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A Rebuttal to the Attack on the Indeterminate Sentence

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A REBUTTAL TO THE ATTACK ON THE INDETERMINATE SENTENCE

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> The indeterminate sentence, like the penitentiary itself, was intended to be an instrument of enlightened reform and a boon to the offender. But as presently administered, I have come to wonder if the indeterminate sentence is not a cruelty device.[1]

As the preceding sentence indicates, the indeterminate sentence has recently come under attack.[2] Although criticisms that should be considered seriously can be directed at the indeterminate sentence, the time for its abolition has not yet arrived. This article will discuss the history and treatment philosophy underlying the indeterminate sentence, but will not consider all the objections to the indeterminate sentence. Rather, the focus will be on the philosophical and practical problems of implementing the treatment philosophy. It will conclude that the system itself should not be viewed as solely responsible for its shortcomings because abuses of the system, as well as practical problems of implementation, are responsible for the current dissatisfaction.

I. THE SENTENCING PROCESS

To the offender and to society, sentencing is an extremely important phase in the criminal justice system,[3] and the issue of the type of

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1. Craven, *Foreword*, 45 MISS. L.J. 601, 603 (1974).

2. For a critical view of indeterminate sentencing, see generally Craven, *Foreword*, 45 MISS. L.J. 601 (1974); Dershowitz, *Indeterminate Confinement: Letting the Therapy Fit the Harm*, 123 U. PA. L. REV. 297 (1974); J. MITFORD, KIND AND USUAL PUNISHMENT (1973); M. FRANKEL, CRIMINAL SENTENCES—LAW WITHOUT ORDER (1972); AMERICAN FRIENDS SERV. COMM., STRUGGLE FOR JUSTICE: A REPORT ON CRIME AND PUNISHMENT IN AMERICA (1971).

3. One commentator has noted that "[s]entencing is perhaps the most dynamic phase in the judicial process; it is the moment when the power of the law directly touches the offender." Comment, *Criminal Sentencing: An Overview of Procedures and Alternatives*, 45 MISS. L. REV. 782, 799 (1974). *See also* United States v. Waters, 437 F.2d 722 (D.C. Cir. 1970), where the court stated: "What happens to an offender after conviction is the least understood, the most fraught with irrational discrepancies, and the most in need of improvement of any phase of our criminal justice system." *Id.* at 723.

sentencing structure which should be utilized has been frequently debated by penologists.[4] Central to this discussion is the distinction between definite and indeterminate sentences and the various manifestations of the latter. When the legislature specifies by statute the length of sentence to be imposed on persons convicted of particular crimes, it has created a definite sentence.[5] Such statutes reflect the influence of the classical theory:[6] that the punishment should fit the crime, that the determination of the sentencing formula should be in the hands of the lawmaking body, and that judges should not be permitted to exercise discretion in determining the length of the sentence.

The "pure" indeterminate sentence, in comparison, takes the decision of sentence length away from both the legislature and the judge and requires that the sentencing decision be made by professionals at the institution of incarceration or, as is usually the case, by parole boards[7] which may or may not be composed of professional treatment personnel. The theory behind this type of sentencing policy is that no one can determine in advance how long a particular person should serve time; if rehabilitation is the goal, the decision to release should be made by persons in a position to observe the progress, or lack thereof, of the offender. The "pure" indeterminate sentence has rarely been used,[8] but several variations of it are in existence. One variation involves a legislative determination of minimum and maximum sen-

4. For arguments in favor of the indeterminate sentence, see Lewis, *The Indeterminate Sentence,* 9 YALE L.J. 17 (1899); P. TAPPAN, CRIME, JUSTICE AND CORRECTIONS 433–37 (1960). For a historical account of the arguments in favor of the indeterminate sentence, see Lindsey, *Historical Sketch of the Indeterminate Sentence and Parole System,* 16 J. AM. INST. CRIM. L. & CRIMINOLOGY 9 (1925). For a critical view of indeterminate sentencing, see articles cited in note 2 *supra.*

5. *See* Tappan, *Sentencing under the Model Penal Code,* 23 LAW & CONTEMP. PROB. 528, 529–30 (1958). Under Washington's new criminal code, WASH. REV. CODE tit. 9A (Supp. 1975), for example, murder in the first degree carries a mandatory life imprisonment sentence. *Id.* § 9A.32.040.

6. *See* note 13 *infra.*

7. For a discussion of the function of the parole board in Washington's modified indeterminate sentence structure, see Johnson, *The Board of Prison Terms and Paroles: Criteria in Decision Making,* 51 WASH. L. REV. 643 (1976).

8. In Maryland a person adjudged to be a sexual psychopath is committed for an indeterminate period with neither a minimum nor a maximum, even though the conviction may have been for a misdemeanor. *See* Maryland Defective Delinquency Act, MD. ANN. CODE art. 31B, §§ 6(a), 9(b) (1976). *See also* Comment, *The Indeterminate Sentence: Judicial Intervention in the Correctional Process,* 21 BUFF. L. REV. 935 (1972). *But see* Rouse v. Cameron, 373 F.2d 451 (D.C. Cir. 1967), holding that such confinement without a meaningful treatment program may be cruel and unusual punishment.

tences for each crime.[9] Another involves a maximum sentence set by the legislature with the minimum set by the judiciary.[10] A final form of the indeterminate sentence permits the judge to set the maximum and the minimum so long as both are within limits set by the legislature.[11]

II. THE INDETERMINATE SENTENCE AND THE REHABILITATIVE IDEAL

The prison as a form of punishment is a relatively modern development.[12] Prior to the development of the modern-day prison, confinement was used for temporary purposes only—to hold the accused while awaiting trial, transportation, corporal or capital punishment. Prison was not seen as a form of punishment in itself. But with the increasing emphasis on humanitarianism and rationalism,[13] accompa-

9. *See* CAL. PENAL CODE § 1168 (West 1970); WASH. REV. CODE ch. 9.95 (1974).

10. MODEL PENAL CODE § 6.06 (Proposed Final Draft No. 1, 1961). *See* Wechsler, *Sentencing, Correction, and the Model Penal Code,* 109 U. PA. L. REV. 465, 475–80 (1961).

11. *See* Comment, *supra* note 8, at 938–43. *See also* S. REID, CRIME AND CRIMINOLOGY 406–07 (1976); Prettyman, *The Indeterminate Sentence and the Right to Treatment,* 11 AM. CRIM. L. REV. 7, 13 n.27 (1972).

12. H. BARNES, THE STORY OF PUNISHMENT 114 (2d ed. 1972). Although institutions for detaining people against their will no doubt existed in ancient times, the prison system of today "which is the agency through which imprisonment is made the mode of punishment for the majority of crimes," *id.,* probably developed during the 18th and 19th centuries. Although the exact time is difficult to fix, while imprisonment for other than religious and political offenders and debtors was unusual at the beginning of the 18th century, it became the conventional method of punishing before the middle of the 19th century. The use of imprisonment accompanied the phasing out of corporal punishment in both America and Europe. *Id.*

13. This emphasis may be traced to the first formal school of thought in criminology, the classical school, which resulted from the desires of writers, many of whom were lawyers, to reform the criminal law and remove from it the harshness of a system which in some countries permitted judges absolute power over defendants, with out recognition of due process of law. During the time of the early theorists, sentences were often severe. In England, for example, during the eighteenth century the "bloody code" permitted capital punishment for over two hundred offenses—including cutting down trees in an avenue or a park, setting fire to a cornfield, taking part in a riot, escaping from jail, shooting a rabbit, and demolishing a turnpike gate. S. REID, *supra* note 11, at 107. "The courts were corrupt. One member of Parliament defined a justice of the peace as 'an animal who, for half-a-dozen chickens, would dispense with a dozen laws.' " 7 W. & A. DURANT, THE STORY OF CIVILIZATION 54 (1961).

The theme of the classical school, rebellion against the extreme power of judges, was set by the leader of the school, Cesare Beccaria, whose most outstanding work, ON CRIMES AND PUNISHMENTS, was first published in 1764. This work was extremely influential in the penal reform movement. C. BECCARIA, ON CRIMES AND PUNISHMENTS at ix–xxiii (Bobbs-Merrill 1963). Beccaria's major contribution was that legislatures should determine the length of sentences in accordance with the type of crime. He

nied by social reform, the brutal forms of corporal punishment which had been used on criminals succumbed to a more "progressive" form of punishment: deprivation of liberty.[14]

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believed that man is rational, that he seeks pleasure and avoids pain, and that the way to deter criminal behavior is to make the pain (that is, the punishment) for that behavior just a little greater than the pleasure of committing the crime. Thus, "let the punishment fit the crime" became the cry of the classical criminologists.

The *neoclassical* school found that the classical approach resulted in penalties that were too severe and which did not take any exceptions into consideration. Such "justice" was unjust. It has been said that "these efforts at revisions and refinement in application of the classical theory of free will and complete responsibility—considerations involving age, mental condition, and extenuating circumstances—constitute what is often called the neoclassical school." G. VOLD, THEORETICAL CRIMINOLOGY 25, 589 (1968).

The doctrine of free will, with its resulting policy of harsh legalism, was rejected by the *positive* school of criminologists who substituted the doctrine of determinism. The school originated in Italy in the 19th century and is often credited with the birth of "scientific" criminology. *See* S. REID, *supra* note 11, at 114–15. The positivists emphasized the constitutional make-up of the individual as a cause of crime and paved the way for an individualized approach to sentencing. *Id.* at 114. Cesare Lombroso, the leader of the positive school, became an early advocate of the indeterminate sentence, but it was Enrico Ferri who gave intensive attention to the theory of sentencing. Ferri did not, however, take the sentencing function out of the hands of judges. Rather, he insisted that judges be trained in the social and psychological sciences. Since jurors are not so trained, they should not be permitted to make sentencing decisions. He felt that any attempt at real individualization of sentences by courts was unrealistic and should be discouraged, but the judge should have enough scientific information to place the particular offender in a class and to decide which sanction was appropriate for that class.

Despite the contributions of the positive school, credit for originating the indeterminate sentence recently has been given to the little recognized reformer, Alexander Maconochie. Maconochie believed that the purpose of imprisonment was to prepare men to return to society and become law abiding people. J. BARRY, PIONEERS IN CRIMINOLOGY 84–106 (H. Manheim ed. 1972); UNITED NATIONS, THE INDETERMINATE SENTENCE 12 (1954). He believed that definite sentences should be abolished and in their place substituted the requirements of completing a determined and specified quantity of labor, which "should be expressed in a number of marks which he must earn, by improvement in conduct, frugality of living, and habits of industry, before he can be released." J. BARRY, *supra* at 91.

The use of the indeterminate sentence in the United States has been traced to the so-called "goodtime" laws, first enacted in New York in 1817, later in Tennessee in 1836, in Ohio in 1856, and in Alabama, California, Connecticut, Illinois, Iowa, Kansas, Maine, Massachusetts, Minnesota, Missouri, Nevada, New Hampshire, New Jersey, Oregon, Rhode Island, and Vermont between 1858 and 1867. Lindsey, *supra* note 4, at 10. After earning credit for good time, an offender could be released on parole without serving the full length of the original sentence.

The National Prison Association, now called the American Correctional Association, adopted indeterminate sentences at its first meeting on October 12, 1870. *Id.* at 20. "By 1922, thirty-seven states had adopted some form of indefinite sentence, while forty-four states in addition to the Federal government and Hawaii had introduced a system of parole." P. TAPPAN, *supra* note 4, at 435. For a detailed discussion of the adoption of indefinite sentencing statutes in the United States, see Prettyman, *supra* note 11, at 13–14; Lindsey, *supra* note 4, at 9–126.

14. For a discussion on the development of the prison system, see O. LEWIS, THE DEVELOPMENT OF AMERICAN PRISONS AND PRISON CUSTOMS (1922; reprinted 1967), H. BARNES & N. TEETERS, NEW HORIZONS IN CRIMINOLOGY 285–347 (3d ed.

Unfortunately, humanitarianism has often been confused with treatment, and although prisons may be "humane" compared to the brutal forms of corporal punishment which they allegedly replaced[15] they have not lived up to the expectations of those who advocated that offenders should be rehabilitated.[16] One of the greatest disappointments in this respect has been the indeterminate sentence. At the root of the criticism of indeterminate sentencing is criticism of the "rehabilitative ideal."[17] The rehabilitative ideal, as embodied in the indeterminate sentence, is based on the theory that offenders should be confined while they are dangerous. During this confinement the offender is to be treated and, since one cannot predict in advance how long it will take to rehabilitate the offender, the decision to release should not be made by a sentencing judge or jury at the time of sentencing; a sentence at or near the trial may release dangerous offenders too soon or keep rehabilitated offenders in prison unnecessarily.[18] The focus of

1959). For a discussion of the modern prison, see S. REID, *supra* note 11, at ch. 16; B. ALPER, PRISONS INSIDE-OUT: ALTERNATIVES IN CORRECTIONAL REFORM (1974); J. MITFORD, KIND AND USUAL PUNISHMENT (1973); W. NAGEL, THE NEW RED BARN: A CRITICAL LOOK AT THE MODERN AMERICAN PRISON (1973); E. WRIGHT, THE POLITICS OF PUNISHMENT (1973).

15. The term "allegedly" is used because of continued revelations of corporal punishment within prison. *See generally* S. REID, *supra* note 11, at 531–34; W. NAGEL, *supra* note 14. *See also* Holt v. Sarver, 309 F. Supp. 362 (E.D. Ark. 1970), *aff'd*, 422 F.2d 304 (8th Cir. 1971), in which the court looked at the infamous Arkansas Prison System and stated:

> Let there be no mistake in the matter; the obligation of the Respondents to eliminate existing unconstitutionalities does not depend upon what the Legislature may do, or upon what the Governor may do, or, indeed, upon what Respondents may actually be able to accomplish. If Arkansas is going to operate a Penitentiary System, it is going to have to be a system that is countennanced by the Constitution of the United States.

