HINDSIGHT AND THE FAILURE OF CALIFORNIA'S UNIFORM DETERMINATIVE SENTENCING ACT

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California Prison Reform

"Determinate Sentencing does not face public safety as a real factor. Determinate sentencing attempts to provide specified terms for purposes of consistency, for purposes of uniformity, for purposes of retribution, for purposes of deterrence. It does not serve the function of rehabilitation and it does not serve the function, logically, of isolation. There's nothing wrong with consistency and there's nothing wrong with uniformity and there is certainly nothing wrong with the fact that determinate sentencing has been largely responsible for providing some consistency in the results we've had with respect to different racial, ethnic groups, crimes, and everything else. But public safety is a goal that must be recognized as one of the paramount concerns of the criminal justice and sentencing system."

- Justice James Ardaiz *Associate Justice, 5th District Court of Appeal*

Fresno, California

Abstract

This paper looks at the initial goals of the Uniform Determinate Sentencing Act as it was enacted in 1976. It analyzes those goals in comparison to the program that came before it, the Indeterminate Sentencing Law. It then looks at the situation as it is today, and attempts to decipher whether any of the goals set forth by the original drafters of the sentencing law were actually accomplished.

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Introduction

Before 1976, California law provided for indeterminate sentences for criminal offenders. A person convicted of a crime might be sentenced to a very broad prison term, such as one-year-to-life. Then that prisoner would serve something within those parameters, depending on which rehabilitation programs he or she participated in, and on the progress he or she has made. This sentencing plan was used with the understanding that prison was for rehabilitation, and that the length of a convicted offender's prison term would depend on how long it took to rehabilitate that offender.[1]

This indeterminate system was far from perfect, and often criticized. Some questioned why education programs should be available to criminals, while many citizens could not afford any higher education at all.[2] Others questioned whether the rehabilitation was working, and whether savvy offenders, who could fool it into letting them out before they were actually "rehabilitated," might abuse the system.[3] Some thought that other factors besides rehabilitation, such as the race or poverty level of an offender, might influence average release dates.[4]

Questions were also raised about the proportionality of sentences to crimes. For example, what if someone convicted of petty theft needed longer to rehabilitate him or herself than another person convicted of homicide?[5] Judges imposed different sentences

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[1] Michael Vitiello & Clark Kelso, "A Proposal for a Wholesale Reform of California's Sentencing Practice and Policy," 38 LOY. L.A. L. REV. 903, 918 (2004).
[2] *Id.*
[3] *Id.*
[4] *Id.*
[5] *Id.* at 918-919.

on offenders from county to county, and prison authorities gave release dates that also varied wildly from criminal to criminal.[6]

Therefore in 1976, the California Legislature enacted the Uniform Determinative Sentencing Act ("UDSA"). The Legislature stated its mission clearly:

> The Legislature finds and declares that the purpose of imprisonment for crime is punishment. This purpose is best served by terms proportionate to the seriousness of the offense with provision for uniformity in the sentences of offenders committing the same offense under similar circumstances.[7]

Therefore the Court Rules stated that the goals for the UDSA were social protection, punishment, specific and general deterrence, incapacitation, restitution for victims, and uniformity among sentences – "the offense, not the offender, determines the length of a prison sentence."[8]

In making the switch to the UDSA, the legislature had to compare different types of criminal conduct in order to determine which charges should carry the lengthiest terms.[9] The UDSA also gave a three-part range of imprisonment terms for each crime, with a lower, middle, and upper range.[10] The presumed term that the court must give to the offender is the middle term, with aggravating or mitigating circumstances leading to the upper and lower sentences.[11] The judge has no discretion outside of the fixed sentencing guidelines that he or she is given, and may not depart from those guidelines in any way. The UDSA goes as far as to tell the judge what facts he or she may consider in

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[6] *Id.* at 919.
[7] *Id.*
[8] *Id.*
[9] *Id.* at 920.
[10] Murder and kidnapping for ransom still fall under indeterminate-sentencing rules.
[11] *Id.* at 922.

deciding whether to give a sentence that is higher or lower then the middle mandate.[12] In addition, consecutive sentences are sometimes imposed under an extremely complex formula.[13] The State Board of Prison Terms, instead of having unlimited power to release inmates, now has zero discretion in deciding when to release prisoners – each prisoner must serve the minimum term given to him or her by the judge.[14]

The new law has been problematic in ways that the legislature did not foresee – so problematic that many are questioning whether it was an improvement at all, or whether it did any of the things it was supposed to do. Its primary focus - social protection, punishment, specific and general deterrence, incapacitation, restitution for victims, and uniformity among sentences – has been pushed to the wayside as other competing interests have arisen over time.

