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Sentencing: The Good, the Bad, and the Enlightened

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I. INTRODUCTION

In June, 1968 the Kentucky Crime Commission, in keeping with legislative instruction, made certain recommendations for a change in Kentucky's current treatment of crime and punishment.¹ Within its report was a suggestion that sentencing in all non-capital criminal cases be rendered by the judge instead of the jury.² Thus, it must be emphasized that this discussion is confined only to sentencing in non-capital cases.

The authors have arrived at a definite recommendation which is offered at the conclusion of the paper. It is our opinion that the sug-
gestion outlined is not only the most efficient and proper but also the
most feasible under our present sentencing apparatus. Although we
have utilized the results of our research and interviews to support our
preference, it is important to emphasize that another purpose of this
writing was to expose the various available alternatives.

It would be most difficult, if not impossible, to accurately assess and
criticize the rationale and practical effect of the Crime Commission
recommendation, relying entirely upon academic recordings. The
writings of legal thinkers provide little basis for a realistic approach to
a practical discussion of what needs to be done to the sentencing pro-
cedure in Kentucky. Consequently, while the authors of this article
have given sufficient adherence to the scholastic writing on the subject,
we have also taken a practical look at the sentencing structure of Ken-
tucky. We have searched out answers to pressing questions on the sub-
ject from members of the judiciary, corrections department, and
members of the parole board. Thus, while it may be said by more
prominent craftsmen than ourselves that such information received
has been unskillfully used, we submit the proposition that at least our
scope has not been impaired by insufficient preparation.

II. PHILOSOPHY OF SENTENCING

We strive not to achieve uniform sentencing, but to acquire a uniform
philosophy which includes the ingredients that lead to a sentence... in
keeping with enlightened social and legal policy.3

In order to intelligently deal with the question of who should
determine the sentence of an offender, it is relevant to first consider
the objectives to be attained by sentencing. It may be that the end
sought to be accomplished will preclude certain persons or groups of
persons from being able to fairly render a sentence.

The first topic to be discussed in this paper, therefore, will be the
current philosophies of sentencing. It would be futile to present as
established a single sentencing philosophy: “... there are as many
philosophies [of sentencing] as there are sentencing judges [and
individual jury members], and the personal factor in sentencing makes
for a myriad of variation. ...”4 To proceed intelligently, however,
some “majority view” of sentencing philosophy must be established,
remembering that such would be only a majority view of todays
writers, and not a uniform view accepted by all.

3 Levin, Toward a More Enlightened Sentencing Procedure, 45 Neb. L. Rev.
499 (1966).
At the risk of being arbitrary and subjective, the goals of modern punishment and sentencing may generally be categorized under four headings: (1) deterrence; (2) neutralization; (3) rehabilitation; and (4) retribution.

Deterence "simply refers to the prospect of pain as a psychological stimulus hoisted by society in anticipation of the response of abstention from gaining illicit pleasure."5 This is one of the most widely accepted purposes of organized punishment. By punishment one offender, society demonstrates that all others will similarly suffer for a breach of the law. Deterrence is usually broken down into two subdivisions: (1) special deterrence, aimed at the specific offender and based upon the assumption that the inflicted punishment will deter the particular offender who has received the punishment from repeating the proscribed act; (2) general deterrence, aimed at the populace and based upon the assumption that the threat of punishment will provide a stimulus for the general public to abstain from the commission of the act.

Since deterrence is aimed at two different classes (i.e., [1] those who have already committed the proscribed act, and [2] those who have not yet committed, but may be tempted in the future to commit the proscribed act), the severity of the punishment necessary to effect deterrence must be determined by weighing the competing demands of both classes, (i.e., [1] general deterrence; [2] special deterrence). With regard to special deterrence, there must be at least enough force brought to bear so as to prevent repetition by the particular offender. This is the minimum amount of force necessary to effect any deterrence: How strong must the stimulus be to prevent others from indulging in the proscribed conduct? Obviously the upper limits contain variables (i.e., who are "others"? how many are included in "others"?) which are necessarily beyond the scope of this paper. These upper and lower limits of severity are presented only to demonstrate the complexity of sentencing for deterrence. Somewhere between this upper and lower limit, the sentence must be set by weighing the competing demands. As will be shown later, the problem is more complicated when the other aims of sentencing are added.

A second goal of punishment is neutralization. This "relies on the idea that restraint has an incapacitating effect."6 When one who perpetrates a crime against society is removed therefrom, there can be no repetition of the criminal act by the offender until he is re-

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6 Id.
admitted into society. “Naturally the principle of utility would dictate that solely as far as neutralization is concerned, no more force should be employed than is necessary for preventive purpose. That means also that restraint should last no longer than the danger emanating from the restrained persons persists.”

The third aim of punishment is rehabilitation. This is based on the theory that a punishment period can also be a period of treatment, and that one who has committed an unlawful act should receive conditioning to prevent a reoccurrence of the violation. Under this goal a convicted criminal should theoretically be detained for the length of time necessary to condition him against the future commission of crime.

A fourth goal or, more properly, justification for punishment, is retribution. Although the concept of retribution has been denounced as Archaic and irrational, this concept is far from dead. In fact, at least one writer has concluded that “retribution has shown a remarkable recovery from a once disadvantaged position.” It has been argued that this concept may be sustained on logical grounds, that punishment is necessary to demonstrate that a wrong is a wrong rather than a right. “Retribution, then, is the most significant instrument for forming a conscience, for teaching right from wrong, for forming a super-ego.”

The foregoing are generally considered to be the goals of “enlightened” sentencing philosophy. Because the concept of retribution is at best controversial, it is assumed in this paper that the majority view is expressed in the first three concepts: (1) deterrence; (2) neutralization; (3) rehabilitation. These should be the goals of sentencing. Obviously, these concepts are interrelated and, more importantly, involve a weighing process. One cannot punish a single offender so severely as to generally deter the public-at-large. Rather, one must weigh the necessity of general deterrence against the other aims of sentencing.

As stated before, this discussion of philosophy becomes relevant when one attempts to assign the duty of sentencing to a person or a group of persons. Thus the question to be determined in this paper becomes, who is most qualified to effect the above explicated goals, while providing maximum protection for the rights of the individual offender.

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7 Id.
III. THE ALTERNATIVES:
THE BAD, THE GOOD, THE ENLIGHTENED

A. Introduction

For the purposes of this paper, discussion will be limited to the three major types of sentencing procedures used today in the United States. The first of these is that which is used in Kentucky today—sentencing by the jury. The second is what may be called a majority procedure—sentencing by the judge. The third procedure is called indeterminate sentencing. In this latter method sentence is not determined by either a judge or a jury. Rather, the convicted felon is committed for a term, the limits of which are set by statute; the length of his incarceration in a penal institution is then set within these limits by a parole board or an adult authority. These alternatives will be discussed in detail later.

By way of definition, it should be noted that “sentencing” for the purposes of this paper may be divided into two stages. The first stage is the initial determination of the length of sentence, and the second, the redetermination of the sentence; i.e., the function of the parole board at present. Thus the question to be discussed by this paper is not only who should make the initial determination of length of confinement, but also who should determine when, within the prescribed limits, a prisoner should be readmitted to society.

B. Jury Sentencing: The Bad?

Kentucky uses a sentencing procedure which a minority of jurisdictions employ.10 In this state the initial determination of sentence length is made by the jury, the same jury that heard the evidence against the offender. This, however, is the procedure only where the defendant has entered a plea of not guilty and has had a trial by jury. Where the defendant has entered a plea of guilty, the judge assesses the penalty. The above is made explicit by the Kentucky Rules of Criminal Procedure which provide:

(1) When the jury returns a verdict of guilty it shall fix the degree of the offense and the penalty, except where the penalty is fixed by law, in which case it shall be fixed by the court.

