Senate Bill 42 and the Myth of Shortened Sentences for California Offenders: The Effects of the Uniform Determinate Sentencing Act

Kenneth R. Zuetel Jr.

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SENATE BILL 42 AND THE MYTH OF SHORTENED
SENTENCES FOR CALIFORNIA OFFENDERS:
THE EFFECTS OF THE UNIFORM DETERMINATE
SENTENCING ACT

My object all sublime
I shall achieve in time—
To let the punishment fit the crime—
The punishment fit the crime*

Bobbie was sixteen when he was sentenced to a state institution
for joyriding. He was released nine years later.1 Another offender,
who had previously served four prison terms, was convicted of
forcible rape at gunpoint, kidnapping, and robbery. Although he
was sentenced to an indeterminate sentence2 with a maximum term
of life imprisonment, the inmate served a little over a year for his
offenses.3

This inconsistency is alleviated by California Senate Bill 42, the
Uniform Determinate Sentencing Act of 1976. This Act makes ex-
tensive changes in existing law, affecting over two hundred provi-
sions in the Penal Code.4 The most significant change concerns

* W.S. GILBERT, THE MIKADO 30 (1926).
1. Meyerson, The Board of Prison Terms and Paroles and Indeterminate
2. [A]n indeterminate sentence is one in which no maximum term is
established, and the appropriate authority has complete power to
release the inmate at any time, with or without conditions, or to
keep him incarcerated for life. . . . An “indefinite sentence,” on
the other hand, is one in which there may be a minimum period
of incarceration, but in any event there is a legislatively or judi-
cially set maximum beyond which the inmate cannot be kept. The
indefiniteness of the sentence arises from the fact that the authority
can release the inmate prior to the expiration of his maximum term.
Prettyman, The Indeterminate Sentence and the Right to Treatment, 11 AM.
CRIM. L. REV. 7, 13 n.27 (1972) [hereinafter cited as Prettyman]. Under
former CAL. PENAL CODE § 1168 (West 1970) (repealed 1977), California
came the closest to the original notion of indeterminate sentencing. See
note 16 infra.
3. Meyerson, supra note 1, at 622-23 n.27.
Serv., ch. 1139, 300-01, for a list of the statutes changed by the new law.
the type of sentence which a convict will now serve. Prior to the Act, most convicted felons were committed to an indeterminate sentence. Upon entering prison, the felon was subjected to the discretion of the Adult Authority, which decided at what point the prisoner should be released prior to the expiration of his maximum sentence. For example, a felon convicted of first degree robbery under prior law could expect to serve a statutory term of five years to life imprisonment. The sentence's indeterminacy arose from the fact that the felon's term could be as short as twenty months, or as long as life imprisonment. However, under the new law the felon will serve a definite or fixed term, a standardized sentence which the offender can calculate with reasonable certainty prior to entering prison.

By eliminating the indeterminate sentence from California law, Senate Bill 42 raises a number of potential problems. This

5. Cal. Penal Code § 5077 (West 1970) (repealed 1977). Section 3020 provided that "[i]n the case of all persons heretofore or hereafter sentenced under the provisions of [the indeterminate sentence law], the Adult Authority may determine and redetermine, after the actual commencement of imprisonment, what length of time, if any, such person shall be imprisoned ...." The California Women's Board of Terms and Parole had similar jurisdiction over females under 1965 Cal. Stats., ch. 238, § 16 (repealed 1977). For a brief discussion of the Adult Authority and its powers under the pre-Senate Bill 42 law, see text accompanying notes 19-25 infra.


7. 1947 Cal. Stats., ch. 1381, § 6 (repealed 1977), provided that an inmate "may be paroled at any time after the expiration of one-third of the minimum term."

8. "A definite commitment is said to be one fixed by the judge (or jury) at a term of years which may be less than (but not more than) the maximum provided by statute for the particular crime." S. Rubin, Law of Criminal Corrections 157-58 (2d ed. 1973).


10. For example, the retroactivity potential of Senate Bill 42 was a highly controversial aspect of the new law. See, e.g., L.A. Times, Dec. 7, 1976, pt. I, at 26, col. 5 (Los Angeles Police Chief Ed Davis claimed that the unclear retroactivity provisions would cause a mass release of prisoners on July 1, 1977, the effective date of Senate Bill 42). In response, Senator John A. Nejedly, an author of the Bill, listed several reasons that the Bill would not have such a disastrous effect. See Letter from Senator John A. Nejedly to All Interested Persons Regarding Retroactivity Provisions of Senate Bill 42, at 1-3 (Sept. 2, 1976) (on file with the San Diego Law Review). As this article goes to print, the legislature is attempting to enact Assembly Bill 476, which should resolve the retroactivity problems associated with Senate Bill 42. This Comment, however, will not address
Comment will briefly review the history of indeterminate sentencing, sentencing rationale, and the new law. The article will then address the specific question of whether the new statute will diminish the amount of time a felon will be required to serve, and will conclude with an analysis of the Act and its potential effects on California.

**INDETERMINATE SENTENCING IN CALIFORNIA**

**History of Indeterminate Sentencing**

Prior to 1917, California had a "definite" sentencing system. The primary purpose of the definite sentence was to ensure the "equality and certainty of punishment expressed in the establishment of prescribed sanctions for every crime according to its seriousness." Under the early statutory form of commitment, the trial court generally fixed one term, usually the maximum punishment allowed under the statute.

California enacted its Indeterminate Sentence Law in 1917. Founded upon an emerging theory that crime was a "curable sickness," the new statute directed the judiciary to determine the defendant's guilt and impose a legislatively mandated sentence for his particular violation. After several revisions, the statutory scheme remained substantially the same until 1976. Under this law, neither the court nor the jury specified the length of imprisonment. The court simply sentenced the convict to the term "as prescribed by law"—a term neither greater than the maximum nor less than the statutory minimum.

the issue of retroactivity under Senate Bill 42. It will be limited to the potentially shorter sentences under the new Act and to the possible effects of the new law.

12. S. RUBIN, supra note 8, at 157.
16. CAL. PENAL CODE § 1168 (West 1970) (repealed 1977), provided that [e]very person convicted of a public offense, for which imprisonment in any reformatory or state prison is now prescribed by law shall, . . . be sentenced to be imprisoned in a state prison, but the court in imposing the sentence shall not fix the term or duration of the period of imprisonment.
17. CAL. PENAL CODE § 3023 (West 1970) (repealed 1977). It should be
A theoretical underpinning of the indeterminate sentence was that it would be administered by experts in the field of behavioral sciences who were to help cure the convict of his sickness. Thus, after the felon was sentenced to prison, the Adult Authority was to help the convict rehabilitate himself by determining within statutory limits the length of the term he would actually serve. The Adult Authority was an administrative agency within the Department of Corrections. Its members were selected on the basis of their "interest in corrections work including persons widely experienced in the fields of corrections, sociology, law, law enforcement, and education." The Authority's purpose was to have a non-judicial agency determine the appropriate length of imprisonment for each offender within its custody. This agency had wide discretion in allowing or refusing release from prison. The Authority was composed of nine members appointed by the governor, with the consent of the Senate for four-year terms. For a detailed description of the Adult Authority, see Note, California Department of Corrections and Adult Authority Decisionmaking Procedures for Male Felons, 26 Stan. L. Rev. 1353 (1974); Comment, The California Adult Authority—Administrative Sentencing and the Parole Decision as a Problem in Administrative Discretion, 5 U.C.D.L. Rev. 360 (1972). For an explanation of how varying the sentence length could aid in rehabilitation efforts, see text accompanying notes 30-34 infra.

For an explanation of how varying the sentence length could aid in rehabilitation efforts, see text accompanying notes 30-34 infra.


