

The Influence Behind, Substance and Impact of the New Determinate Sentencing Law in California

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In this article, the drafters of the new California Determinate Sentencing Act trace the background and purposes of the Act. They conclude with a survey of the potential problems and advantages that may result from the Act's implementation.

The Uniform Determinate Sentencing Act of 1976¹ provided California with a fixed prison-sentence system. After sixty years of the purest indefinite prison-term process in the nation, California's fixed sentences are now the most rigid of any major state. This complete reversal in policy resulted from many influences, aided by the practical dynamics resulting in a nexus of individuals in key positions, with complementary ideas at the right point in time.

Whether determinate sentencing will be any more successful than indeterminate sentencing in changing criminal offenders into law abiding citizens is doubtful. In that sense, the new process is just as experimental as the former. However, a crucial difference between the two is that rehabilitation is not a dominant goal of the new law. In fact, widespread recognition of the failure and abuses of the rehabilitative ideal was the primary factor in the dismantling of a system grounded in a diagnostic, sickness, causality-capability and curative, predictive change. Nonetheless, there is speculation that a collateral benefit of a visible, fair and equitable sentencing process of relatively certain and early prison terms may be rehabilitation. It is hypothesized that the apparent factual fairness of such a system will be more effective than a system geared toward rehabilitation but incapable of making the decisions required to accomplish that end.

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1. 1975 Cal. Stats. Ch. 1139.

The basic premise with which we began was simply to discard that which was unsupported by all available evidence and to retain or add anything which seemed sensible and had ample support. At the same time, the effort was to change as little as possible in the existing law as well as to consolidate and simplify it to provide a viable piece of legislation.²

The Constitution provides for a criminal justice system which includes not only police powers, but also notice, speed, due process and equal protection. Experience and research, together with interviews with those involved in this system, revealed that the indeterminate sentence, while appearing to accomplish some of these legal requirements, did not, in fact, accomplish any. And both aspects, fact and appearance, were seen as important to achieving equity.

Most importantly, after sixty years of operation in California the "sick-patient-model" basis of indeterminacy, developed at the turn of the century, had been totally invalidated. There was no evidence that the state of the sciences enabled anyone to diagnose a criminal's crime-causing problem, treat it, cure it, or predict non-repetition. In fact, the cost/benefit economic analysis of crime was currently predominant among criminologists.³ In other words, rather than being a sickness in a medical or psychological sense, much crime was considered to be the result of a very rational decision. The perpetrator, in a given social system, had more to gain than to lose by committing the illegal act.⁴

It seemed apparent that the criminal justice process was in disrepute everywhere in this country, indeterminate sentencing as much or more than any other aspect. Recidivism continued unabated and violence in our prisons was substantial. Aside from our ability to punish and to provide basic constitutional guarantees, we know very little about human behavior. No democratic system of government with its concerns for the rights of individuals can prospectively solve the public-protection dilemma.

2. Our initial goal was to draft a simple and easily understandable system of sentencing. By so doing, those most affected could comprehend the process with respect to what *could happen* and what in fact *did happen* once the sentence was pronounced. The ambiguity of the indeterminate sentence with penalties such as 5 years to life and outcome such as parole in 40 months created not only tension but also a good deal of cynicism among prisoners and others. While the Act did, in part, make the system easier to understand by quantifying all the variables, it also became complex as a result of efforts to gain acceptance for the legislation from critical interest groups.

3. See, e.g., Mepheters, *Criminal Behavior and the Gains from Crime*, 14 CRIM. 137 (May 1976); Sullivan, *Economics of Crime: An Introduction to the Literature*, 19 CRIME & DELINQUENCY 138 (April, 1973).

4. The importance of the social systems impact on crime is an increasing area of study. An article appearing in the March 5, 1978, Los Angeles Times, by Bill Drummond entitled *Sociologists "Evidence" Links Joblessness, Crime*, p. 2, refers to the recent research of Harvey Brennen a Johns Hopkins University Sociologist who has studied the effect of unemployment on crime.

