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Authorized Dispositions of Offenders Under the New Kentucky Penal Code

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AUTHORIZED DISPOSITIONS OF OFFENDERS
UNDER THE NEW KENTUCKY PENAL CODE

There has recently been a growing public concern over the manner in which convicted criminals are treated in our society. Numerous newspaper stories, magazine articles and television specials have probed, examined, and criticized the present system that, to varying degrees, seeks to rehabilitate, punish and deter those who have committed serious offenses against society. The prison riots of late, the high rate of recidivism among convicted criminals, and the expense of keeping a man in prison are convincing arguments that penal reform is needed. A number of states, including Kentucky, have responded by enacting revised criminal statutes which incorporate modern theories of penology.

The new Kentucky Penal Code makes several important changes in the laws pertaining to the authorized penalties for offenders. Accordingly, the purpose of this article is to give the reader a working grasp of the law of sentencing. It is important that practicing attorneys and trial judges understand the interrelationship of the various sections and the wide range of sanctions available under the new law. Indeed, since the drafters of the Kentucky Penal Code stress the importance of flexibility in the alternatives available to the sentencing authority, it would seem that a necessary prerequisite to enlightened sentencing practices is a thorough familiarity with the provisions of the new law.

Besides the changes made in the law itself, the new Penal Code adopts a modern approach to the implementation of the sections on sentencing. The drafters of the Code have apparently decided that the primary objective of criminal sanctions should be the rehabilitation of the offender. While elements of retribution, deterrence, and neutralization, the other generally accepted theories of sentencing, are present in the new Code provisions, the predominant theme is that

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2 Statistics indicate that it costs on an annual national average, $1966 to imprison a felon, $1046 for inmates of local institutions, and $3613 for every juvenile. Kentucky Commission on Law Enforcement and Crime Prevention, Kentucky Jails 2 (1969). In Kentucky, the annual average cost of keeping a person confined in a local jail is $1116.90. Id. at 30.

3 See Kentucky Legislative Research Commission, Kentucky Penal Code §§ 3405-3625, Commentary (Final Draft 1971) [hereinafter cited as LRC] wherein the term flexibility is repeatedly used by the drafters in describing the significance of the various sections of the new code.
rehabilitation is more effective and more economical.\textsuperscript{4} It is hoped that, by reforming the criminal and turning him into a useful, law-abiding member of society, the wasting of human resources can be avoided and real progress can be made towards reducing crime.\textsuperscript{5}

Yet the goals of even the most enlightened sentencing code are more easily stated than accomplished. The sentencing authority, generally the trial judge, must have at his disposal a sufficient diversity of sanctions, and he must be willing to impose the penalty which will achieve the best result for both the criminal and society.\textsuperscript{6} The automatic sentence for various crimes, without giving due consideration to alternatives such as probation or a fine which might be more appropriate in the individual case, should be avoided. Indeed, it can be said that the success of sentencing depends upon a combination of modern enabling legislation,\textsuperscript{7} skilled trial judges\textsuperscript{8} and adequate correctional facilities.\textsuperscript{9} While the latter two elements require time, expense, and the commitment of many individuals, the Kentucky General Assembly has done its part towards an improved system of criminal sentencing by enacting the new Penal Code.

\textit{Jury Sentencing vs. Judge Sentencing}

One important aspect of pre-existing law has been retained in the new Code. Aligning itself with the minority view, Kentucky will retain jury sentencing.\textsuperscript{10} Under this process the jury makes the initial determination of the maximum sentence at the same time it renders its verdict. Most jurisdictions vest this responsibility in the trial judge,

\begin{itemize}
\item \textsuperscript{5} Palmore, \textit{Sentencing and Correction}, supra note 4, at 6-7.
\item \textsuperscript{6} ABA \textit{Project on Minimum Standards for Criminal Justice, Standards relating to Sentencing Alternatives and Procedures} § 2.1(b) (Tentative Draft 1967) [hereinafter cited as ABA, \textit{Sentencing Alternatives}] states: "The sentencing court should be provided in all cases with a wide range of alternatives, with gradations of supervisory, supportive and custodial facilities at its disposal so as to permit a sentence appropriate for each individual case.
\item \textsuperscript{7} ABA, \textit{Sentencing Alternatives} supra note 6, at § 2.1, Commentary b-e at 50-55.
\item \textsuperscript{8} "Wise and fair sentencing requires intuition, insight, and imagination; at present it is less a science than an art. In the final analysis good sentencing depends on good judges." \textit{President's Commission, The Challenge of Crime}, supra note 1, at 141.
\item \textsuperscript{9} For a study of the present state of our correctional institutions and recommendations for improvements in the area of corrections, see \textit{President's Commission, The Challenge of Crime}, supra note 1, at 158-85.
\end{itemize}
and indeed recent opinion has been nearly unanimous that jury sentencing should be abolished in non-capital cases.

There are several persuasive arguments against jury sentencing in non-capital cases. Most often cited is the fact that juries lack the expertise in sentencing, and thus are not capable of consistently prescribing the penalty which will be most effective. While a judge brings with him to every trial a wealth of knowledge and experience in the treatment of criminals, a jury is composed of laymen most of whom have no experience whatsoever. Further, the constantly changing membership of juries creates a greater chance of disparity in sentencing from case to case involving the same type of crime.  

Besides the general lack of expertise, a jury does not have before it all the information about the defendant which it needs to make a truly informed decision. Though the jurors may be able to gain some insight into the character of the defendant during the trial, the rules of evidence preclude them from receiving all information relevant to sentencing. Certainly, the jury has no equivalent to the presentence report available to the trial judge. A possible solution would be to have a separate sentencing trial at which all relevant data would be admissible. This suggestion, however, has been rejected as both too time-consuming and too costly.

It is also claimed by critics of jury sentencing that jurors are more likely to be influenced by passion or prejudice. Thus, one defendant might receive a stiffer penalty than another solely because of the jury's attitude toward the defendant, or perhaps his attorney. Although these allegations are difficult to substantiate, certainly such factors as the defendant's race, appearance, and conduct must to some extent enter into the sentencing decision as well as the decision of guilt or innocence.

A less obvious weakness in jury sentencing is the possibility that the added responsibility of fixing the penalty might interfere with the jury's primary function of determining the innocence or guilt of the accused. Critics argue that under jury sentencing jurors are able

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11 ABA, Sentencing Alternatives, supra note 6, at § 1.1, Commentary a-b at 43-47; President's Commission, The Challenge of Crime, supra note 1, at 145; Note, Sentencing: The Good, The Bad and The Enlightened, supra note 4, at 473-80.
12 See ABA, Sentencing Alternatives, supra note 6, at § 1.1, Commentary b at 44-47; Palmore, Sentencing and Correction, supra note 4, at 718.
13 Id.
14 See text accompanying notes 44-50 infra.
15 See Note, Sentencing: The Good, The Bad and The Enlightened, supra note 4, at 473-76.
to compromise on a defendant's guilt in return for a lighter sentence.\textsuperscript{16} The seriousness of such practice is apparent. An accused may be denied his right to be convicted only by a unanimous verdict because of a jury's desire to expedite a decision.

