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Determinate Sentencing in California: The New Numbers Game

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BRIAN TAUGHER**

It is easy to overreact to California’s new determinate sentence law. The less familiar one is with actual release figures for convicted felons, the more alarmed one becomes at what appear to be drastically lowered prison sentences; while the more familiar one is with parole, prison discipline, and sentencing, the more dismayed one becomes at the tremendous new complexity attending these decisions. Fortunately, however, patient study of the new law forces even the most skeptical to conclude that it is ultimately comprehensible. It can be learned by jurists and prison administrators not otherwise qualifying for membership in Mensa and its net effect on time

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1. SB 42, CAL. STATS. 1976, c. 1139, §1, at —, as amended by AB 476, CAL. STATS. 1977, c. 165, §1, at —. We will refer to the original law as SB 42, to the amendments as AB 476, and to the final version as the determinate sentence law.

2. Compare CAL. STATS. 1967, c. 1139, §1, at 1216 with CAL. PENAL CODE §213 (penalties for first degree robbery formerly five years to life, now two, three or four years). Compare CAL. STATS. 1957, c. 1968, §1, at 3509 with CAL. PENAL CODE §190 (penalties for second degree murder formerly five years to life, now five, six or seven years). Compare CAL. STATS. 1967, c. 151, §1, at 1217 with CAL. PENAL CODE §264 (penalties for forcible rape formerly three years to life, now three, four or five years).


4. Mensa is an organization of people having extremely high IQ’s.
that inmates serve in prison cannot be as readily predicted as proponents and opponents believe.

The new law will force courts to share with correctional and paroling authorities the experience of complete procedural upheaval similar to that which the correctional agencies survived in the avalanche of new law following *Morrissey v. Brewer.* Both authors of this article participated in a special state Attorney General's task force that helped affected state agencies implement the constantly shifting and expanding procedural rights that flowed from that case. At that time we found it useful to prepare a pragmatic survey of the post- *Morrissey* law that was a basic summary providing background reading and perspective on the more exotic problems developing in specialized subsections of the parole system. Following the passage of Senate Bill 42, and exposition of the determinate sentence law as it existed at that time was prepared for use at the 1977 Criminal Law Institute for Superior Court Judges. This article includes discussion of the latest amendments to the determinate sentence law, and should be useful to anyone who becomes enmeshed in the intricacies of the new law.

This article contains a detailed survey of the new law, Senate Bill 42 (SB 42) as amended by Assembly Bill 476 (AB 476). The article will discuss the background and history of the new law, its changes to theories of crime and imprisonment, its creation of a new sentencing and paroling structure, and its retroactive application. We have attempted not only to describe the new law, but also to catalogue some of the potential problems that may be encountered. We have avoided a philosophic assessment of the law, concentrating instead on practical analysis and criticism.

THE END OF THE INDETERMINATE SENTENCE LAW

**A. The Indeterminate Sentence Law**

By the time California adopted indeterminate sentencing in 1917, the system was by no means a novelty. Between about 1876 and 1922, forty-four states had adopted parole in some form, and thirty-seven states had adopted some form of indeterminate sentencing. In California, the enact-
Determinate sentencing legislation was preceded by parole legislation first adopted around the turn of the century.\textsuperscript{11} Looking at the national trend, the California Supreme Court enunciated what would be a core tenet of parole:

The legislative policy manifested in the act was to provide . . . a system . . . whereby, notwithstanding fixed terms of sentence, a hope was to be held out to prisoners that through good conduct in prison and a disposition shown toward reformation, they might be permitted a conditional liberty . . . . Service of an arbitrary fixed term which has relation to the matter of punishment cannot of itself furnish a proper or just standard by which it may be fairly determined whether or not a prisoner has repented of his crime and evidenced a disposition to redeem himself, and may with safety to society be granted a parole under which to attain complete reformation . . . . [T]he purpose of the legislature in creating a parole system . . . . is to permit the liberation of a prisoner on parole at the earliest period when permitted by law and when on a consideration of the merits of each individual case, parole ought, in the judgment of the board, to be granted.\textsuperscript{12}

In 1918, the California Supreme Court applied these rehabilitative goals of parole legislation to the new indeterminate sentence law:\textsuperscript{13}

It is generally recognized by the courts and by modern penologists that the purpose of the indeterminate sentence law, like other modern laws in relation to the administration of the criminal law, is to mitigate the punishment which would otherwise be imposed upon the offender. These laws place emphasis upon the reformation of the offender. They seek to make the punishment fit the criminal rather than the crime. They endeavor to put before the prisoner great incentive to well-doing . . . . [T]he purpose is to strengthen his will to do right and lessen his temptation to do wrong.\textsuperscript{14}

The indeterminate sentence law was off to a rather idealistic start and over the years met with numerous statutory modifications that tended to broaden the parole board’s\textsuperscript{15} powers. The original part-time board that had set terms and paroles was replaced by a State Board of Prison Directors.\textsuperscript{16} In the 1930’s that board’s discretion in setting and revoking paroles was the subject of several modifications that continued the broadening of the board’s

\begin{footnotesize}
\begin{enumerate}
\item See CAL. STATS. 1913, c. 591, §1, at 1048.
\item Roberts v. Duffy, 167 Cal. 629, 634, 636, 637, 140 P. 260, 262-63 (1914) (emphasis added), also cited in In re Stanley, 54 Cal. App. 3d 1030, 1037, 126 Cal. Rptr. 524, 528 (1976).
\item CAL. STATS. 1917, c. 527, §1, at 665-66 (formerly CAL. PENAL CODE §1168).
\item In re Lee, 177 Cal. 690, 692-93, 171 P. 958, 959 (1918) (emphasis added).
\item “Parole board” is used as a generic term to refer to the Adult Authority and the Women’s Board of Terms and Parole or any of their predecessors.
\item See generally CAL. STATS. 1917, c. 527, §1, at 665-66.
\end{enumerate}
\end{footnotesize}
powers. The California Legislature again reorganized the correctional system in the 1940's, and the provisions for minimum terms and minimum eligible parole dates became extremely complex. In 1944, the Adult Authority was created and was granted broad powers to study individual cases. Reflecting contemporary faith in the social sciences, it was to be a panel of experts that would draw upon psychiatric and other diagnostic aids, and order the parole, transfer, or discharge of inmates. The next two decades saw many adjustments and refinements of the Adult Authority's broad power.

The Adult Authority's actual practices, as they evolved under its expansive power, were a far cry from the lofty rhetoric of the courts and statutes. Indeterminate terms tended to become extremely broad, effectively re-legating legislative responsibility for punishment to a relatively anonymous parole board. Instead of practicing a true parole system in which some penitents were released to complete their terms in the community, the parole board became the actual sentencing agency for all felons who went to prison, with full control over the felon's term and release on parole. The court had little control over the length of the sentence; it merely sentenced the defendant to prison "for the term prescribed by law." The parole board would then fix a "term" somewhere between the statutory minimum and maximum (often a span of one year to life), and release the prisoner on parole after a few years. After release, a prisoner's parole could be revoked, and each time a higher term and new parole date would be set. Prosecutors

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17. CAL. STATS. 1937, c. 543, §1, at 1555-60; CAL. STATS. 1935, c. 603, §1, at 1700-06; CAL. STATS. 1933, c. 814, §1, at 2156-61; CAL. STATS. 1931, c. 483, §1, at 1053-59; CAL. STATS. 1929, c. 872, §1, at 1930-35.
21. See generally CAL. STATS. 1953, c. 1458, §5, at 3058.
22. For another example of legislative change, see CAL. STATS. 1957, c. 2256, §§54-71, at 3934-36. One of the more significant legislative changes to the old law was Penal Code Section 5076.2, CAL. STATS. 1975, c. 1160, §2, at 2875-76, a section retained under the new system. In the face of criticism that the Adult Authority was arbitrary in its policies and secretive in its procedures, the legislature for the first time required the agency to publish its procedures in accordance with the rule-making provisions of the Administrative Procedures Act. See CAL. GOV'T CODE §§11371-11445. The result was Title 15, Division 2 of the California Administrative Code, called the Parole Board Rules. The Parole Board Rules became effective June 1, 1976. 15 CAL. ADM. CODE div. 2 (Register 76, No. 19, 5-8-76). At the same time, the Department of Corrections was required to publish its rules. CAL. PENAL CODE §§5058; 15 CAL. ADM. CODE, div. 3 (Register 76, No. 19, 5-8-76). As we shall discuss later, the Parole Board Rules codified the efforts of Raymond Procunier, then Chairman of the Adult Authority, to cure defects in the system by way of administrative change. The rules of the Community Release Board are published in the same portion of the Administrative Code, and are very useful to anyone dealing with a problem in this area.
23. Most prisoners were eligible for parole in between six and 20 months, and had a maximum term of life. The law was aptly described as indeterminate. For a listing of minimum and maximum terms and parole eligibility, see 15 CAL. ADM. CODE §2225 (Register 76, No. 21, 5-22-76).
25. See notes 23 supra.
and defense attorneys had little influence on the release decisions since their charging practices and plea bargains only affected the maximum term and minimum parole eligibility. Because very few prisoners were released on their minimum eligible parole date\textsuperscript{26} and even fewer actually served the maximum term,\textsuperscript{27} the result was to vest in the parole board—the "board of experts"—virtually total discretion over the remaining period of each prisoner's sentence.

This vast discretion made the parole board the scapegoat of the criminal justice system. Since courts, prosecutors, and legislators had no control over the release of prisoners, anything that went wrong was obviously the fault of the parole board, which had been either too lenient or too harsh. The parole board itself grew wary, gradually adopted the practice of deferring a decision until the board developed the feeling that the prisoner was "ready to go home." But the press would periodically report a sensational new crime committed by a parolee, or less often, the plight of a prisoner whom the parole board had failed to release. Doubt was cast on the ability of the parole board to choose accurately the optimum time of release. As these doubts grew, numerous attacks on the system were launched.\textsuperscript{28}

**B. The Beginning of the End**

Although the courts had for years maintained a "hands off" attitude toward the parole and correctional systems,\textsuperscript{29} 1972 brought a reversal of this traditional policy. In that year, two landmark cases initiated separate trends which, taken together, played a large role in ending California's indeterminate sentence law.

The first and initially most important trend was begun by \textit{Morrissey v. Brewer}.\textsuperscript{30} That case expanded into the postconviction process the procedural protections enunciated several years earlier by \textit{Goldberg v. Kelly}.\textsuperscript{31} \textit{Morrissey} required that parole be revoked only in accordance with the due process clause, a requirement designed to protect the integrity of the fact-
finding process by granting the parolee the right inter alia, to a hearing with notice, disclosure, witnesses and a record. Once Morrissey had imposed a variety of due process procedures upon revocations of parole, every discretionary decision in the prison system came under attack. Within a period of about three years, the half-century old indeterminate sentence law was judicially rewritten to require a variety of due process procedures for such matters as: rescinding an unexecuted grant of parole; increasing a term or revoking parole even for a new felony conviction; requiring disclosure of records and reports; granting parole; revoking narcotics outpatient status; and holding revocation hearings when the parolee faced new criminal charges or had received an out-of-state commitment.

The thrust of these decisions was to force the recordation and judicial reviewability of decisions by correctional and parole administrators that had been only minimally examined prior to this decade. Their combined impact might ultimately have effected a more enlightened and controlled implementation of the broad powers of correctional and parole administrators. But the gradual evolution of these powers under the due process clause was swallowed up in the revolution wrought by SB 42.

The second line of cases, which indirectly led to the determinate sentence law, did not originally affect the discretion of these correctional and parole administrators as did Morrissey and its progeny under the due process clause, but instead attacked the uncertainty and broad range of indeterminate terms as being cruel or unusual punishment prohibited by the eighth amend-

33. See Gagnon v. Scarpelli, 411 U.S. 778, 791 (1973) (granted a limited right to attorney in parole and probation revocation). See also In re Love, 11 Cal. 3d 179, 185-87, 520 P.2d 713, 716-17, 113 Cal. Rptr. 89, 92-93 (1974) (discussed limited right to attorney in parole revocation; granted a due process right to disclosure of parole officer's report prior to revocation of parole).
34. California appears to have been on the brink of taking the same direction that the United States Supreme Court ultimately mandated anyway. See People v. Youngs, 23 Cal. App. 3d 180, 188, 99 Cal. Rptr. 901, 906 (1972).
35. See also Gee v. Brown, 14 Cal. 3d 571, 575, 536 P.2d 1017, 1019, 122 Cal. Rptr. 231, 233 (1975); In re Prewitt, 8 Cal. 3d 470, 474, 503 P.2d 1326, 1330, 105 Cal. Rptr. 318, 322 (1972).
42. Due process has been tentatively extended into the prison itself. Baxter v. Palmigiano, 425 U.S. 308 (1976) (disciplinary proceeding); Wolff v. McDonald, 418 U.S. 539, 557 (1974). For some prison decisions, the applicability of due process depends on whether there is a "state-created right." See Montanye v. Haymes, 427 U.S. 236, 243 (1976) (transfer proceeding); Meachum v. Fano, 427 U.S. 215, 299 (1976) (transfer proceeding). Some of the old prison and parole prerogatives were conceded in administrative regulations. See, e.g., 15 Cal. Adm. Code §2358(a) (Register 76, No. 21, 5-22-76) (limiting consideration of criminal activities to crimes that resulted in conviction); 15 Cal. Adm. Code §3316(c) (Register 76, No. 19, 5-8-76) (at disciplinary hearing held after acquittal in court, court's finding must be accepted as proof that defendant did not commit the act).
1978 / Determine Sentencing

tment to the United States Constitution. Venturing into an area long avoided by the courts, the California Supreme Court, in In re Lynch,\textsuperscript{43} and In re Foss,\textsuperscript{44} attempted to develop a theory of "proportionality" of criminal terms.\textsuperscript{45} The court applied a three-part test to determine whether a criminal punishment was cruel or unusual in the constitutional sense. The test required that: (1) consideration of the punishment in the case at hand be made in relation to the particular offense and offender; (2) a criminal term be compared with punishment in this state for other, more serious offenses; and (3) a criminal term be compared with the punishment imposed in other states for the same offense.\textsuperscript{46} These cases caused almost immediate havoc in the already disorganized hierarchy of statutory terms. As individual challenges under Lynch-Foss wended their way through the courts, minimum terms and particularly minimum eligible parole dates were cut down in haphazard fashion,\textsuperscript{47} causing the courts to be deluged by even more individual appeals and writs.\textsuperscript{48} Pandora's box had been opened.

C. Reform: Legislative, Administrative or Judicial?

1. Legislative Beginnings: The Inception of SB 42

By late 1974, dissatisfaction with the indeterminate sentence law was spreading.\textsuperscript{49} In addition to increased judicial scrutiny, much scholarly work was being done on the validity of the old penal system and the possible forms a new one might take.\textsuperscript{50} "Determinate" sentencing was an idea raised with increasing frequency. The goal of compulsory rehabilitation of criminals was seen by some as illusory. The uncertainty of indeterminate sentences was thought to be counterproductive by impeding rehabilitation of the individual and by contributing to violence in the prisons. The pressure for change was reflected on three fronts—legislative, administrative and judi-

\textsuperscript{43} 8 Cal. 3d 410, 503 P.2d 921, 105 Cal. Rptr. 217 (1972).
\textsuperscript{44} 10 Cal. 3d 910, 519 P.2d 1073, 112 Cal. Rptr. 649 (1974).
\textsuperscript{46} In re Lynch, 8 Cal. 3d 410, 425-29, 503 P.2d 921, 930-33, 105 Cal. Rptr. 217, 226-29 (1972); see In re Foss, 10 Cal. 3d 910, 919-20, 519 P.2d 1073, 1078-79, 112 Cal. Rptr. 649, 654-55 (1974).
\textsuperscript{47} In re Grant, 18 Cal. 3d 1, 18, 553 P.2d 590, 601, 132 Cal. Rptr. 430, 441 (1976), unsuccessfully attempted to evaluate the problem and resolve it once and for all.
\textsuperscript{48} Hardest hit was the legislature's tough new scheme for the punishment of recidivist drug offenders and dealers. CAL. STATS. 1972, c. 1407, §3, at 2987.
\textsuperscript{49} For a summary of recent literature criticizing the Adult Authority and the indeterminate sentence law, see Comment, Senate Bill 42—The End of the Indeterminate Sentence, 17 SANTA CLARA L. REV. 133 (1977). The summary and analysis of the determinate sentence law in this comment was written before the enactment of AB 476 and is thus no longer accurate.
cial. In the legislative area, two consultants to the Senate Select Committee on Penal Institutions began researching and outlining a new system of sentencing and parole in September 1974. By October, they sent a memorandum containing a proposal called “Outline of Proposed Sentencing Scheme” to the Chairman of the Senate Select Committee on Penal Institutions. This draft proposal differed from the ultimate version of the determinate sentence law in a number of notable respects. Under the proposal, the Adult Authority would have remained, and both the Adult Authority and the courts would have retained far broader discretion than the final version of the law permitted. The sentence ranges within which the Adult Authority would have operated were narrower than under the old law, but not significantly, since under the draft proposal most sentences would have been in a range of 5 to 25 years, 3 to 25 years, 3 to 15 years or 3 to 10 years. While parole eligibility would still have occurred at one-third the minimum term as it did under the old law, the Adult Authority would have had the duty to parole inmates on a schedule calculated from an inmate’s minimum eligible parole date. Reasons for denial of parole would have included violent or otherwise disruptive behavior in prison.

Trial court sentencing would also have remained flexible. The judge would have been given the new responsibility of choosing and setting the maximum term for the particular offender. He would have been required to state reasons for his choice, follow criteria to be devised, and might even delay minimum parole eligibility for exceptional reasons. The sentence imposed by the judge would have been subject to appellate review by a special section of the court of appeal to determine whether it was disparate from cases of a similar nature, and whether that disparity was toward too harsh or too lenient a sentence. While such a regimen guided and limited discretion, it was clearly not the mathematical marvel of mechanical rules we have today.

The winter of 1974 and spring of 1975 saw SB 42 take the basic shape it would ultimately retain even after the later, drastic changes wrought by AB 476. On December 5-6, 1974, the Senate Select Committee on Penal Institutions conducted hearings on the indeterminate sentence law. While such a regimen guided and limited discretion, it was clearly not the mathematical marvel of mechanical rules we have today.

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51. SB 42 was primarily written by Raymond Parnas, a law professor at the University of California at Davis and non-lawyer Michael Salerno.
52. The bill was authored by Senator John Nejedly and Senator Howard Way (now chairman of the Community Release Board). Listed as co-authors of the bill were Assemblymen Murphy, Sigler, and McVittie. See Senate Final History, California Legislature 1975-76, at 35-36.
54. The authors gratefully acknowledge the assistance of Bill Hoover of Senator Nejedly’s staff and Mike Ullman of the Assembly Criminal Justice Committee who helped provide a picture of this legislative history.
56. Testifying at these hearings were members of the 7th Step Foundation, the American Civil Liberties Union, the Correctional Counselors Association, the Committee for Prisoner’s
individual desires for a new system varied, the overwhelming majority of
witnesses testified against the indeterminate sentence law and against the
manner in which the Adult Authority had previously implemented it.\textsuperscript{57} After
these hearings, fundamental modification of SB 42 began, and the ground
work was done on ranges and norms for individual crimes and on defining
which penal sanctions in the various codes would require change.\textsuperscript{58} On
January 30, 1975, a five-page press release was issued by the Chairman of
the Senate Select Committee outlining the shape of SB 42. This version of
the bill proposed to abolish the Adult Authority and abandoned the broad
ranges of prison terms. It established court-imposed sentences in the drastic-
ally narrowed ranges of 16 months, two or three years; two, three or four
years; three, four or five years; five, six or seven years. Good-time credits\textsuperscript{59}
were provided for prisoners and a fixed parole period for parolees was
created. The new law was to be fully retroactive. Perhaps the only important
element in this proposal that would not survive into present law was a
provision for lengthy retention of dangerous offenders.\textsuperscript{60} The new bill was
introduced on March 4, 1975.\textsuperscript{61} On March 17, 1975, the author of the bill
sent a letter and twelve-page staff analysis of the new bill to superior court
judges, district attorneys, public defenders, chiefs of police, and sheriffs.\textsuperscript{62}
The legislative efforts to reform the indeterminate sentence law were off to
an enthusiastic start.

2. Administrative Reforms

The major administrative development that temporarily sidetracked SB 42
was the implementation of a new policy by the recently appointed Chairman

\textsuperscript{57} Among the handful speaking against the newly developing determinate sentence
structure were the Los Angeles Superior Court judges. \textit{Id.} at 176. These judges had met with
the Select Committee's staff the previous month and their opinions had been rudely dismissed.
It is notable that the Los Angeles Superior Court judges had such a small voice in shaping the
new law, since that court traditionally plays an active role in shaping criminal justice legislation.
Letter from Raymond Parnas to Judge Raymond Choate (Nov. 25, 1974); letter from Judge
Raymond Choate to Senator John Nejedly (Dec. 2, 1974); letter from Judge Raymond Choate to
Raymond Parnas (Dec. 2, 1974); letter from Judge Charles Woodmansee to Senator John

1975) (copy on file at \textit{Pacific Law Journal}).

\textsuperscript{59} The term "good-time credits" is used in this article to refer to the credits for good
behavior and participation that reduce a prisoner's term as provided in Penal Code Sections
2930-2932.

\textsuperscript{60} Senator John Nejedly, Press Release, Jan. 30, 1975, at 4 (copy on file at \textit{Pacific Law

\textsuperscript{61} \textit{SENATE FINAL HISTORY, CALIFORNIA LEGISLATURE 1975-76}, at 35.

\textsuperscript{62} Letter from Senator John Nejedly to all California Superior Court Judges, District
Attorneys, Public Defenders, Chiefs of Police and Sheriffs (with attachments) (Mar. 17, 1975)
(copy on file at \textit{Pacific Law Journal}).
of the Adult Authority, Raymond Procunier. In February 1975, he announced plans to meet the criticism of reformers by administratively making changes in the system. In April, Chairman’s Directive 75/20 was issued creating a structure for setting parole dates based on listed ranges and factors. Following this directive, numerous hearings were conducted to abolish the practice of deferring a decision on parole and to establish instead fixed parole dates for almost all inmates. At the time, these reforms were received with hostility by proponents of SB 42 who sought an opinion from the Legislative Counsel that they were illegal. The Adult Authority could not win. Its old methods were under attack; yet attempts to correct the system administratively were equally condemned, as critics complained that the administrative reforms could easily be undone by some later board.

Work continued on SB 42 despite the Adult Authority’s reforms. In March 1975, the Attorney General (chief law enforcement officer of the State and the Adult Authority’s own attorney) announced his support of SB 42. After passage in the Senate, talks on the bill continued in the Assembly Committee on Criminal Justice where SB 42 was sent in May 1975. That committee was skeptical of the proposal, preferring to see how the Adult Authority’s reforms would work out. In August 1975, the author of SB 42 sent to the committee a lengthy final letter urging passage of the bill. In this letter he claimed that the Adult Authority’s reforms were legally defective, cited the support of the Attorney General, as well as the support of various judges, district attorneys, and defense counsel, and argued that the new terms would not be shorter than median times currently being served.

The staff of the Criminal Justice Committee and the American Civil Liberties Union of Northern California, however, continued to have reservations. Specifically, they were concerned that: future legislative sessions might dramatically increase statutory sentences; the new Community Release Board might be just as subject to political pressure as the Adult Authority had allegedly been; procedural safeguards might not be adequate in the area of parole and good time credits; and retention of dangerous

offenders might not work. Finally, charges were made that the median time served in California’s prisons under the indeterminate sentence law were high in comparison with most other states. It was felt that it would be inappropriate to formalize sentence ranges reflecting those already allegedly harsh medians. As a result of these questions, passage of SB 42 was halted in August of 1975. Although the author of the bill threatened to drop it entirely, it was converted into a two-year bill.

3. Case Law Developments

The judicial branch also entered the fray in 1975. Apparently recognizing the impossibility of individually reviewing the constitutionality of every felony punishment that may have been challenged under the Lynch-Foss line of cases, the California Supreme Court sought a more efficient means of reviewing the multitude of appeals and writs spawned by those cases. Seizing upon the first prong of the Lynch-Foss test, the requirement that a punishment for a particular offense and offender be tested before constitutionality could be judged, the court in People v. Wingo and People v. Romo held that the constitutionality of an indeterminate prison term would not be reviewed until the Adult Authority had a reasonable opportunity to fix the actual term. Thus, there would be no judicial review of a potential maximum term if in fact a lower actual term was set by the Adult Authority. From this holding, it was a short step to In re Rodriguez, which required the Adult Authority, the only body with jurisdiction to apply the punishment to the individual offender, to fix promptly a prisoner’s term that will be proportionate to the prisoner’s culpability, and thus not constitutionally excessive. Once set, this “primary term” as it was called by the court, could never be increased and was to be proportionate to the particular offense and individual offender, not to subsequently occurring factors.

69. Letter from Brent A. Barnhart, Legislative Representative, American Civil Liberties Union of Northern California to Michael Salerno (Sept. 10, 1975); Assembly Committee on Criminal Justice Bill Digest (Aug. 6, 1975) (copies on file at Pacific Law Journal).
70. Letter from Brent A. Barnhart, Legislative Representative, American Civil Liberties Union of Northern California to Michael Salerno (Sept. 10, 1975) (copy on file at Pacific Law Journal).
71. See note 69, supra.
72. The three-prong test required: (1) consideration of the punishment in the case at hand in relation to the particular offense and offender, 8 Cal. 3d 410, 429-31, 503 P.2d 921, 933-35, 105 Cal. Rptr. 217, 229-31 (1972); (2) comparison of punishment in this state for other, more serious offenses, id. at 431-36, 503 P.2d at 935-38, 105 Cal. Rptr. at 231-34; and (3) comparison of punishment in other states for the same offense, id. at 436-37, 503 P.2d at 938-39, 105 Cal. Rptr. at 234-35.
73. 14 Cal. 3d 169, 534 P.2d 1001, 121 Cal. Rptr. 97 (1975).
74. Id. at 189, 534 P.2d at 1015, 121 Cal. Rptr. at 111.
75. People v. Wingo, 14 Cal. 3d 169, 183, 534 P.2d 1001, 1012, 121 Cal. Rptr. 97, 108 (1975); People v. Romo, 14 Cal. 3d 189, 193, 534 P.2d 1015, 1018, 121 Cal. Rptr. 111, 114 (1975).
77. Id. at 650, 537 P.2d at 392, 122 Cal. Rptr. at 560. The term set by the Adult Authority could be reduced but not increased. CAL PENAL CODE §1168, as amended, CAL. STATS. 1969, c. 990, §1, at 1959; see CAL PENAL CODE §3020, repealed, CAL. STATS. 1977, c. 165, §1, at —; CAL PENAL CODE §2940, repealed, CAL. STATS. 1977, c. 165, §1, at —.
The only real novelty in *Rodriguez* was the degree of inflexibility the decision imposed on term-fixing, a change amounting to judicial rewriting of the indeterminate sentence law. The *Rodriguez* opinion was filed in late June 1975, and in September, as a response to *Rodriguez*, the Adult Authority set forth in Chairman’s Directive 75/30 ranges and factors to bring some uniformity to the setting of the newly invented “primary” terms.⁷⁹

These cases are interesting because at the time they were widely but incorrectly viewed as judicial approval of the Adult Authority’s reforms. The combined impact of *Rodriguez*, the Adult Authority’s reforms and the reservations of the Assembly Committee on Criminal Justice was effectively to stop the progress of SB 42. The bill was dead, though not interred, in August 1975.⁸⁰

D. The Revival and Passage of SB 42

The death knell of the indeterminate sentence law occurred in January 1976, with the filing of the opinion in *In re Stanley*.⁸¹ Written, ironically, as an attempt to preserve some aspects of indeterminacy, this case was used by proponents of SB 42 to overthrow the indeterminate sentence law. As will be noted below, *Stanley* was widely, and perhaps intentionally, misconstrued. *Stanley* did not hold the Adult Authority’s whole new parole system unconstitutional. It did not invalidate the Adult Authority’s attempt to lessen disparity in indeterminate sentencing by administrative means. It held Chairman’s Directive 75/20 illegal in failing adequately to account for one factor that the Adult Authority had argued was already implicit in the rules, the factor of post-conviction rehabilitative conduct.⁸² Far from eliminating the new system of ranges and guiding factors, the court encouraged the Adult Authority in this direction, given a corrected rule.⁸³ The rules were then corrected, review began, and by June 1976 the Parole Board Rules were published in Title 15 of the California Administrative Code,³⁴ covering terms and parolees, eighth and fourteenth amendment rights, *Rodriguez*, *Stanley*, *Morrissey*, and any other controlling guidelines that could be found. Despite the Adult Authority’s efforts to overcome the shortcomings of its reforms, enthusiasm for SB 42 began to revive. The day after the

⁷⁹. See id. at 652, 537 P.2d at 393, 122 Cal. Rptr. at 561. Both authors of this article worked with the Adult Authority and the Department of Corrections in their desperate attempt to rehear the 40,000 cases for whom *Rodriguez* now required a prompt term-setting. Personnel and physical resources were scarcely adequate for so monumental a task. The year ended with the project of codifying these reforms into the Administrative Code. See 15 CAL. ADM. CODE §§2000-2725 (Register 76, No. 21, 5-22-76).


⁸¹. 54 Cal. App. 3d 1030, 126 Cal. Rptr. 524 (1976).