James Enright, an Orange County prosecutor when the law was passed, predicted one of these problems: "Under the old law, the Adult Authority could keep a guy longer if they believed he was dangerous or homicidal. . . . They or the Department of Corrections have in-house testing procedures that are used to classify these guys. But now, if my reading of the new law is correct, these types of persons must be released."[15] One of the original signers of the bill, former governor of California (and current mayor of Oakland) Jerry Brown has spoken out publicly that the UDSA is an "abysmal failure" – leaving parolees who are unprepared to participate in society and are more likely than

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[12] Marguerite A. Driessen & Cole Durham, Jr., "American Law In a Time of Global Interdependence: U.S. National Reports to the XVIth International Congress of Comparative Law Section V, Sentencing Dissonances in the United States: The Shrinking Distance Between Punishment Proposed and Sanction Served" 50 AM. J. COMP. L. 623, 637 (2002).

[13] Walter L. Barkdull, *Fixed Terms Match the Time to the Crime*, L.A. TIMES, Apr. 29, 1987, at Metro Part 2, Page 5, Col. 1.

[14] See Driessen, supra note 1, at 637.

[15] Peter H. King, *The Murders of Roxanne and Polly*, L.A. TIMES, Feb. 23, 1997, at A-3.

not to commit new crimes.[16] People question whether or not the original goals of social protection and restitution are best being served by a sentencing system that allows people out of prison without proof of their ability to behave in society.

Another major problem with the UDSA is that it has left judges without the ability to judge, and burdened them with an incredibly complicated sentencing system that they must decipher before putting forth any of their predetermined "decisions.[17] In *Community Release Bd. v. Superior Court,* Justice Robert Gardner observed that:

> As a sentencing judge wends his way through the labyrinthine procedures of (the determinate sentencing law), he must wonder, as he utters some of its more esoteric incantations, if, perchance, the Legislature had not exhumed some long departed Byzantine scholar to create its seemingly endless and convoluted complexities. Indeed, in some ways it resembles the best offerings of those who author bureaucratic memoranda, income tax forms, insurance policies or instructions for the assembly of packaged toys.

This was in 1979, only two years after the UDSA was originally passed.[18] Though it may seem that the law has created uniformity among sentences, it has simultaneously thrown out any and all discretion judges possessed before the UDSA was passed. In addition, other factors have caused that goal of sentence uniformity to fall by the wayside.

One of these factors is the "drive by" sentencing laws, enacted by the legislature to add enhancement provisions to certain sentences when the media reports on a certain crime or on trends in crime that disturb the public.[19] Sentences are being lengthened

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[16] Jenifer Warren, *Jerry Brown Calls Sentence Law a Failure,* L.A. TIMES, Feb. 28, 2003, at Metro Pt. 2, Pg. 1.

[17] David R. Ross, *The Clutter in Criminal Law*, CALIFORNIA JOURNAL, October 1, 1995, at Feature.

[18] *Id.*

[19] See Vitiello, supra note 1, at 920-921.

continuously, and at random, based on popular or media hysteria, instead of a conscious researched decision that a certain criminal act deserves a higher penalty.

The UDSA has also caused an explosion in the size of the prison population, from 20,000 inmates before the bill was passed, to 180,000 inmates in 1997 - leaving the prisons filled to what is nearly twice their intended capacity.[20] Because of the number of inmates entering the already overcrowded system, lawmakers have been forced to give what are called "good time credits" – which allow many inmates to leave prison early, without participating in any rehabilitation or educational programs, and despite the UDSA's original intention of uniform sentences and punishment.[21]

This paper will examine the original goals of the UDSA – the intention of the legislature when enacting this massive overhaul of the criminal justice system. Using records, news articles, and legislative history from the time the bill was enacted, it will focus on the legitimate goals lawmakers and those involved in prison reform had at the time the UDSA was passed, and then look at the trends showing how those goals failed to be reached.

[20] L.A. TIMES, Feb. 23, 1997, at A-3.
[21] *Id.*

Indeterminate Sentencing – What Went Wrong?

The Indeterminate Sentencing Law ("ISL") was in effect in California from 1917 to mid-1977. It was enacted under much praise, in the light of a movement of social justice, and an effort to effectively reform prisoners instead of just locking them away. Under the ISL, there were no specific prison terms that correlated with certain crimes. The length of an offender's sentence depended on his or her behavior in prison, in order to emphasize the law's goal of rehabilitation.[22] Once a defendant entered prison, officials would help him or her to create both a rehabilitation plan and a timeline for exiting the prison sentence. These plans were in no way comprehensive; the length of one's sentence depended on how well one participated in rehabilitation programs, as well as the discretion of adult authority.