Most jurisdictions, including the federal system, have adopted judge sentencing. Under this procedure, after the defendant is found guilty by judge or jury, the trial judge must either grant probation or sentence the offender to a term of imprisonment within the limits set by statute. Once the offender is sentenced to prison, his release prior to the expiration of the set term is determined by the parole board.\textsuperscript{17} Since the actual amount of time the offender spends in prison is in the discretion of the parole authorities, the real distinction between jury sentencing and judge sentencing lies in who must designate the maximum term. The most attractive aspect of judge sentencing is that most trial judges have had considerable experience in sentencing criminals and have developed a certain amount of expertise in the field.\textsuperscript{18}

Another proposed alternative to jury sentencing is the procedure which has been adopted in California.\textsuperscript{19} There, once an offender is found guilty, the trial judge must either grant probation or sentence the person to the maximum term of imprisonment under the applicable statute. The initial determination of the length of the imprisonment and such matters as parole and parole revocation are the responsibility of an Adult Authority staffed by appointed officials. The effectiveness of the Adult Authority depends upon the competency of the members.\textsuperscript{20} Nevertheless, this method has several distinct advantages over both jury sentencing and judge sentencing. In the first place, the Authority is not as subject to community pressures as is a trial judge. Further, the decisions of the Adult Authority are the result of the deliberation of several persons rather than being a conclusion drawn by one individual. Finally, this procedure improves on the process of jury

\textsuperscript{16}ABA, Sentencing Alternatives, \emph{supra} note 6, at § 1.1, Commentary \textit{b} at 46.

\textsuperscript{17}KYPC § 265(3) [KRS § 435A.1-060(3)] provides that the actual time of release within the maximum set by the judge or jury shall be determined by procedures established elsewhere by law. Thus, the sentencer sets only the maximum term of imprisonment while the actual time of release is determined by the Parole Board. Unlike the federal system, the jury or judge cannot impose a minimum term of imprisonment. \emph{See} LRC § 3430, Commentary.

\textsuperscript{18}See note 12 \emph{supra}.

\textsuperscript{19}See LRC § 3430, Commentary; Palmore, Sentencing and Correction, \emph{supra} note 4, at 9-10; Note, Sentencing: The Good, The Bad and The Enlightened, \emph{supra} note 4, at 469-72.

\textsuperscript{20}Note, Sentencing: The Good, The Bad and The Enlightened, \emph{supra} note 4, at 480.
sentencing in that the Authority has more relevant information before it than does a jury; has more time to consider such information and to consider a proper punishment; and has developed an expertise and uniform policy of sentencing which the lay jury lacks.\(^{21}\)

While a majority of jurisdictions and most commentators in the field of criminal justice and penology are opposed to the practice, there are several valid reasons supporting the decision to retain jury sentencing in Kentucky. Proponents of jury sentencing observe that trial judges are often prone to callousness towards criminals and are equally susceptible to the influence of their passions and prejudices. In this respect a jury, consisting of a number of individuals, is preferable since there is less chance that an entire jury will be swayed by outside influences. Likewise, jurors, who serve only occasionally, are relatively anonymous and are less subject to public pressure as a result of their jury room decisions than are elected judges. Finally, some theorize that where judges are charged with the responsibility of sentencing, juries may be tempted to acquit a guilty defendant for fear that the judge might impose a harsh penalty.\(^{22}\)

Although the weight of authority is in favor of judge sentencing in non-capital cases, the opposite is true in capital cases. There are sound reasons for having a jury determine the sentence where the death penalty is a possibility. The decision to impose the death penalty should be made by a cross-section of the community, thus reflecting a consensus of the community’s sense of justice. Forcing the jury to make this decision also relieves the trial judge of a tremendous burden. A further consideration in favor of jury sentencing in capital cases is the possibility that a jury which does not favor the death penalty would refuse to convict a defendant if they could not be assured that the sentence of death would not be imposed.\(^{23}\)

Although some believe that the retention of jury sentencing is the major weakness of this part of the new Penal Code,\(^{24}\) this weakness is not critical. Most errors committed by the jury are subject to correction by the trial judge or by the parole board.\(^{25}\) If a jury sets a

\(^{21}\) LRC § 3430, Commentary. One of the most important features of the California correctional process is the individualized treatment of the offender, with emphasis on psychiatric therapy, which is aimed towards preparing the individual for life beyond the prison walls. See Palmore, Sentencing and Correction, supra note 4, at 9-10.

\(^{22}\) See ABA, Sentencing Alternatives, supra note 6, at § 1.1, Commentary b at 44; Moreland, Model Penal Code: Sentencing, Probation and Parole, 57 Ky. L.J. 51, 56-57 (1968) [hereinafter cited as Moreland, Model Penal Code].

\(^{23}\) ABA, Sentencing Alternatives, supra note 6, at § 1.1, Commentary c at 47-48.

\(^{24}\) LRC § 3430, Commentary.

\(^{25}\) Id.
term of imprisonment which, though within the statutory limits, is deemed too harsh, the trial judge is empowered under *Kentucky Penal Code* § 266 [hereinafter cited as KYPC], *Proposed Ky. Rev. Stat.* § 435A.1-070 [hereinafter cited as [KRS]], to modify the jury's sentence and to fix a different maximum sentence. Moreover, if the judge is convinced that imprisonment would be inappropriate, he may grant probation or conditional discharge in lieu of imposing the jury's sentence. Finally, since all sentences for felonies are indeterminate, the parole authorities are empowered to release the offender at any time after he is turned over to the Department of Corrections regardless of the maximum term set by the jury.

The only error which cannot be cured is where the jury returns a sentence which is too lenient. Neither the trial court nor the parole board can increase the maximum term of imprisonment set by the jury. Yet, despite this flaw, the drafters of the Code have determined that the advantages of jury sentencing outweigh the disadvantages.

**Authorized Dispositions: Generally**

A major improvement made in the new penal code is the classification of all felonies and misdemeanors. Under the existing law each criminal statute prescribes the sanction to be imposed. The problem inherent in such a system is that one offender can be punished more severely than another who has engaged in substantially the same type of conduct in terms of harm done. The fact that, at present, one who steals up to ninety-nine dollars in cash or property is subject to imprisonment for a maximum of twelve months while one who takes a two dollar chicken is liable to serve up to five years, may be a source of amusement to some, but it is certainly not indicative of a modern system of criminal justice. By classifying all felonies and misdemeanors according to their seriousness, the Code achieves a more uniform, rational, and equitable sentencing structure.

All felonies defined within the Code are placed in one of four classes: A, B, C, or D felonies. There are three classes of mis-
demeanors: Class A, Class B, or Violations. Since the Code has retained jury sentencing the drafters decided that a four-tier classification of felonies was necessary in order to limit the jury's range in fixing maximum sentences. This same reason prompted the drafters to divide non-felonies into three categories.

The authorized punishments for those convicted of Class A felonies are death, life imprisonment, imprisonment for some other indeterminate period not less than twenty years, or a fine. Additionally, in one specific case, the sentence of life imprisonment without privilege of parole is authorized. This punishment may only be prescribed in first degree rape convictions in which the victim was under twelve years of age or in which the victim received serious physical injuries. Originally, the final draft of the code had provided that life without parole would be an authorized punishment in all Class A felony cases. The legislators, however, opted to limit the application of this sentence to the one particular crime.

As enacted, this provision authorizing life imprisonment without parole departs from existing law very little. Under present criminal statutes in Kentucky, such a sentence is authorized for but one crime, the rape of a girl over twelve. Thus, as the law now reads, one convicted of raping a girl over twelve is subject to being imprisoned for life without the possibility of parole, while one convicted for the rape of a girl under twelve cannot be denied parole. The Code cures this discrepancy by prescribing the more severe penalty, life imprisonment without parole, for the more serious offense, rape of a girl under twelve.