Id. at 385. For discussions of corporal punishment, see generally H. BARNES, THE STORY OF PUNISHMENT 56–66 (2d ed. 1972); H. BLOCH & G. GEIS, MAN, CRIME, AND SOCIETY 497–517 (1962); A. EARLE, CURIOUS PUNISHMENTS OF BYGONE DAYS (1896).

16. *See generally* D. GLASER, THE EFFECTIVENESS OF A PRISON AND PAROLE SYSTEM (1964); G. KASSEBAUM, D. WARD & D. WILNER, PRISON TREATMENT AND ITS OUTCOME (1971); W. NAGEL, *supra* note 14; S. REID, *supra* note 11, chs. 3 & 20; PRESIDENT'S COMM'N ON ENFORCEMENT AND ADMIN. OF JUSTICE, TASK FORCE REPORT: CORRECTIONS (1967); Bailey, *Correctional Outcome: An Evolution of 100 Reports*, 57 J. CRIM. L.C. & P.S. 153–60 (1966); Glaser, *Correctional Research: An Elusive Paradise*, 2 J. RESEARCH IN CRIME & DELINQUENCY 2 (1965); Martinson, *What Works?—Questions and Answers about Prison Reform*, 35 PUB. INTEREST 22 (1974).

17. Francis A. Allen coined this phrase in *Criminal Justice, Legal Values and the Rehabilitative Ideal* 50 J. CRIM. L.C. & P.S. 226 (1959).

18. As one commentator has phrased it: "[W]hen once imprisoned, no man [should] be freed until the danger has ceased. This is the principle of what is inexactly called the indeterminate sentence. When society detects an enemy, let it restrain him until he is reconciled to it." Lewis, *supra* note 4, at 17. Lewis continues: "Let society hold its enemy in duress until he ceases to be its enemy." *Id.* at 19.

the rehabilitative ideal is the individual rather than the crime. "The traditional effort to make the punishment fit the crime is largely superseded by an effort to make the treatment fit the offender."[19] The indeterminate sentence "presupposes a system of prison discipline that shall tend to fit the convict for freedom. Mere imprisonment does not have any such tendency; on the contrary, imprisonment under the old retributive system, aiming at punishment, had the opposite tendency."[20]

The rehabilitative ideal is based on a medical model; crime is seen as a disease[21] which should be cured, not punished.[22] When the offender is "cured" he should be released. The purpose of sentencing and incarceration is to determine what is wrong with the offender and then apply the appropriate treatment.[23] The indeterminate sentence, based on the philosophy that neither legislators nor judges are the best

19. Leach v. United States, 334 F.2d 945, 950 (D.C. Cir. 1964). *See also* Williams v. New York, 337 U.S. 241 (1949), where the Court stated:

> Undoubtedly the New York statutes emphasize a prevalent modern philosophy of penology that the punishment should fit the offender and not merely the crime. . . . The belief no longer prevails that every offense in a like legal category calls for an identical punishment without regard to the past life and habits of a particular offender. . . . Indeterminate sentences, the ultimate termination of which are sometimes decided by nonjudicial agencies, have to a large extent taken the place of the old rigidly fixed punishments. . . . Retribution is no longer the dominant objective of the criminal law. Reformation and rehabilitation of offenders have become important goals of criminal jurisprudence.

Id. at 247–48 (citations & footnotes omitted).

20. Lindsey, *supra* note 4, at 72.

21. As two commentators have stated:

> Crime is not a personal disease; it cannot be equated to personal disease; it is, however, a social disease. Looked at from the point of view of society, crime is a disease of an integral part of that society. And it is a virus from which society must seek protection.

Morris & Buckle, *The Humanitarian Theory of Punishment: A Reply to C.S. Lewis*, 6 RES. JUDICATE 231, 232–33 (1953).

22. *See generally* K. MENNINGER, THE CRIME OF PUNISHMENT (1969). For a critique of this approach see S. HALLECK, THE POLITICS OF THERAPY (1971); Murphy, *Criminal Punishment and Psychiatric Fallacies*, 4 LAW & SOC'Y REV. 111–22 (1969).

23. Diagnostic centers for this purpose began appearing in the United States around 1918. They were to provide a sorting out process, particularly for young offenders who were not yet hardened criminals, so that they could be incarcerated separately from confirmed criminals. These centers were to provide an opportunity for offenders to be examined by professionals who could determine an individualized treatment program for them. Unfortunately, the centers have not been successful and the efforts to treat offenders in all places of confinement have been plagued with problems.

Concern has also been expressed that the use of the medical model to replace the legal model has led to "a confusion of purpose and, in some instances, needless deprivation of liberty." Dershowitz, *Psychiatry in the Legal Process: A Knife that Cuts Both Ways*, 4 TRIAL 29 (Feb./Mar. 1968).

determiners of sentence length,[24] supports this approach. Most judges are not trained in the behavioral sciences and, as the argument goes, therefore not in a position to determine sentence length. Furthermore, judges' personalities and socioeconomic backgrounds may unduly influence their decisions.[25] It is argued that the determination of guilt should be made by judges, but sentencing should be placed in the hands of behavioral scientists who not only have the scientific expertise[26] but are trained to use objective rather than subjective factors in decision making:[27]

> The criminal court should cease with the findings of guilt and innocence, and the "procedure thereafter should be guided by a professional treatment tribunal to be composed, say, of a psychiatrist, a psychologist, a sociologist or cultural anthropologist, an educator, and a judge with long experience in criminal trials and with special interest in the protection of the legal rights of those charged with crime."

The difficulties in determining who should sentence reflect the major deficiencies in a model placing responsibility for sentencing in the hands of social scientists. These deficiencies: (1) lack of objectivity in evaluation and measurement; (2) inability to predict human behavior, particularly dangerous behavior; and (3) problems in implementing programs, are discussed below.

III. PRACTICAL PROBLEMS OF THE INDETERMINATE SENTENCE

In 1954 Chief Judge Bazelon of the Court of Appeals for the District of Columbia Circuit formulated a new test for insanity in

24. Since legislators decide sentences without any acquaintance with particular offenders, they obviously are in no position to individualize treatment. For a discussion of the problems judges face in this respect, see Ringold, *A Judge's Personal Perspective on Criminal Sentencing*, 51 WASH. L. REV. 631 (1976).

25. *Contra*, Gaudet, *The Differences between Judges in the Granting of Sentences of Probation*, 19 TEMP. L.Q. 471 (1946). For a general discussion of judicial sentencing see Winick, Gerver & Blumberg, *The Psychology of Judges*, in *Legal and Criminal Psychology* 121 (H. Toch ed. 1961); Smith & Blumberg, *The Problem of Objectivity in Judicial Decision-Making*, 46 SOC. FORCES 96 (1967); JUDICIAL DECISION-MAKING (G. Schubert ed. 1963); Nagel, *Judicial Backgrounds and Criminal Cases*, 53 J. CRIM. L.C. & P.S. 333–39 (1962); J. HOGARTH, SENTENCING AS A HUMAN PROCESS (1971).

26. *See* Kadish, *Legal Norm and Discretion in the Police and Sentencing Processes*, 75 HARV. L. REV. 904, 915–29 (1962).

27. K. MENNINGER, *supra* note 22, at 139. For a critique of Menninger's position, see Murphy, *supra* note 22, at 111–22.

Durham v. United States:[28] the product test. A person was to be judged insane if his unlawful act were the result of a mental disease or defect. Bazelon's hope was to encourage psychiatrists to "bring into the courtroom all the information available on the determinants of human behavior."[29] He expected psychiatrists to tell the court what was and was not known about the causes of behavior, for only with that knowledge could meaningful decisions be made concerning the disposition of offenders. "*Durham*'s purpose was to irrigate the field parched by lack of information and to restore to the jury its traditional function—to apply 'our inherited ideas of moral responsibility' to those accused of crime."[30] This emphasis on the need for knowledge about the determinants of human behavior is, of course, also the basis of the philosophy of treatment behind the indeterminate sentence. But Bazelon later questioned the ability of psychiatry to meet the goal he strove for in *Durham*.[31] The "promise was unfulfilled. The purpose was not achieved."[32] Bazelon placed the blame on the unwillingness of psychiatrists to meet the challenge:[33]

> Despite our best efforts psychiatrists adamantly clung to conclusory labels without explaining the origin, development or manifestations of a disease in terms meaningful to the jury. . . . What became more and more apparent was that these terms did not rest on facts and reasoning which were the product of disciplined investigation, as required by *Durham*. Rather, they were used to cover up the lack of relevance, knowledge and certainty in the practice of institutional psychiatry . . . .

Bazelon's conclusions may be too harsh. The problem may not be due to the unwillingness of psychiatrists to engage in the "disciplined investigation," but rather, due to practical problems inherent within the scientific study of human behavior.

28. Durham v. United States, 214 F.2d 862 (D.C. Cir. 1954).
29. Bazelon, *Institutional Psychiatry—"The Self Inflicted Wound,"* 23 CATH. U.L. REV. 643, 644 (1974).
30. *Id.*
31. *See* United States v. Carter, 436 F.2d 200, 203 (D.C. Cir. 1970) (Bazelon, C.J., concurring). In 1972 the United States Court of Appeals for the District of Columbia Circuit overruled *Durham* and adopted the Model Penal Code test for insanity. United States v. Brawner, 471 F.2d 969 (D.C. Cir. 1972).
32. Bazelon, *supra* note 29, at 645.
33. *Id.*

A. Objectivity

The psychiatrist faces difficult problems of objectivity. In the first place, objective analysis by the psychiatrist is not entirely analogous to that of other physicians. Psychiatry is medical treatment, but that may be true in name only. It is probably more correct to say that psychiatry is basically an attempt to change behavior and values of people.[34] It is incorrect, however, to say that the psychiatrist does little more than alter attitudes and behavior of patients in order to help them live independently in the social environment. The psychiatrist or other social scientist does more than ask a patient how he wishes to behave and then show him how to behave that way, because in many cases the behavior is antisocial and therefore unacceptable. For example, the psychiatrist does not help a patient become a better rapist; the existing behavior pattern must be altered and then replaced.

Similarly, problems of measurement make objectivity difficult. In physical illness, measurements can be made with greater accuracy than is the case in the measurement of attitudes and behavior patterns associated with sentencing and rehabilitation. It is easier to determine a case of smallpox than to decide whether a person is a psychopath.[35] There is thus more room for subjective decisions in the areas of corrections and mental illness than in the general area of medicine. Other problems of objectivity arise because of the methodological problems discussed below.

B. Inability to Predict Human Behavior

1. Methodological problems

The great utility of science is that it makes possible an increased, detailed understanding of what is happening in the real world, enabling individuals to predict what will occur in the future. If a system of indeterminate sentencing based on the theory that offenders should be released only when they are no longer a threat to society is feasible, society must be able to ascertain when that point has been reached

34. T. SZASZ, LAW, LIBERTY, AND PSYCHIATRY at vii (1963).
35. S. HALLECK, PSYCHIATRY AND THE DILEMMAS OF CRIME 241 (1971). *See also* notes 51–56 and accompanying text *infra*.

and predict what the behavior of that offender will be in the future. Unfortunately, the scientific method is not clearly adaptable to this task in the social sciences. For example, the definition of operational terms poses difficult problems for the social scientist and is a threshold consideration prior to any objective measurement.[36]

36. *See* M. COHEN & E. NAGEL, AN INTRODUCTION TO LOGIC AND SCIENTIFIC METHOD 394 (1934). The scientist studies facts and observations that can be verified empirically. He is interested not just in those facts, but also in their interrelationship. Theories are used to express this interrelationship. Theories assist in the conceptualization and classification of facts, thus aiding understanding of the systematic interconnection of facts. Science is based on the assumption that events in the real world can be known and measured empirically, that some of these facts are causally related to others and that by understanding those interrelationships, predictions of future events can be made and, in some cases, the outcome controlled. Some of the facts sought to be measured, however, cannot be measured with the immediate senses. In order to measure those facts, the scientist develops *concepts,* but in the use of such concepts, scientists experience methodological problems which, if not solved, result in errors that invalidate the research.

The first problem in the use of concepts is the definition of terms. In order to "measure" the concept, there must be something in the real world which is observable. Unfortunately, no tools exist for measuring social facts. For a discussion of what constitute "social facts," see generally E. DURKHEIM, THE RULES OF SOCIOLOGICAL METHOD (1938). In the absence of precise measuring tools, operational definitions have been substituted to measure concepts. *See* A. BACHRACH, PSYCHOLOGICAL RESEARCH: AN INTRODUCTION 74 (1962). Such definitions must be distinguished from attribute or property definitions which define a word in terms of what it consists of. For example, one could define "crime" as an act which violates law, and a "criminal" as one who commits a crime. That definition is not practical, however, since those attributes cannot be adequately measured. Furthermore, such definitions would not be distinguishing. Not all who commit crimes are caught, not all who are caught are prosecuted, and of those prosecuted, not all are convicted. Social scientists therefore often use operational definitions of crime and criminal in which "crime" is often defined as a serious offense, the occurrence of which has been established by the police, and "criminal" as "one who commits a crime." S. REID, *supra* note 11, at 95.

Operational definitions should be clear and concise. They should measure the real properties or attributes of the concept under consideration. It is at this point, however, that problems in predicting human behavior, especially dangerous behavior, arise. Society has no viable operational definition of dangerous. In fact, there is disagreement on whether the definition should include dangerousness to self as well as to others:

> Of course, as one talks about "danger," one is not always clear what is meant by the word. It may mean a realistic threat to life, to physical intactness, or to health. It might also include a person who is dangerous to another's peace, harmonious social living, or ego strength. Sometimes it is difficult to say at what point "danger" appears.