⁸². Id. at 1038-39, 126 Cal. Rptr. at 529-30.

⁸³. Id. at 1038-42, 126 Cal. Rptr. at 529-32.

⁸⁴. 15 CAL. ADM. CODE §§2000-2725 (Register 76, No. 21, 5-22-76).
opinion in Stanley was filed, the author of SB 42 issued a very aggressive press release attacking the Adult Authority’s attempts at administrative change, citing Stanley as holding the attempts illegal, attacking the skepticism of the Chairman of the Assembly Criminal Justice Committee and strongly urging passage of SB 42.85

The Senate Select Committee on Penal Institutions initiated discussions with the Governor’s Office during the next few months, emphasizing previous contentions that the Adult Authority’s policy was “illegal”, “possibly unconstitutional” and vulnerable to change at the whim of the board.86 The Governor became interested and agreed to support the legislation if law enforcement groups found the bill acceptable. These groups, led by the Attorney General and the District Attorney of Alameda County, had become concerned in recent years with the increasing willingness of the California Supreme Court to rewrite sentencing law and with the reforms of the Adult Authority.87 Moreover, these groups felt that the legislature would be more responsive to future proposals to increase terms than the Adult Authority bureaucracy had been.88

Talks went forward with the Prisoner’s Union, the Attorney General, the Governor’s Office, the Judicial Council and many others.89 SB 42 was rewritten on April 22, 1976, to reflect some of the concerns of these groups.90 By June, there was a growing feeling that the bill would eventually pass, but the next two months saw a series of hasty moves and counter-moves by various factions to obtain advantages on details of the bill. Following a frantic flurry of last minute legislative activity, SB 42 was passed, sent to the Governor, and on September 21, 1976, was chaptered as Chapter 1139, Statutes of 1976.91

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86. Memo from Select Committee Staff to Senator John Nejedly (Mar. 20, 1975); letter from Select Committee Staff to Marc Poche (June 17, 1975) (copies on file at Pacific Law Journal).
87. Speech by D. Lowell Jensen to Small Counties District Attorneys Association in Fort Bragg, California (Oct. 1976).
88. Id.
89. E.g., Letter from Senator John Nejedly to Chief Justice Donald R. Wright of the California Supreme Court (Aug. 16, 1976); letter from Evelle Younger to Assemblyman Alan Sieroty (Aug. 2, 1976); letter from Michael Ullman, Senior Consultant for J. Anthony Kline, Office of the Governor (July 12, 1976); letter from Senator John Nejedly to Evelle Younger (June 7, 1977); letter from Evelle Younger to Senator John Nejedly (June 3, 1976); letter from Senator John Nejedly to Willie Holder (June 1, 1976); memo from Walter Barkdull, Legislative Liaison, Department of Corrections to J.J. Enomoto and R.K. Proconier (Mar. 11, 1976) (copies on file at Pacific Law Journal).
90. Memo from Raymond Parnas to Senator John Nejedly (Apr. 23, 1976) (copy on file at Pacific Law Journal). These changes threatened to undermine existing support of liberal groups, until Assemblyman Art Torres, an important vote on the Assembly Criminal Justice Committee, informed law enforcement groups that he would not support the bill unless a list of demands were met. He was largely successful in obtaining these concessions. Letter from Art Torres to D. Lowell Jensen (May 18, 1976) (copy on file at Pacific Law Journal).
91. SENATE FINAL HISTORY, CALIFORNIA LEGISLATURE 1975-76, at 36; Finally, Sentences with Periods, Los Angeles Times, Sept. 2, 1976, §2, at 6, col. 1; Fixed Prison Sentences OK’d, Los Angeles Times, Sept. 1, 1976, §1, at 1, col. 5; 29 Crime Bills Signed By Brown, San
In looking at the legislative history of SB 42, it is important to remember that most of the detail work on the bill was done during the few months immediately before passage. Considerations of time and political exigencies effectively precluded thorough review by judges, attorneys and others who must implement the bill. As copies of the bill began to circulate in the fall of 1976, cries of dismay began to be heard from those who were only dimly aware of what had happened in Sacramento.

E. AB 476 “Cleans Up”

A major impetus for amending the new law before it became operative, but after it was legally effective, was fear of the consequences of the retroactivity provisions. In the two years of the bill’s journey through the legislature, it had not been possible to predict the effect of SB 42 on the prison population, and controversy immediately began over whether the law would release a swarm of hardened criminals due to retroactive application of the new, drastically lower maximum terms. In the face of these charges, the Department of Corrections estimated the SB 42 would result in the release of far fewer inmates than many were projecting. Statistics on median time served before first parole showed the overall median for 1976 to be 34 months under the Adult Authority’s system. The author of SB 42 used the figures in an attempt to calm fear of the retroactivity provisions. He argued that SB 42 and the Adult Authority’s release policies were close enough to prevent a flood of new releases.

Nevertheless, concern about the release of inmates remained as more people were compelled to read SB 42 with a view toward practical implementation. Some problems with the bill involved basic comprehensibility, some involved forgotten code sections that retained indeterminate terms, and some involved procedural requirements so complex that it

Francisco Chronicle, Sept. 21, 1976, §1, at 1, col. 6. Final Assembly vote was 60 Ayes, 17 Noes. Concurring Senate vote on Assembly Amendments were 25 Ayes, 9 Noes.

92. A separate bill, SB 15, had to be passed to clarify the intent of the legislature that the new law not become operative until July 1, 1977. CAL. STATS. 1976, c. 1139, §351.5, at —.


97. See, e.g., CAL. PENAL CODE §148.1, as amended, CAL. STATS. 1976, c. 1137, §1, at —; CAL. PENAL CODE §480, as enacted, CAL. STATS. 1850, c. 99, §78, at 238; CAL. PENAL CODE §594, as amended, CAL. STATS. 1974, c. 582, §1, at 1403; CAL. PENAL CODE §597.5, as enacted,
threatened to be physically impossible to implement the substantive matters involved.98 The Secretary of the Health and Welfare Agency, the parent agency of the Department of Corrections, created a committee of interested parties to devise technical corrections needed in the bill.99 This committee labored throughout October, November and December of 1976, reviewing various proposals for so-called technical amendments, which were proposed primarily by the agencies having the responsibility for implementing the new law.100 The committee bogged down in arguments over what was technical and what was substantive, leading to intervention by the Governor’s Office. By December 1976, the Brown Administration had drafted amendments that several months later formed the basis for AB 476.101

By this time it was clear that “technical” amendments would not suffice and that major substantive elements of SB 42 were under attack. Judges attacked the complexity of the trial court procedures,102 charging that they were time consuming and would result in far more trials than had been necessary under prior law. Led by the District Attorney of San Diego, prosecutors attacked the bill as “lenient.”103 In February 1977, the Attorney General attacked the bill he had supported, stating that the terms were too low, the enhancements should be mandatory, the limitation sections were too extensive, and the retroactivity provision was unacceptable.104

This controversy led the Brown Administration during January and early February of 1977, to examine charges that the new law was too lenient. Statistical projections hinted that although overall, the median time served would be close to prior time actually served, some violent and repeat CAL. STATS. 1975, c. 1075, §1, at 2634; CAL. PENAL CODE §653(h), as amended, CAL. STATS. 1975, c. 1132, §1, at 2803; CAL. PENAL CODE §2772, as enacted, CAL. STATS. 1941, c. 106, §15, at 1101; CAL. PENAL CODE §2790, as enacted, CAL. STATS. 1941, c. 363, §1, at 1650; CAL. WELF. & INST. CODE §11483, as amended, CAL. STATS. 1970, c. 693, §1, at 1322, all of which were corrected by various provisions of AB 476.

98. An example was CAL. PENAL CODE §1170.2(b), as enacted, CAL. STATS. 1976, c. 1139, §273, at —. Hearing procedures for holding the multiple or violent offender beyond the date calculated in subdivision (a) were so limited in time, that no more than several hundred inmates in a population of 20,000 could have been considered.
100. See memo from Brian Taugher to J. Anthony Kline, Legal Affairs Secretary, Office of the Governor (Oct. 4, 1976); memo from Joseph M. Cavanagh, Assistant Departmental Counsel, Department of Corrections to Mark Christiansen, Departmental Counsel and Nelson P. Kempsky, Deputy Director, Department of Corrections (Nov. 2, 1976); memos from Brian Taugher to the Obledo Committee (Dec. 1 & 10, 1976); memo from Joseph M. Cavanagh to Nelson P. Kempsky (Nov. 19, 1976) (copies on file at Pacific Law Journal).
criminals would serve less time due to some of the enhancement and limitation provisions of SB 42. 105 Accordingly, the first version of AB 476, introduced on February 10, 1977, amended all enhancements and limitations as well as numerous less important provisions. 106

The original version of AB 476, itself 73 pages long, was well received by judges and prosecutors, but was vehemently denounced by what was loosely referred to as the "liberal coalition." 107 This controversy heightened anxiety over the bill, since it meant that further compromises would have to be achieved in the few remaining months before the new law would become operative. The April 12 version of AB 476 108 reflected extensive negotiations with members of the Assembly Criminal Justice Committee. The San Diego District Attorney, leading a group of prosecutors, threatened to withdraw support for the bill, and particularly disliked the changes in sentencing procedures, prior prison terms, consecutive sentences and vicarious liability for weapons enhancements. 109 After meetings with the prosecutors, the Assembly leadership and the Governor’s Office, a number of these suggestions in compromise form were incorporated into the April 19 version. 110 Several last minute amendments in the Assembly were reflected in the May 2 version, and the Assembly passed the bill by an overwhelming majority after the Assembly Criminal Justice Committee obtained a commitment from the author of the bill that no changes would be accepted in the Senate.

Piqued by this commitment, the Senate Judiciary Committee on June 6, 1977, accepted wholesale amendments from any and all comers to "toughen" the bill, 111 much to the surprise and chagrin of even some law enforcement representatives. That version not only drastically amended additional terms for arming with or use of weapons, causing personal injuries, prior criminal history and consecutive sentences, but also substantially increased base ranges for many crimes, and was obviously unacceptable to the Assembly. In a panic caused by the fact that the new law’s operative date was only three weeks away, law enforcement groups and the

105 See CAL. DEPT OF CORRECTIONS, APPLICATION OF UNIFORM DETERMINATE SENTENCING ACT TO SEVEN OFFENSE GROUPS (Jan. 1977). For an explanation of the new terminology, see text accompanying notes 134-150, infra.

106 Introduction of the bill was referred to by the drafters of SB 42 as law and order politics violating "prior commitments and the integrity of the negotiating table." See Parnas, A Case for Fixed Prison Terms, Sacramento Bee, Mar. 27, 1977, §Forum, at 1, col. 1.

107 This included such groups as the State Public Defender’s Office, the Prisoner’s Union, the A.C.L.U. of Northern California, the California Attorneys for Criminal Justice, and various prisoner’s rights groups.

108 The March 17 version of AB 476 contained primarily the Legislative Counsel’s clean-up of provisions missed in the first version.


111 The magnitude of the changes accepted by the Committee indicate the truly "wholesale" nature of the amendments.
Governor's Office pursuaded the Senate Judiciary Committee to rescind most of the amendments on June 14, 1977.112

AB 476 moved through seven versions in a little over four months and was put in final form on June 24, 1977.113 By sheer number, the bulk of its changes were technical, picking up forgotten penalties,114 changing agency names,115 and repealing outdated sections.116 As will be discussed in more detail below, however, key changes were made in sentencing117 and in retroactive calculations118 aimed at giving greater time in prison to the multiple, violent offender. As to sentencing, more discretion was given to the trial judge in the sentencing hearing.119 Provisions for prior prison terms,120 arming with or use of weapons,121 causing bodily injury122 and consecutive sentences123 were clarified or expanded in scope, and the provisions limiting prison terms were decimated.124 In parole, a badly drafted interface between the Department of Corrections and district attorneys on the matter of in-prison crimes was clarified,125 and a longer total period of parole supervision was made possible subsequent to a revocation of parole.126 In retroactivity, a more realistic time frame was created for hearing the cases of more serious offenders subject to increased time under Penal Code Section 1170.2(b). Under AB 476, the result was by no means a simple system, but those who chafe under the ambiguities in the newly amended law might, for perspective, contemplate the final version of SB 42.127

One of the unappealing quirks of AB 476 resulted from its passage as urgency legislation. The bill was signed by the Governor on June 29, 1977, and made operative July 1, 1977.128

As urgency legislation, a two-thirds vote had been required for its passage, thus assuring that the bill represented a reasonable consensus of the legislature.129 A six-month delay to allow a more leisurely implementation of the drastically complex new provisions was rejected, as subsequent changes could then have been made by the usual majority vote. Courts,
attorneys and the agencies involved therefore entered this new era scrambling for copies of the final version of the new law. Initiating the widely anticipated flood of litigation over the new law, two suits out of San Diego and Fresno attacked the constitutionality of the entire retroactivity provision of the new law as violating the separation of powers.\textsuperscript{130} With this background, perhaps it is now time to discuss what the determinate sentence law says.

**SUMMARY OF THE NEW LAW**

Before the specific provisions of the determinate sentence law are analyzed, it is first important to understand the new law as a whole. In this section we will address the scope of changes made by the determinate sentence law. This section will also provide an introduction to the terminology used in the new law, and a general overview of the new law’s organization. After the summary is presented, the article will discuss the theory of determinate sentencing and the manner in which prison terms are now calculated. The remainder of the article consists of a detailed discussion of each section of the new law. The discussion of each section will be divided into an *exposition* of the law and a *commentary* on the history, practical application, and potential problems of each section.

**A. Dispositions Not Affected**

In order to understand the scope of the new law, it is important to realize that not all provisions of the old law have been changed. For example, neither misdemeanor sentences nor alternative dispositions for felonies,\textsuperscript{131} such as probation, are directly affected by the new determinate sentencing scheme. The new law also does not affect the sentences for the most serious felonies, such as first degree murder.\textsuperscript{132} The sentences for these felonies remain life terms; however, new paroling procedures are provided for inmates convicted of these offenses.\textsuperscript{133}

One of the most notable changes engendered by the determinate sentence law is the requirement of computing prison terms. In this area, the mechanics become somewhat complex and it is important to understand the terminology that the new law introduces. A prison term under the new law is determined by adding the *base term* and any *enhancements* that are pleaded and proved.

**B. Base Terms**

Except for crimes with life terms\textsuperscript{134} and several others\textsuperscript{135} of little conse-

\textsuperscript{131} See text accompanying note 171, infra.
\textsuperscript{132} See text accompanying note 181, infra.
\textsuperscript{133} See text accompanying note 558, infra.
\textsuperscript{134} See text accompanying note 181, infra.
quence, all crimes punishable as a felony carry sentences of a determinate "range." Each range specifies three possible periods of incarceration. The judge must choose the middle term in the range as the base term unless circumstances in aggravation (upper term) or mitigation (lower term) are found to be true by a preponderance of the evidence and are stated on the record. Once the base term is chosen, enhancements may be added to arrive at the prison term that will actually be imposed.

C. Enhancements

For purposes of discussion, it is convenient to divide enhancements into two categories, specific and general. Specific enhancements are those specifically relating to the crime, such as use of weapons. General enhancements relate to other crimes committed by the offender for which the offender has served prior prison terms or will now serve consecutive sentences.

There are four specific enhancements which, if pleaded and proved, must be imposed by the judge unless circumstances in mitigation are found to be true and are stated on the record. These specific enhancements are imposed for: (1) arming with a firearm or use of a deadly weapon; (2) use of a firearm; (3) intentionally causing great bodily injury; and (4) causing great loss of property. There are two general enhancements. The first general enhancement, for prior prison terms actually served by the criminal, if pleaded and proved, must be added by the judge unless circumstances in mitigation are found to be true and are stated on the record. The second general enhancement

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135. An example of crimes still retaining the indeterminate sentence are the so-called year and a day crimes. See text accompanying note 182, infra.

136. The ranges are: 16 months, two or three years; two, three or four years; three, four or five years; and five, six or seven years.

137. See text accompanying note 235, infra.

138. CAL. PENAL CODE §12022. Anyone who personally possesses a firearm during the felony is liable for a one-year enhancement; anyone who personally uses any deadly or dangerous weapon during the crime is liable for a one-year enhancement.

139. CAL. PENAL CODE §12022.5. Anyone who personally uses a firearm during the felony is liable for a two-year enhancement.

140. CAL. PENAL CODE §12022.7. Anyone who personally inflicts great bodily injury on a victim during the felony is liable for a three-year enhancement. Great bodily injury is any significant or substantial physical injury. This enhancement does not apply to murder, manslaughter or assault under Penal Code §245.

141. CAL. PENAL CODE §12022.6. Anyone who takes, damages or destroys property worth more than $25,000 during the felony is liable for a one-year enhancement; anyone who takes, damages or destroys property worth more than $100,000 during the crime is liable for a two-year enhancement.

142. CAL. PENAL CODE §667.5. Anyone who was previously convicted of a felony for which a prior prison term was actually served is liable for a one-year or a three-year enhancement. The enhancement is three years if the present conviction is for a violent felony listed in Penal Code Section 667.5(c) and the offense that resulted in the prior prison term is also a listed violent felony. The listed violent felonies are: murder; voluntary manslaughter; mayhem; forcible rape; forcible sodomy; forcible oral copulation; lewd acts on a child; any felony with a life sentence; any felony with great bodily injury; and any felony with use of a firearm. If there were more than ten years between release from prison on the prior prison term and the date the new crime was committed, and no felonies were committed during that ten years, the prior
results from consecutive sentences which may be imposed at the discretion of the court. If a consecutive sentence is imposed for multiple crimes, the reasons must be stated in the record.

D. Limitations

There are several limitations on the use of enhancements to increase the base term. In general, the same fact used to add an enhancement cannot also be used to impose an upper base term, and the enhancements for arming with or use of weapons or for causing great bodily injury do not apply if the facts justifying the enhancement are an element of the underlying offense. There are also three additional limitations. First, there is a five-year limitation on total enhancements for consecutive nonviolent offenses imposed by Penal Code Section 1170.1(a). Second, there is a “double the base term” limitation imposed by Penal Code Section 1170.1(f). The total term cannot exceed twice the base term unless the crime is a violent one, or there is a specific enhancement, or a consecutive sentence is being imposed because the crime was committed while in prison or subject to recommitment for escape. Last, there is a “stacking enhancements” limitation imposed by Penal Code Section 1170.1(d). Only the largest enhancement for arming with or use of weapons or for causing great bodily injury shall be added if more than one of these enhancements is found to be true for the same crime.

E. Sentence Hearing

Under the determinate sentence law, the court now has a new and expanded role in the sentencing process. At the time set for sentencing,
many factors must be taken into consideration by the court to determine the length of the sentence to be imposed. The court: (1) receives any additional evidence if either side has filed a statement citing circumstances in aggravation or mitigation or if the court on its own motion wishes to hear further evidence; (2) decides whether to grant or deny probation; (3) if probation is to be granted, decides whether to suspend imposition of sentence or to suspend execution of sentence—the former will require that sufficient facts be set out in the record to allow a prison sentence to be later determined should probation be revoked; (4) if a prison sentence is to be imposed, stays punishment of any counts that would result in multiple punishment proscribed by Penal Code Section 654; (5) decides whether the upper, middle or lower term is to be imposed on the principal offense, and on any offense which will be concurrent; (6) imposes any specific enhancements that were pleaded and proved, or finds circumstances in mitigation that justify staying the enhancement; (7) imposes any enhancements for prior prison terms that have been pleaded and proved, or finds circumstances in mitigation that justify staying the enhancement; (8) imposes any consecutive sentence, giving the reasons for doing so; (9) applies any limitations on enhancements, staying any punishment that exceeds the limits; and (10) advises the defendant that he is subject to release on parole after completion of the prison term.

F. Good-Time Credits

All determinate sentences can be reduced by one-third as a result of good-time credits. These include credit for refraining from specified misbehavior, and credit for participating in prison work or prison programs. These credits may be denied or taken away in specified amounts under specified procedures.

G. Community Release Board

The Community Release Board, a new parole board, is created to consider parole for life prisoners, to review each determinate sentence for disparity, to revoke parole, and to apply the new law retroactively. It will also perform additional functions regarding review of the length and condi-

152. See Cal. Penal Code §1203. The discretionary power to grant or deny probation remains as one of the court's few remaining means of treating offenders individually. Even that power has been restricted in recent legislative sessions. See, e.g., Cal. Penal Code §§1203.06, 1203.07, 1203.11.
tions of parole and denial of good-time credits by the Department of Corrections.

H. Parole

Release from prison is mandatory (after reduction for good-time credits) for determinately sentenced prisoners, but discretionary with the Community Release Board, for life prisoners. New procedures are provided to guide the Community Release Board in considering and reviewing parole for life prisoners.

Once released, determinately sentenced prisoners must serve one year on parole, unless waived or shortened by the Community Release Board. Life prisoners must serve three years on parole, unless waived or shortened by the Community Release Board.

Reincarceration after revocation of parole by the Community Release Board is limited to six months, and time spent in custody for revocation of parole does not count toward the period of parole.

I. Retroactivity

The Community Release Board is to apply the new law retroactively to all prisoners and parolees who committed their crimes before July 1, 1977. Penal Code Section 1170.2 provides a mechanical method for calculating the retroactive sentence, but allows the Board to conduct a hearing with counsel and impose a longer sentence than that which would be imposed under the mechanical calculation. Regardless of the retroactive sentence imposed, the prisoner is entitled to the benefits of the old law, including the procedures previously in effect and parole dates set. The prisoner will be released on the earlier of the retroactive term or the parole date set under the indeterminate sentence law procedures.

This summary gives the reader an overview of a system that is tremendously complex. With this general picture in mind, we will now begin to explore some of that complexity.

158. See CAL. PENAL CODE §3000(a).
159. See CAL. PENAL CODE §3040.
161. See CAL. PENAL CODE §3000(a).
162. CAL. PENAL CODE §3000(b).
163. CAL. PENAL CODE §3057.
164. CAL. PENAL CODE §3000(d). A maximum of 18 months or four years, however, is provided for determinately sentenced prisoners and life prisoners, respectively, regardless of the number of times parole is revoked.
165. CAL. PENAL CODE §1170.2.
166. CAL. PENAL CODE §1170.2(b).
167. CAL. PENAL CODE §1170.2(c).
168. See generally CAL. PENAL CODE §1170.2(a)-(c).
NEW THEORY AND TERMS OF IMPRISONMENT

A. Theory

Exposition

Penal Code Section 1170(a)(1)\(^{169}\) states: "The Legislature finds and declares that the purpose of imprisonment for crime is punishment." The wording is crucial, for the law also indicates that dispositions other than prison, such as probation, are not directly affected by the new law.\(^{170}\) This suggests that the judge retains his options for probation, narcotics commitments, Youth Authority commitments, and mentally disordered sex offender commitments in much the same statutory form as they existed before, although the indirect effects of the new law on these alternatives may be serious.\(^{171}\) Despite the legislature's declaration that the purpose of imprisonment is punishment, Rule 410 of the California Rules of Court\(^{172}\) retains as the general objectives of alternatives to prison the protection of society, deterrence, isolation of the offender, uniformity of sentencing, punishment, and "[e]ncouraging the defendant to lead a law abiding life in the future and deterring him from future offenses."\(^{173}\) The now taboo word "rehabilitation" has been dropped from the lexicon of sentencing language, even though the concept apparently remains a goal.

Commentary

While adopting punishment as the goal of the prison system may seem harsh, it is celebrated as the final destruction of the so-called "medical

\(^{169}\) As we commence to summarize the new law, we will cite to code sections rather than bill numbers. When reference is made to earlier forms of the new law, the bill number, amendment date, section and page number, and amended code section will be used.

\(^{170}\) CAL. PENAL CODE §1170(a)(2). Sections prohibiting probation also remain in full effect. See, e.g., CAL. HEALTH & SAFETY CODE §11370; CAL. PENAL CODE §§1203.06, 1203.07, 1203.11.

\(^{171}\) See generally Allen, Reflections on SB 42, 13 SANTA CLARA B. ASS'N J. 36 (1977). A variety of cases, statutes and rules have limited "non-penal" commitments to state institutions following conviction in criminal proceedings to the amount of time which might be served had a prison sentence been imposed. Time to be served is limited to the maximum prison term which could have been imposed in felony proceedings. CAL. WELF. & INST. CODE §§8726, 731 (Youth Authority commitment), 6316.1 (mentally disordered sex offender proceedings). See also In re Anderson, 73 Cal. App. 3d 38, 140 Cal. Rptr. 546 (1977) (mentally disordered sex offenders); In re Moye, 74 Cal. App. 3d 622, 141 Cal. Rptr. 608 (1977) (commitment to state hospital after finding of not guilty by reason of insanity); In re Samuel C., 74 Cal. App. 3d 351, 141 Cal. Rptr. 431 (1977) (Youth Authority commitment); CAL. RULES OF COURT, tit. 2, div. I-A, rules 453, 1373. No similar provisions have yet been adopted governing commitments of narcotic addicts to the California Rehabilitation Center. These provisions raise numerous questions about what is to be included in the maximum term of commitment. For example, is the maximum to be simply the total time an adult felon could be subject to the jurisdiction of the state, including the period of parole, good-time credits, and any revocation of parole? Or is each limit to be applied to the analogous provision for juveniles and mentally disordered sex offenders? Will prosecutors have to change their charging practices in juvenile court in order to plead the basic facts which might support an enhancement? In short, the indirect effects of the new law on these collateral proceedings are so extensive that another article would be required to discuss them.

\(^{172}\) CAL. RULES OF COURT, tit. 2, div. I-A, rule 410(c).

\(^{173}\) CAL. RULES OF COURT, tit. 2, div. I-A, rule 410(c).
The new system treats the crime as a free, volitional act. The "new" theory did not clearly appear in the new law, however, until 1976—the present wording was formulated in the last month before final passage of SB 42. This shift in theory has created a semantic problem in the new law. Under the indeterminate sentence law, a "term" included the total time the state had jurisdiction over the prisoner. The parole date was the date of release from actual custody, but the balance of the "term" was to be served on parole. Under the new law, the prisoner must be released upon expiration of his "term" less good-time credits, with parole acting simply as a variable period of supervision after the end of the term. Parole is no longer service of the term. AB 476 attempted to deal with this problem by defining a "sentence" to include the period of parole. Thus, the former concept of "term" becomes the "sentence" under the new law. "Term" now means the period of actual confinement prior to release on parole.

B. New Penalties

Exposition

For most felons, the base term will be chosen from one of four specific tripartite sentence ranges, which are: 16 months, two or three years; two, three or four years; three, four or five years; or five, six or seven years. Two other types of sentences, however, do remain possible; specifically,

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175. The theoretical shift in the new law was discussed at some length at a June 2-3, 1977, conference in Berkeley, California, at Boalt Hall entitled Determinate Sentencing and co-sponsored by the Earl Warren Legal Institute and the National Institute of Law Enforcement and Criminal Justice. Participants from many parts of the nation attended and presented scholarly papers (copy of report on file at Pacific Law Journal).
176. SB 42, 1975-76 Regular Session, as amended, Apr. 22, 1976, §273, at 126; SB 42, 1975-76 Regular Session, as amended, Aug. 2, 1976, §273, at 121. An interesting last minute battle was fought over the new theory's scope, for in a very early version of AB 476 a line was inserted stating: "This declaration applies to persons sentenced under this section or Section 1168." AB 476, 1977-78 Regular Session, as amended, Apr. 12, 1977, §15, at 17. The declaration referred both to punishment and to achieving punishment by terms proportionate to the seriousness of the offense. This promised to create great confusion as to what information could be considered in the parole of life-termers. For determinate sentences, a parole date is computed by calculating good-time credits to account for in-prison conduct; but for life sentences, no such precise computation is made. See CAL. PENAL CODE §3041. Relating a "punishment for the crime" theory to those serving life terms as well as to determinately sentenced inmates would have further confused the question of how great an effect in-prison conduct and rehabilitation should play in setting parole for a person serving a life term. The sentence was deleted by amendment, however, on June 24, 1977. AB 476, 1977-78 Regular Session, as amended, June 24, 1977, §15, at 15. See text accompanying note 577, infra.
177. CAL. PENAL CODE §§2930-2932, 3000.
178. CAL. PENAL CODE §3000.
179. The new terminology is probably more consistent with most people's understanding of a prison "term," that is, the amount of time spent in prison. But the new terminology will likely lead to litigation. For example, Penal Code Section 1203.03(g) formerly credited both in-patient and out-patient time spent at the California Rehabilitation Center (CRC) to the "term" (which included both prison and parole time). New Section 1203.03(g) credits only in-patient time to the new "term." Narcotic addicts who spent time at CRC before July 1, 1977, and who are excluded from CRC will surely attempt to have out-patient time credited to their new prison "term" which now encompasses prison time only.
180. CAL. PENAL CODE §1170(a)(2). It should be noted that the four enumerated ranges are not all inclusive as there may be other specifications of tripartite sentence ranges.
life (with or without possibility of parole) and indeterminate sentences. A life sentence is imposed for six crimes—first degree murder, kidnap for ransom, trainwrecking, assault by a life prisoner, sabotage and injury by explosives.181 One should also be aware that indeterminate sentences of one year-one day have been retained for a few low-grade felonies for purposes such as ease of extradition.182 An indeterminate sentence is imposed for the "term prescribed by law" pursuant to Penal Code Section 1168(b).

