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CLASSIFICATION OF OFFENSES AND DISPOSITION OF OFFENDERS

I. CLASSIFICATION OF OFFENSES

A. Introduction

Prior to the adoption of the Kentucky Penal Code by the 1972 General Assembly, the Commonwealth classified crimes as either felonies or misdemeanors. Felonies were defined simply as those offenses punishable by death or confinement in the penitentiary with all other offenses, whether common law or statutory, deemed misdemeanors.1 This lack of substantive differentiation often resulted in "disparate sentencing for offenders engaged in substantially identical conduct."2

The only limitation on the imposition of penalties was included in the definition of each statutory offense.3 If convicted of a common law offense where no penalty was provided by statute, the offender could be "imprisoned in the county jail for a term not to exceed 12 months or fined a sum not to exceed $5,000 or both."4 This language also served to fill the void created by statutes which defined offenses without specifying parameters to aid the jury or court in sentencing.

The Kentucky Penal Code, in an attempt to implement a rational sentencing structure capable of uniform application, has developed a four-degree system for felonies and a three-degree system for misdemeanors.5 This represents a compromise between the original three-felony system of the Model Penal Code and the five-felony system adopted by New York. The three-felony system fails to adequately provide necessary distinctions between offenses,6 while the five-felony system requires unrealistic distinctions.7 Misdemeanors, classified in a three-tier system which recognizes degrees of minor offenses, carry a maximum sentence of 12 months imprisonment. "Violations," a category of offenses under misdemeanors, seeks to control non-criminal conduct such as public drunkenness and loitering that is merely offensive. The classification approach improves significantly upon prior law by focusing on the seriousness of the crime rather than

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2 Kentucky Legislative Research Commission, Kentucky Penal Code § 3405, Commentary (Final Draft 1971) [hereinafter cited as LRC].
3 KRS § 431.070. (1) No crime shall be punished with death unless directed by statute. (2) A common law offense, for which punishment is prescribed by statute, shall be punished only in the mode so prescribed.
4 KRS § 431.075.
6 LRC § 3405, Commentary.
7 LRC § 3405, Commentary.
upon the character or circumstances of the offender and reduces the influence of jury bias by imposing sentencing guidelines.

B. *Sentencing Philosophy*

The new Penal Code recognizes implicitly that punishment is necessary for the offender and for society. Society must be protected and offenders must be punished in a manner rationally calculated to achieve proper ends. An enlightened approach to punishment allows individualization of justice while incidentally demonstrating that others will suffer for a similar breach of the law. Kentucky's Penal Code is clearly oriented toward rehabilitation whereas under prior law it was impossible to ascertain any dominant goal of sentencing.

The four goals implicit in sentencing offenders to imprisonment are: (1) deterrence, (2) neutralization, (3) rehabilitation, and (4) retribution. Deterrence is divided into two classes: special and general. Special deterrence seeks to prevent the specific offender from repeating the proscribed act while general deterrence operates to restrain the populace from criminal acts by publicizing successful prosecutions. Neutralization recognizes that incapacitation and removal from society eliminates repetition of crimes by the offender during imprisonment. Rehabilitation involves treatment during confinement designed to prevent recurrent violations and to return the individual to society as a useful member. Retribution demands that the offender demonstrate an understanding of his wrongful conduct to society. The implementation of these goals involves a weighing process to determine which concept should have relative priority in the sentencing scheme and to determine whether judge, jury or parole board should be responsible for effectuating the chosen policies.

C. *The Law Prior to Kentucky's 1972 Penal Code*

Kentucky was previously one of thirteen jurisdictions where the maximum period of imprisonment was determined by the jury within statutory limits. However, the trial judge retained a potentially prominent role due to his power of probation over the convicted offender, which permitted an alternative to imprisonment subject to judicially imposed conditions. The offender's failure to conform to probation conditions could result in the judicial imposition of any sentence which the jury originally has power to mete out.

If the trial judge did not grant probation or if it was granted and subsequently revoked, the Department of Corrections assumed control

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8 KRS § 439.260(1).
9 KRS § 439.280.
10 KRS § 439.300(1).
over the offender for a period not to exceed the maximum sentence set by the jury. The Parole Board ultimately decided whether he was to be paroled prior to serving the full sentence. The only guideline for the exercise of the Parole Board’s discretion was its promulgation of a schedule for parole eligibility. The prisoner was interviewed by the Board and a hearing was conducted after which parole could be denied, recommended with stipulation, or deferred for later review.

“In Kentucky we have had an indeterminate sentence with a maximum term fixed by the jury and no minimum term.” Therefore, a convicted offender could not be forced to serve a sentence exceeding that originally set by the jury. This was true even where the offender had been probated or paroled with a subsequent violation of probation or parole conditions causing him to be recommitted to prison. The concept of “no minimum term” meant that once a prisoner was incarcerated the Parole Board could grant parole immediately. Pre-Code law therefore sought to wrest complete control over the disposition of the offender from the jury by guaranteeing that the trial judge and/or Parole Board share in the decision-making. Despite criticism that jurors may lack appropriate training and education, the jury was believed essential because it assured a defendant that the ultimate issue of guilt or innocence would be equitably decided by the collective common sense of twelve of his peers.

In 1969, following an evaluation of Kentucky’s criminal law by the Kentucky Law Journal, it was suggested that the Parole Board be given responsibility for determining the maximum time to be served by an offender, historically a jury function. It was thought that the jury often failed to set sentences of sufficient duration to ensure successful rehabilitation. Further, the shift of responsibility from jury to Parole Board would benefit the offender by allowing his initial sentence to be determined with reference to a complete presentence report encompassing valuable psychological and psychiatric data. Implementation of this procedure would have resulted in a sentence designed to maximize the opportunity for rehabilitation; however, the General Assembly rejected the change and the jury currently continues to establish maximum terms for offenders.

D. Kentucky’s New Penal Code

By separating offenses into degrees, the new Penal Code provides

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11 KRS § 439.340.
12 Kentucky Parole Board Regulation DC-Rg-6 (1966).
13 LRC § 3430, Commentary.
great improvement in Kentucky's criminal law. Penalties for felony offenses under prior law had no ascertainable basis. Without the benefit of degrees of offenses, judges and prosecutors were forced to make distinctions in individual cases based upon mitigating circumstances; an elusive approach that often produced inconsistent results. To achieve consistency in the application of penalties the Kentucky Crime Commission analyzed and compared the severity of each crime with its respective punishment. During deliberation on the enactment of the Kentucky Code the General Assembly further evaluated all recognized offenses. A prime result of this intensive review should be a reduction in needless and costly prosecutions by more accurately defining criminal conduct.

Section 261 of the Kentucky Penal Code [KRS § 435A.1-010] establishes four classes of felonies: A, B, C, and D. The sanctions imposed for commission of crimes within these respective categories are twenty years to life imprisonment, ten to twenty years, five to ten years, and one to five years. The maximum sanction at each level beginning with “A” and ending at “D” decreases in severity with one year of imprisonment as the minimum sentence for commission of a felonious offense. Any crime which specifies a sentence of months, even if twelve months, constitutes a misdemeanor under the new Code. Misdemeanors are classified as “A,” “B,” or “violations.” The maximum sanction for “A” misdemeanors is imprisonment in a local institution for a period not to exceed twelve months while a “B” misdemeanor provides a definite term of imprisonment not to exceed ninety days. The Code provides two classes of misdemeanor offenses because there is a recognized need for greater restriction on sentencing power where definite terms of imprisonment are involved. While local penal institutions cannot individualize punishment or treatment for these offenders, the drafters felt that exposure to incarceration would provide the necessary deterrence to prevent misdemeanants from becoming felons. “Violations” include those offenses for which the offender may be sentenced to pay a fine. The rationale is special and general deterrence but, since “violations” usually involve no risk of physical harm to others, there is little reason to impose a jail sentence upon the violator.