It should also be noted that the sentence of life imprisonment without privilege of parole cannot be imposed on juveniles, even when tried as adults. In two recent cases, Anderson v. Commonwealth and Workman v. Commonwealth, the Court of Appeals held that this sentence, as applied to juveniles, is unconstitutional as a form of

34 Id.
35 LRC § 3405, Commentary. See also ABA, SENTENCING ALTERNATIVES, supra note 6, at § 2.1, Commentary at 52. Some states have established five classifications of felonies, and others three degrees of felonies. Likewise, some jurisdictions have two types of misdemeanors while others have three types.
36 KYPC § 263 [KRS § 435A.1-030].
37 KYPC § 263 [KRS § 435A.1-030]; KYPC § 264 [KRS § 435A.1-040]. The question whether the Parole Board is bound by such a sentence is seemingly answered in KRS § 439.840 which empowers the board to release on parole such persons as are eligible for parole.
38 LRC § 3415.
39 KRS § 435.090.
40 Compare KRS § 435.090 with KRS § 435.080.
41 465 S.W.2d 70 (Ky. 1971).
42 429 S.W.2d 374 (Ky. 1968).
cruel and unusual punishment. The Court reasoned that, since the objective of this sentence is to isolate from society the dangerous and incorrigible criminals, such a penalty is improper for juveniles, incorrigibility being inconsistent with youth.\textsuperscript{43}

With regard to the sentences of death and life imprisonment without privilege of parole, the General Assembly rejected the proposal that a separate proceeding be held to determine whether these sentences should be imposed. The final draft of the Penal Code had provided for a separate sentencing hearing, after the determination of guilt, at which evidence is presented to the jury in order to aid them in deciding whether to impose the death penalty or life imprisonment without privilege of parole, rather than some other indeterminate sentence of imprisonment.\textsuperscript{44} The main feature of this procedure, as opposed to the system wherein the jury must determine the sentence when they determine guilt, is that much more data relevant to making an informed sentencing decision is available to the jury. When the issues of guilt and punishment are resolved in a single trial, the rules of evidence deny the jury much information concerning the circumstances of the crime, the defendant's background, character, and other mitigating or aggravating matters.\textsuperscript{45} Another argument in support of separate sentencing trials is that the jury can more ably attend to the determination of guilt and is less likely to engage in jury nullification or jury bargaining.\textsuperscript{46}

However, those who favor the single verdict procedure over the split verdict system, and a large majority of jurisdictions do prefer the former,\textsuperscript{47} claim that a separate proceeding would be too costly and time-consuming.\textsuperscript{48} Moreover, it has been suggested that these "second trials" would raise additional complex problems such as: who would prove what and what should the standard of proof be? Would the jury have absolute discretion at this stage or could their decision be reviewed for error? Could the trial judge direct a verdict of life imprisonment at this stage, if the evidence clearly indicated that

\textsuperscript{43} Id. at 378.
\textsuperscript{44} LRC § 3440. See Model Penal Code § 201.6, Comments 5-6 at 74-79 (Tent. Draft No. 9, 1959).
\textsuperscript{45} Id.; see Note, Bifurcating Florida's Capital Trials: Two Steps are Better Than One, 24 U. FLA. L. REV. 127, 146-51 (1971) and Comment, The Constitutionality and Desirability of Bifurcated Trials and Sentencing Standards, 2 SETON HALL L. REV. 427, 428-29 (1971).
\textsuperscript{46} Note, Bifurcating Florida's Capital Trials: Two Steps are Better Than One, supra note 45, at 147.
\textsuperscript{47} Only six states have adopted the separate sentencing trial procedures: California, Connecticut, Georgia, New York, Pennsylvania and Texas.
result? These are several questions which would have to be resolved if the split verdict procedure were implemented.40

Perhaps the most effective criticism of the separate sentencing trial is that it would probably work against the defendant more than it would work in his favor. Certainly, some defendants would fare better with a bifurcated trial; but, on the other hand, this procedure is a two-way street, and while the defendant can offer evidence which would tend to mitigate his sentence, the prosecutor is given the opportunity to counter with proof of the defendant's character and history of prior misconduct. Under the present unitary trial system, a defendant can, by exercising his right not to testify and taking advantage of the restrictive rules of evidence, effectively keep from the jury any information relating to his character or prior crimes. Therefore, the offender who has a criminal record and whose character could not withstand close scrutiny is better protected from the possibility of a sentence based on passion or prejudice where the jury determines his guilt and his penalty at the same time.50

It would seem that enlightened sentencing would require that all relevant information, favorable or disfavorable to the offender, be presented to the person or persons who must settle upon an appropriate penalty. The presentence report, which must be prepared and given to the trial judge before he imposes the sentence in all felony convictions, serves a similar function. Nevertheless, possibly because they felt that the additional proceeding would be too expensive or would further lengthen the time it takes to try a criminal case, or perhaps because they were concerned that defendants would be prejudiced by a separate sentencing trial, the General Assembly decided to retain the present procedure wherein the jury fixes the sentence when they determine guilt.

Most offenders convicted of serious crimes are sentenced to a term of imprisonment. The new Code specifies for each class of felonies the range within which the judge or jury must set the maximum indeterminate sentence.51 Except where the offender may be sentenced as a persistent felon, the maximum terms of imprisonment are: for Class A felonies, not less than twenty years nor more than life imprisonment; for Class B felonies, not less than ten years nor more than twenty years; for Class C felonies, not less than five years nor more than ten years; and for Class D felonies, not less than one year nor more than

40 Id.
51 KYPc § 265 [KRS § 435A.1-060].
five years. Since all felony sentences are indeterminate, the sentencing authority can only designate the maximum number of years which may be served. Neither the judge nor the jury can set a mandatory minimum sentence. Once the offender is turned over to the Department of Corrections, the amount of time that he actually serves is determined by the parole authorities. Thus, although the sentencer must levy a maximum term of between ten and twenty years for one convicted of a Class B felony, the amount of time served could be much less than ten years. This is consistent with the Code's objective of reforming and rehabilitating the criminal. If rehabilitation is the primary goal, the actual length of imprisonment, up to the maximum set by the sentencer, should be determined by those who supervise and continually re-evaluate the offender's case long after the jury is dismissed.

The Code provides that the maximum sentence of imprisonment shall be twelve months for Class A misdemeanors and nine months for Class B misdemeanors. In misdemeanor cases the jury or trial judge sentences the offender to a definite term of imprisonment in the city or county jail or in a regional correctional institution. This, however, does not mean that misdemeanants must serve the entire sentence. Under existing statutes, which will not be superseded by the adoption of the Code, misdemeanants may be granted parole, generally by the county judge. Nevertheless, while it is hoped that felons can be rehabilitated or reformed by serving a sentence in prison, the drafters of the Code readily acknowledge that, due to minimal opportunity to individualize punishment or treatment in local jails, imprisonment for misdemeanor convictions can only be justified as a deterrent. Indeed, the most notable achievement the Code makes