22. Id.


24. In re Schoengarth, 66 Cal. 2d 295, 425 P.2d 200, 57 Cal. Rptr. 600 (1967). Until recently (see text accompanying notes 99-122 infra), a prisoner did not have a right per se to a term of imprisonment fixed short of the statutory maximum. See, e.g., Dorado v. Kerr, 454 F.2d 892, 897 (9th Cir.), cert. denied, 409 U.S. 934 (1972).
exercise of this discretion was ordinarily a matter immune from judicial review.\textsuperscript{25}

Within the last twenty years\textsuperscript{26} widespread disenchantment with the indeterminate sentence has arisen.\textsuperscript{27} In addition, many experts have perceived a trend away from indeterminate sentencing and rehabilitation to definite sentences premised on the punishment of offenders.\textsuperscript{28} With Senate Bill 42, California demonstrates its disapproval of indeterminate sentencing and joins the trend in returning to the definite sentence.\textsuperscript{29}

The Rationale Underlying Indeterminate Sentencing and Reasons for the Return to Definite Sentences

Throughout the last sixty years, the California courts have delineated several reasons for employing the indeterminate sentence. First, unlike definite sentences,\textsuperscript{30} the indeterminate sentence provided an incentive to the offender to rehabilitate himself.\textsuperscript{31}

\textsuperscript{25} Within the last several years, the California Supreme Court had begun to cut back on this general rule. For example, the court in In re Rodriguez, 14 Cal. 3d 639, 537 P.2d 384, 122 Cal. Rptr. 552 (1975), overturned the California judicial precedent that the Adult Authority had complete control over parole and sentence lengths. Comment, Indeterminate Sentence Law—The California Adult Authority Has Duty to Fix Primary Term of Sentence, In re Rodriguez, 14 Cal. 3d 639, 537 P.2d 384, 122 Cal. Rptr. 552 (1975), 3 W. Sr. L. Rev. 304, 307 (1976). See also text accompanying notes 99-122 infra.

\textsuperscript{26} Prettyman, supra note 2, at 17.


\textsuperscript{29} Among the states which have returned to a determinate sentence after experimenting with indeterminate sentencing are Louisiana, Kentucky, Montana, Alabama, and South Carolina. S. Rubin, supra note 8, at 157 n.125.

\textsuperscript{30} Tappan, supra note 11, at 529.

\textsuperscript{31} It is generally recognized by the courts and by modern penologists that the purpose of the indeterminate sentence law . . . [is] to put before the prisoner great incentive to well-doing in order that his will to do well should be strengthened and confirmed by the habit of well-doing. Instead of trying to break the will of the offender.
Through good behavior and self-rehabilitation, the offender could substantially advance the date of his release. Thus, because the offender "held the keys to release within his own hands," he would try to reform himself.

However, the conditions of California prisons made self-rehabilitation all but impossible. In addition, the experts who were to help the prisoner rehabilitate himself were unqualified to predict the optimum release date for the individual offender. Finally, the indeterminate sentence often led inmates to cease attempts at self-rehabilitation because prison authorities frequently strung and make him submissive, the purpose is to strengthen his will to do right and lessen his temptation to do wrong.


34. Id.

35. Folsom and San Quentin are disgraceful dungeons; Vacaville and Soledad are wholly inadequate places to house human beings. It is clear to the [California Committee on Criminal Justice] that the physical facilities of these institutions are incompatible with fundamental and minimal standards of decency and humanity. They are ancient, dark, depressing, and overcrowded—places of total hopelessness and despair. The term "human warehouse" would be an accurate euphemism for these places. Prison administrators intone the dogma that, despite all efforts and studies, they still do not know why prisoners do not "rehabilitate themselves," why they are not motivated to take advantage of prison programs. This is either pretense or incompetence. No one can visit Folsom, San Quentin, Soledad or Vacaville and fail to know the answer.


36. *Prison Reform, supra* note 35, at 358. In theory, Adult Authority Board panelists were to be selected from various fields on the basis of their expertise. See text accompanying notes 21-22 *supra*. In practice, they were not.

The composition of the [1973 Adult Authority] board is not easily squared with its self-appraisal. It is, with the lone exception of a retired dentist, drawn from the ranks of law enforcement and Corrections: former policemen, prosecutors, FBI and prison personnel—"eight cops and a dentist," as the prisoners call them.


37. Although there may have been no chance that the prisoner would be released, a pointless hearing was conducted annually before the [parole] board involving a litany of often-irrelevant questions put to the prisoner. After this charade, he was denied parole and told
along the inmate, never letting him know when he might eventually be released. As some experts have maintained, if there is no rehabilitation, the entire case for the indeterminate sentence has vanished.

A second reason announced by the courts for indeterminate sentencing was to protect society from the premature release of dangerous criminals. By allowing the prison expert, rather than the court or prosecutor, to evaluate the inmate's potential threat to society, the indeterminate sentence more effectively protected the public than could definite sentencing. The determinate sentence could keep the individual incarcerated only for a fixed period of time. The indeterminate sentence restrained the inmate until he no longer presented a threat to society. In addition, because many of the terms under the provisions of the indeterminate sentence law provided for potential life imprisonment, the offender will realize that he may be incarcerated for his entire life. Therefore, the indeterminate sentence would also deter crime.

Yet critics of the indeterminate sentence have shown that there is no reliable test by which to predict a prisoner's potential dangerousness. Moreover, psychiatrists usually overpredict the individual's potential danger to society. "The fact that errors of

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38. Id. See also J. Mitford, supra note 27, at 87-94.
39. Prettyman, supra note 2, at 18.
40. "One essential [element of the indeterminate sentencing system] . . . is that the state be able to adjust the length of sentence so that a person will be supervised as long as he constitutes an unreasonable threat to life or property . . . ." Anderson v. Nelson, 352 F. Supp. 1124, 1129 (N.D. Cal. 1972). See also In re Cowen, 27 Cal. 2d 637, 648-49, 166 P.2d 279, 285 (1946); In re Allen, 239 Cal. App. 2d 23, 25, 48 Cal. Rptr. 345, 347 (1965).
41. See note 40 supra.
42. Id.
45. A decision by the United States Supreme Court in 1966, . . . resulted in the freeing of a significant number of mentally ill per-
underpredicting the possibilities of violence are more visible than errors of overpredicting violence” has led psychiatrists to err on the side of confining rather than releasing. Despite the lack of reliable predicting factors, the Adult Authority often used indeterminate sentencing to confine minorities and unpopular political figures in the name of rehabilitation and protection of society. Such inequity, the critics claim, is cured by the definite sentence, a sentence whose duration is not dependent upon the decision of prison experts. Further, it is unclear whether the indeterminate sentence helped deter crime. By specifying the exact sentence

sons who were predicted to be dangerous. But follow-up studies indicate that these predictions of violence were grossly exaggerated, that very few of the patients who were released and who psychiatrists predicted would commit violent crimes did in fact commit those crimes. Similar studies in other parts of the country have produced similar conclusions.


46. *Id.* In essence, the psychiatrists’ slogan becomes: “When in doubt, don’t let ‘em out.” *Id.*

47. In effect the message conveyed to the prisoner is: “Keep this joint running smoothly and we’ll let you out sooner.” Conversely, the really “dangerous” criminal can be confined almost indefinitely, and the decision as to who fits this definition rests, of course, with the correctional authorities. This category is elastic enough to embrace the political nonconformist, the malcontent, the inmate leader of an ethnic group, the persistent writ-writer, the psychotic, the troublemaker. Any one of these may at the pleasure of his keepers serve years beyond the normal term for his crime; if his sentence carries a “life top,” he may never get out.

J. Mitford, supra note 27, at 82-83. See also Transcript, Cal. State Senate Hearing on the Indeterminate Sentence Law 138-44 (Dec. 5, 1974) [hereinafter cited as Senate Transcript] (on file with the San Diego Law Review); STRUGGLE FOR JUSTICE, supra note 27, at 145-53; Cargan & Coates, *The Indeterminate Sentence and Judicial Bias*, 20 CRIME & DELINQUENCY 144, 153 (1974) (“[T]he indeterminate sentence has not eliminated judicial bias, including racial prejudice; it has merely revised the way of expressing it.”). For example, ex-convict Michael Duke testified that the Adult Authority would give him the maximum term of imprisonment if he continued to produce the large number of writs he had previously written. Senate Transcript, supra at 213-14. In addition, militant George Jackson was discriminated against through the use of the indeterminate sentence. *See* Coleman, *Prisons: The Crime of Treatment*, 11 PSYCHIATRIC OPINION 5, 7-8 (1974).

