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# CALIFORNIA'S DETERMINATE SENTENCING STATUTE: HISTORY AND ISSUES \*

by Sheldon L. Messinger and Phillip E. Johnson

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## I

### INTRODUCTION

The law is constantly changing, but the change is usually evolutionary and incremental. Occasionally, a statute or judicial decision breaks abruptly with the past, announcing not only a set of new rules but also a new philosophical approach, indicating a change in the way the opinion leaders of a society are thinking about a longstanding problem. The paradigm of such a change is the opinion of the Supreme Court in *Brown v. Board of Education*, replacing the concept of "separate but equal" with the revolutionary idea that, in racial matters, separate is inherently unequal.

California's determinate sentencing act is in no way comparable to the *Brown* decision in importance, but it too indicates that ideas about a perennial problem are undergoing radical change. Like *Brown*, it may also show it to be one thing to see that fundamental change is necessary: quite another, to make that change come about.

Before 1976, California was famous or notorious as the state whose laws seemed most thoroughly committed to the idea that sentences should be indeterminate. The laws implied or said that the length of imprisonment should depend more on the individual characteristics of the criminal than on the nature of the

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\*A preliminary draft of this paper was prepared in April, 1977. This draft was prepared in July, 1977, after California's Determinate Sentencing Act was amended and, as amended, went into effect. We have left our discussion of the original act, in Parts III and IV, largely unchanged. We have, however, considerably modified the discussion in Part V to take account of those amendments actually made in June, 1977. And we have enlarged the concluding section, Part VI, to include some thoughts generated by dialogue at the conference for which the preliminary draft was prepared. Parts I and II remain substantially as they were in the preliminary draft. Philip E. Johnson was unable to participate in revision of the preliminary draft. Sheldon L. Messinger made the revisions, and will accept such credit or opprobrium as is due.

crime; maximum discretion over length of sentences should be given to an administrative agency shielded from public accountability; the purpose of imprisonment is to rehabilitate the offender and to protect society from his further misdeeds; and the released prisoner should be subjected to a lengthy period of parole supervision to protect the public and to insure his rehabilitation. The Uniform Determinate Sentencing Act of 1976, commonly known in the state as S.B. (Senate Bill) 42, seems to be based on the opposite assumptions in every respect. As originally passed, it provided a relatively narrow range of fixed penalties for each crime; replaced Adult Authority discretion over release with a complex system of "good time" credits; greatly lessened the period of parole and the importance of parole supervision; and, perhaps most significantly, stated flat out that *the* purpose of imprisonment is punishment.

The California sentencing reform is an event of national significance. If other jurisdictions did not go as far as California in endorsing indeterminacy, they nonetheless went very far indeed. Unchecked discretion is a feature of criminal sentencing law everywhere, whether the discretion is lodged primarily with the courts or the parole boards. Reforms based on the considerations which inspired the California innovations are in the air in many states.

This paper assumes that knowledge of the California experience will be instructive to a national audience. Our disadvantage in writing about that experience is that *our research is in a preliminary state, and our conclusions must therefore be extremely tentative*. We have only begun to understand the complicated history of the attempt to abolish or radically alter the indeterminate sentencing system. The new statute itself only recently went into effect, and before it did it was substantially amended. Even if we knew much more than we do, we could not begin to predict the effect which the new statutory scheme will have as it is put into practice in a system of criminal justice accustomed to applying very different rules. This paper should thus be viewed as a preliminary effort designed to set the stage for discussion, not as a definitive account of the events it relates — or even of our own views.

The paper is divided into sections for the convenience of the reader. Section Two briefly describes the system which the determinate sentence scheme has supplanted. Section Three describes the political and legal situation in 1976 which made it possible and perhaps necessary to replace the Adult Authority system with an entirely different sentencing method. Section

Four describes the principal features of the resulting statute, S.B. 42. Section Five briefly describes the amendment struggle, the forces and issues involved, and the thrust of the amendments finally adopted by the California legislature. Section Six offers some tentative conclusions.

## II

### THE CALIFORNIA INDETERMINATE SENTENCE SYSTEM

First introduced in California in 1917, indeterminate felony sentencing existed until recently in approximately the same form ever since the creation of the Adult Authority in 1944. The system is simple to describe in broad outline, although piecemeal amendments over the years made the specific sections governing such vital matters as parole eligibility incredibly complex and confusing.

Under the indeterminate system, California judges did not fix the sentence for convicted felons committed to prison; instead, they sentenced the offender to "the term prescribed by law." An administrative agency known as the "Adult Authority" determined the amount of time a convict actually served by "fixing" the sentence at some point between the statutory minimum and maximum.

The sentence so fixed was the total amount of time to be served before absolute discharge. Convicts normally served part of this time on parole, a matter also determined by the Adult Authority by setting a parole date to take effect some time before the fixed sentence terminated. With some exceptions, prisoners serving a minimum statutory sentence of more than one year were eligible for release on parole after serving one-third of the minimum term. First-degree murderers and others sentenced to statutory sentence of life imprisonment were eligible for parole after seven years; habitual criminals with three previous convictions were eligible after twelve years. Train wreckers and kidnappers who inflicted bodily harm upon their victims incurred a statutory sentence of life imprisonment without possibility of parole.

Throughout most of its history the Adult Authority followed a practice of delaying fixing a prisoner's sentence until he had been in confinement for a considerable period of time and was considered "ready" or nearly "ready" for parole. Until it acted, the prisoner was considered to be serving the maximum sen-

tence provided by statute, frequently life. Even after a sentence was fixed by the Authority, it could be “refixed” for cause such as violation of prison regulations or of the terms and conditions of parole. The Authority could also refix that portion of the sentence the inmate would serve on parole. Until quite recently the California courts consistently held that the Authority could fix and refix sentences and parole dates, and revoke paroles, without notice or hearing, although the Authority provided hearings as a matter of policy. The decisions of the Adult Authority, finally, were practically immune from judicial review.

To appreciate the full extent of Adult Authority discretion, one must realize that the statutory maxima were extremely long in relation to the time normally served in practice. Such common felonies as second-degree murder, robbery, rape, and burglary of a dwelling each carried a maximum term of life in prison. Yet in 1965, the median time served in prison by prisoners released on parole for these offenses ranged from a high of 5.4 years (second-degree murder) to a low of three years (burglary). Of 522 armed robbers released on parole in that year, 439 had served five years or less and only three had served more than ten years. The situation for less serious felonies was similar. Forgery, for example, carried a maximum sentence of 14 years. Of 432 forgers released on parole in 1965, 337 had served two years or less. Only one had served more than five-and-a-half years.

In short, the California indeterminate sentence system left the determination of the length of imprisonment and the parole period to an appointed board which was given an almost awesome freedom from legislative or judicial control. For years this system was satisfactory to a wide spectrum of opinion, and even when it came under heavy attack it seemed likely to endure because of the difficulty of agreeing on a replacement. The indeterminate sentence appeased liberal sensitivities by purporting to reject such “primitive” notions as retribution and deterrence, and by providing the possibility of speedy release of offenders amenable to rehabilitation. Judges were happy to be relieved of much of the responsibility and pressure inherent in sentencing. Prison administrators considered a flexible date of release an important tool in controlling hostile inmate populations. Politicians were free to be irresponsible: statutory penalties could be raised to grossly unrealistic levels to appease public passions without necessarily affecting the exercise of Adult Authority discretion. Law enforcement officials took comfort because Adult Authority sentences were among the longest in the nation, be-

cause it was possible to confine a "dangerous" prisoner for a very long time even if he could not be proved guilty in court of an exceptionally serious crime, and because many Adult Authority members came from law enforcement backgrounds.

None of these satisfactions was unalloyed, however, and criticism of the indeterminate sentence system did develop, most visibly at first from groups concerned with civil liberties and prisoners' rights. Such critics charged that the system gave too much unchecked discretion to a board which overrepresented law enforcement interests; was based on false assumptions about the predictability of human behavior; resulted in overlong prison terms on the average and especially for prisoners guilty of displeasing their guardians for failing to conform to middle class behavioral norms; and, above all, was cruel and frustrating for prisoners who had no clear idea of how long they might have to serve or what they could do to shorten their sentences.

These criticisms were sufficiently well-founded so that many legislators and influential members of the legal and correctional professions came to agree with them. Yet in themselves such arguments were not enough to force a change as long as the indeterminate sentence system retained its usefulness in other respects. Furthermore, the legislature could not abolish indeterminacy without general agreement on a replacement. One of the most useful features of delegating sentencing authority to the Adult Authority was that it made it possible for the legislature to avoid making hard decisions about how severely crime should or could be punished. Basic reform could come about only if the desire for change were strong enough to compel groups with very different ideas about the appropriate levels of penalties to compromise their differences.

### III

#### THE POLITICAL AND LEGAL SITUATION PRIOR TO 1975

During 1974, Senator John A. Nejedly, Chairman of the Senate Select Committee on Penal Institutions, hired Michael Salerno, then an aide to another legislator, to work on some juvenile justice matters and, more generally, to survey the justice situation in California in search of matters possibly ripe for legislative remedy. Salerno's observations soon led him to the conclusion that there was considerable dissatisfaction with the indeterminate sentencing system and that some change might be

possible. He consulted with Raymond Parnas, a law professor at Davis, who confirmed his belief and expressed interest in working on the matter. Parnas was hired as a consultant to Nejedly's committee after Salerno and Parnas sought and received the senator's approval to begin more determined inquiry into the area with a view to drawing up legislation.

During October and November 1974, Salerno and Parnas consulted with the legislative lobbyists for the district attorneys, police, correctional officers, and the Department of Corrections, other law professors at Davis, and a Corrections Department researcher, among others. There was a meeting with Raymond Procnier, then Director of Corrections, and his staff, and another with five Los Angeles Superior Court judges. Only the last meeting, apparently, resulted in expressions of opposition to plans to move toward greater determinacy in sentencing, and in Salerno's and Parnas' judgment this opposition was, to say the least, uninstructed.

By late November 1974, a working paper had been prepared suggesting cut-down ranges of penalties for offenses and giving judges discretion to fix a maximum prison term within those ranges; the Adult Authority would continue to decide if and when a prisoner might be paroled. This paper was made the basis for discussion at open hearings held on December 5 and 6. Some two dozen witnesses testified at the hearings, including: representatives of various prison reform groups; Richard McGee, former Director of Corrections in California and a recent proponent of more determinacy in sentencing; a delegation of Superior Court judges; and representatives from the California Correctional Officers Association, the Attorney General's Office, and the District Attorney's Association. The burden of testimony was strongly supportive of more determinacy; indeed, strong sentiment was expressed for legislatively fixed, "flat" sentences. Only the judges' representatives took a strongly negative position.

