Understanding California Sentencing

By KARA DANSKY*

Introduction

AFTER 158 YEARS OF STATEHOOD, California's criminal punishment system is in a precarious position—its prisons are dangerously overcrowded, its recidivism rates are extraordinarily high, its corrections budget is enormous, and its sentencing system is incoherent.[1] Many intelligent and competent people are working to alleviate this predicament and have proposed several remedies to the problems listed above.[2] What is missing, however, is a careful review of California's approach to punishment over the centuries, or what might be considered an intellectual history of California's punishment system. With this Article, I endeavor to narrow that gap.

In Part I of the Article, I describe some constitutional foundations and then divide California's punishment history into three time periods—Statehood (1850–1916), the Indeterminate Sentencing Era (1917–1976), and the Determinate Sentencing Era (1977–present). For each time period I attempt to capture the more important developments in California's punishment history and focus on the areas of sentencing structure, parole, probation, juvenile justice, prison administration, and local law enforcement. Drawing meaningful conclusions about the importance of any of these developments is

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1. Kara Dansky, Op-Ed., *Three Good Reasons for a Sentencing Commission,* DAILY J. (San Francisco), Dec. 20, 2006, *available at* http://www.sentencing.nj.gov/downloads/pdf/articles/2007/Jan2007/news12.pdf; JOAN PETERSILIA, CAL. POLICY RESEARCH CTR., UNDERSTANDING CALIFORNIA CORRECTIONS 15 (2006), *available at* http://www.ucop.edu/cprc/documents/understand_ca_corrections.pdf.

2. *See, e.g.*, LEGISLATIVE ANALYST'S OFFICE, GOVERNOR'S PRISON OVERCROWDING PACKAGE IS MORE BALANCED BUT TOO BIG (2007), *available at* http://www.lao.ca.gov/handouts/crimjust/2007/Governors_Prison_04_12_07.pdf (proposing remedies to alleviate problems with California's criminal punishment system).

challenging because the historical record—especially of the state's early years—is extremely fragmented. The historical record that does exist consists of the occasional transcript or report, some legislative history, and a few journalistic sources. Therefore, in order to compile a history of California's punishment system, one necessarily has to make some inferences, and, at times, educated guesses about the historical record.

In Part II, I reflect on several themes that emerge from a review of California's punishment history. The most important theme is that California has always incarcerated more people than its correctional apparatus can handle—in other words, California's prisons have been overcrowded since the early days of statehood. The second major theme is the "purposelessness" of California's punishment system. Since California has never engaged in a serious and genuine examination of why and how it deals with people who violate criminal laws, California's punishment system has never been guided by any particular principle or philosophy. The final theme is that throughout California's history, there has been a tug of war between the legislative and executive branches of California's government over who is responsible for reducing excessive sentences and alleviating prison overcrowding.[3]

In Part III, I conclude by noting California lawmakers' many efforts to alleviate prison overcrowding, including expanding the use of parole, adopting a system of indeterminate sentencing, encouraging greater use of probation, and, of course, building more prisons. I describe some of the current proposals for reducing prison overcrowding and conclude that none of these proposals will fundamentally alter California's approach to punishment or provide a long-term solution to the state's overcrowding problem.

California has no choice but to alleviate prison overcrowding, and its options for doing so in the long term are dwindling. One possible approach—and the one that California might decide is necessary to protect public safety—is to adopt a policy of building more prisons indefinitely. Another option is to decrease the number of people going to prison and the amount of time they spend there by adopting a policy of reducing our reliance on incarceration as an instrument of punishment. The state can take either of these approaches, or it can take both simultaneously.

3. By and large, California's judiciary has managed to remain above the fray. *See* discussion *infra* Part II.C.

The critical point, however, is that while California has repeatedly committed itself to increasing prison construction, it has only done so in response to the failure of its many other attempts to reduce overcrowding. California has never thoughtfully or systematically embraced prison expansion as a policy choice because it has never weighed prison expansion against the alternative of reducing its reliance on incarceration as an instrument of punishment. If California is to make sensible choices about how to alleviate its overcrowded prisons, California must do the hard work of weighing the alternatives. In order to embrace prison expansion as an approach to alleviating prison overcrowding, it has to reject the alternative of reducing reliance on incarceration. To do so, it must first actually consider reducing reliance on incarceration as an option.

I. A Brief Chronology of California's Punishment History

A. Constitutional Foundations

In September 1849, a group of California residents met in Monterey for the state's first constitutional convention.[4] At this convention little was said about how California ought to structure its punishment system.[5] The only two subjects addressed at the convention related to the system of criminal punishment itself were the death penalty and the governor's pardon power. On September 11, 1849, a delegate named Mr. Hastings moved to insert the following section: "As the true design of all punishment is to reform and not to exterminate mankind, death shall never be inflicted as a punishment for crime in the State."[6] The motion to prohibit the infliction of the death penalty

4. *See* J. Ross Browne, Report of the Debates in the Convention of California, on the Formation of the State Constitution, in September and October, 1849, at 3–5 (Washington, John T. Towers 1850) [hereinafter Convention Report].

5. Convention delegates did discuss the question of whether those involved in duels ought to be permitted to hold public office and devoted a small portion of the debates to the availability of appeal from criminal conviction. *Id.* at 226–27, 250–53.

6. *Id.* at 45. Other than Mr. Hastings's name, the report does not contain any biographical information about the delegate and I have not been able to uncover any clues as to the reason for his attendance at the convention or his views on capital punishment. This is one example of an area where the motivation for the policy proposal in question simply has to be inferred. As support for his proposition, the delegate offered the following: (1) a government can only do that which its citizens may legally empower it to do and since the citizens cannot kill they cannot delegate killing authority to the government; (2) innocent men have no recourse once killed; and (3) while deterrence is a laudable goal and some deterrence is surely gained by the infliction of death, neither the value of deterrence nor its effectiveness is more important than the moral principle prohibiting the penalty's use. *Id.* This motion was seconded, but the delegate who seconded the motion did not actually support it. *Id.* After seconding the motion, this delegate proceeded to offer the perspective

in California failed.[7]

Late in the convention, delegates had an important exchange regarding the desired extent of the governor's pardon power.[8] A draft of the new constitution would have given the governor of California the authority to pardon convicted offenders as well as the power to commute their sentences, but one delegate suggested amending the provision to remove the commutation power on the ground that governors should not be permitted to disturb a sentence already provided for in the law and handed down by courts.[9] The amendment passed, and the 1849 constitution thereby conferred the power to the governor to "grant reprieves and pardons after conviction, for all offences except treason and cases of impeachment, upon such conditions, and with such restrictions and limitations, as he may think proper, subject to such regulations may be provided by law relative to the manner of applying for pardons."[10] The governor was only required to report the names of those pardoned to the Legislature.[11]

Convention delegates provided for the formation of a legislature, as Governor Riley had admonished, and ordered the new legislators to convene that fall in San Jose. They also elected Peter H. Burnett as California's first civilian governor. Other than briefly addressing the death penalty and the governor's pardoning power, however, convention delegates had little to say regarding a set of guiding principles for California's system of punishment and sentencing. As we will see, the absence of guiding principles to steer California's punishment system would become something of a trend in years to come.

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that while capital punishment is surely a moral wrong, California should nonetheless maintain it because: (1) the state cannot afford prisons; and (2) capital punishment is a time-honored practice. *Id.*

7. *Id.* at 45. Again, the report sheds no light on whether there were further discussions on this topic or whether the proposal was simply rejected out of hand.

8. *Id.* at 341–42.

9. The delegate went on to explain his suggestion:

> I wish to grant to the Governor the power of pardoning alone. That power carries with it a degree of responsibility that will compel him to interfere with the laws of the land only in those extraordinary cases in which such a power ought to be exercised at all; but when you give him the power of reprieve, or the opportunity of interfering with the decisions of your courts and the laws of the land, you give him a power that has no limit.

Id. at 342.

10. CAL. CONST. art. V, § 13 (1849), *reprinted in* CAL. CONST. app. 1 (amended 1998).

11. *Id.*

B. Statehood

1. Statutory Sentencing Structure

On December 21, 1849, before California was a state, California's first governor addressed its first legislature with exuberance,[12] admonishing it to take up such important issues such as California's admission into the Union, the creation of a taxation system, the status of "free people of color,"[13] the establishment of a judiciary, and the organization of cities and incorporated villages.[14]

He was,notably taciturn, however, regarding the subject of crimes and punishments. The governor's address contained no admonition regarding keeping the public safety, controlling crime, or holding criminals accountable for their deeds. He made no mention of then-prevailing views on the nature of crime or of approaches to punishments and sentencing.[15] He simply recommended that the Legislature adopt "the definition of crimes and misdemeanors contained in the common law of England."[16] He further recommended the creation of a criminal court system consisting of two tribunals: one in San Francisco and one in Sacramento.[17]

The sole remaining mention of a system of crime and punishment in the governor's first address to the Legislature provided that "[i]t will be necessary to pass an act in reference to crimes and misdemeanors, affixing such punishment to each as may be in just propor-

12. In his address, the governor said:

> The circumstances under which you have assembled are most new, interesting, and extraordinary—demanding our devout gratitude to the Supreme Being, the Creator, and Father of us all! You compose the first Legislature of the first free American State organized upon the distant shores of the Pacific. How rapid, astonishing, and unexampled have been the changes in California!

Governor Peter Burnett, Inaugural Address (Dec. 20, 1849), *in* THE JOURNAL OF THE SENATE OF THE STATE OF CALIFORNIA AT THEIR FIRST SESSION 30 (San Jose, J. Winchester 1850) [hereinafter 1849 Inaugural Address of Governor Burnett], *available at* http://www.californiagovernors.ca.gov/h/documents/inaugural_1.html.

13. On this issue, Governor Burnett "cheerfully" recommended that California enact a law prohibiting "free people of color" from setting foot inside its borders. *Id.* at 38.

14. *Id.* at 31–40.

15. Throughout the early and mid-nineteenth century, discussions evolved and debates raged in the eastern United States and Europe regarding the underlying principles and purposes to be served by the various modes of punishment then in use. *See* Charles McClain & Dan M. Kahan, *Criminal Law Reform: Historical Development in the United States, in* ENCYCLOPEDIA OF CRIME & JUSTICE 412 (Joshua Dressler ed., 2002). *See generally* DAVID J. ROTHMAN, THE DISCOVERY OF THE ASYLUM: SOCIAL ORDER AND DISORDER IN THE NEW REPUBLIC (1990) (discussing the changing principles and purposes of criminal punishment during the colonial period).

16. 1849 Inaugural Address of Governor Burnett, *supra* note 12, at 33.

17. *Id.* at 39.

tion to the offence, and in the power of the State to inflict, under existing circumstances."[18] Thus, regarding the establishment of a criminal justice system in California, the state's first governor called for the adoption of a code mirroring the English common law, the creation of two criminal courts, and the enactment of a system of crimes and misdemeanors, including what might optimistically be considered an endorsement of "just deserts" sentencing.

California's original sentencing system contained no provision regarding philosophies of punishment, or purposes of sentencing or incarceration. The code simply defined "crime" as "an act or omission forbidden by law, and to which is annexed, upon conviction, either of the following punishments: 1. Death; 2. Imprisonment; 3. Fine; 4. Removal from office; or, 5. Disqualification to hold and enjoy any office of honor, trust, or profit, under this State."[19] It divided public offences into felonies and misdemeanors, where felonies were punishable by death or imprisonment in state prison and all other offences were misdemeanors.[20]

"An Act Concerning Crimes and Punishments" set forth substantive provisions of criminal law and the penalties one would pay for violating them.[21] The sentencing structure was comprised of sentencing ranges affixed by statute to each substantive penal code section.[22] The law gave judges discretion to impose sentences within those ranges but did not provide judges any guidance concerning how to choose the proper term. It also provided that when a court imposed a judgment of imprisonment, the defendant was ordered to be remanded into custody "until the judgment be complied with."[23] The system contained no provision for conditional release and no provision for post-release supervision. Thus, California's first sentencing system can be characterized as determinate (or simply "term"), discretionary, and unguided.[24] Although several provisions of this original code provided for sentences of imprisonment in the state prison, California had yet to build a state prison. To remedy this problem, the

18. *Id.* at 40.