Ordway, *Experiences in Evaluating Dangerousness in Private Practice and in a Court Clinic,* in THE CLINICAL EVALUATION OF THE DANGEROUSNESS OF THE MENTALLY ILL at 36 (J. Rappeport ed. 1967); "Dangerousness is a difficult term or concept to define. Persons may be dangerous from a sociological, legal or economic viewpoint, to mention just a few. Some revolutionaries are dangerous, but so are some patriots." Usdin, *Broader Aspects of Dangerousness,* in *id.* at 43. *See also* Cross v. Harris, 418 F.2d 1095 (D.C. Cir. 1969). The same question is discussed by Aaron M. Schreiber, a board member of the Board of Advisors of the Patuxent Institution in Maryland. The Maryland Defective Delinquency Statute does not define dangerous; but according to Schreiber:

> A random sample conducted in 1965 of inmate records at Patuxent demonstrates the uninformative nature of the "danger of society" standard. The sam-

Scientific research in the behavioral sciences is plagued with methodological problems beyond that of definition, and research on prediction of behavior is no exception. First, most studies involve sampling problems.[37] Samples should be large enough to represent the population under study and selected in a manner which will not in and of itself bias the study. Because most empirical research is dependent on control groups,[38] it is necessary to compare the reaction of these experimental subjects with those of an analogous group among whom the experimental factor is not introduced (the control group). In addition, follow-up studies should be conducted. This is particularly important in prediction of human behavior since the future behavior of the subject is just as important as the behavior immediately or shortly after release from incarceration.[39]

Even if the methodological problems are solved, more serious problems are encountered. These might be called logic-of-science problems. The first, the dualistic fallacy, is similar to the definitional problem. Its basic assumption is that specific groups are distinguishable, for example, criminals from non-criminals, dangerous persons from non-dangerous persons. It further assumes that the specific groups are homogeneous and can therefore be distinguished on measured traits.

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ple discloses that nearly half of the inmates, who had been judged to pose an "actual danger to society" if released, had initially received criminal sentences of less than four years. The mean original sentence for inmates whose crimes could have resulted in ten-years' imprisonment was only 2.41 years. Evidently, the judges who originally sentenced these inmates did not always regard them as especially dangerous to society. Such statistics cast grave doubts on the adequacy of the standards of Maryland's statutory scheme, under which men may remain in therapeutic confinement for as long as they live.

Schreiber, *Indeterminate Therapeutic Incarceration of Dangerous Criminals: Perspectives and Problems,* 56 VA. L. REV. 602, 615 (1970) (footnotes omitted). "In past years, nearly one-half of Patuxent's inmates have been committed for acts other than assaultive crimes, and 96 of the 348 present inmates were convicted of property crimes, 40 of which did not endanger persons." *Id.* at 617.

37. Because of the difficulty of defining and measuring variables, the impossibility of isolating all variables which might influence the aspect of human behavior under investigation, the cost of studying large samples, and other methodological problems which arise when one is studying human behavior, it is doubtful that any sample of human subjects is ever "adequate" to permit generalization to the total population. For a discussion of specific studies of criminal behavior which involved sampling problems, see S. REID, *supra* note 11, at 82–92. For general discussions of the principle of sampling in scientific research, see F. KERLINGER, FOUNDATIONS OF BEHAVIORAL RESEARCH 51–64 (1965); J. SIMON, BASIC RESEARCH METHODS IN SOCIAL SCIENCE 109–34, 256–70 (1969); STAGES OF SOCIAL RESEARCH: CONTEMPORARY PERSPECTIVES 167–202 (D. Forcese & S. Richer eds. 1970).

38. *See* H. MANNHEIM, COMPARATIVE CRIMINOLOGY 130 (1965).

39. For a more detailed discussion of these subjects, see *id.* at 135–39.

To separate individuals into distinguishable groups, one might posit that criminals violate the law and non-criminals do not; dangerous persons endanger the lives of others and non-dangerous persons do not. The fallacy, however, lies in presuming that such groups can be neatly separated. There are no precise definitions for crime or dangerousness, or for criminals or dangerous people. As a result, behavior is often defined as a crime when committed by some but not so defined when committed by others. Similarly, the same behavior may be labeled dangerous when committed by some, but not when committed by others,[40] even though the circumstances surrounding the behavior are similar or identical. Because it thus becomes impossible to distinguish clearly criminal or dangerous behavior, the second logic-of-science problem, that a given theory must be able to identify the phenomenon under study, becomes a moot point.

This inability to define precisely is of particular importance in the prediction of dangerous behavior by a psychiatrist who, as a result, must rely upon his own experiences and case materials, rather than objective data.[41] "While such clinical judgments must be respected, they are hardly a scientific basis for indeterminate commitment."[42] In most cases, the "prediction of dangerousness must ultimately be based upon overall subjective impression which is based upon understanding of the inter-relatedness of many factors."[43]

40. *See* S. REID, *supra* note 11, at 217–27, for an analysis of studies of white collar crime, indicating that theft among members of the "upper world" usually is not treated as criminal, but rather is handled by administrative agencies; whereas theft among members of the "lower class" is more often handled through the criminal justice system.

41. As one author has described the problem:

> The most a psychiatrist can say is that he has had considerable experience in dealing with disturbed people who commit dangerous acts, that he has been designated by society to diagnose and treat such individuals, and that his skill in treating dangerous behavior in these diagnosed as mentally ill has generally been appreciated.
>
> . . . Often he simply must say, "My experience and intuition tell me that this man is potentially capable of repeating a violent act, but I cannot spell out exactly why I feel this way."

S. HALLECK, PSYCHIATRY AND THE DILEMMAS OF CRIME 314 (1971).

42. *Id.*

43. *Id. See also* Usdin, *supra* note 36, at 43:

> We cannot predict even with reasonable certainty that an individual will be dangerous to himself or to others. . . . All too frequently we cannot identify dangerous personalities. We can make an educated guess, but what right does society have to act upon a guess?

The example of Edmund E. Kemper III, a fifteen year old boy who shot and killed his grandfather and grandmother illustrates dramatically the inaccuracy of prediction. He

One of the problems faced by psychiatrists that hinders their ability to predict, is that not enough is known about the causes of antisocial behavior or its treatment.[44] It may be that some of the questions will never be answered because psychiatrists may never acquire the ability to measure with precision all of the relevant factors. There is a dearth of valid clinical and research studies concerning the prediction of behavior, especially dangerous behavior, and those studies which do exist are filled with methodological problems.[45]

It has been questioned whether increased research will solve the problems of inability to predict human behavior:[46]

> Realistically, it is more likely that the increase in our scientific knowledge of human behavior, derived from both psychological and sociological sources, will increase, rather than decrease, the difficulty in applying such knowledge to legal issues. Increased knowledge brings complexity rather than simplicity, uncertainty rather than certainty, frequently blurring distinctions rather than clarifying them.

On the other hand, some researchers have concluded that violence could be predicted safely and a test developed to measure the predic-

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was confined to Atascadero State Hospital, a California institution for the criminally insane and mentally disordered sex offenders. After he was released and applied to have his records sealed he was examined by two psychiatrists appointed by the court. Both testified that he was not a threat to society. Later, however, it was discovered that he had murdered and dismembered six young girls, one of his mother's friends and his mother during a one year period. One of these murders had taken place just four days before the psychiatric examination in which he had been declared harmless. *See* Diamond, *The Psychiatric Prediction of Dangerousness,* 123 U. PA. L. REV. 439 (1974).

44. *See* notes 124 & 125 and accompanying text *infra.*

45. With regard to the studies which tend to substantiate clinical predictors, see Diamond, *supra* note 43, at 444:

> I know of no reports in the scientific literature which are supported by valid clinical experience and statistical evidence that describes psychological or physical signs or symptoms which can be reliably used to discriminate between the potentially dangerous and the harmless individual. The fact that certain signs may sometimes be associated with violent behavior . . . or that persons who have committed acts of violence tend to reveal in their past histories certain common features, such as an unusual exposure to violence in early childhood, or a higher than average incidence of childhood head injuries, in no way meets the legal need for criteria which will discriminate between the potentially violent and the harmless individual.

See also Dershowitz, *supra* note 23, at 32, where the writer, after noting that there are few studies of information on follow-ups of psychiatric predictions of anti-social behavior, states:

> And even more surprisingly, these few studies strongly suggest that psychiatrists are rather inaccurate predictors; inaccurate in an absolute sense, and even less accurate when compared with other professionals, such as psychologists, social workers and correctional officials; and when compared to actuarial devices, such as prediction or experience tables.

46. Diamond, *supra* note 43, at 451.

tions of such behavior.[47] Until this happens, two interrelated problems occur as a result of the inability of psychiatrists to predict behavior accurately. The existence of dangerous behavior is overpredicted, and this results in the imposition of longer prison sentences.

2. *Overprediction*

The concept of overprediction of dangerous behavior presumes that psychiatrists might recommend confinement for patients who would not in fact be dangerous if released. The psychiatrist usually does not learn about his erroneous predictions of violence because these people are confined. He will, however, always learn about erroneous predictions of nonviolence because those people, upon release, commit crimes. Because of the high visability of this one type of error, psychiatrists tend to overpredict the likelihood of future violence.[48]

Recently, evidence of the overprediction phenomenon has come to light. Statistics from the Patuxent Institution of Maryland are illustrative. That institution was developed for the treatment of recidivists under the indeterminate sentencing law of Maryland.[49] Figures from that institution indicate that a significant proportion of the inmate population was incarcerated needlessly. Of the 432 inmates released contrary to the recommendations of the Patuxent staff, only 137, or 32 percent, committed new offenses in the period 1959 to 1969.[50]

Similarly, overprediction was manifested in *Baxstrom v. Herold.*[51]

47. "Research findings to date strongly suggest that a test to identify individuals organically predisposed to violent behavior could be developed, perhaps in the near future." Note, *Guilt by Physiology: The Constitutionality of Tests to Determine Predisposition to Violent Behavior,* 48 So. Cal. L. Rev. 489, 503 (1974). *Contra, see* note 45 *supra.*

48. Dershowitz, *supra* note 50, at 33. *See also* Schreiber, *supra* note 36, at 602; Peele, Chodoff, & Taub, *Involuntary Hospitalization and Treatability: Observations from the District of Columbia Experience,* 23 Cath. U.L. Rev. 744, 746 (1974).

49. Md. Ann. Code art. 31B, § 9 (1957). For a discussion of the purpose of this institution and the treatment facilities, see Schreiber, *supra* note 36, at 602.

50. Schreiber, *supra* note 36, at 619. The Patuxent staff evidently believed that each of these individuals was a danger to society at the time of his release. *Id.*

51. 383 U.S. 107 (1966). Baxstrom was convicted of second degree assault in 1959 and sentenced to prison for a term of two and one-half to three years. A prison physician certified him to be insane on June 1, 1961. At that time he was transferred to a state hospital which was under the control of the New York Department of Corrections and which was used for male prisoners who had been declared mentally ill while serving a criminal sentence. In November of 1961, because Baxstrom's sentence was almost up, the director of the hospital filed a petition requesting that Baxstrom be civilly committed pursuant to § 384 of the New York Correction Code, ch. 243, art.

After a state court determination that Baxstrom, who had served his sentence, must remain in a hospital for mentally ill criminals because the New York Department of Mental Hygiene had made an *ex parte* determination of his unsuitability for civil treatment, the United States Supreme Court held:[52]

> [P]etitioner was denied equal protection of the laws by the statutory procedure under which a person may be civilly committed at the expiration of his penal sentence without the jury review available to all other persons civilly committed in New York. Petitioner was further denied equal protection of the laws by his civil commitment to an institution maintained by the Department of Correction beyond the expiration of his prison term without a judicial determination that he is dangerously mentally ill such as that afforded to all so committed except those, like Baxstrom, nearing the expiration of a penal sentence.

The court further held that where persons committed civilly were entitled to a jury trial *de novo* on the question of sanity, those persons committed after the expiration of a criminal sentence were entitled to similar protections:[53]

> Where the State has provided for a judicial proceeding to determine the dangerous propensities of all others civilly committed to an institution of the Department of Correction, it may not deny this right to a person in Baxstrom's position solely on the ground that he was nearing the expiration of a prison term. It may or may not be that Baxstrom is presently mentally ill and such a danger to others that the strict security of a Department of Correction hospital is warranted. All others receive a judicial hearing on this issue. Equal protection demands that Baxstrom receive the same.

Following this decision, New York transferred 967 patients from two hospitals for the criminally insane to regular security civil hospitals in the state, a process called Operation Baxstrom.[54] These individuals were long-term patients diagnosed by psychiatrists as the "most dan-

15, § 384 [1929] N.Y. Laws 599 (repealed 1966). At that hearing (in which the procedures followed were constitutionally defective) and in subsequent state court proceedings, Baxstrom was denied civil commitment and was retained in the state institution for mentally ill criminals. *Id.* at 108–09.

52. 383 U.S. at 110.

53. *Id.* at 114–15 (footnote omitted).

54. *See* H. STEADMAN & J. COCOZZA, CAREERS OF THE CRIMINALLY INSANE: EXCESSIVE SOCIAL CONTROL OF DEVIANCE 53 (1974).

gerous" patients. The transfer to civil hospitals was opposed by psychiatrists and feared by the communities and hospitals to which they were transferred.[55] Nevertheless, fears of danger from these patients proved to be exaggerated.[56]

3. *Longer sentences*

The inability to predict behavior accurately also leads to longer sentences. In the United States criminal sentences are longer than in any other country in the western world,[57] and, although it is generally

55. *Id.*

56. Steadman and Cocozza observed:

> Not only had none of the [civil mental] hospitals had any particular problems to report, but also within the year, 176 of the 967 patients had been discharged and only 7 patients had proved to be so dangerous that they were recommitted to the criminally insane hospitals.

Id. at 101.

A four and one-half year follow-up study of these allegedly dangerous patients was made. These patients were compared to a sample of "pre-Baxstrom" patients who had been transferred during the two years prior to Operation Baxstrom from the same hospitals in which the Baxstrom patients were confined. These pre-Baxstrom patients had been transferred with the psychiatric approval of approximately the same medical staff that later opposed the transfer of the Baxstrom patients. *Id.* at 55–73. In terms of social and demographic characteristics, both the pre-Baxstrom and the Baxstrom samples consisted of marginal persons in society. The median grade of education for both groups was seven. A high percentage had never married and were unskilled workers. The Baxstrom patients were fairly evenly divided between black and white. The pre-Baxstrom patients were older and had been hospitalized longer prior to their transfer to a civil hospital. The two groups were similar in terms of psychiatric diagnosis and previous mental hospitalization. They were also quite similar in terms of the history of criminal activity although a much higher percentage of the pre-Baxstrom patients had no history of violent crime conviction: 77.9% compared to 48.7% of the Baxstrom patients.

