Public Protection and the Trend to Determinate Sentence Structure*

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The last five years has witnessed a marked shift in the philosophy of sentencing and penology throughout the United States. This shift has been one from the so-called rehabilitative model or medical model of corrections to the justice model as propounded, for example, by Professor Norval Morris.[1,2] Nowhere in the United States has this shift been more clearly evident than in California, which had previously been most active in implementing the rehabilitative model. As many of you are aware, sentencing in California was completely indeterminate from 1917 until 1977. As I have observed it, this change of direction has been the result of changes in political philosophy, specifically the assertions of the rights of the individual against the State, rather than the result of assessment of the successes or failures of the rehabilitation model.

Whether or not you consider it a cause of the change, there has also been disillusionment with the results of rehabilitative efforts and a debunking of the capability of the courts and clinicians to predict future criminal behavior.[3] The advocates of the justice system have not so much attacked rehabilitation as totally unsuccessful, or attacked discretion in sentencing and paroling as totally without support, but have argued that they are insufficiently strong to balance the loss of individual rights. It is certainly true that the indeterminate mode of sentencing is based in large part on the assumption that it is possible to tell when a person can safely be released to the community, and also on the assumption that people undergo changes while incarcerated, some of which at least may be of a positive nature, so that indeterminate sentencing is inextricably tied to the medical model.

Throughout the 50's and the 60's in this country, the trend was toward more indeterminate sentencing in most jurisdictions. California sentences were fixed by statute between a very broadly separated minimum and maximum, such as one year to life, six months to ten years. In those decades, the trend was toward more discretion to be exercised by parole boards and courts. The textbooks of criminology and penology generally stated that the purpose of imprisonment was threefold:
(1) To punish individuals who had committed crimes.

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(2) To remove individuals from the community likely to commit further crimes.
(3) To rehabilitate those individuals who, by their criminal acts, have indicated an incapacity to live in harmony with society and its rules.

The last two of these purposes, those of preventive detention and rehabilitation, were viewed by most experts as being best served by an indeterminate sentence. Indeterminate sentences would permit the state to continue to confine those individuals who were likely to commit crimes upon their release, thereby providing greater protection to the community. During incarceration, efforts at rehabilitation would be made to diminish the likelihood of repetition of crime when return to the community did occur. It was often pointed out that prisons were full of chronic offenders some of whose self-destructive, criminal careers could only be explained as personality abnormalities.

Just a few years ago, this logic of indeterminancy in sentencing was widely accepted by jurists and eminent psychiatrists. When I found my way into the practice of psychiatry in corrections in the late 50s, the so-called medical model of corrections was predominant. Leaders such as Karl Menninger and Judge Bazelon, Richard McGee in California and James Bennett in the Federal Bureau of Prisons, all propounded a view of the purpose of imprisonment which advocated indeterminacy in sentencing. In fact, when I was looking for a place to locate where psychiatry could be practiced most effectively in the correctional setting, the indeterminate sentence structure in California was a significant part of my choosing to locate there. Many of you who were active in this field in those years will recall with me the enthusiasm for the rehabilitative model of imprisonment and the assumption which we all made that sentences would become increasingly indeterminate as sentencing practice was "reformed."

Yet, at the present time, there remain few advocates indeed of indeterminacy. I, in fact, do not recall a single article in the last five years in any psychiatric or penal or legal journals which advocates greater indeterminacy. One should always distrust so rapid and complete a shift of opinion, and consider the possibility that such changes represent shifts more in fashion than in substance. It seems to me very definitely a time to re-examine the logic of indeterminate sentencing and focus on the realities of what is now happening.

In defending indeterminate sentencing I do not wish to deny its faults. My own disillusionment with the enthusiasm for rehabilitation which existed twenty years ago began only a few years after I had begun a career in prison psychiatry. This experience of mine was shared by most others who also acquired such experience. Our disillusionment with the medical model in fact anticipated a good many of the criticisms which in more recent years have been leveled against indeterminancy. One cannot but agree with the critics on a number of points. As years went by I had increasing experience of knowing that prisoners whom I had seen as very dangerous and had been reluctant to see released went on for years in the community without any criminal behavior; and, conversely, others, whom I had observed to show considerable improvement during their imprisonment, in some cases came back very promptly after their releases, having committed serious crimes. It

also became evident by experience to me that it was difficult as a clinician to retain objectivity in evaluations and to avoid being swayed by personal prejudices, as well as by the desires of the courts and parole boards who sought my opinion.