19. An Act to Regulate Proceedings in Criminal Cases, ch. 119, § 2, 1850 Cal. Stat. 275 (repealed 1851).

20. *Id.* §§ 3–5.

21. An Act Concerning Crimes and Punishments, ch. 99, 1850 Cal. Stat. 229–47.

22. *Id.*

23. An Act to Regulate Proceedings in Criminal Cases, ch. 119, § 497, 1850 Cal. Stat. 312.

24. *See generally* Steven Chanenson, *The Next Era of Sentencing Reform*, 54 EMORY L.J. 377, 381–84 (2005) (discussing sentencing vocabulary).

statute simply provided that the county jail of each county was to be deemed the state prison.[25]

California became a state in September 1850,[26] approximately one year after electing its first statutory code. It is difficult to evaluate or assess California's ability to enforce its own first criminal code in the early years of statehood. It stands to reason, however, that it would have taken some time for California's early cities and counties to establish police forces, jails, and mechanisms for prosecuting criminal cases. It is not clear whether California's early cities and counties endeavored to enforce this first state criminal code, or indeed whether they even knew of its existence.

This review of legislative history reveals that California's first criminal code was not based on a particular punishment philosophy or sentencing principle, such as retribution, deterrence, rehabilitation, or incapacitation. Presumably, the code was modeled after one already existing in the United States or in Europe. It appears that California's first legislators simply did their best to construct a workable penal system without giving much consideration to policy or principle. As a result, the enactment of California's first criminal code seems quite haphazard and expedient.

In 1885, the Legislature established the Penological Commission ("Commission"), whose mandate was to examine California's existing penal system and recommend improvements.[27] The Commission's 1887 report makes several points related to California's statutory sentencing structure. First, it criticizes the inequalities resulting from the imposition of sentences under the term sentencing structure in place at the time.[28] Second, it discusses indeterminate sentencing at length, provides a detailed examination of the indeterminate sentencing systems in place in other states, praises indeterminate sentencing systems for their ability to impose fair and consistent sentences and to reform offenders, and then recommends that California not adopt indeterminate sentencing.[29] The Legislature evidently accepted the Penological Commission's recommendation not to adopt indeterminate sentencing at that time, and the statutory structure of term sentencing that

25. An Act Concerning Crimes and Punishments, ch. 99, § 144, 1850 Cal. Stat. 247.

26. Sheldon L. Messinger et al., *The Foundations of Parole in California*, 19 LAW & SOC'Y REV. 69, 70 (1985).

27. CAL. STATE PENOLOGICAL COMM'N, PENOLOGY, *in* 8 APPENDIX TO THE JOURNALS OF THE SENATE AND ASSEMBLY OF THE TWENTY-SEVENTH SESSION OF THE LEGISLATURE OF THE STATE OF CALIFORNIA 5 (Sacramento, P. L. Shoaff 1887).

28. *Id.* at 56.

29. *Id.* at 56–59.

the Legislature adopted in 1850 remained in place for several decades.[30]

2. Prison Conditions

In 1851, the Legislature created a prison system for the first time.[31] These laws gave all authority for the construction and oversight of the new prison to two individuals—M.G. Vallejo and James M. Estell.[32] Nothing in the legislative history sheds light on the reason for allocating all construction and oversight responsibility to private contractors.[33]

In 1852, the first State Board of Prison Inspectors published its first report.[34] In this report, the inspectors decried the two private contractors' poor job of constructing San Quentin, recommended that responsibility for constructing the prison be returned to the state,[35] expressed a preference for fairness and certainty over severity in sentencing,[36] and called for a change in the criminal law to reduce the number of "purely arbitrary misdemeanors" and to enhance proportionality in sentencing.[37]

30. *Compare* An Act to Regulate Proceedings in Criminal Cases, ch. 119, §§ 3–5, 1850 Cal. Stat. 275 (repealed 1851) (setting forth the statutory structure of term sentencing adopted by the Legislature), *with* discussion *infra* Part I.C.1 (discussing the Legislature's eventual rejection of indeterminate sentencing).

31. BD. OF STATE PRISON INSPECTORS, ANNUAL REPORT, *in* THE JOURNAL OF THE THIRD SESSION OF THE LEGISLATURE OF THE STATE OF CALIFORNIA app. at 676 (San Francisco, G. K. Fitch & Co. et. al. 1852).

32. *Id.* The rationale for this allocation is beyond the scope of this Article.

33. Scholars have commented on this aspect of California's embryonic punishment system, however: "[A]n [A]ct [P]roviding for [S]ecuring the [S]tate [P]rison [C]onvicts is illustrative of conditions where the state has not yet fully undertaken the primary purpose of dealing finally and exclusively with offenders against the penal code." Orrin K. McMurray, *Seventy-Five Years of California Jurisprudence*, 13 CAL. L. REV. 445, 455 (1925). The privatization of California's first prison is also interesting in light of the current debates swirling around private prisons in California and nationally. The early commentator referenced above suggested with some relief regarding the privatization of California's first prison that "[s]uch a mode of expression, such a method of treatment of the penal problem, would fortunately be inconceivable today." *Id.* at 455–56. What was inconceivable in 1925 is evidently not inconceivable today.

34. BD. OF STATE PRISON INSPECTORS, *supra* note 31, at 676. The Board of State Prison Inspectors, created by the "Act [T]o [P]rovide for the [S]ecuring of State Prison Convicts," had three members "appointed by the Governor and the Senate." *Id.*

35. "In all civilized countries, the erection of secure prisons for the safe keeping of criminals, has been justly regarded as one of the first duties and chief cares of government, and in no State has early attention to this matter been more urgently demanded." *Id.* at 677.

36. *Id.* at 678.

37. "By a judicious revision of the jury and criminal laws of the State, by reducing the number of purely arbitrary misdemeanors, and by more carefully proportioning the pen-

That year, construction began on San Quentin prison, which was built in the style of Eastern State Penitentiary in Pennsylvania. Until San Quentin was built, all of California's prisoners were held either on a ship called The Waban, docked in the San Francisco Bay, or in the San Francisco city jail. In 1858, the state removed control of the prison from the hands of the private contractors and placed it in the hands of a newly created Board of State Prison Directors.[38] The new board consisted of the Governor, the Secretary of State, and the Lieutenant Governor, who was also appointed to serve as warden of San Quentin.[39] The board viewed itself as being "constantly directed to reduce the expenses of the Prison, increase the physical comforts of the convicts, and lessen the number of escapes."[40]

There are two important points about the first decade of San Quentin's operation: first, California's prisons were overcrowded from the start;[41] and second, California's early prison administrators were interested in making the prison a place where criminals could reform themselves, rather than simply a place where they would be detained.[42]

San Quentin's population grew quickly in the early years, and by 1858, there were close to 600 prisoners being held in an institution that had only sixty-two cells.[43] To deal with this problem, the State predictably built more cells.[44] There is no indication that California's

alty to the gravity of the offence, it is believed that good order will be promoted and crime diminished." *Id.* at 679. The report also contains a glimpse into the racist attitudes that far too often creep into the development of sentencing policy, as well as a subtle acknowledgment of the criminal law's tendency to perpetuate existing racial inequalities in society. *Id.* at 679. According to the report, California needs "a jailer to deal with those of inferior races who learn to detest the laws that keep them subordinate." *Id.*

38. SHELLEY BOOKSPAN, A GERM OF GOODNESS: THE CALIFORNIA STATE PRISON SYSTEM, 1851–1944, at 28 (1991).

39. Messinger et al., *supra* note 26, at 70.

40. BD. OF STATE PRISON DIRECTORS, ANNUAL REPORT FOR THE YEAR 1859, at 3 (Sacramento, Charles T. Botts 1859) [hereinafter 1859 REPORT].

41. *Id.* at 4.

42. *Id.* at 5–8.

43. In its annual report of 1858, the Board of State Prison Directors stated:

> It will be seen that although one hundred were discharged during the eight months ending with the past year, there is still an increase of forty-five prisoners, and it is quite probable that, before the present session of the Legislature closes, it will exceed six hundred. Now, when it is remembered that we have only sixty-two cells (including those nearly completed), you will perceive at once the crowded condition of the Prison.

BD. OF STATE PRISON DIRECTORS, ANNUAL REPORT FOR THE YEAR 1858, at 4 (Sacramento, John O'Meara 1859).

44. "The building now nearly finished will provide accommodations for some one hundred or more prisoners." *Id.* at 4. The directors also urged legislators to purchase a site

early prison directors advocated dealing with the overcrowding problem by reducing the number of crimes that carried a prison sentence or by reducing the length of sentences themselves.

Directors were partly concerned with the overcrowding at San Quentin because it was an obstacle to reform, which they believed was an essential component of the prison's mission.[45] The directors' 1859 report reveals that in the first eight years of prison administration in California, overcrowding prevented prison administrators from properly classifying inmates or providing programming, which they viewed as their obligation.[46] In their report, the directors called upon the Legislature to view prisoners as redeemable, to envision the prison as a place where they might be redeemed, and to appropriate funds accordingly.[47] From these reports, it appears that California's early prison directors were some of the greatest proponents of rehabilitation and reform and understood that overcrowding made it extremely difficult for them to do their jobs effectively.

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for a new prison at Folsom, and to then transfer inmates to the new prison from San Quentin "until San Quentin is reduced to the proper number." *Id.* at 6. The Legislature did indeed purchase the new site, which was to become Folsom State Prison over a decade later. Whereas San Quentin had been modeled after Eastern State Penitentiary in Pennsylvania, Folsom was modeled after Auburn Correctional Facility in New York. BOOKSPAN, *supra* note 38, at 28–33 (discussing and comparing theories underlying the construction of these two facilities).

45. 1859 REPORT, *supra* note 40, at 7.

46. More specifically, the Board of State Prison Directors stated:

> In the present crowded condition of the Prison at San Quentin, no system can be devised for the instruction of these unfortunate men, morally or intellectually. They cannot be separated or classified, so as to aid those who desire to improve. There should be classification of age and character, and every effort should be made to reclaim the young and the novices. It is certainly no credit to the State to throw these men back upon society, worse, in all respects, than when they entered the Prison.

Id.

47. The Board of State Prison Directors further stated:

> It is a great mistake to suppose that all these men are hardened in crime, and beyond the reach of reform. There are many young men imprisoned, who are the victims of drinking and gambling, in whose breasts beat warm and generous hearts, and honest impulses, and if properly encouraged, would yet become useful and honorable members of society . . . . As a reformatory measure, we would recommend a small appropriation to purchase books for the use of the convicts. If a proper selection could be made, it is not doubted that much good could be effected in this way, whilst their sufferings would be alleviated. Salutary impressions might be made upon hearts and consciences which otherwise could not be reached.

Id.

3. The Power of the Gubernatorial Pardon

During the 1860s and 1870s, governors grew to believe that the punishment system then in place resulted in the imposition of excessive and disparate sentences.[48] The only mechanism to release an inmate before the expiration of the sentence imposed, however, was to issue a gubernatorial pardon.[49] As a result, California's governors used executive clemency and pardon power with increasing frequency.[50]

This presented a number of problems for governors. The first of these problems was their own acknowledgment that on most occasions what these inmates really needed was not a pardon (as there was typically no evidence of innocence), but a commutation of the sentence imposed to a lesser sentence.[51] As noted above, however, California's 1849 constitution denied governors the power to commute sentences.[52] Second, releasing criminals from prison did not endear governors to the public—even when governors genuinely believed that a sentence ought to be more lenient, a decision to release a prisoner was often difficult to justify to the public. In order to remedy both of these problems—to create a legitimate mechanism for the release of prisoners whose sentences were excessive and to provide a justification for release that would assuage the public—governors began to call upon the Legislature to enact a system of parole.[53]

The 1885 Penological Commission addressed the pardon power in its 1887 report, but did not make any specific recommendations.[54] The Commission acknowledged that establishing a parole system would likely reduce the exercise of pardon power, but maintained the importance of the pardon power in a system of justice.[55]

48. "It has been for some years a well settled belief in the minds of those having the best opportunities for acquiring information, that a large number of prisoners at San Quentin [are] . . . suffering imprisonment under unjust or unreasonably long sentences." Governor Frederick F. Low, Governor's Message (Dec. 4, 1865), *in* THE JOURNAL OF THE SENATE DURING THE SEVENTEENTH SESSION OF THE LEGISLATURE OF THE STATE OF CALIFORNIA 39 (Sacramento, D. W. Gelwicks 1868).