(2) Where the defendant enters a plea of guilty, the court may fix the penalty except in cases involving offenses punishable by death.11

10 See note 66 infra.
Although the jury has the duty of assessing the punishment of the offender, it should be noted that the judge has the statutory power to probate the convicted offender:

(1) A Circuit Court, subject to the provisions and conditions provided in KRS 439.250 to 439.560, may postpone the entering of a judgment and the imposing of sentence and place the defendant on probation. This order shall only be made on motion of such defendant.\(^{12}\)

This power of the judge to probate is delimited by Kentucky Revised Statutes § 439.270 [hereinafter referred to as KRS] as follows:

The period of probation shall be fixed by the court and at any time may be extended or shortened by the court by order duly entered. Such period, with any extensions thereof, shall not exceed five years, except in cases in which the defendant is charged with failure to support his dependents. Upon completion of the probationary period, the defendant shall be deemed finally discharged, provided no warrant issued by the court is pending against him, and probation has not been revoked.\(^{13}\)

It should be noted that the court has continuing jurisdiction over the offender and that irrespective of the length of the sentence levied by the jury, the period of probation fixed by the court may not exceed five years.\(^{14}\)

Upon granting probation, the court has the power to impose conditions by which the probated offender must abide. The language of the Statute makes it clear that the court has wide discretion as to the conditions imposed.\(^{15}\) The court has the power at any time to revoke the probation for violation of any of the imposed conditions. If the

\(^{13}\) KRS § 439.270 (1956).
\(^{15}\) KRS § 439.280 (1956) provides as follows:

1. Avoid injurious or vicious habits;
2. Avoid persons or places of disreputable or harmful character;
3. Report to the probation officer as directed;
4. Permit the probation officer to visit him at his home or elsewhere;
5. Work faithfully at suitable employment as far as possible;
6. Remain within a specified area;
7. Pay such an amount of money into the court imposing the conditions as directed by that court;
8. Make reparations or restitution, in an amount to be determined by the court, to an aggrieved party for damage or loss caused by his offense;
probation is revoked, the judge may reinstate the original sentence, or may impose a new sentence within the limits prescribed by law.\textsuperscript{16}

If the convicted defendant is not probated, the sentencing process is then turned over to the Parole Board when he is incarcerated in a penal institution. In Kentucky the responsibility for determining when a prisoner is eligible for parole is left solely to the discretion of the Parole Board.\textsuperscript{17} Prior to the Special Session of the Kentucky General Assembly in 1963, the minimum amount of time which an inmate was required to serve before becoming eligible for parole was set by statute.\textsuperscript{18} This was changed by KRS § 439.340(3) which gives the Parole Board the responsibility for determining when an inmate is eligible for parole.\textsuperscript{19} The Parole Board now has absolute discretion in establishing its own regulations for determining eligibility for a parole hearing.

The Parole Board has responded to its statutory mandate by enacting administrative regulation DC-Rg-6, which sets up a schedule for parole eligibility. The regulation states that each prisoner "shall have his case reviewed in accordance with the schedule. . . ." The schedule is based upon a scale whereby one serving a sentence of a given number of years will be eligible for a parole hearing after serving a given number of months and/or years of the sentence.\textsuperscript{20} It should be emphasized that although there is a schedule for parole eligibility, the Board has retained its discretionary power by enacting section 8 which states as follows:

In keeping with intent of the act [KRS 439.340(3)], the Parole Board may, with the consent of the majority of the board present, review the case of any inmate for parole consideration prior to his eligibility date if it appears advisable to do so.\textsuperscript{21}

\textsuperscript{16} KRS § 439.300(1) (1956) provides as follows:
At any time during probation the court may issue a warrant for the violation of any of the conditions of probation and cause the probationer to be arrested. . . . Thereupon, or upon arrest by warrant as herein provided, the court shall cause the defendant to be brought before it and may continue or revoke the probation, and may cause the sentence imposed to be executed, or may impose any sentence which might have been imposed at the time of the probation.

\textsuperscript{17} KRS § 439.340 (3) (1963) provides as follows:
The board shall adopt such rules or regulations as it may deem proper or necessary with respect to the eligibility of prisoners for parole, the conduct of parole hearings, or conditions to be imposed upon parolees. Regulations governing the eligibility of prisoners for parole shall be in accordance with prevailing ideas of corrections and reform.

\textsuperscript{18} KRS § 439.115-.45 (repealed 1962).

\textsuperscript{19} KRS § 439.340(3) (1963).

\textsuperscript{20} KENTUCKY PAROLE BOARD REGULATION [hereinafter cited as KY. PAROLE Bd. Reg.] DC-Rg-6 (1966).

\textsuperscript{21} KY. PAROLE Bd. Reg. DC-Rg.
When an inmate becomes eligible for a parole hearing, the second stage of the sentencing procedure is begun. This is the determination by the Parole Board of whether to grant parole. When an inmate appears before the Parole Board there are three possible dispositions which may be effected:

1. The board recommends parole with whatever stipulations it deems necessary in order to aid his adjustment in the community.
2. Parole is denied and the inmate is required to serve the remainder of his sentence.
3. His case is deferred until a given date in the future when it will again be reviewed. Deferments are given when the majority of the board feels the inmate is not a good risk for parole at this time, but due to the length of his sentence does not feel he should have to serve the remainder of it without further review. Cases are also deferred for short periods of time when additional information is needed, such as psychiatric evaluations, medical reports and new reports on community attitudes before a decision can be made.

In determining the proper disposition of the parole applicant, the Parole Board has certain information which it considers. KRS § 439.340 provides for the source of their information:

As soon as practical after his admission and at such intervals thereafter as it may determine, the division of correction shall obtain all pertinent information regarding each prisoner, except those not eligible for parole. Such information shall include his criminal record, his conduct, employment and attitude in prison, and the reports of such physical and mental examinations as have been made. The division of probation and parole shall furnish the circumstances of his offense and his previous social history to the institution and the board. The division of corrections shall prepare a report on such information as it obtains. It shall be the duty of the division of probation and parole to supplement this report with such material as the board may request and submit such report to the board.

Section (2) of this act provides that in granting or denying parole "the board shall consider the pertinent information regarding the prisoner and shall have him appear before it for interview and hearing."

The Annual Report of the Parole Board for the Year Ending July 1, 1968, states the procedure followed by the board and the factors considered at a parole hearing:

Prior to the meeting, each board member reviews all available data concerning the inmate including his social history, story of the crime, previous record, attitudes of the residents and officials of his home com-

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munity, and all psychiatric and psychological data available. Upon arrival at the place of incarceration, the board members review the inmates institutional record which contains a record of his prison adjustment, work assignments, school reports, etc. The third and final step in the parole review process is an interview with the inmate. This is conducted in an informal manner with the inmates being given an opportunity to say anything he feels would be helpful to his case, and the parole board members asking questions which they feel pertinent, such as his plans if he is recommended for parole, where he will work, etc. No time limit is set for his individual interview and as much time is allowed for an interview as necessary. Upon completion of the interview, the inmate leaves the room and his case is discussed and voted upon.25

From interviews with members of the Parole Board conducted by the authors, the following was surmised with regard to parole procedure in Kentucky.26 The reports presented to the Board are at least adequate with regard to the prisoner's background, prison record, and social history. However, with regard to psychological and psychiatric reports, information available is sorely lacking. In an October 18, 1968, interview, Mr. Glenn Wade, Chairman of the Parole Board, and Mrs. Lucille Robuck, a member of the Parole Board, revealed that currently neither Eddyville nor LaGrange state prisons has a fulltime psychologist or psychiatrist. Mr. Wade stated that most of the men who have been convicted of crimes of a non-violent nature have no psychological test before appearing before the Board. Mr. Wade further stated, however, that when an inmate has been convicted for a crime of violence, standard practice of the Parole Board is to require a report from a psychologist before the prisoner is released. This psychological data is obtained by individual contracts with non-resident psychologists. Psychiatric reports on prisoners are nearly non-existent.27

In connection with the foregoing description of parole procedure, it should be emphasized that, under present jury sentencing, the only limit placed upon the Parole Board is the maximum amount of time during which a man may remain incarcerated. This is the only effect which a jury sentence has. The release time is otherwise at the sole discretion of the Parole Board.

C. Judge Sentencing: The Good?

A second alternative sentencing procedure, which is the majority procedure, is sentencing by the trial judge after guilt determination by

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26 Administrative policy prohibited the writers from examining any of the individual records of inmates. The adequacy of these reports was endorsed by Mr. Glenn Wade, Chairman of the Parole Board.
27 See Appendix (Interview with Wade).
The procedure followed is generally the same as that used in Kentucky, the distinction being that the jury determines only guilt or innocence and the trial judge assesses the penalty.

Although the procedure here is basically the same as that of Kentucky, a brief look at how it operates may be beneficial. To demonstrate this, we have chosen to describe the procedure used in the federal system.

When one convicted of a crime stands before a federal judge to be sentenced, the judge has two alternative dispositions. The first alternative disposition is pursuant to 18 U.S.C. § 3651. This section provides that with respect to any offense not punishable by death or life imprisonment, the judge may probate the defendant where the judge is "satisfied that the ends of justice and the best interests of the public as well as the defendant will be served thereby."

The judge may, in the alternative, assess a penalty against the convicted defendant. It is here that the sentencing judge performs the function which the jury presently exercises in Kentucky. Like the jury in Kentucky, if the federal judge determines that punishment is required, he must determine within statutory limits how much of the maximum sentence to impose. However, the sentencing judge in a federal court has a power not possessed by the sentencing jury in Kentucky. Under 18 U.S.C. § 4208(a), the judge may control the convictee's right to be paroled. By this provision the court may designate a "minimum term, at the expiration of which the prisoner shall become eligible for parole, which term may not be more than one-third the maximum sentence imposed by the court." In lieu of

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28 See note 66 infra.
29 There is a third possible disposition which can be made under 18 U.S.C. § 4208(b) (1958):
If the court desires more detailed information as a basis for determining the sentence to be imposed, the court may commit the defendant to the custody of the Attorney General, which commitment shall be deemed to be for the maximum sentence of imprisonment prescribed by law for a study as described in subsection (c) hereof [subsection (c) provides that the report "may include but shall not be limited to data regarding the prisoner's previous delinquency or criminal experience, pertinent circumstances of his social background, his capabilities, his mental and physical health, and such other factors as may be considered pertinent]. The results of such study together with any recommendations which the Director of the Bureau of Prisons believes would be helpful in determining the disposition of the case, shall be furnished to the court. . . . After receiving such reports and recommendations, the court may in its discretion: (1) Place the prisoner on probation as authorized by section 3651 of this title, or (2) affirm the sentence of imprisonment originally imposed, or reduce the sentence of imprisonment, and commit the offender under any applicable provision of law.
this, the court may fix the maximum sentence of imprisonment and specify that the Parole Board determine the parole.\textsuperscript{32}

Another difference between the sentencing procedure used in Kentucky and that employed in the federal courts is the use of a pre-sentence report in the federal courts. To better understand exactly what a presentence report is, it will be beneficial to quote at some length from Federal Rule of Criminal Procedure 32(c), which provides for the presentence report:

(1) The probation service of the Court shall make a presentence investigation and report to the Court before imposition of sentence or granting of probation unless the court otherwise directs.