From that point until passage of S.B. 42 on August 31, 1976, activities became very complicated. In this section we present, first, a tentative outline of some of the main activities and events, with dates, to provide a set of guideposts; and, second, equally tentatively, what we take to be some of the major issues of concern to those forces helping to shape S.B. 42.

### **Main Activities and Events**

After the public hearings in December 1974, the working

paper was abandoned. During the early months of 1975, new drafts were prepared and widely circulated; a version of what was to become the final bill was introduced in the Senate on March 4, 1975. At the same time, Raymond Procunier, who had resigned his post as Director of Corrections, became Chairman of the Adult Authority and instituted by directive a plan for early term-fixing based on the seriousness of a prisoner's offense and past criminal record. This move by Procunier was widely interpreted as an effort to undermine S.B. 42.

Notwithstanding Procunier's gambit, work on S.B. 42 continued. The bill was heard and passed by the Senate Judiciary Committee in April 1975, and by the Senate Finance Committee in May. It was passed by the Senate 36 to 1 on May 15, 1975.

The bill was then considered by relevant Assembly committees. There was great difficulty in getting the Assembly Committee on Criminal Justice, headed by Alan Sieroty who was developing competing legislation, to schedule a hearing. It was heard by this committee on August 6, 1975. No definitive vote was achieved in the face of negative testimony from the ACLU and the District Attorney's Association, whose representatives held, respectively, that the penalty provisions were too harsh and too mild. The bill was tabled to be reheard a year later.

This testimony and action apparently dispirited Senator Nejedly and his staff; the senator announced that he would not push the bill further. But within the next month or two the ACLU changed its position, moving to support the bill, as did portions of the State Bar Association. By the end of 1975, it began to appear as if the bill might have a chance of approval when reconsidered.

Judicial opinions helped change the tide of sentiment. Only two of the most important opinions will be noted here. In *Rodriguez*, 14 C. 3d 639, which appeared in mid-summer 1975, the California Supreme Court found that 22 years of imprisonment, even under a statute providing a possible life sentence, was unconstitutionally excessive given the facts of this particular case of nonviolent fondling of a six-year-old child. In the course of the opinion, the Court made clear that it was prepared to find the Adult Authority responsible to fix all sentences proportionately to the culpability of the individual offender, and that, once fixed, sentences could not be refixed upwards — the routine practice in the past in the case of parole violations. The Court also said that to continue to imprison an offender "solely because he was not competent to care for himself in the free society," once a sen-



tence was fixed, "would thereafter constitute punishment for status which is also constitutionally proscribed." "Adequate non-punitive means of caring for such persons are available," the Court said, under existing civil legislation. This provided the Nejedly staff with grounds for amending out of S.B. 42 a provision for extended terms for "dangerous" offenders, a matter of great concern to prison reform and civil liberties forces.

*In re Stanley* (and *In re Reed*), 54 C.A. 3d 1030, came down in January 1976. Two prisoners challenged the Adult Authority's right, under the Procunier directive noted earlier, to postpone their parole dates on the basis of concurrent sentences imposed for lesser offenses. The California Court of Appeals expanded the issue to include the validity of the whole Procunier directive. Its opinion appeared to many to cut the ground from under the directive by holding that the directive's table of fixed time increments, based primarily on the nature of the offense and prior criminal history, militated against taking adequate account of such matters as acceptable in-prison conduct, reclamation potential, postrelease social safety, and premonitions of danger not revealed by overt misbehavior. According to the Court, all of these matters should form part of the "individualized" consideration due prisoners in the fixing of parole dates under the existing Indeterminate Sentence Law.

Our interviews suggest that these opinions were among the most influential factors moving the Governor and his advisors, and some of the more influential district attorneys, to take a positive interest in changing the sentencing statute. Some district attorneys apparently concluded that the opinions had created a situation in which the courts would take an increasing and unpredictable role in determining "appropriate" sentences; a system more responsive to "public opinion" was wanted. The Governor's office, encouraged by Senator Nejedly's staff, apparently found *Stanley* the last straw in suggesting the unworkability of administrative reform without new legislation. In any event, early in 1976 the Governor and some of his top aides met with Adult Authority Chairman Procunier and Senator Nejedly and his staff. The Governor indicated his readiness to support a reworked version of S.B. 42 more acceptable to "law enforcement." He instructed his aides to spend whatever time was necessary to accomplish this goal.

The bill was reworked during the first months of 1976, resulting in an amended version introduced in April 1976. Law enforcement groups, with some reservations, supported this ver-

sion which, compared to earlier versions, qualified the retroactive provisions of the bill by making it possible selectively to keep certain offenders in custody notwithstanding what the court had explicitly taken into account when sentencing such offenders under the old law. The April version also inserted a three-year "enhancement" possibility for each violent offense resulting in imprisonment in the record of a person currently convicted of a violent offense. Prison reform groups, on the other hand, had serious objections to these and other specific features of the bill and worked over the summer of 1976 to have them modified. The Department of Corrections entered the fray more actively at this time as well.

The April version of S.B. 42 was amended four times more, but it is clear that it contained the essence of the bill as finally passed; amendments appear to have "softened" some of its penalty provisions. The bill was reheard and passed by the Assembly Committee on Criminal Justice in August 1976. That same month it passed the Assembly Ways and Means Committee and the Assembly as a whole, 60 to 17, and brought concurrence from the Senate. The Governor signed the bill on September 20, 1976.

Too simply, events in 1975 and early 1976, including increasing evidence that under existing legislation continued intervention by the courts could be expected, moved the Governor's office from an officially neutral to an officially supportive position on the bill. All these events moved law enforcement to think some legislation would pass, and law enforcement seized the opportunity to shape that legislation in ways conforming to its notions of what was needed. Prison reform groups, supportive of the bill in principle throughout, worked to modify various aspects of the bill. They particularly tried to insure limited discretion focused on acts, not persons, with terms as short as possible in light of the contending forces. Civil liberties groups were more ambivalent. The correctional bureaucracy, hampered by the Governor's support of the bill, also worked to modify certain provisions.

## **Major Forces and Issues**

### *The Correctional Bureaucracy*

Legislative changes beginning in 1944 had created a bifurcated correctional bureaucracy, with the Director of Corrections

with responsibility for prisons and the parole organization, and the Adult Authority with wide discretion to grant and revoke paroles and to fix and discharge prisoners and parolees from sentence. The Authority's exercise of its discretion was subject to attack from 1944 on, but during the 1970's, particularly, the attacks mounted. It is important to appreciate that such attacks came from *all* segments of the community, not only from prison reform groups as was sometimes supposed, although, as noted, attacks by these groups were the most visible. Police and prosecutors found parole release dates uncertain and frequently too early; civil libertarians found them arbitrary, capricious, biased, and frequently too late; prisoners found them anxiety-inducing and irrational; a whole series of Governors had been embarrassed from time to time by particular decisions. And — a fact seldom appreciated — prison officials were in almost daily battle with the Authority, finding its practice of fixing terms late a block to rational planning, its terms unpredictable, its release and parole revocation actions subject to whim and political influence.

These matters and others had led to a move within the bureaucracy during the early 1970's, headed by Raymond Procnier, then Director of Corrections, to get the Authority to fix parole dates and sentences early on, at the first hearing in most cases, and to a more diffuse pressure for the Authority to articulate and make known to staff and prisoners the bases for its releasing, sentence setting, and parole revocation decisions. At best, this move was only mildly successful, meeting the resistance of Authority members committed to the view that such decisions were very much a matter for case-by-case decision on the basis of factors too complicated to articulate (but heavily influenced by the "expert" views of members about future dangerousness), and that such decisions were best made late rather than early in prisoners' careers. Even the mild success was ended in 1972 when pressure from Governor Reagan's office, responsive to police complaints about "leniency," moved the Authority back to its former ways of acting.

When Governor Brown took office in 1974, the bureaucracy was pervaded by vague feelings that some changes were in store, probably in the direction of more determinacy; the preference was to make such changes as necessary by administrative, rather than judicial, or, especially, legislative action. Raymond Procnier became head of the Adult Authority in early 1975, as noted, and pursued this goal with vigor. He issued orders making sentence- and term-fixing on the basis of articulated stan-

dards, as early as possible, the operating rule for the Authority.

The move, as we know, did not stave off legislative change. Preliminary inquiry suggests several reasons for this fact. First, it appears that Authority members and representatives, especially those carried over from the Reagan administration, were reluctant to follow Procunier's administrative directive. Early term-fixes, guided by the norms also in the directive, rose for a while, then declined. Exceptions were increasingly frequent. And, for reasons unimportant here, in late 1975 Procunier, in the words of one informant, "withdrew from the battle." The acting chairman to follow, Ray Brown, was unable — whatever his willingness — to implement the Procunier directive. To sum it up: it became increasingly apparent that sufficient reform could not be accomplished by administrative directive alone.

Further, the administrative route to change carried its own troubles. The Authority could, but did not have to, fix terms early or at any particular length by law. If an ex-convict who could have been imprisoned longer got into trouble, this could be seen — and was seen — as a matter of undue "leniency" on the part of gubernatorial appointees who might — and should — have acted differently. Some ex-convicts always get into trouble, almost needless to say, and some forces in the state are ever-ready to publicize such trouble. Some "sensational" cases during 1975 clearly affected the sentiments of Adult Authority members and, presumably, the Governor's office.

The final blow seems to have been delivered by the *Stanley* decision in January 1976, which said, in effect, that so long as the indeterminate sentence law remained on the books, the Authority *had to* take "rehabilitative factors" into account in determining release dates. This was directly contradictory to the logic, if not the fact, of the Procunier directive, which had moved to fit actual prison terms to the seriousness of the offense, the prisoner's culpability, and the past criminal record, with little more than glancing attention to "rehabilitation."

### *The Governor's Office*

This complex of factors appears to have changed the position of the Governor and his advisors. Some participants have suggested that there was "panic" in the office following the *Stanley* decision, the assessment being that a sentencing scheme more acceptable to contending forces could not be fashioned without legislative change. (At least three participants, all lawyers, feel

this was an overreaction, and that further administrative adjustments could have produced a satisfactory outcome without legislative intervention.)