The Code’s classification system is based upon the following factors: (1) the harm actually resulting from a criminal act, (2) the risk of harm caused by the actor, and (3) the degree of temptation faced

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15 LRC § 3430, Commentary.
16 KYPC § 268 [KRS § 435A.1-090].
Moral fault, sometimes considered a fourth factor for measuring culpability, is used by the judge or jury in fixing a particular sentence within discretionary limits. The jury continues to determine the maximum sentence for all offenders within boundaries imposed by the classification system. On the other hand, the trial judge plays an expanded role under the new law which grants him the right to modify the jury's sentence within certain limits.

Generally, the judge may never reduce the maximum length of an indeterminate sentence below the minimum established by the Code for the category into which that offense falls. For example, if a jury sentences an offender to life imprisonment for the commission of an "A" felony, the judge may not reduce the sentence below the twenty year minimum for class "A" felonies. The rationale for creating this "middle alternative" is based on the unsatisfactory alternatives formerly available to the judge of either granting probation or imposing the jury's sentence. However, in the case of a class "D" felony the trial judge may commit the offender to a "local institution for a definite term of imprisonment not to exceed one year." This provision allows individualization of justice in special situations such as that of the young offender whose past record is such that neither probation nor confinement in the state penitentiary is entirely suitable. The probation alternative may not be sufficiently severe, especially where the offender has violated previous conditions of probation. On the other hand, the state penitentiary experience is often too harsh given the young offender's vulnerability as a target for sexual abuse and counter-productive to the goals of sentencing in that he will be exposed to more sophisticated techniques and levels of crime.

II. THE DEATH PENALTY AND LIFE WITHOUT PRIVILEGE OF PAROLE

The death penalty can be traced to ancient times. The ancient edict of "an eye for an eye and a tooth for a tooth" embodied in the Code of Hammurabi is cited by modern proponents to justify imposing death sentences for heinous crimes. With equal vehemence the opponents of the death penalty cite Biblical passages to support their position and condemn it as an unenlightened solution for dealing with criminal offenders.

Capital punishment came to America from Europe but was tempered considerably in the process. "In early sixteenth century

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18 Id.
19 KYPC § 266(1) [KRS § 435A.1-070(1)].
20 KYPC § 266(2) [KRS § 435A.1-070(2)].
England there were eight major capital crimes. By 1688 there were nearly fifty and as late as 1819 one could be put to death for any of 223 capital crimes. These included offenses against the state, persons, property, and the public peace. The mode of execution ranged from hanging to the inhuman torture of drawing, hanging, disemboweling, and beheading, followed by quartering. Early English capital crimes were all considered felonies with mandatory death penalties and the convicted person could escape death only by intercession of the Crown. Frequently, those who thus avoided execution were punished by banishment to the colonies to begin a desolate new life. The seeming severity of English law was mild, however, compared to the criminal codes of other European nations during the same period.

America’s first capital statutes date to 1636 when the Massachusetts Bay Colony listed thirteen capital offenses under the title of “The Capitall Lawes of New-England.” By the War of Independence most colonies had comparable statutes with nine offenses and death by hanging. In 1794, Dr. Benjamin Rush, the father of the movement to abolish capital punishment in the United States, along with Benjamin Franklin and Pennsylvania Attorney General William Bradford, led the crusade which resulted in that state’s repeal of the death penalty for all crimes except “first degree” murder. The 1830’s witnessed strong abolitionist movements in several states although no more than one-fourth of the states have ever abolished the death penalty at any one time. The result of partially successful abolition movements includes reduction of the number of capital crimes, replacement of mandatory death sentences with jury discretion to grant imprisonment, development of more humane methods of conducting executions, and the elimination of public executions. However, the number and variety of capital statutes evidence belief that the death penalty is still an effective deterrent and appropriate punishment.

Supreme Court decisions reflect judicial recognition that capital punishment is an area of divergent opinions. Each time the Court considers the constitutionality of the death penalty or various modes of execution, the justices look to prevailing social attitudes to help them define and apply inherently dynamic legal concepts. A prime example can be found in the eighth amendment language prohibiting “cruel and unusual punishment.”

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21 Bedau, Introduction to The Death Penalty in America at 1 (H.A. Bedau ed. 1967).
22 4 W. Blackstone, Commentaries *92.
The "cruel and unusual punishment" clause of the Bill of Rights was not interpreted by the Supreme Court of the United States until almost a century after its enactment. The Court, in *Wilkerson v. Utah*, upheld capital punishment for premeditated murder and execution by public shooting. Twelve years later, Chief Justice Fuller, writing for a unanimous Court, said electrocution was a permissible mode of imposing death. The Court found that New York's legislature intended to minimize pain for the executed, thereby establishing a humane purpose in their selection of electrocution. However, this early case held that the eighth amendment was inapplicable to the states.

In *O'Neil v. Vermont* the Court reaffirmed the inapplicability of the eighth amendment to the states. The petitioner argued that a $6,500 fine for 307 counts of selling liquor with a potential 54 years imprisonment at hard labor for nonpayment violated the "cruel and unusual punishment" clause. Although the Court upheld the conviction, the minority would have protected individuals against all punishments which by their excessive length or severity were greatly disproportionate to the offenses charged, with Justice Field noting "the whole inhibition is against that which is excessive...". The minority asserted that the nature of the crime, the purpose of the law, and the length of sentence imposed should be adopted as factors to be considered in deciding whether the eighth amendment's "cruel and unusual punishment" clause is violated in future cases.

Eighteen years after *O'Neil* the Supreme Court for the first time invalidated a penalty prescribed by a state legislature. In *Weems v. United States* the petitioner was convicted of falsifying public documents and sentenced to fifteen years imprisonment at hard labor in ankle chains, loss of civil rights, and perpetual surveillance. Indicating that the Constitution was a progressive document whose language is to be interpreted according to present and future rather than past standards, the Court found this punishment excessive.

In *Louisiana ex rel. Francis v. Resweber* a condemned man sought to prevent a second electrocution where, due to a mechanical failure, the first attempt did not cause his death. Although now willing to apply the eighth amendment to the states, the Court, in a 5-4 decision,

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24 99 U.S. 130 (1878).
25 136 U.S. 436 (1890).
26 144 U.S. 323 (1892).
27 *Id.* at 340.
29 *Id.* at 373.
nevertheless upheld the legislature's adoption of electrocution as a humane method of execution in spite of the suffering in this particular case. As in Weems, the Court used the O'Neil factor test to analyze the "cruel and unusual punishment" question.

Judicial interpretation of the eighth amendment was further refined in Trop v. Dulles,\(^{31}\) where the Supreme Court held that loss of citizenship by reason of court-martial conviction for wartime desertion constituted "cruel and unusual punishment." Chief Justice Warren noted that the words "cruel and unusual" were flexible and "[t]he amendment must draw its meaning from the evolving standards of decency that mark the progress of a maturing society."\(^{32}\) Involuntary statelessness was deemed excessive punishment in relation to practices of other civilized nations for similar offenses.