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52 LRC § 3420, Commentary.
53 The Model Penal Code §§ 6.06, 6.07, Comment at 24-26 (Tent. Draft No. 2, 1954) sets a minimum sentence which the court shall impose for felony convictions. The minimum is raised for sentencing of those who are sentenced to extended terms as being dangerous or persistent felons. The argument in favor of allowing the court to designate a minimum sentence is two-fold. In the first place, minimum sentences are aimed at reassuring the public that dangerous criminals will be removed from society. Second, it is thought that the legislature and the courts should retain some control over the actual release of the offender. See ABA, Sentencing Alternatives, supra note 6, at § 3.2, Commentary a-g at 143-60.
54 Nevertheless, beyond the limited minimum sentence, both the Model Penal Code and the ABA Project support the concept of indeterminate sentences for felony convictions. See Model Penal Code §§ 6.06, 6.07, Comment at 24-26 (Tent. Draft No. 2, 1954) and ABA, Sentencing Alternatives, supra note 6, at § 3.2, Commentary b at 144.
55 KYPC § 269 [KRS § 435A.1-100].
56 KYPC § 268 [KRS § 435A.1-090].
57 KRS § 439.175 and KRS § 439.177.
with regard to the sentencing of misdemeanants is that it divides all misdemeanors into two classes, which restricts the jury's discretion in sentencing and should ensure that the punishment matches the offense.\textsuperscript{57}

Like most criminal codes,\textsuperscript{58} the new Kentucky Penal Code provides for the imposition of extended terms of imprisonment for persistent felons. As defined by KYPC § 267 [KRS § 435A.1-080], a persistent felony offender is a person over twenty-one years old who stands convicted of a felony after having previously been convicted of two or more felonies. In order to be considered a previous felony conviction for purposes of this section, certain factors must be present. First, the prior conviction must have carried with it a sentence of at least one year imprisonment or death. The defendant must have been at least eighteen years old at the time of the commission of the prior felony. Finally, the defendant must have been actually imprisoned under sentence for the prior felony. When the defendant has been convicted of two or more felonies for which he served concurrent or uninterrupted consecutive sentences, these convictions shall constitute only one prior conviction in computing the necessary two prior felony convictions.\textsuperscript{59}

These elements indicate that the persistent felony statute will be applied only in those cases where the offender truly deserves to be considered an habitual criminal. This classification is aimed primarily at those individuals who have repeatedly committed felonies and who have shown a lack of capacity for rehabilitation.\textsuperscript{60} Indeed, this section of the Code departs from the general theme of rehabilitation and leans more toward the protection of society from dangerous individuals.\textsuperscript{61} Thus, the requirement that the offender be at least twenty-one years old at the time of the present trial and be no younger than eighteen years of age when he committed the previous felonies is assurance that the individual is a dangerous adult. Likewise, the requirement that the offender must have been imprisoned for each prior felony is substantiation of his inability to be rehabilitated.\textsuperscript{62}

The sentence which may be imposed pursuant to the persistent

\textsuperscript{57} See LRC § 3405, Commentary.
\textsuperscript{58} See Model Penal Code § 7.03, Comment at 38-44 (Tent. Draft No. 2, 1954).
\textsuperscript{59} Existing law requires that the two prior offenses be committed progressively. Thus, the felon must have committed the second offense after he has been convicted and has served his sentence for the first offense. Ross v. Commonwealth, 384 S.W.2d 324 (Ky. 1964); Cobb v. Commonwealth, 101 S.W.2d 418 (Ky. 1936).
\textsuperscript{60} LRC § 3445, Commentary. See generally ABA, SENTENCING ALTERNATIVES, supra note 6, at § 3.3, Commentary a-g at 162-71.
\textsuperscript{61} LRC § 3445, Commentary.
\textsuperscript{62} Id.
felony statute depends upon the classification of the felony for which the defendant presently stands convicted. Thus, if the offender is convicted of a Class B felony, his sentence shall be an indeterminate term of imprisonment or not less than twenty years, nor more than life imprisonment. The effect of this is that the persistent felon who committed a Class B offense will be sentenced as if he had committed a Class A felony, with the one exception that he cannot be sentenced to death. If the offender is convicted of either a Class C or a Class D felony, he can be sentenced to not less than ten years, nor more than twenty years in prison, the normal penalty for convictions of Class B felonies.

This method of computing the extended sentence for an habitual offender is an improvement over the existing law. At present, KRS § 431.190 provides that a person convicted of a second felony shall be imprisoned for not less than double the time of the sentence under the first conviction and that a person convicted of a third felony shall be sentenced to life imprisonment. The Code, on the other hand, does not permit greater penalties for the conviction of a second felony. The drafters of the Code did not feel that a second felony conviction is sufficient evidence that the offender is an habitual criminal. Moreover, by dividing the possible extended sentences according to the seriousness of the present offense, the Code achieves a more fair and rational approach to punishing the individual offender. The present habitual criminal statute does not consider the seriousness of the necessary three felonies. Having been convicted of two prior felonies, an offender convicted of a crime that would be a Class D felony in the Code is subject to a sentence of life imprisonment. In fact, all three convictions could be for relatively minor felonies and the penalty would still be twenty years to life imprisonment. The persistent felony offender section of the Code prevents such inequitable treatment by relating the additional sentence to the degree of the latest, or present, felony.

Finally, the legislators decided to retain the existing procedure for determining whether a defendant should be sentenced as a persistent felony offender. According to current practice, once the defendant has been charged as an habitual criminal, the prosecutor is allowed to introduce evidence of the defendant’s prior felony convictions at the trial of the present offense. Many fear that admitting the proof of these previous crimes is prejudicial to the de-

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63 KYPC § 267(4) [KRS § 435.1-080(4)].
64 LRC § 3445, Commentary. Accord, ABA, Sentencing Alternatives, supra note 6, at § 3.3(b)(i).
fendant in that evidence of past convictions might be used to convict him on the present charges. Indeed, the final draft of the Code required a separate hearing to determine the applicability of the persistent felony sanctions after the defendant is found guilty and sentenced for the present crime. Yet, just as it rejected the proposal for separate sentencing proceedings where the death penalty or life imprisonment without parole are possible, the General Assembly apparently concluded that the present method for invoking the persistent felony statute is adequate and thus deleted from the Code the provision for a separate hearing. Furthermore, the Court of Appeals has defended the present procedure and has resisted pleas to install by judicial decree the method suggested by the drafters of the Code.

Once the defendant is found guilty and the sentence is returned, the jury’s work is finished. At this point, the burden of making several important decisions regarding the disposition of the offender shifts to the trial judge. Among these decisions are: whether to modify the jury’s sentence of imprisonment; whether sentences should run concurrently or consecutively in cases where the defendant has been convicted of multiple offenses; whether the defendant should be placed on probation or conditional discharge; and whether a fine should be imposed in addition to the grant of probation or conditional discharge. These alternatives make the judge a powerful force in the correctional process. In fact, the new Penal Code anticipates the increased participation of trial judges in the sentencing process.

To fulfill this role, trial judges must be willing to utilize the sentencing alternatives which they have at their disposal. A determination of the proper disposition for an offender requires that full and accurate information about that offender be made available to the court. Since there is little opportunity at trial to gather all the information relevant to sentencing the defendant, the presentence report is an indispensable source of information for the trial judge. According

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65 See ABA, SENTENCING ALTERNATIVES, supra note 6, at § 5.5, Commentary a-c at 258-69. This procedure, nevertheless, has been upheld by the Supreme Court in Spencer v. Texas, 385 U.S. 554 (1967).
66 LRC § 3445(1).
67 See text accompanying note 44 supra.
68 See Cole v. Commonwealth, 405 S.W.2d 753 (Ky. 1966); Wilson v. Commonwealth, 403 S.W.2d 705 (Ky. 1966).
69 The MODEL PENAL CODE § 7.07, Comment at 53 (Tent. Draft No. 2, 1954) states: "The use and full development of this device appear to us to offer greatest hope for the improvement of judicial sentencing." See also ABA, SENTENCING ALTERNATIVES, supra note 6, at § 4.1, Commentary a-d at 201-08; PRESIDENT’S COMMISSION, THE CHALLENGE OF CRIME, supra note 1, at 144.
to KYPC § 265 [KRS § 435A.1-050], before imposing sentence for conviction of a felony, the court must order a presentence investigation and must give due consideration to the written report of such investigation. This report is prepared by a probation officer and includes information relevant to the sentencing decision, such as the defendant's history of delinquency or criminality, family background, physical and mental condition, education, and occupation. This section also empowers the court to order the defendant to submit to psychiatric examination and observation for a period not to exceed sixty days. With data supplied by the presentence report, and perhaps a psychiatric report, the trial judge should be able to make an informed decision as to the proper disposition of the offender.

