

2007 California Criminal Legislation: Meaningful Change, or Preserving the Status Quo?

INTRODUCTION

2007 was a tumultuous year for California's criminal justice system. Legislative change was both necessary and timely, as legislators in Sacramento struggled with a burgeoning prison population, constitutional challenges to the prison and sentencing system, and the increasingly publicized problem of erroneous convictions. These issues have been exacerbated by the ever-present budget crisis, a product of a weakening technology sector, and declining property tax revenues in the midst of an uncertain national economy.

This article surveys recent California criminal legislation, including bills that failed to pass, in the areas of prison construction, sentencing reform, and law enforcement reform. Relying mainly upon published sources of legislative history and commentary, it will summarize the political backdrop behind the legislation, evaluate the likely effects, and analyze why alternatives ultimately failed to pass.

Points of view regarding the overall efficacy of the new legislation differ. Supporters of the work done in Sacramento might point to the significant accomplishment of legislators coming together to produce substantive legislation that has addressed difficult problems. Critics of the legislation, however, would contend that politics have unacceptably encroached upon the bounds of sound public policy. The most progressive of reformers would criticize the political agenda of lawmakers as being responsible for obstructing sorely needed substantive changes.

I. ASSEMBLY BILL 900: THE PRISON CONSTRUCTION BILL

Any discussion of problems and their legislative solutions within the California criminal justice system must begin with the "prison crisis." Simply stated, California's prisons are vastly overcrowded. The Department of Corrections and Rehabilitation (CDCR)'s \$8 billion annual budget operates thirty-three prisons throughout the state, originally designed for a capacity of 100,000 inmates. In the summer of 2007, the actual prison population

exceeded 172,000 inmates.¹ The resulting array of improvised new cells—in laundry rooms, basements, and hallways—attracted national negative attention.² A string of federal lawsuits resulting from increasingly critical media coverage has raised the specter of federal judicial intervention in the state prison system on Eighth Amendment grounds.³ Assembly Bill 900, which Governor Schwarzenegger signed into law on May 3, 2007, was the solution devised by the California Legislature to address these problems.

Critics of Assembly Bill 900, a prison construction bill signed by the Governor on May 3, 2007, argue that the bill only pays lip service to more progressive rehabilitation and anti-recidivism efforts. Meanwhile, the bulk of the bill comprises the easiest answer to the problem of overcrowding: construction of new prisons and expansion of old ones—the familiar “more walls, more bars, more guards” principle.⁴ Proponents of Assembly Bill 900 point out that it is the immediate and decisive response needed to address the drastic situation in California’s prisons.⁵ If the state is committed to a long-term policy of continued incarceration for criminal offenders, then the realities of the prison crisis and plain logic lead proponents of the bill to suggest that more walls and bars might be the most prudent solution.⁶

1. CAL. DEP’T OF CORRS. & REHAB., FALL 2007 ADULT POPULATION PROJECTIONS 2, available at http://www.cdcr.ca.gov/Reports%5FResearch/Offender_Information_Services_Branch/Projections/F07pub.pdf.

2. See generally Sonja Steptoe, *California’s Growing Prison Crisis*, TIME, June 21, 2007, available at <http://www.time.com/time/nation/article/0,8599,1635592,00.html?xid=feed-cnn-topics>.

3. See STATE OF CALIFORNIA, LITTLE HOOVER COMMISSION, SOLVING CALIFORNIA’S CORRECTIONS CRISIS 1-5 (2007), available at <http://www.lhcc.ca.gov/lhcdir/185/Report185.pdf> (last visited March 4, 2008). For a closer examination of the dispositions of the prison lawsuits, *Coleman v. Schwarzenegger*, *Plata v. Schwarzenegger*, and *Perez v. Tilton*, see Amanda Denker, Summary, *Developments in California Criminal Law: Contributions from the Courts*, 13 BERKELEY J. CRIM. L. 77, 90-93 (2008).

4. This quote comes from the 1994 classic prison film *The Shawshank Redemption*, where the cynical Warden Norton explains to the idealistic young protagonist why there is no money for a prison library: additional funding from the state legislature is only ever appropriated for “more walls, more bars, more guards.” THE SHAWSHANK REDEMPTION (Columbia Pictures 1994). See also STANFORD EXECUTIVE SESSIONS ON SENTENCING AND CORRECTIONS, STANFORD CRIMINAL LAW JUSTICE CENTER, CALIFORNIA CORRECTIONS REFORM: STATE / LOCAL PARTNERSHIPS 8-10 [hereinafter STANFORD EXECUTIVE SESSIONS], available at https://www.law.stanford.edu/program/centers/scjc/pdf/SESSC071707Report_Ir.pdf. Most views in favor of or opposed to Assembly Bill 900 are summarized here. Notably, the most outspoken critics of Assembly Bill 900 cite an essentially unfixable system and even welcome the idea of federal judicial intervention as an alternative to addressing the prison crisis.

5. *Id.*

6. Incarceration remains the dominant paradigm of punishment for criminal offenders in this country, and the idea of prisons is so vested in criminal justice policy that it’s hard to imagine alternatives. This stands in stark contrast with countries in Western Europe, where prison as a form of punishment tends to be the exception, rather than the rule. In France and Germany for example, first-time violent offenders often receive only probation, day fines, or community service. See JAMES WHITMAN, HARSH JUSTICE: CRIMINAL PUNISHMENT AND THE WIDENING DIVIDE BETWEEN AMERICA AND EUROPE 74-75 (Oxford University Press 2003).

A. New Prisons, Old Prisons, Shipping Prisoners Out of State

Assembly Bill 900 is a prison construction bill to be implemented in two phases.⁷ Phase I involves a \$3.6 billion expansion effort that would create 12,000 new infill beds, which are new cells at existing prisons to alleviate double and triple bunking.⁸ Additionally, 6000 new re-entry beds (cell space for prisoners with less than a year left to serve) would be created.⁹ Plans also include the construction of 6000 new medical beds to augment prison healthcare.¹⁰

Phase II involves an additional \$2.5 billion to be spent on infill, reentry, and medical spaces, provided that the construction of Phase I facilities has met adequate benchmarks.¹¹ Additionally, the bill earmarks an additional \$1.2 billion for expansion of local facilities at the city and county level, with a twenty-five percent match requirement from local entities.¹² This would create an additional 13,000 beds at the local level.¹³ Each new bed costs the state over \$100,000 for up to 40,000 new prison beds collectively between Phase I and Phase II.¹⁴ Assembly Bill 900 authorizes financing for this expansion through a \$7.4 billion lease revenue bond program that would cost the state roughly \$600 million a year in payments over the next twenty-five years.¹⁵

Beyond the straightforward plans for prison expansion, Assembly Bill 900 also contains a provision authorizing CDCR transfers of prisoners to facilities in other states.¹⁶ That provision is a direct answer to a previous California trial court decision deeming prisoner transfers illegal under the Governor's emergency powers.¹⁷ As provided for in Assembly Bill 900, up to 8000

7. Senate Rules Comm., Official Cal. Legislative Info., Assemb. B. 900 Assembly Bill Analysis, at 2-4, available at http://www.leginfo.ca.gov/pub/07-08/bill/asm/ab_0851-0900/ab_900.