ISL was founded on the theory that crime was a "curable sickness."[23] Sentences were discussed and calculated by experts in the behavioral sciences, who would then "cure" the imprisoned of their propensity for crime.[24] Theoretically, ISL provided the prisoner with the incentive to rehabilitate him or herself.[25] If the prisoner participated in these programs, bettering him or herself in the process, then he or she would be ready to re-enter society as a changed individual. However prison conditions in California often made it difficult for prisoners to help themselves in such a way. Experts were often unqualified, with differing opinions about what constituted rehabilitation, and with no guidance answering that question for them. Prison officials often left inmates

[22] Determinate and Indeterminate Sentence Law Comparisons Study: Feasibility of Adapting Law to a Sentencing Commission-Guideline Approach, Report to the California Legislature Joint Committee on Rules, May 1980, II-1.
[23] Kenneth R. Zvetel, Jr., *Senate Bill 42 and the Myth of Shortened Sentences for California Offenders: The Effects of the Uniform Determinate Sentencing Act*, 14 SAN DIEGO L. REV. 1176, 1178 (1977).
[24] *Id.* at 1179.
[25] *Id.* at 1180.

languishing in prison without any concrete idea of their possible release date.[26] ISL was also supposed to keep dangerous criminals off the street by leaving it up to the experts to decide when they were ready to be released, instead of simply releasing them when their "time was up." However at the time of the ISL, critics argued that there was no scientific evidence supporting the idea that one could predict the behavior of an offender after he or she was released from incarceration.[27] Experts could be wrong, prisoners who were considered rehabilitated at one point might offend again, and it seemed unfair that prison sentences for a single crime could differ so much simply depending on the inmate.

Opponents of ISL pointed to these sentencing disparities as a detriment to the law, both in terms of who went to prison (based on race and class), and how long different offenders were kept in prison for similar offenses.[28] Some complained that the nature of the ISL was arbitrary, that the rehabilitation programs were ineffective and lead to higher crime rates, that offenders and prison officials knew how to manipulate the system to get what they wanted, that the ISL did not provide a sufficient deterrent to re-offending, and that the uncertainty of the ISL lead to tension and violence in California prisons.[29] Despite the ISL's goals of rehabilitation for the inmates, the broadness of the statute often led to situations where people were not sure what to do. Different officials kept different inmates in prison longer based on personal ideology or prejudice. This led to litigation put forth by inmates regarding some of the inequalities inherent in the statute.

The first legal criticism against the ISL came in the form of a case, *In re Rodriguez* (June, 1975). In this case the California Supreme Court found that the parole board of

[26] *Id.* at 1181.
[27] Albert J. Lipson and Mark A. Petterson, *California Justice Under Determinate Sentencing: A Review and Agenda for Research*, 3 (June, 1980).
[28] See "Determinate", supra note 22, at II-1.
[29] *Id.* at II-2.

California, known as the Adult Authority, gave a term of imprisonment that was disproportionate to the crime committed.[30] The court found that the Adult Authority had incorrectly interpreted the ISL by failing to set a "primary term" for each offender, therefore forcing the Adult Authority to set a defendant's term as quickly as possible.[31] The outcome of this case forced the adult authority to begin using some mandated sentencing guidelines in order to keep from another arbitrary or unconstitutional sentence such as the one in *Rodriguez.* This was the first step towards what would soon be an entirely new way of sentencing in the state of California.

The move away from ISL, and towards the UDSA, was instigated when Senator John Nejedly, the future author of the UDSA, first began to look into the issue of sentencing reform in the mid-1970's. He claims to have been shocked at what he found. According to his report during a 1990 hearing discussing the success of the UDSA, his office discovered major disparities in sentences received on the basis of race, ethnicity, education, personal appearances, and other things that lead him to believe that serious discrimination was occurring under ISL:[32]

> "It became quite apparent that what we were sentencing people for and the background of criminal statistics was arising on a very disparate basis...You found that blacks, for example, were arrested more often, were tried more often, were convicted more often…"[33]

In addition, Senator Nejedly reported that different hearing officers in the Adult Authority gave different sentences based on their opinions, judgments, and values.[34] He

[30] *Id.*
[31] *Id.*
[32] Hearing on Determinate and Indeterminate Sentencing, California Legislature, Joint Committee for Revision of the Penal Code, 5 (Mar. 28, 1990).
[33] *Id.* at 6.
[34] *Id.*

prompted further investigation, and pushed the Senate to look at sentencing reform as a serious option.

In the fall of 1974, the Senate Select Committee on Penal Institutions took Senator Nejedly's lead and began to look into reforming the ISL. In 1975 Senator Nejedly introduced the original version of the UDSA.[35] Though its passage was controversial, the new bill meant the end of an attempted era of reform in California. It was the beginning of a system where the punishment fit the crime, and would theoretically be served in its entirety, without any incentive towards rehabilitation.

