

The California Adult Authority —Administrative Sentencing and the Parole Decision as a Problem in Administrative Discretion

I. INTRODUCTION

Under California's indeterminate sentencing system, determination of the length of prison sentences within statutory minimums and maximums and the parole decision regarding male prisoners are entrusted to the California Adult Authority. Behind the institution of indeterminate sentencing are the assumptions that the knowledge exists to make accurate diagnoses and prognoses regarding human behavior, that the decision maker administering such a system will possess and use such knowledge, and that behavior modification methods and resources will be broadly available throughout the prison system. Given these assumptions there are persuasive arguments for administrative determination of prison terms. Among them are that individualized sentences are fairer and better achieve the goals of the criminal law than determinate sentences imposed by a legislature, and that the Adult Authority, acting sometime after a defendant has been imprisoned, is better able to determine a man's readiness for release than is the judge at the time of sentencing.

Nevertheless, in recent years criticism of administrative sentence fixing has grown in intensity and variety. Critics in the legislature, sociologists, prisoners and their attorneys question the predictability of human behavior, the expertise of the Adult Authority, the informality and validity of criteria used

in the decision making and the parole board's almost complete freedom from legal restraint. While broad discretion has been defended as necessary to the implementation of an indeterminate sentence law, it has been attacked as an unwarranted grant of arbitrary power to a government agency. This article focuses on the administrative sentencing and parole decision process as a problem in administrative discretion.

II. THE ADULT AUTHORITY – AN OVERVIEW

A. STATUTORY DESCRIPTION

The Adult Authority is an autonomous branch of the Department of Corrections which since 1969 has been a part of the Human Relations Agency.¹ Legislation authorizes an Adult Authority Board of nine members, each appointed by the Governor for a term of four years, and each eligible for reappointment.² Members are to devote full time to their duties and receive salaries and expense allowances from the State.³ A Chairman, designated by the Governor, is made the “administrative head” of the agency with the authority to appoint all civil service employees of the Adult Authority.⁴

The statute further provides that:

Persons appointed to the Adult Authority shall have a broad background in and ability for appraisal of law offenders and the circumstances of the offense for which convicted. Insofar as practicable members shall be selected who have a varied and sympathetic interest in corrections work including persons widely experienced in the fields of corrections, sociology, law, law enforcement, and education.⁵

¹CAL. PEN. CODE § § 5000-5001 (West 1970).

²CAL. PEN. CODE § 5075 (West 1970).

³CAL. PEN. CODE § 5076 (West 1970).

⁴CAL. PEN. CODE § 5075 (West 1970).

⁵*Id.* Current members of the Adult Authority and their career background: Henry W. Kerr, former assistant Commander of the Los Angeles Police Department's Detective Bureau; Curtis O. Lynam, former head of the F.B.I., San Francisco Office; Manley J. Bowler, former Chief Assistant U.S. Attorney to the Southern District of California, Chief Deputy Attorney 1954-64; Walter A. Gordon, parole officer in the California Department of Corrections; Leland M. Edman, Deputy District Attorney in Fresno County; James H. Hoover, former Correctional Officer, C.D.C.; Charles E. Brown, retired Chief of Police of Richmond; Daniel R. Lopez, Correctional Officer and employee Department of Human Resources.

The Adult Authority is structured as a collegium, meeting and transacting business in panels.⁶ The panels are made up of two members, the number designated as a quorum for the transaction of business. The Adult Authority is authorized to employ case hearing representatives who hear cases and make recommendations to the Board.⁷ Recommendations of case hearing representatives for the granting or denial of a parole, for revocation of a parole, for the determination or redetermination of a prison term, or for a discharge from commitment are not final until approved by a panel of Adult Authority members.⁸

The Adult Authority is both a decision making and advisory body. Its decision making functions include the power to grant and revoke paroles,⁹ the fixing of sentences,¹⁰ establishing the conditions of parole¹¹ and the power to restore, with certain exceptions, such civil rights to prisoners and parolees as it, "may deem proper."¹² While sentence fixing and the parole decision are theoretically distinct decisions, in practice they are each made by the same people, using the same procedure and criteria, and are usually made at the same time.

Functioning as an advisory body, the Adult Authority participates in meetings of the Board of Corrections through the Chairman,¹³ it advises the governor in executive clemency cases,¹⁴ it is allowed to send a non-voting representative to meetings of the Correctional Industries Commission,¹⁵ and it is empowered to advise and recommend to the Director of Corrections on, "general and specific policies and procedures relating to the duties and functions of the director."¹⁶

B. THE CALIFORNIA SENTENCING SYSTEM

Under California's system of indeterminate sentencing, when

⁶CAL. PEN. CODE § 5076.1 (West 1970).

⁷*Id.*

⁸*Id.*

⁹CAL. PEN. CODE § § 3020, 3040, 3041, 3056, 3060, 3063, 3103, 3113, 3114, 5077 (West 1970).

¹⁰CAL. PEN. CODE § § 2940, 3020, 5077 (West 1970).

¹¹CAL. PEN. CODE § § 3052-3053 (West 1970).

¹²CAL. PEN. CODE § 2660 (West 1970).

¹³CAL. PEN. CODE § 6025 (West 1970).

¹⁴CAL. PEN. CODE § § 4801-4803, 4810-4814 (West 1970).

¹⁵CAL. PEN. CODE § 5089 (West 1970).

