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WHAT SHOULD BE THE FORM OF THE INDE-
TERMINATE SENTENCE AND WHAT SHOULD
BE THE PROVISIONS AS TO MAXIMUM
AND MINIMUM TERMS, IF ANY?¹

EDWARD LINDSEY²

Thirty-seven of the states have statutory provision for the indeterminate sentence in some form, but there is a considerable diversity in these statutory provisions. In four of the states the form of the sentence is indeterminate as to the term of imprisonment, no term being named, but the statutes provide in substance that the sentence shall be taken as being for an indefinite period not less than the minimum nor more than the maximum term fixed by statute for the offense of which the prisoner has been convicted. This is also true in some other states as to sentences to a reformatory for first or young offenders, but not as to sentences to the penitentiary. In Pennsylvania, for instance, sentences to the Pennsylvania Industrial Reformatory are indefinite in form. Ohio was in this class until the last legislature provided that the court must name a minimum which cannot be less than the minimum fixed by statute for the offense. In eight states the maximum and minimum is expressed in the sentence, but the court must name the maximum and minimum fixed by statute for the offense. In ten states a maximum and minimum must be named in the sentence, but these are in the discretion of the court within the maximum and minimum terms fixed by statute for the offense. In Connecticut this is varied by the additional provision that the minimum shall in no case be less than one year, in Maine not less than six months, and in Montana that it shall not be more than one-half the maximum. Michigan fixes the minimum by statute, but requires the court to name the maximum, not to exceed the maximum fixed by statute for the offense. In two states there is no minimum expressed, but the court fixes the maximum within the upper limit fixed by statute for the offense. In two states the maximum and minimum is fixed by the jury in its verdict, but must be within the upper and lower limits as provided by statute for the offense.

¹Read at the thirteenth annual meeting of the Institute, in Cincinnati, Ohio, November 19, 1921.

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A strictly indeterminate sentence has nowhere been adopted. While it was advocated theoretically, it was recognized that public opinion would not sanction its adoption in its extreme form. One of the earliest and most celebrated of the statutes providing for the indeterminate sentence, the New York statute of 1877 relating to the Elmira Reformatory, provided for maximum but no minimum limits. Mr. Brockway, writing in 1907, says of the Act: "Neither the legislators nor the general public were apparently ready to adopt the plan proposed in the original bill and it was solely out of deference to such unpreparedness that the projectors of the system consented that a maximum sentence limit should be named." Experience with constitutional objections also had something to do with reconciling the advocates of this form of sentence to the placing of a maximum limit thereto. The maximum was fixed as the maximum term provided by statute for the offense of which the prisoner had been convicted.

The early advocates of the indeterminate sentence discarded the retributive and deterrent theories of punishment and justified it solely on the ground of the protection of society by confining the criminal until by reformation he shall be judged fit to be released. In Europe it has been advocated as a means to be applied to recidivists and solely for the purpose of segregating them from the general population and keeping them indefinitely in prison. It has been there generally opposed as a return to the early arbitrary methods of punishment of crime discarded as the results of the efforts of the eighteenth century reformers on much the same grounds as Mr. James M. Kerr argues it to be unconstitutional in the United States in his recent article in the *American Law Review*. Lombroso claimed its adoption in this country as one of the results of his theory of the born criminal. This, however, is not correct, for the proponents in this country wished to apply it not to recidivists but to young first offenders and, while they do not hesitate to follow the theory to its logical conclusion, that if a prisoner cannot be reformed he should be kept in prison indefinitely, there is the underlying idea that practically all prisoners are capable of reformation, at least of the class to which they would apply the indeterminate sentence. It is as an adjunct or perhaps rather a necessary part of the reformatory treatment of prisoners that it is advocated and is often called the "reformatory sentence." A further part of the plan is the system of parole. Says Mr. Brockway in the article previously quoted from: "This system of prison treatment has three elements, namely, restraint, reformation, conditional and then absolute release. * * * The indeterminate sentence system then is a trinal

unity, a structure supported by these three props before mentioned, neither of which can be spared or weakened without injury to the system." Eugene Smith expressed the idea as follows: "It is the aim of the indeterminate sentence to retain the convict in prison until he is fitted for freedom, making such fitness for freedom the condition precedent of his release. The sentence therefore presupposes a system of prison discipline that shall tend to fit the convict for freedom. * * *

An essential principle of the system is the individual treatment of convicts; the utmost pains are taken to gain knowledge of the distinctive aptitudes and defects of each individual and to apply such special training as may serve to develop his capabilities and cure his defects."