We have noted the conferences initiated by the Governor which began in January 1976 and resulted in the amended version of S.B. 42, acceptable to law enforcement, introduced in April. Without more detailed information, it is difficult to be certain of the interest of the Governor's office in the ensuing negotiations — except to say that the office was pervaded with a sense that legislative change was needed, and that a bill was wanted that would, to the extent possible, satisfy contending forces among both law enforcement and prison reform groups. Less attention was given, so far as we can see, to the particular needs being expressed by the correctional bureaucracy. The Adult Authority and Women's Parole Board were apparently considered expendable. At least one conference was held between top prison officials and Senator Nejedly's staff; this resulted in procedures for revoking "good time" more acceptable to prison officials. Other requests from prison officials were mainly filtered through Mario Obledo, head of the larger agency of which corrections is part, and Obledo seems to have differed with prison officials about the advisability of certain changes, e.g., lengthening the proposed parole period. Obledo appears to have prevailed on this issue, although prison officials did get a promise from the Governor's office to introduce further changes for consideration by the Assembly Criminal Justice Committee. This was done, but some or all of the proposals were defeated.

### *Law Enforcement*

At the first hearing of S.B. 42 before the Assembly Criminal Justice Committee, in August 1975, representatives of the district attorneys and the police opposed the bill — although it appears that the district attorneys, at least, were for more determinacy in principle. Proposed prison terms were held to be too short. The Attorney General's Office, on the other hand, supported the bill, even though some officials had reservations about specific provisions.

The Attorney General's supportive position was the outcome of discussion of a position paper prepared in 1975 by Jack Winkler of the office. In that paper, Winkler argued that the indeterminate system had proved to be a failure in controlling recidivism, and he questioned deterrence and isolation as plausible

aims of imprisonment. He suggested that punishment to uphold societal values could be an appropriate aim, and that the sentencing system should be designed to fulfill that aim — without completely abandoning the other aims. He proposed a move to a new system which would mete out penalties based on the seriousness of the offense; mitigating and aggravating circumstances; prior criminal history; and the postconfinement behavior of prisoners, which should affect parole eligibility through a “good time” credit system. It should be remarked that, although the paper does not provide details, the principles pronounced are very close to those embodied in S.B. 42.

We do not know what specific provisions, if any, were proposed by the Attorney General’s office, except that the office threatened later to withdraw support if “enhancement” of terms on the basis of facts pleaded and proved with respect to carrying or using arms, great bodily injury, and past criminal record, were made discretionary rather than mandatory. A compromise was reached whereby enhancements were made “presumptive,” leaving it to the judge to decide and rationalize not increasing the sentence.

The same issue troubled the district attorneys, who agreed to the same compromise. And it seems clear — although again we do not have full detail — that all law enforcement organizations supported longer terms than those originally provided. It is not clear that the April version of the bill in fact included longer terms than earlier versions — but it is clear that it provided the *possibility* of longer terms, especially for persons convicted of a selected set of “violent” offenses, known as the “dirty eight.” And, as noted, law enforcement supported changes limiting the retroactive provisions of the bill, making it possible to hold already-sentenced offenders longer than would have been possible otherwise.

The police, too, seemed to have moved to support the April 1976 version of S.B. 42. Chief Edward Davis of Los Angeles provided a salient exception. His opposition both before and after passage of the bill was variously interpreted as a political gambit to muster conservative support for some future office seeking, and as due to his failure to understand the likely consequences of the legislation. These were not necessarily inconsistent accounts.

Two further comments seem germane. First, many provisions of S.B. 42, presumably sought by prosecutors, appeared to strengthen enormously the say of prosecutors over the sentences

actually to be served by prisoners. S.B. 42 provided that judges could not mitigate or aggravate sentences, nor “enhance” them, without an express motion in court. Defense attorneys were expected seldom to move for aggravation or enhancement. These, among other features of the bill, considerably strengthened the prosecutors’ already great powers in plea bargaining.

Second, it was clear when they were expressed, and became clearer later, that the positions outlined for law enforcement (and other groups, for that matter) represented, at best, a tenuous consensus among the members of these groupings. Bureaucracies are not organizations committed to generating consensus among their members; and, in the case of multiple bureaucracies (like prosecutors’ offices or police departments), even the means for valid opinion gathering are not present. Bureaucratic leadership, as well as access to legislators and their staffs, appears to play an especially important role in articulating the effective positions of such groupings.

### *Judges*

This last point is especially relevant to a discussion of the role of judges, since they appear to be especially poorly organized for the generation of consensus or concerted expressions of opinion. What we know suggests relatively little input from judges, and what there was generally resisted the move to give them the burden of choosing a determinate sentence for convicted felons. We can only speculate about the variety of reasons that those few judges who expressed opinions had for them, but prominent among these reasons appeared to be the belief that “protection of the community” is better served by a later, rather than an earlier, release decision. Unkinder critics also suggested that judges simply do not want to shoulder responsibility for the kind of decision certain almost always to be unsatisfactory to some.

This matter needs further study, clearly. But the preponderant response of judges was resistance, and this throws some light on the history of the struggle over determinacy generally. It has often been speculated that judges must have opposed the moves toward indeterminacy earlier in this century, since they lost discretion as a result. There is little evidence on record that this was so. The recent experience suggested that judges might have welcomed relief from an unpleasant burden and actively supported these moves. In California, it may be noted, the 1917 indeterminate sentence statute was *written* by a judge.

The court does have some means for organized expressions of opinion. The California Association of Judges — a voluntary association in which most judges hold membership — consistently opposed S.B. 42, but with little effect. The California Judicial Council is an organ of court government, under the State Supreme Court. S.B. 42 charged the Council with developing sentencing standards for application by the courts, and with gathering and analyzing information on sentencing. What we know suggests that the Council did not actively enter the bill-shaping process until late in 1976, and it then had little effect on the bill's provisions.

Generally, and with some salient individual exceptions, judges appear not to have believed that a determinate sentence bill would pass the legislature until it was too late to negotiate provisions in which some or many might have been interested. Having often spent much time working on legislative proposals that came to naught, most judges were apparently not excited by the possibility of legislative change, a possibility they thought slight.

### *Penal Reform Groups*

A wide variety of groups interested in reforming penal law and practice exists in California. We spoke with representatives of only two of those most active in helping shape S.B. 42: the local chapter of the American Civil Liberties Union and the Prisoners Union. The ACLU is well known as a "liberal" group concerned with the protection of civil liberties, broadly construed. The Prisoners Union is a more recently formed group of ex-prisoners, attorneys, and others interested in penal reform; it is based in San Francisco.

What we shall say about the positions of these groups is tentative in two senses. First, we need to know more about their positions, including internal divisions of opinion. Second, it is only a guess that the issues dividing these two specific groups from each other — and they were divided — are representative of the main lines of interest and cleavage among prison reform groups generally.

California ACLU executives testified against S.B. 42 in the public hearings during December 1975. In the minds of many observers, this testimony moved or permitted the several "liberal" members of the Assembly Criminal Justice Committee to table the bill for a year, rather than vote for it. The explicit issue



raised by the ACLU was the result of S.B. 42 for lengths of prison terms; its representatives felt terms would be too long, both as the bill then stood and in prospect. ACLU staff attorneys — as well as many others — were fearful that the legislature would continue to raise statutory sentences, and that, under S.B. 42, prisoners would actually have to serve the longer sentences. Another issue — although it is unclear if this was raised in testimony — was preserving administrative discretion to release “deserving” prisoners prior to some fixed date.

The latter point, particularly, troubled — indeed, incensed — Prisoners Union representatives. From their point of view, although briefer prison terms were a legitimate objective, the crucial issue was curbing the discretion of members of the correctional bureaucracy — parole board members or prison officials — to determine or redetermine the period of imprisonment. Prisoners Union representatives preferred legislatively-fixed, “flat” terms geared to the acts, not the persons, of those convicted. Ideally, they wanted to eliminate judicial discretion to grant probation, and they wanted to eliminate parole with its continuing threat of reimprisonment without trial. Indeed, the Union wanted to eliminate “good time,” instead reducing all sentences through the legislative process by the amount now given to “good time.” And, most fervently, they sought to eliminate any provision for the extension of terms for prisoners classified as “dangerous” — a provision of early versions of S.B. 42 that the Prisoners Union, among other forces, helped to remove.

Soon after the ACLU testimony mentioned above, representatives of the Prisoners Union picketed the San Francisco ACLU office and managed to promote a confrontation between ACLU executives and ACLU board members, the latter being “liberals” from a wide spectrum. We have heard that both sides stated their cases verbally and in writing to the board. The board by large majority sided with the Prisoners Union and instructed its executives to take no action henceforth that would impede passage of S.B. 42.

Our impression — and, again, it is only an impression — is that other penal reform forces in California tended to support the Prisoners Union position, not that of the executives of the ACLU. This is not to say that they, or the Prisoners Union, were for the lengthy terms that may and likely will result from S.B. 42; they worked and continue to work to reduce the lengths of terms. It is to say, however, that they seem firmly committed to depriving the correctional bureaucracy of its powers over

lengths of terms; apparently they would rather contest such matters in the legislative arena, or in prosecutors' offices and the courts on a daily basis.

One further matter needs to be mentioned. The "constituency" of the Prisoners Union is often said to be current prisoners; ex-prisoners are conceived to be working in the interest of these inside prisons. In a sense this is correct, although it is difficult to know how much active support the Prisoners Union receives from those in prison. In any case, it has been said by some that the Union traded retroactive provisions in the bill — which called for fixing terms of current prisoners in line with the new norms provided when the bill became effective July 1, 1977 — for possibly much longer terms for future prisoners. We strongly doubt that this kind of thinking informed the actions of Union representatives. They were interested and pushed hard for retroactivity, and partially succeeded in incorporating it into the passed version of the bill. But their willingness to accept potential lengths of prison terms unacceptable to ACLU representatives probably stemmed more from differing judgments of what was politically possible in 1976 than from any excessive concern with retroactivity. That, plus their commitment to dry up the discretion of penal officials to the extent possible, was probably their motivation.

#### IV

#### THE RESULTING STATUTE: S.B. 42

What was the result of all this tugging and hauling? Briefly, in place of prison terms fixed at a time of its choosing by an administrative board from within very wide, statutorily defined ranges, S.B. 42 provides, with few exceptions, that persons sentenced to state prison will receive terms fixed by the courts prior to service of sentence from within relatively narrow ranges set out in the statute for each offense. Such terms can be mitigated or aggravated within these narrow ranges; they can also be "enhanced," i.e., increased, upon motion of counsel for prior terms of imprisonment under certain circumstances: for carrying or using a weapon; for inflicting "great bodily injury;" and for causing a property loss over a certain amount, if these facts are pleaded and proved. Judges retain discretion to treat sentences

for multiple charges concurrently or consecutively. The resultant determinate terms can be reduced by one-third for “good time” and participation in prison programs. The terms also carry a parole period of up to one year in place of formerly very long periods of supervision in the community.

Prisoners sentenced for the very few crimes carrying life penalties (the estimate is fewer than five per cent of admissions) will still be subject to indeterminate terms to be fixed by a newly established board. Such prisoners may be paroled for a period of up to three years.

