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THE BOARD OF PRISON TERMS AND PAROLES AND INDETERMINATE SENTENCING: A CRITIQUE

Jack Meyerson*

Washington newspapers regularly report superior court prison sentencings. A reader may learn that a rapist received a life sentence or a burglar a 15-year sentence. While some may feel these sentences are too harsh, and others may believe they are justifiable, few realize that the sentence which appears in the newspaper bears little relationship to the length of time an offender will spend in prison; the amount of time actually served is determined by the Board of Prison Terms and Paroles.[1]

The Board of Prison Terms and Paroles is given the authority to release most felons from prison when it has determined that the prisoner has been rehabilitated,[2] regardless of the length of time the prisoner has served. Rehabilitation usually consists of satisfactory participation in a formal prison program designed to change the person's criminal behavior into behavior which is more acceptable. The Board has, however, become a target of manipulation by prisoners who indicate outward compliance with rehabilitation procedures in order to be deemed "rehabilitated" and therefore released from prison prior to the expiration of their maximum sentences. In order to alleviate this and other problems with the present system, it is suggested that much of the Board's discretion to release prisoners prior to the completion of their maximum terms be removed.

I. THE BOARD OF PRISON TERMS AND PAROLES

A. Board Powers

In Washington, when an offender is convicted and sent to prison,

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1. For personal observations on how parole and sentence length decisions are made, see Johnson, *The Board of Prison Terms and Paroles: Criteria in Decision Making*, 51 WASH. L. REV. 643 (1976).
2. *See* notes 12–15 and accompanying text *infra*.

the sentencing judge sets only a maximum term of confinement.[3] This maximum term is set in accordance with the applicable criminal statute. Although all felonies carry substantial prison terms and many serious crimes are punishable by as much as twenty years to life,[4] most felons actually serve much shorter terms because the Board of Prison Terms and Paroles has broad discretion over the minimum amount of time a prisoner must serve. Therefore, of those criminals sentenced to prison, the median term of imprisonment is 16.3 months.[5] Most prisoners are paroled prior to the completion of their minimum terms.[6]

Within six months after a convicted felon is admitted to an institu-

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3. WASH. REV. CODE § 9.95.010 (1974) provides in part:

> When a person is convicted of any felony . . . the court shall sentence such person to the penitentiary, or, if the law allows and the court sees fit to exercise such discretion, to the reformatory, and shall fix the maximum term of such person's sentence only.
>
> The maximum term to be fixed by the court shall be the maximum provided by law for the crime of which such person was convicted, if the law provides for a maximum term.

The statute states that where the law fails to provide a maximum term, the sentencing judge must impose a maximum of at least twenty years and may set the maximum at life imprisonment. *Id.*

4. For example, murder and first degree arson are class A felonies, punishable by imprisonment of from 20 years to life. WASH. REV. CODE §§ 9A.32.030(2), -.050(2), 9A.48.020(2), 9A.20.020(1)(a) (Supp. 1975). *Id.* tit. 9A is effective July 1, 1976. *Id.* § 9A.20.010 establishes five classes of crimes for purposes of punishment: class A, class B, and class C felonies; gross misdemeanors; and misdemeanors. The maximum authorized sentences are set by *id.* § 9A.20.020:

	Prison	*Fine*
Felony Class A	20 years to life	not more than $10,000
Felony Class B	not more than 10 years	not more than $10,000
Felony Class C	not more than 5 years	not more than $ 5,000
Gross Misdemeanor	(jail) not more than 1 year	not more than $ 1,000
Misdemeanor	(jail) not more than 90 days	not more than $ 500

Id. § 9A.20.030 permits restitution to victims in lieu of fines and *id.* § 9A.20.040 attempts to relate crimes outside of Title 9A to the sentencing structure above.

If one is convicted of aggravated murder, however, the mandatory punishment is death. If the death sentence is commuted or held to be unconstitutional, the prisoner receives a mandatory life sentence. That life sentence cannot be "suspended, deferred, or commuted by any judicial officer, and the board of prison terms and paroles shall never parole a prisoner or reduce the period of confinement nor release the convicted person as a result of any automatic good time calculation nor shall . . . the convicted person . . . participate in any work release or furlough program." *Id.* § 9A.32.047. *But see* Gregg v. Georgia, 44 U.S.L.W. 5230 (U.S. July 2, 1976).