8. *Id.*

9. *Id.*

10. *Id.*

11. *Id.*

12. 4000, 10000, and 2000 infill, reentry, and medical spaces are to be created, respectively. Assemb. B. 900, 2007-08 Assemb., Reg. Sess. § 15820.917(a) (Cal. 2007).

13. Senate Rules Comm. Rep. Assemb. B. 900, at 7.

14. Press Release, Office of the Governor, California Responds to Federal Courts with Plan to Reduce Prison Overcrowding (May 16, 2007), available at <http://gov.ca.gov/index.php?/press-release/6267/>.

15. Assemb. B. 900 § 15819.40(a).

16. *Id.* at 11191. For a review of how these contract arrangements are to operate, see Katherine Bromberg, Summary, *California Corrections: Confronting Institutional Crisis, Lethal Injection, and Sentencing Reform in 2007*, 13 BERKELEY J. CRIM. L. 117, 132-33 (2008).

17. See Dan Thompson, *Judge Rules California Inmate Transfers are Illegal*, ASSOCIATED PRESS, Feb. 20, 2007, available at <http://www.sfgate.com/cgi-bin/article.cgi?f=/n/a/2007/02/20/state/n110955S04.DTL>. Under then existing law, Governor Schwarzenegger attempted to justify prisoner transfer powers under the state Emergency Services Act. *Id.* While Judge Ohanesian of the Sacramento Superior Court agreed that prison conditions had reached crisis levels, she did not find sufficient authority for transfers under the provisions of that Act. *California Corr. Peace Officers Ass'n v. Schwarzenegger*, No. 06C501568 (Cal. Super. Ct. Sacramento Cty. Feb. 20, 2008).

prisoners declared to be free from medical problems and without outstanding habeas petitions or appeals would be transferred to contract facilities out of state.¹⁸ Until July 1, 2011, transfers may be ordered by the CDCR without an inmate's consent, due to the acknowledged severity of the overcrowding situation.¹⁹ After July 1, 2011, transfers would require the consent of the transferee, coinciding with the time the new prison beds are to become operational.²⁰ Even putting aside the moral issues raised by transferring the state's own prisoners elsewhere, the question remains as to how transferred inmates will be prepared to rejoin California society if they have been taken away from their relatives and support networks.²¹ On the other hand, a transfer out of state may be beneficial to inmates who could stand to gain from additional space and access to more treatment and rehabilitation programs.²²

In June 2007, the CDCR began transferring inmates to contract facilities in other states pursuant to Assembly Bill 900.²³ Slightly more than 3000

2007) (on file with the Sacramento Cty. Super. Ct.). The order marked the first time in California history that a judge has overturned a governor's emergency declaration. See Thompson, *supra* note 17. Prior to this article's publication, on June 4, 2008, the Court of Appeal of California held that the private contracts do not violate article VII of the California Constitution. See *California Correctional Peace Officers' Assn. v. Schwarzenegger*, 77 Cal. Rptr. 3d 844 (Ct. App. 2008).

18. Assemb. B. 900 § 11191(a).

19. *Id.* The exact text reads:

Any court or other agency or officer of this state having power to commit or transfer an inmate...may commit or transfer that inmate to any institution within or without this state if this state has entered into a contract . . . for the confinement of inmates in that institution The inmate shall have the right to a private consultation with an attorney of his choice, or with a public defender if the inmate cannot afford counsel, concerning his rights and obligations under this section At any time more than five years after the transfer, the inmate shall be entitled to revoke his consent and to transfer to an institution in this state. In which case, the transfer shall occur within the next 30 days.

Id.

20. *Id.*

21. For an account of the benefits and drawbacks of transferring inmates to other states, see Chris Levister, *Critics Say Inmate Transfers Punish Children and Families*, BLACK VOICE NEWS, February 23, 2007, available at <http://www.blackvoicenews.com/content/view/40525/4/>. Levister describes one volunteer transfer inmate as ecstatic to be moved to a place where television carries ESPN. *Id.* On the other hand, minority children in particular are affected by being separated even further from their incarcerated parents, some of whom have been moved to the other side of the country. *Id.*

22. Press Release, Cal. Dep't of Corrs. & Rehab., CDCR Contracts for Additional Out of State Beds to Reduce Overcrowding (Oct. 5, 2005), available at http://www.cdcr.ca.gov/News/2007_Press_Releases/Press20071005.html. According to former CDCR Secretary James Tilton, temporary transfers will "increase access to medical and mental health care, and effective rehabilitation programs. [Additionally,] [t]he combination of in-prison rehabilitation programs, intensive services in secure community reentry facilities, and increased parole supervision for high-risk offenders will reduce recidivism and provide long term benefits that will make. . . [California] communities safer." *Id.* Tilton resigned on April 15, 2008 from his position as CDCR Secretary. Don Thompson, *Head of Calif. Prison System Retires*, ASSOCIATED PRESS, Apr. 15, 2008, available at <http://www.sfgate.com/cgi-bin/article.cgi?f=/n/a/2008/04/15/state/n095913D80.DTL>. His resignation will take effect May 16, 2008 when he will be replaced by Matthew Cate, the current inspector general of the corrections department since 2004. *Id.*

23. Press Release, Cal. Dep't of Corrs. & Rehab., *supra* note 22. The state has contracted

inmates have been transferred as of March 2008, and a total of 8000 inmates are due to be transferred by April 2009.²⁴

B. The Problem of Numbers

The passage of Assembly Bill 900 represented a bipartisan effort to directly confront the problem of prison overcrowding. Framing the issue of overcrowding as one of public safety (i.e. keeping dangerous offenders from the “revolving door” of the prison system) was likely critical to the bill’s passage, rather than over-emphasizing the constitutional pressure the federal courts have been placing on the state.²⁵

For example, in July 2007, federal district court judges Lawrence Karlton and Thelton Henderson criticized Assembly Bill 900 as not being an efficient solution to the problem of prison overcrowding.²⁶ They ordered the creation of a special panel to look at alternative ways of addressing the problem.²⁷ Signaling their intention to appeal Judge Karlton and Judge Henderson’s decision, both Governor Schwarzenegger and Assembly Member Todd Spitzer, chair of the Assembly Committee on Prisons, characterized the issue as one of public protection. Governor Schwarzenegger declared, “We intend to appeal these orders to ensure that dangerous criminals are not released into our communities.” Similarly, Assembly Member Spitzer warned that “With this ruling, it is inevitable that federal judges will release thousands of prisoners back into our neighborhoods If the federal court does not believe we are meeting its standards, the Legislature has no other option but to intervene in court to argue that releasing felons will be putting the public at risk.”²⁸

with Correctional Corporation of America, the largest private prison company in the country, for transfers to other facilities in Tennessee, Oklahoma, Arizona, and Mississippi. *Id.* The cost will be \$48 million this fiscal year. *Id.*

24. Cal. Dep’t of Corrs. & Rehab., Housing Inmates Out-of-State, <http://www.cdcr.ca.gov/News/HousingInmates.html> (last visited March 23, 2008).