(2) The report of the presentence investigation shall contain any prior criminal record of the defendant and such information about his characteristics, his financial condition and circumstances affecting his behavior as may be helpful in imposing sentence or granting probation or in correctional treatment of the defendant, and such other information as may be required by the Court. The Court, before imposing sentence, may disclose to the defendant or his counsel all or part of the material contained in the report of the presentence investigation and afford an opportunity to defendant and his counsel to comment thereon.\textsuperscript{33}

It is obvious that the presentence report is to contain information which will aid the court in determining an appropriate sentence. At the First Philadelphia Judicial Sentencing Institute, Mr. John Wallace, Chief Probation Officer, of Probation for the Courts of New York City, outlined the elements of the presentence report as follows:

When viewing the investigative process, you will find that the probation officer will be exploring such areas as family history, marital history, education, employment, military service, religion, social activities, economic status, health, prior record, and any other areas which appear significant. These areas of the defendant's life history will be explored in order to gain some understanding of who the defendant is now and how that defendant came to be what he is.\textsuperscript{34}

\textsuperscript{32} \textit{Id.}

\textsuperscript{33} \textit{Fed. R. Crim. P. 32(c) (1) and (2) states:}

1. The probation service of the court shall make a pre-sentence investigation and report to the court before imposition of sentence or granting of probation unless the court otherwise directs. . . .

2. The report of the presentence investigation shall contain any prior criminal record of the defendant and such information about his characteristics, his financial condition and circumstances affecting his behavior as may be helpful in imposing sentence or granting probation or in correctional treatment of the defendant, and such other information as may be required by the court. The court before imposing sentence may disclose to the defendant or his counsel all or part of the material contained in the report of the presentence investigation and afford an opportunity to defendant and his counsel to comment thereon. Any material disclosed to the defendant and his counsel shall also be disclosed to the attorney for the government.

\textsuperscript{34} Wallace, \textit{Aids in Sentencing}, 40 F.R.D. 433-34 (1965).
It is obvious that the objective of this report is to present facts defining the history and character of the convicted defendant. The utility of this information cannot be over-emphasized, especially in light of the fact that it is often the only source of information, other than the trial proceedings, used by the sentencing judge.

At least two federal district courts (the Eastern District of Michigan and the Eastern District of New York) have deviated from the procedure followed in the other federal districts. This deviation involves the use of a multi-judge sentencing panel. The procedure followed here is that after the defendant has been convicted, and approximately one week before the judges meet to discuss the various cases, each judge in the district is furnished with a presentence report. The panel of judges then convenes and discusses the various recommendations. The value of this system is that it "rescues the sentencing judge from the moral solitude to which he is condemned under the system. He is afforded the opportunity to put his opinion to the acid test of honest forthright discussion . . . and rational appraisal of two equals whose opinion he can hardly ignore. . . ."37

At what may be called the second stage of the sentencing procedure—the granting or denying of parole—there are only minor deviations between the Kentucky procedure and the parole procedure used at the federal level. The relevant federal parole statutes are found in 18 U.S.C. §§ 4201-4208. One significant difference which should be explicated, that is found in 18 U.S.C. § 4202, states that one may be paroled only "after serving one-third of such term . . . or after serving fifteen years of a life sentence or of a sentence of over forty-five years."38 This provision, however, must be read in conjunction with 18 U.S.C. §

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35 Although this presentence report is of great value in sentencing, and although it is often the only sentencing aid used by the federal judge, its use is not mandatory. Neither the defendant nor the prosecution has the right to demand the use of such a report. Roddy v. United States, 296 F.2d 9 (10th Cir. 1961); United States v. Schwenke, 221 F.2d 356 (2d Cir. 1955).

36 Notwithstanding the fact that the presentence report is the primary source of information utilized by the sentencing judge, there are other available sources of information. James Benton Parson, Judge, United States District Court for the Northern District of Ohio recognized the availability of the following sources of information, emphasizing that the desirability of using some of the following is controversial:

a. Transcript of preliminary hearing on sentence.
b. The prosecution's file . . .
c. Formal written statements in aggravation or mitigation . . .
d. Form reports of investigative agency on the type of crimes involved (not the particular crime at issue nor the party or parties involved in it), relative to its current prevalence, its increase or decrease during the prior period, and its relationship to other types of crime . . .
e. The presentence report . . .


37 Id. at 432.

4208(a) which allows a judge to set the minimum amount of time which a prisoner must serve before he is eligible for parole.\textsuperscript{39} It appears that the judge may commit the defendant with no mention as to parole eligibility. In such a case the inmate would be eligible for parole under 18 U.S.C. § 4202 at the expiration of one-third of his sentence. In the alternative, the judge may, pursuant to 18 U.S.C. § 4208(a), set the prisoner’s time for parole eligibility at less than one-third of the sentence imposed.

Since this is the only major statutory deviation from the parole provisions of Kentucky, a further explication is not necessary. For the language of the federal parole statute, reference should be made to the footnotes.\textsuperscript{40}

\textsuperscript{39} 18 U.S.C. § 4208(a) provides as follows:

Upon entering a judgment of conviction the Court having jurisdiction to impose sentence when in its opinion the ends of justice and best interests of the public require that the defendant be sentenced to imprisonment for a term exceeding one year, may (1) designate in the sentence of imprisonment imposed a minimum term at the expiration of which the prisoner shall become eligible for parole, which term may be less than, but shall not be more than one-third of the maximum sentence of imprisonment to be served in which event the court may specify that the prisoner may become eligible for parole at such time as the board of parole may determine.

\textsuperscript{40} The Federal parole provisions are as follows:

A federal prisoner, other than a juvenile delinquent or committed youth offender, wherever confined and serving a definite term or terms of over one hundred and eighty days whose record shows that he has observed the rules of the institution in which he has been in confinement, may be released on parole after serving fifteen years of life sentence of over forty-five years. 18 U.S.C. § 4202 (1948).

If it appears to the Board of Parole from a report by the proper institutional officers or upon application by a prisoner eligible for release on parole that there is a reasonable probability that such prisoner will remain at liberty without violating the law, and if in the opinion of the Board such release is not incompatible with the welfare of society, the Board may in its discretion authorize the release of such prisoner on parole.

Such parolee shall be allowed in the discretion of the Board to return to his home or to go elsewhere, upon such term and condition, including personal reports from such paroled person as the Board shall prescribe, and to remain, while on parole, in the legal custody and under the control of the Attorney General, until the expiration of the maximum term or terms for which he was sentenced.

Each order of parole shall fix the limits of the parolee’s residence which may be changed in the discretion of the Board. 18 U.S.C. § 4203 (1948).

A warrant for the retaking of a United States Prisoner who has violated his parole may be issued only by the Board of Parole or a member thereof and within the maximum term or terms for which he was sentenced. The unexpired term of imprisonment of any such prisoner shall begin to run from the date he is returned to the custody of the Attorney General under said warrant, and the time the prisoner was on parole shall not diminish the time he was sentenced to serve. 18 U.S.C. § 4205 (1948).

A prisoner retaken upon a warrant issued by the Board of Parole, (Continued on next page)
D. Indeterminate Sentencing: The Enlightened?

Indeterminate sentencing is a third alternative sentencing procedure used in some states. Under this procedure, neither the judge nor the jury determines the length of confinement. The function of the jury is to determine only guilt or innocence. The judge then merely commits the defendant to a parole board or adult authority which determines, within the limits prescribed by law, the sentence to be imposed upon the convicted defendant. This adult authority also functions as a parole board. To better understand how this procedure operates, consider the following a description of this procedure as used in California.

When the jury in California has found a defendant guilty of a felony, the jury has completed its duty. At this point the judge must make the initial determination to either probate the convicted felon, or to have him committed to a correctional institution. In order to make this determination, the California Penal Code provides that a hearing be held by the judge to determine whether or not to grant probation. The statute provides that “at the time or times fixed by the Court, the Court must hear and determine such application [for probation], if one has been made...”