¹⁶CAL. PEN. CODE § 5003.5 (West 1970).

a person is convicted of an offense for which imprisonment in state prison is prescribed by law, the judge may (1) with certain exceptions, place the person on probation,¹⁷ (2) grant a new trial, (3) suspend imposition of the sentence or, (4) sentence the person to imprisonment in a state prison.¹⁸ If the court elects to sentence the person to state prison he may only sentence him "to the term prescribed by law."¹⁹ In imposing such a sentence the court is not allowed to fix the term or duration of the period of imprisonment.²⁰

The California Penal Code confers broad authority on the Adult Authority to determine and redetermine prison sentences:

In the case of all persons heretofore or hereafter sentenced under the provisions of section 1168 of this code, the Adult Authority may determine and redetermine, after the actual commencement of imprisonment, what length of time, if any, such person shall be imprisoned, unless the sentence be sooner terminated by commutation or pardon by the Governor of the State.²¹

The Adult Authority is empowered, in cases where a prisoner has been sentenced to two or more consecutive sentences, to determine and redetermine what length of time he will serve on all of his sentences.²² The Adult Authority is required, by statute, to give, on request, 30 days notice of a meeting to fix a sentence to the judge before whom the prisoner was tried and convicted, the attorney for the defendant, the district attorney, and the law enforcement agency that investigated the case.²³ There is no statutory requirement to grant notice or a hearing to the prisoner on determination and redetermination of his sen-

¹⁷CAL. PEN. CODE § 1203 (West 1970).

¹⁸CAL. PEN. CODE § 1168 (West 1970).

¹⁹*Id.*

²⁰One exception to the prohibition occurs in CAL. PEN. CODE § 1202(b) which gives the court authority to specify a minimum term of six months imprisonment if the defendant is under 23 years old.

The judge also retains for 120 days after commitment the option to recall the sentence previously ordered and resentence if it is deemed warranted by the diagnostic study and recommendations of the Director of Corrections.

CAL. PEN. CODE § 1168 (West 1970).

²¹CAL. PEN. CODE § 3020 (West 1970).

²²CAL. PEN. CODE § 3021 (West 1970).

²³CAL. PEN. CODE § 3022 (West 1970).

tence.²⁴ The only statutory limitations on the determinative powers of the Adult Authority are that the term of imprisonment must not exceed the maximum nor be less than the minimum term prescribed by law.²⁵

Because the statutory maximum sentences for many felonies are extremely long and the statutory minimum sentences often relatively short, the power of the agency in sentence determination is great. Second degree robbery, for example, carries a maximum sentence of life imprisonment and a minimum sentence of one year; within these limits the Adult Authority determines the amount of time a man serves.²⁶

Perhaps most significant about the statutory description of the Adult Authority and the system of indeterminate sentencing in California is not what the legislature has enacted but what it has failed to enact. The legislature has provided no standards or criteria by which the Adult Authority is to be guided in carrying out its sentencing and paroling functions.²⁷ The Report of the Select Committee on the Administration of Justice of the California State Assembly, "Parole Board Reform in California, Order out of Chaos", states:

For years the Legislature has neglected its responsibility of providing guidelines for boards charged with parole decision-making. ... The parole board is one of the last bastions of unchecked and arbitrary power in America.²⁸

C. SELF REGULATION – ADULT AUTHORITY RESOLUTIONS

The California Legislature has not detailed the actual pro-

²⁴*Fliescher v. Adult Authority*, 202 Cal. App. 2d 44, 20 Cal. Rptr. 603 (1962).

²⁵CAL. PEN. CODE § 3023 (West 1970).

²⁶Other examples of crimes with a maximum sentence of life: murder, robbery, attempted robbery with use of firearm, robbery with bodily harm, assault by a prisoner, first degree burglary, rape, lewd acts on children, sodomy, annoying a child or loitering around a school with prior, indecent exposure with a like prior.

For most prisoners the minimum eligible parole date is one-third of the minimum term. CAL. PEN. CODE § 3049 (West 1970).

²⁷The discretion lodged in the Adult Authority with reference to fixing or refixing the term of imprisonment is so broad that it is seldom that a case can be made out that would show abuse of discretion. *Azeria v. California Adult Authority*, 193 Cal. App. 2d 1, 13 Cal. Rptr. 839 (1961).

²⁸CALIFORNIA STATE ASSEMBLY, REPORT OF THE SELECT COMMITTEE ON THE ADMINISTRATION OF JUSTICE, PAROLE BOARD REFORM IN CALIFORNIA, ORDER OUT OF CHAOS, 15 (1970).

cedure of sentence determination and parole decision making. The statute does no more than direct the Adult Authority to "meet at each of the state prisons at such times as may be necessary for a full and complete study of the cases of all prisoners whose terms of imprisonment are to be determined by it or whose applications for parole come before it."²⁹ As noted previously, the Adult Authority is permitted by statute to meet and transact business in panels of at least two members and case hearing representatives are allowed to hear cases and make recommendations subject to the approval of a Member panel.³⁰ Specific procedures are determined by the Adult Authority Board and promulgated in the form of Resolutions of the Adult Authority. These are most important in understanding the functioning of the agency and the sweep of its discretion; they are available to the public. Several important resolutions relating to the sentence fixing and parole decision process are considered here.

Resolution number 281 (March 29, 1971) describes the panels, their method of operation, their authority, and the assignment of types of cases to various panel combinations.³¹ Four types of panels are designated, each of which is given authority to hear and decide certain types of cases pursuant to section 5076.1 of the California Penal Code.

En banc meetings of the Adult Authority Board, with a quorum requirement of five members, make the final determination relative to fixing a term or granting a parole of those men convicted of first degree murder, of those cases designated as a "special case"³² and in any case where a panel containing an Adult Authority member "deems appropriate."³³ Cases are also submitted to the Adult Authority *en banc* for policy discussion, for resolving differences of opinion within a two member panel and for designation or removal of designation of a man as a "special case—Adult authority."³⁴

²⁹CAL. PEN. CODE § 5076.1 (West 1970).

³⁰*Id.*

³¹RESOLUTION OF THE ADULT AUTHORITY NUMBER 281 (March 29, 1971).

