there were exceptional circumstances, and, this must be noted in writing. This is where the similarities end. In some jurisdictions there is ordinary judicial review, while in others there is a designated panel (several judges or the parole board) responsible for reviewing earlier decisions. Likewise, depending upon the state, appeal may be permitted by the offender and/or prosecution. Thus, there is considerable variation between jurisdictions in the guideline provisions for dealing with aggravating or mitigating circumstances.

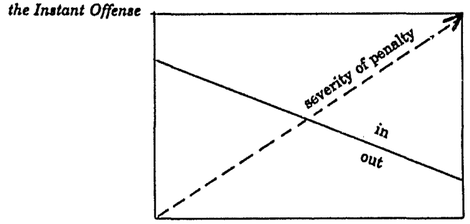
There are other dissimilarities between sentencing guidelines. First, the in/out line (whether an offender should be incarcerated) may or may not be specified for all cases. Judges may be given wide latitude in making the in/out decision or the in/out line may be defined precisely. Likewise, some guidelines mandate incarceration for certain offenders and a minimum term may be required. In contrast, other guidelines preclude the imprisonment of some offenders.

In addition, offense categories as well as penalties often conform to existing statutory provisions. With the former, the seriousness of offense is frequently based upon seriousness as defined by the current criminal code. For example, in some states felonies range from capital to third degree felonies and, in others, there are Class A through Class E felonies. Sentencing ranges may vary according to offense categories designated by the statutes. Similarly, existing laws may place constraints on the sentences imposed. Many states have a maximum penalty for a given offense category and the guidelines must conform to these statutory limitations. However, in other instances, sentencing guidelines are not restricted by existing statutory penalties because the statutes have been completely rewritten.

Finally, there is diversity in the factors weighed in meting out sentences. Some are confined to the instant offense and criminal history or other legal factors, while others may consider characteristics of the offender such as the criminal's employment record, history of drug and alcohol use, etc. Figure 2 illustrates a hypothetical two-way matrix which is limited to consideration of the instant offense and criminal history. In this figure, the in/out is defined as well as the severity of penalties. Many guidelines are considerably more complicated, but a two-way matrix represents one of the simplest schemes for sentencing offenders.

FIGURE 2

A Hypothetical Matrix Based Upon the Seriousness of the Instant Offense and Criminal History



Conclusions

Determinate sentencing guidelines can best be characterized by their diversity; yet, there are several similarities. Determinate penalty systems specify how much punishment offenders will usually receive, the offender receives notice of the sentence imposed prior to serving a large portion of the sentence, and the sentence is relatively fixed. Beyond these similarities, however, there are numerous differences between guidelines. Not only are their origins, methods of development, and underlying rationales often dissimilar, but standard sentencing ranges vary as do aggravating and mitigating circumstances, appellate procedures, the measurement of seriousness, specification of the in/out line, constraints imposed because of existing statutes, and factors weighed in imposing sentences.

Because many guidelines are still in their early stages of development and since there has been little attempt to assess their impact, it is uncertain whether they will continue to diverge or become similar in the future. Still, we would suggest that the trend toward determinate sentencing is unlikely to subside in the near future. The concern over sentencing disparity and the disillusionment with rehabilitation remain; the espousal of classical conceptions of punishment is prominent. Although determinate sentencing for juveniles has not evolved as quickly as it has for adults, this movement is also likely to persist for juveniles. Juveniles committing crimes are being treated more similarly to adults and there are no indications that this trend is on the wane.

Whether determinate sentencing guidelines which meet their intended objectives are more just than indeterminate sentencing awaits future investigation, but they do hold the promise of creating a more rational and fair system of justice in the United States. Since sentencing guidelines are still in their infancy, many questions remain unresolved and unanswered, but we are beginning to address some of these issues.

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THE FACT that some prison inmates will come to the end of a determinate sentence either dangerous, mentally ill, or both, has caused grave concern.

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END