Again it is expressed by Dr. F. H. Wines in his book, "Punishment and Reformation," as follows: "The indeterminate sentence therefore puts into the hands of the competent and devoted prison superintendent the precise lever that he requires in order to subvert the criminality of the convict, assuming that it can be subverted. It is merely a tool. It is of no value if not used or in the hand of a man who does not know how to use it. It has in itself no reformatory power; it is a dead thing. The real power is in the reformatory agencies which have been named—labor, education and religion. These, if applied, will produce the same effect under a definite as under an indefinite sentence; the difference is that under the latter the prisoner ceases to resist their application and may even be induced to apply them to himself."

It would seem then that the most important matter, viewed from the standpoint of attempting to reform the convict, is the treatment in the prison in the way of discipline, education and physical upbuilding; next the system of parole which furnishes the incentive to the prisoner to improvement and that the indeterminate sentence is an adjunct valuable from the standpoint of the prison authorities in making the prisoner more absolutely dependent on his own efforts to improve for his release and affording more leeway as to time for the application of the reformatory treatment and the testing of its efficacy under parole outside the prison. Mr. Brockway's complaint on the limitation of the indeterminate sentence is that it "impairs greatly the motive for self-improvement. The arbitrarily fixed minimum period must be served out. The prisoner cannot shorten it and the maximum limitation gives certainty of release at its expiration, whatever betides. Under this emasculated sentence system, prisoners who are habituated to crimes are less likely to adjust themselves to the necessarily irksome

requirements for the formation of new and improved habits and tastes."

Nevertheless this criticism would not seem to have great force bearing in mind the fact that the statutes providing for penitentiary sentences measure them by years usually. In most cases there would seem to be a sufficient time within the maximum fixed by law for the reformatory treatment to take effect if it is ever going to. Furthermore, the prospect of release on parole would seem to offer sufficient incentive to the prisoner serving under a definite sentence even. It would seem to be doubtful whether the desire for release can be any stronger in a man sentenced to serve ten years than in one sentenced to serve two. It seems problematical to me whether to make his release at all absolutely dependent on the prison authorities would tend in any way to develop moral fiber. It would seem that the knowledge that he retained some rights even though a convict and that he had a definite future to look forward to might in many cases be preservative of the moral personality to an extent perhaps to outweigh the theoretical advantages in favor of the absolutely indeterminate sentence.

The system of parole has been adopted in some form in nine states that have not adopted the indeterminate sentence and in some of the other states has been given a wider application than the latter. While some of the states which have first adopted parole have later added the indeterminate sentence, the results of the parole alone seem to have given satisfaction and it cannot be said that the indeterminate sentence is absolutely essential to the parole system.

At all events we may take it as certain that public sentiment will not approve a sentence without a maximum limit until reformatory methods within the prisons have been developed to a much greater degree of perfection than is the case at present, until there is a higher degree of confidence in the ability as well as the integrity of prison management and until parole methods have been much more highly perfected. This is recognized by many of the advocates of the indeterminate sentence, some of whom have criticized its application to the penitentiaries, or to any institutions not especially designed as reformatories or without reformatory methods. Eugene Smith, in the article before quoted from, says: "The adoption of this form of sentence in some of the states, applying it to convicts condemned to confinement in all kinds of prisons, has been premature and ill-judged. It has been done in disregard or in ignorance of the essential nature of the indeterminate sentence and of the conditions which are indispensable to its successful operation." However, one may say that there is no

reason why reformatory methods should not be adopted in all kinds of prisons and the tendency is in this direction, although of course much remains to be done in this regard.

There is of course also another reason for the demand that the sentence bear some definite degree of punishment and that is the general acceptance of the deterrent and to a less degree of the retributory theories of punishment. Whether the retributive theory appeals to one's mind or not it is necessary to recognize that it accords with the moral sentiments of the great mass of people, including criminals themselves. In a community where as a rule crime is visited with what is generally regarded as adequate punishment the public moral sentiment manifests its satisfaction with a consequent benefit to law observance, while where this is not the case there is a corresponding dissatisfaction which is inimical to good order in that community.