As in the federal courts, the judge has the aid of a presentence report to aid in his determination of whether or not to grant probation to the convicted felon. The California Penal Code provides as follows:

...in every felony case in which the defendant is eligible for probation... the court must immediately refer the matter to the probation officer to investigate and to report to the court... upon the circumstances surrounding the crime and concerning the defendant and his prior record, which may be taken into consideration either in aggravation or mitigation of punishment.

It is apparent that this provision is similar in its scope to Federal Rule 32(c), which also provides for a presentence report. As in the

(Footnote continued from preceding page)

shall be given an opportunity to appear before the Board, a member thereof, or an examiner designated by the Board.

The Board may then, or at any time in its discretion, revoke the order of parole and terminate such parole or modify the terms and conditions thereof.

If such order of parole shall be revoked and the parole so terminated, the said prisoner may be required to serve all or any part of the remainder of the term for which he was sentenced. 18 U.S.C. § 4207 (1948).

41 CAL. PENAL CODE § 1203 (West 1956).
42 Id.

43 See note 31 supra.
federal presentence report, the emphasis of this report is on the history and character of the defendant.\textsuperscript{44}

There is a major difference between the procedure at the probation hearing in California and the sentencing hearing in the federal court. In the California proceeding the defendant has the \textit{right} to see the presentence report and to attempt to refute it.\textsuperscript{45} The California Penal Code states that the presentence "... report must be made available to the court and the prosecuting and defense attorneys at least two days prior to the time fixed by the court for the hearing..."\textsuperscript{46} This provision gives the defendant and his attorney an opportunity to examine the report and, hopefully, time to defend and disprove any false statements in it.\textsuperscript{47} This protection afforded the defendant at a probation hearing is enhanced by another section of the California Penal Code.

The circumstances [presented in aggravation or mitigation] must be presented by the testimony of witnesses examined in open court, except that where a witness is so sick or infirm as to be unable to attend, his deposition may be taken by a magistrate of the county out of court. ...\textsuperscript{48}

It is obvious that this provision affords the \textit{defendant} at the probation hearing the opportunity to call his own witnesses. "A defendant has the right to present evidence in mitigation of his punishment or to assist the court in the determination of defendant's application for probation."\textsuperscript{49}

As previously mentioned, the defendant in the federal courts has no \textit{right} to see or attempt to refute the contents of the presentence report.\textsuperscript{50} It is difficult to rationalize the use of the presentence report, absent such protection for the defendant.\textsuperscript{51} The protection afforded by

\textsuperscript{44} \textit{CAL. PENAL CODE} § 1203 (West 1956) provides as follows:

If probation is not denied and in every felony case in which the defendant is eligible for probation, before any judgement is pronounced and whether or not application for probation has been made, the court must immediately refer the matter to the probation officer to investigate and to report to the court, at a specified time, upon the circumstances surrounding the crime and concerning the defendant and his prior record, which may be taken into consideration either in aggravation or mitigation of punishment.

\textsuperscript{45} \textit{CAL. PENAL CODE} § 1203 (West 1956).

\textsuperscript{46} \textit{Id.}

\textsuperscript{47} In \textit{People v. Valdivia}, 5 Cal. Bptt. 832 (1969), the Court stated, "had the defendant thought the report insufficient or inadequate he could have presented witnesses to counteract or correct any portion of the report." \textit{Id.} at 834.

\textsuperscript{48} \textit{CAL. PENAL CODE} § 1203 (West 1956).

\textsuperscript{49} \textit{People v. Giles}, 70 Cal. App. 2d 872, 161 P.2d 623, 629 (Cal. 1945).

\textsuperscript{50} \textit{Roddy v. United States}, 296 F.2d 9 (10th Cir. 1961); \textit{United States v. Schwenke}, 221 F.2d 365 (2nd Cir. 1955).

\textsuperscript{51} In J. Wigmore, \textit{THE ANGLO-AMERICAN SYSTEM OF EVIDENCE IN TRIALS AT COMMON LAW} § 1397 (3d ed. 1940), the author stated:

(Continued on next page)
such procedure would seem to outweigh any inconvenience.

If the California judge determines "that the ends of justice would be served by granting probation to the defendant, the Court shall have the power in its discretion to place the defendant on probation." If the judge decides in favor of probation, he also has the power to determine the period of probation.

If the judge decides that a period of confinement is required, he must conform to California Penal Code § 1168. This is California's indeterminate sentence statute and it provides as follows:

Every person convicted of a public offense for which imprisonment in any reformatory or state prison is prescribed by law shall [unless probated, granted a new trial or granted a suspended sentence] be sentenced to imprisonment in a state prison, but the court imposing sentence shall not fix the term or duration of the period of imprisonment.

This judgment of the court consists only of a recital of the offense with a designation of the prison to which he is to be committed, and is the end of the judicial proceedings. From this point, any decision as to the prisoner's future is an administrative one to be made by the Adult Authority. The convicted defendant is committed for the maximum time allowed under the statute. Thus if the convictee has been convicted of a crime which carries a penalty of up to fifteen years, he is said to be confined to prison for fifteen years. The judge must commit him for the maximum period allowed. Any decision to lessen the penalty must be made by the Adult Authority.

The California Adult Authority is a board of six members appointed by the governor with the advice and consent of the senate. The function of the Adult Authority can best be illustrated by considering Section 3020 of the California Penal Code.

In the case of all persons heretofore or hereafter sentenced under the provisions of Section 1168 of this Code, the Adult Authority may determine and redetermine, after the actual commencement of imprisonment, what length of time, if any, such person shall be imprisoned.

It is apparent that the function of initial determination of sentence length is vested in the Adult Authority. However, this is not the sole

(Footnote continued from preceding page)

The belief that no safeguard for testing the value of human statements is comparable to that furnished by cross-examination has found increasing strength in lengthening experience.

52 CAL. PENAL CODE § 1203 (West 1958).
53 Id. at § 1203.1.
54 Id. at § 1168.
55 CAL. PENAL CODE § 5075 (West 1958).
56 Id. at § 3020.
function of the Adult Authority. It also functions as a parole board. This is provided by California statute which states that “the granting and revocation of parole and the fixing of sentences shall be determined by the Adult Authority. . . .”57 Thus, once the judge has committed the defendant to a correctional institution, the Adult Authority has the sole control—within the limits fixed by statute—of his future.

It should be emphasized that the Adult Authority is not a judicial body. The judicial proceedings have terminated at the point when the judge commits the convicted defendant to the correctional institution. The appearance before the Adult Authority is an “administrative proceeding” to determine what sentence, within the limits prescribed by law, the defendant should be required to serve.58 Because it is an administrative proceeding, the California court has held that it does not deprive the court of the right to make a final determination of the rights of defendant59 and it does not confer judicial power on the Adult Authority.60

The standard for due process has also changed from that which must be observed at the trial stage. The California court has held that since the determination by the Adult Authority of the sentence length is not a judicial act,61 the prisoner has no constitutional rights to notice, a hearing, or counsel in the proceedings of the Adult Authority.62 This administrative body can, therefore, determine the length of the prisoner’s sentence without his presence, and without affording him an opportunity to introduce any evidence or testimony in mitigation.63

It should be noted that California has at its disposal a diagnostic center in which prisoners can receive psychological and psychiatric evaluation. This should be compared to Kentucky where no such center is available and where there is only limited psychological and psychiatric information available.64

57 Id. at § 5077. This section provides that “the granting and revocation of parole and the fixing of sentences shall be delivered by the Adult Authority. . . .”
59 Id.
60 Id.
61 See p. 19 supra.
63 In re McLain, 55 Cal. 2d 78, 357 P.2d 1080 (Cal. 1960), the court stated:

No statute requires that the Adult Authority in exercising its jurisdiction to determine and redetermine sentences shall give the prisoner notice or a hearing. . . . The Penal Code specifically grants to the Adult Authority power “to suspend, cancel or revoke any parole without notice.” (Pen. Code § 3060) The provisions for determining or redetermining sentence and for granting, suspending, or revoking parole do not violate due process because of the absence of a requirement for notice or hearing. Id. at 1085.
64 See APPENDIX (Interview with Wade).
IV. CRITICISMS OF SENTENCING PROCEDURES

A. Jury Sentencing: Blind Retribution

Kentucky is one of only thirteen states which provide for jury sentencing in non-capital cases. This small minority of states still adhering to the priority of jury sentencing can turn to some impressive arguments for support. For instance, it has been contended that a jury which does not have the power to determine the sentence will acquit a defendant whom it believes to be guilty, fearing that the judge will impose an unreasonably harsh penalty. This proposition has substantial factual support. Numerous judges and attorneys in Virginia have stated that juries consistently acquit persons who are obviously guilty of drunken driving because the mandatory penalty for such misconduct is forfeiture of the offender's license for one year—a reprimand considered too severe by most jurors. It is interesting to point out, however, that circuit judges in Kentucky overwhelmingly reject this idea. Out of thirty-five judges being polled, twenty-eight responded that if the right to sentence were taken from the jury, this would not result in fewer convictions. In fact four circuit jurists opined that such transfer of sentencing power would result in more convictions, and only three agreed with the above Virginia Practitioners.