Without, therefore, reviewing all of the criticisms of the rehabilitative model of corrections, and without rehearsing all of the injustices and dishonest decision-making which went on under the guise of determining when people were ready for release, I wish to declare myself in agreement with a great deal of the criticism of recent years. Nevertheless, I find that the time has come (at least in my own state) to shift stance and to begin again to point to the advantages of indeterminacy and even to question whether the "justice model" is entirely honest in philosophy and just in result.

We used to be appalled at times at reading the comments of sentencing courts which sometimes, in years past, declared that the only purpose of sending the defendant to prison was to do him good and to secure the rehabilitation which he was certain to obtain there. Knowing as we did that there was considerable likelihood that imprisonment and the influences to which a person would be subjected in prison could have a very negative result, and aware as we were of the uncertainty of positive results, such attitudes on the part of the courts were appalling and seemed based on going along with a fashion that denied the reality of punishment as well as the demand of the public for detention. In California we have now come full circle, in that the Uniform Determinate Sentence Law of 1977 begins by declaring that the purpose of imprisonment is punishment only. Now we find jurists and legislators and academic penologists congratulating themselves on having given up the pretense of seeking rehabilitation through imprisonment and proud of their honesty in acknowledging the purpose of punishment. I suggest to you that this new fashion of acknowledging only the purpose of punishment is dishonest in its own way. In fact, it becomes evident when one reads the California Determinate Sentencing Act that the initial statement that imprisonment is for the purpose of punishment does not tell quite all the truth. A great portion of the law is devoted to ways of determining the length of incarceration, and in several places the Community Release Board is instructed to place public protection in the highest priority in determining when individuals should be released. During the time that the change of sentencing structure was being debated in the Legislature, the argument centered mainly around the question of public protection,[6] and this remains the topic of debate to the present.

The idea that as a society we now send people to prison primarily for punishment is as much a pretense as the idea that we sent them to prison 20 years ago primarily for rehabilitation. The bush that we are beating around in taking these different stances is the desire to confine people whom we perceive as a danger so that public protection is served. What people seek mainly from courts and institutions is freedom from being victimized.

This attitude makes itself evident in many different ways. For example, in California as in most states, from 80 to 90 per cent of persons convicted of felonies are not sent to prison but diverted to probation or other dispositions. If several people committing the same crime are not all sent to prison, it is clear that there is another over-riding consideration besides

punishment alone. To me it seems clear that this consideration is whether or not the individual is seen as likely to continue to victimize others. There are many forms of punishment which we can administer, and what is particularly advantageous about prison as punishment is that it accomplishes incapacity to commit similar criminal acts.

Likewise, we can point to the fact that the public rarely complains about individuals being released too soon from prison unless they have committed very exceptional crimes. In fact, people frequently complain that modern prison is not very appropriate punishment in that their sense of justice would be better satisified if the perpetrators of crimes somehow had to recompense the victim or society. This is particularly true in the public mind because people are generally not strongly aware of the punishing aspects of imprisonment. It seems to me that anyone familiar with the criminal justice system cannot fail to come to the conclusion that people in general are really not so much concerned with what happens in prison as they are with the question of whether it provides them with a period of freedom from fear of being victimized. A curious fact, which strikes many people in corrections as difficult to understand, is that the public seems very angry and anxious to punish criminals during the process of their trial, but then seems very rapidly to shift to a position of identification with prisoners. The staffs of prisons are not infrequently viewed with suspicion and concern that they may abuse the very prisoners whom the public seemed eager to abuse a short time before. The vicissitudes of desire for retribution and identification – now with the victim and now with the aggressor – are capable of extensive elaboration by psychologists. One aspect of this example, however, seems clear enough: that in the interaction between criminal and victim, the public identifies with the victim through fear of being placed in the same position and therefore fears and hates the criminal. However, in the conflict between the prisoner and the state which confines him, the public likewise identifies with the prisoner, being conscious of the possibility of themselves being victimized by the power of the state and its officials. This distrust of state officials, by the way, should not be overlooked as a contributor to the trend away from discretion in sentencing. Discretion is granted where there is trust, and trust in government has clearly been diminished in this era of Watergate.