The main provisions may be examined singly in somewhat more detail and certain ambiguities and problems identified.

### *The Penalty Structure*

A major ambiguity and problem is whether the new statute will result in longer prison terms for most offenders; a related problem is whether it will result in the imprisonment of a greater proportion of convicted felons. The weight of opinion, after passage of the bill, was “yes” on both counts.

It is not difficult to discern the reasons why many believe prison terms will be lengthened. S.B. 42 provides three prison terms for all felonies except those calling for the death penalty or life imprisonment: 16 months, two or three years; two, three or four years; three, four or five years; and five, six and seven years. The judge must select the middle term unless a motion is made and evidence presented to mitigate or aggravate the term. Now, by and large, these ranges encompass the actual terms meted out in recent years to about 80 per cent of the prisoners formerly sentenced by the Adult Authority.

So far, it all seems reasonable, assuming one thinks the Adult Authority issued “reasonable” terms on the average.

The Adult Authority ranges, however, reflected the agency’s practice of taking into account such matters as multiple charges, the offender’s record even if not pleaded and proved, and whether the prisoner was armed, used a weapon, created great havoc, or stole large amounts of money or property. Put differently, Adult Authority terms routinely included “enhancements” on the basis of the record — not to mention performance in prison — both official and unofficial. This is *not* the case under S.B. 42, at least to the extent formerly possible and practiced. Instead, the judge selects a “base term” on the basis of the instant offense. He *then* adds on to that term, if he so chooses, periods of

imprisonment for multiple charges, prior record, arming, bodily injury, and property loss. Some limits are provided in the statute for these add-ons and for the total sentence, but it is clear enough that if they are added on to many terms, terms, on the average, will increase.

Whether this will happen in fact is problematic, since it is unclear how often prosecutors will feel the need to move for enhancements, or what other pressures may be brought on judges to find reasons not to grant them if requested. One pressure may come from an escalating prison population, for another expectation, as noted, is that henceforth a larger proportion of convicted felons will be committed to prison. And the increase could easily be very large indeed in view of the fact that currently only ten per cent or so of those the court could imprison are sent to state prison!

The reasoning behind the belief that imprisonment will increase is roughly this: judges have been thought to be reluctant to imprison marginal offenders when they could not guarantee a reasonably brief term. Instead, they placed them on probation or, increasingly, in jail and on probation. Now, however, 16-month prison terms, to be reduced through "good time" to about 11 months, will be available, to be followed by a relatively brief period of parole. Judges, it is said, will be more willing to commit marginal offenders for this and other relatively brief periods of time and they may be encouraged to do so by county officials who would rather have the state pay for incarceration and supervision than the county. Additionally, many police and many prosecutors simply believe that too few offenders are imprisoned; they will press for more imprisonment.

If penal reform groups were mainly interested in shortening periods of imprisonment, they probably lost the contest, at least temporarily. They lost, also, if they were mainly interested in reducing imprisonment. But, as noted, this was but one, and not necessarily the main, interest of most such groups.

### *Control of Discretion*

A major aim of many of the bill's proponents was both to limit and to structure discretion in the interest of justice and equity. Justice, it is said, calls for terms proportionate to the present and past criminal activities of those convicted, not to their prospects for "rehabilitation;" equity, for similar terms for those with similar criminal records. Statutory provisions de-

signed to accomplish these ends include a much-narrowed range of possible prison terms; partial articulation of the bases of mitigating or aggravating, or “enhancing,” these terms, plus the requirement that judges state reasons for reductions or increases; and a limited parole period with limits on periods of reimprisonment for parole violation. Further, the statute directs the Judicial Council to prepare mandatory guidelines for the exercise of judicial discretion in granting probation, for dealing with multiple charges consecutively rather than concurrently, for mitigating or aggravating “base terms,” or for “enhancing” terms. The Council is also called upon to collect, analyze, and disseminate data on the workings of the new law with a view, apparently, to future changes in the interest of justice and equity. Finally, the newly created administrative board is to review the terms meted out and can refer cases back to court for resentencing. The courts may also resentence prisoners during a limited time period, and the Director of Corrections may at any time request resentencing.

Will all this result in a narrower range of sentences, more finely graded by offense and record, and more equitably distributed? We think it will, but we also believe that certain problems are apparent.

The most obvious problem, perhaps, and also the one likely to affect the largest number of defendants, is that the court’s discretion to grant probation (or to suspend sentence, fine, or mete out a year or less in jail) shows little sign of having been limited or structured. The guidelines prepared by the Judicial Council probably indicate the character of Council guidelines-to-be, unless there is further legislation. These call upon the court to consider a list of “criteria” which were said to be “non-inclusive,” i.e., the court could find still other reasons for granting, or not granting, probation. Further, among these criteria are some directly contrary to the spirit many proponents hoped was built into S.B. 42, namely, criteria which permit the court to decide the issue on the basis of its judgment of the offender’s “dangerousness.” In a nutshell, the statute does not appear to deal adequately with the propensity of different judges to use probation, and other alternatives to state prison, in widely varying proportions of their felony dispositions.

Nor is that all. Although the new administrative board will not have discretion to fix terms, it can be argued that its discretion has merely been transferred to prosecutors, with the courts having some residual discretion to reject plea bargains. Formerly

an administrative board, the Adult Authority, decided how much weight to give to the crime or crimes pleaded and proved vs. the balance of the record, and to whether an offender was armed, used a weapon, created bodily injury, or stole a great amount. Now it is the prosecutor who will decide, for what he does not spread on the record formally will likely have small effect. It can be argued, of course, that this does in fact limit discretion insofar as it makes deciders more accountable than formerly. We agree with this, but also believe that while ranges will narrow and disparities decrease, there will continue to be a wide range of terms and disparities unacceptable to many.

It is even more difficult to tell what might result from the data gathering and analysis of the Council, or from the power of the new board and the Director of Corrections to refer cases back to court for resentencing. The result might be the reduction of undesirable disparities.

Penal reform groups appear to have been partially successful in reducing discretion and ambiguously successful in structuring it to focus more clearly on acts rather than personal characteristics. Only certain "liberals" among them had any strong reservations about this move, and they did not seem to have lost everything, for, as noted, the discretionary power of the court to take "goodness" into account in granting probation seems to remain entirely unimpeded. Law enforcement also supported some limits on and structuring of discretion, and prosecutors, in particular, seem to have gained discretion as, in a sense, did judges insofar as they will be able to determine the actual time served within the range of choices opened to them by prosecutorial, or defense, motions. The correctional bureaucracy, on the other hand, has clearly lost discretion. But, as noted earlier, prison officials may have lost little that they cared about, and nobody seemed to care much that the Adult Authority faded into the past.

### *"Good Time"*

The bureaucracy did not lose all discretion. Indeed, it may be argued that certain portions of it gained some. Under indeterminate sentencing, "good time" credit provisions fell into disuse and were eventually repealed. This made prison officials heavily dependent on the Adult Authority which, alone, could decide whether to defer a parole hearing or date. Under the new statute, prison officials decide, within limits, when most offenders

are paroled, subject to appeal to the newly created administrative board. The statute provides four months "good time" for each eight months served, and a list of penalties that may be imposed during each eight-month period for groups of prison rule violations. One of the four months is for participating in prison programs; the other three, for refraining from rule violations.

S.B. 42 provided "good time" from the start. There was argument over whether there should be "good time" — with some prison reform groups arguing against it — how much, and provisions for taking it away. Prison officials want "good time" and have argued to increase the amount, to increase allowable penalties for particular rule violations, to increase penalizable violations, to soften vesting provisions, and to reduce the burden of "due process" protections afforded prisoners caught up in disciplinary proceedings. It does not appear that there was ever any argument about who should decide whether the one-month participation credit should be awarded, or who should decide about the imposition of penalties; nor is it clear the prison officials objected to the appeal powers of the new board.

The Prisoners Union, on the other hand, opposed all of these features. It appeared, understandably, to have lost, although the result of this "loss" seemed likely to be reduced terms for most offenders. Over the course of amendments to S.B. 42, "good time" was increased from one-fourth to one-third of the term, the number of penalizable provisions was increased, and procedures for removing "good time" were changed to make them conform more closely to those already in force in the prisons — they were arguably "softened." At the same time, however, allowable penalties for particular violations were reduced, and the provision which effectively vests "good time" each eight months remained unchanged. One consequence of the new provisions seems likely to be a greater readiness on the part of prison officials to press for formal prosecution of crimes committed by prisoners; whether it will reduce prosecutorial reluctance to take such cases to court remains to be seen. Certainly the difficulty of prosecuting such cases will not be reduced.

Historically, "good time" provisions were the first way in which discretion to shorten prison terms was allocated to the correctional bureaucracy; they were seen as an extension of the executive's pardoning power. It is understandable that such provisions reappear with a move to determinacy since, in the judgment of prison officials, they provide the only reliable incentive, with determined sentences, to conformance. Frankly,

we do not know if this is the case — although, historically, the introduction of “good time” appears to have been associated with reduced use of much less acceptable measures for motivating conformance and penalizing deviancy, measures like the strait-jacket and the whip. If we have prisons, presumably we must supply those responsible for managing them with some disciplinary tools. And, on balance, the “good time” tools provided in the new statute will probably prove acceptable to most of those persons exposed to them.

Will “good time” increase variation in actual prison terms? Doubtless. But no more than 50 per cent of the term. Is such variation within the boundaries of reason? That, like the lengths of terms more generally, is debatable.

### *Parole*

Under the indeterminate sentence statute, the Adult Authority decided whether a prisoner would be paroled, when, and for what period. The Authority also set out the conditions of parole, “tried” parole violators, and refixed prison terms for those whose paroles were revoked. Paroles were often for very long periods determined by consideration of the seriousness of the offense, prior record, expectations of renewed criminality plus fear of what the newspapers might make of such new crimes, and parole officers’ assessments of progress toward “rehabilitation.”

All this has been changed under the provisions of S.B. 42. For almost all prisoners, parole is one year or less (the exceptions being the few percent sentenced for life, who may have up to three years parole). Parole occurs when the judicially-fixed prison term, less “good time,” has been served. The parole organization, administered by the Director of Corrections, will set conditions and discharge parolees from sentence. The new board still “tries” parole violators (and this may be expected to lead to conflict, if past experience be a guide), but it can “sentence” a violator to no more than six months further imprisonment. Parole time under S.B. 42 “ran” during any such imprisonment so that, except for periods when a violator has absconded, prisoners are discharged from sentence no later than one year after release on parole. (This was later changed.) The new board, too, will act as an appeals resource relative to conditions of parole and length. Its role in all these respects has been increased relative to life-sentence prisoners.