Despite almost universal disenchantment with indeterminate sentencing, the legislation resulting from our findings (SB 42) would not have been passed into law if it were not for several external events. First, the California Supreme Court held that the Adult Authority (parole board) had abused its term-fixing discretion in retaining an individual for an excessive period of time, considering the crime, and ordered that the prisoner be discharged from custody.⁵ That decision aided in evading an end run around SB 42 by the Governor in an effort to salvage the political power inherent in the Adult Authority's not always so whimsical control over the prison population.⁶ Next, the public, and thus legislative and media, outcry over the heinous crimes of a recently paroled offender created havoc for the newly reorganized Adult Authority.⁷ The final blow was another appellate decision in which the court invalidated an attempt by the executive branch to circumvent the need for authorizing legislation by establishing a quasi-determinate sentencing system by administrative fiat.

The issue is whether Directive 75/20, as a unitary administrative regulation, complies with the central objectives of the Indeterminate Sentence Law. We hold that it does not.

A cardinal principle holds that administrative regulations must conform to the enabling law; that an administrative agency has no discretion to exceed the authority conferred upon it by statute.

* * *

The question before the reviewing court is not the wisdom of the agency's rule or policy, but whether it would alter or amend the statute. * * * An agency may not adopt a rule which diminishes its own statutory authority. * * *⁸

This series of events, together with the always present political need "to do something about crime," finally caused the Governor to lend the influence of his office to the only viable bill available, SB 42, in an effort to negotiate a passable compromise.

I. PROVISIONS OF THE ACT

The Uniform Determinate Sentencing Act's philosophy is specifically stated in the law.⁹ Reduced to its basics, that philosophy provides:

Imprisonment is to be for punishment; prison terms are to be proportionate to the seriousness of the offense; there are to be uniform sentences for similar crimes.

Offender characteristics, individualization of sentences, and rehabilitation—the bulwarks of indeterminacy—are not mentioned

5. *In re Rodriguez*, 14 Cal. 3d 639, 537 P.2d 384, 122 Cal. Rptr. 552 (1975).

6. Williams, *Parole Reform Needed?* Sacramento Bee, January 28, 1975, at A1, col. 1.

7. The James Reece crime spree in northern California resulting in the rape-murder of Debra Rebeijo.

8. *In re Stanley*, *In re Reed*, 54 Cal. App. 3d 1030, 1036, 126 Cal. Rptr. 524, 528 (3d Dist. 1976).

9. CAL. PENAL CODE § 1170 (West Cum. Supp. 1977).

at all. In fact, the elimination of disparate sentences is the goal of uniformity, a direct slap at the concept of individualization.

The goals of the act's philosophy are to be accomplished by fixed terms established by the legislature. They are to be imposed by the judiciary but with specified discretion, thus implying controls upon the courts. * * *¹⁰

The law which was developed out of this conceptual, factual, legal and political background generally does the following:

Holds an offender personally accountable for his conduct (not sick).

Punishes out front (doesn't involuntarily treat, or release on the basis of treatment).

Provides concrete notice of the punishment out front so that potential offenders and the public will not be misled by either end of a currently meaningless six-months-to-life spectrum.

Provides concrete notice out front so prosecution charging and prosecution, defense, and offender bargaining, and judicial sentencing will be based on fact and not the fiction that currently exists. * * *

Provides notice to the offender, his family, and the victim immediately at sentencing as to the precise prison term to be served (with a comparatively short range of uncertainty still present due to a possible good-time reduction).

Places the length of terms in the hands of the peoples' elected representatives with all the checks and balances of the legislative process so that the political and other pressures will be lessened (admittedly dependent upon the collective wisdom and integrity of the legislature and governor, * * *).

Contrary to some reports, increases judges' sentencing discretion but for the first time provides guidance for the choices that must be made, makes those decisions visible, and thus holds judges accountable for them (the real, though unspoken, reasons some judges are so vehemently opposed to this legislation).¹¹

Provides some flexibility for sentences of different offenders for similar offenses but very narrowly limited, thus greatly reducing disparity.

Provides good-time credit to induce good behavior inside prison and limited program credit to induce some program participation * * *.

Provides for only a qualified and limited retroactive application of the new law's sentences to some persons imprisoned under prior

10. Parnas, *Law and Order Politics: A Case for Fixed Prison Terms*, Sacramento Bee, March 27, 1977, Forum, at 1, col. 1.

11. In the last paragraph of his concurring opinion in *Way v. Superior Court for County of San Diego*, — Cal. App. 3d —, 141 Cal. Rptr. 383, 394, (3d Dist. 1977), Justice Friedman stated:

I would deny standing to the superior court judges who brought suit in the Sacramento case. The disinterest and objectivity essential to the judicial office bars the holder from the sweaty arena of policy struggles. The constitutional claims of these judges emanate from their personal quarrel with the Legislature's policy choice. To accord them alternative standing as taxpayers is a transparent verbal device. They wear their judicial robes 24 hours a day.

law, with equity and fairness in mind, and public protection where needed.