The results of the study indicate that the psychiatrists had overpredicted: "All of the information available on the Baxstrom patients' behavior in the civil hospitals suggests that these 'dangerous' patients were not very dangerous at all." *Id.* at 100–01. Other researchers arrived at the same conclusions. *See, e.g.*, White, Krumholz & Fink, *The Adjustment of Criminally Insane Patients to a Civil Mental Hospital*, 53 MENTAL HYGIENE 34, 38 (1969); Hunt & Wiley, *Operation Baxstrom after One Year*, 124 AM. J. PSYCHIATRY 134 (Jan. 1968).

57. *See* Paulsen, *Prison Reform in the Future—The Trend Toward Expansion of Prisoners' Rights*, 16 VILL. L. REV. 1082 (1971):

> Sentences are long not only in terms of authorized maximums, but also in terms of the amount of time spent in prison. Anyone who has dealt with European students knows how appalled they are by this system. A two-year sentence on the continent is considered very harsh and is reserved only for a quite serious offender.

Studies indicate that while the average sentence of the federal prison population was over five years and nine months in 1965, a sentence in excess of five years is seldom imposed in most European countries. *Project—Parole Release Decisionmaking and the Sentencing Process*, 84 YALE L.J. 810, 815 n.7 (1975).

recognized that the indeterminate sentence laws were expected to result in shorter prison terms,[58] the result has too often been that the sentenced individual has served a longer term than would have been the case under a definite sentence.[59] This result has been upheld by courts on the theory that imposition of the indeterminate sentence is actually imposition of the maximum term provided by statute.[60] In the extreme, the maximum may be life imprisonment for all crimes, as illustrated by the situation at the Maryland Institution at Patuxent.[61] The Maryland statute contains no maximum limit on confinement.[62]

The purpose of incarcerating offenders for a longer period of time may be valid, *i.e.*, to assure that the offender is no longer dangerous and that he has been rehabilitated. Unfortunately, because of the inability to determine when that occurs,[63] the conclusion may be accurate that "the idealist treatment philosophy has become an albatross around the necks of those enmeshed in the system."[64] It is possible that with the existence of the indeterminate sentence some judges might be encouraged to institutionalize persons who could otherwise be released, especially in the cases of youths. It has been noted that young people under the jurisdiction of youth authorities are actually serving longer terms than they would otherwise serve.[65] The indeter-

58. As one court has stated:

> It is generally recognized by the courts and by modern penologists that the purpose of the indeterminate sentence law, like other modern laws in relation to the administration of the criminal law, is to mitigate the punishment which would otherwise be imposed upon the offender. These laws place emphasis upon the reformation of the offender. They seek to make the punishment fit the criminal rather than the crime.

Ex parte Lee, 177 Cal. 690, 171 P. 958, 959 (1918).

59. *See* Dershowitz, *supra* note 2, at 303, *quoting* VanVechten, *The Parole Violation Rate*, 27 J. CRIM. L.C. & P.S. 638 (1937):

> The universal conclusion of studies of time served *in prison* under indeterminate sentence laws and time served under the old definite sentence laws in the same jurisdictions has been that the indeterminate sentences have very materially increased the time served within the walls.

See also Lindsey, *supra* note 4, at 76–77.

60. "It has uniformly been held that the indeterminate sentence is in legal effect a sentence for the maximum term." *Ex parte* Lee, 177 Cal. 690, 171 P. 958, 959 (1918).

61. *See* note 50 and accompanying text *supra*.

62. MD. ANN. CODE art. 31B, § 9(b) (1976).

63. *See* text accompanying notes 41–47 *supra*.

64. S. BRODSKY, PSYCHOLOGISTS IN THE CRIMINAL JUSTICE SYSTEM 144 (1973).

65. The average period of time served by those sentenced under the Federal Youth Corrections Act, 18 U.S.C. §§ 5005–26 (1970), is longer than the period served by those not so sentenced. Rubin, *Illusions of Treatment in Sentences and Civil Commitments*, 16 CRIME & DELINQUENCY 79, 81 (1970). Similarly, a six year study of the effectiveness of treatment programs in the State of California prison

minate sentence may only superimpose the concept of treatment upon the old system of locking people up. Less physical brutality may occur under this system, but the essence of imprisonment is still there and the two concepts are not necessarily compatible; as one commentator stated: "I do not accept the gloss of treatment on modern imprisonment; I do not accept rationalizing imprisonment by the administration of treatment."[66]

IV. PHILOSOPHICAL AND ADMINISTRATIVE PROBLEMS OF TREATMENT PROGRAMS

A. Philosophy of Treatment

The indeterminate sentence has been a major tenet in the evolution of a treatment philosophy within the American correctional system.[67] Serious questions have been raised, however, concerning the system's capacity to implement that treatment philosophy.[68] In addition, the practical problems of implementing the treatment philosophy of the indeterminate sentence are arguably so severe that indeterminate sentencing should be abandoned. The remainder of this article is con-

system revealed that under the indeterminate sentence the average sentence served by inmates increased from twenty-four to thirty-six months. Ward, *Evaluative Research for Corrections,* in PRISONERS IN AMERICA 184, 196 (L. Ohlin ed. 1973).

66. Rubin, *supra* note 65, at 82.

67. For a listing of state statutes and constitutional provisions which articulate a policy of treatment, see Clark, *Legal Policy & the Rehabilitative Reality,* 2 OHIO NORTHERN L. REV. 231–32 nn.1–6 (1974). *See also* Goldfarb & Singer, *Redressing Prisoners Grievances,* 39 GEO. WASH. L. REV. 175, 210 (1970) (footnotes omitted): "[U]nlike foreign criminal codes, which frequently specify rehabilitation as a central purpose of imprisonment, American criminal statutes give little guidance as to the overall policy reasons for incarcerating criminals."

But see United States v. Alsbrook, 336 F. Supp. 973, 975 (D.D.C. 1971), interpreting the purpose of the Federal Youth Corrections Act, 18 U.S.C. §§ 5005–26 (1970):

> The Act represents a humane and deliberate effort to assist young offenders by coupling an adequate degree of punishment with supervised treatment in the hope of salvaging many among the increasing number of young adult offenders involved in serious criminal conduct. . . . The basic theory of the Act is rehabilitative . . . .

In the context of the juvenile court system, the United States Supreme Court in *In re* Gault, 387 U.S. 1 (1967), stated the juvenile procedures were to be clinical, with an emphasis on treatment and rehabilitation, rather than punishment. *Id.* at 15–16. Similarly, the California Supreme Court has stated that the indeterminate sentence laws of that state "place emphasis upon the reformation of the offender." *In re* Lynch, 8 Cal.3d 410, 416, 503 P.2d 921, 924, 105 Cal. Rptr. 217, 220 (1972).

68. *See* Clark, *supra* note 67. *See also* S. REID, *supra* note 11, at 661–62.

cerned primarily with these problems of implementation. This limitation in scope is not to suggest that the constitutional problems of the indeterminate sentence are not important; they have, however, been discussed by many commentators who are primarily concerned with the right to treatment,[69] thereby neglecting the practical problems. It is suggested that the resolution of the latter may be a condition precedent to the meaningful resolution of the former.

B. Definition and Criteria of Treatment

The use of a treatment philosophy as the basis for imposition of the indeterminate sentence assumes that the appropriate method of treatment is known and that its effectiveness can be measured. A court confronted with the right to treatment issue must be able to articulate some criteria for measuring whether the right has been afforded or denied in a given case. The difficulty of establishing criteria is prob-

69. Recognition of a right to treatment for institutionalized patients is generally traced to an article by a doctor-lawyer published in 1960. Birnbaum, *The Right to Treatment,* 46 A.B.A.J. 499 (1960). *See also* Editorial, *A New Right,* 46 A.B.A.J. 516 (1960). The first significant judicial recognition of the right, however, did not occur until 1966 when Chief Judge Bazelon wrote the opinion for the Court of Appeals for the District of Columbia Circuit in Rouse v. Cameron, 373 F.2d 451 (D.C. Cir. 1966). Although the decision was based on statutory grounds, it suggested due process arguments. The court stated that if treatment is the justification for holding a person already acquitted on grounds of insanity in a mental institution against his or her will for a longer period than he or she could be detained if convicted, a due process question might be raised if treatment were not provided. "Indefinite confinement without treatment of one who has been found not criminally responsible may be so inhumane as to be 'cruel and unusual punishment.' " *Id.* at 453.

For other decisions recognizing a right to treatment, see Donaldson v. O'Connor, 493 F.2d 507 (5th Cir. 1974), *vacated and remanded on other grounds,* 422 U.S. 563 (1975); Knecht v. Gillman, 488 F.2d 1136 (8th Cir. 1973); Negron v. Preiser, 382 F. Supp. 535 (S.D.N.Y. 1974); Welsch v. Likins, 373 F. Supp. 487 (D. Minn. 1974); Morales v. Turman, 364 F. Supp. 166 (E.D. Tex. 1973); Martarella v. Kelley, 359 F. Supp. 478 (S.D.N.Y. 1973), *enforcing* 349 F. Supp. 575 (1972); Nelson v. Heyne, 355 F. Supp. 451 (N.D. Ind. 1972) (supp. op.), *affd,* 491 F.2d 352 (7th Cir.), *cert. denied,* 417 U.S. 976 (1974); Inmates of Boys' Training School v. Affleck, 346 F. Supp. 1354 (D.R.I. 1972); Wyatt v. Stickney, 344 F. Supp. 373 (M.D. Ala. 1972), *aff'd sub nom.,* Wyatt v. Aderholt, 503 F.2d 1305 (5th Cir. 1974); Nason v. Superintendent of Bridgewater State Hosp., 353 Mass. 604, 233 N.E.2d 908 (1968). *Contra,* Burnham v. Department of Pub. Health, 349 F. Supp. 1335 (N.D. Ga. 1972), *rev'd per curiam,* 503 F.2d 1319 (1974); Holt v. Sarver, 309 F. Supp. 362 (E.D. Ark. 1970), *aff'd,* 422 F.2d 304 (8th Cir. 1971). Wilson v. Kelley, 294 F. Supp. 1005 (N.D. Ga.), *aff'd per curiam,* 393 U.S. 266 (1968).

For a discussion of the right to treatment, see generally Goldfarb & Singer, *supra* note 67; Katz, *The Right to Treatment—An Enchanting Legal Fiction?,* 36 U. CHI. L. REV. 775 (1969); *Symposium: The Right to Treatment,* 57 GEO. L.J. 673 (1969); Note, 4 CAPITAL U.L. REV. 85 (1975); Note, 23 CATH. U.L. REV. 787 (1974); Note, 53 VA. L. REV. 1134 (1967); Note, 77 YALE L.J. 87 (1967).

ably one of the major reasons why courts have traditionally observed a hands-off policy toward institutions in which the mentally ill and convicted offenders are confined.[70]

In the area of medical treatment, for example, the courts have given prison medical staff broad discretion.[71] In recognition of a general right to treatment, however, the courts have indicated some willingness to establish standards against which treatment programs may be measured.[72] In *Rouse v. Cameron*[73] the statutory requirement that one confined under the 1964 District of Columbia Hospitalization of

70. This "hands-off" doctrine has been justified on the theory that prison administration is within the executive branch and therefore the judicial branch should not interfere, because of the separation of powers doctrine. *See, e.g.,* Powell v. Hunter, 172 F.2d 330 (10th Cir. 1949). In addition, some judges have argued that they do not have the expertise to interfere with penological decisions. *See* Gray v. Creamer, 329 F. Supp. 418 (W.D. Pa. 1971). With regard to state institutions, the principle of federalism has been raised to prevent federal court interference. *See* United States *ex rel.* Atterbury v. Ragen, 237 F.2d 953 (7th Cir. 1956), *cert. denied,* 353 U.S. 964 (1957). In general, the courts have stated that it is not their function to interfere with prison administration: "We think that it is well settled that it is not the function of the courts to superintend the treatment and discipline of prisoners in penitentiaries, but only to deliver from imprisonment those who are illegally confined." Stroud v. Swope, 187 F.2d 850, 851–52 (9th Cir.), *cert. denied,* 342 U.S. 829 (1951). "Courts are without power to supervise prison administration or to interfere with the ordinary prison rules or regulations." Banning v. Looney, 213 F.2d 771 (10th Cir.), *cert. denied,* 348 U.S. 859 (1954). *See generally* Comments, 21 BUFF. L. REV. 891 & 935 (1972); Comment, 16 VILL. L. REV. 1029 (1971); Note, 9 WM. & MARY L. REV. 178 (1967); Note, 72 YALE L.J. 506 (1963).

Since the early 1960's, however, some courts have shown a willingness to abandon the hands-off doctrine in dealing with institutions for the mentally ill and criminals. For a discussion of the origin of this change, see State v. McCray, 297 A.2d 265, 280–81 (1972). *See also* Goldfarb & Singer, *supra* note 67; Comment, 4 CUMBERLAND-SAMFORD L. REV. 471, 478–85 (1974). For a discussion of the view that courts should take a more active role in prison reform, see Spaeth, *The Courts' Responsibility for Prison Reform,* 16 VILL. L. REV. 1031 (1971).

71. *See* Haskew v. Wainwright, 429 F.2d 525 (5th Cir. 1970); Roy v. Wainwright, 418 F.2d 231 (5th Cir. 1969); White v. Sullivan, 3 PRISON L. RPTR. 77 (1974); Pinkston v. Bensinger, 2 PRISON L. RPTR. 544 (1973). The difficulty of establishing a case of deprivation of a right to medical treatment is pointed out in Sawyer v. Sigler, 320 F. Supp. 690 (D. Neb. 1970), *aff'd,* 445 F.2d 818 (8th Cir. 1971):

> The power of this court is to measure the adequacy of the petitioner's medical treatment within the framework only of the Constitution of the United States. It is not for this court to say that better or more regular examinations could or could not have been made. If the treatment or lack of treatment of a prisoner is such that it amounts to indifference or intentional mistreatment, it violates the prisoner's constitutional guarantees.