Some penal reform groups — e.g., the Prisoners Union — object to the whole conception of parole, arguing that it debilitates rather than helps ex-prisoners. Law enforcement appears more ambivalent, partly, perhaps, because some representatives continue to see parole as “leniency” — they would extend prison terms through the period now given over to parole. Other elements of law enforcement appear to endorse the new plan, seeing parole — correctly, we think — as a period of possible close surveillance tacked on to a period of imprisonment potentially as long as morality, or public protection (given our poor predictive powers), or, especially, the fiscal capacities of the state will permit. During that period, the ex-prisoner can be “helped” if resources are available, but in any case he or she can be held to closer account than other citizens. And this, in the view of many, is desirable.

The parole provisions of S.B. 42 are not only of concern to some prison reformers and some members of law enforcement, they are of considerable concern to the parole establishment which envisions, probably realistically, that future years will bring a reduction in its numbers. The establishment moved, unsuccessfully, to extend parole terms for most prisoners to two years, but it did not give up this effort.

### *Retroactivity*

S.B. 42 provided that within a relatively brief period following July 1, 1977, when the bill took effect, the terms of all prisoners committed under the indeterminate sentence law must be fixed or refixed in accordance with the terms that would have been fixed, in the light of court actions, under the provisions of the bill. A large escape clause was provided — and it was provided at the behest of law enforcement, apparently, during the negotiations in early 1976 — whereby, on a vote of the majority of the Board, exceptions can be made, and a prisoner can be sentenced to the term possible under S.B. 42 without respect to the sentence actually imposed by the court under the old law. Arguably, too, if the Board votes to impose a term longer than the one that would be issued under S.B. 42, it may justify its action by citing “facts” in the record whether or not they were pleaded and proved in court.

This provision reflects the features of the indeterminate sentence law and the past practices of the Adult Authority, as well as the response of prosecutors and courts to both. The old law, as

noted, provided lengthy maximum sentences for many offenses, often life “tops.” With such maximums, the Authority could hold prisoners as long as it felt justified without respect, for example, to whether multiple convictions had resulted in concurrent or consecutive sentences. As part of the plea bargaining process, or as a result of judicial practice, many offenders received concurrent sentences when consecutive sentences could have been imposed — a small matter under the old law, but large under the new. Presumably, the provision would permit the Board to treat concurrent sentences consecutively, resulting in a longer term than would be the case were concurrent sentences issued under the new law.

Moreover, the Adult Authority was not bound to take into account only matters on the official court record; indeed, it considered its mandate to go beyond these “facts” to the “true facts.” Responsively, prosecutors and courts frequently failed to press charges and priors or “enhancing” elements of situations, knowing that the Authority would in any case take them into account. This practice of the Authority was one of those that prisoners and penal reformers found most objectionable since, in their view, it often resulted in imprisonment without fair trial.

Retroactivity was a feature of the bill from the start, apparently motivated by considerations of simple justice and equity. It was not, apparently, a matter of great contention, although the change in the provision, noted above, suggests that there was early interest to see that more “serious” offenders would not receive a windfall shortening of deserved terms due to the shift in the rules.

After passage of the bill, however, retroactivity became an issue of considerable contention, with fuel for dispute being provided mainly by Los Angeles Police Chief Edward Davis who argued that the bill would result in the immediate release to the community of a large number — 7,500 — of dangerous ex-convicts. His numbers, frankly, seem grossly exaggerated; it is difficult to discern the basis for his estimate. And his prediction disregards entirely the escape hatch provided by the bill, as explained above.

A more serious objection came from the correctional bureaucracy, namely, that insufficient time was provided by the bill to do the careful sort of job expected. Providing more time would not only result, presumably (though one may doubt it), in a more careful job of term-fixing; it would also provide a greater period over which to spread such releases as would result from

application of the terms of the bill.

## V

### AMENDMENTS

Criticism began to mount even before S.B. 42 had passed, and it continued to crescendo thereafter; as one informant said, the “fragile coalition” of law enforcement and prison reformers supporting the bill “collapsed” almost immediately. The reasons are complex and further inquiry would be required fully to identify and disentangle them.

But this much can be said: many of the provisions of S.B. 42 were, at best, the result of working agreements between a very few people, “representing” many others, in the interests of getting a new law on the books. Even the “representatives” appear to have considered these agreements temporary, though some felt that the agreement probably included some period during which an effort would be made to implement the provisions of S.B. 42. Even they, however, felt that many provisions were badly written and were proper targets for “technical” amendments before S.B. 42 took effect.

Those they “represented,” on the other hand, appear to have felt no such constraints. Many seem to have read or discussed S.B. 42 carefully for the first time after it was passed; this seems to have been particularly the case for judges and district attorneys. Ambiguities led them to fear the worst, and many “clarities,” as well, moved them to want to amend S.B. 42. Other interested parties — especially within the correctional bureaucracy — felt that they had not had a sufficient say in S.B. 42, and they now loudly wanted to be heard.

About the only interested parties who did not strongly move for amendments were the prison reform groups. Their efforts between August 1976, when S.B. 42 was passed, and June 1977, when it was amended, appear largely to have consisted of opposition to changes. Not that they agreed with all the provisions of S.B. 42; far from it. Instead, they felt that S.B. 42 probably embodied the best provisions, from their point of view, that could be hoped for in the situation, and that the problem was to preserve them.

In this section, we shall outline the main activities and events

that took place between passage of S.B. 42 and its amendment, the major forces and issues that seemed to be involved, and the central thrust of the amendments that finally were made by A.B. 476, the "Boatwright bill." This bill was introduced by Assemblyman Daniel Boatwright, passed, and signed into law in late June, 1977. Our discussion will be even more selective and tentative than that presented for S.B. 42; scarcity of time to conduct interviews, read documents, and write dictates such selectivity and uncertainty.

### *Main Activities and Events*

Many believed from the start that, like many complex statutes, S.B. 42 would require some "technical" revisions, possibly before the bill took effect. This seems, indeed, to have been one major reason for its delayed effective date. Ostensibly to consider such "technical" amendments, as well as to consider what to do to prepare for the transition to the new law, the Department of Corrections and the Adult Authority formed a "task force" almost as soon as the bill was passed.

A broader committee — mainly representatives of law enforcement and correctional bureaucracy, but also including a representative from the State Public Defender's Office and one from the State Bar Association — was set up for apparently similar purposes in the late fall of 1976, under the aegis of Mario Obledo, head of the state's Health and Welfare Agency. Representatives of prison reform groups, while permitted to attend, did not have a vote.

Interviews suggest that both the task force and the Obledo committee quickly began to discuss possible amendments that went beyond the "technical," and that both soon became aware that the Governor's office might support such amendments. It also became apparent to at least one participant on the Obledo committee that a coalition to support amendments largely confined to "technical" changes could not be formed; too many prosecutors and judges, particularly, as well as the Attorney General, wanted more substantial changes, and prison reformers, almost needless to say, were committed to opposing them. The Obledo committee appears to have ceased to function even as a discussion group after December 1976.

A third group composed of law enforcement representatives from Los Angeles and certain state correctional officials, which had been meeting informally since 1973 to compose differences.

before they became public issues, also discussed possible amendments. It is reported that Governor Jerry Brown attended a meeting of this group in late 1976 and let it be known that he would support amendments that would “mollify law enforcement.”

A fourth group composed of district attorneys, mainly from California’s southern counties, appears to have been important once Boatwright was introduced; this group helped to shape its final provisions. And further inquiry would certainly reveal still other groupings that formed, if only briefly, to press for changes in S.B. 42 before it went into effect.

In a nutshell, within a few months after passage of S.B. 42, several groups had formed to consider “technical” or other changes to be made in S.B. 42 before it went into effect on July 1, 1977. It was quite clear by Christmas 1976, at the latest, that some changes would be made, probably substantial changes, and the remaining question was which ones.

During the latter part of 1976 and the early days of 1977, Brian Taugher, a Deputy Attorney General assigned to the Adult Authority, and Nelson Kempsey, a lawyer then working in the Department of Corrections, working closely with one or more of the Governor’s top aides, were busy preparing amending legislation. Taugher and Kempsey were members of or had access to the Corrections/Authority task force, the Obledo committee, and the Los Angeles group, and they appear to have tried to take account of what they had heard in these groups in shaping what became Boatwright. They also appear to have considered what the Assembly Criminal Justice Committee might “buy,” reasoning, according to one informant, that “whatever we can get from them we can get through the legislature.” For this reason, perhaps, among others, Michael Ullman, consultant to the committee, was also heavily involved in early drafts and revisions. (Taugher and Ullman remained principal architects of Boatwright to the end. Kempsey changed jobs during the amending period and apparently became less involved.)

During January 1977, the initial version of Boatwright was being drafted, and the Governor’s office was seeking a legislative sponsor. Senator Nejedly was first approached, but in the face of his hesitance (reportedly engendered by the efforts of the prison reform groups), Assemblyman Boatwright was asked to sponsor the bill. This may have been partly a tactical decision, so that the bill would first be considered by the Assembly Criminal Justice Committee (rather than a Senate committee) for the reason im-

plied above; in recent years, this committee has been reputed to be a “liberal” stronghold.

The first version of Boatwright — called the “negotiating version” by one informant — was introduced in the state Assembly February 7, 1977. Other bills that would have affected S.B. 42 were also introduced or threatened. These bills would, among other things, simply have repealed S.B. 42 or delayed its effective date considerably, revised penalty ranges directly or, by removing all limits on “enhancement,” made “enhancements” mandatory, and made it possible to extend the prison terms of selected inmates on the grounds that they are “mentally disordered violent offenders” (MDVOs). We shall not discuss these bills since they did not pass, although some of the provisions of certain alternative bills were eventually incorporated into Boatwright. Neither shall we discuss the bill embodying “technical” changes introduced by Senator Nejedly, although some of its provisions, too, were apparently embodied in Boatwright.

Nor, finally, shall we attempt to describe the vicissitudes of Boatwright in any detail, for the reason stated above. Suffice it to say here that the Boatwright bill suffered — or benefited from — many changes between February 7 and June 24, 1977, when it was put into final shape by a conference committee of the Assembly and Senate; it then easily passed into law. During this period, the effective date of S.B. 42 was preserved; amendments that would have radically increased penalties were adopted but then removed; court discretion to “enhance” base term penalties was preserved, even increased; changes in the “good time” and parole provisions of S.B. 42, a part of the “negotiating version” of Boatwright, were largely eliminated; and the move to permit extended terms for “MDVOs” was delayed for consideration in 1978.