Limits the parole period for all without reducing resources for parole supervision so it can be directed at the most crucial period and thus be more effective.

Brings parole revocation in line with the trend of appellate court opinions and basic concepts of fairness by limiting the period of incarceration where there has been no new conviction, thus stimulating more new prosecutions when appropriate with corresponding statutory punishment upon conviction. [Thereby further reducing the cynicism of a system that formerly convicted a parolee in an administrative hearing for a minor infraction and punished for the suspected but unproven crime.]

Provides for adequate constitutional guarantees at various significant decision points throughout the process to promote fairness and avoid unnecessary, time-consuming, expensive, and counter-productive litigation.¹² * * *

Specifically, the new law exempts from its coverage only those prisoners sentenced to death or serving natural life sentences (about five percent of current prison population).¹³ With respect to these prisoners, for the first time specific procedures are established for parole consideration. This procedure provides for a hearing one year prior to minimum parole eligibility and for a hearing and review mechanism with counsel for the parole applicant where the parole date is not set, set longer than three years after initial eligibility (ten years in most cases), or rescinded.¹⁴

As to all other convicted felons, the law requires the judge to choose from four possibilities: probation, or one of three fixed prison terms. The categories of offenses are few, and the range of sentences is narrow. The lowest category of offenses includes most hybrid or misdemeanor-felonies (wobblers) and the possible sentences are sixteen months, two or three years. Depending on the category of the offense, the range of sentences are two, three or four years; three, four or five years; and five, six or seven years. There are only a few of the latter for such offenses as second degree murder.¹⁵ These terms are, however, only base terms to which additional time may be added if other factors are charged, proven and not stricken by a provision which gives narrow discretion to the judge. In this category of enhancements to base terms are a fractional amount of the base time to be served consecutively for multiple crimes;¹⁶ a one year addition for most prior prison terms already served,¹⁷ for the use of a deadly weapon in the present offense, or for being armed with a firearm;¹⁸ a

12. See note 8 *supra*.

13. CAL. PENAL CODE § 1170(a)(2) (West Cum. Supp. 1977).

14. CAL. PENAL CODE § 3041.7 (West Cum. Supp. 1977).

15. CAL. PENAL CODE § 1170(a)(2) (West Cum. Supp. 1977).

16. CAL. PENAL CODE § 1170.1a(a) (West Cum. Supp. 1977).

17. CAL. PENAL CODE § 667.5(b) (West Cum. Supp. 1977).

18. CAL. PENAL CODE § 12022 (West Cum. Supp. 1977).

two year enhancement for the use of a firearm;¹⁹ and a three year addition where great bodily injury was inflicted or for a prior prison term for a violent crime when the present offense is also violent.²⁰ There are also enhancements of one or two years for taking or destroying property in excess of \$25,000 and \$100,000.²¹ For most offenses, there are limits on the amount of time that can be added to the base term by enhancements as well as limits on imposing time for prior terms where sufficient clean time has elapsed.

In selecting probation or the base term, as well as enhancing or striking enhancements, the sentencing judge must state reasons for the record and is guided by sentencing criteria which the law mandates that the California Judicial Council develop.²² The Judicial Council is also required to compile statewide sentencing data and publish it quarterly.²³

Finally, the ultimate amount of time spent in prison can be decreased by how much good time and participation credit the prisoner earns. He is authorized to receive a maximum reduction in time served of one-third of the sentence. Three of the four months earned per year are for refraining from certain specified acts. One month per year is linked to participation (not success) in work, education, vocation or treatment programs if required by the correctional officials.²⁴

Within one year of imprisonment, the Community Release Board (which replaces the Adult Authority) is charged with reviewing all sentences, with the power to request the sentencing court to reconsider, if disparity or lack of uniformity is apparent.²⁵ This Board also implements the qualified retroactivity provisions of the new law to all those sentenced under prior law;²⁶ acts as a parole board for all those sentenced under prior law and in the future in those cases where parole remains relevant; and provides administrative review for issues of good time denial and other matters.