Another argument in favor of jury sentencing arises out of the anonymity of jurors. The method of random selection of jurors and the


66 Ky. Const. § 7 states that "the ancient mode of trial by jury should be held sacred, and the right thereof remain inviolate, subject to such modifications as may be authorized by this constitution." The Texas constitution has a similar provision and the highest court in that state has held that the right of jury trial is the same right which existed at common law and that there was no such right at common law to have the jury determine the punishment. Ex Parte Marshall, 161 S.W. 112 (Tex. 1913).

67 There is historical support for jury sentencing. At common law, penalties were levied by the court in all cases; jury sentencing in this country is claimed to be a reaction to the harsh penalties imposed by English judges in the colonies and the early distrust of governmental power. The practice was encouraged by the lack of substantial difference in training and competence or intelligence between colonial judges and juries. Note, Statutory Structures for Sentencing Felons to Prison, 60 Col. L. Rev. 1134 (1960); National Committee on Law Observance and Enforcement, Report on Criminal Procedure 23-28 (1931).

68 Id.; McQuown, Reformation of the Jury Sentence, 6 Ky. L. J. 182 (1918).

69 See Appendix (Questionnaire to Circuit judges).

70 Id.
brief tenure of service makes them less susceptible to the pressures of public feelings and opinions than the elected judge who, as in Kentucky, must seek favor at the next election.\textsuperscript{71} One cannot deny, however, that the jury may be influenced by extrinsic pressure in small communities.

It has also been argued that the judgment of the jury may be more enlightened than that of the judge because, unlike the judge, its members do no become calloused by continuous exposure to criminal cases.\textsuperscript{72} Circuit judges of Kentucky generally disagree with this assumption. Nineteen out of thirty-five polled by the authors insist that if they were allowed to sentence they would not impose a harsher sentence than the juries usually do.\textsuperscript{73}

Perhaps the most basic and persuasive support given to jury sentencing is the traditional "two heads are better than one" argument. Even though judges and members of professional sentencing boards are academically equipped for the responsibility of sentencing, a jury "levels" the individual opinions of the defendant's peers and provides a compromise of varied temperaments. Therefore, advocates of jury sentencing proclaim that a jury is more likely to assess a fair punishment.\textsuperscript{74} Only a panel of laymen, it is asserted, can push aside idealistic and theoretical data to reach a realistic determination of the punishment which, from case to case and over the long run, will prove to be the most personalized and most effective.

The weight of authority both in practice and theory is clearly against sentencing by jury.\textsuperscript{75} The main objection to jury sentencing is that it often results in the imposition of sentences, without the benefit of needed information concerning defendant's background, by jurors not appropriately trained. Since the average juror sits on only one or two cases in a period of two or three years, he has little opportunity to utilize expertise gained through judicial experience. It is well known that professional persons, and those most educated, are usually either

\textsuperscript{72} Id.
\textsuperscript{73} See \textsc{Appendix} (Questionnaire to circuit judges).
\textsuperscript{74} See Betts, \textit{supra} note 71. It is important to point out that the polling of circuit judges by the authors produced an interesting composite of ideas in regard to the comparison between jury and judge sentencing. The majority of the judges polled thought that there would be no difference between the two methods of sentencing with reference to consideration given a defendant's social or racial background. Also, while most judges approved of jury sentencing, they also accepted favorably the idea of sentencing by the court, thus indicating that, in their opinion, it does not make a great deal of difference who renders the penalty. See \textsc{Appendix} (Questionnaire to circuit judges).
\textsuperscript{75} See Betts, \textit{supra} note 72; Comment, \textit{Consideration of Punishment By Juries}, 17 U. Chi. L. Rev. 400 (1950); Note, \textit{Should the Jury Fix the Punishment For Crime?}, 24 Va. L. Rev. 462 (1938).
exempted from, or tend to avoid, jury duty.\textsuperscript{76} Although the jury can gain some insight into the character of the defendant during the course of the trial, this information does not serve as an adequate substitute for a presentence report, since the rules of evidence often prohibit introduction of information relevant to sentencing.\textsuperscript{77} It has been suggested that even if the jury had access to information concerning the background, character, and past record of the accused, there is doubt that a jury of ordinary laymen would have the requisite knowledge and experience to interpret the material presented and to determine the proper punishment.\textsuperscript{78}

A similar criticism of jury sentencing is that a lay jury is "retribution oriented." Stated another way, the jury, in assessing a penalty does not give adequate consideration to the accepted goals of sentencing outlined in the second section of this article. Rather, retribution is given too much weight. One finds it difficult to imagine a jury, even if they had a presentence report, properly weighing the needs for deterrence, neutralization, and rehabilitation. Another volley fired by legal scholars at the jury sentencing apparatus is the contention that such practice creates significant disparity in sentences. This inconsistency is attributed to the belief that each penalty imposed by a jury is the result of the momentary whims and emotions of its members influenced by such irrelevant matters as the appearance, demeanor and personality of the lawyers or of some of the witnesses for or against the defendant.\textsuperscript{79} It is reasonable to assume that racial and ethnic factors enter into jury deliberation. However, circuit judges in Kentucky deny that defendants are prejudiced because

\textsuperscript{76} See Hurt, Determination of the Penalty—By Judge or Jury?, 1 Tex. L. & Leg. 124, 130 (1947).
\textsuperscript{77} C. McCormick, Evidence § 158 at 334 (1954).
\textsuperscript{78} In those jurisdictions in which it is the jury's duty to determine the punishment, it would seem that they should be allowed to consider the effect of the parole laws, for punishment cannot be intelligently imposed without full knowledge of the actual amount of time that the defendant will remain incarcerated. Comment, Consideration of Punishment By Juries, 17 U. Cin. L. Rev. 400, 406 (1950).
\textsuperscript{79} See Hurt, supra note 77.

\textsuperscript{76} See Fisher, A Proposal For A Penal Code With Procedure to Be Governed By Rules of Court, 39 Ill. L. Rev. 111 (1944). Three cases in Texas tried in the District Criminal Court of Dallas County give an excellent example of the illogical results reached by the jury in some instances regarding the assessment of penalties. All three defendants in these cases were indicted for the same rape and robbery. Severance was granted and the first to be tried was found guilty and sentenced to death. The second to be tried was sentenced to life imprisonment and the third upon being found guilty was given a five year suspended sentence. All three juries agreed as to guilt but imposed entirely different penalties. While it is not contended that all three sentences should have been the same in type and duration, the diversification does give an indication of the possible incongruities inherent in jury sentencing. Hurt, supra note 76, at 132.
of race. It is only logical that a certain amount of disparity will exist between sentences rendered by juries. However, such a disparity in penalties rendered may well be a desirable aspect of sentencing procedures since it achieves to some extent, the desired flexibility needed for individualized treatment of each defendant. Also, there is little reason to think that incongruity in penalties would be less prevalent if sentences were imposed by the court.

Jury sentencing invites compromise within the jury room of a conviction for a light sentence. There is no way to ascertain precisely the extent of jury compromising except by interviewing jurors and even then there is a reluctance on their part to disclose such information. Nevertheless, "quotient" verdicts do exist with jury sentencing, and such a practice seriously impugns the competency of sentencing. And finally, many claim that with a jury, the personal attachment to each case is lost. It is pointed out that a jury panel is an impersonal congregation. If a miscarriage of justice or a gross wrong results from it's deliberations, there is no individual upon whom censure can be cast.

B. Judge Sentencing: A Lack of Uniformity

The American Bar Association has strongly recommended that sentencing be rendered by the judge in all criminal cases. This is the procedure followed by most of the states and is supported by most writings on the subject. Actually, judge sentencing was the traditional method of rendering criminal penalties prior to the American colonization. Immediately after the Revolutionary War there was a natural reaction to the conduct of colonial judges appointed by representatives of the Crown. This fear of a dictatorial judgeship, along with the fifth amendment, encouraged the implementation of jury sentencing. The return of judge sentencing upon the American judicial scene is due almost entirely to the growing skepticism of the jury procedure. While

80 See Appendix (Questionnaire to circuit judges).
82 See Comment, supra note 67, at 968.
83 Most Kentucky circuit judges expressed the opinion that quotient verdicts are used very little, if at all. Many thought however, that such a practice is prevalent in jury sentencing. While this is difficult for a judge to determine, it would seem that the use of such a compromising device is probable. See Appendix (Questionnaire to circuit judges).
84 Kerr, A Needed Reform In Criminal Procedure, 6 Ky. L.J. 107, 108 (1918).
86 J. R. Moreland, Modern Criminal Procedure 289 (1959).
the defects of jury sentencing have been discussed previously, it is important to point out why many believe that the judge is not affected by the same impairing factors. It is also important to explain why some of the arguments in favor of judge sentencing are subject to question.