In 1962 the Court eliminated any lingering doubts by holding in Robinson v. California\(^{33}\) that the states are bound by the eighth amendment.\(^{34}\) This case found a Court majority willing to use the eighth amendment prohibition against "cruel and unusual punishment" to invalidate a 90 day sentence for a violator of the California "addiction to the use of narcotics" statute. Justice Stewart writing for the Court emphasized that the criteria for "cruel and unusual punishment" must be continually re-examined "in the light of contemporary human knowledge."\(^{35}\) The language in Trop as reiterated in Robinson suggests that a penalty which was previously permissible is not necessarily acceptable today based upon prevailing social standards. An analysis of the preceeding cases reveals situations where punishment was deemed excessive and violative of the eighth amendment; yet no mode of execution was ever set aside as "cruel and unusual punishment." The Court was never willing to even consider capital punishment per se as violative of the convicted offender's eighth amendment rights.

In Witherspoon v. Illinois\(^{36}\) and McGautha v. California,\(^{37}\) the Court confined its attention to procedural aspects of capital trials with a majority in each instance refusing to hold that death could not be constitutionally imposed. Avoiding the eighth amendment issue, the Court refused to find constitutional dimensions in the argument that those who exercise their discretion to send a person to death should be given standards by which to act.

\(^{32}\) Id. at 101.
\(^{34}\) See also Powell v. Texas, 392 U.S. 514 (1968).
\(^{36}\) 391 U.S. 510 (1968).
The general pre-Code statutory death penalty provision in Kentucky provided that "no crime shall be punished with death unless directed by statute." Under pre-Code law death was an alternate punishment for twelve criminal offenses.

Kentucky's Proposed Penal Code § 3440, not enacted by the General Assembly, retained death as a possible sanction for one convicted of an offense categorized as a Class "A" felony. Alternate sanctions under this section included life imprisonment without privilege of parole and an indeterminate sentence of imprisonment. Under § 3440, Class "A" felons must be provided bifurcated proceedings with a determination of innocence or guilt in the first stage and, if the defendant is found guilty, the imposition of sentence in the second stage. Bifurcated trials are designed to allow maximum flexibility in the rules governing admissibility of evidence pertinent to disposition of these often dangerous offenders. For example, in a bifurcated proceeding the sentencing stage may feature introduction of the defendant's prior criminal record and any other relevant evidence that would possibly be prejudicial in a single stage trial. Now, "evidence may be presented by either party on any matter relevant to sentencing . . ." However, the jury must reach a unanimous agreement before death or life without privilege of parole may be imposed and failure to reach such an agreement is cause for a new jury to be impaneled. The decision to impanel a new jury is solely within the discretion of the trial judge; he may instead impose an indeterminate sentence within limits set out in § 3440. This means that the judge's sentence could not be less than the minimum or exceed the maximum sanction established for a particular grade of offense. For instance, one convicted of committing a Class "A" felony could receive a sentence of 20 years to life from the judge. When an offender pleads guilty, the judge impanels a jury which decides the sentence according to the same rules embodied in the penalty stage of a contested case.

Section 3440 represented an attempt to make the sentencing of serious offenders a more rational procedure consistent with the classification system of criminal offenses. The format of § 3440 enables individualization of justice based upon more data than is ever allowed

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38 KRS § 431.070(1).
39 LRC § 3440. The new Code authorizes death as a sanction for anyone causing death or a serious physical injury in the course of an abortion, murder, or rape of a child under 12 years of age; for sodomy; and for kidnapping unless the defendant releases the victim alive, substantially unharmed, and in a safe place prior to trial.
40 LRC § 3440, Commentary.
41 LRC § 3440(3)(a).
42 LRC § 3440(5).
in traditional trial proceedings. Even though the Commentary expresses skepticism as to the value of the death penalty as a deterrent, it was retained as an alternate sanction with protection of society as its rationale.

The drafters of § 3440 also realized that life imprisonment without privilege of parole can be employed to protect society from dangerous offenders without resorting to putting these men to death. This sanction recognizes a particular offender's inability to be rehabilitated and become a useful member of society. Life without parole was recognized under pre-Code law only for the rape of a female over twelve years of age. This resulted in an anomalous situation because of the incongruity between it and the penalty for rape of a child under twelve, clearly a more heinous crime. In both instances a convicted offender could receive the death penalty, but, if death was not imposed in the case of rape of a female under 12, the felon was eligible for parole after serving part of his life sentence. Despite the need for a more enlightened process for imposing sanctions and the need to remedy the above anomaly the 1972 General Assembly omitted § 3440 when enacting the Kentucky Penal Code. The omission demonstrates a lack of understanding of the values of the provision. It is recommended that the provision, absent the death penalty alternative, be reconsidered for inclusion in the law before the bill's effective date of July 1, 1974. Section 3440, a cornerstone of the Penal Code's scheme of disposition of offenders, provides the flexibility required for administering the criminal justice system in Kentucky. Its exclusion leaves the Commonwealth with a progressive Penal Code made incomplete by this legislative omission. This is especially true in light of the revolutionary legal developments in 1972 following the General Assembly's evaluation of the Kentucky Penal Code.

The legal revolution began in February, 1972, with the California Supreme Court's decision in People v. Anderson. Influenced by the fact that 104 men, among them Charles Manson and Sirhan Sirhan, awaited execution on death row, the court felt that the constitutional question of whether the death penalty violated the eighth amendment could no longer be avoided or deferred to any other branch of government. By a 6-1 decision the court held capital punishment violative of the eighth amendment's "cruel and unusual punishment" clause. While several arguments were advanced by the majority as rationale

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43 KRS § 435.090.
44 KRS § 435.080. This statute notes alternate sanctions of death or life imprisonment with possibility of parole.
45 493 P.2d 880, 100 Cal. Rptr. 152 (1972).
for their holding, the California court was concerned primarily with the fact that any execution which ultimately follows pronouncement of the death sentence has in fact become "lingering death" for the convicted.\(^4\) Citing Weems, the court said the "cruel and unusual punishment" clause was "progressive, not being fastened to obsolete standards and acquiring meaning as public opinion became enlightened by a humane justice."\(^{47}\) Related to the "lingering death" concept, the psychological impact of the punishment was characterized as "impending" with the fear and distress that accompanies that state of mind. The court also cited a world-wide trend toward abolition of the death penalty noting that where the sanction is retained, application is exceptional and frequently executive authority pardons the condemned person.\(^{48}\) Finally, while indicating that offenders deserve no sympathy, they also reasoned that society cannot be deemed enlightened if human life is taken for purposes of vengeance.

The Supreme Court of the United States assured the nation that dispositive action on capital punishment would be taken during the 1972 term when it granted certiorari in \textit{Furman v. Georgia}.\(^{49}\) The petitioners were two black men sentenced to death—one for raping a white woman, the other for murder. Also included in the case for disposition was another black man convicted of raping a white woman.\(^{50}\) Certiorari was granted for the following question: "Does the imposition and carrying out of the death penalty in [these cases] constitute cruel and unusual punishment in violation of the Eighth and Fourteenth Amendments?\(^{51}\)

Delaying until the final day of the 1972 term, the Supreme Court handed down its long awaited decision.\(^{52}\) There had been a moratorium of executions in the United States since 1967 while various cases worked their way through the appellate courts, and there were over 600 convicts on death row throughout the country. The Supreme Court, philosophically transformed by President Nixon's four appointees, was expected to uphold the death penalty's constitutionality. However, by a 5-4 vote with all nine justices writing separate opinions, they ruled that capital punishment as currently imposed is "cruel and

\(^{46}\) Id. at 892, 100 Cal. Rptr. at 154.
\(^{49}\) 403 U.S. 952 (1971).
\(^{52}\) Furman v. Georgia, 408 U.S. 238 (1972).
unusual punishment" in violation of the eighth and fourteenth amendments.