The politicians know the societal purpose of imprisonment and reveal it in the rhetoric of campaigning. They speak of "getting the criminals off the street." They do not promise to mete out just measures of punishment.

If, as I have tried to show you, the truth of the matter is that imprisonment is most concerned with keeping the criminals off the street to incapacitate them from criminal acts, then there is danger in any lack of honesty with ourselves about this purpose. We have had experience with the danger in deluding ourselves with the belief that we are primarily concerned with rehabilitation. In California we have already begun to find the dangers in deluding ourselves into the belief that we are concerned only with administering just and equitable punishments for crime. Such self-delusions favor an irresponsible attitude toward public protection.

No one is particularly eager to take on the role and the responsibility of protecting the public by confining dangerous people, and in California it is

becoming evident that, given encouragement, most will do their best to avoid it. This is nowhere more clear than in the difficulty we are now experiencing in dealing with those individuals who suffer some mental disability which makes it difficult for them to live in the community and which in varying degrees increases the likelihood that they will commit some crime.

The same social, legislative, and judicial trend which has revised penology in recent years has resulted in congruent changes in the laws and public policies regarding the involuntary hospitalization of the mentally ill. In 1969, in California, we had, in fact, eliminated civil commitment by the court, with the exception of a brief period of 90 days' confinement in cases where immediate danger to others had been demonstrated by assaults or attempted assaults. The only other way to accomplish involuntary hospitalization is by finding that an individual is in need of a guardian and appointing someone who then can hospitalize. At the same time that this change in the civil law came into effect, the public policy became that of shutting down the state-operated mental hospitals and transferring responsibility for care and treatment to the local level.

One of the results of this change became rapidly evident to those of us in the criminal justice system. A small proportion, but nevertheless a not-to-be-ignored proportion, of those individuals who had been confined involuntarily in mental hospitals were unable to adjust in the community without criminal acts.[8,9] In the absence of civil commitment procedures, these people appeared in increasing numbers in the jails and later in the prisons of the state. Lacking the ability to commit for purposes of public protection, the courts turned away from the civil law and utilized the criminal law, which at that time still included the indeterminate sentence. The state hospitals also found increasing numbers of people being committed as incompetent to stand trial, or not guilty by reason of insanity. At the same time, we in corrections saw a small but definite increase in the number of seriously mentally ill persons who were coming to prison – at times with the clearly stated comment from the courts that in the absence of any other disposition which would provide public protection, the criminal charge and sentence were being pursued.

Discussion of this problem of mentally ill offenders took place at times with considerable heat; however, at first there was no great pressure towards action. For one thing, it was pointed out that in many respects the use of the criminal sanction to confine the mentally disabled was consistent with the emerging philosophy that mental illness should not be reacted to as if it were a crime. Only the actual crimes of the mentally ill or disabled should be the subject of legal action leading to involuntary incarceration. The most vigorous criticism of this effect of the new civil commitment law came in fact from the county sheriffs, who found the county and city jails and detention facilities full of severely mentally ill people whom they could not get accepted into hospitals, and for whom they feld inadequate to provide care in their jails.

As you will immediately perceive, however, the enactment of the Determinate Sentence Law in 1977 has escalated the severity of this problem. The new sentencing law does not permit tailoring the length of sentence or treatment effort to the degree of threat which the individual

presents to the public. In prison, we are faced with the necessity to release people at the expiration of their sentences no matter what the mental state and degree of threat they may represent. Furthermore, since court decisions such as *Jackson v. Indiana* have established the principle that mental health commitments based on criminal charges cannot extend beyond the period of time that the individual could spend incarcerated in prison for the same offense, the same limits are imposed on those kinds of commitments.