As to a parole supervision time, the new law provides for a maximum of one year on parole for all offenders except those serving natural life sentences, in which case the term of supervision is a maximum of three years.²⁷ Parole revocation time, absent a new conviction, is limited to six months.²⁸

Although the Uniform Determinate Sentencing Act of 1976 was signed by the Governor in September of 1976 and became effective on

19. CAL. PENAL CODE § 12022.5 (West Cum. Supp. 1977).

20. CAL. PENAL CODE § 667.5(a) (West Cum. Supp. 1977).

21. CAL. PENAL CODE § 12022.6 (West Cum. Supp. 1977).

22. CAL. PENAL CODE § 1170 (West Cum. Supp. 1977).

23. CAL. PENAL CODE § 1170.4 (West Cum. Supp. 1977).

24. CAL. PENAL CODE §§ 2930-2932 (West Cum. Supp. 1977).

25. CAL. PENAL CODE § 1170(f) (1977 Cal. Legis. Serv).

26. CAL. PENAL CODE § 1170.2 (West Cum. Supp. 1977).

27. CAL. PENAL CODE § 3000 (West Cum. Supp. 1977).

28. CAL. PENAL CODE § 3057 (West Cum. Supp. 1977).

January 1, 1977, it contained a delayed operative date of July 1, 1977²⁹ to provide sufficient time for the Judicial Council to develop guidelines and a data retrieval system, as well as to allow the new Community Release Board and the Department of Corrections to prepare for the conversion to the new system. That nine-month period also gave various vested interests, particularly those with a law enforcement bias, the opportunity to amend the new law, even though many of them had previously supported or acquiesced to it in an exchange for accommodations. The result of this effort was the administration-backed legislation (AB 476)³⁰ amending SB 42 as chaptered. Due to strong opposition to the massive changes first suggested by AB 476, the bill that eventually passed did not alter either the sentencing structure or process of SB 42 or its base terms. Its main focus was providing some additional time enhancements for the more dangerous offenders and allowing more leeway in exempting some previously sentenced offenders from the new law's retroactivity provisions.³¹ It also cleaned up and clarified some provisions.

II. IMPACT OF THE ACT

What has been and what will be the impact of the new law? The major impact of the law cannot be overstated. It works a dramatic change not only in the process of felony term fixing but also in the purpose behind prison sentences. For the first time in a long, long while it has caused most members of the criminal justice establishment to think seriously and learn about the effects of their past practices and what is now going to be required of them. Despite the specific impact of the new law, the information about the prior system and current studies and expertise on the sentencing system, its enactment has provoked long overdue thought about criminal law and corrections among the police, prosecution, defense, attorneys, judges, probation officers, parole officers, and prison personnel. This nationwide impact has provoked a large number of states and Congress to consider similar changes. The Act was also the impetus for a \$600,000 two-year study of determinate sentencing, with major focus on California, funded by the federal government.

Although the law has been in operation since July 1, 1977, to avoid *ex post facto* problems it only applies to crimes committed after that date. Except for the qualified retroactive recalculations required for those already incarcerated, no significant number of offenders began

29. 1975 Cal. Stat. Ch. 1139.

30. 1976 Cal. Stats. Ch. 165.

31. The constitutionality of the retroactivity provisions were sustained over allegations by some judges and DA's that they were violative of the separation of powers in that they conflicted with the Governor's reprieve, pardon, commutation and amnesty powers and contentions of impairment of the obligation of contracts, namely plea bargains. — Cal. App. 3d —, 141 Cal. Rptr. 383 (3d Dist. 1977).

to be sentenced under it until about October 1, 1977. Thus, at the time of this writing, it is still a bit too early to have much information about the specifics of actual operation. A favorable sign, however, appears to be the absence of much continued resistance to the new law's change by those who must administer it, and, in fact, an admission, if grudging at times, that it might not be so bad after all. A further encouraging sign are the Department of Corrections statistics indicating a drop in the parolee arrest rate.³² Nonetheless major efforts to emasculate the new law in the legislature are underway.

A myriad of impact questions which the new law has raised have, of course, been the subject of speculation for some time, and will merit study as experience provides the data for careful scrutiny. A central question is whether plea bargaining, that bane and boon of the criminal justice process, will be increased, decreased, or remain the same changed only in content. Each position has its supporters. One of us believes (and hopes) there will be less because of the known quantity for each crime, the narrowness of flexibility allowed, and the heightened visibility and accountability of the process. At least some evidence seems to support this view. Iris Young, staff writer for the *Sacramento Bee*, reported as follows:

"Plea bargaining for felony defendants will become a thing of the past because the state's new determinate sentencing law doesn't set sufficient prison terms," District Attorney John Price said Tuesday. His office's new policy, expected to take effect next week, is to "insure that offenders who we are satisfied are dangerous and/or incorrigible and/or career criminals serve the maximum time possible under present law," Price said in a draft of the policy.