The ramifications of the holding in *Furman* are especially subject to speculation because of the closeness of the vote in the face of an ever changing Court whose four Nixon apointees voted as a block to uphold the constitutionality of the death penalty. Therefore a brief analysis of the individual opinions is necessary in order to evaluate the impact of the decision with primary emphasis directed toward the ultimate issue of whether the Supreme Court will ever again allow the death penalty to be imposed. This is particularly important in view of those opinions which hint that legislative reform of state statutory language might make the death penalty constitutionally permissible. The articulate and well-reasoned opinions in *Furman* set out in the following analysis demonstrate the justices' divergent legal philosophies.

Although the five majority justices reached their decisions through different legal reasoning, their basic objection to the capital punishment statutes was that present laws permit the death penalty to be administered in a capricious, discriminatory manner. This is ironic when one considers that early twentieth century uneasiness with official executions and a desire to individualize punishment led most states to abandon mandatory death penalties. States reacted by instituting alternate sanctions and establishing degrees of offenses to avoid imposing the death penalty. The irony is compounded because states ultimately sought to avoid arbitrary use of the death penalty by making it a discretionary sanction to be controlled by either the judge or jury in a particular case. The *Furman* majority labeled this humanitarian effort by the states "a haphazard process" while simultaneously hinting that a mandatory death penalty for certain offenses might be the only means to prevent discrimination in the sentencing of capital offenders. If a mandatory death penalty is enacted by Congress or state legislatures for certain offenses, we will have come full circle in the disposition of capital offenders in less than seventy-five years. However, it is unlikely that a mandatory death penalty will be introduced on any wide scale because such an approach is inflexible—a vestige of nineteenth century sentencing philosophy rather than a progressive policy commensurate with an enlightened approach to capital punishment.

Justice Douglas concentrated his attack on the death penalty by noting that society refuses to apply this sanction uniformly. Application inevitably focuses on the poor, minority group members, and other outcasts of society whose relatively small numbers allow them
no countervailing political clout. Further, their poverty makes it nearly impossible to obtain first-rate legal counsel, probably the most crucial factor in the disposition of the convicted offender. Finally, Justice Douglas found these capital punishment statutes unconstitutional as violative of the eighth and fourteenth amendments because of the unlimited discretion of the juries and judges charged with imposing sanctions on the convicted offenders. "Under these laws no standards govern the selection of the penalty. People live or die, dependent on the whim of one man or of 12."54

Justice Brennan noted that the motive of the "cruel and unusual punishment" clause was to head off any cruelty that the legislature might promulgate into law. "Accordingly, the responsibility lies with the courts to make certain that the prohibition of the clause is enforced."55 It is conceded that legislatures have the constitutional right and power to prescribe punishments for crimes—but not where the legislative punishment violates the Bill of Rights. He proposes four principles to assess whether a punishment is cruel and unusual: (1) "a punishment must not be so severe as to be degrading to the dignity of human beings,"56 (2) "... the state must not arbitrarily inflict a severe punishment,"57 (3) "... a severe punishment must not be unacceptable to contemporary society,"58 and (4) "... a severe punishment must not be excessive."59

In discussing the above principles Justice Brennan notes that death causes the individual to lose the right to have rights, and its irrevocable nature makes it uniquely degrading to human dignity. Regarding the second principle he states;

When a country of over 200 million people inflict an unusually severe punishment no more than 50 times a year, the inference is strong that the punishment is not being regularly and fairly applied.60

Applying principle three, he asserts that moral debate has caused a progressive decline in the infliction of death. Rather than exerting a

53 See The Courier-Journal & Times (Louisville), August 13, 1972, § E, at 5. Don Reid, editor of the Hountsville Texas Item, notes that of the 189 executed men whom he knew, only three or four had enough money to hire a good lawyer. The process of discovering new evidence can go on indefinitely, however, the money supply cannot. Mr. Reid is hopeful that the Supreme Court's decision in Furman v. Georgia will stand after having personally viewed all 189 of these Texas executions.
55 Id. at 267.
56 Id. at 271.
57 Id. at 274.
58 Id. at 277.
59 Id. at 279.
60 Id. at 293.
moralizing influence upon community values, death lowers our respect for life and brutalizes our values. Finally, Justice Brennan finds statistical data inconclusive to establish that death is a greater deterrent than imprisonment or that the overall objective of punishment, including protection of society, is served more effectively by death than imprisonment. Death is characterized as unjustifiable retribution when an offender can be adequately neutralized by incarceration. "Obviously, concepts of justice change; no immutable moral order requires death for murderers and rapists."61

Concluding that the death penalty per se violates the eighth and fourteenth amendments, Justice Brennan would hold it impermissible regardless of any possible legislative reform including the enactment of mandatory death penalty statutes.

In sum, the punishment of death is inconsistent with all four principles: death is an unusually severe and degrading punishment; there is a strong probability that it is inflicted arbitrarily; its rejection by contemporary society is virtually total; and there is no reason to believe that it serves any penal purpose more effectively than the less severe punishment of imprisonment. The function of these principles is to enable a court to determine whether a punishment comports with human dignity. Death, quite simply, does not.62

Justice Stewart based his opinion in Furman on the fact that petitioners were among "a capriciously selected random handful upon whom the sentence of death has in fact been imposed."63 Although he did not say that imposition of the death penalty is impermissible in all circumstances, he concluded that the eighth and fourteenth amendments are violated when this unique sanction is imposed "so wantonly and so freakishly."64

Justice White’s opinion focuses on the deterrent effect of the death penalty given its infrequent imposition. The threat of execution to an individual contemplating the commission of a capital offense has become attenuated.

[T]he policy of vesting sentencing authority primarily in juries—a decision largely motivated by the desire to mitigate the harshness of the law and to bring community judgment to bear on the sentence as well as guilt or innocence—has so effectively achieved its aims that capital punishment within the confines of the statutes now before us has for all practical purposes run its course.65

61 Id. at 304.
62 Id. at 305.
63 Id. at 309-10.
64 Id. at 310.
65 Id. at 313.
Justice Marshall alone concurs with Justice Brennan that the death penalty is unconstitutional under all circumstances. After an examination of statistics prepared by Thorsten Sellin, an international authority on capital punishment, Justice Marshall found the death penalty excessive and unnecessary punishment violative of the eighth amendment. He advocates a strong role for judges as "arbiters of the Constitution" and concludes the legislatures have not demonstrated any rational basis for their decisions that capital punishment serves as a more effective sanction than life imprisonment. The question of capital punishment's moral acceptability is treated intelligently by Justice Marshall. He notes that the accuracy of any evaluation depends upon whether people were fully informed of the penalty's purposes and liabilities. With this as his criterion, he concludes that the death penalty would be found "shocking, unjust, and unacceptable" by an informed citizenry.66

Justice Marshall points out that blacks as a class have been the target for discriminatory application of the death penalty far in excess of their proportion as a percentage of the population.67 "Evaluations of social worth naturally affect evaluations of individual culpability and capacity for reform."68 Young and poor men whose lives were spent in the shadows of parental and social neglect are the ones who have been executed over the years. It is also pointed out that "only 32 women have been executed since 1930, while 3,827 men have met a similar fate."69 An analysis of the death sentence for this period indicates:

Whether a man died for his offense depended, not on the gravity of his crime, not on the number of such crimes or the number of his victims, not on his present or prospective danger to society, but on such adventitious factors as the jurisdiction in which the crime was committed, the color of his skin, his financial position, whether he was male or female (we seldom execute females), and indeed oftentimes on what were the character and characteristics of his victim.70

66 See id. at 361 n.145 where Justice Marshall terms it imperative for constitutional purposes to learn the opinion of an informed electorate.
68 Goldberg & Dershowitz, Declaring the Death Penalty Unconstitutional, 83 Harv. L. Rev. 1773, 1793 (1969-70). See also Boykin v. Alabama, 395 U.S. 238 (1969). In this case Alabama imposed the death penalty on a Negro for simple robbery and the Supreme Court reversed on procedural grounds. However, in reversing, the court did not mention that an economic crime simply does not merit death; obviously the sanction was not in proportion to the crime.
70 MacNamara, Statement Against Capital Punishment, in THE DEATH PENALTY IN AMERICA 188 (H.A. Bedau ed. 1967). For a vivid example of how these (Continued on next page)
This portrays the inhuman side of capital punishment in America as seen by the court majority in *Furman*.