48. Debates wage both ways on the potential deterrent effect of the indeterminate sentence. The data which has been compiled is inconclusive, however. As was noted by one court: “Absent empirical proof [of the deterrent effect of long sentences], such debates eventually wind up in a
an offender will serve, the definite sentence may deter crime more effectively than did the indeterminate sentence.\textsuperscript{40}

The final justification advanced for indeterminate sentencing was that it kept hardened criminals behind bars and prevented young or first-time offenders from serving disproportionately long sentences.\textsuperscript{50} This was accomplished through the use of the wide sentence ranges under the indeterminate sentence law.\textsuperscript{51} Thus, because the culpability of two offenders convicted of a similar crime may be highly dissimilar, the indeterminate sentence helped "match" the length of the sentence to the needs of the individual offender.\textsuperscript{52}

However, the fact that two offenders convicted of a similar crime are sentenced to dissimilar terms of incarceration seems to violate fundamental notions of fairness and justice.\textsuperscript{53} Further, disparity in sentencing fails to take into account disparate life-styles within society.\textsuperscript{54} The definite sentence law provides offenders with a better sense of certainty and justice because all are treated in a like manner.\textsuperscript{55}

In eliminating the indeterminate sentence from the California Penal Code, the legislature may have considered some or all of these arguments. However, the legislature's chief concern was with

\begin{quote}
\textsuperscript{49} See, e.g., Senate Transcript, supra note 47, at 53, 160.
\textsuperscript{50} Prettyman, supra note 2, at 15–16.
\textsuperscript{51} Examples of crimes with wide sentence ranges include CAL. PENAL CODE \S 261.5 (West 1970) (repealed 1977) (six months to 50 years for unlawful sexual intercourse); CAL. PENAL CODE \S 245(a) (West 1970) (repealed 1977) (six months to life imprisonment for assault with a deadly weapon).
\textsuperscript{52} In re Lynch, 8 Cal. 3d 410, 416, 503 P.2d 921, 924, 105 Cal. Rptr. 217, 220 (1972); People v. Morse, 60 Cal. 2d 631, 642–43, 388 P.2d 33, 39–40, 36 Cal. Rptr. 201, 207–08 (1964); AUTHORITY POLICY STATEMENT No. 42, adopted Mar. 27, 1973; Prettyman, supra note 2, at 16.
\textsuperscript{53} "The prisoner in a state prison serving 10 years can well wonder why another man on the same cell tier but from another county has a 2-year sentence for the same or even a more serious offense." McGee, \textit{A New Look at Sentencing}, 38 Fed. Probation 3, 4 (1974).
\textsuperscript{54} "Our desire to maximize the democratic values of self-determination necessarily calls for maximum tolerance for disparate life-styles. To cope with the problem of maintaining a workable cooperative relationship between individuals in extremely complex social organizations, we ought to fit the punishment to the crime, not the person." STRUGGLE FOR JUSTICE, supra note 27, at 147.
\textsuperscript{55} McAnany, Merritt, & Tromanhauser, \textit{Illinois Reconsiders "Flat Time": An Analysis of the Impact of the Justice Model}, 52 CHI.–KENT L. REV. 621, 626 (1976) [hereinafter cited as \textit{Flat Time}].
\end{quote}
the disparity in sentences for like offenses. A specific provision of the Penal Code now mandates the elimination of disparity and the promotion of uniformity in sentencing.\textsuperscript{56} The legislature was also concerned with the possible effects definite sentencing would have on alleviating prison unrest.\textsuperscript{57} Under the indeterminate sentence law, an inmate would not ordinarily know when he would be released. This uncertainty, coupled with the arbitrariness\textsuperscript{58} of the Adult Authority in determining the length of incarceration, was a major factor in prison violence.\textsuperscript{59} The return to definite sentences should help alleviate much of the prison unrest associated with the injustices and capriciousness of indeterminate sentencing.\textsuperscript{60} Yet the new law is somewhat paradoxical. In the name of fairness and justice to the prison inmate, California has rejected the progressive theory of prisoner rehabilitation, substituting for it a system of penal laws whose primary purpose is punishment.\textsuperscript{62} However, by enacting Senate Bill 42, California is in keeping with the current trend in penal institutions' philosophy by both rejecting the concept of rehabilitation and declaring that the sole purpose

\textsuperscript{57} As Dr. Lee Coleman, noted Berkeley psychiatrist, testified before the Senate Select Committee on Penal Institutions: Although there's no way to gather data on this that I know of, I am personally convinced, at any rate, that most of the violence in [California] prisons is caused . . . by the frustration and the bitterness and the rage and the despair which results from [a prisoner] not knowing how long he has to be there and from a certain group of people having complete control over that decision, the capriciousness and arbitrariness of that system.
\textsuperscript{58} See note 57 supra.
\textsuperscript{59} Although it is too soon to tell under the new system, Raymond Procunier, past Director of the Department of Corrections, ran a limited survey on a determinate sentencing system used in California in 1975. He said that the determinate sentence had “reduced prison violence and increased motivation of prisoners in job-training and education programs.” Davis Enterprise, June 20, 1976, pt. 1, at 1, col. 2 (on file with the San Diego Law Review). See also S.F. Examiner & Chronicle, Dec. 8, 1974, § A, at 3, col. 1 (on file with the San Diego Law Review). In addition, the good-time provisions under the new law could help reduce the level of violence in California prisons. See Senate Transcript, supra note 47, at 19.
\textsuperscript{60} Oppenheim, Computing a Determinate Sentence . . . New Math Hits the Courts, 51 Cal. St. B.J. 604, 659 (1976).
of prisons is punishment of offenders.\textsuperscript{63} But if sentences are, as critics maintain,\textsuperscript{64} to be shorter than under prior law, will that not contradict the new primary purpose of California prisons—to punish the offender?\textsuperscript{65} Assuming there will be shorter sentences, would shorter sentences punish the offender better than longer terms? A discussion of the new law and its potential for shortening sentences will answer these questions.

**SENATE BILL 42: AN OVERVIEW\textsuperscript{66}**

Under the prior indeterminate sentence law, felonies were usually punished by prison sentences of minimums and maximums.\textsuperscript{67} The new law substitutes the indeterminate sentence with four fixed sentence ranges containing three statutory choices within each range.\textsuperscript{68}

The new law should not change the sentences allotted for misdemeanor crimes under the pre-Senate Bill 42 law. Neither will the Uniform Determinate Sentencing Act affect such life-sentence

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\textsuperscript{63} See note 28 and accompanying text supra.

\textsuperscript{64} See notes 86-88 and accompanying text infra.

\textsuperscript{65} In the text accompanying notes 65-157 infra, the author assumes that the severity of a sentence is directly related to the sentence length. Therefore, it will be assumed that a longer sentence constitutes a more severe punishment than does a shorter term of imprisonment. See Coleman, supra note 47, at 15. See generally Wang, The Metaphysics of Punishment—An Exercise in Futility, 13 San Diego L. Rev. 306 (1976).

\textsuperscript{66} Senate Bill 42 was first introduced on December 2, 1974. The Bill was finally passed by the Senate on August 30, 1976, and was signed into law by Governor Edmund G. Brown, Jr. on September 20, 1976. The legislation became effective on July 1, 1977.

Senate Bill 42's main author was Republican Senator John A. Nejedly, Chairman of the Senate Select Committee on Penal Institutions. Chief endorsers of the new law included the California Attorney General, the District Attorney's Association, the California Peace Officers Association, and Governor Edmund G. Brown, Jr. See Letter from Senator John A. Nejedly to All Interested Persons Regarding Retroactivity Provisions of Senate Bill 42, 2 (Sept. 2, 1976) (This letter is on file with the San Diego Law Review).


