1-1-1977

Senate Bill 42 - The End of the Indeterminate Sentence

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COMMENTS

SENATE BILL 42—THE END OF THE INDETERMINATE SENTENCE

For more than fifty-nine years California had a system of indeterminate sentences for felony convictions.1 The indeterminate sentence system prohibited the sentencing judge from specifying a designated term of imprisonment for each convicted felon, and required the felon to be sentenced for "the term prescribed by law."2 As a result, each felon was sent to prison for a term having a statutory minimum and maximum length, without any indication of the length of term that that specific prisoner would serve. Each individual's term was set after incarceration by the "governing authority of the prison,"3 based on that individual's conduct in prison.4 In theory, the indeterminate sentencing system would allow each prisoner's sentence to be tailored to his rehabilitative efforts in prison, enabling each individual to be released as soon as he was capable of living in society without resorting to crime.

A number of different criticisms5 were leveled at the administration of the law—the uncertain date of release, the varying sentence lengths for prisoners committed on similar offenses, the broad discretion of the Adult Authority, the Au-

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1. The original indeterminate sentencing provision, Penal Code section 1168, was enacted on May 18, 1917, and became effective on July 27 of the same year. 1917 Cal. Stats., ch. 526, § 1, at 665 (a lengthy historical note is included after the section).
2. The term prescribed by law was a statutory minimum and maximum term for the offense of which the defendant was convicted. A recital of the offense of which the defendant was convicted and a designation of the state prison to which he was committed was upheld as a proper sentencing in People v. Mendosa, 178 Cal. 509, 173 P. 998 (1918).
3. 1917 Cal. Stat., ch. 526, § 1, at 665. The governing authority of the prison was originally called the State Board of Prison Directors. In 1941 it became the Board of Prison Terms and Parole and in 1944, the Adult Authority.
4. See notes 41-61 and accompanying text infra for a discussion of the Adult Authority's method of determining sentences.
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The Adult Authority's relative immunity from effective review, and the lack of effective evaluation of available sentencing materials by the Adult Authority.6

These criticisms, however, were only symptoms of the real problem, which was that the fundamental premise upon which the system was based, that is, the ability to rehabilitate was not a viable concept.7 The criticisms generated an Adult Authority attempt to promote uniformity and order within the law8 which was ultimately invalidated by the courts as beyond the Adult Authority's power.9

Increasing criticism motivated the legislature to reexamine the law and numerous alternatives were proposed.10 From among the alternatives Senate Bill 42 was enacted as the favored remedy. It was passed by the legislature on September

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6. There was much criticism of the legislature's grant of total power for sentencing decisions to the Adult Authority without meaningful direction. Some of the criticism came from members of the legislature themselves: "For years the Legislature has neglected its responsibility of providing guidelines for boards charged with parole decision making. . . . The Parole Board [the Adult Authority] is one of the last bastions of unchecked and arbitrary power in America." ASSEM. SELECT COMM. ON ADMIN. OF JUSTICE, PAROLE BOARD REFORM IN CALIFORNIA: ORDER OUT OF CHAOS 15 (1970). See also Frankel, supra note 5, at 88-89; Mitford, supra note 5, at 86; Goldfarb & Singer, Problems in the Administration of Justice in California, ASSEM. J. (Supp. App.), Reg. Sess. 41 (1969) (criticism of the absence of procedural due process safeguards at Adult Authority proceedings).

7. See, e.g., ASSEM. COMM. ON CRIM. PROC., CRIME AND PENALTIES IN CALIFORNIA 25 (1968); CAL. ST. BAR COMM. ON CRIM. JUSTICE, REP. AND RECOMMENDATIONS ON SENTENCING AND PRISON REFORM 1-4, 34-35 (1975); Frankel, supra note 5, at 90-92; Glueck, Predictive Devices and the Individualization of Justice, 44 LAW & Contemp. Prob. 461-62 (1958) [hereinafter cited as Glueck].

8. The major Adult Authority attempts to provide uniform procedures were Chairman's Directives 75/20 and 75/30. Adult Authority Chairman's Directive 75/20 (April 15, 1975) [hereinafter cited as C.D. 75/20]; Adult Authority Chairman's Directive 75/30 (September 2, 1975) [hereinafter cited as C.D. 75/30]. See notes 41-61 and accompanying text infra for a description of C.D. 75/20 procedures. C.D. 75/20 involved the procedure for determining parole release dates, while C.D. 75/30 paralleled those procedures for setting an individual maximum term proportionate to the seriousness of an individual's offense as required by In re Rodriguez, 14 Cal. 3d 639, 652, 653, 537 P.2d 384, 393, 394, 122 Cal. Rptr. 552, 561, 562 (1975).


10. See 1976 Cal. Legis. Serv., ch. 1139, at 4752 (formerly Senate Bill 42) (abolishing most indeterminate sentences and the Adult Authority); A.B. 1440, Reg. Sess. (1975) (requiring that sentences within the maximum length set by the trial judge, be imposed by a panel of superior court judges or hearing officers shortly after incarceration); A.B. 2311, Reg. Sess. (1975) (establishing a Commission on Criminal Sanctions to set fixed, determinate terms for all noncapital felony offenses at some point between zero and the median national time served for similar crimes).
1, 1976, and signed into law by Governor Brown on September 20, 1976.11 The bill eliminates the Adult Authority and returns California to a determinate sentencing system.12

This comment will examine the indeterminate sentencing system and its administration. Senate Bill 42 will be outlined, and the new sentencing system will be evaluated for its ability to alleviate the difficulties of indeterminate sentencing.

A History of Indeterminate Sentencing and the Adult Authority

The Indeterminate Sentence Law

The indeterminate sentence law was enacted May 18, 1917, and became effective July 27 of the same year.13 In its original form, California Penal Code section 1168(a) provided:

Every person convicted of a public offense, for which public offense punishment by imprisonment in any reformatory or the state prison is not prescribed by law, if such convicted person shall not be placed on probation, a new trial granted, or imposing of sentence suspended, shall be sentenced to be confined in the state prison, but the court in imposing such sentence shall not fix the term or duration of the period of imprisonment.14

The indeterminate sentence was a statutorily defined minimum and maximum term for each felony. Within that statutory term each prisoner’s sentence was set after his incarceration by the governing authority of the prison.

The statute also provided that “the governing authority of the reformatory or prison” or “any board or commission that may be hereafter given authority so to do”15 had responsibility for determining what amount of time, if any, greater than the minimum the prisoner would be confined.

Although the indeterminate sentence law also consisted of hundreds of provisions of the Penal Code and other codes defining minimum and maximum terms for each felony, this single short section16 was the backbone of the system. Other sections

13. 1917 Cal. Stats., ch. 526, § 1, at 665.
14. Id. at 665-66.
15. Id. at 666.
established the "governing authority of the prison," but none provided direction for the administration of the law.\textsuperscript{17} The administrative board determining sentences was given total control over the process of indeterminate sentencing.

Immediately after its enactment, the constitutional validity of indeterminate sentencing was unsuccessfully challenged in \textit{In re Lee}.\textsuperscript{18} This challenge went to the core of indeterminate sentencing—that is, to the right to make a sentence indeterminate.

The contention that an indeterminate sentence was void for uncertainty and indefiniteness was not accepted in \textit{Lee}. The court held that the sentence was in legal effect a sentence for the maximum term, and thus, both certain and definite.\textsuperscript{19} In this holding the court relied on the experience of other jurisdictions already possessing some form of indeterminate sentence.\textsuperscript{20}

\textit{Lee} also established the validity of giving sentencing discretion to an administrative body. It was alleged that the law violated the constitutional doctrine of separation of powers.\textsuperscript{21} The court replied by stating that the legislative function, to provide the sentence to be imposed, was completed with the enactment of the indeterminate sentence law and the minimum and maximum terms for each felony. The judicial function, to determine guilt and impose sentence, was completed at trial.\textsuperscript{22} The actual execution of the sentence was seen as a purely administrative task.

Again, the court relied on precedents from other jurisdi-
tions having indeterminate sentences. It cited with approval the Tennessee Supreme Court statement that “the act does not attempt to confer on the board the power to fix the punishment that any given crime shall bear.” Such a statement is belied by the fact that the Adult Authority was given extremely wide latitude in setting sentences. For example, the sentence for a felony conviction of assault with a deadly weapon was six months to life. At the time Lee was decided, the governing authority of the prison had complete freedom to set an inmate’s sentence anywhere within those bounds.

As a result of Lee and its progeny, the validity of indeterminate sentencing per se was solidly established and criticism was restricted to the governing body and its administration of the law.