49. *See generally* Messinger et al., *supra* note 26 (discussing the development of parole in California).

50. *Cf. id.* at 73 (discussing Governor Weller's defense of his exercise of the clemency power to explain his grant of gubernatorial pardons).

51. *See id.* at 71.

52. *See* CAL. CONST. art. V, § 13 (1849), *reprinted in* CAL. CONST. app. 1 (amended 1998).

53. Messinger et al., *supra* note 26, at 73–76; *see also* OFFICE OF BD. OF STATE PRISON DIRECTORS, REPORT OF NOVEMBER 1ST, 1965, at 9 (Sacramento, O.M. Clayes 1865).

54. CAL. STATE PENOLOGICAL COMM'N, *supra* note 27, at 48, 116.

55. The Commission noted, with respect to the gubernatorial pardon power, that

By the late nineteenth century, California's governors both believed that they had a responsibility to reduce excessive sentences when they had the power to do so and wanted a way to avoid exercising this responsibility. They believed that sentences were excessive, but because early release was politically unpopular they needed the Legislature to give them a way out. Thus another central theme emerges: a tug of war between California's executive and legislative branches over who assumes responsibility for reducing excessive sentences and alleviating prison overcrowding.

4. Probation

Another important development in California's punishment system during this early period was the introduction of probation.[56] In 1903, the Legislature enacted a law permitting courts to place defendants on probation rather than sentence them to prison where "there are circumstances in mitigation of the punishment" or where "the ends of justice would be subserved."[57] At that time the focus was on juvenile offenders, although adults were eligible for probation as well.[58] While generally popular,[59] probation had its detractors, who

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its proper exercise is essential to correct mistakes, relieve from unduly severe sentences, and reward those who in a signal way have distinguished themselves while in prison. If the parole system be adopted, the pardoning power will necessarily be limited to few cases than it would otherwise be. Still, it must always be a matter of grave importance to determine where the pardoning power should be lodged, and how it should be exercised.

Id. at 116.

56. *See* David H. Melnick, *Probation in California: Penal Code Section 1203*, 50 CAL. L. REV. 651 (1962) (discussing California's early probation system).

57. Act of Feb. 3, 1903, ch. 34, § 1, 1903 Cal. Stat. 34.

58. The first adult to receive a sentence of probation in California was James Clark. *See New Probation Law*, L.A. TIMES, Mar. 17, 1904, at II2. Mr. Clark was in the habit of taking small amounts of money from his firm to further his work there, a practice his superiors permitted. *Id.* One night he was out with friends when they ran out of money. *Id.* Clark thought it would be a shame to see the party end, so he drew an order for two dollars from his firm, intending to repay them later. *Id.* The firm reported the incident to the police, and Mr. Clark was charged with embezzlement. *Id.* The case came before Judge Smith of Los Angeles County in 1904. *Id.* Because Mr. Clark had no previous offenses and was generally regarded as a man of good character, neither the district attorney nor Judge Smith could see a reason why Clark deserved to go to prison, but the mandatory terms of the law dictated that he must. *Id.* Luckily for Mr. Clark, Judge Smith remembered the newly enacted probation law. *Id.* He ordered Clark to serve probation and "report once a month to the arresting officer, F.H. Steele." *Id.* Judge Smith applauded the new law, saying: "That's a good and merciful law . . . for sometimes defendants are brought into court that while technically guilty, are in no way deserving of such a punishment as has to be meted out under the general law." *Id.*

59. *Id.*

generally believed that it was too lenient.[60] After its original enactment there were few changes to California's probation system until several decades later.[61]

5. Parole

Although the 1885 Penological Commission did not recommend adoption of an indeterminate sentencing system, it *did* recommend adoption of a parole system.[62] The Commission seemed to view parole as a compromise between competing sets of interests: first, the state governors' interest in *not* having to shoulder the responsibility of releasing inmates pursuant to their pardoning power; second, the interests of those in favor of discretionary release; and third, the interests of those who believe that the existing term sentencing structure deters crime.[63]

The Legislature declined the Commission's recommendation to adopt a parole system until six years later, when it enacted California's first parole law.[64] This law permitted first-time offenders convicted of any crime other than murder to apply for parole and gave the Board of Prison Directors ("Board") the authority to make release decisions.[65] The law was amended in 1901 to permit offenders convicted of murder to apply for parole as well.[66]

Although California's early parole system allowed the release of some inmates, it was not particularly effective because the application process was expensive and cumbersome for inmates,[67] and the Board granted few applications out of concern that the public would not tolerate early release of inmates.[68] There was no system of active supervision, and parolees were required simply to report to the Board once a

60. Some of these detractors voiced their opposition in a *Los Angeles Times* article criticizing the judges for often granting probation "without the exercise of the slightest judgment and often in response to weeping and sentimental women . . . ." *Probation Law Under Fire*, L.A. TIMES, Jan. 10, 1914, at II6.

61. To be sure, California's counties were busily developing their probation departments and rules during this time; at the state level, the only amendment to the probation system in the early years was an act to expressly authorize grants of probation to adults. CAL. PENAL CODE § 1203.6 (West 2004).

62. CAL. STATE PENOLOGICAL COMM'N, *supra* note 27, at 164–65.

63. *Id.* at 180–81.

64. Act of Mar. 23, 1893, 1893 Cal. Stat. 183, *reprinted in* CAL. PENAL CODE app. at 694 (Deering 1897).

65. *Id.*

66. Act of Feb. 28, 1901, ch. 64, 1901 Cal. Stat. 82.

67. Messinger et al., *supra* note 26, at 85.

68. *Id.* at 87.

month.[69] The law gave the Board the authority to re-confine parolees for any reason, at their discretion, for the remainder of the entire term.[70]

California's early parole law is significant because of its contrast to other systems of parole. In other parts of the United States and Europe, the development of parole is typically associated with the development of indeterminate sentencing systems where judges simply sentence offenders to prison and leave the task of determining the length of sentence to paroling authorities.[71] Both parole and indeterminate sentencing are typically associated with reform and rehabilitation.[72] They are typically understood to work in tandem with each other, under sentencing regimes that prioritize rehabilitation over retribution.[73]

In contrast, California's first parole law was entirely different because it authorized prison administrators to release offenders before the expiration of a *determinate* sentence.[74] Although inmates seeking parole had to demonstrate that they could be trusted in society, reform and rehabilitation were not the guiding principles of the parole system. Rather, the parole system was recommended and adopted simply to reduce excessive sentences and relieve prison overcrowding.

The Legislature could have done something entirely different—it could have found that the current system results in the imposition of excessive sentences and amended the penal code to adjust the available sentencing ranges downward. However, this would have required legislators to explain to their constituents why they were voting to reduce prison sentences—something few legislators in California's history have been willing to do. As a result, California's first parole law was a compromise in the tug of war between the executive and the legislative branches of government. Governors would no longer have to take the political risk of pardoning prisoners and legislators would not have to take the political risk of reducing sentences.

A decade after its adoption, California's governors began to argue in favor of expanding the parole system as a mechanism to relieve

69. *Id.* at 88.

70. *Id.* at 89.

71. Edward Lindsey, *Historical Sketch of the Indeterminate Sentence and the Parole System*, 16 J. CRIM. L. & CRIMINOLOGY 9, 9 (1926).

72. *Id.* at 14–15.

73. *See id.* (discussing reform and rehabilitation).

74. *See supra* Part I.B.1.

overcrowding.[75] Between 1890 and 1900 the prison population rose by 73 inmates; between 1900 and 1906 the population rose by another 503 inmates.[76] California needed to quickly do something about its overcrowding problem, and the Board of Prison Directors responded by rapidly increasing parole grants.[77]

Between 1907 and 1909, the rate of release on parole tripled and by 1914 there were almost as many inmates being paroled as there were inmates discharged at the expiration of their terms.[78] During this period, the application process was simplified and the decision-making process was more streamlined.[79] Between 1893 and 1916, California's executive branch used parole openly, deliberately, and extensively as a mechanism for reducing prison overcrowding by releasing offenders whose determinate sentences (legislatively fixed and judicially imposed) had yet to expire.

Up to this point, California's lawmakers had not publicly grappled with difficult questions such as whether, when, why, and how to punish. The Board of Prison Directors clearly believed its job was to reform and rehabilitate, governors clearly thought sentences were excessive, members of the Legislature were sufficiently concerned about the matter to form a Penological Commission and hear its recommendations, and there seems to have been general agreement from the legislative and executive branches that prisons were dangerously overcrowded. Yet there is no evidence that these lawmakers examined any long-term solutions to this problem. Rather than confront the issues head-on, lawmakers established parole as a back-door mechanism for reducing sentences and alleviating overcrowding. This period, like later ones, was characterized by slipshod and haphazard crime policies enacted in the interest of political expediency.

75. In an address to the Legislature, Governor Pardee stated that there was a way of "lessening the congestion consequent upon having too many prisoners and too few cells to put them in, aside from constructing additional prison quarters." Governor George C. Pardee, Second Biennial Message (Jan. 7, 1907), *in* THE JOURNAL OF THE SENATE DURING THE THIRTY-SEVENTH SESSION OF THE LEGISLATURE OF THE STATE OF CALIFORNIA 16 (Sacramento, W.W. Shannon 1907). According to Governor Pardee, the answer was "the extension of the parole system." *Id.*

76. Messinger et al., *supra* note 26, at 92.

77. *Id.* at 95.

78. *Id.*

79. *Id.* at 93–95.

C. The Indeterminate Sentencing Era

1. Statutory Sentencing Structure

As the new century dawned, indeterminate sentencing gained traction in California and nationally to reduce excessive sentences, bring more consistency to sentencing practices, reform the majority of offenders, and keep violent offenders incarcerated.[80] At the same time, judges were being urged to impose more probation sentences to ameliorate the ever-worsening prison overcrowding problem.[81] In 1916, the State Board of Charities and Corrections recommended adoption of an indeterminate sentencing scheme and a revision of the entire penal code to provide for corrective treatment rather than punishment.[82]

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80. These changes were encouraged in an article in the *San Francisco Examiner*:

> The next step to be taken is plainly marked out. It is to abolish the present plan of sentencing men to prison for fixed terms. They should be sent to prison when convicted of crime and should be required to serve such time as society may require as punishment for the offense they have committed. After that the time which they shall serve should be determined by themselves. That is, they should be released on parole as soon as they have proved themselves fitted to serve society as free men; and if they prove themselves during a period of parole they should be given a full discharge . . . . All that [the Legislature] has to do is take from the judge the power to determine what the punishment shall be and place it squarely on the law, and on the convict himself by establishing the indeterminate sentence . . . . And finally, the convicts who do not yield to this form of treatment should never be let out of confinement. It is shocking in every way that the State should send out men who have no other intention than to rob, and perhaps murder, its law-abiding citizens.

The Next Improvement in Our Prison System, S.F. EXAMINER, Nov. 27, 1911, at 18.

81. This encouragement is evident in an article in the *Los Angeles Times*:

> Judges in California courts are being urged by members of the State Board of Prison Directors to extend probation to first offenders in every case where there appears to be a chance of reformation. Crowded conditions in both State prisoners [sic] which make it difficult to house the steady stream of incoming criminals and make it impossible to handle the less hardened cases in such a way that there is a chance for them to retain their self-respect have made this action necessary.

State Prisons are Crowded, L.A. TIMES, Feb. 17, 1915, at I4; *see also Judge Advocates Leniency*, S.F. DAILY NEWS, Feb. 18, 1915, at 7.

82. The State Board of Charities and Corrections recommended:

> With the principle of the indeterminate sentence as a starting point, the Legislature should consider a revision of the entire Penal Code. Instead of punishment there should be corrective treatment which should be based on the character of the offender instead of on the nature of the particular act for which he was arrested.

STATE BD. OF CHARITIES AND CORR. OF THE STATE OF CAL., SEVENTH BIENNIAL REPORT, *in* THE JOURNAL OF THE SENATE DURING THE FORTY-SECOND SESSION OF THE LEGISLATURE OF THE STATE OF CALIFORNIA app. at 53 (Sacramento, Cal. State Printing Office 1917).

