THE INDETERMINATE SENTENCE
AT THE CROSSROADS

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Despite years of experimentation and hope, many authorities of penology now conclude that few rehabilitative programs reduce recidivism. However, it has been stated that "lower rates of recidivism are associated with either very short sentences . . . or long sentences." The only method that can tailor length of sentence to individual needs is the indeterminate sentence. By carefully evaluating the offender's progress in changing his attitude and behavior, the indeterminate decree allows correctional administrators the flexibility to release prisoners when they are rehabilitated. Indeterminacy differs from traditional fixed sentence procedure in that in the latter procedure prisoners are retained for years despite their rehabilitation, while others are freed yet have not changed their behavior.

Although indeterminate sentencing is designed to fully meet the needs of incarceration, it has met serious criticism. The liberals object because this apparently benign technique is abused by prison administrators who detain inmates labelled as non-conformers. At the same time conservatives moan that many offenders serve all too brief sentences and return to the streets in relatively short time. Finally, prisoners complain that the uncertainty of indeterminacy damages their morale and frustrates plans for returning to jobs and families.

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2 LIPTON, MARTINSON & WILKS. Id. at 564.

3 Id.
Clearly, the indeterminate sentence stands at the crossroads. Although it has an awesome potential for improving correctional programs, it is criticized for its potential misuse. It would be useful to review the development of the indeterminate sentence and examine its strengths and weaknesses in light of new research and new perspectives in the hope of developing a workable procedure.

The indeterminate sentence originated in New York in the 1820's where it was used for juvenile offenders. In that same state, in 1870, the indeterminate law for adults provided for open-ended sentences which allowed release of offenders only after the prisoners were "'cured.'" This technique appeared far superior to previous fixed sentences which only punished and exiled the offenders. Zebulon Brockway, a nineteenth century correctional administrator who is generally regarded as the pioneer of the concept of adult indeterminacy, stated that the indeterminate sentence "'gratifyingly changed the usual relation of prison governor and prisoners from antagonism of desire to accordance of interest.'"

As used today the term indeterminate sentence has a variety of meanings but generally indicates a procedure in which an inmate receives a range of sentence. The exact time served depends on a decision by penal authorities. It is based on the premise that one who breaks the law is ill and that prison will give "'medicine'" for his problems. One influential proponent of this approach is psychiatrist Karl Menninger who views criminality as a form of mental illness; he declares that criminal acts are "'signals of distress, signals of failure . . . the spasms and strugglers and convulsions of a submarginal human being.'" Further, Attorney

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General Ramsey Clark asserts, "Most people who commit crimes have a mental health problem."

By far the most enticing feature of indeterminacy is the opportunity it offers for realization of the rehabilitative ideal. Because release is tied directly to behavior, the inmate's stay in prison is exclusively therapeutic and thus fulfills a recommendation of the prestigious National Advisory Commission on Criminal Justice Standards and Goals which urges that virtually all sentences be totally rehabilitative in nature. One writer has commented, "Inherent in the indeterminate sentence procedure is the stimulation of the offender's incentive toward rehabilitation." Francis Carney, a psychologist at Maryland's Patuxent Institute, has written that "most of the professional staff at Patuxent hold that their major therapeutic tool is the indeterminate sentence." One group of authors put it most bluntly: "Only an indeterminate sentence can supply a true incentive for a prisoner to rehabilitate himself and adequately reward his efforts."

A corollary to this rehabilitative aspect of indeterminacy is the potential to reduce recidivism. Since the inmate will not be released until he has changed his attitude, fewer crime prone persons will be free in society. The indeterminate sentence also would not keep a person longer than necessary to rehabilitate him. Quoting again from Patuxent psychologist Carney, "Under the determinate sentence apparent changes in behavior occur but the personality structure remains in tact . . . all the prisoner does is learn to adjust and some-

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times manipulate external controls." 12 When released "he is thrown back on his own resources which are grossly underdeveloped if they exist at all." 13 But Carney notes that under the indeterminate sentence the offender learns "internal controls" which help him to adjust and cope with free society. 14 Another author, although critical of the indeterminate sentence, concedes that the technique "can make a person less unhappy with himself and less dangerous to others." 15