The Adult Authority

In 1944 the Board of Prison Terms and Paroles was abolished and the Adult Authority was created as the agency to administer the indeterminate sentence law. Originally, the Adult Authority had three members. It later was expanded to nine members who were appointed by the Governor and confirmed by the Senate. Section 5075 of the Penal Code directed

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23. Id. at 693-94, 171 P. at 959.
24. Id. at 694, 171 P. at 960, quoting Woods v. State, 130 Tenn. 100, 113, 169 S.W. 558, 561 (1914).
26. Prior to the decision in In re Rodriguez, the general rule was that a prisoner had no vested right to a term fixed at less than the maximum sentence. In re Schoengarth, 66 Cal. 2d 295, 302, 425 P.2d 200, 204, 57 Cal. Rptr. 600, 603 (1967). As a result terms were set and reset anywhere within the statutory bounds, if the prisoner violated any Department of Corrections rules. Rodriguez limited this rule by requiring that the maximum for each prisoner must not be disproportionate to the seriousness of the prisoner's offense. 14 Cal. 3d at 652, 537 P.2d at 393, 122 Cal. Rptr. at 516. This compulsion of proportionality was derived from United States and California constitutional provisions against cruel and/or unusual punishment. See U.S. CONST. amend. VIII; CAL. CONST. art. I, § 17.
28. CAL. PENAL CODE §3000 (West 1970). Jessica Mitford described the Adult Authority in this manner: “This board wields total, arbitrary despotic power over the destinies and liberties of California's state prison population, not only while they are in custody but also after they have been released on parole.” MITFORD, supra note 5, at 86.
that, to the extent possible, the members selected should be experienced in the fields of corrections, sociology, law, law enforcement, and education.\footnote{30}

Statutes provided very little guidance for the Authority in its administration of indeterminate sentencing. Penal Code section 5076.1 directed the Authority to hold hearings at the prisons as often as necessary to allow a full and complete examination of each inmate’s file.\footnote{31} As the size of the prison population increased, the section was amended to give the Adult Authority the power to employ hearing representatives to assist the Authority in its time-consuming tasks of examining each inmate’s file, setting terms and making parole decisions.\footnote{32}

Most of the direction for the operation of the indeterminate sentence law was provided by the Adult Authority itself.\footnote{33} In the absence of statutory direction, the Adult Authority regularly issued policy statements, resolutions and chairman’s directives which specified exactly how the indeterminate sentence law would be administered.\footnote{34}

\footnote{30. \textit{Id.} Supposedly these special areas of knowledge would assist the Adult Authority members in their task of determining sentence lengths. The former occupations of the 1976 Adult Authority members included: Raymond Procunier, director of the Department of Corrections; Raymond Brown, Oakland deputy chief of police; Manuel Quevedo, Jr., San Bernardino police officer and member of the Alcoholic Beverage Control Board; Robert Wood, state assemblyman and farmer; Rudy Garcia, community director of the state health and welfare agency, and Lt. Commander in the United States Navy in charge of special court martials; Henry Kerr, Assistant Commander, Los Angeles Police Department, Detective Division; Curtis Lynum, San Francisco District Director, FBI; Ruth Rushen, Los Angeles County Probation Department, Probation Officer. Telephone conversation with Adult Authority personnel (March, 1976).

Marvin Frankel has spoken of these “experts” running our sentencing system as follows: “In our easy adoration of expertise we have given over power to people of dubious qualifications, subjected to little or no control.” \textsc{Frankel, supra} note 5, at 88-89.


32. \textit{Id.} In 1976 the Adult Authority employed about 29 hearing representatives to assist the nine Adult Authority members. These 38 people were responsible for hearing the cases of over 40,000 inmates in the custody of the Department of Corrections. Telephone conversation with Adult Authority personnel (March, 1976).

33. For criticisms of the Adult Authority’s operation of the indeterminate sentence law see authorities listed in note 5 \textit{supra}.

34. The distinctions among these documents is not clear. Both policy statements and resolutions appear to be general declarations of Adult Authority decisions on various topics. Chairman’s Directives, on the other hand, are much more specific and deal with detailed procedural matters. \textit{See, e.g.}, \textsc{C.D.} 75/30, \textit{supra} note 8. The relative importance of these statements, resolutions and directives in Adult Authority operations is not clear. Apparently, they differ only in the depth to which they cover the subject matter.
Rehabilitative Foundations of Indeterminate Sentencing

Indeterminate sentencing in the United States grew out of notions of preventive confinement.\(^3\) Though early statements of the rationale for indeterminacy were based upon a desire to isolate the criminal from society,\(^38\) very shortly the purpose of indeterminancy was subtly shifted from confining a prisoner until he had reformed to the actual reformation itself.\(^37\) Shortly after the enactment of California's indeterminate sentence law, the California Supreme Court wrote: "The purpose of the indeterminate sentence 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."\(^38\)

The difficulty with attempting to make the punishment fit the criminal rather than the crime lay in the limited ability of the criminal justice system to identify and treat the cause of crime. For years the administrators of the indeterminate sentence law attempted to individualize rehabilitation through sentencing while lacking the expertise and methods necessary for treatment. The result was that sentencing was open to criticism as arbitrary, excessive and unfair.\(^39\)

In early 1975 when Raymond Procunier became chairman of the Adult Authority, he recognized that rehabilitation could not be achieved within the indeterminate sentencing system.\(^40\)

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36. Zebulon Brockway, the long time superintendent of Elmaira Reformatory in New York and an early proponent of indeterminate sentencing in the United States, rejected both punishment and deterrence as rationales for sentencing and instead proposed that all persons convicted of crimes should be confined to prison until they could safely be returned to society. Z. Brockway, Fifty Years of Prison Service 401 (1912).

37. See Dershowitz, supra note 35.


39. See K. Davis, Discretionary Justice: A Preliminary Inquiry 133-34 (1973);

Frankel, supra note 5.

40. Sacramento Bee, Feb. 28, 1975, at Bl, col. 3. There seems to be a general consensus that rehabilitation, making a criminal into a law abiding citizen, is an impossible task. See, e.g., Frankel, supra note 5, at 93; Friedman, The Dilemmas of Sentencing, 44 Cal. St. Bar J. 372, 377 (1969); Sacramento Bee, Feb. 28, 1975, at Bl, col. 3. Punishment, deterrence and protection decisions are really policy decisions which demand less qualification than a rehabilitation decision. Senate Bill 42 recognizes that these policy decisions are best made by a legislative body which is answerable to the people rather than by an administrative board which is not.
As a result, he attempted to remove rehabilitation from sentencing decisions. Chairman's Directive 75/20 was the result.

**Chairman's Directive 75/20—An Administrative Attempt to Make Sentencing Decisions More Uniform**

As a major step in administrative reform, Raymond Procunier, the Adult Authority Chairman, issued Chairman's Directive 75/20 (C.D. 75/20), which established a procedure for setting parole release and discharge dates for each prisoner. The parole release date was the length of time an inmate would serve in prison before being released on parole. In a sense, it was the inmate's individualized minimum term. The date was tentative. If for any reason the inmate was found unfit to be released, the date could be revoked.

The parole discharge date was the date on which the inmate would be released from the Department of Corrections' control and supervision after a successful period of parole. It also was a tentative date because the individual's actions while on parole could cause parole to be revoked or the time under supervision to be lengthened.

The major purpose of C.D. 75/20 was to establish procedures for evaluating information and guidelines for release decisions. It was intended that these dates would be set at an inmate's first regularly scheduled parole consideration meeting.

The first section of C.D. 75/20 was administrative. It specified what information could be considered in making parole release and discharge decisions, as well as what situations would allow a postponement of decision or a denial of parole. Postponement could be ordered only if the information at the hearing was incomplete. The reason for postponement had to

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41. C.D. 75/20, supra note 8.
42. Prior to the decision of In re Rodriguez, 14 Cal. 3d 639, 537 P.2d 384, 122 Cal. Rptr. 552 (1975), a parole release date was only tentative. It could be revoked and the sentence returned to the statutory maximum for any breach of prison discipline. After Rodriguez the date could not be raised above the "primary term" which was a maximum proportionate to the individual's offense. See note 26 supra; C.D. 75/30, supra note 8 (establishing Adult Authority procedures for setting a proportionate maximum).
43. Such a meeting includes two Adult Authority members or hearing representatives and the inmate. The purpose is to review his file and make recommendations that will speed his release. The first scheduled meeting is six months before the inmate's minimum eligible parole release date. Adult Authority Policy Statement No. 15 [on file at SANTA CLARA L. REV.]
44. C.D. 72/20, supra note 8, at § A.1.
be noted on a standardized form in the inmate’s file\textsuperscript{45} and the Department of Corrections’ staff had to be instructed to obtain the necessary information. In no situation could a case be postponed longer than ninety days.