In May 1917, the Legislature responded by enacting the new California Penal Code section 1168—the Indeterminate Sentencing Act.[83] The new law required judges to impose an indefinite term of imprisonment rather than select a determinate term. It did not, however, repeal the sentencing ranges that had been affixed to each substantive crime by earlier legislatures.[84] In fact, those ranges all remained intact and provided the statutory minimum and maximum terms offenders would come to serve under indeterminate sentencing.[85] The law also did not mention the word "rehabilitation" or the word "reform," even though most proponents of indeterminate sentencing deliberately and openly championed reform of criminal offenders as one of the primary justifications for indeterminate sentencing practices.[86]

At first, the newly created indeterminate sentencing system faced many challenges. In *In re Lee*,[87] an offender sentenced under the Indeterminate Sentencing Act complained that the grant of authority to the Board of Prison Directors to determine the length of prison confinement constituted an unconstitutional delegation of legislative authority.[88] The California Supreme Court ruled against the offender, finding that the Legislature maintained its authority to impose sentences by sentencing offenders to the state prison and that the delegation of authority to an administrative agency to determine length of confinement was both constitutional and proper.[89] The law also

83. Act of May 18, 1917, ch. 527, § 1, 1917 Cal. Stat. 665 (current version at CAL. PENAL CODE § 1160 (West 2004)). For a thorough discussion of the enactment of the indeterminate sentencing law, see Paula A. Johnson, *Senate Bill 42—The End of the Indeterminate Sentence*, 17 SANTA CLARA L. REV. 133 (1977).

84. § 1, 1917 Cal. Stat. at 665.

85. *Id.*

86. *Id.*

87. *In re* Lee, 171 P. 958 (Cal. 1918).

88. *Id.* at 959–60.

89. The California Supreme Court stated:

> In answering the claim that the authority vested by the indeterminate sentence law in the board of prison directors is a delegation of either legislative or judicial powers to an executive body, it is pointed out that the legislative function is filled by providing the sentence which is to be imposed by the judicial branch upon the determination of the guilt of the offender. This is done by the enactment of the indeterminate sentence law. The judicial branch of the government is intrusted [sic] with the function of determining the guilt of the individual and of imposing the sentence provided by law for the offense of which the individual has been found guilty. The actual carrying out of the sentence and the application of the various provisions for ameliorating the same are administrative in character and properly exercised by an administrative body.

Id.

survived a legislative political attack in 1923 that had been launched in the wake of a crime wave.[90]

Although California's statutory sentencing structure changed dramatically with the enactment of indeterminate sentencing in 1917, two things remain unclear: (1) why the Legislature did not take the opportunity to adjust the sentencing ranges set forth in the statute; and (2) the motivating factors for the adoption of the indeterminate sentencing structure.

First, there is no evidence that the Legislature relied on data to inform its choice of sentencing ranges. In fact, the law provides no explanation for all the ranges chosen.

Second, the legislators' motivation for adopting this law remains unclear. It may be that the State Board of Charities and Corrections and other commentators successfully persuaded legislators that prisoner reform was a laudable goal and that it made policy sense to require prisoners to prove their reformation in order to obtain release—the accolades usually offered in praise of indeterminate sentencing. However, reform and rehabilitation are not mentioned in the legislation.

At that time California had still not found a permanent solution to its prison overcrowding problem and it seems plausible that the Legislature may have adopted the new structure to serve this purpose. Like the parole system adopted in 1893, indeterminate sentencing gave legislators a way to avoid the risk of telling their constituents that they were lowering prison sentences without putting the burden on the governor to exercise his pardon power. In fact, since the sentencing ranges prescribed in the statute were left intact, the public did not necessarily have any reason to think that sentence length would be at all affected by the amendment. The Legislature simply placed the responsibility for determining sentence length in the hands of the Board of Prison Directors—a body largely shielded from public view, and with no obvious expertise in the art of determining when a prisoner had been reformed.

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90. As one news article noted:

> Repeal of the indeterminate sentence law in the approaching session of the Legislature is practically certain if the opinions of the score of legislators who have thus far arrived here are held by their fellow lawmakers . . . . Agitation for the repeal of the indeterminate sentence statute grew out of the recent crime wave which swept the state and which was marked particularly by brutal attacks on young girls in San Francisco, Fresno and elsewhere.

Legislators in Fight to Kill Indeterminate Sentences, INT'L NEWS SERVICE, Jan. 1, 1923 (on file with the California State Archives).

2. Probation

In 1945, California began to match 50% of county expenditures on probation.[91] In 1965, the Legislature enacted the California Probation Subsidy Act, a law "firmly based on the proposition that correctional rehabilitation cannot be effectively carried out in conditions of captivity."[92] This Act provided counties a maximum of "$4,000 for each adult or juvenile offender not committed to state prison (above historical commitment levels)."[93]

Administrators of the probation subsidy program were both ambitious and optimistic,[94] and the program was ultimately "responsible for the diversion of more than 45,000 [adult and juvenile] offenders from state institutions to local probation and rehabilitation-oriented programs."[95] Between 1965 and 1975, California spent $145 million in probation subsidies.[96] Between 1966 and 1972, the state saved $126 million in prison costs as a result of probation subsidies.[97]

This period also saw some developments in the rules governing the use of pre-sentence reports in sentencing proceedings. Before 1929, courts could impose a sentence of probation with or without the benefit of a pre-sentence report.[98] From 1929 to 1947, courts could deny probation without a report, but could only grant probation having reviewed a pre-sentence report submitted by the county probation department.[99] In 1947, the probation statute was amended again to require a pre-sentence report in any case where probation was even being considered.[100]

3. Juvenile Justice

Before 1941, delinquent and criminal youth in California were sent either to prison, one of several state reform schools, or county

91. MARCUS NIETO, CAL. STATE LIBRARY, THE CHANGING ROLE OF PROBATION IN CALIFORNIA'S CRIMINAL JUSTICE SYSTEM 8 (1996).

92. John P. Conrad, *Corrections and Simple Justice*, 64 J.L. & CRIMINOLOGY 208, 211 (1973).

93. NIETO, *supra* note 91, at 8.

94. Richard McGee, *Objectivity in Predicting Criminal Behavior*, 42 F.R.D. 192, 198 (1966).

95. NIETO, *supra* note 91, at 8.

96. LITTLE HOOVER COMM'N, THE JUVENILE CRIME CHALLENGE: MAKING PREVENTION A PRIORITY (1994), *available at* http://www.lhc.ca.gov/lhcdir/127rp.html.

97. HUMAN RELATIONS AGENCY, CAL. BD. OF CORR., COORDINATED CALIFORNIA CORRECTIONS 72 (1971).

98. Act effective July 29, 1927, ch. 770, § 1, 1927 Cal. Stat. 1493.

99. Melnick, *supra* note 56, at 653 n.17.

100. *Id.*

juvenile halls.[101] In 1941, the Legislature enacted the Youth Corrections Authority Act, which mandated acceptance of all commitments under twenty-three years of age and appropriated $100,000 to run the Youth Corrections Authority for two years.[102] Its first ward was committed in 1942.[103] In 1943, the word "corrections" was dropped, resulting in the creation of the California Youth Authority, which became a state department in 1953.[104] In 1945, the state legislature appropriated a subsidy to counties for the establishment of several juvenile homes, ranches, and camps for juvenile court wards, and directed the Youth Authority to administer the subsidy.[105] In 1947, the state began to charge counties $25 per month for each ward sent to the state institution.[106] California enacted its Juvenile Court Law in 1961, establishing the Youth and Adult Corrections Authority.[107] In 1996, the fee for sending a ward to the state institution increased to $150 per month;[108] and in 2003, it increased again to $176 per month.[109]

4. Parole

During the 1960s and 1970s, lawmakers in California grappled with the best way to administer its indeterminate sentencing and parole systems. People became increasingly concerned about perceived race and class bias in the Board's release decisions and sought to decrease the Board's discretion.[110] At the same time, others were concerned that the Board was too lenient and was making decisions about whether to release offenders based not on the offender's ability to function in society but on the need to reduce prison populations.[111] Just about everyone with a stake in the system argued that the lack of transparency in sentencing was a problem.[112]

101. California Department of Corrections and Rehabilitation, History of the Division of Juvenile Justice, http://www.cdcr.ca.gov/Divisions_Boards/DJJ/About_DJJ/History.html (last visited October 25, 2008).

102. *Id.*

103. *Id.*

104. *Id.*

105. *Id.*

106. Act of May 8, 1947, ch. 190, § 3, 1947 Cal. Stat. 752.

107. History of the Division of Juvenile Justice, *supra* note 101. *See generally* Joel Goldfarb & Paul M. Little, *1961 California Juvenile Court Law: Effective Uniform Standards for Juvenile Court Procedure?*, 51 CAL. L. REV. 421 (1963) (examining the 1961 law).

108. Act of Feb. 1, 1996, ch. 6, § 4, 1996 Cal. Stat. 23.

109. Act of Aug. 2, 2003, ch. 158, § 13, 2003 Cal. Stat. 14.

110. Michael Vitiello & Clark Kelso, *A Proposal for Wholesale Reform of California's Sentencing Practice and Policy*, 38 LOY. L.A. L. REV. 903, 908 (2005).

111. *Id.*

112. *See, e.g.*, Dansky, *supra* note 1.

In the 1970s a series of court decisions limited the Adult Authority's ("Authority") release discretion and resulted in enhanced standardization of release decisions.[113] These promoted uniformity in sentencing, but seemed inconsistent with the idea that decisions were to be made in individual cases based on the circumstances presented.[114]

Under intense pressure from the public to make sentences more uniform and less excessive, in 1975 the Adult Authority issued a series of directives promoting enhanced uniformity in its release decisions.[115] Chairman's Directive 75/20 ("CD 75/20") established a procedure for setting parole release and discharge dates for each prisoner.[116] The parole release date was defined as the length of time an inmate would serve in prison before being released on parole; this tentative date could be revoked at any time.[117] The parole discharge date was defined as the date on which an inmate was released from Department of Corrections control and supervision after a successful period of parole.[118] The major purpose of CD 75/20 was to establish procedures for evaluating the information and guidelines that the Authority consulted in making its release decisions.[119] CD 75/20 did not permit the Authority to consider the offender's rehabilitation in setting parole release and discharge dates.

Shortly after the issuance of CD 75/20, the California Supreme Court decided *In re Rodriguez*[120] and ordered that the Authority fix a primary term for inmates as a part of its responsibility to ensure that

113. Turalu Brady Murdock, *Indeterminate Sentence Law—The California Adult Authority Has Duty to Fix Primary Term of Sentence*, 3 W. ST. U. L. REV. 304, 309 (1976).

114. In *In re Minnis*, 498 P.2d 997 (Cal. 1972), the California Supreme Court found that the Adult Authority abused its discretion when it acted pursuant to general policy rather than to the individual cases before it. *Id.* at 999. *In re Lynch*, 503 P.2d 921 (Cal. 1972), was the first case in which a California court found a statutory penalty grossly disproportionate to the crime committed. There, the Supreme Court ordered California to apply the three-prong test previously established by the United States Supreme Court. *In re* Lynch, 503 P.2d at 932–33 (citing in Weems v. United States, 217 U.S. 349 (1910)). The *Weems* test required appellate courts to consider: (1) the nature of offense and offender; (2) the penalties imposed in same jurisdiction for other offenses; and (3) the penalties imposed in other jurisdictions for same offense in reviewing a particular sentence. 217 U.S. 349. In 1974, the California Supreme Court declared unconstitutional the non-individualized fixing of parole without considering gradations of culpability among persons who were guilty of the same statutory crime. *In re* Foss, 519 P.2d 1073, 1088 (Cal. 1974).