5. Office of Research, Washington State Dep't of Social & Health Serv., Table 5 [Median Length of Stay in Months by Race, by Offense Category and by Fiscal Year of Release (Regular Parole)], June, 1973 (unpublished statistics on file at the offices of the *Washington Law Review*).

6. *Compare* Table 3 *with* Table 10 in Comment, *A Perspective on Adult Corrections in Washington*, 51 WASH. L. REV. 495 (1976).

tion, the Board fixes the duration of his confinement.[7] This duration of confinement is a minimum term.[8] Once the initial minimum term has been established, the Board may, at any subsequent time, redetermine it.[9] If a prisoner behaves well and has a good record within the institution, the Board may allow good time credits toward the reduction of the term of imprisonment.[10] Similarly, if a prisoner violates rules and regulations of the institution and is generally uncooperative, the Board may revoke and redetermine the offender's minimum term.[11] A prisoner may not be released from a penitentiary or reformatory before the expiration of his maximum term unless, in the opinion of the Board, his rehabilitation has been complete and he is a fit subject for release.[12]

The discretion of the Board also extends to convictions for criminal acts for which the legislature has mandated a five-year minimum sen-

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7. WASH. REV. CODE § 9.95.040 (1974). The Board's term must not exceed the maximum provided by law or set by the sentencing judge.

8. State v. Fairbanks, 25 Wn. 2d 686, 171 P.2d 845 (1946); Pierce v. Smith, 31 Wn. 2d 52, 195 P.2d 112 (1948). In *Fairbanks* the supreme court held that the Board has the authority to set a minimum term for criminal conduct that was explicitly outlawed subsequent to the enactment of the indeterminate sentencing system. The court in *Pierce* stated specifically that the Board's determination constitutes a minimum term.

9. WASH. REV. CODE § 9.95.052 (1974) states:

> At any time after the board of prison terms and paroles has determined the minimum term of confinement of any person subject to confinement in a state correctional institution, the board may request the superintendent of such correctional institution to conduct a full review of such person's prospects for rehabilitation and report to the board the facts of such review and the resulting findings. Upon the basis of such report and such other information and investigation that the board deems appropriate the board may redetermine and refix such convicted person's minimum term of confinement.

10. *Id.* § 9.95.070 states:

> Every prisoner who has a favorable record of conduct at the penitentiary or the reformatory, and who performs in a faithful, diligent, industrious, orderly and peaceable manner the work, duties, and tasks assigned to him to the satisfaction of the superintendent of the penitentiary or reformatory, and in whose behalf the superintendent . . . files a report certifying that his conduct and work have been meritorious and recommending allowance of time credits to him, shall upon, but not until, the adoption of such recommendations by the board . . . be allowed time credit reductions from the term of imprisonment fixed by the board . . . .

The maximum good time credit which can be allowed is one-third the minimum term set by the board. *Id.* § 9.95.110 (1974).

11. *Id.* § 9.95.080. The statute also provides that good time credits may be removed only after a hearing before the Board. At the hearing the offender is entitled to present evidence and witnesses on his behalf.

12. Lindsey v. Superior Court, 33 Wn. 2d 94, 204 P.2d 482 (1949). The court stated:

> The discharge or release from imprisonment of a convicted person serving a maximum sentence is not, prior to the expiration of his maximum term, a matter of right, but is a matter of discretion with the board of prison terms and paroles.

tence for the first offense, for instance, commission of a felony while armed with a deadly weapon.[13] In these instances the Board may parole an inmate prior to expiration of a mandatory minimum sentence provided such inmate has behaved in a manner that satisfies the Board.[14] Four of the seven Board members[15] can set any minimum they deem appropriate, even for those offenses where the legislature imposed mandatory minimum terms of life and prohibited parole at less than 20 years minus good time. Consequently, with limited exceptions, an offender's duration of incarceration is not established by the sentencing judge, but by the members of the Board of Prison Terms and Paroles.[16]

B. *The Members and Procedures of the Board*

The legislature has provided that the Board of Prison Terms and Paroles[17] consist of seven members appointed by the governor with

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> Such prisoner may not be released from the penitentiary or the reformatory unless, in the opinion of the board of prison terms and paroles, his rehabilitation has been complete . . . .

Id. at 104–05, 204 P.2d at 487. *See* WASH. REV. CODE § 9.95.100 (1974). *See also* Butler v. Cranor, 38 Wn. 2d 471, 230 P.2d 306 (1951), where the court held that a prisoner was not entitled to release as a matter of right until the end of his maximum sentence. Release of the offender was entirely within the discretion of the Board.