Price said because of the state's new law, effective July 1, prison terms for felons are "too short to adequately protect society." From now on, attorneys in his office will insist defendants plead guilty to all charges, as well as admit to all "meaningful enhancing allegations." Under the new law, admission of these "enhancing allegations,"—which include such things as prior (terms), infliction of injury and use of a weapon—would increase length of the prison term.

Deputy district attorneys also will refuse to agree to judges "sentencing defendants to lesser or concurrent terms," Price said. One result of the new policy is likely to be a greater number of trials for defendants who do not plead guilty.

"I do not think it's going to flood the courts with trials," Price said. "But if it does, we'll just have to face that when it comes." Under the old law, "we often felt justified in agreeing to plea bargains under which a defendant would plead guilty to certain counts on the assurance that other counts and/or enhancing allegations would be dismissed."

"The Adult Authority would then have flexibility in determining how long a felon would remain in prison."

32. CAL. BUREAU OF CRIM. STATS., STATEWIDE ARRESTS OF PAROLEE'S, BCS No. 770611, Attachment 3 (Nov. 10, 1977).

Besides clearly calling the legality of the whole process of plea bargaining under an indeterminate sentence system into question, Price's comments raise at least two additional impact questions. Will societal protection suffer because of the new law? And will court time and thus costs or congestion be increased? As to the first question, there is absolutely no doubt that there will be a loud hue and cry when the first persons sentenced under the new law are released from prison and shortly thereafter some commit heinous crimes. Would they have been incarcerated longer under the old law? There is no way of telling because the new law generally eliminates the shortest and longest sentences served under the old law, creating less disparity and more uniformity by concentrating all new sentences within the perimeters of the prior usual practice. Accordingly, will the average time served remain about the same as most seem to predict? Will Price be right about an overall decrease? Or, as the drafters contemplated, will the average time go down slightly for most non-violent offenders and increase for the most violent ones?

Does the new law provide greater impetus for the legislature to react to public outcry, no matter how irrational, and increase penalties more so than it or the Adult Authority did under the old system?³³ Arguably, the restraint exercised in the final rendition of AB 476 belies that speculation though there are those who see the resolution of that issue quite to the contrary. The interrelationship between offenses and the building block nature of the penalty provisions may provide a built-in obstacle to piecemeal changes. But there is little doubt that some kind of violently dangerous offender extension legislation³⁴ will be passed into law next session, if for no reason other than it being an election year, thus returning some, but hopefully limited, indeterminacy for a small number of offenders.

Another related impact of the new law may well be that more people who, under the old law, would have been placed on probation will be sent to state prison. This may result from the judge's new found certainty as to the realistic limits of the maximum time to be served, as well as the visibility and accountability of a sentencing process which requires recorded reasons for sentencing and subsequent public distribution of sentences rendered. It seems clear that most persons felt after sixty years of experience that the indeterminate sentence system did not adequately protect the public. Under the

33. One important factor tends to be ignored by critics of determinate sentencing who argue penalties will become draconian: under this type of scheme the cost of longer sentences will be ascertainable which was not the case with indeterminate sentences. For example, when the penalty for assault with a deadly weapon was raised from six months to ten years to six months to life the fiscal impact was impossible to calculate. By comparison when a bill is introduced to lengthen a determinate sentence, the cost is easily identified by simply calculating the average number of individuals sent to prison for the given offense and multiplying that figure with the per capita cost for the additional time.

34. *See, e.g.*, S. 37, 278, 1054 and 1331, Ca. Senate Sess. 1976-1977.

disparate old system, some spent disproportionately long periods in confinement due to faulty concepts of predictability, or for more base reasons, only to be released well past their optimum for non-repetition of crime. This anomaly may have produced more recidivism than a more fair and equitably enforced system which may incarcerate more but some for shorter periods. Consequently, the dual goals of fairness and public protection may be achieved.