Implicit, then, in the indeterminate decree is the belief that those incarcerated who are not likely to recidivate must not merely sit in confinement, and that those who are considered likely to recidivate should be confined until they pose little likelihood to break the law. 16

By far the chief advocates of the technique are the prison administrators. Indeterminacy permits correctional authorities to manage and dispose of cases with greater involvement than in fixed sentences. Allowing correctional officials to make this judgment is theoretically alluring because it transfers the sentencing decision to a panel of officials who are trained in penology and acquainted with the inmate's behavior. As one commentator stated, "It is a flexible therapeutic approach which adjusts the term of commitment based upon an ongoing evaluation of the offender's needs and does not straight-jacket him into a term based upon the correctional judgment or philosophy of one man at one point in time." 17

12 Carney, supra note 10 at 138, 140.
13 Id.
14 Id.
The indeterminate sentence has received endorsement from a wide variety of sources. The National Advisory Commission favors the indeterminate procedure because “the alternative would leave little room for correctional administrators or parole boards to release the offender when it appears to them that he is capable of returning to society.”

Ramsey Clark stated that it “gives the best of both world—long protection for the public yet a fully flexible opportunity for the convict’s rehabilitation.”

Dr. E. Preston Sharp, former executive secretary of the American Correctional Association and now a professor and consultant to the Virginia Department of Corrections, has written that the indeterminate sentence should be used on a voluntary basis and mainly for first offenders who “wish time to serve them and not merely to serve time.”

Despite this praise, there still remain serious questions about the indeterminate sentence. One judge asks how does one know if a rehabilitation program can or cannot work? The answer is found in research reports.

Unfortunately, research findings in the effectiveness of the indeterminate decree are few in number and ambiguous in results. One comprehensive study by Dr. Emory Hodges showed a recidivism rate of thirty-five percent for those who received full treatment of the indeterminate sentence, and the author concluded, “The indeterminate sentence law appears to have been reasonably successful in achieving the dual purpose of protecting society from the defective delinquent while simultaneously handling him more effectively and humanely.” In another study at Patuxent, psychologist Carney reported a

18 NATIONAL ADVISORY COMMISSION ON CRIMINAL JUSTICE STANDARDS AND GOALS, 152 (1973).
19 CLARK, supra note 7, at 215, 224, 225.
recidivism rate of twenty percent. In yet another study, results were similar and researchers concluded that such findings “deviate significantly from the anticipated recidivist rates. When one considers the severe behavior disorders that are found in our (Patuxent) population . . . these figures become even more impressive.”

But opponents to indeterminacy find fault with these figures. While critics grudgingly concede that recidivism is lower in the indeterminate method, they also point to the fact that of 432 inmates released by the courts against Patuxent recommendations, only 187 or forty-three percent committed new crime. Thus there was only forty-three percent recidivism of those released by the courts which Patuxent officials felt had not been rehabilitated. Gerald Wheeler analyzed the impact of indeterminate sentencing throughout the nation and concluded that the procedure results “in nothing less than a right to confine people longer against their will in remote rural based institutions.” Therefore statistical evidence is not clear cut, but depends on one’s value concerning liberty and justice.

Although the statistical evidence gives only the most precarious conclusions, critics oppose indeterminacy on other grounds. The first consideration is cost. Since the indeterminate sentence usually increased the inmate’s length of sentence, the average cost per man per year increases. For example, if the indeterminate sentence would have been in effect in Virginia from 1973 to 1975, inmates would have served additional man years which at a cost of $5,000 per man per

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24 Schriever, supra note 16, at 619.
25 G. Wheeler, National Analysis of Institutional Length of Stay: The Myth of the Indeterminate Sentence (Division of Research, Planning and Development, Ohio Youth Commission; note: the Ohio Youth Commission did not endorse this report).
year would have amounted to a total cost increase of millions of dollars over the three-year period.\(26\)