The minority opinions written by the four dissenting justices appointed since 1968 by President Nixon argue that the state is justified in taking the life of one of its citizens for certain criminal offenses after a trial and conviction. Common to the opinions of Chief Justice Burger and Justices Blackmun, Powell, and Rehnquist is the idea that abolition of execution is a legislative function rather than a judicial task. Their advocacy of judicial self-restraint is influenced by what they consider to be the greater fact-finding expertise of the legislature when it comes to the questions of administering the death penalty and its psychological effects upon those awaiting execution.

Chief Justice Burger's interpretation of the eighth amendment's "cruel and unusual punishment" clause would not prohibit punishment by death as long as the states prove it to be necessary for the deterrence or control of crime. Rather than adopting the *Furman* majority's interpretation that jury discretion in sentencing criminal offenders is a "haphazard process," he quotes from *Witherspoon* which characterized the jury system as an "articulate expression of the community conscience on life and death." Chief Justice Burger denies that the system of discretionary sentencing in capital cases has failed to produce even-handed justice. He considers it an element of "fortuity" that some people are sentenced to death while others committing the same offense in another jurisdiction or tried before another jury escape that sanction. Finally, he hints that legislatures may comply with *Furman* by establishing standards for judges and juries to follow in determining the sentence in capital crimes or by narrowing the number of crimes that would carry a mandatory death penalty.

Justice Blackmun notes:

Were I a legislator, I would vote against the death penalty for the policy reasons argued by counsel for the respective petitioners and

(Footnote continued from preceding page)

factors operate, see Bob Dylan's ballad entitled "The Lonesome Death of Hattie Carroll" which appears on his album "The Times Are A-Changing." The ballad tells of the cold-blooded murder of a black woman who, while cleaning up a restaurant table, spilled a drink on a very wealthy Maryland landowner. The incident took place in a downtown Baltimore Hotel as an entire room of patrons were dining. Mr. William Zanzinger, the defendant, beat Hattie Carroll to death with his cane and received a six month sentence—which was never even fully served! 71 See Goldberg & Dershowitz, supra note 69, at 1798, 1806. The authors hint that the Supreme Court's avoidance of a decision such as that ultimately rendered in *Furman* is based upon the peculiar institutional position of the Court. However, it is also their contention that the legislative and executive branches of government are not absolved of responsibility to guard constitutional rights when the Supreme Court has declined to require them to do so. Instead, they have an even greater burden to interpret and apply the constitution.

expressed and adopted in the several opinions filed by the Justices who vote to reverse these convictions.\textsuperscript{73}

His refusal to join the majority holding stems from a feeling that the Court's action is sudden and disregards the principle of stare decisis, particularly in regard to the recent holding in \textit{McGautha v. California}.\textsuperscript{74} \textit{McGautha} held that there was no mandate in the due process clause of the fourteenth amendment that juries be given instructions as to when the death penalty should be imposed, the Court concluding that judicially articulated standards were not needed to ensure a responsible decision as to penalty. \textit{McGautha} credits juries with "due regard for the consequences of their decision."\textsuperscript{75} Justice Blackmun indicates that the California Supreme Court's judicial nullification of the death penalty\textsuperscript{76} is primarily responsible for the forced decision in \textit{Furman}. He concludes, "I fear the Court has overstepped. It has sought and has achieved an end."\textsuperscript{77}

Justice Powell's opinion accepts the notion that constitutional concepts are dynamic and such flexibility is the hallmark of our democratic government. However, he opposes total abolition of capital punishment by judicial fiat especially when such action is based upon individual Justices reading their personal preferences into the Constitution. Recognizing that in the past there may have been discriminatory application of the death penalty by the states upon blacks convicted of raping white women, Justice Powell concludes this is not proper grounds for invalidating present sentencing procedures.\textsuperscript{78} He does not want the Supreme Court to take an active role in reforming criminal punishments and insists that legislation should only be struck down in extraordinary cases.

Justice Rehnquist criticizes the \textit{Furman} majority for striking down the death penalty because it offends their sense of morality. He indicates that the judgment of the legislative branches, both state and federal, is more responsive to the popular will than the judicial branch.\textsuperscript{79} He concludes that "this decision holding unconstitutional capital punishment is not an act of judgment, but rather an act of will."\textsuperscript{80}

\textsuperscript{73} \textit{Furman v. Georgia}, 408 U.S. 238, 406 (1972).
\textsuperscript{74} 402 U.S. 183 (1971).
\textsuperscript{75} Id. at 208.
\textsuperscript{76} People v. Anderson, 493 P.2d 880, 100 Cal. Rptr. 152 (1972).
\textsuperscript{77} But see Goldberg & Dershowitz, \textit{supra} note 69, at 1794. The authors state that if the choice is between imperfect administration of capital punishment and abolition of capital punishment, constitutional values are heavily weighted in favor of the latter.
\textsuperscript{78} See The Courier-Journal (Louisville), June 30, 1972, \S\ A, at 24.
\textsuperscript{80} \textit{Furman v. Georgia}, 408 U.S. 238, 468 (1972).
The immediate question upon reading *Furman* is what are the ramifications of this holding and how will the states and federal government react to this dramatic change in the criminal justice system. Apparently the Supreme Court's declaration that present capital punishment statutes are unconstitutional means that over 600 convicted offenders throughout the country have an unconditional reprieve from death. Even if future capital punishment statutes are enacted and held constitutional, they cannot be applied retroactively to these individuals. One must speculate that a period of uncertainty will follow before the future of capital punishment in the United States will be finally decided; however, reading the nine opinions indicates that death might not be considered too harsh a penalty for some crimes if it were administered to all persons found guilty of those crimes.

When the Supreme Court decided *Furman* there were 24 condemned prisoners on death row in Kentucky's Eddyville penitentiary. Apparently none of the 24 will ever be executed. The circuit court which tried the prisoner may hold a new trial for the sole purpose of resentencing or the Governor may commute the death sentences to life imprisonment. Finally, these men have the option of individually petitioning the Supreme Court to be included under the *Furman* mandate. The immediate result for those on death row at Eddyville is "new and better quarters, farther removed from the prison's electric chair, and privileges almost equal to those of other inmates."81

Kentucky Attorney General Edward Hancock's immediate reaction to the Supreme Court's holding was that "the death penalty can neither be carried out in cases already settled, nor demanded by prosecutors under present circumstances."82 He hoped that the Kentucky Court of Appeals would clarify the application of the decision and institute guidelines to be followed in Kentucky. Realizing that until the law is amended the death penalty is defunct, the Attorney General requested that Governor Ford convene a special session of the legislature to consider the problem.