These and other proposed and actual changes both to S.B. 42 and the initial and ensuing versions of Boatwright (there were seven versions, including the one finally adopted) deserve extended analysis, for they reveal much about the wants of those who operate the criminal justice system, particularly, and what legislators will and will not support. For our purposes, it seems fair to say that, with some “softening” of the penalty provisions and some other give and take on “good time,” parole and judicial discretion, some of which will be noted below, the initial, “negotiating version” of Boatwright survived to the end. Boatwright may be summarized as a bill embodying changes wanted mainly by prosecutors, judges, and the correctional bureaucracy,

filtered through what it was believed or known the Assembly Criminal Justice Committee and the Governor would accept.

### *Main Forces and Issues*

*The Governor's Office* — As indicated, clearly by December 1976, and probably earlier, key participants understood that the Governor was prepared to support more than “technical” amendments to S.B. 42 prior to its effective date. Apparently, he personally spent many hours considering the implications of the various provisions of S.B. 42 and the amendments being proposed.

By mid-January at the latest, he was prepared to support changes in the provisions for “good time” to increase the penalties for violations of prison rules and parole conditions and add to the grounds for imposing such penalties; to convert time spent in prison for a parole violation to “dead time,” thereby increasing the period an offender might have to serve on parole; and to “clarify” the retroactive provisions of S.B. 42, to make certain that the Community Release Board would not be bound by sentences imposed by the courts under the Indeterminate Sentence Law. He was also ready to support changes to make it easier administratively to impose such exceptional sentences by reducing the number of Board members that could initiate such an exception, and by extending the time for a final determination of such exceptional sentences. He apparently was also ready to support legislation to permit the new Board to commit “MDVOs” to a mental institution for an observation period at the end of their determinate prison terms, after which a one-year renewable commitment could be ordered by a jury.

On the other hand, at this point at least, the Governor appears to have been opposed to changes which would have increased penalties. Within days or weeks, however, he appeared to have shifted ground somewhat, indicating that he would support some changes in the various “enhancement” provisions of S.B. 42, changes that would make much longer terms possible for some and possibly many defendants. This shift of position resulted in a burst of drafting activity just prior to the introduction of the “negotiating version” of Boatwright.

In sum, the Governor's office appears to have supported “technical” amendments from the start, and quickly to have indicated readiness to support more substantial amendments, particularly those of interest to the correctional bureaucracy. At

first, he opposed changes that would increase penalties for those convicted of “violent” offenses who were about to be released from prison and then were held to be “mentally disordered.” Taugher and Kempsey, at any rate, seem to have worked with this understanding. As it became clear that many in law enforcement and judges wanted greater possible penalties, however, the office seems to have become ready to accommodate them. Most or all of the changes the Governor’s office wanted or supported were made. The one exception, apparently a matter of considerable importance to the Governor and his aides, was the provision to extend the terms of “mentally disordered violent offenders.”

*Law Enforcement* — Generally speaking, law enforcement was dissatisfied with the penalty provisions of S.B. 42; it wanted higher possible penalties. The most radical change would have been to increase the base term penalty ranges, e.g., to increase the unenhanced penalties for burglary in the first degree from S.B. 42’s two, three or four years, to three, five or seven years. This kind of change would mean increased prison terms across the board, which, as one informant said, would quickly “bankrupt” the state by increasing its prison population enormously. Although, as noted, such a change was amended into Boatwright at one point, it was promptly removed. It is not clear whether many law enforcement people (or judges, some of whom also wanted this kind of change) feel they lost much.

A more effective concern of law enforcement, especially prosecutors, was to increase possible penalties for particular offenders, especially those possessing or using weapons, and those with long criminal histories. S.B. 42 placed certain “caps” or limits on the amounts of time that might be added to base terms for armed offenders who also inflicted physical injuries, or had prior prison sentences, or were convicted of multiple current offenses. Law enforcement — particularly prosecutors — moved selectively to remove or raise such “caps.” They also wanted certain language changes that would change the application of many enhancement provisions, making the definitions of certain matters, like a “violent” felony, “deadly” weapons, and “great bodily injury,” broader and more consistent with past case law. Some wanted to make enhancements mandatory for the court, but it is not clear how strongly this was supported. There was general support for making certain that the new Board would have time and resources to apply the retroactive provisions of



S.B. 42 in a way that would permit all justified exceptions. Finally, law enforcement appears strongly to have supported some legislation to permit extended terms for “MDVOs.”

Prosecutors had an important hand in shaping S.B. 42; they had an equal or more important hand in shaping its amendments. Interviews suggest that many more prosecutors participated in the amendment process, and that the composition of the active prosecutors’ group was more heavily weighted to the “right” than earlier. The explanation seems to be that, after S.B. 42 passed, many prosecutors read it carefully since they shortly would have to be guided by its provisions; no use, one might say, carefully to consider a statute that might not become law. Those on the “right” appear to have been more concerned with these provisions and determined to do what they could about them.

The Attorney General’s office seems to have been quite active from start to finish, though perhaps less effectively so relative to amendments. We do not know what specific effects the police had in either case, except that part of the intent behind the Governor’s moves, and perhaps the moves of others, was to head off or modify provisions Chief Edward Davis and his colleagues would have built into S.B. 42 or its amendments.

*Judges* — Judges, generally, appear to have supported greater penalties, both across the board and for selected offenders; they also supported “clarification” of the provisions for retroactive application of the new law. How judges felt or what they did specifically about the move for extended terms for “MDVOs,” we do not know. But the brunt of their sentiments and activities was clearly supportive of more severe penalties for, or “protections” against, those convicted of “violent” crimes and repeaters.

More especially, however, judges appear to have been concerned that S.B. 42 be amended in ways that would increase their discretion to mitigate or aggravate the base term penalty, i.e., to impose the lower or upper base term, by removing the requirement that a motion to mitigate or aggravate be made, and by explicitly freeing judges to consider a wider range of sources for “facts” justifying mitigation or aggravation than S.B. 42 seemed to permit. Most of all, judges wanted to eliminate the requirement for a separate sentencing hearing, arguably imposed by S.B. 42, many holding that such hearings would further clog the courts.

It seems clear that judges in particular were more active in trying to amend S.B. 42 than they were in fashioning it; many

more became involved. It is reported that the judges' annual sentencing seminar, held in February 1977, was much more heavily attended than usual (one informant said, "they were *all* there!"), and that at this seminar they applauded a presentation of the main outlines of the first version of Boatwright. The increase in interest on the part of judges probably occurred for the same reason as the increased interest of prosecutors: becoming more familiar with S.B. 42 in preparation to being governed by and with it, many found parts unsatisfactory and moved to change them. So far as we can tell, their support of harsher possible penalties for certain offenders; for more discretion for themselves, given their responsibilities under a determinate sentence law; and for court procedures that would continue to permit relatively rapid disposition of cases, represents no change in the sentiments of many or most judges. They were only a bit late in effectively proclaiming them.

*The Correctional Bureaucracy* — The correctional administrators responsible for prisons and parole apparently wanted a long list of changes in S.B. 42, many of which, if not all, were embodied in the first version of Boatwright. Prominent among their concerns was "good time," particularly provisions limiting the conditions under which it could be revoked, the time available for revocation, and the amount of "good time" that could be denied for particular offenses. They wanted to loosen the first, increase the second and third. They also wanted to increase the parole period, if not directly and for all parolees, then by increasing the period of parole for those who violated parole conditions and were reimprisoned. It does not appear that correctional administrators were concerned to modify the penalty structure, although it is known that many employees — especially prison guards — wanted more severe penalties. Nor do we know whether correctional administrators took a position on "MDVOs," but it can be guessed that they would not have opposed such a change.

The Adult Authority — some of whose members would soon become members of the new Community Release Board — was among the many groups supporting changes in S.B. 42's retroactivity provisions. More time was wanted to apply them, at least in the case of exceptions; they also sought a procedure that would require fewer hands, and a broader mandate to consider a prisoner's record without respect to what judges may have explicitly taken into account in sentencing under the old law.

Corrections, but particularly the Adult Authority/Community Release Board, was more effectively active in the amendment process than it was in shaping S.B. 42, especially through the work of Brian Taugher and, temporarily, Nelson Kempsey, as noted earlier. There also appears to have been, for a while at least, a greater willingness on the part of the Governor's office to consider the Corrections "want list" (so named by some) — though in the end Corrections got only a small fraction of what it wanted, as a result, it seems, of "bargains" struck with members of the Assembly Criminal Justice Committee, in particular. Clearly, neither S.B. 42 nor Boatwright represent Corrections in an ascendant phase; this is quite a change from the situation that existed when indeterminate sentence laws were adopted.

*Penal Reform Groups* — We have already noted that the penal reform groups, this time around, were mainly engaged in a holding action. This should not be taken to imply that they were inactive; some representatives of the Prisoners Union and others worked night and day for long stretches of time. Nor should it be taken to suggest that they were ineffective, although it is inherently difficult to measure the extent of success in preventing change: what is the measure — a change that might have taken place but for one's activities? Who can tell?

What we know, however, tentatively supports the view that the prison reformers were successful in some measure in fending off changes that others seriously wanted. Base term penalty ranges remain intact; although the "caps" on enhancements were selectively raised or eliminated, some remain; though some definitions changed, making enhancements possible for more defendants, they changed less drastically than proposed by some; and, perhaps most of all, "good time" provisions, including those which vest the earned "good time" each eight months, remain relatively untouched. The parole period for most offenders (and parole is not revoked for most, notwithstanding some belief otherwise) remains the same as under S.B. 42 — a hard-won initial change in the indeterminate sentence law. And the retroactive provisions still seem likely to mean shorter terms for many prisoners sentenced under the old law. It also appears that the prison reformers were very important in killing action on "MDVOs" during 1977, at least, though the full battle on this issue has yet to be joined.

On the other hand, as we shall discuss a bit more fully below, more defendants seem likely to get longer terms under the

amended law; more and greater disparity among the sentences issued to similarly situated defendants is possible and seems likely; more prisoners sentenced under the indeterminate sentence law seem likely to receive "exceptional" terms from the Community Release Board. At best, the defensive action of the prison reformers had a modest success.

*The Result: Some Changes Made by Boatwright*

In summary, Boatwright left the sentencing scheme adopted through S.B. 42 intact: with few exceptions, persons sentenced to state prison will receive terms fixed by the courts prior to service of sentence from within a relatively narrow range set out in the amended statute for each offense. Such terms can be mitigated or aggravated at the discretion of the court after Boatwright; a motion by counsel is no longer required. Further, the "facts" used to mitigate or aggravate can arguably be drawn from a larger variety of sources, including, specifically, the probation report. "Enhancements," i.e., increases for carrying or using a weapon, for inflicting physical injury, or for causing a property loss over certain amounts, continue to require a motion from counsel, as do enhancements for prior prison terms, and the amount of increased penalty for each of these matters remains roughly the same as under S.B. 42. On the other hand, definitions have been reworked to permit wider applicability, in some cases clearly much wider. And limits on the aggregate increases for particular kinds of enhancements, as well as limits on the total sentence that may be imposed under certain conditions, have been removed or raised.