Commentary

The sentences as they now appear remained relatively stable throughout the development of SB 42, though there was some shifting downward. For example, penalties for such common offenses as robbery, burglary, or various sex offenses drifted downward prior to the passage of SB 42.183 Some of this appears to have involved altering the term for the substantive offense in light of enhancement sections that add separate additional penalties, so that the typical overall sentence was not actually reduced. In any event, the drift was not substantial, involving a slip of only one range, approximately one year.

Under the new law, the defendant is sentenced under one of the existing three-choice ranges "or for any other specification of three time periods."184 Any attempt to increase dramatically the range for a particular offense could be expected to run into serious constitutional challenge under In re Lynch,185 not so much for excessive time but because such an increase would destroy its relationship to penalties for other crimes. Uniformity of sentences among offenders committing the same offense under similar circumstances is now a part of the statute's basic fabric.186 If forcible rape were suddenly increased by the legislature to 10, 20, or 30 years while other

182. See, e.g., Cal. Penal Code §§270 (failure to provide for children), 502.7(f) (defrauding telephone company), 597.5 (dog fighting). AB 476 attempted to make these crimes either misdemeanors or felonies with terms in the 16 month, two or three year range, but such a howl of protest resulted from either solution that the present anomalous structure was retained. There may be other felonies in this indeterminate category whose indeterminate sentences were not caught in SB 42 or AB 476, especially crimes amended during the 1977 Session, but the authors are aware of only two. These are found in Cal. Penal Code §4011.7 and Cal. Civ. Code §1916-3.


forms of rape or child molestation remained at three, four or five years, the reasonable relationship with other comparable crimes required by In re Lynch would be destroyed.

Comment is also in order concerning conflicting predictions that under the new ranges, more felons will go to prison for more time, versus predictions that SB 42 is a legal, mass jail break. So many factors affect the length of terms under the new law’s radically changed sentencing structure that only future experience can provide any definitive answers. Despite this, much speculation has been engaged in. Some have argued that to choose medians under the old law as maximums under the new law benefits only the hardened offender who upon release will immediately reoffend, sending the crime rate soaring. Furthermore, it is argued that less time will be served since those medians are further reduced by good time credits. Others have pointed out that, ironically, the elimination of low minimum eligible parole dates will mean that the less serious offenders will serve more time. Further, should notoriety attend particular crimes, future legislative action is another unpredictable factor, since a set of higher ranges could be enacted. The reaction of district attorneys, judges, and public defenders to charging and plea bargaining (now virtually sentence bargaining) under the new system is hard to predict. Some penalties do seem higher. Enhancement provisions, freed of many limitations by AB 476, may add substantial actual time for the multiple, violent offender. Finally, the enhancement for large losses of property is not merely an expansion of former law, but totally new. Conclusive predictions at this time are simply not possible.

With all these qualifications in mind, only a few hesitant, educated guesses can be made. First, it is almost certain that the total range of time to be served for any given crime will be dramatically compressed. For example, of all releases under the indeterminate sentence law during the period from 1970 through 1975, for male felons convicted of second degree murder, one felon had served only 19 months, while another had served 321

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188. One of the better analyses of this problem is found in Comment, Senate Bill 42 and the Myth of Shortened Sentences for California Offenders: The Effects of the Uniform Determinate Sentencing Act, 14 SAN DIEGO L. REV. 1176 (1977).
189. Compare CAL. PENAL CODE §664 (penalty of five, six or seven years for attempt) with CAL. STATS. 1953, c. 713, §1, at 1983. Although the term appears to be reduced, we predict that actual time served under this statute will increase.
192. One ludicrous note is struck by CAL. PENAL CODE §1170(a)(2), which provides that if the inmate’s preimprisonment credit, from time in county jail awaiting trial, exceeds his term, he need not even be delivered to the Department of Corrections. His conviction will, however, be considered a prior term. CAL. PENAL CODE §1170(a)(2).
months. Various predictions about practices under the new law for the same offense vary from 48 to 104 months.\(^9\) Thus, even if median times served remained the same, the upper and lower ends of the range will tend to shift significantly toward the middle.

Second, it seems likely that whether more or less time is served on the average depends upon the extent to which good-time credits are earned or lost. If all credits over the entire term are earned by every prisoner, median times will probably fall by about three months. If no credits are earned by any prisoner, median times will probably increase by the same amount. And since it seems likely that virtually all good-time credits will be earned by most prisoners, the new medians may drop slightly.

Third, some judges have expressed the opinion to the authors that they are now more likely to send marginal offenders to prison. Their attitude in the past was to favor probation, since the high maximum terms under indeterminate sentencing created the fear that the Adult Authority might actually keep a marginal offender for an extended time. Now that a property offender can be sent to prison for 16 months, which with good-time credits is about 10 2/3 months in prison, courts may use the prison sentence instead of a "bullet" in county jail (12 months in county jail as a condition of probation) so frequently used now. The actual time served would be about the same in either case, after being reduced by the good-time credits that can be earned under either the county jail sentence\(^1\) or the prison term,\(^2\) but the state prison sentence is at state instead of county expense.

C. New Crime Definitions

**Exposition**

Some crime definitions have been altered by the new law's pattern of separating the penalty for the substantive offense from the penalty for certain factors aggravating the crime or that offender's commission of it. Some offenses have therefore been changed by extracting from their definition the elements of being armed with a deadly weapon, using a firearm, or causing great bodily injury. There is no longer, for example, first degree robbery, only robbery with potential enhancements for the involvement of weapons in the crime.\(^3\) Rape, robbery and burglary with great bodily injury have become simply rape, robbery or burglary, with a potential separate enhancement.\(^4\) Penal Code Section 209 formerly imposed life imprisonment without possibility of parole for kidnapping for ransom or robbery if injury was inflicted. Now kidnapping for robbery has a life term with possibility of parole, regardless of injury under Section 209.

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193. See note 93, supra.
As to the offender himself, his prior history is also handled differently. Rather than including an increased penalty for prior crimes within various code sections, this factor is embodied in a single section.\(^{198}\) The impact of this change may be seen in the repeal of: (1) increased narcotics terms where prior similar convictions were involved;\(^{199}\) (2) Penal Code Section 3024’s scheme for minimum terms; (3) the habitual criminal statute;\(^{200}\) and (4) petty theft with a prior felony conviction.\(^{201}\)

**Commentary**

While we have become accustomed to certain definitions of crimes, it would be well to reread them carefully under the new law, for even the general pattern of change discussed above is not uniform. Special penalties remain, for example, for battery with *serious* bodily injury.\(^{202}\) Attempted robbery, along with other special attempt crimes,\(^{203}\) has retained a penalty\(^{204}\) different from most attempted crimes. Some of these theoretically consistent changes did not come about smoothly.\(^{205}\)

Early versions of SB 42 would have given prosecutors greater capability to handle the career criminal. Originally, the habitual criminal statute was retained\(^{206}\) and the bill further created a separate provision for the continued incarceration of inmates “physically dangerous to the public.”\(^{207}\) The proposed Penal Code Sections 1172.1 to 1172.8 would have allowed retention of those “dangerous” prisoners for two years at a time after application to the committing court, a hearing, and in some cases, a jury trial. This proposal was an obvious alternative to other civil commitment provisions

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198. **CAL. PENAL CODE** §667.5.

199. See **CAL. HEALTH & SAFETY CODE** §§11350, 11351, 11352, 11353, 11354, 11355, 11357, 11360, 11361, 11363, 11366, 11368, 11371, 11372, 11377, 11378, 11379, 11380, 11382, 11383. For example, compare **CAL. STATS.** 1975, c. 1087, §§1-3, at 2647-50 with **CAL. HEALTH & SAFETY CODE** §§11350-11352.

200. **CAL. STATS.** 1976, c. 1139, §261.5, at —.

201. **CAL. PENAL CODE** §667. Eight days after this repeal became operative, however, most of what was in Section 667 was incorporated into Section 666. **CAL. STATS.** 1977, c. 296, at —. Compare **CAL. STATS.** 1963, c. 1905, §1, at 3896 (petty theft, with prior felony or petty theft conviction, punishable by one to five years imprisonment) and **CAL. STATS.** 1976, c. 1139, §267, at — (repeal thereof) with **CAL. STATS.** 1976, c. 1139, §266, at — (incorporating most of repealed elements into another still effective statute). This incredible legislative history leads one to wonder whether petty thieves with prior criminal records are worth the effort.

202. **CAL. PENAL CODE** §243. The definition of serious bodily injury in Section 243 sounds very much like that of great bodily injury in Section 12022.7.

203. See **CAL. ADM. CODE** §2166.

204. **CAL. PENAL CODE** §213 (refer to Penal Code Section 18 for punishment where statute only provides for imprisonment in state prison); cf. **CAL. PENAL CODE** §12310 (great bodily injury is still an element of the offense covered by this explosives statute).

205. For example, the new law generally deletes prior felony convictions from the definitions of various substantive crimes, but a few anomalies remain. Petty theft with a prior conviction for petty theft, grand theft, burglary or larceny remains punishable as a felony. **CAL. PENAL CODE** §666. Litigation over this section seems likely, since amendments to the section were not signed by the Governor until after the new law went into effect. **CAL. STATS.** 1977, c. 296, §1, at —. In another example, Penal Code Section 647(a) still punishes child molesting as a felony only if the defendant has previously been convicted of violating Section 288.

206. **CAL. STATS.** 1976, c. 1139, §261.5, at —.

inadequate for the restraint of such criminals. The extended incarceration provision and the habitual criminal statute were, however, swept away in the August 1975 attempt to get SB 42 through the Assembly Committee on Criminal Justice. The rationale for deleting the habitual and dangerous criminal provisions may have been that enhancements for prior prison terms could handle the career criminal. Limitation sections, otherwise curbing maximum time that could be given, did contain exceptions for certain offenses based upon their nature or the manner of their commission. Minimizing even further the effect of these limitations on repeat offenders was a priority of the authors of AB 476. The extended confinement of dangerous criminals was a vestige of indeterminacy and presumed rehabilitative concepts not in tune with the new law. Nevertheless, we may yet see mentally disordered violent offender bills or career criminal bills bringing back a limited version of the indeterminate sentence, as it were, through the back door.

The maneuvering over the reduction in penalty for kidnapping for the purpose of robbery under Penal Code Section 209 provides another interesting sidelight. This reduction was from life without possibility of parole to life with possibility of parole in cases in which the victim is harmed. The reduction in penalty was controversial, and the drafters were afraid that expressly making the reduced penalty retroactive to offenders currently in prison would endanger SB 42. Accordingly, they attempted to make it retroactive through indirect means. Instead of flatly stating in the section itself that it was retroactive, Section 1170.2(g) was added to the code, stating that "[i]n the case of any inmate sentenced . . . prior to the effective date of this section, who would have been sentenced under Section 1168 after the effective date of this section, the Community Release Board shall provide for release from prison as provided for by this code." After a great deal of head-scratching, one can conclude that the sole purpose of this mysterious language is to make the changes in Section 209 fully retroactive, and the drafters have indicated that that was indeed their intent. Upon advice

208. For example, the Lanterman-Petris-Short Act allows establishment of a conservatorship for those who are "gravely disabled." CAL. WELF. & INST. CODE §§5350-5371. At the expiration of the 14-day period of intensive treatment, those who can care for themselves, but who are "imminently dangerous" may be incarcerated for 90 days. CAL. WELF. & INST. CODE §5300. This may presumably be repeated every 90 days if the requisite overt threat or violent act is repeated. See CAL. WELF. & INST. CODE §5300. Several proposals to allow incarceration and treatment of the mentally disordered violent offender are pending before the legislature. See note 212, infra.


210. CAL. STATS. 1976, c. 1139, §273, at —.


213. This reduction was one of Assemblyman Torres' demands during the spring and
of the Attorney General, the Community Release Board is applying the reduced penalty retroactively.\textsuperscript{214}

D. New Community Release Board

Exposition

The Adult Authority and the Women’s Board of Terms and Paroles are replaced with a nine-member Community Release Board [hereinafter referred to as the CRB].\textsuperscript{215} These members are appointed by the Governor with the advice and consent of the Senate to staggered four-year terms. Initially, the CRB will include two members of the Adult Authority and two from the Women’s Board. Ultimately the CRB is to reflect “as nearly as possible a cross-section of the racial, sexual, economic, and geographic features of the population of the state.”\textsuperscript{216}

The business of the new CRB will be conducted in panels of three with a majority vote required upon any decision. The panel must include a majority of full CRB members (gubernatorial appointees) if the decision to be made involves the parole of an inmate serving a life sentence or the recommendation that a disparate sentence be recalled.\textsuperscript{217} CRB hearing officers (civil service employees) may otherwise be used to hear cases and may make decisions within policies enunciated by a majority of the total Community Release Board membership.\textsuperscript{218}

Commentary

The “reform” provision creating this new paroling agency reeks with irony. One criticism of the old Adult Authority was that it was capricious, arbitrary, and subject to the political pressures of the hour. Yet the new CRB is to represent racial, sexual and other aspects of the population without a word about competence or independence. Even the old law required minimal qualifications for membership, yet there appears to have been no attempt to include requirements of competence in law, sociology, psychology, or other disciplines under the new law. From the outset the quibble was whether to say “racial, sexual, economic, and geographic” or whether to simply say “demographic” features of the citizenry.\textsuperscript{219} It is probably naive

\begin{footnotes}
\item[215] This was originally to be called the Men’s Parole Board, but the drafters of SB 42 unfortunately opted for this inaccurate euphemism. Perhaps it was felt that use of a simple name such as the “California Parole Board” would have been inconsistent with a system that calls prisons a “men’s colony” or a “conservation center.” See Cal. Penal Code §§5075-5082.
\item[216] Cal. Penal Code §5075.
\item[217] Unfortunately, the cross-reference in Cal. Penal Code §5076.1 to recall provisions in Cal. Penal Code §1170 is partially incorrect. The reference is to (c) and (f), but (c) says nothing about recall and subsection (d) of Section 1170 is obviously intended to be the reference instead of subsection (c).
\item[218] Cal. Penal Code §5076.1.
\item[219] Compare SB 42, 1975-76 Regular Session, as amended, Mar. 4, 1975, §294, at 148 (delineating racial, sexual, economic, and geographic features) with SB 42, 1975-76 Regular
\end{footnotes}
to expect that politics, in the broader sense, plays no role in the sentencing process, which is essentially a moral, societal judgment. It is perhaps impossible to guarantee competence and independence, and to exclude "political influence." But if the drafters of the new law were attempting to ensure qualified appointments to the CRB and to minimize political influence, it is hard to see how these concerns are reflected in the final product. There is no institutionalized attempt to avoid the problems of the Adult Authority so long inveighed against.

Whatever the Board's composition, one problem involves distinguishing the duties of full members from the duties of representatives of the CRB. This has been a troublesome problem since the the passage of SB 42, which itself simply specified, "The board may employ representatives to whom it may assign appropriate duties not restricted only to members by law." It then never said what those duties might be and key duties seemed to require full member action since Penal Code Section 5076.1 restricted panels to three members. As this ambiguity may well have caused thousands of invalid hearings before courts interpreted panel requirements, the correction of this section was in the first version of AB 476. The ability of representatives to hear and decide cases, as they had in the past, was restored after having been severely limited in SB 42; member participation, however, was required for decisions such as granting parole to life-termers or recommending a recall of sentence.

Finally, it is interesting to note that while the CRB has less total power than its predecessor, its function still looms large. Aside from its control of parole for inmates serving life terms and its new powers to review judicial sentences for disparities, it sets parole conditions for all inmates and has full power to suspend, revoke, and return parolees to prison. It is the administrative body of last resort in appealing from Department of Corrections' denial of good-time credit, or the setting of parole length or conditions. Also, it retains the Adult Authority's relationship to the Department of Corrections on matters of mutual concern. Of course, for a time there will
be transitional duties in applying the new law to those sentenced under the old law. 226 What has been eliminated is the power to parole or fix terms for most inmates who in the future will be under determinate sentences. Determinately sentenced inmates sent to prison for crimes committed after July 1, 1977, will not be released on their court term, less good-time credits, and the parole board will not be able to release them on parole earlier. Their terms will be set by the sentencing court and their parole dates will be mechanically computed by the Department of Corrections. It is to that term-setting by the court that we now turn.

NEW SENTENCING STRUCTURE

Most sentencing under the new law will be determinate and will require the following: (1) a determination of the base term; (2) the addition of applicable enhancements 227 to the base term; and (3) a determination whether any limitations affect the ultimate figure computed as the inmate’s final term. The legislature has declared that the punitive purpose of imprisonment

is best served 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 . . . [and] that the elimination of disparity . . . of sentences can best be achieved by determinate sentences fixed by statute in proportion to the seriousness of the offense as determined by the Legislature to be imposed by the court with specified discretion. 228

In other words, the legislature is taking over criminal sentencing and the discretion of the executive and judicial branches is accordingly circumscribed.

A. Finding the Base Term

Exposition

The judge will undertake the prison term calculation only after considering and rejecting other alternatives 229 such as probation 230 or diagnostic referral. 231 If the judge decides to grant straight probation, suspending even the imposition of sentence, then he will be free of the need to specify a

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227. The drafters of SB 42 exhibited a true sense of gallows humor by use of the word “enhancement.” Serious thought was given to changing it in AB 476, but it was felt that the word had gained such currency that it was already too late.
229. These alternatives include commitment to: the Youth Authority from adult court, Cal. Welf. & Inst. Code §1731.5; the California Rehabilitation Center as a narcotic addict, Cal. Welf. & Inst. Code §§3050-3051; a state hospital as a mentally disordered sex offender, Cal. Welf. & Inst. Code §6302.
230. See, e.g., Cal. Penal Code §§1203, 1203.06, 1203.07, 1203.11.
231. Cal. Penal Code §1203.03(g). The judge should be aware, however, that while preprison credit is earned for time spent on a Section 1203.03 referral, good-time credits under Penal Code Section 1203.03 will not accrue during that time. See Cal. Penal Code §2931(a).
1978 / Determinate Sentencing

term. Once the judge decides to impose a sentence, whether or not execution of the sentence is suspended, the computation of the sentence is now complicated by a miriad of new rules and criteria. The Penal Code now provides that "[i]n sentencing the convicted person, the court shall apply the sentencing rules of the Judicial Council." Rules now exist setting forth the general objectives of sentencing, the criteria affecting probation vel non, and the criteria affecting probation in unusual cases.

In determining the sentence to be imposed, the court's discretion is now circumscribed by the requirement that the middle term within the applicable three term range be imposed, unless there are "circumstances in aggravation or mitigation of the crime." A finding of aggravated circumstances permits the imposition of the upper term and, conversely, a finding of mitigated circumstances permits the imposition of the lower term. Apparently the court may find these circumstances on its own motion after considering the ever present Judicial Council Rules on the subject, and reviewing the record in the case, the probation report, and any Section 1203.03 reports. Further, both the prosecution and the defense may submit a document called a "statement in aggravation or mitigation" to dispute facts otherwise presented or to present additional facts. This statement must be submitted at least four days prior to sentencing, and at the sentencing hearing further evidence may be provided. Finally, after following all these criteria, reviewing all this material, and entertaining statements and hearings, the court must, before imposing sentence, consider various provisions in the new law that will affect the overall length of the term. For instance, the court may not use the same fact both to set the upper term and to enhance the length of that term under one of the six enhancement sections. Given ranges of only one year off the middle term for the crime itself, but enhancements as high as three or even five years, the decision to use a fact either to impose the upper term or to add an enhance-

235. CAL. PENAL CODE §1170(b).
236. CAL. PENAL CODE §1170(b).
238. CAL. PENAL CODE §1170(b).
240. CAL. PENAL CODE §1170(b).
ment can be just as critical as the decision to strike an enhancement or to give consecutive or concurrent sentences.

Commentary

The basic sentencing provision, Penal Code section 1170, was subjected to constant change throughout the development of both SB 42 and AB 476. Initially, the judge retained discretion to choose any term in the range. He was simply to consider the Judicial Council Rules and state the reasons for his choice. These generous provisions were eliminated in the August 1975 push to try to get SB 42 through the legislature that year and the judge was required to choose the middle range unless one of the parties "moved to aggravate" or "mitigate." Limiting the court's choice of terms and depriving the judge of the ability to set a higher or lower term on his own motion was a point of controversy in the final version of SB 42. Other changes to the basic sentencing section as SB 42 evolved dealt with: (1) the timing of the motion to mitigate or aggravate, whether before or at the sentencing hearing; (2) what information the judge could consider when ruling on such a motion; and (3) the weight to be given to Judicial Council guidelines. Under the final version of SB 42, at least five major problems remained: (1) the judge's hands were tied should the prosecution and defense agree not to make motions in mitigation or aggravation; (2) it was unclear whether the probation report and other hearsay material was properly considered in deciding which term to choose; (3) it was unclear whether evidence of past conduct could be considered, as opposed to only evidence directly relating to the crime; (4) the bill's reference to "trial judge" raised a serious problem as to who could sentence where plea, or trial and sentencing were bifurcated (such as upon revocation of probation) and different judges participated in guilt and sentencing phases; and (5) the bill contained a prohibition against dual use of facts that provoked serious questions.

AB 476 immediately restored the judge's ability to find circumstances in aggravation or mitigation on his own motion, thus enabling him to impose an upper or lower term even if the prosecution and defense failed to make

246. See CAL. STATS. 1976, c. 1139, §273, at —.
248. See CAL. STATS. 1976, c. 1139, §273, at —. An addition made in August 1976 stated: "In no event shall any fact be used twice to determine, aggravate, or enhance a sentence." SB 42, 1975-76 Regular Session, as amended, Aug. 2, 1976, §273, at 123. Did this include using a fact to rule out probation? For example, if probation were denied because the rape victim had been tortured, did that preclude use of the torture facts to impose a great bodily injury enhancement? How could a record clearly show what facts were or were not used for all these purposes, even if it could make the simpler showing that a fact was not used both to enhance and set an upper term?
such motions. It broadened the specification for what material might be considered in mitigation or aggravation, required advance filing of statements in mitigation or aggravation, and wherever the statute referred to the trial court or trial judge, AB 476 substituted the word "court." 249

AB 476 also narrowed the broad prohibition against dual use of facts. 250 The problem, however, has not been entirely clarified. The law expressly allows dual use of facts in some instances. 251 It may implicitly allow the dual use of facts in other instances, such as where the enhancement 252 includes within its scope a wide range of conduct. For example, if the defendant not only brandishes but also fires the firearm, the question is raised whether the brandishing is a sufficient fact to support an enhancement under Penal Code Section 12022.5, and the firing is a sufficient fact to support imposition of an upper term. On the other hand, it is possible they are so closely related that they may support either an upper term or an enhancement, but not both. 253 Similar arguments could be made where the defendant not only injures but also tortures the victim. The problem of dual use of facts will remain a headache for some time to come.

Several interesting questions also remain in the choice of the base term. One is the evidentiary effect of the newly created "statement in mitigation or aggravation." 254 Is this really a motion, an argument of counsel drawing attention to, but not itself constituting, evidence as contended by the Judicial Council Rules? 255 Or could a judge rely on allegations made in these statements, if he lacked any other evidence on the point? The Judicial Council repeatedly offered amendments during the last days of AB 476 trying to turn the "statement in aggravation or mitigation" into a motion procedure without evidentiary value. 256 After the proffered amendments were expressly rejected in the Assembly, in the Senate, and by the conference committee, the Judicial Council then adopted Rule 437, which clearly treats the "statement" as a motion and indicates that factual matters therein cannot be considered unless otherwise supported by competent evidence. The rather broad comment to this rule declares that it would be unconstitutional to do otherwise. The comment thereby either conflicts with a long line

250. CAL. PENAL CODE §1170(b).
251. CAL. PENAL CODE §§667.5(c)(8), 1170.1(d).
253. This problem is very similar to the one posed by Penal Code Section 654, for which there is presently no adequate answer. See note 379, infra and accompanying text.
254. CAL. PENAL CODE §1170(b).
256. Letter from James P. Corn, Assistant Director (Legislation) of the Judicial Council, to Assemblyman Boatwright, May 23, 1977; letter from James P. Corn to J. Anthony Kline, Governor’s Legal Affairs Secretary (with attachments) (June 21, 1977) (copies on file at Pacific Law Journal).
of cases that allow hearsay to be considered in sentencing, or concludes as a
matter of law that factual matters contained in the "statement" are unreliable.\textsuperscript{257} Resolution of this issue must await future litigation, but the question underlines a more general problem of the weight that will be given to the Judicial Council Rules where they diverge from or interpret the statute. For example, the legislature decided that courts \textit{shall apply}, not just consider, these rules.\textsuperscript{258} In the rules that must be applied, however, the Judicial Council declared at the outset that the rules are simply to be considered.\textsuperscript{259} It would seem that a rule could not directly contradict the statute, but clearly the courts will give great weight to the Council's interpretation of an ambiguous or vague statute.

Yet another unresolved issue as to basic sentencing involves the language "circumstances in aggravation or mitigation of the \textit{crime},"\textsuperscript{260} in Section 1170(b). It was contended by the "liberal coalition"\textsuperscript{261} that facts relating to the crime itself could be considered by the court, but facts relating to the defendant's background were excluded by the legislature's use of the word "crime." It was argued that had the legislature intended to include background, it would have said "punishment," as it did in the probation statutes.\textsuperscript{262} The first version of AB 476 attacked this problem by changing "crime" to "punishment," but a hasty retreat was made after the change was severely criticized during committee hearings on the amended bill.\textsuperscript{263} "Punishment" was changed back to "crime," despite an awareness of a proposed Judicial Council Rule that included the defendant's background as a circumstance in aggravation or mitigation of the crime.\textsuperscript{264} It can be argued that this sequence of events constitutes a "reverse" legislative intent. That is, having had the opportunity to change "crime" to "punishment," the legislature expressly intended to exclude consideration of the defendant's background when it rejected the word "punishment."

The current Judicial Council Rules reject this notion of reverse legislative intent in the factors they set forth in mitigation and aggravation.\textsuperscript{265} These factors deal not only with the crime but also with the offender's criminal history, his probation or parole status, his mental or physical state, his

\textsuperscript{257} The leading cases are cited in the comment as support for the rule. The comment overlooks the long accepted practice of submitting hearsay information through a defendant's presentence report authorized by Penal Code Section 1204.

\textsuperscript{258} \textsc{Cal. Penal Code} \S1170(a)(2).

\textsuperscript{259} \textsc{Cal. Rules of Court}, tit. 2, div. I-A, rules 408, 409.

\textsuperscript{260} \textsc{Cal. Penal Code} \S1170(b) (emphasis added).

\textsuperscript{261} See note 107, supra.

\textsuperscript{262} \textsc{See Cal. Penal Code} \S1203.


\textsuperscript{264} Judicial Council Rule 421(b), proposed at the time AB 476 was being considered by the legislature, was subsequently adopted by the Judicial Council, and allows consideration of "facts relating to the defendant." \textsc{Cal. Rules of Court}, tit. 2, div. I-A, rule 421(b).

acknowledgement of wrongdoing, and his restitution to the victim. Consideration of such factors may violate the guiding principle of uniform sentencing for the same offense under similar circumstances. It can be argued, however, that a sentence can justifiably be tailored to the individual since the individual offender and his background constitute part of the circumstances of the offense.

B. Adding Enhancements

Once the judge has considered Judicial Council guidelines, reviewed the evidence specified in Penal Code Section 1170, heard any statements in mitigation or aggravation, and finally made his choice of a base term for the substantive offense, he may make further findings that will result in an increase to the defendant's total term. The six means for increasing the term are called "enhancements" or "additional terms." It is important to note that, with the exception of consecutive sentencing, if the enhancements are pleaded and proved they must normally be imposed by the court. If the court decides to strike this additional time, it is the punishment, not the finding, that is stricken or stayed. Further, the court must state on the record the mitigating circumstances that justify this action. The provision making imposition of enhancements mandatory was a hotly contested matter in the development of SB 42, one that almost cost the support of the Attorney General. The result is clearly a compromise, emphasizing uniformity by generally requiring that the penalty be imposed but allowing for some judicial discretion in appropriate cases.

For purposes of discussion, it is convenient to divide enhancements into two categories, specific and general. Specific enhancements are those specifically relating to the crime, such as being armed with, or the use of, a weapon, causing great loss of property, or causing great bodily injury. General enhancements result from prior prison terms and the imposition of consecutive terms.

267. CAL. PENAL CODE §1170.1(a), (c).
269. The statute speaks of striking a mitigated enhancement, but it is unlikely that this language was intended to prevent staying the enhancement in lieu of striking it. We shall use the word "strike" in the sense of staying the punishment.
270. CAL. PENAL CODE §1170.1(g); see CAL. RULES OF COURT, tit. 2, div. I-A, rule 445. This procedure creates a presumptive enhancement, that is, one neither discretionary nor mandatory.
274. CAL. PENAL CODE §12022.7.
275. CAL. PENAL CODE §667.5.
1. Specific Enhancements

a. Penal Code Section 12022(a)(b)

Exposition

Penal Code Section 12022 now adds one year to the base term if the felon was armed with a firearm or personally used a deadly or dangerous weapon in the commission or attempted commission of the felony. Involvement of a firearm is so disapproved that merely being armed is sufficient for application of the enhancement. One need not be personally armed with the firearm, as any principal in the offense is subject to the enhancement. The enhancement for the use of a deadly or dangerous weapon, however, is only applied for personal use.

Section 12022, like other enhancement sections, specifies that the enhancement may not be added if such arming or such use is an element of the substantive offense for which the person was convicted. Thus, double punishment in the base term and the enhancement is avoided, just as Section 1170(b) generally avoids a double punishment that might occur through use of the same fact to impose both an upper term and an enhancement.