\textsuperscript{68} Sentence Examples of the Crimes Range Base Term within each Range

<table>
<thead>
<tr>
<th>Range</th>
<th>Base Term</th>
<th>Examples of the Crimes within each Range</th>
</tr>
</thead>
<tbody>
<tr>
<td>Range 1</td>
<td>16 months, 2 or 3 years</td>
<td>Burglary 2, Receiving Stolen Property, Grand Theft, Forgery</td>
</tr>
<tr>
<td>Range 2</td>
<td>2, 3, or 4 years</td>
<td>Burglary 1, Robbery (unarmed), Manslaughter, Mayhem</td>
</tr>
<tr>
<td>Range 3</td>
<td>3, 4, or 5 years</td>
<td>Simple Kidnapping, Sale of Heroin, Rape, Lewd act w/Child</td>
</tr>
<tr>
<td>Range 4</td>
<td>5, 6, or 7 years</td>
<td>Murder 2</td>
</tr>
</tbody>
</table>

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crimes as first degree murder,\textsuperscript{69} trainwrecking,\textsuperscript{70} or kidnapping for robbery or ransom\textsuperscript{71}—sentences which remain life terms under the new law. Finally, the new law will not affect the judge’s authority to impose a fine, probation, jail, or suspended sentence.\textsuperscript{72}

After the court has determined that the felon should be sentenced to prison, it will look to the three statutory choices provided under the violated statute. The trial court will then order the middle of the three provided terms, “unless there are circumstances in aggravation or mitigation of the crime.”\textsuperscript{73} The new legislation also provides for good-time credits—a reduction of up to one-third of the felon’s sentence for good behavior and participation in rehabilitation programs while in prison.\textsuperscript{74}

Moreover, the new law fixes definite terms for various enhancements—additions to the provided base terms incidental to the charged felony.\textsuperscript{75} Under prior law, enhancements were indeterminate in nature.\textsuperscript{76} However, under Senate Bill 42, the enhancements will be of definite duration.\textsuperscript{77} For example, if a felon were convicted of second degree burglary under the new law, he would be sentenced to a base term of either sixteen months, or two or three years.\textsuperscript{78} If he were armed with a deadly weapon,\textsuperscript{79} or if he

\textsuperscript{69} \textit{CAL. PENAL CODE} § 190.5 (West Supp. 1977).
\textsuperscript{70} Id. § 218.
\textsuperscript{71} Id. § 209.
\textsuperscript{72} Id. § 1170 (a) (2).
\textsuperscript{73} Id. § 1170 (b).
\textsuperscript{74} Id. §§ 2930–2932. Thus, up to four months may be reduced for each eight months served in prison. Three months of this four month reduction shall be based upon forbearance from physically assaultive behavior, including assault with a weapon, escape, and intentional destruction of state property in excess of $50. The remaining one month shall be awarded for participation in “work, educational, vocational, therapeutic or other prison activities.” Id. § 2931 (c). The new law also sets up extensive guidelines for revocation of good-time credits. See id. §§ 2931–2932. For a discussion of why the good-time credits will not reduce the time served under Senate Bill 42 versus the prior indeterminate sentence law, see text accompanying notes 143–57 infra.
\textsuperscript{75} For a discussion of enhancements under the new law, see notes 148–55 and accompanying text infra.
\textsuperscript{76} \textit{CAL. PENAL CODE} § 12022 (West 1970) (repealed 1977) provided that a felon would serve a five-to-ten year term for being armed with a deadly weapon in the commission of a crime.
\textsuperscript{77} Id. (West Supp. 1977) (one year for being armed with a deadly weapon in the commission of a crime); id. § 12022.7 (three years for intentionally inflicting great bodily injury during a crime).
\textsuperscript{78} Id. § 461.
inflicted great bodily injury during the course of the burglary,\textsuperscript{80} his base term would be enhanced by a one- or three-year term of additional imprisonment, respectively.\textsuperscript{81}

Finally, the Uniform Determinate Sentencing Act replaces the Adult Authority and Women’s Board of Terms and Parole with the Community Release Board.\textsuperscript{82} The Board will be chiefly concerned with alleviating sentence disparity, granting or denying parole, reviewing parole conditions, and considering prisoner’s requests for denied good-time credits.\textsuperscript{83}

**WILL SENATE BILL 42 SHORTEN SENTENCES?—THE MYTH OF SHORTENED SENTENCES FOR CALIFORNIA OFFENDERS**

Although Senate Bill 42, when first passed,\textsuperscript{84} was applauded

\begin{itemize}
\item \textsuperscript{79} Id. § 12022.
\item \textsuperscript{80} Id. § 12022.7.
\item \textsuperscript{81} The following is an example of how sentences will be computed under the new law. The hypothetical case used is that of a felon who had served a prior sentence for forcible rape, and who is now convicted of forcible rape with great bodily injury to the victim. His term would be computed as follows:
\item Offense: Forcible Rape (Cal. Penal Code § 261)
\item Base Term Range: 3, 4, or 5 years (Cal. Penal Code § 264)
\item Middle of the Three Terms (Cal. Penal Code § 1170(b)): 4 years = 4 yrs.
\item Plus Enhancements:
\item (1) Great Bodily Injury to Victim (3 year add-on to base term) = 3 yrs.
\item (2) Prior Violent Felony* (3 year add-on to the base term) = 3 yrs.
\item Sentence given by trial court: 10 yrs.
\item Maximum good-time credits earned while in prison (up to \(\frac{1}{2}\) reduction in sentence given by trial court): \(\frac{1}{2}\) of 10 years = 3.3 yrs.
\item Sentence given by trial court (10 years) minus maximum good-time credits (3.3 years) equals 6.7 years.
\item Minimum Term to be Served: = 6.7 yrs.
\end{itemize}

* See **Cal. Penal Code** § 667.5(c) (West Supp. 1977) for a list of what are termed violent felonies under the new law.

\textsuperscript{82} Id. § 5078(a) & (b). The Board will be composed in part of the same individuals who served on the Adult Authority and Women’s Board of Terms and Parole. Id. § 5075.

\textsuperscript{83} Id. § 5077. The main difference between the Board and the Adult Authority will be one of degree. Although the new law is not completely determinate—since a convict may receive good-time credits which thereby reduce his term—Senate Bill 42 provides a more determinate sentencing system than accorded under prior law. Hence, the Board will have substantially less arbitrary power than did the Adult Authority. It will be able to deny good-time credits for good cause, but it will no longer be able to despotsically control inmates through the use of long indeterminate sentences.

\textsuperscript{84} See note 66 supra for a brief examination into the history of Senate Bill 42.

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by most members of government, press, and courts, it was quick to mount a drive to repeal the act. They contended that under prior law a convict often served a potential of life imprisonment, while under the new law the highest of the three statutory choices falls far short of life imprisonment. On the surface, the critics’ position appears sound—all the Senate Bill 42 terms appear to be far shorter than under prior law.

It is true that the new law’s terms seem too short to satisfy the legislature’s primary purpose of incarceration—to punish the of-
However, because the sentencing structure of the California judiciary had already made a de facto shift to determinate sentencing, the sentences employed under the statute will not be significantly shorter than the terms previously served by California prisoners.

Prior Trend in California Case Law Toward the Determinate Sentence

As recently as 1975, the convict had no right to a term set at less than the statutory maximum. However, in a series of cases beginning in 1972, the California Supreme Court decreased the Adult Authority’s plenary discretion to fix a felon’s term of imprisonment.

The first of these cases is In re Lynch. After spending over five years in prison for indecent exposure, the defendant challenged his potential life sentence on the ground that it violated the cruel or unusual punishment clause of the California Constitution. The California Supreme Court concluded that the constitutional validity of the statute must be evaluated with reference to the potential life sentence, regardless of whether a lesser term could be fixed by the Adult Authority. The court held that the penalty prescribed in the statute violated the prohibition against cruel or unusual punishment because the punishment was grossly disproportionate to the offense committed. In its holding, Lynch laid the

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90. See text accompanying notes 91-122 infra.
91. Prior to the 1975 decisions in People v. Wingo, 14 Cal. 3d 169, 534 P.2d 1001, 121 Cal. Rptr. 97 (1975), and In re Rodriguez, 14 Cal. 3d 639, 537 P.2d 384, 122 Cal. Rptr. 552 (1975), the law generally held that “[o]ne who is legally convicted has no vested right to the determination of his sentence at less than maximum.” In re Schoengarth, 66 Cal. 2d 295, 302, 425 P.2d 200, 204, 57 Cal. Rptr. 509, 513 (1967). See also In re Cohen, 27 Cal. 2d 637, 641, 166 P.2d 279, 281 (1946); In re Clutchette, 39 Cal. App. 3d 561, 566, 114 Cal. Rptr. 509, 513 (1974).
92. See text accompanying notes 93-122 infra.
93. 8 Cal. 3d 410, 503 P.2d 921, 105 Cal. Rptr. 217 (1972).
94. The defendant in Lynch was convicted of misdemeanor indecent exposure in violation of former Penal Code section 311 and was sentenced to two years probation. Nine years later, he was again convicted of indecent exposure and was sentenced under Former Penal Code section 314 which provided that “[u]pon the second and each subsequent conviction [for indecent exposure] . . . every person so convicted is guilty of a felony, and is punishable by imprisonment in state prison for not less than one year.”
96. 8 Cal. 3d at 419, 503 P.2d at 926, 105 Cal. Rptr. at 222.
97. “[A] punishment may violate . . . the Constitution if, although not
foundation for subsequent cases which eroded the Adult Authority's power to fix or fail to fix sentences short of the statutory maximum.98