Goals of the UDSA

On January 30, 1975, the Senate Select Committee put forth a press release outlining the UDSA. This bill abolished the Adult Authority, and created narrowly defined court-imposed sentences for different crimes. Instead of the broad sentences imposed under the ISL, the UDSA contained very specific sentences for each crime committed, depending on severity. For example, assault and battery by two or more people would carry a low sentence of two years and a high sentence of four years. The new law was also fully retroactive.[36] The goals of the bill were discussed widely amongst various organizations and in many different forums in order to distinguish it entirely from the ISL, and to show how it would be effective where the ISL had failed.

The preface to the UDSA outlines some of the legislatures intentions in creating and passing the replacement to ISL:

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[35] See "Determinate," supra note 22, II-2.

[36] April Kestell Cassou & Brian Taugher, *Determinate Sentencing in California: The New Numbers Game*, 9 PAC. L. J. 5, 13 (1978).

> "The legislature finds and declares that the purpose of imprisonment for crime is punishment. This purpose is best served by terms proportionate to the seriousness of the offense with provision for uniformity in the sentence of offenders committing the same offense under similar circumstances. 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 trial court with specified discretion."[37]

Therefore two of the main goals addressed by the new bill were punishment for prisoners proportionate to the seriousness of their crimes, and uniformity amongst sentenced offenders. These two goals in particular meant that certain organizations supported the bill, though for different reasons, bringing a broad base of collaboration to the new initiative.

The Judicial Council also set forth seven objectives that they wanted to be considered in determining appropriate sentences under rule 410 of the Sentencing Rules for the Superior Courts. These objectives were:

1. Protecting society;
2. Punishing the defendant;
3. Encouraging the defendant to lead a law abiding life in the future and deterring him from future offenses;
4. Deterring others from criminal conduct by demonstrating its consequences;
5. Preventing the defendant from committing new crimes by isolating him for the period of incarceration;
6. Securing restitution for the victims of crime;
7. And achieving uniformity in sentencing.[38]

[37] See "Determinate," supra note 22, at iii.
[38] See "Determinate," supra note 22, at II-5.

The basic ideology behind the new bill was that "Punishment should fit the crime, inmates should know how much time they can expect to spend behind bars, and rehabilitation, though attempted, should not be a condition of parole."[39] Reformers were tired of promises of rehabilitation that, in their opinion, led nowhere. They wanted a system that was more predictable, thinking that predictability would act as a deterent to defendants, and as a comfort to the victims of crime. The new law was a complete turn around from the previous ISL, and the crucial difference between the two laws was the role played by rehabilitation.[40]

The evolution of the UDSA itself shows how ideology moved further and further away from rehabilitation and the original intentions of the ISL, towards the radical change that was the final version of the UDSA. Under one of the original versions of the UDSA, which went through many changes before finally becoming law, the Adult Authority would have remained intact, and along with the court would have retained much broader discretion than was actually written into the final version. In addition, trial court sentencing would have remained flexible, leaving the judge some ability to set maximum terms for a particular offender.[41] As opponents and critics of the ISL grew in their momentum to get the bill passed, the bill had to be reformed even further in order to appease all supporting parties, and to attempt at accomplishing all of the goals set forth by the bill's supporters.

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[39] William Endicott, *State Parole: Gates Open to New Ideas*, L.A. TIMES, May 8, 1975, at B1.
[40] Raymond Parnas & Michael Salerno, *The Influence Behind, Substance and Impact of the New Determinate Sentencing Law in California*, 11 U.C.D. L. REV. 29, 29 (1978).
[41] See Cassou, supra note 36, 12.

Despite all of the attempts to differentiate the new bill from the former ISL, especially in the area of rehabilitative incentive for early release, the UDSA did include one way for inmates to help themselves shorten their sentence. The bill included "Good Time" credits, meaning that an offender's prison term would be reduced by a total of one-third for good time. Offenders did not have to do anything positive to earn good time, they only had to stay away from misbehavior. It was an automatic credit unless an offender committed assault in prison, tried to escape, incited a riot, falsified records, or was found with weapons or drugs.[42] Though the idea of good time credits at the inception of the bill seemed rather insignificant in comparison to the many ways in which inmates could shorten their sentences under the ISL, it would hinder the goals of the UDSA greatly after implementation.