Commentary

SB 42 advanced the concept of a one-year penalty for being armed with a deadly weapon, and simply subsumed the definition by former Penal Code Section 3024 of a deadly weapon into Section 12022. This approach, while simple, created a hidden problem regarding the type of weapon to be proscribed. Prior law punished the offender armed with a deadly or dangerous weapon only during the crime of first degree robbery, and punished being armed, either during the crime or at arrest, with a deadly weapon in connection with other crimes under Section 3024. That section made peculiar distinctions in defining what constituted a deadly weapon by including within that definition a "slung shot," "sandclub," and knife with a blade longer than five inches. Adopting the narrower definition of a deadly weapon in former Section 3024 eliminated from the prohibited weapon category many weapons whose use could previously have resulted in first degree robbery convictions. A second problem under SB 42 concerned whether the defendant was to be personally or vicariously liable for the penalty. Armed robbers were vicariously liable for the arming and use of a firearm.

277. CAL. PENAL CODE §12022(a).
278. CAL. PENAL CODE §12022(b).
280. CAL. STATS. 1923, c. 128, §1, at 271.
282. CAL. STATS. 1957, c. 1617, §3, at 2965.
weapons by their companions, and in recent years litigation over this question attended the former arming and use provisions.283

AB 476 set about rectifying these matters by initially proposing to punish merely being armed with any deadly or dangerous weapon and requiring personal arming.284 This was quickly changed to using a deadly or dangerous weapon, apparently to avoid the problem of punishing the defendant who possessed an object that could have been used as a weapon, but was not.285 Finally, Section 12022 was bifurcated into its present form, which punishes in subdivision (a) being personally or vicariously armed with a firearm and in subdivision (b) personally using any deadly or dangerous weapon.

b. Penal Code Section 12022.5

Exposition

Penal Code Section 12022.5 requires a two-year enhancement for personal use of a firearm in the commission or attempted commission of a felony. The section contains the usual limitation prohibiting application of the enhancement if use of a firearm is an element of the offense itself. Although Section 12022.5 generally retains the form in which it was enacted by SB 42, the list of crimes to which the enhancement was once limited has now been eliminated.286 To make clear the legislative intent, the last sentence specifies that one may impose the enhancement in a case of assault with a deadly weapon under Penal Code Section 245.287

Commentary

Because Sections 12022 and 12022.5 both provide enhancements for weapons, their legislative histories are interrelated. A change to one section usually required a change to the other.288 The changes demonstrate clearly that an appropriate gradation of culpability for possessing or using various types of weapons was being sought. The final version of these sections

287. CAL. PENAL CODE §12022.5.
definitely distinguishes possession or use of firearms, from other types of weapons. Because of the close relationship of the two sections, they might better be combined into a single section.

c. Penal Code Section 12022.6

Exposition

Section 12022.6 provides that if in the commission or attempted commission of a felony the perpetrator intentionally causes the taking, damage, or destruction of property exceeding in value $25,000, an additional year may be added to the sentence. If the value of the property exceeds $100,000, two years are added. The statute specifically requires that the facts of such damage in excess of the specified amount must be charged in the accusatory pleading and must be admitted or found true by the trier of fact.289

Commentary

The enhancement for great loss of property had a checkered history in the course of SB 42 and AB 476. It did not appear at all in the March 4, 1975, version of SB 42. Indeed, it did not enter the bill until 1976 and then its monetary triggers were $100,000 and $500,000; it only applied where taking was already an element of the crime; the definition of the crime itself could specify no amount or an amount under $100,000; and the added penalty was calculated on percentages of the base term for the crime, 50 percent of the base term added for amounts between $100,000 and $500,000 and 100 percent for amounts equal to or greater than $500,000. As with the current law, the necessary facts had to be pleaded and proved.290 Consistent with the move to give judges the power to strike enhancements, such a provision was added to SB 42 in August 1976.291 Unfortunately, the enhancement was virtually emasculated by another assembly amendment that excepted a sentence for the crimes of robbery, arson, and burglary292 from the addition of the enhancement, and this version of the enhancement briefly became law.293 As it was set forth in SB 42, the enhancement may have been limited to white-collar crime and even the exceptions made little sense. For example, one exception, burglary, involves entering with the intent to commit any variety of felony,294 but does not necessarily involve a taking, and therefore was already covered by an exception. Likewise, the essence of robbery is not the amount taken but the manner in which it is taken.295 Further, arson would be one of the crimes to which the penalty

293. CAL. STATS. 1976, c. 1139, §305.5, at —.
295. CAL. PENAL CODE §211.
would seem most readily applicable. The reasoning behind these exceptions is not easily perceived.

AB 476 greatly expanded the enhancement's applicability and simplified its calculation. The enhancement became applicable to any felony; the numerical triggers were dropped to $25,000 and $50,000; and the penalty itself became one or two years. What appears to be a wholly unnecessary amendment, still extant in the new law, requires that the additional facts be pleaded and proved. At one point, the thought had apparently been entertained to drop the entire enhancement. Section 12022.6 did, however, survive basically in its May 2, 1977, form.

One remaining peculiarity of the enhancement is that, unlike the other penalties that relate to the manner in which the crime was committed, Section 12022.6 does not by its own terms render itself inapplicable to crimes in which taking or damage is an element of the offense. Nor does it any longer require, as it did in SB 42, that taking or damage be an element of the crime. This seems to open the way for a rather difficult multiple punishment argument the first time the penalty is added to a crime in which taking or damage is included. Moreover, to take a ridiculous example, suppose $25,100 is taken. Can the one-year enhancement be imposed for the first $25,000 and the upper term imposed considering the other $100 as an aggravated circumstance resulting in the same term as though $100,000 were taken? Finally, if this enhancement is used frequently, we will see some interesting valuation battles in criminal trials.

d. Penal Code Section 12022.7

Exposition

Section 12022.7 represents an unsuccessful attempt to define specifically what constitutes great bodily injury. As it now reads, this enhancement adds a three year penalty to the sentence of an offender who personally and intentionally inflicts great bodily injury in the commission or attempted commission of a crime. Excepted from the enhancement are: great bodily injury inflicted by accomplices; crimes in which great bodily injury is already an element; and the specified offenses of murder, manslaughter, and assault with a deadly weapon or assault by means of force likely to produce great bodily injury under Penal Code Section 245. The statute redundantly

299. Compare CAL. PENAL CODE §12022.6 with CAL. STATS. 1976, c. 1139, §305.5 at —.
requires the fact of great bodily injury to be pleaded and proved. Great bodily injury is defined as "significant or substantial physical injury." Great bodily injury is defined as "significant or substantial physical injury."  

Commentary

Infliction of great bodily injury once constituted an element in the definition of several crimes. Case law had developed a relatively flexible standard for defining what type or degree of injury qualified, at least for purposes of going to the jury. Indeed, the first version of SB 42 contained no separate enhancement for great bodily injury but continued instead the pattern of increased punishment where that factor was involved. The change to a separate enhancement occurred in the assembly in August 1975, though the provision still drew upon existing law in defining what constituted the offending conduct. It was in 1976, again in the assembly, that a definition of great bodily injury was drafted. In its final form, SB 42 defined great bodily injury as "a serious impairment of physical condition," which included any of the following: (a) prolonged loss of consciousness; (b) severe concussion; (c) protracted loss of any bodily member or organ; (d) protracted impairment of function of any bodily member or organ or bone; (e) a wound or wounds requiring extensive suturing; (f) serious disfigurement; or (g) severe physical pain inflicted by torture.

This definition drew the details fine indeed, and the section promised to foment endless litigation over questions such as: how much unconsciousness is "prolonged;" is serious disfigurement a redundancy; how severe must pain inflicted by torture be; and what constitutes torture? The overall thrust of the list was also disturbing for those concerned with sex offenses, where rather slight physical injury may have been accompanied by severe psychological damage or breakdown. Finally, the section was not drawn in a style consistent with other enhancements. It omitted the language of commission or attempt to commit; it excepted "homicide offenses;" and its exception of assault by means of force likely to produce great bodily injury resided in a distant subsection.

Under AB 476, the "homicide offenses" in the exception were defined, the list of injuries was eliminated, and the exception for assault by

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305. See SB 42, 1975-76 Regular Session, as amended, Mar. 4, 1975, §138, at 69-70; §154, at 75; §207, at 97; §316, at 158.
308. Cal. Stats. 1976, c. 1139, §306, at —.
309. Cal. Stats. 1976, c. 1139, §273, at —.
means of force likely to produce great bodily injury was brought into the
penalty section itself.\(^{311}\) An interesting problem created by this section
arises from the fact that the final version of AB 476 provided that the great-
bodily-injury enhancement would not apply to the crimes of assault with a
deadly weapon and assault by means of force likely to produce great bodily
injury under Penal Code Section 245.\(^{312}\) The question of whether this
enhancement should apply to assault crimes was frequently raised during the
summer of 1976 by the staff of the Assembly Criminal Justice Committee.
Arguing that "the definition of many crimes (assault with intent to commit
murder, assault with a caustic chemical, etc.) imply or certainly practically
never occur without a weapon present or injury inflicted," the staff urged
that no weapons or injury enhancement be permitted in connection with an
assault crime.\(^{313}\) The argument was made that allowing an enhancement for
great bodily injury in assault crimes results in "the anomaly that the assault
crimes are going to be punished in the category of second-degree mur-
der"\(^{314}\) since addition of three years to the two-, three- or four-year crimes
results in a five-, six- or seven-year punishment. Although it was recognized
that infliction of injury in an assault should be punished, it was felt that "on
a comparative scale," imposition of the upper term of four years was
sufficient.\(^{315}\) The Chairman of the Assembly Criminal Justice Committee
adopted this position.\(^{316}\) Overlooked was the absurdity that the criminal who
set out to rob his victim and inflicted injury could have been punished with
the injury enhancement, but the criminal who set out to injure his victim and
was successful, could not be additionally punished.

The argument that no great-bodily-injury enhancement should be permitt-
ed in conjunction with an assault crime was rejected in SB 42, but was
partially accepted in AB 476, as noted above. The public policy behind the
exception of some, but not all, assault crimes from the purview of this
enhancement is not at all clear, but was apparently the result of comprom-
ises reflected in the April 19 version of AB 476.\(^{317}\) The compromise leads to
the irony that assault with intent to commit murder under Penal Code
Section 217 can carry the injury enhancement, but assault with a deadly
weapon or murder cannot. The likely result is that prosecutors will charge
under Section 217 what formerly would have been charged as an assault

\(^{312}\) CAL. PENAL CODE §12022.7. It is difficult to understand why this should have been
excepted when use of a firearm was allowed to enhance assault with a deadly weapon under
CAL. PENAL CODE §245. Factually one can easily posit an ADW—great bodily injury case. The
apparent reasoning was that a person convicted of ADW without injury would probably receive
a probationary sentence, and that to use an injury to enhance the crime would be tantamount to
double punishment.
\(^{313}\) Memo to Alan [Sieroty] and Jack [Knox] from Tom Clarke, Jr. and Mike Ullman (May
\(^{314}\) Memo to J. Anthony Kline from Mike Ullman (July 29, 1976) (copy on file at Pacific
Law Journal).
\(^{315}\) Id.
\(^{317}\) See note 110, supra, and accompanying text.
with a deadly weapon. This again illustrates the need to redefine the crime of assault, which now encompasses an excessively broad range of criminal conduct.\textsuperscript{318}

One important element of the old concept of great bodily injury is now an open question. Great bodily injury is now specifically tied to "significant or substantial physical injury."\textsuperscript{319} Psychological trauma, such as that resulting from rape, may be excluded from this enhancement provision. One can expect arguments that psychological damage should be included on the same basis that case law had previously included it in the statutory language of "great bodily injury."

2. General Enhancements
   a. Penal Code Section 667.5

   Exposition

While specific enhancements concern facts surrounding the crime, general enhancements focus on other crimes committed by the criminal. Section 667.5 provides an enhancement for his prior criminal history, if it has been established beyond a reasonable doubt by felony convictions and the service of prison terms. It is important to remember that whatever the continuing relevance of prior felony convictions, the focus of Section 667.5 is on actual service of a prison term and on the nature of the past and current felony terms.

Penal Code Section 667.5 provides enhancements of either three years or one year for each prior prison term served. A three-year enhancement is added to a prison term under Penal Code Section 667.5(a) and (c) when: (1) one of the current offenses is specified in subsection (c), which lists violent felonies;\textsuperscript{320} (2) the prior term in question also involved one of the offenses listed in subsection (c);\textsuperscript{321} (3) the defendant served a "prior separate prison term" for that prior offense; (4) the prior term is properly pleaded and proved;\textsuperscript{322} and (5) the prior term is not cut off by a ten-year period during which the defendant remained free of both prison custody and the commission of an offense that results in a felony conviction.

A one-year enhancement is added under Penal Code Section 667.5(b) if: (1) either a current offense or the prior conviction in question is not listed in subsection (c); (2) the defendant served a "prior separate prison term”; (3) the prior term was properly pleaded and proved; and (4) the prior term is not insulated by a five-year period during which the defendant remained free of

\begin{itemize}
  \item \textsuperscript{318} See text accompanying notes 354-355, infra.
  \item \textsuperscript{319} CAL. PENAL CODE §12022.7.
  \item \textsuperscript{320} The eight subsections of Section 667.5(c), while outlining more than eight offenses, have become known as the dirty-eight or in more polite society, the listed violent felonies.
  \item \textsuperscript{321} See note 320, supra.
  \item \textsuperscript{322} See CAL. PENAL CODE §§667.5(d), 1170.1(c).
\end{itemize}
both prison custody and the commission of an offense that results in a felony conviction. The difficulties in Section 667.5 center on ambiguities in the definition of a prior prison term. Each element of this new concept of a prior prison term has its own complexities.

A "prior separate prison term" is a "continuous completed period of prison incarceration imposed for the particular offense alone or in combination with concurrent or consecutive sentences for other crimes . . . ." 323 Thus, the concept of a prior prison term emphasizes not the crime itself, but the fact of the actual time served in prison. It begins when the defendant is committed to prison on that first offense, even though concurrent or consecutive sentences may follow. It ends when the prisoner has been released as discharged or on parole. 324 Because of its close relationship to time in prison, reimprisonment for escape or upon revocation of parole does not start the running of a new and separate term, but is included in the old term. 325 Perhaps the legislature felt that treating such reimprisonment as a new term would give the sentencing judge or prosecutor too much leverage from one antisocial period in the criminal's life. Such reimprisonment is instead included in the term from which the inmate escaped or was paroled. 326 Out-of-state convictions may qualify as prior terms if the offense is punishable as a felony in California and if the offender served one or more years in prison in the other jurisdiction. 327 To determine the applicability of the enhancement, the out-of-state felony is identified as the California offense having all the same elements. Also qualifying as a prison term is confinement in a state or federal penal institution as punishment for an offense, even though that confinement might be called hospitalization. 328 If the jurisdiction credits it as service of prison time, it may constitute a prior term. 329

As important as the definition of the prison term, is the definition of the five- or ten-year "washout period." This is a period during which the defendant remained free of prison custody and did not commit an offense that results in a felony conviction, and if present appears to prevent further use of the prior prison term as a general enhancement. Again, we are dealing with the concept of actual service of a term in prison to define when the period runs. It begins to run when the prisoner has served the term, that is, when he has been released as discharged or on parole. It is interrupted by either actual prison custody or the commission of an offense that results in a

323. Cal. Penal Code §667.5(g).
329. See Cal. Penal Code §667.5(h), (i). An example of this is commitment for over one year as a mentally disordered sex offender.
felony conviction.\textsuperscript{330} Thus, a felony conviction that results in probation with a suspended sentence would interrupt the running of the "clean" time.\textsuperscript{331} Similarly, the date the offense is committed is the critical date, even though actual prosecution and conviction may have occurred beyond the five- or ten-year mark.

It is interesting to note the scope of the current statute's specification of violent felonies meriting a three-year enhancement when one of the current offenses is also a violent felony. Subsections (1) through (7) are relatively limited: (1) murder or voluntary manslaughter; (2) mayhem; (3) rape (under Penal Code Sections 261(2) and (3)); (4) sodomy by force, violence, duress, menace, or threat of great bodily harm; (5) oral copulation by force, violence, duress, menace, or threat of great bodily harm; (6) lewd acts on a child under 14 (Penal Code Section 288); and (7) any felony punishable by death or imprisonment for life.\textsuperscript{332} But subdivision (8) includes any felony with a pleaded and proved enhancement for great bodily injury or use of a firearm. To this broad sweep of offenses, Section 667.5(c) applies a special declaration of the legislature that these crimes "merit special consideration when imposing a sentence to display society's condemnation for such extraordinary crimes of violence against the person."\textsuperscript{333} While the court has the power to strike the enhancement, such specific condemnation of crimes that can range from a liquor store holdup to sodomy and murder will doubtlessly give the judge extra pause when faced with such prior offenses.

\textit{Commentary}

The method of enhancing under Penal Code Section 667.5 was constantly amended to the very end of the progress of AB 476 through the legislature. This is understandable in light of the heavy burden this one section bears. It is one of the few means of increasing time for the multiple offender;\textsuperscript{334} and it is the sole means of directly taking into account a violent and criminal past.\textsuperscript{335}

The section began as a simple provision adding one year for each prior prison term pleaded and proved.\textsuperscript{336} In August of 1975, however, other provisions for retaining the repeat offender were deleted, the habitual criminal statute was repealed,\textsuperscript{337} and provision for extended confinement of

\begin{itemize}
\item \textsuperscript{330} \textit{Cal. Penal Code} §667.5(a), (b).
\item \textsuperscript{331} A dismissal of the original charges after successful completion of probation as permitted by Penal Code Section 1203.4 will have an uncertain effect.
\item \textsuperscript{332} \textit{Cal. Penal Code} §667.5(c).
\item \textsuperscript{333} \textit{Cal. Penal Code} §667.5(c).
\item \textsuperscript{334} Consecutive sentencing requires more than one active term of imprisonment. \textit{Cal. Penal Code} §1170.1(a).
\item \textsuperscript{335} \textit{Cal. Rules of Court}, tit. 2, div. I-A, rules 421, 423. Although these rules include a criminal past as one of numerous factors, they may be challengeable for failure to adhere strictly to factors surrounding the crime rather than the criminal.
\item \textsuperscript{336} SB 42, 1975-76 Regular Session, \textit{as amended}, Mar. 4, 1975, §268, at 125.
\item \textsuperscript{337} SB 42, 1975-76 Regular Session, \textit{as amended}, Aug. 7, 1975, §261.5, at 106.
\end{itemize}
dangerous offenders was abandoned.\textsuperscript{338} By 1976, Section 667.5 had become more complex, providing different guidelines for certain violent felonies versus other felonies, setting up washout periods, and entering the morass of defining when prison terms and washout periods began, when they ended, and how they might be interrupted.\textsuperscript{339}

As it passed into law in SB 42, the enhancement provision for prior prison terms had several serious defects. One was a problem of proof, for the prosecutor was obliged to prove prior separate prison terms of "at least one year in duration."\textsuperscript{340} This obviously required more than the readily available abstract of judgment because the sentence imposed would not necessarily correspond to the actual term served, but there was confusion over which records from the Department of Corrections would suffice to demonstrate incarceration of the offender for a period of over a year. Another problem was whether a prior term might be "resurrected" despite the passage of a five- or ten-year washout period.\textsuperscript{341} The statute described a washout period "immediately preceding" the filing of the current case.\textsuperscript{342} A repeat offender might then be faced with his entire criminal past if his most current offense was not immediately preceded by one of the washout periods. A third point promising at least annoyance was that a felony conviction without actual prison incarceration interrupted the ten-year washout period while only actual prison custody interrupted the five-year washout period.\textsuperscript{343}

Section 667.5 was extensively modified by AB 476. The pattern in SB 42 of adding a flat one or three-year penalty for each prior prison term was reconsidered and the Assembly substituted instead a percentage of the total term for the new offense as the penalty for each prior offense.\textsuperscript{344} This formulation of the penalty was, however, soon rejected, and AB 476 reverted to the one-year/three-year penalty pattern.\textsuperscript{345} AB 476 redefined the phrase "prison term" by eliminating the one-year minimum duration requirement and excluding paroles revoked after a new felony commitment to state prison.\textsuperscript{346} The list of violent felonies was expanded to include crimes enhanced under Penal Code Sections 12022.5 and 12022.7.\textsuperscript{347} The problem of proving a prior separate prison term of "at least one year in duration" was solved by eliminating the requirement that at least one year be served.

\textsuperscript{340} See CAL. PENAL CODE §3024, raising the minimum term and hence minimum release date for repeat offenders, had already been repealed. SB 42, 1975-76 Regular Session, \textit{as amended}, Mar. 4, 1975, §279, at 137.
\textsuperscript{341} See text accompanying notes 330-331, supra.
\textsuperscript{342} CAL. STATA. 1976, c. 1139, §268, at —.
\textsuperscript{343} See CAL. STATA. 1976, c. 1139, §268, at —.
\textsuperscript{346} CAL. PENAL CODE §§667.5(e), 667.5(g).
Presumably, then, a copy of the readily available abstract of judgment now satisfies proof of a prior prison term in state prison.\(^{348}\) AB 476 then corrected the definition of the washout period indicating that once a prior term was followed by the statutory washout period that term could never be used as a basis for adding an enhancement to a later sentence. Also, the events capable of interrupting the five- and ten-year washout periods were made uniform.\(^{349}\)

While Section 667.5 has been greatly clarified, it still promises to raise its share of issues. The fact that washout periods are interrupted by “prison custody” as well as the commission of a new felony raises the problem of how prison custody in the context of a referral under Penal Code Section 1203.03, or a later recall of the sentence under subsection (d) or (f) of Penal Code Section 1170 are to be treated. In either situation, sentencing or resentencing the defendant for a felony if the crime is a misdemeanor/felony would moot the question, because the washout would be interrupted by a felony conviction. But if a misdemeanor sentence is ultimately imposed, will prior prison custody pursuant to a diagnostic referral or before recall of a sentence interrupt clean time? If so, perhaps resentencing as a misdemeanor will restore an uninterrupted washout period.

One intriguing aspect of Section 667.5(a) is its “poison the well” quality. If any one of the new offenses committed by a defendant is one of the listed violent felonies, each prior prison term for a violent felony will merit a three-year, rather than one-year, enhancement. This gives interesting leverage to the prosecutor in the charging and plea bargaining process. A more fundamental problem concerns the arbitrariness of the list of violent felonies contained in Section 667.5(c). The list defines as violent some crimes that often do not involve actual injury to the victim, such as lewd acts on a child or the armed holdup, but excludes many crimes that frequently involve actual injury to the victim, such as assault with a deadly weapon, assault with intent to commit murder, and attempted murder. A hidden, though significant anomaly allows severe punishment for lewd conduct with a child under 14\(^{350}\) even without actual violence, but either oral copulation\(^{351}\) or sodomy\(^{352}\) with the same child is not on the list. Because placement of a crime on this list has such severe consequences on the amount of increase in penalty and on the elimination of limitation provisions,\(^{353}\) it is likely there will be a yearly legislative battle to expand or contract the list. The problem

\(^{348}\) See CAL. PENAL CODE §969b.
\(^{350}\) CAL. PENAL CODE §285.
\(^{351}\) CAL. PENAL CODE §288a(c).
\(^{352}\) CAL. PENAL CODE §286(c).
\(^{353}\) See text accompanying notes 404 and 409, infra.
is essentially one of defining the culpability of crimes within the definition of the crime itself. This was of little consequence under the indeterminate sentence law since the parole board was supposed to exercise discretion in assigning culpability based on the actual facts of the crime, regardless of the code section under which the defendant was ultimately convicted. Now that a set penalty is tied directly to the crime, this determination of culpability has become a much more acute problem. As pointed out in People v. Wingo, the crime of assault can range in culpability from the drunk who takes a swing in a bar fight all the way to the street hoodlum who stomps an old man to death on the streets of San Francisco, as occurred in Wingo. Under the new law, both defendants are subject to base terms of two, three or four years. Hopefully, this difficulty will result in pressure on the legislature to define more narrowly the range of criminal conduct proscribed by any given criminal statute and to subdivide the "wide range" crimes discussed in Wingo.355

One last note is in order. Section 667.5 nowhere precludes imposition of the enhancement if the prior term is an element of the offense. For example, a violation of Penal Code Section 647(a) is ordinarily a misdemeanor but becomes punishable as a felony if the defendant was previously convicted of violating Section 288. Apparently, if the prior conviction under Section 288 resulted in a prison term, the present violation of Section 647(a) is not only a felony, but also subject to an enhancement for that prior prison term.

b. Penal Code Section 1170.1

Exposition

The second general enhancement, consecutive sentencing, brings us to the only penalty section356 that allows the judge openly to consider rather subjective factors in making a sentencing determination. Apart from the basic requirement that the defendant be convicted of more than one currently active felony, this enhancement provision is restricted almost exclusively to the calculation of the consecutive term enhancement, rather than defining when the enhancement may be imposed. Once the judge has considered the multiple punishment aspects of Penal Code Section 654 and any merger problems under Penal Code Section 669, and has chosen or been compelled357 to sentence consecutively, he faces a difficult calculation problem. A consecutive term is calculated by adding the principal term, all subordinate

354. 14 Cal. 3d 169, 176-77, 534 P.2d 1001, 1007-08, 121 Cal. Rptr. 97, 103-04 (1975).
356. While under the old law one thought of consecutive sentencing simply as a mode of sentencing and not a penalty like arming or use, it is now listed as an enhancement in Penal Code Section 1170(b) and it does involve a computation that adds a numerical increment to the term.
357. E.g., CAL. PENAL CODE §§4501, 4501.5, 4502, 4503, 4530, 4532.
terms for consecutive offenses and any enhancement for prior prison terms.\textsuperscript{358}

The principal term is the greatest term the court can impose based on any of the offenses then before it or based on other currently active terms.\textsuperscript{359} The court may impose consecutive sentences for two or more felonies "whether in the same proceeding or court or in different proceedings or courts, and whether by judgment rendered by the same or by a different court. . . ."\textsuperscript{360} In determining which term is the greatest, and therefore principal term, the court considers both the base term to be imposed (upper, middle, or lower, as appropriate) and the enhancements added to the base term under Penal Code Sections 12022, 12022.5, 12022.6, or 12022.7. Hence, rape with great bodily injury may result in a greater term than second degree murder,\textsuperscript{361} even though the base term for rape is lower.

The subordinate terms are computed by taking one-third of the middle term prescribed for each of the remaining felonies to be sentenced consecutively.\textsuperscript{362} This is not one-third of the actual term imposed, but is merely a computational device. Specific enhancements are not included in this computation unless an offense is one of the listed violent felonies in Section 667.5(c). In such case the subordinate term for that offense consists of one-third of the middle term and one-third of any enhancement imposed under Penal Code Sections 12022, 12022.5, or 12202.7. Section 1170.1(a) imposes a five-year limitation on the total of subordinate terms for offenses not listed in Section 667.5(c), excepting those enumerated violent felonies from the five-year ceiling on the overall duration of subordinate terms. The principal term, all subordinate terms (perhaps grouped into violent and nonviolent categories) and any enhancements for prior prison terms\textsuperscript{363} are then added to compute the total term.\textsuperscript{364}

Penal Code Section 1170.1(b) provides for imposition of consecutive terms where one or more of the felonies were committed in prison or involved an escape from prison. If one such felony is committed, the consecutive term "shall commence from the time such person would otherwise have been released from prison."\textsuperscript{365} If, however, two or more felonies are committed while the inmate is in prison or during escape from prison and

\textsuperscript{358} Prior prison terms must be separately considered since, unlike other enhancements, they attach to the offender, not one of the particular offenses.

\textsuperscript{359} If it were not still being served, it would be a prior term handled under Penal Code Section 667.5. Cf. Cal. Penal Code §667.5(d) (definition of when a term is deemed ended).

\textsuperscript{360} Cal. Penal Code §1170.1(a).

\textsuperscript{361} Assuming use of the middle term, rape at four years plus three years for great bodily injury exceeds six years for second degree murder. Cal. Penal Code §§190, 264, 12022.7. If there are circumstances in aggravation justifying an upper term, the figures for rape would be five plus three years.


\textsuperscript{363} Cal. Penal Code §667.5.


\textsuperscript{365} Cal. Penal Code §1170.1(b).
the new offenses are to be served consecutively, a principal term and subordinate term are calculated following the method described in Section 1170.1(a). These terms, then, must be served after the date the inmate would otherwise have been released. Furthermore, the five-year limit on subordinate terms does not apply to these offenses.

Section 1170.1 is silent on the question of how the court is to exercise its discretion in imposing a consecutive sentence. The only guidance is found in California Rules of Court, Rule 425, and it provides only the most general guidelines.

Commentary

The legislative history of the code section providing for consecutive sentencing was characterized by experimentation with the definition of the term “consecutive.” Running the full term for each offense in tandem was rejected from the outset. The consecutive sentence enhancement under Section 1170.1 began as the straightforward addition of one year for each lesser crime (paralleling the early version of Section 667.5) to the “greatest term of imprisonment” imposed by the judge. The consecutive sentence enhancement was intended to apply to all active terms, even those derived from convictions in other than the present sentencing court. In 1976, Section 1170.1 took on its current complex form, specifying that the “greatest term of imprisonment” included enhancements but that lesser terms were computed by adding one-third (originally one-half) of the middle term excluding all enhancements. Poor language in the statute gave the impression that the enhancement for prior prison terms was to be excluded from the total calculation, a problem that was corrected by AB 476.