The difficulty presented by the mentally disabled who are dangerous, furthermore, goes beyond the changes in legislation themselves. It goes even beyond the changes in mental health care delivery system from state hospital to local program. These changes in legislation did not occur in a vacuum, but were supported by many psychiatrists and jurists, and their enactment has in turn affected the attitudes of all of us. It has been evident to me that we psychiatrists have reacted to legislation which asserted the rights of the individual and placed greater restrictions upon social control measures by going (in some cases) beyond the intent of legislation. For example, although there is a provision in the mental health law in California for committing individuals who are dangerous for periods of 90 days, in the first few years of this law a survey revealed that this provision had been used by hospitals and psychiatrists extremely rarely. In the County of Los Angeles, there had been, in the first five years of the new law, only 8 or 10 cases in which there had been an effort to secure this type of commitment. It was evident that the law not only had placed great limitations upon our ability to confine people for purposes of public protection, but also had conveyed to psychiatrists, attorneys and the courts a message that public protection should be pursued with extreme caution. In private conversation, psychiatrists could frequently be heard to express the feeling that the laws had become so complicated and restrictive that it was clear that they were no longer being called upon to take action in the cause of public protection, and accordingly no longer needed feel responsibility to do so. With some the reaction was more emotional: that in view of the distrust of psychiatrists, which this new legislation seemed to them to enunciate, the public did not deserve the protection which they formerly had felt an obligation to provide.

Given this history of what happened in response to the changed civil commitment laws, it is not surprising that we can already see a similar process developing with the change to a determinate sentence law. It is certainly not an illogical conclusion for professionals in corrections that if the legislature has seen fit to take away discretion in handling of criminals committed to prison, and has declared that the purpose and justification for prison is confined to that of administering a measure of punishment, then the professionals have been relieved of responsibility for protection of the public and for rehabilitation of the prisoner. I find that now no one is eager to make predictions as to whether prisoners are likely to commit crimes in the future. There is a growing reluctance to give expert opinion as to whether individuals represent an unreasonable threat to the public if they are released. The Community Release Board has replaced the old Adult Authority. The old California Adult Authority was inclined to talk a great deal about rehabilitation when it often was really a secondary consideration, but it did also talk about public protection, and determined the length of

sentence on the basis of assessment of the risk which individual prisoners represented upon their release. The new Community Release Board, while it avoids the excesses of the old board, seems likely in the future to move too far away from concerns of public protection. In the place of individual assessment of individual cases and the threats they represent, the Board is developing elaborate formulae and charts for matching the length of sentence to the severity of crimes. It has already come under some public criticism. That criticism, as we would predict, has been for lack of attention to public protection, rather than for any failure of administering just punishment.

The question to ask now is "Who is concerned with public protection?" Who bears responsibility in this area? There lies the chief danger of telling ourselves that punishment is the sole purpose of imprisonment and that all sentences should be determinate, based upon the nature of the crime and the culpability of the criminal. If we do not acknowledge our purpose of public protection, we cannot hold anyone responsible for pursuing this goal. The second danger is that if we deny that control of an individual is our primary societal reason for imprisonment, the desire to control will not just go away; it will pervert our aim of justice as surely as it did our aim of rehabilitation. This possibility is evident in California in strong pressure on the Legislature to increase greatly the length of sentences. Sentences which were just for the average offender will be extended for the real purpose of dealing with the more dangerous offenders and no longer be just.*

The problem we have created is most clear in regards to the mentally ill offender. I want to preface my argument regarding the mentally ill offender with the statement that I believe mentally ill people are not, because of illness alone, more likely than others to commit crimes. At Vacaville, we recently reviewed the history of more than 1,000 recidivist violent offenders and found that less than 8 per cent had come to psychiatric attention and received any other diagnosis than personality disorder. Where illness is related to crime and dangerousness, it is through the disability it may create in coping with life stresses, combined with propensities for criminal solutions that do not differ from the criminal propensities of mentally healthier offenders.