³²CALIFORNIA DEPARTMENT OF CORRECTIONS, CUMULATIVE CASE SUMMARY MANUAL, CS-VII-03-(1967).

³³RESOLUTION OF THE ADULT AUTHORITY NUMBER 281, 2 (March 29, 1971).

³⁴*Id.*

A special case designation may be given a man on these bases: (1) the potential to commit "crimes of unusual or exceptional violence," (2) when a case has received unusual publicity (3) "organized crime" type offenses including large scale prostitution, extortion, corrupt labor union or business practices, large scale bookmaking, bribery of public officials, professional gamblers who have used dishonest methods or devices, (4) men whose institutional behavior has been "notorious" or who are inmate leaders, and (5) major narcotics dealers.³⁵ Designation of certain inmates as "special cases" on the basis of these criteria and the subsequent special treatment given them provides a classic example of extremely broad administrative discretion. Questions are also raised as to the validity and possible arbitrariness of the criteria.

Member panels, consisting of at least two members of the Adult Authority, act primarily on cases referred to them by panels consisting of one member and one case-hearing representative (M.R. panels) or panels of two case-hearing representatives (Representative or R panels).³⁶ Member panels, acting *in absentia*, make the final determination on those cases interviewed by Representative panels.³⁷ Member panels have authority to decide, "any case clinically identified as high violence potential [sic]", any case which a panel member desires to be reviewed by a Member panel prior to release, cases formerly designated as a "special case" and certain enumerated violent crimes.³⁸

Member-Representative panels, consisting of one Adult Authority member and one case-hearing representative, are allowed to make the final determination, subject to review and concurrence by a second member of the Adult Authority pursuant to section 5076.1 of the California Penal Code on any type of case except those designated for release action by *en banc* meetings or by Member panels.³⁹

³⁵CALIFORNIA DEPARTMENT OF CORRECTIONS, CUMULATIVE CASE SUMMARY MANUAL, CS-VII-03-(1967).

³⁶RESOLUTION OF THE ADULT AUTHORITY NUMBER 281, 2-3 (March 29, 1971).

³⁷*Id.* pursuant to CAL. PEN. CODE § 5076.1 (West 1970).

³⁸RESOLUTION OF THE ADULT AUTHORITY NUMBER 281 (March 29, 1971). The crimes enumerated include second degree murder, manslaughter, robbery, rape, kidnaping, and eight serious assault crimes.

³⁹*Id.* at 3.

Representative panels, consisting of two case-hearing representatives, consider those cases not specifically designated for consideration by other panels. They are permitted to conduct the initial hearing on all prisoners; they interview those who refuse to attend an Adult Authority hearing; with certain exceptions, Representative panels hear cases of parole violators returned to prison to finish their terms; they interview prisoners committed for life without possibility of parole and those prisoners whose minimum eligible parole date is over 42 months from the date of reception. Recommended determinations by Representative panels do not become final until approved by a panel of Adult Authority Members.⁴⁰

Prisoners are automatically calendared for appearances before hearing panels. Details of the automatic calendaring procedure are set forth in Resolution of the Adult Authority number 184 (July 20, 1970), Resolution number 266 (May 8, 1967), and Resolution number 270 (August 30, 1965).

By resolution the Adult Authority has also provided formal procedures for internal review and reconsideration of actions taken by Adult Authority panels.⁴¹ Resolution 283 details separate and distinct procedures for review and for reconsideration. Under each procedure a Member panel reviews the application for rehearing; if the application is granted, a rehearing takes place within 60 days.⁴² The sole and exclusive grounds for review are (1) that the action by the Adult Authority was in excess of its powers, (2) that the action was procured by fraud, (3) that the action was based upon whim and caprice, or (4) that the action was not supported by the facts.⁴³ Grounds for reconsideration, "must be based upon a substantial change of circumstance which has occurred subsequent to the last action of the Adult Authority."⁴⁴

On January 17, 1972 the Adult Authority formally adopted a new policy of setting parole dates for most inmates within six months of their entering prison.⁴⁵ Eligible prisoners will

⁴⁰*Id.* at 6; CAL. PEN. CODE § 5076-1 (West 1970).

⁴¹RESOLUTION OF THE ADULT AUTHORITY NUMBER 283 (May 19, 1971).

⁴²*Id.* at 6.

⁴³*Id.* at 1.

⁴⁴*Id.* at 3.

⁴⁵Peek, *Prison Law Change*, Sacramento Bee, January 18, 1972, at 1, col. 3.

be required to fulfill a program which could include vocational training, educational objectives or psychiatric counseling.⁴⁶ The inmate's "contingency parole date," as the Board calls it, would be reviewed annually and could be advanced or be revoked depending on the prisoner's participation in his "program."

The announced objectives of the new policy are to provide greater consistency in sentencing, to place responsibility for release with the prisoner himself, and to alleviate the emotional limbo and uncertainty caused by the indeterminate sentence.⁴⁷ The reform is claimed to combine the advantages of the indeterminate sentence with the advantages of giving inmates firm release dates. Whether the change will accomplish its announced purposes remains to be seen. If the Adult Authority sets the contingency dates at an unrealistically long time period the effect will be minimal. However, if the dates are set realistically, the new policy will result in a major modification of the indeterminate sentence. The details of the procedure will be contained in a resolution to be released to the public sometime this year.

D. CASE LAW

The absolute discretion conferred upon the Adult Authority by the legislature has not been greatly diminished by the courts which have traditionally maintained a "hands off" policy toward the prison release process.⁴⁸

The indeterminate sentencing system with administrative fixing of the term of imprisonment has been held to be constitutional, and not violative either of requirements of due process or of equal protection.⁴⁹ In sustaining the indeterminate sentence, California courts have taken the view that the Adult Authority's determination of the length of term to be served is not part of the imposition of the sentence.⁵⁰ The prisoner, it is reason-

⁴⁶*Id.*

⁴⁷*Id.*

⁴⁸For a more detailed discussion of due process as applied to the parole process see Comment, *Rights Versus Results: Quo Vadis Due Process for Parolees*, 1 PAC. L.J. 321 (1970).