Judges retain discretion to treat sentences for multiple charges concurrently or consecutively. Should they decide on consecutive sentences, however, they can "stack" them higher in more cases. Terms continue to be reducible by one-third for "good time" and participation in prison programs, but prison officials will have some greater freedom to deny such "credits." The parole term remains one year for most offenders, but under Boatwright time spent in prison for parole violation no longer "counts," and one year paroles can be extended to 18 months from the date of release on parole.

Prisoners sentenced for those crimes carrying life penalties will continue to receive indeterminate terms to be fixed by the new board. Their parole period remains three years, but can become four if enough "dead time" for parole violation accumulates.

The main changes made by Boatwright may be examined in some detail.

*The Penalty Structure* — Despite a vigorous campaign to increase base term penalties, they remain intact. But other changes make it possible and even likely that a significant proportion of defendants will receive longer prison terms. There is no reason to believe, however, that more defendants will be imprisoned after Boatwright than before.

To specify fully the many ways in which Boatwright makes increased penalties possible would require a more detailed analysis of both S.B. 42 and the amendments than seems warranted for our purpose here. Several changes that seem particularly important may be noted, however. S.B. 42 provided that, except upon conviction of a “violent” felony, or for a felony involving arming, use of a firearm, or “great bodily injury,” the total term could not exceed twice the base term imposed by the court. Boatwright lifts this “cap” for those convicted of a felony involving certain amounts of property loss, and for prisoners and escapees convicted of a new felony. The definitions of “violent” felony, arming, use of a firearm, and bodily injury have all been changed, greatly extending their applicability. Perhaps particularly significantly, the “dirty eight” “violent” felonies have now become the “dirty nine” — or even “dirty all” — since conviction of *any* felony can now result in its classification as “violent” if it is also pleaded and proved that the defendant used a firearm. And the dollar amount of property loss required to trigger enhancement has been drastically lowered, as well as now qualifying the defendant for a longer total prison term.

These are only a few of the changes. Others include lifting the “cap” on the aggregate increase that may be made for prior prison sentences, and for consecutive sentences, in the case of multiple offenses; apparently increasing the number of prior prison sentences that may result in additional penalties by changing the rules to “wash” them out; and permitting enhancement for both possession and use of weapons *and* bodily injury in some cases, instead of only one.

Prior to passage of S.B. 42, many “liberals” among the prison reformers, as well as many others, greatly feared that the legislature would quickly agree to increase penalties when brought under “public” pressure to do so. There is no sure sign that the “public” brought pressure on the legislature, unless prosecutors and judges are that “public.” There is plenty of evidence, on the

other hand, that enough legislators are ready to increase penalties, and some of the fears, if not the worst fears, of the “liberals” have been realized. Neither they nor the other prison reformers (who call them “liberals”) are very happy. But neither do they appear to have any good idea — if one exists — of what to do about it.

One other group appears ambivalent about the increases in possible penalties: those responsible for administering the prisons. Although there is no reason to think that the changes will result in more persons being committed to prison after Boatwright, there is an obvious reason to think that many prisoners will be even more unhappy with their terms, and that the prison population will increase because turnover will be reduced. And given the new sentencing provisions, severely curtailing administrative capacity to shorten terms and release prisoners, there are no obvious mechanisms for dealing with such problems. One suggestion heard is that a larger proportion will be sent to camps and other non-institutional facilities. Another is that the Director of Corrections and the Community Release Board will send more prisoners back to court for resentencing. Whether either will happen, or work if they do, remains to be seen.

*Discretion* — The penalty modifications necessarily increase official discretion by making a wider range of prison terms possible. Other changes increased discretion by making offenders potentially subject to penalties in a greater variety of circumstances. Both kinds of changes clearly further increased prosecutorial discretion — enormous before S.B. 42 and enhanced, as it were, by S.B. 42 itself. And both kinds of changes not only make it likely that longer terms will issue in a greater number of cases, they also make it likely that “disparities” will increase. The sentencing rules to be prepared by the Judicial Council will, in any case, do little to curb prosecutorial discretion to press or drop charges, plead enhancing circumstances, or more for enhancement. And the rules, as so far promulgated, do not seem very likely to affect judicial discretion either.

The court also gained a modicum of discretion from Boatwright, insofar as it can now mitigate or aggravate a base term without motion from counsel and can, as mentioned above, seek mitigating and aggravating circumstances in a greater variety of sources. Also, as noted, the court is arguably freer after Boatwright to deal with sentencing summarily, or at least as summarily as it has done during the past few years.

Boatwright also increases discretion in other ways to be mentioned below. Here it seems worth noting, again, that although the correctional bureaucracy clearly lost discretion under S.B. 42, and gained but little back under Boatwright, its members do not appear to have lost anything they greatly care about. The exception is the capacity to accommodate intake by adjusting outgo. And, as said above, this problem is only now, apparently, getting any serious consideration.

*“Good Time”* — As mentioned, the first version of Boatwright included a number of changes which would have added up to increasing the penalties available for sanctioning fractious inmates, and the likelihood and ease with which they could be penalized. All such changes were dropped in the end, except one giving prison officials more time to request a prosecutor to press charges for inmate crimes. How hard prison officials fought for the changes they wanted is unclear, just as their importance is unclear since “good time” has not been used in California since the 1940’s (and then under the indeterminate sentence law, which made it redundant). If the current provisions fail to “work,” the changes will almost certainly be pursued again. And if past experience be a guide, they will fail to “work” in the measure some prison officials hope.

*Parole* — We have already mentioned the main change in provisions for parole; the parole period may “run” to 18 months for most prisoners if they are reimprisoned for parole violations, and to 48 months for the few who will still receive indeterminate sentences. Clearly parole officers wanted greater changes, but they were unable to effect them. It is not difficult to infer the objectives of the change that was made, as well as those that failed: it will increase the possible penalties for parolees proving troublesome, without requiring reprocessing by the courts. The parole organization’s discretion is obviously increased.

And, almost without question, the change will provide more employment for parole officers by increasing the number of persons on parole at any given time, and by providing a stronger rationale for “supervising” them. Another change made by Boatwright makes the importance of the latter point for parole officers rather apparent. Introduced by Timothy Fitzharris, Executive Director of the California Probation, Parole and Correctional Association, an organization of parole officers, the final version of this change warrants quotation (it was watered down a

bit in the last version of Boatwright). The law now says that:

The Legislature finds and declares that the period immediate (sic) following incarceration is critical to successful reintegration of the offender into society and to positive citizenship. It is in the interest of public safety for the state to provide for the supervision and surveillance of parolees and to provide educational, vocational, family and personal counseling necessary to assist parolees in the transition between imprisonment and discharge.

The order of purposes alleged to be served by parole perhaps deserves special notice as a sign that parole officers will not be left out of the move toward punishment and control, and away from "treatment." Many parolees, of course, have held all along that this is where most parole officers always were.

*Retroactivity* — Within 90 days of the effective date of the law (or of the receipt of the prisoner), the Community Release Board is to calculate the terms of all prisoners committed under the indeterminate sentence law in accordance with the provisions of the new statute. In doing so, it is to rely on the court record of matters pleaded and proved, and the sentence imposed by the court. It may fix the prisoner's term as the result of this calculation, not taking "good time" into account for time served before July 1, 1977. So much was to be the case under S.B. 42.

The Board may decide not to fix the term at the figure reached by this calculation, however, determining that due to the number of convictions, priors, or the character of the offense, a longer term is justified. Boatwright explicitly provides that the Board is to be "guided by, *but not limited to*, the term which reasonably could be imposed on a person convicted after July 1, 1977" (our emphasis). Most informed observers feel that this was already implicitly the case under S.B. 42. The relevance of the addition, as well as certain related changes, as explained above, appears to be to make it absolutely clear that the new Board, like the Adult Authority before it, need not be bound by the sentence imposed by the court or, arguably, by charges or evidence pleaded and proved in court.

Assuming that this was already true under S.B. 42, it is more important to note that Boatwright gives the Board more time to fix a sentence different from that reached through its initial calculation, and it can do so more easily. S.B. 42 required a majority of the Board to decide to make an exception; Boatwright permits



two members to do so. And in the event of such a decision, S.B. 42 required both a hearing and a term-fix still within 90 days of the effective date of the bill; Boatwright still requires the hearing, but the prisoner need only be notified within 90 days that it will take place. The hearing and term-fix can be delayed until April 28, 1978 — nine months after the bill is effective — and then extended by administrative action for another 90 days, unless either house of the legislature vetoes such action.

It appears that the Board can take little if anything into account under Boatwright that, arguably, it could not consider under S.B. 42, but making the matter explicit seems to have quieted the fears — or, at least, complaints — of some of those who predicted the immediate release of a hoard of violent and dangerous criminals. It will also be possible to spread such releases over a greater period of time, indeed into 1978, which will affect the statistical report on numbers released during 1977, and reduce the number of ex-prisoners entering the community at any given time. Having more hands and time to do the work, too, it is said, will make the Board less willing and likely to settle for the term suggested by the initial calculation. As a result, a greater proportion of prisoners will receive some other term than that “which reasonably could be imposed” on those convicted under the new law. The only countervailing factor would seem to be the longer terms that will be calculated as a result of the changes made by Boatwright in the penalty structure; perhaps these will be thought “reasonable” in more cases.

## VI

### CONCLUSION

One of the authors of this paper confidently used to predict that a bill like S.B. 42 would never pass in the California legislature. His reasoning was the legislature would never agree on a range of definite penalties to replace indeterminate sentences, and that political pressures would keep statutory penalties at unrealistic levels, thus necessitating administrative discretion to keep the prison system from being overwhelmed with large numbers of long-term prisoners.

The legislature did pass S.B. 42 and thus appears decisively

to have refuted the prediction. At the same time, it did so without reaching a firm consensus on appropriate penalty levels, and through Boatwright may already have made possible penalties for many defendants unrealistic. Basing the penalty levels in the first go-around on the sentences actually imposed in the past by the Adult Authority was an expedient but arbitrary decision. It facilitated a temporary working agreement permitting passage of S.B. 42, but avoided the very hard question of just how heavily crimes should be punished in view of prevailing moral standards, and how heavily they can be punished in view of prevailing demands on the public budget. Considering the almost universal dissatisfaction with the performance of the Adult Authority, it is ironic that its sentencing levels were even temporarily considered appropriate for a new statutory scheme based on what is purported to be a new public policy endorsing "punishment" as the purpose of imprisonment. Boatwright appears to compound the irony.