A case which recently came to my attention will illustrate the lack of effective response to the needs of some mentally disabled offenders. This was the case of a man in his late twenties who had been incarcerated several times, beginning with commitments to juvenile institutions. His arrest record included several instances of assault with a deadly weapon, and he had been convicted on one of these charges. He also had been committed on one occasion to a mental hospital for evaluation after one of these instances of assault. He had come to psychiatric attention during his imprisonment as a result of a high level of anxiety, frequent requests for medication to calm himself, and, on one occasion, self-mutilation. He had been diagnosed as suffering a psychotic episode on one occasion, but the overall diagnostic impression was that of Borderline Personality. A longitudinal view of his mental health indicated that he did not tolerate stress very well and that

*Since this writing the Governor has signed legislation which increases length of sentence but (happily) also increases the courts' discretion in fixing term.

under conditions of stress he manifested a high level of anxiety and a tendency to impulsive violent behavior against himself and others. He also showed a high level of dependence on others, bur relatively low ability to maintain long-term relationships.

He was kept in prison rather longer than the average individual convicted of assault with a deadly weapon, but was eventually released to parole. He remained on parole a little over a month, during which time he established contact with a young woman he had known previously but became very upset when she did not wish to continue their relationship. He sought assistance from his parole officer and later went to the nearby mental hospital because of his anxiety and feeling that he could not cope. The hospital felt that he did not meet the legal standard for involuntary commitment, and that he was too unstable to be expected to carry out a voluntary treatment plan. He was returned to prison by his parole officer in the absence of alternative ways of dealing with his immediate problem. Back in the prison under psychiatric care, he rapidly regained his emotional control and mental equilibrium. After several months he was again released to parole as required by the new sentence law, only to experience within a few days the same high level of anxiety and inability to cope with the demands of living in the community. The man sought help once again at the mental hospital but was again released after several days. He sought help from the community mental health clinic and was given attention in a crisis center. He came to the attention not only of his parole officer but also of the personnel at the hospital and personnel in the community Mental Health Services. Less than a month after his second release, however, at a time when he had reached the limit of stay allowed in a residential center in the community, he assaulted two individuals and is charged with a homicide in a separate incident.

Such cases occur from time to time, this one being remarkable because the individual contacted every available source of control and support, whereas many others do not take this initiative. Furthermore, the agencies and professionals involved provided what they are called upon to provide under the present system. The prison kept him as long as he could legally be retained. The hospital admitted and treated him for the 72-hour period which is provided for in the law. The parole officer provided loans of money and other practical assistance. The Community Mental Health Care provided crisis intervention, including residential care for a limited period of time, and offered him outpatient appointments which he did not keep. Some would perhaps say that no more help is possible. He was not at any time irrational or otherwise psychotic in his thought processes so as to need a guardian. Some will say that in such circumstances we simply must wait for the individual to hurt someone or to commit some other act which will justify placing him in jail and thereby securing custody over him. I cannot accept this passive point of view. To me it does not serve either the public or the individual offender who poses a threat to the public. What is missing in this drama, in order for it to have a happier ending, is the laws, the people, the agencies which will accept responsibilty for working towards public protection and intervening in a supportive and controlling way when such intervention is justified. The remedy must lie in changes in the law, in the

attitudes of individual professionals and in the mission of those agencies in society that provide support and control.

There is an obligation, I would suggest, for the lawyers and legislatures to write laws which concern themselves with public protection, at the same time that they preserve the rights of the individual. Indeed there have been attempts in California and I believe in other jurisdictions to deal more directly with this issue. In recent years, however, such attempts have generally foundered on the problem of prediction. It has been pointed out repeatedly in the literature of psychiatry, psychology and sociology that it is not possible to predict future behavior with anything like one hundred per cent accuracy and that justice requires that action to intervene in an individual's life must be based on higher degrees of certainty.[5]

However, the same studies and reports which reveal the limitations of clinical prediction also establish beyond reasonable doubt that there is significant accuracy in prognostication at least to the extent of being able to define different levels of risk. In fact, if one examines the findings of the variety of studies done in recent years, such as that of Kozol in Boston,[4] Steadman[5] in New York, and Jew and Clanon[7] in California, as well as recently reported experience with parolees from Michigan, one will find that case studies of individuals reliably permit a group of offenders to be divided into higher and lower risk levels. These risk levels differ by a factor of three to five on follow-up experience. High risk parolees will commit five times the number of crimes as the low risk parolees. Furthermore, we have all encountered individual cases in which special circumstances make it possible to be much more accurate in predicting future violent criminal behavior.