13. If by special verdict of the jury or by a finding of fact by the judge it is determined that the defendant was armed with a deadly weapon during commission of the crime, *see* WASH. REV. CODE § 9.95.015 (1974), *id.* § 9.95.040(1), (2) compels the Board to set a mandatory minimum sentence. *Id.* § 9.95.040(2) defines the term "deadly weapon." If, however, the trial judge or jury makes no special finding as required by *id.* § 9.95.015, the Board need not impose a mandatory minimum sentence. *See* State v. Coma, 69 Wn. 2d 177, 417 P.2d 853 (1966). *Id.* § 9.41.025 requires the addition of a penalty for use of a firearm in an "inherently dangerous crime" to the penalty prescribed by law for commission of the crime without the firearm. *See* State v. Smith, 11 Wn. App. 216, 521 P.2d 1197 (1974); State v. Canady, 69 Wn. 2d 886, 421 P.2d 347 (1966).

14. WASH. REV. CODE § 9.95.040(4) (1974) provides that, with the exception of cases of murder in the first or second degree, "the board may parole an inmate prior to the expiration of a mandatory minimum term, provided such inmate has demonstrated meritorious effort in rehabilitation and at least four board members concur in such action . . . ."

15. In 1969 the size of the Board was increased from five to seven. *Id.* § 9.95.003. At that time *id.* § 9.95.040 (requiring four Board members to concur in order to parole an inmate prior to the expiration of a mandatory minimum term) was not amended to reflect that change. In Baker v. Morris, 84 Wn. 2d 804, 529 P.2d 1091 (1974), the court struck down an administrative rule requiring the concurrence of six of the seven members before a mandatory minimum term could be waived.

16. The power of the Board is limited in instances of aggravated murder, first and second degree murder, and first degree rape. WASH. REV. CODE §§ 9A.32.047 (Supp. 1975), 9.95.040 (1974), 9.79.170 (Supp. 1975).

17. *Id.* § 9.95.001 (1974).

the consent of the Senate.[18] Board members hold office for five years and are removable only for court-determined cause during their term of office.[19] Members are required to meet with offenders at the state penitentiary and other institutions to study the cases of convicted persons whose terms of imprisonment are to be determined, and to handle parole applications.[20] The Board is authorized to transact business in panels of two members, but a majority of the members must decide policy matters and matters pertaining to the internal affairs of the Board.[21] The Board is not authorized to utilize hearing officers, but pending legislation would authorize the use of hearing officers and would limit Board functions to appellate adjudication and rulemaking in the areas of minimum sentence determination, pardon, and parole.[22]

One of the problems of the Board is the fact that it is not an elective body and its actions are not subject to review. Consequently, Board decisions are not subject to effective public supervision. Additionally, the statutes governing Board operations do not specify any qualifications for members, and, although the members of recent Boards have displayed unusually appropriate qualifications for service,[23] such qualifications are not guaranteed where the appointment of members might be subject to undue political influence or where members could be appointed on the basis of past political service rather than penological expertise.

II. WASHINGTON SENTENCING STRUCTURE: A CRITIQUE

Washington has a modified indeterminate sentencing system. The theory behind this system is that offenders are to remain in prison until they are rehabilitated. Criminal conduct is thus viewed as a dis-

18. *Id.* § 9.95.003.
19. *Id.*
20. *Id.* § 9.95.005.
21. *Id.* § 9.95.007.
22. *See* S.H.B. 487, § 6, 44th Legis., Reg. Sess. (1975).
23. Of the seven present Board members, six have college degrees and five have advanced degrees. Four members hold the degree of Master of Social Work. All seven members have experience in the criminal justice system either in law enforcement, juvenile services, prisons and other state institutions, or parole and probation work. A description of the members of the Board of Prison Terms and Paroles is on file at the offices of the *Washington Law Review*.

ease; something foreign and abnormal in the individual which presumably can be cured.[24] Criminals are to be isolated and undergo a series of treatments. Once "rehabilitated," they may return to the community. Therefore, although a judge may send an offender to prison for a lengthy maximum term, the length of commitment will actually depend upon the offender's response to treatment programs, as evaluated by the Board.

The Washington statutes outlining imprisonment procedures are phrased in terms indicative of the theory behind the sentencing system: each offender serves his term until "his rehabilitation has been complete and he is a fit subject for release."[25] Upon being committed to prison, all prisoners go through an extensive initial evaluation.[26] Based on this evaluation inmates are then placed in available prison treatment programs. Their progress is monitored and that progress determines the length of time that they ultimately serve. An individual may, through his efforts within prison, mitigate or modify his sentence. The concept is that by testing an individual's responses within the institution, penal authorities will be able to determine when he or she can be a productive member of society and safely return to the community.