⁴⁹*Fleischer v. Adult Authority*, 202 Cal. App. 2d 44, 20 Cal. Rptr. 603 (1962).

part of the imposition of the sentence.⁵⁰ The prisoner, it is reasoned, is therefore not entitled to rights retained by a convicted person at the time of sentencing. It has been held that a prisoner has no constitutional right to counsel at Adult Authority proceedings to fix or redetermine his sentence.⁵¹ The holdings rest on the view that the imposition of sentence was by the Court and that an indeterminate sentence, until fixed, amounts to the maximum sentence provided for the crime in question; when the Adult Authority reduces the maximum sentence it is viewed as a tentative action which may be changed for cause.⁵² The discretion lodged in the Adult Authority, however, is so broad, "that it is seldom that a case can be made out of that would show an abuse of that discretion."⁵³

While the traditional view has long withstood attack from advocates of greater due process protection, a few recent cases raise the possibility that the courts may now be willing to make a more critical examination of the Adult Authority's sentencing function.

In *Hester v. Craven*,⁵⁴ a United States District Court held that the Adult Authority violated due process in redetermining the sentence of a prisoner based on a factual determination of events which occurred outside of prison while he was on parole without giving the prisoner the right to confront and cross-examine witnesses against him. The Adult Authority argued that redeter-

⁵⁰*In re Sandel*, 64 Cal. 2d 412, 412 P.2d 806, 50 Cal. Rptr. 462 (1966).

⁵¹*People v. St. Martin*, 1 Cal. 3d 524, 463 P.2d 390, 83 Cal. Rptr. 166 (1970). *In re McLain*, 55 Cal. 2d 78, 357 P.2d 1080, 9 Cal. Rptr. 824 (1960), *appeal dismissed*, 368 U.S. 10 (1961).

⁵²*Id.* at 78, 357 P.2d 1080, 9 Cal. Rptr. 824.

⁵³*Azeria v. California Adult Authority*, 193 Cal. App. 2d 1, 5, 13 Cal. Rptr. 839, 842 (1961).

⁵⁴Concluding a discussion of the development of the modern case law on procedural due process as it relates to Adult Authority hearings to redetermine sentences, Judge Ferguson stated:

The application of due process procedural requirements to the factual determination underlying the decision to redetermine a sentence does not compel the state to abandon any of the substantive benefits of the indeterminate sentence. Indeterminate sentencing is a very humane and well-intended method of sentencing. There is no reason why the application of due process requirements should interfere with the many advantages of this method of sentencing.

Hester v. Craven, 322 F Supp. 1256, 1265 (C.D. Cal. 1971).

mination of the prisoner's sentence at less than the maximum prescribed by law was a privilege and not a right. The court answered that once the sentence was determined, the prisoner had a right to have the sentence terminate on that date absent a change that justified redetermination. The court noted that the privilege label does not relieve government from abiding by basic principles of fairness.

The United States Supreme Court in *Mempa v. Rhay*⁵⁵ held that the Sixth Amendment affords a defendant the right to be represented by counsel at the time of sentencing. In *Mempa* the defendant had been placed on probation and the imposition of sentence deferred. After four months the court revoked the defendant's probation and sentenced him to ten years in prison. The Supreme Court, in overturning the sentence, reaffirmed the principle that appointment of counsel for an indigent defendant was required, "at every stage of a criminal proceeding where substantive rights of the criminal accused may be affected."⁵⁶

The Eighth Circuit Court of Appeals, in a case in which they declined to apply *Mempa* to an Iowa Parole revocation procedure, offered this interpretation of *Mempa*:

The core of *Mempa* is that because sentencing, whenever and however it takes place, is a stage in the criminal proceeding against an accused, the Sixth Amendment as applied through the Due Process Clause of the Fourteenth Amendment requires that the right to counsel be afforded at sentencing.⁵⁷

As recently as June 1971, however, the California Supreme Court in a case in which they declined to apply *Mempa* to parole revocation proceedings, characterized Adult Authority actions as "wholly administrative in nature," holding that the agency's determination of the length of sentence and conditions of parole are not judicial acts.⁵⁸ The virtually unrestricted discretion of the Adult Authority was reaffirmed in the majority opinion

⁵⁵*Mempa v. Rhay*, 389 U.S. 128 (1967).

⁵⁶*Id.* at 134.

⁵⁷*Morrissey v. Brewer*, 443 F.2d 942, 951 (8th Cir. 1971).

⁵⁸*In re Tucker*, 5 Cal. 3d 171, 177, _____ P.2d _____, _____, _____ Cal. Rptr. _____, _____ (1971).

which stated, "due process only requires that the Adult Authority discharge its responsibilities in good faith, neither arbitrarily nor capriciously, and that judicial review remains available to correct abuses of discretion."⁵⁹ Justice Tobriner, in a dissent in which Justice Peters concurred, argued forcefully that due process applies to parole revocation hearings and requires, among other things, the right to be represented by counsel.⁶⁰

Judge Browning, concurring in *Sturm v. California Adult Authority*,⁶¹ has recognized that the Adult Authority is actually engaged in sentencing.