While the jury may lack the proper information needed for the determination of effective sentencing, the judge is believed to have a keener insight into the needs of each individual defendant. A judge sits from term to term, hears the testimony in every case that comes before him, and knows the value and weight of the testimony that is offered. It is contended that because of his experience and training the judge may more properly determine from the witnesses the credence to which they are entitled and is in a much better position to impose just and fair punishment than is the jury. Here it must be noted with a certain amount of vexation that some of the arguments in favor of both jury and judge sentencing are circuitous and confusing. For instance, one writer claims that because of the transient nature of the jury, its members associate themselves with the real problems of sentencing and do not become calloused. However, an argument in favor of judge sentencing uses the same reasoning by proclaiming that the judge is more sensitive to peculiar nature of each case since he has gained more experience by confronting recurrent problems over a long period of time.

There is no doubt that a judge has access to more information relevant to sentencing. Kentucky judges being interviewed stated that in sentencing they would consider such things as family life, previous record of defendant, economic condition of defendant, and chance for rehabilitation. All of these factors are inadmissible at the trial for jury consideration. Judges saddled with the duty of sentencing would probably rely on professional assistance in their decisions. More than half of the Kentucky circuit judges polled, replied that they would desire a presentence report from a board of psychiatrists and psychologists. Thus, it can be concluded that the most persuasive argument

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88 See Kerr, supra note 84.
89 See Betts, supra note 71 at 370.
90 See Kerr, supra note 84 at 108.
91 See APPENDIX (Questionnaire to circuit judges).
93 See APPENDIX (Questionnaire to circuit judges). Some of the judges polled qualified their answers by preferring such a report only in instances where the defendant suffers from mental illness. The main objection to a presentencing report from a board of psychiatrists and psychologists in the field of crime and punishment is the mistrust of doctors by judges. Some judges asserted that such reports are far too idealistic and impractical.

Interestingly enough, the converse of a presentence report to the judge has been suggested by one writer. This would be a post-sentencing report by the judge.

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in favor of judge sentencing stems from the tremendous advantage a judge normally has over the jury in regard to the accumulation of information needed for rendering the proper punishment. Despite the magnitude of the added responsibility, a substantial majority of the Kentucky circuit judges polled approved of sentencing by the court.94

While many proponents of judge sentencing support their arguments by referring to the defects in jury sentencing, there is a reckless disregard of fact in this line of argument. For example, it is alleged that the jury considerations as to penalty is incited by the emotions and prejudices of its members.95 But judges are no less human and do not have the benefit of the reconciliatory influence that is wielded by a collective panel. Some judges regard sex offenses as the worst; others feel that the most heinous crimes are committed with guns. There are judges who favor the prosecution and there are judges who favor the defendant. There are judges who are severe and judges who are lenient. There are judges who rely heavily on presentence reports and there are others who give the reports only the most casual reading.96 Men who have either pleaded guilty or have been determined such by judicial proceeding may march past the bench at the rate of forty or fifty a day, during which time the judge will levy penalties based on hunch, or influenced by his mood at the moment.97 It is impossible for the judge, just as it is for the jury, to disengage himself from his own personality. Consequently, if there is disparity in jury sentencing, it no doubt exists equally, at least, with sentencing by the court.98 Clearly there is evidence of the human factor lurking within the

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and the submission of sentencing decisions to judicial review. If this procedure were adopted, both trial and appellate judges would be forced to put forth in writing the reasons for imposing punishment in a given case. Nowhere in the United States is such a method used. Frankel, The Sentencing Morass and a Suggestion for Reform, 3 CRIM. L. BULL. 865, 870 (1967).

94 See Appendix (Questionnaire to circuit judges).


96 GUIDE FOR SENTENCING, NATIONAL PROBATION AND PAROLE ASSOCIATION, NEW YORK CITY (1957).


The magistrates handling as they do in the year's gristmill a similar class of cases, it had been almost taken for granted that ascending to the judge's bench clothed each magistrate with the wisdom of Solomon and dignified his rulings with the oracular wisdom of justice himself and had entirely freed him from any personal bias or eccentricity. Everson, The Human Element in Justice, 10 J. CRIM. L. C. 90, 93 (1919).

98 "When 202 judges hand out sentences as widely variant as their personalities, maybe it is not difficult to see why there is unrest among prisoners and a feeling among the law-abiding members of society that justice is not the even goddess that she is symbolized." Address by Mayor Frank I. Hanscom, member of the Board of Parole of New York reprinted in the United States Daily, June (Continued on next page)
unique discretion of each individual judge just as it does in each jury panel. An example of this judicial variable is the U.S. District Courts, where judges render penalties in each case. For instance, the U.S. District Court for the Northern District of Indiana imposed terms of imprisonment averaging 46.9 months in 1956 as compared with terms averaging 8.6 months for a U.S. District Court in Vermont. In 1948, the Northern District of California sentenced its average narcotics offender to 41.5 months while the Southern District of California averaged 18.1 months. In 1965, conviction for a Dyer Act violation in the Eastern District of North Carolina drew an average sentence of 43 months while in the Middle District of North Carolina the sentence for the same offense averaged 21 months. Thus, it is evident that disparity in judge sentencing is just as prevalent as in jury sentencing. It is only proper to submit, however, that it is extremely difficult to determine whether such disparity is undesirable. While discrepancies may exist at the expense of fairness, it may be that a certain amount of disparity is not only unavoidable but appropriate for individualized sentencing.

The reason that disparity of length in sentencing is often appropriate in punishment for similar crimes can best be demonstrated by repeating an earlier quotation: "We strive not to achieve uniform

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But there is some support for the proposition that if judge sentencing were adopted, state-side uniformity in sentencing could be advanced by periodic meetings of judges throughout the state. At such meetings problems of sentencing could be discussed. Such "sentencing institutes" are in existence in many states as well as in the federal system. Note, Jury Sentencing in Virginia, 53 VA. L. REV. 968, 982 (1967).

See Breecher & Breecher, supra note 97.


But there is strong disagreement on this point. Even today, disparity is largely the product of judicial inconsistencies and not, as some suggest, the product of individualization. At a federal workshop of the Sixth, Seventh and Eighth Judicial Circuits, a set of identical presentence reports of five convicts were distributed to groups of judges, who were then asked to pronounce sentence. Three judges hypothetically fined an income tax evader, 23 judges released him on probation, and 23 imprisoned the same man for times ranging from one to five years. Forty-seven released a Dyer Act violator on probation, six committed him under the Youth Correction Act. For a bank robber, 28 recommended indeterminate sentences under 4208(A)(2) for maximum periods ranging from five to 20 years, and three recommended probation with psychiatric care. For a forger, 34 opted for straight sentences ranging from one to ten years, 14 for commitment under 4208(A)(2) for terms ranging from three to ten years. Seven would have levied straight sentences ranging from two to five years, two split sentences, and nine indeterminate commitments under 4208(A)(2) ranging from two to five years. Frankel supra note 93, at 969.
sentences, but to acquire a uniform philosophy which includes the ingredients that lead to a sentence... in keeping with enlightened social and legal policy." The uniform philosophy which was earlier explicated includes deterrence, neutralization and rehabilitation. These are the goals of sentencing. It is obvious that it will take longer to rehabilitate some than others. The same can be said of the other two goals. This disparity per se is not bad. However, it would seem that the average sentences discussed above reflect either a disparity in judgment or in philosophy. Both of these are unfair.

Finally, as mentioned previously, the judge is susceptible to political pressures of the most severe variety. Even if the man who has donned the robes of public justice can stand aloof from the influence of a constituency, he may become an overseer in an ivory tower, keenly attuned to the needs of the convicted person, but unknowingly detached from the interests of the society of which his voters are a part.

C. Indeterminate Sentencing: Experience, Expertise and Information

Indeterminate sentencing has also been the subject of extensive comment by scholars. The use of the Adult Authority has generally been accepted by scholars as a giant step forward in the search for enlightened sentencing. Typical of the response of scholars is that of Judge Theodore Levin:

It is my opinion that the most practical remedy for eliminating the faults of our present sentencing practices lies in the creation of a sentencing board composed of individuals who, by reason of their education and demonstrated experience are able properly to analyze the elements of criminal conduct and evaluate the prescribed treatment. It should be noted that although approval of indeterminate sentencing is probably a majority view among scholars today, there are writers who have presented valid criticism of indeterminate sentencing.

The principal criticism of Adult Authority type indeterminate sentencing lies in the possibility of incompetency of its members. Obviously one of the chief factors which would contribute to competency is adequate salaries for the board. In order to get competent individuals to serve on a sentencing board, there must be adequate compensation. Only in this manner is it possible to obtain members with a background closely related to corrections. Absent salaries adequate to attract competent personnel, the members "may lack the

103 See text at note 3 supra.
judgment necessary to make wise decisions or the character to resist pressures from prosecutors or influential politicians who demand favorable action with respect to their clients."

Another valid criticism is that there is at least some increased danger of an abuse of the rights of the individual offender. As previously mentioned the California Court has determined that the initial determination of sentence length by an Adult Authority is not a judicial proceeding. Rather, it is an administrative proceeding in which the prisoner has no constitutional right to notice, a hearing, or counsel in the proceedings of an Adult Authority.

Beyond this it is suggested that there is also protection afforded the individual who is sentenced by a judge or jury merely by the more direct pressure exerted by the community on the judge or jury. Although it is recognized that this pressure may at times be detrimental to enlightened sentencing, it is added protection for the defendant. This protection would seem to be lessened by the use of indeterminate sentencing. It could be argued that the fate of the prisoner may be lost in the autonomy of the Adult Authority, as well as the anonymity of the defendant after his commitment to an institution.