To determine whether the basic assumptions underlying *Furman* can be substantiated by the Kentucky experience we need to examine the statistics relevant to the imposition of the death penalty. Since Kentucky installed its electric chair at Eddyville in 1911, 79 whites and 83 blacks have been executed. Since 1930 all seven men executed for rape have been black. The educational background of the 99 persons electrocuted since 1930 reveals:

Fourteen were illiterates;

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Twenty-five never went beyond the Fourth Grade; Thirty-seven did not complete the Eighth Grade; Sixteen attended high school, but didn’t graduate; Only seven were high school graduates and none had attended college. 88

Obviously, during the past 43 years a capital offender had a far better chance to be sentenced to death in Kentucky if poor, black and uneducated. 84

The Kentucky experience also illustrates that hardened criminals with long histories of criminal conduct are not the ones most frequently executed. A profile of the ninety-nine offenders executed during this period portrays the following facts:

Fifty-six of the 99 had no record of a previous criminal conviction; Twenty-two had one previous conviction; Only 21 of those killed by the state had been convicted of two or more criminal offenses; Four of those executed were under 18 years of age, and 18 were under 21 years of age; Forty-two more were under 30 years of age; The youngest person executed was 16 years of age, and this occurred in March 1946. 85

An analysis of the 24 men facing execution at the time the Supreme Court decided Furman reveals 10 blacks and 14 whites with average ages of 23½ years and 29½ years respectively at the time they committed their offenses. 86 The criminal offenses for which the blacks were convicted ranged from willful murder in the course of armed robbery to willful murder of an on-duty policemen. The average age of blacks convicted of killing on-duty policemen was 20 years with all of these crimes being committed in the populous and industrialized Louisville metropolitan area. All of the blacks were from very poor families and

84 Yet, the more frequent imposition of the death penalty for criminal offenders characterized as poor, black, and uneducated has been partially explained by the composition of the jury—if the jury belongs to the dominant or “in group” and the defendant and his witnesses belong to an “out group”—as they frequently do—the defendant’s evidence is often discounted to zero. Ehrmann, The Death Penalty and the Administration of Justice, in The Death Penalty in America 451-22 (H. A. Bedan ed. 1967).
86 The author would like to thank Superintendent Henry E. Cowan of the Kentucky State Penitentiary at Eddyville who furnished some of this data about the men on “death row” and several recent University of Kentucky College of Law graduates who provided information on some of the 24 men, including the nature of crimes and victims.
demonstrated a lack of education. The criminal offenses for which the whites were convicted ranged from rape of a girl over 12 to willful murder in the course of an armed robbery. The only policeman killed by whites was attempting to thwart an escape by four men after an armed robbery. The average age of these four whites was 32% years.

The most striking aspect of many of these savage crimes is the senselessness of the killing, which often occurred in the course of committing lesser crimes such as petty robberies. These men seem to have been acting impulsively, their crimes generally not dictated by economic need. "They will act psychopathically. Their tendencies and acts will be anti-social, egotistic, disruptive, and outright criminal." On November 17, 1972, the Kentucky Court of Appeals decided the first case involving a defendant who had been sentenced to death prior to the Furman decision. The Court upheld the murder conviction of Warren Caldwell; however, it suspended the death penalty imposed by the Christian County Circuit Court. They remanded the case to the lower court for the purpose of reducing Caldwell's sentence to life imprisonment, citing Furman as declaring the death penalty unconstitutional as presently imposed.

On March 15, 1973, the Kentucky Court of Appeals, speaking through Chief Justice John S. Palmore, formally announced the invalidation of the Commonwealth's death penalty and required modification of the sentences of the remaining 23 men on death row. The Court said these men should be sentenced to the "next highest penalty the law sets for the crime." The judges of the circuit courts will
modify the sentences by order, thereby avoiding costly resentencing procedures. In theory, these men are eligible for a parole hearing after serving six years. Three formerly condemned prisoners have already served this six year period.

Mrs. Lucile Robuck, chairman of the state's Parole Board, anticipating public outcry at the possibility that men who faced the electric chair for murder might now be freed, stressed that "being eligible for parole is not at all the same as actually being paroled." Mrs. Robuck explained that the men will receive parole hearings but emphasized that when the Board deals with someone who has taken a life, decisions to grant parole are made very carefully. Psychiatric evaluations of each man will be studied to determine whether he has reached the point where he can be safely released into society. Some are psychotic and therefore will never be released; others may be eventually paroled under strict conditions and the watchful supervision of a parole officer.

An analysis of the crimes for which the majority of the 24 previously condemned men stand convicted might prompt the Kentucky General Assembly to consider enacting mandatory death penalty statutes for the murder of policemen or for the commission of a murder in the course of another felony. It seems likely that the present Supreme Court will uphold such enactments providing capital punishment is applied automatically to all those convicted of the particular offense. In some respects this does not seem too harsh for heinous crimes. However, such a course cannot benefit our society. Institutionalized violence in the form of legal killing is self-indulgent, self-destructive, and incompatible with the vast progress of this century. The perpetration of violence on fellow human beings, far too common and almost casually accepted, is not inevitable in a civilized society.

In light of the Furman holding precluding the death sentence, life imprisonment without privilege of parole should be adopted for the most serious offenders whose past criminal records indicate a definite trend of psychopathic behavior. This sentence implies that the offender cannot be rehabilitated and permanent incarceration is necessary to protect society. The enactment of such a sanction would eliminate

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92 Sellin, Capital Punishment, 8 Cmnm. L.Q. 36, 46-49 (1965-1966). The author demonstrates that policemen are no safer in jurisdictions where the death penalty exists as a sanction for their murder than in jurisdictions where no death penalty exists. Furthermore, Sellin undercuts the often stated argument that life sentences for murderers risk homicides in jails. He notes that murders in prison are committed by persons serving life sentences for crimes such as robbery and forgery rather than for murder.
the anomalous situation we are presently facing where all men serving sentences of life imprisonment must be accorded parole hearings after six years in the penitentiary.

Nationally, the Supreme Court's holding in Furman resulted in vigorous efforts by many states to restore the death penalty. On November 2, 1972, the Delaware Supreme Court declared capital punishment permissible for murder convictions since the death penalty was mandatory there for certain crimes prior to Furman. On November 7, 1972, California voters passed a referendum reinstating the death penalty in state prosecutions thereby overturning People v. Anderson.93

The California referendum has the effect of a state constitutional amendment. However, California voters can re-establish capital punishment only to the extent permitted under Furman. In other words, the referendum vote could restore capital punishment only for those crimes that carried a mandatory death penalty prior to Anderson or for crimes that the California legislature subsequently makes mandatorily punishable by death. Further, this type of legislative action seems to preclude judicial review because the referendum's Proposition 17 states that capital punishment "shall not be deemed" to violate any part of the California Constitution. This raises a serious separation of powers question. In effect, Proposition 17 means that Californians have overruled their state Supreme Court's interpretation of the Bill of Rights and have attempted to limit judicial review of future legislative action. The role of the judiciary as arbiters of the Constitution could be severely undercut by such legislative action.

The Attorneys General of several states are drafting proposals ranging from a United States Constitutional amendment to model laws with mandatory capital punishment for specific offenses. "Of the 35 states with functioning death penalty statutes, courts in at least 17 states have thus far ruled that the Supreme Court's decision in Furman is controlling."95 However, a strong campaign to restore capital punishment is expected in at least 10 states. For example, on December 1, 1972, the Florida State Legislature passed legislation giving judges the option of imposing the death sentence for certain crimes but laid down very specific guidelines requiring aggravating circumstances to justify its imposition. The Supreme Court has yet to review any of the new state legislation relating to capital punishment.