Despite some problems that had to be ironed out in the bill, it was supported by liberal groups such as the ACLU of Northern California and the Prisoners Union, as well as by conservative law enforcement. Liberals backed it because it gave inmates dependable release dates and provided uniformity in sentencing, while conservatives were appeased by the idea that consistency would lead to longer sentences.[43] However the liberal groups also wanted to ensure that sentences would be appropriate for the crimes committed – they did not want sentences to be too long. In addition, conservatives wanted to make sure that violent offenders served long sentences, with no leniency for the rehabilitative programs provided for under the ISL. It was important for backers of the bill to have support on all sides of the political spectrum, but they could not win the support of the California Probation, Parole, and Correctional Association,

[42] See Lipson, supra note 27, at 6.
[43] *Id.* at 4.

because the reduction in rates of parole meant that jobs would be lost and their system would be drastically changed.[44] In addition, the supporters of the UDSA were less concerned of what the judiciary thought of the sentencing reform bill. Judges had little input in the sentencing reform debate, and those that did express opinions seemed reluctant to shoulder the burden of imposing determinate sentences on offenders.[45] The future UDSA would leave them with an extremely complicated set of sentencing guidelines – so complicated that new justices had to take courses from more experienced judges regarding their responsibilities under the law.

In 1977, when the UDSA was finally passed in its final form, it was clear what the intentions of the legislature were, and what they hoped the bill would accomplish. They wanted to punish defendants for their crimes, and they wanted to do this efficiently, consistently, and without room for error. They hoped that the very structured UDSA guidelines would lessen discrepancies in sentencing based on race and other factors. Secondly, they wanted the punishments to be harsh enough to act as deterrents against the committing of future crimes, while not being so long as to create an unlawful situation for anyone. Thirdly, they wanted to make examples of the inmates, so that other members of the society would also be deterred from committing crimes. They wanted to keep the streets as safe as possible, by locking up violent offenders for long periods of time, without the chance for release before their sentences were completed. And lastly, these incarceration periods were to serve as restitution for the victims of crimes, so that they could feel some resolution and comfort from the fact that offenders would serve a fair sentence no matter what rehabilitative programs they participated in. Rehabilitation was

[44] Dick Howard, *Determinate Sentencing in California*, The Council of State Governments, 4 (Dec. 1978).
[45] *Id.*

no longer a main concern of the sentencing law. It was instead a footnote, to be considered once all other pieces of the new law were in place, and even then, only if necessary.

Did the UDSA "Work"?

Initial Problems

The UDSA received adverse reaction almost from the moment it was passed, and was therefore significantly changed within less than a year.[46] There were objections and complaints regarding the implementation of the new law, and outcries from different factions who felt that it was not catering to their needs. The retroactive nature of the bill was a major concern, there were mistakes in the bill regarding sentencing, and some parties thought that the mandatory sentences were not long enough, while others found some of them too long. Therefore after its passage, there was an immediate rush to change many parts of the UDSA in an attempt to appease the many displeased parties.

Both the public and law enforcement were fearful regarding the retroactive aspect of the bill. Some claimed that it would result in the immediate release of many inmates after they were re-sentenced under the UDSA, for they would have already served their maximum sentence even though they were not considered to be rehabilitated under the ISL. The Chief of Police of Los Angeles County claimed that "7,000 of the worst prisoners would be released."[47] Considering the goal of public safety, these numbers seemed frightening, and had to be dealt with. However the bill contained other unintentional mistakes as well.

[46] *Id.*
[47] *Id.* at 5.

The bill as passed was incorrect even in its original inception. It was passed with several forgotten code provisions continuing indeterminate sentencing, and in some parts was so complex that it was impossible to put into practice.[48] Initial changes fixed the forgotten provisions, and simplified some of the sentencing guidelines so that they could be more easily implemented; however the bill remained extremely complicated, especially for the judges who had to put it into practice on a daily basis in their courtrooms. These complexities made many believe that the UDSA was going to be very expensive to figure out, as people sued the state over possible inequities or misapplications of the law.

Authorities feared an increase in litigation costs over some of the bills problems, and therefore a committee was formed to write technical corrections to the bill. This resulted in a new bill entitled AB 476.[49] AB 476 was meant to fix the many problems that different groups complained about after the UDSA passed. For example, law enforcement saw the UDSA as insufficient. They felt that the prison terms prescribed for many of the crimes were too low, and they thought that the limitations section was too broad. In addition they were opposed to the bill being retroactive, claiming that it would create an unsafe situation in communities were offenders were released many at a time. Law enforcement pushed for longer sentences for violent and repeat offenders, which became one of the main focus points of AB 476.[50]

It was at this point that the aforementioned liberal-conservative coalition over the bill fractured. The liberal groups disagreed with the changes fought for by law enforcement.