A. Inequality: Different Punishments for Similar Crimes

The first difficulty with the Washington indeterminate sentencing system is that, because of the discretionary power held by prison officials and members of the parole board, individuals who commit similar crimes serve different sentences. For example, a burglar who satisfactorily completes his high school education in prison, and who actively participates in group therapy sessions may be released earlier than a person with the very same history of criminality who is uncooperative and who refuses to participate in group therapy.

Within recent years this system of indeterminate sentencing has resulted in dramatically disparate sentences.[27] The interjection of so-

24. *See generally* K. MENNINGER, THE CRIME OF PUNISHMENT (1969); Morris & Buckle, *The Humanitarian Theory of Punishment: A Reply to C.S. Lewis*, 6 RES JUDICATAE 231 (1953).

25. WASH. REV. CODE § 9.95.100 (1974).

26. *See generally id.* ch. 72.13. The reception and classification center for adult males is located at Shelton, Washington. *See also* Comment, *A Perspective on Adult Corrections in Washington*, 51 WASH. L. REV. 495 (1976).

27. Two articles in a Seattle newspaper recently highlighted the plight of Bobbie

ciological and rehabilitative strategies into determining an offender's length of incarceration creates this inequality. It has been the author's experience that those prisoners who "know how to do time" obtain earlier release. Serious social policy questions as to the advisability of permitting disparate treatment of offenders based on factors determined to be important by an administrative tribunal emerge from this experience.[28]

Miller who, at age 16, was committed to a state institution for joyriding. At the time of his release he had spent 9 years in a reformatory and a prison. This excessive stay resulted from what prison officials and the Board of Prison Terms and Paroles considered his rebellious and unrepentent manner within the institutions. Seattle Post-Intelligencer, Jan. 13, 1975, at A7, col. 2, and Mar. 18, 1975, at A9, col. 2.

In contrast, the author was involved in the case of an offender who had served four previous prison terms. Most recently he had been sentenced for life, having raped a woman while armed with a firearm. Such an offense carries a mandatory minimum of five years and the sentencing judge committed him for life. He was released by the Board after having served slightly over one year. I learned of his prior criminal history after interviewing a young mother he had raped, kidnapped, and robbed.

28. Equal protection is guaranteed both by U.S. CONST. amend. XIV, §1 and WASH. CONST. art. I, § 12, but the courts have not found the disparities in length of sentences inherent in indeterminate sentencing violative of those constitutional provisions. In State v. Hurst, 5 Wn. App. 146, 486 P.2d 1136 (1971), the Washington Court of Appeals, in a case involving a felon who was sentenced to a greater term than his partner in the same crime, held that although disparity was generally to be avoided, the disparity in sentencing was justifiable given the defendant's criminal background. The court, citing State *ex rel.* O'Brien v. Towne, 64 Wn. 2d 581, 392 P.2d 818 (1964), indicated that differences in degree of prior criminal involvement were a rational basis for classification. *See also* Davis v. Rhay, 156 F. Supp. 114 (E.D. Wash. 1957), *aff'd*, 256 F.2d 617 (9th Cir. 1958); State v. Bresolin, 13 Wn. App. 386, 534 P.2d 1394 (1975).

The administrative determination of sentencing has also been upheld as consistent with equal protection standards. In Stiltner v. Rhay, 258 F. Supp. 487 (E.D. Wash.), *aff'd*, 367 F.2d 148 (9th Cir. 1965), *cert. denied*, 385 U.S. 941 (1966), *rehearing denied*, 385 U.S. 1044 (1967), the District Court for the Eastern District of Washington stated, with respect to the Washington statutory system:

> [I]t is unnecessary to cite authority for the proposition that the enactment of reasonable criminal statutes is within the police powers of a state. The statutes here do not conflict with any constitutional limitation nor with any subject delegated to the federal government. They are not unconstitutional.

258 F. Supp. at 490. In two early cases, Ughbanks v. Armstrong, 208 U.S. 481 (1907), and Dreyer v. Illinois, 187 U.S. 71 (1902), the United States Supreme Court held that indeterminate sentencing statutes did not violate the federal constitution. *See also* State v. Deats, 83 N.M. 154, 489 P.2d 663 (1971).