More strongly still is the belief generally held that punishment is a deterrent to crime and that the prospect of punishment furnishes a psychologic motive greatly strengthening the inhibition of impulses to crime. The acceptance of the deterrent theory is well nigh universal. Reformers believe in it implicitly when they go to the legislatures for the enactment of measures. It is so strongly held that we are attempting at the present time to change the habits of a large percentage of the population with regard to the use of alcoholic liquors and overcome the greed for the large profits obtainable by purveying to the thirsty by the fear of punishment. If we do not believe in the deterrent effect of punishment, then in the name of common sense let us stop filling our jails with bootleggers and clogging our criminal courts with cases of violations of the prohibitory statutes.

From the standpoint of deterrence the embodiment of the maximum term in the sentence is desirable. A more definite and clear cut idea is presented than in the case of a sentence in general terms to a penal institution. If the term is actually limited by law, as it is, there is no object that I can see in having the form of the sentence indefinite and no objection from any standpoint to having it expressed in the sentence, while there is a benefit from the deterrent standpoint. To be sure this assimilates the indeterminate sentence to a definite sentence with provision for parole, but we have seen that parole and the right kind of treatment in the prison are the most important matters and the form of sentence subsidiary. I believe it must be regarded as an open question whether the indeterminate is the better form of sentence in all cases; it may be that a definite sentence with reformatory and parole measures is sometimes to be preferred.

The matter of minimum term is a vexed question. The objection is made that the fact that it cannot be shortened removes some of the incentive to the prisoner to reform. Some considerable period of time is necessary, however, for the application of reformatory measures and it has been generally recognized that for this reason the reformatory system is not applicable under short sentences. Moreover, most reformatories where the statutes do not require a minimum term to be fixed have themselves adopted by rule a minimum period under which the question of parole will not be considered, usually one year. Of course the minimum sentence might be much longer than this in some cases, but where the minimum is that fixed by statute for the offense committed it would only be in the case of the more serious crimes. The public demand for a minimum term is a result of the general idea that prisoners usually serve a shorter time under an indeterminate than under a definite sentence. This is probably not the case as a rule. A comparison of the average time served by prisoners at the Joliet prison in Illinois for the three crimes of burglary, larceny and robbery for the five-year period from 1890 to 1894 under the definite sentence and from 1916 to 1920 under the indeterminate sentence shows that under the definite sentence the average time served was one year, nine months and six days and under the indeterminate it was two years, six months and four days. In Minnesota a comparison has been made between the average time served in the last fifty cases under the definite sentence and the first fifty under the indeterminate sentence for the crimes of grand larceny and assault in the second degree. In the case of grand larceny the average time served under the definite sentence was one year, four months and thirteen days and under the indeterminate sentence two years, eight months and twenty-two days, and in the case of assault under the definite sentence it was one year, seven months and seven days and under the indeterminate sentence two years, five months and three days. This would indicate that where the parole system is carefully administered the prisoners remain in detention a longer time on the average under the indeterminate than under the definite sentence. It is unfortunately not always the case that the administration of the parole system is all that could be desired. It by no means follows, however, that the requirement of a minimum term in the sentence would remedy this. The report of the Prison Inquiry Commission of New Jersey (1917) says: "In actual practice parole is granted as a matter of course at the expiration of the minimum term, except in those cases in which the applicant has had his minimum term extended as a penalty for misconduct in prison. * * *

Thus in all the state institutions is the aim of the indeterminate sentence defeated by the policy of the paroling authority." In the 1916 Annual Report of the Prison Association of New York, in commenting on the parole system in the state prisons of New York, it is said: "We would reiterate that more than ninety-one per cent of the 1,028 persons on parole at the time of this survey, November 22, 1916, had been released either immediately upon the expiration of their minimum sentences or within one month of the expiration of the same; in short, it may fairly be said that at the present time the minimum sentence to state prison represents practically the length of imprisonment to be undergone by the inmate. It is hardly possible, on the other hand, that ninety-one per cent of the men in prisons are sufficiently similar in character, training or other physical or mental conditions as to justify the almost automatic release of nine out of every ten applicants practically at the expiration of the shortest term during which they may be held in prison. * * * It is a most serious thing if, in departing from the traditional definite sentence in favor of an indeterminate sentence, that sentence becomes synonymous with a general shortening of terms of imprisonment, unless such shortening of terms of imprisonment be wholly on the basis of adequate and scientific study of each case that is presented to the Board." The difficulty in New York is stated to be that with the compensation paid members of the Board of Parole they cannot and are not expected to give their whole time to the work. The Report of the Prison Survey Committee of the State of New York (1920) says: "At the forty sessions held during the year ending June 30, 1918, 1,411 applications for parole were made to the board. It has been contended that there was not enough business to occupy the entire time of members of the board, but the committee does not believe that 1,411 cases can be adequately dealt with in forty sessions. There is obviously a defect in the system of reporting to this board adequately the conduct and working history of these inmates or it would be impossible for any such number of applications to be heard in any such time. The committee believes that the Parole Board fails to function adequately largely because the machinery is not provided now by law which will place before this board such full record of the prisoner's conduct and past life as it should have before it can adequately pass upon his case. When the Parole Board is given these records in full, as it should receive them, it will be impossible to pass upon such a large number of cases in so little time. The committee does not believe that 93 per cent of the prisoners who made initial application for parole last year were fitted to re-enter society.