But the irony may be less than first appears. Has the new scheme imposed by S.B. 42 and Boatwright imported a new public policy? Will California now have "determinate sentences" justified by "terms proportionate to the seriousness of the offense with provision for uniformity in the sentences of offenders committing the same offense under similar circumstances," in place of "indeterminate sentences" fitted to the prospect that the prisoner will commit further crimes, especially violent or notorious ones? We think the answer is not so clear, although clearly the length of prison and parole terms, once fixed, will be less amenable to manipulation by the correctional bureaucracy on the grounds of potential recidivism, and almost all will be fixed prior to, and most will stay fixed after starting, service of the prison term.

But before they are fixed, even after the court has decided to impose imprisonment, considerable discretion is left to issue terms of quite different lengths, assuming only that the prosecutor moves for enhancement and places relevant facts in the record — likely events in a substantial portion of cases. And nothing in the new law appears to prevent prosecutors and judges from taking the possibility of recidivism, as they see it, into account when they decide what charges to make and drop, what evidence to put forward, what motions to make, and what penalties to apply. Moreover, after Boatwright, the court need not wait for a motion to enhance prison sentences a year — and it is mainly those who need not serve time in prison, apparently,

who consider a year (or eight months, if reduced by “good time”) a trivial matter.

And before the judge decides on imprisonment, in most cases the court will retain the option of probation and related alternatives. This has not changed at all, and Judicial Council standards so far show no sign of changing it. Indeed these standards appear to make it likely that potential recidivism will be an important consideration in granting probation.

In sum, in a number of important ways, sentences after S.B. 42 and Boatwright remain almost as “indeterminate” as ever, in both the sense that a defendant, until sentence is fixed, will not be able to know the penalty for his or her crime or crimes until it is actually imposed, and in the sense that considerations of future recidivism — gleaned, one supposes, from his or her personal characteristics in some part — will remain important. Timing will change, and the defendant will know the term within firmer and narrower limits than earlier, before imprisonment begins in most cases. But after imprisonment, the correctional bureaucracy will still be able to extend the term by one-half if a prisoner violates rules and fails properly to participate in programs; shorten the parole period, or lengthen it by six months or one year if a parolee violates rules; and recommend resentencing to shorten some terms. And, as always in California history, the Governor will be able to commute sentences or pardon offenders, and can be encouraged to do so by the bureaucracy.

Even so much “determinacy,” “proportionateness” based on seriousness, and “uniformity” seem almost certain to be reduced in coming months. There is considerable concern in the Governor’s office and elsewhere that some means be found to extend legally the prison terms of offenders believed likely to commit “violent” crimes in the future. Persons coming to be classified as “MDVOs” — and they may be many — will face roughly the same uncertainty, justified by roughly the same rationale, as they have in the past.

One lesson is, perhaps, that the struggle between “just deserts” and “social defense” as means to provide public satisfaction and protection through sentencing is far from over. The move toward “indeterminacy” in the earlier part of this century was widely interpreted, after the fact, as a move toward “social defense:” reformed inmates would be quickly released, unreformed inmates retained, both by a board of “experts.” To be sure, “just deserts,” both as proportionate and as uniform sentences, was also to be served, though it was never clear just how

— except as “proportionate” came to mean in accordance with the degree of rehabilitation and risk. The move toward “determinacy” is being interpreted as a move toward “just deserts:” defendants will be punished equally in accordance with the moral and material damage they have wrought. But the “indeterminate sentence” never worked as advertised, the “experts” continuing mainly to issue terms consonant with their vision of “just deserts,” although leavened, to be sure, by their fears about what prisoners might do if released. Under the new California law, prosecutors and judges will be able to follow the same logic. And if “social defense” has been weakened a bit — which is arguable — impending legislation on “MDVOs” promises fully to rectify the balance.

Nor are the differing implications of “just deserts” and “social defense” all that are involved; each contains its own difficulties. There is little sign that the various interested parties agree what “deserts” are “just” for different offenses or, above all, different offenders. Nor is there any sign that agreement can be reached about which offenders truly represent a serious future risk, without making more mistakes than many find acceptable. And even if the number of mistakes could be reduced, there are many who would still hold that preventive detention is immoral if not unconstitutional, and should not be practiced.

None of these controversies will go away as a result of the new law; the legislature’s hope, if members seriously thought about it, can only be to have defused them temporarily. This seems to have been a main hope earlier, when California adopted a parole law and later, when it placed responsibility for fixing the overall term in an administrative board. These changes helped shield the courts from the “just deserts” and “social defense” controversies of the time, and relieved the Governor as well of the intense pressures and work associated with pleas for commutations and pardons. They also helped the correctional bureaucracy maintain discipline, or so it said, and more certainly to deal with population pressures when the legislature was reluctant to expand the prison system. The changes did not resolve the controversies over just and expedient sentences, but they did, for a long time as human events go, bury them under a rhetoric of both justice (the boards would cure “disparities”) *and* expediency (the boards would selectively retain the “dangerous” on the basis of their “expert” opinions). Equally important, the changes also served partially to hide both decisions and their results from any but the most powerless of those affected by them

— the prisoners.

In recent years, for a variety of reasons, this “solution” to what is probably a permanent problem has gradually ceased to work. For one thing, the rhetoric has been undermined; for another, the decision process and its results have become more visible due to the efforts of prisoners, ex-prisoners, interested lawyers, some courts, and some newspapers. The pressure to give more weight to “just deserts” has increased, and not just with respect to sentences for crime; and the new “solution” appears to do so. Whether this appearance will serve to make legitimate the new arrangements for long remains to be seen. At the same time, as the impending “MDVO” legislation makes clear, new arrangements will be sought to make the system appear better able to accord “social defense.” Whether this will satisfy anyone for long remains to be seen, too.

In an odd way as well, the decision process and its results may be less visible under the new law than the old. The parole and indeterminate sentence arrangements served to centralize that portion of the sentencing process that fixed the terms of those committed to prison. Under the new law, it will be decentralized and, perhaps, a less easy target for criticism and concerted action, even though the Judicial Council is ordered to report results. Even more of the most significant decisions will be made in the generally invisible halls of prosecutors; judges will be able to plead “not guilty” on grounds of “constraint” should there develop any considerable dissatisfaction with the length of prison terms. Judges will have less defense about probation, but no less than they have had in the past. We cannot be certain — though we doubt — that this “solution” will have the lengthy life of its predecessor. We are more certain that prosecutorial discretion, and judicial discretion to grant probation, will, in a relatively brief time, become the subject of the same kind of intense concern and criticism recently visited on the Adult Authority.

Finally: We have not undertaken to “explain” the advent of the move toward more determinacy — in California, much less elsewhere. The reason is simple if painful to state: we have no “explanation” that satisfies us. It does seem clear that, broadly, the move was initiated from “beneath” by prisoners and ex-prisoners who felt oppressed by the indeterminate sentencing system. They moved to abolish it. One way was through the courts, but it can be argued that the result of this effort — like their other efforts — at best worked to “reform” the system. Seeing this to be the case, they negotiated the most far-reaching re-

forms that seemed possible.

We have argued, in effect, that these reforms do not reach very far; indeed, it is not entirely evident that many prisoners and prospective prisoners are not worse off now than before. However this may be, it seems clear, too, that a major reason the reforms in the end were so modest is that criminal justice functionaries, particularly prosecutors, came to feel that the old form of indeterminate sentencing had become more burden than benefit, and worked hard — very hard — to see that the reforms made would permit their agencies to continue to function in ways not too different from the past. They reached out to contain, and to shape in ways consistent with their purposes, the strivings of those “below.” This phenomenon — a form of “cooptation” in the term made well known by our colleague Philip Selznick — is probably inevitable so long as the supporting structures, which procedures like sentencing serve, are left intact. And understandably, those “below” were unable — and did not try, by and large — to affect these structures: the police, prosecutors, public defenders, courts, and most of the correctional bureaucracy. To consider changing these structures is to consider changing government more generally, for these are important components of it. To understand the move toward more determinacy in California — and we think elsewhere — nothing less is required than a theory about the forces moving persons to change the institutions that govern them. To understand the modest results usually achieved, one must grasp the forces that limit both their abilities to do so — and their vision of what is required.

## DISCUSSION

As a prelude to the discussion of their paper, Professors Johnson and Messinger invited to the podium two people who, as staff aides to the state legislature, had been primarily responsible for writing the California sentencing law. Raymond Parnas, who has since returned to his post as professor of law at the University of California at Davis, began his remarks with the observation: “I used to consider myself an academician; now I consider myself a politician.” He went on to say that the authors of new sentencing legislation should recognize the inevitability of political compromise, and should prepare for it by determining their priorities among various features of proposed legislation.

Michael Salerno made a few comments about the amendment process then going on in the state legislature. The mood of the legislature, he said, could only be described as “hysterical.” Conservative political forces, he said, were threatening to weaken many reforms included in S.B. 42.

A conference participant in the audience agreed, saying that political expediency had overwhelmed the spirit in which the bill had first been conceived. He said that in its present form, the bill could be better characterized as one calling for the “warehousing” of prisoners than as a determinate sentencing bill.

Another participant said that he was “troubled” by the assertion that legislatures cannot be trusted to enact reasonable terms. Any attempt to short-circuit legislative authority in term-setting, he said, was doomed to failure.

Judge David L. Bazelon, chief judge for the U.S. Circuit Court of Appeals for Washington, D.C., then made a few comments. “I’ve heard nothing here about individualizing justice,” he said. “Nowhere do I hear any word about understanding the individual. If we’re giving up on that, then we’re giving up on one of the most important concepts of democracy. The greatest inequality is equal treatment of unequals — and people are unequal.”

This last point was disputed by a member of the audience, who responded: “You treat a man more unequally under a discretionary system.” He went on to say that the underlying cause of disparity in the criminal justice system is economic disparity. This, in turn, prompted someone else to propose that “perhaps the best thing you can do for the individual is not to treat him as an individual.”

Returning to the question of whether legislatures would invariably make sentences too long, a participant said that from his experience, it would be a mistake to assume that the public was unanimously in favor of more punitive sentences. Even the corrections department of his own state, he said, was sharply divided over proposed sentence lengths.

Perhaps it is too soon to adopt a rigid new sentencing structure, said another participant. In viewing sentencing over the perspective of the last several decades, he said it was clear that while faith in the theories that provided the basis for the current sentencing system had been severely shaken, there did not seem to be any consensus on what new system should replace them. □