115. Johnson, *supra* note 83, at 140.

116. *Id.*

117. *Id.*

118. *Id.*

119. *Id.*

120. *In re* Rodriguez, 537 P.2d 384 (Cal. 1975).

the legislative purpose of the indeterminate sentencing law was maintained. The Court ruled that while the Authority had the right to fix parole, CD 75/20 had relieved it of its obligation to fix the length of prison terms, in contravention of its obligation under the Indeterminate Sentencing Act.[121]

The Authority issued Chairman's Directive 75/30 ("CD 75/30") later that same year, after the Court's decision in *Rodriguez.* It provided specific direction to the Authority on how to comply with *Rodriguez,* and, like the earlier version, did not permit the Authority to consider an offender's rehabilitation in making release and discharge decisions.[122]

The following year the Supreme Court threw the administration another curve in *In re Stanley,*[123] by invalidating the procedures set forth in CDs 75/20 and 75/30 on the ground that by omitting rehabilitation as a factor in determining sentence length the Authority was neglecting a major component of its obligations under the Indeterminate Sentencing Act and was thereby failing to comply with its legislatively imposed mandate.[124]

During the 1970s, the Authority faced pressure from *both* the public to make sentencing and parole decisions more consistent and increase uniformity in sentencing *and* from the Court to comply with its statutory mandate to make individualized sentencing decisions based on prisoners' ability to demonstrate that they had successfully rehabilitated. Within one year of the issuance of CD 75/30 and the decisions in *Rodriguez* and *Stanley,* the Legislature resolved this problem deci-

121. Commentator Murdock states:

> [T]he direct effect of the *Rodriguez* decision on the Authority's powers and the inevitable erosion of legislative authority is a serious infringement on the integrity of the legislature's jurisdiction . . . . [T]he legislature could have enacted such a procedural change in the Authority's functions, but had not, and . . . [this] formulation "in a single judicial quantum leap, is both unnecessary and unwise."

Murdock, *supra* note 113, at 309 (quoting *In re* Rodriguez, 537 P.2d 384, 399 (Cal. 1975) (Richardson, J., concurring in part and dissenting in part)).

122. Some scholars have observed that in fact, since the Authority had abandoned rehabilitation as a relevant consideration by 1975, the 1976 Determinate Sentencing Act's emphasis on punishment rather than rehabilitation was less of a dramatic shift in punishment theory than is typically believed. Johnson, *supra* note 83, at 145. According to this view, the Determinate Sentencing Act's emphasis on punishment was simply a legislative legitimization of policy choices that had already been made by the executive branch. *Id.*

123. *In re* Stanley, 126 Cal. Rptr. 524 (Cal. Ct. App. 1976).

124. *Id.* As noted above, however, the word "rehabilitation" does not appear in the original indeterminate sentencing act. The *Stanley* court acknowledged that the indeterminate sentencing act "omits express enumeration of parole criteria," but found that such criteria "have emerged from six decades of judicial interpretation." *Id.*

sively by repealing the Indeterminate Sentencing Act and abolishing the Adult Authority.

D. The Determinate Sentencing Era

1. Statutory Sentencing Structure

In 1976, the California legislature enacted, and Governor Jerry Brown signed, the Determinate Sentencing Law ("DSL").[125] Unlike its predecessor, the Indeterminate Sentencing Act, this law was not brief. Hundreds of pages long, the legislation declared the purpose of incarceration to be punishment, established a system of determinate sentencing with set terms called "triads," set forth a system of potential sentencing enhancements, explained the basic outline of sentencing procedures to be adopted by sentencing courts across the state, established statutory specifications for good time grants, and created a new parole structure.

Under the new law, all offenses were categorized into degrees of seriousness, there being five total degrees. Each level was assigned three definite terms (the "triads"). A significant portion of the DSL consisted of statutes defining the terms for each offense.[126] The law did not, however, remove all indeterminate sentencing from California's punishment system. Very serious crimes would still be punished using indeterminate sentences, and this practice is still in use today.[127]

The justifications most often offered to explain the enactment of the DSL are a shared interest in eliminating unwarranted disparity,[128] a shared interest in enhancing transparency,[129] and a shared interest

125. Uniform Determinate Sentencing Act, ch. 1139, 1976 Cal. Stat. 5062 (current version at CAL. PENAL CODE § 1170 (Deering 1993)).

126. Johnson, *supra* note 83, at 161 app. B (listing all the offenses, their seriousness levels, and the triad to be attached to each); *id.* at 148–53 (discussing the new law's prescribed sentenced procedure); *id.* at 153–54 (discussing the new statutory specifications of good time grants); *id.* at 156–57 (discussing the new parole structure).

127. ELIZABETH G. HILL, LEGISLATIVE ANALYST'S OFFICE, CALIFORNIA'S CRIMINAL JUSTICE SYSTEM 9 (2007), *available at* http://www.lao.ca.gov/2007/cj_primer/cj_primer_013107.pdf.

128. The California Penal Code provides:

> The Legislature further finds and declares that the elimination of disparity and the provision of uniformity 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.

CAL. PENAL CODE § 1170(a)(1).

129. *See* Michael Tonry, *The Fragmentation of Sentencing and Corrections in America*, SENTENCING & CORR. (U.S. Dep't of Justice, Washington, D.C.), Sept. 1999, at 6, *available at* http://www.ncjrs.gov/pdffiles1/nij/175721.pdf.

in eliminating the influence of race and class on sentence length.[130] It must also be noted, however, that although it was not often mentioned publicly, a motivating force behind the DSL's enactment was a perceived need to *shorten* criminal sentences.[131]

As noted above, the DSL provided the possibility of an enhanced sentence in cases where the judge believed that the sentence prescribed by the triad is insufficient.[132] The law's original enhancement structure provided for enhanced sentences under limited circumstances, permitted judges to strike enhancements when their imposition would not be in the interests of justice, prohibited the imposition of more than one enhancement for any conviction, and imposed additional limits on the length of enhanced sentences.[133] This evidences a clear attempt on the Legislature's part to avoid the imposition of excessive punishments.[134] The law also contemplated that individual sentences or enhancements could be adjusted upward if additional punishment was deemed necessary.[135]

Notwithstanding this acknowledgment that adjustments upward might be necessary, it is difficult to imagine that the proponents of the DSL envisioned the enhancement explosion that occurred in the subsequent thirty years. In 2006, the Stanford Criminal Justice Center conducted an analysis of California Penal Code sections 1170, *et seq.* and 12022, *et seq.* (enhancements imposed upon offenders for engaging in certain types of conduct during the commission of an offense).[136] We did not examine the sentencing provisions set forth at §§ 668–678 (Combination Determinate and Indeterminate Sentencing); §§ 2933–2935 (relating to conduct and work credits);

130. *See* CORAMAE RICHIE MANN, UNEQUAL JUSTICE: A QUESTION OF COLOR 197 (1993). *See generally* LITTLE HOOVER COMM'N, PUTTING VIOLENCE BEHIND BARS: REDEFINING THE ROLE OF CALIFORNIA'S PRISONS (1994), *available at* http://www.lhc.ca.gov/lhcdir/124es.html (discussing each of these justifications for the DSL).

131. This perceived need can be inferred from proponents' reasons for supporting the DSL:

> This change to much shorter sentences was urged by proponents of the Bill for two reasons—first, California had the longest average sentences in the United States, and perhaps in the world, and second, sentences over about five years in length could not be justified because there appears to be no significant 'improvement' in prisoners after that period.

Johnson, *supra* note 83, at 146.

132. *Id.* at 147.

133. *Id.* at 147–48.

134. *Id.* at 148.

135. *Id.* at 159.

136. LITTLE HOOVER COMM'N, SOLVING CALIFORNIA'S CORRECTIONS CRISIS 67 (2007), *available at* http://www.lhc.ca.gov/lhcdir/report185.html.

§§ 4019–4019.5 (relating to pre-sentence credits); §§ 1192–1192.8 (relating to the parties' ability to engage in plea bargaining in cases involving violent felonies); §§ 667–667.17 (habitual offenders and three strikes); other recidivism enhancements set forth under the Penal Code, Health & Safety Code, or Insurance Code; or the specific conduct enhancements set forth under the Penal Code, Health & Safety Code, Vehicle Code, or Welfare & Institutions Code.[137]

We found at least eighty substantive increases in sentencing between the DSL's enactment in 1976 and 2006 contained only in Penal Code sections 1170 and 12022.[138] We also concluded "that while the Legislature occasionally lengthened the term of years to be imposed upon conviction of a particular offense or imposition of a particular enhancement, it also frequently increased sentences by limiting sentencing judges' discretion to make determinations with respect to the imposition, aggravation, or enhancement of a sentence."[139]

Enhancements are rarely based, if ever, on legitimate policy needs, empirical research, or normatively justifiable punishment principles; rather, they are based on emotional reactions to one-time events, leading many commentators to refer to the California legislature's post-DSL approach to punishment as "drive-by sentencing."[140] This explosion of sentencing enhancements has made California's DSL unnecessarily complicated and utterly nonsensical.[141]

In January 2007, the United States Supreme Court threw the California criminal justice community into a temporary panic when it decided in *Cunningham v. California*[142] that California's system of imposing sentences in accordance with statutorily prescribed triads violated the Sixth Amendment to the United States Constitution, as that

137. *Id.* at 67–68.

138. *Id.* at 68 app. F.

139. *Id.* at 68.

140. This approach was discussed by Jenifer Warren of the *Los Angeles Times*:

> "Each has tried to outdo the other on who could be toughest on crime, but nobody was thinking clearly about what the ramifications would be for the state," [Little Hoover Commissioner Dan Hancock] said. The result is an incoherent penal code dominated by what experts call "drive-by sentencing laws," often enacted by politicians responding to a single high-profile crime.

Jenifer Warren, *State Prisons in "Tailspin," Panel Says*, L.A. TIMES, Jan. 26, 2007, at B1.

141. This is somewhat ironic, as one of the unstated purposes of the DSL as originally enacted was to simplify the Penal Code's sentencing provisions. *See* Raymond I. Parnas & Michael B. Salerno, *The Influence Behind, Substance and Impact of the New Determinate Sentencing Law in California*, 11 U.C. DAVIS L. REV. 29, 30 n.2 (1978).

142. Cunningham v. California, 549 U.S. 270, 127 S. Ct. 856, 870–71 (2007).

amendment had been interpreted in *Blakely v. Washington*.[143] The Court held that California Penal Code § 1170(b) establishes the middle term of the sentencing triad as the statutory maximum sentence, and therefore a sentencing judge may not constitutionally impose a base term higher than the middle term unless the higher term is imposed on the basis of facts that have either been agreed to by the defendant or formally alleged by the state and found by a jury to be true beyond a reasonable doubt.

In response, the California legislature enacted Senate Bill 40, which provided that the choice of which of the three triad sentences to impose would "rest within the sound discretion of the court."[144] The bill contained no additional guidance for courts to follow in determining the proper sentence and no language addressing the applicable standard of review on appeal.[145] The bill contains a sunset provision, providing for the law's automatic repeal on January 1, 2009.[146]

2. Probation

In 1978, California changed its approach to administering probation by repealing the probation subsidy program and replacing it with the County Justice Subvention Program.[147] The State of California does not currently fund probation services for adults. In fact, since the repeal of the probation subsidy program, county administrators have assumed all responsibility for the funding and administration of adult probation services.

3. Parole

Under determinate sentencing, virtually all inmates are released from prison after expiration of their sentence into what California calls "parole."[148] In California, 95% of released offenders are placed

143. *Id.*; *see* Blakely v. Washington, 542 U.S. 296, 301 (2004) (holding that sentences imposed in excess of the prescribed statutory maximum penalty violate a defendant's right to a jury trial where the sentence was imposed based on facts not found by a jury to be true beyond a reasonable doubt).

144. S.B. 40, 2007 Reg. Sess. (Cal. 2007).

145. *Id.* The California Supreme Court amended the Criminal Rules in accordance with *California v. Cunningham* and Senate Bill 40 to provide sentencing courts with guidance in imposing sentence. *See* CAL. R. CT. 4.420.

146. S.B. 40, 2007 Reg. Sess. (Cal. 2007). Senate Bill 1701, enacted in 2008, extended this sunset provision to January 1, 2011. S.B. 1701, 2008 Reg. Sess. (Cal. 2008).

147. *See* CAL. WELF. & INST. CODE §§ 1805–1806 (West 1998).

