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## Criminal Law: Oklahoma's Indeterminate Sentence Act

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feated in the semi-finals by University of Texas. Southern Methodist took top honors, University of Texas won second.

**STUDENT BAR ASSOCIATION:** The University of Tulsa Student Bar Association was named the outstanding Student Bar in the state by the Oklahoma Bar Association. The officers are: David Field James, President; Robert L. Funston, Vice President; Ronnie Main, Secretary and Kenneth Ellison, Treasurer. David Field James also was selected by the Oklahoma Bar Association as Outstanding Student at the University of Tulsa.

**UNITED STATES DISTRICT ATTORNEY'S STUDENT TRAINING PROGRAM:** This program was adopted during the summer session to allow the student an opportunity to observe and participate in the functions of the Department of Justice. Stan Pierce Doyle and William Bruckner served during the summer session and Kelly Dee Young and James Pohl are presently serving.

### CRIMINAL LAW: OKLAHOMA'S INDETERMINATE SENTENCE ACT

The writings criticizing and suggesting revisions in the laws of criminal justice administration are legion.<sup>1</sup> All such writers on criminal law administration, agree on at least one point, if no other, that equal justice under the law is a must. The Senate Judiciary Committee comments "that the existence of wide disparities [in sentencing] casts doubt upon the evenhandedness of justice and discourages a respect for the law."<sup>2</sup>

George H. Boldt, Judge, United States District Court, District of Washington stated: "All the available data on sentences clearly disclose an appalling lack of 'equal justice under the law' in sentences in all categories of crime: by area, by court, by judge, by defendant, and by every conceivable criterion of comparison."<sup>3</sup>

Part of the problem relative to inflexible determinate sentencing lies in the fact that convicts are released if they have served the time imposed by the court whether they are reformed or not. Release from prison of such a person defeats the primary purpose of criminal laws. The objective of all criminal laws is the protection of society, and such purpose should also apply to criminal sentences.<sup>4</sup>

Then, of course, the opposite situation, equally unfair is the

<sup>1</sup> E.g., Boldt, *Recent Trends in Criminal Sentencing*, AM. CRIM. LAW Q., vol. 1, no. 4 at 5 (1963); Schwartz, *The Model Penal Code: An Invitation to Law Reform*, 49 A.B.A.J. 447 (1963); Lumbard, *The Administration of Criminal Justice: Some Problems and Their Resolution*, 49 A.B.A.J. 845 (1963).

<sup>2</sup> 30 F.R.D. 413-415. The Seminar and Institute on Disparity of Sentence was authorized by Public Law on August 25, 1958. The law stated as its purpose "the studying, discussing, and formulating the objectives, policies, standards and criteria for sentencing those convicted of crimes and

convict who has not served "his time", yet by any reasonable standard has reformed and should be returned to society.<sup>5</sup> Current determinate sentencing does not and cannot take into consideration these problems. Parole or retention of prisoners is certainly a worthy attempt at correcting these evils, but serious weaknesses, inherent in parole laws, negate much of the hoped for benefits from them.

On May 21, 1963, the twenty-ninth legislature of the State of Oklahoma approved,

"An Act relating to criminal procedure; providing for indeterminate sentence by fixing eligibility of parole at time of sentence and providing juries may assess term confinement within limits of law; fixing time for parole board hearing; authorizing the pardon and parole board to make rules and regulations; repealing all acts in conflict herewith; and declaring an emergency."<sup>6</sup>

The act will be known as the Indeterminate Sentence Law, and will become effective January 1, 1964. Though discussed and argued for many years, the soundness of indeterminate sentencing has been fully established by actual experience and should be beyond question by now.<sup>7</sup>

In order to review this law, it is necessary to know what an indeterminate sentence means, its purpose and intended benefit, and its impact upon existing law.

According to BLACK, LAW DICTIONARY, (4th ed. 1951), an indeterminate sentence is the "imprisonment for the maximum period defined by law, subject to termination by the parole board or other agency at any time after service of the minimum period." This type of sentence must be authorized specifically by statute, otherwise it is invalid.<sup>8</sup>

The general purpose of statutes providing for an indeterminate sentence is to make the punishment fit the offender rather than the crime.<sup>9</sup> The underlying design of such a sentence is to subject the offender to reformatory influences; to rescue for useful citizenship one started on a criminal career and thus to enable him to assume right relations with society, but such purpose also includes the protection of society from the offender who has not reformed.<sup>10</sup>

offenses in the courts of the United States . . . which will assist in promoting the equitable administration of the criminal laws of the United States."

<sup>3</sup> Boldt, *supra* note 1, at 5.

<sup>4</sup> *Id.*, at 4.

<sup>5</sup> Schwartz, *supra* note 1.

<sup>6</sup> 57 OKLA. STAT. §§ 353-356 (Supp. 1963).