25. As a representative example of statements touting the bill’s passage, see Press Release, Assemblyman Jose Solorio, Press Statement by Assembly Public Safety Committee Chairman Jose Solorio (D-Anaheim) on Governor’s Signing of Historic Prison Construction and Reform Bill (Assemb. B. 900) (May 3, 2007), available at <http://democrats.assembly.ca.gov/members/A69/newsroom/20070503AD69PR01.htm>. Assemblyman Solorio states:

This bill was crafted to prevent the early release of prisoners and stop the revolving door that the status quo represents. That’s good for the general public, and frankly, also for inmates. I am confident that the federal courts will appreciate the impact this legislation will have on reducing prison population in the short and long term. . . . Californians should be proud that their state legislative leaders and Governor have put their party affiliation and ideological differences aside to work together on this important issue. This legislation represents the can-do ability of state government.

Id.

26. Dan Thompson, *Judges Order Panel to Examine California Prison Overcrowding*, ASSOCIATED PRESS, July 23, 2007, available at <http://www.signonsandiego.com/news/state/20070723-1735-ca-californiaprisons.html>.

27. *Id.*

28. *Id.*

However, a straightforward analysis of Assembly Bill 900 reveals that the federal judges may be right, and even an ambitious \$7.4 billion prison expansion package would not fully alleviate the problem of overcrowding. The Senate Rules Committee's analysis of the bill, issued a week before it was signed, reads:

The state prison system currently has 171,000 inmates in space designed to accommodate, *with overcrowding*, approximately 155,000. The inmate population is projected to increase to 190,000 by 2012. Therefore, by 2012, the system will face a bed deficiency of about 35,000. . . . This bill authorizes up to 40,000 new state prison beds, contingent upon significant program enhancements designed to reduce recidivism. This bill also provides the California Department of Corrections and Rehabilitation temporary authority to house up to 8,000 inmates out-of-state until new construction is completed and the results of enhanced anti-recidivism programming impact the inmate population.²⁹

The bill itself suggests, then, that the best possible result is to sustain the current level of "acceptable overcrowding," rather than a reduction in prison population or improvement in general living conditions. It is this very level of "acceptable overcrowding" that has invited judicial scrutiny and the protests of civil rights advocates across the country.

Final judgment on this problem of numbers turns on whether one believes that California's prisons can securely, sustainably, and humanely house one and a half or even two times the number of inmates for which they were optimally designed. Recent research casts doubt on that proposition: experts agree that prison overcrowding correlates directly to increased rates of prisoner illness and disciplinary infractions.³⁰ This is due to an unfortunate cycle whereby increasing unrest causes more force and intimidation to be used by guards in maintaining control, fomenting more unrest.³¹ Furthermore, overcrowding

29. Senate Rules Comm. Rep. Assemb. B. 900, at 1 (emphasis added).

30. Commission on Safety and Abuse in America's Prisons, Hearings on Prisoner Overcrowding: Harmful Consequences and Dysfunctional Reactions, (July 2005) (Testimony of Craig Haney, Professor of Psychology, Univ. of Santa Cruz) [hereinafter Haney Testimony], available at http://www.prisoncommission.org/statements/haney_craig.pdf. The Commission is dedicated to exploring violence and abuse in America's prisons, as well as ways to make prisons safer for inmates and staff. Prisoncommission.org, Commission on Safety and Abuse in America's Prisons, Mission Statement, <http://www.prisoncommission.org/mission.asp> (last visited Apr. 20, 2008). It is co-chaired by former U.S. Attorney General Nicholas Katzenbach and former Third Circuit Chief Judge John Gibbons. *Id.* In summarizing a number of studies, Professor Haney opines that given "high levels of uncertainty, interference, and cognitive load...crowded conditions heighten the level of cognitive strain that persons experience by introducing social complexity, turnover, and interpersonal instability into an already dangerous prison world in which interpersonal mistakes or errors in social judgments can be fatal." Haney Testimony, *supra* note 30, at 3. However, there is not yet consensus on at what levels of overcrowding these effects become significant. *Id.* at 3. Given these studies, one might question if there is such a thing as "acceptable overcrowding" at all.

31. Haney Testimony, *supra* note 30, at 3.

conditions logically necessitate a reduction in rehabilitation and educational programs available to prisoners. Group therapy meetings and one-on-one training and counseling all require additional space and staffing—things in short supply given the crowding situation. When overcrowding situations are at their worst, correctional staff can hope for no more than to keep inmates free from violence and secure in their cells, let alone dream of enrichment programming.³²

Assembly Bill 900 at its most optimistic then, represents spending \$7.4 billion in the hopes that the current overcrowding situation will not worsen, and that the status quo will not lead to long-term undesirable social consequences. Sadly, the current overcrowded conditions are guaranteed to continue for the months and years it will take from the time the new funds are dispersed to the actual construction of the new prison spaces. Additionally, the results of new “enhanced anti-recidivism programming” that the bill is counting on are by no means guaranteed.³³

One might wonder why the State Legislature waited until this year to deal with the issue. Even if prison expansion in the form of Assembly Bill 900 is the best way of addressing California’s prison crisis, demographic projections had already predicted a significant overcrowding situation almost a decade ago.³⁴ The Senate analysis of the bill suggests that the imminent threat of judicial intervention was the primary impetus to stir legislative action. It concedes that “the state faces three federal court cases based on existing court orders. These cases . . . seek overcrowding relief and could result in federal orders to control and/or cap the inmate population.”³⁵ While it is easy to criticize the Legislature for being slow to act (and then acting only under threat of litigation), the truth is that it may well have taken until the crisis reached a boiling point this year for such a massive expenditure to be politically

32. See *id.* at 7-8.

33. See *infra* notes 37-48 and accompanying text for a discussion of Assemb. Bill 900’s rehabilitation provisions. For a discussion on theories of punishment in California and effective reentry programs, see generally Dusty Collier, Note, *The “Ideal” Pendulum Swing: From Rhetoric to Reality*, 13 BERKELEY J. CRIM. L. 177.