From this standpoint, it seems to me that rather than being critical of the accuracy of clinical prediction, we should be critical of the law, which has not found a way to utilize what expertise we have. I do not have the new laws and legal procedures to propose. However, development is sorely needed in this area and must come from the combined efforts of lawyers and psychiatrists and other clinicians. Certainly we have a naïve law if it cannot distinguish between an individual with little potential for danger to others, and another individual with five times the potential for inflicting harm. One is tempted to draw an analogy with a baseball manager who could see no difference between a player with a batting average of .100 and one with a batting average of .500. One area seems to me to have promise for an answer to this legal problem. That is the fact that it should be justifiable to distinguish legally between those who have not been guilty of crimes and those who have been convicted of violent destructive acts which give society reason for intervening in their future lives.

Separate from the matter of laws, although connected in many ways, is the attitude of individual psychiatrists and lawyers. In the case which I have cited, for example, some more aggressive action was available under existing law to several of the people whom that man contacted. As I have indicated, Mental Health Legislation in California does provide for at least a short period of involuntary hospitalization for those who are perceived as dangerous and found to be so in court proceedings. This particular provision of the law has been used very infrequently, for a variety of reasons. The reasons, however, all add up to the fact that individuals are averse to

invoking unfamiliar new legal processes, and averse to becoming involved in legal conflicts which may seem likely to become very uncomfortable and unpleasant. As I have suggested, many receive the trend toward removing discretion and the application of social controls as a message to themselves to give up the effort to carry out this function. In recent years psychiatrists have been called agents of social control in such derogatory tones at times that we are prone to feel that it is indeed always bad to be such an agent.

The third response which is needed lies in the area of the institutions and agencies by which mental health care and social control and support are provided. I refer to the kinds and availability of general support programs and treatment programs and criminal justice programs which we choose to develop and fund. In California, as elsewhere in the United States, the public policy has been to divert resources from state hospitals to community clinics and other local mental health care delivery systems. This trend has overall been successful in greatly improving the lot of and the chances of recovery for the great majority of persons in America who become mentally ill. It has, however, decreased the level of public protection, and unnecessarily so.[5] It seems to me clear that the commendable mental health goal of reducing hospitalization to a minimum has been seized upon to justify withdrawing resources and support from those hospitals still required and from those patients who do require hospitalization. For some patients with considerable disabilities, release from mental hospitals has been to a solitary existence in high-crime urban areas where, indeed, their only choice may be whether to be victim of crime or perpetrator. The resources to provide support for such mentally disabled people have not followed them into their new home in the community, at least not in California. Indeed those funds and professionals lost to the old state hospitals have frequently been shifted from care of the more seriously disabled to the provision of outpatient care to less disabled and politically more powerful patients.

The reality of this phenomenon of the abandonment of the mentally disabled is now generally acknowledged, along with the paradox that it had its origin in the commendable desire to intervene as little as possible in the lives of the victims. I suggest to you that there is a real potential for the same paradox to occur in penology. Recognition of the limits of the rehabilitation model and discretion in sentencing can readily be perverted into denial of responsibility to use the tools we do have in appropriate cases. This perversion takes the form of legislation and budgets which do not provide for supportive and control agencies which deal with offenders. At the individual professional level, it takes the form of judges, parole boards and penologists who fail to use the discretion and intervention which the law permits. The result, if this tendency continues, will be a loss of public protection which is unnecessary and which will gain no one more individual liberty. It is quite conceivable that irresponsibility will increasingly masquerade as concern for individual freedoms.

The alternative is to use what we know about appropriate indeterminacy in sentencing and intervening in supportive and rehabilitative ways. We must address ourselves to defining and limiting the application of this model of penology, however, to those cases where it is justified by the balance of individual freedom and public protection. We must also maintain support for

those dedicated correctional workers who strive to promote growth and change in prisoners. Their spirit and efforts provide hope, which is both essential to humane treatment in the present and essential to achieve the more effective rehabilitation of the future.

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