Three years after Lynch, the California Supreme Court decided People v. Wingo.99 In Wingo, the defendant was convicted of assault by means of force likely to produce great bodily injury under former Penal Code section 245(a),100 and was sentenced to an indeterminate term of imprisonment. As in Lynch, the defendant in Wingo contended that his potential life sentence constituted cruel or unusual punishment. However, "unlike Lynch... [the court in Wingo was] concerned with a maximum penalty which might be permissible in some circumstances but excessive in others."101 In Lynch, there were no circumstances under which a life sentence for a second offense exhibitionist would be valid. However, the court in Wingo concluded that there may be circumstances under which a life term for assault under Penal Code section 245(a) would constitute appropriate punishment.102 Although the challenged statute in Wingo may have been suspect under cruel or unusual in its method, it is so disproportionate to the crime for which it is inflicted that it shocks the conscience and offends fundamental notions of human dignity." Id. at 424, 503 P.2d at 930, 105 Cal. Rptr. at 226 (footnote omitted).

100. CAL. PENAL CODE § 245(a) (West 1970) (repealed 1977) provided that such an offense was "punishable by imprisonment in the state prison for six months to life."
101. 14 Cal. 3d at 176, 534 P.2d at 1007, 121 Cal. Rptr. at 103 (emphasis added).
102. The difference in analysis rested upon the type of statute which was challenged:

If a statute prescribes a single, narrowly delineated mode of behavior—as in Lynch—it is appropriate in considering the constitutionality of the penalty to look only to the maximum in order to determine whether under any circumstances the crime would justify the punishment. But this analytic proves inconclusive when applied to a statute regulating a broad variety of conduct [as in Wingo], since by definition there is no single "offense" to measure against the subject penalty. Id. at 182, 534 P.2d at 1011, 121 Cal. Rptr. at 107. But cf. Note, Prohibiting Cruel or Unusual Punishment: California's Requirement of Proportionate Sentencing After Wingo and Rodriguez, 10 U.S.F. L. Rev. 524, 528-30 (1976) [hereinafter cited as Proportionate Sentencing] (author questions the Wingo court's attempted differentiation between the two decisions).
Lynch, the court nevertheless upheld the challenged Penal Code section.103

Under a Lynch analysis, the court should have denied the defendant's petition for relief after it had determined that the statute in Wingo was valid on its face.104 But Wingo went beyond the Lynch decision, holding that while the statutory sentence did not constitute cruel or unusual punishment in violation of the California Constitution, the "sentence may be unconstitutionally excessive either because the Adult Authority has fixed a term disproportionate to the offense or, in some circumstances, because no term whatever has been set."105

The Wingo court held that a felon who is convicted under a section encompassing a wide range of conduct has an "undeniable vested right" to have his term fixed proportionately to his individual culpability.106 The imprisonment determined by the Adult Authority was then to be analyzed as to whether the statute, as applied to the defendant, was constitutional. According to this analysis, if the Authority failed to fix the term within a "reasonable time," the statutory maximum would be employed107 in determining whether the type of offense, the absence of violence, or the individual's past history, age, or culpability merit such a sentence.108

By extending judicial review to include the actual exercise of the Authority's term-fixing power, Wingo constitutes a further revision of the Adult Authority's plenary discretion to fix or fail to fix prisoners' terms short of the statutory maximum.109 "Thus, Wingo is a logical extension of Lynch. Both evince an increasing judicial

103. 14 Cal. 3d at 180, 534 P.2d at 1010, 121 Cal. Rptr. at 106.
104. Although this argument was expressly rejected by the court in In re Rodriguez, 14 Cal. 3d 639, 649, 537 P.2d 384, 391, 122 Cal. Rptr. 552, 559 (1975) prior to Wingo-Rodriguez, cases that addressed a Lynch challenge would ordinarily not go beyond the test outlined in Lynch in adjudicating the statute's validity. See, e.g., People v. Smith, 42 Cal. App. 3d 700, 711, 117 Cal. Rptr. 88, 91 (1974); People v. Morgan, 36 Cal. App. 3d 444, 449, 111 Cal. Rptr. 540, 551 (1973). But cf. People v. Kingston, 44 Cal. App. 3d 629, 636, 118 Cal. Rptr. 896, 900 (1974), which held that, even though the statute was valid on its face, it was unconstitutionally applied to the particular defendant. See also In re Foss, 10 Cal. 3d 910, 519 P.2d 1073, 112 Cal. Rptr. 649 (1974) (invalidating a statutory penalty which, although proportional to many serious offenders, was not proportional to this particular defendant.)
105. 14 Cal. 3d at 182, 534 P.2d at 1012, 121 Cal. Rptr. at 108.
106. Id.
108. Id. at 654, 537 P.2d at 395, 122 Cal. Rptr. at 563.

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tendency to limit the constitutional authority of the legislature and offset the administrative discretion of the Adult Authority with a judicial standard of proportionality.110

Shortly after the Wingo ruling, the California Supreme Court decided In re Rodriguez.111 The defendant in Rodriguez had been convicted of lewd and lascivious acts upon a child and had been sentenced to an indeterminate term of imprisonment with a maximum of life.112 As in Wingo, the Rodriguez court upheld the statute in question because the potential life sentence for its violation may be proper.113 While reiterating the Wingo requirement "that the Authority must fix terms . . . that are not disproportionate to the culpability of the individual offender,"114 the Rodriguez court swept beyond Wingo, holding that the Adult Authority would now be required to set "primary terms" proportionate to the prisoner's culpability.115 The "primary term" requirement mandated that the Adult Authority promptly delineate a proportionate term for each prisoner upon commitment.116 This term must be fixed with a "substantial degree of certainty,"117 and once fixed, it could not be redetermined upward.118 As one commentator has noted:

110. Id.
112. CAL. PENAL CODE § 288 (West 1970) (repealed 1977) provided that the punishment for such conduct was imprisonment "in the State prison for a term of from one year to life." After serving 22 years in prison, the defendant challenged the sentence as excessive. He argued that the Adult Authority had abused its discretion in failing to fix his term at less than life, and in failing to grant him parole. In re Rodriguez, 14 Cal. 3d 639, 642-43, 537 P.2d 384, 386-87, 122 Cal. Rptr. 552, 554-55 (1975).
113. 14 Cal. 3d at 647, 537 P.2d at 390, 122 Cal. Rptr. at 558.
114. Id. at 652, 537 P.2d at 393, 122 Cal. Rptr. at 561.
115. Id. In addition, the court noted that if the terms were not "promptly fixed," the constitutionality of the convict's term would be determined in reference to the statutory maximum. Id. at 654 n.18, 537 P.2d at 395 n.18, 122 Cal. Rptr. at 563 n.18. Further, the individual's term must be based on factors present at the time of the offense, that is, the convict's primary term had to be based on that particular crime, and not on "irrelevant, post-conviction factors." Id.
116. Id. at 652-53, 537 P.2d at 393-94, 122 Cal. Rptr. at 561-62. Prior to Rodriguez, the Adult Authority normally set terms only when the convict's application for parole was considered. Id. at 646, 537 P.2d at 389, 122 Cal. Rptr. at 557. Thus, a convict might have to wait for many years without either a parole date or ultimate release date—and the deferment of his parole "readiness" would therefore prolong the indeterminacy of his term. In re Stanley, 54 Cal. App. 3d 1030, 1033-34, 126 Cal. Rptr. 524, 526 (1976).
118. Id.
A major consequence of these combined judicial declarations has been to advance California substantially along the continuum from an indeterminate sentencing system toward a determinate system.  