This percentage, however, was released on parole." Wherever it may be a fact, therefore, that the adoption of the indeterminate sentence and parole system has resulted in a material shortening of time served by prisoners, it is probable that this is due to defective machinery or defective functioning of the machinery provided to operate the system and that the true intent thereof is defeated. The remedy should be not the abolition or curtailment of the system but the improvement of parole methods.

If prison and parole authorities tend to regard an indeterminate sentence with maximum and minimum expressed as practically equivalent to a definite sentence for the minimum period it is not surprising that the prisoner should take it that way. Most of them do. The public generally also look at it in the same light. A sentence for not less than two nor more than five years is regarded by the public as a sentence for two years. Probably that agrees with the practice in many places. The deterrent effect of the sentence is therefore minimized. It is partly to offset this that the provision authorizing the court to fix a maximum and minimum within the limits fixed by law has been adopted. We have seen that the largest number of states have this form of the sentence and the next largest require the court to name the maximum and minimum fixed by law. It is probable that the preference for allowing the court a discretion is also largely based not on mere conservatism but on the doubt that the paroling authority will be better able to determine how long a prisoner should be held than will the court from the information afforded at the trial.

It is probably best not to be at all dogmatic at present as to what is the best form of the sentence. We have several varieties in effect, but we really have very little knowledge as to results. Little attempt to observe their operation, much less to compare them, has been made. It is time to suspend theoretical discussion and undertake detailed observation of the operation and results of the statutes we have before proceeding further with theorizing. Very little statistical data can be obtained and what exists in one state is not comparable with what exists in another. This applies to the whole parole system. We do not know how effective it is. We do know in some states how many men have satisfactorily completed their terms of parole (which in some cases are not long), but we do not know anywhere what becomes of them after their final discharge. Whichever may be the preferable form of the sentence on the whole all of those in effect would seem to afford considerable opportunity for the application of reformatory and parole methods. It seems to the present writer that the pressing need

at present is for the improvement of these. The need is for the improvement of the methods of treatment of the prisoner in the prison, of the methods of determining how long he should be detained and when he should be released, including the provision of capable and conscientious parole authorities at salaries which will enable them to devote their whole time to the work and especially of the methods of oversight while on parole. As with the probation system, much of the success of parole depends on whether the released man is afforded assistance in the way of employment, advice and the occasional personal contact with a parole officer or whether he is simply turned loose with a requirement to report by letter. Nor should the parole period be too short. The period of contact outside the prison with society again under supervision may be more important for the prisoner than the time spent in prison. Any changes in form of sentence may well await these improvements. This thought was well expressed by the New York Prison Survey Committee: "The committee believes that the line of expansion of law in matters of sentence should be a gradual extension of the indeterminate sentence law in place of the fixed sentence. No substantial progress along this line is likely to occur until the judges, as well as the legislature, are satisfied with the wisdom and efficiency of the methods of determining the duration of imprisonment in the prison, by or through prison officials. This means the intelligence of the working methods of the Board of Pardon and Parole will be the criterion governing future progress in indeterminate sentence legislation. The courts and the legislature will be willing to extend indeterminate sentence laws when and as they are convinced that this board can more wisely determine the length of a prisoner's detention based upon his conduct while in prison than can the judge based upon his previous history and the offense which is the cause of his retention."