\textit{C.D. 75/20 Procedures}

The body of C.D. 75/20 was concerned with the procedure to establish a parole release date—a procedure that involved a number of different steps.

\textit{The “base offense.”} The “base offense” was the most serious offense for which the inmate had been sentenced.\textsuperscript{46} This was determined by examining the statutory minimum and maximum sentences for each offense for which the inmate had been sentenced, selecting the most severe as the “base offense,” and listing that offense on the Adult Authority Parole Decision form 279. If the inmate was committed for multiple offenses, all offenses other than the base offense had to be listed as running either concurrently or consecutively with that offense.

\textit{The typical or aggravated range.} The “base offense” was then characterized as “typical” or “aggravated” for that type of offense.\textsuperscript{47} To do this, the facts of the crime were evaluated for their “relative seriousness” with respect to other crimes of the same type. The directive listed several factors to be considered in making this determination, including the seriousness of any personal injury to the victim of the crime, the number of victims, the degree to which the inmate was involved in inflicting such personal injury, the extent of damage to or loss of property, the professionalism with which the crime was carried out, the possession or use of weapons, and the quantities of contraband possessed or sold.

No relative weights for each of these factors were supplied, nor was there an instruction to disregard or alter factors which were integral parts of the definition of an offense. Thus, in effect, some factors were weighed twice—once as a definition of the offense and again as a factor in determining the seriousness of the offense.

\textit{The base period of confinement.} The base period of con-

\begin{itemize}
\item[45.] California Department of Corrections form 279 [on file at Santa Clara L. Rev.].
\item[46.] C.D. 75/20, supra note 8, at \$ A.2.a.
\item[47.] Id. at \$ A.2.b.
\end{itemize}
finement was established by referring to the table of suggested base ranges attached to the directive. The base offense and the typical or aggravated character of that offense were used to determine which average sentence range would be applied to a particular prisoner. By evaluating the facts of a crime, a specific period within that range was selected as the “base period” of confinement for that inmate. The primary factor in this determination was the seriousness of the offense, apparently determined by using the same factors which allowed the offense to be characterized as typical or aggravated. If there were “unusual” factors in a particular case, the base period could be set above or below the chosen range.

Adjusting the base period. The Adult Authority then adjusted the base period for prior prison terms, concurrent or consecutive sentences, prior felony convictions plead and proven in court which had not resulted in a prison sentence, and weapons charges. Periods of time were to be deducted from the base period for an individual whose minimum term had been reduced under Penal Code section 1202b, the Youthful Offender Statute. The directive defined each of these “mitigating” or “aggravating” situations, defined ranges to be used to select the adjustment period for each, and cautioned that the categories were mutually exclusive and that the same felony convictions should not result in two additional periods being added to the base. The directive also warned that dismissed charges were not to be considered in adjusting the base range.

This last manipulation resulted in a specific period of months. When added to the date on which the inmate was

48. Id. at § A.2.c.
49. For a table of suggested base ranges see app. A infra.
50. These factors include the individual’s age; the individual’s pattern of criminality (whether the individual is a professional, systematic criminal or an amateur, occasional offender); serious or major disciplinary offenses in prison; a lengthy period of incarceration prior to actual reception by the Department of Corrections, etc. C.D. 75/20, supra note 8, at § A.2.c.
51. Id. at § A.3.
53. The Youthful Offender Statute allows the sentencing court to reduce to six months the minimum term of a defendant who was convicted of a felony, other than a felony punishable by death, committed while he was under the age of 23 years. Cal. Penal Code § 12026 (West 1970).
54. For a table of suggested adjustment ranges see app. A infra.
received at the Department of Corrections, this period resulted in the parole release date.\textsuperscript{55} The parole release date had to be set beyond the minimum eligible parole date, which was generally one-third of the minimum sentence.\textsuperscript{56}

\textit{Parole discharge date.} The directive specified that the normal period served under parole supervision was three years. When the three-year period was added to the parole release date, the parole discharge date was obtained.\textsuperscript{57} A parole period other than three years might be selected if the reasons for that decision were listed in the inmate’s file. Since the parole discharge date represented the individual’s total sentence for his offense, it had to be set at or beyond the statutory minimum term.

\textit{Recalculation of dates.} The periods established were only tentative, based on the assumption that the inmate would maintain a disciplinary-free record in the institution and would satisfactorily perform any work assignments given him.\textsuperscript{58} If the inmate’s behavior did not meet these standards, he might have his release and discharge dates recalculated.\textsuperscript{59} Also, if the inmate’s “mental condition” deteriorated, his dates might be rescinded. Deterioration of mental condition was not defined nor was a review procedure for this decision established.

This procedure for the rescission of dates allowed parole release to be postponed for virtually any reason. Charges of prejudice were often leveled at Adult Authority decisions, but they could seldom be proved because of poor documentation of decision-making procedures. The directive provided for a type of review procedure,\textsuperscript{60} but the review could only be made after two-thirds of the time to parole release had been served. In addition, the review did not consider the validity of the reasons for the Adult Authority’s release decision, nor did it examine the propriety of the length of term before release. Instead, the procedure required the inmate to demonstrate “unusual reha-

\textsuperscript{55} C.D. 75/20, \textit{supra} note 8, at § A.4. If the adjusted based period for an individual who was received at a Department of Corrections institution on January 1, 1976, was 24 months, his parole release date would be January 1, 1978.

\textsuperscript{56} Thus, if the minimum sentence for an offense was five years, the minimum eligible parole date would be 20 months after incarceration.

\textsuperscript{57} C.D. 75/20, \textit{supra} note 8, at § A.5. In the example in note 55\textit{supra}, the parole discharge date would be January 1, 1981.

\textsuperscript{58} C.D. 75/20, \textit{supra} note 8, at § C.

\textsuperscript{59} \textit{Id.} at § D. Recalculation generally would result from additional court convictions or prison disciplinary offenses.

\textsuperscript{60} \textit{Id.} at § I.
"rehabilitation" to justify a resetting of his release and discharge dates. This procedure did not allow Board error to be a factor in a review of the dates. In addition, it established rehabilitation as the criterion for change when the procedures for setting the dates initially did not even include rehabilitation as a factor."

Invalidation of C.D. 75/20

The procedural inadequacies of C.D. 75/20 and the possibilities of prejudice involved therein were overshadowed by the glaring fact that the directive allowed for absolutely no consideration of rehabilitation in the original sentence setting decision. The directive marked the Adult Authority's recognition that rehabilitation was not a reasonable standard for determining sentences.

Unfortunately, the indeterminate sentence law required individual sentences to be at least partially based on consideration of factors of "individual reclamation and post-release expectations." In other words, rehabilitation and the prediction of recidivism were mandatory factors to consider under the indeterminate sentence law.

In January, 1976, the California Court of Appeal for the Third District decided the case of In re Stanley. This case invalidated C.D. 75/20 procedures on the ground that rehabilitation was not considered. Since the indeterminate sentence law required consideration of rehabilitation in term setting, and since the Adult Authority had admitted it could neither rehabilitate nor evaluate efforts at rehabilitation, Stanley seemed conclusively to establish that the goal of the indeterminate sentence was beyond reach.

The dilemma of indeterminate sentencing has been stated succinctly:

[It is time . . . that reformers of the criminal law face the fact that the feasibility of a reliable technique of individualization is crucial to the entire program of scientific and humane criminal justice. If, in fact, a reasonably

61. Id.

62. In re Stanley, 54 Cal. App. 3d 238, 248, 126 Cal. Rptr. 524, 531 (1976). The invalidation of C.D. 75/20 was predicted months before Stanley was decided. See letter from G. Murphy, California Legislative Counsel, by B. Dale, Deputy Counsel, to Sen. J. Nejedly (Mar. 18, 1975) [on file at SANTA CLARA L. REV.].

63. 54 Cal. App. 3d 238, 126 Cal. Rptr. 524.
sound individualization cannot be accomplished by the means at hand, then, despite the lofty aims of modern correctional philosophy and regardless of the most elaborate investigation and case history, the system will not work.  

When Stanley invalidated the Adult Authority’s effort at a reasonably workable and uniform sentencing procedure, the California legislature was forced to act. Senate Bill 42 was passed by the legislature on September 1, 1976. When the Governor signed the Bill, indeterminate sentencing and the Adult Authority were eliminated.

**DETERMINATE SENTENCING UNDER SENATE BILL 42**

Senate Bill 42 ends indeterminate sentencing and substitutes a system of determinate sentences to be imposed by the trial judge. The conceptual foundation of Senate Bill 42 is significantly different than that for the indeterminate sentencing system.