34. The earliest published prison population projections available on the CDCR website date from spring of 2000. CAL. DEP’T OF CORRS., FALL 2000 POPULATION PROJECTIONS (2000), available at http://www.cdcr.ca.gov/Reports_Research/Offender_Information_Services_Branch/Projections/F00Pub.pdf. At that time, the prediction of roughly 170,000 inmates by 2007 was remarkably accurate. *Id.* There were 173,312 actual inmates as of June 30, 2007. CAL. DEP’T OF CORRS. AND REHAB., POPULATION REPORTS, MONTHLY REPORT, available at http://www.cdcr.ca.gov/Reports_Research/Offender_Information_Services_Branch/Population_Reports.asp (last visited June 30, 2007). See also LITTLE HOOVER COMMISSION, STATE OF CALIFORNIA, BEYOND BARS: CORRECTIONAL REFORMS TO LOWER PRISON COSTS AND REDUCE CRIME, January 1998, available at <http://www.lhc.ca.gov/lhcdir/144/TC144.html>. The report acknowledges continual investments in California prison infrastructure throughout the 1990s, but those efforts are dwarfed by the sheer size of Assembly Bill 900’s multi-billion dollar expenditure authorization. *Id.*

35. Senate Rules Comm. Rep. Assemb. B. 900, at 6.
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palatable. California's fiscal troubles have long been widely publicized. Authorizing additional funds for prisons towards the beginning of the decade, at a time when Californians faced rolling blackouts due to an aging power grid and cuts in education and other services, would have been the equivalent of political suicide. In politics, grudging pragmatism often trumps prudent foresight. The final vote on Assembly Bill 900 tells this story: the \$7.3 billion deal passed the Assembly 70-1 and the Senate 27-10, with little floor debate.³⁶

C. Rehabilitation and Anti-recidivism Efforts: Substance or Mere Puffery?

Some legislators would be quick to refute the idea of Assembly Bill 900 representing only expanded incarceration by pointing to the bill's numerous provisions for rehabilitation and for improved prisoner health care and treatment programs as evidence of the bill's progressive elements. The official Senate bill analysis on the rehabilitation provisions seems promising at first glance,³⁷ as Assembly Bill 900 requires the new prison spaces to include substance abuse treatment, work programs, education, and mental health care.³⁸ The bill also provides for the creation of a California Rehabilitation Oversight Board, an eleven-member body consisting of education, drug treatment, law enforcement, and prison state officials. The Board is charged with meeting at least quarterly to evaluate, report, and make recommendations on "various mental health, substance abuse, educational, and employment programs for inmates and parolees operated by the Department of Corrections and Rehabilitation."³⁹

To the disappointment of reform-minded advocates, only \$50 million of the \$7.4 billion Assembly Bill 900 monies is specifically earmarked for rehabilitation and treatment.⁴⁰ This distribution scheme belies the great deal of

36. See Press Release, Friends Comm. on Legislation of Cal., FCL Action Alerts (Apr. 27, 2007), available at http://www.fclca.org/curnews/actionalerts/2007/prison_beds0407.html. In fact, the most serious debate centered on the high cost of the measure, and not the general appropriateness of a prison expansion. *Id.* Some Republicans pushed for even more prison beds, but at reduced cost by using private prisons. *Id.* Senator Tom McClintock (R-Thousand Oaks) also objected to financing the new beds with lease-revenue bonds, which do not require voter approval. *Id.* For an account of the floor debate, see Frank D. Russo, California Progress Report, *Prison Bill Passes Legislature and Goes to Governor*, Apr. 26, 2007, available at http://www.californiaprogressreport.com/2007/04/prison_bill_pas.html. Russo describes how the Assembly vote was straightforward, but the Senate debate relatively more contentious. *Id.* The first Senate vote fell well short of the numbers needed for passage, but after a Republican caucus, the needed votes were found. *Id.* The main concerns expressed were the overall cost of the bill, the lack of cost savings measures, the use of revenue bonds to finance the construction, and the lack of a public hearing on Assembly Bill 900 beforehand. *Id.* In the end, Senate Leader Don Perata (D-Oakland) spoke in favor of the bill, calling it a "lousy vote", but with no better choices available in the face of a rapidly worsening situation. *Id.*

37. See Senate Rules Comm. Rep. Assemb. B. 900, at 8-9.

38. See generally Assemb. B. 900 §§ 6140-7021.

39. Assemb. B. 900 § 6141.

40. Assemb. B. 900 § 15602.1(b). HeinOnline -- 13 Berkeley J. Crim. L. 104 2008

rhetoric within the bill itself, and claims a fresh commitment to rehabilitation and anti-recidivism efforts. The bill does require that certain rehabilitative milestones and benchmarks be met before Phase II funding (\$2.5 billion) becomes available. Specifically, 2000 of the 4000 drug treatment slots authorized by Phase I funding must be established. Also, new individualized assessment procedures must be in place for six months, and a minimum of 300 parolees must be served by new crisis care and day treatment programs. The California Rehabilitation Oversight Board must successfully operate for at least a year. Finally, inmate participation in educational programs must increase by at least ten percent.⁴¹ Whether these milestones have been met is to be determined by a three-member panel comprising the State Auditor, the Inspector General, and an appointee of the Judicial Council.⁴² However, the dire overcrowding situation, coupled with new economic opportunities created by the prison expansion project, might well put intense political pressure on the three-member panel to approve the implementation of Phase II even if the rehabilitation goals are not met.

It is unclear where rehabilitation fits into Assembly Bill 900. The fifty million dollars for rehabilitation programs is one piece. However, the order to create and to implement appropriate inmate treatment and prison-to-employment plans⁴³ seems out of place. Certainly the CDCR did not need a legislative directive to implement effective rehabilitation programs on its own. While progressive reformers might be encouraged by continued prison expansion funding conditioned upon rehabilitative progress, the hard numbers and demand for real accountability are not entirely there.

Finally, as of November 2007, six months after the bill was enacted, the rehabilitation measures outlined in Assembly Bill 900 have not gotten off the ground. The Sacramento Bee reported disagreement between the state and counties as to which entity will run new reentry facilities throughout the state as a main cause of the delay.⁴⁴ Local sheriffs do not trust the CDCR to run the facilities, while the state agency is reluctant to relinquish responsibility for those under its charge.⁴⁵

Assembly Bill 900 justifies its more extreme measures, like temporary prisoner transfers out of state, on the premise that the combination of expanded prison facilities and efficacious rehabilitation programs will eventually bring the situation under control.⁴⁶ Though Assembly Bill 900 undoubtedly gives California its more “walls and guards,” only time will tell if the rehabilitation provisions of the bill have any real effect.