One of the main advantages of indeterminate sentencing advanced by its proponents is the information which can be gathered by the time the convicted person is brought before the Adult Authority. Even if there is a presentence report which can be utilized by a sentencing judge or jury, the use of an Adult Authority or sentencing board has the added advantage of having time to properly reflect upon the report as well as obtain any additional background information needed. This indeterminate sentencing procedure would avoid the hurried consideration given by the judge who is "under heavy time pressure in disposing of the cases crowding his docket." This added time becomes especially important where there is available a professional staff to gather relevant background and psychological data.

Another advantage of a sentencing board is also listed as an advantage for jury sentencing. This is the requirement that several must agree on the disposition of a case. Thus the fate of an inmate is not subject to the whim of a single individual. This is some added protection for the defendant.


Hayner, supra note 106.

George, supra note 105.

Hayner, supra note 106.

George, supra note 105.
A third advantage of a sentencing board making the initial determination of the duration of the sentence is that it would enhance the possibility of a uniform philosophy of sentencing. Obtaining sentences which conform to enlightened sentencing philosophy (as explicated in the second section of this paper) is always a difficult matter. But to think that any uniformity can be obtained when the duty of sentencing is placed in the hands of fifty different sentencing judges or juries is absurd. Each person has his own ideas as to what should be considered in imposing a sentence. Only if this sentencing function is effected by one group, such as a professional sentencing board, can there be hope for uniformity of philosophy. An earlier quotation appropriately states the objective of sentencing reform: "We strive not to achieve uniform sentencing, but to acquire a uniform philosophy which includes the ingredients that lead to a sentence . . . in keeping with enlightened social and legal policy."112

All the foregoing advantages are contingent upon obtaining qualified members to serve on the sentencing board. Without quality on the board, its advantages disappear. However, the potential quality of the board which may be obtained is the chief advantage of a professional sentencing board. A judge or jury normally is not trained in the area of corrections psychology. It would be impossible to demand such training of either. It would not be impossible to demand such qualification for members of a sentencing board. Thus the possibility of an improved quality of sentencing would be a great advantage of a professional sentencing board, if the potential were realized.

V. RECOMMENDATION

Kentucky should adopt indeterminate sentencing with the present Parole Board functioning as the sentencing board. Although this proposal appears at first blush to be a radical departure from the jury sentencing procedure now used in Kentucky, a closer look will show that it will not involve such a radical change.

Under the present jury sentencing procedure, the only function of the jury is to set the maximum amount of time, within the statutory limits, which a convicted defendant can serve. The minimum amount of time which one must serve before he is eligible for parole is left solely to the discretion of the Parole Board.113 Although the Board has enacted a regulation that sets the minimum amount of time which must

be served before being eligible for a parole hearing, the regulation specifically allows the Board to hear any petition for parole if it is so agreed by a majority. Thus to turn over sentencing to the Parole Board would only give them the additional right to set the maximum amount of time, within statutory limits, which one could serve.

It is submitted that members of the Parole Board are in a better position to determine the maximum sentence required for a convictee. Under the present system the jury assesses the upper limits of a sentence with only the information which it has obtained by the trial proceedings. There is no presentence report available. Thus the jury has little opportunity to impose a penalty which conforms to the present philosophy of sentencing. Even if the sentencing duty were turned over to a judge, the absence of a presentence report would severely limit the propriety of the sentence.

The Kentucky Crime Commission has stated that the present mechanical framework cannot support a presentence report because it would overload the system. The same was stated by Mr. Sture Westerberg, Commissioner of Corrections—that without additions to the staff of parole and probation officers in Kentucky, there can be no presentence report. This is not the case with the Parole Board. Not only does the Parole Board have the facilities and personnel to conduct a presentence report, but it is presently conducting investigations of a similar nature which guides its decisions in granting or denying parole. The same information relevant to the granting of parole would be relevant in making the initial determination of the maximum length of the sentence. It would be but a small extra burden on the Board to set the maximum length of time to be served. It seems undesirable not to utilize to the maximum the information collected by the Kentucky Department of Corrections. It is extremely unwise for either judge or jury to attempt to levy a penalty without such information.

Another advantage of indeterminate sentencing is that sufficient time becomes available to observe the convicted defendant, and also sufficient time to properly investigate the history of the defendant and gather psychological data. This is an advantage, even if there is a presentence report, and no matter who—judge or jury—assesses the penalty.

In addition to the previous advantages mentioned, allowing the Parole Board to set the upper limits will increase the flexibility of

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114 Ky. PAROLE Bd. REG. DC-RG-6 (1966).
115 See Appendix (Interview With Westerberg and Black).
sentencing. To allow the Parole Board to set the maximum sentence would eliminate the problem of forcing the Parole Board to release a prisoner whose maximum period of detention was set by a jury at less than the statutory maximum. At the present time 50% of the prisoners are released because they serve out their sentence.117 Also, at the present time only about 13% of the prisoners now serving sentence for committing crimes against property were sentenced for the maximum amount of time allowed by statute.118 Thus it is apparent that a sizeable percentage of the men who are returned to society are returned to society, not because the Parole Board believes that they are ready to assume their responsibilities as citizens. Rather, they are returned because they have served a period of time which was fixed by a jury with no presentence report, a jury which fixed the amount of time to be served at less than the statutory maximum.

A jury, totally uninformed as to the background and character of the defendant, should not have the power to bind a Parole Board which has at its disposal adequate information for making a proper decision as to sentence length. To do so is to frustrate, at least in some cases, the goals of corrections; i.e., rehabilitation, deterrence, and neutralization. The maximum length should be determined (within statutory limits) by a well informed body possessing a certain degree of expertise. In Kentucky, the Parole Board seems to best meet that criteria.

A final reason for turning over the sentencing to the Parole Board is to insure that there is more unanimity in sentencing philosophy and judgment. As previously stated there is a wide disparity in sentences assessed by different judges.119 But more importantly, such gross disparity is injurious to the objective of a consistent sentencing philosophy. It is submitted that a professional parole board would more closely conform to the modern sentencing philosophy.

Although the above recommendation has been made considering the present framework in Kentucky, it is not an indorsement of the present system. First of all, the parole board members are underpaid. Under the provisions of KRS 439.320(2), the salary of the Board members is $10,000. The chairman’s salary is $10,500. KRS § 439.320(1) directs the Governor to appoint to the Board only persons “who have demonstrated their knowledge and experience in correctional treatment or crime prevention and members shall be appointed without regard to their political affiliation.” It is unwise to rely upon such a small

117 See Appendix (Corrections Information).
118 Id.
119 See pages 478-79 supra for data on sentencing disparity.
salary to attract the high calibre board member demanded by statute. High quality does not come at a low price.

A second necessary improvement is to increase the accessibility to psychological and psychiatric data. It is appalling that there is no resident psychologist or psychiatrist at any Kentucky correctional institution. As previously stated, the only data available is obtained by independent contracts with psychologists. Psychological data is available only when relating to those who are guilty of crimes of violence. There is hardly any psychiatric data available for inmates in general, no matter what their needs or how heinous the crime they have committed.

To properly gather such information, it is imperative that Kentucky establish some type of diagnostic center to which selected inmates—at least—can be confined for presentence examination. The cost of such a center would be great, but, it is a cost which is necessary. It seems that the legislature has for too long turned its back on the cost of sending a repeater back through the complete arrest, trial, and re-committal procedure. Also forgotten seems to be the “cost” in human lives and property damage caused by those released without proper attention. In essence, while the recommendations made by this article can help set up a working sentencing apparatus, more efficient and effective than the one we now have, in the long run its success will depend entirely upon the General Assembly. For it is this representative body that in the last analysis must decide whether the loss of voting franchise due to unacceptable acts makes a human being any less deserving of just treatment.

Rutheford B. Campbell, Jr.
Bill Cunningham

120 See APPENDIX (Interview With Westerberg and Black).
I. Questionnaire to Kentucky Circuit Judges

There were 85 responses to the 67 questionnaires sent to circuit judges. The comments from them were outstanding. It would not be feasible to list them all. Stated henceforth, however, is a excerpt from the written response of Hon. John A. Breslin, Jr., Circuit Court Judge of the 19th District, which is indicative of the forethought and perception exhibited in the replies:

"We are dealing with courts, felonies, and punishment—not medical admissions. The English have long said that certainty of punishment is more of a deterrent to crime than severe penalties, and I have found this so. England today is following the Sociological pattern, and the crime rate is soaring. We must not lose sight of our function as a court—primarily to protect the community and to punish those who violate the laws of the land and then if possible, to correct the criminal. Failure to uphold the law as declared by the Legislature, and the reluctance to require its adherence (order) is a failure to be just, anarchists to the contrary."