320 F. Supp. at 696.

72. For a discussion of standards by which treatment effectiveness might be measured, see Note, *Civil Restraint, Mental Illness, and the Right to Treatment,* 77 YALE L.J. 87, 107 (1967).

73. 373 F.2d 451 (D.C. Cir. 1966). In this case the habeas corpus petitioner was involuntarily committed pursuant to D.C. CODE ANN. § 24–301(d) (1961), upon the trial court's finding of not guilty by reason of insanity of carrying a dangerous weapon. *Id.* at 452.

the Mentally Ill Act[74] be afforded medical and psychiatric care and treatment was extended to those involuntarily committed. This right to treatment was interpreted to include "not only the contacts with psychiatrists but also activities and contacts with the hospital staff designed to cure or improve the patient."[75] The court recognized that it could not establish one standard which would apply to all; nor did the hospital have to show that the treatment actually improved or cured the patient "but only that there is a bona fide effort to do so."[76] The statute required periodic evaluation of the progress of the patient and the court emphasized the importance of that requirement as well as providing a program which is suited to the particular needs of an individual. Finally, in recognition of the fact that social scientists have not "reached finality of judgment" with regard to treatment, the court required that the hospitals make an effort "to provide treatment which is adequate in light of present knowledge."[77]

The individualized approach of *Rouse* was followed in *Nason v. Superintendent of Bridgewater State Hospital*[78] where the court required a reasonable relationship between the form of treatment and the specific needs of the individual patient. The treatment would be determined by "competent doctors in their best judgment within the limits of permissible medical practice . . . ."[79]

The subjective approach to treatment, exemplified by *Rouse* and *Nason* fails to establish criteria of an objective nature by which treatment can be measured, but this approach may be necessary due to the complexities of medicine and psychiatry.[80] Nevertheless, the court in *Wyatt v. Stickney*[81] specifically issued "minimum constitutional standards for adequate habilitation of the mentally retarded,"[82] including

74. D.C. CODE ANN. §§ 21–501 *et seq.* (1973).
75. 373 F.2d at 456.
76. *Id.*
77. *Id.*
78. 353 Mass. 604, 233 N.E.2d 908 (1966).
79. 233 N.E.2d at 914.
80. *See* Cameron, *Nonmedical Judgment of Medical Matters*, 57 GEO. L.J. 716 (1969); Birnbaum, *A Rationale for the Right to Treatment*, *id.* at 752. For a discussion of an objective approach to determining adequacy of treatment in an individual case, see Bazelon, *Implementing the Right to Treatment*, 36 U. CHI. L. REV. 742 (1969).
81. 344 F. Supp. 373 (M.D. Ala. 1972), *aff'd sub nom.* Wyatt v. Aderholt, 503 F.2d 1305 (5th Cir. 1974).
82. 344 F. Supp. at 395. Habilitation was defined as:
the process by which the staff of the institution assists the resident to acquire and maintain those life skills which enable him to cope more effectively with the de-

such standards as the right to receive suitable educational services; the right not to be admitted to the institution if adequate services for treatment were available in the community; the right to an individualized habilitation plan formulated by the institution, the right to dignity, privacy and humane care; the right not to be subjected to experimental research without consent; and the right to be protected by restrictions on the use of behavior modification and drugs.

An administrative role for the courts in treatment programs of institutions has been rejected on grounds similar to those raised against the establishment of subjective treatment criteria. In *Burnham v. Department of Public Health,*[83] a class action claiming constitutional inadequacy of treatment in mental hospitals in the state of Georgia was found inappropriate since adequate treatment could only be measured in an individual case:[84]

> The rigidity of the court process can often stifle intelligent experimentation in dealing effectively with social problems, often to the ultimate detriment of the very persons for whose benefit the litigation is commenced. It is beyond the technical expertise of this, and presumably most, judges to endeavor to administer a state-wide mental health program . . . .

Similarly, in *Wilson v. Kelley*[85] a three judge federal court rejected the concept of a right to treatment despite the fact that a state statute required a "program of rehabilitation."[86] Plaintiffs were confined in a work camp at hard labor. They argued that the conditions of their confinement constituted cruel and unusual punishment since the work camp did not provide the same academic and trade programs as did other institutions in the state. The court held that "work and labor on the part of prisoners is not in itself unconstitutional or unlawful,"[87]

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mands of his own person and of his environment and to raise the level of his physical, mental, and social efficiency. Habilitation includes but is not limited to programs of formal, structured education and treatment.

Id.

83. 349 F. Supp. 1335 (N.D. Ga. 1972), *rev'd per curiam,* 503 F. 2d 1319 (1974).

84. *Id.* at 1344. *See* Birnbaum, *Some Remarks on "The Right to Treatment,"* 23 ALA. L. REV. 623, 635 (1971): "Recognition of the right [to treatment] . . . is only child's play compared with the problems now faced by the court in defining and enforcing standards of adequate mental health care."

85. 294 F. Supp. 1005 (N.D. Ga. 1968), *aff'd per curiam,* 393 U.S. 266 (1968).

86. GA. CODE ANN. § 77–319 (1973).

87. 294 F. Supp. at 1012.

and addressed itself to the issue of equal treatment for all inmates in the state system:[88]

> Humane efforts to rehabilitate should not be discouraged by holding that every prisoner must be treated exactly alike in this respect. There is no general agreement among state or federal experts regarding the extent of rehabilitative efforts, but they are dependent upon variable factors such as length of sentence, prior training, psychiatric evaluations and the like. . . . To order the maximum for each and every person confined . . . would be financially prohibitive for this state and could result in a reduction of rehabilitative efforts rather than an implementation.

The court resorted to subjective treatment evaluation to avoid the role of prison administrator in formulating objective criteria.

The problem of what is meant by treatment is complicated by situations involving "untreatable" patients. The court in *Rouse* avoided that issue,[89] but implied that it might take the position that all patients are treatable.[90] Still another problem is created by the patient who does not wish, or actively refuses, to be treated. It has been suggested that the right to treatment may imply an obligation to submit to treatment.[91] As a corollary to this, some authorities have suggested that coercion may be the solution in cases where people resist treatment even though psychiatrists establish that unconsciously they desire treatment.[92]

88. *Id.* at 1012–13.

89. The court stated: "We need not now resolve the implications of the 'right to treatment' for a patient who is demonstrated by the hospital to be 'untreatable' in the present state of psychiatric knowledge, if such a patient exists." 373 F.2d at 457 n.28.

90. The court quoted a statement of Dr. Winfred Overholser, then Superintendent of Saint Elizabeth's Hospital: "I do not believe we should write off any patient as incurable . . . In other words, we are going to try our hand at treating every patient that is sent to us." *Id.* The issue is a difficult one. Chief Judge Bazelon, a strong advocate of treatment, speaking at Harvard Law School in November 1966, first suggested that "all patients are treatable" but then admitted that "[t]his may be a legal fiction." 80 HARV. L. REV. 898, 900 (1967). For a more optimistic view, see G. STÜRUP, TREATING THE UNTREATABLES (1968).

91. *See* Katz, *supra* note 69.

92. These persons may be convinced that no one cares about their welfare or really wishes to treat them. A long period of trust and respect is needed to show such persons that treatment is indeed desired by society. "Behind the conscious refusal of treatment, other unconscious wishes also operate—to be protected, to be cared for, to be sustained, to be helped. What weight should be given to these wishes when they are almost drowned out by words which damn their own self and the world?" *Id.* at 771. Arguably, some people are not able to exercise their right to treatment without some assistance through the coercion of others. Any coercion should, of course, be

The meaning of treatment raises further issues of who prescribes what type of treatment:[93] whether treatment should be limited to those methods which, to be successful, require the cooperation of the patient, or if it may be extended to psychosurgery and other physiological methods which can alter the individual's behavior without his cooperation.[94] In addition, there are questions of what treatment methods should be used if the patient prefers an inferior method in terms of long-range treatment or one that would more quickly return him to society than a method the therapist considers superior in the long run,[95] and whether the doctrine of informed consent would be invoked.[96] Finally, if the cooperation of the patient is necessary for effective treatment, there is the question whether the patient should be released if he refuses to cooperate.[97]

C. *Court Administration of Treatment*

In the final analysis, the right to treatment "if it is to have meaning, requires in addition a person who can exercise such a right, or if treatment is imposed, can benefit from it."[98] It may be that the only way the courts can supervise that right is to consider overall treatment facilities and hospitals by looking at such factors as the ratio of patients

limited by procedural safeguards. "Since coercion has a life of its own, and if left unwatched can destroy those who live in its shadow, any use of coercion must be surrounded by safeguards for the individual." *Id.* at 772.

Most likely, only a few people needing treatment suffer from this condition, however. Many therapists would argue that, to the contrary, treatment is usually not effective unless those persons cooperate. Freud, Jung, and Adler and "most of the best-known contemporary psychotherapists" would treat only consenting patients. *See* T. SZASZ, *supra* note 34, at 97.

93. In People *ex rel.* Popino v. Warden of N.Y. City Penitentiary, 31 App. Div. 2d 788, 296 N.Y.S.2d 873 (1969), the court found that the legislature intended decisions regarding what treatment is appropriate to be left to the designated authorities. "No power of interference or direction is given to the courts." *Id.* at 876.

94. *See* Katz, *supra* note 69, at 775–78.

95. *Id.* at 777–78.

96. *Id.* at 778. *See also* Canterbury v. Spence, 464 F.2d 772 (D.C. Cir. 1972).

97. As Katz states:

> Duration of treatment should not depend on the patient's mental condition or dangerousness, but his willingness to continue treatment. With patients who have accepted treatment and with whom a therapeutic alliance has been established it should be possible to review, whenever necessary, indications and contraindications for release and to explore whatever differences in opinion may emerge. Should this lead to a break in the therapeutic relationship and a refusal to accept further therapy, either release or preventative detention would then be a consequence.

Katz, *supra* note 69, at 779.

98. *Id.* at 764.

to staff, the institution's treatment philosophy, and the availability of different treatment methods[99] without a consideration of individual cases. Since so little is known about the effectiveness of specific treatment methods,[100] courts may have to adopt the approach that they can only insist that treatment programs be made available to patients and that they will not be confined in institutions which decrease the likelihood of effective treatment.[101] But even that "assurance" raises definitional problems. The scope of the treatment requirement has not been assessed, particularly given a variation of institutions and treatment styles. Treatment cannot be confined to specific treatment programs.

In addition to minimum treatment facilities for all institutions, classification programs, guard-inmate relationships, adequate prison administration, education programs, vocational training, work release and furlough programs, release programs may be also required to implement the right to treatment.[102] It has been suggested:[103]

> [Treatment] should include for each prisoner the development of a rehabilitative plan designed to develop his talents and meet his particular needs. Plans might encompass schooling, professional or vocational training, medical or psychiatric attention and provision for earning money to support dependents. The treatment rhetoric should not, however, be used to deny them their liberty unnecessarily or paradoxically to deprive them of their constitutional rights.

Such a program of treatment again suggests a subjective evaluation of rehabilitation[104] with very little room for court-formulation of objective measurements. The result is that the right to treatment must be enforced on an individual basis.

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99. *Id.* at 780–81.

100. *See* notes 107–13 and accompanying text *infra.*

101. *See* Holt v. Sarver, 309 F. Supp. 362 (E.D. Ark. 1970), *aff'd,* 422 F.2d 304 (8th Cir. 1971), where the court stated: "The absence of an affirmative program of training and rehabilitation may have constitutional significance where in the absence of such a program conditions and practices exist which actually mitigate against reform and rehabilitation." *Id.* at 379.

102. For a lengthy discussion of "Adjuncts to Prison Treatment Programs," see S. REID, *supra* note 11, at 586–89.

103. Goldfarb & Singer, *supra* note 67, at 215.

104. Courts have distinguished between "treatment" and "rehabilitation." Whereas ordering treatment may be feasible, ordering rehabilitation is more complicated. In Wilson v. Kelley, 294 F. Supp. 1005 (N.D. Ga. 1968), *aff'd per curiam,* 393 U.S. 266 (1969), a federal court rejected the idea of a right to rehabilitation. The concept was

If treatment programs are to be supervised by courts, it must be recognized that some of the inherent difficulties may adversely affect the patient. Not only may the patient have to originate the proceedings to enforce the right to treatment, but he may have difficulty communicating his need for treatment to a lawyer; the cost may be prohibitive; the proceedings may be long and exhaustive; and the stress of the trial may worsen the patient's condition. Furthermore, a principal reason for lack of treatment or lack of effective treatment may be shortages of staff members, a problem that will be magnified if staff personnel are required to spend time in court. The essential trust between patient and therapist also may be adversely affected.[105] In general, the result has been that relief is available to few patients, and only the most assertive patients have been able successfully to challenge the quality of their treatment.[106]

V. PRACTICAL PROBLEMS WITH EXISTING TREATMENT PROGRAMS

A multiplicity of treatment programs with varying degrees of effectiveness are available for consideration in analyzing the concept of treatment in the context of corrections. The numerous approaches to treatment are not discussed in detail here, but basically they may be divided into two groups: psychological and psychiatric therapies, and environmental therapies. The psychological approach includes psychotherapy,[107] reality therapy,[108] behavior modification,[109] and physi-

again considered in Holt v. Sarver, 309 F. Supp. 362 (E.D. Ark. 1970), *aff'd*, 422 F.2d 304 (8th Cir. 1971), although the court refused to recognize a right to rehabilitative programs:

> This Court knows that a sociological theory or idea may ripen into constitutional law; many such theories have done so. But, this Court is not prepared to say that such a ripening has occurred as yet as far as rehabilitation of convicts is concerned. Given an otherwise unexceptional penal institution, the Court is not willing to hold that confinement in it is unconstitutional simply because the institution does not operate a school, or provide vocational training, or other rehabilitation facilities and services which many institutions now offer.