The judicial imposition of a life sentence upon appellant is no more than a legislatively mandated device for transferring the sentencing function from the State court to the State administrative agency with a grant of jurisdiction over appellant's person for a period sufficiently long to enable the agency to perform its functions under the States indeterminate sentencing law. Use of that device cannot be seized upon as a means to validate whatever action the administrative agency might subsequently choose to take, no matter how seriously the appellant might be injured, and without regard to whether the agency's action was arbitrary, basically unfair, or invidiously discriminatory.⁶²

Judge Browning's opinion suggests a willingness to depart from the traditional judicial reluctance to recognize the Adult Authority's significant role in the sentencing process. The extent to which courts will be willing to control the discretion of the Adult Authority remains to be seen. It is clear, in any event, that the effect, and indeed the purpose, of a system of indeterminate sentencing is to transfer a substantial portion of the sentencing function from the courts to an administrative agency. Fundamental rights are at stake regardless of which instrument of government administers the sentencing process.

⁵⁹*Id.* at 177, ____ P.2d at ____, ____ Cal. Rptr. at ____.

⁶⁰*Id.* at 204, ____ P.2d at ____, ____ Cal. Rptr. at ____.

⁶¹*Sturm v. California Adult Authority*, 395 F.2d 446 (9th Cir. 1968).

⁶²*Id.* at 449. The Ninth Circuit Court of Appeals, in a case decided after this article went to the printer, reaffirmed the traditional judicial "hands off" policy toward the sentence fixing and parole process. In dictum the court stated that due process does not require presence of counsel, access to cumulative records or formal written records of hearings. *Dorado v. Kerr*, 454 F.2d 892 (9th Cir. 1972).

III. THE TERM FIXING AND PAROLE DECISION PROCESS

A. PROCEDURE USED IN DECISION MAKING

Participants in an Adult Authority hearing include the inmate, the hearing panel and a staff representative, an employee of the Department of Corrections. Attendance of attorneys, relatives and friends is prohibited as a matter of Adult Authority policy.⁶³ The staff representative, often a correctional counselor, acts as a clerk, briefly recording the panel's formal actions, giving a summary of the impression made by the prisoner at the interview and recording comments by panel members regarding the inmate.⁶⁴ The notes taken by the staff representative constitute the only written record of the interview available to the Adult Authority in subsequent reviews of the case.⁶⁵

While each panel is made up of at least two members, only one is usually actively involved in each interview because the other is reading the case of the next prisoner to be interviewed.⁶⁶ It is seldom that the inactive panel member speaks to an inmate. The decision on the case is often made within seconds after the prisoner leaves the room. The interviewing member states his decision to the other panel member and each then records it on a vote sheet. There is rarely any disagreement.⁶⁷ The average interview lasts only about ten minutes.⁶⁸

Adult Authority panels normally do not use the comprehensive files maintained by the Department of Corrections; rather they

⁶³Interview with Joseph A. Spangler, Administrative Officer, California Adult Authority, in Sacramento, California, November 12, 1971.

⁶⁴CALIFORNIA DEPARTMENT OF CORRECTIONS, *STAFF REPRESENTATIVES MANUAL*, 1-03 (1968) (hereinafter cited as *STAFF MANUAL*); Porter, *State Imprisonment and Parole*, CALIFORNIA CRIMINAL LAW PRACTICE, 572-573 (1969) (hereinafter cited as Porter).

⁶⁵*STAFF MANUAL*, *supra* note 64.

⁶⁶The information found in this paragraph is based largely on observations made by Shirley Cartwright, a sociologist at the University of San Francisco. Ms. Cartwright, who has observed over 100 hearings, graciously gave the author access to her field notes and an unpublished paper on the Adult Authority (hereinafter cited as Cartwright).

⁶⁷In the first 55 cases observed by Ms. Cartwright in only one instance did the non-interviewing panel member attempt to influence the decision; that attempt was unsuccessful. Cartwright, *supra* note 66.

⁶⁸In 55 cases observed by Ms. Cartwright, the average interview was 10.9 minutes with a range of 3 to 22 minutes. In 8 cases observed by the author the average was 12 minutes. Cartwright, *supra* note 66.

usually rely on the Cumulative Case Summary prepared by the prison staff.⁶⁹ The summary includes legal data (including offense, sentence, minimum term, minimum eligible parole date, prior felonies), a section on the circumstances of the offense (fact statement, probation officer's report, district attorney's statement and the prisoner's version of the offense), prior record (including C.I.I. record and F.B.I. entries), a case study (biographical information), a social evaluation, a psychological report, psychiatric evaluations when required by law or Board order, a custodial evaluation, a medical report, and an evaluation of the prisoner's readiness for release.⁷⁰ All of the above material is reviewed during the immediately prior interview—in an average time of ten minutes.⁷¹

The Cumulative Case Summary is not made available to the inmate, his family, or his attorney. Adult Authority Chairman Henry Kerr defended non-disclosure before a subcommittee of the House Committee on the Judiciary on the basis of, "the time factor, cost and personnel limitations."⁷² He went on to draw an analogy to private hospitals who refuse to make a patient's medical file available to the patient, his family, or his attorney.

B. CRITERIA USED IN DECISION MAKING

The Legislature has given no guidance to the Adult Authority in the way of criteria for decision making; the courts have likewise largely abstained from establishing criteria or ruling on the validity of factors considered by Adult Authority panels except to say that the agency must, "discharge its responsibilities in good faith, neither arbitrarily nor capriciously...."⁷³

⁶⁹CALIFORNIA DEPARTMENT OF CORRECTIONS, CASE SUMMARY MANUAL; See also Porter, *supra* note 64 at 533 *et. seq.* for a detailed description of a cumulative case summary.

⁷⁰*Id.*

⁷¹In Ms. Cartwright's experience she found that a minimum of 30 minutes was required to fully acquaint herself with the case of a first termers who had been imprisoned for a year. She required as much as 3 or 4 hours with the case of a man who had prior incarcerations and had been presently incarcerated for several years. Cartwright, *supra* note 66.

⁷²Testimony of Henry W. Kerr, Chairman of the Adult Authority before a subcommittee of the House Committee on the Judiciary, in San Francisco, California, October 25, 1971 (hereinafter cited as Kerr Testimony).