<sup>7</sup> Boldt, *supra* note 1, at 9.

<sup>8</sup> Rush v. State, 24 Ala.App. 256, 133 So. 917 (1931).

<sup>9</sup> People v. Ralph, 24 Cal.2d 575, 150 P.2d 401 (1944).

<sup>10</sup> *In re Cowen*, 27 Cal.2d 637, 166 P.2d 279 (1946).

These purposes seem to be in keeping with the trend of enlightened revision of thought about crime and punishment. It does appear that truly enlightened penal codes are not seeking revenge in the name of justice,<sup>11</sup> but are attempting to reform those capable of reforming and returning them to society.

With the passing of the Indeterminate Sentence Law in Oklahoma, we are on the verge of such enlightened penal philosophy. However, the present law arguably contains a serious weakness. This weakness is that its application is in the discretion of the court.

Following are excerpts from statutes of three states having the indeterminate sentencing law. Such excerpts will be used to compare features contained therein with the Oklahoma law.

The Iowa code reads:

"When any person over sixteen years of age is convicted of a felony, except treason or murder, the court imposing a sentence of confinement in the penitentiary, men's or women's reformatory shall not fix the limit or duration of the same, but the term of such imprisonment shall not exceed the maximum term provided by law for the crime of which the prisoner was convicted."<sup>12</sup>

It will be noted that if the defendant is over sixteen and is convicted of a felony, excepting treason or murder, the court may not impose a determinate sentence, but rather must impose the indeterminate sentence.<sup>13</sup>

It appears that the Oklahoma law applies only to felonies even though such is not specifically set out. We can make that estimation in that the law refers to crimes involving sentencing in the state reformatory or penitentiary. Such confinement requires the conviction of a felony.<sup>14</sup> Perhaps the discretionary feature of the Oklahoma law explains the absence of any exclusionary felonies. However, the California law is mandatory,<sup>15</sup> and it too fails to specifically exclude any crime from operation of the statute.

The first part of the Illinois code on indeterminate sentencing specifically provides for determinate sentencing for the crimes of misprision of treason, murder, rape, or kidnapping. Then following:

"It is expressly provided that the definite sentence provided for in this section 'one' shall be applicable only to the crimes enumerated in this section 'one' and definite sentences shall not be applicable to any other crime or offense enumerated

<sup>11</sup> Boldt, *supra* note 1, at 5.

<sup>12</sup> IOWA CODE ANN. § 789.13 (West 1958).

<sup>13</sup> IOWA OPS. ATT'Y. GEN. 125 (1911-12).

<sup>14</sup> 21 OKLA. STAT. § 5 (1961).

<sup>15</sup> People v. Kostal, 159 Cal.App.2d 444, 323 P.2d 1020 (1958).

in this Act; and further, that indeterminate or general sentences shall apply to all other crimes and offenses enumerated in this Act, but not to the crimes or offenses enumerated in this section 'one'.<sup>16</sup>

It should be noted that the operation of this statute is similar to that of the Iowa law, however, excluding even more crimes from operation of the statute.

The California code relative to indeterminate sentencing, passed prior to 1917 provides:

"Every person convicted of a public offense, for which imprisonment in any reformatory or State prison is now prescribed by law shall, unless such convicted person be placed on probation, a new trial granted, or the imposing of sentence suspended, be sentenced to be imprisoned in a State prison, but the court in imposing the sentence shall not fix the term or duration of the period of imprisonment."<sup>17</sup>

The California code is the broadest of the three statutes thus far set out, in that no crime is excluded from the statute's operation, nor is any person excluded from its operation, and it, as the Iowa and Illinois code, is mandatory upon the court. The limits of the imprisonment is provided by law and the court's function after conviction is to sentence to the proper institution. The fate of the defendant is then in his own hands and those of the Adult Authority, an administrative agency which does the actual sentencing. The court cannot be influenced by the heinous nature of the defendant's crime nor is it in any way subjected to pressure of public opinion. Of course, the agency may receive this pressure at a later time, but with the passing of time, one's hatred of the criminal and his crime can be viewed with more perspective.

Section 1 of the Oklahoma law provides:

"In all cases where a sentence of imprisonment in the penitentiary is imposed, the court in assessing the term of the confinement *may* fix a minimum and a maximum term, both of which shall be within the limits now or hereafter provided by law as the penalty for conviction of the offense. The minimum term may be less than, but shall not be more than, one-third of the maximum sentence imposed by the court. Provided, however, that the terms of this act shall not limit or alter the right in trials in which a jury is used for the jury to assess the penalty of confinement and fix a minimum and maximum term of confinement, so long as the maximum confinement be not in excess of the maximum term of confinement provided by law for conviction of the offense."<sup>18</sup>

<sup>16</sup> ILL. ANN. STAT. ch. 38, § 801 (Smith-Hurd 1961).