Controversy surrounds the issue of whether the contents of the presentence report should be disclosed to the defendant. Those who oppose disclosure argue that confidential sources of information would dry up, that the working relationship between the offender and the probation officer would be disrupted, that individuals and social agencies would be less willing to cooperate with probation authorities, and that the sentencing process would be prolonged. On the other hand, the proponents of disclosure claim that fundamental fairness requires that defendants be given the opportunity to refute damaging information which may be based entirely on hearsay. Moreover, they assert that by disclosing the information which forms the basis for the sentence and allowing the defendant to participate in the process of setting his penalty, the offender will better understand the court's action, the first step toward rehabilitation. Both sides of this debate contain merit. Most jurisdictions and the federal courts leave the decision of disclosure to the discretion of the court, while only a

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70 The present statute, KRS § 439.280, only requires a presentence report when the defendant is to be placed on probation. The drafters have concluded that such a report is necessary in all felony convictions. This is basically in accord with Model Penal Code § 7.07 (Proposed Official Draft 1962). Some authorities suggest that a presentence report should be supplied in all cases. See ABA, Sentencing Alternatives, supra note 6, at § 4.1; President's Commission, The Challenge of Crime, supra note 1, at 144.

71 KYPC § 265(2) [KRS § 435A.1-050(2)].

72 KYPC § 265(3) [KRS § 435A.1-050(3)]. See generally Campbell, Sentencing: The Use of Psychiatric Information and Presentence Reports, 60 Ky. L.J. 285 (1972).


74 President's Commission, The Challenge of Crime, supra note 1, at 144; ABA, Sentencing Alternatives, supra note 6, at § 4.4.

75 Zastrow, Disclosure of the Presentence Investigation Report, supra note 73, at 21.

76 Fed. R. Crim. P. 32(c)(2).
small number of states require that the presentence report be turned over to the defendant.\textsuperscript{77}

KYPC § 265 [KRS § 435A.1-050] adopts the modern approach of compromise.\textsuperscript{78} Accordingly, the court is obligated to advise the defendant or his attorney of the factual contents and conclusions of any presentence investigation or psychiatric examination. Furthermore, the defendant must be given the time and opportunity to refute the facts and conclusions contained in the report if he chooses. The court, however, is not required to reveal the sources of confidential information. Thus, while those who cooperate with the court and probation officials are afforded anonymity and protection, and, consequently, the fear that these sources might dry up is laid to rest, the defendant is treated fairly by being aware of the factors which the court must weigh in reaching a decision and by being able to participate in the sentencing process. Undoubtedly, the presentence procedure of the new Code will achieve favorable results.

Except for his power to probate the defendant's sentence, the most illustrative example of the trial judge's role in the disposition of the offender is where he must decide whether sentences for multiple convictions should run concurrently or consecutively. Indeed, the stated objective of KYPC § 270 [KRS § 435A.1-110] is to provide the trial judge with as much flexibility as possible in determining sanctions.\textsuperscript{79} Thus, with just three exceptions which are new to the law in Kentucky,\textsuperscript{80} the court is given discretion to rule whether multiple sentences should be served concurrently or consecutively.\textsuperscript{81}

The first situation in which the court has no discretion is where the defendant has been sentenced to both definite and indeterminate terms of imprisonment. The Code provides that in such cases service of the indeterminate term shall satisfy the definite term sentence. Since the goal of indeterminate sentences is the rehabilitation of the offender, he would not benefit from further punishment in a local jail upon his release from the state correctional institution.\textsuperscript{82} A second exception is that the aggregate of consecutive definite terms cannot

\textsuperscript{77} See ABA, Sentencing Alternatives, supra note 6, at § 4.3, Commentary at 211-12. See also Annot., 40 A.L.R.3d 681 (1971).

\textsuperscript{78} This is the approach adopted by the Model Penal Code § 7.07(5) (Proposed Official Draft 1962). See also Thomsen, Confidentiality of the Presentence Report: A Middle Position, 28 Fed. Probation, March 1964, at 8.

\textsuperscript{79} LRC § 3460, Commentary.

\textsuperscript{80} Id.; KY. R. CRIM. P. 11.04 states that "[i]f two or more sentences are imposed, the judgment shall state whether they are to be served concurrently or consecutively."

\textsuperscript{81} This section of the new Code follows substantially Model Penal Code § 7.06 (Proposed Official Draft 1963).

\textsuperscript{82} LRC § 3460, Commentary. See Model Penal Code § 7.06, Comment at 50 (Tent. Draft No. 2, 1954).
exceed one year. Since deterrence is the only justification for confinement in a local jail, one year in such an institution should accomplish that result. The third exception applies to convictions for multiple felony offenses. The aggregate of indeterminate terms cannot exceed the maximum sentence which the offender could have received under the persistent felony statute for the most serious crime for which he stands convicted. For example, if the offender is convicted of three felonies, the most serious of which is a Class C felony, the aggregate of consecutive sentences cannot be more than twenty years. These limitations on the aggregation of consecutive terms do not apply where one commits a crime while in prison, during an escape from prison, or while waiting to serve a sentence. The Code specifically provides that under such circumstances any sentence may be added to the offender's present term. This avoids the possibility that an individual would have nothing to lose by commission of another offense.

One other major change in the existing law is made by this section. When the trial court fails to indicate whether multiple sentences should run concurrently or consecutively, the present rule is that they should be served consecutively. The Code, however, reverses this approach. Unless the court specifically rules to the contrary, all sentences run concurrently. If the more severe penalty of consecutive sentences is to be imposed, the trial judge must clearly indicate that this is his intent.