148. Properly understood, "parole" is a program designed to reintegrate a rehabilitated offender into society once he has been released prior to the expiration of his maxi-

on parole, compared to a national average of 82%.[149] A full two-thirds of prison commitments in California are returning parolees.[150] During this era, while the adult prison population increased six-fold, the number of parolees increased ten-fold, and the number of parole violators returned to prison increased thirty-fold.[151]

The primary factor that distinguishes California's flawed post-DSL parole system from effective parole systems is its heavy use of technical violations or "administrative returns."[152] Twenty percent of parolees returned to prison in California are returned for an administrative, non-criminal matter such as a failed drug test or a missed appointment with a parole officer.[153] A large number of technical violations, however, are "criminal administrative returns"—criminal offenses that could be charged and prosecuted. Almost one-third of administrative criminal returns are for drug use and possession,[154] but in 2002, 524 robberies and 384 rapes and sexual assaults were handled administratively through the parole revocation process rather than through the traditional criminal process.[155] Regardless of the reason for the revocation, revoked parolees spend an average five months in prison before being released.[156]

This phenomenon of returning parole violators to prison has been described as a system of "back-end sentencing"—an invisible form of punishment that subjects offenders to additional prison stays, costs the state approximately $43,000 per year per parole violator, ig-

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mum sentence. *See* JEREMY TRAVIS ET AL., URBAN INST. JUSTICE POLICY CTR., BEYOND THE PRISON GATES: THE STATE OF PAROLE IN AMERICA 25 (2002), *available at* http://www.urban.org/UploadedPDF/310583_Beyond_Prison_gates.pdf. California places all offenders on parole whether or not they have been rehabilitated, and, except in the rare cases in which an offender has been sentenced to an indeterminate term, all offenders released from California's prisons have completed their sentences. California's system would more accurately be described as a mandatory control-based system of punishment and supervision than a system of parole.

149. LITTLE HOOVER COMM'N, BACK TO THE COMMUNITY: SAFE & SOUND PAROLE POLICIES 29 (2003), *available at* http://www.lhc.ca.gov/lhcdir/172/report172.pdf.

150. *Id.*

151. *Id.* at ii.

152. *Id.* at xii; *see also* PETERSILIA, *supra* note 1, at xii; Ryan Fischer, *Are California's Recidivism Rates Really the Highest in the Nation? It Depends on What Measure Of Recidivism You Use*, BULLETIN (Univ. of Cal. at Irvine Ctr. for Evidence-Based Corr., Irvine, Cal.), Sept. 2005, at 1, *available at* http://ucicorrections.seweb.uci.edu/pdf/bulletin_2005_vol-1_is-1.pdf.

153. LITTLE HOOVER COMM'N, *supra* note 149, at xii.

154. *Id.*

155. *Parole in California 1980-2000: Hearings on Parole Reform Before the Little Hoover Commission* (2003) (prepared testimony of Jeremy Travis, Senior Fellow, Urban Inst.), *available at* http://www.urban.org/UploadedPDF/900598_Parole_in_Calif.pdf.

156. PETERSILIA, *supra* note 1, at xii.

nores the needs of victims to have their cases fully investigated, deprives offenders of their due process protections, and threatens public safety.[157]

The 2008 legislative session produced interesting approaches to reforming California's parole system,[158] including the governor's proposal to place tens of thousands of offenders on what he has termed "summary parole" as well as the Legislative Analyst's Office's proposal to realign parole and probation and transfer the supervision of drug and property offenders released from prison to the county level. These proposals are outside the scope of this Article, but they suggest that California's "parole" system, as currently constructed, contributes massively to the overcrowding in state prisons.

The current parole system can be improved in several ways: decision-makers should make intelligent decisions about whom to place on parole (through the use of a validated risk-needs assessment instrument, for example),[159] parole officers should think of themselves more as service providers than as law enforcement officials, state and county administrators should provide meaningful services that help parolees reintegrate successfully into the community, and parole officers should impose a system of graduated sanctions rather than sending all offenders whose parole has been revoked to prison.[160] The practice of using the parole revocation process to prosecute criminal cases should be abolished.

157. *See* Jeremy Travis & Kirsten Christiansen, *Failed Reentry: The Challenges of Back-End Sentencing*, 13 GEO. J. ON POVERTY L. & POL'Y 249 (2006).

158. The governor proposed to place tens of thousands of offenders on "summary parole." CAL. DEP'T OF FIN., GOVERNOR'S BUDGET: MAY REVISION 2008–09, at 59–60 (2008), *available at* http://www.ebudget.ca.gov/pdf/Revised/BudgetSummary/FullBudgetSummary.pdf. The Legislative Analyst's Office proposed to realign parole and probation, and transfer the supervision of drug and property offenders released from prison to the county level. ELIZABETH G. HILL, LEGISLATIVE ANALYST'S OFFICE, THE 2008–09 BUDGET, at 128–33 (2008), *available at* http://www.lao.ca.gov/analysis_2008/2008_pandi/pandi_08.pdf.

159. *See generally* ROGER WARREN, THE CRIME & JUSTICE INST., EVIDENCE-BASED PRACTICES TO REDUCE RECIDIVISM: IMPLICATIONS FOR STATE JUDICIARIES (2007), *available at* http://nicic.org/Downloads/PDF/Library/022843.pdf (discussing the use of a validated risk-needs assessment instrument to make intelligent decisions about who to place on parole).

160. Not all states send revoked parolees to prison. In Washington, when an offender violates the terms of his post-release supervision, he is brought before the court, which can order that he be confined in the county jail for up to sixty days per violation. WASH REV. CODE ANN. § 9.94A.628 (West 2003). California could simply follow Washington's lead and abolish the practice of sending parole violators to prison.

4. A California Sentencing Commission

This era also included at least eight unsuccessful attempts to create a sentencing commission for the state of California.[161] Senate Bill 110 and Assembly Bill 160, introduced in the 2007 legislative session, are the most recent attempts to create a sentencing commission.[162] Although they differ in scope, purpose, and design, these bills agree that a California sentencing commission would make California's sentencing system more coherent, bring the thousands of existing sentencing enhancements into some sort of cohesive structure, and bring rationality to California's sentencing policy development by basing sentencing laws and practices on empirically sound research. Both bills passed in their own chamber and stalled on the floor of the other chamber at the end of the 2007 legislative session.[163]

5. Three Strikes

The Determinate Sentencing Era is also the era of the enactment of "Three Strikes and You're Out"—California's notorious habitual offender statute. First enacted legislatively and then confirmed by voter initiative, California's three-strikes law provides that defendants with one prior serious or violent felony conviction must receive twice the term that they would otherwise receive for the conviction offense. It also provides that defendants with two or more such prior convictions shall be sentenced to an indeterminate term of imprisonment for life with a minimum term of the greatest of the following: three times the term otherwise provided for the conviction offense, twenty-five years, or the term for the underlying conviction offense, including applicable enhancements.[164] Although the qualifying prior felonies must be serious or violent, the offense that triggers the three-strikes sentence

161. Lauren E. Geissler, Creating and Passing a Successful Sentencing Commission in California 14 (Jan. 27. 2006) (unpublished manuscript, on file with the University of San Francisco Law Review), *available at* http://www.law.stanford.edu/program/centers/scjc/workingpapers/LGeissler_06.pdf.

162. S.B. 110, 2007 Reg. Sess. (Cal. 2007); Assem. B. 160, 2007 Reg. Sess. (Cal. 2007).

163. SB 110 Senate Bill – History, http://www.leginfo.ca.gov/bilinfo.html (last visited Oct. 25, 2008) (select "2007–2008" in SESSION drop-down menu; then search "Bill number" for "SB 110"; then follow "SB 110" hyperlink; then follow "History" hyperlink); AB 160 Assembly Bill – History, http://www.leginfo.ca.gov/bilinfo.html (last visited Oct. 25, 2008) (select "2007–2008" in SESSION drop-down menu; then search "Bill number" for "AB 160"; then follow "AB 160" hyperlink; then follow "History" hyperlink).

164. *See* Mark Owens, *California's Three Strikes Law: Desperate Times Require Desperate Measures—But Will it Work?*, 26 PAC. L.J. 881, 890–91 (1995).

can be any felony.[165] The new law also required that all three-strikes sentences be served in prison rather than in jail or on probation and limited good time credits to 20% of the sentence imposed.[166]

Shortly after the Legislature adopted the law, the Rand Corporation published a study that projected the three-strikes law would reduce serious felonies committed by adults in California between 22 and 34 percent at a cost of $4.5–$6.5 billion in then current dollars.[167] It also projected that several alternative proposals then under consideration would yield similar returns in terms of crime reduction but at a significantly lower cost.[168]

Between 1994 and 2004, California courts sent over 80,000 second strikers and 7,500 third strikers to state prison.[169] "As of December 31, 2004, there were almost 43,000 inmates serving time in prison under the three-strikes law, making up about 26 percent of the total prison population."[170] As of 2006, approximately 40% of imprisoned strikers had committed a violent offense as their strike offense.[171]

Further discussion of California's three-strikes law is beyond the scope of this Article. For present purposes, it is sufficient to simply remark that the three-strikes law has significantly impacted California's criminal punishment system.[172] This impact is both ideological[173] and practical.[174]

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165. *See* RAND CORP., CALIFORNIA'S NEW THREE STRIKES LAW (1994), *reprinted in Three Strikes Statutes: Goals, Problems, and Precedents*, 7 FED. SENT'G REP. 53, 98 (1994), *available at* http://www.rand.org/pubs/research_briefs/RB4009/index1.html.

166. *Id.* at 98.

167. *Id.* at 98–99.

168. *Id.* at 99.

169. BRIAN BROWN & GREG JOLIVETTE, LEGISLATIVE ANALYST'S OFFICE, A PRIMER: THREE STRIKES—THE IMPACT AFTER MORE THAN A DECADE 15 (2005), *available at* http://www.lao.ca.gov/2005/3_strikes/3_strikes_102005.htm.

170. *Id.*

171. HILL, *supra* note 127, at 42.

172. *Id.*

173. The law's object of incarcerating habitual offenders, even those whose commitment offense is nonviolent, is inconsistent with the Determinate Sentencing Act's pronouncement that the sole purpose of incarceration is punishment.

174. The law resulted in a massive expansion of California's prison population and a tremendous expansion of the amount of money the state spends on corrections. In 1996, the California Supreme Court held that judges have the discretion to dismiss prior serious or violent felony convictions under the three-strikes law. People v. Superior Court (*Romero*), 917 P.2d 628 (Cal. 1996). Since the decision in *Romero* it is possible for offenders charged with strikes to seek dismissal of previous strikes and thus avoid imposition of an indeterminate life term. It would be worthwhile to compile and publish information on how many offenders have sought such dismissals, how often prosecutors decline to oppose their requests, and how many *Romero* dismissals have been granted. Almost a decade after the decision in *Romero*, the United States Supreme Court held that California's three-strikes

6. Juvenile Justice

Developments in the area of juvenile justice are among the more dramatic ones to occur during this era. In 1996, the Legislature enacted Senate Bill 681, establishing new fee schedules for youth committed to the California Youth Authority ("CYA"). Beginning in 1947, California's counties paid $25 per month per youth committed to the state institution.[175] In 1996, that amount was increased to a minimum of $150 per month per youth commitment.[176]

The bill also created a sliding fee scale. Under this system, wards sent to the CYA are assigned a category number between one and seven, with one being the most serious offenders.[177] The legislation required counties to pay 100% of the cost of wards in category seven, 75% of the costs for wards and category six, 50% of the costs for wards in category five, and $150 per month per ward for all other commitments.[178] The sliding scale discourages counties from sending low-level offenders to the CYA and encourages the development of locally based placement alternatives.[179]

7. Local Law Enforcement

Throughout the 1990s and 2000s, the Legislature adopted a series of enactments that affected local law enforcement.[180] These enactments, along with some equally important voter initiatives, shed some light on the relationships between county and state government in the administration of the criminal justice system.

a. Booking Fees

In 1990, the Legislature enacted Senate Bill 2557 to permit counties to charge cities for the costs of booking inmates into county jails ("booking fees").[181] The primary purpose of this new law was to make up for the fact that the state was cutting $708 million from various

law does not violate the Eighth Amendment's prohibition of cruel and unusual punishment. Ewing v. California, 53 U.S. 11, 30 (2003).

175. Act effective Sept. 19, 1947, ch. 190, § 3, 1947 Cal. Stat. 752.

176. Legislative Analyst's Office, Analysis of the 1996–97 Budget Bill, http://www.lao.ca.gov/analysis_1996/a96d2.html#A10 (follow "Department of the Youth Authority (5460)" hyperlink) (last visited Oct. 25, 2008).

177. *Id.*

178. *Id.*

179. *See* CORR. INDEP. REVIEW PANEL, REFORMING CORRECTION 182 (2004), *available at* http://cpr.ca.gov/report/indrpt/corr/.

180. *See supra* Part I.D.7.a–d.