The Washington system of indeterminate sentencing does not constitute an unconstitutional delegation of judicial power by the legislature. State v. Mulcare, 189 Wash. 625, 66 P.2d 360 (1937); *Ex parte* Behrens, 55 F. Supp. 460 (E.D. Wash. 1944). Additionally, the courts have held that Washington sentences may not be challenged as cruel and unusual punishment under U.S. CONST. amend. VIII or WASH. CONST. art. I, § 14 until the Board of Prison Terms and Paroles has determined the minimum term. State v. Fairbanks, 25 Wn. 2d 686, 171 P.2d 845 (1946); State v. Bresolin, 13 Wn. App. 386, 534 P.2d 1394 (1975); State v. Harp, 13 Wn. App. 239, 534 P.2d 842, *review denied*, 85 Wn. 2d 1015 (1975); State v. Floyd, 11 Wn. App. 1, 521 P.2d 1187 (1974); State v. Hurst, 5 Wn. App. 146, 486 P.2d 1136 (1971). However, in State v. Lindsey, 187 Wash. 364, 61 P.2d 293, *rev'd*, 300 U.S. 397 (1937), the United States Supreme Court held that U.S. CONST. art I, § 10, pertaining to ex post facto laws, was

Some disparity in sentences might be acceptable in Washington if the fundamental concept of indeterminate sentencing were sound, but it is not clear that prisons do perform the task of rehabilitation. Studies indicate that the programs individuals undertake while in prison have no effect on their subsequent involvement in criminal behavior. The best known study in this area is that of Robert Martinson.[29] At the request of the New York State Government Commission on Criminal Offenders, Martinson analyzed 231 studies on the treatment of criminality. He reviewed studies, published between 1945 and 1967, that met various tests of methodological adequacy in an attempt to determine if success in the prison context correlated with future conduct. Martinson arrived at a number of startling conclusions. First, he concluded that participation in special education programs does not affect recidivism rates. The extent of education and the development of special skill training received in prison had no apparent effect on recidivism.[30] Also, participation in vocational training programs within prison did not produce fewer recidivists.[31] Even individuals who had undergone extensive individualized psychotherapy returned to prison in large numbers after release.[32] Martinson concluded that "to date, education and skill development have not lowered recidivism by rehabilitating criminals."[33] Other studies appear to verify the results obtained by Martinson.[34]

Statistics available in Washington appear to confirm these studies. The Office of Research of the Washington Department of Social and Health Services compiles statistics indicating the number of parolees

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violated when an offender was sentenced under an indeterminate sentencing system after having been convicted under the pre-indeterminate sentencing statutory provisions.

29. Martinson, *What Works?—Questions and Answers About Prison Reform*, 35 PUB. INTEREST 22 (1974).

30. *Id.* at 26.

31. *Id.* at 25.

32. *Id.* at 29.

33. *Id.* at 28.

34. AMERICAN FRIENDS SERV. COMM., STRUGGLE FOR JUSTICE 87 (1971). The Friend's Service Committee, after an extensive study of prisons, concluded there is considerable evidence that various treatment strategies do not make any significant difference in the future criminal behavior of inmates.

The Citizens Inquiry on Parole and Criminal Justice in New York City in 1954 prepared a study measuring the results of the parole system. They found no significant difference between the return to prison of those paroled and those who were not paroled and served out their full terms. In one year about 10–11% of each group went back to prison. They concluded, "Clearly, the parole board was unable to guess who had been rehabilitated and who had not." J. Q. WILSON, THINKING ABOUT CRIME 172 (1975).

(who presumably were rehabilitated at the time of their release) who have subsequently returned to Washington institutions. Of all parolees released between January 1, 1965 and December 31, 1972, 29.8% had returned to an institution as of June 30, 1973.[35] Of those released during calendar year 1971, 22% had returned by June of 1973.[36] As the time since release increases, so does the percentage of recidivists. Of those persons paroled in 1965, 40.6% had returned to an institution within the State of Washington by June 1973.[37] Of 14,182 felons admitted to Washington State correctional facilities from 1965 to 1973, 4,088 had previous institutional commitments.[38]

These recidivism figures demonstrate that correctional institutions within the State of Washington have not been totally successful in changing the behavior patterns of persons incarcerated. The figures reflect returns to state institutions for felony convictions and may, therefore, underestimate the total number of crimes committed by paroled felons. Nevertheless, the figures, as well as academic studies, point to the conclusion that prisons do not rehabilitate all criminal offenders.