The trial judge may, within limitations, modify a sentence of imprisonment for a felony. Once the jury has designated the maximum sentence, the judge has the options of granting probation or conditional discharge or reducing the maximum sentence. If the judge determines that imprisonment is warranted but that the maximum term fixed by the jury is too harsh, he may modify the sentence, imposing some lesser maximum term within the statutory limits for the particular crime. If, for example, the jury sentences an individual convicted of a Class B felony to the maximum twenty years in prison, the trial court may reduce this sentence to some other term not less than ten years. Further, the trial court has the power to reduce the sentence for a Class D felony conviction to a term of one year or less in a local penal institution. The importance of this section is that the

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83 LRC § 8460, Commentary.
84 Beasley v. Wingo, 432 S.W.2d 413 (Ky. 1968); Russell v. Commonwealth, 405 S.W.2d 683 (Ky. 1966).
85 KYPC § 270(2) [KRS § 435A.1-110(2)].
86 See LRC § 3460, Commentary.
87 KYPC § 266 [KRS § 435A.1-070]. This power in the Court is also recognized in Model Penal Code § 6.12 (Proposed Official Draft 1962) and in ABA, Sentencing Alternatives, supra note 6, at § 3.7.
increased alternatives prevent the judge from having to make an all or nothing choice between imposing the jury’s sentence or granting probation where neither is appropriate.88

Probation and Conditional Discharge

Next to the death penalty, probation is probably the most vigorously debated and least understood aspect of our system of criminal justice. Most laymen and many members of the legal profession misconceive the nature and utility of probation as a correctional tool. Not a mere gratuity bestowed upon criminals by lenient or weak trial judges, probation is a legitimate device for the treatment and rehabilitation of offenders; consequently, it should be given as much consideration in the sentencing decision as the more common forms of punishment, imprisonment and fines.89 Clearly not every offender should be probated anymore than every offender should be imprisoned, yet modern concepts of sentencing require that the possibility of probation be explored in almost every case.90

In most cases, especially where youthful offenders are involved, probation is to be preferred over imprisonment. Probation is founded on the premise that the best place to accomplish rehabilitation is within the individual’s own community, rather than in the abnormal, anti-social environment of a prison. Under the guidance and supervision of probation officials, the offender can live and work under relatively normal conditions. Since he will eventually return to his community, a period of closely supervised probation will better prepare the offender to be a productive, law-abiding member of that community than will incarceration, isolated from the society in which he must learn to live.91

It becomes even more apparent that many offenders should receive probation when the alternative, imprisonment, is examined. The impact of prison is catastrophic. The individual is physically and psychologically removed from society and the supportive influences of friends and family, banished into a surrealistic world from which he will probably emerge more dangerous than before.92 This is

88 LRC § 3435, Commentary.
90 See ABA, Standards Relating to Probation, supra note 89, at 1-2.
91 Id.; President’s Commission, The Challenge of Crime, supra note 1, at 165; Moreland, Model Penal Code, supra note 22, at 70.
92 See ABA, Standards Relating to Probation, supra note 89, at 1-2; President’s Commission, The Challenge of Crime, supra note 1, at 159, 165.
particularly debilitating for young offenders and supports the argu-
ment that they should be granted probation whenever possible. More-
over, the effects of a prison sentence remain with a man long after he
is released, for it is a stigma which he will carry for the rest of his life.93
Further, the price of keeping a man in prison is high, both in terms
of economic cost and waste of human resources. It is expensive to
house, feed, and guard the inmates of these institutions.94 Then there
is the less obvious, but no less real, cost to society when the head
of a household is imprisoned and unable to support his family. A well
organized and properly staffed probation system would require the
expenditure of a considerable amount of public funds, but not as
much as is spent in keeping the offender imprisoned; and, at least while
on probation the individual can support himself and his dependants.95
The legislature implicitly recognized the serious effect that im-
prisonment has on an individual by enacting the controversial “shock
probation” law.96 This statute, which will remain in force after the
Code becomes effective, empowers the trial judge to grant probation
to an offender after he has served at least thirty days in jail or prison.
The theory underlying this statute is that for many people a brief
stay in a penal institution will operate as a sufficient deterrent. Once
the offender has been exposed to prison, he is released on probation
to be rehabilitated within the community. This is a very useful cor-
rectional tool since it enables the trial court to place the offender in
prison without forfeiting the power to grant probation if it is later
determined that the individual has learned a lesson and will not bene-
fit from further confinement. Under former law, the trial court could
not grant probation after the offender had been turned over to the
Department of Corrections.97 The one foreseeable danger which “shock
probation” entails is that trial courts might too readily sentence an
offender to prison with the intention of subsequently granting pro-
bation when any length of imprisonment for that particular person
would be inappropriate.

The new Penal Code adopts a modern approach to the use of pro-
bation as a correctional device. Several changes in the law indicate
a determination by the drafters that probation should be more fre-

93 Moreland, Model Penal Code, supra note 22, at 70.
94 See note 2 supra; See also ABA, SENTENCING ALTERNATIVES, supra note 6,
at § 2.3, Commentary e at 73.
95 ABA, SENTENCING ALTERNATIVES, supra note 6, at § 2.3, Commentary e at
73; ABA, STANDARDS RELATING TO PROBATION, supra note 89, at § 1.2, Com-
mentary at 29-30.
96 KRS § 439.265.
97 See Commonwealth v. Fanelli, 445 S.W.2d 126 (Ky. 1969); Woll v. Com-
monwealth, 146 S.W.2d 59 (Ky. 1940).
quently utilized in sentencing. KYPC § 272 [KRS § 435A.2-010] pro-
vides that anyone convicted of a crime who is not sentenced to death
or life imprisonment without privilege of parole may be granted pro-
bation or conditional discharge. Thus, probation is an authorized
alternative to imprisonment for even the most serious crimes. This
section does not suggest that dangerous criminals be let loose on
society, but merely that there may be circumstances where one con-
victed of even a Class A felony should not be sentenced to prison.98

However, the most important change in this area is contained in
KYPC § 272(2) [KRS § 435A.2-010(2)] wherein the trial court is
required to consider the possibility of probation or conditional dis-
charge before imposing sentence. Furthermore, this section provides
that, after considering factors such as the defendant's background,
character, and the nature and circumstances of the crime, probation
or conditional discharge should be granted unless imprisonment is
deemed necessary for the protection of the public. There are but
three situations in which the protection of the public would require
imprisonment: where there is substantial risk that the defendant will
commit another crime while on probation, where the defendant is in
need of correctional treatment which can best be provided by com-
mitment to an institution, or where the granting of probation would
unduly depreciate the seriousness of the defendant's crime.99 Re-
quiring the judge to consider probation as the desired disposition of
the offender is a reversal of the present practice in the trial courts.
This current reluctance to grant probation is largely due to miscon-
ceptions of the nature and purpose of this sentencing alternative.
Many still view probation as a matter of grace conferred by the court,
rather than a correctional tool that should be implemented when the
circumstances warrant it.100 Worse yet, there are some who refuse
to grant probation even in the most obvious cases.101 Clearly, the Code
calls for more liberal use of this sentencing alternative.

98 See LRC § 3505, Commentary.
99 KYPC § 272 [KRS § 435A.2-010]; See ABA, STANDARDS RELATING TO
PROBATION, supra note 89, at § 1.3(a) (i)-(iii).
100 See King v. Commonwealth, 471 S.W.2d 297, 298 (Ky. 1971), wherein
the Court stated:
Whether probation should be granted in any particular case is a
question addressing itself to the discretion of the trial court. When
granted, it is a matter of grace and not of right.
101 In Wyatt v. Ropke, 407 S.W.2d 410 (Ky. 1966), the trial judge was
ordered to vacate the bench where he had stated that under no circumstances
would he suspend or probate the sentence of one convicted of armed robbery.
The Court of Appeals, while recognizing that the trial judge is vested with dis-
cretion in the decision whether to probate, stated that in any case the judge must
at least exercise such discretion by considering the possibility of probation.
(Continued on next page)
When the court determines that imprisonment is inappropriate, it must either place the offender on probation or sentence him to conditional discharge, attaching whatever conditions are deemed necessary to help the defendant lead a law-abiding life. Probation shall be imposed when the individual is in need of supervision, guidance, or assistance.\textsuperscript{102} Conditional discharge should be the sentence when probationary supervision is considered unnecessary.\textsuperscript{103} Prior to the expiration of the term of probation or conditional discharge, which may not exceed five years in the case of felonies or two years for misdemeanors, the court may modify or enlarge the conditions or may revoke the sentence upon commission of another offense or upon a violation of the terms of the sentence.\textsuperscript{104} Upon revocation of probation or conditional discharge, for whatever reason, the defendant shall be imprisoned.\textsuperscript{105}

The conditions which may be affixed to a sentence of probation or conditional discharge are enumerated in KYPC § 274 [KRS § 435A.2-030]. A few of the more important include: that the defendant work at suitable employment, that he remain in a specified area, that he report to a probation officer, that he permit the probation officer to visit him in his home, that he avoid disreputable persons or places, and that he make restitution for any loss resulting from his offense. Not intended to be an exhaustive list, the court may impose any other reasonable condition. Every grant of probation or conditional

\footnotesize{(Footnote continued from preceding page)}

\footnotesize{A classic example of a situation where the trial court refused to probate an offender who clearly qualified for probation can be found in Jordan v. Commonwealth, 371 S.W.2d 632 (Ky. 1963).\textsuperscript{106} KYPC § 273(1) [KRS § 435A.2-020(1)].