Senate Bill 42 defines the purpose of imprisonment for crime to be *punishment.* This statement implicitly rejects the other major theories of sentencing—isolation, deterrence and rehabilitation. Such a singleness of purpose, while removing much of the flexibility inherent in indeterminate sentencing promotes uniformity of sentencing for offenders committing similar crimes under similar circumstances and eliminates the difficult balancing of purposes which under indeterminate sentencing led to disparity of sentences.

**Sentence Lengths**

All offenses are categorized into degrees of seriousness. There are five levels of seriousness and each level is assigned three definite terms. The three terms at each level represent

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64. Glueck, *supra* note 7, at 461.
65. It should be noted that although Senate Bill 42 changed the law and, of course, altered the procedures for setting prison terms, it did not substantially alter the philosophy of sentencing. When C.D. 75/20 dropped rehabilitation as a sentencing criterion, punishment and proportionality became the predominate themes in sentencing. Senate Bill 42 continued this emphasis and legitimated it.
68. The categorization is not explicit in the Bill, but the statutes which assign determinate terms yield only five levels of penalty.
mitigated, typical and aggravated offenses at that level of seriousness. For example, the middle level of seriousness is assigned terms of three, four and five years.\(^7\) One offense with this degree of punishment is rape.\(^7\) A rape conviction would normally result in a sentence for the middle term, but if the sentencing judge finds that there were mitigating or aggravating factors involved, the lowest or highest term, respectively, might be selected.\(^7\)

The major portion of Senate Bill 42 consists of statutes defining the terms for each offense.\(^2\) Almost all of the new sentences represent substantial reductions in sentence length from the minimum and maximum statutory terms for the same offense under the indeterminate sentence law.\(^7\) This change to much shorter sentences was urged by proponents of the Bill for two reasons—first, California had the longest average sentences in the United States, and perhaps in the world,\(^7\) and second, sentences over about five years in length could not be justified because there appears to be no significant "improvement" in prisoners after that period.\(^7\)

69. For a table of selected offenses with determinate and indeterminate penalties see app. B infra.


71. 1976 Cal. Legis. Serv., ch. 1139, § 273, at 4819 (to be codified as CAL. PENAL CODE § 1170(b)). See notes 78-121 and accompanying text infra (trial court sentencing).

72. For a comparison of the penalties for various offenses see app. B infra.

73. Senate Bill 42 was severely criticized by Judge Bruce Allen, presiding judge in the criminal division of Santa Clara County Superior Court, primarily because of the extremely short sentences which it provides compared to those provided under the indeterminate sentence law. San Jose Post-Record, Sept. 20, 1976, at 1, col. 1. This is not necessarily accurate. Given the suggested base ranges which the Adult Authority used for sentencing prior to the passage of Senate Bill 42, the new sentences should be very close to the sentences actually served under the prior law. Compare app. A with app. B infra.

74. See Transcript, supra note 5, at 20 (remarks of Peter Sheehan, American Civil Liberties Union, San Francisco); MITFORD, supra note 5, at 86. Mitford commented that "[u]nder cover of the indeterminate sentence, the median term served by California's 'felony first releases' had risen from 24 months in 1960 to 36 months in 1970, highest in the nation and probably the world." Id.

75. To urge that sentences be reduced because rehabilitation is ineffective for prisoners confined more than five years doesn't seem very persuasive since the basis of S.B. 42 was punishment, not rehabilitation. It is likely, given the fact that Senate Bill 42 seeks to establish sentences that are similar to those served for similar crimes in other jurisdictions, that the first rationale urged for shorter sentences (that California's sentences were substantially longer than those in other jurisdictions) was given much more weight by the legislature than the rehabilitation rationale.

The American Bar Association has noted that "[t]here is general agreement among most who have recently studied the pattern of sentencing in this country that
The sentence imposed may be increased by adding extra periods of punishment for certain "enhancing" circumstances. Whenever an additional sentence is to be imposed under any of the enhancement statutes, the court is authorized to strike that additional punishment if it finds circumstances in mitigation of the prescribed punishment and if the reasons for striking are stated on the record. In addition, subdivision (d) of section 1170.1a provides that the arming or use (of a weapon) enhancements shall not apply when arming or use is an element of the offense, nor shall the great bodily harm enhancement apply when that is an element of the offense. Further,

the average sentence to prison is for a term in excess of what can reasonably be justified and that there are far too many long-term commitments." ABA STANDARDS RELATING TO SENTENCING ALTERNATIVES AND PROCEDURE, Commentary at 56 (approved draft 1968).

Both the ABA Standards and the National Council on Crime and Delinquency's Model Sentencing Act provide that the maximum statutory prison term for most offenses should be no longer than five years; for serious offenses, ten years; and only in unusual situations, twenty-five years. ABA Standard 2.1; COUNCIL OF JUDGES, NATIONAL COUNCIL ON CRIME AND DELINQUENCY, MODEL SENTENCING ACT §§ 5-9 (2d ed. 1972). See also, SB 42—AB 1440—AB 2311: The Sentencing Struggle, THE OUTLAW: J. PRISONERS UNION, June/July, 1975, at 3, col. 4.

Though Senate Bill 42 could yield sentences exceeding five years, it still represents a decrease in sentence length from the indeterminate sentence system (under which the average term actually served was generally longer than five years). See C.D. 75/30, supra note 8. Senate Bill 42 represents a good faith effort to bring California sentences within reasonable bounds and within the presently acceptable maximums.

76. These "enhancing" circumstances are various acts by the defendant, either in the course of the offense for which he has been convicted or in the past, which the legislature has determined will justify a longer sentence. These circumstances include prior prison terms served, being armed with or using a weapon, the infliction of great bodily harm, and the infliction of great property loss or damage. 1976 Cal. Legis. Serv., ch. 1139, §§ 268, 304, 305, 305.5, 306 (to be codified as CAL. PENAL CODE §§ 667.5, 12022, 12022.5, 12022.6, 12022.7).


77. 1976 Cal. Legis. Serv., ch. 1139, § 273, at 4820 (to be codified as CAL. PENAL CODE § 1170.1a(c)).

78. Id. §§ 304, 305, at 4835 (to be codified as CAL. PENAL CODE §§ 12022, 12022.5).

79. Id. § 306, at 4836 (to be codified as CAL. PENAL CODE § 12022.7).

80. Id. § 273, at 4820 (to be codified as CAL. PENAL CODE § 1170.1a(d)). For example, a conviction for assault with a deadly weapon would not be subject to the arming enhancement since being armed is an element of the offense.
no more than one of these enhancements shall apply to the sentence for any single offense. Here again, Senate Bill 42 very clearly seeks to avoid double or excessive punishment as well as to clarify the application of these enhancement provisions. The indeterminate sentence law did not contain similar rules of application and, as a result, sentences varied widely because enhancement provisions were applied differently.

Enhancement for prior terms and consecutive sentences is limited to five years and the total term of imprisonment is limited to twice the number of years imposed as the “base term,” unless the defendant is convicted of a violent felony, being armed with a deadly weapon, the use of a firearm, or the infliction of great bodily harm. If the conviction falls into one of these exceptions, it appears that there is no limit on the total term of imprisonment except for the limitation provided by the number of enhancements which can be imposed by law.

**Sentencing Procedure**

**Trial court sentencing.** Section 1170 (a)(2) provides the basic outline of sentencing procedure. The trial court is required to sentence an individual convicted of an offense to one of the three specified terms unless the defendant is given some other disposition provided by law. At all times the court must consider the sentencing rules prescribed by the Judicial Council as authorized in section 1170.3, and it is required to impose appropriate enhancements unless it finds mitigating circumstances.

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81. Id. § 273, at 4820 (to be codified as Cal. Penal Code § 1170.1(a)(e)).
82. The base term is the unenhanced term selected by the trial judge from among the three choices for any determinate offense.
84. Id. at 273, at 4820 (to be codified as Cal. Penal Code § 1170.1a(f)).
85. Id. at 4818 (to be codified as Cal. Penal Code § 1170(a)(2)).
86. Other dispositions include a fine, jail, probation or the suspension or imposition or execution of sentence. Id.
87. Id. at 4822 (to be codified as Cal. Penal Code § 1170.3). The rules, which the Judicial Council is required to develop, are to be designed to promote uniformity. They must provide guidance for the court’s decision to:
   (a) Grant or deny probation.
   (b) Impose the lower or upper prison term.
   (c) Impose concurrent or consecutive sentences.
   (d) Consider an additional sentence for prior prison terms.
   (e) Impose an additional sentence for being armed with a deadly weapon, using a firearm, an excessive taking or damage [to property], or the infliction of great bodily injury.
88. Additional punishment due to aggravating circumstances can be avoided by
When sentencing for an offense having three specified terms, the court must order the middle of the three possible terms, unless circumstances in mitigation or aggravation of the crime are presented by motion and found to be true at a hearing on that motion. A warning is given that no facts used to enhance a sentence, such as prior prison terms for violent crimes, consecutive sentences, or use of a firearm, shall justify imposition of the aggravated (or upper) term, and that no fact should be used twice to determine, aggravate or enhance a sentence. This warning is a substantial change from the procedures under the indeterminate sentence law where the facts which define an offense could also be considered as aggravating circumstances as well as conditions for enhancement.