93 493 P.2d 880, 100 Cal. Rptr. 152 (1972).
94 These four rather obscure crimes are killing a prison guard, train wrecking, treason against California, and perjury leading to execution of an innocent person.
95 Time, November 20, 1972, at 74.
The Nixon administration on January 4, 1973 announced that "Congress will be asked to enact a mandatory death penalty for several categories of cold-blooded, premeditated federal crimes." Attorney General Kleindienst indicated that the death penalty would be sought for "kidnapping, assassination of a public official, sky-jacking, killing a prison guard, or bombing a public building." However, this proposal has drawn criticism and an alternate bill has been introduced in Congress by Senator McClellan of Arkansas. The McClellan bill, the result of years of study and legislative hearings, calls for the death penalty only where a defendant in the course of a serious criminal act intentionally takes another's life. It also includes a provision for bifurcated trials with one proceeding to decide the issue of guilt followed by a separate proceeding to determine punishment if the offender is found guilty. The McClellan bill is the more realistic proposal and seems more likely to pass than the administration's proposal.

While the ultimate solution for the disposition of serious criminal offenders has yet to be reached, the states and federal government must be realistic in their interpretation of Furman. Attorneys General, legislators, and law enforcement officials must be willing to take Camus's "civilizing step," the abolition of the death penalty. Although the Supreme Court did not prohibit capital punishment under all circumstances, the thrust of their holding represents its death knell in view of the belief that the mandatory death penalty is inflexible and undercuts the role of the jury in our criminal justice system. Chief Justice Burger states in Furman, "... mandatory sentences of death, without the intervening and ameliorating impact of lay jurors, may be so arbitrary and doctrinaire that they violate the Constitution." Most importantly, reintroduction of the mandatory death penalty would represent a step backward in the slow progress of penal reform.

III. Persistent Felony Offenders

The persistent felony offender may be characterized generally as an individual repeatedly in trouble with the law, associating mainly with other criminals, spending a large part of his life in prison, and living from the proceeds of crime. Many are psychologically disturbed and highly dangerous. Increasingly bitter after each confrontation with the criminal justice system, habitual offenders develop more sophisticated notions of criminality during incarceration as a result.

97 Id.
of exposure to other hard core criminals. When dealing with persistent felony offenders, two basic problems emerge: the duration of imprisonment and the type of individual to whom the extended term should be applied. The primary legal task involves distinguishing dangerous from less serious offenders.

A. Habitual Criminal Statutes—A Backward Glance

Most states have habitual criminals statutes. However, according to Wechsler, "[t]he consensus is that habitual criminals statutes are a failure, productive of chaotic and unjust results when they are used, and greatly nullified in practice."\(^9\) Operating to sweep up persistent social nuisances while more dangerous and serious offenders remain free, these statutes are most often invoked against narcotic addicts, prostitutes, alcoholics, vagrants, petty offenders, and some professional criminals. Even sexual psychopath laws which exist in most jurisdictions fail to distinguish the dangerous and brutal offenders from those who are merely inadequate and aberrant. The contribution of these laws to the problem of controlling dangerous criminal offenders is minimal.\(^{10}\) Wechsler points out four defects generally found in habitual offender laws:

... first, they are mandatory wholly or in part in over half the jurisdictions; second, the extensions often are too long or appear arbitrary in their length, especially when they import long minima or otherwise exclude parole; third, the extension especially when it involves life sentences, takes inadequate account of the gravity of the offense of last conviction for which the sentence is imposed; fourth, the extension rests entirely upon prior record and takes no account of other types of special danger that particular offenders may represent.\(^{101}\)

The inadequacy of the law dealing with habitual offenders may be partially explained. Where discretion in imposing sentence or granting parole exists, the judge or parole board will consider the potential danger to the community in deciding whether to release the offender. Some consider this an adequate safeguard. However, many who repeatedly commit crimes of violence and consequently represent a real threat to society manage to escape the imposition of life imprisonment and must eventually be released.

Over a decade ago, a movement to establish a more precise definition of "dangerous" offenders resulted in a variety of recommendations

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\(^{101}\) See Wechsler, supra note 99, at 483.
including those of the Advisory Council of Judges of the National Council on Crime and Delinquency and the American Law Institute. The Advisory Council’s Model Sentencing Act defines “dangerous offenders” as those who have committed or attempted certain crimes of physical violence and who are found by the court to be “suffering from a severe personality disorder indicating a propensity toward criminal activity.” The Act provides that “dangerous offenders” may be sentenced to 30 years imprisonment and recommends, but does not require, psychiatric substantiation of the defendant’s criminal propensities. Under the American Law Institute’s Model Penal Code a convicted felon could have his term of imprisonment extended beyond the maximum provided for that category of felony when “the defendant is a dangerous, mentally abnormal person whose commitment for an extended term is justifiable for protection of the public.” As a prerequisite to judicial imposition of the extended sentence there must be a psychiatric examination resulting in the conclusion that his mental condition is gravely abnormal; that his criminal conduct has been characterized by a pattern of repetitive or compulsive behavior or by persistent aggressive behavior with heedless indifference to consequences; and that such condition makes him a serious danger to others.

Both approaches require a prediction as to the course of one’s future criminality. The subsequent uncertainty made sentencing a guessing game for judges dealing with potential persistent felony offenders as they sought to protect society without inflicting needless injustice on criminals in the form of extended sentences.

These recommendations reflect a sincere effort to articulate alternatives to conventional persistent offender statutes. However, they have failed to mobilize the psychiatric resources necessary to recognize and treat psychologically disturbed and potentially dangerous offenders. The criminal justice system with its emphasis on imprisonment for offenders perpetuates the habitual offender as a behavioral phenomenon, for the total experience produces an individual committed to criminal values. We desperately need to develop viable alternatives to imprisonment for dealing with the habitual offender.

B. Kentucky Pre-Code Habitual Offender Law

Prior to the enactment of the Kentucky Penal Code, this state’s habitual offender statute fit the defective mold described by Wechsler.

102 ADVISORY COUNCIL OF JUDGES OF THE NATIONAL COUNCIL ON CRIME AND DELINQUENCY, MODEL SENTENCING ACT §§ 5(a), 5(b) (1963).
104 Id.
Persons previously convicted of two or more felonies were automatically given life imprisonment. Rarely were they given psychiatric examinations to determine the propriety of the sentence. The law operated mechanically and often unfairly due to a complete lack of distinction between types of criminal acts. An individual who was convicted of three felonies, regardless of whether they involved violence or resulted in injury to others, was automatically sentenced to life imprisonment. For this reason alone the statute seems unjustifiable and could probably have been challenged on constitutional grounds. Isolation and deterrence are valid penal objectives; however, statutory language imposing an automatic life sentence on thrice-convicted felons violates prevailing principles of excessiveness and proportionality.

C. Persistent Felony Offenders Under the Kentucky Penal Code

Influenced by the American Law Institute’s Model Penal Code and the penal codes of New York and Michigan, Kentucky adopted an approach to persistent felony offenders consistent with the Code’s classification of crimes approach. Mindful of the need to protect from habitual criminals, the General Assembly nevertheless recognized that not all deserved the same sanction.

The Kentucky Penal Code does not provide for extended terms of imprisonment for an individual convicted of a Class “A” felony because adequate sentencing alternatives exist without regard to the offender’s past criminal record. However, the legislature recognized a need for extended terms applicable to habitual felons convicted of a Class “B,” “C” or “D” felony. Class “B” felons are most likely to pose a serious threat to the public, since they include those convicted of crimes involving violence to persons and often have a high degree of recidivism.