\footnotescript{107} KYPC § 273(2) [KRS § 435A.2-020(2)]. The sentence of conditional discharge is technically new to the criminal law of Kentucky, although courts have recognized this correctional device under the label of a "suspended sentence." LRC § 3510, Commentary.

\footnotescript{108} KYPC § 273 [KRS § 435A.2-020]. This section represents a change from existing law, KRS § 439.270 which limits the probationary period to five years regardless of whether the offense is a felony or a misdemeanor. In Lanham v. Commonwealth, 353 S.W.2d 201 (Ky. 1962), the Court ruled that it was not unconstitutional to extend the period of probation beyond the length of the defendant's prison sentence.

\footnotescript{109} When probation or conditional discharge is revoked, the Court must impose a sentence of imprisonment. See LRC § 3510, Commentary. The Court, however, cannot impose a greater sentence upon such revocation than that determined by the jury. Hord v. Commonwealth, 450 S.W.2d 530 (Ky. 1970).

\footnotescript{110} KYPC § 276(2) [KRS § 435A.2-050(2)] establishes the procedure which the court must follow in revoking or modifying a sentence of probation or conditional discharge. The offender must be given written notice of the grounds for revocation or modification, and a hearing must be held at which the defendant must be represented by counsel. These steps satisfy minimum due process requirements. LRC § 3525, Commentary. See generally ABA, Standards Relating to Probation, supra note 89, at § 5.4, Commentary at 65-71.
discharge must contain the explicit condition that the defendant not commit another offense during the term of such sentence.106

Another important rehabilitative device authorized by the Code is popularly known as the "split sentence."107 KYPC § 274 [KRS § 435A.2-030(4)] enables the trial court to require the offender to submit to periodic imprisonment in the county jail as a condition of probation or conditional discharge. These periods of imprisonment may be whenever and for as long as the court considers necessary to further the offender's program of rehabilitation. However, the total length of confinement under a split sentence cannot exceed six months or the length of his original sentence, whichever is shorter.

The advantages of this provision should be obvious. The trial judge is given the necessary flexibility to treat the criminal individually and to structure a program of probation which will ensure, as far as possible, that the offender will adhere to the other conditions of his sentence. Thus, it is envisioned that the man with a job could be released during working hours or could be required to spend his weekends in jail.108 This statute, like the one authorizing "shock probation," also allows the judge to give the defendant a taste of imprisonment without turning him over to the Department of Corrections or to the local jail to serve his entire sentence. Undoubtedly, the inclusion of this sentencing alternative within the Code is an improvement over the existing law and adds another important dimension to the role of the trial judge in the process of treating convicted criminals.

Fines

The use of fines as a criminal sanction is very common, especially for less serious offenses. Penologically, a fine is an effective deterrent, at least for those who can afford to pay, and is an economical substitute for imprisonment.109 For these reasons courts have long re-

106 This section is similar to the present statute, KRS § 439.290. The Code provision, however, adds several conditions which may be imposed along with probation. See also MODEL PENAL CODE § 301.1 (Proposed Official Draft 1962); ABA, STANDARDS RELATING TO PROBATION, supra note 89, at § 3.2, Commentary at 45-50.


108 See LRC § 3515, Commentary; ABA, SENTENCING ALTERNATIVES, supra note 6, at § 2.4, Commentary at 75-80. It is also noted that utilization of this provision would be especially appropriate for youthful offenders.

Under present law, KRS § 439.179 such "release" programs are authorized in misdemeanor cases. This statute is patterned after MODEL PENAL CODE § 303.9 (Proposed Official Draft 1962).

109 See LRC § 3515, Commentary; ABA, SENTENCING ALTERNATIVES, supra note 6, at § 2.4, Commentary at 75-80. It is also noted that utilization of this provision would be especially appropriate for youthful offenders.

107 Note, Imprisonment of Indigents for Non-payment of Fines or Court Costs; The Need for Legislation that will Provide Protection to the Poor, 48 N.D.L. REV. 109 (1971).
sorted to this form of punishment. However, much of the law regarding the imposition of monetary penalties has had to be rewritten as a result of recent Supreme Court decisions. The Code makes several changes in the existing law to reflect the new constitutional imperatives but nevertheless retains the use of fines as a sentencing alternative for both misdemeanors and felonies.

In *Tate v. Short*¹¹⁰ and *Williams v. Illinois*,¹¹¹ the Supreme Court held that a defendant may not be imprisoned for nonpayment of a fine where his failure to pay is a result of indigency. In *Williams*, the defendant was convicted of petty theft and received the maximum sentence of one year's imprisonment and a $500 fine. Too poor to pay the fine, Williams was required to remain in prison to satisfy the fine at a rate of $5 per day. The Court held that the defendant was denied his rights under the equal protection clause of the fourteenth amendment by being forced to serve a sentence longer than the statutory maximum solely because he was unable to pay the fine. The decision in the *Tate* case extended this rule. In *Tate* the defendant was fined $425 for numerous traffic convictions. Though the offenses for which he was convicted did not carry a sentence of imprisonment, Texas law permitted an offender to be incarcerated in order to pay off his fine at a rate of $5 per day. Since the defendant, an indigent, was unable to pay the fine, he was placed in jail. The Court held that this was discrimination which violated the defendant's equal protection rights since he was subject to imprisonment solely because he was indigent.

The effect of these decisions on the use of fines as a penalty is far-reaching. No longer may a defendant who is unable to pay be imprisoned for nonpayment.¹¹² This result is sound. It is unfair that a poor man should have to go to jail when, under the same circumstances, a person with more wealth can avoid this fate merely by paying the fine. More importantly, if the defendant is sitting in jail, he is unable to earn any income whatsoever; therefore, he can neither pay the fine nor support his dependents. Finally, where the individual is unable to pay, imprisonment for nonpayment of fines is inconsistent with any goal of punishment. If the man cannot pay, jail is neither a deterrent nor a rehabilitative process.¹¹³ The only situation where imprisonment is warranted for nonpayment of a fine is where the

¹¹² The Kentucky Court of Appeals has followed the decisions in *Tate v. Short* and *Williams v. Illinois* in the case of *Spurlock v. Noe*, 467 S.W.2d 320 (Ky. 1971).
¹¹³ See ABA, SENTENCING ALTERNATIVES, supra note 6, at § 2.7, Commentary b at 120-21.
defendant willfully refuses to pay. The decisions in Tate and Williams do not preclude imprisonment of a defendant who, though able, does not pay his fine.