From the inception of AB 476, new ways were sought to increase the length of time that could be added under this enhancement. At first AB 476 provided that the lesser terms were to be computed by taking one-half of the middle term including enhancements for each such offense. Then the terminology of principal and subordinate terms appeared and a provision for more severely punishing subordinate terms for violent felonies (listed in Penal Code Section 667.5(c)) was added. Finally, AB 476 provided that one-third of any enhancement imposed could be added to subordinate terms involving the listed violent felonies. The resulting Section 1170.1, in comparison to the consecutive sentencing provision in SB 42, does provide a longer term for the multiple, violent offender. For some of the

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373. See CAL. STATS. 1976, c. 1139, §273, at —.
worst felonies, it includes in the computation a proportion of the enhancements imposed for arming with or use of weapons, and causing great bodily injury.\textsuperscript{374} It includes enhancements for prior prison terms without the limitation that was imposed by an earlier version of SB 42.\textsuperscript{375} It does, however, limit the time added for nonviolent consecutive offenses to five years.\textsuperscript{376} Because of the many problems associated with consecutive sentencing, the remainder of this commentary is broken down into various categories.

\textit{i. Disparity in Sentencing}

The relatively subjective nature of the decision to sentence consecutively creates the danger of disparity in sentences imposed by different judges, and it is likely to pose major problems for the Community Release Board in performing its disparate sentence review function. Should a particular judge’s sentences be too inconsistent with the sentencing practices of other judges, the anomalous cases will likely reappear for resentencing due to the disparity.\textsuperscript{377} Reference made to the Judicial Council Rule governing this decision does not give assurance that merely following the guidelines will avoid that disparity. Rule 425 simply refers to the factors in mitigation or aggravation and states new factors sounding very much like the considerations used to determine whether multiple punishment under Penal Code Section 654 is involved. In short, the factors are so subjective in nature that consecutive sentencing is the one area in which the judge’s discretion concerning imposition of the enhancement remains least circumscribed.

\textit{ii. Multiple Punishment}

This leads to another serious problem indirectly related to consecutive sentencing. Before a court can impose sentence, it must first determine for which crimes a sentence can be imposed without causing multiple punishment as prohibited by Section 654. The \textit{existing doctrine}, developed since \textit{Neal v. State},\textsuperscript{378} is inadequate to discern clearly when the proscribed multiple punishment may occur. The tests provided in case law are confusing, vague, and difficult to apply to factual situations. The issue is frequently raised on appeal, and the doctrine has been subjected to scholarly criticism.\textsuperscript{379} It seems probable that the doctrine will break down under the determinate sentence law because each separately punishable offense can now result in additional time in prison, a result which was not clear under former law. Judges as well as attorneys should pay close attention to the

\begin{small}
\textsuperscript{374} CAL. STATS. 1977, c. 165, § 19, at —.
\textsuperscript{375} See text accompanying note 416, infra.
\textsuperscript{376} CAL. STATS. 1977, c. 165, § 19, at —.
\textsuperscript{378} 55 Cal. 2d 11, 357 P.2d 839, 9 Cal. Rptr. 607 (1960).
\end{small}
multiple punishment doctrine, for a count stayed under Section 654 is a count that cannot result in a consecutive sentence.

iii. Equal Principal Terms

How does the court choose the greater offense to be the principal term where offenses with different base ranges yield identical terms after specific enhancements are added to the respective base terms? Choosing the term that includes specific enhancements as the principal term will always result in a longer total term, since the specific enhancements that would be excluded from the subordinate term will have already been included in the principal term.

AB 476 solved this problem for many violent crimes by allowing one-third of the enhancement to be added for subordinate terms. Hence, assuming use of the middle term as the base term, it will make no difference in the length of the consecutive term whether the judge computes the principal term based on the offense of second degree murder or robbery with great bodily injury.\(^3\)

The choice of offense to be the principal term will, however, still make a difference in the duration of a consecutive term for a great variety of other crimes—for example, the combination of robbery and second degree burglary with excessive taking.\(^3\) Is the judge’s choice to be guided by rule, by accident, or by the judge’s inclination to be severe or lenient? Logically, the choice should depend on the relative culpability of the offender, comparing the two offenses. Certainly, depending on the victim, the manner in which the crime was committed, and the criminal’s motivation, robbery might be a more or less serious offense than burglary.

\(^3\) Taking the middle term from the range of five, six or seven years specified for second degree murder, the principal term would be six years. CAL. PENAL CODE §190. Similarly, taking the middle term from the range of two, three or four years specified for robbery and adding the three-year enhancement for causing great bodily injury, a principal term of six years results. CAL. PENAL CODE §§213, 12022.7. If second degree murder is chosen as the principal term and robbery as the subordinate term, the consecutive sentence is computed as follows:

\[8 \text{ years} = 6 + [(1/3 \times 3) + (1/3 \times 3)]\]

If robbery is the principal term and second degree murder is the subordinate term, the consecutive sentence is computed as follows:

\[8 \text{ years} = (3 + 3) + (1/3 \times 6)\]

Compare these with the computation under SB 42 if second degree murder is chosen as the greatest term, which would be:

\[7 \text{ years} = 6 + (1/3 \times 3)\]

CAL. STATS. 1976, c. 1139, §273, at —

\(^3\) Again assuming that the middle term is selected, the range for robbery (two, three or four years) would result in a principal term of three years. CAL. PENAL CODE §213. For burglary the range is 16 months, two, or three years and the enhancement for excessive taking (assuming over $100 but under $25,000) is one year, resulting in a principal term of three years. If robbery is selected as the principal term and burglary is the subordinate term, the consecutive sentence is computed as follows:

\[3 + (1/3 \times 2) = 3 \frac{2}{3} \text{ years}\]

If burglary is selected as the principal term and robbery is the subordinate term the consecutive sentence is computed as follows:

\[4 \text{ years} = (2 + 1) + (1/3 \times 3)\]
with excessive taking.\textsuperscript{382} Perhaps judges can simply avoid the problem by imposing the mitigated or aggravated term for one of the offenses.\textsuperscript{383}

\textbf{iv. Different Proceedings or Courts}

Putting aside this comparatively simple problem, let us address one of Section 1170.1’s more serious lacunae. Assuming a crime spree that results in several convictions in different courts, can the last judge to sentence the offender rearrange the consecutive or concurrent pattern that prior judges have placed on the convictions that occurred in their courts? For example, Judge \textit{A} sentences the offender on three counts concurrently. Judge \textit{B} in a new case wishes to impose a consecutive sentence. Is Judge \textit{B}’s sentence consecutive to the \textit{longest} of the concurrent counts or does Judge \textit{B} consider and sentence for \textit{every} felony, including those that had been before Judge \textit{A}?\textsuperscript{384} This seems at first glance to be a problem easily resolved since Penal Code Section 1170.1(a) specifically refers to felonies, not to sentences. It seems to direct attention to each offense, not each term of imprisonment imposed by the court, and one would therefore lean toward the second result. Furthermore, Section 1170.1(a) is an artificial, mathematical formula for reaching a figure to impose as the penalty for a multiple offender.\textsuperscript{385} This is emphasized by the use of one-third of the middle term for subordinate offenses, disregarding the actual term chosen by the court for each offense. This suggests that Judge \textit{B} may recalculate the term for each felony, disregarding Judge \textit{A}’s decision.

Adopting the view that the term for every felony may be recalculated, however, raises statutory, and possibly constitutional problems. First, does the last sentencing judge have the statutory power to negate the earlier judge’s choice,\textsuperscript{386} which may be based on a plea bargain? Is Section 1170.1 specific enough to give him that power, or does it simply fail to address the problem? One might seek help in the fact that Section 1170.1 refers to “sentences imposed” under Penal Code Section 669. Indeed, some of the language in Section 1170.1(a) is similar to Section 669, which was not changed by SB 42 or AB 476. The temptation is to carry over into the new law the method of calculation under Section 669. But when Section 669

\textsuperscript{382} Compare for example, robbery of a social security check from an elderly, frail victim and burglary of a well-insured jewelry store or robbery of a wallet from a wealthy, unarmed adult versus burglary and destruction of all the worldly belongings of a widowed pensioner.

\textsuperscript{383} \textsc{cal. rules of court}, tit. 2, div. i-a, rules 421, 423, guiding imposition of a mitigated or aggravated term, do not include numerical manipulation as a mitigating or aggravating factor. This is apparently a sentence choice requiring statement of reasons. \textsc{cal. rules of court}, tit. 2, div. i-a, rule 405.

\textsuperscript{384} Stated in another manner, if Judge \textit{A} sentenced concurrently on three counts of robbery and Judge \textit{B} also has a robbery conviction before him for sentencing, does he give four years \((3 + (1/3 \times 3))\) or does he give six years \((3 + (1/3 \times 3) + (1/3 \times 3))\)? To do the latter is to make Judge \textit{A}’s sentence consecutive internally as well as externally to Judge \textit{B}’s sentence.

\textsuperscript{385} See \textsc{cal. penal code} §1170(b).

\textsuperscript{386} On sentencing, see generally \textsc{cal. penal code} §§1191-1208.5.
refers to imposing a consecutive sentence, it refers to "term of imprisonment," and thus retains the internal pattern of the prior judge's convictions. Section 1170.1 with its reference to "crimes" and "felonies" arguably does not.

Second, while a full discussion of all possible constitutional implications is beyond the scope of this article, we might at least suggest that some due process or ex post facto problems may be involved in the failure to retain the prior court's pattern of sentences. Effectively making consecutive sentences that were concurrent, may be an increase in penalty fitting one of the ex post facto categories. Making previously concurrent sentences run consecutively may also violate the doctrine of finality of judgments and deprive the offender of a vested and substantial right or vitiate an earlier plea bargain. Certainly, this sentencing roulette will lead to "judge shopping" where crimes are being separately tried, for a tough last judge could undo any leniency in the earlier sentence. A proper solution would require the subsequent sentencing judge to leave the prior judgments as they stand and make the new sentence consecutive to the longest earlier concurrent term.

v. Concurrent Sentence—More Time in Prison

The sentencing court in a subsequent proceeding may have to compute the sentence both consecutively and concurrently to determine which results in more time served. A well-intentioned judge should not automatically impose a concurrent term assuming it will always result in less time than a consecutive term. Unusual as it may sound, a concurrent term may not be shorter than a consecutive term if sentence is imposed on a new offense while the defendant has almost completed a current active term. Pursuant to Penal Code Section 2900 the prison term commences upon reception of the defendant into prison. If the defendant is subsequently sentenced to a term that is to run concurrently with the active term, the concurrent term will commence upon reception in prison on the new term, even if the defendant is serving a currently active term. Thus, a concurrent sentence of three years imposed towards the end of an active term being served will add almost the full three years, there being only a brief period during which the two terms overlap. On the other hand, if the three-year sentence is to run consecutively with the active term, the defendant will presumably have the additional increment added to the term already being served. This assumption that the consecutive incremental term for the new offense (subordinate term) is added to the principal term for the prior offense is made only because of the lack of a better alternative. The situation becomes hopelessly confused when one contemplates the possibility that the new offense may carry a greater term than the old, and therefore becomes

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389. CAL. PENAL CODE §2900.
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additional three-year term imposed consecutively might add only one year (one-third of three years) to the active term since that term would be the principal term and the later term would be added as a subordinate term. Consequently, the trial judge may have felt he was doing the defendant a favor by imposing a concurrent sentence rather than a consecutive sentence, but the road to the appellate court is paved with good intentions.

vi. Combination of Determinate and Indeterminate Sentences

Another area of confusion is the order in which an offender should serve consecutive sentences for a combination of determinate and indeterminate sentences. This situation can arise if the defendant is sentenced for an indeterminate, nonlife offense, or for an offense committed prior to July 1, 1977. In the latter event, presumably the Community Release Board would retroactively calculate a determinate term for the indeterminate offense and then combine this term with the determinate term imposed by the court for the post-July 1 offense in the same manner as though the consecutive sentences had been imposed in different proceedings. In either event, which term should be served first, the discretionary, indeterminate term, or the fixed, determinate term?

The Judicial Council has decided, by rule, that the offender must serve the indeterminate sentence first. This rule raises conceptual problems, for apparently the determinate term cannot begin to run until a decision is made by the CRB that the offender should be released on the indeterminate term. If that indeterminate parole date is later rescinded, presumably the determinate term goes back into limbo until the CRB establishes a new parole date for the indeterminate term. In short, the offender cannot be sure of when his determinate term will begin until he has actually reached his indeterminate release date, or has reached the maximum of his indeterminate term.

A more easily understood procedure would require that the determinate term be served first. The determinate term, reduced by good time credits, the principal term. Presumably, the total term for both offenses would still commence to run from the defendant’s prison reception date on the first (now subordinate) offense. At this point, logic breaks down, for the prisoner might have already served more time than the first (now subordinate) term, and thus have begun serving time on the new offense before it was even committed! See In re Park, 63 Cal. App. 3d 963, 134 Cal. Rptr. 170 (1976).

391. The total new term is subject to reduction by any applicable "preprison" credits. CAL. PENAL CODE §2900.5.

392. See note 663, infra.

393. Section 1170.1 specifically does not address this, for subsection (a) limits the provisions to sentences under Penal Code Sections 669 and 1170. Indeterminate sentences are provided for in Penal Code Section 1168(b).

394. Life sentences would apparently cause other active sentences to merge, precluding imposition of consecutive sentences. See CAL. PENAL CODE §669. This merger doctrine is likely to be challenged, since a life sentence is no longer for life, it is discharged three years after release on parole. It is still possible to have indeterminate sentences even under the new law, however, since sentences such as those not exceeding one year and a day remain. See text accompanying note 182, supra.

395. See CAL. PENAL CODE §2931, which requires that the prisoner be advised of his tentative release date, an impossibility if an indeterminate term runs first.

would then act as a period of parole ineligibility, followed by release on the indeterminate term with its period of parole taking effect. This approach has the advantages of more closely approximating the traditional parole model (a mandatory minimum period of time in prison, followed by a period of eligibility for parole) and of being easier to administer. It has the disadvantage of conflicting with the Judicial Council Rule. This may become an issue as the Judicial Council conducts new hearings on its rules during the spring of 1978.

vii. Repeated Prison or Escape Offenses

Yet another problem with Section 1170.1 involves consecutive terms for prison and escape offenses under Section 1170.1(b). This problem is likely to arise in many cases since most mandatory consecutive terms are for such offenses. We have already discussed how these sentences are computed, but consider the situation of the prisoner who stabs several people during the first year of imprisonment, receives consecutive terms for the offenses, and several years later while still a prisoner, repeats the crimes. Are the new crimes to be figured as principal terms or as subordinate terms with the earlier series, using the one-third method of Section 1170.1(a)? Or, are they to be computed independently for their full value, and “commence to run from the time such person would otherwise have been released from prison?” The last two sentences of subdivision (b) control, but provide little guidance. The first sentence requires that “the new offenses . . . [which are] consecutive with each other” be calculated as provided in subdivision (a), implying that it is possible to have a series of new offenses, and to have each series commence to run upon termination of the previously imposed term. The next sentence, however, provides that “the provisions of this subdivision shall be applicable in cases of convictions of more than one offense in different proceedings, and convictions of more than one offense in the same or different proceedings,” thus indicating that the offenses are to be computed as principal or subordinate terms with the earlier offenses. While the legislative intent is probably the former, it is a close question.

viii. Relationship to Prior Prison Term

We shall avoid such practical nightmares as how a court informs itself of all felony proceedings currently in progress against the defendant and what the trial court does when the appellate court reverses a principal term in a series of consecutive terms involving different courts. One final problem, however, deserves mention. The calculation in Section 1170.1(a) adds the
principal term, the subordinate term and "any additional term imposed pursuant to Section 667.5." If there were several convictions in separate courts that are now being consecutively sentenced by a later court, there may well be duplications and omissions in what prior terms were pleaded, proved, and imposed by the various judges. A question arises as to whether the later court is to include all additional terms imposed pursuant to Section 667.5 in its computation of the consecutive sentence. There are three possibilities. In the first, the court must impose any enhancement for prior prison terms imposed by a court in a previous proceeding, but eliminate all duplications, and then exercise its discretion on any additional prior prison terms pleaded and proved in the present proceeding. Second, a literal interpretation of Section 1170.1(a) might require that only the prior prison terms pleaded in this latest proceeding be imposed in the final sentence, with the prior enhancement for prior prison terms imposed in earlier proceedings being dropped since they were not pleaded and proved in this latest proceeding. Third, it is possible to argue that all enhancements for prior prison terms are duplications in the different proceedings.

The first possibility is the only one that really makes any sense. Only the first option retains the internal pattern of earlier judgments, already the subject of the exercise of judicial discretion. Nothing in Section 1170.1 implies that it is meant to somehow reopen discretion on the earlier courts' sentencing choices; once decided, those decisions should stand unless there was some defect in them. The enhancement for prior prison terms is, however, a general enhancement as it attaches to the offender and not to each separate crime. We are unaware of any other situation in which the enhancement for prior prison terms is added to individual crimes as opposed to the total term imposed once punishment is determined. Thus, while those enhancements for prior prison terms that were imposed in previous proceedings should be included in the present calculation of the concurrent term, duplications should be eliminated. Unfortunately, it is easier to answer this with a result-oriented response than it is with a specific, statutory reference.

ix. Simplifying Consecutive Sentencing

A number of the problems raised above could be solved by simply eliminating the idea of consecutive sentencing and instead treating multiple crimes in the same manner as prior criminal history is currently treated. Instead of becoming involved in complicated calculations in which a percentage of the subordinate term for each multiple offense must be figured, a simple one or three-year enhancement could be added for each nonviolent or violent offense. There appears to be no reason to distinguish between current multiple offenses and prior prison terms, and a great simplification of the determinate sentence law would be achieved.
C. Limitations on Imposition of Enhancements

Exposition

There are many limitations on determinate sentencing if we describe "limitations" in the general sense. As we have noted, the same fact may not be used both to enhance and to impose the upper term. A fact that is already an element of the offense generally cannot be used to add an enhancement. The judge may choose to impose a concurrent, as opposed to a consecutive sentence, or may strike an enhancement. Enhancements must be specifically pleaded and proved. By cautioning the judge to check for any limitations on the term, however, we refer to three numerical or mechanical limitations apart from the general limitations described above.

1. Five-Year Limit on Consecutive Sentences

The first is a five-year limitation on the amount of time that can be added for subordinate terms in the consecutive sentence calculation. Section 1170.1(a) limits the total time to be added for felonies not among the listed violent felonies of Penal Code Section 667.5(c). If one of the violent felonies is involved, two effects detrimental to the offender occur. The five-year limit is removed and one-third of the enhancements for arming with or use of weapons or causing great bodily injury may be added to that subordinate term as well. Finally, the phrasing of the last sentence of Penal Code Section 1170.1(a) makes it appear that the listed violent felonies are to be distinguished from other felonies for purposes of applying the five-year limitation on the total of subordinate terms. It states: "In no case shall the total of subordinate terms be consecutive offenses not listed in subdivision (c) of Section 667.5 exceed five years," thus suggesting that subordinate terms for offenses not listed are subject to the limitation even if one or more of the listed offenses is also present.

2. Stacking Enhancements

The second limitation is contained in Section 1170.1(d) and restricts the multiple application of enhancements for arming with weapons, use of weapons, or causing great bodily injury. In some cases, the prosecutor may wish to charge multiple enhancements on a given offense, and the trier of fact may find more than one to exist. In such a case, the court is directed to apply the greatest enhancement. A special rule, however, is set forth for rape, robbery, or burglary whether attempted or actually committed. In such cases the court "may impose both (1) one enhancement for weapons as

401. See text accompanying note 242, supra.
403. CAL. PENAL CODE §1170.1(a)
provided in either Section 12022 or 12022.5 and (2) an enhancement for great bodily injury as provided in Section 12022.7.\footnote{406} Under the indeterminate sentence law, rape, robbery, and burglary convictions carried special penalties if great bodily injury was involved.\footnote{407} This provision of AB 476 appears to carry forward or even strengthen that special condemnation\footnote{408} for these crimes.

3. Double the Base Term

The third limitation, contained in Section 1170.1(f), restricts the total term of imprisonment to more than twice the base term imposed under Section 1170(b), but contains exceptions so numerous that it effectively limits only the term of the nonviolent, nonprison crimes\footnote{409} having no added enhancements where the offender has a few too many prior and subordinate terms added to the principal term. It basically means you cannot keep a forger in prison forever. Section 1170.1(f) itself provides that the term of imprisonment may not exceed twice the base term \textit{unless}: (1) the defendant \"stands convicted\" of one of the listed violent felonies; (2) the defendant is being consecutively sentenced for an in-prison crime; or (3) an enhancement \"is imposed\" under virtually any of the specific enhancement provisions. Section 1170.1(f) appears to limit, then, all enhancements for prior prison terms\footnote{410} and consecutive sentences for nonprison, nonviolent offenses.\footnote{411} Due to the number of exceptions and the overlap of enhancements and listed violent felonies, it is difficult to list in an affirmative fashion precisely what is limited by this section.

\textit{Commentary}

The first full version of SB 42 contained only one sentencing limitation which provided that if \"the aggregate of cumulative or consecutive sentences\"\footnote{412} exceeded ten years, the sentence was to be reviewed by the Community Release Board for a recommendation on resentencing.\footnote{413} This in practical terms was scarcely a limitation at all and was eliminated in August 1975. At the same time, however, a limitation on the use of multiple enhancements was drafted.\footnote{414} It provided \textit{inter alia} that only one of the

\begin{footnotesystem}
\footnote{406}{\textit{CAL. PENAL CODE} §1170.1(d).}
\footnote{407}{\textit{CAL. STATS.} 1967, c. 150, §1, at 1216; \textit{CAL. STATS.} 1967, c. 151, §1, at 1217.}
\footnote{408}{Prior law did not specify attempts of these offenses as meriting this special penalty. Compare \textit{CAL. PENAL CODE} §§213, 264, 461 with \textit{CAL. STATS.} 1967, c. 149, §1, at 1216 and \textit{CAL. STATS.} 1967, c. 150, §1, at 1216.}
\footnote{409}{That is, no specific enhancements relating to the crime itself, as opposed to general enhancements, are involved.}
\footnote{410}{\textit{CAL. PENAL CODE} §667.5(c). Violent prior terms can be limited, for if a current offense is also one of the violent felonies, the limit automatically does not apply anyway. If it is not, all priors seem limited under this section.}
\footnote{411}{They must be nonviolent as well as nonprison consecutive terms, for if any current crime is a listed violent felony, the limit does not apply under the first exception.}
\footnote{412}{SB 42, 1975-76 Regular Session, \textit{as amended}, Mar. 4, 1975, §273, at 129.}
\footnote{413}{\textit{Id}.}
\footnote{414}{\textit{See} SB 42, 1975-76 Regular Session, \textit{as amended}, Aug. 7, 1975, §273, at 114.}
\end{footnotesystem}
enhancements for arming with or use of weapons or causing great bodily injury could be applied to a single offense. A prisoner affected by this provision, however, would receive a mandatory consecutive sentence.415

Just before SB 42 died in committee, another familiar limitation made its debut. A five-year limit was imposed on the addition of enhancements for prior prison terms and consecutive sentences for other than in-prison offenses.416

In 1976, SB 42 contained the basic limitation provisions that would be present when SB 42 became law. The limitation provisions appeared as subsections (d), (e) and (f) of former Penal Code Section 1170.1a.417 Subsection (d) indicated, inter alia, that only one of the enhancements for arming with or use of weapons or causing great bodily injury could be used. Subsection (e) placed a five-year limit on addition of enhancements for nonviolent prior prison terms and nonprison consecutive sentences. A new subsection (f) indicated that the term of imprisonment could not exceed twice the base term. The limitation of subsection (f) would not apply if a violent felony, or arming with a deadly weapon or use of a firearm, was charged and found by the jury, or admitted by the defendant.418 The array of limitations in subsections (d), (e), and (f) first entered SB 42 accompanied by a provision that the imposition of enhancements was to be mandatory,420 and these limitations would have served as one of the few, if not the only, mollifying forces in such a scheme. They nevertheless remained in SB 42 even after the court’s power to strike enhanced punishment was restored.421

The trend of AB 476 to punish more severely the multiple violent offender is most visible in the alteration of these sentence limitations. Its first version virtually eliminated all limitations.422 All that remained was a portion of subsection (d), providing that only the greatest of the enhancements under Sections 12022, 12022.5, or 12022.7 would be applied to a given offense.423 One by one, however, the limitation provisions reappeared. The five-year limit on enhancements for prior prison terms and consecutive sentences became a five-year limit on nonviolent subordinate terms.424 At the same time, the use of multiple enhancements was expanded

415. Id.
416. SB 42, 1974-75 Regular Session, as amended, Aug. 14, 1975, §273, at 117. In addition, the loose ten-year limit or review trigger was revived. Id. at 117-18.
417. SB 42, 1975-76 Regular Session, as amended, Apr. 22, 1976, §273, at 130 as enacted CAL. STATS. 1976, c. 1139, §273, at —.
418. Id.
423. The former provision stated that only one enhancement could apply—it never said which one.
in the cases of rape, robbery or burglary, and the twice-the-base-term limitation returned. On June 6, 1977, the provision that one enhancement for arming with or use of weapons and one enhancement for causing great bodily injury might apply to certain crimes was expanded by the Senate to include all felonies. In conference, the list of felonies eligible for multiple enhancements shrank back to rape, robbery, burglary or attempts thereof, and this was the limitation that was ultimately passed into law.

There are far fewer problems in understanding and applying the limitation sections than in comprehending the enhancement provisions for prior prison terms or consecutive sentences, but each limitation does have its peculiarities. First, the five-year limit on nonviolent, subordinate terms provides: "In no case shall the total of subordinate terms for consecutive offenses not listed in subdivision (c) of Section 667.5 exceed five years." This implies that violent and nonviolent felonies would be segregated for application of this limitation, and only the total of subordinate terms for nonviolent felonies would be limited to five years. Assume, for example, that a defendant has ten years of subordinate terms for nonviolent felonies to be added onto an offense and ten years of listed violent terms to be added as well. It would follow that the five-year limit would affect the ten years of subordinate terms for nonviolent felonies, leaving the ten years for violent felonies unaffected. Fifteen years, then, would be added to the term, not 20. The presence of prior terms for violent offenses would not have "poisoned the well" such that all 20 years would be added. This differs from the effect that a single, current listed violent felony seems to have in determining whether one or three years is to be added for a series of listed violent prior prison terms.

The interesting questions about the multiple enhancement limitation concern how courts will treat the ability to stack enhancements in rape, robbery, or burglary cases. While the general rule in Section 1170.1 is that only the greatest applicable enhancement applies, when it comes to stacking enhancements, that section states that the court may, not must, impose one enhancement for arming with or use of weapons, and one enhancement for causing great bodily injury. Even within the weapon enhancement, it specifies either a weapons enhancement under Section 12022 (one year), or one under 12022.5 (two years). It is uncertain what guidance, if any, a court should follow regarding this apparent discretion to choose the higher or lower enhancement. Does it turn to the Judicial Council's guidelines

429. (10 - 5) + 10 = 15 years.
430. See CAL. PENAL CODE §667.5.
concerning mitigating circumstances? Presumably, the general rule of the section would apply here, that is, the greater weapon enhancement must be applied. But it may be that this is one remnant of judicial discretion which, as with consecutive sentences, is left relatively untouched.

Finally, the twice-the-base-term limitation in Section 1170.1(d) does present some relatively serious problems. It appears at first glance that where some base terms were enhanced and some were not, one could manipulate this limitation by choosing as the base term the higher, unenhanced offense. Twice the higher base term would allow a longer total sentence. This is probably not a correct reading of the provision, however, because by its own terms almost any enhancement renders the limitation inapplicable. After all, the limitation applies to only prior terms and nonprison, nonviolent consecutive sentences. It does not limit cases involving arming, use, great bodily injury, or great loss.

The other difficulty with the twice-the-base-term limitation involves its shift in terminology when listing its exceptions. The court is free of the limitation if the defendant “stands convicted” of a violent offense, or if a consecutive sentence “is being imposed” for an in-prison felony, or if any enhancement “is imposed” under the listed sections. Consider the multiple offender receiving sentences in several separate proceedings. From the perspective of the judge in the last of these cases, does the defendant “stand convicted” of a violent felony if he has an active term for such felony from any of these prosecutions, or does the judge consider only the offenses now before the court? Use of the terminology “is imposed” is less problematic, and “is being imposed” definitely relates only to the case then before the court. Of what practical significance is the fact that a felony is listed in Section 667.5(c)? Recall that the legislature made a special finding in Section 667.5(c) “that these specified crimes merit special consideration when imposing a sentence to display society’s condemnation for such extraordinary crimes of violence against the person,” implying that if any active offense is violent, even an offense from an earlier proceeding, the limitation does not apply.

D. Imposition of Sentence

Exposition

It is earnestly to be hoped that most of the above calculations and quandaries will have been dealt with in chambers, perhaps with the aid of
trial briefs. At some point, however, armed with a fistful of notes, the judge will take the bench to impose sentence. The new law provides: "The court shall state the reasons for its sentence choice on the record at the time of sentencing." The court also must inform the defendant of the possibility of parole. Early controversy over whether "sentence choice" includes probation was settled by a Judicial Council Rule that defines it as the selection of any disposition not amounting to a dismissal, acquittal, or grant of a new trial. There is some advantage in granting "straight" probation, that is, suspending even imposition of sentence, for under Penal Code Section 1170(b): "A term of imprisonment shall not be specified if imposition of sentence is suspended." While this frees the judge from actually making the calculation, the Judicial Council has required that even in such cases factual findings be made regarding imposition of upper or lower terms.