105 KRS § 431.190. Any person convicted a second time of a felony shall be confined in the penitentiary not less than double the time of the sentence under the first conviction; if convicted a third time of a felony, he shall be confined in the penitentiary during his life. Judgment in such cases shall not be given for the increased penalty unless the jury finds, from the record and other competent evidence, former convictions for felonies committed by the prisoner, in or out of this state.

106 KRS § 210.360. The Kentucky Commissioner of Mental Health causes the person to be examined by a department psychiatrist to determine his mental condition and the existence of any mental disease or defect which would affect his criminal responsibility. Yet, the Kentucky Court of Appeals in Etherton v. Commonwealth, 379 S.W.2d 730 (Ky. 1964), held that such mental examination is not a condition precedent to subjecting someone to trial under the habitual criminal statute nor will the failure to perform such an examination void the conviction.

107 See Wingo v. Ringo, 408 S.W.2d 469 (Ky. 1966).

108 KYPC § 267 [KRS § 435A.1-080].

109 KYPC § 265 [KRS § 435A.1-060].

110 KYPC § 265(2)(a) [KRS § 435A.1-060(2)(a)].
Section 3445 of the Proposed Kentucky Penal Code as presented to the General Assembly provided that when a persistent felony offender charge is brought, the jury acts in a bifurcated proceeding to determine whether the accused is guilty of the felony charge. If found guilty, the jury fixes sentence for that offense. The same jury then considers whether the accused qualifies as a persistent offender. An affirmative verdict requires a unanimous vote. If this occurs, the extended term replaces the ordinary sentence fixed by the prior jury deliberation. This procedure was designed to afford full protection to the accused on the issue of guilt or innocence, yet provide leeway in the penalty stage for consideration of all information relevant to sentencing. This bifurcated proceeding resolves the conflict between the need to introduce proof of prior convictions and the evidentiary safeguard that an accused should not be convicted of an alleged present crime merely because of past criminal conduct. However, when § 3445 was enacted, the General Assembly eliminated the language in subsection (1) providing for a bifurcated proceeding. This effectively destroys the contemplated scheme and it is urged that the legislature reconsider its action and enact the proposed section in its entirety.

Perhaps the most important feature of the section dealing with persistent offenders concerns the requirements which must be satisfied before an individual can be convicted. The Code requires the persistent felony offender (1) to be more than twenty-one years of age, (2) to stand presently convicted of a felony, and (3) to have been previously convicted of at least two felonies. The previous felony convictions may have taken place in Kentucky or in another jurisdiction so long as the defendant was over eighteen years of age at the time the first offense was committed, a sentence of at least one year of imprisonment was imposed for each felony, and the defendant was imprisoned under sentence for both convictions prior to commission of the present felony.

Because protection of society through incarceration of the dangerous individual rather than rehabilitation of the offender is the objective, "care must be taken to avoid a classification of an individual as an habitual offender." The strict age limitations are necessary "to

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111 KYPC § 265 [KRS § 435A.1-060].
112 LRC § 3445(1). Yet, if the jury is unable to agree unanimously that the defendant is a persistent felony offender or on the sanction to be imposed upon him, the original sentence fixed by the jury under LRC § 3440 shall stand.
113 KYPC § 267(2) [KRS § 435A.1-080].
114 KYPC § 267(2)(a),(b),(c) [KRS § 435A.1-080 (2)(a),(b),(c)].
115 LRC § 3445, Commentary.
restrict application of the extended terms of imprisonment to individuals who have achieved relative maturity.""116

The requirement that at least one year of imprisonment was served for both prior felonies enables the Commonwealth to use convictions from another state for the purpose of this statute. This is true even where the other state labeled the particular offense a misdemeanor rather than a felony. For example, if a man were convicted of an offense in Indiana for which he served one year, it could subsequently be used in the compilation of the three felonies required for sentencing as a persistent felony offender in Kentucky. By requiring the defendant to have been imprisoned for the previous offenses prior to treating him as a habitual offender, exposure to a rehabilitative effort during the prior institutionalization will be assured. The Kentucky Penal Code further specifies that

in determining whether a person has two or more previous felony convictions, two or more convictions of crime for which that person served concurrent or uninterrupted consecutive terms of imprisonment shall be deemed to be only one conviction, unless one of the convictions was for an offense committed while the person was imprisoned.117

The exception whereby an individual would be charged with two convictions if one of his offenses took place in prison is necessary to deter the commission of crimes while offenders are incarcerated. The general impact of this provision represents an effort to defer labeling an individual a persistent offender if rehabilitation is possible during an ordinary term of imprisonment.

Section 267118 of the Penal Code operates in the following manner to assess the time to be served in an extended term by the persistent felony offender. If the defendant's most recent offense was a Class "B" felony, the jury is limited to consideration of an indeterminate term with a maximum sentence of from twenty years to life. In other words, the persistent felon is treated exactly as a Class "A" felon convicted of committing a single Class "A" offense under the general classification scheme of the Code.119 Those individuals categorized as persistent offenders whose most recent offense was a Class "C" or "D" felony may be sentenced to extended terms120 double the ordinary term provided for the conviction of a single Class "C" felony.121 "This ap-

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116 Id.
117 KYPC § 267(3) [KRS § 435A.1-080(3)].
118 KYPC § 260 [KRS § 435A.1-010].
119 KYPC § 267(4)(b) [KRS § 435A.1-080(4)(b)].
120 KYPC § 265(2)(c) [KRS § 435A.1-060(2)(c)].
121 KYPC § 265(2)(c) [KRS § 435A.1-060(2)(c)].
proach to the question of duration of the term imprisonment for a habitual criminal is consistent with the approach proposed in the Model Penal Code."^{122}

The extended term provision of the Kentucky Penal Code is a more flexible and reasonable legislative pronouncement than that represented by the old statute.\(^1\)\(^2\) No longer is it possible for an offender to receive an extended term of imprisonment after only two felony convictions. The requirement that one be adjudged an habitual offender only after committing three felonies goes a long way toward establishing the felon's incapacity for rehabilitation through normal terms of imprisonment.

D. Concurrent and Consecutive Terms of Imprisonment

Section 270\(^\text{124}\) of the Kentucky Penal Code was enacted to augment Section 267.\(^\text{126}\) The section deals with the length of the term which may be imposed on a defendant and how these terms are to be served. Even with the imposition of consecutive indeterminate terms, the maximum term which can be accumulated by a defendant can be no greater than the maximum term that can be imposed on a persistent felony offender.\(^\text{126}\)

Anyone who commits an offense while on parole is treated the same as the offender who commits an offense while in prison. His second sentence may have to be served consecutively rather than concurrently if the court chooses to exercise its discretion.\(^\text{127}\) The Code also removes all restrictions from the trial court's imposition of consecutive sentences on one who commits an offense while in prison, pending imprisonment, or during an escape from custody.\(^\text{128}\) The major thrust of this Code provision reverses the prior principle that sentences imposed would be construed to run consecutively, and therefore unless the court specifies how a sentence is to run, it shall run concurrently.\(^\text{129}\) The rationale for such a change is based on the fact that if a court does not feel strongly enough about the case to specify the manner in which the sentences are to run, then such sentences should run concurrently.

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\(^1\) KYPC § 270(1)(c) [KRS § 435A.1-110(1)(c)].
\(^2\) See Beasley v. Wingo, 432 S.W.2d 413 (Ky. 1968).