⁷³*In re* Tucker, 5 Cal. 3d 171, ____ P.2d ____, ____ Cal. Rptr. ____ (1971).

Neither has the Adult Authority developed a formal set of criteria for the fixing of sentences or the granting or denial of parole. Chairman Kerr presented a list of "factors most often considered" as to the parole decision in testimony before a subcommittee of the House Committee on the Judiciary on October 25, 1971:⁷⁴

1. Details of current commitment offense.
2. Extent and nature of criminal history and/or behavior pattern.
3. Probation officer's presentence report and subject's attitude toward offense.
4. Views of trial judge and district attorney.
5. Views of defense counsel and any interested parties.
6. Social and psychological history.
7. Time served on current commitment offense.
8. Response to institutional program in terms of participation and accomplishments.
9. Present attitude toward offense and future.
10. Insight into personal and family problems.
11. Psychiatric evaluations (including prognosis) when required by law or Board order.
12. Nature and degree of threat to public safety.
13. Plans and preparation for release on parole, including job offers, reasonable employment opportunities, family support, and living arrangements.

He defended the failure of the Adult Authority to adopt and promulgate more detailed, formal criteria, asserting that new factors are added based upon ongoing research and that factors considered necessarily vary with each case.⁷⁵

A Report of the Assembly Committee on Criminal Procedure, highly critical of the lack of standards guiding the parole decision process, asserted that the time spent in prison, "seems to depend on three factors:

1. The values and feelings of individual parole board members.
2. The mood of the public.
3. Institution population pressures."⁷⁶

⁷⁴Kerr Testimony, *supra* note 72.

⁷⁵*Id.*

⁷⁶CAL. ASSEMBLY COMMITTEE ON CRIMINAL PROCEDURE, DETERRENT EFFECTS OF CRIMINAL SANCTIONS 40 (1968).

Absence of formal criteria together with lack of written reasons for decisions and the unilateral nature of most decisions result in a completely discretionary and therefore possibly arbitrary decision process. Some evidence of the reasons for decisions are provided by samples of the minutes of interviews taken by the Staff Representatives in which are recorded panel members' reasons for their decision. These samples were collected by staff members of the California State Assembly in December 1970 and presented to the Assembly Committee on Criminal Justice. The samples include parole denials of selected inmates at the Department of Corrections facility in Chino. On the first three examples a date after the letters G.P.E. is struck out and a new date written beside it; in these three cases an original panel of hearing representatives had granted parole but, upon review by a Member panel, the date had been extended. The comments following were those justifying the extension and were in the handwriting of the reviewing Member panel. Names and numbers of the prisoners are omitted. G.P.E. means, granted parole effective; T.F.A. means, term fixed at; T.R.A. or T.R.F.A. means, term refixed at.

Example #1

A 00000 11/3/70
 G.P.E. ~~12/21/70~~ 6/7/71
 Review panel Bowler/Hoover
 Time extended for further assessment of gains to date — S is 4th
 term narc. viol.

Example #2

A 0000 11/9/70
 G.P.E. ~~6/7/71~~
 Denied 8/71 KR
 Review panel Bowler/Hoover
 Observed staff eval. that S is not yet ready for parole — S must
 do something positive toward self-improvement before release.

Example #3

A 00000 11/9/70
 TRA 8 yrs.
 GPE ~~4/12/71~~ 4/12/72
 Rev. panel Hoover & Bowler feel that S violated his parole with
 another burglary with same MO as the committing offense.

Example #4

A 00000 May '70
 TFA 5 yrs. parole eff. 6/7/71
 To get voc. baking training prior to release.

Example #5

A 00000 May '70 (Brown & Kerr)
 5-71 MM
 Story of instant offense not too plausible. Background and gravity of offense call for time.

Example #6

A 00000 7/15/70
 7-71 MR
 Continue program. Consolidate gains before further reconsideration.

Example #7

A 00000 7/21/70
 TFA 5 yr. parole effective 1-17-72
 30 yr. old 2nd term. Essentially alcoholic – thief – nomadic patterns.
 Rationale (1) above, (2) 61-66 arrest free, (3) sincere, open-aware/afraid of his drinking.
 Mandatory:
 A. constant - real A.A. [Alcoholics Anonymous]
 B. upgrade job skills - to be arranged by Class Comm.
 C. clear conduct. May be motivated now.

In addition to providing some evidence of the criteria on which decisions are made, these examples raise questions as to the adequacy of the written records of the hearings. It is upon these meager notes that future hearing panels must depend for the observations and opinions of previous panels. And it is upon these notes taken by the staff representative that counselors must rely in interpreting the panel's decision to the inmate.

IV. CONTROL OF ADULT AUTHORITY DISCRETION

The failure of the California Legislature to establish procedures and criteria to guide and control the Adult Authority in the sentence fixing and parole decisions, and the reluctance of the courts to intervene in the process have left the Adult Author-

ity with almost unlimited discretion. Administrative self-control by way of Adult Authority Resolutions has been minimal. The procedure followed by the panels results, in most cases, in unilateral decisions by a panel member who is not guided by any formal criteria and who does not have to justify his decision or record his reasons for it.

Robert O. Dawson has defined the basic issue:

One of the important problems in corrections is finding ways to accommodate the need for discretion and flexibility in making decisions with society's need to assure itself that fair and sensible decisions are indeed being made—to control discretion without destroying it.⁷⁷

In California, the discretion of the Adult Authority in sentence determination and parole decision making has not been subject to even reasonable constraints.