181. Act of July 31, 1990, ch. 466, § 1, 1990 Cal. Stat. 2041.

county criminal justice programs that year.[182] This new program angered city officials (in particular the California chiefs of police) who, perhaps reasonably, felt that they should not have to shoulder the financial burden of enforcing the state's penal laws.[183]

After a series of amendments to the program, the cities, counties, and State reached a compromise in 2006 by agreeing that the State would allocate $35 million annually to local detention facilities.[184] In years in which the State allocates this entire amount, counties will not be permitted to charge booking fees; in years in which the State fails to allocate the entire amount, counties will be able to charge booking fees at a rate set in 2006.[185]

The 2006 compromise also established a working group comprised of county, sheriff, city, and police chief representatives, which met several times throughout the fall of 2006.[186] This group successfully compiled an estimated allocation of the $35 million appropriation into local detention facility revenue accounts, devised proposed procedures for charging booking fees in years in which the state appropriates less than the $35 million currently prescribed by statute, and devised proposed procedures for counties to use in charging jail access.[187] To date, it has not provided formal recommendations to the governor's office.

b. The Citizens Options for Public Safety Program

In 1996, the Legislature first enacted the Citizens Options for Public Safety ("COPS") program.[188] This legislation authorized approximately $100 million in virtually unrestricted funds to be allocated annually to cities and counties: $75 million for "front-line" law enforcement, $12.5 million for sheriffs and jail operations, and $12.5 million for district attorneys.[189]

Almost from the program's inception, the Legislative Analyst's Office ("LAO") has questioned its efficacy and efficiency. In its

182. CAL. GOV'T CODE § 29550 (West 2008).

183. CAL. CITY FINANCE, LOCAL DETENTION FACILITY BOOKING FEES 2 (2008), http://www.californiacityfinance.com/BkgFees070831.pdf.

184. *See* CAL. ASS'N OF COUNTIES, BOOKING FEES: A SHIFT IN PARADIGM 2 (2006), *available at* http://www.csac.counties.org/images/public/Advocacy/aoj/BF%20fact%20sheet%20-%20Oct%2006_FINAL.pdf.

185. *See id.*

186. *See id.*

187. *See id.*

188. Assem. B. 3229, 1996 Reg. Sess. (Cal. 1996).

189. *Id.*

1997–98 budget analysis, the LAO found that the program did not compare favorably with other public safety programs because it contained no ongoing mechanism for evaluating the effectiveness of its expenditures or for sharing information with local government; allocated funding to local governments on a per capita basis rather than on the program's merits; and was not oriented towards achieving any specific statewide objective.[190]

The LAO reiterated its criticism of the COPS program in 2004. Noting that the program "lacks a specific measurable statewide objective," that the relatively small amount of funding for it raises questions "about the potential impact of the program on public safety," and that "a significant amount of COPS expenditures is not used for direct services," the LAO recommended eliminating the program entirely.[191] In every year since the program's enactment, the State has allocated approximately $100 million in its annual budget to COPS.

c. Proposition 36

Known as the "Substance Abuse and Crime Prevention Act of 2000,"[192] Proposition 36 was an initiative that changed California state law to allow qualifying first- and second-time defendants of nonviolent, simple drug possession charges to receive probationary substance abuse treatment at licensed and/or certified drug treatment programs instead of incarceration.[193] Sometimes referred to as the state's "treatment-instead-of-jail program," Proposition 36 was passed by 61% of California voters on November 7, 2000, and went into effect on July 1, 2001. More than 35,000 Californians enter drug treatment annually through Proposition 36, and more than 12,000 have successfully completed substance treatment during each year of the program's existence.[194]

Prop 36 has caused controversy. Its detractors have long contended that Prop 36 is a failure and that the lack of jail sanctions pro-

190. Legislative Analyst's Office, Analysis of the 1997–98 Budget Bill, http://www.lao.ca.gov/analysis_1997/general_govt_overview_anal97.html (last visited Oct. 25, 2008).

191. Legislative Analyst's Office, Analysis of the 2004–05 Budget Bill, http://www.lao.ca.gov/analysis_2004/crim_justice/cj_04_cc_tanf_anl04.htm (last visited Oct. 25, 2008).

192. CAL. PENAL CODE § 1210.1 (West 2004 & Supp. 2008) (from Proposition 36, the Substance Abuse and Crime Prevention Act of 2000).

193. DOUGLAS LONGSHORE ET AL., UNIV. OF CAL. L.A. INTEGRATED SUBSTANCE ABUSE PROGRAMS, EVALUATION OF THE SUBSTANCE ABUSE AND CRIME PREVENTION ACT 4 (2006), *available at* http://www.uclaisap.org/prop36/documents/sacpa_costanalysis.pdf.

194. *Id.*

vided for in the program has resulted in increased workloads and high expenditures for local police.[195] The law was amended in 2006 to allow for the incarceration of offenders who fail to comply in some way with their treatment program. That amendment has been challenged, however, on the ground that it is an unconstitutional amendment of a voter initiative, in violation of Article II § 10(c) of the California Constitution.[196] Determining that the plaintiffs demonstrated a likelihood of success on the merits, the court entered an order enjoining implementation of the amendment in September 2006.[197]

d. Additional Local Law Enforcement Programs

There have been many other notable developments in California's punishment system during this era, but they are beyond the scope of this Article.[198]

195. *Hearing on Alcohol and Drug Treatment Programs Before the Little Hoover Commission* (2003) (prepared testimony of Richard Word, Vacaville Police Chief), *available at* http://www.lhc.ca.gov/lhcdir/AOD_Review/WordAug07.pdf.

196. Complaint for Injunctive & Declaratory Relief at 8, Gardner v. Schwarzenegger, No. RG06-278911 (Cal. Super. Ct. July 12, 2006), *available at* http://www.drugpolicy.org/docUploads/Complaint_Exhibits_Prop36Lawsuit_0706.pdf.

197. Order Granting Preliminary Injunction at 3–4, Gardner v. Schwarzenegger, No. RG06-278911 (Cal. Super. Ct. Sept. 14, 2006), *available at* http://www.drugpolicy.org/docUploads/OrderGrantingPrelimInj_SB1137Suit.pdf.

198. There are several examples of other notable developments in local law enforcement during this era. The Lockyer-Isenberg Trial Court Funding Act of 1997 restructured California trial court operations and called for the state to assume full responsibility for funding them. *Trial Court Funding*, SPECIAL REPORT (Judicial Council of Cal., Administrative Office of the Courts, San Francisco, CA), Sept. 1997, at 2, *available at* http://www.courtinfo.ca.gov/reference/documents/tcfnews.pdf. California's Gang Violence and Juvenile Crime Prevention Act of 1998 (Proposition 21), codified in scattered sections of the California Code, expanded the types of cases that juveniles could be tried for in adult court, increased the number of available gang-related sentencing enhancements, and required convicted gang members to register with local law enforcement. *See* CAL. WELF. & INST. CODE § 602(b) (West 1998 & Supp. 2008); CAL. PENAL CODE § 186.30 (West Supp. 2007); CAL. PENAL CODE § 186.22 (West 1998). Proposition 69 required law enforcement officers to collect DNA samples from all convicted felons, many convicted misdemeanants, and some arrestees, for inclusion in the state DNA databank and submission to CODIS (the FBI's Combined DNA Indexing System); beginning January 1, 2009, Proposition 69 requires law enforcement officers to collect DNA samples from all felony and many misdemeanor arrestees for inclusion in the state DNA databank and submission to CODIS. Information Bulletin from Attorney Gen. Bill Lockyer, to Cal. Law Enforcement Agencies & Pers., DNA Fingerprint, Unsolved Crime and Innocence Protection Act (Mar. 15, 2005), *available at* http://ag.ca.gov/bfs/pdf/69IB.pdf. Jessica's Law (Proposition 83), which was passed in 2006, requires lifetime monitoring for all convicted sex offenders, restricts where convicted sex offenders may live, and increases sentences for sex offenses. *See* Proposed Text of Proposition 83, *reprinted in* CAL. SEC'Y OF STATE, OFFICIAL VOTER INFORMATION GUIDE 127–38 (2006), *available at* http://vote2006.sos.ca.gov/voterguide/pdf/English.pdf.

8. Prison Conditions

What stands out as the most significant aspect of California's punishment system in the late twentieth and early twenty-first centuries is the problem of prison overcrowding and its consequent federal prison litigation. As noted earlier, California's prisons were overcrowded from the time of statehood.[199] Unfortunately, this problem only worsened over the course of the subsequent 150 years.

In the early 1980s, California housed approximately 24,000 inmates in twelve prisons.[200] In 2006 it housed approximately 170,000 in thirty-three prisons.[201] This rapid and dramatic growth in California's prisons prompted Governor Arnold Schwarzenegger to declare a state of emergency for California's prisons in October 2006.[202] As of October 6, 2008, California's prisons housed 171,314 inmates.[203]

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199. *See* 1859 REPORT, *supra* note 40, at 4.

200. Trevor Paglen, *Recording California's Carceral Landscapes*, ART J., Spring 2004, at 41, 41.

201. Office of the Governor of the State of Cal., Prison Overcrowding State of Emergency Proclamation (Oct. 4, 2006), *available at* http://gov.ca.gov/index.php?/print-version/proclamation/4278/.

202. In his emergency proclamation, Governor Schwarzenegger declared:

> WHEREAS, the current severe overcrowding in 29 CDCR prisons has caused substantial risk to the health and safety of the men and women who work inside these prisons and the inmates housed in them, because: With so many inmates housed in large common areas, there is an increased, substantial risk of violence, and greater difficulty controlling large inmate populations; With large numbers of inmates housed together in triple-bunks, there is an increased, substantial risk for transmission of infectious illnesses; The triple-bunks and tight quarters create line-of-sight problems for correctional officers by blocking views, creating an increased, substantial security risk . . . . Accordingly, under the authority of the California Emergency Services Act, set forth at Title 2, Division 1, Chapter 7 of the California Government Code, commencing with section 8550, I hereby proclaim that a State of Emergency exists within the State of California's prison system.

Id.

203. From the end of 2006 through the end of 2008, the total in-state prison population decreased slightly, while the number of prisoners transferred from California to other states increased steadily. On October 25, 2006, California housed 172,221 inmates in its state institutions and transferred zero to other states. CAL. DEP'T OF CORR. & REHAB., WEEKLY POPULATION REPORT FOR OCTOBER 25, 2006, at 1 (2006), http://www.cdcr.ca.gov/Reports_Research/Offender_Information_Services_Branch/WeeklyWed/TPOP1A/TPOP1Ad061025.pdf. On October 6, 2008, California housed 171, 314 inmates in its state institutions and transferred 5,108 to other states. CAL. DEP'T OF CORR. & REHAB., WEEKLY POPULATION REPORT FOR OCTOBER 6, 2008, at 1 (2008), http://www.cdcr.ca.gov/Reports_Research/Offender_Information_Services_Branch/WeeklyWed/TPOP1A/TPOP1Ad081001.pdf. Thus, between October 2006 and October 2008, the number of inmates in California's institutions decreased by 907 and the number of inmates California sent to other states increased by 5108. *See id.*

In *Coleman v. Schwarzenegger* (originally brought in 1990 as *Coleman v. Wilson*), a class of mentally ill inmates filed suit against the state, alleging that the mental health care provided in the prisons was so inadequate that it violated their rights under the Eighth Amendment to the U.S. Constitution.[204] The federal court agreed and granted a permanent injunction in 1995.[205]

In *Plata v. Schwarzenegger* (originally brought in 2001 as *Plata v. Davis*), ten prisoners filed suit against the state of California alleging that the State was being deliberately indifferent to their medical needs, in violation of the Eighth Amendment to the United States Constitution.[206] Four years later, the federal court entered an order appointing a receiver, finding that the state prison's health care system was "broken beyond repair" and that it was causing "an unconscionable degree of suffering and death."[207] Consistent with their obligations under the Prison Litigation Reform Act,[208] plaintiffs in each of these cases requested that the court form a three-judge panel to consider whether to impose a cap on the number of inmates who could constitutionally be held in California's prisons, which was granted.[209]

While these motions were pending, the Legislature enacted and Governor Schwarzenegger signed the Public Safety and Offender Rehabilitation Services Act of 2007 (AB 900), which expends approximately $7.7 billion in new state bonds to expand beds at current institutions, build several new reentry facilities, and enrich the reha-

204. Coleman v. Wilson, 912 F. Supp. 1282, 1293 (E.D. Cal. 1995).

205. *Id.* at 1324.