Penal Code section 12022.6 provides a punishment enhancement for excessive taking of or damage to property where the elements of the offense involve the criminal taking of funds or property from or property damage to any individual, organization, group or the community in general and the offense does not specify a minimum value of the taking or damage, or specifies a minimum of less than $100,000.

This enhancement has two levels depending on the magnitude of the taking or damage. For a taking or damage greater than $100,000 but less than $500,000, the enhancement is for an additional term equal to one-half of the base term selected by the judge. If the taking or damage is equal to or greater than $500,000 then the enhancement is for a term equal to the base term selected by the judge. This new section represents a recognition by the legislature that a serious property crime can be as damaging to individuals and the community as a violent crime involving bodily harm or a threat of bodily harm.

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89. 1976 Cal. Legis. Serv., ch. 1139, § 173, at 4819 (to be codified as CAL. PENAL CODE § 1170(b)).

90. Id. § 268, at 4816 (to be codified as CAL. PENAL CODE § 667.5). New Penal Code section 667.5(a) provides enhancement only if the commitment offense is one of several defined "violent felonies" or a felony in which great bodily injury to a person other than the defendant or his accomplices has been pled and proven and the prior separate prison term also involved a "violent felony." The enhancement imposed is an additional three year term for each such prior felony unless the felon was free of prison custody and felony conviction for ten years immediately preceding the filing of the accusatory pleading that resulted in the present felony conviction. In this section the legislature specifically declares that these "violent felonies" merit special consideration when imposing a sentence to display society's condemnation for such extraordinary crimes of violence against the person.

Section 667.5(b) provides for one year enhancement for other prior prison terms for any felony.

91. Id. § 273, at 4819 (to be codified as CAL. PENAL CODE § 1170.1a).

92. Id. § 305, at 4836 (to be codified as CAL. PENAL CODE § 12022.5).

93. See notes 41-61 and accompanying text supra (discussion of C.D. 75/20 procedures).
Whenever a mitigated or aggravated term is selected, the facts relied upon must be set forth on the record. In fact, the record must include all facts supporting the choice of sentence, whether the mitigated, typical or aggravated term is chosen. This requirement provides a more complete record, thereby aiding appellate review of sentencing decisions.

A provision for resentencing within one hundred and twenty days of commitment is retained from the prior law. There are no significant changes in this provision, except for the proviso that the trial judge in resentencing should apply the rules and information provided by the Judicial Council regarding sentences of other prisoners convicted of similar crimes.

To promote uniformity of sentencing, the Community Release Board, which is the successor to the Adult Authority and the California Women's Board of Terms and Paroles, must review all sentences within one year after commencement of the terms thereof and recommend recall of the present sentence and resentencing of the defendant if a sentence is found to be disparate.

The California Judicial Council has the responsibility for establishing rules and procedures designed to foster the aims of determinate sentencing—uniformity of sentencing and sentencing proportionate to the seriousness of the offense committed. Accordingly, it is directed to establish criteria to aid the

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95. The composition of Community Release Board is similar to that of the Adult Authority. The Board includes nine members, each serving a four year term. 1976 Cal. Legis. Serv., ch. 1139, § 294, at 4832 (to be codified as CAL. PENAL CODE § 5075). Board membership is required to reflect "as nearly as possible a cross-section of the racial, sexual, economic and geographic features or the population of the state." Id. The Board is responsible for reviewing all prisoner's requests for reconsideration of denial of good time credit, and for setting parole length and conditions. In addition, it has the authority to modify decisions of the Department of Corrections in these matters. Id. § 297, at 4833 (to be codified as CAL. PENAL CODE § 5077). In contrast to the Adult Authority, the Community Release Board is authorized to do business in panels of three rather than two. Compare id. § 296, at 4833 (to be codified as CAL. PENAL CODE § 5076.1) with CAL. PENAL CODE § 5076.1 (West Supp. 1976). Since panels will probably be conducted in groups of the lowest allowable number, the addition of one member to the panel will prevent deadlocks.
96. 1976 Cal. Legis. Serv., ch. 1139, § 273, at 4820 (to be codified as CAL. PENAL CODE § 1170.1b). This is another one of many provisions in the Bill designed to promote uniformity of sentence.
97. The Judicial Council is established by the California Constitution. CAL. CONST. art. VI, § 6.
98. See 1976 Cal. Legis. Serv., ch. 1139, § 273, at 4822 (to be codified as CAL. PENAL CODE § 1170.3 et seq.) (defining the duties of the Judicial Council under the Bill).
trial judge in his sentencing decisions,\textsuperscript{99} to collect, analyze and distribute information on sentencing in California and other jurisdictions;\textsuperscript{100} to conduct annual sentencing institutes;\textsuperscript{101} and to review present sentencing statutes and procedures and recommend changes to the legislature.\textsuperscript{102} The main objectives of the Council in this review are to strive to maintain sentences proportionate to the seriousness of the offense, and to assure that California lawmakers remain abreast of current sentencing trends by comparing sentences in other jurisdictions and sentencing procedures recommended by national commissions and other learned bodies.\textsuperscript{103}

\textit{Multiple convictions.} Multiple convictions under Senate Bill 42 are dealt with by a formula.\textsuperscript{104} The aggregate term for all convictions is the greatest term imposed for any one of the offenses for which the individual is convicted, including any enhancement imposed for that offense, plus one-third of the middle term of imprisonment for each other felony conviction for which a consecutive sentence was imposed without any enhancement for those additional offenses.\textsuperscript{105}

Since no mention is made of concurrent sentences, it may be presumed, from the failure to provide an aggravating term for those sentences, that the terms are in fact to run concurrently. This is a distinct change from prior Adult Authority policy which added time to the "base term" for concurrent as well as consecutive sentences.\textsuperscript{104} The Adult Authority procedures considered additional convictions in establishing the seriousness of a commitment. They also added time to that sentence as a penalty for sentences whose terms were, by definition to run at the same time as the commitment offense. Senate Bill 42 clarifies the roles of concurrent and consecutive sentences by allowing an extension of the sentence only in the case of convic-

\textsuperscript{99} See note 87 supra.
\textsuperscript{100} 1976 Cal. Legis. Serv., ch. 1139, § 273, at 4822 (to be codified as \textsc{cal. penal code} § 1170.4).
\textsuperscript{101} Id. (to be codified as \textsc{cal. penal code} § 1170.5).
\textsuperscript{102} Id. (to be codified as \textsc{cal. penal code} § 1170.6).
\textsuperscript{103} Id. (listing of considerations).
\textsuperscript{104} Id. at 4819 (to be codified as \textsc{cal. penal code} § 1170.1a).
\textsuperscript{105} For example, a conviction for robbery with proof of great bodily harm and an additional conviction for first degree burglary to run consecutively might be treated as follows: 3 years (the middle term for robbery) plus 3 years (the enhancement for great bodily harm, plus 1 year (one third of the middle term for burglary), for a total sentence of seven years.
\textsuperscript{106} C.D. 75/20, supra note 8, at § A.3.b. See notes 51-54 and accompanying text supra.
tions intended to be served consecutively.

When an individual is convicted of a felony committed while in prison, and his sentence is to run consecutively with his present prison term, his term is calculated in the same manner as for multiple convictions.\(^{107}\) His term is the remainder of time to be served on the original offense(s) plus the greatest term imposed for any felony committed while serving the original term plus one-third of the middle term for each other felony conviction.

*Sentences imposed prior to Senate Bill 42.* All inmates sentenced before the effective date of Senate Bill 42, who would have been sentenced to a determinate term under the applicable provisions of the new bill, will have their terms recalculated by the Community Release Board. This will be done by utilizing the middle term of the most serious offense for which the prisoner was convicted, aggregated by any additional terms imposed at the time of sentencing.\(^{108}\) If this calculation results in a term which would end before the parole release date already set by the Adult Authority,\(^{109}\) then the inmate’s parole date must be reset at the shorter term. Resetting is mandatory unless a majority of the Community Release Board determines that a longer term is warranted due to the number of present or prior convictions, or due to the presence of facts justifying an *arming, use or great bodily harm* enhancement.

When a longer term is believed justified, the prisoner is entitled to a hearing at which he may be represented by counsel and in which the setting of his term and parole date will be reviewed.\(^{110}\) All inmates who have not had a parole date set by the Adult Authority prior to the effective date of Senate Bill 42 shall have their terms calculated and parole dates set in the same manner as that described above.\(^{111}\) They also are entitled to a review hearing if the Board decides that they should serve a longer sentence than that calculated.