A. ADEQUATE WRITTEN RECORDS

Both the minimal written records of Adult Authority hearings and the unavailability of any kind of a statement of reasons for a decision to the prisoner and his attorney act to preserve absolute discretion. *In re McClain* teaches that the liberty of a legally convicted person, or denial thereof, may not be made to turn upon "mere whim, caprice or rumor."⁷⁸ But in the absence of a written record, review short of complete redetermination is impossible. Likewise, it is nearly impossible without a written record for a prisoner to make out a case of abuse of discretion. An adequate written record of a hearing panel's reasons for a decision available to the inmate would seem to be a *sine qua non* of effective judicial enforcement of a prisoner's right to have his sentence determined and his parole decided on the basis of legally permissible criteria. Requiring communicated written records of a panel member's reason for a decision and the factors he considered in reaching a decision would not only make possible

⁷⁷Dawson, *The Decision to Grant or Deny Parole: A Study of Parole Criteria in Law and Practice*, 1966 Wash. Univ. L. Q. 243, 295 (1966).

⁷⁸*In re McClain*, 55 Cal. 2d 78, 357 P.2d 1080, 9 Cal. Rptr. 824 (1960), appeal dismissed, 368 U.S. 10 (1961).

judicial review but would also serve to require a full consideration of all relevant factors and a decision supported by a logical and objective reasoning process.

A better record of reasons for a decision would also give the inmate a more reliable guide to what the Adult Authority expects of him. Lack of continuity in Adult Authority expectations from hearing to hearing has been a major convict grievance.⁷⁹ One parolee interviewed by this author noted that at one parole hearing the only suggestion the panel made to him was that he should participate in a vocational training program; at a subsequent hearing at which he was denied parole he was told by a panel member to participate in Alcoholics Anonymous. Finally, a more complete record of the panel's reasons for a decision and the factors considered by the panel members in reaching a decision would help subsequent panels to make more informed decisions.

B. PRESENCE OF COUNSEL

Along with a more adequate record of the hearing and the panel's reasons for a decision, presence of counsel at Adult Authority hearings would have a controlling effect on the panel's discretion. A frequently cited Iowa Law Review Comment sets forth the arguments in favor of counsel.

Under the present system most parole boards operate under staggering work loads, and therefore have developed a tendency to dispose of petitions in a routine manner which often fails to adequately consider the merits of the individual case. Even in cases where an attempt is made to consider the merits, the factors considered may often have little relation to the capacity of the prisoner to live lawfully in society. The absence of any external source of scrutiny such as could be provided by counsel is one factor which makes possible the perpetuation of such inadequate conduct by the parole board. The presence of counsel could help assure responsible consideration of the cases.⁸⁰

The Comment also points out that the nature of the hearing

⁷⁹R. MINTON, JR., *INSIDE, PRISON AMERICAN STYLE*, 267, 268 (1971).

⁸⁰Comment, *Due Process: The Right to Counsel in Parole Release Hearings*, 54 IOWA L. REV. 497, 502 (1968).

makes it "impossible for the unassisted prisoner to present his case effectively."⁸¹ The prisoner cannot be at once the subject of the examination and at the same time be an effective advocate. In view of the power that the Adult Authority has over the prisoner he has a great interest in having his case presented effectively.

Legal counsel would enjoy all the advantages which the prisoner lacks as his own advocate. Counsel would be able to take an objective view of the evidence, including the possibility of using the prisoner as a witness. Counsel could weigh each piece of evidence and put together a more accurate and complete case because he would not have to rely on the relatively few sources of information available to the unassisted prisoner. Counsel would have the mobility necessary to make inquiries into facts outside the prison. In seeking information from the prison staff and records he would not be overwhelmed by the power of the prison administration. Not only could counsel present an affirmative case on behalf of the prisoner but he could, if necessary, rebut any adverse evidence that might be presented, either by suggesting reasons why it should be given less weight than the board might be inclined to give it, or by challenging its factual basis.⁸²

The Adult Authority, however, strongly resists permitting counsel to attend its hearings. Joseph A. Spangler, Administrative Officer of the Adult Authority, recently summed up the agency's objection:

Caution should be the password for our all-out 'due-process' adherents since all too often legalistic, attorney centered technicalities, in general and overall, can be far more damaging to the public interest and the parolee client than a well administered, flexible, and dynamic parole service.⁸³

Judge Feinberg, dissenting in *Menechino v. Oswald*, maintained that counsel could not constitutionally be excluded from parole hearings and effectively dealt with such an objection:

⁸¹*Id.* at 503.

⁸²*Id.*

⁸³Spangler, *Parole in the West: 1870-1970-1980, Past Present and Future*, 5 J. CALIF. LAW ENFORCEMENT 166, 177 (1971).

It requires little imagination to conclude that a trained lawyer could have materially aided both appellant and the Board, unless the inaccurate and unworthy assumption is made that lawyers generally do more harm than good. It makes little difference whether present parole personnel are seen as sincere men earnestly doing the best they can in a difficult job, or are regarded less favorably. On either view, a Parole Board should be interested in such relevant facts as job availability for a prisoner, his family situation, and his progress in self-education. The ability to marshal such facts and to uncover unfairness that a trained lawyer possesses would improve, not injure, the parole release hearing.⁸⁴

The presence of legal counsel need not turn the hearings into adversary proceedings with "all-out due process." There are several important functions lawyers could perform without unreasonably restricting the discretion of the hearing panel. An attorney could present alternative suggestions as to the kind of treatment required. He could assure that contested facts were properly determined and he could challenge inaccurate or irrelevant information. His presence would also help insure that the panel adheres to established policies and procedures.

C. DISCLOSURE

The Cumulative Case Summary, which is the source of the written information on which sentencing and parole decisions are made, should be made available to the prisoner's attorney, subject to the prisoner's approval, to insure against the use of erroneous or improper material in the sentencing and parole decisions. Disclosure of the contents to the inmate's attorney would help assure that the sentence fixing and parole decisions are made on the basis of accurate and relevant information.