Commentary

The provisions for imposition of sentence retained the same substance throughout the years that the legislature struggled with the new law. There were no dramatic policy shifts. The requirements that the judge state the reasons for the sentence choice and give notice of the possibility of parole appeared at the outset and remained intact although the role of the Judicial Council shifted somewhat.

Problems with imposition of sentence may be largely practical rather than theoretical. One inquiry is how detailed the judge must be in imposing sentence since numerous sections demand attention. Penal Code Section 1170(c) requires reasons for a sentence choice, but does not specify the detail needed. The grant or denial of probation, for example, is a sentence choice. There is the upper or lower term for the judge to consider. Penal Code Section 1170(h) requires the judge to state the "facts and reasons" for imposing an upper or lower term. Enhancements may be stricken on the one hand or stacked up on the other, each requiring the court's justification. Consecutive sentencing may be considered. Limitations may prevent

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438. CAL. PENAL CODE §1170(c).
439. CAL. PENAL CODE §1170(c).
442. SB 42, 1975-76 Regular Session, as amended, Mar. 4, 1975, §273, at 128. Warning about the possibility of extended confinement of dangerous offenders was deleted.
444. See text accompanying notes 356-400, supra.
certain punishments. Some facts cannot be used twice and some can. The sentence includes any period of parole following the term. By the time the court has explained its last subtrahend and minuend, we will see a hearing far longer than that necessary to sentence a defendant to the "term prescribed by law." And by the time the appellate courts have combed through the trial judge's soliloquy, many an offender's term will have been served.

Where imposition of sentence is suspended, the judge will not have to go into quite that much detail. This, however, is both good and bad news. The good news is that the court will not have wasted extravagant amounts of time making findings never really needed when probation is successfully completed. A certain embarrassment or incongruity is also avoided in that the judge will not have to make findings on aggravated aspects of the crime and then release the person on straight probation. The authority for this exemption from making detailed findings is found in the tautologous last sentence of Section 1170(b), which warns, "[a] term of imprisonment shall not be specified if imposition of sentence is suspended." This seems to be more a definition of suspending imposition of sentence than a procedural guide. The amendment was introduced by the Judicial Council in the last days of AB 476 in order to "avoid a possible misconstruction where specification of a "term of imprisonment" would be 'required,' even in an alternative felony-misdemeanor situation where a misdemeanor disposition is appropriate." Various judges and the Judicial Council were extremely concerned during the drafting of both SB 42 and AB 476 that the word "findings" be scrupulously avoided in the statute to assure that extensive "findings of fact" similar to those required in civil cases are not required. Accordingly, the more generic terms, "circumstances," "facts," and "reasons" were used to assure that reasonable factual detail would be forthcoming, without the formalism found in civil cases.

The bad news is that some detail is required, even if imposition of sentence is suspended. The California Rules of Court require this, and it may be necessary to avoid practical and constitutional problems that could arise later. The practical problem arises upon revocation of probation, where the revoking judge will have to recreate a great number of facts in an unfamiliar case. The constitutional problem faces the court at the same time,

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445. See text accompanying notes 401-437, supra.
446. See text accompanying notes 242-243, supra.
447. CAL. PENAL CODE §1170(c).
448. In all seriousness, considering the factors recently set forth for bail pending appeal, that area may be modified greatly. See In re Podesto, 15 Cal. 3d 921, 544 P.2d 1297, 12 Cal. Rptr. 97 (1976). In fact, it now seems likely that many more criminal appeals will not be decided until after release of the prisoner.
since *Rodriguez*\textsuperscript{451} appears to prohibit considering any facts subsequent to the original crime, including the probation violation, to increase the term on the original offense.\textsuperscript{452} If not done with sufficient clarity, an offender will surely claim, and perhaps rightly so in some cases, that the term being given on the original offense really reflects misconduct on probation instead.

**E. Sentence Review**

**Exposition**

Having pronounced sentence, the judge may still face the case again for resentencing should the term be considered disparate. Resentencing can occur in *two ways*. First, the court may on its own motion within 120 days, or upon the recommendation of the Director of Corrections or the Community Release Board at any time, recall the sentence and resentence the defendant.\textsuperscript{453} The court will apply Judicial Council rules to eliminate the perceived disparity, so long as the sentence is downward.\textsuperscript{454} The second way in which the court may receive the case is after the one-year Community Release Board review. That agency is directed to review the sentence within one year after commencement of the term of imprisonment and may, by motion, recommend that the case be recalled and resented.\textsuperscript{455} The Community Release Board must apply the Judicial Council's rules and information on sentencing\textsuperscript{456} in deciding whether to make its motion. The law requires the CRB to consider not only the length of the prison sentence received but also whether probation was properly denied.\textsuperscript{457} Nothing in the law, however, requires the sentencing court to accept the CRB's recommendation, and presumably the motion may simply be denied.

**Commentary**

Throughout the histories of SB 42 and AB 476, recall could always be recommended by the Director of Corrections or the Community Release Board, or could be accomplished by the court itself. Changes in this area of the law basically involved the following issues: (1) how broad the Community Release Board's disparate sentence review would be and whether it would be mandatory; (2) whether resentencing would be limited to a lower rather than a higher sentence; and (3) what the placement and numbering of the provisions should be.\textsuperscript{458}

\textsuperscript{451} In *re* Rodriguez, 14 Cal. 3d 639, 537 P.2d 384, 122 Cal. Rptr. 552 (1975).

\textsuperscript{452} Id. at 652-53, 537 P.2d at 547, 122 Cal. Rptr. at 562.

\textsuperscript{453} CAL. PENAL CODE §1170(d).

\textsuperscript{454} See CAL. PENAL CODE §1170(d).

\textsuperscript{455} CAL. PENAL CODE §1170(f).

\textsuperscript{456} See CAL. PENAL CODE §§1170.4-.6.

\textsuperscript{457} CAL. PENAL CODE §1170(f).

The disparate sentence review and recall powers of the Community Release Board raise more questions than are answered by the statute. There appear to be two distinct procedures authorized in the statute: (1) the "recall" power of Section 1170(d), which is basically the old Section 1168 recall provision with the Community Release Board authorized to recommend recall along with the Director of Corrections, after the 120 days for court recall has passed; and (2) the "disparate sentence review" of Section 1170(f).

The recall provision of Section 1170(d) allows the CRB to recommend recall of a sentence. No criteria are specified in the statute. The court may recall the sentence previously ordered "and resentence the defendant in the same manner as if he had not previously been sentenced, provided the new sentence, if any, is no greater than the initial sentence."459 Obviously, probation may also be granted, and the resentence is to "eliminate disparity of sentences and to promote uniformity of sentencing."460 The CRB is not mandated to review each prisoner's case, and this appears to be a purely discretionary procedure that can occur at any time during the prison term for any reason; these reasons can go beyond the narrower provisions for disparate sentence review.

The disparate sentence provision of Section 1170(f), on the other hand, requires the CRB to review each prisoner's term within one year of the commencement of the term with a view toward ensuring uniformity of sentences for similar offenses and offenders. It shall recommend recall of a sentence if it determines that the sentence is disparate, and although the statute is silent, the court apparently has the choice of rejecting the CRB's recommendation. The statute is also silent on whether a higher sentence may be imposed. There are three approaches to this problem: (1) if the recall is construed to occur under subdivision (d), the statute expressly prohibits a higher sentence; (2) if the recall occurs under subdivision (f) there may be finality of judgment reasons461 that prohibit the imposition of a higher sentence.


461. There appears to be no absolute, constitutional bar to later imposition of a higher sentence. See North Carolina v. Pearie, 395 U.S. 711, 719-23 (1969); see also People v. Thornton, 14 Cal. App. 3d 324, 326, 92 Cal. Rptr. 327, 328 (1971). If the defendant, however, is exercising his right to an appeal, later imposition of a higher sentence is prohibited. See People v. Ali, 66 Cal. 2d 277, 281, 424 P.2d 932, 935, 57 Cal. Rptr. 348, 351 (1967); People v. Henderson, 60 Cal. 2d 482, 495, 386 P.2d 677, 685, 35 Cal. Rptr. 77, 85 (1963); In re Ferguson, 233 Cal. App. 2d 79, 82, 43 Cal. Rptr. 325, 327 (1965).
sentence; or (3) the disparate sentence review provisions may be such an integral part of the sentencing procedure that the strongly stated policy of uniformity of sentences allows imposition of a higher sentence when the original sentence was disparately low.

Another theoretical problem is whether the disparate sentence review procedure violates the separation of powers doctrine.\textsuperscript{462} A similar contention was rejected under the indeterminate sentence law,\textsuperscript{463} which allowed an administrative agency to set a term under a judicial commitment. There seems to be no reason to believe that a mere recommendation of a judicial recall and resentence would violate the doctrine.

The real problems with sentence review again appear to be practical rather than theoretical. The following practical problems are raised. In conducting its disparate sentence review, how sensitive must the CRB be to every change in the statistics that are gathered on an ongoing basis by the Judicial Council? How many times can a sentence be reexamined? How disparate must a sentence be before recall is in order? On what factual basis will similar cases be compared? Will the CRB be able to rely on the more complete facts in the probation officer’s report, or will it be limited to consideration merely by the legal facts proved beyond a reasonable doubt in the elements of the crime?\textsuperscript{464} Will the CRB review the reasons given by the judge for imposing the upper (aggravation) or lower term (mitigation), striking an enhancement, or imposing a consecutive sentence? Will the CRB second-guess the prosecutor’s charging decision if that has apparently resulted in the disparity?

There is a very practical question, too, as to whether the statistics on California prison terms will drift inexorably downward. If courts may not resentence to a higher term to correct a lenient and hence disparate sentence, will not statistics in California begin to fall? And as to figures in other states, great care must be taken in relying on the validity of figures used to express the “penalty” for the offense.\textsuperscript{465} After all, the statutory “penalties” in California under the old law were extremely high, but its median times served were comparable to the new ranges. Will actual practice in other jurisdictions, rather than their statutory figures, be compared? Will figures on the actual medians in other states even be physically retrievable? The answers to these and other related questions will have to await future

\textsuperscript{462} See Way v. Superior Court, 74 Cal. App. 3d 165, 141 Cal. Rptr. 383 (1977), and the cases cited therein.
\textsuperscript{463} In re Lee, 177 Cal. 690, 692-95, 171 P.2d 958, 959-60 (1918).
\textsuperscript{464} If the CRB may rely only on those facts proved beyond a reasonable doubt there will rarely be a disparity, since each like crime has identical elements and the same range of three choices for base terms.
\textsuperscript{465} CAL. PENAL CODE §§1170.4, 1170.5. The new law requires the Judicial Council to provide essentially an ongoing Lynch test for sentence reviewers to use. See In re Lynch, 8 Cal. 3d 410, 503 P.2d 921, 105 Cal. Rptr. 217 (1972). Those who supported SB 42 out of annoyance with judicial interference with the legislature’s sentences would seem to have bought as much uncertainty as they have sold.
litigation and further regulations of the CRB in Title 15 of the Administrative Code. This new experiment in Anglo-American law may well become the most important function of the CRB in the future.

This is sentencing under the Uniform Determinate Sentencing Act of 1976.\textsuperscript{466} If you liked the new sentencing structure, you will find the new structure this law creates for parole equally engaging.

**NEW PAROLING STRUCTURE**

**A. The Nature of Parole**

*Exposition*

The nature of parole under the new law is substantially different from that under the old indeterminate sentencing system. Parole in the past has been thought of as constructive custody, as service of a prison sentence outside prison walls.\textsuperscript{467} The powerful, theoretical "handle" on the parolee was the Adult Authority's ability to revoke parole and return the inmate to serve, potentially, the rest of his maximum term in prison.\textsuperscript{468} Penal Code Section 3000 now opens with the legislative declarations 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 of and surveillance of parolees and to provide educational, vocational, family and personal counseling necessary to assist parolees in the transition between imprisonment and discharge. A sentence pursuant to section 1168 or 1170 shall include a period of parole, unless waived as provided in this section.

There are elements in this statement of supervision and social work, public safety and personal rehabilitation. The control aspect of parole, however, should diminish, given a more limited parole period than under the old law and a highly limited period of reincarceration for a parole violation.

Parole for determinately sentenced inmates runs for a maximum period of one year.\textsuperscript{469} It may be waived by the Community Release Board\textsuperscript{470} and the CRB is also obligated to consider the request of any inmate regarding the length of his parole and the conditions thereof.\textsuperscript{471} Outright absconding can

\textsuperscript{466}. CAL. STATS. 1976, c. 1139, §350 at —. The word "Uniform" in the title is puzzling. If it means sentences are uniform, it is redundant; if it means Uniform Act, it is merely a conceit of the drafters.


\textsuperscript{469}. CAL. PENAL CODE §3000(a).

\textsuperscript{470}. CAL. PENAL CODE §3000(b).

\textsuperscript{471}. CAL. PENAL CODE §3000(c). One might question whether this consideration of requests is the same as the review of parole lengths and conditions under Penal Code Section 5077.
toll the running of the parole period, but revocation can only do so for a limited time. Additional confinement time for revocation of parole unaccompanied by a new felony commitment is limited to six months,472 and jurisdiction over the parolee, whether through parole supervision or custody, may not extend longer than 18 months from the date of initial parole.473

Parole is also available for the inmate sentenced to an indeterminate term or a life term under Penal Code Section 1168(b); and it appears clear that the Community Release Board retains ultimate control over conditions of parole for both determinately sentenced inmates and those sentenced to life imprisonment.474 For those sentenced to life, the parole period is three years, as opposed to the one-year period for those determinately sentenced.475 Either period may be waived, however, by the Community Release Board. The limit on parole jurisdiction over those sentenced to life imprisonment is four years rather than 18 months, although additional confinement for any one revocation not involving a new felony commitment is limited to six months.476 Absconding from parole will toll the running of the parole period.477 As with determinately sentenced inmates, those sentenced to life imprisonment are now discharged at the end of the parole period.478 This is a significant innovation, as formerly such persons had to obtain a pardon to be free from parole.479

**Commentary**

The history of the provisions relating to the nature and duration of parole reflect two basic trends. One is the shortening of parole and parole revocation periods, and the other is an attempt to define the purpose of parole under the new system. SB 42 originally provided for a two-year parole for most inmates and five years for those serving a life term.480 One year of additional confinement was allowed for revocation not accompanied by a new commitment.481 With these exceptions parole under the new system was characterized by fixed periods at the end of which the offender was

472. Cal. Penal Code §3057. It is questionable whether parole may be revoked for longer than six months if accompanied by a new felony commitment. This may have a practical effect on a parolee sentenced to life imprisonment who is later released on a three-year parole and who receives a new 16-month term. The new sentence, less good-time credits, may expire before the original three-year parole expires.

473. Cal. Penal Code §3000(d). Hence, if the parolee constantly violates parole and is immediately processed through Morrissey revocation procedures, several reincarcerations of six months or less duration might be fitted into the 18-month ceiling before jurisdiction ran out.


479. This occurred because they were serving a sentence fixed by statute at life. The Adult Authority had no power to fix the sentence at less than life imprisonment.


released, rehabilitated or not, dangerous or not. The CRB was required to consider any inmate's request regarding length and conditions of parole.\textsuperscript{482} Revocation did not toll the running of the parole period, but it was soon recognized that absconding would have to toll the running of parole.\textsuperscript{483} Other than that, however, the parole and revocation periods began to drift downward, first by making it procedurally more difficult to set the longer parole\textsuperscript{484} and then by directly reducing the periods themselves.\textsuperscript{485} AB 476 slightly increased jurisdiction over the parolee by providing that revocation could toll the parole period to a limited degree.\textsuperscript{486}

Under the determinate sentence law, the concept of parole has changed radically from the traditional model of constructive custody while completing the term in the community.\textsuperscript{487} SB 42 consistently provided that parole came \textit{after} the term had been served.\textsuperscript{488} While some more traditionally worded sections remain,\textsuperscript{489} parole was simply \textit{not} considered to be continued service of the sentence. SB 42 never addressed questions concerning the theoretical basis for parole, but the new parole was clearly different from the former idea of continued custody, given automatic discharge, limited revocation and limited jurisdiction. AB 476 finally answered the question with the theory, which was quoted from Section 3000 above, that parole is a period of reintegration into society during which parolees will be supervised, kept under surveillance and given assistance.\textsuperscript{490}

One theoretical problem deserves mention. Considering the presumption that parole will be granted and the subsequent inevitability of discharge, there will effectively be no such thing as a life term\textsuperscript{491} once the prisoner is released on parole. This legal discharge of a life term raises some new possibilities. First, will the constitutional principles enunciated in \textit{Rodri-
guez require the CRB to set a "primary term" now that the "term" is no longer life, but rather the preparole period plus three years? Or, will the courts hold that a maximum of life is appropriate for six crimes carrying life sentences regardless of the individual circumstances of each crime? Second, can determinate enhancements and terms now be made to run concurrent with a life term? Under Penal Code Section 669, punishment for other crimes must "merge and run concurrently" with a life term. But what if the court stayed the determinate punishment, to become effective only in the event the prisoner was released and discharged on the life term? In addition to these considerations, many practical problems remain in the parole provisions under the new law. The interplay between fixed revocation periods and the due process requirements of recent years provide one example. Even assuming the parolee violates the conditions of his parole soon after release, the revocation process developed in recent years has taken months to complete. The new law's six month maximum additional confinement period for revocation refers to "confine ment pursuant to a revocation of parole." Does this time commence to run after final revocation or does the six month period run during the revocation process? Suggesting that time during the revocation process is a part of the six month period, Penal Code Section 3000(d) speaks of "suspension" of parole when a parolee has absconded, implying that otherwise the time is counted. If this is the case, a lengthy parole revocation procedure, perhaps involving a pending prosecution, fearful witnesses, and delays by counsel may mean no additional confinement time upon revocation is possible at all if the parolee has been held in custody pursuant to a parole "hold."

If a convicted offender violates parole toward the end of his parole period, the limitation on additional confinement time pursuant to a revocation may make revocation impractical. Again, Penal Code Section 3000(d) speaks of a suspended parole, perhaps giving the Community Release Board the power to retain jurisdiction by suspending parole pending full revocation procedures. If revocation takes several months, however, there would be little point in going through complete Morrissey procedures just to send the offender back to prison for a month or two. Similarly, if the parolee were near the 18-month or four-year limitation on parole, the situation again makes revocation impractical, if not impossible.

493. See text accompanying notes 78-79, supra.
494. One technical problem concerns year-and-a-day prisoners. While it is clear that someone sentenced to a term not to exceed one year and one day would have a one year, not a three-year parole, CAL. PENAL CODE §3000(a), (b), it is not quite as clear that he would have an 18-month maximum rather than a four-year maximum. See CAL. PENAL CODE §3000(d). Presumably, such a peccadillo is easily remedied by sound interpretation.
496. See 15 CAL. ADM. CODE §§2607-2610.
497. CAL. PENAL CODE §3057.
The new CRB rules require that the parolee’s hearing occur within 30 days of the placement of the parole hold, unless the parolee in effect pleads nolo contendere. Since most parolees are undergoing a criminal prosecution of some sort for the same incident, the use immunity provisions of *People v. Coleman* are now going to be the subject of many arguments in the criminal proceedings. Indeed, already many anguished defense attorneys are requesting that the revocation proceedings be delayed until after the criminal proceedings. This procedure is not being allowed because it would mean that the revocation hearing would be held after the six-month revocation time had elapsed, arguably turning the parole hold into mere preventive detention.

### B. Releasing the Determinately Sentenced Inmate

**Exposition**

In general, it is evident that not only has the nature of parole been altered, but the manner of releasing inmates has been radically changed. Once a matter of broad discretion in the hands of the parole board, the inmate’s release is not determined by the court’s sentence minus good time credits. As we will describe, good time credits are easily earned but can be taken away only after a complex procedure has been meticulously followed. As good time credits take into account the good or bad behavior of the inmate in prison, the creation of elaborate procedures for their grant or denial also constricts the broad power of the Department of Corrections over internal prison control. Somewhat offsetting this dramatic constriction of the discretion of prison officials is the fact that the terms imposed for many prison offenses are mandated by statute to be served consecutively. There is also relatively harsh treatment of consecutive prison crimes under Section 1170.1(b), which provides for tandem service of consecutive terms, rather than a mathematical increment.

1. **Granting Good-Time Credits**

The inmate’s arrival at prison triggers a series of duties imposed on prison officials to notify the prisoner of his rights to good-time credits. Within 14 days after arrival at the reception center, the prisoner must be informed of “all applicable prison rules and regulations” including the possibility of good-time credits. Then, within 14 days of arrival at the institution to

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499. 15 CAL. ADM. CODE §2641.
500. 13 Cal. 3d 867, 889-97, 533 P.2d 1024, 1042-47, 120 Cal. Rptr. 384, 402-07 (1975) (use-immunity required for any testimony given by a probationer at a probation revocation hearing, held prior to criminal trial on the same charge).
501. See 15 CAL. ADM. CODE §§2640-2641.
502. See CAL. PENAL CODE §§5003.5, 5055 for a description of the Department’s broad powers.
503. E.g., CAL. PENAL CODE §§4501, 4501.5, 4502, 4503, 4530, 4532.
504. See CAL. PENAL CODE §2930(a).
which the prisoner is ultimately assigned, he must be informed of the "programs" that are offered and available at that institution. The fact of communicating these notices must be reflected in the inmate's central file within 90 days of arrival in state prison. Also apparently during that 90-day period a document signed by a prison official is given to the prisoner outlining the conditions under which good-time credit may be earned. While this is hardly an atmosphere for arms-length bargaining, the document apparently has some binding effect on the Department of Corrections, for it may be modified only upon: (1) mutual consent of the prisoner and the Department of Corrections; (2) the transfer of the inmate from one institution to another; (3) the Department's determination of the prisoner's lack of adaptability or success in a specific program or assignment (in such case the inmate shall be entitled to a hearing regarding the Department's decision); and (4) a change in custodial status. Finally, within 30 days of reception in prison, the inmate must be notified of the maximum credits he can earn and the resulting "good-time release date," that is, the date of release on parole assuming accumulation of all possible credits.

The prisoner, settled at his ultimate prison address, notified of the rules, notified of the programs, notified of good-time credits, and in possession of a document specifying how to earn those credits, begins to earn credits at a rate of four months possible reduction for every eight months served. Thus, good-time credits can result in a possible one-third reduction in the court-imposed term, and any period of less than eight months is subject to a comparable ratio. One must note, however, that good-time credit is earned on time "served in prison." Hence, preprison credits which include time spent in county jails before trial or under a parole hold would presumably be credited against the court-imposed term, but would not also permit accrual of good-time credits further to reduce that term. As a result, the expected release date cannot be precisely calculated by taking one-third off of the court-imposed term.

Actually it is an overstatement to refer to "earning" good-time credits. Good-time credits are composed of good behavior credit (three of the four months' reduction) and participation credit (one of the four months' reduction). Good behavior credit is defined in Section 2931(b) as not: assaulting anyone, escaping, inciting successful riots, falsifying significant

505. CAL. PENAL CODE §2930(a).
506. CAL. PENAL CODE §2931(a).
507. CAL. PENAL CODE §2931(a).
508. CAL. PENAL CODE §2932(b).
509. CAL. PENAL CODE §2931(b).
510. CAL. PENAL CODE §2931(b).
511. CAL. PENAL CODE §2931(b).
512. CAL. PENAL CODE §2900.5. See also 15 CAL. ADM CODE §§2340-2346 for the complicated manner in which preprison credits for different offenses are credited.
513. CAL. PENAL CODE §2931(b), (c).
514. Inciting riots does not count unless acts of force or violence result. CAL. PENAL CODE §2931(b)(2).

78
records, intentionally destroying state property in excess of fifty dollars, possessing escape tools without permission, possessing a weapon without permission, possessing drugs without prescription, or manufacturing or selling intoxicants. Participation credit is "earned" by participation in "work, educational, vocational, therapeutic, or other prison activities." No demonstrable success or skill need be shown, since participation credit is earned as long as a reasonable effort is made. Those "confined by choice or due to behavior problems" are given a chance to participate in activities "commensurate with the custodial status," and may earn participation credits in these activities.

2. Taking Away Good-Time Credits

If the inmate has earned good-time credits, these credits can be taken away for misbehavior, but only after an elaborate procedure has been meticulously followed. Misbehavior is divided into three categories of seriousness, and in these categories, 45 days, 30 days, or 15 days of good-time credits are lost for each prohibited activity. Failure to participate in activities can result in the loss of 30 days of good-time credits for each failure. A limitation enters into this calculation, requiring that an inmate not lose more than 90 days of good behavior or 30 days of participation credit "during any eight-month period during which the misbehavior or failure to participate took place." Furthermore, if prison officials fail to follow the time limitations set forth for the procedures, they are barred from denying any good-time credit at all.

The procedure for denying good-time credits grants the inmate certain rights. The inmate is entitled to written notice of the charge, the date, time, and place of alleged misbehavior, the evidence relied upon, his rights and the procedures that will be employed at his hearing. This notice must be promptly given, preferably within five days of discovery of the misbehavior. If the notice is delayed until 30 days or more after the misbehavior took place, it must include reasons why the evidence was not reasonably discoverable within 30 days "or any sooner than it was discovered." After notice has been given, the inmate is entitled to a hearing held within

516. While the idea behind this is probably sound, the way in which it is phrased is, to say the least, curious.
520. Apparently, then, if you cannot go to class because you are in maximum custody for stabbing a guard, prison officials will design a program, such as sweeping your cell, so you can continue to earn participation credits.
ten days by "an individual who shall be independent of the case." Again, a time table is involved, for if the hearing is not held within ten days, it can only be held up to 30 days after the notice, after further notifying the inmate of the extraordinary circumstances causing delay and after ascertaining that he is not prejudiced thereby. Beyond 30 days, no hearing may be held at all.

Another provision entitles the inmate to an "investigative employee" to gather information, talk to witnesses, prepare a written report, and be present at the hearing. If the hearing officer determines that the inmate needs assistance in presenting a defense at the hearing, the inmate, may request that an employee of the Department of Corrections be assigned to assist in that task. Finally, the inmate may request witnesses to attend the hearing, and they must be called unless the hearing officer denies the request on the basis of specific reasons presented to the inmate in writing. The inmate, under the hearing officer's direction, may personally question all witnesses.

The standard of proof at the hearing is a preponderance of the evidence. If the inmate is found guilty of the misbehavior charged he is entitled to written notice of that decision, the specific evidence relied upon, and the amount of credits to be denied. This notice must be given within ten days, and the inmate may then appeal the decision first through department procedures and then to the Community Release Board. The CRB may affirm, reverse, or modify the "department's decision" or grant a hearing before the CRB itself with rights specified in Penal Code Section 3041.5.

One variety of misbehavior worth special mention involves misbehavior by the inmate that also constitutes a crime, for this initiates a different procedure. In such cases the Department may refer the case for prosecution and if it does so, the timetable for the hearing described above is suspended, and the following procedure applies. If the district attorney has not filed an accusatory pleading within 60 days of referral, the prisoner may request that the Department go forward and the Department must then hold its

527. CAL. PENAL CODE §2932(a)(1).
528. CAL. PENAL CODE §2932(a)(1).
529. CAL. PENAL CODE §2932(a)(2).
530. CAL. PENAL CODE §2932(a)(4). It is difficult to assess the meaning, if any, of the variations in reference to the "investigating employee" and the departmental employee. Presumably, they may be the same.
531. CAL. PENAL CODE §2932(a)(3).
532. CAL. PENAL CODE §2932(a)(5).
533. CAL. PENAL CODE §2932(a)(6).
534. CAL. PENAL CODE §2932(a)(7).
535. CAL. PENAL CODE §2932(a)(7). Which decision is meant—the Department's final denial of the appeal or the Department's denial of good-time credits? Is the review mentioned in Section 2932(a)(7) the same as that provided for in Penal Code Section 5077? See also the discussion of Penal Code Section 3041.5, the general rights provision, in text accompanying notes 583-594, infra.
536. CAL. PENAL CODE §2932(c).
hearing within 15 days of the request. If the district attorney does file the case and the inmate is convicted, good-time credits may be denied or taken away. If the inmate is acquitted, no credits may be taken away. If the Department does not wait for the prosecution and denies or takes away credits in its own hearing, good-time credits must be restored to the inmate upon acquittal in court even if this means crediting that time against parole.537

Commentary

The history of the provisions in SB 42 relating to good-time credits reflects a continual increase in the rights of the felon and in the complexity of procedures required of the Department of Corrections. It is obvious from the history of SB 42 that the Department had relatively little influence in the drafting of this procedure, and many practical problems were ignored. AB 476 later made certain provisions comprehensible or, in some cases, physically possible to comply with.

As the good-time credit provisions were first drafted, the Department of Corrections had 90 days to provide the initial notice of rules, programs and credits. Credit of a one-fourth reduction in the term for "good behavior and cooperation" was to be possible and a "document" was to be executed by a prison official and the inmate specifying how credits might be earned. A month prior to the good-time release date, a Department of Corrections official would meet with the inmate to grant or deny the credit for refraining from violent behavior or lack of cooperation with the program.538 Clearly, this left the Department with broad discretion, with a lot of room for its own rules and regulations, and with an easily calculated system of credits and time limits.