Of course, the answer to the questions of the number of persons sent to state prison and the length of their stay will determine the impact of the new law on an increase or decrease in prison population, the need for additional prisons or the ability to close existing ones, and, to some extent, the conditions within the prisons. Unanswered are the questions of whether the anxiety level of prisoners and their families will be lessened, a dominant purpose of the new law, and if so, whether non-gang related prison violence will be decreased.

What will be the impact upon the terms of women prisoners? Unless sentencing criteria can legally consider the sex of the offender as a mitigating circumstance, their sentences will probably be longer than under the old law. Under the cloak of the indeterminate sentence law, women's sentences were generally shorter than men's,³⁵ although women may well have been sent to prison at earlier points in their criminal careers than men. The lengths of women's sentences were lumped with those of men since their numbers were small, they therefore had negligible effect, and the new statutory terms thus reflect the longer time previously served by the male prisoners.

The other issue raised by Price's comments concerns court costs and congestion. It is probable that the impact of determinate sentencing on plea bargaining will effect costs and delay to some extent, although probably not to the extent most plea bargaining proponents believe. But there are several other impact questions which may effect these important concerns as well. For example, since confinement pursuant to parole revocation may be for no longer than six months, will there be more trials in an attempt by prosecutors to obtain the longer sentence available upon a new conviction? Since imprisonment is now explicitly for punishment and judicial criteria have been developed for all felony sentencing decisions, will the content and effect of the presentence report change? Because of the possibility of a mitigated or aggravated base prison term, will there be more involvement of the prosecutor and defense counsel at the sentencing stage? And, due to the number of sentencing decisions required of the judge, as well as the requirement of recording the reasons for those decisions, will in court time for sentencing be increased? The apparent answer to this last series of questions is, likely. Arguably, however, rather than a negative feature of a new law, such added time spent in

35. DEPARTMENT OF CORRECTIONS, CALIFORNIA PRISONERS (1973).

rationally determining an appropriate sentence is long overdue. In recent years, criminal justice literature and bar standards have finally begun to push for increased involvement of all, particularly defense attorneys, in sentencing.³⁶ The fact is that little time has been spent on the details of what is to be done with the convicted offender despite the savings in court time through acquiring eighty-five percent or more of all convictions without trial. Even when substantial time is spent in trial to arrive at the sentencing stage, little time has traditionally been spent in sentencing.

A major impact of the new law is the mandate for and development of written criteria for all felony sentencing where none was required before.³⁷ A weakness in the law was putting very general authority for criteria development, data collection and dissemination in the hands of the Judicial Council, a body made up almost entirely of judges. A similar criticism is valid concerning the very broad requirement for the sentencing judges' statement of reasons. These weaknesses were recognized by the drafters at the outset; but, nonetheless, pursued for pragmatic reasons. The result is, indeed, a set of very general criteria and reporting procedures. But, the major goal has been accomplished: written statewide sentencing guidelines and a requirement for written sentencing reasons in each case where none whatsoever existed before. Litigation challenging the guidelines for overbreadth, inequity, and vagueness as well as asserting abuse of discretion in specific cases for failure to conform to even such general guidelines will undoubtedly be forthcoming and possibly serve to correct the lack of current specificity. On the other hand, perhaps the narrowness of base terms, availability of uniform sentence criteria, sentence accountability through reasons and reporting, and Community Release Board sentence review and recall will, in the long run, eliminate the increasingly frequent call for formal appellate sentence review. Perhaps these various mechanisms will eliminate the need to incur the otherwise clear costs of more appellate judges.

A major goal of the new law was sentencing equality, especially for those who receive state prison sentences. Under the old system of indeterminate sentencing, two offenders who committed identical crimes could serve vastly different sentences under the guise of "treatment" and "rehabilitation." This single fact of prison life was a major reason for the typical cynical attitude about "justice" expressed by convicts. Under the new law, such inequality is theoretically no longer permissible. Both the title and the intent sections of the

36. See Miller, *The Lawyer's Hang-up: Due Process Versus The Real Issue*, 11 AM. CRIM. L. REV. 197 (1972); Dash, *The Defense Lawyer's Rose at the Sentencing State of a Criminal Case*, 54 F.R.D. 315 (1972); ABA PROJECT ON MINIMUM STANDARDS FOR CRIMINAL JUSTICE, STANDARDS RELATING TO THE DEFENSE FUNCTION, APPROVED DRAFT § 8.1 (1971).