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[48] *Id.* at 4.
[49] *Id.* at 5.
[50] *Id.*

They conflicted over sentencing increases and other revisions of the substance of the bill. Both sides stopped being agreeable and compromising when they felt they could, and instead used the situation to fight for their extreme wants. These fractures created more problems, and the UDSA had to be modified to appease all of the groups involved in its implementation.

Thereafter, AB 476 moved through seven different versions in four months, and was finalized only four months before the original UDSA was to go into effect.[51] The new version of the bill changed the retroactive provisions of the original UDSA, where new sentences had to be set for offenders by the Adult Authority in order to give the board more time to implement correct and effective sentences.[52] It also fixed some of the technical problems in the bill, and adjusted sentences. After the bill became law, California made the transition from their formerly rehabilitation-based sentencing plan, to their new punishment and deterrence based plan. What happened next was documented in various studies, news reports, and statistics regarding crime rates that came out over the next three decades.

In 1980, the State of California Joint Committee on Rules hired Arthur D. Little, Inc. to do a study on the effectiveness of the UDSA up to that point.[53] They outlined the goals of the any sentencing laws as they saw them implemented in plans for reform. Their first goal was adequacy – the relationship of the punishment to the offense.[54] Their second goal was equity, which they defined as "fairness achieved in sentencing: similar

[51] *Id.* at 6.
[52] *Id.* at 7.
[53] See "Determinate," supra note 22, at I-3.
[54] *Id.* at I-4.

offenders convicted of similar offenses should receive similar dispositions."[55] In order to increase equity, policy makers must reduce the discretion of those deciding who gets what sentence.[56] The third and final goal identified by Arthur Little was certainty, or the degree to which one can predict the dimensions of an incarceration period.[57] The report went on to see how well these goals had been met, in the first few years of the UDSA. This section of this paper takes the Arthur Little report one step further, looking at how the UDSA fared in meeting its goals over the next thirty years. How has it held up to its promises, and what if any parts of it can be salvaged in the creation of a new sentencing reform in 2006?

Uniformity Amongst Sentences and Punishment

The UDSA is a very complex law, and it became more complicated over time. Sections were added to the bill, aspects of the bill were changed, and the more things about the bill that were changed, the more difficult it was for judges to apply. This created problems for the goal of sentence uniformity. In order for there to be sentencing standardization, the sentences had to be correctly applied in the first place, and the fact that the UDSA was so complex hindered this from happening all of the time.

The continuous addition of supplemental bills to the sentencing law in California created an extremely complex and confusing system and resulted in sentencing errors by judges who incorrectly calculated prison terms. During the review of the UDSA in 1990, Bill Lockyer said about this problem that:

[55] *Id.* at I-5.
[56] *Id.* at I-5.
[57] *Id.* at I-5.

> …so one of the consequences of this complexity is that in the last few years a study was done on criminal appeals. They found that one out of four successful criminal appeals was due to sentencing error by the judge. Just simply to compute the law and what we've done to if over the past 14 years.[58]

One judge in the system, who teaches the sentencing guidelines to incoming judges, said that: "I used to say to then, 'you can understand it.' I don't say that anymore. You can't. And that's a product of so many exemptions, classifications, qualifications, and what have you, that it really makes the internal revenue code look simple."[59] If judges misapplied the laws, then in some instances there surely were disparities amongst sentences. This type of confusion has not been widespread enough to cause a serious disparity amongst sentences. But it has contributed to the situation, as have other problems.

California has run out of room to house prisoners, and that has forced the state to unwillingly frustrate two of its main goals – sentence uniformity and punishment. Different prisoners are getting out of incarceration more quickly than other prisoners, based on falsified qualifications for release. A 2003 article from the Sacramento Bee reported that the state's inmate population was expected to decline by 15,000 inmates. This was not because people were up for release under the UDSA, or because the crime rate was down. It was because the state budget needed to be cut, and one of the ways Governor Davis decided to accomplish that was by closing units, and possibly entire prison facilities.[60] Despite the fact that the numbers of inmates in California prisons was on the rise, the state was choosing to release thousands of prisoners who had yet to serve

[58] See "Hearing," supra note 32, at 14.
[59] *Id.* at 17.
[60] John Hill, "Steep Inmate Decline Slated," SACRAMENTO BEE, 11/12/2003.

their fixed terms under the UDSA. The article reported that "The department was directed to release prisoners a few months early to supervised drug treatment, [and] expand opportunities for inmates to earn time credit for good behavior." Inmates were to be allowed good time credit reducing their sentences, for taking part in education programs upon arriving at prison reception centers. They were also to be given good time credits for being on a wait list for work or education programs. Other inmates were released to drug treatment facilities after serving four months less time than they were sentenced to serve. Mentally ill patients were to be transferred to treatment programs as well. Despite the release of so many prisoners, the senators supporting the budget cuts did not believe that their decision was unsafe or unfair in any way. Sue North, the chief of staff for Sen. John Vasconcellos, was quoted as saying "They're releasing people who should not pose a risk to public safety…It's time for them to come out." Time for them to come out, despite the fact that they still had sentences to serve under the law of the state of California – the UDSA.