The assumptions underlying Washington's system of indeterminate sentencing may be unrealistic. An initial difficulty is that prison behavior is not a satisfactory guide to subsequent behavior in the community. A parole board "purport[s] to predict the likelihood of the prisoner's future criminality and to fix his release date partly in relation to that prediction,"[39] but prison behavior may not be a predictor of community behavior. A prisoner's avoidance of prison disciplinary

35. Office of Research, Washington State Dep't of Social & Health Serv.. Table 1 [Total Number of Releases to Parole from Washington State Adult Corrections During the Period Beginning January 1, 1965 and Ending December 31, 1972 by Offense and by the Number Who Had Returned as of June 30, 1973], June, 1973 (unpublished statistics on file at the offices of the *Washington Law Review*).

36. *Id.*, Table 3 [Number of Releases to Parole from Washington State Adult Corrections During Calendar Year 1971 by Offense and by Number and Percent Returned to DAC Facilities], June, 1973 (unpublished statistics on file at the offices of the *Washington Law Review*).

37. *Id.*, Table 9 [Number of Releases to Parole from Washington State Adult Corrections During Calendar Year 1965 by Offense and by Number and Percent Returned to DAC Facilities], June, 1973 (unpublished statistics on file at the offices of the *Washington Law Review*).

38. *Id.*, ADULT CORRECTIONS DEMOGRAPHIC DATA FOR COUNTIES PARTICIPATING IN ADULT PROBATION SUBSIDY vol. 8 (Research Rep. 2–1, June, 1975), at Table 37. Of the total number of admissions, 8,735 had no prior commitments and 1,359 were "not reported." *Id.* Presumably, the latter category may contain individuals who have had prior commitments.

39. N. MORRIS, THE FUTURE OF IMPRISONMENT 31 (1974).

offenses and his involvement in prison training programs do not correlate with later successful completion of parole or with later avoidance of criminal convictions.[40]

Other criteria may be more helpful in appraising the likelihood of future criminality than behavior while in prison. Specifically, an offender's record before coming to prison, the preservation of family ties, the availability of a place to live, and the existence of a job may be significant factors upon release.[41] Age and maturation also appear to result in diminished criminal involvement.[42]

Additionally, a paramount objective of the prison system is to maintain custody of those offenders who, if released, would commit violent crimes against other persons. Unfortunately, none of our existing diagnostic techniques enable the Board or anyone else to say who, among a certain population, will subsequently commit a violent offense. Studies conducted on the ability to predict future violent behavior conclude that it may be impossible.[43]

B. Board Effectiveness: A Lack of Statutory Guidelines

A second serious difficulty in our system of indeterminate sentencing is the theory that the Board of Prison Terms and Paroles can properly exercise the uncontrolled discretion it has been granted. Supposedly, the Board examines all aspects of the prisoner's life and behavior and decides if he or she is ready for release. No Board can make profound judgments on the thousands of cases it hears each year. A decision as to who is rehabilitated and who is not is made by

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40. *Id.* at 35.

41. *See generally* D. GLASER, THE EFFECTIVENESS OF A PRISON AND PAROLE SYSTEM (1964).

42. N. MORRIS, *supra* note 39, at 35–36.

43. One study found that 86% of those identified as potentially dangerous subsequently were not found to be involved in violent acts. N. MORRIS, *supra* note 39, at 34. In another study completed in 1972, Doctors Harry Kelso, Richard Boucher, and Ralph Garofalo reported on a ten-year study of the ability to predict dangerousness of high-risk offenders in prison in Massachusetts. They divided the population into dangerous and non-dangerous offenders. Of 386 "safe" offenders, 31 (8%) were subsequently involved in violent crimes. Of 49 "dangerous" offenders, 17 (35%) were subsequently involved in violent crimes. *Id.* at 71. Although under their criteria the doctors were able to predict with some greater degree of frequency those offenders who would be violent, this classification system should not be utilized to determine minimum terms and parole dates; it is still not precise enough. If a parole board had followed the index of dangerousness as developed in the above study, 31 dangerous offenders would have been returned to the streets and two-thirds of those classified as dangerous would have been unfairly detained.

reviewing a file of reports and interviewing the inmate for ten to fifteen minutes. In the final analysis, the Board is making extremely difficult and sophisticated decisions without fixed criteria.[44]

The legislature has never defined what constitutes "satisfactory progress towards rehabilitation" or what factors should be considered to determine who is or is not dangerous. Ultimately each Board member cannot help but rely on his own intuitions and prejudices. One member may strongly believe that white collar criminals are frequently treated too leniently while another reacts strongly to sex offenses. Furthermore, once a decision is made, it is not subject to review.[45] The Board is not even required to issue a written opinion explaining the action taken.