206. First Amended Complaint at 2, Plata v. Schwarzenegger, No. C-01-1351 TEH, 2005 WL 2932253 (N.D. Cal. Aug. 1, 2001), *available at* http://clearinghouse.wustl.edu/chDocs/public/PC-CA-0018-0004.pdf.

207. Findings of Fact and Conclusions of Law Re: Appointment of Receiver at 1–2, Plata v. Schwarzenegger, No. C-01-1351 TEH, 2005 WL 2932253 (N.D. Cal. Oct. 3, 2005), *available at* http://clearinghouse.wustl.edu/chDocs/public/PC-CA-0018-0007.pdf. On January 23, 2008, the Court issued another order revoking the authority of the first receiver and appointing a second receiver, reflecting the need for a shift in focus. Order Appointing New Receiver at 5–6, Plata v. Schwarzenegger, No. C-01-1351 TEH (N.D. Cal. Jan. 23, 2008), *available at* http://www.cand.uscourts.gov/cand/judges.nsf/33fd9c0607be66f188256d480060b74b/9d5bb7faba2e98c7882573d9006b34fe/$FILE/order%20appointing%20new%20receiver.pdf.

208. The Prison Litigation Reform Act of 1995, Pub. L. No. 104-134, 110 Stat. 1321–66, § 802, limits the rights of prisoners to obtain relief for violations of their constitutional rights and establishes a set of procedural rules and substantive standards with which prisoners must comply in seeking such relief. *Id.*

209. Order Granting Plaintiff's Motion to Convene Three-Judge Court at 10, Plata v. Schwarzenegger, No. C-01-1351 TEH (N.D. Cal. July 23, 2007), *available at* http://clearinghouse.wustl.edu/chDocs/public/PC-CA-0018-0042.pdf.

bilitation programs available to inmates on the verge of reentry.[210] The Department of Corrections and Rehabilitation indicated that it has completed the process of validating a risk-needs assessment tool to help implement some of the provisions of AB 900.[211] AB 900 has been described as "the largest single prison-building project in the history of the world."[212]

The *Plata* and *Coleman* cases were consolidated for a hearing in July of 2007, and the plaintiffs' motions were ultimately granted, the courts having concluded that regardless of whether overcrowding was the "primary cause" of the unconstitutional conditions surrounding the medical and mental health case systems, it was "at least part of the problem."[213] The California Supreme Court has not expressed an opinion as to whether AB 900's new bed construction plans are likely to resolve the state's overcrowding problem.

II. Reflections and Analysis

In this section I will suggest some themes and conclusions that one might draw from this journey through the history of California's punishment system. These suggestions are neither conclusive nor exhaustive because the observations one might make from the above chronology are potentially limitless. I endeavor simply to suggest a few.

A. California's Chronic Overcrowding Problem

First, California prisons have always been overcrowded. Individual institutions may not have been overcrowded at various times over the last 150 years, and California may also have been successful in easing the overcrowding problem marginally at different periods throughout its history. Despite this, beginning with a time when San Quentin held 600 prisoners in 62 cells and continuing to a time when the governor has declared a state of emergency (and the state is facing a federally imposed prison cap), overcrowding has consistently been a problem

210. Assem. B. 900, 2007 Reg. Sess. (Cal. 2007).

211. James Tilton, Secretary, Dep't of Corr. & Rehab., Testimony Before the California Senate Budget Committee (Mar. 12, 2008).

212. CALIFORNIANS UNITED FOR A RESPONSIBLE BUDGET, FACT SHEET ON AB 900 (2007), *available at* http://www.criticalresistance.org/downloads/AB900_Fact_Sheet.pdf.

213. Order Granting Plaintiff's Motion to Convene Three-Judge Court, *supra* note 209, at 10.

for California.[214] Unfortunately, it does not appear that the problem is going to take care of itself any time soon.

Over the last 150 years, California lawmakers have tried just about every policy imaginable to relieve the prison overcrowding problem—from increasing the use of probation to expanding the system of parole to simply building more and more prisons.[215] Yet, there is one approach to dealing with prison overcrowding that California has never embraced overtly—reducing our reliance on incarceration as a way of dealing with crime. If California were to decrease the number of people entering prison and shorten the amount of time people spend there, California would house fewer prisoners over the long term. Other states have shown that it is possible to reduce prison sentences without increasing crime.[216] Moreover, it is clear from our recidivism rates and parole revocation rates that what we are currently doing is not helping us reduce crime or prison populations. Further, recent research demonstrates that sustained increases in incarceration rates are likely to increase crime rather than reduce it.[217]

B. The Purposelessness of California's Punishment System

California has never engaged in a penetrating examination of how to approach the problem of crime. In 1850, before California became a state, its legislature enacted the state's first statewide punishment system, providing no explanation for its choice of a term sentencing structure or for the length of sentencing ranges it prescribed.[218] Throughout the next couple of decades, prison populations rose as judges imposed excessive and disparate sentences in accordance with their obligations under the statute. Parole was established first as a mechanism for relieving governors of the politically risky act of issuing pardons, and then expanded as a mechanism for relieving prison overcrowding. There is no evidence that Califor-

214. *See* Office of the Governor of the State of Cal., *supra* note 201; 1859 REPORT, *supra* note 40, at 4.

215. *See supra* Part I (discussing California's criminal punishment history).

216. In New York throughout the 1990s, homicide and violent crime rates dropped at rates higher than the national average during a time when the state had the slowest growing prison system in the country and the city's jail was shrinking. JASON ZIEDENBERG ET AL., CTR. ON JUVENILE & CRIMINAL JUSTICE, THE PUNISHING DECADE: PRISON & JAIL ESTIMATES AT THE MILLENNIUM 4 (2000), *available at* http://www.cjcj.org/files/punishing.pdf.

217. DON STEMEN, VERA INST. OF JUSTICE, RECONSIDERING INCARCERATION: NEW DIRECTIONS FOR REDUCING CRIME 3 (2007), *available at* http://www.vera.org/publication_pdf/379_727.pdf.

218. An Act Concerning Crimes and Punishments, ch. 99, 1850 Cal. Stat. 229–47.

nia's lawmakers made any attempt to evaluate the effect of these policies on the incidence of crime or on long-term prison populations.

Over the years, California has dabbled in discussions about the purposes of punishment. Early prison administrators seemed to believe that the purpose of prison was to reform inmates, although it is not clear that legislators agreed with them, or even concerned themselves with the question of why incarceration is the preferred method of punishment. The establishment of probation clearly indicates an interest in rehabilitation as a response to crime, although there is some evidence that prison administrators encouraged the use of probation not as an approach to rehabilitation but rather as a relief mechanism for prison overcrowding. And in 1976, the California legislature notoriously declared the purpose of incarceration to be punishment, as opposed presumably to rehabilitation or reform.

Yet even the 1976 declaration, as authoritative as it sounds, was not the result of a serious examination of how California might effectively and responsibly deal with crime. While it may have stated the reason for incarceration, the pronouncement that "the purpose of incarceration is punishment" tells us nothing about how that punishment is to be administered or what philosophy is supposed to guide those responsible for administering it. Moreover, the same law that declared the purpose of incarceration to be punishment and determinate sentencing as the fairest approach maintained a system of indeterminate sentencing for the most serious crimes. So, even if the state were to accept "the purpose of incarceration is punishment" as a guiding principle, it is not obvious what sentencing policies or practices might bc consistent with this principle.

Of course, California is not unique in its failure to identify one overarching purpose or principle of punishment. Most states in the country have cobbled together a set of principles on which they rely in developing and implementing their punishment policies, and these typically combine some blend of retribution, rehabilitation, incapacitation, and deterrence—the four traditional purposes of punishment. What makes California anomalous, however, is its failure to even engage in this kind of inquiry. While other states' punishment theories and principles are not necessarily models of clarity, it is nonetheless true that many states have at least endeavored to make deliberate choices regarding their reasons for choosing one principle of punishment over another—California is atypical in this regard.

C. The Hot Potato Between California's Three Branches of Government

No one wants to take the heat for reducing sentences, and California's executive and legislative branches have been playing hot potato with this burden since the dawn of statehood. When governors got tired of taking the heat for reducing sentences through the use of the gubernatorial pardon, they begged the Legislature for an alternative.[219] Rather than reduce sentences themselves, legislators tossed the responsibility back to the executive, but at least gave governors cover by placing the parole responsibility in the hands of the Board of Prison Directors.[220] When this proved insufficient to reduce the prison overcrowding problem, the Legislature enacted an indeterminate sentencing system—without reducing the statutory sentencing ranges, they gave the Board even more responsibility for releasing prisoners.[221] When parole and indeterminate sentencing failed to resolve California's prison overcrowding problem, prison officials pressured judges to increase the number of probation sentences they imposed.[222]

California lawmakers have always known that overcrowding is a problem, and they have always understood (and acknowledged to themselves and each other) that sentencing fewer people to prison is the only sensible way to approach this problem.[223] But they have never been willing to acknowledge this publicly, and they have been engaged in a tug of war with each other for the last 150 years over who should have to take the heat.

California's lawmakers have understood at least since the 1852 publication of the first report of the Board of Prison Inspectors that

219. *See supra* Part I.B.3 (discussing the process of creating an alternative to the gubernatorial pardon).

220. *See supra* Part II.B.5 (discussing the parole system).

221. *See supra* Part II.C (discussing the Indeterminate Sentencing Era).

222. *Probation Urged: State Prison Board Requests Trial Courts to Grant Probation to First Offenders*, CAL. J. (Los Angeles) (Feb. 18, 1915) (on file with the California State Archives). It appears that as a general matter, California's judiciary has been able to avoid becoming entangled in this battle between the legislative and executive branches of government. At various times throughout the state's history, the legislative and executive branches have lashed out at judges for imposing sentencing they viewed as either too harsh or too lenient (depending, perhaps, on how overcrowded the state's prisons were at the relevant time). Judges in general do not seem to have responded to these allegations. It will be interesting to see how, if at all, the California judiciary will weigh these issues if the federal court moves to impose a prison population cap or if the Legislature votes to create a sentencing commission.

223. *See supra* Part I (discussing California's criminal punishment history).

overcrowded prisons would create inhumane and unsafe conditions permitting of no possibility for instruction (or what we would today call "programming"). They also understood that the inevitable result of this state of affairs was that inmates would be released at the end of their sentences with no more skills or motivation than they entered with, and that most of the inmates being released were likely to return. Today's lawmakers are no less sensible and they understand all of this as well. Whether they are willing to take responsibility for remedying the problem is a different question.

III. Conclusion

California's current punishment system is marked by overcrowded and inhumane prisons; experts and public officials who agree that reducing our reliance on incarceration would be a sensible approach to prison overcrowding but who are reluctant to say so publicly; a general agreement that there are some people in prison who could safely be released and some dangerous individuals who need to be kept from society; an enormous corrections budget; people leaving prison in worse shape than when they entered; an unacceptable degree of unwarranted disparity in sentencing, especially with respect to race and class but also with respect to geography; and the fact that crime still happens. Sadly, this characterization accurately describes the California of 1850, the California at any time during the 1900s, and the California of today.

One solution to California's prison overcrowding crisis is to build as many beds as necessary to house the current population and to continue to build beds whenever prison populations rise. This approach presents a number of logistical challenges—for example, choosing locations for future prisons, hiring enough correctional officers to staff them, and the length of time it takes to actually construct them—but, assuming an unlimited corrections budget, this solution might work to alleviate prison overcrowding.

California has already tried prison expansion as an approach to alleviating overcrowding. It has not, however, done so thoughtfully or systematically. California's approach to dealing with overcrowding, like its approach to punishment policy generally, has been ad hoc since the late nineteenth century. Part of the reason for this is that California has never carefully weighed the alternative policy options before it. As explained above, it has repeatedly implemented backdoor approaches to alleviating overcrowding and, when those have failed, simply built more institutions.

If California is going to adopt a policy of prison expansion as a way of dealing with overcrowding, it can only do so after engaging in a cost-benefit analysis of expansion alongside its alternatives, and the only alternative that it has never tried is a reduction in reliance on incarceration as an instrument of punishment. It may turn out that this approach simply presents too great a risk to public safety to be workable, but we do not know that for certain, because California's lawmakers have never openly and seriously treated it as an option. Now is the time to consider this alternative.