Inmates sentenced prior to the effective date of Senate Bill 42 who still have indeterminate sentences under the Bill will have their release dates set by the Community Release Board

\(^{107}\) 1976 Cal. Legis. Serv., ch. 1139, § 273, at 4820 (to be codified as *Cal. Penal Code* § 1170.1a(b)).

\(^{108}\) *Id.* at 4821 (to be codified as *Cal. Penal Code* § 1170.2(a)).

\(^{109}\) *See* notes 41-61 and accompanying text *supra* (C.D. 75/20, Adult Authority procedures for setting parole release dates).

\(^{110}\) The procedural guidelines for such a review are established by 1976 Cal. Legis. Serv., ch. 1139, § 281.8, at 4827 (to be codified as *Cal. Penal Code* § 3041.5).

\(^{111}\) *Id.* § 273, at 4821 (to be codified as *Cal. Penal Code* § 1170.2(c)).
in the manner established by prior law. 112 Nothing in Senate Bill 42 will require an inmate, sentenced before the effective date of the Bill, to remain in prison longer than he would have been kept in custody under the indeterminate sentence law. Though the indeterminate sentence law is retained only in a few provisions, mainly those providing terms of life imprisonment, 113 its procedure will continue to be relevant in setting the terms of prisoners sentenced before the passage of Senate Bill 42.

Good Time Credit

The second major procedural section of Senate Bill 42 deals with provisions for granting "good time" credit for time served in prison. 114 Every prisoner with a determinate term must be advised within fourteen days of the commencement of his term of all applicable prison rules and available institutional programs, including the possibility of receiving a reduction of up to one-third of his sentence for good time and participation. 115 All prisoners sentenced prior to the effective date of Senate Bill 42 who will have determinate sentences must be advised of the rules and programs within ninety days of the Bill’s effective date. 116 In all cases, the inmate’s file must reflect compliance with this provision.

At the time the prisoner is informed of the availability of “good time,” he must be shown a document, which both he and a Department of Corrections official will sign, which outlines the conditions for obtaining good time credit. 117 These conditions may be modified by the mutual consent of the Department and the prisoner, by transfer of the inmate to another institution, or by the Department’s determination of the prisoner’s lack of adaptability and success in a specific program or assignment. If lack of adaptability is claimed, the inmate is entitled to a hearing on that decision. 118

112. Id. at 4822 (to be codified as Cal. Penal Code § 1170.2(e)).
113. See, e.g., id. § 271, at 4818 (to be codified as Cal. Penal Code § 1168).
114. Id. § 276, at 4823 (to be codified as Cal. Penal Code §§ 2830-32). Good time credits apply to all prisoners. Id. § 273, at 4822 (to be codified as Cal. Penal Code § 1170.2(d)). However, prisoners sentenced prior to the effective date of the bill can receive credit only from the effective date of the bill. Id.
115. Id. § 276, at 4823 (to be codified as Cal. Penal Code § 2930(a)).
116. Id. (to be codified as Cal. Penal Code § 2930(b)).
117. Id. (to be codified as Cal. Penal Code § 2931(a)).
118. Id. at 4824 (to be codified as Cal. Penal Code § 2931(a)(3)).
The documentation requirement in this section is undoubtedly an effort to avoid the criticism that was directed at the Adult Authority that each time a prisoner appeared before the Board he was told to do something different in order to obtain an early release.\textsuperscript{119} Although the Department can unilaterally change the credit requirements for lack of adaptability, the hearing requirement should prevent abuses.

The maximum possible good time credit will result in a four month reduction in sentence for every eight monthly served.\textsuperscript{120} Three months of each four month reduction are based upon forebearance from illegal activities or prison disciplinary infractions. These forbidden activities range from assault with a weapon and escape to manufacture or sale of intoxicants. Penalties for participation in these activities range from a forty-five day reduction in credit for the most serious to a fifteen day reduction for the least serious.

In any case the Department may seek a criminal prosecution for violations of law. If the prisoner is prosecuted, he may not be denied credit if found not guilty and he may be denied credit at the specified rates if found guilty.\textsuperscript{121} One month of good time credit can be awarded for participation in prison activities.\textsuperscript{122} Success in the activity is not required for credit, if a reasonable effort is made. However, failure to participate, unless confined by choice or due to behavior problems, will result in a maximum loss of thirty days credit for every eight month period actually served.

The Bill's credit provisions provide some incentive to prisoners to better themselves and to reduce their sentences by not committing additional crimes in prison.\textsuperscript{123} Even if the inmate

\begin{itemize}
\item[119.] See Transcript, supra note 5.
\item[120.] 1976 Cal. Legis. Serv., ch. 1139, § 276, at 4824 (to be codified as CAL. PENAL CODE § 2931(b)).
\item[121.] Id. at 4825 (to be codified as CAL. PENAL CODE § 2932 (d)).
\item[122.] Id. at 4824 (to be codified as CAL. PENAL CODE § 2931(c)).
\item[123.] Almost all prohibited activities are at least misdemeanors. The activities prohibited by the bill and their penalties are as follows:
\begin{enumerate}
\item Assault with a weapon; or escape.
\item Physically assaultive behavior; possession of a weapon without permission; attempt to escape; or urging others, with the intent to cause a riot, to commit acts of force or violence, at a time and place under circumstances which produce a clear and present and immediate danger of a riot which results in acts of force or violence.
\item Intentional destruction of state property valued in excess of fifty dollars ($50); falsification of a significant record or document; possession of escape tools without permission; or manufacture or sale of intoxicants.
\end{enumerate}
Activities specified in paragraph (1) may result in a maximum denial of
refuses to participate in prison activities and does all the forbidden activities, nothing except another felony conviction will lengthen his term.\textsuperscript{124}

Denial of good time credit is possible only if certain time limitations and procedures are observed.\textsuperscript{125} First, credit can be denied only within the eight month credit review period in which the misbehavior takes place. Second, the Department must follow a strict timetable for notifying the inmate of its intent to deny credit and for proceeding with the denial hearing. The Department must also meet specific notice requirements.\textsuperscript{126} Third, the inmate must be granted certain procedural assistance and safeguards, including the right to request the attendance of witnesses and to question all witnesses at the hearing and the right to assistance by Department employees in gathering facts and presenting the prisoner's defense.\textsuperscript{127} Finally, the inmate must be notified within ten days of the hearing of the results and reasons therefor, and he must be granted not only Department, but also Community Release Board review upon request.\textsuperscript{128}

Although the inmate does not have the full panoply of procedural safeguards, substantial safeguards are provided, and the proceeding to deny credit can not result in additional criminal penalties to the inmate.\textsuperscript{129}

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\textsuperscript{124} Id. (to be codified as Cal. Penal Code § 2931(b)).

\textsuperscript{125} Id. (to be codified as Cal. Penal Code § 2932(a)(1)).

\textsuperscript{126} Id. at 4825 (to be codified as Cal. Penal Code § 2932(a)(2)-(6)).

\textsuperscript{127} Id. (to be codified as Cal. Penal Code § 2932(a)(7)).

\textsuperscript{128} It is possible that an inmate's right to credit could be considered so closely related to his liberty that even more procedural safeguards may be necessary to meet the requirements of due process. See, e.g., Cal. Const. art. I, §§ 14-15 (specific constitutional due process protections for criminal trials). Since a person's freedom is restricted by a denial of good time almost as much as it is by a criminal conviction, full criminal trial protections may be required. However, since the procedures provided for
Every eight months the Department must recompute prison time to be served on the basis of good time earned and must notify each prisoner of his new release date. If credit denial proceedings or criminal prosecutions prevent release of a prisoner who otherwise would have been released, and he is subsequently found not guilty, the time spent incarcerated beyond the scheduled release date will be deducted from the prisoner's parole period.\textsuperscript{130}

There were no good time provisions in the indeterminate sentence law. Each sentence could vary anywhere within the statutory minimum and maximum bounds. Procedural safeguards were not provided by law and were developed only on a case by case basis.\textsuperscript{131}

Although the new determinate sentence law will probably be challenged in the courts on many procedural grounds, the safeguards that are built into the law will prevent serious abuses before the procedures can be tested. Moreover, the substantial documentation requirements will make review of any case much more complete and accurate.

\textbf{Parole}

The last major procedural section of Senate Bill 42 deals with parole.\textsuperscript{132} Parole is a required period of Department of Corrections supervision of an inmate after he is released from prison.\textsuperscript{133} For all inmates serving determinate sentences and the Bill are already quite detailed and protective of a prisoner's rights, additional safeguards should be imposed only if the courts find present procedures do not adequately protect those rights.