In a subsequent version of SB 42, the time for providing notice to the inmate was dropped from 90 days to 30 days, and the maximum credit was raised to a one-third reduction in the term. The four-month credit for eight-months served formula was created with no provision for a comparable ratio for lesser periods of time. Credits were deemed automatically earned unless the Department acted, and notice of the ever-redetermined release date was to be given to the inmate every eight months. If misconduct constituted a crime, the Department was prohibited from proceeding until the district attorney had acted or certified in writing that he would not act.539

The first 1976 rewrite of SB 42 contained most of the good-time credits provisions that are now in the new law. It further reduced the time for giving initial notices to 14 days. It limited conditions under which the document on earning credits could be altered. It specifically listed how

537. See CAL. PENAL CODE §2932(d).
credit might be earned, or, more accurately, what one must not do in order to earn credit. It created the constellation of rights given upon initiation of credit denial proceedings. Finally, where misbehavior was to be referred to the district attorney, it created the interesting loophole that the Department could not act until: (a) the district attorney certified in writing that he would not act; or (b) the trial court proceedings were completed. The Department, however, had to act within 30 days of notice to the inmate of possible credit loss (and notice had to be given within five to 30 days after the conduct) unless an accusatory pleading was at least filed. If the district attorney simply delayed, credits could apparently not be taken away even if the inmate were convicted.  

AB 476 made mostly technical changes to this whole area. One change involved starting the time limit for the 14 day notices from the time of the inmate’s arrival in prison rather than from the “commencement of term.” Presentence credit for county jail time would otherwise have made it physically impossible for the Department to comply. AB 476 also added the idea of a comparable ratio for credit on time less than eight months, so that credit could be earned under SB 42’s formula.

This area of the new law remains deeply troubled and once it takes full effect, good-time credits may prove to be a very significant source of litigation. At the outset, the adequacy of the 14-day notices under Penal Code Section 2930 may be challenged. To require that “all applicable” prison rules be explained to each new inmate is burdensome at best. The nature of the “document,” at one time characterized as an agreement between the Department of Corrections and the inmate, described in Penal Code Section 2931(a) must be questioned. For example, could the drafters have intended the document to be contractual in nature? Can credit be given for activities not included or taken away for conduct not expressly covered by the provision? Among the list of events justifying modification of this document after the initial briefing is the vague “lack of adaptability of a program” that results in an undefined “hearing regarding the Department’s decision.” Transfer to another prison and change in custody are also listed as reasons to modify this document. These provisions may lead to a requirement that due process procedures be followed before such decisions can be made.

541. CAL. PENAL CODE §2930.
542. AB 476, 1977-78 Regular Session, as introduced, Feb. 10, 1977, §38, at 41; see CAL. PENAL CODE §2931(b).
543. Does this include due process rights specified in case law or only “rules” the prison has specifically compiled?
545. CAL. PENAL CODE §2931(a)(3).
546. See note 42, supra.
These are minor questions compared to the problems one perceives in working with the list of activities that must be avoided in order to earn credit. Provisions regarding possessing weapons or escape tools without permission, the prohibition against destroying only state property, the prohibition against successfully inciting riots or falsifying significant records seem ludicrous. The key question in this list is, of course, whether it is exclusive. Its opening line simply allows credit for "forbearance from any or all of the following activities," a phrase not especially helpful in determining whether exclusivity was intended. The odd admonition that "[n]othing in this section shall prevent the Department of Corrections from seeking criminal prosecution for violations of law" almost suggests that if the misconduct is not listed, the only recourse is criminal prosecution. It seems likely that the scope of misconduct in the gap between this list and a new criminal offense that can be proved in a prison setting will be dealt with in other ways, such as restrictions on internal prison privileges and more extensive use of disciplinary confinement in security housing units. While perhaps less important, another question can be raised as to the value judgments drawn in this list. Failure to participate in a prison program may result in loss of 30 days credit, yet destruction of state property, falsifying records, possessing escape tools, manufacture or sale of intoxicants merit only a 15-day loss per incident.

The specification in Penal Code Section 2932(a) of a maximum limit on credit denial also raises a serious question. If only four months' credit can be lost "during any eight-month period during which the misbehavior or failure to participate took place," which eight-month period is to be considered? Is the inmate's term conceptually divided into eight-month blocks from his receipt in state prison? Or does one look to an eight-month period before or perhaps after or perhaps around the date of the misbehavior? Considering an inmate who is repeatedly involved in disciplinary incidents or constantly refusing to participate in activities, definition of this eight-month period becomes vital to determining how much credit can be taken away.

Even the portion of Penal Code Section 2932 detailing hearing rights causes certain problems. One question arises from the provision that if time limits are not met by the Department, credit may not be denied. No provision is made for delay caused or requested by the inmate himself. The provision that requested witnesses be "called" does not specify the consequences if the witness refuses. No subpoena power is given to compel

547. See CAL. PENAL CODE §2931(b).
548. CAL. PENAL CODE §2931(b).
549. CAL. PENAL CODE §2931(b)(3).
550. CAL. PENAL CODE §2931(c).
551. CAL. PENAL CODE §2931(b)(3).
552. CAL. PENAL CODE §2932(a).
attendance nor does the provision take into account the violent atmosphere of prison when it requires this confrontation. Finally, in the provision for referring cases to the district attorney, the question of whether departmental hearings should be stayed pending the district attorney's decision is unclear. In SB 42, the Department was clearly forced to await the district attorney's decision, but now that priority is not so clear. It seems that if the verdict in the criminal proceeding conflicts with the result of the credit hearing, amends are simply made. One interesting aspect of this interface is that "worse is better." If the inmate's conduct is so egregious that criminal prosecution is justified, he goes unpunished unless the high standard of "beyond a reasonable doubt" is met. But if it were less serious and not referred to the district attorney, the same credit may be denied on a mere preponderance of the evidence.

C. Paroling Life Prisoners

Exposition

Procedures for paroling those inmates sentenced to life imprisonment retain a much more familiar form. The practitioner will notice, however, some significant differences under the new law. The Community Release Board is now required to meet with an inmate sentenced under Penal Code Section 1168(b) within the first year of incarceration. The sole purpose is to review the inmate's file and make recommendations, although Penal Code Section 3041(a) does not say to whom or about what. Due to the changes in Penal Code Section 5076.1 (dealing with the composition of CRB hearing panels) discussed previously, the Board may apparently be represented at this hearing by case-hearing representatives.

One year prior to the minimum eligible parole date the inmate's case is again reviewed, this time by a three member panel of gubernatorial appointees. This body according to the new law, "shall normally set a parole release date." The aim is to "provide uniform terms for offenses of similar gravity and magnitude in respect to their threat to the public." The

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553. Hopefully, this will not be too serious since witnesses will often be inmates or prison officials who are available for such hearings. Cf. In re Prewitt, 8 Cal. 3d 370, 375-76, 503 P.2d 1326, 1331, 105 Cal. Rptr. 318, 323 (1972) (disclosure of informants' statements).


555. Cal. Stats. 1976, c. 1139, §276, at —-


557. This is also contrary to the principles of In re Coughlin, 16 Cal. 3d 52, 56-57, 545 P.2d 249, 251-52, 127 Cal. Rptr. 337, 339-40 (1976) and In re Dunham, 16 Cal. 3d 63, 69, 545 P.2d 255, 259, 127 Cal. Rptr. 343, 347 (1976).

558. Actually, a life sentence is not an indeterminate term; it is "determinate" life as opposed to the old indeterminate life sentences such as five years to life. We will, however, discuss the parole of inmates serving life terms under this general heading.

559. One example already discussed is the discharge of life-terms.


panel is directed to comply with the Judicial Council rules devised for determinately sentenced inmates and to consider any sentencing information relevant to parole dates.\textsuperscript{563} The Community Release Board must also establish its own criteria for setting parole dates and must consider therein: (1) the number of victims of the crime for which the inmate was sentenced; and (2) other factors in mitigation or aggravation of the crime.\textsuperscript{564} There is a lame attempt to maintain continuity among panels considering the inmate, for Section 3041(a) provides "at least one member of the panel shall have been present at the last preceding meeting, unless it is not feasible to do so or where the last preceding meeting was the initial meeting." The grant of parole is important enough that any member of the hearing panel may send any decision regarding parole to the Board for a full en banc hearing. In such case, a majority vote of the full Board is required to grant parole.\textsuperscript{565} While these rules encourage the establishment of a parole date, the panel clearly may decline to set one, and the new law addresses that situation directly. It states that a date \textit{shall} be set by the panel unless it determines that "the gravity of the current convicted offense or offenses, or the timing and gravity of current or past convicted offense or offenses, is such that consideration of the public safety requires a more lengthy period of incarceration for this individual, and that a parole date, therefore, cannot be fixed at this meeting."\textsuperscript{566}

Special provisions govern the parole of those sentenced to life imprisonment. Apparently due to the seriousness of these offenses, written notice of an impending hearing to set or advance parole must be sent 30 days in advance thereof to the judge, the district attorney, the defense attorney who tried the case, and the law enforcement agency that investigated it.\textsuperscript{567} These parole hearings are recorded and a transcript is made within 30 days of the hearing.\textsuperscript{568} Incorporated into the transcript are statements, recommendations or "other materials" considered at the hearing unless confidentiality is required to preserve institutional security or personal safety.\textsuperscript{569} Also contained in the transcript are the findings and supporting reasons for the action taken.\textsuperscript{570} The transcript is then filed with the Community Release Board and made available to the public in the office of the CRB no later than 30 days after the hearing. The public has at least 30 days, then, to examine the record leading to the decision concerning parole for the inmate, since the prisoner may not be released within 60 days after the hearing date.\textsuperscript{571}

\textsuperscript{563} \textsc{Cal. Penal Code} §3041(a).
\textsuperscript{564} \textsc{Cal. Penal Code} §3041(a).
\textsuperscript{565} \textsc{Cal. Penal Code} §3041(a).
\textsuperscript{566} \textsc{Cal. Penal Code} §3041(b).
\textsuperscript{567} \textsc{Cal. Penal Code} §3042(a). Reference to the prosecutor is actually reference to the district attorney of the county from which the inmate was sentenced.
\textsuperscript{568} \textsc{Cal. Penal Code} §3042(b).
\textsuperscript{569} \textsc{Cal. Penal Code} §3042(d).
\textsuperscript{570} \textsc{Cal. Penal Code} §3042(c).
\textsuperscript{571} \textsc{Cal. Penal Code} §3042(b).
Commentary

The first major version of SB 42 contained the same basic parole provisions for inmates sentenced to life imprisonment that were contained in the final version of SB 42. The provisions required a CRB hearing in the first year of an inmate's incarceration and another hearing one year prior to minimum release date. Three members of the CRB were required to attend both hearings.\textsuperscript{572} Special provisions were also made for the parole of inmates convicted of first degree murder or kidnapping for robbery or ransom under Penal Code Section 209.\textsuperscript{573}

AB 476 removed the requirement of a three-member panel at the initial review and of continuity among panels. The special provisions for hearings were expanded to include all inmates sentenced for life and those provisions were moved to Penal Code Section 3042.\textsuperscript{574} The entire 3020 series, relating to term fixing, was repealed.\textsuperscript{575} Despite these procedural changes, the Board clearly retains an extensive discretionary power over inmates sentenced to life imprisonment.

The new procedures, however, raise intriguing questions. One question concerns the notices to officials of the impending hearing required by Penal Code Section 3042. These notices are now automatically sent out, whereas in the past they were only sent out upon request. Under Penal Code Section 3046, the CRB on granting or denying parole must consider any statements submitted by the people who were notified and responded or by other interested persons. Even assuming the public or notified officials violently oppose parole, what effect can that have on the Board, given Penal Code Section 3041’s specification of criteria in granting a parole date?\textsuperscript{576}

A more fundamental question involves the theoretical basis for setting parole dates for inmates sentenced to life imprisonment, now apparently a hybrid of determinate and indeterminate sentencing theories. On the determinate side, Penal Code Section 3041(a) emphasizes the “punishment” provisions of Section 1170 by exhorting the Community Release Board to “set the parole release date in a manner that will provide uniform terms for offenses of similar gravity and magnitude in respect to their threat to the public” and to “consider the number of victims of the crime for which the prisoner was sentenced and other factors in mitigation or aggravation of the crime.” Section 3041(b) seems to reinforce this determinate emphasis on the crime and past criminal history by mentioning “the gravity of the current convicted offense or offenses, or the timing and gravity of current or past

\textsuperscript{572} SB 42, 1975-76 Regular Session, as amended, Aug. 31, 1976, §278.2, at 139-40.
\textsuperscript{573} SB 42, 1975-76 Regular Session, as amended, Aug. 31, 1976, §278.2, at 139-40.
\textsuperscript{574} Compare Cal. Stats. 1976, c. 1139, §278.2 at — with Cal. Penal Code §3042.
\textsuperscript{575} AB 476, 1977-78 Regular Session, as introduced, Feb. 10, 1977, §43, at 48.
convicted offense or offenses.\textsuperscript{577} Suddenly, in midsentence, the theory changes to protection of public safety, requiring parole to be denied if "public safety requires a more lengthy period of incarceration for this individual. . . ."\textsuperscript{578} Apparently the inmate's present danger to society and degree of rehabilitation must be taken into account. This subjective consideration of the inmate, characteristic of an indeterminate sentencing system, is buttressed by retention of the diagnostic and psychological reports required by Penal Code Sections 5068 and 5079, which "shall include a scientific study of each prisoner, his career and life history, the cause of his criminal acts and recommendations for his care, training and employment with a view to his reformation and to the protection of society."\textsuperscript{579}

The major difficulty raised by these conflicting mandates is not whether uniform terms can be established based on the crime and prior criminal history, but the extent to which uniformity is destroyed by consideration of post-conviction factors. These factors include the inmate's conduct and mental attitude while in prison. Common sense dictates that the CRB \textit{must} be able to consider post-commitment conduct. For the determinately sentenced prisoner, it is the good-time credit system that takes account of good or bad behavior, and participation or lack of participation in prison activities. Only the traditional parole considerations can do the same for the life prisoner. To summarize, the CRB sets uniform terms based on the current crime and that inmate's prior crimes. \textit{But} the CRB also must give "traditional consideration" to the life patterns of the inmate,\textsuperscript{580} the public safety, the incarceration needed for "this individual,"\textsuperscript{581} and comments from the public under Section 3042.\textsuperscript{582} To what extent, then, can prison conduct and present mental status be considered? The Board will be forced to synthesize this unfortunate pastiche of theories in the criteria Section 3041 requires it to adopt.

\section*{D. Parole Setting, Rescission, and Review Rights}

\textit{Exposition}

One portion of the new law contains a set of inmate's rights that are to be applied to a variety of hearings.\textsuperscript{583} The rights section, Penal Code Section 3041.5, directly applies to hearings, "for the purpose of reviewing a prisoner's parole suitability, or the setting, postponing, or rescinding of parole dates." At such hearings, the inmate has the following rights:

\begin{itemize}
  \item \textsuperscript{577} Convicted offenses perhaps means felony convictions as opposed to "silent beeps."
  \item \textsuperscript{578} \textit{CAL. PENAL CODE} §3041(b).
  \item \textsuperscript{579} \textit{CAL. PENAL CODE} §5079.
  \item \textsuperscript{580} \textit{CAL. PENAL CODE} §5068.
  \item \textsuperscript{581} \textit{CAL. PENAL CODE} §3041(b).
  \item \textsuperscript{582} \textit{See generally In re Stanley, 54 Cal. App. 3d 1030, 1038-41, 126 Cal. Rptr. 524, 529-31 (1976); CAL. PENAL CODE} §3046.
  \item \textsuperscript{583} \textit{See CAL. PENAL CODE} §§2932(a)(7), 3041.5, 3041.7.
\end{itemize}
(a) The inmate has the right to review the file to be used by the CRB. He is allowed to make his review at least ten days prior to the hearing and may enter a written response to any material to which he objects.\[^{584}\]

(b) The inmate can be present at his hearing, can ask and answer questions, and can speak on his own behalf.\[^{585}\]

(c) A person designated by the Department will be present at the hearing to insure that all facts relevant to the decision are presented, including contradictory assertions as to matters of fact that have not been resolved by departmental or other procedures. This requirement is dispensed with if the defendant is represented by legal counsel at the hearing.\[^{586}\]

(d) Upon request, the inmate will receive a stenographic record of all proceedings.\[^{587}\]

(e) If the hearing is being held to postpone or rescind parole dates, the inmate is further given the right to the attendance of witnesses, the right to question such witnesses, and the right to specific reasons in writing for refusal to call any witness the inmate desires.\[^{588}\]

(f) Depending on the result of the hearing, the inmate is entitled to written findings sent within a specified time:\[^{589}\]

(i) If it was a hearing to set parole and a parole date was granted, the inmate is entitled to a written statement setting forth the parole date, conditions to release on that date and consequences of failure to meet those conditions. This notice must be sent within ten days of the hearing.\[^{590}\]

(ii) If it was a hearing to set parole and a parole date was denied, the inmate is entitled to a written statement, sent within 20 days of the hearing, that sets forth reasons for not setting a parole date and suggests beneficial activities in which the inmate might participate. Also, if a date was not set, the CRB is obliged to hold a hearing with the inmate every year thereafter.\[^{591}\]

(iii) If the hearing resulted in postponement of a previously set date, the inmate is entitled to a written statement, sent within ten days of that CRB action,\[^{592}\] that sets forth the new date and the reasons for postponement. The inmate is further allowed to seek review of the postponement within 90 days of receiving the statement.\[^{593}\]

\[^{584}\] CAL. PENAL CODE §3041.5(a)(1).
\[^{585}\] CAL. PENAL CODE §3041.5(a)(2).
\[^{586}\] CAL. PENAL CODE §3041.5(a)(3).
\[^{587}\] CAL. PENAL CODE §3041.5(a)(4).
\[^{589}\] CAL. PENAL CODE §3041.5(b).
\[^{590}\] CAL. PENAL CODE §3041.5(b)(1).
\[^{591}\] CAL. PENAL CODE §3041.5(b)(2).
\[^{592}\] CAL. PENAL CODE §3041.5(b)(3). Note that in this and the following section, the date of the "board action" rather than the hearing date is controlling. This apparently refers to the date the decision is final under Board regulations.
\[^{593}\] CAL. PENAL CODE §3041.5(b)(3).
(iv) If the hearing resulted in rescission of a parole date the inmate is entitled to a written statement, within ten days of the Board action, setting forth the reasons for rescinding the date. In addition, however, a new release date must be set within six months.594

Assuming that the inmate has had hearings which preserved all of the rights described in Penal Code Section 3041.5(a) and has received the notices required by Penal Code Section 3041.5(b),595 he may further request a rehearing by the Board under Penal Code Section 3041.7. A rehearing must be granted to any life prisoner: (1) whose parole date is set at more than three years beyond the minimum eligible parole date; (2) whose parole release date is not set at the hearing held one year prior to the minimum release date; or (3) whose parole date is rescinded.596 At this rehearing, held within 60 days of the inmate’s request, the inmate is entitled to counsel and to the rights set forth in Penal Code Section 3041.5. Furthermore, he is entitled to counsel and to a hearing with rights specified in Section 3041.5 at every subsequent hearing to set or advance a parole date.597

Commentary

As with the basic provisions for parole consideration of inmates sentenced to life imprisonment, the provisions defining an inmate’s rights at various hearings did not vary dramatically in the course of SB 42. SB 42, however, did contain a number of semantic and procedural problems. Sections 3041 and 3041.5 referred to the CRB’s reviewing “eligibility” for parole, a fruitless task, since legal eligibility for parole is determined by statute and is not the subject of discretion. The more appropriate word “suitability” was added by AB 476.598 The requirement that the Board grant counsel at “any subsequent hearing,” was clarified to mean any hearing for the purpose of setting or advancing a parole date.599

Many less significant problems remain in the final version of the new law. One question concerns the types of hearings at which the new statutory rights will apply. The introductory sentence of Section 3041.5 provides that the section applies to hearings reviewing “parole suitability, or the setting, postponing or rescinding of parole dates.” Is a suitability hearing different

594. CAL. PENAL CODE §3041.5(b)(4). Apparently a date must be set, regardless of whether the new date is within six months.
595. Not all hearings contain specific notice provisions like those for setting, postponing, or rescinding a date. Review of suitability, appeal from the denial of good-time credits, en banc review of a parole decision are examples. Compare CAL. PENAL CODE §§2932(a)(7), 3041(a), 3041.5(c) with CAL. PENAL CODE §§3041.5(b), 3042. Perhaps the inmate’s right to request a stenographic record protects his interest in this area. See CAL. PENAL CODE §3041.5(a)(4). Additionally, some records are public and determinately sentenced inmates must be informed of changes in their release date. CAL. PENAL CODE §§2932(b), 3042.
596. CAL. PENAL CODE §3041.7.
597. CAL. PENAL CODE §3041.7.
598. CAL. PENAL CODE §3041.5(a).
599. CAL. PENAL CODE §3041.7.
from one setting a parole date? Does it include board hearings reviewing the denial of good-time credits for determinately sentenced inmates? Will it apply if a member of a panel dissents and takes the case to the full Board, as provided by Section 3041(a)?

The rights of the inmate granted in the section also raise certain questions. The right to review the file relied on by the CRB\(^600\) raises the question of what can be done to protect the confidentiality of sensitive material. Must all material be turned over to the inmate? Under existing law it is possible to protect the confidentiality of some sources where individual safety or institutional security would be threatened.\(^601\) The problem was avoided in other areas of the new law by expressly retaining limited confidentiality.\(^602\) One must assume, then, that the inmate's right to review the file remains subject to the security exception of current case law.

Other questions are raised in Section 3041.5(a)(3) and (4), which provide for the assistance of a person designated by the Department and for production of a record on request. What right, if any, does an inmate have to choose the person appointed? Clearly this designee represents the inmate's interest, as well as the overall interest of fairness. Can the inmate insist on appointment of his favorite jailhouse lawyer, or is this person always an employee of the Department? As to a stenographic record, how soon must this be requested? After what period of time may such records be purged without violating an inmate's rights under Section 3041.5 and without thwarting effective review of a decision?

The rights granted to an inmate by Section 3041.5(a)(5) in connection with a rescission hearing fall short of those hitherto required by case law. The rights do not include certain requirements of notice of charges. The rights also do not include the conditional right to counsel at the rescission hearing itself; and its provision for confrontation and cross examination of witnesses is broader than that in case law.\(^603\) It is not clear, however, whether the due process rights required by case law continue to exist side by side with the new statutory rights, or whether the new law represents a reweighing of the interests involved. After all, several of the new rights exceed what Prewitt\(^604\) and Gee\(^605\) required. For example, the due process case law did not include the right to review the file used by the CRB or the right to stenographic record, or a specific schedule for notification of

\(^600\). Cal. Penal Code §3041.5(a)(1).
\(^602\). See Cal. Penal Code §3042(d).
\(^603\). Compare Gee v. Brown, 14 Cal. 3d 571, 536 P.2d 1017, 122 Cal. Rptr. 231 (1975) and In re Prewitt, 8 Cal. 3d 479, 503 P.2d 1326, 105 Cal. Rptr. 318 (1972) with Cal. Penal Code §3041.5.
\(^604\). See In re Prewitt, 8 Cal. 3d 479, 503 P.2d 1326, 105 Cal. Rptr. 318 (1972).
results, or an absolute right to counsel on rehearing. Dramatic additions under the new law include the duty to set a new parole date within six months of the rescission and the right to a contested hearing with counsel at any subsequent parole hearing. The life prisoner, upon rescission of parole, is not cast back into the boundless discretion of the parole board as he once was. Discretion to set a parole date must follow published departmental criteria and Judicial Council Rules, and, again, a new parole date must be set. If due process is flexible and represents a balancing of interests, as stated in numerous cases, then perhaps the provisions of the new statutory law supplant rather than supplement older case law in this field.

Another question raised by the new provision granting rights to inmates involves the consequences of a postponement hearing. The inmate is given the opportunity for a review within ninety days of the postponement, but the scope of this review is not stated. Originally, an "appeal" was required for both postponement and rescission, but the appeal for rescission became a full rehearing under Section 3041.7 while the appeal for postponement became a review. This history hardly answers the question of whether the review of postponement decision is a de novo hearing or an appellate type review of an earlier record.

Finally, a question arises as to the rights to be given at rehearings under Penal Code Section 3041.7. Generally, rehearings involve the right to counsel and the rights of Penal Code Section 3041.5. One part of Section 3041.5, however, further refers to the rights of Penal Code Section 2932(a)(3)(5) when postponement or rescission is involved. Where the rehearing or subsequent parole consideration hearing involves a case which was rescinded, do the rights to confront and examine witnesses apply? Or despite the language of Section 3041.7, is this a portion of Section 3041.5 that does not apply?

An interesting aspect of the entire section which grants rights to inmates is that revocation of parole goes unmentioned. It is clear that the Community Release Board will be the body revoking parole. Presumably, the rights the

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607. Occasionally even the California Supreme Court will tailor due process rights in the field of prison law where competing interests are involved. See, e.g., In re Winn, 13 Cal. 3d 694, 532 P.2d 144, 119 Cal. Rptr. 496 (1975); In re Bye, 12 Cal. 3d 96, 524 P.2d 854, 115 Cal. Rptr. 382 (1974); In re Sturm, 11 Cal. 3d 258, 521 P.2d 97, 113 Cal. Rptr. 361 (1974); In re Law, 10 Cal. 3d 21, 513 P.2d 621, 109 Cal. Rptr. 573 (1973).

608. CAL. PENAL CODE §3041.5(b)(3).


inmate has will continue to be those set forth in *Morrissey v. Brewer*, 611 *Gagnon v. Scarpelli*, 612 and their progeny.

Undoubtedly the course of future litigation will show either that the problems discussed in this article merely scratch the surface of the new law's complexity or that we are needlessly splitting hairs. But problems beyond those already discussed will still arise in applying the new law to inmates and parolees already in the system, and the retroactivity provisions of the new law will undoubtedly be the area where the first major litigation occurs. We now turn our attention to the retroactivity provisions of the new law.

**RETROACTIVITY OF THE NEW LAW**

**A. Retroactivity in General**

The determinate sentence law is, by its own terms, retroactive to inmates and parolees already within the jurisdiction of the Department of Corrections. The new sentencing provisions apply to persons committing felonies on or after July 1, 1977. 613 The new law, however, also applies the new sentencing provisions and the new parole and credits system to inmates whose crimes were committed prior to July 1, 1977. 614 The primary section we shall discuss in the retroactivity context is Penal Code Section 1170.2.

For the most part, the express retroactivity of the new law relieves courts from the obligation of analyzing the express, presumed, and rebutted legislative intent that has characterized efforts to determine the retroactivity of previous changes in penalties. 615 Penal Code Section 1170.2 explicitly provides a method of applying the new law to those who committed crimes before July 1, 1977, so that, with few exceptions, all inmates will enjoy the same provisions regarding sentence, imprisonment, and parole. 616 Despite the express legislative intent to make the new law retroactive, however, this portion of the new law will not go into effect unchallenged. The retroactivity provisions raise questions of constitutional magnitude regarding problems of ex post facto laws, equal protection, separation of powers, and impairment of the obligations of contracts. In addition, within the new law itself, there are questions regarding the interpretation of some of the ill-drafted provisions of Section 1170.2. 617

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611. 408 U.S. 471 (1972).
614. *See* People v. Alcala, 74 Cal. App. 3d 425, 141 Cal. Rptr. 442 (1977); *CAL. PENAL CODE* §§1170.2, 2930(b), 2931(a), 3000(b), (d), 3041(c), 3065.
616. *See also* *CAL. PENAL CODE* §3065.
617. As we have seen in the history of the determinate sentence law, particularly of AB 476, retroactivity with its spectre of thousands of hard-core offenders released under new, drastically reduced statutory maximums, became for a time a very political issue. A figure of
For most inmates, the new law became operative July 1, 1977, and within 90 days thereof inmates incarcerated under the old law should have been informed of any new rules, of programs offered at their institutions, and of the possibility of beginning to earn good-time credits on and after July 1.\footnote{618} For those inmates, the most interesting question is whether the recalculation of sentence will result in release sooner than they would have been released under the old law.

\section*{B. Calculating Retroactive Determinate Terms}

\subsection*{1. The Basic Retroactive Release Date}

The portion of the retroactivity provisions having by far the greatest overall impact is the retroactive calculation of a determinate term under Section 1170.2(a) and the consequent setting of a parole release date. If the inmate committed, prior to July 1, 1977, a felony that would now result in a determinate sentence, he receives a determinate term retroactively calculated by the Community Release Board. The CRB must determine "what the length of time of imprisonment would have been under Section 1170"\footnote{619} but must ignore the good-time credit provisions of the new law and must make the calculation using a specified formula.\footnote{620} The calculation is made utilizing the middle term of the offense bearing the longest term of imprisonment of which the prisoner was convicted increased by any enhancements justified by matters found to be true and which were imposed by the court at the time of sentencing for such felony.\footnote{621}

The enhancements to be used in the calculation are expressly noted.\footnote{622} Since the existence of a set of enhancement provisions is a new concept, the new enhancements do not precisely correspond to similar provisions of prior law, and many enhancements were previously elements of crime definitions. Hence, Section 1170.2(a) provides by analogy to the new Section 12022, that a one-year enhancement may be added for being armed with a deadly or dangerous weapon as was provided in former Penal Code Sections 211(a), 460, 3024, or 12022. A two-year enhancement may be added for using a...
firearm as specified by former Penal Code Section 12022.5. On the other hand, one or three years may be added as appropriate for prior felony convictions meeting the new requirements of Penal Code Section 667.5 for prior prison terms. Enhancements to be added also include "any consecutive sentence." We must make the working assumption that the consecutive sentence enhancement must also meet the new requirements of Penal Code Section 1170.1. Roughly stated, then, the CRB largely by analogy to the enhancement provisions of the new law, will compute what the inmate's determinate term would have been by taking the longest middle term of the offenses as the base term, and then adding applicable enhancements, if any, to that base term.