... [C]oupling prompt term-fixing with the edict to ignore post-conviction factors in fixing the term should merge California's system into the sentencing perspective associated with determinate sentencing systems.119

The Lynch-Wingo-Rodriguez standard constitutes a severe reduction in the Adult Authority's power. Prior to these cases, an inmate serving an indeterminate sentence had no right to a term fixed short of the statutory maximum.120 However, by requiring that a prisoner's term be set proportionately to those served by other prisoners for similar crimes, as well as requiring that the prisoner's term be fixed proportionately to his individual culpability, the California Supreme Court severely reduced the Authority's term-fixing discretion.121

Because the prisoner's sentence must reflect his individual culpability at the time of the offense in order to withstand constitutional scrutiny, the new statute does not appear to shorten most offenders' sentences.122 Hence, assuming the Senate Bill 42 sentences are substantially similar to the Adult Authority release dates set in response to Rodriguez, the conclusion can be made that it was the California Supreme Court, and not the new law, which shortened sentences.

Length of Terms Set by the Adult Authority123

Amid prison disturbances protesting the inequities of the indeterminate sentencing system, especially the Adult Authority's policy

119. Proportionate Sentencing, supra note 102, at 537-38.
120. See note 91 supra.
122. See note 115 supra.
123. Under prior California law, the Adult Authority had two distinct discretionary functions: (1) fixing sentences within the statutory minimum and maximum terms for an inmate's offense, and (2) granting parole. For example, although a convict may serve only three years for committing a felony, technically his sentence may extend far beyond his release or parole date. Although California courts have consistently held that a parolee is "constructively a prisoner . . . fettered by the conditions and restrictions of his parole," People v. Hernandez, 229 Cal. App. 2d 143, 149, 40 Cal. Rptr. 100, 103 (1964), cert. denied, 381 U.S. 953 (1965), many authorities criticize this "constructive custody" approach. See United States v. Consuelo-Gonzalez, 521 F.2d 259 (9th Cir. 1975); F. COHEN, THE LEGAL CHALLENGE TO CORRCompactions 33 (1969); Note, Parole: A Critique of Its Legal Foundations and Conditions, 38 N.Y.U.L. Rev. 702, 713-14 (1963); Comment, The Parole System, 120 U. Pa. L. Rev. 282, 289-95 (1971). Consequently, in the text accompanying notes 124-56 infra, this Comment will compare the actual time served by a felon under the prior law with the actual time he will serve under Senate Bill 42.
of "stringing along" inmates serving indeterminate sentences, the Adult Authority offered to provide determinate sentences as early as 1972. However, after considerable fanfare and publicity announcing the new term-fixing policy, the Adult Authority ceased to follow its promised policy.

Because of increased political pressure, by March 1975, the Adult Authority re-initiated the determinate sentencing system with fixed release dates for most felons. The Authority set these dates with reference to the median time served under the prior law. The Authority would first set a "base term" for the convict's sentence in accordance with his particular offense. Then other factors, such as prior convictions, consecutive terms, violence of the crime, and use of a weapon, would be taken into account before determining the sentence to be imposed.

This policy was first issued in codified form in mid-April 1975. A major provision of the new policy was that once a release date had been fixed, the date could not be rescinded except for "misconduct or under extraordinary circumstances." The California Adult Authority had, by this time, nearly abandoned the concept of the indeterminate sentence and had adopted a determinate sentencing system in its place.

After In re Rodriguez, the Adult Authority issued a second policy directive which established separate standards for term-fixing and limited the April policy directive to parole date fixing. The new

124. For an example of this policy in action, see note 37 supra.
125. J. MITFORD, supra note 27, at 87.
126. Id.
129. Id.
130. Id.
132. Letter from the Chairman, California Adult Authority to All Inmates Under Jurisdiction of Adult Authority, Apr. 15, 1975. This provision was later changed to require mere "good cause" for revocation. See 15 Cal. ADMIN. CODE § 2102(b) (2) (1976).
133. Prison Reform, supra note 35, at 358.
directive established a base term from the most serious offense for which the prisoner was currently committed. It also directed a selection of either a typical or an aggravated sentencing range for the base offense, and included an attached schedule of felonies with typical and aggravated ranges. The directive also provided that prior, concurrent, or consecutive sentences could be added onto the provided base terms. By late 1975, both the Adult Authority and Women's Board of Terms and Parole had begun to implement the Rodriguez decision by fixing primary terms for nearly all inmates.

The “indeterminate” sentences imposed by the Adult Authority and the sentences set under Senate Bill 42 do not differ substantially. The new law's typical sentences are as long, if not longer, than those provided by the Adult Authority. In addition, the aggravated or enhanced provisions under the new law are applicable to all offenses, whereas under the prior law they were restricted to a few.

<table>
<thead>
<tr>
<th>Offense Committed</th>
<th>Adult Authority Terms*</th>
<th>Senate Bill 42 Terms†</th>
</tr>
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<tbody>
<tr>
<td></td>
<td>Typical</td>
<td>Aggravated</td>
</tr>
<tr>
<td></td>
<td>(in months)</td>
<td>(in months)</td>
</tr>
<tr>
<td>Robbery/1st degree</td>
<td>30-36</td>
<td>37-44</td>
</tr>
<tr>
<td>Robbery/2d degree</td>
<td>18-30</td>
<td>31-42</td>
</tr>
<tr>
<td>Burglary/1st degree</td>
<td>24-30</td>
<td>31-36</td>
</tr>
<tr>
<td>Burglary/2d degree</td>
<td>16-22</td>
<td>23-28</td>
</tr>
<tr>
<td>Assault w/deadly weap.</td>
<td>24-32</td>
<td>33-38</td>
</tr>
<tr>
<td>Rape</td>
<td>30-48</td>
<td>49-60</td>
</tr>
</tbody>
</table>

* 15 CAL. ADMIN. CODE § 2225 (1976).
† Although there are neither “typical” nor “aggravated” ranges under Senate Bill 42, the “typical” range figures in this table are the three base terms provided within each particular statute. For example, first degree burglary under the new law is punishable by a sentence of either 24, 36, or 48 months. CAL. PENAL CODE § 461 (West Supp. 1977). Thus, the Senate Bill 42 “typical” range under this particular statute will be from 24-48 months.

In addition, “aggravated” ranges for Senate Bill 42 terms in this table consist of potential enhancements to the provided base term. The three mentioned enhancements are: CAL. PENAL CODE § 12022 (West Supp. 1977) (one year for being armed with a deadly weapon during the commission of a crime); CAL. PENAL CODE § 12022.5 (West Supp. 1977) (two years for using a firearm in the commission of a crime); and CAL. PENAL CODE § 12022.7 (West Supp. 1977) (three years for inflicting great bodily injury in the course of a crime).

135. Id.
136. Id.
137. 15 CAL. ADMIN. CODE §§ 2153-2154, 2225 (1976).
138. Comment, supra note 25, at 311 n.66.
139. A comparison of the release dates in the policy directives with sentences under Senate Bill 42 demonstrates their similarity:

140. Id. §§ 12022.5, 12022.7 (West Supp. 1977).
141. Letter from Senator John A. Nejedly to All Interested Persons,
Comparison of Terms Actually Served Under the Adult Authority: 1974

Although the terms set under Senate Bill 42 seem shorter than the terms accorded under the Indeterminate Sentence Law, the maximum term of imprisonment is misleading, for relatively few convicts serve the absolute maximum statutory sentence. Thus, it is more accurate to compare the actual time served under the prior law with the sentence a convict will now receive under the new statute.

An examination of the median time served in prison by male felons before their first parole reveals that most of the Senate Bill 42 terms appear to be less than the median time served under the pre-1975 law. In addition, if the felon is an "ideal offender"—one who cooperates with prison authorities, who does not have a past record, and whose crime is unenhanced by any acts incidental


142. One estimate has put the number of inmates serving the entire sentence at 5% of the total prison population. See Note, California Department of Corrections and Adult Authority Decisionmaking Procedures for Male Felons, 26 Stan. L. Rev. 1353, 1364 (1974).

143.