41. Senate Rules Comm. Rep. Assemb. B. 900, at 5.

42. *Id.*

43. Assemb. B. 900 § 3105.

44. Andy Furillo, *Big Plan for Change Stumbles*, SACRAMENTO BEE, Nov. 25, 2007, at A1.

45. *Id.*

46. Senate Rules Comm. Rep. Assemb. B. 900, at 1.

III. SENATE BILL 40: SENTENCING

Many experts agree that the California prison crisis can not be solved without meaningful reforms to sentencing.⁴⁷ CDCR does not have a say in determining the size of the prison population. Instead, it is the operation of the courts and Legislature that has steadily increased the length of sentences over time. Governor Schwarzenegger pushed the Legislature to include the creation of a Sentencing Commission within Assembly Bill 900, tasked with reviewing sentencing laws and implementing parole reforms meant to reduce the numbers of parolees forced to return to prison on technical violations.⁴⁸ However, even the Governor's considerable influence could not move the Legislature to fold the controversial idea of sentencing reform into the more acceptable goal of prison construction within Assembly Bill 900. As a result, Senate Bill 40 is the only piece of significant widespread sentencing legislation passed this year, and it is difficult to characterize as especially reform-minded. As described in the Senate Bill Analysis, Senate Bill 40 is meant to address directly the United States Supreme Court's decision in *Cunningham v. California*, which struck down California's determinate sentencing law.⁴⁹ In *Cunningham*, the Supreme Court held that California's determinate sentencing law, which provided for lower, middle, and upper terms, violated the Sixth and Fourteenth Amendments by allowing judges, rather than juries, to decide outside factors which mandated an upper sentencing term.⁵⁰ With the entire state sentencing scheme's future in doubt, legislators hastily came together to create a temporary fix that could maintain the status quo until a more permanent sentencing reform solution could be achieved. The end result was Senate Bill 40.

Difficult Choices

Legislators essentially had three options to deal with the sweeping impact of *Cunningham* on the state sentencing regime. The first was simply to do nothing. By not taking any action, the Legislature would accept that the current determinate sentencing scheme with respect to upper terms was unconstitutional. This would have removed the possibility of upper term sentences being imposed across the board in California. The rest of the state determinate sentencing law would presumably have stayed the same.⁵¹ At first glance, this idea appears attractive. Every upper term imposed does contribute

47. See, e.g., STATE OF CALIFORNIA LITTLE HOOVER COMMISSION, SOLVING CALIFORNIA'S CORRECTIONS CRISIS (2007) [hereinafter LITTLE HOOVER COMMISSION], available at <http://www.lhc.ca.gov/lhcdir/185/Report185.pdf>.

48. *Id.* at 45-46.

49. *Cunningham v. California*, 127 S. Ct. 856, 860 (2007).

50. See Casey McTigue, Note, *The Problem of Post-Cunningham Judicial Review: The Impact of Gall, Kimbrough, and Senate Bill 40 on California Sentencing*, 13 BERKELEY J. CRIM. L. 201, 210-12 (2008) for a thorough discussion of Senate Bill 40 and its relationship to the *Cunningham* decision.

51. See *id.*

in some way to overcrowding at state prisons. But according to the CDCR, only 3793 of 30,597 felon admissions to state prison in 2007 were sentenced to upper terms.⁵² When also considering that the difference between middle and upper terms is often only a year or two in otherwise very lengthy sentences anyway, it might seem reasonable just to accept the *Cunningham* decision.⁵³

However, allowing upper term sentences to be taken off the table likely was unacceptable politically. The traditional factors that contribute to the imposition of upper terms, such as a lack of remorse or the particular vulnerability of the victim, draws the attention of the voting public in a way that few legislators could ignore.⁵⁴ Historically, laws increasing sentences have nearly always been supported by voters, and have been marketed by legislators as necessary responses to crime.⁵⁵ Sentencing enhancements for crimes perceived as particularly egregious, such as sex crimes involving children, almost always receive voter support.⁵⁶ In the wake of *Cunningham*, merely allowing upper terms to lapse was probably politically unfeasible.

The second option to address the Supreme Court's designated deficiencies in the current system was to create a new system of pleading and proof for aggravating factors in a crime that could result in imposition of an upper term. Prosecutors seeking to obtain upper terms would have to charge the factors that would warrant the term, such as prior offenses or lack of remorse, in the initial

52. Per Senate Bill 40, the CDCR must bi-annually publish the number of inmates who have received upper term sentences. See, e.g., DEPARTMENT OF CORRECTIONS AND REHABILITATION, NUMBER OF FELONS ADMISSIONS WITH A FLAG FOR THOSE WHO RECEIVED AT LEAST ONE UPPER TERM SENTENCE WHOSE ADMISSION TO ADULT CDCR WAS WITHIN THE CALENDAR YEAR 2007 (2007), available at http://www.cdcr.ca.gov/Reports_Research/Offender_Information_Services_Branch/Annual/UpperTerm/UpperTermd2007.pdf.

53. This is especially true given California's system of sentencing "enhancements", which are typically legislative additions to crimes committed a certain way, such as hate crimes or particular crimes against women. Enhancements must be pled and proven, but often result in a much higher sentence than the upper term otherwise would have. District Attorneys seeking maximum sentences under the pre-*Cunningham* system were likely to ask for enhancements on the onset rather than leaving it for the judge to impose an upper term during sentencing. In that sense, discussions of upper terms are almost irrelevant unless the enhancement system is overhauled.

54. Consider, for example, "Jessica's Law," also known as the Jessica Lunsford Act passed in Florida in 2005 after a nine year old girl was abducted, raped, and murdered by a previously convicted sex offender. The law adds restrictions on released sexual offenders, such as a prohibition on living near schools or parks and a requirement of wearing GPS monitoring devices for life, as well as increased sentences for repeat offenders. See The Jessica Marie Lunsford Foundation, <http://www.jmlfoundation.org/> (last visited April 11, 2008). Variants of Jessica's Law have been passed in thirty-three states, usually by wide margins, including in California in the form of Proposition 83. See *id.*; Text of Proposition 83 [hereinafter Proposition 83], available at http://www.sos.ca.gov/elections/vig_06/general_06/pdf/proposition_83/entire_prop83.pdf, at 127-38. As of submission of this article for publication, the proposition is on hold until its constitutionality can be reviewed by the courts. Jennifer Warren, *Judge Blocks Part of Sex Offender Law*, L.A. TIMES, Nov. 8, 2006, at A32.

55. See LITTLE HOOVER COMMISSION, *supra* note 47.

56. See Proposition 83, *supra* note 54. HeinOnline, 13 Berkeley J. Crim. L. 107 2008

charging document. A jury then would determine whether those factors had been proven sufficiently (likely under a reasonable doubt standard⁵⁷) to allow imposition of a higher term over the default middle term. By way of contrast, in the prior system judges made this determination.