It becomes apparent at once that long before the courts must do so, the Community Release Board will face nearly all the questions about the new sentencing structure that were discussed earlier, particularly questions raised by the enhancement provisions. As a result, the first sizable body of case law on determinate sentencing may well result from the CRB's application of the retroactivity provisions.

2. The Increased Retroactive Term

Once the Community Release Board has completed the calculation required in Section 1170.2(a), all is not over. It is possible that the inmate may be subject to an increased retroactive term if he fits the description of Section 1170.2(b), which outlines five factors that allow an inmate's recalculated date of release to be increased. If two members of the Community Release Board determine that the prisoner should serve a longer term than the basic term calculated under Penal Code Section 1170.2(a) due to: (1) the number of crimes for which the prisoner was convicted; (2) the number of his prior convictions; (3) the fact that he was armed with a deadly weapon when the crime was committed; (4) the fact that he used a deadly weapon during the commission of the crime; or (5) the fact that he inflicted or attempted to inflict great bodily injury on the victim, the prisoner will be so notified and will be scheduled for a hearing. He must be notified of his placement in this category within 90 days of July 1, 1977, or of his entering the custody of the Department of Corrections, whichever is later. This allows time for prompt notice of possible increases both to inmates now in custody and to offenders who were given an indeterminate

624. CAL. PENAL CODE §1170.2(a).
625. CAL. PENAL CODE §1170.2(b). Conduct in prison is a notable exception from this list.
626. CAL. PENAL CODE §1170.2(b). These were colloquially called "bad dude" hearings. They are now formalized as "serious offender hearings" in the CRB rules, despite the fact that many of the hearings will involve the addition of enhancements which could have been imposed under the new law, and regardless of whether the offender is "serious."
627. CAL. PENAL CODE §1170.2(b).
sentence only because their crime occurred before July 1, 1977, but who were received by the Department well after that date.

The hearing to which an inmate is entitled before the term calculated under Section 1170.2(a) may be increased, is to be conducted by two members of the Community Release Board and must be held either by April 1, 1978, or by 120 days after his receipt into state prison, whichever is later. The CRB is given authority to extend this period by 90 days, subject to veto by a resolution of either house of the legislature. It is made the express intent of the legislature that these hearings be accomplished as expeditiously as possible.

At the hearing, the inmate is entitled to counsel. He is ultimately entitled to the setting of a release date, to written findings of the "extraordinary factors [which the CRB] specifically considered determinative," and to an explanation of the basis upon which the new date has been calculated. He is not entitled, however, to a term set within the maximum limits of determinate sentencing for his crimes. Apparently the term set may go as high as a term set under the old Rodriguez guidelines. Reinforcing this provision is yet another legislative declaration that "the necessity to protect the public from repetition of extraordinary crimes of violence against the person is the paramount consideration."

3. Retaining Benefits of Former Law

Once a retroactive date has been calculated for the inmate under either subsection (a) or subsection (b) of Section 1170.2, it is important to remember that the benefits of the old law are preserved to the inmate if they result in release earlier than this recalculated date. For example, if an inmate has a parole or discharge set for a date earlier than the date calculated under subsection (a) of Section 1170.2, subsection (c) provides:

Nothing in this section shall be deemed to keep an inmate in the custody of the Department of Corrections for a period of time longer than he would have been kept in its custody under the provisions of law applicable to him prior to July 1, 1977.

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628. CAL. PENAL CODE §1170.2(b).
629. CAL. PENAL CODE §1170.2(b).
630. CAL. PENAL CODE §1170.2(b).
631. CAL. PENAL CODE §1170.2(b).
632. See text accompanying notes 76-80, supra.
633. CAL. PENAL CODE §1170.2(b).
634. Actually subsection (b) is a huge section which might be considerably easier to understand if it were completely subdivided.
635. Ameliorative provisions of former law, which were repealed, remain in effect for those who commit crimes before July 1, 1977. The most important of these, besides minimum eligible parole dates, is the youthful offender provision of former Penal Code Section 1202(b), CAL. STATS. 1959, c. 916, at 2948. But cf. CAL. GOV'T CODE §9608 (when a law is repealed or amended an information indictment can still be filed against a person who acted prior to the effective date of the repeal or amendment).
636. One may question whether "custody" as used here means actual custody in prison or includes the constructive custody of parole. The concept of actual custody in Penal Code Section 667.5(d) appears to apply to that section only.
If, on the other hand, a parole date has not been set, but his parole eligibility under the old law is still earlier than his recalculated term, his suitability for release under the old rules will be reviewed annually.\(^6\) In short, each inmate will be treated independently under both systems, receiving parole consideration hearings upon becoming eligible for parole under the old law and a fixed term calculated under the new law, until he is actually released on the earlier of the two dates.

C. The Impact of Retroactivity on Indeterminate Terms and on Parole

Clearly the first impact of the new law will be on the calculation of terms under the retroactivity provisions of Section 1170.2(a) and challenges to the serious-offender hearing provisions of Section 1170.2(b) involving persons currently in prison. Section 1170.2, however, also affects inmates who will continue to have indeterminate sentences under Penal Code Section 1168(b), and it has an effect on persons already on parole. The retroactivity section states that inmates whose sentences would still be indeterminate under the new law receive the release procedures of the new law.\(^6\) This would appear to require that the procedures of Penal Code Section 3041 and related sections be followed for setting the parole release date of inmates serving life sentences and the other few, still indeterminately sentenced inmates. These inmates then become entitled to the new parole with its new length, conditions, and other attendant rights.\(^6\)

Inmates already out on parole, as of July 1, 1977, will begin to serve a parole under the new law, to end in either one or three years as appropriate.\(^6\) It is important to note that what one calculates under Section 1170.2(a) and (b) is a term, but what is then set is a parole release date.\(^6\) The parole period itself will run from either the date of initial parole or July 1, 1977, whichever is later.\(^6\) Thus, inmates serving sentences under the old law, even parolees, must still serve a period of parole governed by the new law unless the Board chooses to waive further parole.\(^6\)

1. History

Perhaps no other portion of the new law was as constantly rewritten and as significantly changed as Section 1170.2. Few versions of SB 42 or AB 476 failed to alter it in some way, although no version failed to include retroactivity. The first version of Section 1170.2 presented a problem that

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\(^6\) CAL. PENAL CODE §3041(g). This of course raises the problem of defining what decisional law, provisions or administrative decisions must be preserved and used by panels doing the Section 3041(c) review. Cf. People v. Sobick, 30 Cal App. 3d 458, 472-76, 106 Cal. Rptr. 519, 528-31 (1973) (general discussion of changes raising ex post facto problems).

\(^6\) CAL. PENAL CODE §1170.2(e).

\(^6\) See, e.g., CAL. PENAL CODE §§1170.2(e), (f), 3000(b), 3065.

\(^6\) CAL. PENAL CODE §§1170.2(f), 3000(d).

\(^6\) CAL. PENAL CODE §1170 2(b).

\(^6\) CAL. PENAL CODE §3000(d).

\(^6\) CAL. PENAL CODE §3000(b).

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continued into SB 42's chaptered form. The first version of Section 1170.2 made the date of sentencing, rather than the date on which the crime was committed, dispositive as to what law applied to the inmate and used the effective date of the act as the pivot point for when the new law would begin to apply. The retroactive calculation involved finding the maximum the judge could have imposed under the new law, although the inmate did get the benefit of the indeterminate sentence or the recalculated term, whichever was less. If an inmate had already served the recalculated term, he would be released on parole within one year. If already a parolee, he would simply be discharged.

In the course of the many changes that were made to Section 1170.2, a pattern of shortening the recalculated terms was established by the early amendments. Some of the first amendments specified that recalculation of terms would use the middle term rather than the upper term, and parole release, if one had already served this term, would have to occur within six months rather than one year. Some virulent virus, however, began to attack the basic comprehensibility of the section, for it provided that if an inmate had not served time in prison that exceeded the middle term of imprisonment as computed under Section 1170.2(a), "his term of imprisonment shall be set at such maximum time plus the maximum statutory period of parole. . . ." Incomprehensibility struck again a week later when SB 42 was amended to add:

In the case of any inmate sentenced for a felony to state prison prior to the effective date of this act, who would have been sentenced under Section 1168 or Section 1168a of this act after the effective date of this act, the length of time of imprisonment shall be deemed to be the maximum time which could have been imposed by the judge under this act.

The problem with this amendment was that the sections referred to forbade judges to impose any time at all. Even a charitable reading of this provision in practical terms invoked shades of Gertrude Stein—a life sentence which is still a life sentence is a life sentence.

In 1976 the section was completely rewritten, although the date of sentencing and the effective date of the act were still controlling as to which law applied. This 1976 rewrite was the version of retroactivity that was enacted in SB 42. The basic calculation of the retroactive term required the board to use "the middle term of the offense bearing the longest terms of

644. Id. at 130.
646. SB 42, 1975-76 Regular Session, as amended, Aug. 14, 1975, §273, at 118. Sections 1168 and 1168a in this quotation refer to indeterminate sentencing.
imprisonment of which the prisoner was convicted aggregated by any additional terms which could have been imposed by the judge under this section for such felony or aggravation." Aside from the obvious semantic difficulty that "aggravation" referred back to nothing and prisoners were not convicted of terms of imprisonment, the section retained substantive problems. How did one "aggregate" two numbers? And what were these additional terms—enhancements, possibly?

Under this 1976 version of Section 1170.2, an increased term was possible if a majority of all of the members of the Community Release Board reviewed the file and determined that more time was necessary due to the five factors previously discussed. But the hearing to increase the term had to occur within 90 days of the effective date of the new law, and presumably a panel of three members would have to conduct the hearing. It was ludicrous that proponents of the bill pointed to the increased term provisions as the safeguard against release of large numbers of violent offenders. Given 18,000 to 20,000 inmates, nine members of the Community Release Board, the time and personnel limitations on these hearings, the inmate's extensive hearing rights and the requirement of counsel at the hearing, it would have been physically impossible to increase terms for more than a handful of violent offenders.

The 1976 version of SB 42 went on to provide that the inmate receive the benefit of old or new law, whichever produced the greatest benefit to him, and also that the inmate receive the benefit of the new parole provisions. Even increased term calculations were to be guided by the new term the prisoner might have gotten for a "similar crime under similar circumstances" tried after the effective date of the bill.

One last minute addition to SB 42 was the so-called "McAlister Amendment," which provided that in cases of increased retroactive terms, particularly where one of the violent felonies of Section 667.5(c) was involved, "the necessity to protect the public from repetition of such extraordinary crimes of violence against the person is the paramount consideration." If ultimately retained, this would have caused confusion in the standards to be applied under subsection (b) of Section 1170.2, which referred to guidelines related to the crime rather than to whether the criminal was rehabilitated.

648. Id. at 132.
649. See text accompanying note 625, supra.
651. Id. at 133-34.
652. Id. at 132-33.
653. It took well over a year just to comply with In re Rodriguez, 14 Cal. 3d 639, 537 P.2d 384, 122 Cal. Rptr. 552 (1975), and that was with full use of case hearing officers. See In re Williams, 53 Cal. App. 3d 10, 125 Cal. Rptr. 457 (1975).
655. Id. at 133-34.
The basic changes that AB 476 made to SB 42 clarified the controlling dates when the old law ended and the new law began, and made it physically possible for the Community Release Board to conduct the hearings required to increase the retroactive term calculated under subsection (a). It had become obvious that use of the date of sentencing created serious ex post facto problems. If an inmate committed a crime before July 1, 1977, and was sentenced after July 1, 1977, the CRB might lack jurisdiction to give the benefits of the old law even if it might be more lenient than the new law. Use of the date of sentencing rather than the date of the crime to determine which law applied to the inmate was also somewhat arbitrary. An inmate exercising rights to extensive pretrial challenges as to searches, discovery, or change of venue might be sentenced at a later date due to the extra time required, and might thereby be penalized by receiving a harsher sentence under the new law than he could have received under the old law. An Attorney General’s Indexed Letter therefore opined that despite the language of the statute, July 1, 1977, rather than the “effective” date of the statute, January 1, 1977, should be utilized as the date that the new law began, and the date of the crime, rather than the date of sentencing, would be critical in determining which law applied to the defendant. AB 476 rendered litigation on the applicable dates of the new law less likely by specifying them in the amendments to SB 42. The date, July 1, 1977, replaced references to “effective date” and the date of commission of the crime was made determinative as to which law applied.

The first version of AB 476 also made other basic corrections to Section 1170.2. It consolidated provisions for setting increased terms, provisions formerly contained in two nearly identical subsections. It allowed two members of the Community Release Board rather than a majority of the entire board to schedule an inmate for a hearing on an increased term and simply required that that hearing be held as expeditiously as possible. It freed the hearing panel from using the guideline of determinate terms for fixing a retroactive term under subsection (b) and eliminated the “McAlister Amendment’s” reference to violent felonies under Section 667.5 when rewording the legislature’s intent.

Later versions of AB 476 were extensively rewritten but were not significantly changed in content. When the legislature in AB 476 redefined the enhancements for arming with or use of a weapon or causing great bodily injury, it was of course necessary to explain how one would add enhancements retroactively. Time allotted for completion of hearings to increase

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657. See In re Sandel, 64 Cal. 2d 412, 412 P.2d 806, 50 Cal. Rptr. 462 (1966) (discussion of the limited jurisdiction of the Adult Authority to correct errors or change legal status).
660. Id.
One of the most interesting additions to the new law arose from the fact that in retroactively calculating the term for a multiple offender, it was possible to come out with an earlier release date if he were consecutively sentenced, than if sentencing had been concurrent. If one simply computed a number and added that number to the date of first receipt in prison, rather than working with the real calendar history of the case, some inmates even appeared to serve their term on a crime before they had committed it. The new Penal Code Section 1170.2(c) made it clear that this should not occur and that no one consecutively sentenced should benefit thereby. This was referred to by many as the rule of "presumed judicial intelligence," so-called because it was hoped that even under SB 42, a judge would have reached this result.

2. Remaining Problems

The retroactivity provisions as finally amended and made operative on July 1, 1977, still left dozens of unanswered questions, many of them highly complex. While it is beyond the scope of this article to explain fully all of the constitutional, mathematical, and statutory dilemmas hidden in the retroactivity provisions, we will point out some of the more notable problems in the order in which they arise in the code section itself.

The threshold problem with Penal Code Section 1170.2 is whether the entire section is unconstitutional. Way v. Superior Court has declared that the provision does not violate the doctrine of separation of powers. It was argued that the legislature was infringing upon the pardoning power of the Governor by discharging certain individuals and upon the power of the judiciary by altering final judgments. Another interesting issue raised by Way was impairment of the obligation of "contracts" made during the plea bargaining process—a unique argument that indicates the extent to which plea bargaining has become ingrained in our system, and the extent to which it is a double-edged sword. Numerous judges doubtlessly did give concurrent rather than consecutive sentences and did strike various allegations assuming that the then existing penalties under the old law would quite suffice. Numerous district attorneys and defendants surely plea bargained

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663. Consider, for example, three robberies in 1965, 1970 and 1976. If one merely computed a consecutive sentence—$3 + \frac{1}{3} \times 3 + \frac{1}{3} \times 3$—and added it to 1965, the inmate would have served his full term before he even committed the last robbery. If one used the real calendar and the idea that it is not possible to serve the time until the crime has been committed, then the last $(\frac{1}{3} \times 3)$ would be added onto 1976. The release date would then be at least 1977. If one further reasoned that as of 1976 there was really no new term for the 1976 conviction to be consecutive to and that the inmate ought not to profit by a sentence obviously intended to be more severe, a full three years for the robbery would be added onto 1976 for a release date of 1979. He would then not receive a more lenient sentence consecutively than he would have had concurrently. CAL. PENAL CODE §1170.2(c).
with certain consequences in mind. The parole board doubtlessly released life prisoners on parole with the understanding that full revocation and return would be possible. Although the rules of the game have now been changed, it hardly amounts to the impairment of a contract. It is also certain that prisoners will file suit to bar the use of Section 1170.2(b), which allows an increased retroactive term. It may be years before the basic validity of the sweeping retroactive provisions are settled.

Assuming, however, that the retroactivity section is upheld, Section 1170.2 itself creates problems in its first sentence. The first sentence provides general guidance for the CRB in determining "what the length of time of imprisonment would have been under Section 1170 . . . ." Yet the CRB cannot determine what a court in an adversary sentencing hearing at a time when facts were fresh would have done, and the inability to do so creates equal protection issues, particularly for inmates whose cases were still pending before the trial court when the new law came down. Equal protection problems may be raised by the fact that the express terms of Section 1170.2(a) provide that good-time credits cannot be considered, nor can enhancements be stricken, in spite of guidelines that the Judicial Council might give suggesting that this case might be appropriate for such leniency. Furthermore, recalculated sentences do not appear to be eligible for disparate sentence review. Given the chance assignment of a harsh or a lenient judge, and the fact that the calculation under Section 1170.2(a) discounts many mitigating factors and the CRB's inability to adjust disparate terms, the CRB cannot actually do what Section 1170.2(a) says it shall.

In attempting to do its impossible task, the CRB must use the middle term of the "offense bearing the longest term of imprisonment of which the prisoner was convicted . . . ." Of course the prisoner was not convicted of a term of imprisonment, but the genuine question this phrase raises concerns multiple punishment under Penal Code Section 654. The inmate may have been convicted of several felonies whose effect was stayed due to problems of multiple punishment. Presumably these are not to be used. More interesting yet is how one chooses which term is the "longest." It must be recalled that we are dealing with great gaps between statutory maxima under the old and the new law. Which is greater, the second degree murder conviction from 1970 or the second degree burglary from 1976?

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666. Cf. In re Estrada, 63 Cal. 2d 740, 742, 408 P.2d 948, 950, 48 Cal. Rptr. 172, 174 (1965) (holding that when a criminal statute is amended after the prohibited act is committed, but prior to final judgment, and the punishment is mitigated, the amended act prevails).
668. CAL. PENAL CODE §1170.2(a).
669. The murder at five, six and seven years would expire in 1976, CAL. PENAL CODE §190, while the burglary at 16 months, two and three years would expire in 1978, CAL. PENAL CODE §461(2).
Do we deal with numbers in the abstract or with the real, calendar implications of the latest expiring term? The Community Release Board Rules have interpreted this section to mean the latest expiring term.\textsuperscript{670}

Further, once the CRB determines which offenses have the longest term of imprisonment, the middle term for that offense is to be increased by "any enhancements justified by matters found to be true and which were imposed by the court . . . ."\textsuperscript{671} The enhancements are then listed by reference to the sections in which they existed under prior law or by analogy to their current code sections. One readily notes that the requirement that enhancements have been \textit{pleaded}, proved and imposed is absent; proved and imposed suffices. This is probably due to the fact that pleading the enhancement in many cases involved pleading the offense itself.\textsuperscript{672} Presumably the enhancement was, by the same token, sufficiently imposed when the court imposed sentence for the offense containing the enhancement in its definition.

A less easily resolved question concerning the enhancements to be imposed retroactively by the CRB is their relation to the existing enhancement provisions of the new law. Three of these retroactive enhancements are defined, for purposes of Section 1170.2(a), as they were defined under prior law, yet the postscript is added "pursuant to the provisions of Section 12022" or 12022.5 or 12022.7. Perhaps this postscript does no more than emphasize the reason for the number of years assigned to each retroactive enhancement. Certainly the content of enhancements under the new law differs from similar aggravating factors appearing in various forms under the old law. Yet when we come to the enhancement for prior prison terms, the full requirements of the \textit{new} law, Penal Code Section 667.5, \textit{must} be met to enhance retroactively. No guideline is given whatsoever for how consecutive sentencing will apply retroactively. Surely cases will explore the relationships of old and new enhancement definitions given the general goal, stated in Section 1170.2(a), of finding the length of time the inmate would have received under the new law.

Finally, let us assume the CRB does not wish to increase the retroactive term under Section 1170.2(b) but wishes to release the inmate on the date calculated under subsection (a). May the inmate who has not yet reached his minimum eligible parole date under the old law be released?\textsuperscript{673} Way

\textsuperscript{670} 15 CAL. ADM. CODE §2150(e).
\textsuperscript{671} CAL. PENAL CODE §1170.2(a).
\textsuperscript{672} Examples are burglary with great bodily injury and armed robbery.
\textsuperscript{673} One may not give a snappy "yes" on the theory that under Section 1170.2(c) the inmate gets the benefit of whichever law lets him out earlier. The problem is brought into focus by comparing Penal Code Section 1170.2(g) and Penal Code Section 3049. Section 1170.2(g) provides that nothing in this chapter shall affect the eligibility for parole of indeterminately sentenced inmates (emphasis added). "This chapter" presumably refers to Chapter 4.5 of Title 7, Part 2, of the Penal Code, not Chapter 1139 of the 1976 Statutes. These inmates may obtain a parole period as set forth in the new Penal Code Section 3000(b), which refers to Penal Code Section 1170.2, after going through the procedures of Penal Code Section 3040 and related sections. When you turn to the 3040 series, however, you find that Penal Code Section 3049 provides:
appears to answer this question affirmatively by recognizing that the retroactive provisions will result in the release and final discharge of prisoners before this could have occurred under former law.674

Breaking free of arguments over release on a date calculated under Section 1170.2(a), we come to the problems of Section 1170.2(b), allowing an increase in the date calculated under Section 1170.2(a). One point of interest is the imperfect correlation between the five factors675 that may subject an inmate to a hearing to increase his retroactive term and the enhancement provisions. The definition of being armed with a deadly weapon is of course quite different now from what it was under the old law.676 Great bodily injury is more narrowly defined now than it was under the old law.677 To enhance the length of a term, prior convictions now must be prior prison terms.678 No changes in Section 1170.2(b) occurred comparable to those in Section 1170.2(a), tying down definitions to those existing under prior law. Apparently the subsection is designed simply to give the CRB greater latitude, with exactitude left behind.

Consideration of this latitude in making the Section 1170.2(b) determination really leads one to question what evidentiary rules and what standard of proof was intended for these hearings. If the hearing panel can only utilize these facts if they appear on the abstract of judgment, then there is no purpose to the subsection as these matters result in the term under subsection (a). Moreover, a standard of "beyond a reasonable doubt" was ex-


675. The factors enumerated in Section 1170.2(b) are: (1) the number of crimes of which the prisoner was convicted; (2) the number of prior convictions received by the prisoner; (3) whether the prisoner was armed with a deadly weapon when the crime was committed; (4) whether the prisoner used a deadly weapon during the commission of the crime; and (5) whether the prisoner inflicted or attempted to inflict great bodily injury on the victim of the crime.


677. Cal. Penal Code §12022.7. This section does not include an attempt.

pressly suggested to the legislature, and apparently rejected.\textsuperscript{679} There is also a question of whether the appearance of any of the five factors in the transcript of trial and sentencing or in the probation officer’s report is sufficient to allow them to be considered by the Board in the hearings to increase the term. This would be consistent with the Board’s practice under the indeterminate sentence law of looking at all relevant circumstances. There is also a question of whether allegations that were stricken clearly as part of a plea bargain may be considered by the board in the hearing to increase the term. Consideration of these factors appears permissible and would also be consistent with former practice, but raises further questions about the integrity of plea bargains.

Another difficulty in interpreting subsection (b) of Section 1170.2 appears in determining how much time can be added at the hearings to increase the term. The legislative intent expressed in the last sentence emphasizes that “the necessity to protect the public from repetition of extraordinary crimes of violence against the person”\textsuperscript{680} is paramount. As we reviewed above, this provision once specifically referred to prisoners who had committed violent felonies listed in Penal Code Section 667.5(c), but now refers only to those who have committed “extraordinary crimes of violence.” How will a hearing panel deal with an inmate whose in-prison or parole conduct, rather than aspects of his crime, show that he would be an imminent threat to the public safety? Does it expand the five factors from which it is obviously removed in subsection (b)? Does it add anything at all except perhaps an outdated reference to prediction of violence or rehabilitation, prognostications which the new law decisively abandons?

Finally, there remains the question of the equal protection implications of Section 1170.2(b). Granted, one can divine a rational basis, even a compelling interest, in distinguishing subsection (a) and subsection (b) inmates. Judges sentencing under the old law could not know how the sentences they imposed would be altered, and for the more serious offender perhaps the increase permitted by subsection (b) more accurately reflects the sentence the judge would have imposed originally than does subsection (a). But individuals sentenced under the new law who have the same record as inmates sentenced under the old law, will receive terms that cannot reach the maximum possible for a retroactive calculation under Section 1170.2(b), with its possible increase all the way to a primary term under \textit{Rodriguez}. Perhaps the sole distinction is that one inmate committed his crime under the old law and the other under the new. Therefore it is possible that despite the rhetoric in Section 1170.2(b) of public safety, the maximum term for a given

\textsuperscript{679} Memo from Tom Clarke, Jr. and Mike Ullman to Alan [Sieroty] and Jack [Knox] (May 28, 1976) at 3 (copy on file at Pacific Law Journal).

\textsuperscript{680} CAL. PENAL CODE §1170.2(b).
offense under the new law may be constitutionally compelled by the equal protection clause as the maximum for those sentenced under the old law.

CONCLUSION

Having been so involved in the history of this law, we cannot resist the temptation to indulge in a little speculation about the future. It is clear that a major effect of SB 42 and AB 476 has been the limitation of discretion in the judicial and executive branches, and the vesting of that discretion in the legislature. Apart from imposing a consecutive sentence, imposing an upper or lower term, or striking enhancements, courts are given no real discretion to set terms based on the widely varying culpability involved in the human conduct we denote as criminal. The prison and parole authorities that once had such a power have it no longer. Yet it remains to be seen whether the legislature, having so blithely taken over this responsibility of determining the actual release date for most prisoners, can live with the pressures inevitably accompanying that task.

Certainly the legislature will soon face demands for higher penalties. Generally increasing prison terms as high as some advocate will surely present great difficulties. Dramatic increases in a few terms, perhaps as a reaction to some notorious crime, will destroy the pattern of penalties created in the new law and will invite courts to invoke the Lynch and Rodriguez doctrines. Too many readjustments of penalties will destroy any certainty in punishment and will create a chaotic set of diverging penalties for the same crime, a set of penalties to be somehow understood and administered by the Department of Corrections and the Community Release Board.

While the setting of penalties will be a problem, the failure of the legislature to provide for mentally disordered violent offenders may equally be a problem. The new law does not address the question of how to handle the prisoner who has completed his determinate sentence but because of some mental disorder is likely to injure seriously another victim upon release. The drafters of SB 42 made several proposals to answer this question, but their efforts came to naught. This was predictable in light of the decisive rejection in the new law of the concept of rehabilitation, a cornerstone in the old law. The limited ability of the psychiatric profession either to predict future violence or to treat the underlying mental disorder gives the drafter of any proposed rule in the area no firm scientific base on which to work. By contrast, certainty and predictability were the goals of the new law. Unpleasant as the prospect may be, however, the new law must eventually accommodate this problem. One can predict public outrage over egregious cases of clearly violent people mechanically released and claiming new victims. This is the sort of pressure legislators are unlikely to overlook.
Upon reflection, another result of the new law may be to bring home to the legislature the magnitude of the task it has assumed in taking control of criminal sentencing. Whether due to longer terms or increased readiness to sentence to state prison, the prison population is likely to increase. The problem of prison overcrowding never directly presented itself under the indeterminate sentence law. California had almost the same number of persons in prison in 1977 as it did in 1960, despite large increases in state population and in the crime rate. The increasing use of probation during this period doubtlessly had a lot to do with this anomaly, but it is significant that the parole board was always there to act as a safety valve for prison overcrowding; whether or not this was a conscious consideration of the board. If more defendants receive prison terms rather than probation, and particularly if prison terms are increased, overcrowding will become a growing and intransigent problem forcing the legislature into some unpleasant choices. More prisons to relieve the problem mean more taxes. On the other hand, inaction may allow prison populations to increase and conditions to deteriorate to the level which in Florida and Alabama caused drastic measures to be taken—closing prisons by court order, refusal by prison authorities to accept new prisoners, or the exercise of executive clemency to relieve the pressure.681 In the same way that it may be forced into a rehabilitation test for mentally disordered violent offenders, the legislature may find it necessary to create a board or commission capable of adjusting terms or parole to reflect changing social attitudes and the physical capacity of the state to house prisoners. One thing is certain—this determinate sentence law has a most indeterminate future.

Finally, we may modify what we so cheerfully stated in our introduction about the ultimate comprehensibility of the new law. It takes a heroic effort to understand the complex provisions of this legislation which ought to be dubbed the "Lawyer's Relief Act of 1976." There is some solace in the fact that things always look bleak on this end of a landmark change in law. After five or ten years of litigation, the new law of sentencing and parole—like the new procedures forced by Morrissey—will surely settle into manageable proportion.

Until then, think of it as job security.