Another group of critics are dismayed by the mental illness aspect implicit in the indeterminate sentence. Indeterminacy, opponents say, forces a man to reject his friends, background, and values as deranged.\(27\) Even psychologist Carney states that "the structure of self must first be destroyed and then rebuilt."\(28\) But critics assert that because one exhibits anti-social behavior does not mean that one is mentally ill. Judge Marvin Frankel notes that judges sentence people who are not mentally ill quite frequently.\(29\) Psychiatrist Thomas Szasz comments that little agreement exists on standards to indicate mental illness and states that "the thesis that the criminal is a sick individual in need of treatment . . . is false."\(30\)

Aside from this, indeterminacy brings into question awesome political considerations. The state certainly has a right to confine a person because of his aggressive acts, but not to change his basic aggressiveness. In an article concerning behavior modification and the indeterminate sentence the authors note that the state has the right to demand that a person conform to the rules of society but the government does not have the right "to alter his nature or belief."\(31\) Another writer comments that the area of indeterminacy has really been a political question entrusted to legislators and courts "rather than to psychiatrists and social scientists who claim no expertise in these matters."\(32\)


\(27\) American Friends Service Committee, Struggle for Justice, 83-86, 97, 98 (1971).


\(29\) M. Frankel, Criminal Sentences: Law Without Order, 90 (1971).


Beyond these theoretical problems, the indeterminate sentence has been rejected for the abuse that it has caused. The most outspoken critic is Jessica Mitford who, in her book *Kind and Usual Punishment*, asserts that the indeterminate sentence is used to crush political agitators or non-cooperative inmates. She writes that indeterminacy "is elastic enough to embrace the political nonconformist, the malcontent, the inmate leader of an ethnic group, the persistent writ writer, the psychotic, the troublemaker . . . a potent instrument for inmate manipulation and control." As for prison officials, the indeterminate sentence "endows them with total unfettered power over prisoners consigned to their charge." A number of prisoners also claim that indeterminacy is used by prison administrators as a "club" to "keep prisoners in line."

Closely connected to the idea of abuse, is the fact that, indeed, administrators do possess considerable power under the indeterminate sentence. One author has noted that the warden's job is not the rehabilitation of prisoners but the maintenance of order, and with indeterminacy the warden has a powerful tool for maintaining that order. Judge Frankel complains that administrators use the technique vaguely and without guidelines and therefore such practices can lead to abuse. Miss Mitford adds that the indeterminate sentence "is the perfect prescription for securing compliance and crushing defiance."

The basic administrative problem in indeterminacy deals with the prediction of behavior. In many states, correctional administrators lack trained personnel to evaluate future ac-

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33 Mitford, *supra* note 26, at 83, 90.
34 Id.
37 Frankel, *supra* note 29, at 88-89.
38 Mitford, *supra* note 26, at 90.
tions. Moreover even in states with adequately trained staff, there exists disagreement on the reliability of the factors used to make predictions. In the judgment of one writer this lack of personnel makes the indeterminate sentence "a well intentioned, yet futile road to correctional justice."\textsuperscript{39} In Illinois a study noted that after one doctor certified a prisoner as mentally ill it was difficult for another to claim that the man was rehabilitated.\textsuperscript{40} In 1958, Dr. Seymour Halleck proclaimed that "there is little science to be brought to this sensitive task. Research in the area of dangerous behavior is practically nonexistent."\textsuperscript{41} In 1970, new research indicated that psychologists cannot predict future criminal activity with an acceptable degree of certainty.\textsuperscript{42} Prisoners, consequently resent their liberty being subject to such a capricious and vague process.

In many cases the indeterminate sentence weakens the will of the inmate to rehabilitate himself. Instead he develops a cynical attitude in which the therapy program degenerates into a form of role playing with the inmate trying to "dupe the therapists quite deliberately and consciously." Ray Johnson, a former convict, in recounting his stay in the California system writes that he achieved his release by pretending he had changed his attitude and behavior.\textsuperscript{43} Even ardent indeterminate supporter Carney states that the inmate will "play upon your specific traits to convince you that he has changed."\textsuperscript{44}

A number of writers and agencies have condemned the indeterminate sentence. Participants in the 1972 Earl Warren