Id. at 379. For a skeptical view of the right to rehabilitation, see People *ex rel.* Popino v. Warden of N. Y. City Penitentiary, 31 App. Div.2d 788, 296 N.Y.S.2d 873 (1969).

105. *See, e.g.*, Note, *Mental Health—Right to Treatment Under G.S.* 122–55.6, 10 WAKE FOREST L. REV. 289 (1974).

106. Halpern, *A Practicing Lawyer Views the Right to Treatment*, 57 GEO. L.J. 782, 794 (1969).

107. In psychotherapy the therapist works with the patient on an individual basis, helping that person work through early life experiences which might aid in understanding his or her personal problems. Psychotherapy may be implemented with individuals in group or individual therapy sessions. The basic elements of psychotherapy have

ological behavior control.[110] The environmental approach includes

been stated as follows: (1) Creation of a sense of emotional security which the patient develops from interaction with the therapist; (2) Development of respect for the integrity and self-determination of the individual or respect for the patient's identity; (3) The relief of pent-up emotional tension; (4) Reduction or stimulation of the patient's sense of responsibility for his actions; (5) Attenuation or stimulation of the guilt-anxiety of the person; (6) Reduction of feelings of inferiority or inadequacy of patients. D. GIBBONS, CHANGING THE LAW BREAKER: THE TREATMENT OF DELINQUENTS AND CRIMINALS 145 (1965).

Psychotherapy may also take the form of client-centered therapy, developed and popularized by Carl Rogers, which does not involve the probing of traditional psychotherapy. Rather, the therapist establishes a secure relationship with the patient and leads that patient to understand his problems, usually by reflecting to the patient what he has said. The atmosphere is not diagnostic or judgmental, but reflective. *See* C. ROGERS, CLIENT-CENTERED THERAPY (1951); Rogers, *"Client-Centered" Therapy*, 187 SCIENTIFIC AMERICAN 66 (Nov. 1952).

108. Reality therapy focuses on the present and the belief that all people have two basic needs: the need to feel that one is important to himself and to others, and the need to give and receive love. It has been stated that individuals who are not meeting their own needs

> refuse to acknowledge the reality of the world in which they live. This becomes more apparent with each successive failure to gain relatedness and respect. Reality therapy mobilizes its efforts toward helping a person accept reality and aims to help him meet his need within its confines.

Rachin, *Reality Therapy: Helping People Help Themselves*, 20 CRIME & DELIQUENCY 45, 49 (1974).

109. Behavior modification is concerned with behavior which can be observed and manipulated. The patient who has learned anti-social behavior has evidently found it to be rewarding. To modify this behavior pattern, the reward can be removed or the anti-social behavior replaced by acceptable behavior which is more rewarding. "Behavior modification, then is the systematic application of proven principles of conditioning and learning in the remediation of human problems." Milan & McKee, *Behavior Modification: Principles and Applications in Corrections*, in HANDBOOK OF CRIMINOLOGY 745, 746 (D. Glaser ed. 1974). *See generally* Moya & Achtenberg, *Commentaries: Behavior Modification: Legal Limitations on Methods and Goals*, 50 NOTRE DAME LAWYER 230, 233–38 (1974).

110. "Behavior modification" is often defined to include the "mind-controlling" behavior techniques, such as the use of drugs and other aversive techniques, psychosurgery, chemotherapy, and electrode implantation. *See* Knecht v. Gillman, 488 F.2d 1136 (8th Cir. 1973) (court enjoined further use of aversive drug apomorphine except when administered under guidelines formulated by court which required written, informed consent by patient with right to revoke consent, administered only by doctor or nurse, and administered only in event of infractions of rules as personally observed by a member of the professional staff). Psychosurgery is perhaps the most controversial of these methods. It can be defined simply as brain surgery conducted for the purpose of controlling behavior.

For discussion and critique of this technique, see Shapiro, *Legislating the Control of Behavior Control: Autonomy and the Coercive Use of Organic Therapies*, 47 So. CAL. L. REV. 237 (1974). For a discussion of the impact of psychosurgery on our society, see Mearns, *Law and the Physical Control of the Mind: Experimentation in Psychosurgery*, 25 CASE W. RES. L. REV. 565 (1975). For more complex definitions of psychosurgery, see Kaimowitz v. Department of Mental Health, 42 U.S.L.W. 2063 (Cir. Ct. Wayne County, Mich., July 10, 1973), *noted in* Kaimowitz v. Department of Mental Health: *A Right to be Free from Experimental Psychosurgery?*, 54 BOSTON U.L. REV. 301 (1974). *See also* Gobert, *Psychosurgery, Conditioning and the Prisoner's Right to Refuse Rehabilitation*, 61 VA. L. REV. 155 (1975).

Probably the most widely used form of physiological behavior control in prisons and mental institutions is drug therapy. The use of the drug Anectine at the California

such techniques as group therapy,[111] milieu management,[112] and community treatment.[113] Each technique has problems associated with it

Medical Facility at Vacaville and the Atascadero State Mental Hospital has been described in Serrill, *California*, 1 CORRECTIONS MAGAZINE 29, 37 (1974). The drug is used to associate in the mind of the patient an aversive experience with undesirable behavior. Some patients said that while under the influence of the drug they felt like they were dying or drowning. The drug was used on inmates who violated disciplinary rules of the institution. *See also* MacKey v. Procunier, 477.F.2d 877 (9th Cir. 1973) (complaint of state prisoner that at a state medical facility he had been administered a "fright drug" without his consent was sufficient to raise serious constitutional issues respecting cruel and unusual punishment or impermissible tinkering with mental processes); Nelson v. Heyne, 355 F. Supp. 451 (N.D. Ind. 1972), *aff'd and remanded*, 491 F.2d 352 (7th Cir. 1974) (order prohibiting the Indiana Boys School from giving intermuscular injections of drugs without first attempting to administer the drugs orally). *See generally* Burt, *Of Mad Dogs and Scientists: The Perils of the "Criminal-Insane,"* 123 U. PA. L. REV. 258 (1974).

111. Group therapy utilizes the process of socialization in an attempt to change the behavior of an entire group. It is based on the theory that behavior is learned and that if criminals can become assimilated into groups that emphasize law-abiding behavior, their anti-social behavior can be changed. For a discussion of the utilization of the theory of differential association in the treatment of criminals, see Cressey, *Changing Criminals: The Application of the Theory of Differential Association*, 61 AM. J. SOCIOLOGY 116–20 (1955).

112. Milieu management is similar to group therapy, but in form extends beyond a single group to the entire milieu of the group under treatment. Such management is impractical within the community; thus, this therapy is usually implemented within an institutional setting. An example of milieu management is the Snyanon drug program in which drug addicts and former addicts live together in a confined environment and the entire milieu is devoted to the problems of curing addiction. *See* M. HASKELL & L. YABLONSKY, CRIME AND DELINQUENCY 470 (1970); L. YABLONSKY, SYNANON: THE TUNNEL BACK (1965). For a critique of the Synanon program, see Sternberg, *Synanon House—A Consideration of its Implications for American Correction*, 54 J. CRIM. L.C. & P.S. 447–55 (1963).

113. The greatest hope for rehabilitation may lie in community based treatment programs. These programs are essentially recent developments, stemming mainly from the impetus given by the support of the Law Enforcement Assistance Administration (LEAA) to such programs. According to LEAA Administrator Richard Velde, LEAA has had a great impact on corrections, having made a "major investment in the development of community based corrections in this country, literally funding hundreds of projects in that area." Serrill, *supra* note 110, at 27–28. Velde noted, however, that it is too early to determine whether the results would prove successful. *Id.* Velde cited the Des Moines, Iowa community-based corrections program as an example which reduced the jail population and number of commitments to state institutions from Des Moines. *See also* U.S. DEP'T OF JUSTICE, HANDBOOK ON COMMUNITY BASED CORRECTIONS IN DES MOINES (1973). For a summary of the Des Moines program, see S. REID, *supra* note 11, at 657–58. For a discussion of detoxification and diagnostic centers, see U.S. DEP'T OF JUSTICE, THE ST. LOUIS DETOXIFICATION AND DIAGNOSTIC EVALUATION CENTER (1973).

Other examples of community-based corrections are guided group interaction programs, foster and group homes, halfway programs, intensive community treatment programs, and reception center parole as well as more extensive use of probation and parole. B. ALPER, *supra* note 14, at 133–43. Total diversion from institutions to community treatment has also been tried, with the closing of the major state training schools for juveniles in the state of Massachusetts and the development of a number of community based treatment programs for juveniles. Serrill, *supra* note 110, at 33.

individually, but it is also possible to generalize some of the problems with the basic treatment approach.

A. Lack of Treatment Facilities in Corrections

It was pointed out fifty years ago that drafting an indeterminate sentence and parole statute was simple compared to the problem of securing "the introduction of the reformatory plan and methods in all prisons."[114] The author suggested that little was known about the differences in sentences and their effects and that "it is time to suspend theoretical discussion" and start trying to get statistical results on the effect of these various methods.[115] Unfortunately, those words fell on deaf ears, for today little is known about methods and results of treatment; there is still more theorizing than empirical testing and many institutions are still primarily custodial rather than rehabilitative.[116] Some progress has been achieved, however, and the effectiveness of these present treatment methods will now be examined.

The first problem to consider in analyzing the effectiveness of treatment is the lack of facilities. That prisons, reformatories, and institutions for the criminally insane are understaffed and have inadequate facilities needs little documentation. In *Rouse v. Cameron,*[117] Chief Judge Bazelon noted the shortage of treatment personnel in institutions for the mentally ill, citing a statement from the American Psychiatric Association that "no tax-supported hospital in the United States can be considered adequately staffed,"[118] and that the problem could not be remedied immediately. It is generally recognized that the facilities and treatment personnel in institutions for the mentally ill are superior to those found in correctional institutions.[119] In 1962, the president of the Association for the Psychiatric Treatment for Of-

114. Lindsey, *supra* note 4, at 72.
115. *Id.* at 78.
116. *See* G. SYKES, SOCIETY OF CAPTIVES 18–21 (1959), discussing his study of a prison in which he found that prison staff viewed custody as its main function and internal security as its secondary function.
117. 373 F.2d 451 (D.C. Cir. 1966).
118. *Id.* at 458.
119. Although more treatment personnel per capita may be found in mental hospitals than in correctional institutions and prisons, some of the latter may have more opportunities for treatment through "programs" such as educational and vocational training. *See* Rubin, *Illusions of Treatment in Sentences and Civil Commitments,* 16 CRIME & DELINQUENCY 79, 87 (1970). *See also* Schmideberg, *The Promise of Psychiatry: Hopes and Disillusionment,* 57 NW. U.L. REV. 19 (1962).

fenders wrote that "[p]robably all over the country, only several hundred offenders, at most, receive any adequate psychiatric treatment."[120] He noted that most of the work of psychiatrists in institutions involved not treatment but diagnosis; "treatment is the rare exception."[121]

Lack of facilities cannot indefinitely excuse institutions from providing adequate treatment. As one court has held, "The rights here asserted are . . . *present* rights . . . and, unless there is an overwhelming compelling reason, they are to be promptly fulfilled."[122] There is precedent permitting the federal judiciary to order governmental agencies to spend the necessary funds to meet constitutional requirements.[123]

B. Lack of Knowledge

Lack of knowledge about the results of treatment is also a serious problem. As the Director of the Federal Bureau of Prisons has said,[124] "The only thing we can say with any degree of certainty is that we still know very little about how to deal effectively with offenders. It is ludicrous to pretend otherwise." Lack of knowledge is often used by critics to argue for abolition of the indeterminate sentence and the treatment philosophy. Their argument, however, overlooks the fact that most offenders will, at some time, be returned to the community. The

120. Schmideberg, *supra* note 119, at 20.

121. *Id.*

122. Rouse v. Cameron, 373 F.2d 451, 458 (D.C. Cir. 1966). In that case, however, the right to treatment was statutory and the court's unwillingness to permit the lack of facilities as a defense was based on the court's interpretation of the intent of the statute. As the court indicated:

> Congress considered a Draft Act Governing Hospitalization of the Mentally Ill prepared by the National Institute of Mental Health and the General Counsel of the Federal Security Agency, which contained the following provision: "Every patient shall be entitled to humane care and treatment and, *to the extent that facilities, equipment, and personnel are available,* to medical care and treatment in accordance with the highest standards accepted in medical practice." The italicized language was omitted in the present Act. This omission plainly evidences the intent to establish a broader right to treatment.

Id. at 457–58.

123. *See* the 1964 desegregation case, Griffin v. School Bd. of Prince Edward County, 377 U.S. 218 (1964). *See also* Argersinger v. Hamlin, 407 U.S. 25 (1972) (in misdemeanor cases, a defendant may not be imprisoned if he did not have counsel at trial); Gideon v. Wainwright, 372 U.S. 335 (1963) (right to counsel in felony cases); Griffin v. Illinois, 351 U.S. 12 (1956) (in cases of appeals by indigents, transcripts must be provided by the state).

124. Craven, *Foreword,* 45 MISS. L.J. 601 (1974) (quoting Norman A. Carlson).

question is not whether all offenders can be rehabilitated, but whether the treatment philosophy combined with the indeterminate sentence is, in the long run, more functional than a definite sentence approach, with or without treatment. If the indeterminate sentence hinders the treatment process, it should be abolished, but lack of knowledge alone is not a sufficient reason for its abolition because that same lack of knowledge to an even greater degree faces the judge or the legislature setting a definite sentence.[125]

C. *General Problems Evaluating Treatment Effectiveness*

The effectiveness of specific treatment methods is difficult to measure because few correctional systems have allocated funds for evaluation of correctional programs.[126] Perhaps the reasons are explained by the severe problems encountered in evaluation research: administrative and treatment personnel attitudes, difficulty in isolating the treatment variable, problems in defining "success," the conflicting roles of the evaluation researcher, and methodological problems.