C. *Prisoner Participation in Rehabilitation Programs: A Prerequisite to Early Release*

The third and most serious difficulty with the Washington indeterminate sentencing system is that it does not recognize that true rehabilitation cannot be forced on a prisoner.[46] Unless the prisoner wants to be rehabilitated, he will not be. Yet the system forces each prisoner to go through the motions of rehabilitation if he wants to gain release before the term of his maximum sentence has run.[47] Thus,

44. *See* note 10 *supra* and J.Q. WILSON, *supra* note 34, at 171–72.

45. *See* WASH. REV. CODE § 9.95.040 (1974). Whereas the Board's determination is not subject to judicial review, the Washington Court of Appeals in State v. Hurst, 5 Wn. App. 146, 486 P.2d 1136 (1971), indicated that the determination of the trial court may be subject to review if the record fails to reveal a basis for the exercise of the court's discretion and it can be said "no reasonable man would take the view adopted by the trial court." *Id.* at 148, 486 P.2d at 1138. *See also* State v. Bresolin, 13 Wn. App. 386, 534 P.2d 1394 (1975); State v. Harris, 10 Wn. App. 509, 518 P.2d 237 (1974); State v. Birdwell, 6 Wn. App. 284, 492 P.2d 249, *appeal denied*, 80 Wn. 2d 1009, *cert. denied*, 409 U.S. 973 (1972); State v. Derefield, 5 Wn. App. 798, 491 P.2d 694 (1971); State v. Potts, 1 Wn. App. 614, 464 P.2d 742 (1969).

46. Prison is frequently the last step for offenders who have experienced a life of deprivation. Many persons committed to prison arrive with a history of crime and sociological problems. As adults, their capabilities, personalities, values, and disorders have developed over many years. Prison programs seek to provide them with the skills and insight to change longstanding life patterns. But, unless the inmate sincerely seeks to acquire the offered skills or to change his lifestyle, the programs are doomed to fail. An offender can be forced to attend adult education classes, but he cannot be forced to learn to read. He can be directed to attend group therapy sessions, but he cannot be compelled to change his personality. "In psychological treatment of abnormal behavior it is widely agreed that conventional psychotherapy, particularly if it is of the psychoanalytic variety, must be voluntarily entered into by the patient if it is to be effective." N. MORRIS, *supra* note 39, at 17.

47. Coerced rehabilitation may even be an additional form of punishment: "Co-

rehabilitation is reduced to a game, a system in which prisoners seek to manipulate prison officials, parole board members, and parole officers. They appear to conform to externally imposed values in order to obtain release.[48] Prisoners perceive that they must get into a program in order to be paroled.[49] This manipulation invariably breeds a cynicism which is the antithesis of the rehabilitation that the system of indeterminate sentencing seeks to foster. The resulting effect on the parole board is that it must decide whether an inmate's participation in rehabilitation programs is genuine or a mere pretense to gain release.

III. WASHINGTON SENTENCING STRUCTURE: A RECOMMENDATION

The apparent inadequacies of our present system of indeterminate sentencing require that a careful and realistic evaluation of our prisons and their treatment programs be made. The concept of incarceration should not be viewed as a rehabilitation device, but as a form of punishment. An offender certainly does not view institutionalization as rehabilitative; rather, he views prison as his punishment for the crime of which he was convicted.[50] Incarceration is essentially a detriment imposed on offenders out of social necessity. It does not effect a "cure" upon offenders, although it may help deter future criminal conduct. Therefore its duration should be based on the nature of the

ercing persons into treatment routines or imprisoning them and making their participation in rehabilitative programs a condition of their release has not, in any sense we can measure or evaluate, made them into less criminal and more contented or more effective individuals." AMERICAN FRIENDS SERV. COMM., *supra* note 34, at 146. "When we punish the person and simultaneously try to treat him, we hurt the individual more profoundly and more permanently than if we merely imprison him for a specific length of time." *Id.* at 147–48.

48. The programs offered in the name of rehabilitation are an attempt to mold a prisoner's character and values. Acceptable correctional practice is dominated by indoctrination in dominant social values such as learning a trade, establishing proper work habits, acquiring basic or supplemental educational skills, and participation in religious training to the satisfaction of the Board. Offenders are thus held to a higher standard of conduct than other citizens. Ordinarily society takes no interest in whether or not citizens espouse generally accepted norms. If the nonoffender seeks to be unemployed, and remain illiterate, it is not a matter for state intervention. The parolee or probationer who does not conform with these societal norms, however, may find his liberty taken or his incarceration prolonged.