\textsuperscript{130} See notes 133-43 and accompanying text \textit{infra} (explanation of parole procedure under the Bill).

\textsuperscript{131} The protections that were developed in the courts were often limited to very narrow facts, leaving other areas unprotected until the appropriate case reached the courts. For example, parole revocation and parole rescission procedures both involved the withdrawing of liberty, but due process procedures were extended to one proceeding long before they were extended to the other. Gee v. Brown, 14 Cal. 3d 571, 534 P.2d 716, 120 Cal. Rptr. 876 (1975); \textit{In re Prewith}, 8 Cal. 3d 470, 503 P.2d 1326, 105 Cal. Rptr. 318 (1972). Also, the documentation required by Adult Authority procedures was inadequate, often limiting review to only the most glaring cases of abuse.

\textsuperscript{132} 1976 Cal. Legis. Serv., ch. 1139, § 278 et seq., at 4826 (to be codified as \textit{CAL. PENAL CODE} §§ 3000-65).

\textsuperscript{133} To anyone familiar with present concepts of parole, the parole period provided by the Bill looks like an additional period of supervision, and possibly of incarceration if parole is revoked, after an individual's determinate sentence has been served. Such an additional penalty could present constitutional due process problems if viewed as an additional period of supervision and control without a trial and a conviction. However, since all determinate sentences have a one year parole provision
those serving indeterminate sentences less than life imprisonment, parole will be a period up to one year. Prisoners serving indeterminate sentences with a life maximum will serve a parole period up to three years. This parole can be waived by the Community Release Board for good cause, and the inmate can be released from custody immediately.

Major provisions of the Bill include specific guidelines for every decision which must be made and procedural safeguards to assure that each individual is treated fairly and equally and has a right to some form of review.\textsuperscript{134} The primary exception is the parole waiver decision; no definition of good cause or factors to be considered are provided, nor is any procedure set up for making and reviewing that decision.\textsuperscript{135} The absence of guidelines for this decision allows for disparity in its application and will certainly lead to litigation even if the Community Release Board adopts procedures paralleling other notice and hearing procedures in the Bill.\textsuperscript{136} The legislature should remedy this defect by providing standards for making the parole waiver decision, by requiring documentation of the reasons for the decision, and by providing a review procedure.

The remainder of the parole provisions deal with the parole release decisions for inmates still serving indeterminate sentences under Senate Bill 42. Within the first year of incarceration of such an inmate, a Community Release Board panel\textsuperscript{137} must meet with the inmate to review his file and make recommendations.\textsuperscript{138} Presumably these recommendations will deal with the activities the inmate should engage in to assure

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\textsuperscript{134} See, e.g., id. § 281.8, at 4827 (to be codified as CAL. PENAL CODE § 3041.5) (procedural requirements for hearings to review parole eligibility or the setting, postponing or rescinding of parole dates or the evaluation of a prisoner’s appeal of good time denial).

\textsuperscript{135} See id. § 278, at 4826 (to be codified as CAL. PENAL CODE § 3000).

\textsuperscript{136} See note 130 supra. Some cases have already held that parole is a substantial liberty. See, e.g., Gagnon v. Scarpelli, 411 U.S. 778 (1973); Preston v. Piggman, 496 F.2d 270 (1974). If parole is a substantial liberty requiring due process protections, surely the right to be free without parole is an even greater liberty entitled to at least as much protection.

\textsuperscript{137} 1976 Cal. Legis. Serv., ch. 1139, § 296, at 4833 (to be codified as CAL. PENAL CODE § 5076.1) (provides for doing business in panels).

\textsuperscript{138} Id. § 281, at 4827 (to be codified as CAL. PENAL CODE § 3041(a)).
early release, similar to the conditions for granting good time credit for a prisoner with a determinate sentence.\(^{139}\)

One year prior to the inmate's minimum eligible parole release date,\(^{140}\) a Community Release Board panel will meet with the inmate and will set his parole release date. These dates must be set in a manner that will provide uniform sentences for similar offenses.\(^{141}\) The Judicial Council is authorized to provide rules for the Board which will help promote uniformity.

Subdivision (b) of section 3041 gives the Community Release Board authority to consider the protection of society by refusing to set a parole release date if public safety so requires. That subdivision makes reference to the "timing" of current or past offenses as a factor which makes a more lengthy period of incarceration necessary. Timing is not defined.\(^{142}\)

**CONCLUSIONS**

Senate Bill 42 eliminates most of the problems of the indeterminate sentence while creating few of its own. It clearly defines the purpose of sentencing and imposes numerous requirements to assure that that purpose is met. Although the resulting sentences can be questioned as too short for the adequate protection of society,\(^{143}\) the scheme of varied levels of

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\(^{139}\) See notes 118-20 and accompanying text supra. For the information of the Community Release Board and the protection of the inmate, these recommendations should be carefully documented and included in the inmate's file. Though these recommendations will be more easily modified than conditions for granting good time credit because of the indeterminate features of the inmate's term, careful documentation will prevent the Board from making contradictory recommendations each time it meets with the inmate and will allow the inmate to question changes in recommendations.

\(^{140}\) See notes 41-42 and accompanying text supra (definition of parole release date).

\(^{141}\) Uniformity was not a primary goal of the indeterminate sentence procedures. See C.D. 75/20, *supra* note 8.

\(^{142}\) The only interpretation this author can imagine for the use of that word is that the Community Release Board may consider whether there has been a rash of crimes similar to the inmate's immediately prior to his release and whether the public outcry at the release of such a prisoner would be too great to allow release. It does not seem rational to postpone an individual's release because of the crimes of others. If this interpretation of timing is correct, its use is certainly subject to challenge on due process grounds.

\(^{143}\) Such a decision is purely a policy decision and should be made by the legislature and not an administrative board. Under the indeterminate sentence system this decision was made on a case-by-case basis and the result was disparity. The Adult Authority's approach to the protection of society was expressed in a policy statement: Felons committed to prison should be kept until there is reasonable cause to believe they can lead crime-free lives in society. Doubt should be
seriousness and proportionate levels of sentencing is consistent with the punishment rationale. If additional punishment or greater protection of society is deemed necessary, individual sentences or the entire system can be skewed upward by adding years or months to the sentences without increasing the disparity of the system or upsetting the goal of proportionality.

Determinate sentencing, when combined with the goal of uniformity in sentencing crimes of similar gravity, eliminates the disparity of sentences under an indeterminate sentencing system. Merely having punishment as a purpose, a goal which can be achieved, goes a long way toward improving the sentencing system. The procedural safeguards of careful documentation, and adequate notice, hearing and review for every major decision involving the inmate, erase the additional problems of arbitrariness and insulation from review with which the indeterminate sentencing system was plagued. Finally, this determinate sentencing system provides short enough sentences so that even a supposedly rehabilitated individual who cannot be detected need not serve very long.

The frustration of the indeterminate sentence system has been eloquently expressed by Judge Marvin Frankel:

The sentence purportedly tailored to the cherished needs of the individual turns out to be a crude order for simple warehousiing. . . .

. . . In a host of cases, then, when somebody says a prisoner must stay locked up because he is not "ready" for release, the ultimate Kafkaism is the lack of any definition of "ready."14

With a determinate sentencing system that frustration should be at an end.

Paula A. Johnson

resolved in favor of public protection. Prisoners who make a career of criminal behavior forfeit their right to be treated leniently.

Violent, dangerous criminals and those who make a career of stealing other persons' property will be confined until there is adequate assurance they have been reformed.

Adult Authority Policy Statement No. 24 [on file at SANTA CLARA L. REV.].