<sup>17</sup> WEST'S ANN. CAL. PENAL CODE, § 1168 (1956).

<sup>18</sup> 57 OKLA. STAT. §§ 353-356 (Supp. 1963) [Emphasis added].

Apparently all that the legislature has done is to authorize the courts to use indeterminate sentencing. Such a position, it would seem, is bound to lead to inequities in the administration of justice, for here, with the use of the word *may* the legislature has opened the door to the possibility of prejudice, personal bias, discrimination, and divergent administration of a law, according to the court's personal preference.

On this point a Pennsylvania Superior Court felt that the legislature has exclusive power to set up a penal system and its administration; further, it can grant such measure of discretion to the courts as it may deem proper.<sup>19</sup> Pennsylvania's indeterminate sentencing law is discretionary with the court.<sup>20</sup> Is the law any less discriminatory simply because the legislature has remained within the limits of its authority in granting discretion to the court? It is difficult to understand how a law, unequal in its application, is likely to render justice. One of the primary purposes of the indeterminate sentence law is uniformity of administration to all prisoners undergoing confinement.<sup>21</sup>

Of course, courts throughout the history of the law have exercised discretion in the administration of justice, and rightly so, but is it good legislative policy to allow the operation of a law at the court's discretion? Interpretation of the law and administration of justice under the law are proper areas of discretion, but the fact of the law's operation ought not be discretionary with the court.

Under the circumstances, as it exists now, if it were possible to have two defendants, charged with the same crime, in the same court, under the same set of circumstances, one defendant could be given a determinate sentence, the other an indeterminate sentence. It is hard to see how the rendition of justice will prevail under this possibility. According to J. Edward Lumbard, Chief Judge, United States Court of Appeals for the Second Circuit, "Disparities [of sentence.] whether real or apparent, create prison disciplinary problems and in many cases tend to defeat one of the purposes of sentence—the rehabilitation of the defendant as a useful member of society."<sup>22</sup> It would seem better to do without the indeterminate sentencing law, with all of its humane features, and continue under determinate sentencing in order that equal justice be rendered to all charged with a crime.

Section 1 of the act provides in part:

"The court in assessing the term of the confinement may fix a minimum and a maximum term, both of which shall be within the limits now or hereafter provided by law

<sup>19</sup> Commonwealth *ex rel. Green v. Court of Oyer and Terminer and Quarter Sessions*, 176 Pa.Super. 103, 106 A.2d 896, 898 (1954).

<sup>20</sup> PENN. STAT. ANN., Tit. 19, § 1057 (West Supp. 1962).

<sup>21</sup> *In re Cowen*, 27 Cal.2d 637, 166 P.2d 279 (1946).

<sup>22</sup> Lumbard, *supra* note 1.

as the penalty for conviction of the offense. The minimum term may be less than, but shall not be more than, one-third of the maximum sentence imposed by the court."

It appears that these two statements are in conflict and cannot stand side by side. This statute provides that the limits of the sentence as imposed by the court must be within the limits imposed by law, however the minimum sentence shall not be more than one-third the maximum penalty imposed. As an example to illustrate this conflict consider a conviction for second degree manslaughter.

The statute provides:

"Every person guilty of manslaughter in the second degree is punishable by imprisonment in the penitentiary not more than four years and not less than two years, or by imprisonment in a county jail not exceeding one year, or by fine not exceeding one thousand dollars, or both fine and imprisonment."<sup>23</sup>

Applying a conviction for second degree manslaughter under the indeterminate sentencing law we find that if the court imposed the maximum penalty provided by law, that is four years, such sentence does not square with the provision of the indeterminate sentencing act providing that the minimum sentence shall not be more than one-third of the maximum.

For these provisions to operate together, the determinate sentences provided by law must be in a ratio of one to three, that is, the minimum determinate sentence must be at least one-third of the maximum. Perhaps we are saved from this dilemma by section five of the act which is the repealer section. This section provides "all acts and parts of acts in conflict herewith are herewith repealed." Does this mean that the indeterminate sentence law repeals the determinate sentencing laws in conflict with it, or merely stays their operation when the indeterminate sentence is applied?

If we assume that section five resolves the conflict posed above, the minimum sentence for second degree manslaughter is one-third of four years or sixteen months. The minimum term is wholly dependent upon what the court sets as the maximum with the limitation that the minimum may not be more than one-third of the maximum sentence imposed by the court (or jury), but it may be less. In any event, the problem posed here cannot be resolved on theoretical speculation, but rather, its answer must await an interpretation by the Oklahoma Court of Criminal Appeals.

*Jeryl Q. Looper*

<sup>23</sup> 21 OKLA. STAT. § 722 (1961).