49. AMERICAN FRIENDS SERV. COMM., *supra* note 34, at 88.

50. One report indicates, "As experienced by the prisoner, imprisonment with treatment is identical with traditional imprisonment in most significant aspects." *Id.* at 25. The report continues, "[T]he punitive spirit has survived unscathed behind the mask of treatment." *Id.* at 26.

crime committed and on prior criminal activity, not on sociological evaluations of how long it will take to rehabilitate an offender.

Prison may serve beneficial ends if inmates voluntarily participate in treatment programs. Although existing treatment programs in prison should be continued, participation should not determine the length of time a prisoner must serve. Society does not have the right to insist upon conformity to behavior patterns deemed socially acceptable, except to prevent future criminal activity.

A number of changes in the sentencing system should be made in order to achieve these objectives. First, the legislature must define more specifically the penalties for particular criminal conduct. It should establish varying degrees of crimes carrying specified penalties commensurate with the harm of the crime. For example, first degree robbery involving the use of a deadly weapon or in which a victim is injured might carry five to seven years; second degree robbery involving the implied use of force might carry three to five years. The Washington criminal statutes should afford less sentencing discretion to the Board of Prison Terms and Paroles, while providing greater clarity as to the punishment for particular criminal conduct.[51]

Second, when an offender is first admitted to prison he should be notified by the Board of a fixed release date. This date would not be earlier than the expiration of a specific statutory minimum term, *e.g.*, five years for first degree robbery, three years for second degree robbery. In determining this date, the Board would work from defined legislative guidelines, considering the facts of the crime as well as the criminal history of the offender. Psychological data presently utilized, such as family history, employment history, and intake diagnosis, should not be considered in determining the term an individual spends in prison.

Third, when each prisoner is first incarcerated, he or she should be compelled to participate in a mandatory orientation period. During this orientation the offender would be informed of the various educa-

51. The changes in sentencing structure in WASH. REV. CODE tit. 9A (Supp. 1975), *see* note 4 *supra*, do not narrow the discretion of the Board in setting minimum terms. The legislature could have prescribed sentence limits that related to factors such as the age of the offender, the nature of the crime committed, and the offender's record of prior convictions and incarceration, thereby limiting the Board's discretion. *See* Bayley, *Good Intentions Gone Awry—A Proposal for Fundamental Change in Criminal Sentencing,* 51 WASH. L. REV. 529 (1976). Now that the legislature has re-evaluated sentencing on a crime-by-crime basis in Title 9A, it should also consider the effectiveness of the prevailing sentencing policy in Washington.

tional, religious, and psychological programs available within the prison. At both the beginning and the end of the orientation, offenders should be told that participation in any of these programs is voluntary and will not affect release.

Fourth, once the date for release has been set, it should not be reduced by the offender's behavior within the institution. The Board should, however, have the option of *increasing* the inmate's term up to the court-imposed maximum for infractions of prison rules. This would aid prison officials in maintaining control and would assure that each person serves no less than the legislatively determined minimum term for his or her particular offense.

Finally, a prisoner's return to the community should be gradual. The prisoner's ability to return to society should be tested by limited periods of release during the prison term. Through the utilization of work-release programs, halfway houses, or furloughs, these periods of freedom could increase gradually, thus easing the prisoner's transition back to the outside community.

These recommendations are designed to assist in the process of redefining the purposes and objectives of prisons. The punishment of imprisonment is a warranted social response to certain types of criminal conduct, but offenders should be punished for the crimes they committed, not for indefinite sociological and psychological factors in their backgrounds such as family life or ability to conform to societal norms.

IV. CONCLUSION

The Board of Prison Terms and Paroles has broad discretionary powers to release most convicted felons whenever it determines that such persons have been rehabilitated and are fit to return to society. Unfortunately, this system has led to many prisoners' outward participation in rehabilitation programs without their mental commitment to it. The result has been that unrehabilitated prisoners are released from prison long before the expiration of their maximum sentences. It has been suggested herein that a more determinate method of sentencing, along with voluntary participation in rehabilitation, is preferable as it would not only lead to similar offenders being treated similarly, but would result in more adequate rehabilitation for those who wished to participate in such rehabilitation programs.