The United States Supreme Court has recognized that a defendant has the right not to be, "sentenced on the basis of assumptions concerning his criminal record which [are] materially untrue."⁸⁵ A limited right to review the material included in the presentence report to the sentencing judge has

⁸⁴*Menechino v. Oswald*, 430 F.2d 403, 416 (2nd Cir. 1970).

⁸⁵*Townsend v. Burke*, 334 U.S. 736, 741 (1948).

been recognized as the only practical way a defendant has to be sure that he is not being sentenced on the basis of materially untrue information.⁸⁶ While, as discussed previously, the courts have not yet extended to Adult Authority hearings the same protection afforded a criminal defendant in judicial sentencing, a similar decision is being made and the same interests are at stake for the prisoner; a similar need exists for accurate and fair determination.

The objections raised to disclosure of the contents of the Case Summary are similar to those raised to complete disclosure of the presentence report. It is argued that much of the material comes from trustworthy and logical informants whose confidence should be preserved. Current Board Chairman, Henry Kerr recently asserted that, "[s]ome items in almost every inmate's file should not be released; for the inmate's sake, or for his family's sake, and very often for the safety of the victim or the witnesses."⁸⁷

Conceding for the sake of argument that there are some things which should not be disclosed there remains much information that should be disclosed to the prisoner's attorney if the prisoner's interest in fair and rationale decision making is to be protected. The Case Summary may contain misleading, inaccurate or even malicious and prejudicial information. Access to the contents of the Case Summary would also allow the attorney to draw the attention of the overworked panel members to important information favorable to his client's case.

Even though the discretionary power to withhold information for cause would probably have to reside in the Adult Authority, a procedure whereby disclosure to the attorney would be the general rule and non-disclosure the exception would do much to help assure that decisions would be made on the basis of accurate and relevant information.

V. CONCLUSION

The Adult Authority exercises tremendous power in fixing sentences and deciding on paroles. It presently does so with almost unlimited discretion. Its case load is heavy and the

⁸⁶Baker v. United States, 388 F.2d 931 (4th Cir. 1968).

⁸⁷Kerr Testimony, *supra* note 72.

hearings brief. In practice, the decision on which the liberty of the prisoner turns is made unilaterally by one man who is not guided by formal criteria and who is not legally required to justify his decision. More adequate written records, availability of counsel and disclosure to the attorney of information on which the panel relies on its determination would serve to control discretion, assure fair and rationale decision making, promote rehabilitation, increase credibility and reduce prison tensions.

Douglas J. Hitchcock

APPENDIX

Reproduced here, verbatim, are the written responses of three parolees to questions regarding the Adult Authority. Their comments are included here as a representative sample of the responses received by the author to a questionnaire directed at ex-convicts, seeking their perceptions of the sentence fixing and parole process.

Parolee A:

Q: *Did you feel your hearings were fair?*

A: "No."

Q: *Why or why not?*

A: "What hearing? I've never been really heard at any time I appeared. They told me the five or ten minutes I was before them each time. They told me about things I had paid for in months and years when I was a juvenile. They told me things such as, 'the police dept. and D.A. have written letters to us stating you probably committed many felonies in their area; and I had to pay for them also. Their suspicions are the same as convictions.'"

Q: *Were you ever denied parole?*

A: "Many times."

Q: *Were you given a reason for the denial?*

A: "Of course not."

Q: *What do you think their reasons for the denial were?*

A: "I don't think or feel that they have reasons in too many cases, and even when they do have they are rarely aware of them. But I do know they don't need any reason for whatever they do."

Q: *What changes, if any, should be made in the parole hearing?*

A: "The counsellor should appear with the inmate giving his true feelings concerning the case and merits of the inmate—and other officials who write to the Adult Authority concerning any rehabilitative advancement the inmate has shown, etc., should be read and considered by the A.A. The inmate himself should be allowed some allotted time to talk to them as a human being instead of a statistic. There are so many and varied factors in each case that should be brought out and recognized for whatever

they are in each individual's case—They are NOT all the same.”

Parolee B:

Q: *Did you feel your hearings were fair?*

A: “No.”

Q: *Why or why not?*

A: “Too little time before the Board—subjective evaluation based upon biased reportage from custody. Criteria of acceptability for parole is unrealistic. Obeying rules in prison (prison conformity) is no accurate gauge for a man's ability to live in society.”

Q: *Were you ever denied parole?*

A: “Yes.”

Q: *Were you given a reason for the denial?*

A: “No (nebulous).”

Q: *What do you think their reasons for the denial were?*

A: “I don't know. I think they were thinking about the guy who was scheduled to appear immediately after me.”

Q: *What changes, if any, should be made in the parole hearing?*

A: “First, an honest response to prison is rebellion against the numerous unconstitutional/oppressive rules of prison. A man who honestly responds to this incredible oppression is punished with parole denials. Stop the war on prisoners under the guise of indeterminate sentencing! Stop political appointees to parole boards. Stop putting ex-cops on the Board.”

Parolee C

Q: *Did you feel your hearings were fair?*

A: “Generally yes.”

Q: *Why or why not?*

A: “My manner and appearance as they reflected my attitude were not an indicator that I was prepared to deal with myself and society.”

Q: *Were you ever denied parole?*

A: “Yes.”

Q: *Were you given a reason for the denial?*

A: “No.”

Q: *What do you think their reasons for the denial were?*

A: “They were considering my lying to them about my background and my complete inability to face myself as I really was at that time.”

Q: *What changes, if any, should be made in the parole hearing?*

A: “First: There should not be enforcement oriented people on the Board. Second: The members on the Authority should be people trained in the behavioral sciences. Third: Some person from the institution should sit in on the decisions to grant or not grant the parole. Fourth: The Authority should have some way to measure all the information that is compiled on an inmate rather than judge on the impressions they may get in the few moments the man is in front of them in an interview situation.”