This idea of a plead and prove system prompted another question: would the proceedings be bifurcated such that evidence in the sentencing phase of a trial would be kept separate from the guilt phase? The advantages of such proceedings are obvious: many types of evidence used to prove the existence of aggravating factors would necessarily invoke concerns of improper character evidence or other prejudicial concerns that would preclude their admission under the current system. A prosecutor might trumpet past convictions or the particular vulnerability of the victim in seeking to meet his burden on sentencing during the guilt phase of trial, but jurors are equally likely to consider such evidence in determining the core issue of a defendant's guilt or innocence. Bifurcation of the guilt and sentencing phases of all criminal trials throughout the state would resemble the bifurcation procedures already used in death penalty cases throughout the country. While this proposal would eliminate the evidentiary issues raised above, it could also create a logistical nightmare, as already backlogged courts would take even longer to dispose of criminal trials. The potential financial cost, loss of judicial resources, and extra burden on district attorneys are all daunting obstacles to setting up separate sentencing phases at trial.

Nonetheless, proponents of a bifurcated system cite the disproportionate impact of judge imposed maximum sentences upon ethnic minorities under the current system, and the high fiscal costs inherent in long-term incarceration. Separate sentencing proceedings arguably could reduce this unequal treatment, and could be done quickly and efficiently in most instances.⁵⁸ Even if states spent more on the implementation of separate proceedings, they could save much more in the long run by avoiding the operational costs of longer sentences that judges typically impose upon defendants.⁵⁹

57. See, e.g., Jeff Adachi, *SB 40 Will Not "Fix" California's Sentencing Scheme and is Unconstitutional*, California Progress Report, Mar. 26, 2007, available at http://www.californiaprogressreport.com/2007/03/sb_40_will_not.html.

58. See *id.* Mr. Adachi, the Public Defender of San Francisco, writes that under the current regime of aggravating factors found by a judge, African-Americans and Latinos receive heavier sentences than Caucasians. *Id.* For example, Caucasians serve an average of twenty-seven months for drug-related offenses, while African-Americans serve forty-six months. *Id.* Adachi further draws comparisons to Kansas's bifurcated sentencing scheme, which adds "only" an hour to each trial. *Id.* However, one might disagree with him in that an extra hour per trial could be considered a trivial or insignificant additional expense. See Matthew Yi, *SF Public Defender Cautions Lawmakers on Sentencing Bill*, S.F. CHRON., Mar. 23, 2007, at B6.

59. See Adachi, *supra* note 57. The notable reason for this is that sentencing factors usually would have to be proven to a jury beyond a reasonable doubt, while under Senate Bill 40, there is no standard of proof for sentences handed down by judges. Judges can find factors on their own, and must only state a "reason" for their sentencing choice. *Id.*

Practically speaking, even a separate bifurcated system may not be necessary to implement a plead-and-prove system. While the evidentiary concerns outlined above are implicated, the fact is that trial court decisions on evidentiary issues are almost never overturned at the appellate level.⁶⁰ Thus, if a judge determines that character evidence is in fact proffered to prove an aggravating factor, and not to show propensity or other improper purpose, then that fact will likely be admissible, and the decision to admit it will remain undisturbed on appeal.⁶¹ It falls to the Legislature to determine whether the policy reasons behind the rules of evidence trump the extra constitutional protections conferred by a plead-and-prove system.

The final option, which the Legislature eventually ratified, was embodied in Senate Bill 40. Simply put, the bill specifically authorizes judges to give sentences without consideration of jury findings or factors, as long as a “reason” is given for the decision.⁶²

There is no question that Senate Bill 40 was designed as a quick fix to the problem presented by the *Cunningham* decision. The Legislature’s action operated to prevent chaos in the courts while more permanent solutions, such as the plead and proof system described above, or the creation of a Sentencing Commission, could be analyzed and put into place. Senator Romero, the bill’s sponsor, deliberately inserted into the bill a two-year sunset provision as a way to remind the Legislature that meaningful sentencing reform must still be addressed.⁶³

Senate Bill 40 is best understood as a means of sidestepping the *Cunningham* decision. The published bill analysis itself describes the new law as functioning to “respond to the decision . . . of *Cunningham v. California* . . . [and to] maintain stability in California’s criminal justice system while the criminal justice and sentencing structures in California sentencing are being reviewed.”⁶⁴ Thus, upper terms may still be imposed by judges without specific findings from juries as long as appropriate “reasons”⁶⁵ are given. As a bill to maintain the status quo then, Senate Bill 40 functions very well. However, whether the slightly modified sentencing scheme will now pass constitutional muster is by no means certain. The Supreme Court may well be dissatisfied with these superficial changes that have merely followed the letter,

60. MICHAEL H. GRAHAM, HANDBOOK OF FEDERAL EVIDENCE § 103 (6th ed. 2007). Evidentiary errors usually must have been preserved at trial and affect the substantive rights of the appellant. See FED. R. EVID. 103.

61. See GRAHAM, *supra* note 60.

62. See S.B. 40, 2007-08 S., Reg. Sess. (Cal. 2007).

63. S.B. 40 §§ 1-4. The bill’s major provisions are scheduled to last until January 1, 2009. Note that Senator Romero has also publicly opposed a separate plead and proof system on the grounds that it would overburden the courts. Adachi, *supra* note 57.

64. SENATE RULES COMMITTEE, SB 40 SENATE FLOOR ANALYSIS 1 (2007), available at http://www.leginfo.ca.gov/pub/07-08/bill/sen/sb_0001-0050/sb_40_cfa_20070327_150041_sen_floor.html.

65. What counts as appropriate is not defined in the bill. See S.B. 40.

and not the spirit, of the *Cunningham* decision.⁶⁶

IV. TOWARDS A LONG TERM SOLUTION: A SENTENCING COMMISSION

Another story in recent California sentencing law lies not in bills such as Senate Bill 40 which were ratified, but rather in bills that were not. This past year saw some of the strongest movements yet for the creation of a sentencing commission in California, both as a part of Assembly Bill 900, and as separate, stand-alone measures. The two separate bills introduced by legislators that failed to pass were Senate Bill 110, introduced by Senator Romero, and Assembly Bill 160, introduced by Assembly Member Sally Lieber.⁶⁷ Additionally, a working group created by the California Correctional Peace Officers Association plans to sponsor legislation that would create a sentencing commission in the near future.⁶⁸ These three proposals share a common objective: the creation of an independent sentencing commission that would conduct research and collect sentencing data with the goal of creating uniform and just sentencing policy throughout the state.⁶⁹

The idea of a sentencing commission was borne largely out of frustration with ever-increasing sentences throughout the state as a result of so called “drive-by legislation.” When particularly heinous crimes are highly publicized, lawmakers eager to appear tough on crime often quickly introduce legislation that includes tougher penalties for offenders.⁷⁰ With the passage of Jessica’s Law and others, well-meaning legislators have enacted more than 100 felony sentence enhancements across twenty-one separate titles of California law.⁷¹ Regardless of intent, these laws are termed “drive-by,” in that lawmakers, after having had their name associated with a particular bill, are usually no longer held accountable for the resulting law. The enhancements remain on the books indefinitely, with the burden of increased sentences falling squarely upon the shoulders of the CDCR. When the next push to increase sentences comes, few consider that the existing laws may already provide ample sentences for the crimes in question. As a result, the prison population grows rapidly, resulting in the present crisis. Legislators, in defending their actions, point to generally widespread voter support for measures to toughen sentences whenever polled. However, as the Little Hoover Commission points out, these surveys rarely present voters with the critical information that additional tax dollars must be spent, or alternative public services must be cut, in order to support the extra