144. FRANKEL, supra note 5, at 93.
### Appendix A

**Suggested Base Ranges for Sentences**

<table>
<thead>
<tr>
<th>Offense</th>
<th>Typical (in months)</th>
<th>Aggravated (in months)</th>
</tr>
</thead>
<tbody>
<tr>
<td>Murder 1st</td>
<td>96-156</td>
<td></td>
</tr>
<tr>
<td>Murder 2nd</td>
<td>42-66</td>
<td></td>
</tr>
<tr>
<td>Manslaughter</td>
<td></td>
<td></td>
</tr>
<tr>
<td>Voluntary</td>
<td>36-46</td>
<td></td>
</tr>
<tr>
<td>Involuntary</td>
<td>24-32</td>
<td></td>
</tr>
<tr>
<td>Vehicle</td>
<td>18-24</td>
<td></td>
</tr>
<tr>
<td>Robbery 1st</td>
<td>30-38</td>
<td>36-44</td>
</tr>
<tr>
<td>Robbery 2nd</td>
<td>22-30</td>
<td>28-36</td>
</tr>
<tr>
<td>Arson</td>
<td>18-30</td>
<td>30-42</td>
</tr>
<tr>
<td>Assault</td>
<td>24-32</td>
<td>30-38</td>
</tr>
<tr>
<td>Burglary 1st</td>
<td>24-30</td>
<td>28-34</td>
</tr>
<tr>
<td>Burglary 2nd</td>
<td>16-22</td>
<td>20-29</td>
</tr>
<tr>
<td>Theft</td>
<td>16-22</td>
<td>20-28</td>
</tr>
<tr>
<td>Grand theft</td>
<td>22-28</td>
<td>26-34</td>
</tr>
<tr>
<td>Sexual crimes</td>
<td>30-60</td>
<td></td>
</tr>
<tr>
<td>Controlled substances (heroin; opium and its derivatives; hallucinogens)</td>
<td></td>
<td></td>
</tr>
<tr>
<td>Possession</td>
<td>26-36</td>
<td></td>
</tr>
<tr>
<td>Possession for sale</td>
<td>34-42</td>
<td></td>
</tr>
<tr>
<td>Sale</td>
<td>38-48</td>
<td></td>
</tr>
<tr>
<td>Controlled substances (marijuana and dangerous drugs)</td>
<td></td>
<td></td>
</tr>
<tr>
<td>Possession</td>
<td>18-32</td>
<td></td>
</tr>
<tr>
<td>Possession for sale</td>
<td>28-38</td>
<td></td>
</tr>
<tr>
<td>Sale</td>
<td>36-44</td>
<td></td>
</tr>
<tr>
<td>Bribery</td>
<td>12-24</td>
<td></td>
</tr>
<tr>
<td>Prisoner with weapon</td>
<td>9-18</td>
<td>18-36</td>
</tr>
<tr>
<td>Escape</td>
<td>6-18</td>
<td>16-22</td>
</tr>
<tr>
<td>Ex-felon in possession weapon</td>
<td>9-18</td>
<td>18-30</td>
</tr>
<tr>
<td>Sale or mfg. weapon</td>
<td>9-18</td>
<td>18-36</td>
</tr>
<tr>
<td>Parole violation</td>
<td>0-9</td>
<td>9-18</td>
</tr>
</tbody>
</table>

### Suggested Adjustment Ranges

<table>
<thead>
<tr>
<th>Prior Prison Terms</th>
<th>Sentencing Status</th>
<th>Subsequent Offenses</th>
</tr>
</thead>
<tbody>
<tr>
<td>Less serious</td>
<td>Youthful Offender</td>
<td>Court convictions</td>
</tr>
<tr>
<td></td>
<td>(each) + (3-9) mos.</td>
<td>(each) + (12-24) mos.</td>
</tr>
<tr>
<td>More serious</td>
<td>Concurrent sentence</td>
<td>Disciplinary</td>
</tr>
<tr>
<td></td>
<td>(each) + (9-24) mos.</td>
<td>Less serious + (3-9) mos.</td>
</tr>
<tr>
<td></td>
<td>Consecutive sentence</td>
<td>More serious + (9-18) mos.</td>
</tr>
<tr>
<td></td>
<td>(each) + (12-24) mos.</td>
<td>(each) + (0-9) mos.</td>
</tr>
</tbody>
</table>

*Derived from tables in C.D. 75/20, supra note 8.
### Appendix B

#### Comparative Sentences for Selected Offenses Under S.B. 42 and Indeterminate Sentencing Systems

<table>
<thead>
<tr>
<th>Penalty Under S.B. 42</th>
<th>Offense</th>
<th>Penalty Under Indeterminate Sentencing</th>
</tr>
</thead>
<tbody>
<tr>
<td>16 months, 2 years or 3 years</td>
<td>Accessory</td>
<td>6 months to 5 years</td>
</tr>
<tr>
<td></td>
<td>Misprison of treason</td>
<td>6 months to 5 years</td>
</tr>
<tr>
<td></td>
<td>Threatening public official to deter from duties</td>
<td>6 months to 5 years</td>
</tr>
<tr>
<td></td>
<td>Defrauding government</td>
<td>6 months to 5 years</td>
</tr>
<tr>
<td></td>
<td>Corrupt influencing of jurors</td>
<td>6 months to 5 years</td>
</tr>
<tr>
<td></td>
<td>Escape from reformatory</td>
<td>6 months to 10 years</td>
</tr>
<tr>
<td></td>
<td>False report of secretion of explosive</td>
<td>6 months to 3 years</td>
</tr>
<tr>
<td></td>
<td>Assault by public officer</td>
<td>6 months to 3 years</td>
</tr>
<tr>
<td></td>
<td>Assault with attempt to commit felony except murder</td>
<td>6 months to 5 years</td>
</tr>
<tr>
<td></td>
<td>Child/wife beating</td>
<td>6 months to 15 years</td>
</tr>
<tr>
<td></td>
<td>Bigamy</td>
<td>6 months to 10 years</td>
</tr>
<tr>
<td></td>
<td>Indecent exposure, 2d conviction</td>
<td>1 year to life</td>
</tr>
<tr>
<td></td>
<td>Burglary 2d</td>
<td>1 year to 15 years</td>
</tr>
<tr>
<td></td>
<td>Forgery</td>
<td>1 year to 14 years</td>
</tr>
<tr>
<td></td>
<td>Receiving stolen property</td>
<td>6 months to 10 years</td>
</tr>
<tr>
<td></td>
<td>Wiretapping</td>
<td>6 months to 3 years</td>
</tr>
<tr>
<td>2, 3 or 4 years</td>
<td>Bribing executive officer</td>
<td>1 year to 14 years</td>
</tr>
<tr>
<td></td>
<td>Perjury</td>
<td>1 year to 14 years</td>
</tr>
<tr>
<td></td>
<td>Manslaughter</td>
<td>6 months to 15 years</td>
</tr>
<tr>
<td></td>
<td>Mayhem</td>
<td>6 months to 14 years</td>
</tr>
<tr>
<td></td>
<td>Robbery 1st</td>
<td>5 years to life</td>
</tr>
<tr>
<td></td>
<td>Robbery 2nd</td>
<td>1 year to life</td>
</tr>
<tr>
<td></td>
<td>Poisoning with intent to kill</td>
<td>10 years to life</td>
</tr>
<tr>
<td></td>
<td>Assault with intent to murder</td>
<td>1 year to 14 years</td>
</tr>
<tr>
<td></td>
<td>Assault with intent to commit rape, sodomy, mayhem, robbery, grand larceny</td>
<td>1 year to 20 years</td>
</tr>
<tr>
<td></td>
<td>Dueling resulting in death</td>
<td>1 year to 7 years</td>
</tr>
<tr>
<td></td>
<td>Battery with serious bodily injury</td>
<td>6 months to 5 years</td>
</tr>
<tr>
<td></td>
<td>Assault with caustic chemical</td>
<td>1 year to 14 years</td>
</tr>
<tr>
<td></td>
<td>Assault with deadly weapon</td>
<td>6 months to 10 years</td>
</tr>
<tr>
<td></td>
<td>Pimping</td>
<td>1 year to 10 years</td>
</tr>
<tr>
<td></td>
<td>Child stealing</td>
<td>6 months to 20 years</td>
</tr>
<tr>
<td></td>
<td>Sodomy with force</td>
<td>6 months to 5 years</td>
</tr>
<tr>
<td></td>
<td>Lynching</td>
<td>6 months to 20 years</td>
</tr>
<tr>
<td></td>
<td>Arson, not dwelling house</td>
<td>2 years to 20 years</td>
</tr>
<tr>
<td></td>
<td>Burglary 1st</td>
<td>5 years to life</td>
</tr>
<tr>
<td></td>
<td>Counterfeiting</td>
<td>1 year to 14 years</td>
</tr>
<tr>
<td></td>
<td>Grand theft</td>
<td>6 months to 10 years</td>
</tr>
<tr>
<td></td>
<td>Extortion</td>
<td>1 year to 10 years</td>
</tr>
</tbody>
</table>
| 3, 4 or 5 years | Kidnapping  
Robbery of transportation operator  
Attempt to kill President  
Assault with a deadly weapon on a peace officer  
Rape  
Sodomy against will of victim  
Child molesting  
Arson during emergency  
Burglary with explosive  
Prisoner holding hostage in prison | 1 year to 25 years  
5 years to life  
10 years to life  
6 months to 15 years  
3 years to life  
5 years to life  
1 year to life  
5 years to life  
10 years to 40 years  
5 years to life |
|---|---|
| 5, 6 or 7 years | Murder 2d  
Rape with force or violence | 5 years to life  
5 years to life |
| life imprisonment—no special circumstances | Murder 1st  
Kidnapping resulting in death of victim | life, special circumstances  
capital punishment  
life with or without possibility of parole |