A. Sentencing by jury

1. Do you approve of sentencing by jury: Yes 13; No 11

2. What factors do you believe the jury takes into consideration in determining the measure of punishment?
   - (26) appearance of defendant;
   - (14) appearance, ability, and personality of defendant's attorney;
   - (19) character of defendant;
   - (28) brutality of the crime;
   - (1) the race or color of the defendant;
   - Others: Political influence; established families; personal experience with defendant.

3. To what extent do you believe the jury uses quotient sentencing in criminal cases? Extensively 9; Minimal 12; No opinion 2.

4. In your opinion, if the right to sentence were taken from the jury and placed under the control of a judge, would this result in fewer convictions, because the jury, not knowing what punishment the judge would fix, would in many instances find a verdict of not guilty? Yes 3; No 28; More convictions 4.

5. Is it your opinion that Negroes are given greater sentences than are whites for the same crime? Yes 2; No 28; Lesser sentences 3.
B. Sentencing by Judge

1. Would you approve of sentencing by judge? Yes 22; No 12.

2. What factors as a judge would you consider in determining the measure of punishment?
   a. Family life
   b. Flagrant violation of the law
   c. Habits of defendant
   d. Previous record
   e. Age
   f. Economic conditions of defendant
   g. Chance for rehabilitation

3. Would you as a judge rendering sentence desire the submission of a pre-sentence report from a board of psychiatrists and psychologists relating to the character of defendant? Yes 17; No 12

4. Do you think a judge would be more or less prejudiced in regard to racial or social background of defendant than the jury? More 5; Less 12; No difference 16.

5. If you were allowed to sentence, would you impose a harsher penalty on defendants than juries normally do? Yes 11; No 15; More lenient 1.

6. Have there been any instances that you thought the jury sentence was either too severe or to lenient? Yes 28, No 4.

C. Indeterminate Sentencing

1. Would you favor commitment of defendant to a professional parole board at the penal institution to determine punishment after examination by the board of defendant's character and personal record? Yes 8; No 25.

2. Would you favor the fixing maximum sentence by judge and leaving determination of minimum sentence to parole board? Yes 9; No 25.

3. Would you favor the fixing of minimum sentence by judge and leaving determination of maximum sentence to the parole board? Yes 7; No 25.

II. INTERVIEW WITH MR. GLEN WADE AND MRS. LUCILLE ROEBUCK OF THE KENTUCKY STATE PAROLE BOARD, OCTOBER 18, 1968:

Wade: The Kentucky Parole Board is an independent agency of state government attached to the Department of Corrections for admini-
strative purposes only. Responsible only to the Governor, members are appointed in staggered terms for a term of four years, only to be removed for cause. They visit each institution once a month to interview inmates who are coming up for parole. The Legislature has removed any minimum time required in prison and left such up to the Parole Board. Incidentally, since that law was passed recidivism has decreased. Last fiscal year only 40 parolees were convicted of a new felony. This was out of a thousand under parole supervision.

Campbell: The Crime Commission has recommended sentencing by judge. We have three alternatives—judge, jury, and indeterminate sentencing. Would you favor a law providing that the Parole Board would be given sole discretion as to the term of the convictee?

Wade: The recent law which gives the Parole Board the discretion to set the minimum gives Kentucky the best system in the country.

Roebuck: The proposed law would give judges the responsibility of setting the minimum and maximum. I would be opposed to judges setting the minimum. I'm opposed to any change in the law as it is right now. We've presently the best law in the country. The Parole Board has the discretion to let a person go whenever it deems him ready. With the new law we reduced the old sentences rendered before the law minimum. We are doing this gradually. The law gives wide latitude, including a kicker clause which deems that the Board has authority to hear a case if three members out of five desire to hear it at any time.

Campbell: One problem in allowing judge or jury sentencing is that there will be a time when the judge sets the maximum and the Parole Board finds that this is not long enough to rehabilitate the convictee but its hands are tied. Wouldn't the Parole Board like to have the power to extend a sentence and don't you think that the Parole Board is better qualified to sentence than is a judge or jury?

Wade: That's a very searching question. I think it would deserve further study.

Roebuck: I think that you will find, in that situation, that when the court wants to give a man a sentence which is less than what the statute required, it will reduce the charge down to something lower and I don't think you would accomplish anything in that situation. You've got to have local control over sentencing so that sentencing will be done by someone who knows the defendant well.

Wade: You've got personality to consider.

Roebuck: Everybody by human nature likes to take care of their own little bailiwick and when you try to take sentencing away from local authorities, i.e., judges, then you are going to create a bigger headache than you realize. When you get right down to it, there is nothing wrong with the community where crime was committed sentencing the defendant.

I'm far more concerned with the repeaters. A man who commits one offense right after another should be treated differently than one-time offenders. We were at Eddyville Penitentiary this month and out of 46 cases we heard, at least 15 had four or five convictions or more. There should be a change for this type of person in order to keep him there for longer than maximum time. Constant repeaters are our biggest problem. The number of recidivists is extremely large.

Campbell: Who should set the maximum among the judge, jury, or parole board?
Wade: As of right now, the parole board is not asking for the power to set the maximum.

Cunningham: Do you think there should be a statutory change in the structure of the Parole Board, and qualification of its members?

Wade: No statutory reform is needed. It is efficient as it is now.

Roebuck: We are hardly in a position to say about that, but I think the method whereby the Governors Committee on Corrections—a bipartisan committee made up of psychiatrists, the attorney general, labor leaders, and others—is the best way to choose qualified members for the Parole Board.

The rest of the interview can be summarized as follows:

It is the opinion of both Mr. Wade and Mrs. Roebuck that without a diagnostic center and adequate staffing of such a center the Parole Board did not want the duty of setting the maximum term which a man could remain with them.

It was the opinion of both that the judge was the proper person to determine the maximum sentence. Mrs. Roebuck emphasized the disparity in sentencing among those who were guilty of the same kind of offense. She felt that a jury was also more susceptible to a sentence based upon emotion.

Mr. Wade emphasized that to be able to do a competent job in determining the maximum sentence a person should serve, a diagnostic center is essential. He stated that the cost of such a facility at the present time was, as a practical matter, prohibitive.

In response to a question concerning facts considered when a prisoner comes up for parole, Mr. Wade emphasized that such facts as his social, economic, and family history are important as well as his vocational abilities, and his attitude and record in prison.

Mr. Wade stated that there was not a full-time psychologist or psychiatrist at either Eddyville or LaGrange. He stated that no psychological or psychiatric report is made before those who have been convicted of non-violent crimes are paroled. But he stated that when an inmate has been convicted of a crime of violence, it is the general practice of the Parole Board to have a report from a psychologist before the prisoner is released. As for a psychiatric report, these are nearly non-existent. The psychological data is obtained by individual contracts with non-resident psychologists.

III. INTERVIEW WITH MR. STURE WESTERBURG, COMMISSIONER OF CORRECTIONS, AND MR. HAROLD BLACK, DEPUTY COMMISSIONER, JANUARY 9, 1969.

Although Mr. Westerburg and Mr. Black would not oppose the recommendation of sentencing by the Parole Board, they both ex-
pressed the belief that the placing of such a responsibility on the Board might create an unbearable burden because of lack of facilities now available for sentencing. They opined that such a procedure would be ideal if the Parole Board was provided with more members so that it could be split into separate panels, higher salaries to attract qualified personnel, and needed facilities for the sentencing function such as presentence reporting and/or diagnostic centers. Mr. Westerburg estimated that such an indeterminate procedure would require a maximum security center of 125 beds at $20,000 per bed. As to what should be done now, under our present system, both suggested that judge sentencing would be the next best thing to a well-equipped professional sentencing board. They were strongly in favor of presentence reports and any other means of educating the judge as to the propensities and character of the defendant.

IV. LETTER FROM DEPUTY COMMISSIONER OF CORRECTIONS,
MR. HAROLD BLAKE:

This is in reply to your request for information concerning the percentage of prisoners paroled and released by expiration of sentence from our male institutions during their last several years. An examination of our records for the last six year period, determined on a fiscal year basis at the Penitentiary and a calendar year basis at the Reformatory, reveals the following percentages:

<table>
<thead>
<tr>
<th>Institution</th>
<th>Discharged by Parole</th>
<th>Discharged by Expiration</th>
</tr>
</thead>
<tbody>
<tr>
<td>Kentucky State Penitentiary</td>
<td>46.22%</td>
<td>53.58%</td>
</tr>
<tr>
<td>(Fiscal years 1962-63 through 1968-69)</td>
<td></td>
<td></td>
</tr>
<tr>
<td>Kentucky State Reformatory</td>
<td>50.36%</td>
<td>49.64%</td>
</tr>
<tr>
<td>(Calendar Year 1963-68)</td>
<td></td>
<td></td>
</tr>
</tbody>
</table>

In addition, you wished to know what percentage of inmates are committed to serve the maximum sentence prescribed by the statutes for their respective crimes. We have examined the records of 1213 persons who are serving sentences on less than the allowable maximum term prescribed by the statute covering their specific offense, and 13% are serving the maximum terms. Due to your request that the information be provided as rapidly as possible, we did not have an opportunity to adequately review those sentences against persons and hope that this information will be satisfactory for your purposes.