66. See McTigue, *supra* note 50, for a criticism of Senate Bill 40.

67. S.B. 110, 2007 S. Reg. Sess. (Cal. 2007); Assemb. B. 160, 2007-08 Assemb. Reg. Sess. (Cal. 2007).

68. LITTLE HOOVER COMMISSION, *supra* note 47.

69. See *id.*

70. See Proposition 83, *supra* note 54.

71. LITTLE HOOVER COMMISSION, *supra* note 47, at 34. See also Proposition 83, *supra* note 54.
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cost of increased incarceration resulting from tougher sentencing schemes.⁷²

The realization that logical sentencing may well have to be divorced from the realm of politics and emotional public opinion has engendered the push for the creation of a Sentencing Commission. However, conservatives in the legislature have successfully defeated all attempts to create such a commission by characterizing those efforts as a sneaky way to reduce sentences.⁷³ Pragmatically speaking, this is likely to be true in the aggregate. An independent Sentencing Commission may increase sentences for some offenses while reducing them for others; nevertheless, the main point is to have diverse and accountable experts, instead of politicians, drive sentencing policy. These experts are ideally backed by authoritative research, immune from political pressures, and unmotivated by personal gain.

The Politics of Sentencing

It is a sad fact that data-driven efforts by legislators to reform sentencing and address the prison crisis have succumbed to politics. One example of this has been Senator Romero's Receivership/Overcrowding Crisis Aggravation (ROCA) policy, instituted in early 2007.⁷⁴ As chair of the Senate Public Safety Committee, Senator Romero (D-Los Angeles) declared that any bill presented to the committee that might contribute to the prison overcrowding problem—particularly bills that might increase sentences—would be held and not allowed to progress at least until 2008.⁷⁵ The Senate Republican Caucus, frustrated that seventeen Senate and nine Assembly Bills were languishing on the desk of the Public Safety Committee, has sharply criticized the senator's policy.⁷⁶ Republican Senator Ackerman has called the policy "Crime with no punishment. . . a policy that has stalled important public safety bills and, as a consequence, will increase California's crime and result in significant damage to public safety."⁷⁷ Republican Senator Harman was even more blunt. His

72. See LITTLE HOOVER COMMISSION, *supra*, note 47, at 38.

73. Megan Corcoran, Center on Juvenile and Criminal Justice, *What a California Sentencing Commission Might Do*, Feb. 20, 2007, http://www.californiaprogressreport.com/2007/02/what_a_californ.html ("It is a great disappoint, therefore, to read statements asserting that sentencing commissions are intended as nothing more than a mechanism to reduce inmate sentences with no public accountability."). Assembly Bill 160 did not pass the Senate, by a vote of 25-9. Assemb. B. 160, Complete Bill History, California Legislation Information, *available at* http://www.leginfo.ca.gov/pub/07-08/bill/asm/ab_0151-0200/ab_160_bill_20080213_history.html. This bill differed from Senate Bill 110 primarily in that it would have created a Sentencing Commission based on a model from other states. *Id.*

74. Press Release, California State Senate Republican Caucus, Receivership/Overcrowding Crisis Aggravation ("ROCA") (Aug. 22, 2007), *available at* <http://republican.sen.ca.gov/opeds/99/oped4059.asp>.

75. See *id.*

76. See CALIFORNIA STATE SENATE REPUBLICAN CAUCUS, BRIEFING REPORT: RECEIVERSHIP/OVERCROWDING CRISIS AGGRAVATION ("ROCA") (2007), *available at* <http://republican.sen.ca.gov/opeds/99/oped4059.asp>.

77. Press Release, San Mateo County Republican Party, Crime with No Punishment (Sept. 5,

press release read, "Senate Chair Stalls Legislation to Punish Child Rapists" after his bill to make the transmission of child pornography over the internet a felony was held in committee.⁷⁸ Those in Senator Romero's camp may well counter that while all lawmakers should be lauded for being tough on crime, pushing for sentencing enhancements without a sound policy basis for doing so is more irresponsible than decisive. Perhaps the saddest irony is that the creation of a Sentencing Commission is inhibited by the very kind of politicking and unthinking emotionalism it is intended to curtail.

V. COMMITTEE ON FAIR ADMINISTRATION OF JUSTICE BILLS: THE GOVERNOR SHOWS HIS HAND

The prison crisis dilemma is compounded by the issue of wrongful convictions. Not only does the imprisonment of an innocent citizen represent a betrayal of justice of the highest order, but any wrongful incarceration in an already overburdened system is a cost Californians can ill-afford to pay. Since DNA evidence has begun to be accepted throughout the country, well-publicized exonerations based on this evidence have helped stir reform in the criminal justice system in all states.⁷⁹ The California Commission on the Fair Administration of Justice was established by the Senate in 2004 with three objectives for addressing the issue of wrongful convictions:

- (1) To study and review the administration of criminal justice in California to determine the extent to which that process has failed in the past, resulting in wrongful executions or the wrongful conviction of innocent persons.
- (2) To examine ways of providing safeguards and making improvements in the way the criminal justice system functions.
- (3) To make any recommendations and proposals designed to further ensure that the application and administration of criminal justice in California is just, fair, and accurate.⁸⁰

As originally planned, the Committee was to present its findings and recommendations to the Legislature and to the Governor by December 31, 2007. However, because of a need for additional time to complete its work, the Legislature passed Senate Resolution 44 on June 28, 2007, granting a six-month extension, until June 30, 2008. The Committee has not waited until the new deadline to urge change. Instead, 2007 was a year of intense activity, as the Committee authored and lobbied for a trio of bills designed to reduce the

2007), available at <http://www.sanmateogop.org/press/index.cfm/ID/145.htm>.

78. Press Release, State Senator Tom Harman, Senate Chair Stalls Legislation to Punish Child Rapists (Apr. 17, 2007), available at <http://republican.sen.ca.gov/news/35/pressrelease4592.asp>.