<table>
<thead>
<tr>
<th>Offense</th>
<th>1974 Median Terms under the Indeterminate Sentence* (in months)</th>
<th>Terms Served By Middle 80% of Felons (in months)</th>
<th>Senate Bill 42 Median Terms† (in months)</th>
</tr>
</thead>
<tbody>
<tr>
<td>Robbery/1st degree</td>
<td>42</td>
<td>29-82</td>
<td>36</td>
</tr>
<tr>
<td>Robbery/2d degree</td>
<td>34</td>
<td>23-58</td>
<td>36</td>
</tr>
<tr>
<td>Burglary/1st degree</td>
<td>38</td>
<td>22-74</td>
<td>36</td>
</tr>
<tr>
<td>Burglary/2d degree</td>
<td>27</td>
<td>18-49</td>
<td>24</td>
</tr>
<tr>
<td>Assault w/deadly weap.</td>
<td>37</td>
<td>26-70</td>
<td>36</td>
</tr>
<tr>
<td>Rape</td>
<td>48</td>
<td>32-85</td>
<td>48</td>
</tr>
</tbody>
</table>

to the charged felony—he will apparently have a shorter sentence than that accorded under prior law because he will get a one-third reduction in the Act's median term for good-time credits.

Yet the 1974 figures are medians. Thus, even though some "ideal offenders" may have received longer sentences under prior law, in all probability the "ideal offender" served a sentence shorter than the 1974 median figures. Because the "ideal offender" had a much shorter term, the Senate Bill 42 median term, less good-time credits, is probably near the terms served under prior law.

In addition, the new terms appear shorter than the 1974 median sentences because they do not take into account potential enhancements to the charged felony. Many rapes, assaults, and armed robberies were probably enhanced in some form. While the 1974 medians represent certain enhancements to the base sentences, the Senate Bill 42 figures are median terms absent enhancements. Therefore, enhancement(s) to the base term must also be included in the final computation of the felon's sentence to accurately reflect the true Senate Bill 42 sentence. Thus, the felon's base term is increased if he inflicts great bodily injury, uses a firearm,

† The Senate Bill 42 term contained in the table is the middle of the three provided base terms. The middle term will usually be the base term to which the trial court will sentence the felon. See text accompanying note 73 supra.

144. Although the Adult Authority does not maintain records of parole release dates which differentiate between the terms served by first time offenders and repeaters, considerations such as prior sentences and violence of the crime would tend to increase the length of the sentence. See text accompanying notes 130, 137 supra. Consequently, an "ideal offender" would serve much less time than other inmates. But c.f. Senate Transcript, supra note 47, at 136-37 (representative of prisoner organization argued that "first-timers" may serve more time than "repeaters").

145. See note 144 supra.

146. Although the Adult Authority does not "break down" sentences into the amount of additional time served for enhancements, the 1975 F.B.I. Uniform Crime Reports states that the above mentioned crimes are considered violent crimes against the person and in the case of armed robbery, "frequently results in injury to the victim." Additionally, other non-violent enhancements will be included in the base term computation, including concurrent terms, prior terms, and taking or damage in excess of statutory amounts. See notes 148-55 and accompanying text infra.

147. SB 42 Sentences, supra note 141, at 1.

148. CAL. PENAL CODE § 12022.7 (West Supp. 1977) provides an additional three-year term for intentionally inflicting great bodily injury in the commission of a crime when said injury is not an element of the offense.

149. Id. § 12022.5 provides an additional two year term for using a firearm in the commission of a crime, which use is not an element of the offense.
or is armed with a deadly weapon\textsuperscript{130} during the commission of the offense. Moreover, if the felon is convicted of any felony\textsuperscript{161} and has served a prior term for either a violent\textsuperscript{162} or non-violent\textsuperscript{163} offense, his base term is increased accordingly. Finally, the new law provides for definite or "fixed" enhancements if the felon is to serve consecutive sentences,\textsuperscript{164} or if he took or damaged property in excess of statutory limits.\textsuperscript{165} Therefore, even assuming that the convict receives maximum good time credits under the new law, if enhancements are included in the final computation of the Senate Bill 42 terms, these terms do not appear to deviate from the prior 1974 medians.\textsuperscript{166}

\begin{itemize}
  \item 150. Id. § 12022 provides an additional one year term for being armed with a deadly weapon during the commission of a crime, when arming is not an element of the offense. No more than one out of the three enhancements mentioned in notes 148–50 supra may be added to any one sentence, and these enhancements may not be added to increase the one-third of the middle term sentence for consecutive sentences. Id. §§ 1170.1a (a) & (d).
  \item 151. Id. § 667.5 (b).
  \item 152. Id. § 667.5 (a) provides an additional three year term for prior violent terms where the present offense is one of violence. If the felon has remained free of prison custody and felony conviction for 10 years, this section is inapplicable.
  \item 153. Id. § 667.5 (b) provides an additional one year term for prior non-violent terms. If the felon has remained free of prison custody for five years, this section is inapplicable.
  \item 154. Id. § 1170.1a provides an additional term of one-third the middle base term for which the convict is presently convicted. However, the aggregate enhancements for prior terms, as specified in Cal. Penal Code § 667.5 (b) (West Supp. 1977), plus consecutive sentence enhancements may not exceed five years. Id. § 1170.1a (e). Also, except for those crimes enumerated in id. § 667.5 (c), or for felonies involving arming, use of a firearm, or great bodily injury, the term of imprisonment may not exceed twice the base term imposed by the trial court. Id. § 1170.1a (f).
  \item 155. Id. § 12022.6 (a) provides additional punishment of one-half the base term for taking or damage in excess of $100,000; id. § 12022.6 (b) provides additional punishment equal to two times the base term for taking or damage in excess of $500,000. These enhancements are not available if the taking or damage resulted from such crimes as burglary, robbery, or arson. All enhancements in notes 148–55 supra must be charged and proved. The trial court must then sentence upon the enhancements unless it determines there are circumstances in mitigation of the additional punishment. If there are such circumstances in mitigation, the court must provide its reasons for sentence reduction within the record. SB 42 Sentences, supra note 141, at 2. See also Cal. Penal Code §§ 1170 (a) (2); 1170.1a (c) (West Supp. 1977).
  \item 156. SB 42 Sentences, supra note 141, at 1. See also Senate Transcript, supra note 47, at 49; L.A. Times, Sept. 2, 1976, pt. II, at 6, col. 1 (J. Anthony Kline, Governor Edmund G. Brown, Jr.'s legal adviser, said that "sentences for most crimes [under Senate Bill 42] would remain much the same
Sentences under the prior law, although appearing to be longer, were in reality almost always shorter than the statutory maximum. The median time served by prisoners is a more accurate indicator of the actual time served under the prior law. Because Senate Bill 42 terms do not appear to differ from prior median sentences actually served, the new statute does not promote shorter sentences for California offenders.

THE EFFECTS OF SENATE BILL 42

Effect on the Public

Some critics of these arguments may contend that the use of medians is misleading. On the one hand, the five percent of the inmates who would have served their maximum indeterminate sentence under prior law must be released within a certain time under the definite sentence law. This type of criminal receives a windfall—possibly to the detriment of the public because this “hardcore” criminal is now free. On the other hand, the “ideal offender” who would have served a term shorter than the prior median sentence will now serve a greater term under the new law, because Senate Bill 42’s base sentences are equal to prior medians. Hence, the critics maintain that the new law will unjustly shorten some sentences, and unfairly lengthen others.

However, both contentions are inaccurate. First, “the [hardcore inmates] will not even be affected by SB 42, insofar as SB 42 does not set determinate sentences for those convicted of such crimes as capital offenses or kidnapping for robbery or ransom.”

Second, even without the enactment of Senate Bill 42, the California Supreme Court has held that an individual’s term must be fixed proportionately to his individual culpability. Although an

. . . ”); L.A. Times, Oct. 23, 1975, pt. 1, at 1, col. 1 (the Adult Authority terms discussed at note 139 supra were “based upon actual time served by felons who have been paroled in the last five years”). Cf. Sacramento Bee, Sept. 12, 1976, pt. A, at 13, col. 1 (Mike Salerno, co-drafter of Senate Bill 42, said that “[n]onviolent offenders will serve less time, . . . [and] [v]iolent offenders will serve more. The total number of man-hours served will probably stay the same.”) (articles on file with the San Diego Law Review).