1. *Administrative and treatment personnel attitudes*

Due to their vested interest in certain treatment programs, administrative and treatment personnel may not wish to have treatment evaluated[127] for fear that the results will be negative and the funds for

125. *See* text accompanying notes 24–27 *supra.*

126. The paucity of evaluation research in the field of corrections is illustrated by a 1966 study based on survey returns from 48 agencies in 46 states, the federal government, and the District of Columbia. Only 19 of those systems had evaluation research programs. Of the $400,000,000 spent annually on adult corrections in the United States, only $1,300,000, or roughly one-third of one percent, was allocated for evaluation and, of that amount, over one-half was spent in two states: New York and California. Fosen & Campbell, *Common Sense and Correctional Science,* 3 J. RES. IN CRIME & DELINQUENCY 73, 75 (1966). Yet, the importance of research should not be underestimated. "Research is the bookkeeping of corrections. Unfortunately, many correctional enterprises operate without such bookkeeping." Glaser, *The Effectiveness of Correctional Education,* in CORRECTIONAL INSTITUTIONS 325 (R. Carter ed. 1972).

127. One commentator suggests:

> Because many people are committed to *particular* treatment approaches, any objective evaluation is viewed with anxiety. As a result, the evidence presented in favor of a program by treaters is usually anecdotal in which striking examples of success are illustrated, but in which failures are rarely mentioned, or if mentioned, are explained with a series of complex rationalizations.

Rabow, *Research and Rehabilitation: The Conflict of Scientific and Treatment Roles in Corrections,* 1 J. RES. IN CRIME & DELINQUENCY 67, 75 (1964).

the programs discontinued. Because of this attitude, some research projects have been co-opted[128] and others have been suppressed.[129] Suppression generally occurs in one of two ways: further evaluation research may be prohibited, or the administration may refuse to permit release of the results of the evaluation or refuse to release until additional research lending support to the treatment program is produced. When further research is required, the administration may change the goals. For example, to the previous goal of "treatment," might be added the goal of "control." Thus, if a higher percentage of released people are returning to the institutions for law violations after the beginning of the treatment program than before, rather than deciding that the treatment is not effective, institution personnel may claim that probation officers and treatment personnel working with the releasees are now doing a superior job of keeping track of their post-release activities. That is, the additional violations were probably occurring before the implementation of the new treatment program, but now the institution is doing a better job of "control."[130]

The most publicized example of administrative refusal to permit publication of research findings involved the research of Robert Martinson and his colleagues, hired in New York by the Governor's Spe-

128. During the 1930's in Illinois a noted sociologist, Ernest Burgess, initiated research in the area of prediction of behavior. Influenced by his research, each of the three major state prisons in the state employed a "sociologist-actuary" whose function was "to advise the parole board of the violation probability predicted by the Burgess table for each parole applicant, and second, to conduct research to improve the prediction tables. This, ideally, would create a cumulatively increasing contribution of science to correctional decision-making." Glaser, *Correctional Research: An Elusive Paradise*, 2 J. RES. CRIME & DELINQUENCY 1, 3 (1965). For a discussion of how that function was co-opted over the years to serve the legal and political interests of the members of the parole board, see *id.* at 3.

129. After discussing the problem of co-optation, Daniel Glaser, a noted criminologist has reported:

> I have heard reports of other evaluative studies conducted by such offices but suppressed from publication by administrators who considered the findings unflattering or feared that they would be misunderstood. At any rate, these researchers soon were assigned the task of counting the volume of business conducted by the correctional system, as a means of justifying budgets. This so-called "research" mainly produced tables for annual reports which indicated prisoners on hand at the beginning and end of fiscal periods, or received and released during these periods. Again we see the coöptation of researchers by administrators trying to equate correctional research with simple head-counting.

Id. at 4.

130. This higher percentage of returned releasees may, of course, also involve the efforts of police. This is not always true, however, since many of the releasees will be returned for violations of parole regulations which may not involve what would otherwise be an unlawful act. *Id.* at 5–6.

cial Committee on Criminal Offenders. The Committee had decided to expand rehabilitation facilities and, seeking to make the decision on programs on the basis of available knowledge, hired researchers to survey the literature on corrections programs published between 1945 and 1967. Later, however,[131]

> the state planning agency . . . [viewed] the study as a document whose disturbing conclusions posed a serious threat to the programs which, in the meantime, they had determined to carry forward. . . . [T]he state had not only failed to publish [the report], but had also refused to give [the author] permission to publish it on [his] own.

When an attorney subpoenaed the information for use in a court case, the research came to the attention of the public. Martinson was able to publish his research results with his opinion that indeterminate sentencing should be abolished.

A second problem is that treatment personnel may be reluctant, or refuse, to articulate the goals of treatment programs, making it impossible for research evaluators to determine whether treatment has been effective;[132] they may have goals which although important from a treatment perspective, are not reflected in lower recidivism, the usual measure of treatment effectiveness.[133] Finally, treatment personnel may argue that treatment is an "art" rather than a science and that its effectiveness cannot be accurately measured. Since they place emphasis on the need for professionally trained treatment personnel, they may argue that if treatment programs do not appear to be effective, the reason is not attributable to the programs, but to the lack of sufficient and adequately trained personnel.[134]

2. *Isolating the treatment variable*

A significant problem with evaluating the effectiveness of treatment is that the role of treatment per se has usually not been measured because of the difficulty, if not impossibility, of isolating the treatment

131. Martinson, *supra* note 16, at 23.
132. Rabow, *supra* note 127, at 75.
133. For a discussion of the uses of recidivism as a measure of treatment effectiveness, see S. REID, *supra* note 11, at 688–91. "[M]any clinical practices are viewed as an art in which any evaluation must be intuitive and subjective rather than empirical and objective." Rabow, *supra* note 127, at 69.
134. Rabow, *supra* note 127, at 67–79.

variable from other potentially influential variables. The changes measured may be the result of treatment, or of factors totally unrelated to treatment.[135]

Additionally, a treatment method may be effective on one individual and not on another, or effective with one category of individuals but not with other types of offenders. "Success" of treatment programs might be due to the differences in the attitudes of reporting. For example, parole officers of treatment groups may be less likely to report additional offenses than the parole officers of control groups.[136]

3. The definition of treatment success: methodological problems

One of the problems with measuring treatment effectiveness lies in the difficulty of defining what is meant by "success." Length of stay on the job or recidivism are the usual measures used by evaluators, but treatment personnel emphasize that one who is "better adjusted" may nevertheless commit another crime or quit a job.[137] A second method sometime used is cost-benefit analysis. If the treatment program costs less than no treatment (for example, persons are released more quickly, decreasing the per person support cost and eliminating the need for construction of more correctional facilities) it may be considered a "success" whether or not any significant rehabilitation has occurred in the inmates.[138]

Correctional evaluation research is most frequently conducted by sociologists, but sociologists traditionally have not been involved in action programs and have been primarily engaged in "pure" research. Other professionals have carried out the actual implementation of that research, the treatment programs. This divorce of the role of the evaluator from that of the treatment personnel has meant that the evaluator is usually not involved in the treatment program at its inception. He therefore has difficulty obtaining pre-treatment data to use as a comparison with post-treatment data.[139]

Just as there exist methodological problems in attempts to predict

135. *Id.* at 73. For a discussion of the problems of isolating the treatment variable, within the context of specific research studies, see S. REID, *supra* note 11, at 697–98.
136. Lerman, *Evaluative Studies of Institutions for Delinquents: Implications for Research and Social Policy*, 13 SOCIAL WORK 55–64 (July 1968).
137. *See* Rabow, *supra* note 127, at 67–79.
138. *See* note 136 *supra*.
139. *See* Rabow, *supra* note 127, at 67–79.

human behavior scientifically,[140] those same methodological problems hinder the efforts of evaluation research. Measuring instruments are inaccurate and often elicit biased responses;[141] control groups are difficult to arrange;[142] personalities of the researchers may affect results; subjects often respond in terms of how they think they are expected to respond;[143] and treatment goals, if formulated, are difficult to define in operational terms.[144]

D. Available Evaluations of Treatment Programs

Despite the methodological problems, some evaluation research has been published. One of the most significant is an evaluation of the treatment programs of the California Department of Correction, the largest prison system in America.[145] California has not only permitted more types of treatment programs than any other system in this country, but has also permitted evaluation of those programs.[146]

In the early 1970's,[147] significant reports from social scientists like

140. *See* Part III-B-1 *supra*.

141. For a discussion of the problems of developing measuring instruments, with particular emphasis on the need for reliability and validity, see F. KERLINGER, *supra* note 37, at 411–66. For a discussion of objective tests and scales, see *id.* at 479–502.

142. This has been discussed by one author as follows:

> Scientifically selected treatment and control groups are imperative for any realistic evaluation of treatment. Yet, only rarely have such groups been systematically compared. But to add complexity to an already difficult problem, it should be noted that a comparison of groups, whether on the basis of recidivism rates, personality tests, or other characteristics, is only one dimension of evaluation. In the absence of supporting information, significant statistical differences among groups do not necessarily justify attributing these differences to one treatment method or the other. In many cases differences might not be a direct function of treatment, but due to the effect of other variables which the statistical comparison does not reveal.

Rabow, *supra* note 127, at 69.

143. This problem has been described in social science literature:

> People like to please other people, and subjects in research studies are no exceptions. Interviewees often answer questions they way that they think the interviewer would like them to answer. And subjects in experiments often act the way they think the observer wants them to act.

J. SIMON, *supra* note 37, at 104–05. Careful researchers, however, may control some of the problems of this nature through careful design of the measuring instrument. *See id.* at 105.

144. For a general discussion of these problems, see J. MANN, CHANGING HUMAN BEHAVIOR 177–89 (1965). *See also* Rabow, *supra* note 127, at 67–79.

145. Ward, *Evaluative Research for Corrections*, in PRISONERS IN AMERICA 184 (L. Ohlin ed. 1973).

146. *Id.* at 184–206. For a summary of this evaluation, see S. REID, *supra* note 11, at 700–03.

147. In 1974, the Federal Bureau of Investigation revealed that crime had increased 15% during the first quarter of that year. Public officials began demanding that more criminals be incarcerated; among the most vocal and influential critics

Martinson[148] suggested that treatment programs had failed to affect recidivism: "With few and isolated exceptions, the rehabilitative efforts that have been reported so far have had no appreciable effect on recidivism."[149] Martinson acknowledged that treatment may be effective but that the instruments for measuring its effectiveness are imprecise, and although he did find some instances of effectiveness, no patterns indicated that any particular treatment program was effective. This may mean that treatment programs "cannot overcome, or even appreciably reduce, the powerful tendency for offenders to continue in criminal behavior."[150]

Martinson's approach may be of questionable validity. His analysis stopped with the year 1967. Major federal aid to prisons and prison reform movements had not yet begun at that time.[151] Martinson admits that his study did not include many kinds of treatment programs, either because they did not exist or because of a lack of published evaluation of the programs,[152] and Martinson also may have been looking for a treatment program which would work "across the board" and, not finding that, concluded that treatment was ineffective.[153]

A study by Professor Bailey[154] reviewed 100 empirical data reports

was then Attorney General William Saxbe. Saxbe's speeches may have been influential in contributing to public dissatisfaction with most forms of correctional treatment programs. He said that he had once believed in rehabilitation but now realized it would not work and that the only deterrent to further crime was punishment. For violent criminals at least, he said, rehabilitation is a myth. Serrill, *Is Rehabilitation Dead?*, 1 CORRECTIONS, May/June, 1975, at 3.

148. Martinson, *supra* note 16.

149. *Id.* at 25 (original in italics).

150. *Id.* at 49.

151. The Law Enforcement Assistance Administration, which has funded treatment and other programs in the criminal justice system, was not in existence until 1968. *See* Omnibus Crime Control Act of 1968, Pub. L. No. 90–351, 82 Stat. 197 (codified in scattered sections of 5, 18, 28, 42 & 47 U.S.C.). Major reforms in treatment, especially the community-based treatment programs, were not in existence at the time of Martinson's research.

152. Serrill, *supra* note 147, at 7.

153. *Id.*, referring to the analysis of Dr. Ted Palmer, formerly research director of California's Community Treatment Project. A closer look should be taken at his methodology, however. He did not actually evaluate treatment programs. He reviewed the published reports of evaluations of treatment programs. His work was limited to reports published between 1945 and 1967 and to evaluations of treatment programs which involved a control group and employed an independent measure of the improvement secured by the treatment method.

154. Bailey, *Correctional Outcome: An Evaluation of 100 Reports*, 57 J. CRIM. L.C. & P.S. 153 (1966). Bailey's report, published prior to Martinson's but similar in its approach, did not gain the national recognition of Martinson's study. Perhaps one of the reasons for the attention given to Martinson's work was the fact that it was suppressed for so long and because, in frustration over the rising crime rate, people

published between 1940 and 1960, along with a few unpublished reports. His study was not limited to treatment in correctional institutions, although a slight majority dealt with forced treatment settings. Over half were concerned with some form of group treatment. In approximately one-half of his sample some positive results were reported, but Bailey questioned those results because the successes or failures tended to be based upon the conclusions and therefore the biases of the authors of the reports. He claimed that if one made a systematic analysis and critically evaluated the reports, the success rate would be lower. "Therefore, it seems quite clear that, on the basis of this sample of outcome reports with all of its limitations, evidence supporting the efficacy of correctional treatment is slight, inconsistent, and of questionable reliability."[155] His report is encouraging, however, in that he found an increasing concern with evaluation research, a concern that has increased since Bailey's study. Bailey also found[156]

> progressive improvement in the calibre of the scientific investigations conducted. This is shown in the increasing numbers of experimental and systematic-empirical investigations, the greater involvement of professionally trained researchers and the resulting increase in sophistication and rigor of research designs, and in the growing efforts to more explicitly relate treatment practice to behavioral science theory.

It was reported that as the rigor of methodological design increased, the frequency of reported success also increased.[157]

VI. CONCLUSION

The indeterminate sentence is under attack nationwide.[158] The at-

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were looking for the type of conclusion Martinson made, *i.e.*, that treatment does not work.