These Supreme Court decisions do not mean that the states may not enforce the payment of fines; indeed, in both opinions the Court suggested alternative methods for collecting fines from indigents. The Kentucky Penal Code includes several alternatives. KYPC § 273 [KRS § 435A.3-020] authorizes the court to allow payment within a specified period of time or in specified installments. This affords the court enough flexibility to accommodate even the poorest man's budget. This method of enforcing fines not only increases the amount of revenue that will be collected, but also maximizes the deterrent effect.

This section also prohibits the court from fixing an alternative, contingent sentence of imprisonment in case the fine is not paid at the same time the fine is imposed. Thus, the "$30 or 30 days" sentence which was ruled unconstitutional, at least when applied to indigents, is no longer permitted.

In accordance with the decision in Tate v. Short, the Code includes a procedure for sanctioning those who fail or refuse to pay their fines which is fair to those who are unable to pay but which penalizes those who merely refuse to pay. KYPC § 282 [KRS § 435A.3-060] states that when a defendant defaults in payment of a fine or any installment, the court on its own motion or that of the prosecutor may order the defendant to show cause why he should not be imprisoned for nonpayment. If the court finds that the defendant's default is attributable to an intentional refusal to obey or to a lack of good faith in his effort to obtain the necessary funds, he may be imprisoned for a term not exceeding: (1) six months, if fine was for a felony; (2) one-third of the maximum authorized term of imprisonment for the offense committed, if the fine was for a misdemeanor; or (3) ten days, if the fine was for a violation. On the other hand, if the default is deemed excus-

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114 See Note, Imprisonment of Indigents for Non-payment of Fines or Court Costs; The Need for Legislation that will Provide Protection to the Poor, supra note 109, at 129.
116 The installment payment method for collecting fines has been adopted in MODEL PENAL CODE § 303.1 (Proposed Official Draft 1962) and in ABA, SENTENCING ALTERNATIVES, supra note 6, at § 2.7(b). See also Comment, Installment Payments: A Solution to the Problem of Fining Indigents, 24 U. FLA. L. REV. 166 (1971).
117 See Note, Imprisonment of Indigents for Non-payment of Fines or Court Costs; The Need for Legislation that will Provide Protection to the Poor, supra note 109, at 125.
118 See LRC § 3605, Commentary. See also ABA, SENTENCING ALTERNATIVES, supra note 6 at § 2.7, Commentary f at 127.
able, the court may extend the time for payment, reduce the amount of the installments, or otherwise modify the manner of payment. Further, if the defendant's default was innocent, the court may under certain conditions, compel the defendant to work for a department of local government and order that up to forty percent of his compensation be paid toward his fine. This provision should maximize the deterrent and rehabilitative effect of fines. 119

The Code authorizes the imposition of fines in felony convictions, but limits the amount and use of this form of punishment. This reflects the modern theory that fines have limited utility as a correctional technique. 120 Thus KYPC § 279 [KRS § 435A.3-030] authorizes imposition of a fine only after the defendant has been granted probation or conditional discharge and restricts the amount to not more than $10,000 or double the defendant's gain from the commission of the offense. Since probation or conditional discharge is a prerequisite to use of this sentence, a jury may not impose a fine in a felony case. This is consistent with the view that fines should not be used as a matter of course in felony convictions. Further, a jury would not have sufficient information before them to properly administer such penalties. 121

This section also prescribes certain factors which the court must consider in determining the amount and method of payment of the fine. 122 First, the court must evaluate the defendant's ability to pay and the hardship imposed on his dependents by the amount of the fine and the method of payment. Fines should be imposed only on those who have the ability to pay. This approach is dictated by the Supreme Court's decisions in Williams and Tate. Indeed, since little action can be taken against an offender who in good faith cannot pay his fine, it would be futile for the trial court to impose a fine which clearly exceeds the defendant's means. Furthermore, the drafters of the Code have accepted the principle that the amount of the fine should not cause the defendant's family to suffer; therefore, the court must consider the impact of the fine on his dependents.

The court is also required to consider the effect of a fine on the defendant's ability to make restitution or reparation to the victim of his crime. Certainly, the court should not, by imposing a fine that


120 In fact it has been suggested that fines be authorized only in cases where the defendant has received gain from the commission of his crime. ABA, Sentencing Alternatives, supra note 6, at § 2.7, Commentary d at 124-25.

121 See LRC § 3610, Commentary.

122 KYPC § 279(3) [KRS § 435A.3-030(3)]. These factors are also stated in Model Penal Code § 7.02 (Proposed Official Draft 1962) and in ABA, Sentencing Alternatives, supra note 6, at § 2.7(c).
exhausts the defendant's resources, deprive the defendant's victim of compensation for any loss incurred. Moreover, the court should always consider what gain an offender may have derived from his crime. Fines are most appropriate where the individual has profited from commission of the offense. Indeed, it has been suggested that this is the only situation where the sentence of a fine for felony convictions is proper.123

Since the justification for fines is their deterrent effect, they are more appropriately utilized for misdemeanor convictions.124 KYPC § 280 [KRS § 435A.3-040] provides that for any crime defined within the Code, other than a felony, the offender may be sentenced to pay a fine not to exceed: $500 for a Class A misdemeanor; $250 for a Class B misdemeanor; or $250 for a violation. Unlike the procedure in felony cases, the sentence of a fine for a misdemeanor can be rendered by the jury in the same manner as a sentence of imprisonment.125 In fact, the legislators, presumably for the sake of clarity, added a provision which states specifically that the jury may levy a fine in addition to or in lieu of a sentence of imprisonment for misdemeanor convictions.126

The Code makes special provision for fines against a corporation.127 KYPC § 281 [KRS § 435A.3-050] establishes the maximum amount which may be assessed against a corporation convicted of a crime defined by the Code: $20,000 for any felony; $10,000 for a Class A misdemeanor; $5,000 for a Class B misdemeanor; $500 for a violation; or, double the amount of the defendant corporation's gain from the commission of the offense. This section also limits the maximum penalty for offenses defined outside the Code. This is accomplished by determining within which Code classification the offense would fall based on the maximum sentence of imprisonment authorized by that statute. Thus, if an offense defined the Code carries a possible sentence of imprisonment of not more than twelve months nor less than ninety days, it would be comparable to a Class A misdemeanor under the Code and the corporation could be fined up to $10,000.

123 See note 119, supra.
124 LRC § 3615, Commentary.
125 Id.
126 KYPC § 279(1) [KRS § 435A.3-030(1)]. It is not clear why this addition to the original Code draft, concerning the use of fines in misdemeanors, has been inserted in the section dealing with fines in felony cases.

More significantly, the language of this added section is vague and could be construed to authorize the "thirty dollars or thirty days" type sentence. However, in light of the decision in *Tate v. Short*, such sentences should not be utilized; and indeed, it was the intention of the drafters of the Code that this type of sentence should be abolished. LRC § 3610, Commentary.

Conclusion

While retaining some major aspects of the present law such as jury sentencing, the Kentucky Penal Code makes very significant changes in the disposition of criminal offenders. Indicative of the improvements contained in the sections dealing with the authorized dispositions of offenders is the rational classification of all offenses, the power given the court to modify jury sentences, and the increased emphasis on probation and conditional discharge as an alternative to imprisonment. By enacting these provisions, the General Assembly has provided the tools to achieve a more just and effective system of criminal sentencing. Now, it is the responsibility of the bar and the courts to implement these provisions skillfully and in the progressive spirit in which they were enacted.

Gregory M. Bartlett