DISCUSSION

COLONEL WILLIAM C. RIGBY: I may be permitted to add to the statistics, a little from the experience of the army during the war—our army and the British army, with which I happen to be somewhat familiar. As a result of the realization during the war of the loss of man power in the British army—men were being sentenced who were really not criminals—the British army worked out in 1916, I believe, a law for repeated suspension of sentence that they called the "Cat and Mouse Act," allowing the military authorities to suspend the sentence and then, if the conduct of the man was not good to put the sentence into effect again, and then to suspend it again, freeing the man indefinitely. The British

military authorities informed us that as a result of that statute during the last two years of the war, from 1916 to 1918, they saved between thirty and forty thousand men to the government, who were tried out that way. In our own army I have not the statistics at hand to differentiate between suspension and parole, and the suspension of the sentence and the indeterminate sentence law. You know the army sentence is wholly an indeterminate sentence. It has a maximum, but it has no minimum, so that a man with a nominally long-term sentence may only serve two or three months; but the total result of those three agencies was that on the 31st day of August, 1919, when the demobilization of the army was just about completed, and after our four million army had come and gone, we had in the disciplinary barracks just 1,626 more men than we had on the day that war was declared, and of all the men who had been in confinement during the war, no matter how long the sentence, the average sentence actually served was 49-100 of a year. The system showed that the men could be restored.

DR. A. E. LAVELL: You may be interested to know that in the Province of Ontario, of which I happen to be the Chief Parole Officer, we have had a law for about a year that puts men out on probation or on parole. We have the indeterminate sentence and have no intention of going back on it. Our parole system is working pretty well, and we have a law under which a man may be put out on permit. A commissioner has been appointed under the act, who, in the name of the governor and council, can take a man or woman out of any penal institution in the Province of Ontario, if he be serving anything less than two years, and set him at work, keep him in custody, place him in jail over night at any time, or place him in jail for a week, and then take him out again. The "cat and mouse act," as Col. Rigby has just called it. Our experience under this law has been a rather remarkable one. We are rather conservative up there. We don't like to go to the full extent of probation, though I think public opinion fully sympathizes with the statements of Judge Hoffman and the arguments for probation. But the commission says: "What about his wife and children? Here is a man who has a wife and four children who are destitute because he has been sentenced." That is now taken into account very seriously by the laws of Ontario. If a man is serving a twelve months' sentence, or eighteen months, or twenty-four months less one day, and it can be shown that his wife and family are in destitute circumstances, and if work can be provided outside for that man, I have the authority to take him out of jail, set him to work for his wife and family, making any provision that I think wise for his custody and the administering of his wages. We have not had many cases. I didn't dare do it wholesale the first year, because it is an experiment, but it has worked to this extent: I have had 120 of them out during the year, all over the province of Ontario; two have escaped during that time; we have had to send seven back because they didn't live up to the regulations, and I demanded absolutely strict compliance; the rest made good, supported their families and were absolutely of no expense to the state, for I worked without any salary, and it cost the province nothing for the support of the men. Half of them I saw fit to send to jail every night, from 7 in the evening to 5 the next morning. They were allowed

to take their meals with their families. They were punished, but their families were not. They were serving a definite sentence; their liberty was lost; it was punishing the prisoner with a definite sentence and yet not punishing the wife and family in any way except for the blot on the name. In fact, in some cases the family lived better without him than with him. I don't administer this law in exactly the same way as parole in crime. In parole, the possibility of reformation is taken into account. I have had some of the most arrant scamps in Ontario out on permit, taking care that they were very carefully looked after, and, as I say, only two out of the one hundred and twenty got away from me, and we will get them again. In one of these cases, at least, I gave instructions that he was not to go within one hundred miles of where his family was—because he was so mean and contemptible toward them—but he could work and earn four or five dollars a day, and every cent of that was paid to my agent and by him paid to the family. The family had a better time as a consequence than they had had for many years. I have no doubt that next year I will be able to make some experiments taking a man out within two or three days after he has been given twelve months. I think I can do that, but I will experiment very cautiously. I may add that after much refusal I consented to release a few women. I took a few out and put them in charge of a very capable Salvation Army woman of long experience. Some of the experiments I tried were with bootleggers. The plea was made that their husbands and children needed them, and upon investigation I found that that was the case. I allowed the woman to go home to her husband and her family on condition that she would be absolutely in charge of this Salvation Army officer, acting on my behalf, who had absolute power, not only over the wife, but over the husband and the children, over every visitor that came into that house, and over the whole management of the house. The result was rather interesting. I think I had twelve women out in that way, and in every case the penalty was a return to jail for the whole of her sentence, if the husband, wife or children failed to carry out in any way the instructions of the officer. The result was, in not a single case, but in every case, at this present moment, after some have passed the period of their sentence by six months or eight months, every one of these homes has been completely cleaned up. I think it has been a most successful experiment, and I speak cautiously. We haven't done it with a great many, but I thought because of certain remarks this afternoon that possibly you would be interested in this experiment in Ontario.