Even the original proponent of the UDSA, Senator Nejedly, sees the reform as a failure in terms of sentencing consistency and punishment, and blamed it on the state's inability to build new prisons, that would house the inmates with longer sentences under the UDSA:

> "If you have a thousand-room hotel and everyone who is a guest at that hotel stays for a year, there's only a thousand people you can put in that hotel at any one time for a year. If you want longer sentences, then you're going to have more facilities. If you don't have the facilities, don't blame the system for the incapacity of the system to deal with the function that it was charged to deal with.[61]"

The lack of prison facilities was not a surprise to those coordinating the prison system. For a few years after the UDSA was passed, there were attempts to budget millions of dollars towards the construction of new prisons. However the Ways and Means Committee continuously failed to approve the budget, year after year, until the money was spent elsewhere and to build new facilities would have left the government in even greater debt.[62] The lack of prison space has led to inconsistencies in sentencing, and has detracted from the greater goal of punishment by letting some out of prison without paying their debt. However the UDSA itself also led to problems, even without the outside factor of overcrowding in prisons.

Another change since the implementation of the UDSA that affected the consistency of sentencing is the "piecemeal revisions of the law" – laws enacted after crimes sensationalized by the media. Every time a new crime is committed that catches the media's attention, the California legislature creates a new law sentencing someone who committed such a crime to an incredibly long period of incarceration. One article described this phenomenon using examples: "There are people in prison for white-collar crimes serving sentences that are longer than for second-degree murderers, and burglary

[61] See "Hearing," supra note 32, at 11.
[62] See "Hearing," supra note 32, at 62.

gets a longer sentence than taking corrosive acid and throwing it in someone's face."[63] These additions to the sentencing law make it even more complex, and take away from that goal of sentence conformity.

In terms of punishment, the ISL did a better job in some aspects then the UDSA. Repealing indeterminate sentencing, in some cases, allowed criminals who would have spent more time in prison under ISL to be released much earlier under the UDSA. For example, under ISL, a mentally disordered sex offender who would have been sentenced to an indeterminate period of time in prison. That meant that the prisoner might be there for 10 years or 15 years, depending on the crime and how well he or she rehabilitated him or herself. Under the UDSA the same prisoner would be released after the maximum sentence for his or her crime - 8 years.[64] There would be no further evaluation based on necessity, just a release with the hope that the person would not re-offend. The hope was that the lack of ability to change one's situation would force people to realize that they were better off never coming to prison, and therefore staying crime free. If they knew they could not play the system to get out earlier, then maybe, hopefully, that would act as a deterrent against them committing future crimes, even if the punishment was not indefinite.

[63] "The Prison Dilemma: California Locks up more and more felons, so why don't we feel safer?," CALIFORNIA JOURNAL, at Feature (1994).
[64] See "Hearing," supra note 32, at 21.

Specific and General Deterrence?

The overcrowding in prisons might answer to the success of deterrence as well. As of 1990, fourteen of California's state prisons were at over 200 percent of their population capabilities, with one facility at over 300 percent. In comparison, at the same time, the state of New York had just one facility that was nearly at 200 percent, with the prison union ready to go on strike as a result.[65] In addition, every year from 1975 through 1990 saw an increase in the recidivism rate in California.[66] According to the Little Hoover Commission, a watchdog agency of the executive branch of the California state government, only 11% of parolees returned to prison for parole violations or new crimes in 1975, the year before the UDSA came into affect. By 1990, that number had risen to nearly 80%. By 1994, the number had dropped to 60% - but not because the UDSA was working, per se. It was then that the Department of Corrections adopted a new policy of not sending all parole violators back to prison – therefore artificially lowering the recidivism rate.[67]

One article sees the rise of recidivism as a direct *result* of the UDSA, despite the fact that reduction was a central goal of the initiative. The UDSA nearly eradicated the parole system, which kept people who would otherwise be in jail accountable while still part of society. And despite many years of research, organizations like RAND have been unable to discover a connection between long prison sentences and rates of recidivism in a positive sense. Even though certain bills might create a shock, causing crime in that

[65] *Id.* at 33.
[66] *Id.* at 40.
[67] See "The Prison Dilemma," supra note 63.

area to lower temporarily, that deterrent affect goes away within two years.[68] The UDSA has not resulted in the rates of deterrence that backers initially hoped for – which meant it might not have kept the public any safer, either.

Social Protection?