157. See note 142 supra.
158. See Note, supra note 142, at 1364.
159. With the exception of certain crimes discussed at notes 69-71 supra, nearly all criminal violations under the new law will have fixed, definite sentences.
160. See note 156 and accompanying text supra.
162. See text accompanying notes 93-122 supra.
individual may constitute some risk to society, his term may not be so long as to constitute cruel or unusual punishment in violation of the California Constitution.\textsuperscript{163} Thus, even if the "dangerous" criminal could be readily defined and identified,\textsuperscript{164} such an individual cannot be indeterminately incarcerated merely for his possible risk to society.\textsuperscript{165} He must have committed some violation of the law which merits the extent and magnitude of the sentence he receives.

Third, the Uniform Determinate Sentencing Act increases sentences for women offenders by bringing them into parity with those imposed on men. A comparison of the median time served by men and women under the old law, with comparative sentences under the new law,\textsuperscript{166} reveals that women will serve longer sentences under the new Act.\textsuperscript{167}

\begin{table}[h]
\centering
\begin{tabular}{llll}
\hline
\textbf{Offense} & \textbf{Median Time Served by Felons Paroled for First Time 1974-1975}† & \textbf{Senate Bill 42 Terms} \\
\textbf{(in months)} & \textbf{Women} & \textbf{Men} & \\
\hline
Manslaughter & 27 & 48 & 36 (unenhanced) \\
Burglary & 18 & 29 & 24 (unenhanced) \\
Grand Theft except auto & 20.5 & 30 & 24 (unenhanced) \\
Forgery and Checks & 19 & 26.5 & 24 (unenhanced) \\
CSS I & 31 & 40.5 & 36 (unenhanced) \\
CSS III, IV, & V & 25 & 37 & 36 (unenhanced) \\
\hline
\end{tabular}
\end{table}

\textsuperscript{163} Although the defendant in Rodriguez constituted some risk to society, in his 22 years of imprisonment he had committed no violent act. Even though he has since been returned to prison on a charge of child molesting, "as the court read the psychiatric reports there was no support for a conclusion that at the time of the offense petitioner's character was such that when considered with the facts of his particular offense, life imprisonment was justified." Proportionate Sentencing, supra note 102, at 554 (emphasis added) (citation omitted).

\textsuperscript{164} See Steadman & Cocozza, supra note 44, at 33.

\textsuperscript{165} See note 163 supra.

\textsuperscript{166} Median Time Served by Felons Paroled for First Time 1974-1975†

\textsuperscript{167} The new sentences should be in accord with the equal protection clause. See, e.g., Dershowitz, supra note 14, at 326-28; Comment, Sex Discrimination—Disparate Sentencing of Male and Female Offenders Violates Equal Protection—State v. Chambers, 63 N.J. 287, 307 A.2d 78 (1973), 8

In addition, the contention that the good offender will serve an unjustly longer sentence than under the prior law is unfounded. Under the new law, the trial court must choose the middle of the three provided terms unless "there are circumstances in . . . mitigation of the crime." The "good offender" will not serve any more time under the new law because the court may, upon motion, choose the lower of the three provided terms if circumstances warrant such a decision. Moreover, Senate Bill 42 will not affect the probation process, which keeps the offender who should not serve a prison sentence from being incarcerated.

Finally, the new law will benefit the public by reducing the flood of habeas corpus petitions which preceded the enactment of Senate Bill 42. A deluge of petitions had begun to inundate the courts after the Rodriguez decision, each demanding—often without merit—that the appellate court review the proportionality of the individual's sentence. Since appellate courts will no longer evaluate definite sentences in reference to proportionality, the large inflow of petitions should cease.

**Effect on the Prison Inmates**

The women's prison will necessarily become more crowded because women will be serving longer prison sentences. Therefore, new prison facilities should be authorized by the legislature in response to this effect. However, should the Community Release Board choose to give liberal good-time to all or most offenders—an action which is unlikely—the base terms for women under

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169. Under CAL. PENAL CODE § 1170(b) (West Supp. 1977), a motion must be made prior to or at the time of sentencing. The circumstances in mitigation must be set forth within the motion, and must be found true by the trial court upon the evidence introduced at the hearing on the motion and/or previously heard by the judge at the trial. The factual findings and reasons in support of the motion must then be set forth on the record at the time of sentencing.
170. Id.
171. Oppenheim, supra note 61, at 654 & n.15.
174. This statement is not to imply that if a term set by the legislature constitutes cruel or unusual punishment in violation of the California Constitution the courts would be powerless to act. The contention here is that the Rodriguez test of proportionality will no longer be employed to ascertain individual sentences under Senate Bill 42.
175. S. Rubin, supra note 8, at 164.
176. The good-time provisions under CAL. PENAL CODE §§ 2930-2932.
Senate Bill 42 would begin to approach prior medians. This action would forestall some potential overcrowding.

From the prisoner's perspective, the most important aspect of the new act is the alleviation of the anxiety caused by the indeterminate sentence. According to one survey, prisoners disliked the indeterminate sentence more than bad food, dangerous living conditions, or incompetent medical treatment. The arbitrary, subjective, and meaningless sentence review sessions will no longer loom over the head of the prisoner. Furthermore, because the indeterminate sentence was a major factor of prison unrest and prisoner misconduct, its abolition should improve prison discipline.

**CONCLUSION**

The *Wingo-Rodriguez* decisions compelled the Adult Authority to set primary terms. These release dates were based on prior median time served under the old law. A comparison of these prior medians with the Senate Bill 42 terms plus potential enhancements reveals no discrepancy. Thus, the new Act does not decrease the length of terms which felons will now be required to serve. Even assuming that certain individuals' terms may be somewhat shorter, Senate Bill 42 terms are nearly identical to the Adult Authority release dates used over a year before the new law was enacted. The primary purpose of Senate Bill 42 definite terms—

(West Supp. 1977) are fixed at a one-third sentence reduction. Thus, unless the Community Release Board were to give nearly everyone maximum good-time credits, notwithstanding their behavior, the higher terms under Senate Bill 42 would still be above prior medians. However, since the use of good-time credits may decrease prison violence, it is doubtful that the Community Release Board would give unearned good time credits to all women offenders because there would then be little incentive to refrain from assaultive behavior while in prison.

177. *In re Rodriguez*, 14 Cal. 3d 639, 654 n.18, 537 P.2d 384, 395 n.18, 122 Cal. Rptr. 552, 563 n.18 (1975); J. Mitford, *supra* note 27, at 86-87; *Flat Time*, *supra* note 55, at 626. See also note 57 *supra*.
179. See note 37 *supra*.
180. See notes 97-99 and accompanying text *supra*.
181. Id. See also note 60 *supra*.
182. See text accompanying notes 99-122 *supra*.
183. See text accompanying note 128 *supra*.
184. See text accompanying notes 123-156 *supra*.

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to punish the offender—is therefore met by a system of penal laws which has not diminished the severity of punishment by reducing the length of incarceration.

Although terms for women will be longer, unjustly longer terms for good offenders—whether male or female—will not result. Senate Bill 42 should provide a greater measure of fairness to the criminal justice system, because all offenders will be treated in a like manner.

The Indeterminate Sentence Law was a fraud. Although it was based on the false promise of rehabilitation of criminals, it often led to great anxiety among prisoners. The abolition of indeterminate sentencing should reduce prison unrest and prisoner frustration associated with the arbitrariness of the indeterminate sentence.

Additionally, the new law should have the same general effect on deterring crime as did the indeterminate sentence. Because the sentence imposed must be proportionate to the individual's culpability, it is doubtful that the prior indeterminate sentence law had any greater effect in protecting society from the dangerous offender than will the present law.

The new law is honest. It announces that the purpose of prison is to punish the offender. It makes no promise of rehabilitation. Yet, the new law may accomplish what the old law failed to do—releasing a convict back into society who, although not rehabilitated, is not eternally bitter with the society that incarcerated him.

**AFTERWORD**

As this Comment goes to press, the legislature has enacted Assembly Bill 476, which amends various portions of Senate Bill 42. However, the main thrust of this Comment—that Senate Bill 42 does not shorten sentences—remains viable regardless of the passage of Assembly Bill 476.

KENNETH R. ZUETEL, JR.

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185. Oppenheim, supra note 61, at 659.
186. Flat Time, supra note 55, at 626.
187. See note 60 supra.
188. See notes 48, 49 supra.
189. See text accompanying notes 99–122 supra.

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