79. See, e.g., Kevin Johnson, *DNA Tests Fuel Urgency To Free The Innocent*, USA TODAY, Feb. 18, 2008, at 1A.

80. S. Res. 44, 2007-08 S., Reg. Sess. (Cal. 2004). HeinOnline 13 Berkeley J. Crim. L. 112 2008

leading causes of wrongful convictions in California.⁸¹ Unexpectedly, all three bills were enacted by the legislature but vetoed by Governor Schwarzenegger with little explanation.⁸²

Senate Bill 756 sought to convey a task force to study and to improve eyewitness identification and photo lineup procedures for police. It contained no hard reforms in and of itself, but merely authorized a group to study and propose a set of voluntary guidelines for law enforcement investigations that could later turn into future legislation.⁸³ The bill was vetoed by the Governor on the grounds that it would unduly restrict law enforcement agencies. His corresponding veto message was brief and to the point: “Law enforcement agencies must have the authority to develop investigative policies and procedures that they can mold to their own unique local conditions. . . rather than be restricted to methods created that may make sense from a broad statewide perspective.”⁸⁴

Sponsored by Senator Romero and supported by both district attorneys and public defenders throughout the state, Senate Bill 609 would have required the corroboration of testimony by in-custody informants. Many District Attorney’s offices and law enforcement agencies already consider “jail house” informants so inherently unreliable that they rarely solely rely upon them to secure a conviction.⁸⁵ One report actually found that false testimony from jailhouse informants is the leading cause of wrongful convictions in United States capital cases.⁸⁶ In spite of this, the Governor’s short veto message indicated his opinion that the bill was not needed:

This bill would enact a broad solution to a perceived problem that arises in very few criminal cases. In-custody informant testimony is disfavored and therefore rarely used. When that kind of testimony is necessary, current criminal procedures provide adequate safeguards against its misuse. Consequently, this bill is unnecessary.⁸⁷

Finally, Senate Bill 511 would have required the electronic recording of interrogations held at police stations and jails for cases involving homicides

81. See Press Release, California Committee on the Fair Administration of Justice, CCFJA Hails Bills’ Senate Passage (June 22, 2007), available at <http://www.ccfaj.org/news.html>.

82. See *infra*, notes 84, 87, 90, and accompanying text.

83. Press Release, California Committee on the Fair Administration of Justice, CCFJA Hails Bills Awaiting Governor’s Signature (Sept. 18, 2007), available at <http://www.ccfaj.org/document/s/press/Press16.pdf>.

84. Gov. Arnold Schwarzenegger, Veto Message on S.B. 756 (Oct. 13, 2007), available at http://info.sen.ca.gov/pub/07-08/bill/sen/sb_0751-0800/sb_756_vt_20071013.html.

85. Press Release, California Committee on the Fair Administration of Justice, CCFJA-Endorsed Bill Requiring Corroboration of Informants Passes Assembly (Sept. 5, 2007), available at <http://www.ccfaj.org/documents/press/Press14.pdf>.

86. *Id.*

87. Gov. Arnold Schwarzenegger, Veto Message on S.B. 609 (Oct. 13, 2007), available at http://info.sen.ca.gov/pub/07-08/bill/sen/sb_0601-0650/sb_609_vt_20071013.html.

and other violent felonies.⁸⁸ This bill was a second incarnation of a recording requirement bill, revised after the Governor had expressed concerns of unduly restricting law enforcement.⁸⁹ The revised bill, while handily passing the legislature, apparently did not alleviate his concerns:

I cannot support a measure that would deny law enforcement the flexibility necessary to interrogate suspects in homicide and violent felony cases when the need to do so is not clear This bill would place unnecessary restrictions on police investigators.⁹⁰

The Governor's surprising eleventh-hour vetoes dealt a serious blow to reform-minded advocates throughout the state. In all three cases, there had been no prior indication that he would oppose the bills. All three bills had been the product of progressive, painstaking research on the part of the Commission, itself comprised of bipartisan members representing the entire spectrum of the California criminal justice system.⁹¹ The short statements accompanying each veto did little to reveal the mind of the Governor. Predictably, the Committee immediately expressed its disappointment. In a press release, Committee Chair John Van De Kamp blasted the influence of the law enforcement lobby on the Governor in "taking California out of the front lines of criminal justice reform."⁹² Characterizing the defeated legislation as "modest bills . . . based on the best science and the best practices available," Van De Kamp pointed out that every state newspaper that had editorialized on the bills had supported them.⁹³ He also pointed to the positive results experienced by other states that had implemented similar measures, and urged local agencies to adopt the needed reforms on their own.⁹⁴

Without more of an official statement from the Governor, it is impossible to tell if the Commission's speculation that the law enforcement lobby had undue influence on the Governor in opposing the bills is correct.⁹⁵ Regardless, the difficulty the state has had in legislating for criminal justice reform is

88. S.B. 511, 2007-08 S., Reg. Sess. §§ 1-4 (Cal. 2007).

89. Press Release, California Committee on the Fair Administration of Justice, *supra* note 81.

90. Gov. Arnold Schwarzenegger, Veto Message on S.B. 511 (Oct. 13, 2007), *available at* http://info.sen.ca.gov/pub/07-08/bill/sen/sb_0501-0550/sb_511_vt_20071013.html.

91. Notable members of the Commission include: Attorney General Jerry Brown, Federal District Court Judge John Moulds, Pleasant Hill Chief of Police Pete Dunbar, Los Angeles Rabbi Allen Freehling, Former President of the State Bar and California Attorney General John Van De Kamp, and Law Professor and Director of the Northern California Innocence Project Kathleen Ridolfi. For a complete membership list, see the CCFAJ website at <http://www.ccfaj.org/membership.html>.

92. Press Release, California Committee on the Fair Administration of Justice, Commission Chair Responds to Vetoes of Criminal Justice Reform Bills (Oct. 18, 2007), *available at* <http://www.ccfaj.org/documents/press/Press17.pdf>.

93. *Id.*

94. *Id.*

95. See Press Release, California Committee on the Fair Administration of Justice, *supra* note 92.
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apparent. The hurdle of clearing the Governor's mansion has proved no less daunting than ensuring the bill survived the Legislature intact.

CONCLUSION

In sum, the past year's legislative efforts have produced, at best, mixed results. Proponents of Assembly Bill 900, the centerpiece of recent California criminal legislation, would likely praise the Legislature's bold move to address the prison crisis. Those proponents would likely point to the rehabilitation goals included in Assembly Bill 900 as a sign of progressive reform. Additionally, the Legislature deserves some praise for acting quickly to address the *Cunningham* decision in Senate Bill 40, if only by maintaining the status quo.

More reform-minded advocates, however, will be disappointed with last year's lack of more sweeping change. Perhaps no issues are more quickly politicized than those concerning public safety. As a result, an understandable reluctance on the part of legislators to appear soft on crime has stymied efforts to bring about the progressive reform that these advocates have sought. Critics of the work done by the Legislature will likely end up frustrated with a well-meaning legislative process shackled by the reality of politics. The most cynical might say this reality is even more somber when considered alongside the differing and often indiscernible vision of a conservative Governor eager to tout his independence in public but arguably beholden to the powerful prison and law enforcement lobby all the same. Collectively, those most disappointed might characterize recent California criminal legislation as no more than a series of half-starts and stops aimed more at preserving the status quo than at achieving the meaningful change that all Californians deserve.