With the number of prisoners in California growing, and with recidivism rates remaining high, the UDSA seems to have failed to protect society, which was one of its main goals at the outset. Crime rates have not gone down since the inception of the new sentencing law. There is nothing to show that the public is safer now, under this program, then they were before.

One way that UDSA actually lessened public safety is in its restructuring of the parole system. Under the ISL, parole equated serving one's prison term outside of prison. It was a continuation of the prison term, and could be revoked at any time if the prisoner failed to follow the rules for his or her parole. Since prison terms under ISL were indiscriminate, so were parole terms. They could last as long as was deemed necessary by those in charge. Under the UDSA the parole period was definite and completely separate from the period of incarceration.[69] Whereas a period of parole under the ISL could go on as long as the parolee was considered a danger, under the UDSA the parolee is free after three or four years no matter what. One former police officer notes an example of the situation presented by parole under the UDSA:

[68] *Id.*
[69] See "Hearing," supra note 32, at 50.

> "We had…a prison gang member that was a fourth termer. We knew that he as going to re-offend as soon as he got out…Within two weeks he had committed over seven felonies involving firearms…That's just one example of many that came about and we had no control. As a parole violator, he went back for a maximum of a year."[70]

This change in the parole system means that more offenders are on the street with less incentive to act appropriately. There is less of a deterrent than under the old system.

Another area of concern is that the change away from any rehabilitation might have contributed to the problem of social protection instead of helping to prevent it. Since an inmate's release is no longer dependent on whether or not the inmate could support him or herself outside of prison, or was able to transition successfully back into society, they might not be prepared to handle life outside of prison. In 1994, 280 of the prisoners released from Pelican Bay came directly out of super-maximum security and directly into society. In maximum security there is no counseling, training, or education. Therefore inmates leave prison with no rehabilitation – nothing that makes them ready to live a life without crime, a life different from the one they lived previously.[71] It is hard to reconcile this simple fact with the overall goal of public safety.

[70] *Id.* at 56.
[71] See "The Prison Dilemma," supra note 63.

Conclusion – What Have We Learned?

As of 1990, indeterminate sentencing had been returned to for the crimes of attempted first degree murder, second degree murder, aggravated mayhem, habitual offenders, habitual sex offenders, certain drug offenses, and attempted assassinations.[72] Slowly, the UDSA has transformed over time. It is no longer the strictly uniform sentencing plan put forth by Senator Nejedly presented to the State thirty years ago. Therefore it is little wonder that it did not accomplish many of the goals the legislature hoped it would.

Many of the recommendations made by experts in prison reform and sentencing reform have involved re-introducing rehabilitation programs into the prison system. The simple fact is that, at this point in time, prisoners have no incentive to participate in rehabilitation programs – unless those programs get them out of prison early, such as the good time credits being instituted in order to lessen the burden on already overfilled prisons. Rehabilitation programs in prison work on supply and demand. At this point in time, under the UDSA, there is little demand for the programs because they do not provide any benefit for the prisoners. Why go to therapy or to a class, if you can lift weights or sleep? There is no reason for them to go unless someone convinces them that it is a good use of their time. And if they do not want to go participate in these programs, then there is no incentive for the prisons to offer such programs.

It seems inevitable that some rehabilitation needs to re-enter the California prison system, including an incentive for inmates to participate that is not entwined with a need for more prison space. Despite all of the complaints about the old system, it clearly had

[72] See "Hearing," supra note 32, at 2.

some upsides that are now being missed within the prison system. One prison guard commented on the differences between the old program and the new program: "Under the old indeterminate…we were able to help the inmate help themselves more… they were forced to get an education. Today 42 % of all inmates in our system do not have a high school education."[73] Maybe the ISL did not work – maybe it was too disorganized, to biased. Maybe it was unfair and confusing. But several of the goals set forth in its solution, the UDSA, could be solved through some sort of rehabilitation program. Education is a deterrent on its own. When people have an education or skills training, it gives them an option besides crime when they are released from prison. Prisons could implement effective job placement programs to help keep the recidivism rate low. This in turn would provide social protection.

The only goal that is not met by including rehabilitation programs as part of the prison system is maybe the main goal of the UDSA – punishment. And it is surely true that someone who commits a crime should be punished for it. However, letting someone out of prison early for merely being on the waiting list for a program does not seem like an effective punishment either. Both the ISL and the UDSA have taught today's politicians and prison officials valuable lessons about what works and what has failed to work. It is time for the government to implement that knowledge, put it to work, and to create a prison system that will accomplish all of the goals set forth by the UDSA – while at the same time producing a new generation of former convicts, less likely to re-offend, and more likely to become contributing members of California.

[73] *Id.* at 34.