155. *Id.* at 157.

156. *Id.*

157. *Id.* at 156.

158. President Ford has called for a study and United States Attorney General Edward Levi has already announced his advocacy of a determinate sentencing system. Seattle Times, Mar. 14, 1976, at G5, col. 1. Several states, including Washington, are considering abolishing the indeterminate sentence. *See* H.B. 1535, 44th Legis., 2d Ex. Sess. (1976), the thrust of which is to reinstitute definite sentences for certain offenses, with a specific provision that in case of those sentenced to definite terms for classified felonies, there shall be no possibility of parole. *Id.* § 1(9). Maine has abolished not only the indeterminate sentence, but also parole. ME. REV. STAT. ANN. tit. 17–A, §§ 1151–55, 1201–06, 1251–54 (Supp. 1975). Discretionary sentencing, however, is still used. Judges may set definite terms within the limits established by the legislature and good time deductions are still allowed.

tack upon the indeterminate sentence is also an attack upon the treatment philosophy upon which it rests. This is the great danger of what appears to be a move toward an either-or—treatment or punishment —approach. The current inclination to return to definite sentencing appears to be a reaction to the rising crime rates[159] which have occurred during the period when sentencing reflected a treatment-rehabilitation philosophy. The assumption is that treatment and rehabilitation have failed, thus mandating a return to a system emphasizing punishment.[160] The sentence would no longer be individualized in terms of the characteristics of the individual offenders; rather, all who are convicted of certain offenses would receive the same sentence. This approach would be a regression in our criminal justice system. It is a return to the 18th century and the classical school[161] with its theme of "let the punishment fit the crime." It is based on a philosophy of free will which assumes that all people are rational, that they choose pleasure over pain, and that if the pain of punishment is greater than the rewards of crime, they will select law abiding behavior. The philosophy is no more applicable today than it was in the 18th century, and it is based on unsupported assumptions.

This deterrence theory of punishment has received considerable attention in the literature and in court opinions, but little empirical research has been conducted on the subject. The arguments underlying the assumption that punishment deters are mainly based on intuition, emotion, or conjecture. The empirical studies which do exist

159. The FBI's UNIFORM CRIME REPORTS 10 (1974) indicated that there had been an 18% increase in crime for 1974 over 1973: "Murder increased 6 percent, forcible rape 8 percent, and aggravated assault 8 percent. Robbery increased 15 percent. The voluminous property crimes as a group increased 18 percent. Larceny-theft increased 21 percent . . . ." *Id.* Since 1969, the FBI's reports indicate that the violent crimes as a group have increased 47% and the property crimes 37%. *Id.*

160. One must not be too quick, however, to assume that the increased crime rate is the result of "leniency" in sentencing. *See* Seattle Times, Mar. 14, 1976, at G5, col. 1: "Proponents suggest major flaws in the corrections system. The violent-crime rate in Washington jumped 29% in 1974, compared to an 11% national increase, but proportionately fewer offenders were incarcerated." It should be noted that official crime statistics may be inadequate. The FBI's UNIFORM CRIME REPORTS, considered to be the best official source of crime reporting, have been seriously questioned and may be affected by methods of reporting or by administrative discretion. *See, e.g.*, Black, *Production of Crime Rates*, 35 AM. SOC. REV. 733 (1970); Zeisel, *F.B.I. Statistics—A Detective Story*, 59 A.B.A.J. 510 (1973). *See also* PRESIDENT'S COMM'N ON LAW ENFORCEMENT AND ADMIN. OF JUSTICE, THE CHALLENGE OF CRIME IN A FREE SOCIETY 25–27 (1967). It is thus possible that the increase in crime represents a change in reporting, a change in administrative decision, an increase in police personnel, or a number of other factors. *See* S. REID, *supra* note 11, at 73–74.

161. *See* note 13 *supra*.

suggest that severe punishments may not deter serious crimes.[162] Moreover, the classical theory that people are rational and that they will choose to obey the law if the result of disobeying is painful defies experience and our knowledge of human behavior.[163]

The argument is made that at least punishment deters those who are in prison. It is, of course, obvious that while one is restrained one cannot commit a crime outside the institution. But this argument fails to cope with the reality that most offenders at some time will be released into the community. The crucial question is whether, *in the long run,* they and society are in a better position because of their incarceration for a specified period of time despite individual circumstances involved in their crimes. This is the question which remains unanswered by those who argue for a return to definite sentencing. They must confront the arguments that prison sentences may increase the possibility that an offender will be a recidivist when he or she returns to society. Such punishment may "aggravate these human reactions [aggression, regression with dependency, resignation, fixation or obstinate clinging to deviant patterns], which are frequently connected with a long history of prior frustration . . . . [The offender] who has turned to aggressive outbursts may leave the punitive situation much more prone to violent aggression than when he entered."[164]

A second assumption, that there is a causal relationship between the increased crime rate and the indeterminate sentencing-treatment approach, assumes too much. Not only are official crime statistics often

162. *See, e.g.,* Chiricos & Waldo, *Punishment and Crime: An Examination of Some Empirical Evidence,* 18 Soc. Probs. 200 (1970); Gibbs, *Crime, Punishment and Deterrence,* 48 Sw. Soc. Sci. Q. 515 (1969); Tittle, *Crime Rates and Legal Sanctions,* 16 Soc. Probs. 409 (1969). *See also* Sellin, *The Death Penalty, Deterrence, and Police Safety,* in The Sociology of Punishment and Correction 370 (2d ed., N. Johnston, L. Savitz & M. Wolfgang 1970), concluding that "executions have no discernible effect on homocide death rates."

163. As this author has previously noted: "Punishment occurs in the future, and the fear of that punishment is not strong enough to counteract the passion of the present, especially for people who are oriented toward immediate, not delayed, gratification." S. Reid, *supra* note 11, at 501–02. As King County Superior Court Judge Donald Horowitz has said, "Most criminals don't think the way you and I think . . . . These [referring to the large number of criminals who have alcohol, drug, or mental problems] are people who cannot rationally weigh the advantages and disadvantages of committing a crime." *See* Seattle Times, Mar. 14, 1976, at G5, col. 1. The threat of punishment may deter some people from committing some crimes, for example shoplifting. *See* Andenaes, *Determinism and Criminal Law,* 47 J. Crim. L.C. & P.S. 406 (1956). In those cases, however, it may be that apprehension is sufficient deterrence and that punishment in the form of deprivation of liberty is excessive.

164. Ball, *Why Punishment Fails,* 31 Am. J. Correction, Jan.–Feb., 1969, at 19.

inadequate to determine the cause of the increase,[165] but the assumption ignores the very warning given by the FBI in its UNIFORM CRIME REPORTS. The FBI emphasizes that "[c]rime is a social problem" and that the "reader of this publication is cautioned against comparing statistical information of individual communities solely based on a similarity in their population counts."[166] Numerous other factors are mentioned, including relationships and attitudes of law enforcement and the community, policies of the prosecuting officials, density and size of the community population, composition of the population, stability of population, climate, education, recreational, and religious characteristics, and effective strength of the police force.[167]

The conclusion that the treatment philosophy of the indeterminate sentence has led to the increased crime rate has led to a third major assumption by those who argue for the abolition of discretion in sentencing. The assumption is that treatment has failed. There is little empirical evidence to support that statement.[168] To the contrary, it

165. *See* note 160 *supra*.

166. FEDERAL BUREAU OF INVESTIGATION, UNIFORM CRIME REPORTS at v (1974).

167. Any or all of these factors might account for the increasing crime rate. For example, traditionally most arrestees have been male, not female, but that gap is closing. It is possible that the recent "increase" in crime among women is the "result" of an increased willingness to arrest and prosecute women, not an increase in the proportion of women committing crimes; or, it may be the result of their increased participation in the total life of the community, particularly the economic system, with an increased exposure to opportunities for committing crimes. For example, a noted criminologist, Sir Leon Radzinowicz, in analyzing data on crime noted that participation of females in shoplifting, political terrorism, and drug-induced crimes has apparently been increasing. He concluded:

> This is one of criminology's few laws. Any member of society who starts to take an increasing role in the economic and social life of that society will be more exposed to crime and will have more opportunities and therefore will become more vulnerable and more prone to criminal risk.

TIME, Sept. 10, 1973, at 48.

Another important variable to consider in analyzing crime statistics is age. Of the total arrests reported by the F.B.I. in 1974, 57.8% were of persons twenty-four years old or under, with another 11.1% of persons ages 25–29, for a total of 68.9% of the total arrests involving persons thirty or younger. FEDERAL BUREAU OF IVESTIGATION, UNIFORM CRIME REPORTS 187–88 (1974). That proportion of the population is increasing much faster than the other age groups. *See* S. REID. *supra* note 11, at 58–59. Thus more crimes would be expected due to the increase in the numbers of persons in the "high risk" age group. Furthermore, these persons are becoming increasingly concentrated in the urbanized areas where crime rates traditionally have been higher than in rural areas. *See* Ferdinand, *Demographic Shifts and Criminality: An Inquiry*, 10 BRIT. J. OF CRIMINOLOGY 169 (1970); Boggs, *Urban Crime Patterns*, 30 AM. SOC. REV. 899 (1965); K. HARRIES, THE GEOGRAPHY OF CRIME AND JUSTICE (1974); and S. REID, *supra* note 11, at 67–69.

168. *See* notes 135–57 and accompanying text *supra*. For a discussion of treatment programs which have shown some effectiveness, see S. REID, *supra* note 11, at 559–61, 649–61.

can be argued that treatment has not really been tried. Attention has already been given to the lack of treatment facilities and personnel in correctional institutions.[169] In addition, a treatment program cannot be expected to be effective if it is not accompanied by support programs within correctional facilities. Inadequate educational and vocational facilities within the prison, improper classification systems, strained relationships between correctional staff (especially guards and inmates), limited use of work release and furlough programs, daily living conditions, and inadequate preparation for release mitigate against the effectiveness of any treatment efforts.[170] The problems are further magnified when the individual returns to a society not only unprepared to live in that society,[171] but to face the constant rejection and hostility of a society unwilling to consider major social and economic changes which might be contributing to problems of crime.[172]

Because of the practical problems discussed in this article as well as the assumptions discussed above, many have concluded that indeterminate sentencing is inherently a dysfunctional system. This focus, however, is misplaced. The abuses of the system and the lack of support for the system, not the system itself, are at fault. Before the system is abolished, an effort should be made to provide adequate support and correct the abuses. The shortage of treatment personnel must be corrected. Adequate correctional facilities must be provided, along with funds for effective utilization of the personnel and the facilities. Lack of knowledge must be attacked with a massive research effort. Judges must be better trained in the behavioral sciences and they must be provided with better trained probation officers and social

169. *See* notes 114–23 and accompanying text *supra*.

170. For a detailed discussion of all of these phases of the correctional program, see S. REID, *supra* note 11, at 561–89. *See also* PRESIDENT'S COMM'N ON LAW ENFORCEMENT AND ADMIN. OF JUSTICE, *supra* note 160, at 159: "For a great many offenders . . . corrections does not correct. Indeed, experts are increasingly coming to feel that the conditions under which many offenders are handled, particularly in institutions, are often a positive detriment to rehabilitation."

171. One report indicates:

> Life in many institutions is at best barren and futile, at worst unspeakably brutal and degrading. To be sure, the offenders in such institutions are incapacitated from committing further crimes while serving their sentences, but the conditions in which they live are the poorest possible preparation for their successful reentry into society, and often merely reinforce in them a pattern of manipulation or destructiveness.

PRESIDENT'S COMM'N ON LAW ENFORCEMENT AND ADMIN. OF JUSTICE, *supra* note 160, at 159.

172. For an analysis of social structural theories of criminal behavior, see S. REID, *supra* note 11, at 172–207; for an analysis of social process theories, see *id.* at 208–51.

workers who can prepare more detailed and helpful pre-sentence reports. Finally, problems created by the politicization of parole boards must be abolished. Many of the criticisms aimed at the indeterminate sentence are really statements about the abuses of that system made by parole boards composed of people who are not adequately trained or who do not take the time required for careful analysis of the case they are to consider.[173] It is clear that the indeterminate sentence cannot be adequately implemented if the parole board is functioning inadequately.[174]

The alternative of a definite sentence with less emphasis on treatment programs is easier than the one proposed here. It is easier to put the offender out of sight than to examine the social structure for cracks. It is easier to punish than to treat. It is easier to abolish the entire system of discretionary sentencing by attacking the abuses than to correct those abuses and provide the resources needed for an adequate implementation of the philosophy of individualized sentencing. It is easier to attack the judges for "leniency" than to examine the need to decriminalize the criminal code or to provide sufficient and well trained probation and parole officers or adequate community treatment facilities. It is also easier to lose than to win the war against crime.

173. For example, in the official report on the riots at Attica, it was revealed that the average parole hearing lasted only 5.9 minutes and that most of the questions asked of the offenders were superficial. No reasons were given for denial of parole and although three commissioners were required to "hear" each case, while one commissioner questioned the candidate before the board, the other two were often reading the files for the next candidates. NEW YORK STATE SPECIAL COMM'N ON ATTICA, ATTICA 95–96 (Bantam 1972).

174. It may be that the abuses of the system can be corrected only by court action. *See, e.g.,* Morrissey v. Brewer, 408 U.S. 471 (1972) (due process requires preliminary hearing to determine probable cause to believe parole has been violated); Childs v. United States Bd. of Parole, 511 F.2d 1270 (D.C. Cir. 1974) (due process requires a written statement of reasons for denying parole application); King v. United States, 492 F.2d 1337 (7th Cir. 1974) (same); Wren v. United States Bd. of Parole, 389 F. Supp. 938 (N.D. Ga. 1975) (decision of board is subject to judicial review where it acts in an arbitrary or capricious manner, abuses its discretion, or denies a prisoner's constitutional rights); Soloway v. Weger, 389 F. Supp. 409 (M.D. Pa. 1974) (board decision denying parole insufficient to constitute a meaningful statement of reasons).