37. Cal. Ct. Crim. P.R. Tit. 2, Div. IA.

new law call for uniformity. A specific provision of the law provides for a sentencing review by the Community Release Board to identify sentences that are disparately long and to send those cases back to the sentencing court. What will happen at that point is speculative. Once the Board identifies a disparately long sentence is the board required to send the sentence back to court? The logical answer seems to be that it is. Is the sentencing judge required to adjust the sentence once it is returned? Will a cooperative or advisory relationship exist between trial courts and the Board? Will it be necessary for the appellate courts to clarify relationships by establishing re-sentencing guidelines?

The switch from a "rehabilitation" to a "punishment" model with respect to the dominant purpose behind incarceration in state prisons raises a number of extremely important questions concerning related processes in the administration of justice. Most directly, what impact will there be on resources provided for institutional rehabilitation programs and the motivation of inmates to participate in such programs? The one month reduction in sentence for program participation continues to allow for formal recognition in the budget for rehabilitation programs. In addition, in never opposing these features of the new law, the Department of Corrections acknowledged their own studies which indicated an *increase*, rather than a decrease, in participation after inmates received parole dates. This indicates the absence of any need for internal coercion in participation under such circumstances.³⁸ Finally, of course, there is that school of thought which believes that voluntarily sought assistance is far more productive than forced participation.

What will be the impact on parole services? Quite frankly, the drafters would have preferred to eliminate a parole term altogether. There is a perceived hostility to, and thus negative effect on, many parolees caused by continued state control in the form of an ambivalent law enforcement and treatment entity. Moreover, there are both legal and factual questions about the actual and perceived equity and fairness of the coercive mechanism of surveillance, searches, interrogation, holds and revocation imposed on parolees in the absence of full constitutional guarantees. But politically, it was not feasible to eliminate parole completely. Thus, an experiment is in the making. The termination of parole for many already on parole due to the qualifiedly retroactive provisions of the new law, the shorter parole terms for the newly released, and a statutory intent not to diminish the resources for parole should decrease the parole agent caseload to a point where any change in the effectiveness of the state as a treatment entity can be determined. However, recent legislative action may

38. HOLT, RATIONAL RISK TAKING: SOME ALTERNATIVES TO TRADITIONAL CORRECTIONAL PROBLEMS, IN PROBATION, PAROLE AND COMMUNITY CORRECTIONS 334 (R. Carter ed. 1976).

thwart this important experiment before it has a chance to succeed.

There are a whole range of questions concerning the application and implications of the new law to Youth Authority commitments. Is such an institution a state prison? Do the provisions of the new law apply, at least where the defendant is a young adult sentenced by the criminal rather than the juvenile court? And what, if any, are the implications of such a dramatic switch away from rehabilitation in favor of punishment for the whole juvenile justice process, a system little older than the indeterminate sentence, also based on the medical model, which is increasingly adopting the ways of the criminal process?³⁹

Finally, does the treatment and rehabilitation emphasis of probation continue to make sense in light of the reasons behind and the existence of the Uniform Determinate Sentence Law? And what of the disparity in treatment between those sent to prison and those ordered on felony (or misdemeanor) probation for similar crimes. Will the probation criteria, reasons and reporting system, and Board review adequately control that vast number of cases? Almost assuredly not, for probation was intentionally only a minor concern of the drafters of the new law who did not want to stir up more opposition than essential while meeting the primary objective, the demise of the indeterminate sentence law.

Conclusion

Although it must be recognized that the new law touches a disproportionately small number of those in contact with our criminal justice system, the impact will be felt system-wide. While primarily only the ten to fifteen percent of the convicted felons who go to state prison are directly affected, the reform movement is clearly underway. The next logical step is to critically evaluate the eighty-five to ninety percent of all convicted felons ordered to probation who are largely unaffected by the new law's provisions and all of the vast array of misdemeanants who are totally unaffected. The infraction and misdemeanor levels are where most people first come into contact with our so-called system of criminal justice and where the least scrutiny to the equality of sentences has been traditionally provided. More carefully thought out and applied sanctions at the first instance of criminal activity may serve a far more preventative and rehabilitative purpose than any subsequent display of concern where patterns of conduct are already established and the offense too serious for leniency. Now is the time to shake up the criminal justice establishment at its lowest level, as it has been at the prison level, if we are really serious about providing an even-handed, rational, and equitable system of dealing with criminal behavior.

39. In *Re Gault*, 387 U.S. 1 (1967) and progeny.