\textsuperscript{39} Martin, \textit{supra} note 17, at 713.
\textsuperscript{40} \textit{JOHN HOWARD ASSOCIATION, GOVERNOR WALKER'S PROPOSED JUSTICE MODEL: ANALYSIS OF ITS IMPACT} (1975).
\textsuperscript{43} R. Johnson, \textit{Too Dangerous to Be At Large}, 85-86 (1975).
\textsuperscript{44} Carney, \textit{supra} note 28, at 40.
Conference on Advocacy concluded: "The ultimate goal of imprisonment should be no indeterminacy whatsoever..." 43 Norman Carlson, Director of the Federal Bureau of Prisons has stated, "As a correctional administrator, it is my personal philosophy people should not be sent to an institution for rehabilitation. If the prime goal is for correction, it should be done in the community." 46 In the Report of the Committee for the Study of Incarceration the members rejected indeterminacy as unfair and unrealistic. 47 Further, corrections administrator and scholar David Fogel in his book "... We Are The Living Proof..." condemns indeterminacy and rehabilitation. 48

Perhaps the words of one inmate might sum up the opposition to the indeterminate sentence: "... to be remade after some pattern of 'normality' hatched in a Viennese laboratory to which I never professed allegiance; to know that this process will never end until either my captors have succeeded or I've grown wise enough to cheat them with apparent success — who cares whether this is called Punishment or not." 49

These criticisms have caused the courts to be clogged with petitions seeking to invalidate indeterminacy. State and federal courts have ruled that an inmate has no legal right to have sentence set at less than the maximum provided for the offense, and, in the words of one recent article, "... regardless of his prior record, his conduct in prison, his adherence to prescribed programs, or the sentences given co-defendants, the paroling authority has complete discretion to determine and redetermine the time he must spend in prison." 50 Nonetheless, some legal scholars feel the indeterminate decree is on question-

45 ORLAND & TYLER, supra note 21, at 54-55.
46 Id. at 55.
48 FOGEL, supra note 1.
49 Schreiber, supra note 16, at 612.
able constitutional grounds because of the use of such words as "mentally ill" and "dangerous" offender. Such terms when used to justify incarceration are certainly open to future court test because of a breadth of meaning arguably unconstitutional.\footnote{Schreiber, supra note 16, at 608-611; Goldfarb & Singer, supra note 4, at 170.}

Despite these criticisms, the indeterminate sentence should be employed, but under strict control. As stated in one article: "Society is not prepared to abandon the premise of rehabilitation since the alternative punitive model is too bleak, too defeatist for a 'can do' society as ours has traditionally been."\footnote{Recent Developments, supra note 40.} Another advantage is that the indeterminate decree allows correctional administrators considerable flexibility in sending inmates to community based programs. In a five year study by the California State Bar Committee the authors concluded that the indeterminate sentence should be retained with a "total commitment to the goal of rehabilitation."\footnote{Id.}

The most serious objection to the indeterminate sentence is its potential for arbitrary administration. Therefore every indeterminate sentence should function under written guidelines with allowance for appellate review. Statutory definitions should be enacted to define terms such as "dangerous" and "mentally ill." Only first offenders who enter the program voluntarily should be allowed to participate. Finally there should be no minimum time for parole eligibility and release should come either from an administrative board or from the courts.\footnote{See Gaylin & Blatte, supra note 31; Hudson, Galaway, Hensche, Lindgren & Penten, Diversion Programming in Criminal Justice: The Case of Minnesota, 1975 Fed. Prob. 17; Murray, Ringer & Alarcon, supra note 11, at 357-361, 396-398.}

As for the problem of behavior prediction, indeterminate commitment must be accompanied by an analysis which indicates that the person has an identifiable disorder. The offender should be compared to other inmates who have successfully

\footnote{Id.}
completed the program and a statistical prediction should be made on the chances of success. If the study indicates a high probability, then the judge should sentence the offender to the program for that specific problem.

The indeterminate sentence, even under the above safeguards is not error-free and scholar David Rothamn's word to judges should be kept in mind: "... exercise the most incredible kind of skepticism, that no program which parades as rehabilitation ought even to be accepted by you as valid." Nonetheless, indeterminacy offers the flexibility and hope that could help many inmates. The indeterminate sentence is at the crossroads; let us hope that the criticism has made the program stronger and more ready to meet inmates needs.

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55 ORLAND & TYLER, supra note 21, at 51.